

Supreme Court No. 900396
Court of Appeals No. 309835

SUPREME COURT
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,
Respondent,

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h/h

v.

MARISA MAY FUENTES,
Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

Where the police observe continuous activity consistent with drug transactions for two hours in an apartment late at night on a weekday, see the defendant arrive at the apartment and deliver something in an unusual manner, is there sufficient reasonable suspicion of a crime to conduct a *Terry* stop?

- A. Since the trial court's Findings of Fact are not challenged on appeal, what is the standard on review?
- B. Do the Findings of Fact support the conclusion that the *Terry* stop was appropriate?
- C. Does the totality of circumstances support the conclusion that the *Terry* stop was appropriate?
- D. Is the case law consistent with a conclusion that the *Terry* stop was appropriate?
- E. Even if the Court held that the *Terry* stop was inappropriate, would that resolve the issue about the defendant's confession?

II. STATEMENT OF THE CASE

The State incorporates the Statement of Facts presented by both parties in their respective briefs to the Court of Appeals. In addition, the

State makes the following comments regarding the Court of Appeals' summation of the facts:

A. The trial court's Findings of Fact are important.

The trial court found that "the defendant delivered something to the apartment." CP 78, Finding No. 12. The trial court also found that the short length of time the defendant visited and the other people visited "are consistent with drug transactions." CP 78, Finding No. 10. These Findings have not been challenged on appeal.

B. The number of people who visited Mr. Fenton's apartment at 108 N. Conway, #B, Kennewick, Washington, from 10:00 p.m. to midnight on October 6, 2011, was at least 10.

Detective Trujillo stated that he stopped counting at 10 visitors. RP at 19. Detective Veitenheimer estimated that 8 to 10 people went into Mr. Fenton's apartment during this time frame for visits lasting between 5-20 minutes. RP at 33. However, Detective Veitenheimer approximated the number; Detective Trujillo actually *counted*. RP at 8.

C. The plastic grocery bag the defendant was carrying was not just "emptier" after she left Mr. Fenton's apartment; it was empty.

Detective Trujillo stated that when the defendant went to Mr. Fenton's apartment carrying the plastic grocery bag, it had something in it like the size of a nerf football, something smaller than a regular football but bigger than a softball. RP at 10, 12. When she returned, the plastic

grocery bag was “obviously empty.” RP at 13.

D. The defendant was very protective about an empty plastic grocery bag.

The Court of Appeals correctly outlines that the defendant went into Mr. Fenton’s apartment and then came back to her trunk and took the plastic grocery bag back inside. RP at 10. However, also noteworthy is that the defendant came out of Mr. Fenton’s apartment, with a now-empty grocery bag, and put it in her trunk. RP at 14. Detective Trujillo commented that putting an empty plastic grocery bag in a car trunk, rather than the passenger compartment, is odd. RP at 28.

E. Detective Trujillo is an experienced police officer.

Detective Trujillo has been with the Kennewick Police Department for 14 years. RP at 4.

F. The suspicious activities connected with Mr. Fenton’s apartment occurred on two successive nights, with significant activity in the two hours leading up to the defendant’s arrest.

While working on their October 5 to October 6, 2011, shift, Detectives Trujillo and Veitenheimer went to Mr. Fenton’s apartment sometime after midnight looking for a Carl Dickenson, who had an outstanding warrant. RP at 4-5. As they walked toward the apartment, two individuals saw them and fled into the apartment. RP at 35-36. The detectives knocked on the door but no one answered. RP at 8. Detectives

Trujillo and Veitenheimer then left. RP at 8, 36.

The next shift, on the night of October 6, 2011, at around 10:00 p.m., the detectives began surveillance on the apartment. RP at 9. That is when they saw at least 10 people coming to and going from the apartment after staying for short periods. RP at 8.

III. ARGUMENT

A. The standard on review:

The trial court's Findings of Fact are not disputed on appeal. Therefore, the standard on review is de novo, but is whether those facts support the Conclusion of Law that the police had reasonable suspicion to conduct the *Terry* stop. *State v. Lee*, 147 Wn. App. 912, 916, 199 P.3d 445 (2008). A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." *Id.* (quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).

B. The Findings of Fact support the Conclusion of Law that the police had sufficient reasonable suspicion to conduct a *Terry* stop.

The trial court entered a Finding of Fact Number 12, that "[t]he defendant delivered something to [Mr. Fenton's] apartment." CP 78. Further, the trial court entered Finding of Fact Number 10, that activity "consistent with drug transactions" was occurring at Fenton's apartment in the two hours prior to the defendant's arrival. *Id.* Specifically, the drug

activity consisted of numerous people going to Fenton's apartment between 10:00 p.m. and midnight on October 6, 2011, and staying for short periods of time. RP at 8, 33.

Putting these two Findings together, the defendant went to a residence where drug dealing was probably occurring and delivered something. CP 78. Her activity itself, going to the apartment at midnight, staying 10 minutes, and being very protective of a plastic grocery bag, was consistent with a drug transaction. These Findings support the conclusion that there was a reasonable suspicion that the defendant had just delivered a controlled substance at the Fenton apartment.

C. Other factors support the reasonableness of the *Terry* stop.

Some of those additional factors include:

- The experience of police officer, *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Here, Detective Trujillo had 14 years of experience. RP at 4. The trial court could take into consideration his impressions of the defendant's actions in protecting the plastic grocery bag and of the frequent late night visitors in the area.
- The defendant's overly protective behavior concerning the plastic grocery bag is another factor. She kept the grocery

bag in the trunk of her vehicle. RP at 10. She went up to Mr. Fenton's apartment, and then returned to her vehicle to get the grocery bag. *Id.* She then went back up to Mr. Fenton's apartment, returned with the bag empty and placed it in the trunk of her vehicle. RP at 13-14. There may be an innocent explanation for this behavior. However, the police are not required to rule out all such possibilities before conducting a *Terry* stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

- A possible explanation of the defendant's actions is that she had marijuana in the grocery bag and wanted to carry it in her trunk so that a police officer or citizen would not see or smell it if they happened to contact her. She went up to Mr. Fenton's apartment without the grocery bag to make sure the delivery would be to a trusted person. After the delivery, she again put the grocery bag in the trunk of the vehicle so others would not detect a smell of marijuana.
- Mr. Fenton's apartment had not only been the source of drug activity in the past, it appeared to be the source of drug activity on the night in question. Further, the police could consider the fact that some informants had stated Mr.

Fenton was back in the drug world. Also, the police knew that two people had fled into the apartment without any explanation the night before.

D. A review of case law supports the conclusion that the *Terry* stop was valid.

The keys facts herein are: Mr. Fenton's apartment had been the location for drug activity in the past; there was suspicious activity at the apartment the night before the defendant's arrest, with two people fleeing the police by scurrying into the apartment; on the night of the arrest, at least 10 people had gone into and left the apartment between 10:00 p.m. and midnight, staying for short periods of time; the defendant arrived at the apartment and behaved overly protective of a plastic grocery bag; she also was in the apartment for a short time and delivered something. These facts distinguish this case from others such as *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010), and *State v. Richardson*, 64 Wn. App. 693, 825 P.2d 754 (1992).

In *Doughty*, neighbors had made numerous complaints of frequent short stay traffic at a house, causing the police to label it as a drug house. *Doughty*, 170 Wn.2d at 60. The police did not have actual, personal evidence of drugs, controlled buys or known dealers in the house. *Id.* The Court held that these facts were insufficient to stop *Doughty*, who went to

the house at 3:20 a.m. and stayed for two minutes. *Id.* at 62. In contrast, the police here knew Mr. Fenton had a history of drug activity at the apartment, personally saw drug type activity, saw the defendant acting overly protective of a plastic grocery bag and saw the defendant deliver something which had been in the bag.

In *Richardson*, the defendant was in a high crime area, late at night and walking with another person suspected of “running drugs.” *Richardson*, 64 Wn. App. at 694. The Court held these were not sufficient facts to justify a *Terry* stop. In the case herein, the police did not merely see the defendant in the proximity of another person suspected of drug dealing. They saw her go into an apartment where apparent drug dealing was occurring and deliver something which was in a plastic grocery bag.

A more analogous case is *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). In *Kennedy*, officers received neighbors’ complaints about heavy, short-stay, pedestrian traffic at a residence in Walla Walla. *Kennedy*, 107 Wn.2d at 3. A detective also received a tip that Kennedy purchased drugs at the residence. *Id.* The police saw Kennedy leave the residence. *Id.* There was nothing in Kennedy’s hands and no other suspicious activity. *Id.* at 3. The Court affirmed the lawfulness of this stop, finding the totality of the circumstances provided a reasonable, articulable suspicion Kennedy engaged in criminal activity. *Id.* at 8-9.

There are more facts supporting the stop in the instant case than in *Kennedy*. Here, the police personally observed the heavy, short-stay traffic at the apartment for two hours and then personally observed the defendant arrive, deliver something in the apartment, and leave a short time later.

E. Even if the *Terry* stop was invalid, the defendant's confession may still be admissible.

The defendant has assumed that if the *Terry* stop was invalid, her confession would also be suppressed. That is not necessarily so. In *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011), the defendant was illegally arrested when law enforcement officers exceeded the scope of the consent they had to enter a residence, proceeded upstairs, and arrested the defendant at the door of his bedroom. At the police station, the defendant ultimately confessed to a burglary. *Eserjose*, 171 Wn.2d at 911.

The defendant argued that the confession should be suppressed as fruit of the poisonous tree. However, this Court held that the confession was sufficiently attenuated from the improper police activity. This Court stated that the proper inquiry is whether the confession is “sufficiently an act of free will to purge the primary taint.” *Id.* at 918-19. The Court cited three factors to consider: “the temporal proximity of the arrest and the

confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.” *Id.* at 919.

Here, the trial court entered extensive Findings of Fact that the police properly advised the defendant of her *Miranda* rights and that she spoke voluntarily. However, the trial court did not directly address the issue of whether the defendant’s confession would be admissible if her initial detention was improper.

The defendant requested in her brief to the Court of Appeals that the case be dismissed. At most, if this Court holds that the *Terry* stop was invalid, the case should be returned to the Superior Court for a determination of whether the defendant’s confession was “sufficiently an act of free will.”

IV. CONCLUSION

The Court of Appeals’ ruling should be upheld.

RESPECTFULLY SUBMITTED this 8th day of August, 2014.

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State v. Marisa May Fuentes
#900396
Supplemental Brief of Respondent (attached for filing)

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