No. 93377-4

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Jan 17, 2014
Court of Appeals
Division III
State of Washington

31868-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WESLEY J. WEYAND, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The trial court erred in finding the fruits of an investigative seizure were admissible at trial.

B. ISSUE

1. A police officer knows of the extensive documented history of drug-related criminal activities involving a specific house. The officer sees two men leave the house early in the morning after a brief visit. Based on these facts, does he have a reasonable suspicion the men are in possession of a controlled substance?

C. STATEMENT OF THE CASE

Wesley Weyand and a companion came out of a known drug house at 2:40 in the morning after a brief visit and Mr. Weyand got in the passenger seat of a car. (3.5 RP 5) Based on his observation of this activity, a police officer suspected they had recently used or were in possession of a controlled substance. (3.5 RP 22) He pulled the car over as it was leaving the residence, questioned the occupants, and arrested Mr. Weyand on an outstanding warrant. (3.5 RP 22-26)

Mr. Weyand was charged with possession of heroin. (CP 1) At a suppression hearing the officer testified to his knowledge of an extensive history of drug-related and other criminal activity involving or related to the house and its occupants. (3.5 RP 10-22; CP 69-71) Noting that the detailed record of drug-related history distinguished this case from *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573, 575 (2010), the court concluded the officer reasonably believed Mr. Weyand was involved in criminal activity and ruled that evidence derived from the seizure was admissible. (CP 72) Mr. Weyand appeals his conviction. (CP 63)

D. ARGUMENT

1. SEIZURE OF AN INDIVIDUAL, ABSENT PARTICULARIZED SUSPICION HE IS ENGAGED IN CRIMINAL ACTIVITY, IS UNLAWFUL AND THE FRUITS OF THE SEIZURE MUST BE SUPPRESSED.

The Fourth Amendment, made applicable to the states by the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643, 647, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961). Searches and seizures must be supported by probable cause whether or not a formal arrest or search pursuant to a warrant occurs. *Dunaway v. New York*, 442 U.S. 200,

208, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). Evidence seized during an illegal search must be suppressed under both the exclusionary rule and the fruit of the poisonous tree doctrine. *State* v. *Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

Under article I, § 7 of the Washington Constitution, warrantless seizures are per se unreasonable and the State bears the burden of demonstrating that the warrantless stop falls within one of the narrow exceptions to the general rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Exceptions authorizing seizure on less than probable cause are narrowly drawn and carefully circumscribed. *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982).

One such exception is a brief stop to investigate suspicious activity. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). "A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct." *State v. Doughty*, 170 Wn.2d at 62. In *Doughty*, the Supreme Court found the facts were insufficient to support an investigative stop.

The facts in the present case and *Doughty* are strikingly similar.

> At 3:20 a.m. on August 14, 2007, Officer Derek Bishop of the Spokane Police Department observed Doughty park his car, approach a house, return to his car less than two

> minutes later, and drive away. Bishop did not see any of Doughty's actions at the house, or even if Doughty interacted with anybody there. Neighbors had previously "made numerous complaints of large quantities of short stay traffic" at the house, prompting police to identify it as a "drug house." Clerk's Papers at 45.

State v. Doughty, 170 Wn.2d at 60. The opinion implies that the insufficiency of the evidence resulted in part from the minimal evidence of drug use at the house: "Nothing in the record indicates that police based this suspicion on anything other than neighbor complaints, such as actual evidence of drugs, controlled buys, reports of known drug users or dealers frequenting the house, and so forth." *Id*.

In the present case, this court is asked to decide whether the more substantial evidence of criminal activity is sufficient to justify the seizure.

The conclusion in *Doughty* rested largely on its similarity to the facts in *State v. Gleason*, a case in which the Court held the facts were insufficient to justify an investigative seizure:

> A more apt analogy rests with *State v. Gleason*, 70 Wash.App. 13, 851 P.2d 731 (1993). Based on the totality of the circumstances, the *Gleason* court held it improper to seize a person merely for exiting an apartment complex that had a history of drug sales. *Id.* at 18, 851 P.2d 731. The court reasoned that "this was the first time the defendant had been seen in the area, the officers did not know what occurred inside the apartment and neither officer saw him involved in the purchase of drugs. Further, there was no evidence Mr. Gleason was acting suspiciously, he was not carrying any unusual objects." *Id.* (citation omitted). That

> statement describes the events in Doughty's chronology almost exactly.

State v. Doughty, 170 Wn.2d at 64-65. In *Gleason* the finding that the apartment complex had a history of drug activity was unequivocal. *State v. Gleason*, 70 Wn. App. 13, 851 P.2d 731 (1993) Thus the facts in the present case are closer to *Gleason* than to *Doughty*.

Furthermore, the *Doughty* opinion emphasizes the need for evidence supporting individualized suspicion such as the detailed informant's tip in *State v. Kennedy*, 107 Wn.2d at 4; *State v. Doughty*, 170 Wn.2d at 63-64. This court has similarly recognized the necessity for particularized suspicion tying the detained individual to the suspected criminal activity. *State v. Martinez*, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006)

Thus, it would appear that once an officer has a reasonable belief that a particular location is closely associated with criminal activity, the facts necessary to support the inference that a particular individual who visits that location is engaged in criminal activity must include suspicious activity on the part of that individual.

The only activity on the part of Mr. Weyand that the officer described as being suspicious was that he "walked quickly" towards the car, "looking around." (3.5 RP 8) It appeared to the officer that in

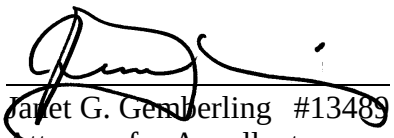
looking around, Mr. Weyand was "checking the area." (3.5 RP 8) Even if such actions can be described as suspicious, they fall far short of the informant's tip provided in *Kennedy*, or "carrying any unusual objects," which might have justified a seizure in *Gleason*.

E. CONCLUSION

The trial court's denial of the defense motion to suppress evidence found in, or derived from, Mr. Weyand's unlawful seizure requires reversal of his conviction.

Dated this 17th day of January, 2014.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31868-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
WESLEY J. WEYAND,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on January 17, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on January 17, 2014, I mailed a copy of the Appellant's Brief in this matter to:

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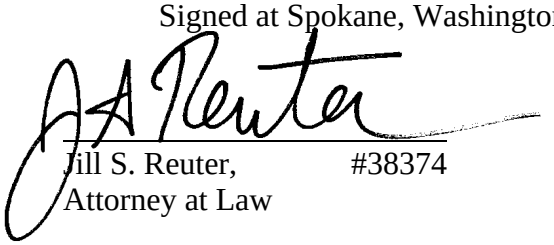
Signed at Spokane, Washington on January 17, 2014.



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