No. 93377-4

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Court of Appeals
Division III
State of Washington

NO. 318681-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

WESLEY J. WEYAND, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-00035-4

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not err when it found that Officer Henry had reasonable suspicion to initiate a *Terry* stop.

II. ISSUE PRESENTED

May an officer conduct a *Terry* stop of a vehicle when the driver and his passenger leave a known drug house at a very late hour, walking quickly from the drug house, while cautiously looking around and checking their surroundings as they walk?

III. STATEMENT OF FACTS

The one-bedroom residence on 95 Cullum in the city of Richland, Washington, has been the subject of numerous drug-related activity, complaints, arrests and search warrants. (CP 69-71; RP at 10-21[1]). The residence has also been associated with known gang members, drug users and drug dealers. *Id.* Consequently, the Richland Police Department has classified 95 Cullum as a known drug house due to the high volume of

[1] Unless otherwise dated, RP refers to the verbatim transcript of the 3.5 hearing conducted on July 25, 2013 and recorded by Court Reporter Joseph D. King.

narcotic activity, as well as the observation and contact with known drug users and dealers. (RP at 6).

On December 22, 2012, the defendant was arrested when Officer Henry conducted a *Terry* stop after seeing the defendant and another individual leave the 95 Cullum house. (CP 71). A search incident to arrest revealed a syringe full of a brown substance, which the defendant stated was heroin. (CP 72; RP at 29). The defendant filed a motion to suppress and dismiss, arguing that the stop was improper. (CP 19-30). The trial court denied the motion, based on the extensive documented drug history of the 95 Cullum house, and the specific facts observed by Officer Henry. (CP 71-72; RP at 36-38). The underlying drug history of the 95 Cullum house was extremely relevant to the trial court's ruling.

This history includes the June 10, 2011, execution of a search warrant, where an individual was arrested for possession of methamphetamine. (CP 69; RP at 10). He told officers he purchased it from another individual at 95 Cullum. *Id.* This search yielded methamphetamine, and four individuals were arrested for possession of a controlled substance. (RP at 10-11). On January 10, 2012, officers responded to 95 Cullum in an attempt to locate a resident who was wanted on a felony warrant. When officers arrested him, he was found to be in possession of a controlled substance. (CP 69; RP at 12). Law

enforcement again responded to 95 Cullum, on March 9, 2012, in an attempt to locate wanted suspects. (CP 69; RP at 13). A Melissa Eggers and a documented gang member, Apolonio Saldana, were arrested on warrants at that time. Both individuals had a history of controlled substance abuse. (RP at 13).

On May 18, 2012, and June 16, 2012, law enforcement received complaints about individuals that looked to be on narcotics and "tweaking," as well as a high flow of short-stay traffic at the residence. (CP 69; RP at 13-14). One complainant asked for extra patrols in the area to deal with this issue. *Id.* Due to the continued drug-related activity and narcotics violations at 95 Cullum, law enforcement sent a notification letter to the property owner on June 20, 2012. *Id.* Later, on August 5, 2012, Officer Henry was involved in a traffic stop where Melissa Eggers was again arrested on a warrant. (CP 69; RP at 14-15). It was notable that at the time of her arrest, Ms. Eggers was in a vehicle with another individual who had been charged multiple times for possession of a controlled substance and was a suspect in a home invasion robbery. (CP 69-70; RP at 14-15). All the occupants of the vehicle were together at the 95 Cullum residence just prior to being stopped. (CP 70; RP at 15).

On September 26, 2012, two individuals ran from Officer Henry as he attempted contact after observing them exit the backyard of

95 Cullum. *Id.* Upon making contact, both individuals were found to be under the influence of methamphetamine and one of them had track marks on her arms. (CP 70; RP at 16). Following an investigation into the whereabouts of a wanted subject, a search warrant was issued on November 6, 2012, for several purses located at the 95 Cullum residence. (CP 70; RP at 16). A glass smoking device, a crystal substance in paper, a broken glass pipe with white residue, a plastic bag with green powdery substance and a silver marijuana pipe were among the items found during the search. (CP 70; RP at 16-17).

Within the same month as the incident at bar, law enforcement had three separate encounters with residents or individuals who were frequenting the 95 Cullum house. (CP 70-71; RP at 17-21). A December 9, 2012, incident resulted in suspects attempting to elude the officer and fleeing on foot after they crashed a vehicle. (CP 70; RP at 17). The vehicle was found to be stolen and a search revealed methamphetamine and scales. *Id.* The occupants stated that they had been at 95 Cullum just prior to being stopped and then fleeing from police. *Id.*

Three days later on December 12, 2012, Officer Henry contacted an individual after observing him exit a vehicle that was parked near 95 Cullum. (CP 70; RP at 18). The individual was found to be under the influence of heroin and in possession of heroin. *Id.* He stated that he used

heroin earlier that day and was staying at 95 Cullum. *Id.* The vehicle he exited was later found to be stolen. *Id.* Less than a week later, on December 18, 2012, officers located a stolen vehicle parked in the driveway of 95 Cullum. (CP 71; RP at 18-19). Officer Henry was one of the officers who responded. Upon arriving, multiple individuals were arrested and a search warrant was granted for the premises. *Id.* The search yielded a variety of drug paraphernalia including two glass smoking pipes used for methamphetamine, a clear plastic baggie that contained suspected methamphetamine, a "kit" which contained spoons with residue of drugs, and small bits of a cotton type material which appeared burnt. *Id.*

Among the gang members and known drug users that were arrested at that time, an Abby McDowell was arrested for possession of a controlled substance. (CP 71; RP at 19). During a post-Miranda interview, Ms. McDowell told Officer Henry that 95 Cullum is regularly frequented by drug users, drug dealers and gang members. (CP 71; RP at 20). Ms. McDowell named several known drug offenders that frequent 95 Cullum, and further stated that the people who reside at the home were consistently using and injecting methamphetamine. *Id.*

On December 22, 2012, four days after the search warrant and four days after Abby McDowell made her statements to Officer Henry, he was

on an extra patrol near the 95 Cullum residence. (CP 68, 71; RP at 6, 21). At approximately 2:39 a.m., Officer Henry observed a tan Buick that was unfamiliar to the area. (CP 68; RP at 6-7). He noted that the vehicle was not present on the street when he drove by 20 minutes prior. *Id.* While driving past the vehicle, he ran the plates and found it was registered to a Jesse Willoughby. (RP at 7). A check through ILEADS revealed nothing of consequence under that name. *Id.* Officer Henry decided to park off of the street and observe the vehicle and the house. (CP 68; RP at 8). He did so, due to the extensive drug history of the location and his personal experience with vehicles rapidly leaving once law enforcement was sighted. (RP at 9-21).

After observing for a couple of minutes, Officer Henry witnessed two men, one later identified as the defendant, exit the residence through the front door and begin walking toward the tan Buick. (CP 68, RP at 8). Both men were walking quickly toward the vehicle and looking around as if checking the area. *Id.* Prior to entering the vehicle, the driver stopped and again looked around, looking down both sides of the street for a few seconds before entering the vehicle. (CP 68; RP at 8-9). Based on the time of night, the suspicious manner in which the men were acting, and Officer Henry's personal experience with residents and visitors at 95

Cullum, he believed he had reasonable suspicion to effect a *Terry* stop to question the driver and passenger. (CP 71; RP at 9, 22).

Upon contacting the defendant, Officer Henry learned the defendant was at the 95 Cullum residence visiting a known heroin user with an extensive criminal history. (RP at 24). Officer Henry noted that the defendant's eyes were red and glassy, droopy, and his pupils appeared constricted. (RP at 24-25). Based on his experience and training as a Drug Recognition Expert, he concluded the defendant was under the influence of a depressant. (RP at 25). After running his name, Officer Henry found the defendant had an active warrant for drug possession. (RP at 26). After placing him under arrest, Officer Henry discovered a syringe loaded with a large amount of brown liquid that the defendant admitted was heroin. (CP 72; RP at 29). The defendant stated he purchased the heroin inside the 95 Cullum house. *Id.*

The defendant moved to suppress and dismiss the charge, arguing that the decision in *State v. Doughty,* 170 Wn.2d 57, 62, 239 P.3d 573 (2010), precluded a *Terry* stop based on individuals leaving a drug house. (CP 19-30). The court denied the motion noting among other things that unlike in *Doughty,* the drug house here was classified through actual evidence, not just neighbor's complaints. (CP 71-72; RP at 36-38). Furthermore, the trial court reasoned that Officer Henry had specific

observations that were not present in *Doughty. Id.* After a stipulated facts trial, the defendant was found guilty and now appeals. (CP 45, 48, 63).

IV. ARGUMENT

A. Officer Henry had reasonable suspicion that the defendant was involved in a criminal activity based on the specific and articulable facts known to him at the time of the *Terry* stop.

The Fourth Amendment protects against unlawful searches and seizures, and article I, section 7 of the Washington Constitution protects against unlawful government intrusions into private affairs. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). A *Terry* stop is permissible if the officer "has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." *State v. Bray*, 143 Wn.App. 148, 153, 177 P.3d 154 (2008) (quoting *State v. Acrey,* 148 Wn.2d 738, 747, 64 P.3d 594 (2003)); *Terry v. Ohio,* 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The level of articulable suspicion necessary to support an investigatory detention is "a substantial possibility that criminal conduct has occurred or is about to occur." *Bray,* 143 Wn.App at 153 (quoting *State v. Kennedy,* 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).

According to the *Bray* Court, "the reasonableness of a stop is a matter of probability not a matter of certainty." *Id. (citing State v. Mercer,*

45 Wn.App. 769, 774, 727 P.2d 676 (1986)). In examining the reasonableness of the stop, a court considers the totality of circumstances presented to the investigating officer. *Bray,* 143 Wn.App at 153. An individual simply found in a high crime area at a late hour of night is not, *by itself,* enough to establish reasonable suspicion for an arrest. *Doughty*, 170 Wn.2d at 62. While an "inchoate hunch" is not sufficient to justify a stop, "experienced officers are not required to ignore arguably innocuous circumstances that arouse their suspicions." *State v. Santacruz,* 132 Wn.App. 615, 619-20, 133 P.3d 484 (2006). An officer is allowed to take these facts into consideration when looking at the totality of the circumstances. Furthermore, "a tip may justify a detention if it possesses sufficient indicia of reliability . . . " *Kennedy*, 107 Wn.2d at 7.

In this case, *State v. Doughty* is directly on point when analyzing the validity of Officer Henry's *Terry* stop of the defendant. In *Doughty*, the state Supreme Court found an investigative stop to be unlawful due to a lack evidence to support a reasonable suspicion of criminal activity. *Doughty,* 170 Wn.2d at 65. In *Doughty,* an officer arrested a defendant after he made a two-minute stop at a *suspected* drug house. *Id.* at 60. The Court there took issue with the manner in which the suspected drug house was classified. *Id.* at 60, 64, 66.

The police suspected the home was a drug house based solely on calls and complaints received from neighbors about short-stay traffic. *Id.* at 60. The Court noted there was no informant tip putting the officer on notice of potential criminal activity, nor were there any furtive movements on the part of the defendant. *Id.* at 64. Furthermore, the Court observed that the officer did not even know if the defendant entered the home, or if he even interacted with anybody at that residence. *Id.* In reversing the conviction, the Court found that the officer's "incomplete observations" were not enough to establish reasonable suspicion. *Id.*

In contrast, the house at 95 Cullum was not a *suspected* drug house, but was a clearly identifiable drug house according to the Richland Police Department. This classification is supported by the extensive documented drug history of 95 Cullum. (CP 68-73; RP at 6-30.) In addition to the clearly established drug history, Officer Henry had firsthand information via the execution of a search warrant only four days prior to the arrest of the defendant. (CP 71; RP at 19-20). Officer Henry also had eyewitness information received from Abby McDowell. *Id.* Ms. McDowell described with specificity the drug traffic that was coming and going from 95 Cullum. *Id.* She also described the constant drug use of 95 Cullum's residents and named several known drug dealers and drug users who frequented the residence. *Id.*

In addition, Officer Henry also made specific observations of the defendant and his companion as they exited the one-bedroom house. (CP 68, 71; RP at 6-9). Unlike the defendant in *Doughty*, the defendant and his companion here clearly exited the 95 Cullum house through the front door. (RP at 8). Again, unlike the *Doughty* case, the defendant and his companion here acted suspiciously by walking quickly and cautiously while looking around as if checking the area. (CP 68; RP at 6-9). This suspicious activity was confirmed when the defendant's companion stopped before entering the vehicle and once again scanned the area. *Id.* These facts, in addition to the time of night and the short duration of the stay, show that Officer Henry had a reasonable suspicion that criminal conduct had occurred or was about to occur. The evidence present in this case is precisely the type of evidence that the Court in *Doughty* did not have. *Doughty,* 170 Wn.2d at 64-66.

Contrary to his argument at trial, the defendant now asserts that the facts here are closer to those in *State v. Gleason* than those in *Doughty.* (App. Brief at 5; CP 23-30; RP at 32). It is the State's position that the blatant dissimilarities between the facts of *Gleason* and the case at bar clearly indicate why *Doughty* controls. In *Gleason,* officers witnessed a clean-cut Caucasian man walking out of a primarily Hispanic apartment complex. *State v. Gleason,* 70 Wn.App 13, 15, 851 P.2d 731 (1993). At

trial, the officer testified that "when Caucasians were on the premises, they usually were there to buy narcotics." *Id.* at 14, 18.

Consequently, by the officer's own admission, there was no reason other than race to suspect the defendant. *Id.* Despite that, officers initiated a *Terry* stop anyway and discovered a bindle of cocaine. *Id.* The Court noted that once the racial incongruity was stripped from the equation, "there was no evidence Mr. Gleason was acting suspiciously, he was not carrying any unusual objects, and the officers admitted there was no basis to arrest him for loitering." *Id.* at 18. The Court reversed the conviction, holding that no reasonable suspicion existed when the officers' suspicions were based solely on the fact the defendant was a Caucasian at an apartment complex that was primarily Hispanic. *Id.* at 18. The Court in *Gleason* did not consider whether or not the complex at issue was a known drug house or whether it was part of an ongoing investigation. *Id.* at 14.

In contrast, Officer Henry did not rely on race as a factor in establishing reasonable suspicion. (RP at 9-22). This is not a case where the defendant was simply strolling through a high-crime neighborhood and picked up by law enforcement without cause. As the record shows, Officer Henry's determination was informed by specific observations such as the suspicious and furtive glances while the defendant and his

companion walked quickly away from the *known* drug house to a car. (CP 68; RP at 8-9). Likewise, unlike *Doughty*, the defendant here was actually inside the *one-bedroom* house and the car was there for less than 20 minutes. *Id.* Furthermore, Officer Henry was not required to disregard his own extensive personal knowledge including the known drug activity, the arrests and the search warrants executed at 95 Cullum. (RP at 22).

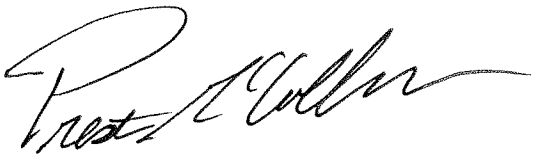
Accordingly, the defendant's reliance here on *Gleason* inaptly fails to consider the well-documented drug history of 95 Cullum, the information from Abby McDowell, and the extensive experience of Officer Henry. An examination of the totality of facts and circumstances known at the time to Officer Henry show that Officer Henry had reasonable suspicion, supported by specific and articulable facts, to suspect that criminal activity was afoot.

V. CONCLUSION

Because Officer Henry performed a lawful *Terry* stop based on specific and articulable facts, the evidence and admission that resulted were properly admitted. Based on the foregoing, the State respectfully asks this Court to affirm the defendant's conviction.

RESPECTFULLY SUBMITTED this 17th day of April, 2014.

ANDY MILLER
Prosecutor



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