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Supreme Ct No. 93377-4

COA No. 31868-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

WESLEY J. WEYAND, Petitioner

SUPPLEMENTAL BRIEF

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A. ARGUMENT

In reaffirming its prior decision in this case, the Court of Appeals distinguished this court's decision in *Fuentes* based on the greater evidence of drug history at the residence in the present case. The Court of Appeals asserted that because the trial court found his observations credible, Corporal Henry should be considered to have some expertise in "determining whether criminal activity is afoot." The court concluded that, "based on the totality of the circumstances, Corporal Henry, with his experience and training as a law enforcement officer, had a reasonable, articulable suspicion that justified the stop." *State v. Weyand*, No. 31868-1-III (Slip Op., June 7, 2016, at 2). Mr. Weyand submits that the court's analysis is flawed.

1. THE DRUG HISTORIES OF THE RESIDENCES
IN THE *FUENTES* CASES DO NOT
DISTINGUISH THEM FROM THE PRESENT
CASE.

The court reasoned the cases analyzed in *Fuentes* differ from the present case because neither of those cases involved "a suspect exiting . . . a house with the extensive drug history that 95 Cullum Street accrued." Slip Op. at 2. Although none of these cases involves identical facts, all three involve residences with a significant history.

With respect to Mr. Sandoz, this court noted the officer saw him leaving the apartment of Jennifer Meadows, a person known to have been convicted of possession of narcotics with intent to distribute; “the officer had seen approximately 60 people coming and going from her apartment;” he knew a “high number of documented criminal incidents occurred in the area of this apartment building;” and four other tenants had drug-related criminal convictions. *State v. Fuentes*, 183 Wn.2d 149, 154, 352 P.3d 152 (2015).

Similarly, an officer saw Ms. Fuentes visit an apartment from which police had previously made controlled drug purchases, methamphetamine and related materials had been found there during the execution of a search warrant, and recent interviews with individuals arrested for narcotics-related offenses suggested that the occupant of the apartment was still selling narcotics. 183 Wn.2d at 156.

The record in Mr. Weyand’s case includes extensive testimony regarding drug-related criminal activity at the residence he visited, but that evidence does not differ significantly in character or quality from facts described in *Fuentes*.

The only significant factual distinction between the *Fuentes* cases and the present case appears to be “the brisk walking, and the glances up

and down the street” during the “suspicious approach and entry to a car,” seen in light of the officer’s experience and training. Slip Op. at 2.

2. THE RECORD DOES NOT SHOW THAT THE OFFICER’S TRAINING AND EXPERIENCE SUPPORT HIS ASSERTION THAT WALKING QUICKLY AND LOOKING AROUND PROVIDE A REASONABLE BASIS FOR SUSPECTING CRIMINAL ACTIVITY.

“A valid *Terry* stop requires that the officer have reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop.” 183 Wn.2d at 158. An officer’s hunch does not justify a stop. 183 Wn.2d at 161. “The existence of reasonable, articulable suspicion is determined by the totality of the circumstances, taking into account an officer’s deductions and rational inferences resulting from *relevant* training and experience.” *United States v. Horton*, 611 F.3d 936, 940 (8th Cir. 2010) (emphasis added).

The trial court, in determining the admissibility of evidence at a suppression hearing, is not bound by the rules of evidence. ER 104(a) and ER 1101; *State v. Jones*, 112 Wn.2d 488, 493, 772 P.2d 496 (1989); *see also State v. O’Cain*, 108 Wn. App. 542, 556, 31 P.3d 733 (2001). The rules may, however, provide useful guidance in assessing the usefulness of expert testimony provided by a law enforcement officer to support a reasonable suspicion justifying warrantless seizure.

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ER 702. Accordingly, the record should include sufficient evidence of the nature and extent of the officer’s training and expertise: “[T]he expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness’ area of expertise.” *State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999).

Generally, a police officer may testify as an expert as to the significance of evidence based on his or her training, experience, and observations at the scene. *State v. Sanders*, 66 Wn. App. 380, 386, 832 P.2d 1326 (1992). But unless the officer’s experience or training suggests that the significance of the evidence lies within his area of expertise, his opinion that certain activities suggest criminal activity is not based on articulable facts that support the suspicion. If an opinion is based on an officer’s experience or training, there should be some evidence that the training or experience is relevant to the issue before the court. *See e.g. State v. Kennedy*, 107 Wn.2d 1, 8, 726 P.2d 445 (1986) (“In addition, Officer Adams had been with the Walla Walla Police Department for 20 years and had been involved in over 100 drug-related investigations over

the previous 5 years”); *State v. Maddox*, 152 Wn.2d 499, 511, 98 P.3d 1199 (2004) (“the affidavit contained Detective Parsons’ recitation of her training and experience in investigating drug crimes with the task force”); *State v. Francisco*, 148 Wn. App. 168, 177, 199 P.3d 478 (2009) (“Detective had close to six years’ experience in the drug unit, had made several hundred drug arrests, and had received extensive advanced level training. His experience was sufficient to qualify him as an expert regarding a general practice of drug users”); *State v. Johnson*, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995) (“the affidavit here amply identifies the specific training and experience of each agent involved in the investigations. It thereby adequately dispels any notion that the representation in the affidavit was merely a personal belief”).

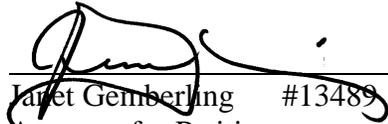
The legal or logical significance of the activity described by Corporal Henry rests on his relevant experience and training. Here, the record discloses that his experience and training consisted of 12 years as a patrol officer in Richland, and four additional years as a police officer in other departments. (RP 4) No evidence suggests that he has acquired expertise respecting “a general practice of drug users” as they approach their car following a drugs transaction. *Francisco*, 148 Wn. App. at 177.

B. CONCLUSION

The totality of the circumstances known to Corporal Henry, taken together or separately, does not support the inference that Mr. Weyand was engaged in criminal activity. In the absence of a reasonable suspicion of criminal activity, his seizure was unlawful and the evidence obtained thereafter was inadmissible. His conviction should be reversed and dismissed.

Dated this 9th day of January, 2017.

Respectfully submitted,



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	S. Ct. No. 93377-4
Respondent,)	
vs.)	COA No. 31868-1-III
)	
WESLEY J. WEYAND,)	CERTIFICATE
)	OF MAILING
Petitioner.)	

I certify under penalty of perjury that on this day I served a copy of the Supplemental Brief in this matter by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Andrew K. Miller
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I certify under penalty of perjury that on this day I served a copy of the Supplemental Brief in this matter by pre-paid first class mail addressed to:

Wesley J. Weyand
705 Eighth Street
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Signed at Spokane, Washington on January 9, 2017.


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