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No. 93377-4-III

SUPREME COURT OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

WESLEY JAMES WEYAND, Petitioner

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## I. ISSUE PRESENTED

A. Was there reasonable suspicion, based on the totality of the circumstances, for Officer Henry to conduct a *Terry* stop of the defendant?

## II. STATEMENT OF THE CASE

The one-bedroom residence at 95 Cullum in the city of Richland, Washington, has been the subject of numerous drug-related activities, complaints, arrests, and search warrants. CP 69-71; RP at 10-21<sup>1</sup>. 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 narcotic activity, as well as the observation and contact with known drug users and dealers. RP at 6. Based on all this information, the Richland Police Department did extra patrol in this area. RP at 5-6.

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 house at 95 Cullum had an extensive drug history that was known to Officer Henry at the time he contacted Mr. Weyand. 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. CP 69; RP at 12. 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. *Id.* 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

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<sup>1</sup> Unless otherwise dated, RP refers to the verbatim report of proceedings for the 3.5

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

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hearing conducted on July 25, 2013, and recorded by Court Reporter Joseph D. King.

silver marijuana pipe were among the items found during the search. CP 70; RP at 16-17.

Within the same month as the instant case, 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. RP at 18. Upon arriving, multiple individuals were arrested and a search warrant was granted for the premises. CP 71; RP at 18. 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. CP 71; RP at 19.

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. Officer Henry has memorized all the vehicles that belonged to house in that area. RP at 7. He noted that the vehicle was not present on the street when he drove by 20 minutes prior. CP 68; RP at 7. 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 Mr. Weyand, 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. The vehicle was parked on the same side of the street as 95 Cullum. *See* Ex. A – “Drawn Map of Street and Residence.” Based on the time of night, the suspicious manner in which the men were acting, and Officer Henry’s personal experience with 95 Cullum and its residents and visitors, 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 and entered findings. CP 68-73; RP at 36-38. After a stipulated facts trial, the defendant was found guilty and appealed. CP 45, 48, 63. On January 27, 2015, the matter was affirmed in *State v. Weyand*, 185 Wn. App. 1038 (2015). On June 7, 2016, after a motion for reconsideration, the matter was affirmed again. *State v. Weyand*, 194 Wn. App. 1024 (2016). On December 8, 2016, this Court granted the petition for review.

### III. ARGUMENT

**A. Did the officer have reasonable suspicion of criminal activity under the totality of circumstances to justify his *Terry* stop?**

The Fourth Amendment to the United States Constitution protects against unlawful search and seizure. Article I, section 7 of the Washington Constitution protects against unwarranted government intrusion into private affairs. Warrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d (1968). A *Terry* investigative stop is one such exception. A *Terry* stop is effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. *Terry*, 392 U.S. at 22. Under this exception, an officer may, without a warrant, briefly detain a person for questioning if the officer had a reasonable suspicion that the person stopped is or is about to engage in criminal activity. *Id.*; *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

When reviewing the merits of an investigatory stop, a court must evaluate the totality of the circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (citing, *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). The totality of circumstances includes: (1) the officers' training and experience; (2) the location of the stop; (3) the conduct of the person detained; (4) the purpose of the stop; (5) and the amount of physical intrusion on the suspect's liberty. *State v. Fuentes*, 183 Wn.2d 149, 158, 352 P.3d 152 (2015) (quoting *State v. Acrey*, 148 Wn.2d 738, 746-47, 64 P.3d 594 (2003)). When looking at the totality of the circumstances, as outlined in *Fuentes*, it is clear that Officer Henry had reasonable suspicion to believe that Mr. Weyand was in possession of a controlled substance.

**1. Police officers' training and experience.**

Officer Henry's training and experience is an important component in evaluating the totality of the circumstance in this matter. On the day in question, Officer Henry was a drug recognition expert with over 14 years of patrol experience. CP 71; RP at 24. Officer Henry also had personal experience and knowledge of the drugs activities at 95 Cullum. Just four days prior to the instant case, Officer Henry participated in a search warrant at 95 Cullum where drugs were found and further gained intel of

the most current drug activity at 95 Cullum. Officer Henry also had personal experience with people leaving 95 Cullum soon after he drives by. RP at 9. A police officer may rely on his experience to evaluate apparently innocuous facts. *State v. Samsel*, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985); *State v. Moreno*, 173 Wn. App. 479, 294 P.3d 812 (2013). A hunch alone does not warrant police intrusion into people's everyday lives. *Doughty*, 170 Wn.2d at 63.

In *Moreno*, an officer observed a car moving out of an alley quickly. 173 Wn. App. at 486. The officer was on patrol in a Sureño neighborhood. *Id.* One of the occupants was wearing a red shirt, which is associated with the rival Norteño gang. *Id.* There had been a report of shots fired one block away moments prior to the officer seeing the vehicle in the alley. *Id.* The officer contacted the vehicle due to his extensive experience with gangs in that specific area. *Id.* It was unusual for a person to be wearing a red shirt in a Sureño neighborhood. *Id.* The court held this was a lawful *Terry* stop and emphasized the officer's training and experience in evaluating the totality of the circumstances. *Id.* at 493.

Like in *Moreno*, Officer Henry's contact was based on more than a hunch. It was based on his extensive training and experience with this neighborhood, with past and present drug activity at 95 Cullum, and with the cars associated with 95 Cullum. This extensive knowledge and

experience cannot be ignored. The court must evaluate the conduct of Mr. Weyand through the lens of Officer Henry.

**2. Location of the stop.**

The house at 95 Cullum was a known documented drug house. This was based on reliable corroborated and recent information of drug activity. Police form a reasonable and articulable suspicion to seize a defendant based on detailed information provided by a reliable informant. *See State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986); *Doughty*, 170 Wn.2d at 63.

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 reliable tip that Kennedy purchased drugs at the residence. *Id.* The police saw Kennedy leave the residence. *Id.* 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. The court emphasized that the officers' knowledge of the criminal activity was based on a reliable informant and several citizen complaints. *Id.* at 7-9.

In *Doughty*, neighbors had made numerous complaints of frequent short-stay traffic at a house, causing the police to label it 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 *Doughty*, the court held the officer relied only on his own incomplete observations as there was no reliable information on that “suspected” drug house. *Id.* at 64. In the instant case, we have reliable corroborated documentation of the drug activities at 95 Cullum.

In the instant matter, there are more facts supporting the stop than in *Kennedy*. The drug activities of 95 Cullum were well documented and known to Officer Henry when he drove by the residence at 2:30 in the morning and saw a Buick that was not associated with that area. The Buick had not been there 20 minutes earlier. He drove by, went around the block, and decided to park. He had a view of 95 Cullum. Soon thereafter, the defendant and his companion left 95 Cullum in a hurry and looked up and down the street several times. They did not have to cross the street to get in their car. Based on these observations and his training and experience, Officer Henry had reasonable suspicion to believe Mr. Weyand was in possession of a controlled substance.

### **3. The defendant’s conduct.**

The appellant contends that simply walking briskly and looking around may be conduct not associated with criminal activity; therefore, the

contact of Mr. Weyand is unlawful. This type of piecemeal argument must be avoided when looking at the totality of the circumstances.

A police officer may rely on his experience to evaluate apparently innocuous facts. *Samsel*, 39 Wn. App at 570-71. Courts have given deference to an officers' training and experience when evaluating innocuous facts. *Moreno*, 173 Wn. App. at 493. Circumstances that might appear innocuous to the average person may appear incriminating to a police officer in light of past experience, and the officer may bring that experience to bear on a situation. *State v. Thierry*, 60 Wn. App. 445, 448, 803 P.2d 844 (1991). It is necessary only that the circumstances at the time of the stop be more consistent with criminal activity than innocent conduct. *State v. Mercer*, 45 Wn. App. 769, 774, 727 P.2d 676 (1986).

In *Thierry*, officers watched two teenagers drive through a high crime area one winter afternoon with the car windows rolled down and loud music playing. 60 Wn. App. 446-47. The car drove through a parking lot containing open spaces without attempting to park and stopped at the entrance. *Id.* at 447. As officers approached, they saw a wooden bat at the driver's feet and noticed the passenger making furtive hand motions. *Id.* at 447. The court upheld the stop, stating the officers had observed behavior consisted with the profile of drive-by shootings and were not required to ignore their observations. *Id.* at 448.

In *Fuentes*, officers stopped a female leaving a known drug apartment. 183 Wn.2d at 157. The officers knew about past drug activity at that apartment. *Id.* at 156. They observed several short stays that night. *Id.* The officers observed the female enter the apartment briefly then return to her car. *Id.* She then carried a plastic bag into the apartment. *Id.* at 157. When she left, the bag appeared to have noticeably less content. *Id.* The officer formed reasonable suspicion that the female had made a drug delivery at the apartment. *Id.* The Court held this contact was a lawful *Terry* stop because of the defendant's suspicious behavior, the known drug activity at the apartment, and the officers' observations of current drug activity. *Id.* at 163.

In the instant case, Mr. Weyand's behavior might appear innocuous to the lay person, but when looking at it through the lens of Officer Henry, it is not. Here, the defendant's actions of a short stay, at 2:30 in the morning, in a documented drug house, with known recent drug activity, leaving after the police drove by, in a vehicle not associated with the neighborhood, and his suspicious body language led Officer Henry to suspect the defendant was in possession of a controlled substance.

#### **4. Purpose of the stop.**

The purpose of the stop must be related to an investigation focused on the defendant. *Williams*, 102 Wn.2d at 740-41. There is no dispute that

Officer Henry contacted Mr. Weyand to investigate the crime of possession of a controlled substance.

**5. Amount of physical intrusions on the defendant.**

The degree of intrusion must also be appropriate to the type of crime under investigation and to the probable dangerousness of the suspect. *Williams*, 102 Wn.2d at 740. In the instant matter, once the vehicle was pulled over, the defendant, who was sitting in the front passenger seat, made furtive movements and began cleaning off his side windows and angling them so he could see exactly where the officer was. RP at 23. Due to these actions, Officer Henry walked to the back of his patrol car and waited for a cover officer. *Id.* After the cover officer arrived, Officer Henry approached the vehicle. Given the actions of the defendant, Officer Henry acting appropriately.

**IV. CONCLUSION**

The Court must look at the totality of the circumstances and not piecemeal the facts as defendant suggests. Based on what Officer Henry knew about 95 Cullum and the neighborhood, his experience on patrol, his experience with driving by 95 Cullum, his experience with the vehicles associated with 95 Cullum, and the defendant's actions as he walked toward a vehicle parked on the same side of the street as 95 Cullum, Officer Henry had reasonable suspicion that Mr. Weyand was in

possession of a controlled substance. The contact of Mr. Weyand was a lawful *Terry* stop.

**RESPECTFULLY SUBMITTED** this 9th day of January, 2017.

**ANDY MILLER**

Prosecutor

A handwritten signature in black ink, appearing to read 'Anita Petra', with a long horizontal flourish extending to the right.

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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

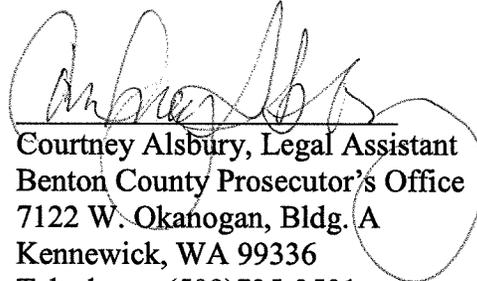
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