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FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2009 OCT 26 AM 10:55

NO. 63179-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAMAL RICHARDSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Charles Mertel, Judge

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred in denying the defense CrR 3.6 motion to suppress evidence.

2. A portion of finding of fact number five is not supported by substantial evidence.

Issues Pertaining to the Assignments of Error

1. A caller told dispatch that a possible suspect from a prior burglary was at an apartment complex, and that the suspect was wearing khaki shorts. Acting on this tip, a deputy ordered five young men to the ground at gun point. Ecstasy was found in Ramal Richardson's pocket. At a suppression hearing, two defense witnesses testified that Richardson was wearing long blue jeans, not khaki shorts. The state did not present any conflicting testimony, nor did the court make any oral or written findings to the contrary. Given that the absence of a material finding of fact is to be construed against the party with the burden of proof, must this Court presume that the defendant did not match the description of the burglary suspect?

2. When the officer arrived at the scene he saw a group of five young black males, some of whom matched the description provided by dispatch. The officer did not observe any confrontation

between the young men, nor see any activity that caused him to believe they were engaged in criminal activity. Nonetheless, rather than just ordering the men matching the suspect's description to stop, the officer ordered all of the young men to the ground at gunpoint. Did the officer lack an individualized suspicion of criminal activity as to those men who did not match the suspect's description?

3. The caller told dispatch that a man currently at an apartment complex "looks like a guy" seen on a video tape breaking into an apartment on a prior occasion. Given that there was no indication as to who had viewed that video, or how much the suspect "looked like" the guy on the video, was the officer required to verify or corroborate the information before forcefully seizing a group of young men at the apartment complex?

II. STATEMENT OF FACTS

1. Procedural Facts

The State charged Ramal Richardson with one count of possession of a controlled substance, alleged to have occurred on July 5, 2007. CP 1; RCW 69.50.4013. On December 16, 2008, the case was assigned to the Honorable Charles Mertel for a jury trial. The defense brought a CrR 3.6 motion to suppress the drugs that

were found in Mr. Richardson's pocket following an investigative stop. The court heard testimony from Deputy Ehlers, Ramal Richardson (the defendant), and Anthony Baker (a defense witness). On December 17, 2008, the court denied the defense motion. RP 142. The defense then waived the right to trial by jury, and submitted the case to the court for a trial based on the police report. RP 145. The court found Mr. Richardson guilty as charged. RP 150. The court entered written findings of fact and conclusions of law as to both the trial and CrR 3.6 hearing. Supp CP ____ (sub nos. 80 & 81, filed 10/29/08)

The only issue on appeal is the court's ruling on the defense motion to suppress evidence. As such, appellant has ordered neither the trial nor sentencing transcript for this appeal.

2. Trial testimony

On July 5, 2006, Deputy Ehlers was working uniformed patrol when the dispatcher directed him to respond to the Creston Apartments. Management had informed dispatch that a possible suspect from an earlier burglary had been spotted on the premises. RP 12. Dispatch advised Ehlers that "the reporting party has a male at the location who looks like a guy who they have on video for breaking into a unit at that location." RP 18; Exhibit 1 (CAD

Report). There was no indication from dispatch as to whether the caller had seen the video, the nature or quality of the video, or whether the viewer of the video recognized the suspect from prior contacts. See RP 14-20. The caller was vague as to the physical appearance (black male in this 20's), but more specific as to clothing (khaki shorts and a white tee shirt). RP 20.

Deputy Ehlers received this call from Dispatch around 5:40 p.m. and responded immediately. RP 12. From his prior experiences, Deputy Ehlers believed this apartment complex to be a hotbed of criminal activity, with a spectrum of violent crimes occurring on the premises. RP 13. Although most of the calls he had received in the past had come in from Valerie Hayes, the manager of the complex, Ehlers had received calls from others in the management office as well. RP 14. Ehlers did not believe he had ever received "had problems" with the information provided by anyone in the management office. RP 50. This particular call had come from Valerie (See Exhibit 1); although, Deputy Ehlers was unaware of that fact at the time. RP 14.

While in transit, dispatch advised Ehlers that the burglary victim was verbally confronting the suspect. RP 19. Dispatch later notified him that at least one of the victim's friends was present as

well. RP 22. There was no indication that the confrontation was physical, that it was escalating, or that any of the suspect's friends were on the scene. See RP 38.

Ehlers was the first Deputy to arrive at the apartment complex. The weather was clear and sunny. RP 12. The management office is not far from the "L" building, where the suspect was alleged to be standing. RP 34. He did not stop at the office to view the video, determine who in the office had viewed the video or how similar the guy on the video looked to the "suspect." RP 36. Ehlers later admitted that he did not think a crime was in progress at the time, other than the investigation of the prior burglary, but believed that if he stopped to obtain or confirm information, the suspect might leave. RP 38-40.

When the deputy drove up to L building, he observed five African-American young men, four of whom were wearing some type of white shirts (not necessarily tee shirts). RP 23, 40. There were more people there than he expected to see. RP 23. Later in court, he could not remember who was not wearing a white shirt, nor could he specifically recall what any of the men were wearing. RP 39-40.

Ehlers did not observe any type of verbal or physical altercation. RP 39. He could not recall seeing any body movements indicative of conflict. RP 44. He could tell that the men were talking to each other, but he was too far away to hear what the men were saying to each other. RP 43.

According to Ehlers, as he drove up, the men all started to walk away. RP 24. He parked his car about 75 feet away, exited his vehicle, and told them all to stop. RP 24-25, 50. They did not comply but continued walking. RP 26. Ehlers was sure that they would have been able to hear him, because when he called out a second time, a couple of the men looked at him before turning away. RP 28-29. According to Ehlers, it was then that he pulled out his service revolver, pointed it at the men, and ordered them all to the ground. Ehlers had them kneel on the ground with their fingers interlocked behind their heads. RP 29-30. He forced them all to stay this way for about three minutes until other officers arrived. RP 41.

One of the young men held at gunpoint was Ramal Richardson. When the other deputies arrived, they discovered that Richardson had marijuana and ecstasy in his pocket. Richardson was charged with possession of a controlled substance. From the

evidence presented, it did not appear that any of the men were ever charged with burglary.

The defense brought a CrR 3.6 motion, challenging the initial detention leading up to the search. At that hearing, Deputy Ehlers testified as described above. The court also heard from Ramal Richardson, as well as Anthony Baker, one of the other men held at gun-point by Deputy Ehlers.

Both men testified that Richardson was wearing blue jeans and an overcoat that day. RP 106, 133. The court did not reject this testimony in either the oral or written findings, nor did the court make any factual findings inconsistent with that testimony.

Both men disputed Ehlers' claim that he called out to them to stop a couple of times before drawing his gun on them. Both Richardson and Baker were sure that the first time the deputy ordered them to stop, he already had his pistol out and aimed at them. RP 86, 125, 127. The court did not enter findings as to that disputed fact.

When confronted with why he ordered all of the men to stop and get on the ground, when only one person was the burglary suspect, Deputy Ehlers explained that it is best to "detain then begin your investigative steps." RP 27. When asked what he

planned to do after he had forced them all to the ground at gun

point, Ehlers stated:

Well, first, I wanted to find out if I was even contacting the right individuals because it's a large apartment complex and there's a lot of people that move through there, so my first step would have been seeing at least if I was contacting the correct people.

RP 48.

The court entered the following findings of fact and conclusions of law.

1. Richard Ehlers is a Deputy with the King County Sheriff's Office and has received the standard training for his job as a law enforcement officer. He is familiar with the Creston Point Apartments (hereinafter "Creston Point") at 13445 Martin Luther King Jr. Way South in King County, WA. Through his experience, he is aware that Creston Point experiences a high amount of illegal activity.
2. Prior to July 5, 2007, Deputy Ehlers had been called to Creston Point many times before by the management staff to investigate illegal activity. Deputy Ehlers knows Valerie Hayes, a manager at Creston Point. In the past, the information she had provided to Deputy Ehlers via dispatch had been accurate and reliable. Deputy Ehlers has also received information from other staff members at Creston Point and has found information provided by them to be accurate and reliable as well. Deputy Ehlers has never received information from Creston Point management that he found to be false or misleading.
3. On July 5, 2007, at approximately 5:40pm, Deputy Ehlers was on duty in his uniform and driving a marked patrol car when dispatch informed him that a suspected burglar was at Creston Point. Deputy Ehlers believed that a member of the management staff had given this information to dispatch.

The CAD report, entered as State's pre-trial Exhibit 1, indicates that the caller was Valerie Hayes.

4. Deputy Ehlers immediately responded to the call. While traveling to Creston Point, dispatch also informed Deputy Ehlers that the suspected burglar was in a verbal confrontation with the victim of the burglary at the "L" building at Creston Point, and that other people had arrived at the confrontation. Dispatch relayed that the suspected burglar was an African-American male in his twenties, wearing a white shirt and khaki shorts.
5. Deputy Ehlers arrived at Creston Point a few minutes after the call from dispatch. Deputy Ehlers then entered the Creston Point property and drove around behind the management building to the L building. After entering the Creston Point property, he was able to see a group of five individuals outside the L building. Four members of that group were wearing clothing that matched the description of the suspected burglar.
6. Upon reaching the L building, Deputy Ehlers again saw the group of individuals matching the description given by dispatch. In total, five people were in front of the L building and appeared to be interacting with each other. There was no disturbance or fight in progress observed. Of the five individuals, four of them were wearing white shirts. The emergency equipment on Deputy Ehlers' patrol car was not activated.
7. Deputy Ehlers exited his patrol car and ultimately ordered the group of individuals to their knees at gunpoint. Deputy Ehlers testified that he handled the stop in this manner do [sic] the fact that Creston Point had a reputation for illegal activity, he was the only officer present, he was interacting with five unknown individuals who were walking away from him, he believed one of the individuals was a suspected burglar, and he believed the group might be engaged in a verbal confrontation.

8. The five individuals complied with Deputy Ehlers' order and got down on their knees. A couple minutes later, two other deputies arrived at the L building to assist Deputy Ehlers. One of the individuals stopped by Deputy Ehlers and later subjected to a Terry frisk was the defendant, who Deputy Ehlers identified in court.

THE DISPUTED FACTS

1. Deputy Ehlers testified that when he pulled up to the L building, the group of individuals immediately began walking away from him. Wishing to interact with the group, Deputy Ehlers ordered them to stop. When the group continued walking, Deputy Ehlers began walking after them, and again ordered the group to stop walking. After this second request, a couple of the individuals looked back at Deputy Ehlers but the group continued walking. As the group neared one of the apartment buildings, Deputy Ehlers drew his firearm and ordered them to stop in a loud voice. The group complied with the third and final request.
2. The defendant testified that he did not see where Deputy Ehlers had come from when he stopped the group. The defendant also testified that Deputy Ehlers only told the group to stop one time, that Deputy Ehlers had his firearm drawn the entire time, and that they complied with this single request.
3. Anthony Baker testified that at the time of the detention, Ramal Richardson was wearing a black and white Northface jacket, a black and white baseball cap, he did not wear a white shirt, and he did not wear khaki shorts.
4. Ramal Richardson testified that at the time of the detention he was wearing a black coat and black and white shoes.

5. Deputy Ehlers could not remember what clothing Ramal Richardson was wearing at the time of the detention.

CONCLUSIONS OF LAW

Under the totality of the circumstances in this matter, Deputy Ehlers acted lawfully in conducting a Terry stop of the defendant. The facts known to Deputy Ehlers from dispatch, Deputy Ehlers' own personal observations of the group outside of the L building at the Creston Point Apartments, and the behavior of the defendant when Deputy Ehlers' attempted to contact him and his associates are specific and articulable facts that warranted the intrusion. The facts of this matter, and the rational inferences that stem from them, indicated that there was a substantial possibility that criminal conduct had occurred or was about to occur.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Supp CP ____ (sub no. 80, filed 10/29/08)

III. **ARGUMENT**

A. **SUMMARY OF ARGUMENT**

One of the indispensable elements of a valid *Terry* stop is an *individualized* suspicion of criminal activity. The officer must have a reasonable belief that the person detained is the person engaged in the criminal behavior. As such, mere proximity to others suspected of criminal activity will not justify even a short detention for questioning.

Here, the officer had no independent knowledge of the burglary or burglary suspect. The only information he possessed

was from the dispatcher, who told him that there was only one burglary suspect, and that the suspect was wearing a white tee shirt and khaki shorts. When the officer arrived at the scene, he observed five black males, some dressed in shorts and some who were not.

The undisputed evidence is that Ramal Richardson was wearing blue jeans, not khaki shorts. As such, the officer could not have reasonably believed that Richardson was the burglary suspect. Nor did the officer believe there was any other criminal activity afoot. In the absence of an individualized suspicion of criminal activity, Richardson's detention violated the state and federal constitutions.

On a more fundamental level, the call to the police was insufficient to justify the seizure of *anyone* that afternoon. The caller was not a victim or witness to the crime. Rather, the caller was merely reporting that either she or someone else had seen a videotape of a prior burglary, and that a person currently at the apartment complex "looks like" the guy on the tape. While this may have given the officer a good reason to further investigate, and to find out how similar the person looked to the video, it did not give

the officer justification to first seize all of the young men and then investigate the earlier crime.

B. THE COURT ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS UNLAWFULLY SEIZED EVIDENCE.

1. **The absence of material findings of fact relating to the clothes Richardson was wearing must be construed against the party with the burden of proof.**

Dispatch reported that the burglary suspect was wearing khaki shorts and a white tee shirt. Both Richardson and Baker testified that Richardson was wearing blue jeans at the time of the incident. Deputy Ehlers did not dispute this, offering no testimony as to the type of pants Richardson was wearing and not recalling the type of shirt. Deputy Ehlers did not include a description of the clothing in his police report. The Court did not make a finding as to what Richardson was wearing that day.

“In reviewing the findings from a suppression hearing, the appellate court will presume that the State has failed to prove a factual issue if the trial court fails to make a finding on that issue.” State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Thus, “absent an express finding upon a material fact, it is deemed to have been found against the party having the burden of proof.” Burns v. McClinton, 135 Wn. App. 285, 300, 143 P.3d 630 (2006).

Applying that rule here, Richardson was not dressed similar to the description of the burglary suspect.

A key issue in this case is whether the officer had an individualized suspicion that Richardson was the burglary suspect. To that end, the question of whether Richardson was dressed like the burglary suspect was a material fact in determining whether the deputy had a legal justification for the stop. The court, however, did not make any findings as to what clothing Richardson was wearing at the time of the stop. As such, on appeal, this Court must presume that the State failed to prove Richardson was dressed similar to the burglary suspect.

2. Portions of finding of fact number five are not supported by substantial evidence.

The last sentence in finding of fact number five states: “Four members of that group were wearing clothing that matched the description of the suspected burglar.” Supp CP ____ (findings of fact, sub number 80). This is not accurate. What the deputy said is that four of the five were dressed “similar.” RP 39. He then explained that he did not recall what pants the men were wearing, and that the only part that “matched” was the white shirt. RP 40. Given that dispatches’ description of the suspect unequivocally

referred to “a white tee shirt, and khaki shorts,” the court’s finding that four of the five men matched the description of the suspect is not supported by the evidence and should be disregarded. See State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) (“A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal.”)

3. The Washington Constitution provides greater protection against warrantless seizures.

“The United States Constitution prohibits unreasonable searches and seizures; our state constitution goes further and requires actual authority of law before the State may disturb the individual's private affairs.” State v. Day, 161 Wn.2d 889, 183, 168 P.3d 1265 (2007). “Authority of law” is a higher standard than mere “reasonableness”, and generally, has been interpreted to mean that the State may not intrude upon an individual’s private affairs without a warrant. *Id.*

In the absence of a warrant, it is presumed that any search or seizure violates the state constitution. This presumption can only be rebutted through proof that the seizure fit within “a few jealously and carefully drawn exceptions.” State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Washington courts

carefully limit the scope of these exceptions, “lest they swallow what our constitution enshrines.” Day, at 894. The prosecution bears the burden of proving a particular seizure fits within one of those narrowly drawn exceptions. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); State v. Duncan, 146 Wn.2d 166, 171-172, 43 P.3d 513, 516 (2002).

One such exception is what has come to be known as a Terry¹ stop. Under this exception, police officers may briefly detain an individual if they “have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Washington courts interpret this exception more narrowly than their federal counterparts. See State v. Gatewood, 163 Wn.2d 534, 538, 542, 182 P.3d 426 (2008).

Because it is now “well established” that Article 1, Section 7 places greater restrictions on Terry stops, it is no longer necessary to engage in a Gunwall² analysis when relying upon the state constitution for additional protection. State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).

¹ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)

² State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)

4. The Washington Constitution requires an individualized suspicion that the person seized is the person suspected of committing the crime.

A valid Terry stop requires an individualized suspicion as to a particular suspect. State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855, 857 (2006). “The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.” *Id.* (emphasis added)). See also, U.S. v. Cortez, 449 U.S. 411, 417-418, 101 S.Ct. 690 (1981) (“Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.”)

Washington courts are particularly sensitive to this need for an individualized suspicion. This is apparent in a number of different contexts. For instance, in York v. Wahkiakum School District, 163 Wn.2d 297, 178 P.3d 995 (2008), the Washington Supreme Court struck down random drug testing for student athletes. The Court did this despite the decreased privacy interests of students and, more importantly, despite a United States Supreme Court decision upholding this type of intrusion without individualized suspicion. York, 163 Wn.2d at 304, *discussing*

Vernonia School District v. Action, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). In Vernonia, the United States Supreme Court had held that because it was impractical to expect teachers and administrators to recognize signs of drug usage, it was reasonable to allow for searches of student athletes without an individualized suspicion. Vernonia, 515 U.S. at 663.

By contrast, the focus under the state constitution is not on whether the government intrusion is “reasonable.” Instead, the question is whether a search or seizure without individualized suspicion is made under “authority of law.” The Washington Supreme Court held that it is not, and that without an individualized suspicion, there can be no “authority of law” to justify the search of the student athletes under the state constitution. York, 163 Wn.2d at 304, 315-16. The Court explained that the difference in outcome is a result of the difference in constitutional language. Id.³

Another state supreme court case highlighting the need for an individualized suspicion is Seattle v. Mesiani, 110 Wn.2d 454,

³ See also, State v. Day, 161 Wn.2d at 896 (“Article I, section 7, does not use the words “reasonable” or “unreasonable.” Instead, it requires “authority of law” before the State may pry into the private affairs of individuals.”)

755 P.2d 775 (1988). Mesiani involved the state's use of sobriety checkpoints in areas known for increased drunk driving. The police in that case stopped all on-coming motorists "without warrants or individualized suspicion of any criminal activity." 110 Wn.2d at 455. The Washington Supreme Court first observed that the state constitution provides greater protection than its federal counterpart. The Court concluded that even these brief detentions, without individualized suspicion, were unconstitutional. *Id.* at 456-57. This holding stands in sharp contrast to the position taken by the federal courts, and most state courts. See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455, 110 L.Ed.2d 412 (1990) (sobriety checkpoints not prohibited by the Fourth Amendment); See also, 32 *Washington Practice* 20:13 ("Washington is one of just a handful of states that bans the use of roadblocks.") The holding in Mesiani is consistent with this state's focus on the rights of the citizen, rather than just the reasonableness of the officer's actions.

This requirement of an individualized suspicion also means that mere proximity to others suspected of criminal activity does not justify a seizure. State v. Crane, 105 Wn. App. 301, 312, 19 P.3d 1100, 1106 (2001) ("Neither close proximity to others suspected of criminal activities nor presence in a high crime area, without more,

will justify a seizure.”) As discussed below, Richardson’s proximity to someone the deputy might have suspected of previously committing a burglary does not justify the seizure.

5. The Deputy did not have reasonable suspicion that Richardson was engaged in criminal activity.

A seizure occurs when an officer tells a suspect, “Stop, I need to talk to you.” State v. Gatewood, 163 Wn.2d 534, 539-540, 182 P.3d 426 (2008). In the present case, the deputy seized Richardson when the deputy first exited the car and told the group of men to stop. Whether Ehlers pointed his gun at them immediately, as testified by Richardson, or whether he pulled out his revolver after the men refused to stop, as claimed by Ehlers, has no bearing on when the seizure occurred. It was Ehlers’ words—not the act of displaying a weapon—that created the seizure.

The deputy’s actions must be justified at their inception. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). The deputy’s claim that the men continued to walk after he had called out for them to stop cannot be used to support the previous stop. In order for the seizure to be upheld, the officer must have had

reasonable suspicion of criminal activity when he first exited his vehicle and ordered the men to stop.

Ehlers testified that when he pulled up, before he even attempted contact, the men turned around and walked away. The trial court did not make a factual finding that this had occurred. But even assuming Ehlers claim to be true, it is of no significance. Washington courts have repeatedly held that simply walking away when a patrol car pulls up is not indicative of criminal activity. For instance, in Gatewood, the officers saw the suspect at a bus stop. When the suspect saw the officer, his “eyes got big . . . like he was surprised to see us.” He then twisted his body, as if he was trying to hide something. As the officers drove by, Gatewood left the bus shelter, jay-walked across a street, and then continued slowly walking away when the officers pulled up behind him. A unanimous court found that this was not suggestive of criminal activity. In reaching this conclusion, the Court cited with approval a Colorado case, which similarly held that a defendant walking away after noticing a patrol car does not give rise to reasonable suspicion. Gatewood at 540, citing to Outlaw v. People, 17 P.3 150, 157 (Colo. 2001).

The Gatewood court distinguished cases in which a suspect flees (i.e., runs) from the police, and those cases in which the suspect simply walks away when a police car pulls up. Gatewood, at 540-41. For instance, in State v. Sweet, the police observed the suspect in a suspicious location, and when the officers approached him, he “fled at a full run.” Gatewood, at 541, quoting State v. Sweet, 44 Wn. App. 226, 228, 721 P.2d 560 (1986). Applying Gatewood here, Richardson’s purported desire to avoid talking with the deputy does not support a finding of reasonable suspicion.

Although Gatewood may be the most recent pronouncement of this rule, Gatewood is hardly cutting-edge law. To the contrary, it has long been recognized that walking away from an approaching officer does not supply reasonable suspicion of criminal activity. See e.g., Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637 (1979) (in an alley located in high drug area, no reasonable suspicion when two men suddenly walk away from each other as a patrol car appeared); State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980) (no reasonable suspicion where car stopped in high crime area near a closed park attempted to drive away when the police approached.)

In the present case, the court did not even make a finding that Richardson walked away from Ehlers when he drove up to near where they were standing. The court did, in the conclusions of law, refer to the men's actions once Ehlers did attempt to contact them. But as discussed above, Ehlers first attempt at contact was the command that they stop. Anything that occurred after that command cannot be used to justify the seizure. State v. Ladson, 138 Wn.2d at 350.

The trial court placed significance on the fact that Richardson was with a group where one person was suspected of previously committing a burglary. But proximity to others suspected of criminal activity does not give rise to reasonable suspicion. State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

The Washington State Supreme Court decision in Thompson, supra, is on point. In that case, the police received a call that the driver of a Cadillac was waving a handgun. The police located the Cadillac and watched as it "meandered" in the parking lot before stopping next to a Green Chrysler in a "somewhat isolated" location in the parking lot. The officer parked his car in front of the Cadillac and ordered the occupants out. At the same time, the man in the Green Chrysler got out of his car and began to

walk “rapidly” away from the police. The officer ordered him to stop, which led to the eventual discovery of a controlled substance. Id. at 839. On appeal, the Supreme Court found that the proximity to others suspected of criminal activity, even when combined with the driver’s decision to walk away from contact with the officer, did not justify the seizure. Id. at 842-43.

The facts in Thompson were stronger for the State than the facts in the current case. In Thompson, the police were investigating an on-going crime involving firearms, one that presented an immediate risk to the public. By contrast, in the present case, Deputy Ehlers was investigating a property crime that had occurred on an earlier date. See State v. Sieler, 95 Wn.2d 43, 50, 621 P.2d 1272 (1980) (“The seriousness of the criminal activity reported by an informant can affect the reasonableness calculus which determines whether an investigatory detention is permissible.”)

Other cases are in accord that proximity to people suspected of criminal activity does not give rise to reasonable suspicion. In State v. Richardson, 64 Wn. App. 693, 694-95, 825 P.2d 754 (1992) (no relationship to Ramal Richardson), the officer watched a man engage in three suspected street drug transactions over a

short period of time in a high crime area. A short while later the officer observed the suspected drug dealer walking down the street with Mr. Richardson. The officer stopped them both to ask them questions. The court of appeals concluded that neither the high crime area, nor Mr. Richardson's mere proximity to the drug dealer justified the seizure. Id. at 697.

Applying this case law here, Ehlers did not suspect any criminal activity, other than the prior burglary, and Richardson clearly did not meet the description of the burglary suspect. Even assuming that the deputy had a legal justification for seizing all of the men who met the caller's description of the burglary suspect, the officer did not have grounds to seize Richardson or anyone else who did not have on shorts and a white tee shirt.

Finally, Ehlers' actions cannot be justified on appeal by some perceived need for Ehlers to halt everyone—suspect and non-suspect alike—for purposes of investigating the burglary. See State v. Carney, 142 Wn. App. 197, 203-04, 174 P.3d 142 (2007), review denied 164 Wn.2d 1009 (2008), (merely having information that may aid the police does not justify a *Terry* stop, unless the person stopped is reasonably suspected to be involved in a crime.) This was an investigative stop, but there was no reasonable

suspicion. And in the absence of reasonable suspicion relating to Richardson, the evidence seized following that stop must be suppressed.

6. In addition to a lack of individualized suspicion, the stop was unlawful because the tip from the management office was not sufficiently reliable.

As noted above, based on the information provided by dispatch, there was no individualized suspicion as to Ramal Richardson. There was no reason to believe that he was the burglary suspect or that he was engaged in some other criminal activity. On a more fundamental level, however, the call to the police was insufficient to justify the seizure of *anyone* that afternoon. The information presented was not sufficiently reliable to support the seizure of the young black men at the apartment, even those who might have matched the description provided by dispatch.

A Terry stop is a narrow exception to the general requirement that a warrant be issued by a neutral magistrate. The general requirement for a warrant runs the risk of even greater dilution when the seizure is not based on the officer's own

observations, but is based upon information supplied to him by other people.

Because of the greater protection afforded defendants under Article 1, section 7 of the state constitution, Washington adheres to a two part test in determining whether the informant's tip was sufficient to justify a seizure. Sieler, 95 Wn.2d at 47-49; State v. Hopkins, 128 Wn. App. 855, 863, 117 P.3d 377 (2005). Some decisions from Division One, however, have held that this two-part test does not apply to Terry stops, and that the court should use the "totality of the circumstances" test employed by the federal courts. See State v. Randall, 73 Wn. App. 225, 228-29, 868 P.2d 207 (1994). Fortunately, this is most likely a moot issue, as the information from dispatch was insufficient to create reasonable suspicion of criminal activity under either test. Nonetheless, this brief will examine the evidence under both tests.

"An informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient 'indicia of reliability.'" Sieler, 95 Wn.2d at 47. In Sieler, the Washington Supreme Court employed a two-part test for determining whether an informant's tip supplies the necessary level of reasonable suspicion. One part looks at the informant's veracity, while the

other examines the informant's basis of knowledge. Id. at 47-49.

It is the basis of knowledge prong that is particularly troubling in this case.

The basis of knowledge prong requires factual details from which police officers could conclude that the informant's tip was based upon personal knowledge. Sieler, 95 Wn.2d at 48. This is most often satisfied when the caller states that he is the victim of the crime or that he observed a crime being committed.

In the present case, Valerie was neither victim nor eyewitness. Instead, she merely reported that there was someone at the apartment "who looks like [the] guy they have on video."

There was no indication that Valerie was the person who had seen the video or that she had reached the conclusion that the person in khaki shorts "looks like [the] guy" on the video. This is a fundamental deficiency in the State's case. After all, "It makes no sense to require some 'indicia of reliability' that the informer is personally reliable but nothing at all concerning the source of his information, considering that one possible source would be another person who was totally unreliable." State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784 (1992) (quoting, 3 W. LaFave, Search and Seizure § 9.3(e) at 481 (1987)). Given the difficulties

associated with identifications based on a review of videotapes, the lack of information regarding the person who drew that “looks like” conclusion, as well as the nature and quality of the tape is particularly troubling. State v. George, 150 Wn. App. 110, 119, 206 P.3d 697 (2009) (reversible error to allow witness to testify he recognized defendant from a security video tape, where facial features were impossible to discern from the tape).

These same concern also applies when examining the the evidence from a totality of the circumstances perspective. Alabama v. White, 496 U.S. 325, 328-29, 110 S.Ct 2412, 110 L.ED 310 (1990) (totality of the circumstances necessarily includes the informant’s credibility and basis of knowledge). But aside from concerns regarding the accuracy of the information, even when taken at face value, the information conveyed was ambiguous enough to require further clarification by the police before taking action. Dispatch merely reported that someone on the premises “looks like” someone in the video. This begs the question. How similar did he look? So similar as to justify a stop, or simply similar enough to notify the police that this is something they should follow up on with some investigation? Deputy Ehlers should not have seized these young men without either clarifying or confirming the

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information. Good police work required no less. See e.g., Gatewood, at 42 (Where the officers' suspicions did not rise to the level of a reasonable suspicion, the officers "could have continued to follow Gatewood or engaged in a consensual encounter to further investigate the activity Longley observed in the bus shelter."); State v. Lesnick, 10 Wn .App. 281, 285, 518 P.2d 199 (1973) ("While the police may have a duty to investigate tips which sound reasonable, [in the absence of corroboration or evidence of reliability] . . . a forcible, stop based solely upon such information is not permissible"), affirmed State v. Lesnick,_ 84 Wn.2d 940, 944, 530 P.2d 243, 246 (1975).

Unfortunately, Ehlers apparently believed it was appropriate to first seize everybody in the surrounding area—regardless of whether they even matched the suspect's description—and then investigate. Ehlers explained that the best practice is to "detain and then begin your investigative steps." RP 27. But this approach ignores the dictates of this Court—that *any* exception to the warrant requirement is to be narrowly construed. State v. Day, 161 Wn.2d at 894 ("[W]e jealously guard these exceptions lest they swallow what our constitution enshrines.")

“An important factor comprising the totality of circumstances which must be examined is the nature of the suspected crime.” State v. Randall, 73 Wn. App. at 229. This was not a call that required immediate action so as to protect the public. It was not an on-going crime; it was an investigation of a property crime that had occurred on an earlier date. CF Randall, at 249-50 (immediate action required where two armed robbers were escaping from scene of the crime).

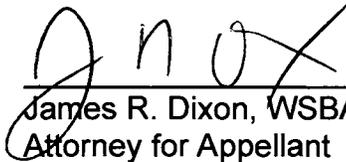
Ehlers had to drive right past the management office in order to confront the young men. It would not have been impractical to conduct additional investigation before seizing all of the young black males in the area. Even a call to the management office may have provided much of the missing information. See State v. Hopkins, 128 Wn. App. at 863 (Finding a lack of reasonable suspicion where “[t]he officers did not attempt to call the informant back on his cell phone or the other number to obtain more information about his suspicions.) Without taking these additional steps, Deputy Ehlers did not have reasonable suspicion to justify the seizure of any of these young men.

D. CONCLUSION

In the absence of clarification or corroboration, the call to dispatch did not create a reasonable suspicion of criminal activity. But even assuming that there was reasonable suspicion as to some of the men, there was no reasonable suspicion as to Ramal Richardson. He was dressed in long pants, whereas the suspect was someone dressed in shorts.

The deputy's discovery of the ecstasy in Ramal's coat pocket was a direct result of the unlawful seizure. As such, the ecstasy should have been suppressed. The court erred in holding otherwise.

Respectfully Submitted on this 30th day of October, 2009


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