

66727-1

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NO. 66727-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LYLE ESTEP,

Appellant.

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

BRIEF OF APPELLANT

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DIVISION ONE

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in failing to suppress the fruits of a warrantless search.

2. The trial court erred in finding specific and articulable facts leading to the conclusion that a crime either had been or would be committed. (Findings of Fact 1, 3, 4, and Conclusion of Law 1).

3. The trial court erred in finding specific and articulable facts leading to the conclusion that Mr. Estep was the suspect named by the 911 caller. (Findings of Fact 6, 7, 8, 9, and Conclusion of Law 2).

4. The trial court erred in finding specific and articulable facts leading to the conclusion that Mr. Estep might have been armed. (Findings of Fact 1, 3, 8, 14-16, and Conclusion of Law 3).

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Article I, section 7 and the Fourth Amendment prohibit warrantless searches and seizures. This rule is subject to a few narrowly drawn and jealously guarded exceptions. Only an actual custodial arrest provides the authority of law necessary to justify a warrantless search incident to arrest. Here, Mr. Estep was stopped and frisked by police. Did the warrantless search violate constitutional protections?

C. STATEMENT OF THE CASE.

Early one morning, Lyle Estep was walking along the east shoulder of First Avenue South in Federal Way. 2/8/11 RP 16-17. It had been a cold and rainy night, and Mr. Estep was walking alone, with his hands in his pockets and the hood of his jacket over his ears. Id. at 20-23.

Deputies Koby Hamill and Jeff Barden had received a report of a “suspicious person” of unknown race, wearing dark clothing, possibly with a hood, and carrying a backpack and a flashlight. 2/8/11 RP 12-13. The caller expressed concern over recent thefts of gasoline in the neighborhood and vehicle prowls, but did not indicate that this particular person was doing anything illegal at the time. Id.

The deputies received a radio dispatch regarding this 911 call and approximately 10 minutes later, saw Mr. Estep walking on the shoulder of First Avenue South, but heading in the opposite direction indicated by the caller. Id. at 16-17, 58-59. The deputies made a u-turn and began to follow him in their patrol car, and Mr. Estep turned around to look at them. Id. at 20. The deputies then activated their car’s emergency lights, and Mr. Estep stopped walking. Id. at 21-22, 59-60.

The deputies spoke with Mr. Estep and told him he was being detained for the investigation of suspected prowling. 2/8/11 RP 61. Mr. Estep told the deputies that he was walking to the convenience store that was a few blocks farther on First Avenue South. 2/8/11 RP 37-38. Mr. Estep did not have a flashlight, nor a backpack, in his possession. Id. at 36, 65. Deputy Hamill had asked Mr. Estep to keep his hands out of his pockets at the time he was stopped; when Mr. Estep slipped his hands back into his pockets at one point, Deputy Hamill informed him that Deputy Barden would be performing a pat-down search of his person for weapons. Id. at 23-24, 60-62.

Deputy Barden performed a pat-down and felt a bulge in Mr. Estep's waistband. 2/8/11 RP 24, 63. He asked Mr. Estep if the bulge was a gun, and Mr. Estep answered that it was, and that he carried it for protection after being stabbed twice before. Id.; CP 28. Both deputies agreed that Mr. Estep was cooperative and "extremely cordial" with them." Id. at 39.

Mr. Estep was charged with unlawful possession of a firearm in the second degree. CP 66.

A suppression hearing was conducted, after which the trial court denied Mr. Estep's motion to suppress. 2/9/11 RP 7; CP 67-

69. Mr. Estep then agreed to proceed by bench trial on a stipulated record before the Honorable Regina Cahan. 2/9/11 RP 9-11. Mr. Estep was found guilty of unlawful possession of a firearm in the second degree. CP 70-72.

Mr. Estep appeals. CP 80-84.

D. ARGUMENT

THE COURT ERRED IN DENYING MR. ESTEP'S MOTION TO SUPPRESS, AS THE WARRANTLESS SEARCH AND SEIZURE VIOLATED ARTICLE I, SECTION 7 AND THE FOURTH AMENDMENT.

1. Article I, section 7 and the Fourth Amendment prohibit unreasonable searches and seizures. The state and federal constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. 4; Const. art. I, § 7. The Fourth Amendment of the United States Constitution guarantees: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no warrants shall issue, but upon probable cause.” U.S. Const. amend. 4; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Under the Washington Constitution, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

Washington courts have long recognized that article I, section 7 provides even greater protections to citizens' privacy rights than those afforded by the Fourth Amendment of the federal constitution. See, e.g., State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999); State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998); City of Seattle v. Mesiani, 110 Wn.2d 454, 457-58, 755 P.2d 775 (1988). The Washington provision "is not limited to subjective expectations of privacy, but, more broadly protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" Parker, 139 Wn.2d at 494 (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

A warrantless search is generally considered per se unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Thus, a warrantless search is presumed unlawful unless the search meets one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden of demonstrating

whether a search fits within one of these exceptions. Id. (citing State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)).

2. The warrantless search of Mr. Estep did not meet the Terry exception to the warrant requirement. Although not explicitly cited in the court's findings, it was argued that Mr. Estep was searched pursuant to Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). 2/9/11 RP 6-7; CP 69. This argument fails.

Police may briefly detain an individual to investigate suspicious activity where the officer has a reasonable suspicion that criminal conduct has occurred or is about to occur. Terry, 392 U.S. at 21. Under Terry, police may engage in a frisk or pat-down of the detainee for weapons only if the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. As stated by the Terry Court:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30.

Such a pat-down does not, however, throw open the doors to a full-scale search of the person. Rather, a pat-down under Terry is “strictly limited in its scope to a search of the outer clothing” of the person detained. State v. Hudson, 124 Wn.2d 107, 113, 874 P.2d 160 (1994).

A potential Terry pat-down involves three questions. First, did the officer have a reasonable basis to suspect criminal activity involving the detainee? Second, did the officer have reasonable grounds for suspecting the particular individual of being armed and presently dangerous? Terry, 392 U.S. at 30. Finally, did the scope of the search exceed that permitted by the constitution? State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (burden is on the State to show a seizure is legitimate, the safety concern is reasonable, and the scope of the frisk is limited to protective purposes).

a. The officers had an insufficient basis to suspect Mr. Estep was involved in criminal activity. Here, police were investigating a possible prowling incident. 2/8/11 RP 10-11. Despite the fact that Mr. Estep was walking on First Avenue South alone,

significantly, he was not walking in the direction that the prowling suspect was allegedly walking at the time of the call. Id. at 67-69.

In addition, Mr. Estep did not particularly match the description given by the caller. He was wearing a dark jacket with the hood up, but as Deputy Barden conceded, "It was raining. Very hard ... you could actually see the rain bouncing off the pavement in front of the headlights." 2/8/11 RP 18. It is fair to say that most people in Western Washington that night were probably wearing jackets and hats of some type.

The 911 caller did not cite the suspected prowler's race, nor did the caller give any other description, other than claiming that the prowler was carrying a backpack and a flashlight. Id. at 12-13, 56-57. Mr. Estep had neither a backpack, nor a flashlight. Id. at 36, 65.

In State v. Gatewood, the Supreme Court, on similar facts, held that the premature seizure of an individual tainted all evidence discovered during the subsequent Terry search, requiring suppression. 163 Wn.2d 534, 542, 182 P.3d 426 (2008). In Gatewood, officers were driving a marked patrol car after midnight in a high-crime area of Seattle. Id. at 537. The officers saw the defendant sitting at a bus shelter; when the defendant seemed to

notice the patrol car, his “eyes got big ... like he was surprised to see us, “ and he “twist[ed] his whole body to the left, inside the bus shelter, as though he was trying to hide something.” Id. Gatewood then walked briskly away from the officers, jaywalked across Rainier Avenue, and continued to walk away, despite a verbal order to stop. Id. at 538. Officers observed Gatewood pull an object from his waistband and toss it into the bushes immediately before he was handcuffed. Id.⁵

The Supreme Court held that “these facts are insufficient for a Terry stop.” Id. Although the officers saw Gatewood twisting to the side, they never saw what, if anything, he was hiding. Id. at 540. The Court also held that startled reactions to seeing the police do not amount to reasonable suspicion. Id. (citing State v. Henry, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (nervousness is not sufficient for Terry stop)).

The facts of the instant case are even less suspicious, as Mr. Estep was fully cooperative with the deputies, never concealing anything from them or attempting to evade them. 2/8/11 RP 21-22, 39, 59-60. If the behavior exhibited by Gatewood – which included

⁵ Officers recovered a loaded firearm from the bushes, marijuana from Gatewood’s person, and cocaine from a subsequent search of the bus shelter. State v. Gatewood, 163 Wn.2d 534, 538, 182 P.3d 426 (2008).

twisting his body as if to conceal drugs and walking away from the police -- did not create reasonable suspicion, it is hard to believe that Mr. Estep, who cooperated at every step with the police, justified the level of intrusion to which he was subjected.

More recently, in State v. Doughty, the Supreme Court reversed an order denying a motion to suppress, noting that “[t]he Terry-stop threshold was created to stop police from this very brand of interference with people’s everyday lives.” 170 Wn.2d 57, 63, 239 P.3d 573 (2010). In Doughty, emphasizing the lack of specific and articulable facts necessary to support reasonable suspicion, the Court clarified that a person’s presence in a location at a “late hour” does not give rise to reasonable suspicion to detain that person. 170 Wn.2d at 62.

The Supreme Court embraced the Terry rule to stop police from acting on mere hunches. “Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.” Terry, 392 U.S. at 22. On these facts, [the officer] acted on a hunch alone.

Id. at 63.

The facts of Doughty are analogous to the instant case, due to the lack of specific information possessed by the police at the

time of the seizure of Mr. Estep. The Supreme Court suppressed in Doughty primarily due to the officers' lack of articulable facts regarding the suspected "drug house" into which the suspect entered for a short period of time. 170 Wn.2d at 64.⁶ As in the instant case, the officers' information consisted of a single civilian complaint, without further details describing the suspect's conduct. Id. Without more, the Doughty Court held that the officers lacked sufficient specific and articulable facts to seize him, and therefore there was no legal basis for the Terry stop. Id. at 65.

Here, the deputies seized Mr. Estep, similarly based upon a single civilian complaint regarding a possible prowler in the neighborhood. 2/8/11 RP 12-13. The sheriff's department was given a minimal description, lacking race or any other physical traits, and was told of prior gasoline thefts in the neighborhood. Id. As in Doughty, however, insufficient specific, articulable facts connected Mr. Estep to the suspected prowler referred to by the civilian caller. Other than the fact that Mr. Estep was wearing a dark jacket with a hood – after all, this was "a pretty nasty night" where the rain was "bouncing off the pavement" – the seizure was not sufficiently

⁶ In Doughty, the officers had received previous complaints from neighbors of drug activity at the house, Doughty visited the house at 3:20 a.m., and his visit lasted less than two minutes. 170 Wn.2d at 62.

supported by more than an inarticulate hunch. 2/8/11 RP 18, 58-59. Mr. Estep was walking the opposite direction from which the suspect was spotted by the caller, and was noticeably lacking the only two items noted by the 911 caller: Mr. Estep had no flashlight and no backpack. 2/8/11 RP 16-17, 36, 58-59, 65. As Deputy Hamill conceded, had the firearm not been found, Mr. Estep would have ultimately been released, rather than been charged with prowling, because there simply was not enough information to connect him with any criminal activity. Id. at 71-72.

Under the circumstances, neither Mr. Estep's behavior, nor the information provided to the police, warranted the intrusion into Mr. Estep's private affairs, justifying the seizure. Doughty, 170 Wn.2d 57; Gatewood, 163 Wn.2d at 542; State v. Setterstrom, 163 Wn.2d 621, 627, 183 P.3d 1075 (2008) (in public area, nervousness and lying insufficient bases to justify frisk).

b. The officers had no basis to believe Mr. Estep was presently armed or dangerous. If police reasonably believe criminal activity may be afoot and that the individual involved may be armed and dangerous, they may conduct a pat-down, pursuant to Terry, of the individual. Garvin, 166 Wn.2d at 250; Hudson, 124 Wn.2d at 112-13. Terry, however, strictly prohibits such a search

based on “inchoate and unparticularized suspicion[s].” 392 U.S. at 27. Rather, a pat-down must be based on the reasonable and specific inferences to be drawn from such a hunch. Id.

Both deputies testified to Mr. Estep’s calm and helpful demeanor, with Deputy Barden adding that he was “extremely cordial to us.” 2/8/11 RP 39. Nothing about Mr. Estep’s behavior indicated that he posed a threat to officer safety, or that he was being anything but completely cooperative. Deputy Barden discussed how, at the beginning of the contact, Mr. Estep walked toward the patrol car, rather than away from it, when the deputies began to follow him along the shoulder of the road. Id. at 22. Mr. Estep even removed his own hood at the beginning of the conversation with law enforcement, indicating his intention to cooperate and identify himself. Id. at 60. Based on Mr. Estep’s helpful demeanor during the entire interaction with officers, despite the one moment when his hands allegedly returned to his pockets, the officer decided to “pat him down for weapons.” Id. at 24, 61-62.

Under these conditions, there was no reason to suspect Mr. Estep was a threat to officer safety. Nor did the officers have a valid basis to stop and frisk him, as there were no “specific and articulable facts” to suggest he was involved in criminal conduct

that had occurred or was about to occur. Terry, 392 U.S. at 21.

Mr. Estep was simply not engaged in any “suspicious activity” at the time the officers arrived, nor did his demeanor or behavior rise to the level justifying a search of his person. From the outset of the contact, the officers had no basis to suspect Mr. Estep, even if he were the suspected prowler referred to by the caller, might be armed or dangerous.

The State did not establish that a pat-down search was reasonable under Terry or its progeny. Because the officers did not have well-founded concerns that Mr. Estep was armed or presently dangerous, they had no basis to search him.

3. The trial court erred in failing to suppress the fruits of the unlawful search. If a search is unlawful, evidence obtained therefrom is deemed inadmissible as the “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Doughty, 170 Wn.2d 65; Garvin, 166 Wn.2d at 254.

Here, police seized Mr. Estep and searched him without a warrant. The record indicates that the deputies acted without sufficient specific and articulable facts to seize Mr. Estep; therefore, no legal basis existed for the Terry stop. 392 U.S. at 21. If the

Terry stop was unlawful, the fruits obtained as a result must be suppressed. Doughty, 170 Wn.2d 65; Garvin, 166 Wn.2d at 254.

The warrantless search of Mr. Estep violated basic constitutional principles. The court's failure to articulate a valid basis for circumventing the warrant requirement requires exclusion of the evidence and reversal of Mr. Estep's conviction.⁷

E. CONCLUSION

For the foregoing reasons, Mr. Estep respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 7th day of September, 2011.

Respectfully submitted,



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⁷ The trial court stated in its oral findings that this case presented, "frankly, a pretty close call." 2/9/11 RP 3, 6.

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LYLE ESTEP,)	
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