

NO. 67259-2-I
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAYNE WELLS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SAN JUAN COUNTY

The Honorable Donald Eaton, Judge

OPENING BRIEF OF APPELLANT

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove police had a reasonable suspicion of criminal activity justifying appellant's seizure.

2. The trial court erred when it entered conclusions of law A6 and B-D.

3. The trial court abused its discretion when it failed to grant a downward departure from the standard range sentence.

Issues Pertaining to Assignments of Error

1. Police conducted an investigatory stop based on a tip that had originated with a group of students and was relayed to police through a high school principal. The student informers remained unidentified to police. Although the students reported that two strangers who were carrying a gun and selling drugs had been on campus to sell drugs and had tried to open a student's car door, neither the principal nor police knew if the students had personal knowledge of any criminal activity. A day later, a police officer identified the strangers as they drove past him on a public street, so he conducted an investigatory stop. Did the trial court err in finding police had a reasonable suspicion of criminal activity based on the students' tip?

2. Did the trial court err when it did not mitigate appellant's sentence downward by fifteen months to compensate for extra prison time he served based on a criminal history that included two points for charges that were ultimately dismissed in this case?

B. STATEMENT OF THE CASE

1. Procedural History

On September 22, 2000, the San Juan County prosecutor charged appellant Rayne Wells, Jr. with: one count of possession of a controlled substance with intent to deliver; one count of second degree unlawful possession of a firearm; and one count of possessing a dangerous weapon on school facilities. CP 5-7. On October 20, 2000, Wells pled guilty to all three charges and was sentenced accordingly. CP 8-36.

While serving his sentence, Wells was subsequently convicted of other crimes (subsequent convictions) and was sentenced based on a criminal history that included three points for the charges to which he pled guilty in 2000. CP 96-97, 221. He served most of these subsequent sentences in full. CP 197.

Meanwhile, on October 31, 2007, Wells moved to withdraw his guilty plea because he was misinformed about the standard

sentence range. CP 37-35. Eventually the case wound its way up to this Court. CP 76-84. This Court concluded Wells' guilty plea was involuntary but remanded for a determination of whether there was a compelling reason not to allow Wells to withdraw his plea. Id. On March 8, 2011, the trial court entered an order allowing Wells to withdraw his plea. CP 85-86.

Upon retrial, the court dismissed two charges. CP 215. The only remaining charge was unlawful possession of a firearm. CP 213-15. The defense moved to suppress the evidence as fruit of an illegal stop. CP 90-101. After the trial court denied this motion (CP 105-111), it conducted a stipulated bench trial and found Wells guilty. CP 112-195, 201-05.

At sentencing, Wells asked for a downward departure from the standard range. CP 198-99. He argued, due to the two extra points in his criminal history associated with the two dismissed charges, he had unjustly served an additional 15 months of prison time on the subsequent convictions he otherwise would not have been obligated to serve. Id.; RP 282-84. The trial court denied this request and sentenced appellant to the low end of the standard range (51 months). RP 313; CP 213-22.

2. Facts Pertaining To The Motion To Suppress

At the 3.6 hearing, the State called Barbara Kline who was the Orcas Island High School principal in 2000. RP 8. Kline testified that on September 19 and 20 of that year, approximately six students approached her reporting there were strangers on campus.¹ RP 10-16. The students said they had heard the strangers had guns, were selling drugs, and had attempted to break into a student's car. RP 12-16, 33-37. The students indicated one of the men was named "D.J." and provided a basic description. RP 11, 19. Kline did not speak to anyone with first-hand knowledge that "D.J." had brought a gun or drugs on campus. RP 39, 41. Nonetheless, Kline believed the students were scared. RP 18. On September 20, 2000, Kline relayed what the students had told her to Deputy Raymond Clever. RP 19.

As school was ending the next day, someone came into Kline's office and said "They're here." RP 27. Kline went outside and a student standing with her identified "D.J." as the passenger in a car that drove slowly past the school. RP 28.

The State also called Deputy Clever to testify at the 3.6 hearing. He confirmed that Kline had relayed the students' report

about strangers on campus who were trying to sell drugs, possessed a gun, and had tried to open a car door. RP 61. He recalled Kline also relayed the description and name "D.J." RP 61.

On September 21, 2000 (a day after Kline's call), Clever parked outside the Orcas Island Elementary School which is located near the high school. RP 63. He often parked there for routine traffic patrol. RP 64. Suddenly, two high school students ran up to him and said the strangers were back, and Kline wanted the officer to come to the high school. RP 64. Just then, a dark blue truck drove down the public street in front of Clever. RP 65. Lisa Harvey (one of the students who had run up to him) said "That's them." RP 65. Clever observed that the passenger matched the description of "D.J." RP 66.

Clever followed the truck and, after calling for back up, stopped it. RP 66-67. Drawing his gun, he ordered "D.J." out of the car and frisked him. RP 69. Discovering a marijuana pipe, Clever placed Wells ("D.J.") under arrest, and obtained consent from the car owner to search the truck where he discovered a gun and drugs. RP 70-74, 76-78.

¹ The State did not call any of the students.

C. ARGUMENT

I. POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY SUFFICIENT TO JUSTIFY THE STOP.

As a general rule, a warrantless seizure is per se unreasonable under both the Fourth Amendment and article I, section 7, unless it falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). One exception to the warrant requirement occurs where a police officer makes a brief investigatory stop. Terry v. Ohio, 392 U.S. 1, 21–22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Doughty, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010).

A police officer may conduct an investigatory stop if the officer has a reasonable suspicion that there is a substantial possibility that criminal activity has occurred or is about to occur based on “specific and articulable facts” and the rational inferences from those facts. Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); Doughty, 170 Wn.2d at 63. Even in the context of a Terry stop, however, the State must show that the initial stop was legitimate. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). Any evidence obtained pursuant to a Terry stop that does not meet this requirement is suppressed as “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 at 65.

An informant's tip may provide police a reasonable suspicion to make an investigatory stop as long as it is reliable and is sufficient to establish the requisite quantum of suspicion. Adams v. Williams, 407 U.S. 143, 147, 92 S.Ct. 1921, 1924, 32 L.Ed.2d 612 (1972); State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). “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 (quoting Adams, 407 U.S. at 147).

An informant's “veracity, reliability, and basis of knowledge” are highly relevant in determining whether a stop is justified as an exception to the Fourth Amendment. Alabama v. White, 496 U.S. 325, 329, 110 S.Ct. 2412, 2416, 110 L.Ed.2d 301, 308 (1990); see also, People v. Sparks, 315 Ill.App.3d 786, 792, 734 N.E.2d 216 (2000) (providing a detailed analysis of these factors). Even under a totality of the circumstances test, where the information possessed by the police before the stop stems solely from an informant's tip of another, the determination of reasonable suspicion is limited to an examination of the weight and reliability

due that tip. Illinois v. Gates 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Thus, the appropriate analysis is whether the informant and the tip have sufficient indicia of reliability to justify the investigative stop. Id.

When deciding whether this “indicia of reliability” exists, Washington courts have primarily considered: (1) whether the informant is reliable; (2) whether the information was obtained in a reliable fashion; and (3) whether the officer can corroborate any details of the informant's tip. State v. Lee, 147 Wn. App. 912, 918, 199 P.3d 445 (2008) (citing Sieler, 95 Wn.2d at 47, and State v. Lesnik, 84 Wn.2d 940, 944, 530 P.2d 243 (1975)).² Under this test, the State must show both the informant and the factual basis of the tip are reliable. State v. Hopkins, 128 Wn. App. 855, 862-63, 117 P.3d 377 (2005) (reversing conviction where both prongs not met); State v. Hart, 66 Wn. App. 1, 830 P.2d 696 (1992) (same).

² The trial court did not apply this test correctly and instead concluded that the State need only show that the informant is reliable or a corroborative observation suggesting criminal activity or the informant obtained the information in a reliable manner. CP 210 (citing State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986)). Surprisingly, it did so even after citing this Court's opinion in Lee (CP 209), which considered Kennedy at great length and still articulated the test as set forth above. Lee, 147 An. App. at 918-20.

The first step in evaluating the tip here is determining who the informant was. The defense argued the reporting students were the informants. The trial court disagreed, concluding Principal Kline and Lisa Harvey were the informants whose reliability was at issue. CP 210. Case law does not support the trial court's conclusion.

When a citizen reports his or her concerns to a third-party and that third-party relays the information to police, the citizen who originated the tip is considered the informant. Sieler, 95 Wn.2d at 45; U.S. v. Brown, 448 F.3d 239, 249 (3rd Cir. 2006). For example, in Sieler, police officers received information from an unknown but named informant that criminal activity was occurring at a high school parking lot. 95 Wn.2d at 45. A school secretary telephoned police and stated that "a Mr. Tuntland" had called the school to report that he had observed what he believed to be a drug sale in a black-over-gold Dodge with a certain license number in the school parking lot. Id. at 44–45. Mr. Tuntland gave no details of the transaction. Id. at 45. Nevertheless, the officers proceeded to the scene and, without being able to corroborate any sign of criminal activity, detained the occupants of the vehicle matching the description given by the informant. Id. at 45.

When reviewing the reasonableness of the stop, the Washington Supreme Court explained Mr. Tuntland, not the school secretary, was the informant whose reliability had to be determined. Id. at 47; see also, Brown, 448 F.3d at 249 (distinguishing between the original informant and the person who relayed the tip to police). The Supreme Court held, based on Mr. Tuntland's bare-boned conclusion, the investigatory detention was not reasonable and constituted a violation of the Fourth Amendment. Id. at 51.

Contrary to Sieler, the trial court did not consider the students who originally reported their concerns to Kline as informants despite the fact the students were the original source of information as to the alleged criminal activity. Instead, it focused on Kline and Harvey. This was error.

Neither Kline nor Harvey possessed personal knowledge of "specific and articulable facts" that indicated a substantial possibility that criminal activity was afoot. Like the school secretary in Seiler, Kline had not seen strangers on campus, did not witness any criminal activity, and was simply relaying the report of another. Consequently, the focus of the trial court's inquiry should have been on the reporting students, not Kline.

The trial court's focus on Harvey was also misplaced. Harvey simply reported to Clever: (1) two strangers were back at the high school; (2) Principal Kline wanted him to come to the high school; and (3) that the men driving by the officer in a car were the strangers. While this was sufficient information to identify the strangers and their car, Harvey provided no facts that indicated criminal activity was afoot. Thus, Harvey was not an informant as to the possibility of criminal activity. See, Florida v. J.L., 529 U.S. 266, 272, 120 S.Ct. 1375 (2000), 146 L. Ed. 2d 254 (holding informant's description of a subject's location and appearance alone does not meet the requirement that a tip be reliable in its assertion of illegality); Lesnik, 84 Wn.2d at 943 (explaining a tip that merely identifies subject's car is not sufficiently reliable). It was the reporting students who provided the tip regarding criminal activity; therefore, they were the originating informants whose reliability was at issue.

The next step in this analysis is to determine what weight should be given to the students' tip. Informants' tips come in many shapes and sizes from many different types of persons. Gates, 462 U.S. at 232. Courts have generally identified three classes of informants: the anonymous informant, the known informant

(someone from the criminal world who has provided previous reliable tips), and the identified citizen informant. State v. Gaddy, 114 Wn. App. 702, 707, 60 P.3d 116 (2002). A citizen informant, as opposed to a “professional” police informant or an anonymous tipster, is presumptively reliable. Id. However, an anonymous informant is comparatively unreliable and his tip, therefore, will generally require independent police corroboration. White, 496 U.S. at 329.

When an informant relays his information to police through a third party but the informant remains unidentified to police, the informant’s reliability is analyzed under the same standard as an anonymous informant. Brown, 448 F.3d at 249. For example, in Brown, Jelena Radenkovic was victim of a purse-snatching. Id. at 241-42. After the incident, she placed a phone call to her friend, William Firth, and told him about the incident. Id. A few minutes later, Firth called Radenkovic back and told her that he believed he just saw the suspects at a particular location. Id. Radenkovic relayed this information to police and they went to the location and stopped the defendant. Id.

When determining whether the stop was reasonable, the Third Circuit noted, although Firth was known to Radenkovic and

did not affirmatively attempt to hide his identity from police, he nonetheless remained unnamed and unknown to police. Id. at 248-49. Thus, there was no presumption of reliability and the court had to consider “all the facts about the tip, the honesty of the caller, the reliability of his information and the basis of his knowledge.” Id. at 249 (citing White 496 U.S. at 328-29). It ultimately concluded Firth’s tip, while “sincere,” did not provide objective facts justifying Brown’s seizure and did not establish a reasonable suspicion. Brown, 448 F.3d at 251.

Like Firth, the student informants remained unnamed and unknown to police.³ CP 207. Thus, there is no presumption of reliability and tip must be scrutinized under the anonymous tipster standard.

³ Although Kline testified she told Clever the names of the students during their phone conversation (RP 19), Clever testified he could not recall whether he was given the names prior to the stop (RP 83). The State never procured a finding that Clever knew the names of the students. (CP 206-07). Hence, this Court must presume the State failed to establish the fact that Kline told Clever the names of the student informants prior to the stop. See, State v. Kull, 155 Wn2d 80, 86, n.5, 118 P.3d 307, (2005) (“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.”)

In Brown, the Third Circuit combed through the applicable Fourth Amendment case law and concluded that when a tipster remains unidentified to police the following factors indicate reliability:

- (1) The tip information was relayed from the informant to the officer in a face-to-face interaction such that the officer had an opportunity to appraise the witness's credibility through observation.
- (2) The person providing the tip can be held responsible if her allegations turn out to be fabricated.”
- (3) The content of the tip is not information that would be available to any observer.
- (4) The person providing the information has recently witnessed the alleged criminal activity.
- (5) The tip predicts what will follow, as this provides police the means to test the informant's knowledge or credibility and can reflect particularized knowledge.

Id. at 249-50 (citations omitted); see also, State v. Jackson, 348 Ill. App.3d 719, 730-34, 810 N.E.2d 542 (2004) (surveying cases that apply similar factors).

Applying these factors here, there was not sufficient indicia the students' tip was reliable. First, Clever never obtained the names of the students or directly spoke with them despite the fact

he had over 24 hours to do so. CP 207. Thus, Clever was in no position to personally appraise their credibility.

Second, while it is true the students could be located and held accountable if they provided false information, the record does not establish that they were indeed the original source of the information. CP 207. If the reporting students were merely conveying rumors they had heard from others at school, it would be very difficult to hold the original source accountable for a fabrication. Given the State's failure to establish the students had first-hand knowledge of the things they reported, this factor carries little weight. This factor alone is not sufficient to establish a reasonable suspicion without something establishing that the informants are well informed. See, Brown, 448 F.3d at 250.

Third, much of the content of the students' tip is information that could have been available to any observer. For example, the defendant's presence in the school parking lot, his attempt to open a car door, and the description of his person and his car was all information available to outside observers. CP 206.

Fourth, the record does not establish that any of the students personally witnessed any particularized criminal activity. CP 206-07. Clever could not recall if Kline had told him the students had

personal knowledge of the facts. CP 207. Indeed, Kline originally reported that at least two of the informants reported they merely “had heard” that the suspects were carrying guns and drugs. RP 37-41. More importantly, Kline admitted that no student had reported personally witnessing drugs or guns on campus. Id. Thus, the tip could have been nothing more than unconfirmed hearsay, and such tips do not carry great weight as to reliability without further corroboration. Jackson, 348 Ill.App.3d at 733.

Equally important is the fact the students did not include particularized factual details that supported their conclusion that criminal activity was afoot. CP 206. For instance, none reported what the alleged gun looked like or where they had seen it. None reported who the strangers had approached to sell drugs, where the alleged solicitation took place, or what drugs the strangers were trying to sell. Likewise, the students did not report under what circumstances the strangers had tried to open a student’s car door. Hence, the students’ report, as relayed to Clever, contained no more than the conclusionary assertion that the strangers were engaged in criminal activity. This alone was insufficient to justify a stop. See, J.L., 529 U.S. at 273; Lesnik, 84 Wn.2d at 943.

Finally, there was no predictive information in what the students reported. CP 206. Thus, there was no basis upon which Clever could test the reliability of the information with regard to future actions. See, J.L., 529 U.S. at 271 (explaining the importance of this factor).

In sum, the weight of these factors establishes the students' tip was not sufficiently reliable. While the tip perhaps would have merited further police investigation, standing alone, it was insufficient to justify the stop. J.L., 529 U.S. at 279; Sieler, 97 Wn.2d at 50; Hart, 66 Wn. App at 9-10. Therefore, the evidence seized pursuant to that stop should have been suppressed.

II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR A MITIGATED SENTENCE.

The trial court may impose a sentence outside the standard sentence range if it finds, considering the purpose of Sentencing Reform Act (SRA), that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. A stated purpose of the SRA is to "Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history." RCW 9.94A.010. Another purpose is to "Promote a respect for the law by promoting

punishment that is just.” Id. In Wells’ case, a standard range sentence was not proportionate given his criminal history and it did not promote a just punishment.

Because the dismissed counts has lower his offender score, Wells served fifteen months more prison time for his subsequent convictions than his criminal history merits. RP 281-83. Consequently, he asked the trial court to consider this fact as a mitigating factor justifying a downward departure from the standard range. RP 279-86; CP 198-99. He argued this would provide a just punishment by allowing him to recapture unnecessary time served and essentially credit this time against his current sentence. Id.

The trial court ruled that in theory, the serving of too much prison time could serve as a mitigating factor supporting a downward departure. RP 313. It concluded, however, that such a departure was not merited in Wells’ case because it was too difficult to determine exactly how much extra time appellant served. RP 313. Yet, the record does not bear this out.

As defense counsel carefully laid out at the sentencing hearing, calculating the extra time Wells served was simply a matter of looking at the SRA and Wells’ incarceration history and

doing some basic math. RP 281-83. In fact, the defense actually calculated this extra time to be 15 months and asked that only that amount of time be credited. Thus, the trial court's stated reason for denying this downward departure was without merit, and its failure to exercise discretion was an abuse of discretion. See, Brunson v. Pierce County, 149 Wn. App. 855, 861, 205 P.3d 963 (2009). Remand is, therefore, necessary. State v. Bunker, 144 Wn. App. 407, 421-22, 183 P.3d 1086 (2008).

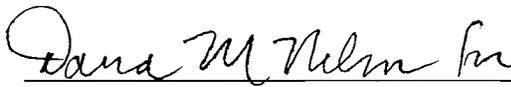
D. CONCLUSION

Appellant respectfully asks this Court to reverse the order denying suppression and dismiss his conviction. Alternatively, this Court should remand for a new sentencing hearing.

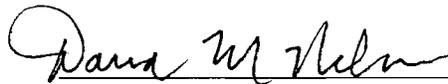
Dated this 19th day of December, 2011.

Respectfully submitted

NIELSEN, BROMAN & KOCH



JENNIFER L. DOBSON, WSBA 30487



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67259-2-I
)	
RAYNE WELLS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JAMES BURI
BURI FUSTON MUMFORD PLLC
1601 F STREET
BELLINGHAM, WA 98225

- [X] CHARLES SILVERMAN
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

- [X] RAYNE WELLS
DOC NO. 819131
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

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SIGNED IN SEATTLE WASHINGTON, THIS 6TH 19TH DAY OF DECEMBER 2011.

x Patrick Mayovsky