

69403-1

69403-1

NO. 69403-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS J. WENGER,

Appellant.

2013 JUL -5 PM 2:19
COURT OF APPEALS DIV I
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. ISSUES

1. Police responded to a tip that two males were trying to jimmy a church door while pretending to fix a bicycle. Within six minutes police had arrived and separately encountered two men, on bicycles, in the area on church grounds where the witness had reported them to be. Both men tried to flee. One of the two was the defendant. No one else was on the church grounds. Was this a lawful Terry stop based on a fact-specific tip from a named citizen informant presumed to be reliable?

II. STATEMENT OF THE CASE

A. PRETRIAL HEARING.

The trial court entered findings of fact after an evidentiary pretrial hearing. 1 CP 1-3. They are attached. They are unchallenged except for Finding of Fact # 9 and Conclusion of Law #3 (stating the defendant matched the "general description" provided by the witness). The findings are summarized as follows:

On August 1, 2012 at 1:27 p.m., Officer Soderstrom was dispatched to a possible break-in attempt at Our Lady of Perpetual Help church. A citizen informant, Gayle Evans, had reported two men trying to jimmy open a church door. Findings of Fact # 1, 2, 3; Verbatim Report of Proceedings of 9/21/12 Pretrial Hearing

(hereafter "Pretrial Hrg RP") 3-5, 9; Ex. 3. Ms. Evans gave a general description of the men including their clothing, hair, race, gender, and the fact they had bicycles. Finding of Fact # 4; Pretrial Hrg RP 4-5, 12; Ex. 3. Officer Soderstrom arrived onscene at 1:30 p.m. and began searching for the suspects. One of them, who matched Ms. Evan's general description, jumped out from bushes and tried to flee on his bicycle. Findings of Fact # 5, 6, 7; Pretrial Hrg RP 4-7, 12-13; Ex. 3. This person was secured by other officers and Soderstrom began to look for the second suspect. Finding of Fact # 8; Pretrial Hrg RP 6-7. The defendant came out near an entrance to the church and upon seeing police fled on his bicycle, despite being ordered to stop. Findings of Fact 9, 10, 11; Pretrial Hearing RP 6-8; Ex. 3. The defendant also matched the general description given by Ms. Evans. Finding of Fact # 9; Pretrial Hrg RP 12; Ex. 3. Another officer, Officer Reid, was able to stop and detain the defendant a half block away. Finding of Fact # 13; Pretrial Hrg RP 20-21, 27. The defendant had an outstanding warrant and a search of his person incident to arrest on that warrant yielded methamphetamine. Findings of Fact 14, 15, 17, 18; Pretrial Hearing RP 20-23, 25.

Other testimony at the hearing established the following: The named informant-witness identified the suspects as “2 males, looking like they are trying to fix a bike, but one male is trying to jimmy into the door . . . white males, gryish hair, It clrd [light colored] T-shirts.” Ex. 3; Pretrial Hrg RP 12. The church is at 25th and Cedar in Everett. Pretrial Hrg RP 4; Ex. 3. Officers arrived onscene within 3 minutes. Ex. 3. Within the next three minutes officers separately encountered both the defendant and the second individual in the same general area – an archway-outcropping over an entrance to the church. Pretrial Hrg RP 13, 16, 17; Ex. 3. This was also the same general area where the informant-witness had reported the two men to be. Pretrial Hrg RP 6-7. The other individual detained on the church grounds was Joshua R. Cooper. Ex. 3.

While teenagers and others sometimes cut through the church grounds, and go bike riding and skateboarding through the church parking lot, officers encountered no one else on the church grounds at the time of this reported incident. Pretrial Hrg RP 9-11, 15-16. They certainly encountered no one else with bicycles. Pretrial Hrg RP 16. When Officer Reid stopped the defendant on 25th, there was no one else on the street riding a bicycle. Pretrial

Hrg RP 27. The defendant was identified as a white male. Ex. 3. By 1:35 p.m. he was in custody. Ex. 3. As the defendant notes, officers described him as wearing a black T-shirt, and as having dark brown hair, and the other suspect, Joshua Cooper,¹ as wearing a blue shirt. Pretrial Hrg RP 13-14.

B. COURT'S CONCLUSIONS AFTER PRETRIAL HEARING, AND STIPULATED TRIAL.

The trial court concluded that this was a lawful Terry stop of a suspicious individual attempting to flee the scene, conducted minutes after receipt of a tip from a named citizen informant that a crime might be occurring. 1 CP 3; Pretrial Hrg RP 37-40.

The defendant was found guilty of possession of methamphetamine while on community custody at a stipulated bench trial on documentary evidence, and sentenced within the standard range. Verbatim Report of 9/24/21 Stipulated-Facts Bench Trial 2-11. 1 CP 6-16, 17-21. This appeal (of only the pretrial ruling) followed. 1 CP 5.

III. ARGUMENT

This was a lawful Terry stop based on factual, non-speculative information indicating possible criminal activity,

¹ Finding of Fact # 7, that Cooper matched the description given by Ms. Evans, is not challenged.

received minutes earlier from a named citizen witness. Such a witness is presumed reliable. A few discrepancies in her description of the suspects did not render the witness or her tip unreliable.

A. TERRY STOPS GENERALLY.

A well-founded suspicion that a detainee is engaged in possible criminal activity will support a brief, warrantless investigative stop or seizure, even where the detaining officer lacks probable cause to arrest. Terry v. Ohio, 392 U.S. 1, 21, 25-26, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The officer must be able to point to specific and articulable facts giving rise to a reasonable suspicion that criminal conduct has occurred or is about to occur. State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999) (citing Terry v. Ohio, 392 U.S. at 21. A reasonable or well-founded suspicion exists if the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Mendez, 137 Wn.2d at 223 (quoting Terry, 392 U.S. at 21).

The reviewing court examines examine the reasonableness of an officer's suspicion under the totality of the circumstances known to the officer at the time of the initial detention, taking into

account an officer's training and experience when determining the reasonableness of the stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). This includes information given the officer, observations the officer makes, and inferences and deductions drawn from his or her training and experience. United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 694-95, 66 L. Ed. 2d 621 (1981). The suspicion must be individualized. Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). Circumstances must be more consistent with criminal than innocent conduct, but the officer need not have a specific crime in mind, for "reasonableness is measured not by exactitudes but by probabilities." State v. Mercer, 45 Wn. App. 769, 774, 727 P.2d 676 (1986) (quoting State v. Samsel, 39 Wn. App. 564, 571, 694 P.2d 670 (1985)). While an inchoate hunch cannot justify a stop, circumstances that appear innocuous to the average person may appear incriminating to a police officer in light of past experience. Samsel, 39 Wn. App. at 570. A reviewing court gives due weight to the deductions drawn by officers with specialized training, knowledge, and experience in law enforcement, whose inferences

and deductions may elude an untrained person. U.S. v. Arvizu, 534 U.S. 266, 122 S. Ct. 744, 750-51, 151 L. Ed. 2d 740 (2002).

The burden of proof is on the State to show that a particular search or seizure falls within the Terry exception. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

B. STANDARD OF REVIEW.

The lawfulness of a Terry stop is reviewed as a mixed question of law and fact: State v. Hansen, 99 Wn. App. 575, 577, 994 P.2d 855, review denied, 141 Wn.2d 1022 (2000). The reviewing court gives great deference to a trial court's resolution of factual accounts of the circumstances surrounding the encounter. State v. Hill, 123 Wn.2d 641, 646-47, 870 P.2d 313 (1994). The ultimate question of whether those facts constitute an unlawful seizure is an issue of law reviewed de novo. State v. Armenta, 134 Wn.2d at 9 (citing State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996)).

C. TRAFFIC AND PEDESTRIAN STOPS ARE A SUBCATEGORY OF TERRY STOPS.

Traffic stops are seizures. Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). But they generally are analyzed as brief detentions for articulable suspicion under

Terry. Berkemer v. McCarty, 468 U.S. 420, 437-39, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984); Kennedy, 107 Wn.2d at 4-5. The same standard of articulable suspicion that justifies stopping a car can permit an investigative detention of a pedestrian. Kennedy, 107 Wn.2d at 6. And the same holds true for the stop of a bicyclist. State v. Rowell, 144 Wn. App. 453, 455, 458-59, 182 P.3d 1011 (2008), review denied, 165 Wn.2d 1021 (2009) (suspect seen speeding on bicycle from location of shots-fired call; stop lawful under Terry).

D. A TERRY STOP CAN BE BASED ON AN INFORMANT'S TIP IF CIRCUMSTANCES SUGGEST RELIABILITY OR THERE IS CORROBORATION.

A Terry stop can be based on an informant's tip if the tip

. . . possesses sufficient indicia of reliability, i.e., the circumstances suggest the informant's reliability or there is some corroborative observation which suggests the presence of criminal activity or that the information was obtained in a reliable fashion.

State v. Kennedy, 107 Wn.2d at 7, citing State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); accord, Adams v. Williams, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

This is not the same standard used for evaluating the strength of an informant's information in a warrant to *search*. Specifically, the two-pronged probable-cause standard of Aguilar-

Spinelli² (evaluating whether both an informant's reliability and his or her basis of knowledge provide probable cause to search) is not implicated. Adams v. Williams, 407 U.S. at 147 (Aguilar-Spinelli standard inapplicable to Terry stops based on informant's tip); State v. Lee, 147 Wn. App. 912, 916-22, 199 P.3d 445 (2008) (same). The defendant's argument, that officers must "verify the veracity of the informant and the reliability of the tip," BOA 8, is unsupported by these cases. Rather, reasonable suspicion can arise from information that is less reliable than that required to establish probable cause. Alabama v. White, 496 U.S. 325, 330, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990) (cited in Lee, 147 Wn. App. at 917).

Here the informant, an ordinary citizen, was actually named. A named citizen informant is presumptively reliable. State v. Wible, 113 Wn. App. 18, 24, 51 P.3d 830 (2002); accord, State v. Chatmon, 9 Wn. App. 741, 746, 515 P.2d 530 (1973) (uninvolved witness presumed more reliable than professional informant). And a citizen-witness's credibility is enhanced when he or she, as here, purports to be an eyewitness to the events described. Lee, 142 Wn. App. at 918 (citing State v. Vandover, 63 Wn. App. 754, 759, 822

² Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

P.2d 784 (1992)). The defendant ignores this presumption in his analysis.

The appellant is correct that articulable suspicion for Terry purposes does require more than just a reliable informant. State v. Jones, 85 Wn. App.797, 800, 934 P.2d 1224 (1997) (holding unnamed citizen's accurate description of suspect DUI truck not enough); Campbell v. Dep't of Licensing, 31 Wn. App. 833, 836, 644 P.2d 1219 (1982) (citizen pointing out car and saying "he's drunk" not enough). Rather, an informant, even if reliable, must either give some "underlying factual justification" for his or her conclusion, or else the officer must also observe some corroboration before making the stop. Campbell, 31 Wn. App. at 835-37. Here, there was some corroboration, in that the two suspects tried to flee. Finding of Facts 6, 10, 11; Pretrial Hearing RP 6, 8, 12. And in any event the witness gave an "underlying factual justification" for her conclusion of possible criminal conduct (two individuals trying to jimmy open a church door). Findings of Fact # 1, 2, 3; Pretrial Hrg RP 3-5, 9; Ex. 3.

If there is an underlying factual justification to the tip, as here, that can be enough: contrary to the defendant's argument, there need not be any corroboration. In Adams v. Williams, police

received information from a known informant that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist. Officers approached this individual and asked him to exit; when he rolled down the window instead, an officer reached in and pulled a pistol from the driver's waistband. Officers had not observed anything suspicious themselves. Recognizing a known informant's uncorroborated but fact-specific tip might not meet the Aguilar-Spinelli test of probable cause for a search warrant, the U.S. Supreme Court held it nonetheless carried sufficient indicia of reliability for articulable suspicion for a Terry stop. Adams v. Williams, 407 U.S. at 147.

Washington cases are in accord. In Sieler, a parent informed authorities that he had observed what he thought was a drug sale in a car in a school parking lot. The parent gave his name and phone number, but gave no specific description of the conduct he thought suspicious. Officers arrived and after observing nothing unusual, contacted the occupants of the car, smelled marijuana, and found drugs. All evidence was suppressed because, while the named informant was reliable, the information he related was merely conclusory. "[T]he State generally should not be allowed to detain and question an individual based on a reliable informant's tip

which is merely a bare conclusion unsupported by a sufficient factual basis[.]” Sieler, 95 Wn.2d at 49. The Sieler court added that a merely conclusory tip would have nonetheless supported a stop if corroborated by some police observation. Id. at 49 n.1.

In Campbell, a citizen informant whom the court considered reliable told a passing state trooper that there was a “drunk driver” going the other way and described the vehicle. The trooper made a U-turn, followed the described vehicle, and after observing no infraction or erratic driving pulled it over. He immediately noticed signs of intoxication from the driver. Finding no factual information to support the informant’s conclusory tip that the driver was “drunk,” the Campbell court held the stop unlawful. Campbell, 31 Wn. App. at 836.

Here, unlike the “drug sale” in Seiler or the “drunk driver” in Campbell, the tip (trying to jimmy open a church door) was not conclusory.

In Wakeley, named informants described three gunshots, the sound of gun bolt action, a driver, a passenger, and a particular car. Officers encountered the vehicle and its two described occupants. They stopped the vehicle and found marijuana. The Wakeley court found that the information related by reliable informants contained

the requisite objective facts to justify the stop. State v. Wakeley, 29 Wn. App. 238, 241-43, 628 P.2d 835 (1981).

In Anderson, a known citizen informant beckoned to a trooper and, pointing to car ahead of him, made a weaving motion with his hand, “like a snake . . . going back and forth.” The trooper followed the indicated vehicle and saw the driver weaving within her lane. The reviewing court found the information sufficiently objective and fact-specific and upheld the lawfulness of the stop. In so doing, it distinguished Seiler and Campbell. State v. Anderson, 51 Wn. App. 775, 778-80, 755 P.2d 191 (1988) (distinguishing the tips in Seiler and Campbell as lacking a sufficient factual basis).

Read together, these cases articulate the rule that a Terry stop based on a citizen tip requires not only the informant be reliable – already presumed for a citizen – but also that either the tip include an objective factual basis or else that the officer sees something corroborative. This standard is met here. The defendant ignores this rule, instead postulating that a named informant is not reliable if his or her tip, even if objective, fact-specific and not speculative, is incorrect on some details. BOA 5-8. He argues that officers should have verified both the veracity of the informant and the reliability of her tip. Id.

But more recent cases, cited by the defendant, have not changed the standard. In Hopkins, an informant (whose name was not retained) phoned in a tip about an underage individual carrying something resembling a firearm. Police found an individual where the informant indicated, but the physical descriptions did not match: the individual was not a minor, and the height and weight were off, too. Police saw nothing suspicious, but approached and asked him if he had a gun; when he said he “might,” he was frisked, to reveal a loaded revolver in his pocket. State v. Hopkins, 128 Wn. App. 855, 858-59, 117 P.3d 377 (2005). The defendant, a felon, was convicted of unlawful possession of a firearm. Hopkins, 128 Wn. App. at 860.

Reversing the trial court, the Hopkins court concluded the informant was unreliable: because he or she had not wished to be contacted, police had not retained the name. Hopkins at 863-64. And it concluded the tip itself failed to provide reasonable suspicion of any criminal activity: since the suspect was not a minor, there was nothing inherently illegal in his having a gun. Hopkins at 864-65. But Hopkins did not change the underlying standard for analysis set forth in Seiler:

An informant's tip can provide police a reasonable suspicion to make an investigatory stop. State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). But the informant's tip must be reliable. Sieler, 95 Wn.2d at 47 The State establishes a tip's reliability when "(1) the *informant* is reliable and (2) the informant's *tip* contains enough objective facts to justify the pursuit and detention of the suspect or the noninnocuous details of the tip have been corroborated by the police thus suggesting that the information was obtained in a reliable fashion." State v. Hart, 66 Wn. App. 1, 7, 830 P.2d 696 (1992) (relying on Sieler) (emphasis in original).

Hopkins, 128 Wn. App. at 862-63. Hopkins involved a name-not-retained informant (enjoying no presumption of reliability) giving information that didn't describe criminal activity. Here, by contrast, a named citizen informant, carrying a presumption of reliability, gave a factual description that could not be anything but criminal (i.e., an attempted burglary). And that information was not "vague and inconsistent," as the defendant asserts. See BOA 9.

In Lee, officers saw a vehicle pull up to a pedestrian and, after a brief conversation, pull away. The pedestrian, who gave her name to officers, said the occupants had asked her to smoke "crack" with them, showing her drugs and paraphernalia. Another officer stopped the suspect vehicle. When the defendant exited, he dropped a glass pipe. Officers discovered cocaine during a search

incident to arrest for possession of drug paraphernalia. State v. Lee, 147 Wn. App. at 915.

In analyzing the lawfulness of the stop, this Court held, first, that a threshold analysis of the informant's veracity and basis of knowledge, derived from Aguilar-Spinelli, did not apply to Terry stops. Lee, 147 Wn. App. at 916-17. Secondly, in deciding whether an informant's tip possessed sufficient "indicia of reliability" under a "totality of the circumstances" test, the Lee court explained

the courts will generally consider several factors, primarily (1) whether the informant is reliable, (2) whether the information was obtained in a reliable fashion, and (3) whether the officers can corroborate any details of the informant's tip.

Lee at 918. Lee involved a named informant with an objective, fact-specific tip. Its reliability analysis focused on the informant being named and being a witness, adding "courts should not treat information from ordinary citizens who have been the victim of or witness to criminal conduct the same as information from compensated informants from the criminal subculture." Id., citing 2 LaFare, Search and Seizure: A Treatise On The Fourth Amendment § 3.4(a) at 204 (3d ed.1996). And while the presence or absence of corroboration will always be a factor to be considered

under the totality of the circumstances, nothing in this Court's analysis in Lee required it, as the defendant seems to argue.

Rather, the standard, as first articulated in Kennedy and Seiler, remains the same: In addition to a reliable informant, one needs either a fact-specific tip or corroboration. Kennedy, 107 Wn.2d at 7; Anderson, 51 Wn. App. at 778-80, citing Sieler, 95 Wn.2d at 48-49; accord, State v. Hopkins, 128 Wn. App. at 862-63; compare Campbell, 31 Wn. App. at 836 (bare conclusion of "he's drunk") with Anderson, 51 Wn. App. at 778-80 (weaving motion with hand "like a snake" sufficiently fact-specific). The defendant's position is something very different: that a citizen informant with a fact-specific tip of suspicious behavior enjoys no presumption of reliability if some details are wrong, and if there is no police corroboration. But the defendant matched the witness' general description. And case authority does not support his position.

E. THE DEFENDANT WAS LAWFULLY STOPPED BASED UPON A FACT-SPECIFIC TIP FROM A RELIABLE INFORMANT.

Ms. Gayle Evans had reported two white males appearing to fix a bicycle as one tried to jimmy a church door. Finding of Fact 2; Pretrial Hrg RP 4-5, 9, 12; Ex. 3. Ms. Evans was named, not anonymous; she was apparently disinterested; and she was an

eyewitness. Id. (And her name and contact information was retained. Id.) This made her presumptively reliable. Lee, 142 Wn. App. at 918; Wible, 113 Wn. App. at 24; Chatmon, 9 Wn. App. at 746, State v. Vandover, 63 Wn. App. at 759. Her description of what she saw was not conclusory (such as, “he’s drunk,” as in Campbell, or “drug sale,” as in Seiler) but was fact-specific and described suspicious behavior (“trying to jimmy into the door”). Finding of Fact 2; Pretrial Hrg RP 4-5, 9, 12; Ex. 3. As such, her tip did not require corroboration. Adams v. Williams, 407 U.S. at 147; Kennedy, 107 Wn.2d at 7; Seiler, 95 Wn.2d at 49; Hopkins, 128 Wn. App. at 862-63; Anderson, 51 Wn. App. at 778-80; Campbell, 31 Wn. App. at 836; Wakeley, 29 Wn. App. at 241-43. Officers arrived in three minutes. Findings of Fact 3, 5; Pretrial Hrg RP 4-6, 13; Ex. 3. Within the next three minutes they encountered two males, both on bicycles. Findings of Fact 6, 9; Pretrial Hrg RP 6-8, 12; Ex. 3. Both were discovered in the same general area as reported by Ms. Evans. Pretrial Hrg RP 6, 7, 13, 16 17. No one else was on the church grounds, certainly no one else on bicycles. Pretrial Hearing RP 9-11, 15-16. No other cyclist was on the nearby street where the defendant was apprehended. Finding of Fact # 13; Pretrial Hrg RP 27. Both men initially tried to flee. Finding of Facts

6, 10, 11; Pretrial Hearing RP 6, 8, 12. The defendant was a white male. Ex. 3. And the defendant does not challenge the finding below that Ms. Evan's general description matched his cohort, Joshua Cooper. See Finding of Fact 7, 1 CP 2; see BOA 1.

All this comprised specific and articulable facts giving rise to a reasonable suspicion that criminal conduct (an attempted burglary) had occurred or was about to occur. See Terry, 392 U.S. at 21; Mendez, 137 U.S. at 21. And that suspicion was individualized. Brown v. Texas, 443 U.S. at 51; Thompson, 93 Wn.2d at 841. Nor was the information stale. The trial court was correct when it held the stop lawful. 1 CP 3; Pretrial Hrg RP 37-40. This can end the inquiry.

The defendant, as noted above, disagrees. First, he takes exception to the trial court's findings that the defendant matched the "general description" provided by Ms. Evans. BOA 1; see Finding of Fact 9 and Conclusion of Law 3 at 1 CP 1-3. He focuses on the defendant's hair being dark brown (rather than "grayish") and his wearing a black T-shirt (rather than a "light colored" one). BOA 8. There were in fact these two discrepancies. But both men matched the *general* description given by the witness: Ms. Evans reported two white males with at least one bicycle, and at least one

of them trying to jimmy open a church door. Finding of Fact 2; Pretrial Hrg RP 4-5, 7, 9, 12; Ex. 3. In some six minutes or less, officers had arrived and encountered first one man (Mr. Cooper), and then a second man (the defendant), both in the same area of the church grounds in which Ms. Evans had seen them. *Both had bicycles, and both made an initial attempt to flee.* Findings of Fact 6, 9, 10, 11; Pretrial Hrg RP 6-8, 12-13, 16 17. There was no one else on the church grounds. Pretrial Hearing RP 9-11, 15-16. The defendant was white, as Ms. Evans had reported. Ex. 3. And the finding that the other individual, Joshua Cooper, matched the witness' general description is unchallenged. See Finding of Fact # 7. A reviewing court will give great deference to a trial court's resolution of factual accounts of the circumstances surrounding the encounter. State v. Hill, 123 Wn.2d at 646-47. Viewed by this standard, the trial court's finding that the two men matched the "general description" of Ms. Evans was supported by substantial evidence.

Next, the defendant argues that Terry stops based on an informant-witness's tip are not examined under the "totality of the circumstances." BOA 5. He is wrong. This Court has held that "totality of the circumstances" is precisely the test to be used. Lee,

147 Wn. App. at 917-18, 921. And to respondent's knowledge no case holds, as appellant argues, that Terry stops based on an informant's tip are subject to higher scrutiny under Art. 1, § 7 of the Washington Constitution. See Lee at 916-17 (articulating same "totality" standard under both Fourth Amendment and Art. 1, § 7).

Thirdly, he argues that neither Ms. Evans nor her tip were reliable, because she got his shirt and hair color wrong. BOA 5-10. But a named citizen-witness is presumptively reliable. Lee, 142 Wn. App. at 918; Wible, 113 Wn. App. at 24; Chatmon, 9 Wn. App. at 746, State v. Vandover, 63 Wn. App. at 759. And the cases the defendant cites for finding both Ms. Evans and her tip unreliable examine what is required to establish *probable cause* in a search-warrant affidavit, based on information from an informant. BOA 5-10, citing Aguilar v. Texas (see n. 2) and State v. Jackson, 102 Wn.2d 432, 433 688 P.2d 136 (1984) (citing the Aguilar-Spinelli standard). Defendant would apply this rule, or something very much like it, to assess reliability in the Terry context. He is wrong here also. Establishing probable cause under Aguilar-Spinelli is not the standard for Terry stops. Adams v. Williams, 407 U.S. at 147; Lee, 147 Wn. App. at 916-22. No case holds that a named citizen informant becomes unreliable for Terry purposes if her tip, even

though objective and fact-specific, contains some discrepancies. Hopkins and Vandover, cited by the defendant for a contrary proposition, both involved *unnamed* informants. Hopkins, 128 Wn. App. at 863 (name not retained, therefore “meaningless”); Vandover, 63 Wn. App. at 756, 757-60 (anonymous phone tip).

Lastly, the defendant appears to argue that corroboration of an informant’s tip is always required. BOA 8. This is not the case either. As discussed above, one needs, in addition to a reliable (i.e., named) informant, *either* a fact-based tip or corroboration. Kennedy, 107 Wn.2d at 7; Anderson, 51 Wn. App. at 778-80, citing Sieler, 95 Wn.2d at 48-49; accord, Hopkins, 128 Wn. App. at 862-63; Wakeley, 29 Wn. App. at 241-43; compare Campbell, 31 Wn. App. at 836 (“he’s drunk” not enough without corroboration) with Anderson, 51 Wn. App. at 778-80 (weaving motion with hand “like a snake” sufficiently fact-specific, so corroboration not required). One does not need both. Moreover, there actually was at least some corroboration here, in that both men initially tried to flee. Finding of Facts 6, 10, 11; Pretrial Hearing RP 6, 8, 12.

In Rowell, police responded to a shots-fired call and stopped a suspect speeding away from that location on an unlit bicycle. Some seven or eight minutes had elapsed. Rowell, 144 Wn. App.

at 455-56. Under the totality of the circumstances, the Rowell court found the stop lawful. Id. at 458-59.

Officers in Rowell had less to go on than the police officers here. As that stop was lawful, *a fortiori* the stop here is. The trial court correctly so found. On appeal the defendant urges an incorrect probable-cause standard to this Court. His argument should be rejected.

IV. CONCLUSION

The judgment and sentence should be *affirmed*.

Respectfully submitted on July 2, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

CHARLES FRANKLIN BLACKMAN, WSBA #19354
Deputy Prosecuting Attorney
Attorney for Respondent

FILED

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

vs.

Thomas J. Wenger

Defendant.

Case No.: 12-1-01758-6

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

A hearing pursuant to CrR 3.6 and CrR 3.5 was conducted before the Honorable Ellen J. Fair on September 21, 2012. The State was represented by Deputy Prosecuting Attorney Bob Langbehn, and the defendant was represented by Attorney Cassie Trueblood. Testifying on behalf of the State was Officer Christopher Reid and Officer Alex Soderstrom, both of the Everett Police Department. The defendant did not testify.

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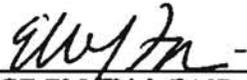
FINDINGS OF THE FACTS

- 1) On 8-1-2012 Officer Soderstrom was on duty when he received a call from dispatch
- 2) Gayle Evans, a named citizen informant, had called 911 and indicated that there were two people who appeared to be trying to jimmy the door to Our Lady of Perpetual Help, a nearby church
- 3) This phone call came in at 1:27 p.m.
- 4) Ms. Evans gave a general description of the males including their clothing, hair, race, gender, and the fact that they had bicycles
- 5) Officer Soderstrom arrived at the scene on 1:30 p.m. and began searching for the two individuals
- 6) One of the individuals (not the defendant), jumped out from the bushes and began to flee on his bicycle
- 7) This person matched the general description given by Ms. Evans
- 8) Officer Soderstrom stopped and detained this individual. After custody of him was transferred to a third officer, Officer Soderstrom went back to the area and began looking for the other suspect
- 9) The defendant, Thomas Wenger, came out near an entrance to the church and looked at Officer Soderstrom. Mr. Wenger also matched the general description of that given to dispatch
- 10) The defendant looked at Officer Soderstrom then began riding away on his bicycle
- 11) Officer Soderstrom yelled "Stop, Police" but the defendant continued to ride away
- 12) Officer Reid was also dispatched to the scene and heard Officer Soderstrom command the defendant to stop
- 13) Officer Reid stopped and detained the defendant a half block from the church.
- 14) The defendant gave his name to the officer
- 15) Dispatch advised that the defendant had a warrant out for his arrest, and he was taken into custody
- 16) The defendant was advised of his Miranda rights and agreed to speak to the officer
- 17) The defendant indicated that he had methamphetamine in his wallet
- 18) Officer Soderstrom located methamphetamine, a controlled substance, in the defendant's wallet

1 **CONCLUSIONS OF LAW**

- 2 1) The Court finds that the facts in this case should be properly analyzed under a Terry analysis
- 3 2) At the time that Officer Reid stops the defendant, he knows that a named citizen informant has
- 4 called 911 and indicated a crime may be occurring
- 5 3) The Officers are given a description which generally matches the defendant. They arrive on
- 6 scene 3 minutes after the original 911 call, the defendant has run away from the scene, and he
- 7 has refused commands to stop by a uniformed police officer
- 8 4) This indicates a suspicious activity and/or suspicious actions on the part of the defendant
- 9 5) Officer Reid and Officer Soderstrom had a reasonable and articulable suspicion to allow
- 10 detainment of the defendant
- 11 6) This detainment lead to the defendant's name, the discovery of a warrant, the subsequent arrest
- 12 of the defendant, and the discovery of the controlled substance
- 13 7) The defendant was properly advised of his Miranda rights and all statements are admissible at
- 14 trial

15 DONE IN OPEN COURT this 20 day of NOV, 2012

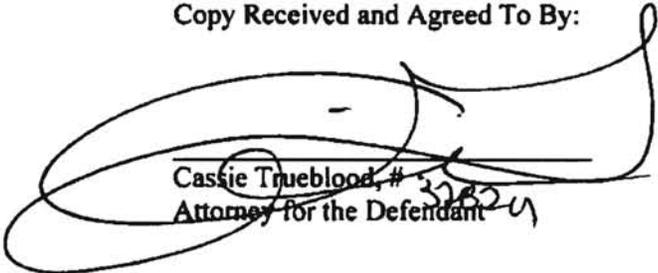
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17 JUDGE ELJEN J. FAIR

18

19 Presented By:

20 
21 Bob Langbehn, #37508
22 Deputy Prosecuting Attorney

Copy Received and Agreed To By:

23 
24 Cassie Trueblood, # 37824
25 Attorney for the Defendant