

No. 69951-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ARDEN CURTIS GIBSON,

Appellant.

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

The Honorable Michael Hayden

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The detention of Mr. Gibson without reasonable suspicion violated his Fourth Amendment and Article I, section 7 rights.

2. The trial court erred in failing to file written findings of fact and conclusions of law following the CrR 3.6 hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Fourth Amendment and article I, section 7, the police may engage in a brief investigatory stop where they have reasonable suspicion the individual may be engaged in criminal activity. Mr. Gibson was stopped by the police in a public area in the middle of the day and did not match the very general description given by the victim, which consisted of an African-American man wearing dark clothing. Did the police lack reasonable suspicion requiring reversal of Mr. Gibson's conviction?

2. Following an evidentiary hearing on a motion to suppress, CrR 3.6(b) requires the trial court file written findings of fact and conclusions of law. To date, written findings have not been entered in this case. Must this Court remand to the trial court for the entry of written findings, or alternatively, reverse and dismiss Mr. Gibson's conviction if such written findings are not entered?

C. STATEMENT OF THE CASE

On October 1, 2012, at about 11:00 a.m., Seattle Police Officer Joseph Kowalchuk received a call of a burglary that had occurred at N. 128th Street. 1/10/2013RP 7-13.¹ The officer received a general description of the suspect: an African-American man, 25 to 35 years of age, wearing a dark jacket and carrying a backpack. 1/10/2013RP 11. The police broadcast did not mention a direction of flight and did not mention any facial hair or hair type for the suspect. 1/10/2013RP 30.

Near N. 125th Street and Stone Way, several blocks from the residence that had burglarized, the officer stopped and detained an African-American man, later identified as Arden Gibson.² 1/10/2013RP 21. According to the officer, when he first observed Mr. Gibson, he was putting a dark piece of clothing into a backpack. 1/10/2013RP 22. Kowalchuk claimed he and Mr. Gibson made eye contact and Mr. Gibson began walking away. 1/10/2013RP 23. After being detained, Mr. Gibson was identified as the person responsible in a police show-up. 1/10/2013RP 24-27. Mr. Gibson was then arrested and he and his backpack were searched. 1/10/2013RP 27.

¹ Facts are taken from the evidentiary hearing on Mr. Gibson's motion to suppress.

² Mr. Gibson was 49 years of age. CP 8.

Mr. Gibson was charged with one count of first degree burglary. CP 1. Mr. Gibson moved to suppress the items seized as a result of his detention and subsequent arrest. CP 7-15. Following an evidentiary hearing, in an oral ruling, the trial court found the officer had reasonable suspicion to detain Mr. Gibson and denied the motion the suppress. 1/10/2013RP 43-47. To date, the trial court has not entered written findings of facts and conclusions of law as required by CrR 3.6.

Following a jury trial, Mr. Gibson was found guilty as charged. CP 16. He appeals. CP 54.

D. ARGUMENT

1. THE OFFICER LACKED REASONABLE SUSPICION TO STOP AND DETAIN MR. GIBSON UNDER *TERRY*, THUS THE DETENTION WAS ILLEGAL.

a. A *Terry* stop must be supported by reasonable, objective, and articulable suspicion of criminal activity. Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. 1, § 7. “Authority of law” means a warrant, unless one of the few “jealously and carefully drawn” exceptions applies. *State v. Martinez*, 135 Wn.App. 174, 179, 143 P.3d 855 (2006). Under the Fourth Amendment, the United States Supreme Court has also afforded police

officers the ability to conduct warrantless investigatory stops. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). These investigatory stops, however, must be supported by reasonable, objective, and articulable suspicion of criminal activity. *Id.* at 21. The level of articulable suspicion required to justify a *Terry* stop is a substantial possibility that criminal conduct has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). “[A] hunch does not rise to the level of a reasonable, articulable suspicion.” *State v. O’Cain*, 108 Wn.App. 542, 548, 31 P.3d 733 (2001). “Innocuous facts do not justify a stop.” *Martinez*, 135 Wn.App. at 180; *State v. Armenta*, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997). When the “reasonable suspicion” standard is not strictly enforced, the exception swallows the rule and “the risk of arbitrary and abusive police practices exceeds tolerable limits.” *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). Furthermore, an investigatory stop must be “reasonably related in scope to the justification for [its] initiation.” *Terry*, 392 U.S. at 29.

Additionally, if the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963);

Kennedy, 107 Wn.2d at 4. Lastly, the State bears the burden of proving the reasonableness on an investigatory stop. *State v. Hopkins*, 128 Wn.App. 855, 862, 117 P.3d 377 (2005).

A person is “seized” under the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). This standard is analyzed in light of the objective facts surrounding the encounter. *Armenta*, 134 Wn.2d at 10-11; *State v. Ellwood*, 52 Wn.App. 70, 73, 757 P.2d 547 (1988). Likewise, a seizure has occurred article I, section 7 of the Washington Constitution only when, by means of physical force or a show of authority, a person’s freedom of movement is restrained and when, in light of all of the circumstances, a reasonable person would not believe he is free to leave or to otherwise decline an officer’s request and end the encounter. *State v. Young*, 135 Wn.2d 498, 510-11, 957 P.2d 681 (1998). The same objective standard, as applied under the Fourth Amendment, also applies here. *Id.*

There was no dispute among the parties that Mr. Gibson was seized. Thus, the only issue concerned whether the police had

reasonable suspicion to stop and detain Mr. Gibson. Given the vague, extremely general description of the suspect here, which failed to provide reasonable suspicion, Mr. Gibson submits this Court must reverse the trial court's denial of his motion to suppress and order the contraband seized suppressed.

b. The officer lacked reasonable suspicion, thus creating an illegal and improper Terry stop and seizure. Here, the police officer had an extremely vague general description of a suspect and stopped Mr. Gibson based upon that description. Mr. Gibson submits the description was so vague and general that it did not provide reasonable suspicion to detain him and he is entitled to reversal of his conviction.

Instructive on this issue is the decision in *United States v. Brown*, 448 F.3d 239 (3rd Cir. 2006). In *Brown*, two young black men attempted to grab a woman's purse. When she refused to let go, one of the young men pointed a gun at her. Undeterred, the woman walked away and the men abandoned their robbery attempt. The police were called and a description of the young men was given to the police. The description was of two African-American males between 15 and 20 years of age, one five foot eight inches tall, the other six feet tall, both wearing dark hooded sweatshirts, and last seen running from the scene.

Police stopped defendant and another as they came out of a store. The two men were African-American and wearing dark clothing. One was 29 years of age, the other 31 years of age. A pat search of the defendant revealed a gun. At a subsequent show-up, the victim told the police the two men were not the men who attempted to rob her. The defendant's motion to suppress the firearm was denied and he was convicted of being a felon in possession of a firearm.

On appeal, the circuit court reversed, finding the police officers lacked reasonable suspicion to stop the two men. *Brown*, 448 F.3d at 252. Regarding the police officer's claim the two men matched the description of the assailants, the Court noted:

To make matters worse, the match of Brown and Smith to even this most general of descriptions was hardly close. Among other things, the robbery suspects were described as between 15 and 20 years of age, but on the date of the stop Brown was 28 years old and Smith was 31 years old. Moreover, both Brown and Smith had full beards and the description of the suspects included no mention of any facial hair. Indeed, about the only thing Brown and Smith had in common with the suspects was that they were black. What we have is a description that, while general, is wildly wide of target. By no logic does it, by itself, support reasonable suspicion.

Id. at 248.

Similar circumstances existed here as well. The description of the victim's assailant was an African-American man, between 25 to 35

years of age, wearing dark clothing and carrying a backpack.

1/10/2013RP 11, 29. Mr. Gibson is an African-American man and was 49 years old when stopped, and was wearing a black and red striped shirt. CP 8; 1/10/2013RP 32. As in *Brown, supra*, the description was extremely general and “widely wide of target,” given the same age difference between the description of the suspect and the person detained as in *Brown*. Thus, as in *Brown*, the description simply did not provide Officer Kowalchuk with reasonable suspicion to detain Mr. Gibson.

The trial court relied primarily on two decisions of this Court; *State v. Clark*, 13 Wn.App. 21, 533 P.2d 387 (1975), and *State v. Randall*, 73 Wn.App. 225, 868 P.2d 207 (1994). Neither decision supports the court’s conclusion that the police had reasonable suspicion to stop and detain Mr. Gibson.

In *Clark*, police officers were sent to a residence to investigate an alarm. Approximately 300 yards from the residence, the police saw the defendant walking towards the residence. The police stopped the man and a subsequent pat-down search revealed items taken from inside the residence. A pre-*Terry* decision, this Court found reasonable suspicion where the defendant’s “appearance, conduct, and presence in

the vicinity pointed directly toward his participation in the activation of the alarm.” *Clark*, 13 Wn.App. at 23. Here, Mr. Gibson was not observed a mere 300 yards from the residence but several blocks away. Further, the defendant in *Clark* was stopped mere moments from the initial dispatch. Here, Mr. Gibson was detained several blocks away from the victim’s residence and the stop was sometime after the police were called.

Similarly, in *Randall*, police were dispatched to a report of a robbery allegedly perpetrated by two men with a firearm. About 10 minutes after the report, and about five blocks away, a police officer noted two men standing in a park, who immediately began walking away as soon as the officer approached. One of the men matched the description of one of the suspects, although the details of that description were not included in the opinion. The two men were detained, and a subsequent pat search of one of the men revealed marijuana and a pipe for smoking marijuana. Applying a totality of the circumstances test, this Court found reasonable suspicion based primarily on the fact the two men fit the description of the suspects. *Randall*, 73 Wn.App. at 230-31.

Without knowing the specific description of the two men in *Randall* it is impossible to determine whether *Randall* had any applicability to the case at bar. Presumably the description in *Randall* was substantially more specific than the very, very general description here.

Given the description of the suspect here, which was essentially a young African-American man, this Court should find that the detention of Mr. Gibson, a 49 year-old African-American man, was without reasonable suspicion. Accordingly, this Court should suppress the items seized from Mr. Gibson.

c. This Court should order the evidence seized by the police suppressed. “All evidence obtained as a result of an unlawful seizure is inadmissible.” *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). Thus where officers obtain evidence as a result of an improper *Terry* stop, the evidence must be suppressed. *Armenta*, 134 Wn.2d at 17. “[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. . . . [W]henever the right is unreasonably violated, the remedy must follow.” *State v. Winterstein*, 167 Wn.2d 620, 633, 220 P.3d 1226

(2009), quoting *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

Accordingly, all evidence obtained as a result of the illegal stop must be suppressed.

2. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE CrR 3.6 HEARING

The trial court held the evidentiary hearing on the admissibility of the evidence seized from Mr. Gibson on January 10, 2013. At the conclusion of the hearing, the court found the investigative stop was supported by reasonable suspicion and denied the motion to suppress. RP 80-81. To date written findings of fact and conclusions of law as required by CrR 3.6 have not been entered by the trial court.

CrR 3.6(b) requires:

If an evidentiary hearing is conducted, at its conclusion the court *shall enter* written findings of fact and conclusions of law.

(Emphasis added.) The term “shall” indicates a *mandatory* duty on the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

The importance of written findings and conclusions has been reinforced by the Washington Supreme Court:

A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. [citations omitted.] An oral opinion “has no final or binding effect unless formally incorporated into the findings, conclusions and judgment.”

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998), quoting

State v. Dailey, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980).

Head determined that in adult bench trials where written findings and conclusions are not filed, remand for entry of findings is the appropriate remedy. *Head*, 136 Wn.2d at 622. But, at the hearing on remand, no additional evidence may be taken as the findings and conclusions are based solely on the evidence already taken. *Head*, 136 Wn.2d at 625.

We hold that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Head, 136 Wn.2d at 624.

Although *Head* involved failure to enter written findings and conclusions on the issue of the defendant’s guilt, following a bench trial, its rationale is equally applicable here where the court has failed to file written findings following a hearing pursuant to CrR 3.6(b).

Written findings and conclusions facilitate appellate review and enable the appellant to focus on the material issues. *Id.* at 622-23.

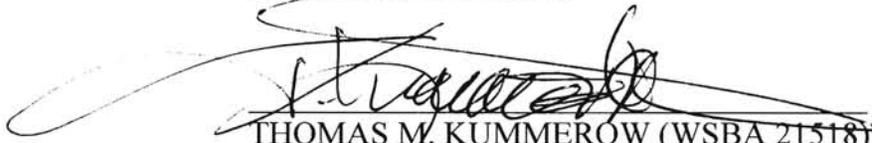
Here findings have never been filed. The significance of the lack of findings cannot be understated since the court's ruling has been challenged and this Court is left with merely an oral record from which to review the trial court's ruling, which as *Head* noted is not the final order of the court. This Court must remand Mr. Gibson's matter for the entry of the CrR 3.6 findings, or alternatively, reverse and dismiss Mr. Gibson's conviction if such findings are not entered.

E. CONCLUSION

For the reasons stated, Mr. Gibson asks this Court to reverse his conviction and order suppressed the items seized from him as the result of an unlawful detention. Alternatively, Mr. Gibson asks this Court to remand to the trial court for the entry of written findings of fact and conclusions of law following the CrR 3.6 hearing.

DATED this 8th day of August 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 69951-2-I
v.)	
)	
ARDEN GIBSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ARDEN GIBSON 953052 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF AUGUST, 2013.

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