

NO. 70713-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLYDE JOHNSON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 19 PM 4:27

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE 3

E. ARGUMENT 6

The police lacked reasonable suspicion to seize and search Mr. Johnson without corroborating the unreliable accusation from a paid informant 6

1. A person has the constitutional right to be free from unreasonable seizures 6

2. The court agreed that the tip from the unnamed and unknown professional informant was not a reliable basis for a *Terry* stop but misapplied the law requiring corroboration 7

3. The unnamed informant’s status as a paid informant does not authorize police to rely on his or her uncorroborated second-hand allegation to supply reasonable suspicion for an investigative detention 10

4. Suppression of the illegally seized evidence is required 16

F. CONCLUSION 17

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997)..... 12

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010)..... 6

State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002)..... 16

State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008) 7

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009) 6, 16

Washington Court of Appeals Decisions

State v. Cardenas-Muratalla, _ Wn.App __, 2014 WL 457597 (Feb. 3, 2014)..... 8

State v. Hopkins, 128 Wn.App. 855, 117 P.3d 377 (2005)..... 9, 10, 11

State v. Ibarra, 61 Wn.App. 695, 812 P.2d 114 (1991) 11

State v. O’Cain, 108 Wn.App. 542, 31 P.3d 733 (2001)..... 9

State v. Wakeley, 29 Wn.App. 238, 628 P.2d 835 (1981) 11

State v. Z.U.E., _ Wn.App. __, 315 P.3d 1158 (2014) 7, 16

United States Supreme Court Decisions

Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000)
..... 7, 8, 9, 10, 12, 15

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 6, 7, 8,
9

Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441
(1963)..... 16

Federal Court Decisions

United States v. Mendonsa, 989 F.2d 366 (9th Cir. 1993) 13
United States v. Morales, 252 F.3d 1070 (9th Cir. 2001)..... 14
United States v. Thomas, 211 F.3d 1186 (9th Cir. 2000) 13

United States Constitution

Fourth Amendment..... 1, 2, 6, 16

Washington Constitution

Article I, section 7 1, 2, 6, 16

A. INTRODUCTION.

Police officers commanded Clyde Johnson to stop and submit to a weapons frisk without having seen him commit a possibly illegal act. The reason they seized Mr. Johnson was that an unidentified FBI agent told them that a paid informant had told him that he or she saw someone matching Mr. Johnson's description argue with someone and flash a gun. No information was offered showing the informant's reliability or basis of knowledge beyond this description. When the police arrived at the scene, they saw Mr. Johnson but found no evidence of an argument or indication he had a gun.

Established law dictates that police do not have reasonable suspicion of criminal activity when the only information they corroborate from an tip is a person's physical description. The trial court erroneously relied on the mere description of Mr. Johnson as sufficient supply reasonable suspicion that he committed a crime. The court's ruling is contrary to the guarantees of the Fourth Amendment and article I, section 7.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred in denying Mr. Johnson's motion to suppress evidence, contrary to the Fourth Amendment and article I, section 7.

2. The trial court erroneously found that the informant told the FBI agent that he or she just witnessed criminal activity when there was no evidence of the recentness of the claimed incident. CP 47.¹

3. To the extent the court's conclusions of law are deemed to contain findings of fact, the record does not support the finding that the details of the informant's tip were corroborated. CP 52.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

In *Florida v. J.L.*,² the United States Supreme Court held that it violates the Fourth Amendment to stop and frisk a person based on a tip that a person wearing certain clothes has a gun unless the police also corroborate the claim that an illegal act may have occurred. Police stopped Mr. Johnson because he matched the description of a person

¹ The court did not enter numbered findings of fact or conclusions of law pursuant to CrR 3.6. The written findings are attached as Appendix A.

² 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000).

who reportedly had a gun but the police did not see any other evidence indicating he had committed a crime and they did not establish the reliability of the initial tip. Where the police receive a tip from a person of unproven reliability and they do not see any evidence showing the possibility that a crime occurred, is there insufficient information for the police to demand that the suspect submit to a stop and frisk?

D. STATEMENT OF THE CASE.

One day while on regular patrol, Detective Jon Huber received a telephone call from an FBI agent. 6/30/13RP 16. This FBI agent, whose name Detective Huber never offered, said he had received a telephone call from a “paid informant.” *Id.* The informant told the FBI agent that she saw a man arguing “back and forth” with a woman and “at some point during this argument the male involved flashed a handgun.” *Id.*

The tipster told the FBI agent what the person looked like who flashed the gun, said his name was Clyde Johnson, and gave the location of the incident as 18th and Yesler. *Id.* at 17, 19.³ It was about 10:00 a.m. when the FBI telephoned Detective Huber and told him what he heard from the informant. 6/30/13RP 39.

³ The description was “a blue North Face jacket” worn by “a black male, 30s, 5’8” or so with closely cut hair.” 6/29/13RP 19.

Detective Huber steadfastly refused to divulge any information about this unnamed informant to anyone, including the prosecutor, defense attorney, and judge. 6/29/13RP 31. In their written report, the detectives said they received information from a “citizen,” leaving out any mention that it was an FBI agent who repeated information that came from a paid informant. 6/29/13RP 34. The detectives agreed that their report was misleading, but said they did not want to divulge any information about the person who passed the tip to the FBI agent. 6/29/13RP 34; 6/30/13RP 35. Having received no information about the person who called the unnamed FBI agent, the court found that there was no evidence showing the informant was reliable. CP 50, 52.

Nevertheless, Detective Huber and his partner Edward Hagerty drove their police car to 18th and Yesler. 6/29/13RP 18-19. Mr. Johnson matched the description and was standing alone on the corner, outside a convenience store. *Id.* at 19. The police circled the block and did not see anyone else in the area. *Id.* at 33, 39. They drove back to Mr. Johnson. Mr. Johnson looked up, seemed surprised, and started walking in the opposite direction. *Id.* at 23. He did not run and was not holding anything suspicious. *Id.* The police did not describe him as looking upset, angry, or otherwise excited. *Id.*

The detectives got out of their police car and said in a “firm and direct” tone, “Stop. Police.” 6/29/13RP 23. Mr. Johnson complied. *Id.* at 24. Each detective took one of Mr. Johnson’s arms and walked him to their police car. *Id.* at 24, 42. They ordered him to put his hands on the car. *Id.* The prosecutor asked Detective Huber, “Other than the initial report from the informant, was there anything that led you to believe or be concerned that Mr. Johnson might have a firearm on him when you contacted him?” *Id.* at 32. The detective answered, “No.” *Id.*

Mr. Johnson was wearing two jackets and the police did not initially find a firearm when frisking him. 6/30/13RP 9, 31. After either unzipping his jacket or lifting it up, the police found a gun in his waistband. *Id.* at 9, 32-33. After his arrest, Mr. Johnson admitted he had a gun and knew he was not allowed to lawfully possess one. 6/29/13RP 30.

Mr. Johnson was charged with unlawful possession of a firearm in the first degree. CP 1. He argued that the police lacked authority to stop and frisk him based on the informant’s uncorroborated and unreliable tip. 6/29/13RP 66; 6/30/13RP 22-23, 39. The court denied his motion to suppress. CP 52-54. After a stipulated facts trial, Mr.

Johnson was convicted. CP 42-45. The court sentenced him to a low end term of 89 months in prison. 7/31/13RP 11-12.

E. ARGUMENT.

The police lacked reasonable suspicion to seize and search Mr. Johnson without corroborating the unreliable accusation from a paid informant

1. *A person has the constitutional right to be free from unreasonable seizures.*

Article I, section 7 and the Fourth Amendment to the United States Constitution prohibit unreasonable, warrantless seizures. *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010); U.S. Const. amend. IV; Const. art. I, § 7. Washington recognizes few exceptions to the warrant requirement and those that are recognized are “jealously and carefully drawn.” *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

A *Terry* stop is an exception to the warrant requirement, but it is constitutionally authorized only if justified at its inception by “reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime.” *Terry*, 392 U.S. at 20; *State v. Gatewood*, 163 Wn.2d 534, 539, 182

P.3d 426 (2008). A reasonable, articulable suspicion means “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Z.U.E.*, _ Wn.App. __, 315 P.3d 1158, 1164 (2014).

2. *The court agreed that the tip from the unnamed and unknown professional informant was not a reliable basis for a Terry stop but misapplied the law requiring corroboration.*

In *Florida v. J.L.*, 529 U.S. 266, 268, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), the Supreme Court held that an anonymous tip of a person carrying a gun is, without more, insufficient to justify a police officer’s stop and frisk of that person. In *J.L.*, an anonymous caller reported that a young man in a plain shirt was carrying a gun at a bus stop. *Id.* at 268. Although the caller accurately described a person that the police saw when responding to the scene, the court held that matching a physical description does not corroborate the informant’s claim of criminal activity. *Id.* at 272.

To establish the reasonable suspicion required for a *Terry* stop and frisk, “the tip [must] be reliable in its assertion of illegality, not just its tendency to identify a determinate person.” *Id.* Matching a description of a person does not create a predicate for a stop and frisk. *Id.* at 269-71.

The *J.L.* Court also refused to craft an “automatic firearm exception” to its “established reliability analysis.” *Id.* at 272-73. While an accusation that someone has a firearm increases the potential for danger, it does not alter the requirement that the police determine the reliability of the alleged illegal behavior before stopping and frisking someone. *Id.*

The type of corroboration that must follow a tip from an unnamed informant is verifying the tipster’s prediction of the suspect’s future activities based on a range of details, not just easily observed facts. *Id.* at 270-71. It is impermissible to stop and frisk a person when the police have no independent observations indicating a reason to believe the person has engaged in a criminal act apart from a tip that consists of a suspect’s description. *Id.* at 271. Without more information or observations by the police, they have no “means to test the informant’s knowledge or credibility.” *Id.*

This Court has followed *J.L.* on numerous occasions. In *State v. Cardenas-Muratalla*, _ Wn.App _, 2014 WL 457597, *3 (Feb. 3, 2014), the court held that an accurate description of a person does not suitably corroborate an anonymous 911 call to permit a *Terry* stop

without confirming that the tip was reliable in its description of the illegality alleged.

In *State v. O’Cain*, 108 Wn.App. 542, 554, 31 P.3d 733 (2001), this Court held that under *J.L.*, “the mere fact that a tip, if true, would describe illegal activity does not mean police can make a *Terry* stop without meeting the reliability requirement.” In *O’Cain*, a police officer relied on a report of a stolen car, but had no information that the report was accurate. *Id.* at 554-55. An allegation of unconfirmed criminal activity contained in a police record must be treated as if it were nothing more than an anonymous tip and the State bears the burden of establishing its reliability. *Id.* at 555.

In *State v. Hopkins*, 128 Wn.App. 855, 858, 117 P.3d 377 (2005), a “citizen informant” gave police a detailed description of a person and said this person looked like he was carrying a gun at a certain location. The police received the caller’s name and telephone number but did not call him to confirm what he claimed he saw or whether he knew the suspect. *Id.* at 858-59. They assumed the caller’s information was true. *Id.* The court held that the State did not meet its burden of proving the caller’s reliability. *Id.* at 863. The court also held

that the information provided in the call, standing alone, could not supply a lawful predicate for a crime. *Id.* at 865-66.

Similarly to *Hopkins* and much like *J.L.*, the police received information that a person was seen “flashing” a gun at a certain location. 6/29/13RP 16. Although the informant also said this person was arguing with someone, there was no argument going on when the police arrived. *Id.* at 19-20. Nor was there anyone at the scene to confirm the allegation. *Id.* Mr. Johnson matched the description of the person who had a gun but he was merely “standing there on the corner outside the store.” *Id.* at 19.

Under *J.L.* and this Court’s precedent, the court erroneously inferred that the corroboration of an innocuous description of a person supplies reasonable suspicion of criminal activity absent information corroborating the alleged illegal act.

3. *The unnamed informant’s status as a paid informant does not authorize police to rely on his or her uncorroborated second-hand allegation to supply reasonable suspicion for an investigative detention.*

Even if the police know the informant’s identity, when the informant’s identity is kept from the judge, prosecutor, and defense attorney, the State does not establish the informant’s reliability and

credibility. *State v. Ibarra*, 61 Wn.App. 695, 700, 812 P.2d 114 (1991).

“Professional” police informants are not deemed to be presumptively reliable sources of information. *State v. Wakeley*, 29 Wn.App. 238, 241, 628 P.2d 835 (1981).

In *Hopkins*, a “concerned citizen” caller left his name and his telephone number with the police. 128 Wn.App. at 858. He even called back, leaving another telephone number, to give the police more information about the suspect’s location. *Id.* But the police did not know this person and did not contact him to confirm what he saw. *Id.* at 858-59. The *Hopkins* Court found the uncorroborated information given by the caller, who had no established record of reliability, did not provide sufficient information to stop and frisk Mr. Hopkins. *Id.* at 863.

In the case at bar, the police informant’s track record of reliability was never divulged, and the court presumed no reliability in the tip. In its written Findings of Fact, the court ruled, “No information was provided by police regarding the identity of the paid informant to law enforcement, not the informant’s track record as a paid informant or the informant’s reliability.” CP 50. As a Conclusion of Law, the court repeated, “no evidence was presented regarding the reliability of the informant.” CP 52. Because the prosecution bears the burden of

proof, its failure to establish the reliability of the informant relayed second-hand to the detective means the State did not prove the informant's tip was reliable. *See State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Despite the acknowledged lack of reliability from the essentially anonymous and unconfirmed tip, the court concluded that the police had reasonable suspicion to stop and frisk Mr. Johnson based on their purported corroboration of the tip. But the "corroborating information suggesting the informant's tip to law enforcement was accurate" consisted solely of the description of the person. CP 52. His location and physical description were confirmed when the police saw a person matching the description in the area. CP 52. Because he was wearing the jacket that the tipster described, "[t]he implication" is that the informant saw him that same day. CP 52.⁴

This reasoning is contrary to *J.L.* Accurately describing a person's location and appearance has limited reliability: it "will help the police correctly identify the person whom the tipster means to accuse."

529 U.S. at 272. But it does not constitute reasonable suspicion justifying a stop and frisk. *Id.*

Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Id. “[M]ere confirmation of innocent static details is insufficient to support an anonymous tip.” *United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993).

Here, the court’s findings and conclusions conceded that the single informant’s tip did not reveal his or her basis of knowledge and it did not provide any predictive information about future events. CP 50, 52. The trial court properly found that the unnamed informant’s connection with the FBI does not establish reliability, but it improperly relied on the corroboration of innocent descriptive details of the suspect without any relationship to illegal acts. CP 52.

A similar scenario arose in *United States v. Thomas*, 211 F.3d 1186, 1188 (9th Cir. 2000). The FBI instructed the sheriff’s department

⁴ The court entered findings of fact that the reported incident where a person flashed a gun had “just occurred” and was “just witnessed” by the paid FBI informant. CP 47. But there was no evidence presented to the court that the informant had “just” seen this incident. *See* 6/29/13RP 16-18. These findings are

to pay attention to a certain house in Tucson because there was a suspicion that the house contained narcotics. *Id.* The Ninth Circuit held that the sheriff's department could not simply defer to the FBI's tip without itself establishing the articulable facts upon which the tip was based. *Id.* at 1189. Because the FBI did not provide the sheriff's department with information about the basis of its tip, the tip should be treated as "nothing more than an anonymous tip." *Id.* at 1190 n. 3. Reasonable suspicion had to rest on what the police officers observed at the scene, not the fact that the FBI conveyed a tip. *Id.* at 1190.

Likewise, in *United States v. Morales*, 252 F.3d 1070, 1074 (9th Cir. 2001), Spokane officers conveyed a tip to Montana officers that a certain car was carrying methamphetamine. The Spokane police did not describe the reliability of the informant or the basis of the informant's knowledge. *Id.* at 1072. The Ninth Circuit held that "the tip should be treated as an anonymous tip because the ATL [attempt to locate bulletin from Spokane police] did not include information about the tip's source." *Id.* at 1074.

In the case at bar, the tip came from an informant whose reliability and basis of knowledge were never established. CP 50, 52.

not supported by the record.

The police did not corroborate his or her claim that Mr. Johnson was involved in illegal acts. Confirming the clothing Mr. Johnson wore and his location standing outside a store showed only that the informant had seen him. But when the police arrived, he was not involved in any type of altercation, argument, or disturbance. The police lacked reasonable suspicion to order him to stop and submit to a weapons frisk that included unzipping his jacket and reaching into his clothes.

The trial court also indicated that the allegation of possession of a firearm gave the police additional authority to frisk Mr. Johnson for safety purposes. CP 53. But the only reason the police wanted to frisk Mr. Johnson was because the informant claimed he had a gun.

6/29/13RP 32. And the Supreme Court in *J.L.* squarely rejected the notion that reporting someone has a gun constitutes an exception to the established reliability analysis. A bare bones allegation that someone possesses a gun could easily swallow the rule and the Supreme Court refused to create any such exception that would relieve the government of proving a reliable basis to suspect a person has probably committed a crime. 529 U.S. at 271-72.

Because it is undisputed that the court found the informant was not a reliable source of information, simply corroborating the fact that

Mr. Johnson stood on a street corner wearing the clothes the informant described does not constitute “a substantial possibility that criminal conduct has occurred or is about to occur.” *Z.U.E.*, 315 P.3d at 1164.

4. *Suppression of the illegally seized evidence is required.*

Without reasonable suspicion, the police stopped and frisked Mr. Johnson in violation of article I, section 7 and the Fourth Amendment. Accordingly, the evidence gathered during that search is inadmissible. *Winterstein*, 167 Wn.2d at 632; *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) (“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.”); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.”). The evidence recovered from this search supplied the sole basis of the prosecution for unlawful possession of a firearm. CP 44. His conviction must be reversed and the charge dismissed with prejudice.

F. CONCLUSION.

The police did not have reasonable suspicion that Mr. Johnson had committed a crime when he stood on a street corner by himself then complied with the police directive that he submit to a frisk. This Court should order the suppression of the evidence obtained and reverse his conviction.

DATED this ^{19th} day of March 2014.

Respectfully submitted,



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APPENDIX A

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KING COUNTY WASHINGTON

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 13-1-09570-6 SEA

vs.

CLYDE JOHNSON,

Defendant,

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on July 29, 2013 before the Honorable Judge Bruce Heller. After considering the evidence submitted by the parties and hearing argument, to wit: the testimony of Detectives Jonathan Huber and Edward Haggerty, the defendant's clothing from the day of his arrest, and the testimony of the defendant, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

On April 27, 2013, while on patrol in his "subdued" marked patrol car with his partner, Det. Huber received a phone call from an FBI agent. The FBI agent relayed to Det. Huber that a paid confidential informant working for the FBI had called to report an incident that had just occurred on 18th Avenue and East Yesler Way, in the city of Seattle. The informant indicated that they had just witnessed a person believed to be Clyde Johnson embroiled in a "heated but

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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1 not physical” argument with a female, and that during that argument Johnson had “flashed” a
2 gun at the female. The informant provided the location and a detailed physical description of
3 Johnson and the clothing he was wearing¹. The informant did not specify which corner at the
4 intersection of 18th and Yesler the incident occurred. Det. Huber had seen photos of Johnson on
5 prior occasions and knew that Johnson was a convicted felon and prohibited from possessing
6 firearms. After the telephone call from the FBI, Det. Huber, and his partner Det. Haggerty
7 immediately drove to the location of 18th and Yesler to investigate a potential violent felony
8 crime and insure there was no ongoing threat to public safety.

9
10 Upon arriving at the location specified by the informant, Detectives observed the
11 defendant standing on the north east corner of 18th and Yesler in front of a convenience store.
12 Detectives observed the defendant matched the physical description of the suspect provided by
13 the informant, including the clothing described. There were no other persons observed in the
14 area. Upon making eye contact with Det. Haggerty, who sat in the passenger side of the patrol car
15 facing the defendant, the defendant looked surprised, then turned and began briskly walking in
16 the opposite direction from the officers.

17
18 Det. Huber was 95% certain that the man on the street corner was Clyde Johnson. He
19 pulled up to the location where the defendant had been standing and both he and Det. Haggerty
20 exited the patrol car. Detectives identified themselves and directed the defendant to stop and
21 return to their location. The defendant complied. Det. Huber and Det. Haggerty each took control
22 of one of the defendant’s arms and placed his hands on the hood of the patrol car.

23
24 ¹ The description of Johnson included: a black male in his 30’s, 5’8”, with short hair, wearing a blue North Face brand jacket.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

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1
2 Det. Hagerty conducted a weapons frisk prior to the detectives beginning any
3 investigation into the tip provided by the informant. This was done for officer safety reasons and
4 was based on the information they had received from the informant regarding Johnson flashing a
5 gun 5-10 minutes before and the defendant's suspicious reaction upon realizing the police were
6 focusing their attention on him. During the weapons frisk, Det. Hagerty felt a hard object in the
7 defendant's waist area. Det. Hagerty lifted up the defendant's jacket and both Dets. Hagerty and
8 Huber observed the butt of a handgun protruding from the waistline of the defendant's pants.
9 Det. Huber estimated that it was only a few seconds after detaining the defendant that the firearm
10 was discovered in his pants. The firearm located on the defendant was later found to be a 40
11 caliber Berretta, which is a full sized, metal handgun. It measures approximately 8 inches long
12 and an inch thick, with a grip that extends approximately 4 inches.

13
14 The defendant was handcuffed immediately after officers observed the gun. He was told
15 he was under arrest for Unlawful Possession of a Firearm. Det. Huber removed the handgun
16 from the defendant's pants after his hands were secured in cuffs. The rest of the defendant's
17 pockets were emptied at that time as well. The defendant's identity as Clyde Johnson was
18 confirmed by the identification on his person. The defendant remarked that he could not go back
19 to jail, and ran from the custody of Det. Hagerty as he was being escorted to the back of the
20 patrol car.

21
22 The defendant let the detectives on a short foot pursuit while still in handcuffs. He was
23 eventually apprehended by Det. Hagerty and returned to the patrol car. The defendant was
24

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

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1 transported to the Seattle Police headquarters and placed into an interview room. He was read his
2 Miranda rights by Det. Hagerty, who used his department issued Miranda card to assist him. The
3 defendant indicated he understood his rights, and although he would not agree to a recorded
4 statement, agreed to speak with the detectives. At no point during their conversation did he
5 request an attorney or indicate he wished to remain silent.
6

7 During his conversation with police, the defendant indicated that he was carrying the gun
8 for protection. He told them he had been threatened the day prior by an individual named Glen.
9 The defendant also admitted to arguing with a female named "Noraneda" although it is disputed
10 whether he told police the argument with "Noraneda" had occurred just prior to being arrested or
11 the day before. The defendant also admitted to being a convicted felon and knowing he was not
12 legally permitted to carry firearms.
13

14 The defendant was wearing a North Face fleece jacket layered over a black hooded
15 sweatshirt. Both items had zippers up the front.
16

17 No information was provided by police regarding the identity of the paid informant who
18 furnished the information to law enforcement, nor the informant's track record as a paid
19 informant or the informant's reliability. The informant's identity was not disclosed for two
20 reasons: 1) safety concerns on behalf of the informant and 2) to allow for the continued use of
21 this particular informant, which requires that anonymity be preserved.
22
23
24

1 2. THE DISPUTED FACTS:

2 Did officers unzip the defendant's outer jacket during the weapons frisk?
3 Did Det. Hagerty feel the firearm through the defendant's clothing?

4 3. FINDINGS AS TO THE DISPUTED FACTS:

5 The disputed facts are immaterial to the Court's analysis of the identified issues of law.

6 4. ISSUES OF LAW

7 Considering the totality of circumstances, did police have a legitimate basis to conduct an
8 investigative stop of the defendant predicated on a) the information provided by a confidential
9 paid informant and b) what police were able to corroborate when they responded to the area of
10 18th and Yesler?

11 At what point during the contact between police and the defendant did the detention of
12 the defendant rise to a custodial arrest?

13 Did police exceed the scope of a weapons frisk by lifting up the defendant's jacket or
14 unzipping the defendant's jacket?

15 5. CONCLUSIONS AS TO THE ISSUES OF LAW

16 The Court finds that the initial detention of the defendant was an investigative stop
17 pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968). The detectives had justification for
18 an investigative stop, or articulable suspicion that criminal conduct had occurred or was about to
19 occur. Police were able to form the requisite reasonable suspicion predicated on the informant's
20 tip as there were sufficient indicia of reliability. The Aguillar-Spinelli test, 378 U.S. 108, 84
21 S.Ct. 1509 (1964), which is used for determining the reliability of an informant in the context of
22 establishing probable cause for arrest or a search warrant, does not apply to this case. The
23 defendant was not initially placed under arrest by police and therefore probable cause was not
24 required.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 5

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1 The proper analysis for determining whether police properly relied on an informant's tip
2 in investigative stops such as this is outlined in State v. Lee, 147 Wn.App. 912, 199 P.3d 445
3 (2008) and State v. Sieler, 95 Wn.2d 43, 621 P.2d 1272 (1980). In Lee, the Court of Appeals
4 found that courts consider several factors in determining whether an informant's tip posed
5 "indicia of reliability," primarily: 1) whether the informant is reliable; 2) whether the information
6 was obtained in a reliable fashion; and 3) whether the officers can corroborate any details of the
7 informant's tip. The Lee opinion does not require that all three of these factors be satisfied. State
8 v. Marcum, 149 Wash.App. 894, 205 P.3d 969 (2009) dictates that the trial court should examine
9 the totality of circumstances known to police at the time of the stop. Under the totality of
10 circumstances test for determining whether police suspicion resulting from an informant's tip is
11 sufficiently reasonable to support a Terry stop, a reviewing court determines whether an
12 informant's tip possess the required indicia of reliability by inquiring whether there exists: "[1]
13 circumstances suggesting the informant's reliability, or some corroborative observation with
14 suggests either [2] the presence of criminal activity; or [3] that the informer's information was
15 obtained in a reliable fashion." Marcum at 904.

16 In this case, no evidence was presented regarding the reliability of the informant.
17 However, there was corroborating information suggesting the informant's tip to law enforcement
18 was accurate. Specifically in this case, the corroborating information was the location,
19 identification of the suspect, and the suspect's physical description and clothing description. The
20 implication is that the defendant was seen wearing the jacket by the informant on the day in
21 question as relayed to police. This satisfies the third prong of the test outlined in Marcum, and in
22 State v. Lee as well. The details of the informant's tip were corroborated as soon as police
23
24

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 6

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1 arrived at 18th and Yesler. Although the indicia of reliability here would not satisfy the Aguillar-
2 Spinelli test, that is not required, as it was an investigative stop, not a warrantless arrest.

3 At least one purpose of the responding detectives was to investigate an allegation of a
4 violent felony, which, given the specifics of the informant's tip, certainly made it permissible for
5 police to pat the defendant down for safety purposes: Once the gun was located during the pat
6 down, the police had cause to arrest the defendant for Unlawful Possession of a Firearm, despite
7 the fact that Detective Huber was only 95% certain of the identity of the defendant at that point.

8 The standard for the scope of Terry frisks is whether police have a reasonable safety
9 concern given specific and articulable facts. Police officers need not be absolutely certain that a
10 suspect is armed, but if a reasonably prudent person would have safety concerns than a weapons
11 frisk is appropriate. In this case, all of the information came from the informant, similar to the
12 weapons frisk of the car interior in State v. Holbrook, 33 Wn.App. 692, 657 P.2d 797 (1983).²
13 Although the second-hand information alone was not enough for a lawful stop in Holbrook, the
14 officers in this case did make a lawful stop of the defendant given the totality of circumstances
15 known to them at the time.

16 Based on the information received by the police from the informant, they had a reason to
17 do a protective frisk. The scope of the frisk performed here was permissible, even if the
18 defendant's testimony regarding the police unzipping his jacket is to be believed. Per State v.
19 Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994), if an initial pat down of a suspect is inconclusive,
20 the officer's only option to dispel safety concerns is to reach into a suspect's clothing. Hudson
21 cited an instructive Arizona case, State v. Vasquez, 167 Ariz. 352, 807 P.2d 520 (1991), where a

22
23 ² While Holbrook is no longer good law with respect to the search of the car in light of State v. Snapp,
24 174 Wn.2d 177 (2012), the logic of Holbrook regarding weapons frisks based on informant tips remains
persuasive.

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 7

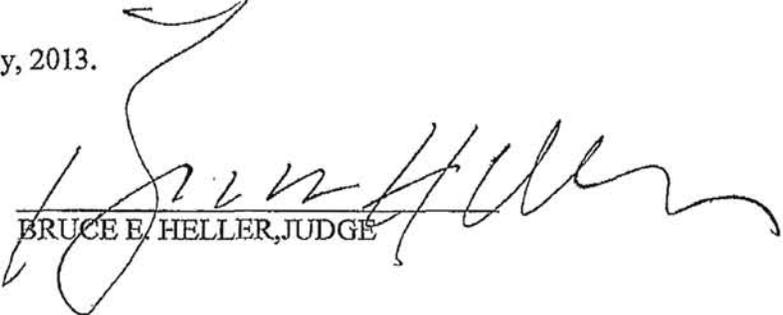
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1 suspect wanted to don a heavy leather jacket and officers could not establish the absence of
2 weapons by simply frisking the exterior of the coat. Based on the logic in Hudson, and given that
3 the defendant here was wearing bulky clothing, an outward pat down would not have allowed
4 them to make a definitive determination as to whether the defendant was indeed armed. Since the
5 officers in this case had a specific report that the defendant was armed with a firearm, it was
6 reasonably necessary for them to lift up the defendant's jacket to see the waistband.

7
8 6. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
9 SOUGHT TO BE SUPPRESSED:

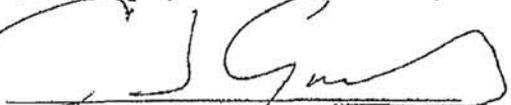
10 The defendant's motion for suppression of the firearm located by police during a
11 weapons frisk is denied. In addition to the above written findings and conclusions, the court
12 incorporates by reference its oral findings and conclusions.

13 Signed this 31 day of July, 2013.

14
15 
16 BRUCE E. HELLER, JUDGE

17 Presented by:

18
19 Julie E. Kline, WSBA# 35461
20 Senior Deputy Prosecuting Attorney

21 
22 Carlos Gonzales, WSBA# 35784
23 Attorney for Defendant

24 WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 8

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70713-2-I
v.)	
)	
CLYDE JOHNSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2014, 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:

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x _____ 

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