

NO. 70713-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CLYDE JOHNSON,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

---

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. There are sufficient indicia of reliability justifying an informant-initiated investigatory stop under the totality of the circumstances when the informant is an eyewitness known to the officer who reports the event contemporaneously; the police not only corroborate the suspect's physical description and location but personally observe suspicious or unusual behavior; and the action alleged is a violent weapons offense with an emergent risk of danger to the public. Here, a paid FBI informant personally witnessed the suspect flashing a gun at a woman in public on a street corner during a heated argument; contemporaneously reported the suspect's name, physical description and location to an FBI handler, who then contacted a Seattle Police detective who had also met the informant; and the detective verified an exact match of the physical characteristics, clothing and location of the suspect, who registered surprise upon seeing police and quickly walked away. Did the trial court correctly conclude that the officers had reasonable suspicion to briefly detain the suspect to investigate the report?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged defendant Clyde Johnson by information with Unlawful Possession of a Firearm in the First Degree, for an incident that took place on or about April 27, 2013. CP 1. Johnson moved to suppress the gun that police found on his person during a safety frisk. CP 20-32. Following a CrR 3.6 hearing on June 29, 2013, the trial court denied the motion. 1RP 78-83;<sup>1</sup> CP 47-54. The trial court found Johnson guilty as charged following a stipulated-facts bench trial. 2RP 49-50; CP 42-46. The court imposed a low-end sentence of 87 months. CP 33-41.

2. SUBSTANTIVE FACTS

On April 27, 2013, Seattle Police Detectives Jon Huber and Edward Hagerty were on patrol duty in the city of Seattle.<sup>2</sup> 1RP 15, 36. They were dressed in full black police uniforms with front-facing badges and name tags, police patches on their

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<sup>1</sup> The Verbatim Report of Proceedings consists of four volumes, only two of which will be referenced in this brief as follows: 1RP (July 29, 2013), 2RP (July 30, 2013).

<sup>2</sup> While it is unclear exactly what time of day it was, both parties agreed that the incident occurred during the daytime sometime after midmorning. 1RP 37, 61; 2RP 6.

shoulders, and police insignia on their backs. 1RP 20-21, 36. They were in a marked patrol car equipped with emergency lights in the front grill and windshield, a siren, a "subdued" "Seattle Police Department" inscription on the side, and untinted windows. 1RP 20-22; CP 47.

That day, Huber received a phone call from an FBI agent indicating that he had just been contacted by a paid informant. 1RP 16; CP 47. Huber had personally met this particular informant on a previous occasion, during which the informant told Huber and an FBI agent about Johnson's proclivity for carrying guns. 1RP 17-18. Based on this piece of intelligence, Huber was able to research the defendant and learn that Johnson was in fact a convicted felon and forbidden from having firearms. Id. He also had the opportunity to see photographs of Johnson. 1RP 17; CP 48. Although Huber obviously knew the name and background of the informant, he was concerned that disclosure in open court would, first and foremost, jeopardize the informant's safety because of the nature of the information that had been provided, and

secondarily, "out" the informant and thereby terminate that person's ability to gather information. 1RP 31-32.<sup>3</sup>

On this particular day, the informant notified the FBI agent about an incident that had just occurred on 18<sup>th</sup> Avenue and East Yesler Way. 1RP 16; CP 47. The informant had just witnessed a person believed to be Johnson embroiled in a heated argument with a female, during which Johnson had "flashed" a gun at the woman. 1RP 16-17, 37-38; CP 47-48. It was clear to Huber that the informant was reporting firsthand knowledge. 1RP 31, 47.

The informant provided the FBI agent, and consequently Huber, with detailed information about the suspect: his name (Clyde Johnson); his physical description (black male in his 30's, 5' 8", close-cut hair, blue North Face jacket); and location (corner of 18<sup>th</sup> and Yesler). 1RP 17-19, 37-38; CP 48.

The detectives were near the location where the incident was reported to be taking place and immediately drove to 18<sup>th</sup> and Yesler. 1RP 23, 38-39; CP 48. At the time, their concern was for

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<sup>3</sup> Contrary to appellant's contention that Huber "steadfastly refused to divulge any information about this unnamed informant to anyone, including the . . . judge," the State offered to disclose the identity and track record of the informant *in camera* if the record could be sealed afterward to preserve the safety and usefulness of the informant, but the court ultimately decided that disclosure was not necessary based on the strength of the other two prongs in the "totality of circumstances" test (reliability of the manner in which the information was obtained and police corroboration). App. Br. 4; 1RP 57, 79.

public safety, since there had been a report of a gun being brandished and a potential violent felony domestic violence crime.<sup>4</sup> Id. Because of their proximity to the scene of the alleged incident, it took only 5-10 minutes for them to arrive. 1RP 39; CP49. When they got there, they saw Johnson standing on the corner of 18<sup>th</sup> and Yesler, just as described; he exactly matched the description given by the informant, including his height, hair, race, age and blue North Face jacket. 1RP 19, 39. Huber was 95% certain that the man on the street corner was Johnson based on the prior photographs he'd seen. 1RP 52-53; CP 48.

Upon making eye contact with officers, Johnson gave a look of surprise, then immediately turned and began walking quickly away in the opposite direction. 1RP 20, 23, 40-41. Prior to this, he had been stationary and did not appear to be headed anywhere. 1RP 40. At the time he made eye contact the officers were only about 25-30 feet away, with the front of their car facing him so that he had a frontal view of their vehicle, the lights in the grill and the

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<sup>4</sup> Assault with a deadly weapon is criminalized under RCW 9A.36.021(1)(c) as assault in the second degree, a Class B felony and a violent offense. RCW 9A.36.021(2)(a); 9.94A.030(54)(a)(8).

push bar on the front. 1RP 21-22, 41. Johnson would thus immediately recognize the car as a police vehicle. 2RP 7-8. He also had a gun tucked into his waistband that he knew at the time he was legally forbidden to possess. 2RP 9-10.

The officers exited the patrol vehicle, directed Johnson to stop, and identified themselves as police. 1RP 23, 41. No guns were drawn. 1RP 23-24, 41. Johnson initially complied, placing his hands on the hood of the patrol car after each detective took control of an arm. 1RP 24, 42; CP 48. Hagerty performed a weapons frisk for officer safety and that of the general public, based on the allegation that the defendant had flashed a firearm minutes earlier, coupled by his suspicious reaction upon seeing the officers. 1RP 23, 49-50; CP 49. Johnson was "confident they wouldn't find it" because "I [had] my stomach tucked in real good so they don't find anything." 2RP 9, 20. Hagerty did, in fact, feel a hard weapon in the shape of a handgun in Johnson's waist area, across the top of his jacket and through his jacket. 1RP 42; CP 49. Hagerty, who has felt firearms in this manner many times as a police officer, pulled up the outside of Johnson's coat so he could visually confirm

it was a handgun. 1RP 42-43; CP 49. Both detectives could then clearly see the butt of a handgun protruding from the waistline of Johnson's pants. 1RP 25, 43; CP 49. The firearm was found only a few seconds after the initial detention. 2RP 34.

For officer safety reasons, the detectives immediately cuffed Johnson and then removed the firearm, a .40 caliber full-sized semiautomatic Beretta handgun. 1RP 25, 43; 2RP 32-33; CP 49. He was then placed under arrest for Unlawful Possession of a Firearm. 1RP 26; CP 49. After he was taken to the police car, Johnson told officers he couldn't go back to jail and fled while still in cuffs, leading the officers on a chase until he was finally apprehended about a block and a half away. 1RP 26-27, 44; CP 49. After being read his Miranda<sup>5</sup> rights, he acknowledged having the gun despite knowing he was prohibited from doing so because he'd been in an argument with a female named Noraneda; he later claimed this argument had been the day before, but acknowledged that this was not what he told the police that day. 1RP 29-30; 2RP 17; CP 50.

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<sup>5</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

C. ARGUMENT

1. POLICE LAWFULLY DETAINED JOHNSON AFTER: (1) RECEIVING A CONTEMPORANEOUS EYEWITNESS REPORT OF A POTENTIAL VIOLENT WEAPONS OFFENSE FROM A KNOWN FBI INFORMANT, AND (2) CORROBORATING THE SUSPECT'S PHYSICAL DESCRIPTION, LOCATION AND SUSPICIOUS BEHAVIOR AT THE SCENE.

Johnson argues that the trial court erred when it found reasonable suspicion for his investigatory stop because the tip was not corroborated by police and came "secondhand" from an informant who was "unnamed and unknown" and therefore unreliable. App. Br. 7, 10. This argument fails for several reasons. The arresting officer did, in fact, know the informant, whom he had actually met earlier with an FBI handler to discuss the very same suspect; the informant personally witnessed Johnson flash his gun in public and gave a detailed description of a violent weapons offense to the FBI agent, who conveyed the tip and its source in real-time to Huber; and the arresting officers confirmed not only an exact match of Johnson's physical description and location when they arrived, but observed him act suspiciously when he registered clear surprise upon their arrival and immediately walked away. This Court should therefore reject Johnson's claim and uphold the

trial court's conclusion that the officers were entitled to make an investigatory stop.

a. Reasonable Articulable Suspicion For An Informant-Initiated Investigation Is Reviewed Under The Totality Of Circumstances For Sufficient Indicia Of Reliability.

In reviewing the denial of a motion to suppress, this Court reviews factual findings for substantial evidence and conclusions of law de novo. State v. Hopkins, 128 Wn. App. 855, 862, 117 P.3d 377 (2005) (citing State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). If an appellant challenges specific findings of fact entered by the trial court but does not support those assignments of error with argument or citation to authorities, a reviewing court will not consider those assigned errors. State v. Lee, 147 Wn. App. 912, 915, 199 P.3d 445 (2008), review denied, 166 Wn.2d 1016 (2009); see RAP 10.3(a)(6). In such cases, the trial court's factual findings will be considered unchallenged and therefore verities on appeal. Lee, 147 Wn. App. at 915; State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 2015 (2006).

Brief, investigatory "Terry" stops are well-established exceptions to the general rule that warrantless seizures are unconstitutional. Terry v. Ohio, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Lesnick, 84 Wn.2d 940, 530 P.2d 243, cert. denied, 423 U.S. 891 (1975). A Terry stop is justified when an officer has specific and articulable facts that give rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000).

A reasonable suspicion is the "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). "The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop." State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991), overruled in part on other grounds by State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The totality of the circumstances include factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion

upon the suspect's liberty, and the length of time the suspect is detained. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

Courts have repeatedly emphasized that the totality of the circumstances analysis is a highly fact-specific inquiry that draws heavily on the particular situation facing the officer in question. Lesnick, 84 Wn.2d at 944 (“[N]o single rule can be fashioned to meet every conceivable confrontation between the police and citizen . . . each case must be considered in light of the particular circumstances facing the officer”); State v. Marcum, 149 Wn. App. 894, 205 P.3d 969 (2009) (citing United States v. Arvizu, 534 U.S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002) (criticizing a “divide-and-conquer” analysis of factors that individually might be consistent with innocent activity but amount collectively to reasonable suspicion)). Nor do potentially innocent explanations of a suspect's behavior, evaluated in isolation, necessarily undermine a determination of reasonable articulable suspicion. Navarette v. California, 572 U.S. \_\_\_, 134 S. Ct. 1683, 1691 (2014) (“[W]e have consistently recognized that reasonable suspicion ‘need not rule out the possibility of innocent conduct’”); Kennedy, 107 Wn.2d at 448 (“[W]hen the activity is consistent with criminal activity,

although also consistent with noncriminal activity, it may justify a brief detention”).

Reasonable suspicion may be based upon information supplied by another person. Lesnick, 84 Wn.2d at 943; State v. Randall, 73 Wn. App. 225, 227, 868 P.2d 707 (1994). An informant’s tip provides police with reasonable suspicion to justify an investigatory stop when it possesses sufficient “indicia of reliability.” Marcum, 149 Wn. App. at 903 (citing State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980)). To determine whether sufficient indicia exist, “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, 147 Wn. App. at 918 (citing Sieler, 95 Wn.2d at 47; Lesnick, 84 Wn.2d at 944). These factors are non-exclusive exemplars of indicia of reliability. Kennedy, 107 Wn.2d at 7 (noting the three factors as examples, “e.g.,” of sufficient indicia).

b. The Nature And Seriousness Of The Alleged Offense Is A Critical Factor In A Totality Of Circumstances Analysis.

The seriousness of the crime alleged by an informant prior to a Terry stop bears considerably on the weight to be given other indicia of reliability in a totality of circumstances analysis. Lee, 147 Wn. App. at 917; State v. Randall, 73 Wn. App. 225, 229, 868 P.2d 207 (1994); State v. Franklin, 41 Wn. App. 409, 412-13, 704 P.2d 666 (1985). Washington courts have long recognized that when the potential danger posed by an individual is significant, a greater intrusion on lesser suspicion will be tolerated.<sup>6</sup> When Lesnick held that the stop in that case invalid, for example, one of the court's considerations was that the suspected crime was merely a gross misdemeanor, with "no threat of physical violence or harm to society or the officers." 84 Wn.2d at 944.

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<sup>6</sup> See, e.g., Duncan, 146 Wn.2d at 177 ("[W]e place an inversely proportional burden in relation to the level of the violation. Thus, society will tolerate a higher level of intrusion for a greater risk and higher crime than it would for a lesser crime."); Sieler, 95 Wn.2d 43, 50, 621 P.2d 1272 (1980) ("[T]he seriousness of the criminal activity reported by an informant can affect the reasonableness calculus which determines whether an investigatory detention is permissible."); Randall, 73 Wn. App. 225, 868 P.2d 207 (1994) (relaxing the informant reliability requirement in cases involving violent offenses, because requiring an in-depth analysis of the reliability of the information would "greatly increase the threat to public safety"); State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991) ("Officers may do far more if the suspect conduct endangers life or personal safety than if it does not."); State v. McCord, 19 Wn. App. 250, 253, 576 P.2d 892 (1978) ("A determination of the reasonableness of an officer's intrusion depends to some degree on the seriousness of the apprehended criminal conduct. An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not.").

In Franklin, by contrast, this Court upheld a stop in which an unnamed informant reported seeing a man with a gun in a public restroom. 41 Wn. App. at 410. Although the informant's reliability and identity could not be shown at trial and police corroboration was limited to the physical description of the suspect and location, the Court held that in the face of a potentially violent crime involving a weapon, the need to extensively verify such factors diminishes. Id. at 412-13. Because "the potential danger to the public posed by an armed individual calls for immediate action," prompt verification of a suspect's description and location is sufficient to (1) justify a stop, and (2) support a reasonable inference that the tip came from eyewitness observation and that the unverified portion of the tip would also be accurate:

[C]ourts have recognized the need for an immediate investigatory stop when an anonymous informant of undetermined reliability states that he or she observed a suspect carrying or displaying a gun in a public place. . . . In these unique and potentially dangerous circumstances, such a tip is sufficiently reliable to support an investigatory detention if the police immediately verify the accuracy of the description and location of the subject.

Id. at 412-14.

In Randall, this Court also held that where officers receive information about a recent threat of serious violence, corroborated

by their observations, they may act upon it without first undertaking an exhaustive analysis of the tip's reliability. Randall, 73 Wn. App. at 230. The officer in Randall responded to a 911 call regarding an armed robbery, saw a suspect matching the anonymous caller's description ten minutes later six blocks from the scene, and noticed that the suspect immediately left upon seeing his marked patrol car. Id. at 226. These details constituted sufficient corroboration in favor of the tip's reliability. Id. at 230-31. Further exhaustive inquiry into the informant's reliability and corroboration of additional details was not necessary because of what was at stake:

The tip in this case was of an alleged armed robbery, a violent crime posing a significant threat to the safety of the officers and the public in general. An officer acting on a tip involving the threat of violence and rapidly developing events does not have the opportunity to undertake a methodical, measured inquiry into whether the tip is reliable, as does an officer acting on a tip that a nonviolent offense such as possession of drugs has been committed, or an officer seeking a search warrant based on a tip. Rather . . . the officer must make a swift decision based upon a quick evaluation of the information available at the instant his or her decision is made. To require an officer under these circumstances to stop and undertake an in-depth analysis of the reliability of the information received by the police dispatcher would greatly impede the officer's discharge of duty and would greatly increase the threat to the public safety. Under such circumstances, the officer should be able to rely on the reliability of information disseminated by police dispatch and, when his or her

observations corroborate the information and create a reasonable suspicion of criminal activity, to make an investigatory stop.

Id. at 229-30.

c. Navarette v. California Clarifies The Degree Of Corroboration Required To Satisfy The Indicia Of Reliability Test.

As illustrated in the recent United States Supreme Court opinion of Navarette v. California, the central concern behind the judicial requirement of indicia of reliability is the specter of the anonymous troublemaker, who is both “unknown and unknowable,” and therefore insulated from repercussions. 134 S. Ct. at 1688. Navarette casts further light on prior judicial interpretation of what constitutes satisfactory constitutional protection against this risk.<sup>7</sup>

In Adams v. Williams, the Court first extended Terry stops to situations involving third-party tips. 407 U.S. 143, 92 S. Ct 1921, 32 L. Ed. 2d 612 (1972). The informant in Adams was unnamed but known to the officer, to whom he had previously given information in the past, and on this occasion approached him

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<sup>7</sup> Washington caselaw indicates that the constitutional analysis for reasonable articulable suspicion under both the Fourth Amendment and Article I, Section 7 both utilize the same totality of circumstances test for indicia of reliability. See Kennedy, 107 Wn.2d at 4-5; Lee, 147 Wn. App. at 916; State v. Conner, 58 Wn. App. 90, 94, 791 P.2d 261 (1990); Marcum, 149 Wn. App. at 903.

saying a man was sitting nearby with a gun in his waistband and some drugs. Id. at 144-46. The fact that the informant was known to the officer and had provided information in the past made it “a stronger case than obtains in the case of an anonymous telephone tip” even though there was nothing in the record indicating whether the prior information or the informant was reliable. Id. at 146. What mattered to the Court was that “the informant here came forward personally to give information that was immediately verifiable under the scene” and that a legal consequence existed should have proven false: the charge of false complaint. Id. at 146-47. The factors remaining under the totality of circumstances gave the tip enough indicia of reliability on their own to justify a forcible stop under Terry.

Alabama v. White held that a wholly anonymous phone tip can still ultimately provide sufficient indicia of reliability for a stop. 496 U.S. 325, 328, 110 S. Ct. 2412 (1990). White involved a totally unknown informant who called police headquarters to describe a suspect, her car, and her future activities, which would ultimately involve the covert transportation of cocaine. 496 U.S. at 327, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). In holding the stop reasonable, the Court noted that the informant, although

anonymous, demonstrated reliability because her prediction of future behavior “demonstrated inside information – a special familiarity with respondent’s affairs.” Id. at 332. The police were also able to corroborate “significant aspects of the informer’s predictions” prior to the stop, such as the suspect’s location, her car, and the time of her departure. Id. at 332. The corroboration of these details lent credence to other claims made by the caller. Id. at 331-32.

In Florida v. J.L., the central case upon which Johnson relies, the Court yet again underscored the principal concern with stops involving anonymous informants: their untraceability and corresponding unaccountability. 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). J.L. involved an anonymous informant who, like the informant in White, called the police department instead of 911 to report a young black male standing at a bus stop wearing a plaid shirt and carrying a gun. Id. at 268. Nothing in the record showed how the caller knew J.L. had a gun or whether that person was even an eyewitness; nor was there any allegation that the suspect was threatening or harming anyone. Id. at 271. When police saw J.L. in the aforementioned plaid shirt, he was “just hanging out” and made no “unusual movements.” Id. at 268.

In holding the stop invalid, the Court pointed to the fact that the tip had originated “from an unknown location by an unknown caller,” compared to an informant with a known identity “who can be held responsible if her allegations turn out to be fabricated.” Id. at 270. Because the tip was essentially a “bare report” from “an unknown, unaccountable informant” who had neither provided the basis for the tip nor indicated any inside knowledge of the suspect’s future behavior, under the totality of the circumstances, mere verification of J.L.’s “readily observable location and appearance” did not provide sufficient indicia of reliability. Id. at 271.

In his concurrence, Justice Kennedy summarized the fundamental problem with unknown and unnamed informants: “If the telephone call is *truly anonymous*, the informant has not placed his credibility at risk *and can lie with impunity*. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.” Id. at 275 (emphasis added). That risk necessarily falls as a caller’s exposure rises, because there is something more at stake for someone beyond the truly unknown informant, such as the unnamed person who

nevertheless makes himself known to an officer in a “face-to-face” and describes criminal activity. Id. at 276.<sup>8</sup>

In Navarette, however, the Court departed from the holding in J.L. that an anonymous caller must predict future behavior in addition to a suspect’s physical description and location at the scene. 134 S. Ct. at 1692 (holding that although there were no indicia of predictive behavior as in White, “there is more than one way to demonstrate ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity’”).<sup>9</sup> The Court held that a report of dangerous driving by an anonymous caller who had no prior relationship with the arresting officer had provided sufficient indicia of reliability justifying a stop of the offending driver, despite no corroboration of the dangerous driving by officers. Id. After the caller reported being nearly run off the road by a particular car, the Court concluded that the

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<sup>8</sup> In a particularly prescient forecast of the Court’s recognition in Navarette of the evolving capability of 911 centers to pinpoint phone numbers and GPS locations, Justice Kennedy further noted in his concurrence that changes in technology even at that time had helped eliminate some of the unreliability of the truly anonymous phone tip (“the ability of the place to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips”). Id. at 276,

<sup>9</sup> Navarette also undercuts Johnson’s reliance on Washington state cases that have extended J.L.’s requirement of “predictive behavior.”

dangerousness of the behavior supported a reasonable suspicion of ongoing drunk driving. Id. at 1691.

The caller, though anonymous, was deemed reliable for several reasons. First, the call had been made immediately after the incident and the police responded soon afterwards; the Court concluded that “that sort of contemporaneous report has long been treated as especially reliable . . . [because] substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.”<sup>10</sup> Id. Second, unlike the caller in either J.L. or White, the caller in Navarette had used the 911 system, which inherently contains safeguards like caller identification, GPS locators, and an inability to block caller ID, all of which guard against the prospect of malicious callers lodging false accusations with the “impunity” that so concerned the concurrence in J.L. Navarette, 134 S. Ct. at 1689-90; J.L., 529 U.S. at 275. Third, the caller in Navarette was clearly an eyewitness, as distinguished from the informants in J.L. and even White, where the basis of the informant’s knowledge was vague at best. 134 S. Ct. at 1689.

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<sup>10</sup> The Court noted there was no such evidence of contemporaneous report and response in either J.L. or White. Id.

d. Sufficient Indicia Of Reliability Was Established Under The Facts Of This Case.

Here, the totality of circumstances establishes that officers had reasonable suspicion to justify a Terry stop: police received information from a fellow law enforcement officer relaying a tip from one of their paid informants; Huber knew the identity of this informant and had in fact personally met the CI regarding Johnson on an earlier occasion; the informant called the FBI agent directly and reported having just witnessed a violent altercation between Johnson and a woman on a public street corner in the middle of the day, during which Johnson flashed a gun at the woman. It was not merely a conclusory allegation that Johnson was carrying a gun, as in Hopkins or J.L. Indeed, Huber did not go seize Johnson immediately after his first meeting with the informant who stated that Johnson was known to carry guns. The 911 system that was cited in Navarette as being so essential in assuaging concerns regarding informant accountability was not even needed in Johnson's case because the informant here was already known and accountable, to the point where he had a direct line to an FBI handler and could be traced.

The informant was able to provide details regarding Johnson's clothing, his appearance, his name, and the cross streets of his location. These details exactly matched what officers saw when they arrived minutes later. Additionally, when officers arrived in a marked police vehicle in full uniform, Johnson, who had been loitering at the corner prior to making eye contact with them, looked at the officers in alarm and immediately turned and started quickly walking away. This was not like the defendants in J.L. or Hopkins, who made no unusual moves upon seeing the police and were observed simply either standing on the street or talking on the phone. Hopkins, 128 Wn. App. at 858; J.L., 529 U.S. at 261. Furthermore, the detention itself lasted mere seconds prior to the discovery of the gun. Finally, this was not a case where the alleged activity was clearly non-criminal or even merely suspicious; it was the report of an active dispute between a woman and a man who flashed a gun at her on a street corner, raising concerns for an emergent risk to both her safety and the public at large.

Johnson characterizes the informant in this case as "unnamed and unknown" and therefore "essentially anonymous" and presumably unreliable, citing J.L. for his contention that "an anonymous tip of a person carrying a gun is, without more,

insufficient to justify a police officer's stop and frisk." App. Br. 7, 12. The flaw in this argument is that the informant in this case was not anonymous, as was the case in J.L. and other Washington cases involving 911 callers who, named or not, were also truly "unknown" to the officers. See, infra, Cardenas-Muratalla; Hopkins. The caller in this case was absolutely known to Huber and had in fact personally met with him previously. The significance of this detail cannot be disregarded, nor should the reliability of this known informant automatically revert to that of an anonymous informant as suggested by Johnson simply because the informant remains unnamed in the record. Unnamed in this case did not actually mean "unknown," just as being named does not always equate to being "known" in the context of informant reliability. Sieler, 95 Wn.2d at 48 ("a named but unknown telephone informant . . . could easily fabricate an alias and thereby remain, like an anonymous informant, unidentifiable").

Because the courts have stated that their fundamental concern with wholly anonymous informants is their potential to evade detection and future punishment and therefore to "lie with impunity," J.L., 529 U.S. at 270-71, 275, an informant who is known and traceable by authorities does not present the same degree of

risk. This proposition is certainly more so in the case of paid FBI informants who are not merely “known,” but who by dint of their very relationships with law enforcement are much more exposed in terms of their vulnerabilities, intimately entwined with their contacts, and arguably have more at stake if they fail in their capabilities.

Contrary to Johnson's assertion that this case is like J.L., it is in actuality similar to the fact pattern in Adams, where an unnamed but known informant who had previously given information to an officer contacted that officer directly one night to report a man with a gun. Even though the reliability of the informant or his prior tips was never disclosed, the Court upheld the stop because of the violent nature of the allegation and the fact that he was known to police. Interestingly, Adams did not even involve a suspect actively threatening another person with a gun as it did in this case.<sup>11</sup>

Johnson also cites two cases in an attempt to further dilute the reliability of the known informant as “secondhand” in this case simply because the tip was conveyed under the well-established

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<sup>11</sup> This was also true of the informant in Franklin where the stop was upheld despite no explicit threat of violence or allegation of “brandishing” in the record. 41 Wn. App. at 414.

fellow officer rule. App. Br. 10, 13-14 (citing United States v. Thomas, 211 F.3d 1186, 1188 (9<sup>th</sup> Cir. 2000), and United States v. Morales, 252 F.3d 1070, 1074 (9<sup>th</sup> Cir. 2001)). Both cases, he claims, stand for the contention that a law enforcement agency cannot “simply defer to [another agency’s] tip without establishing the articulable facts upon which the tip was based.” App. Br. 14. But that is not what happened in this case. Huber did not simply accept a conclusory statement that Johnson was known to carry guns. The FBI agent in fact disclosed both the tip’s source and extensive details to Huber who, after learning that an eyewitness had just seen Johnson actively flashing a firearm at someone, immediately responded in an attempt to defuse an emergent and dangerous situation.<sup>12</sup>

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<sup>12</sup> It should be noted that the fact patterns in both Thomas and Morales were particularly dubious in terms of overall reliability and the totality of the circumstances. The FBI tip in Thomas conveyed that local police “might” want to pay attention to a house because of a “suspicion” that there was a “possibility” that there “might” be some narcotics there. 211 F.3d at 1188. The court noted that the tip was “entirely conjectural and conclusory,” “exceedingly equivocal and attenuated,” and accompanied by no observations of any unusual or suspicious activity. Id. at 1190. The tip in Morales involved a stop by a neighboring law enforcement agency whose officers could not tell whether the occupants were even the correct race as those in the conclusory and unsourced tip, the car was observed for 32 miles without any observation of any suspicious activity while the officers tried to think of a reason to pull it over, the eventual basis for the stop (tinted windows) was not even an infraction in that state, and the occupants were nonetheless held for 40 minutes for a narcotics dog sniff despite their stop for tinted windows. Id. at 1071-72.

Johnson's reliance on J.L. is further misplaced in light of the Court's recent opinion in Navarette. If the veracity of the informant in Navarette, who truly was a wholly unknown tipster, could be boosted by her use of the 911 emergency system with all its built-in protections and the "opportunity to identify the false tipster's voice and subject him to prosecution," 134 S. Ct. at 1690, then it is difficult to conceive how a known informant who directly calls his FBI handler with information, which is then conveyed to Seattle Police, could be found to be affirmatively unreliable. Given the confidence advanced by use of the 911 system, a call like the one made here not only contains all the information captured by that system but assures a reviewing court of an inherently better foundation with which to locate the informant if the information went awry.

Even if the informant here was truly anonymous,<sup>13</sup> Navarette further erodes Johnson's reliance on prior caselaw regarding the weight to be given police corroboration and the reliability of how the information was obtained. This includes his primary argument that, under J.L., an anonymous informant must predict a suspect's future

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<sup>13</sup> For purposes of argument only, the State will address caselaw cited by Johnson that presumes anonymity of the informant, although the record shows that this was not the case here.

activities using a broad range of details and police must corroborate this predictive behavior in the absence of any observation of suspicious or criminal behavior.<sup>14</sup> App. Br. 7-10, 12-13, 15-16. Navarette, of course, upheld a stop based on a tip from an informant who was wholly unknown to the arresting officers, either by name or experience, without requiring such extensive description of the suspect's future movements or police corroboration of these details. The police corroboration consisted wholly of verification of the suspect's car and general location; no unusual driving was observed during the 5-minute period that police followed the suspect's car. 134 S. Ct. at 1691.

Johnson's reliance on Washington cases for the requirement of predictive behavior under J.L. is not only undercut by Navarette but because each case he cites can be distinguished on its facts. State v. Cardenas-Muratalla, \_\_\_ Wn. App. \_\_\_, 319 P.3d 811 (2014), for example, does not hold that "an accurate description of a person does not suitably corroborate an anonymous 911 call . . . without

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<sup>14</sup> Although Johnson initially frames this issue in his assignments of error as a matter of insufficient evidence in the record to support the finding that the informant's tip was corroborated, he does not present any further argument on this issue or cite to the record or any caselaw in support of that contention. Therefore, the State does not pursue this avenue beyond citations to the record in support of the court's findings in the Statement of the Case. See RAP 10.3(a)(6).

confirming that the tip was reliable in its description of the illegality alleged.” App. Br. 8-9. Cardenas’ actual holding, under a very specific and unique set of facts, was that “an anonymous tip reporting conduct *not constituting a crime*” could not justify a Terry stop.<sup>15</sup> 319 P.3d at 812-13 (emphasis added).

Cardenas actually reiterated the lower level of police corroboration required in tips alleging serious violent offenses or threats to public safety, especially the “significant risk to public safety” in the “actual or threatened use” of a firearm: “Officers investigating reports of emergent risks of imminent violence do not have the opportunity to make detailed inquiries to establish the veracity or vantage point of individuals reporting suspicious activity.” Id. at 814-15; see also n.12 (citing numerous cases holding that J.L. does not apply in emergent situations). The tip in Cardenas was held to be unreliable not because the only corroboration was of the suspect’s physical appearance and location but because the 911 caller was wholly unknown and

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<sup>15</sup> There were conflicting reports of unusual or threatening behavior by the officers at the scene, with the officer who ultimately shot Cardenas-Muratalla claiming he had seen menacing behavior in direct contradiction of the in-car video. Id. at 817. Most importantly, the 911 caller, who was truly anonymous and whose identity was never discovered by officers, told dispatch that the suspect had shown him a gun but specifically stated that there was never any threat of violence to anyone nor did he personally feel threatened.. No crime was thus ever alleged. Id. at 813, 816.

alleged no actual crime, or even any threat of violence; police also observed no threatening or “unusual” behavior. Id. at 816-17.

Johnson also cites to State v. O’Cain, 108 Wn. App. 542, 31 P.3d 733 (2001) as support for his argument that the tip in this case must be treated as uncorroborated, anonymous and insufficient because “an allegation of unconfirmed criminal activity contained in a police record must be treated as nothing more than an anonymous tip.” App. Br. 9. O’Cain, however, was addressing the reliability of stolen car reports from WACIC, not that of actual informants. Id. at 555.<sup>16</sup>

Finally, Johnson claims that Hopkins, much like J.L., presents facts and circumstances similar to the case at hand and urges this Court to extend those holdings to this case. App. Br. 10. But the facts in Hopkins can be distinguished from Johnson’s situation. Hopkins involved an informant who, this Court noted, was completely unknown to the officers; they did not even know whether or not the informant even knew Hopkins. 128 Wn. App. at 858. Nor did the informant there sufficiently allege any criminal

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<sup>16</sup> Notably, the O’Cain court also explained the rationale behind the fellow-officer rule, noting that “officers, who often must act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the information.” Id. at 551.

activity by the suspect, much less any violent or threatening behavior towards anyone; he merely reported that a minor "might" be carrying a gun and was scratching his leg with what "looked" like a firearm. Id. This equivocal and attenuated statement was accompanied by an inaccurate physical description of Hopkins' height, weight and age. Id. at 864.

The officers who arrived saw no suspicious behavior; Hopkins' back was actually to the officers as he talked on the phone. Id. at 859. The tip was held unreliable because of the lack of clarity about whether the informant was an eyewitness or how he had obtained his information, the officer's lack of knowledge about the informant's identity,<sup>17</sup> the inaccuracy of the tip itself, the lack of any allegation of an actual crime or danger to anyone, and the total lack of any suspicious behavior. Id. at 863-65.

These cases stand in sharp contrast to Johnson's case, where the evidence showed that the officers not only knew the informant but that the informant knew Johnson; the report was of an unequivocally violent and threatening crime, the brandishing of a

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<sup>17</sup> Again, it was the fact that informant's identity was truly unknown to the officers that troubled the court, not whether he had given a name or not: "a named and *unknown* informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable." Id. at 863-64.

gun on a street corner; the informant was an eyewitness; the informant's extensive description of Johnson included not only wholly accurate physical details but the suspect's actual name. Contrary to Johnson's contention that he was simply "standing there," the police corroborated more than just his physical description, the brand and color of his clothing, and his location; they observed the "unusual" or suspicious behavior noted as sufficient corroborative behavior in J.L., 529 U.S. at 268, and Cardenas-Muratalla, 319 P.3d at 816-17, when he made eye contact with police, displayed a clear look of surprise, and then immediately turned and walked quickly away from the scene.

Contrary to Johnson's arguments, corroboration in these types of cases need not be excessive, especially in the face of a violent allegation involving weapons. All that was needed in another case where shots were heard by named parties, for example, was a matching description of a car and its driver, along with the officer's observation that the driver appeared to be trying to hide something. State v. Wakeley, 29 Wn. App. 238, 242, 628 P.2d 835 (1981) ("The officers' decision to adopt an immediate response was reasonable because crimes involving firearms present a serious threat of physical injury.").

Johnson next contends that the stop lacks sufficient indicia of reliability regarding the manner in which the information was obtained. In doing so, he asserts that the trial court's findings of fact and conclusions of law "conceded that the single informant's tip did not reveal his or basis of knowledge." App. Br. 13, 14. This is directly contradicted by the record and the court's findings, which explicitly state that the informant was an eyewitness to the incident. 1RP 31; CP 47-48. Furthermore, both the court's findings and the records indicate that the incident happened contemporaneously with the call itself. 1RP 16-17 (testimony from Huber that the caller stated "there was a disturbance between a male and female at 18<sup>th</sup> and Yesler" and that they were close to the location "where it was reported to be taking place," implying it was ongoing and contemporaneous). CP 47, 49 (undisputed finding that the informant "had just witnessed" the incident and that it happened "5-10 minutes" before the officers' arrival).<sup>18</sup>

These two facts – eyewitness observation and contemporaneity – were advanced in Navarette as compelling evidence that the information provided by the caller had been

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<sup>18</sup> Johnson also initially frames this issue as an assignment of error regarding the sufficiency of the evidence to support the recentness of the claimed incident but does not cite to the record or any caselaw to further his argument.

obtained in a reliable fashion. 134 S. Ct. at 1689; see also Franklin, 41 Wn. App. at 413; Lee, 147 Wn. App. at 918; State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784 (1992). Navarette contrasted the fact of the firsthand knowledge in that case to the conclusory statements in White, which offered “scant evidence” of any eyewitness observations of cocaine, or J.L., where the tip “provided no basis for concluding that the tipster had actually seen the gun” since there was no allegation that the suspect had flashed it as they did in the instant case. 134 S. Ct. at 1689. The Court also noted that those two earlier cases did not contain any evidence of “contemporaneity of event and statement” of criminal activity. Id.

Indeed, it is clear in the instant case that Detective Huber certainly did not seek out Johnson after the informant’s initial conclusory comment to Huber at their first face-to-face meeting that Johnson was known to carry guns. Only once there was an actual, real-time eyewitness observation that Johnson was brandishing a weapon in public did the officers seek to take action, and even then first and foremost to defuse a potentially violent emergent situation.

Under the totality of the circumstances, the officers had reasonable suspicion justifying an investigatory stop. This Court

should affirm the trial court's denial of Johnson's suppression motion.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Johnson's conviction for Unlawful Possession of a Firearm in the First Degree.

DATED this 19 day of May, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

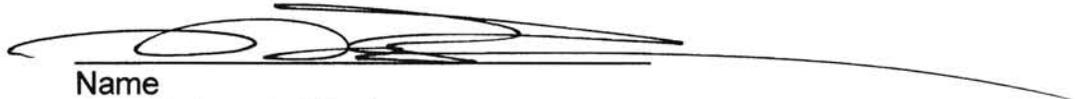
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to NANCY P. COLLINS, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. CLYDE JOHNSON, Cause No. 70714-2 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of May, 2014



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