NO. 46512-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL JASON BURKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00543-0

BRIEF OF RESPONDENT

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SERVICE		
	John A. Hays 1402 Broadway Longview, Wa 98632 Email: jahays@3equitycourt.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED March 12, 2015, Port Orchard, WA Elizabeth Allen **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence supported the trial court's conclusion that Burks's name came up when the officer ran Bierlein's drivers license?

2. Whether Officer Faidley had a reasonable articulable suspicion of wrongdoing, and he properly requested Burks's identification to dispel or confirm that suspicion?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Paul Jason Burks was charged by information filed in Kitsap County Superior Court with felony violation of a no-contact order. CP 1.

Burks moved to suppress. CP 12. After an evidentiary hearing, the trial court denied the motion. CP 94.

Burks was tried before the court on stipulated facts. CP 73. The court found him guilty as charged and imposed a standard-range sentence. CP 76-77, 79.

B. FACTS

The following facts were adduced at the CrR 3.6 hearing.

Bremerton Police Officer Christopher Faidley stopped Tanya Bierlein for speeding. RP (7/7) 6, 8. When Faidley approached the car and spoke with Bierlein, the passenger appeared to be shielding his face from Faidley with his hand. RP (7/7) 7. The passenger was a tall thin

black male. RP (7/7) 8.

Faidley returned to his car and ran Bierlein's name in his computer. RP (7/7) 8. The "first thing that popped up" was that Bierlein was a protected party under a court order. RP (7/7) 9. Faidley asked the dispatch to read him the physicals of the respondent to the order. RP (7/7) 9. They gave him height, weight, race and age, and they matched the passenger. RP (7/7) 9.

After calling for backup, Faidley returned to the car with the intent to investigate a possible protection order violation; he was no longer investigating the traffic infraction. RP (7/7) 9-10. He asked for the passenger's ID and explained that he needed to see the ID to make sure he was not the respondent on the protection order. RP (7/7) 9-10.

The passenger responded that he did not have any ID. RP (7/7) 10. Faidley requested a name and date of birth. He told the passenger that he matched the description of the respondent. The passenger told him that he got confused with Paul Burks all the time. RP (7/7) 10. Faidley had not mentioned Burks's name before that. RP (7/7) 10.

The passenger told Faidley his name was Alexander Ashiene and said he was from Oregon. RP (7/7) 11. Bierlein appeared to be whispering prompts to the passenger when he gave his name and date of birth. RP (7/7) 11. Faidley ran the information through databased for

both Washington and Oregon and found no record of him in either place. RP (7/7) 11.

As soon as the backup officer arrived, Faidley searched for Burks on his computer and came up with a photo. RP (7/7) 11-12. The picture matched the passenger. RP (7/7) 12. Faidley arrested Burks for violation of a protection order. RP (7/7) 12.

The whole stop took about 10 minutes. RP (7/7) 12. The initial contact was 30 seconds to a minute. RP (7/7) 12. Running Bierlein's status took another few minutes. RP (7/7) 12. About five to seven minutes had passed by the time he tried to verify the name of Ashiene. RP (7/7) 13.

III. ARGUMENT

A. EVIDENCE SUPPORTED THE TRIAL COURT'S CONCLUSION THAT BURKS'S NAME CAME UP WHEN THE OFFICER RAN BIERLEIN'S DRIVERS LICENSE.

Burks argues that the trial court's Finding of Fact V, "that when Officer Faidley ran Ms. Bierlein's information, he found out that she was the protected party in a no contact order with respondent Paul Burks," is not supported by substantial evidence. This claim is without merit because this fact is a fair implication of the testimony below.

On appeal, the Court reviews findings of fact for substantial

evidence. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings of fact are verities on appeal. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009).

At the CrR 3.6 hearing, Faidley specifically testified that

> The first thing that popped up was an order between her *and an individual*. She was listed as the protected party in the order.

RP (7/7) 9 (emphasis supplied). It is a reasonable inference that the information received would not have just read "an individual," but would have named the individual. It is uncontested that the named individual was Paul Burks. As such, the trial court's finding is supported by substantial evidence and this claim should be rejected.

Further, an erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal. *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992) (*citing In re Bailey's Estate*, 178 Wash. 173, 176, 34 P.2d 448 (1934)). Here, the finding is not material to the conclusions of law.

The next following finding by the trial court was that "That Officer Faidley requested more information on Mr. Burks and was given his

height, weight, race and approximate age, a description that matched the passenger in the Honda." CP 95 (FOF VI). This finding is unchallenged and is thus a verity on appeal.

The corresponding conclusion of law to these two findings is that "Officer Faidley had reasonable suspicion to believe the crime of protection order violation was occurring when he returned to the car a second time based on the fact that the Defendant appeared to be trying to hide his face during the first contact and that he matched the description of the respondent in the protection order." CP 96 (COL II). Regardless of whether Faidley learned Burks's name in the initial "hit" or when he asked for more information, he had reasonable suspicion when he returned to the car, as will be discussed *infra*.

B. OFFICER FAIDLEY HAD A REASONABLE ARTICULABLE SUSPICION OF WRONGDOING, AND HE PROPERLY REQUESTED BURKS'S IDENTIFICATION TO DISPEL OR CONFIRM THAT SUSPICION.

If an officer believes a driver of a vehicle has committed a traffic offense, the officer may stop the vehicle and detain the driver in order to check the driver's license, vehicle registration, insurance, and outstanding warrants. *State v. Larson,* 93 Wn.2d 638, 641, 611 P.2d 711 (1980); *State v. Malone*, 136 Wn. App. 545, ¶ 28, 150 P.3d 130 (2007) (police may

detain a person for a seat belt infraction for a reasonable period of time to obtain information authorized by RCW 46.61.021(2)). RCW 46.61.021(2) provides:

> Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

Burks appears to concede that he initial stop of Bierlein's car for speeding was proper.

The scope of a traffic stop may be lawfully expanded if evidence of additional infractions or suspicious circumstances are observed after the stop. *State v. Chelly*, 94 Wn. App. 254, 970 P.2d 376, *review denied*, 138 Wn.2d 1009 (1999). When reviewing the propriety of an investigatory detention, the court must evaluate the totality of the circumstances presented to the investigating officer taking into account an officer's training and experience. *State v. Glover,* 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The reasonableness of an investigative detention is evaluated by considering the totality of the circumstances known to the officer at the detention's inception. *State v. Gatewood,* 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing *State v. Ladson,* 138 Wn.2d 343, 350, 979 P.2d 833 (1999)). In *State v. Rankin,* 151 Wn.2d 689, 697-699, 92 P.3d 202 (2004), the Washington Supreme Court held that where passengers in vehicles are

concerned, officers are not permitted to request identification for investigatory purposes unless there is independent basis to do so, which amounts to individualized articulable suspicion of criminal activity.

When Faidley first approached the vehicle he noticed the defendant raise his had to cover his face, which seemed suspicious. Next, when Faidley ran the information of the driver through his system he was provided with the physical description of the respondent to the no contact order which matched the physical attributes of the person that he had seen sitting in the passenger seat of the vehicle.

Burks primary complaint seems to be that Faidley acted improperly when he sought identifying information relating to Burks when he learned that Bierlein was a protected party. However, Burks was not yet "seized" at that point in time.

Under *State v. Brown*, 154 Wn.2d 787, 796, 117 P.3d 336 (2005) (*citing Rankin*, 151 Wn.2d at 697), the seizure did not occur when he pulled the vehicle over but when Faidley asked Burks his name for investigatory purposes. Further, "under article I, section 7, law enforcement officers are not permitted to request identification from a passenger for investigatory purposes unless there is an independent basis to support the request." *Rankin*, 151 Wn.2d at 699. The question, then is whether Faidley had a reasonable articulable suspicion to ask Burks for

identification *at the time he asked*. *Brown*, 154 Wn.2d at 798.

Here, the officer had observed Burks attempting to hides his face from him. The license check revealed that a person named Burks who met the passengers height/weight/race/age description was prohibited from having contact with Bierlein. Given these facts, Burks had a reasonable articulable suspicion that the passenger could be the respondent to the protection order. Faidley properly asked for identification to either confirm or dispel that suspicion.

Burks's response did nothing to dispel Faidley's suspicion. Instead, without prompting from the officer, Burks indicated that he is often confused with someone named Paul Burks, who just happened to be the respondent in the order that came back with the driver's information. Further, his response regarding his name and date of birth were "stuttered" and appeared to be coached by Bierlein. Rather than allaying his suspicion, Burks's conduct increased it.

If a police officer's initial articulable suspicion is further aroused during a *Terry*[1] stop, that officer may expand the scope of that lawful *Terry* stop as necessary. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). In view of the Burks's responses and the other information at hand, Faidley thus reasonably took brief further steps to confirm Burks's

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

identity. He contacted dispatch and learned that there was no person on record in Washington or Oregon matching the identity Burks had given. Faidley's suspicion was thus again not allayed, and he performed a search of his computer to obtain a photo of Burks. At that point, Faidley had probable cause to believe Burks was in violation of the protection order and arrested him.

The cases cited by Burks are easily distinguishable. In *State v. Tijerina*, 61 Wn. App. 626, 811 P.2d 241 (1991), the officer noted that the individual was of Hispanic descent, and that he had hotel soaps on the dashboard of his car. The officer asserted that in his experience, there were Hispanics in the area who dealt drugs and stayed in hotels. The court concluded that this "suspicion" was too generalized to justify a *Terry* detention. *Tijerina*, 61 Wn. App. at 629. Similarly, in State v. Cantrell, 70 Wn. App. 340, 344, 853 P.2d 479 (1993), *reversed on other grounds*, 124 Wn.2d 183 (1994), the Court found that the officer had *no* grounds for further investigation after a lawful traffic stop. Here, on the other hand, there was a person matching the respondent's description in the presence of the protected party. Each subsequent further inquiry raised greater suspicion until the final one created probable cause.

As a final note, the State would point out that Burks's "alternate scenario," Brief of Appellant at 14, is not well taken or helpful to the issue

presented. Contrary to his contention, police are permitted to converse and ask for identification from pedestrians even without an articulable suspicion of wrongdoing. *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998).

Here, the officer had a reasonable basis to ask for identification. The circumstances surrounding the response made it reasonable for him to confirm the response. Finally, when that confirmation failed, it was reasonable to further briefly detain Burks to obtain his photo. The trial court did not err and this claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Burks's conviction and sentence should be affirmed.

DATED March 12, 2015.

Respectfully submitted,
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KITSAP DISTRICT COURT

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