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Jul 06, 2016
Court of Appeals
Division III

Supreme Ct No. 93377.4 State of Washington

COA No. 31868-1-III

FILED

JUL 14 2016
WASHINGTON STATE
SUPREME COURT

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

WESLEY J. WEYAND, Petitioner

PETITION FOR REVIEW

Janet G. Gemberling
Attorney for Petitioner

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CONSTITUTIONAL PROVISIONS

Const. art. 1, § 7 2

COURT RULES

RAP 13.4(b) 2

A. IDENTITY OF PETITIONER

Wesley Weyand asks this court to accept review of the decision of Division Three of the Court of Appeals, designated in Part B of this petition, terminating review.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the opinion filed on June 7, 2016. A copy of the decision is in the Appendix at pages A-1 through A-2.

C. ISSUE PRESENTED FOR REVIEW

Does a person's visit to a known drug house at 2:30 in the morning constitute grounds for an investigative seizure if, upon leaving the house, the person walks quickly to a nearby car and looks up and down the street before getting in and driving away?

D. STATEMENT OF THE CASE

A police officer stopped Mr. Weyand after seeing him and a companion leave a known drug house at 2:30 in the morning, walk briskly to a parked car, look up and down the street, get into the car and drive away. The trial court found that Mr. Weyand's actions gave rise to an articulable suspicion that he was engaged in criminal activity and that the

fruits of the investigative stop were admissible at trial. (CP 72) Mr. Weyand appealed his ensuing conviction. The Court of Appeals affirmed the conviction, acknowledging:

We consider the State of Washington to have presented the slimmest of evidence needed to justify the stop of Wesley Weyand. For this reason, we do not wish the opinion to become precedential and we decline publishing it.

State v. Weyand, 2015 WL 411604 at 18, COA No. 31868-1-III.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court. RAP 13.4(b).

1. NEITHER WALKING BRISKLY NOR LOOKING AROUND IS SUSPICIOUS ACTIVITY SUFFICIENT TO SUPPORT THE STATE'S SEIZURE OF ANY PERSON LATE AT NIGHT IN A HIGH-CRIME AREA.

Conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Under article 1, § 7 of the Washington Constitution, warrantless seizures are per se unreasonable and the State bears the burden of demonstrating that the warrantless stop falls within one of the narrow exceptions to the general rule. *State v. Williams*, 102

Wn.2d 733, 736, 689 P.2d 1065 (1984). Exceptions authorizing seizure on less than probable cause are narrowly drawn and carefully circumscribed. *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982).

One such exception is a brief stop to investigate suspicious activity. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). “A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct.” *Doughty* at 62. In determining the presence of such a suspicion, the court considers the totality of the circumstances. *Id.* “A person’s presence in a high-crime area at a ‘late hour’ does not, by itself, give rise to a reasonable suspicion to detain that person.” *Id.*

Circumstances that appear suspicious to an officer do not support a reasonable suspicion of criminal activity unless the suspicion indicates, or at least suggests, criminal activity. *See State v. Fuentes*, 2015 WL 2145820 at 4, SC Nos. 90039-6, 90270-4 (May 7, 2015).

A suspect’s startled reaction on seeing the police does not suggest criminal behavior. *Id.* at 4, *citing State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008). The fact that a suspect is pale and shaking does not add to “circumstances that suggest criminal activity” unless the officer attributes this appearance to any illicit conduct. *Id.*

On the other hand, a suspect whose arrival at a known drug house occurs following numerous brief visits by other individuals, and who carries a shopping bag into the premises and returns shortly thereafter with the bag noticeably less full, may be reasonably suspected of specific criminal activity, namely delivery of a controlled substance. *State v. Fuentes*, 2015 WL 2145820 at 6-7.

Walking briskly and looking around is conduct which may or may not be associated with criminal activity, but it does not suggest any particular activity merely because it occurs late at night at premises with a known history of drug sales. Indeed, leaving the visited premises and walking immediately to a nearby vehicle without stopping is conduct tending to negate suspicions of drug loitering. *See State v. Fuentes*, 2015 WL 2145820 at 2.

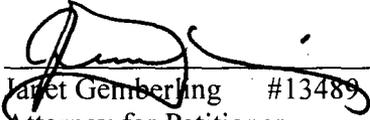
The Court of Appeals decision fails to identify any rational basis for inferring drug-related activity from a suspect's walking briskly to his vehicle while looking around. An officer's testimony that the behavior appeared "suspicious," without more, merely confirms that the alleged suspicion of criminal activity was just that, mere inarticulate suspicion. The opinion affirming a conviction that rests on the alleged reasonableness of such suspicion is contrary to this Court's decisions.

F. CONCLUSION

Review should be granted and the Court of Appeals decision should be reversed.

Dated this 6th day of July, 2016.

Respectfully submitted,


Janet Gemberling #13489
Attorney for Petitioner

APPENDIX A

FILED
JUNE 7, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III



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

STATE OF WASHINGTON,)	
)	No. 31868-1-III
Respondent,)	
)	
v.)	
)	
WESLEY JAMES WEYAND,)	UNPUBLISHED OPINION
)	
Appellant.)	

FEARING, C.J. — On January 27, 2015, this court, in an unreported decision, affirmed the trial court’s denial of Wesley Weyand’s motion to suppress. *State v. Weyand*, noted at 185 Wn. App. 1038 (2015). Weyand sought review from the state Supreme Court. The Supreme Court granted Weyand’s petition for review and remanded to this court for reconsideration in light of *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015). *State v. Weyand*, 184 Wn.2d 1001, 357 P.3d 663 (2015). After reconsideration, we again affirm the trial court.

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State v. Weyand

At the instruction of the state Supreme Court, we reconsidered our ruling in light of *State v. Fuentes*, 183 Wn.2d 149, 352 P.3d 152 (2015). *Fuentes* is a consolidation of two cases *State v. Fuentes* and *State v. Sandoz*. In each case, the high court resolved whether the totality of the circumstances provided law enforcement with reasonable, individualized suspicion of criminal activity to conduct a *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Neither case involves a suspect exiting, after a short visit, a house with the extensive drug history that 95 Cullum Street accrued, combined with the suspicious approach and entry to a car.

We once again hold that, based on the totality of the circumstances, Corporal Henry, with his experience and training as a law enforcement officer, had a reasonable, articulable suspicion that justified the stop. The circumstances included the long history of drug activity at 95 Cullum Street, the time of night, the twenty-minute stop at the house, the brisk walking, and the glances up and down the street. When the trial court finds the officer's observations and impressions credible, Washington case law directs us to consider Henry to have some expertise in determining whether criminal activity is afoot. Persuasive cases suggest a fast walk and peering up and down the street may be included in the calculus of reasonable suspicion.

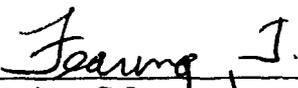
This appeal conforms closer to *State v. Fuentes* than *State v. Sandoz*. In *Fuentes*, the officer saw the suspect enter and exit a house, where a controlled buy had earlier occurred and where drugs had been found upon entry with a search warrant. In our

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appeal, a critical fact is the extensive drug activity in the home where Wesley Weyand entered. In *Fuentes*, the length of time the suspect spent inside the home was consistent with a drug purchase. In *Sandoz*, the officer knew four tenants in a six-unit apartment building had been convicted for drug-related activity and drug-related activity occurred in the area, but the record does not show any drug activity in the apartment from which the suspect exited. The officer did not know for how long the suspect had been inside the apartment.

Once again, we affirm the conviction of Wesley Weyand.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

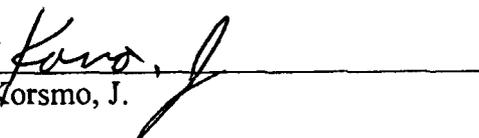


Fearing, C.J.

WE CONCUR:



Siddoway, J.



Korsmo, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	S. Ct. No. _____
Respondent,)	
vs.)	COA No. 31868-1-III
)	
WESLEY J. WEYAND,)	CERTIFICATE
)	OF MAILING
Petitioner.)	

I certify under penalty of perjury that on this day I served a copy of the Petition for Review in this matter by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Andrew K. Miller
prosecuting@co.benton.wa.us

I certify under penalty of perjury that on this day I served a copy of the Petition for Review in this matter by pre-paid first class mail addressed to:

Wesley J. Weyand
705 Eighth Street
Benton City, WA 99320

Signed at Spokane, Washington on July 6, 2016.


Janet Gemberling #13489
Attorney for Petitioner

JANET GEMBERLING, PS

July 06, 2016 - 3:16 PM

Transmittal Letter

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Division III
State of Washington

Document Uploaded: 318681-WeyandPRV2.pdf

Case Name: Wesley J. Weyand

Court of Appeals Case Number: 31868-1

Party Represented: Wesley J. Weyand

Is This a Personal Restraint Petition? Yes No

Trial Court County: Benton - Superior Court # 13-1-00035-4

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Comments:

No Comments were entered.

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