IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. NICHOLAS BRANDON VAN DUREN DOB: 09/08/1990, Appellant.	No. 76901-4-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

APPELWICK, C.J. — Van Duren appeals his conviction for residential burglary while on community custody. He claims that the trial court should have suppressed evidence discovered as a result of an investigatory detention. He also challenges the trial court's imposition of certain LFOs. We affirm the conviction but remand to the trial court to strike the challenged LFOs, consistent with recent changes in the law.

FACTS

On November 24, 2015, a burglary took place in a residential home in the area of the Glen Eagle development in Arlington. At 10:07 a.m., Arlington Police Officer Pendleton Cook responded to a report of burglary. Once at the scene, Officer Cook received information from a female witness—who he thought was a neighbor.[1] He did not obtain identifying information from her.

[1] Findings of fact 2 and 3 mistakenly identify Officer Brian DeWitt rather than Officer Cook as the person who contacted this witness.

The informant told Officer Cook that she "had seen a subject leaving the vicinity of the residence going" to a car and that "she could identify that subject upon seeing that person again." The informant showed Officer Cook a mobile phone picture of the subject and vehicle. The picture showed a male subject wearing a gray jacket and a black backpack. It also showed, according to Officer Cook, a red "2005-ish Toyota Corolla."[2] Based on this information, Officer Cook believed that a man involved in the burglary was somehow associated with the red car.

Prior to Officer Cook's arrival,[3] Arlington Police Officer Brian DeWitt investigated a suspicious red vehicle in Glen Eagle parking lot with a female driver (who was later identified as Lauren Kenney). Officer DeWitt obtained the red vehicle's license plate information but did not make an arrest. Officer Dewitt relayed the information that he had learned from his encounter with the red vehicle to Officer Cook.

Officer Cook described the parking lot area in which Officer Dewitt made contact with the red vehicle as being "basically across the street" from the residence under investigation. He also explained that the two locations are within sight distance of each other. According to Officer Cook, the informant's description

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[2] Officer Cook believed the vehicle was a 2005-ish Toyota Corolla because he owns and drives an identical vehicle. The picture, however, did not show the vehicle's license plate.

[3] It is unclear when Officer DeWitt had seen Kenney in relation to Officer Cook's arrival. However, it is clear that it had occurred before Officer Cook arrived at 10:07 a.m.

and picture of the red car "essentially matched" the make and model of the red vehicle that Officer DeWitt obtained prior to 10:07 a.m.

After talking with the informant, Office Cook went into the residence and "conducted a procedural search of the home because burglaries are dangerous and officer safety necessitates such a search." Officer Cook and his partners discovered a forced entry through a bay window in the rear of the home and "[f]ound evidence of the fact that the house had been likely burglarized." The officers then reviewed tactical operations and decided how to proceed.

Based upon his investigation to that point, Officer Cook believed the person "who left the house and got in the vehicle that drove away, was related to" the burglary. Officer Cook then departed the residence to "perform an area check for the vehicle, thinking that it might still be in the area." Less than a mile away from the residence, Officer Cook spotted a red vehicle matching the description of the informant and Officer Dewitt. At 10:56 a.m., Officer Cook conducted a traffic stop of the red vehicle in which Kenney was the driver and Nicolas Van Duren was the passenger.

Officer Cook explained that there "was nothing that I could see that would make me perform a traffic stop on that car, except for the fact that it matched the exact description and the plate was the same that we had for the suspicious call earlier in that day, and that it matched time, location, those things."

Officer Cook later described the basis of his associating the red car with the burglary:

> I had seen the picture that the witness had given me and that it matched the make and model, the color that Officer Dewitt had gone out with earlier in that day. In my understanding, too, how that car would be sitting there possibly watching that residence, and then to see a subject or hear that the witness had seen a subject leaving the vicinity of the residence to that car, sort of the connection of the two, I believed that I had enough reasonable suspicion to stop the car and [identify the occupants].

Pursuant to a subsequent search, police officers recovered some items from the red vehicle that the homeowner later identified as being stolen from his home.

The State charged Van Duren with residential burglary. Van Duren moved under CrR 3.6 to suppress all evidence stemming from the investigatory detention and to dismiss the charge against him. He argued that the State seized and later searched him without reasonable suspicion that he had committed a crime. The trial court denied the motion to suppress, ruling:

> Clearly the officer here, based on the corroboration, based upon the informant tip, had a reasonable suspicion. The informant, although the informant is anonymous for this case, clearly provided enough information to link the defendants with the red car, and so this was a valid stop.

Later, the trial court reduced its oral ruling on the suppression motion to writing and entered findings of fact and conclusions of law.[4] The trial court concluded, in relevant part, that

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[4] In his opening brief, Van Duren asserted that the trial court erred when it failed to (1) enter written findings of fact and conclusions of law pursuant to CrR 3.6(b) and (2) enter written findings of fact and conclusions of law setting forth its reasons for consecutive sentences pursuant to RCW 9.94A.535. However, with

2. Based on the corroboration and the information from the informant, the officer had reasonable suspicion.

3. Although the informant is anonymous in this case, there was clearly enough information provided to link the defendants with the red car with the burglary. Therefore, the stop was valid.

. . . .

5. Here, there is sufficient indicia that there was a reasonable suspicion.

The jury found Van Duren guilty of residential burglary. Van Duren later stipulated that he was on community custody at the time of the burglary. He now appeals.

DISCUSSION

Van Duren makes two arguments. First, he argues that the trial court erred in denying his CrR 3.6 motion to suppress evidence. He contends that the seizure was unlawful because the totality of the circumstances do not establish an individualized, reasonable suspicion that he or the car in which he was a passenger, was involved in any criminal wrongdoing. Second, Van Duren argues that, because he was indigent, the trial court's imposition of certain LFOs should be stricken, consistent State v. Ramirez, 191 Wn 2d 732, 426 P.3d 714 (2018).

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our permission, the trial court entered these written findings after Van Duren filed the instant appeal. Late entry of CrR 3.6 findings and conclusions does not require reversal unless it prejudices the defendant. State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996). The written findings and conclusions of law are consistent with the trial court's oral ruling. Because Van Duren does not suggest that the findings and conclusions were tailored to meet the issues presented in his appellate brief, he cannot show prejudice. State v. Tagas, 121 Wn. App. 872, 875, 90 P.3d 1088 (2004) (noting that "a conviction will not be reversed for tardy entry of findings unless the defendant can establish either that [he] was prejudiced by the delay or that the findings and conclusions were tailored to meet the issues presented in [his] appellant's brief."). We, therefore, do not address Van Duren's original assignments of error as to failure to enter written findings.

I. Suppression of Evidence

A. Standard of Review

We review findings of fact entered following a motion to suppress for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the stated premise. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings are considered verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). We review conclusions of law from an order governing the suppression of evidence de novo. State v. Duncan, 146 Wn2d 166, 171, 43 P.3d 513 (2002).

B. *Terry*[5] Stop

Generally, the Fourth Amendment to the United States Constitution protects against unlawful searches and seizures. Article I, section 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. A brief investigative detention, otherwise known as a Terry stop, is an exception to the warrant requirement. State v. Gatewood, 163 Wn 2d 534, 539, 182 P.3d 426 (2008). Although article I, section 7 provides greater protection than guaranteed by the Fourth Amendment, regarding the validity of a Terry stop, however, article I, section 7 generally tracks the Fourth Amendment. State v. Z.U.E., 183 Wn.2d 610, 617, 352 P.3d 796 (2015). Warrantless searches are per se unreasonable. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). The

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

State has the burden to demonstrate that a warrantless search falls within an exception to the rule. Id.

A Terry stop is permissible where the State shows "that the officer had a 'reasonable suspicion' that the detained person was, or was about to be, involved in a crime." Z.U.E., 183 Wn.2d at 617 (quoting State v Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)). The officer's reasonable suspicion must be grounded in specific and articulable facts. Id. at 617-18. The facts must demonstrate more than a generalized suspicion or hunch that the person detained has committed a crime. Id. at 618.

In analyzing the grounds for a Terry stop, trial courts are required to evaluate the totality of the circumstances available to the investigating officer. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). Furthermore, when an officer bases his or her suspicion on an informant's tip, the State must demonstrate that the tip bears some indicia of reliability. Z U.E , 183 Wn.2d at 618. Indicia of reliability is shown by either "(1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion." Id.

If the Terry stop is determined to be unlawful, "the subsequent search and fruits of that search are inadmissible." State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

Van Duren argues that tips from the anonymous informant did not show the requisite indicia of reliability to justify Officer Cook's alleged reasonable suspicion.

He also argues that the red vehicle's mere proximity to the burglarized home does not justify Officer Cook's Terry stop of the vehicle. We disagree on both grounds.

Here, Officer Cook responded to a burglary. Once on scene, an anonymous informant told him that she had seen a subject "walk from the vicinity of the residence" to a red car. She then showed him a picture of the subject and a portion of the red vehicle, which Officer Cook recognized as a 2005 Toyota Corolla. Officer Cook also received information from Officer Dewitt, who had previously made contact with a red vehicle in the vicinity of the burglarized home. At a minimum, the evidence in the record establishes that the Glen Eagle parking lot and the burglarized home are in sight distance of each other. The informant had seen, and had a picture of, a male subject walking toward a red vehicle.

Officer Cook and his team conducted a search of the home and found evidence that a burglary had been committed. Based on all that he knew at that point, Officer Cook believed that there was likely some connection between the individual who committed the burglary and the red vehicle that drove away. He also determined that there was likely a connection between the red vehicle depicted in the informant's mobile phone picture and the red vehicle Officer Dewitt contacted. He then conducted an area search for a red vehicle matching those descriptions.

Within a relatively close proximity, and within 50 minutes of responding to the burglary call, Officer Cook spotted a red vehicle that looked similar to the informant's picture and matched the license plate that Officer Dewitt obtained earlier. Given the totality of circumstances, Officer Cook had a reasonable

suspicion that the red vehicle in which Van Duren was a passenger was connected to the residential burglary under investigation. Officer Cook's Terry stop was valid.

Van Duren also claims that the circumstances of his case are similar to those in Z.U E. and argues that law enforcement did not have a reasonable suspicion to justify a Terry stop. We disagree.

In Z.U E , an unknown 911 caller reported that she saw a 17 year old girl hand a gun to a shirtless man, who then carried the gun through a park. 183 Wn.2d at 614. The caller gave a detailed description of the girl's appearance but not why she thought the girl was age 17. Id. Other callers also reported seeing a man with a gun in the park and that the man got into a white or gray two door car with about eight other people at an intersection by the park. Id at 613-14. Officers responded to investigate for a minor in possession of a firearm but could not find the man. Id. at 615. However, officers did see a girl—matching the description provided—get into the backseat of a gray four door car. Id. at 614-15. As part of their investigation, the officers approached the car and ordered the occupants out. Id. at 616. Z.U.E. was one of the occupants and was later arrested for obstruction of law enforcement and possession of marijuana. Id. Later, Z.U.E. challenged the officers' reasonable suspicion for the stop and the reliability of the caller's tip. Id

The Washington Supreme Court held that the 911 caller's tip was unreliable and did not create a sufficient basis to justify the Terry stop. Id. at 622-23. It reasoned that while the call was made by a citizen eyewitness, made contemporaneous to the events, came through an emergency 911 call, and the caller provided her name and contact information, the caller did not offer any

factual basis to support the allegation that the crime of a minor in possession of a firearm had been committed. Id. The officer could not ascertain how the caller knew the girl was a minor to evaluate the accuracy of the statement. Id. at 623. Nor did the officers make any corroborative observations showing the presence of criminal activity or that the caller's information was obtained in a reliable fashion. Id.

In contrast, here, the anonymous informant's tips here provided a factual basis to connect a male subject—walking from the vicinity of the burglarized residence—to a red 2005 Toyota Corolla. It was documented in a photograph. The suspicious nature of the red vehicle's presence was corroborated with what Officer Dewitt previously observed—a red 2005 Toyota Corolla parked in the vicinity of the burglarized residence. Unlike Z.U.E., where the 911 caller did not provide a factual basis for the alleged crime of a minor in possession of a firearm, Officer Dewitt's observations showed that the anonymous informant's tips possessed an indicia of reliability and a reasonable suspicion for the stop. Therefore, the trial court did not err in concluding that there was sufficient indicia that there was a reasonable suspicion to stop the red vehicle in which Van Duren was a passenger

II. Legal Financial Obligation Challenge

Van Duren filed a supplemental brief, based on recent changes in the law concerning legal financial obligations (LFOs), seeking to have the $200 criminal filing fee and the $100 DNA (deoxyribonucleic acid) sample collection fee stricken

from his judgment and sentence. At the time Van Duren was sentenced, these fees were mandatory.

In June 2018, amendments to former RCW 36.18.020(2)(h) took effect and prohibited trial courts from imposing the $200 criminal filing fee on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17. Also effective in June 2018, the DNA collection fee statute—RCW 43.43.7541—now mandates, in important part, that "[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction." LAWS OF 2018, ch. 269, § 18.

In September 2018, the Washington Supreme Court held that LFO statutory amendments apply prospectively and are applicable to cases pending on direct review and not final under RAP 12.7 when the amendments were enacted. Ramirez, 191 Wn.2d at 748-49. That includes Van Duren's case.

The record establishes that Van Duren was indigent at the time of sentencing. The State concedes that the $200 criminal filing fee should be stricken from his judgment and sentence. Accordingly, per Ramirez, we direct the trial court to strike the $200 criminal filing fee.

Van Duren argues that the $100 DNA collection fee was improper because he has previous felony convictions and he would necessarily have had his DNA sample collected pursuant to RCW 43.43.754(1)(a).[6] While the State concedes

[6] Under RCW 43.43.754: "(1) A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult or juvenile individual

that Van Duren has multiple prior convictions, it asks that this issue be remanded to the trial court to determine if his DNA has previously been collected. Based on Van Duren's lengthy criminal history, including five prior adult convictions and one juvenile adjudication,[7] we infer that Van Duren has previously provided a DNA sample following his prior felony convictions. We, therefore, direct the trial court to strike the $100 DNA collection fee.

CONCLUSION

We remand the judgment and sentence to strike the criminal filing fee and the DNA collection fee, but affirm the sentence in all other respects. The State did not request appellate costs, and we do not award costs pursuant to RAP 14.2.

WE CONCUR:

convicted of a felony, or" other crimes (or equivalent juvenile offenses) identified in subsection (1)(a)(i)-(x) and (1)(b).

[7] Between 2009 and 2017, Van Duren was convicted of second degree burglary, bail jumping, possession of a controlled substance, residential burglary. In 2007, as a juvenile, Van Duren was convicted of residential burglary.