

68274-1

68274-1

NO. 68274-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DERRON WIGGINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUES PRESENTED

An officer may conduct an investigatory stop based on a reasonable, articulable suspicion that a suspect is involved in criminal activity. Here, Wiggins was parked after midnight in a high crime area especially known for narcotics activity. The officer observed Wiggins moving frantically to shove a large amount of cash under his person, between his legs, and into the center console, observed Wiggins' open pant zipper, and observed a wooden stick that could be used as a weapon located in the console area. Based on the totality of the circumstances at the time of the stop, did the officer have a reasonable and articulable suspicion to believe Wiggins was involved in criminal activity?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Derron Wiggins was charged by information with a violation of the Uniform Controlled Substances Act- possession of cocaine. CP 1. The case proceeded to pre-trial motions after being assigned to trial.

In a CrR 3.6 motion, Wiggins argued that Officer Auderer's stop of Wiggins was unlawful. 1RP 48-56, 63-66.¹ The trial court denied Wiggins' motion to suppress. CP 12-14. After the CrR 3.6 ruling, the Court found the defendant guilty after he stipulated to the facts of the crime as described in the police reports and waived his right to a jury trial. CP 9-11, 23-26. The court imposed a standard-range sentence. CP 15-22.

2. SUBSTANTIVE FACTS.

On February 26, 2010, Seattle Police Officer Auderer was working by himself in a marked patrol vehicle conducting routine patrol. 1RP 7, 11. Shortly after midnight, Officer Auderer was patrolling the area near the intersection of 13th Avenue East and Jefferson Street in Seattle, Washington. 1RP 10, 11. Officer Auderer was familiar with this area and described it as a "hotbed of criminal activity," especially narcotics activity. 1RP 10.

He noticed a number of vehicles parked illegally along 13th Avenue East, an area designated as a "no stopping zone" between the hours of 10:00 P.M. to 5:00 A.M. 1RP 21, 24. Officer Auderer

¹ The verbatim report of proceedings consists of two volumes: 1RP (12/8/11) and 2RP (12/12/11).

parked his patrol car approximately 35 feet away from the illegally parked vehicles and shined his spotlight down the line of vehicles to illuminate the area. 1RP 22. Officer Auderer was planning to walk down the line of illegally parked vehicles to tell people to move their vehicles and ticket unoccupied vehicles. 1RP 36-37.

As Officer Auderer exited his vehicle, he saw that the vehicle closest to him was occupied by two people. 1RP 22. Officer Auderer approached the vehicle to tell the occupants to "move along." 1RP 23. As Officer Auderer approached the vehicle, he saw Wiggins frantically moving money on his lap, "stuffing money under his buttocks and in the center console, anywhere he could get it, frantically moving around." 1RP 24-25.

Officer Auderer shined his flashlight inside the vehicle where he could see Wiggins' arms moving very quickly. 1RP 25. Officer Auderer saw money spread across Wiggins' lap with some of it spilling onto the floor boards of the car. Id. Wiggins did not appear to be shuffling or arranging the money, rather he appeared to be shoving it out of sight between his legs, under his buttocks, and into the center console area. 1RP 24, 29-30. As Officer Auderer approached, the female passenger in the car turned to look at the officer with a surprised look. 1RP 25-26. Officer Auderer also

observed that the zipper on Wiggins' pants was open and undone. 1RP 30, 45.

As he walked up to the vehicle, Officer Auderer also observed a stick, "about the width of a walking stick" shoved in the console area between the passenger and driver seats. 1RP 30. Officer Auderer described the stick as a polished hard wood, but could not give an estimate of the length of the stick because it was shoved between the seats. Id.

At that time, Officer Auderer believed that he had stumbled upon narcotics and/or prostitution activity.² 1RP 31. Officer Auderer noted that the presence of the stick, which could be readily used as a weapon, was consistent with his experience of narcotics activity which he described as often occurring with weapons. Id. Officer Auderer ordered Wiggins to stop moving his hands and to place them on the steering wheel. Id.

At the stipulated trial, Wiggins agreed that two baggies of cocaine were recovered from between his buttocks during a strip search of his person. CP 25.

² Officer Auderer testified that he is trained in how to recognize both narcotics and prostitution activity. 1RP 7-10. He further described his frequent encounters with both types of illegal activity through his work as a police officer. Id.

C. ARGUMENT

OFFICER AUDERER HAD A REASONABLE,
ARTICULABLE SUSPICION THAT WIGGINS WAS
INVOLVED IN CRIMINAL ACTIVITY.

Wiggins argues that Officer Auderer's stop was unlawful because the officer did not have a reasonable, articulable suspicion that he was involved in criminal activity. Wiggins' argument should be rejected. Wiggins was parked after midnight in a high crime area especially known for narcotics activity. As Officer Auderer approached Wiggins, he observed Wiggins moving frantically to shove a large amount of cash under his person, between his legs, and into the center console. Wiggins' pant zipper was undone inside a parked car with a female passenger. In addition, Officer Auderer observed a wooden stick that could be used as a weapon located in the console area between Wiggins and the passenger and within reach of both parties. Considering the totality of the circumstances, Officer Auderer had a sufficient basis to stop Wiggins.

When reviewing the denial of a motion to suppress, appellate courts review findings of fact for substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249,

127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). A trial court's conclusions of law are reviewed de novo. Mendez, at 214.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, warrantless seizures are per se unreasonable, unless they fall under one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 62 L. Ed. 2d 235 (1979)). An investigatory stop is one such exception to the warrant requirement. Doughty, 170 Wn.2d at 61 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). An investigatory stop must be supported by reasonable suspicion of criminal activity based on objective, articulable facts. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing Terry, 392 U.S. at 21).

Because no single rule can be fashioned to meet every encounter between the police and citizens, courts evaluate the reasonableness of police action in light of the particular circumstances facing the officer. State v. Kennedy, 107 Wn.2d 1,

7-8, 726 P.2d 445 (1986). The reasonableness of the officer's suspicion is determined by the totality of the circumstances known at the inception of the stop. State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008), review denied, 166 Wn.2d 1016 (2009).

"[T]he totality of the circumstances...include[s] factors such as] the officer's training and experience, the location of the stop, and the conduct of the person detained"; as well as "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) (quoting State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984)).

Although innocuous explanations might exist, circumstances appearing innocuous to the average person may appear incriminating to a police officer, based on the officer's experience. State v. Samsel, 39 Wn. App. 564, 570, 694 P.2d 670 (1985). A "determination that reasonable suspicion exists... need not rule out the possibility of innocent conduct." United States v. Arvizu, 534 U.S. 266, 277, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); see also Kennedy, 107 Wn.2d at 6 (activity consistent with both criminal and noncriminal activity may justify a brief detention). As pointed out in State v. Marcum, 149 Wn. App. 894, 205 P.3d 969 (2009):

[T]he United States Supreme Court has specifically criticized viewing incriminating police observations, one by one, in a manner divorced from their context as a 'divide and conquer' approach that is inconsistent with the totality of the circumstances test.

Marcum, 149 Wn. App. at 907 (citing Arvizu, 534 U.S. at 274).

In light of the totality of the circumstances, Officer Auderer had a sufficient basis to stop Wiggins. Officer Auderer ordered Wiggins to stop moving his hands and place them on the steering wheel only after he observed Wiggins making furtive movements to shove and conceal money. Before executing the Terry stop, Officer Auderer saw Wiggins with his pant zipper undone seated in a car, at night, with a female passenger. Also before executing the stop, Officer Auderer saw a wooden stick located inside of the vehicle between the driver and passenger. All of these actions and observations took place shortly after midnight at a location known by Officer Auderer for high criminal and, specifically, narcotics activity. Based on his training and experience, Officer Auderer had articulable reasons to suspect Wiggins was involved in narcotics or prostitution activity and, thus, conducted a Terry stop of Wiggins.

Wiggins argues that the Terry stop occurred because Wiggins was parked illegally or because Wiggins was in a high crime area at night. Both of Wiggins' arguments are incorrect. Despite Wiggins being in a high crime area at night, Officer Auderer described that when he saw Wiggins' vehicle parked illegally with occupants, he intended to only contact the occupants to tell them to move their vehicles. 1RP 23, 47. It was only after Officer Auderer approached Wiggins and observed his suspicious behavior and property that Officer Auderer stopped Wiggins to investigate narcotics or prostitution activity.

Wiggins further argues that Wiggins' behavior of frantically stuffing money, alone, did not provide Officer Auderer with a lawful basis to stop Wiggins. Wiggins claims State v. Pressley is illustrative to support his claim. Pressley, 64 Wn. App. 591, 593-94, 825 P.2d 749 (1992). It is not. In Pressley,

"[t]he officer articulated a series of observations which, when seen in the light of his experience and training, establish a well founded suspicion based on objective fact that he was observing illegal drug activity."

Id. at 597.

Similar to Pressley, Officer Auderer did not conduct the stop of Wiggins based on a single observation of behavior, but based on the totality of the circumstances, incorporating his training, experience, and knowledge of the location of the stop.

Finally, Wiggins assigns error to one of the trial court's findings of fact. Wiggins contends that Officer Auderer did not observe the wooden stick until after he ordered Wiggins to stop moving his hands. Assignment of Error 1. Wiggins is incorrect and his assertion is not supported by the record. Officer Auderer described specifically how he observed the wooden stick as he walked up to Wiggins' vehicle. 1RP 30. Officer Auderer further explained that the presence of the wooden stick was part of his analysis in suspecting illegal activity and his concern for officer safety which prompted him to tell Wiggins to stop moving his hands. 1RP 31. Even if this finding is flawed, the flaw is minor and does not undermine the court's ultimate conclusion. For the reasons stated above, the trial court properly denied Wiggins' motion to suppress.

D. CONCLUSION

For all of the foregoing reasons, the State asks this court to affirm Wiggins' conviction.

DATED this 12 day of September, 2012.

Respectfully submitted,

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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 Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DERRON WIGGINS, Cause No. 68274-1-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.



Name Angela Blocki
Done in Seattle, Washington



Date 9/13/12

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