IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BARRY DEAN ELLIOTT, Appellant.	No. 38943-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Barry D. Elliott appeals his jury conviction for heroin possession. He argues that the trial court denied him a fair trial when it denied (1) his motion to suppress a hypodermic needle containing heroin residue, and (2) his oral motion to exclude the State's expert testimony related to positive heroin lab test results. We affirm.

FACTS

Background Facts[1]

At approximately 2:30 am on May 10, 2008, Longview Police Officer Christopher Trevino responded to a 911 dispatch call. The 911 caller, Cheryl Gunnells, stated that a male

[1] Because Elliott's first claim asserts that the trial court erred in denying his suppression motion, we refer to the factual record from the August 19, 2008 suppression hearing. Elliott's second claim (related to his motion to exclude expert testimony) is not impacted by this factual record.

subject armed with a handgun was attempting to break into a vehicle at the 800 block of Ninth Avenue in Longview, Washington. When Trevino arrived at this location approximately two minutes later, he parked a short distance away behind the McClelland Art Center and observed a male subject (later identified as Elliott) while he waited for backup. From this position, directly behind Elliott, he could see Elliott manipulating a vehicle's left rear door or window and he suspected that Elliott was attempting to get into the vehicle. Although Trevino did not actually see Elliott try to break a window or reach inside the vehicle,[2] given his observations, he was suspicious of Elliott's activity. Then, after about a minute or two, Elliott stopped what he was doing and walked away from the vehicle. He crossed the street on the east side of the road and walked down an alley towards some apartment buildings.

Because Officer Trevino was unsure if Elliott walked away after detecting his presence, he decided to follow him into the alley without backup. And though he momentarily lost sight of him, Trevino spotted Elliott kneeling down just off the alley in between two buildings. The area was dark, but from 25 to 30 feet away, Trevino could see Elliott manipulating some items with his hands. But because Elliott's back was to him, Trevino could not see what exactly Elliott was manipulating.[3] At this point, concerned for his safety given the dispatch report of an armed subject, Trevino drew his handgun. He then ordered Elliott to stand up, turn around, and show his hands. Elliott complied. Trevino placed Elliott in handcuffs and performed a pat-down search that revealed no weapons. Trevino testified that he did not arrest Elliott at this point because he had yet to observe Elliott commit a crime; he was merely "detaining him because [he] thought

[2] Trevino later learned that Elliott actually owned the vehicle involved.

[3] At a CrR 3.5 hearing, Elliott testified that he was bent down looking for his car keys.

[Elliott] might be armed." Report of Proceedings (RP) at 21.

Shortly after the pat-down search, on the ground about two feet from where Elliott had been kneeling down, Officer Trevino noticed a hypodermic needle that contained a dark liquid substance. Based on his training and experience with drug crimes, Trevino suspected the substance to be either heroin or methamphetamine.[4] Then, after Trevino collected the needle, he conducted a more thorough pat-down search. Trevino's search revealed a nylon bag (or a fanny pack) that contained three scales inside. Two of the scales contained a dark residue that Trevino believed to be heroin. At this point, Trevino apprised Elliott of his *Miranda*[5] rights. Aware of his rights, Elliott denied knowledge, ownership, or possession of the hypodermic needle, but admitted to possession of the scales. Elliott claimed to be getting rid of the scales for somebody else.

Next, Officer Trevino completed his arrest and transported the needle and the scales to the police department where he field tested the needle's liquid, which revealed the presence of heroin. Lab tests later confirmed the field test results and also confirmed that the residue from one of the scales was heroin residue.

Procedural Facts

On May 14, 2008, the State charged Elliott with one count of heroin possession without a valid prescription in violation of RCW 69.50.4013.[6] In an August 19, 2008 suppression hearing, Elliott moved to suppress the State's drug evidence, arguing that Officer Trevino's seizure

[4] Officer Trevino has extensive experience with narcotics and drug investigations. He spent three years in the street crimes unit where he conducted drug investigations almost exclusively.

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[6] Elliott was also charged with bail jumping by an amended information on December 17, 2008, which the trial court dismissed on January 15, 2009.

violated the Fourth Amendment of the federal constitution and article 1, section 7 of the state constitution. Specifically, he argued that Trevino illegally seized Elliott when he placed Elliott in full custodial arrest without sufficient objective facts indicating that Elliott was involved in criminal activity. The State countered that, under the circumstances, objective facts provided Trevino with reasonable suspicion of Elliott's criminal activity. The State argued that Trevino, therefore, took a reasonable safety precaution by placing Elliott in handcuffs during the weapons pat-down search. The trial court agreed with the State and orally denied Elliott's suppression motion. The trial court did not issue a written order.

On January 15, 2009, before Elliott's trial began, defense counsel orally moved to exclude the State's positive lab test results that confirmed that one of Elliott's scales contained heroin residue. Defense counsel argued that because the State only provided it with the test results one week before trial, the admission of these lab results would prejudice Elliott considering that he had not had time to independently test the residue or adequately prepare his cross-examination strategy for the State's expert witness. The State countered that the lab results would not prejudice Elliott because Elliott never requested the scales for testing and never disputed the substance involved when he stipulated that the needle contained heroin. The trial court agreed that the lab results would not prejudice Elliott and orally denied his motion to exclude this evidence. After the case proceeded to trial, a jury found Elliott guilty of heroin possession. Elliott appeals.

Analysis

On appeal, Elliott claims that the trial court erred by denying both his suppression motion and his motion to exclude the State's expert testimony with respect to the scale's positive heroin

test results. We disagree and affirm the trial court's resolution of these claims. Each claim is addressed in turn.

Trial Court's Denial of Elliott's Suppression Motion

Elliott first asserts that the trial court denied him the right to a fair trial when it denied his suppression motion. He argues that under the Fourth Amendment and article 1, section 7, Officer Trevino illegally seized his person and the needle because he did not have reasonable suspicion of criminal activity sufficient to justify a *Terry*[7] stop. Elliott does not challenge the suppression motion's factual record;[8] he challenges the trial court's legal conclusion that Trevino's *Terry* stop was constitutional.

We review a suppression motion's legal conclusions de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). The issue here turns on whether the evidence supports the trial court's conclusion that Officer Trevino had reasonable suspicion of criminal activity sufficient to justify his *Terry* stop. Here, the facts, which Elliott does not dispute, support the trial court's oral finding that Trevino had an objectively reasonable basis to suspect that Elliott was engaged in criminal car prowling.

As a general rule, a warrantless search is per se unreasonable under both the Fourth

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[7] *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[8] Elliott does, however, point out that the trial court never entered written findings of fact or conclusions of law following the August 19, 2008 suppression hearing as required by CrR 3.6(b). We have re-examined the existing record and conclude that the failure to enter a written finding was harmless in light of the fact that the court made a clear oral finding that is supported by the evidence. *See State v. Smith*, 68 Wn. App. 201, 208, 842 P.2d 494 (1992) (holding that a court's failure to enter written findings of fact and conclusions of law following a suppression hearing is harmless error if the court's oral opinion and the record of the hearing are "so clear and comprehensive that written findings would be a mere formality").

Amendment and article I, section 7 unless the search falls within one or more specific exceptions to the warrant requirement. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). One exception to the warrant requirement occurs in a situation where a police officer makes a brief investigatory *Terry* stop with reasonable suspicion, based on objective facts, that an individual is involved in criminal activity. *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). "[N]o single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer." *State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243, *cert. denied*, 423 U.S. 891 (1975).

And "'[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others,'" he may conduct a limited protective search for concealed weapons. *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972) (quoting *Terry*, 392 U.S. at 24); *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).[9] The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. *Adams*, 407 U.S. at 146 (citing *Terry*, 392 U.S. at 24). So long as the officer is entitled to make a *Terry* stop and has reason to believe that the suspect is armed and dangerous,

[9] For a permissible *Terry* stop under article I, section 7, the State must show that (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes. *Duncan*, 146 Wn.2d at 172. Here, our Fourth Amendment seizure analysis sufficiently covers these article I, section 7 factors in sufficient detail such that we need not focus on article 1, section 7 separately.

he may conduct a weapons search limited in scope to this protective purpose. *Adams*, 407 U.S. at 146 (citing *Terry*, 392 U.S. at 30).

Here, Elliott argues that neither Officer Trevino's observation of his activity next to the vehicle or the 911 informant's tip justifies Trevino's *Terry* stop, because Trevino did not verify the reliability of the 911 call or corroborate its tip before detaining him. We disagree.

An informant's tip can provide police a reasonable suspicion to make an investigatory stop as long as the tip is reliable. *Sieler*, 95 Wn.2d at 47. Generally, we may presume the reliability of a tip from a citizen informant, unless the only information available to the responding officer is the informant's name and phone number. *State v. Hopkins*, 128 Wn. App. 855, 863-64, 117 P.3d 377 (2005). Without more than an informant's name and phone number, an officer may not detain the individual based on the informant's tip alone. *Hopkins*, 128 Wn. App. at 863-64 (quoting *Sieler*, 95 Wn.2d at 48).[10] The officer must either have some corroborative observation which suggests the presence of criminal activity or some verification that the police obtained the informer's information in a reliable fashion. *Sieler*, 95 Wn.2d at 47 (quoting *Lesnick*, 84 Wn.2d at 944). Here, Trevino corroborated the informant's reported suspicious car prowling activity as required by *Sieler*.

When Officer Trevino responded to the 800 block of Ninth Avenue, within two or three minutes after receiving the 911 dispatch call, he saw Elliott next to a vehicle at the exact location of the informant's tip. From his position behind Elliott, it appeared to Trevino that Elliott was

[10] Elliott places significant reliance on *Hopkins* in his briefing, arguing that Officer Trevino improperly relied on the 911 call without verifying its reliability. But Elliott's reliance on *Hopkins* is misplaced because Trevino, unlike the officer in *Hopkins*, took steps to verify the reliability of the informant's reported suspicious activity before detaining Elliott. Therefore, *Hopkins* is properly distinguished on this point.

manipulating either the left rear door or the left rear window in an attempt to get into the vehicle. This observation not only corroborated the 911 caller's tip with respect to the suspicious car prowling activity reported, but it also corroborated the informant's tip with respect to (1) a male subject (2) next to a vehicle (3) at the exact location of the informant's tip (4) within two or three minutes of dispatch. Additionally, Elliott was the only subject in the area at 2:30 am and his actions in trying to get into the vehicle were much more suspicious than they would have been during the day time or if others had been present in the area. Elliott's conduct, therefore, is much more consistent with criminal activity than it is with innocent conduct. *See State v. Pressley*, 64 Wn. App. 591, 596, 825 P.2d 749 (1992) (noting that when an activity is more consistent with criminal than innocent conduct, the reasonableness is measured by probabilities not exactitudes). Thus, under the totality of the circumstances, the evidence supports the trial court's finding that Trevino had reasonable suspicion, based on objective facts, to suspect that Elliott was involved in criminal car prowling activity. *Terry*, 392 U.S. at 21-22; *Sieler*, 95 Wn.2d at 47.

Moreover, after independently observing Elliott and corroborating the information in Gunnells's 911 call, Officer Trevino had a reasonable basis to believe Gunnells's statement that Elliott possessed a handgun. And when Trevino spotted Elliott in the alley kneeling down manipulating some items with his hands, he had an articulable objective basis to be concerned for his own safety. Not only was it dark and very late, but Trevino could not see whether Elliott was manipulating a gun or any other potentially dangerous item that could be used as a weapon—like a hypodermic needle. And when an officer is justified in believing that the individual whose suspicious behavior is potentially armed and dangerous, he may conduct a limited protective

search for concealed weapons. *Adams*, 407 U.S. at 146 (quoting *Terry*, 392 U.S. at 24, 30). Accordingly, Trevino's brief detainment of Elliott for the purpose of a pat-down search did not violate either Elliott's Fourth Amendment or article 1, section 7 rights. *Adams*, 407 U.S. at 146 (quoting *Terry*, 392 U.S. at 24); *Duncan*, 146 Wn.2d at 172.

Trial Court's Admission of State's Crime lab Evidence

Next, Elliott argues that the trial court denied him the right to a fair trial when it denied his oral motion to exclude expert testimony related to his scales' positive heroin test results. He asserts that because he received these test results only one week before trial, he had no time to independently test the scales or prepare for cross-examination. We disagree.

We review a trial court's evidentiary rulings under an abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its ruling is manifestly unreasonable or based upon untenable grounds or reasons. *Powell*, 126 Wn.2d at 258. Given the facts before us here, the trial court did not abuse its discretion when it admitted the State's expert testimony related to the positive heroin test results.

On the morning of Elliott's trial, defense counsel argued that the admission of the State's lab test results would prejudice Elliott's ability to adequately investigate the evidence, perform independent testing, or prepare its defense with respect to cross-examining the State's expert witness. The State countered that the positive heroin residue test results would not prejudice Elliott because (1) defense counsel was well aware that the police had seized the scales for evidence during Elliott's arrest; (2) Trevino's police report indicated that the scales contained residue suspected to be heroin; (3) the lab just tested the syringe before the scales, which is not uncommon; and (4) defense counsel never requested the scales for independent testing. The

prosecutor stated, "I'm kind of befuddled by [this claim] since they have stipulated to the lab report that says the substance" in the needle is heroin. RP at 49. "I don't see how he is prejudiced by not being able to test" the scales because the substance was never at issue. RP at 49. Following this exchange, the trial court denied Elliott's motion after concluding that the admission of the lab tests would not prejudice Elliott.

On appeal, however, Elliott now asserts that the introduction of the State's expert testimony regarding the scales' positive heroin test denied him a fair trial because (1) "at no point had the state claimed that there was heroin on the scales," and (2) "the state's dilatory conduct in waiting eight months to test the scales denied the defendant the opportunity to perform its own analysis on the scales or to prepare to meet this claim." Br. of Appellant at 17. This argument is unpersuasive.

Even if the State committed a discovery violation with respect to its late lab test submission, a trial court has broad discretion to determine the appropriate sanction for a discovery violation. CrR 4.7(h)(7); *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998), *cert. denied*, 525 U.S. 1157 (1999). In general, when evidence improperly surprises a defendant, the appropriate remedy is a reasonable continuance or recess to allow the investigation of and response to the evidence. *See State v. Linden*, 89 Wn. App. 184, 195-96, 947 P.2d 1284 (1997), *review denied*, 136 Wn.2d 1018 (1998); *State v. Beard*, 39 Wn. App. 601, 609, 694 P.2d 692, *review denied*, 103 Wn.2d 1032 (1985). But here, Elliott did not request a continuance; instead, he moved to exclude the evidence. The exclusion of evidence, though, is an extraordinary sanction that a court should impose only if no other remedy would cure the potential prejudice. *Hutchinson*, 135 Wn.2d at 882-83. But here, there was no potential prejudice.

As the prosecution pointed out in the pretrial hearing, defense counsel was well aware that police seized the needle *and the three scales* and that the police report stated that the scales *contained heroin residue*. And while the police report is not in the appellate record, Officer Trevino's suppression hearing testimony is in the appellate record. At the suppression hearing, Trevino testified that two of the confiscated scales contained a substance that he suspected to be heroin. Trevino further testified that after he completed his arrest, he transported the needle and the scales to the police department. Elliott, therefore, was clearly aware that the police possessed the scales for evidentiary purposes from at least the August 19, 2008 suppression hearing nearly five months prior to Elliott's January 15, 2009 trial date and oral motion to exclude.

Defense counsel neither challenged the prosecution's factual assertions in the January 15, 2009 evidentiary hearing nor Officer Trevino's testimony in the August 19, 2008 suppression hearing (held nearly five months before trial). Defense counsel knew that Elliott's confiscated scales contained residue suspected to be heroin. Moreover, Elliott was on notice that the State planned to test the heroin results and call an expert to testify to those results. Page two of the State's amended information charging documents, filed May 14, 2008, listed a Washington State Crime Lab representative as a planned witness on its witness list. This record, therefore, belies Elliott's claim that he had no knowledge that the scales allegedly contained heroin residue or that the State planned to test the residue. And, under CrR 4.7(d),[11] Elliott could have requested the

[11] CrR 4.7(d) provides,

> Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant.

scales from the State crime lab for independent testing, but he did not do so.[12] The trial court did not abuse its discretion when it denied Elliott's motion to exclude the heroin test result evidence.

On this record, we hold that the trial court properly denied Elliott's suppression motion and properly admitted the State's expert's testimony related to the positive heroin lab tests. Accordingly, we affirm.

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

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

HUNT, J.

[12] On July 1, 2008, the trial court granted Elliott's omnibus motion to inspect physical or documentary evidence in the State's possession.