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

STATE OF WASHINGTON, Respondent, v. D.M. (d.o.b. 6/12/92), Appellant.	))))))))))	No. 66609-6-I UNPUBLISHED OPINION FILED: April 23, 2012

Ellington, J. — When determining whether to detain an individual for investigatory purposes, a police officer may rely on information supplied by an informant. Here, multiple citizens called the 911 operator to report an ongoing fight between two groups of young men. The callers also described circumstances suggesting that a man matching D.M.'s description may have displayed or threatened to display a gun during the altercation. Because the information was sufficiently reliable to support a reasonable suspicion that D.M. was involved in criminal activity, police officers properly stopped D.M. for further investigation, and the juvenile court did not err in denying D.M.'s motion to suppress the evidence seized after his detention. We therefore affirm the juvenile court adjudication finding D.M. guilty of one count of second degree unlawful possession of a firearm.

FACTS

The relevant facts are essentially undisputed. At about 3:00 p.m. on June 6,

2010, seven people called 911 to report a fight or altercation in the parking lot of a Renton Safeway. Based on the reports, dispatch advised Renton police officers that the fight involved two groups of young men and that one of the men was believed to have a gun. Dispatch described the man with the gun as a black male, medium build, in his late teens or early twenties, wearing a black jacket and blue jeans, and carrying a black drawstring or duffle style bag.

Officer Christopher DeSmet responded initially to a report that some of the suspects might have left in a car travelling on Rainier Avenue South. Dispatch then advised that one of the callers had seen the suspects, including the man believed to have the gun, headed eastbound on South Third Street. A short time later, DeSmet spotted D.M. and several other individuals walking near South Third Street and Shattuck Avenue. D.M. matched the broadcast description and was carrying a small black drawstring bag.

DeSmet ordered the group to stop and show their hands. Almost immediately, DeSmet noticed the black bag at D.M.'s feet. He then ordered the group to walk over to the nearby curb and sit down. DeSmet picked up the bag by the neck and moved it to where he stood behind the suspects. DeSmet described the bag as soft, with no structure.

Officer Shawn Tierney contacted Gloria Butler, an eyewitness, at the Renton Safeway. Butler, who had not called 911, described the bag and the gun she had seen during the altercation. When Tierney learned that Officer DeSmet had stopped a possible suspect, he drove Butler to the scene. Upon arrival, Butler became agitated and said, "[T]hat's the black bag, that's it."[1] Butler could not identify the person who

had been holding the bag.

Tierney got out of the patrol car to bring the bag closer for Butler to confirm her identification. Because the bag was lying flat on the ground, with the drawstring and top concealed, Tierney grabbed a side of the bag to pick it up and immediately felt the butt of a revolver and the trigger and trigger guard. In order to prevent a possible discharge, Tierney moved his hand to the butt of the gun and advised the other officers of the weapon.

At this point, D.M. volunteered, "[T]hey had nothing to do with it, just me. I just want you guys to know that none of these guys had anything to do with it."[2] Officers arrested D.M. and advised him of his Miranda[3] rights. D.M. waived his rights and admitted that he had bought the gun for $75 from someone on the street. Officers removed a .38 caliber Smith & Wesson revolver and six .38 caliber bullets from the black bag.

The State charged D.M. in juvenile court with one count of second degree unlawful possession of a firearm. D.M. moved to suppress the gun and his post-arrest statements, arguing, among other things, that the 911 tips were not reliable and that the circumstances therefore did not support a lawful investigatory detention.

The juvenile court denied the motion to suppress, concluding that the officers had a reasonable suspicion of criminal activity, justifying D.M.'s detention. The court also concluded that officers lawfully seized the gun under the "plain feel" exception

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[1] Report of Proceedings (RP) (Jan. 6, 2011) at 52

[2] Clerk's Papers at 42.

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

and, alternatively, in a lawful search incident to D.M.'s arrest. The court then found D.M. guilty as charged and imposed a mandatory minimum disposition of ten days on electronic home monitoring.

DISCUSSION

D.M. contends that the information provided to the 911 operators was too unreliable to support an investigatory detention because none of the callers reported seeing the gun. He argues that Officer DeSmet therefore lacked a reasonable suspicion that he was involved in criminal activity and that the juvenile court should have suppressed the evidence recovered after his unlawful seizure.

The juvenile court's findings of fact, entered after the suppression hearing, are undisputed.[4] The determination of whether there was an unlawful seizure is therefore a question of law that we review de novo.[5]

In accord with the Fourth Amendment and article I, section 7 of the Washington Constitution, police officers may conduct an investigatory stop if the officers have a reasonable and articulable suspicion that an individual is involved in criminal activity.[6] The necessary level of articulable suspicion is "a substantial possibility that criminal conduct has occurred or is about to occur."[7] We review the reasonableness of the

[4] D.M. has assigned error to the juvenile court's omission of certain facts from the findings. But because he has not provided any supporting argument or citation to relevant authority, the assignment of error is waived. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

[5] State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

[6] State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980); see also Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[7] State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

officer's suspicion by considering the totality of the circumstances known to the officer at the time of the stop.[8] The determination of reasonable suspicion "must be based on commonsense judgments and inferences about human behavior."[9]

An officer's reasonable suspicion may be based on an informant's tip if the information possesses sufficient "indicia of reliability."[10] In assessing indicia of reliability, courts consider factors such as (1) the reliability of the informant, (2) whether the information was obtained in a reliable manner, and whether officers corroborated any details of the informant's tip.[11]

D.M. contends that the information relayed to Officer DeSmet was insufficient to create a reasonable suspicion of criminal activity because none of the 911 callers reported seeing the alleged gun. But D.M.'s argument does not address all of the information that was communicated to the 911 operators.

Officer DeSmet acted on information that there had been some kind of a fight or altercation between two groups of young males in the Safeway parking lot and that one of the participants, who was specifically described, was believed to have a gun. That information was based on multiple calls to 911 from citizen informants, including store personnel and witnesses to the alleged incident. At least four of the callers identified themselves.[12] Although none of the callers had observed the gun, one of the named

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[8] State v. Rowe, 63 Wn. App. 750, 753, 822 P.2d 290 (1991).

[9] Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

[10] Sieler, 95 Wn.2d at 47 (quoting Adams v. Williams, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

[11] Id. (citing State v. Lesnick, 84 Wn.2d 940, 530 P.2d 243 (1975)).

[12] See State v. Wible, 113 Wn. App. 18, 24, 51 P.3d 830 (2002) (named citizen

callers described the suspect as walking towards another man and gesturing in a manner that "everybody thought he had a gun the way he was acting."[13] Another named caller, who provided a detailed description of the suspect, said that he was reaching into his duffel bag as another participant said, "Go ahead, pull it, pull it if you want to."[14] The caller said that a woman attempting to put her groceries in the car then yelled out, "Please don't pull it out; my baby's out here in the car."[15]

Viewed in their totality, the circumstances suggested that D.M. had been involved in an altercation between two groups of young men and that he displayed or threatened to display a gun. That information, supplied by citizen informants, contained sufficient indicia of reliability to support a reasonable suspicion that D.M. had been involved in assaultive behavior.

D.M.'s reliance on State v. Hopkins[16] and State v. Vandover[17] is misplaced. In both cases, the court held that a single report from an unknown informant about a suspect carrying or brandishing a gun contained insufficient information to justify the resulting investigatory detention. In each case, the officers were unaware of the circumstances surrounding the tip or the reliability of the caller and did not observe any criminal or suspicious behavior.[18]

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informants are presumptively reliable).

[13] RP (Jan. 14, 2011) at 30.

[14] Id. at 18.

[15] Id. at 19.

[16] 128 Wn. App. 855, 117 P.3d 377 (2005).

[17] 63 Wn. App. 754, 822 P.2d 784 (1992).

[18] See Hopkins, 128 Wn. App. at 864 (informant's allegation that a minor was "scratching his leg" with what appeared to be a gun failed to provide reasonable suspicion of criminal behavior); see also Vandover, 63 Wn. App. at 759-60 (anonymous

Here, unlike both Hopkins and Vandover, multiple eyewitnesses provided information while an incident was occurring. And that information directly linked the possession of a gun with potential criminal activity. The juvenile court did not err in concluding that Officer DeSmet had a reasonable suspicion justifying an investigatory detention.

Relying on recent case law, D.M. contends that even if Officer DeSmet properly detained D.M., the search of the bag incident to his arrest was unlawful because the bag was in the control of the police and he could not have accessed it.[19] The juvenile court concluded, in the alternative, that the seizure of the gun was proper as part of the search incident to an arrest. But because D.M. has not challenged the juvenile court's primary theory that the gun was lawfully seized under the "plain feel" exception to the warrant requirement, we need not address whether the gun was properly seized incident to the arrest.

Under the "plain touch" exception to the warrant requirement, a corollary to the "plain view" exception, an officer may seize contraband detected solely by means of touch while engaged in otherwise lawful conduct.[20] D.M. has not alleged that Officer Tierney's decision to pick up the bag to show it to an eyewitness was either unlawful or

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report of man in gold Maverick brandishing gun did not support investigatory stop of green Maverick).

[19] See State v. Byrd, 162 Wn. App. 612, 258 P.3d 686, rev. granted, 173 Wn.2d 1001 (2011) (warrantless search of defendant's purse while defendant was handcuffed in patrol car violated Fourth Amendment); see also Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

[20] See State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 1266 (1994); see also State v. Garvin, 166 Wn.2d 242, 248, 207 P.3d 1266 (2009).

unreasonable. Nor has he challenged the court's finding that upon grabbing the bag with one hand, Tierney "immediately recognized the handle, barrel and chamber of a revolver."[21] The evidence supports the court's determination that the gun was admissible under the "plain feel" exception.

The juvenile court did not err in denying D.M.'s motion to suppress. We affirm the disposition.

Ellington, J.

WE CONCUR:

Cox, J.

Becker, J.

[21] Clerk's Papers at 41.