

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66972-9-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
R.T., dob 07/22/95,	)	
	)	
Appellant.	)	FILED: September 4, 2012

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Schindler, J. — R.T. appeals his adjudication of guilt in juvenile court for unlawful possession of a firearm in the first degree. R.T. contends the trial court erred in denying his motion to suppress because the findings of fact do not support the determination that the stop and frisk was lawful. We affirm.

FACTS

On December 26, 2010, Tukwila Police Department Sergeant Mark Dunlap and Tukwila Police Department Officer Prasad were working at Southcenter Mall. At about 5:30 p.m. that evening, mall security broadcast that there was “a fight brewing at the opposite end of the mall.” Sergeant Dunlap testified that he heard “over the radio mall security commenting that the -- that they were now following the group . . . towards the north mall lot.” Sergeant Dunlap said that “[a]ll of a sudden [we] heard screaming over

the mall radio . . . and then we heard somebody utter, 'north Macy's lot.' ” Sergeant Dunlap and Officer Prasad ran towards the north parking lot.

As they reached the parking lot, Sergeant Dunlap and Officer Prasad saw a group of five to six male teenagers wearing dark clothing running east through the north parking lot toward ACME Bowling. ACME Bowling is located opposite the northeast corner of the mall. Lowe's Home Improvement is to the east of ACME Bowling. There is an alleyway that runs between ACME Bowling and Lowe's.

Sergeant Dunlap and Officer Prasad ran after the group. Sergeant Dunlap yelled, “ [P]olice, stop.’ ” When the officers were about 150 feet behind the group, five or six gunshots were fired. Sergeant Dunlap immediately broadcast over the police radio that “we had shots fired” and continued to run in the direction of the group. Sergeant Dunlap said that three of the members of the group ran behind a row of cars and he “noticed that there was another subject that was now sprinting across Andover Park West towards ACME Bowl.” Sergeant Dunlap said he lost sight of the other two members of the group and did not know “where they went.” Officer Prasad detained the three African American teenagers while Sergeant Dunlap chased the other teenager.

Sergeant Dunlap broadcast over the police radio that he was chasing an African American male wearing dark clothing and a long, black coat,

last seen running eastbound on the south side of the ACME Bowl building and disappeared somewhere in the parking lot and that I suspected that he might be hiding under a car. I think I reiterated that shots were fired . . . I did not know whether or not anyone had been hit.

At 5:37 p.m., Tukwila Police Department Officer Kraig Boyd heard over the

police radio that there was a fight at Southcenter Mall. A few seconds later, Sergeant Dunlap made a request to “ ‘send everyone.’ ” Officer Boyd activated his emergency lights, and began driving toward the mall. Sergeant Dunlap said “there were subjects running eastbound towards Andover Park West and then across Andover Park West into the ACME Bowling parking lot.” At 5:39 p.m., Officer Boyd heard Sergeant Dunlap say that shots had been fired.

Officer Boyd arrived at the ACME Bowling parking lot a few minutes later. Officer Boyd met with Sergeant Dunlap and Tukwila Police Department Sergeant Steve Gurr and Sergeant Devlin. The officers set up a perimeter and “direct[ed] incoming units to locations that are strategically advantageous . . . with the . . . field of sight as well as [to] cut off avenues of escape.”

Officer Boyd and Sergeant Devlin began checking under cars and searching the parking lot for “suspects or evidence.” Officer Boyd testified that he carried a semiautomatic rifle with him because “I was dealing with unknown distances, I was in the dark, . . . I was dealing with known armed suspects who had already fired -- fired their weapons.”

Officer Boyd and Sergeant Devlin walked east along the south side of ACME Bowling toward the alleyway. Officer Boyd testified that he and Sergeant Devlin did not go into the alleyway because “it was dark, we were back lit, . . . we were approaching armed people, . . . we were visible, and whoever was hiding in that area was not.” Officer Boyd noticed two male African American teenagers, later identified as R.T. and T.J., in the walkway next to the alleyway. Officer Boyd testified that R.T. and T.J.

“looked like they were trying to avoid making eye contact,” as if they were “trying to walk towards me without . . . acknowledging anything that was going on around them.”

Officer Boyd said he “couldn’t figure out where they emerged from.”

Officer Boyd pointed his rifle at R.T. and T.J.’s shoes and told them to get down on the ground. Officer Boyd shouted for assistance from the other police officers. The officers ran over and placed R.T. and T.J. in handcuffs.

Sergeant Gurr patted down R.T. and found a loaded semiautomatic handgun in the front left pocket of his pants. The gun had jammed because the bullet casing did not eject after the gun was fired.

The State charged R.T. in juvenile court with unlawful possession of a firearm in the first degree. The State alleged R.T. had previously been convicted of robbery in the second degree.

R.T. filed a motion to suppress the semiautomatic handgun. R.T. argued the officers lacked justification to conduct a stop and frisk under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The parties agreed to a combined motion to suppress and fact-finding hearing.

Officer Boyd, Sergeant Dunlap, and Sergeant Gurr testified. Officer Boyd testified that he carried the rifle and placed R.T. and T.J. in handcuffs for safety reasons. Officer Boyd said that the location and description of R.T. and T.J. was consistent with the information he had about the fleeing juveniles. Officer Boyd testified that he knew “there was a large group of African-American male youth, teenage looking, that was running from the [scene],” and that R.T. “matched the

description of the people that were running away from Sergeant Dunlap in general.”

[PROSECUTOR]: Why did you have [the rifle] with you on that evening?

[OFFICER BOYD]: Um, I -- well, because I -- I was dealing with unknown distances, I was in the dark, I wanted a -- I was dealing with known armed suspects who had already fired -- fired their weapons.

....  
[PROSECUTOR]: Do you always place subjects in handcuffs when first making contact with them?

[OFFICER BOYD]: No, not always, no.

[PROSECUTOR]: Why did you on this date?

[OFFICER BOYD]: Again, we're dealing with a lot of unknowns. You had the subjects with the guns that were outstanding, I had people coming from a dark alleyway, I'm assuming, or a place where there weren't very many people that should have been there, they matched the description of the people that were running away from Sergeant Dunlap in general, and they were armed -- I mean there was somebody from that group that was armed, they had fired rounds, and so I was detaining them with their hands to make sure that there was no -- there was nobody going to reach for a weapon or anything like that.

During the testimony of the officers, the court admitted Exhibits 2, 3, 4, and 5.

Exhibit 2 is a Google map of Southcenter Mall. The map shows the location of the parking lots at the mall, the Southcenter Parkway, Interstate 5 to the west, Tukwila Parkway and Interstate 405 to the north, Strander Boulevard to the south, and Andover Park West to the east. The map also shows the location of ACME Bowling. ACME Bowling is located to the east of Andover Park West. Exhibit 4 is a close-up satellite photograph of the ACME Bowling building, the Lowe's building, the alleyway between the buildings, the walkway next to the alleyway, and the parking lots next to the two buildings.

The prosecutor used two other exhibits, Exhibits 3 and 5, to show the location of

the chase, where the officers set up the perimeter, the location of the search in the parking lot, and where Officer Boyd stopped R.T. and T.J. Exhibit 3 is a Google map that shows a similar view of Southcenter Mall as State's Exhibit 2, but is in the form of a satellite photograph with the streets, street names, and landmark names superimposed on the photograph. Exhibit 5 is a close-up Google map of the block with ACME Bowling and Lowe's, Andover Park West to the west, Tukwila Parkway to the north, Baker Boulevard to the south, and Andover Park East to the east. R.T. did not testify for purposes of the CrR 3.6 hearing.<sup>1</sup>

The trial court denied the motion to suppress. The court entered "Written Findings of Fact and Conclusions of Law on CrR 3.6 Motion to Suppress Physical, Oral or Identification Evidence." The findings of fact state, in pertinent part:

The respondent was wearing blue and white sneakers, a black sweater, and jeans.

. . . .  
. . . Officer Prasad and Sergeant Dunlap of the Tukwila Police Department were working overtime at Southcenter Mall when they heard mall security officers requesting assistance for a fight in progress. They started to run towards where the reported fight in progress was taking place. As they approached several African-American males wearing dark clothing were running in the other opposite direction.

The officers followed the group of males running in the parking lot. At that time 5-6 gunshots were fired. The group of people who the officers were following scattered as shots were fired. . . . Officer Prasad and Sergeant Dunlap observed some of the suspects fleeing towards the area of ACME Bowl.

Officers set up a perimeter around the mall parking lot and surrounding commercial buildings in an attempt to keep fleeing suspects within the perimeter grid. Officer Boyd was helping secure a parking lot in an area where Officer Prasad and Sergeant Dunlap reported suspects fleeing. Officer Boyd was set up along a perimeter boundary located near the alleyway that runs between the Lowe's store and a commercial building. Officer Boyd and another officer started to walk down the alleyway, but due to the darkness and the circumstances of an armed

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<sup>1</sup> R.T. testified during the defense's case in chief.

suspect being reported in the area, the officers decided to wait for an approaching K9 unit to arrive before entering the alley.

Within fifteen minutes of the shooting, Officer Boyd was standing outside the alley when he saw movement in the alleyway and two teenage African-American males wearing dark clothing walking towards him. At that time, Officer Boyd knew that no single person had been identified as the shooter, but that those involved in the shooting and disturbance prior to the shooting matched the description of the respondent and the other person he was with.

Officer Boyd believed the two males were coming from an unusual location because they were within the contained grid area and coming from an area where businesses were already closed. Officer Boyd stopped the two males and ordered them on the ground. . . . While patting down the front of the respondent, Sergeant Gurr located a handgun.

At the conclusion of the fact-finding, the court found R.T. guilty of unlawful possession of a firearm in the first degree. R.T. appeals.

#### ANALYSIS

R.T. contends the trial court erred in denying his motion to suppress because Officer Boyd lacked reasonable suspicion justifying a Terry stop.

Subject to a few “ ‘jealously and carefully drawn’ exceptions,” warrantless searches and seizures violate the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002)<sup>2</sup> (quoting State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)).

A Terry stop is a well-established exception that allows the police to briefly stop and detain a person to investigate whether a crime has occurred. Terry, 392 U.S. at 27; State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). Although less intrusive than an arrest, a Terry stop is nevertheless a seizure. State v. Kennedy, 107 Wn.2d 1,

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<sup>2</sup> (Internal quotation marks and citation omitted.)

4, 726 P.2d 445 (1986).

A Terry stop is justified if the officer can point to “ ‘specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.’ ” Kennedy, 107 Wn.2d at 5 (quoting Terry, 392 U.S. at 21). A reasonable suspicion is the “substantial possibility that criminal conduct has occurred or is about to occur.” Kennedy, 107 Wn.2d at 6. Whether an officer’s suspicion is reasonable is determined by the totality of the circumstances known to the officer at the inception of the stop. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

“[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 Williams, 102 Wn.2d at 740).

The nature of the crime is also an important factor in examining the totality of the circumstances. State v. Randall, 73 Wn. App. 225, 229, 868 P.2d 207 (1994).

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 this court 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).

We review a trial court’s decision on a motion to suppress to determine whether the challenged findings are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. State v. O’Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We review conclusions of law de novo. Duncan, 146 Wn.2d at 171.<sup>3</sup>

R.T. asserts substantial evidence does not support the findings that “Officer Prasad and Sergeant Dunlap observed some of the suspects fleeing towards the area of ACME Bowl,” and that Officer Boyd “saw movement in the alleyway.” Because substantial evidence supports the findings, we disagree.

Sergeant Dunlap testified that he and Officer Prasad chased “about five or six” male teenagers who were running eastbound along the “main east-west driveway” in

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<sup>3</sup> The State concedes the finding that R.T. “was wearing blue and white sneakers, a black sweater, and jeans” and the finding that two individuals “wearing dark clothing” approached Officer Boyd, as well as the finding that R.T. was “coming from an area where businesses were already closed,” are not supported by the record.

the north mall lot near ACME Bowling. Sergeant Dunlap used the satellite photograph of Southcenter Mall to show the direction of flight. Officer Boyd testified that he heard Sergeant Dunlap say over the police radio that the group was running east toward ACME Bowling. Officer Boyd used the Google map of Southcenter Mall to show the location of the group.

[OFFICER BOYD]: [O]n the radio I heard that there were subjects -- there were shots fired, and then a few seconds later I heard that there were subjects running eastbound towards Andover Park West and then across Andover Park West into the ACME Bowling parking lot, towards the ACME Bowling.

....  
[PROSECUTOR]: Okay. And you said over dispatch that you heard that suspects were running eastbound. Can you point out [on the map] what you heard over dispatch of where they would -- where they were running? . . . I'm sorry, let me clarify. . . . The direction the subjects were running.

[OFFICER BOYD]: He was saying they were running eastbound towards ACME Bowl, so this way.

Officer Boyd testified that the alleyway between ACME Bowling and Lowe's was dark, and he was watching the area around the buildings and the alleyway. Officer Boyd marked State's Exhibit Number 4 to show where he was standing when he saw R.T. and T.J. standing on the walkway next to the alleyway.

[PROSECUTOR]: . . . So then you -- you positioned yourself where what has been marked as KB-2 is located on the map. What did you do when you were there?

[OFFICER BOYD]: Um, what I was trying to do is observe the area here, and over between Lowe's and these businesses here, and, you know, any -- anything else coming out of the alleyway here.

....  
[PROSECUTOR]: Did you encounter any pedestrians in that area?

[OFFICER BOYD]: Um, yes, I did, after a little bit.

[PROSECUTOR]: Where did you encounter pedestrians?

[OFFICER BOYD]: Right in this walkway right here, there were two . . . subjects coming up the walkway right there.

. . . .

[PROSECUTOR]: And so those were the first people you saw coming from the darker area?

[OFFICER BOYD]: Correct.

[PROSECUTOR]: Okay. And what did you do when you -- when you saw them?

[OFFICER BOYD]: . . . I didn't see where they came from, in other words, I didn't see them walking from in through here, I didn't -- couldn't figure out where they emerged from. I just kind of caught the movement out of the corner of my eye and turned and saw them standing there.

R.T. relies on United States v. Brown, 448 F.3d 239 (3d Cir. 2006), to assert substantial evidence does not support the finding that “those involved in the shooting and disturbance prior to the shooting matched the description of the respondent and the other person he was with.” But unlike the totality of the circumstances in this case, in Brown, the sole evidence to support the Terry stop was a description of the robbery suspects as “African-American males between 15 and 20 years of age, wearing dark, hooded sweatshirts and . . . one male was 5’8” and the other was 6’.” Brown, 448 F.3d at 247-48. The court held the stop was not justified because the other factors that “informed [the officer’s] decision to stop and frisk Brown” also did not support reasonable suspicion. Brown, 448 F.3d at 247, 252.

Here, unlike in Brown, the totality of the circumstances supports the findings and conclusion that the Terry stop was justified. Officer Boyd did not stop R.T. based solely on a general description. Officer Boyd knew there was a fight at Southcenter Mall, that a group of five or six African American male teenagers were running “eastbound towards ACME Bowl,” and that during the chase, five or six gunshots were fired.

Officer Boyd also knew that Officer Prasad detained three members of the group while Sergeant Dunlap chased an African American teenager in a long, dark coat, and the other African American teenagers had not been located.

After setting up the perimeter approximately 15 minutes after the shots were fired, Officer Boyd saw two African American teenagers, later identified as R.T. and T.J., near the dark alleyway beside the ACME Bowling building, less than 100 yards from where the shots were fired. R.T.'s appearance did not exclude him from the general description of the group of African American teenagers involved in the fight and shooting.

In the alternative, R.T. claims that even if the Terry stop was lawful, there was no objectively reasonable concern for officer safety to justify the pat-down search. A protective frisk is warranted if a “ ‘reasonable safety concern exists’ ” and there is an objectively reasonable belief, based on specific and articulable facts, that the suspect is armed and dangerous. State v. Harrington, 167 Wn.2d 656, 667, 222 P.3d 92 (2009) (quoting State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)).

An officer need not be convinced that an individual is in fact armed; it is sufficient “that a reasonably prudent person in the same circumstances would be warranted that their safety, or that of others, was in danger.” Harrington, 167 Wn.2d at 667-68; State v. Belieu, 112 Wn.2d 587, 602, 773 P.2d 46 (1989).

We must consider the entirety of the circumstances in determining the validity of a protective search. State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002). Importantly, an officer “may do far more if the suspected misconduct endangers life or

personal safety than if it does not.” State v. Rice, 59 Wn. App. 23, 27, 795 P.2d 739 (1990). The constitution does not require officers to wager their physical safety against the odds that a suspect is actually unarmed. Belieu, 112 Wn.2d at 602, n.3.

The testimony supports the determination that Officer Boyd had an objectively reasonable safety concern to justify the pat-down search. Officer Boyd testified, in pertinent part:

[W]e’re dealing with a lot of unknowns. You had the subjects with the guns that were outstanding, I had people coming from a dark alleyway, I’m assuming, or a place where there weren’t very many people that should have been there, they matched the description of the people that were running away from Sergeant Dunlap in general, and they were armed -- I mean there was somebody from that group that was armed, they had fired rounds.

The cases R.T. relies on, State v. Xiong, 164 Wn.2d 506, 191 P.3d 1278 (2008); State v. Setterstrom, 163 Wn.2d 621, 183 P.3d 1075 (2008); and State v. Galbert, 70 Wn. App. 721, 855 P.2d 310 (1993), are distinguishable. None of those cases involve gun shots fired by one or more fleeing individuals and a police pursuit in the dark. We conclude specific and articulable facts support a conclusion that the officers had an objectively reasonable belief that R.T. was armed and dangerous.

We affirm denial of the motion to suppress and the adjudication of guilt.

WE CONCUR:



