IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. S.V.P., D.O.B. 03/31/1993 Appellant.	))))))))))	 DIVISION ONE No. 67077-8-I UNPUBLISHED OPINION FILED: September 10, 2012

Dwyer, J. — S.V.P. appeals from his conviction in juvenile court of possession of forty grams or less of marijuana in violation of the Uniform Controlled Substances Act, chapter 69.50 RCW. He contends that his investigative detention was unlawful and that the evidence obtained as a consequence of the detention should have been suppressed. Because the officers' suspicions of criminal activity were reasonable and articulable in light of the totality of the circumstances, S.V.P.'s arguments are without merit. Accordingly, we affirm.

I

In February 2010, David Buck and Autumn Majack, both experienced Kent Police Department officers, were on bicycle patrol in downtown Kent. As

they rode by a gas station with a convenience store, the parking area of which the officers knew to be a high-crime location with a history of drug activity, the officers noticed a van illegally parked in a handicapped space.[1]

S.V.P. was seated in the front passenger seat of the van. As the officers watched, a person approached the passenger side of the van and exchanged something with S.V.P. through the window of the van. Neither officer was able to identify the particular items being exchanged. Nevertheless, believing that they had observed a drug transaction, the officers approached the van. It being after dark, Officer Buck told the occupants of the van to put their hands where he could see them.

S.V.P. did not raise his hands. Instead, he reached around the seat and between the door and the seat. The officers could not see into the back of the van. Despite Officer Buck's repeated commands to raise his hands, S.V.P. did not comply. Officer Buck then opened the passenger side door and removed S.V.P. from the van.

Officer Buck placed S.V.P. in handcuffs and patted him down to check for weapons. While conducting this frisk, Officer Buck saw a bag containing prescription pills protruding from S.V.P.'s pocket, in plain view. Officer Buck arrested S.V.P. for illegally possessing prescription drugs. Upon searching S.V.P. incident to this arrest, Officer Buck found seven or eight bags of

[1] Officers Buck and Majack typically engaged in five or six interactions per night related to drug or alcohol-related offenses at the location where the van was parked. Officer Buck frequently observed drug use both where the van was parked and in the alley adjacent to the parking lot.

marijuana in S.V.P.'s coat pocket.

S.V.P., who was 17 years old at the time of this incident, was thereafter charged by information in juvenile court with the crime of possession of 40 grams or less of marijuana, a violation of the Uniform Controlled Substances Act. At trial, S.V.P. denied that the exchange that the officers had observed was a drug transaction.[2] S.V.P. moved to suppress the drug evidence, arguing that both his seizure and the subsequent search had been unlawful.

The trial court disagreed, denying S.V.P.'s motions to suppress and to dismiss. It concluded that the officers' observation of the exchange conducted at a high-crime location gave rise to a reasonable suspicion justifying the officers in approaching and temporarily detaining S.V.P. in order to conduct a further investigation. After denying S.V.P.'s motion to dismiss the marijuana evidence, the trial court found him guilty as charged and imposed a standard-range sentence.

S.V.P. appeals.

II

S.V.P. contends that the trial court erred by concluding that his participation in a hand-to-hand exchange at a high-crime location "warranted further investigation" and justified an investigative detention. He further asserts that, because of this erroneous ruling, the trial court erred by denying his motion to suppress the evidence obtained during the investigative detention and after

[2] S.V.P. testified that the exchange that the officers witnessed involved a friend asking S.V.P. to buy him a cigar and attempting to give S.V.P. the money to do so.

his arrest. We disagree.

A trial court's conclusions of law in rulings on motions to suppress are reviewed de novo.[3] State v. Marcum, 149 Wn. App. 894, 902 n.3, 205 P.3d 969 (2009).

Warrantless seizures are prohibited by the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, unless falling within several narrow exceptions.[4] State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). One such exception is an investigative detention, or "Terry stop," during which a police officer may briefly detain a person for questioning without a warrant and on grounds amounting to less than probable cause. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Doughty, 170 Wn.2d at 61-62; State v. Kennedy, 107 Wn.2d 1, 4-6, 726 P.2d 445 (1986). An investigative detention, while falling short of an arrest, is nonetheless a seizure for the purposes of the Fourth Amendment and article I, section 7. Terry, 392 U.S. at 19; Kennedy, 107 Wn.2d at 4-5. Accordingly, a lawful investigative detention must be grounded upon a well-founded suspicion that criminal conduct has occurred or is about to occur. Terry, 392 U.S. at 21; Kennedy, 107 Wn.2d at 6. The reasonableness of an investigative detention is evaluated by considering the totality of the circumstances known to the officer at the detention's inception. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d

[3] S.V.P. does not challenge the trial court's findings of fact. As such, they are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

[4] S.V.P.'s appeal is based on article I, section 7 of the Washington Constitution, which states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

426 (2008) (citing State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999)). Accordingly, as a preliminary matter, we must determine when S.V.P. was seized.[5]

Our Supreme Court has held that, for article I, section 7 purposes, the existence of a seizure is determined by an objective evaluation of whether a reasonable person would have felt free to leave the scene or to decline an officer's request.[6] Specifically, the court has stated that

> [u]nder article I, section 7, a person is seized "'only when, by means of physical force or a show of authority,'" his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998) (quoting State v. Stroud, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981) and citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)), or (2) free to otherwise decline an officer's request and terminate the encounter, see Florida v. Bostick, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); [State v.] Thorn, 129 Wn.2d [347,] 352, 917 P.2d 108 [(1996),] [overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003)]. The standard is a "a [sic] purely *objective* one, looking to the actions of the law enforcement officer."' Young, 135 Wn.2d at 501 (emphasis added).

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[5] S.V.P. challenges the trial court's conclusion of law that the officers' observation of his participation in a hand-to-hand exchange, at a high-crime location, justified "the officers [in approaching] the van and temporarily [detaining] [S.V.P.] to conduct further investigation." Although the trial court determined that these circumstances "warranted further investigation" and that "it was reasonable under Terry v. Ohio for the officers to approach the van and temporarily detain [S.V.P.] to conduct further investigation," it also determined that S.V.P. was "detained *once* he was removed from the vehicle." (Emphasis added.)

[6] Under the Washington Constitution, seizures are interpreted slightly differently than they are under federal law. State v. Young, 135 Wn.2d 498, 509-10, 957 P.2d 681 (1998). The United States Supreme Court has held that a seizure for the purposes of the Fourth Amendment can occur only where the subject actually yields to an officer's physical force or show of authority. California v. Hodari D., 499 U.S. 621, 626-28, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). Washington courts reject the application of this test in article I, section 7 seizure analysis, instead applying a purely objective standard. Young, 135 Wn.2d at 510-11. Reported opinions applying the Fourth Amendment seizure analysis continue to be applicable to an article I, section 7 analysis, so long as they do not involve an application of the Hodari D. "subjectivity" test.

State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). "[T]he 'reasonable person' test presupposes an *innocent* person." Bostick, 501 U.S. at 438. The defendant "bears the burden of proving a seizure occurred in violation of article I, section 7." State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

Of course, not all interactions with police officers are seizures. Mendenhall, 446 U.S. at 553-54; Young, 135 Wn.2d at 511. Police officers may engage in social contact, request identification, ask to speak with a person, and request consent to search possessions without effecting a seizure. Bostick, 501 U.S. at 434-38; O'Neill, 148 Wn.2d at 577-78; Young, 135 Wn.2d at 511-12. However, "'[w]here an officer *commands* a person to halt or demands information from the person,'" such circumstances generally indicate that a seizure has occurred. O'Neill, 148 Wn.2d at 577 (quoting State v. Cormier, 100 Wn. App. 457, 460, 997 P.2d 950 (2000)).

Here, the record indicates that Officer Buck's initial statements directing S.V.P. to raise his hands were commands rather than requests.[7] Although social contact is not transformed into a seizure by virtue of an officer's request for a person to remove his hands from his pockets, State v. Nettles, 70 Wn. App. 706, 708-09, 855 P.2d 699 (1993), an officer seizes a suspect when the officer demands that hands be shown under circumstances in which a reasonable person would not feel free to decline, State v. Carney, 142 Wn. App. 197, 202,

[7] The trial court found that Officer Buck "ordered" S.V.P. to raise his hands where the officer could see them. At trial, in response to the deputy prosecuting attorney's inquiries as to his "verbal commands," Officer Buck testified in an affirmative manner and also said that S.V.P. was "not complying with [his] commands."

174 P.3d 142 (2007); State v. Richardson, 64 Wn. App. 693, 696-97, 825 P.2d 754 (1992). In this case, no reasonable person in S.V.P.'s situation would have felt free to ignore Officer Buck's commands. Furthermore, whether on the first command, or after repeated commands, at some point S.V.P. was clearly not free to decline, as evidenced by the fact that he was removed from the van due to his noncompliance. Accordingly, we conclude that S.V.P. was seized at some point before being removed from the vehicle.[8]

This seizure was readily supported by the circumstances of the encounter. An investigative detention is lawful when an officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21; accord State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). A suspicion is reasonable under article I, section 7 when it is based upon the "substantial possibility that criminal conduct has occurred or is about to occur." Kennedy, 107 Wn.2d at 6. Officers can make inferences based upon the "totality of the circumstances," drawing on their experience and specialized training. United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Presence in a high-crime area at a late hour does not, standing alone,

[8] If S.V.P. was seized only after Officer Buck made *repeated* requests that he show his hands, S.V.P.'s furtive hand movements would be further evidence supporting the officers' decision to seize S.V.P. See State v. Pressley, 64 Wn. App. 591, 597, 825 P.2d 749 (1992) (holding that suspicious behavior following an officer's approach can justify either an investigative detention or an expansion of the scope of the detention). See also Terry, 392 U.S. at 26-27 (holding that a suspect's behavior that puts an officer in reasonable fear that the suspect is armed and dangerous warrants not only an investigative detention, but also a "protective search" for weapons).

warrant an investigative detention. Doughty, 170 Wn.2d at 62. S.V.P. argues that the addition of the observed hand-to-hand exchange cannot justify a reasonable suspicion of criminal activity, as required for officers to lawfully conduct an investigative detention. We disagree.

S.V.P.'s reliance on State v. Pressley, 64 Wn. App. 591, 825 P.2d 749 (1992), to argue that the officers' observation of the exchange did not justify his detention is not well taken.[9] In Pressley, the suspect's observed behavior prior to the officer's approach—huddling with others who were examining an item in her hand—was deemed to be insufficient to justify a detention. 64 Wn. App. at 597. This is not such a case. Here, Officer Buck observed an actual hand-to-hand exchange. This exchange occurred through the window of a van, the interior of which was blocked from view.

In determining the reasonableness of an officer's suspicion, we consider that officers are allowed to draw from the "totality of the circumstances." See Arvizu, 534 U.S. at 272-75 (holding that Terry precludes a divide-and conquer analysis in which factors that by themselves are susceptible to innocent explanations are entitled to "no weight"). The totality of the circumstances

[9] S.V.P. also implies that the officers must have seen the actual transfer of drugs or money to justify the investigative detention. This argument is unavailing. If the officers had actually seen items appearing to be money or drugs, they would have had *probable cause for an arrest*. See, e.g., State v. Rodriguez-Torres, 77 Wn. App. 687, 693-94, 893 P.2d 650 (1995); State v. White, 76 Wn. App. 801, 803-05, 888 P.2d 169 (1995), aff'd, 129 Wn.2d 105, 915 P.2d 1099 (1996). In contrast, investigative detentions require a quantum of evidence less than probable cause. Terry, 392 U.S. at 27; Kennedy, 107 Wn.2d at 6. Because observations of actual drug transactions are sufficient grounds for probable cause, and probable cause is not necessary to conduct a lawful investigative detention, one cannot conclude that investigative detentions for drug offenses are necessarily unlawful where the officers are unable to identify the specific materials exchanged.

includes the detaining officer's experience and training, the location of the investigative detention, and the suspect's conduct. Glover, 116 Wn.2d at 514. Thus, it is inappropriate to evaluate the reasonableness of the officers' suspicions by viewing the hand-to-hand exchange in isolation. Rather, reasonableness must be understood in light of the following factors: the officers had specialized training and substantial experience conducting similar interactions; the officers made five to six stops in that parking lot each night for drug and alcohol offenses; the officers observed a hand-to-hand exchange through the window of the van; and the officers were unable to see inside the dark van. "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000); accord State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008). The circumstances in this case were consistent with a substantial possibility that criminal conduct had occurred.

Finally, S.V.P.'s contention that the circumstances underlying the officers' suspicions could also be consistent with innocent behavior does not change our analysis.[1] The federal and state constitutions do not require that innocent

[1] Although S.V.P. contends that the facts known to the officers must be more consistent with criminal than with innocent conduct to justify a lawful investigative detention, such a standard is instead consistent with definitions of probable cause. C.f., State v. Werth, 18 Wn. App. 530, 536, 571 P.2d 941 (1977) (stating that probable cause sufficient for a search warrant requires "facts and circumstances which, if believed, would lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found if a search takes place"). Modern case law establishes that an investigative detention is justified by a reasonable suspicion that a *substantial possibility* exists that the suspect is about to engage in or has already engaged in criminal activity. See, e.g., Marcum, 149 Wn. App. at 903; State v. Lee, 147 Wn. App. 912, 916, 199 P.3d 445 (2008); State v. Hart, 66 Wn. App. 1, 5, 830 P.2d 696 (1992).

persons never be detained; indeed, "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." Arvizu, 534 U.S. at 277; accord Wardlow, 528 U.S. at 126 (concluding that "Terry accepts the risk that officers may stop innocent people"); Kennedy, 107 Wn.2d at 6 (finding that brief detentions are justified under the Washington Constitution even when based on activity consistent with both criminal and non-criminal conduct). The recognition that innocent persons may be subjected to an investigative detention reflects a balancing of the public's interest in safety and crime prevention against an individual's interest in avoiding the minimal intrusion resulting from an investigative detention based on less than probable cause. See Terry, 392 U.S. at 22; State v. Mercer, 45 Wn. App. 769, 775, 727 P.2d 676 (1986).

For the foregoing reasons, the officers' investigative detention of S.V.P. was lawful. Accordingly, the trial court did not err by denying S.V.P.'s motions to suppress the challenged evidence and to dismiss the charge against him.

Affirmed.

Dwyer, J.

We concur:

Spearman, A.C.J.