IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RAYNE DEE WELLS, JR., Appellant.	No. 67259-2-I DIVISION ONE UNPUBLISHED OPINION FILED: November 26, 2012

Leach, C.J. — After vacation of his original conviction, Rayne Wells appeals his conviction of unlawful possession of a firearm on retrial, arguing that the court erred by denying his motion to suppress evidence and by refusing to impose an exceptional sentence. In his statement of additional grounds, Wells argues that the court erred by refusing to calculate credit for time served and by counting in his offender score calculation convictions that occurred after the date of the original conviction and sentence. Finding no error, we affirm.

Background

On September 20, 2000, students at Orcas High School informed their principal, Barbara Kline, that a man carrying a pistol was selling drugs on school grounds and attempted to break into a vehicle. Kline reported the incident to San Juan County Sheriff's Deputy Ray Clever. The next day, two students approached Clever while he was patrolling near the school and informed him that the suspect had returned to the area. As Clever and the students returned

to the high school, a pickup truck drove by, and one of the students said, “That’s them.”

Clever and another deputy stopped the truck. The driver consented to a search of the vehicle. The passenger, identified as Rayne Wells Jr. had in his possession a smoking pipe and 19 individually wrapped “baggies” of marijuana. The officers also located more marijuana buds and a loaded pistol in the truck.

The State charged Wells with possession of a controlled substance with intent to deliver, possessing a dangerous weapon on school grounds, and second degree unlawful possession of a firearm. Wells pleaded guilty to all charges. He served 12 months and one day for the crimes.

In 2011, the trial court allowed Wells to withdraw his guilty plea, finding that the State miscalculated his offender score and misinformed him of the sentencing consequences of the plea. The State dismissed the charges for possession with intent to deliver and possession of a dangerous weapon on school grounds and retried Wells only on second degree unlawful possession of a firearm. Wells agreed to a bench trial on a stipulated record. The court denied a motion to suppress the gun evidence and found Wells guilty.

At sentencing, Wells argued that he was entitled to a downward departure from the standard range sentence because he had already served an extra 15 months, due to the extra two points on his criminal history for the dismissed charges. The trial court declined to depart from the standard range but sentenced him to the low end of the standard range, 51 months, with credit

for time served. Wells appeals.

Standard of Review

We review the denial of a motion to suppress by determining whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law.[1] We review conclusions of law de novo.[2] We review a finding of fact as such, even if erroneously labeled a conclusion of law.[3] On appeal, we treat unchallenged findings of fact as verities.[4]

Analysis

Wells contends that the trial court should have excluded the evidence found in the truck because Deputy Clever did not have lawful authority to stop the truck. "Police may conduct an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity."[5] A reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur."[6] Specifically, "[t]he reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop."[7]

---

[1] State v. Ross, 106 Wn. App 876, 880, 26 P.3d 298 (2001). Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

[2] State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

[3] State v. Ross, 141 Wn.2d 304, 309-10, 4 P.3d 130 (2000).

[4] Acrey, 148 Wn.2d at 745.

[5] State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992).

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

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

This totality of the circumstances test allows the court and police officers to consider several factors when deciding the propriety of a Terry[8] stop based on an informant's tip. These factors include the nature of the crime, the officer's experience, and whether the officer's own observations corroborate information from the informant.[9] Moreover, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."[10]

Wells challenges the court's conclusion that Kline and the two students who spoke to Clever on September 21 were citizen informants and that Clever knew them to be reliable, trustworthy sources. He argues that the court should have considered the original group of students who spoke to Kline on September 20 to be the informants. He also asserts that because neither Kline nor Clever could recall exactly the identity of these students, the court should analyze the reliability of the students' report as we would that of an anonymous tipster or a paid police informant. We disagree.

Relying on State v. Sieler,[11] Wells argues that when a witness provides information to a third party who then notifies the police, the informant is the original witness, not the person making the report. Seiler is distinguishable. In that case, a parent waiting to pick his son up from school saw a drug sale occur

---

part on other grounds by State v. Bailey, 109 Wn. App. 1, 3, 34 P.3d 239 (2000).

[8] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[9] State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975).

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

[11] 95 Wn.2d 43, 47, 621 P.2d 1272 (1980).

in another car parked nearby.[12] He called school officials and reported the incident to the secretary who answered.[13] He also provided the license plate number of the suspect vehicle and his contact information in case anyone needed to follow up with him later.[14] At trial, both parties treated the parent as the informant.[15] The record did not reflect any information about his conversation with the school secretary or the secretary's call to the police, and neither party testified at trial.[16] With this lack of evidence in the record, the court chose to accept, without analysis, the parties' treatment of the issue and treated the parent as the informant whose reliability was to be determined.[17] Thus, the case does not answer the question whether Kline, a school principal, or the multiple students providing her with information should be considered the informant.

Wells next claims that the State must show that both the witness and the information must be reliable to justify a Terry stop. "An informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient 'indicia of reliability.'"[18] When deciding whether this "indicia of reliability" exists, we generally consider several factors, primarily (1) whether the informant is reliable, (2) whether the information was obtained in a reliable

[12] Sieler, 95 Wn.2d at 44.
[13] Sieler, 95 Wn.2d at 44.
[14] Sieler, 95 Wn.2d at 44-45.
[15] Sieler, 95 Wn.2d at 46.
[16] Sieler, 95 Wn.2d at 46.
[17] Sieler, 95 Wn.2d at 46.
[18] 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)).

fashion, and (3) whether the officers can corroborate any details of the informant's tip.[19] Relying upon several cases in which the court identified some evidence of the witness's reliability plus some other corroborative evidence to justify it, Wells concludes that some evidence of at least two and maybe all three factors must be met before a police officer may make an investigatory stop.

This argument ignores the fact that Washington courts have rejected applying a rigid framework for evaluating citizen informants' tips. As we have stated before, "a single, inflexible test would not work for Terry stops based on an informant's tip . . . . 'One simple rule will not cover every situation.'"[20]

Wells also argues that the court misapplied the "indicia of reliability" test by allowing the State to rely upon evidence addressing one of the listed factors. The trial court stated,

> As set forth in State v. Kennedy, 107 Wn.2d 1 (1986), there are three criteria, any one of which can satisfy the indicia [of] reliability test: (a) the circumstances suggest the informant is reliable; or (b) there is some corroborative observation to suggest the presence of criminal activity; or (c) the informant's information was obtained in a reliable manner.

The trial court did not misstate the rule because in the correct circumstances, evidence addressing a single factor may be sufficient. Here, the court considered the totality of the circumstances and found more than sufficient evidence to satisfy the indicia of reliability test. We agree.

Wells next claims that in order for a tip to be valid, the record must

---

[19] Sieler, 95 Wn.2d at 47; Lesnick, 84 Wn.2d at 944.

[20] State v. Lee, 147 Wn. App. 912, 919, 199 P.3d 445 (2008) (quoting Adams, 407 U.S. at 147).

establish a basis for the informant's personal knowledge. This rule, however, applies only to unknown informants[21] because police cannot gauge their reliability. While professional police informants and anonymous tipsters may have questionable backgrounds and reliability, a citizen informant is presumptively reliable.[22]

Further, personal knowledge to support the allegation is only one factor that the court may consider under the totality of the circumstances test. Wells claims that without at least one eyewitness account, the students were merely spreading rumors. Kline testified that she believed the students' reports for a variety of reasons, but largely she sensed from the students' behavior that they had personally seen the gun and drugs and were simply hesitant to admit it for fear of punishment. She also cited students' general reluctance to disclose information to a school official, the consistency among different students' stories, and that the students making the reports were individuals Kline expected might have knowledge of drug activity. We agree with the trial court's conclusion that, overall, Kline was a reliable informant who provided reliable information, and based on that information, Clever had a reasonable suspicion, based on clear and articulable facts, that Wells was engaged in criminal activity.

Wells also alleges that the court abused its discretion by imposing a standard range sentence without considering that the two dismissed charges had already been used to calculate his offender score for other convictions. The

[21] State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784 (1992).
[22] State v. Gaddy, 114 Wn. App. 702, 707, 60 P.3d 116 (2002).

sentencing court has the discretion to determine whether the circumstances warrant an exceptional sentence downward.[23] Generally, a defendant cannot appeal a sentence within the standard sentence range for the given offense.[24] However, where "a defendant has requested an exceptional sentence below the standard range, we may review the decision if the court either refused to exercise its discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence."[25]

The court considered Wells's request for an exceptional sentence at length.[26] It correctly determined that the law requires that any adult convictions occurring before the date of sentencing must be included in calculating the offender score. It then considered whether to impose a downward deviation and decided, in its discretion, not to do so.

In his statement of additional grounds, Wells alleges that the sentencing court erred by not determining how much credit Wells should receive for time already served on the conviction. The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, mandates credit for time served before sentencing if the confinement "was solely in regard to the offense for which the offender is being sentenced."[27] A sentencing court's failure to allow such credit violates due

---

[23] State v. Korum, 157 Wn.2d 614, 636-37, 141 P.3d 13 (2006).

[24] RCW 9.94A.585; State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000).

[25] Khanteechit, 101 Wn. App. at 138.

[26] The court took a recess to review the statutes and case law in more depth and consider both parties' arguments.

[27] RCW 9.94A.505(6); State v. Speaks, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992).

process, denies equal protection, and offends the prohibition against multiple punishments.[28]

Wells relies on State v. Phelan[29] to argue that the sentencing court had a duty to calculate his precise credit for time served and to note it on the judgment and sentence and that the court violated his due process rights by delegating this duty to the Department of Corrections. We disagree. The court agreed that Wells was entitled to credit for time served on the first conviction. The judgment and sentence clearly notes that the Department of Corrections would calculate the appropriate credit. Phelan does not require the court to make an exact calculation of time served credit at the sentencing hearing. The court did not err by delegating this calculation to the Department of Corrections to enforce the sentence.

Next, Wells contends that the court erred by including in his offender score two convictions that occurred in between his original conviction in 2000 and his retrial and conviction in 2011. He argues that ambiguity in the SRA about offender scoring after a conviction on retrial requires that we apply the rule of lenity to interpret the statute in his favor.

We review questions of statutory interpretation de novo.[30] If a statute is clear on its face, we derive its meaning from the language of the statute alone.[31] RCW 9.94A.525(1) states, "A prior conviction is a conviction which exists before

[28] State v. Cook, 37 Wn. App. 269, 271, 679 P.2d 413 (1984).
[29] 100 Wn.2d 508, 515, 671 P.2d 1212 (1983).
[30] State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003).
[31] State v. Jones, 168 Wn.2d 713, 722, 230 P.3d 576 (2010).

the date of sentencing for the offense for which the offender score is being computed." Wells argues that this language is ambiguous because it does not explicitly address cases where the defendant faces sentencing after a retrial. We disagree. The statute clearly states that the offender score should include "all prior convictions . . . existing at the time of that particular sentencing, without regard to when the underlying incidents occurred, the chronological relationship among the convictions, or the sentencing or resentencing chronology."[32] Thus, at the time of sentencing after retrial, the court correctly included all of Wells's prior convictions, including those occurring after the original conviction.

Wells also argues that increasing his sentence from 12 to 51 months because of the intervening convictions violates double jeopardy. The United States Supreme Court has held that the constitutional protection against double jeopardy does not pose an absolute bar to imposing a harsher sentence at retrial after a defendant has his original conviction set aside.[33]

However, Wells argues that because he did not appeal the sentence, he was entitled to finality. For this proposition, he relies on State v. Hardesty,[34] a case that notes exceptions to the rule apply when the State tries to increase a correct sentence or when the defendant defrauded the court into issuing the sentence. Wells would have us read Hardesty as describing the only situations

[32] State v. Shilling, 77 Wn. App. 166, 175, 889 P.2d 948 (1995).

[33] Burlington v. Missouri, 451 U.S. 430, 438, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981); Sattazahn v. Pennsylvania, 537 U.S. 101, 105, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003).

[34] 129 Wn.2d 303, 311, 915 P.2d 1080 (1996).

in which double jeopardy does not apply, but such a reading is clearly contrary to both federal and state precedent.

As the court noted in Hardesty, pending review is only one factor bearing on whether a defendant has a reasonable expectation of finality. Like a defendant with a pending appeal, when Wells decided to withdraw his guilty plea and potentially subject himself to a new trial, he had notice of the consequences of a subsequent conviction upon the calculation of his offender score and resultant standard range sentence under the SRA. This negates any expectation of finality in the first sentence. Double jeopardy does not apply.

Conclusion

Because Clever had reasonable suspicion to justify the initial stop, the court properly denied Wells's motion to suppress the evidence. The court did not abuse its discretion by refusing to consider an exceptional downward sentence.

The sentencing issues Wells raises in his statement of additional grounds have no merit. We affirm.

Leach, C.J.

WE CONCUR: