IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE V. WASHINGTON, Respondent, v. JAMES WILLIAM HOPKINS, Appellant.	No. 40347-1-II UNPUBLISHED OPINION

Penoyar, C.J. — James W. Hopkins appeals his conviction for possession of a controlled substance with intent to deliver. Hopkins argues that he was unlawfully seized in violation of article I, section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution. He claims the police officer who initially detained him lacked reasonable suspicion of criminal activity sufficient to initiate an investigative stop. He also contends the stop was an illegal seizure due to its length and character. We affirm.

FACTS

Around 11 a.m. on November 2, 2009, Hopkins approached William Curry, a Walgreens employee, in the store's parking lot and offered to sell him some pain pills. Curry declined and informed his manager of the attempted sale. They called the police, describing Hopkins and his movements after he left the Walgreens's parking lot. They described him as a man dressed in black clothes wearing a blue cap and sunglasses.

Port Angeles Police Officer John Nutter found Hopkins two blocks from Walgreens, wearing all black clothes, a blue cap, and dark sunglasses. Nutter parked his patrol car ten yards from Hopkins and approached him on foot, saying, "[H]ey, I need to talk to you for a second."

Report of Proceedings (Jan. 11, 2010) at 17. Nutter did not use his car's lights or siren as he drove up, and he did not approach Hopkins with his hand on his weapon. During the CrR 3.5 hearing, the State questioned Nutter about his conversation with Hopkins:

> Q: And what did you talk about?
>
> A: I explained to Mr. Hopkins that we'd taken a report of someone matching his description was selling pain pills and asked him had he been selling any pain pills?
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> His initial response to that was no and I followed that up with a follow up question of 'do you have any pills with you?' And Mr. Hopkins was honest with me and pulled out a pill bottle and said 'well, yeah, I have these' which lead us to further our discussion.
>
> I made some factual observations as I was speaking to Mr. Hopkins that morning that his legs were shaking.
>
> He is known based to me from previous law enforcement contacts to consume beer was normally the drug or liquor of choice whenever I've interacted with him before and I noticed that he was shaking as if having alcohol withdrawals and so I said 'you know what? I'll go out on a limb here and I'm going to take a guess that perhaps you're having some withdrawals from the lack of alcohol and were you maybe trying to sell those pills you just pulled out of your pocket to try and get some beer money?'
>
> And again, he was open and honest with me and said 'yeah, that's what I was trying to do.'
>
> Q: So how did he actually respond to that question?
>
> A: How did he respond? He agreed with me, he said 'yeah, that's what happened.'

RP (Jan. 11, 2010) at 17-18. Nutter testified that this part of the conversation occurred within the first 30 seconds of the stop.

At some point before Hopkins admitted his motivation for the attempted sale, Officer Brian Stamon and Corporal Robert Ensor arrived in separate patrol cars. Nutter and Hopkins

remained at the scene while Stamon returned to Walgreens to bring Curry to identify Hopkins. Nutter testified that he kept Hopkins at the scene by either a request or a directive, testifying that "I asked him just to hang out there" and "I probably said something to the effect that 'were [sic] going to hang out here for awhile until my officer comes and drives by.'" RP (Jan. 11, 2010) at 18, 19.

Apparently, while waiting for Curry to arrive to the scene, Nutter and Hopkins had a "social conversation" about several topics tangentially related to the alleged crime.[1] RP (Jan. 11, 2101) at 19. Curry identified Hopkins as the individual from the parking lot. Curry later estimated at trial that approximately 30 minutes had passed between the attempted sale in the Walgreens's parking lot and his visual identification of Hopkins. Nutter testified that it took Stamon 10 minutes to leave the scene, retrieve Curry, and return for the identification.

After Curry's identification, Nutter decided he had probable cause for arrest and he handcuffed Hopkins, taking him formally into custody. Nutter informed Hopkins of his *Miranda*[2] rights upon placing him under arrest. Nutter then took Hopkins to the Clallam County jail, where Nutter testified that Hopkins repeated his confession.

The State charged Hopkins with possession of a controlled substance with intent to deliver.[3] Hopkins moved to suppress all the incriminating statements he made to Nutter, arguing that these statements resulted from Nutter's custodial interrogation before Nutter gave him

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[1] Topics of this conversation included the cause of the bruising on Hopkins's face, the type of beer he hoped to procure, and the amount of money he had on his person.

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

[3] A violation of RCW 69.50.401(1).

Miranda warnings. The trial court orally ruled, after some ambivalence, that Nutter's detention of Hopkins was a valid *Terry*[4] stop and not a custodial arrest. The trial court also made an oral finding that Hopkins received and understood his *Miranda* rights, but chose not to exercise them by making the incriminating statements at the jail. The police never obtained a *Miranda* waiver from Hopkins.

The jury convicted Hopkins as charged. He appeals.

ANALYSIS

I. The Investigative Stop

Hopkins argues that the trial court erroneously determined that he was lawfully detained as part of an investigative stop. He contends that the police lacked reasonable suspicion to instigate the stop because (1) they did not know if Curry or the Walgreens manager was credible and (2) neither specifically reported the attempted sale of an illegal substance. Finally, he also alleges that the length of the investigative stop made it unreasonable. We conclude that the stop was a valid investigative stop.

We review whether a stop was supported by reasonable suspicion de novo. *State v. Lee*, 147 Wn. App. 912, 916, 199 P.3d 445 (2008), *review denied* 166 Wn.2d 1016, 210 P.3d 1019 (2009). This review evaluates the existence of reasonable suspicion using a totality of the circumstances test. *Lee*, 147 Wn. App. at 916-17. Investigative stops are analyzed in the same manner under article I, section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution for the questions of law at issue here. *See State v. Marcum*, 149 Wn. App. 894, 908 n.5, 205 P.3d 969 (2009).

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

A. reasonable suspicion

"[A] stop, although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment and article 1, section 7 of the Washington Constitution." *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Our analysis of the lawfulness of an investigative stop requires an analysis of two factors: whether the stop was justified at its inception, and whether the stop was reasonably related in scope to the circumstances justifying the stop. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). A legitimate initiation of an investigative stop requires that the police have reasonable suspicion stemming from "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Williams*, 102 Wn.2d at 739 (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). This reasonable suspicion is the "substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, 107 Wn.2d at 6 (citing 3 Wayne R. LaFave, Search & Seizure § 9.2, at 65 (1978)).

Hopkins argues that the police lacked reasonable suspicion to stop him because they did not evaluate the credibility of the Walgreens manager or Curry. Thus, he appears to argue, without citation to authority, for the application of the *Aguilar-Spinelli*[5] test, which requires police to determine an informant's reliability and basis of knowledge concerning the tip. We, however, do not apply the *Aguilar-Spinelli* test to determine whether or not police have reasonable suspicion for a stop. *Lee*, 147 Wn. App. at 916. Rather, we apply the totality of circumstances test. *Lee*, 147 Wn. App. at 916-17.

[5] *See Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

Under the totality of circumstances test, we examine numerous factors to determine if reasonable suspicion supported a stop. *Lee*, 147 Wn. App. at 917. Reasonable suspicion may come from a report of criminal activity from a citizen-witness to the crime. *Lee*, 147 Wn. App. at 918-19. Police officers may presume that such citizen-witness reports are credible. *Lee*, 147 Wn. App. at 919 (citing 2 Wayne R. LaFave, Search & Seizure: A treatise on the Fourth Amendment § 3.4(a), at 223 (3d. ed. 1996) and *United States v. Christmas*, 222 F.3d 141, 145 (4th Cir. 2000)); *see also State v. Wakeley*, 29 Wn. App. 238, 241, 628 P.2d 835 (1981).

Nutter had reasonable suspicion justifying his stop of Hopkins. Nutter had a report of suspected criminal activity from a citizen-witness to the attempted sale. Hopkins matched Curry's description of the suspect; he was wearing all black clothes, a blue cap, and dark sunglasses. Nutter located him two and a half blocks away from the Walgreens parking lot in the approximate direction that Curry and the manager had indicated that the suspect had traveled.

Hopkins also claims that Nutter lacked reasonable suspicion to believe that criminal conduct had occurred because Curry only told police the sale involved "pain pills," which could refer to any number of legal substances. Reasonable suspicion does not require police to eliminate the possibility of lawful conduct. *Marcum*, 149 Wn. App. at 907 (citing *United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002)). As the Washington State Supreme Court has noted, "When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention." *Kennedy*, 107 Wn.2d at 6; *accord Illinois v. Wardlow*, 528 U.S. 119, 126, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) ("In allowing such [investigative] detentions, *Terry* accepts the risk that officers may stop innocent people.").

Here, Nutter had a report about an attempted sale of pain pills in a store parking lot. Based on the type of "commonsense judgment and inferences about human behavior" that underlies determinations of reasonable suspicion, Nutter could reasonably have concluded that the suspect was not attempting to sell legitimate over-the-counter medication. *Marcum*, 149 Wn. App. at 907 (quoting *Wardlow*, 528 U.S. at 125). Even if Nutter knew the attempted sale could involve legitimate substances, the fact that a citizen worried enough about the incident that he phoned police could justify further investigation by the officer. Nutter thus possessed reasonable suspicion sufficient to stop Hopkins.

B. The Length of the Investigative Stop

Because an investigative stop is a seizure, it must be reasonable under both the Fourth Amendment to the Constitution and article I, section 7 of the Washington State Constitution. *Marcum*, 149 Wn. App. at 903 (quoting *Kennedy*, 107 Wn.2d at 4). The reasonableness of a stop is measured by weighing the intrusion into the individual's Fourth Amendment interests against the law enforcement interests used to justify the search; the length of a stop is an indicator of its reasonableness. *United States v. Place*, 462 U.S. 696, 709-10 n.10, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *Williams*, 102 Wn.2d at 739 (quoting *Place*, 462 U.S. at 709)). While the Supreme Court has expressed doubts about a bright-line standard for the reasonable duration of an investigative stop,[6] here the incriminating statements and evidence at issue resulted from the first minute of the stop, when Nutter asked Hopkins whether he was involved in the Walgreens incident and Hopkins admitted he was and produced the pills. We see no way to view this short detention as excessive. The continued detention after the initial minute resulted from Hopkins's

[6] *Place*, 462 U.S. at 709 n.10.

open admission to an offense. Thus, the seizure of the pill bottle was lawful.

II. Admission of Incriminating Statements

Hopkins challenges the admission of the statements he made in the alley admitting to possessing the bottle of pills and wanting to sell the pills to acquire money to buy alcohol; he also challenges the admission of his statement at the jail that he tried to sell the pills for beer money. He contends that he made these statements while in custody without first receiving *Miranda* warnings. We disagree.

We review conclusions of law concerning the suppression of evidence de novo. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004). Both the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution protect individuals from being compelled to serve as a witness against themselves; the two provisions are equivalent in scope and function. *State v. Templeton*, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002). To protect this right in the face of coercive police interrogations the Supreme Court requires that certain warnings be given to a person when subjected to (1) custodial (2) interrogation (3) by state agents. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citing *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). Absent police providing these warnings prior to custodial interrogation, statements made by a suspect undergoing custodial police interrogation are presumed involuntary and excluded from use in the State's case-in-chief at trial. *Dickerson v. United States*, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).

Both state and federal law have exempted investigative *Terry* stops from the *Miranda* requirement. *See, e.g.*, *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d

317 (1984) ("The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*."); *Heritage*, 152 Wn.2d at 218. This exception stems from the "non-coercive" investigative detentions. *Heritage*, 152 Wn.2d at 218 (citing *Berkemer*, 468 U.S. at 439). As part of these stops, police may ask a "moderate" number of questions relating to the investigative purpose of the stop without the detainee being considered in custody for *Miranda* purposes. *Heritage*, 152 Wn.2d at 218 (citing *Berkemer*, 468 U.S. at 439).

A. Statements in Alley

Hopkins contends that the statements he made to Nutter in the alley were the product of custodial interrogation. He argues that the facts of his detention closely parallel those in *State v. France*, 129 Wn. App. 907, 120 P.3d 654 (2005). In that case, officers detained a man suspected of violating a no-contact order and told him he would remain detained until the matter was resolved. *France*, 129 Wn. App. at 908-09. The court held that this transformed the stop into one of possibly unlimited detention, and thus the questioning constituted custodial interrogation. *France*, 129 Wn. App. at 909-11. This case is clearly distinguishable from *France*. The detention here was of a fixed, limited duration. Nutter informed Hopkins that the stop would only last long enough to allow the identification, providing a limit to its length that the detention at issue in *France* lacked. The admissions made in the alley were properly admitted. *Miranda* does not require the suppression of non-custodial statements. *See Miranda*, 384 U.S. at 436.

B. Statements at Jail

Hopkins repeated his confession post-*Miranda* in response to Nutter's questions at the jail. The trial court determined that Hopkins waived his right to remain silent, apparently accepting the State's theory that Hopkins waived this right by confessing. We need not resolve whether Hopkins waived his *Miranda* rights because, even if the trial court erroneously admitted Hopkins's incriminating statements made during the jailhouse interview, these statements were entirely duplicative of the statements that he made during the investigative stop, which the trial court properly admitted. "Error is harmless 'if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.'" *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (quoting *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). The jury would have reached the same conclusion even without the jailhouse comments; they merely repeated Hopkins's earlier admissions.

We affirm Hopkins's conviction.

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.

Penoyar, C.J.

We concur:

Hunt, J.

Johanson, J.