IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW PETER RASMUSSEN III, Appellant.	No. 42112-7-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — At a bench trial, Andrew P. Rasmussen III was found guilty of methamphetamine possession. Rasmussen appeals his conviction, arguing that he was illegally seized. We affirm.[1]

FACTS

At 3:26 am on July 24, 2010, Aberdeen police received a dispatch call about a burglary or prowler. Officers Chris Rathbun, George Kelley, and Sergeant Chastain responded in separate police vehicles.

[1] The State filed a motion on the merits. A commissioner of this court initially considered the motion under RAP 18.14 and then transferred it to a panel of judges.

Dispatch informed the officers that the suspect was last seen walking toward East Scott Street. Officer Rathbun drove his car[2] onto Scott Street and saw Rasmussen riding a bicycle about one block from the address that made the 911 call. The officers were familiar with Rasmussen because he had been arrested in the past. Rathbun parked beside Rasmussen and got out. He "engaged in a conversation with him about why he was down in that part of town, asked him where he was currently living, that kind of thing." Report of Proceedings (RP) (March 25, 2011) at 5. Sergeant Chastain parked behind Rathbun's vehicle and conducted a warrant check during this conversation. Rasmussen responded that he was just going for a ride on his bicycle and confirmed that he still lived "[a]cross the river." RP (March 25, 2011) at 5.

Officer Kelley left the scene to investigate the scene of the break-in. A resident of the house from which the 911 call had originated told Kelley that the suspect left on a bicycle. "Right after the initial contact," dispatch updated Officer Rathbun with Kelley's information that a suspect left on a bicycle. RP (March 25, 2011) at 6. The warrant check run by Sergeant Chastain then reported outstanding misdemeanor warrants for Rasmussen. Rathbun arrested Rasmussen based on the outstanding warrants. He conducted a search incident to arrest and located a substance in Rasmussen's coat pocket that field tested positive for methamphetamine.[3]

The trial court denied Rasmussen's request to find that his seizure or search violated his rights under the state and federal constitutions. It rejected his argument that the stop was

[2] Officer Kelley testified that although the police vehicles had flashing lights as they responded to the dispatch call, he did not recall the lights remaining on while the vehicles were stopped on Scott Street.

[3] Long after Rasmussen was taken into custody, a witness stated he saw someone running from the scene in a white T-shirt and shorts. Rasmussen was wearing a dark jacket and blue jeans.

pretextual. Specifically, the court concluded that the "contact with Rasmussen . . . was a valid investigatory stop given the nature of the call, the hour of the day, the officers' familiarity with Rasmussen, and the fact that he was riding a bicycle." Clerk's Papers at 5. It added that the warrant check did not unreasonably extend the initially valid stop.

Rasmussen waived his jury trial and preserved his illegal search and seizure issue for appeal, arguing that officers unlawfully seized him without reasonable suspicion when they stopped to speak with him on Scott Street. In response, the State filed a motion on the merits. The State argues that Rasmussen was not seized in the initial contact and, if seized, the officers had reasonable suspicion under the circumstances to speak with him and that the warrant check did not illegally extend the legal contact.

ANALYSIS

Article I, section 7 of the Washington Constitution protects against unwarranted intrusions into private affairs. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). This section provides greater protection against unwarranted searches and seizures than the Fourth Amendment to the United States Constitution.[4] *Harrington*, 167 Wn.2d at 663. Article I, section 7 requires a two-part analysis: (1) whether state action constituted a disturbance of private affairs and (2) whether the intrusion was justified by authority of law. *State v. Buelna Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (quoting *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008)).

In reviewing a suppression motion, we independently evaluate the evidence to determine

[4] An analysis the merits of Rasmussen's article I, section 7 claims under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), is not required. *See State v. Snapp*, 174 Wn.2d 177, 194 n.9, 275 P.3d 289 (2012).

whether substantial evidence supports factual findings and whether the findings support the legal conclusions. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review de novo the trial court's conclusions of law. *Bliss*, 153 Wn. App. at 203.

Not every encounter between a police officer and a private individual constitutes an official intrusion triggering constitutional protections. *United States v. Mendenhall*, 446 U.S. 544, 551-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). For example, as part of their "community caretaking" function, police officers must be able to approach citizens and permissively inquire into whether they will answer questions. *State v. Mote*, 129 Wn. App. 276, 282, 120 P.3d 596 (2005) (citing *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993), *review denied*, 123 Wn.2d 1010 (1994)).

Conversely, a seizure occurs under article I, section 7 when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This determination is made by objectively examining the actions of the law enforcement officer. *Rankin*, 151 Wn.2d at 695.

> Examples of circumstances that might indicate an individual is restrained are
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> "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting *Mendenhall*, 446 U.S. at 554-

55). Absent such circumstances, inoffensive contact between the police and a private citizen cannot, as a matter of law, amount to a seizure of that person. *Mote*, 129 Wn. App. at 283.

In cases in which a seizure occurs, *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), permits a warrantless investigatory seizure based on "a well-founded suspicion that the defendant engaged in criminal conduct." *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (citing *Terry*, 392 U.S. at 21). To justify a seizure under *Terry*, a police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the seizure. *Doughty*, 170 Wn.2d at 62 (quoting *Terry*, 392 U.S. at 21).

During a *Terry* stop, an officer may "'briefly detain and question a person reasonably suspected of criminal activity.'" *State v. Watkins*, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) (quoting *State v. Rice*, 59 Wn. App. 23, 26, 795 P.2d 739 (1990)). When reviewing the justification for a *Terry* stop, we evaluate the totality of the circumstances presented to the officer, taking into account the officer's training and experience and considering the location of the stop and the conduct of the person detained. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Rasmussen argues that the initial contact he had with officers was a seizure because there was more than one officer and they engaged in a "display of authority." Br. of Appellant at 6. Although the State in its argument to the trial court and in its motion on the merits suggests that the officers did not seize Rasmussen when they initially approached him, the trial court rejected this position. RP (Apr. 19, 2011) at 36 ("it might have been a social contact"); Motion at 3 (stating that not every contact between an officer and an individual amounts to a seizure). Rather

the trial court ruled that the officers' contact with Rasmussen was a valid investigatory stop.

Officers initially approached Rasmussen while investigating a 911 call. Accordingly, substantial evidence supports the trial court's legal conclusion that Rasmussen's contact with the officers at 3:26 am was an investigatory detention, rather than a social contact or contact under the officers' community caretaking function. The State, therefore, bears the burden of demonstrating that the warrantless detention was permitted under *Terry* or another exception to the warrant requirement. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Here, the trial court relied on several factors to reject Rasmussen's pretext argument and conclude that the officers had reasonable suspicion to investigate Rasmussen: the basis of the 911 call, the time of day, past law enforcement contacts with Rasmussen, and the fact that Rasmussen was on a bicycle. Rasmussen argues that the officers lacked a legitimate reason to stop him. He primarily argues that because Rasmussen was stopped on a bicycle less than one block from the scene of the 911 call, and the officers "agreed that Mr. Rasmussen was closer to the scene than would be expected for a person departing by bike, given the amount of time elapsed since the 911 call," the officers lacked reasonable suspicion to stop him. Br. of Appellant at 7; *see also* RP (Apr. 19, 2011) at 38 ("he believes . . . they were just stopping him because they knew of his record, . . . he just happened to be standing in front of a place that had been burglarized minutes before").

Substantial evidence supports the trial court's legal conclusion that the officers conducted a legitimate investigatory stop. The court correctly examined whether the officers, based on experience, location, and the conduct of Rasmussen, possessed sufficient reasonable suspicion to stop him to investigate the recently-reported burglary. *See also Glover*, 116 Wn.2d at 514. The

mere fact that Rasmussen was riding a bicycle arguably too close to the scene of the 911 call does not tip the "totality of the circumstances" in favor of Rasmussen. The investigating officers were not required to assume that a suspect's departure from a crime scene proceeded in a linear fashion. *State v. Mercer*, 45 Wn. App. 769, 774, 727 P.2d 676 (1986) (stating that "'reasonableness is measured not by exactitudes, but by probabilities'" (quoting *State v. Samsel*, 39 Wn. App. 564, 571, 694 P.2d 670 (1985))).

Because the conversation between the officers and Rasmussen constituted a legitimate *Terry* investigatory stop, the officers could conduct a warrant check during the legal interaction so long as it did not unreasonably extend the contact. *State v. Villarreal*, 97 Wn. App. 636, 645, 984 P.2d 1064 (1999), *review denied*, 140 Wn.2d 1008 (2000). Rasmussen does not argue on appeal that the warrant check illegally extended the initial contact. And as set out by the trial court, there is no evidence that the check extended the conversation.

In addition, additional facts developed immediately after the initial contact to justify continued investigation of Rasmussen. *State v. Reid*, 98 Wn. App. 152, 158, 988 P.2d 1038 (1999) (stating that a stop may be prolonged as required by the circumstances). As Officer Rathbun started to speak to Rasmussen about his presence and Sergeant Chastain commenced a warrant check, they received an update that the suspect left the premises on a bicycle. Thus, the officers had specific facts to continue to detain Rasmussen: he was found near the address of a reported crime at 3:30 am, riding away from the address, with no other persons present in the area; he had no explanation for the officers as to why he was riding his bicycle some distance from where he lived in the middle of the night; and the victim reported the suspect left on a bicycle during the officers' conversation with Rasmussen.

Because the officers did not violate Rasmussen's rights to be free from illegal search and seizure when they stopped him during the investigation of a 911 call, we affirm Rasmussen'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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, P.J.

HUNT, J.