IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA WILLIAM REISMAN, Appellant.	No. 42888-1-II UNPUBLISHED OPINION

Johanson, A.C.J. — Joshua Reisman appeals his convictions for possession of a controlled substance. He argues that the trial court erred in denying his motion to suppress because the state trooper who detained Reisman for committing an infraction impermissibly extended the detention when he questioned Reisman about drug possession. We agree and reverse.[1]

FACTS

On May 26, 2011 at 1:00 p.m., Washington State Trooper Nathan Hovinghoff observed Joshua Reisman walking on the shoulder of SR 12 at milepost 110. Trooper Hovinghoff was driving westbound on SR 12 and Reisman was walking eastbound on the right-hand side of the road with his back to traffic. The highway does not have a sidewalk.

State law prohibits walking with the flow of traffic. In addition, the trooper recognized

[1] A commissioner of this court initially considered this appeal as a motion on the merits under RAP 18.14 and then referred it to a panel of judges.

that Reisman was unsafe walking without being able to see oncoming vehicles. He decided to "stop and talk to [Reisman] about walking wrong on the highway." Report of Proceedings (RP) at 16.[2] *See also* RCW 46.61.250 ("Pedestrians on Roadways").

Trooper Hovinghoff activated his emergency lights. He turned and parked behind Reisman and exited his car. He met Reisman near the front of the vehicle and asked him for identification.

Reisman stated that he did not have any identification. He identified himself as Joshua Reisman and provided his date of birth. Trooper Hovinghoff informed Reisman "the reason I stopped [you] was because [you were] walking with [your] back to traffic and [you] need[] to walk facing traffic." RP at 9.

The trooper observed that Reisman had constricted pupils and that he "spoke with kind of a very mush mouth . . . like his mouth and tongue were swollen." RP at 9-10. He was also "very slow in his movements, along with his thought process." RP at 10. Trooper Hovinghoff, however, did not believe that Reisman's condition made it unsafe for Reisman to walk on the highway shoulder.

Trooper Hovinghoff is a trained drug recognition expert (DRE). He received 40 hours of training on observing impaired persons and diagnosing "the drugs that they are under, with a certain amount of accuracy." RP at 6. He believed that Reisman's condition was consistent with being under the influence of a "narcotic analgesic." RP at 10. He knew from his experience that

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[2] When stopping individuals for failing to walk with traffic, Trooper Hovinghoff tries "to take the least enforcement necessary, sometimes just speaking with them, other times writing an infraction." RP at 15-16.

people under the influence of these medications were often in possession of the drug.

Trooper Hovinghoff, therefore, asked Reisman if he had any drugs on him. He testified that he asked Reisman about drugs because he had a "reasonable suspicion" "[t]hat there's possibly some narcotic analgesics or drugs on his person." RP at 18.[3] Reisman replied that he had a prescription and removed a pill bottle from a pocket.

Trooper Hovinghoff asked to see the bottle and Reisman passed it to him. The trooper testified that he asked to see the bottle for "a couple of reasons." RP at 11. He set out first that he wanted to see if the name on the bottle matched the name provided by Reisman because Reisman lacked identification. He did not actually testify as to his other reasons for wanting to see the bottle.

Reisman passed the bottle to Trooper Hovinghoff. The bottle had Joshua Reisman's name on it and it was a prescription for Tramadol. While the trooper was looking at the label, he saw at least two "different colored pills through the side." RP at 11. He opened the bottle to confirm that it contained pills in addition to those prescribed. Trooper Hovinghoff asked Reisman if all of the medication was his. Reisman stated that all he was prescribed was Tramadol. The trooper placed Reisman under arrest.

At a CrR 3.6 hearing, the State conceded that Trooper Hovinghoff seized Reisman when he activated his emergency lights and asked Reisman for identification. Analogizing the situation to a DUI stop, it argued that the trooper engaged in a legitimate inquiry about drugs when he noticed Reisman appeared to be under the influence. It added that Reisman voluntarily produced

[3] Trooper Hovinghoff stated that analgesic narcotics may "either be legal drugs prescribed to them or they can be illegal drugs." RP at 10.

the pill bottle and that the trooper asked to see the bottle to confirm Reisman's identity. According to the State, Trooper Hovinghoff legally observed the multiple pills and then had probable cause to open the bottle.

Reisman countered that that situation was unlike a DUI stop because "it's not illegal to have a prescription for a narcotic nor it is it illegal to walk along the road under the influence of a narcotic." RP at 28. Reisman took the position that the seizure became illegal once Trooper Hovinghoff asked Reisman whether he possessed drugs because there was no evidence Reisman was committing a crime. Thus, the trooper had no legal reason to "extend[] the contact beyond the initial education about the side of the road situation." RP at 29.

The superior court denied the motion to suppress. It recognized that Trooper Hovinghoff had a legitimate reason to seize Reisman when he saw him walking on the wrong side of the road. With respect to the trooper's inquiry about drug possession, the court concluded that the inquiry "was reasonable given [Trooper] Hovinhoff's [sic] observations of the defendant along with his training and experience as a" DRE. CP at 23.[4] Reisman then "whips the pill bottle out and says, here it is." RP at 34. The superior court concluded that Reisman was never compelled to produce the pill bottle or forced to give it to the trooper. Finally, the court ruled that Trooper Hovinghoff had probable cause to suspect Reisman unlawfully possessed prescription drugs when he saw the different pills while reading the label.

After a bench trial, the superior court convicted Reisman of two counts of possession of a controlled substance. It sentenced him to 18 months in custody and entered a stay of enforcement

[4] At the CrR 3.6 hearing, the court stated that the trooper made an "innocent inquiry" about drug possession. RP at 34.

of the sentence pending appeal. Reisman appeals.

ANALYSIS

On appeal, Reisman argues that Trooper Hovinghoff impermissibly exceeded the limited scope of a stop and brief seizure for a minor civil infraction when he engaged in a "fishing expedition" regarding narcotics. Br. of Appellant at 9. The State responds that the "purpose of investigating a traffic infraction became a classic *Terry* detention due to [Trooper] Hovinghoff's observation of Reisman's obvious physical condition." Br. of Resp't at 6.

Warrantless searches and seizures are unconstitutional unless they fall within one of the narrowly drawn exceptions to the warrant requirement. *State v. Schlieker*, 115 Wn. App. 264, 269-70, 62 P.3d 520 (2003); *see also State v. Ladson,* 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State bears the burden of demonstrating that a warrantless search or seizure falls within an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

When reviewing the denial of a suppression motion, we determine whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *State v. Hill,* 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We give great deference to a trial court's resolution of differing accounts of the circumstances surrounding the encounter set forth in its factual findings. *Hill*, 123 Wn.2d at 646. When challenged, we review findings entered in a CrR 3.6 suppression for substantial evidence. *Hill*, 123 Wn.2d at 644. "Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the stated premise." *State v. Reid,* 98 Wn. App. 152, 156, 988 P.2d 1038 (1999).

Infraction Stops

Both parties agree that Trooper Hovinghoff seized Reisman when he stopped him for walking with the flow of traffic, an infraction. The trial court also so concluded. When an officer stops an individual for committing a civil traffic infraction, an officer may detain the individual:

> for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

RCW 46.61.021(2); *see also* RCW 46.64.015 ("The detention arising from an arrest under this section [for misdemeanor traffic violations] may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice."). "[T]he detention length and scope must be reasonably related to the circumstances justifying the stop." *State v. Veltri*, 136 Wn. App. 818, 822, 150 P.3d 1178 (2007). And, once the initial purpose of the traffic stop is completed, any additional detention must be based on "'articulable facts giving rise to a reasonable suspicion of criminal activity.'" *State v. Armenta*, 134 Wn.2d 1, 15–16, 948 P.2d 1280 (1997) (quoting *State v. Cantrell*, 70 Wn. App. 340, 344, 853 P.2d 479 (1993), *aff'd in part*, 124 Wn.2d 183, 875 P.3d 1208 (1994)).

In this case, Trooper Hovinghoff originally detained Reisman to speak with him about the infraction of "walking wrong on the highway." RP at 16. At the point in time that the trooper asked Reisman about narcotics possession, however, he had already fulfilled the purpose of the infraction detention.

Trooper Hovinghoff stopped Reisman, informed him of the law against walking with traffic, and asked him to comply with the law. There is no indication that he was actually going to issue a citation to Reisman. *Veltri*, 136 Wn. App. at 822-23 (stating the that officer "decided not

to issue an infraction, resolving the initial stop purposes."). Trooper Hovinghoff, in fact, testified that he rarely cites individuals for this infraction (testimony that he issued three citations in three years but stopped people to warn them "[m]ultiple, multiple, multiple times."). RP at 15-16. The trooper did not testify that he doubted the accuracy of the oral identification information initially provided by Reisman.[5] *see generally State v. Terrazas*, 71 Wn. App. 873, 863 P.2d 75 (1993) (finding nothing to support officer's suspicion that driver provided a false name), *review denied*, 123 Wn.2d 1028 (1994).

Thus, because the purpose of the initial stop—to "stop and talk to [Reisman] about walking wrong on the highway" —was fulfilled before Trooper Hovinghoff asked Reisman if he had any drugs on his person, he needed an independent justification for extending the seizure to discuss drugs. RP at 16. The State relies on the exception to the warrant requirement set out in *Terry v. Ohio* to justify the trooper's continued detention of Reisman. 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Terry Stops

One well-recognized exception to the warrant requirement is an investigatory or *Terry* stop. *Terry*, 392 U.S. 1. A police officer may conduct a *Terry* stop based on a reasonable suspicion, grounded in specific and articulable facts, that criminal activity is afoot. *State v. Kinzy,* 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000).

During a *Terry* stop, an officer may "'briefly detain and question a person reasonably

[5] Although Trooper Hovinghoff later thought to examine the pill bottle for identification purposes, at the time he initially asked Reisman about medication possession, he was not concerned with identity verification. Rather, he asked about drug possession based on Reisman's physical condition.

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).

The State sets out that Trooper Hovinghoff properly conducted a criminal investigation under *Terry* when he asked Reisman about drug possession because Reisman appeared to have ingested prescription analgesic narcotics and, therefore, he "needed to investigate" whether Reisman unlawfully possessed "whatever drug had caused his physical condition." Br. of Resp't at 5, 7. The trial court agreed that the trooper acted reasonably in inquiring about drugs based on his observations and training.

Here, Reisman appeared to have ingested a narcotic substance. Trooper Hovinghoff, however, admitted that it might have been a legal substance. Neither the trial court nor the State relied on circumstances other than Reisman's altered condition and the trooper's training to support the legitimacy of his drug possession inquiry. Under these circumstances, even assuming there was a high probability that Reisman possessed whatever drug he ingested, the State nevertheless does not identify any particular fact relied upon by Trooper Hovinghoff to support a reasonable suspicion that Reisman was engaged in criminal activity.

"The circumstances [surrounding an investigative stop] must be more consistent with criminal conduct than with innocent behavior." *See State v. Rowell*, 144 Wn. App. 453, 457, 182 P.3d 1011 (2008) (citing *State v. Pressley*, 64 Wn. App. 591, 596, 825 P.2d 749 (1992)), *review*

denied, 165 Wn.2d 1021 (2009). This does not mean, however, that an officer needs to ignore facts that suggest criminal activity simply because it may also be consistent with noncriminal activity. *See State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). In *Kennedy*, for example, a suspect's innocent activity of leaving a house and driving away justified further investigation based on additional information from an informant and neighbors about the drug activity in the house. 107 Wn.2d at 6.

In contrast, when circumstances only "look[] suspicious" but otherwise lack additional objective facts to support a suspicion of criminal activity, officers do not have reasonable suspicion to conduct a warrantless investigation. *State v. Tocki*, 32 Wn. App. 457, 463-64, 648 P.2d 99 (officers lacked reasonable suspicion to question individual with known criminal record and a past history of firearm possession, who was sleeping in a car in a high crime area in the middle of the night because his actions were "as consistent with innocent as criminal activity."), *review denied*, 98 Wn.2d 1004 (1982); *see also State v. Carlson*, 130 Wn. App. 589, 594-95, 123 P.3d 891 (2005) (mere purchase of legal items used in methamphetamine manufacture insufficient to support officer's stop of purchasers), *review denied*, 157 Wn.2d 1020 (2006).

The determination of reasonable suspicion is based on "commonsense judgments and inferences about human behavior." *Illinois v. Wardlaw,* 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). In the present matter, the facts found by the trial court support an inference that Reisman ingested and perhaps possessed a drug, but do not support an inference that he ingested and possessed an *illegal* drug. Further, his impaired state was not in itself illegal because unlike a DUI context, the law did not prevent Reisman from taking a walk while impaired. Accordingly, Trooper Hovinghoff's extension of the traffic infraction detention does

not fall within the warrant exception in *Terry*.

Finally, the State's reliance on *State v. Reid*, 98 Wn. App. 152, 988 P.2d 1038 (1999), is misplaced. In *Reid*, an officer approached a parked car that had a man asleep in the driver's seat. 98 Wn. App. at 158. We concluded that the officer properly investigated the situation because the driver could have needed aid. *Reid*, 98 Wn. App. at 158-59. The officer shook the man and smelled alcohol. At that point, the officer had reasonable suspicion that the man was intoxicated and in control of the vehicle, in violation of RCW 46.61.504. *Reid*, 98 Wn. App. at 159. Thus, in *Reid*, the officer properly extended an ongoing investigation to account for new facts that further indicated illegal activity. Here, in contrast, Trooper Hovinghoff fulfilled the purpose of the initial infraction detention and, as previously discussed, he lacked reasonable suspicion to continue to detain Reisman. In addition, Reisman's altered state in itself was not a crime, unlike the DUI crime investigated in *Reid*.

Consequently, because the State failed to demonstrate that Trooper Hovinghoff had "reasonable suspicion, grounded in specific and articulable facts, that criminal activity [was] afoot," substantial evidence does not support the trial court's conclusion that his inquiry was reasonable. *Kinzy,* 141 Wn.2d at 384-85.

We reverse.

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.

Johanson, A.C.J.

We concur:

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Quinn-Brintnall, J.

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Van Deren, J.