IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29166-9-III**
	)	**(consolidated with**
Appellant,	)	**No. 29167-7-III)**
	)	
v.	)	
	)	
ANDREW G. TRUTTER,	)	
	)	**Division Three**
Respondent.	)	
_____	)	
STATE OF WASHINGTON,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
JOSHUA D. SMOLINSKI,	)	
	)	**UNPUBLISHED OPINION**
Respondent.	)	
	)	

Siddoway, J. — Andrew Trutter and Joshua Smolinski successfully challenged the lawfulness of a *Terry*[1] stop by members of the Quad Cities Drug Task Force, who

[1] *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

observed what they believed to be several drug transactions taking place in three intermittently-stopped vehicles, one being Mr. Trutter's Dodge Durango. Charges were thereafter dismissed, the State conceding it was unable to prosecute the defendants without the evidence obtained during and as a result of the stop. The State appeals the suppression decision and the resulting dismissal of charges, arguing that the defendants' unusual behavior, appraised in light of the officers' training and experience, provided a reasonable articulable basis for the stop. We agree, reverse the trial court's orders, and remand for trial.

FACTS AND PROCEDURAL BACKGROUND

On the afternoon of February 11, 2010, drug task force officers placed Tanner Hardin's Clarkston residence under surveillance based on information received that morning from a confidential informant that Mr. Hardin intended to "re-up" his supply of heroin. Report of Proceedings (RP) (May 11, 2010) at 91. The informant had trafficked in stolen property and purchased narcotics in partnership with Mr. Hardin in the past, and had earlier provided reliable detailed information about Mr. Hardin's criminal activity. On this occasion, the informant was living in a rehab facility and provided only this general information about Mr. Hardin's situation and plans.

At about 8:30 that evening, task force members saw Mr. Hardin and a passenger leave the home in a Dodge crew cab pickup truck and followed them; Mr. Hardin drove

directly to the parking lot of an Albertson's store in Clarkston, where he parked in a location remote from other vehicles and the store. Within moments after Mr. Hardin parked, a white Dodge Durango drove up and parked driver's side to driver's side next to his truck. Officers later determined the driver of the Durango to be Andrew Trutter and his passenger to be Joshua Smolinski. Without exchanging words, Mr. Trutter immediately got out of the Durango, walked around Mr. Hardin's truck, and got into the truck's back seat. Detective Rodney Wolverton, who was nearby, saw Mr. Trutter lean forward over the bench seat as he spoke to Mr. Hardin and his passenger but saw nothing being exchanged. Detective Wolverton quickly became concerned that his vantage point was too close; fearing it might blow his team's cover, he stepped out of his car and walked into the Albertson's store, staying in radio contact with other officers.

Within a few moments, and with Mr. Trutter still in the back seat of Mr. Hardin's truck, other task force members saw Mr. Hardin's front seat passenger get out and run across the parking lot, entering the back seat of a small sport utility vehicle (SUV) that had just arrived and parked in the lot, also in a remote location. The SUV's driver then began driving toward the area where the truck and Durango were parked; as it approached, Detective Darin Boyd saw one of the passengers in the SUV hand something back to Mr. Hardin's original passenger. When the SUV arrived at the truck, Mr. Hardin's passenger got out of the SUV and returned to the front seat of the truck. The

SUV then left the parking lot. A few moments later, Mr. Trutter left Mr. Hardin's truck, got back into the Durango and both vehicles left the parking lot. Detectives Boyd and Wolverton later testified that this entire series of events had taken only 5 to 8 minutes. None of the passengers in the three vehicles had approached or entered the Albertson's store or any other business served by the parking lot.

Task force officers separated, some following Mr. Hardin and others the Durango. Mr. Hardin drove back to his home and was not stopped.

The Durango was trailed for several blocks and followed down a side street, where it pulled into a parking spot on a corner of a dimly-lit park. Mr. Trutter opened the driver's door and turned sideways, placing his feet on the running board of the cab and facing to look toward the open door. Within a few moments, a tall man approached on foot, walking deliberately toward the truck according to Detective Boyd. The tall man walked to Mr. Trutter's opened door and spoke with him for a moment or two. Officers did not see any object pass between the men. After the tall man walked away and Mr. Trutter closed his door and began to drive off, Detective Boyd conferred with Detective Wolverton, the two agreed they had a sufficient basis for an investigative stop, and Detective Boyd directed other officers to pull over the Durango.

Officers stopped the Durango and requested identification. Mr. Trutter was advised of the reason for the stop and was asked to step out of the truck and keep his

hands in plain view. When he did not, he was placed in handcuffs and frisked for officer safety. The officer conducting the pat felt a large bulge in Mr. Trutter's right front pocket that he recognized as a large roll of cash.

Based on their earlier observations, the apparent cash, Mr. Trutter's untruthful responses as to his whereabouts that evening, and a large bottle of pills that a second officer observed on the floor of the front seat when he asked Mr. Smolinski to step out of the Durango, officers detained the two men and applied for and obtained a search warrant. The search revealed several thousand dollars in cash, pharmaceuticals, marijuana, and a handgun. Mr. Trutter and Mr. Smolinski were charged with three counts of possession of a controlled substance with intent to deliver (morphine, oxycodone, and marijuana), each with a firearm enhancement.

Mr. Trutter moved to suppress the evidence, challenging (1) the validity of the *Terry* stop and (2) the sufficiency of the search warrant affidavit to establish probable cause. Mr. Smolinski joined in the motion. In responding to the motion and arguing at the CrR 3.6 hearing, the State implicitly conceded that without information gained in the *Terry* stop, the officer's affidavit in support of the search warrant lacked sufficient competent evidence to establish probable cause. Clerk's Papers (CP) at 85-90; RP (May 11, 2010) at 12-13. Accordingly, the CrR 3.6 hearing addressed only the validity of the *Terry* stop, not whether the magistrate erred in issuing the warrant.

At the CrR 3.6 hearing, the court heard live testimony from Detectives Boyd and Wolverton as to what they knew at the time of the initial stop and matters in their training and experience that raised suspicion about Mr. Trutter's and Mr. Smolinski's conduct. Among behaviors they described as significant and characteristic of "open air" drug deals were the short contacts in public places away from the dealer's home with none of the usual indicia of a social contact (no apparent greetings, exchanging pleasantries, shaking hands, or lingering) but instead quick moves in an out of vehicles; parking in the middle of the lot, at a distance from any store front, in order to reduce the prospect of being noticed; arranging to conduct more than one transaction in a given trip to a public place (as with the two transactions officers believed were conducted by Mr. Hardin and his passenger while in the Albertson's lot); evidently prearranged meeting times in light of closely-timed arrivals; and no business conducted by any participant at any of the businesses served by the parking lot. Detective Wolverton testified that he had been involved in approximately 800 controlled buys, about 40 percent of which had been "open air" transactions in places like parking lots. Detective Boyd testified that he had done "a dozen or two" controlled buys in the same Albertson's parking lot and that Mr. Trutter's and Mr. Smolinski's dealings were similar to the earlier buys. RP (May 11, 2010) at 53.

On cross-examination, defense counsel elicited the officers' admissions that the

confidential informant had provided no information on Mr. Trutter or Mr. Smolinski; that task force members had no information on the Durango; that people commonly get in and out of cars and speak to each other in parking lots; that task force members had no specific information as to when or how Mr. Hardin would be dealing drugs on February 11; that the behavior of getting into another car, speaking briefly and then departing would be consistent with friends being lost and regrouping to share directions; and that prior to the stop, neither Mr. Trutter nor Mr. Smolinski had been observed passing any objects in the encounters that detectives deemed suspicious. In the end, the officers justified their reasonable suspicion on the basis of reliable information that Mr. Hardin was a drug user and trafficker with reported plans, that day, to resupply and their observation of many behaviors characteristic of controlled buys that they set up and execute "on a day to day basis." RP (May 11, 2010) at 78. Given all, the detectives denied that the behavior was consistent with an innocent explanation. Neither Mr. Trutter nor Mr. Smolinski testified. Apart from cross-examining the detectives, the defendants presented no evidence.

The trial court concluded that the officers' confidential informant was credible and did not question the facts testified to by the detectives. It nonetheless concluded that the information relied upon to stop the Durango was not sufficient to justify the stop and that the evidence obtained upon executing the search warrant was fruit of the poisonous tree.

The State conceded its inability to prove the charged crimes without the evidence, stipulated to dismissal, and appealed.

ANALYSIS

I

We first address the State's argument that the trial court applied the wrong legal standard in deciding the *Terry* suppression issue. The State points to the court's statement in announcing its decision that the officers' information fell short of the requirements of *Aguilar-Spinelli*,[2] which the State notes is not the standard applied to determine whether information is sufficient to warrant an investigative stop.

During the course of the suppression hearing, the court said, "This is, in my opinion, a classic case where, as the officer testified, under the totality of the circumstances, ah, we had enough. And under *Illinois versus Gates*,[3] I think you did have enough, but I'm constrained to use the *Aguilar-Spinelli,* the tighter, more stricter test." RP (May 11, 2010) at 117. It later reiterated its conclusion, "[S]o, again, the court's conclusion is—is that while you met *Illinois v. Gates*, you didn't meet *Aguilar-Spinelli,* and the stop was bad. And all evidence secured as a result of the stop, which includes the search warrant . . . are fruits of the poisonous tree and are suppressed." *Id.*

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

[3] *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

at 118.

The United States Supreme Court decisions in *Aguilar* and *Spinelli* established a two-pronged test for evaluating the existence of probable cause for a search warrant in relation to informants' tips, requiring the State to demonstrate both the informant's credibility and his or her basis for knowledge. *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984). After nearly 15 years, the United States Supreme Court abandoned the *Aguilar-Spinelli* test for Fourth Amendment purpose in *Gates*, in favor of a "totality of the circumstances" approach. *Id*. at 435 (quoting *Gates*, 462 U.S. at 238). The totality of circumstances analysis downgrades the veracity and basis of knowledge prongs from required elements to "'relevant considerations.'" *Id.* at 436 (quoting *Gates*, 462 U.S. at 233). But in *Jackson*, our Supreme Court rejected *Gates*' totality of circumstances approach as the basis for evaluating probable cause for a search warrant for state constitutional purposes in favor of continuing to apply *Aguilar-Spinelli*. *Id.* at 443.

The defendants' suppression motion was based on two arguments: The first was that the initial stop of Mr. Trutter's vehicle was unlawful because there was no reasonable suspicion of criminal activity and, because information obtained from the stop was relied upon for the search warrant, the subsequent search and its fruits were inadmissible as fruits of the poisonous tree. *See State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). The second was that even with the information secured through the

stop, Detective Boyd's affidavit in support of the search warrant was insufficient to establish probable cause. Our State's continuing reliance on the *Aguilar-Spinelli* standard was relevant at most to the defendants' second argument. But the trial court's decision to grant the suppression motion was based solely on their first argument. CP at 148, 153-54 (Conclusion of Law 4.2, "Although the confidential informant was established as being reliable and credible, there was insufficient information produced by the confidential informant to establish, together with the observations of the officers, a reasonable suspicion to stop and detain the defendant").

While Washington has rejected the totality of circumstances approach for assessing informant's tips as a basis for search warrants, it, like the federal courts, does apply the totality of circumstances approach to determine whether an officer has the articulable suspicion required for an investigative stop. *Kennedy*, 107 Wn.2d at 6. Based on the comments cited by the State, standing alone, it would appear that the trial court applied the wrong legal standard. However, the defendants point to other statements by the court indicating that it had the correct standard in mind.

Either way, an error, if one occurred, is not a basis for reversal as an abuse of discretion, which is the first argument for legal error made by the State. Abuse of discretion is not the standard we apply in reviewing a suppression motion. If the court committed legal error by applying too stringent a standard, it is a basis for reversal only

if, as a result, the court's findings of fact do not support its conclusions of law. On their face, the findings and conclusions do not rely on any insufficiency of evidence under *Aguilar-Spinelli*. We address our de novo review of the court's conclusions of law in part III.

II

The State next challenges three of the court's findings of fact. We review a trial court's findings of fact supporting a suppression decision for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence exists where there is sufficient evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644.

Finding of Fact 3.2. The State challenges the italicized portion of the trial court's finding 3.2, which states in its entirety:

> The confidential informant told officers that Tanner was dealing and/or using drugs, including heroin, methamphetamine and "pills". No specifics were given by the confidential informant as to location, method or manner used by Tanner to buy, sell or use drugs. *No specifics were given by the confidential informant as to how recently such activity of Tanner had taken place.* Officers identified "Tanner" as Tanner Hardin.

CP at 146, 152 (emphasis added); Br. of Appellant at 15. The State argues that the challenged portion of the finding is contrary to the testimony of Detective Wolverton, who testified:

> [O]n that date we were . . . acting on some information—the informant had

> called me earlier that day and had advised me that . . . Hardin was sounding like he was trying to get money together, and was planning on . . . re-upping or . . . resupplying himself with heroin. . . . [S]o, with that information, that's actually what kind of stemmed our surveillance that day.

RP (May 11, 2010) at 91. Mr. Trutter and Mr. Smolinski defend the challenged portion of the finding, emphasizing the words "no specifics." The import of the challenged portion of the finding in their view is that Mr. Hardin provided no details what stolen property was currently to be exchanged for what narcotics, a level of specificity he had provided in the past. Br. of Resp't Trutter at 8; Br. of Resp't Smolinski at 4. The defendants do not dispute and the trial court did not indicate that it disbelieved Detective Wolverton's testimony that the informant provided same-day information that Mr. Hardin was on the verge of resupplying himself with heroin. The State does not contend that the informant provided specifics beyond this information.

The parties' dispute is a semantic dispute about the court's finding, not a dispute about the facts demonstrated in the suppression hearing. The primary purpose of the findings of fact is to aid appellate courts in their review. *Port Townsend Publ'g Co. v. Brown*, 18 Wn. App. 80, 85, 567 P.2d 664 (1977). We will construe the finding consistent with the parties' common understanding. On that basis, it is supported by substantial evidence.

Finding of Fact 3.5. The State challenges the italicized portion of the trial court's

finding 3.5, which states in its entirety:

> Detective Boyd has been involved in at least a dozen controlled purchases which occurred in the parking lot of Albertson's. No time frame was given as to dates observed. Parking out away from the businesses, away from other cars, can, according to Detective Boyd, be consistent with drug transactions. *However, such parking location may also be consistent with non-drug activity, such as avoiding having*[4] *a car being damaged or dinged.*

CP at 146, 152 (emphasis added). The State argues that no evidence of this innocent explanation for the parking location was offered or admitted at the suppression hearing. The trial judge mentioned it as an explanation for parking behavior in announcing his decision on the suppression motion and at presentment, he acknowledged it to be his own finding, based on his own experience. RP (May 11, 2010) at 116-17; RP (June 7, 2010) at 140-41. The State does not quarrel with the trial judge's experience so much as it objects to this process of adding to the record for our review.

Mr. Trutter and Mr. Smolinski respond that a trial court may take judicial notice of an adjudicative fact sua sponte. ER 201(c). A judicially noticed fact must be "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b). If a court intends to take judicial notice of a fact on its own initiative, it should give the parties

[4] The word "having" does not appear in Mr. Smolinski's finding 3.5. CP at 152.

notice and an opportunity to be heard, something that did not happen here. ER 201(e); 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 201.7 (5th ed. 2007) (citing Wright & Miller, Federal Practice and Procedure: Evidence § 5109). The State would have disputed the finding; it argues that viewed in its entirety, the manner in which the vehicles arrived, parked, and left in this case is *not* equally consistent with avoiding damage.

Mr. Smolinski adds that a trier of fact is expected to draw on his or her opinions, insights, common sense, and everyday life experience, citing *State v. Carlson*, 61 Wn. App. 865, 878, 812 P.2d 536 (1991), a case that deals with jurors' deliberations. Br. of Resp't Smolinski at 7. But we do not rely upon jurors to reduce the material matters on which they rely to findings that an appellant must either challenge on appeal or concede as a verity.

Without doubt, a trial judge deciding whether matters that were observed by an officer support a *Terry* stop will necessarily call upon common sense and common understanding in deciding whether the total circumstances reasonably aroused the officer's suspicion. But ultimately it is not helpful or consistent with the rules for the court to make findings on matters that were not admitted in evidence or identified as judicially noticed facts in accordance with ER 201(e). If independent "findings" that are part of the judge's thought process are truly matters of common sense and common

understanding, they will be taken for granted on appeal just as they were taken for granted by the trial judge. If not, and they are outside the evidence, they should not be relied upon for the court's decision. Because the challenged finding on parking practices was outside the evidence and the State was not given notice and an opportunity to respond to its being judicially noticed, we will disregard it.

Finding of Fact 3.6. The trial court's finding 3.6 states:

> The evidence fails to establish the Albertson's parking lot was a high crime area or known as a high drug crime area.

CP at 146, 152. The State argues that this finding ignores the testimony of Detective Boyd that he had personally been involved in approximately a dozen controlled purchases of drugs in the parking lot in the last three years. The defendants respond that in light of unchallenged finding 3.5 that "[n]o time frame was given as to [the] dates [of the dozen controlled purchases] observed [by Detective Boyd]" the State cannot ask us to assume that the dozen controlled purchases took place in the 3 years the detective was assigned to the task force; instead, we must recognize that they could have taken place during any of the 11 years he was employed in police service in the two neighboring counties. Given that time frame, substantial evidence supports the trial court's finding that the evidence did not establish the parking lot to be a high crime area.

III

Finally, the State argues that the trial court wrongly concluded that facts supported by the evidence did not support reasonable suspicion to conduct an investigative stop. We treat unchallenged findings of fact as verities on appeal. *Hill*, 123 Wn.2d at 644. In this case, even the challenged findings do not turn on material disputed facts. The determination of whether undisputed facts constitute a violation of the constitution is a question of law that we review de novo. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

"It is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions." *Kennedy*, 107 Wn.2d at 5-6. Less than probable cause is required because the stop is significantly less intrusive than an arrest. *Id.* at 6. *Terry* frames the inquiry with regard to an investigative stop as whether the officer had "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. An officer has an articulable suspicion when, looking at the totality of circumstances known to the officer, there is "a substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, 107 Wn.2d at 6. When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention. *Id.*

In defending the trial court's suppression decision, Mr. Trutter and Mr. Smolinski point to the fact that the task force informant had provided less specifics on the date of

their apprehension than he had provided in the past, and no information on anyone other than Mr. Hardin. But no particular quantum of detail from an informant is required; an investigative stop can be based upon unusual activity recognized by an experienced police officer, standing alone. *Terry* is an example: in that case, the stop was based upon an officer's observation of two men repeatedly taking turns walking past and peering into a store window; he reasonably suspected they were casing the location for a robbery. 392 U.S. at 6; *see also State v. White*, 76 Wn. App. 801, 888 P.2d 169 (1995) (veteran narcotics officer's recognition that unknown man's actions were consistent with those of a lookout or setup man were sufficient to establish probable cause for arrest), *aff'd*, 129 Wn.2d 105, 915 P.2d 1099 (1996).

The defendants point to the fact that the information provided to the task force by the informant pertained to Mr. Hardin, not to them. But where officers have reliable information that one party is intending to transact in drugs,[5] or that a house is a drug house, then that information—coupled with conduct consistent with a drug deal—provides a basis for suspecting an unknown contra-party or visitor. *See, e.g., State v. Biegel*, 57 Wn. App. 192, 194, 787 P.2d 577 (actions fitting the normal mode of conduct for a drug transaction in high crime area supported *Terry* stop, even though

[5] The court stated during its oral ruling that it found the confidential informant was reliable and credible based upon the testimony of the officers with regard to his "track record." RP (May 11, 2010) at 114.

neither individual was known to officer to be a user or a dealer), *review denied*, 115 Wn.2d 1004 (1990); *State v. Glover*, 116 Wn.2d 509, 511-12, 806 P.2d 760 (1991) (unknown suspect in apartment complex having a history of high drug activity).

The defendants point to the fact that no officer saw any object change hands between them, Mr. Hardin, the tall man at the park, or any other participant in the events. But a number of cases dealing with suspected drug transactions cited by the parties involved no firsthand observation of any exchange. *See, e.g.*, *Kennedy*, 107 Wn.2d at 3 (officer "saw nothing in Kennedy's hands nor any suspicious activity"); *Glover*, 116 Wn.2d 509 (no observed transaction). The defendants legitimately argue that surveillance of their conduct in and around the Durango presented more opportunity for an officer to see an item changing hands than exists in drug house cases, but there were a number of reasons why the officers' failure to see a transaction hardly meant that none occurred: Mr. Trutter and the others would be expected to make their movements as discreet as possible; it was nighttime; dome lights were only intermittently on in the vehicles; and the officer with the closest proximity—Detective Wolverton—was able to observe Mr. Trutter's and Mr. Smolinski's actions for only a short time before he felt compelled to go into the store to preserve the team's cover.

Finally, the defendants point to the fact that there are innocent explanations for the conduct observed by the officers, especially when separate events are viewed separately.

Innocent explanations can be imagined for all but the most unusual conduct, and some conduct would almost always be seen as innocent were it not for surrounding circumstances that reasonably arouse suspicion. *See, e.g.*, *Glover*, 116 Wn.2d at 515 (notice that defendant was carrying something in a plastic baggie is not inherently suspect, but was a factor in an area where plastic baggies are commonly used to transport narcotics). Here, information from a reliable informant that Mr. Hardin was intending to acquire heroin, seemingly tight choreography of the arrivals of several participants, actions by the participants that were recognized by experienced law enforcement officers as characteristic of drug deals, and the lack of a *plausible* explanation for the events as a whole amounted to articulable suspicion justifying the detectives in stopping Mr. Trutter and Mr. Smolinski.

The defendants never challenged the scope of the *Terry* intrusion and there is no challenge on appeal to the trial court's refusal to suppress the State's evidence on the alternative ground argued below by the defendants.

We reverse the trial court's orders granting the suppression motion and dismissing the charges and remand for trial.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.