No. 29895-7-III

Sweeney, J. (dissenting) — Of course, these teenage children including Darren Hopkins were not free to just walk away from two armed sheriff's deputies. I would, therefore, conclude that the stop here was an unjustified investigatory stop and not a "social contact"; and, accordingly, I would order that the drug evidence be suppressed.

Two uniformed and armed sheriff's deputies see four kids walking from an area where there had been reports of vandalism and partying. The deputies stop their patrol car and stop the kids to talk to them. They smell alcohol from the group. They ultimately separate three of the kids and move them to the front of the patrol car. One officer stays with Mr. Hopkins, smells alcohol, and asks Mr. Hopkins if he can search him. He finds an Altoids can and after being told there are only Altoids in it, presses Mr. Hopkins further and he admits there is marijuana in the can.

We are invited to conclude that this was simply a social contact by the deputies with these kids.

Our Supreme Court has zeroed in on the concerns that, for me, have resulted in the current governmental abuse of the so-called "social contact." In *State v. Harrington*, the court noted that "[t]he phrase's plain meaning seems somewhat misplaced. 'Social contact' suggests idle conversation about, presumably, the weather or last night's ball

game—trivial niceties that have no likelihood of triggering an officer's suspicion of criminality. The term 'social contact' does not suggest an investigative component." 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

For me, the facts here suggest a prohibited "investigative component" to this stop:

- The deputies here were "policing" this area because of noise ordinance violations, Clerk's Papers (CP) at 45 (Finding of Fact (FF) 2.2), or, as the majority opinion characterizes it "earlier incidents of vandalism and partying." Majority at 1-2; *see also* Report of Proceedings (RP) at 7 ("people partying and damaging property").

- It was at night and dark and the subjects of this police investigation were children. CP at 45 (FF 2.3).

- Two of the deputies stopped their patrol car. CP at 45 (FF 2.4).

- Both deputies approached the kids. CP at 45 (FF 2.4).

- And they asked these kids what they were doing. CP at 45 (FF 2.4). Deputy Mark Williams smelled alcohol: "I could smell the odor of alcoholic beverages and also they [(presumably the whole group)] appeared to be exhibiting signs of being under the influence." RP at 7. The deputies apparently stood close enough to the group to smell alcohol on the breath.

- The deputies asked Mr. Hopkins specifically if he had been drinking. CP at 45 (FF at 2.6).

- Deputy Christopher Garza took three of the kids some distance away, CP at 45 (FF 2.6), "[a]nd at that point Deputy Garza began speaking with the other three males in front of our patrol car while I spoke to Mr. Hopkins." RP at 52; *see also* RP at 82.

- The deputy became concerned because Mr. Hopkins kept putting his hands in his

> pockets, and so he searched Mr. Hopkins, after asking if he could search him. CP at 45 (FF 2.7).

The touchstone in these cases is whether a reasonable person would have felt free to walk away. *Harrington,* 167 Wn.2d at 663. I would conclude that neither Mr. Hopkins nor his companions were free to walk away. For me, the circumstances support the conclusion that this was an investigation and not a social contact. *State v. Gantt*, 163 Wn. App. 133, 141-42, 257 P.3d 682 (2011), *review denied*, 173 Wn.2d 1011 (2012). I would conclude that these officers operated on a hunch of criminal activity—perhaps a solid hunch, a hunch based on extensive police experience—but a hunch nonetheless and therefore constitutionally prohibited. *United States v. Mendenhall*, 446 U.S. 544, 573, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) ("his inchoate and unparticularized suspicion or 'hunch'" (internal quotations marks omitted) (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889 (1968)).

We create disrespect for the rule of law and thereby do the rule of law a disservice by creating these fictions to accommodate police investigation of citizens. If the exceptions to the general requirement of a warrant are to truly be "jealously guarded" then we should not pretend that police investigation of possible criminal activity is an innocuous so-called "social contact." *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265

(2007) ("[w]e jealously guard these exceptions lest they swallow what our constitution enshrines").

Ultimately, the question is whether this was investigative and interrogative or whether it was simply "social" in nature. The stop and the questions here were not just conversational chit chat. The subjects were interrogated and frisked. The inquiries were calculated to ferret out evidence of criminal activity. That was not a social contact. This was an investigative detention, without either a reasonable suspicion of criminal activity or probable cause to believe a crime had been committed. *Terry*, 392 U.S. 1; *Day*, 161 Wn.2d at 895.

Nor would I conclude that this police stop here fell within the so-called community caretaking exception. Again, the contact was hardly "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). It was not "divorced from a criminal investigation." *State v. Kinzy*, 141 Wn.2d 373, 385, 5 P.3d 668 (2000). Indeed, it was part and parcel of a police investigation of the kids who they suspected were up to no good. And, of course, as it turns out, the kids were up to no good but that should not be the point of our analysis.

I dissent.

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Sweeney, J.