IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WALTER MOSES DOUGHTY, Petitioner.	)	No. 82852-1 En Banc Filed September 23, 2010

SANDERS, J.—Late one night petitioner Walter Moses Doughty approached a suspected drug house, stayed for two minutes, then drove away. A police officer who observed Doughty's approach and departure stopped Doughty on suspicion of drug activity. During this investigative seizure the officer ran a records check and, based on the results, arrested Doughty for driving with a suspended license. Police found

methamphetamine during a vehicle search incident to arrest. Doughty argues the investigative seizure was unlawful. We agree, and we reverse the Court of Appeals.

FACTS

At 3:20 a.m. on August 14, 2007, Officer Derek Bishop of the Spokane Police Department observed Doughty park his car, approach a house, return to his car less than two minutes later, and drive away. Bishop did not see any of Doughty's actions at the house, or even if Doughty interacted with anybody there. Neighbors had previously "made numerous complaints of large quantities of short stay traffic" at the house, prompting police to identify it as a "drug house." Clerk's Papers at 45. Nothing in the record indicates that police based this suspicion on anything other than neighbor complaints, such as actual evidence of drugs, controlled buys, reports of known drug users or dealers frequenting the house, and so forth.

After the two-minute visit, Bishop stopped Doughty "for the suspicion of drug activity." *Id*. Bishop ran Doughty's license through a license check and learned he was driving with a suspended license. Bishop arrested Doughty for the license offense, then searched Doughty's car incident to arrest. Bishop discovered a glass pipe that field-tested positive for methamphetamine. Bishop re-arrested Doughty for possession of a controlled substance and transported him to jail. During booking, officers found a plastic baggie, which contained a crystal substance, in Doughty's shoe. The substance also field-tested positive for methamphetamine.

At trial Doughty moved to suppress evidence obtained as a result of an unlawful investigative detention. The trial court denied the motion. Following a bench trial on stipulated facts, the trial court found Doughty guilty of possession of a controlled substance (methamphetamine). The court sentenced him to 18 months' incarceration. Doughty appealed, and the Court of Appeals affirmed the conviction in a split decision. *State v. Doughty*, 148 Wn. App. 585, 201 P.3d 342 (2009). Doughty sought discretionary review in this court, which we granted. 166 Wn.2d 1019, 217 P.3d 782 (2009).

ANALYSIS

We must decide whether a person's two-minute visit to a suspected drug house at 3:20 in the morning constitutes grounds for an investigative seizure. In its conclusions of law, the trial court determined Bishop did not violate Doughty's constitutional rights. We review conclusions of law de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

The Fourth Amendment[1] to the United States Constitution protects against unlawful search and seizure. Article I, section 7[2] of the Washington Constitution

[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

[2] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7.

protects against unwarranted government intrusions into private affairs. We have held that warrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). These exceptions are "'jealously and carefully drawn.'" *Id*. (quoting *Arkansas v. Sanders,* 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). The *Terry* stop—a brief investigatory seizure—is one such exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct. *Id*. at 21; *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

A *Terry* stop must be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (citing *United States v. Cortez,* 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). The State must show by clear and convincing evidence that the *Terry* stop was justified. *Garvin*, 166 Wn.2d at 250.

A person's presence in a high-crime area at a "late hour" does not, by itself, give rise to a reasonable suspicion to detain that person. *State v. Ellwood*, 52 Wn. App. 70, 74, 757 P.2d 547 (1988) (citing *Terry*, 392 U.S. at 21-22). Similarly, a person's "mere proximity to others independently suspected of criminal activity does not justify the stop." *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). A traffic stop is a seizure for purposes of constitutional analysis. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

The State argues Bishop had valid grounds for a *Terry* stop. It cites facts to support the seizure, including (1) law enforcement's identification of the house as a drug house, (2) complaints from neighbors,[3] (3) Doughty visited the house at 3:20 a.m., and (4) his visit lasted less than two minutes. Br. of Resp't at 4-5. These facts fall short of the reasonable and articulable suspicion required to justify an investigative seizure under both the Fourth Amendment and article I, section 7. Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes.

The *Terry*-stop threshold was created to stop police from this very brand of interference with people's everyday lives. The Supreme Court embraced the *Terry* rule to stop police from acting on mere hunches. "Anything less would invite

[3] These first two facts accomplish the same purpose, i.e., to establish that the house was a suspected drug house.

intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Terry*, 392 U.S. at 22. On these facts, Bishop acted on a hunch alone.

The State relies on *Kennedy*, 107 Wn.2d 1, to support its argument that investigative seizures may rest on grounds amounting to "less than probable cause." Br. of Resp't at 7 (citing *Kennedy*, 107 Wn.2d at 6). The State suggests articulable suspicion arises when "there is a substantial possibility that criminal activity has occurred or is about to occur." *Id*. The officer's suspicion must nevertheless be well-founded (i.e., based on specific and articulable facts that the individual has committed a crime) and reasonable. *See Kennedy*, 107 Wn.2d at 4-5; *Terry*, 392 U.S. at 21.

Moreover *Kennedy* is distinguishable. We held the investigative seizure in *Kennedy* did not violate the defendant's rights. 107 Wn.2d at 13. However, we emphasized that police formed a reasonable and articulable suspicion to seize the defendant based on detailed information provided by a reliable informant. The informant told police that Kennedy "regularly purchased marijuana [at a suspected drug house], that Kennedy only went [there] to buy drugs, and that Kennedy usually drove either a [green truck or maroon car]." *Id*. at 3. The officer observed Kennedy leave the location in the maroon car described by the informant. *Id*. As the officer signaled Kennedy to pull over, he saw Kennedy make a furtive movement to place something (later discovered to be marijuana) under his seat. *Id*. These grounds

justified the investigative seizure and the officer's vehicle search for a weapon.

In contrast, here Bishop relied only on his own incomplete observations. There was no informant's tip (which was the element we found most persuasive in *Kennedy*, *id*. at 6-8) and no furtive movement. Bishop merely saw Doughty approach and leave a suspected drug house at 3:20 a.m. Bishop had no idea what, if anything, Doughty did at the house. The totality of these circumstances does not warrant intrusion into Doughty's private affairs.

The Court of Appeals below relied upon *State v. Richardson*, 64 Wn. App. 693, 825 P.2d 754 (1995), to affirm the trial court's denial of Doughty's motion to suppress. *See Doughty*, 148 Wn. App. at 589-90. But *Richardson* finds an investigative seizure improper on arguably less substantial facts than those present here. A police officer observed Richardson walking at 2:50 a.m. with a person whom police suspected of dealing drugs. 64 Wn. App. at 694-95. The officer stopped both men. The court held the investigative detention to be unlawful. "At the time of the seizure, [the officer] knew only that Mr. Richardson was in a high crime area, late at night, walking near someone the officer suspected of 'running drugs'." *Id*. at 697. In *Richardson*, then, consorting with a suspected drug dealer late at night in a high-crime area did not justify a *Terry* stop.

The facts of Doughty's case are similar, but even less damning. Here, police never saw any of Doughty's interactions at the house. He may not have even interacted

with anybody there. As far as Officer Bishop knew, maybe Doughty knocked and nobody answered. Maybe Doughty even had the wrong house. The two-minute length of time Doughty spent at the house—albeit a suspected drug house—and the time of day do not justify the police's intrusion into his private affairs.

A more apt analogy rests with *State v. Gleason*, 70 Wn. App. 13, 851 P.2d 731 (1993). Based on the totality of the circumstances, the *Gleason* court held it improper to seize a person merely for exiting an apartment complex that had a history of drug sales. *Id*. at 18. The court reasoned that "this was the first time the defendant had been seen in the area, the officers did not know what occurred inside the apartment and neither officer saw him involved in the purchase of drugs. Further, there was no evidence Mr. Gleason was acting suspiciously, he was not carrying any unusual objects." *Id*. (citation omitted). That statement describes the events in Doughty's chronology almost exactly.

Officer Bishop lacked sufficient specific and articulable facts to seize Doughty. No legal basis existed for the *Terry* stop. If a *Terry* stop is unlawful, the fruits obtained as a result must be suppressed. *See Garvin*, 166 Wn.2d at 254. "'The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.'" *Id*. (quoting *State v. Duncan,* 146 Wn.2d 166, 176, 43 P.3d 513 (2002)); *see also Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Accordingly, suppression of the evidence obtained after the

unlawful seizure in this case is proper.

We reverse the Court of Appeals, suppress the evidence against Doughty, and vacate his conviction.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:
Justice Susan Owens
Justice Charles W. Johnson
Justice Gerry L. Alexander
Justice Debra L. Stephens