IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CEDRIC LAMAR BERRY, Appellant.	No. 62874-7-I DIVISION ONE UNPUBLISHED OPINION FILED: January 25, 2010

J. Leach — Cedric Lamar Berry challenges his conviction for Violation of the Uniform Controlled Substances Act, possession of cocaine, RCW 69.50.4013. He contends that the investigatory stop leading to his arrest was unlawful. Berry also claims that the evidence was insufficient to support two of the trial court's findings of fact. Because the officers had a reasonable, articulable suspicion that Berry was committing criminal trespass when they initially stopped him and because the challenged findings of fact were supported by substantial evidence, we affirm.

Background

On December 20, 2007, Seattle Police Officers Michael Settle and Richard Nelson were patrolling the area of Rainier Avenue South and Fontanelle Street on bicycles when they observed Berry walking on a walkway from the Parkway Apartments. Officer Settle had recently spoken with the Parkway

Apartments manager and knew that the complex had a history of narcotics-related activity. The manager expressed concern regarding that activity as well as the presence of people hanging out around the building who were not supposed to be there. Several signs were posted around the apartment complex stating that trespassing and loitering were prohibited.

Officer Settle recognized Berry from prior contacts in the area involving narcotics-related activity and had run his name on the computer system during these contacts. He believed that Berry had been "trespassed from"[1] the Parkway Apartments and was on active supervision with the Department of Corrections. The officers testified that when Berry saw them, his eyes widened. Based on this history and their observations, the officers decided to make contact with Berry to determine if he was involved in criminal activity such as criminal trespass.

Both officers approached Berry on their bicycles dressed in full uniform. No weapons were drawn, and Berry was not restrained in any way. Officer Settle testified that he asked Berry if he lived at the Parkway Apartments to determine if he had a reason to be at the building; Berry said that he did. When asked his apartment number, Berry was unable to provide it. As the officers spoke with Berry, they noticed that he continued to display nervous behavior:

[1] Officer Settle testified that the Seattle police have a trespass admonishment system: once a person is admonished from a location, his name and the location are inserted into the computer system contained in the officers' vehicles. Officers routinely run names of suspects to determine if they have been "trespassed from" a particular location.

Berry was not paying attention to what the officers were saying and kept shifting his eyes as if he were looking for an opportunity to flee. At this point, Officer Settle's suspicion about criminal activity heightened. He asked Berry to sit on a nearby step— to help ensure both the safety of the officers and a longer reaction time if Berry attempted to flee—while his name was being checked through the radio for trespass and warrant information. Ultimately, dispatch determined that Berry did not have any warrants and that he had not been trespassed from the Parkway Apartments but from an apartment complex up the street.

While waiting for dispatch to obtain the warrant and trespass information, Officer Settle saw Berry throw an object over his shoulder. Officer Settle retrieved the object, which he believed was a baggie of crack cocaine, and placed Berry under arrest for possession of cocaine. Berry was read his Miranda[2] rights, stated that he understood them, and subsequently apologized to Officer Settle for not telling him about the drugs. When asked where the cocaine came from, Berry physically gestured and said it came from his pant cuff. Berry testified that he chose to speak with the officers, without an attorney present, after being read his Miranda rights.

On January 25, 2008, King County charged Berry with one count of VUCSA, possession of cocaine. Berry filed a motion to suppress the evidence under CrR 3.6, claiming that the evidence was unlawfully obtained. At the CrR

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

3.6 hearing, Berry argued that the evidence was illegally seized because the initial stop was not a lawful Terry[3] stop. The trial court disagreed and denied his motion for suppression. Berry then proceeded to a jury trial where he was found guilty as charged. Posttrial, on November 13, 2008, the trial court entered findings of fact and conclusions of law as to the CrR 3.6 ruling.

Analysis

We first address Berry's challenges to the sufficiency of the evidence supporting the trial court's factual findings because we can dispose of them quickly. When reviewing the denial of a suppression motion, we examine whether substantial evidence supports the challenged findings and whether those findings support the conclusions of law.[4] Evidence is substantial when it is enough "to persuade a fair-minded person of the truth of the stated premise."[5] The trial court is in a better position to make credibility determinations, and we will not substitute our judgment for that of the trial court on appeal.[6] Additionally, we treat unchallenged findings as verities on appeal.[7]

Berry challenges findings of fact 7 and 9. Finding of fact 7 states, "Officer Settle and Nelson decided at that point to contact the defendant to investigate whether or not the defendant was involved in criminal activity, specifically

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[3] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
[4] State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).
[5] State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999).
[6] Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990).
[7] Ross, 106 Wn. App. at 880.

criminal trespass." And finding of fact 9 states, "The officers approached the defendant outside the Parkway Apartments and engaged him in conversation and asked him if he lived in the building. The defendant answered yes."

Contrary to Berry's position, substantial evidence supports both of these findings. At the CrR 3.6 hearing, Officer Settle testified that they stopped Berry because they had prior contact with him in the neighborhood and believed he had been trespassed from the Parkway Apartments. Officer Settle further testified that Berry said he lived at the Parkway Apartments but could not recall his unit number. Although Berry testified that he told officers he was visiting a friend at the apartment building and did not indicate that he personally lived there, the trial court weighed the credibility of each witness and determined that Officer Settle's testimony was more credible. Thus, both findings of fact 7 and 9 are supported by substantial evidence.

We now turn to the question of whether the trial court erred in denying Berry's suppression motion based on its conclusion that the officers had the reasonable, articulable suspicion necessary for a valid investigatory stop.

A warrantless search is unreasonable under both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution, unless the search falls within one or more specific exceptions to the warrant requirement.[8] One such exception is a Terry stop. To justify a Terry stop under the state and federal constitutions, an officer must have a suspicion

[8] State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000).

of a particular crime connected to the particular person, rather than a mere generalized suspicion that the person detained may have been up to no good.[9] The officer must have an "articulable suspicion," meaning "a substantial possibility that criminal conduct has occurred or is about to occur."[10] He must possess "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[11]

In determining whether the officer's suspicion was reasonable, courts look to the totality of the circumstances.[12] The court takes into account an officer's training and experience when determining the reasonableness of a Terry stop.[13] Other factors that may be considered in determining whether a stop was reasonable include "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained."[14] The standard for determining the validity of an investigatory stop is objective, so the existence of a reasonable suspicion necessary to support an investigatory stop does not depend on an officer's subjective beliefs.[15] But the facts within the officer's knowledge must support a basis for a reasonable suspicion to believe that a suspect is engaged in criminal activity.[16]

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[9] State v. Martinez, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006).
[10] State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).
[11] Terry, 392 U.S. at 21.
[12] State v. Randall, 73 Wn. App. 225, 229, 868 P.2d 207 (1994).
[13] State v. Mercer, 45 Wn. App. 769, 774, 727 P.2d 676 (1986); State v. Samsel, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985).
[14] State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).
[15] State v. Mitchell, 80 Wn. App. 143, 147, 906 P.2d 1013 (1995).
[16] Mitchell, 80 Wn. App. at 148.

Officers Settle and Nelson are experienced police officers. Officer Settle had completed the field training officer program and received narcotic training. During his nine-year career, Officer Settle had been involved in approximately 50 narcotics investigations. Officer Nelson had served 18 years on the police force and had undergone training involving firearms, defensive tactics, narcotics, anticrime team mounted patrol, and bicycle patrol. Throughout his career, Officer Nelson had participated in approximately 100 crack cocaine investigations.

At the time of the incident, these officers had information that prior complaints existed about trespassing activity related to narcotics at the location Berry was seen leaving. The officers also knew Berry from prior contacts and narcotics-related activity in the neighborhood. From these prior contacts, the officers believed that Berry was on probation or supervision with the Department of Corrections and that he had been trespassed from the Parkway Apartments. These facts were within the officers' knowledge when they spotted Berry outside of the Parkway Apartments and observed Berry's eyes widen, exhibiting a surprised look. The officers' initial suspicions were further aroused when Berry could not identify which apartment he was in and began acting more nervous and appeared as if he might flee. Even though the officers mistakenly believed that Berry was trespassed from the Parkway Apartments when, in actuality, he was trespassed from a nearby complex, the facts within the officers' knowledge

provide a basis for a reasonable suspicion that Berry was committing criminal trespass.[17]

The cases on which Berry relies are factually distinguishable. In State v. Martinez, the defendant was seen by officers in an area known for high crime and vehicle prowls.[18] He was unknown to the officers when they stopped him for questioning.[19] The defendant admitted that he did not live in the apartment complex where he was located.[20] After asking the defendant to sit down, he was searched, and the officers found a container of methamphetamine.[21] On appeal, the defendant argued that the officer lacked the particularized suspicion necessary to stop him.[22] Division Three agreed, holding that in order to stop a suspect, officers must have some suspicion of a particular crime or a particular person and a connection between the two.[23] In this case, Berry, unlike the defendant in Martinez, was particularly known to the officers due to previous contacts they had with him. Based on these contacts, the officers believed Berry was trespassed from the Parkway Apartments. These facts support a reasonable suspicion that he was committing criminal trespass.

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[17] The parties do not dispute that the officers' stop constituted a seizure. Berry does not challenge the length or place of the detention, and the record does not contain any evidence indicating that these aspects of the detention exceeded the permissible limits of a Terry stop.

[18] 135 Wn. App. 174, 177, 143 P.3d 855 (2006).

[19] Martinez, 135 Wn. App. at 177-78.

[20] Martinez, 135 Wn. App. at 177-78.

[21] Martinez, 135 Wn. App. at 178.

[22] Martinez, 135 Wn. App. at 178.

[23] Martinez, 135 Wn. App. at 182.

Berry's reliance on State v. Gatewood[24] is also misplaced. There, police officers stopped the defendant based on a "wide-eyed" expression he gave as they drove by a bus shelter where he was sitting.[25] The defendant appeared to discard some drugs and then crossed the street, leaving the bus shelter.[26] Our Supreme Court determined that a Terry stop was not supported by these facts alone.[27] Here, Berry's nervous expression was not the only reason he was stopped by the officers. He was recognized from previous encounters and was suspected to be trespassing at the apartments. The cumulative circumstances included Berry's nervous expression, but the officers did not stop him based upon this fact alone.

Taken as a whole, the officers had a reasonable, articulable suspicion when they stopped Berry outside the Parkway Apartments. They were under a duty to prevent narcotics and trespassing activity at the location Berry was seen leaving, they knew Berry from prior contacts, and they reasonably believed he was trespassed from the Parkway Apartments and was on probation with the Department of Corrections. Berry's nervous and surprised behavior in the officers' presence further confirmed their suspicions that Berry was engaged in criminal activity, such as criminal trespass. These circumstances, coupled with the officers' extensive training and experience, establish that the officers had a

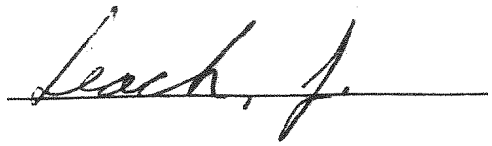
[24] 163 Wn.2d 534, 182 P.3d 426 (2008).
[25] Gatewood, 163 Wn.2d at 537.
[26] Gatewood, 163 Wn.2d at 537.
[27] Gatewood, 163 Wn.2d at 541.

reasonable, articulable suspicion that Berry was committing criminal trespass. Therefore, the investigatory stop was lawful.

Conclusion

We agree with the trial court's conclusion that the officers had a sufficient, specific, articulable suspicion to make a Terry stop. In addition, the trial court's challenged findings are supported by substantial evidence.

Affirmed.



WE CONCUR: