SUPREME COURT NO. SC#93631-5

COA NO. 47765-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CHRISTENSEN,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable K.A. van Doorninck, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. IDENTITY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 2

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 5

A. The Supreme Court should accept review and hold that the police violated Mr. Christensen's rights under the Fourth Amendment and Wash. Const. art. I, § 7 when they stopped him simply because he was in the area they were investigating and the same race as a robbery suspect. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4). 5

B. The Supreme Court should accept review and hold that even if the original stop was lawful, the officers exceeded the scope of an allowable *Terry* detention by patting Mr. Christensen down and then locking him in a patrol car. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4). 10

VI. CONCLUSION 15

Appendix: Court of Appeals Decision

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Brown, 448 F.3d 239 (3d Cir. 2006)............................ 7, 8

United States v. Sharpe, 470 U.S. 433, 93 S.Ct. 1568, 84 L.Ed.2d 605 (1985).. 11

WASHINGTON CASES

State v. Cardenas-Muratalla, 179 Wn. App. 307, 319 P.3d 811 (2014).... 6

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010) 6

State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008).......................... 9

State v. Hamilton, 179 Wn. App. 870, 320 P.3d 142 (2014).................... 13

State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009)........................ 11

State v. Harris, 154 Wn. App. 87, 224 P.3d 830 (2010).......................... 12

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986)............................. 10

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).. 12

State v. Saggers, 182 Wn. App. 832, 332 P.3d 1034 (2014) 5, 9, 10, 11, 12

State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984)....................... 10

State v. Z.U.E., 183 Wn.2d 610, 352 P.3d 796 (2015)........................ 5, 6, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 5, 6, 12

U.S. Const. Amend. XIV 5

Wash. Const. art. I, § 7.. 5, 6, 12

OTHER AUTHORITIES

RAP 13.4 .... 5, 9, 10, 15

RAP 2.5 .... 12, 13

I. IDENTITY OF PETITIONER

Petitioner Richard Christensen, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Richard Christensen seeks review of the Court of Appeals unpublished opinion entered on August 23, 2016. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: The police may conduct a brief investigatory seizure of a person if they have specific and articulable facts creating a reasonable suspicion that s/he has committed a crime. Did the officers violate Mr. Christensen's constitutional rights by seizing him (a black man over six feet tall with no hair and tattoos reading "ZyZy" and "Libra") based on information that a robbery had been committed by a black man who was about 5'9" tall with cornrows and a tattoo that included the word "bitch"?

ISSUE 2: The police may conduct a protective frisk for weapons of a person whom they have reason to believe is presently armed and dangerous. Did the officers exceed the scope of a permissible *Terry* stop of Mr. Christensen by patting him down for weapons even after they could have easily determined that he was not the robbery suspect they were looking for?

ISSUE 3: Defense counsel provides ineffective assistance by failing to move to suppress resulting evidence when the police violate his/her client's constitutional rights. Did Mr. Christensen's attorney provide ineffective assistance by failing to argue that the gun should be suppressed based on the officers' actions beyond the permissible scope of a *Terry* stop?

IV. STATEMENT OF THE CASE

Richard Christensen ran into an acquaintance and asked her to give him a ride to the Emerald Queen Casino in Fife. Ex. 4 at 09:20-09:56. She agreed and dropped him off in the parking lot of the Days Inn across the street from the casino around 3:00 pm. CP 24; Ex. 4 at 09:20-09:56. That area of Fife has a lot of traffic. *See* Ex. 4.

Mr. Christensen got out of the car and tried to walk across Pacific Highway to the casino. CP 24. Before he crossed the street, though, he was stopped by a police officer and ordered to put his hands on the police car. CP 24.

The officer was investigating a robbery that had happened in the early morning hours. CP 23. Other officers were conducting a sting operation in the Days Inn to try to apprehend a woman who had been involved in the robbery. CP 23.

The officer who stopped Mr. Christensen had been told that the other robbery suspect was a black male, approximately 5'9", with

cornrows in his hair, and a neck tattoo of text including the word "bitch." RP 35-36.

Mr. Christensen is also a black male. RP 55. But he is over six feet tall and had no hair. RP 60, 97; Ex 4 at 04:09. Mr. Christensen has tattoos on his neck saying "ZyZy" and "Libra." CP 24.

Mr. Christensen stood with his hands on the police cruiser until another officer arrived. RP 79, 83; Ex. 4 at 00:37. Then the two officers handcuffed him and patted him down together. RP 47, 86; CP 24. They found a small gun. RP 48.

Several minutes later, Mr. Christensen explained how he had gotten to the Days Inn. Ex. 4 at 09:20-09:56. He also eventually admitted that he had a prior felony conviction. Ex. 4 at 12:05.

The police formally arrested Mr. Christensen for unlawful possession of a firearm. CP 25.

The police eventually arrested the man responsible for the robbery as well. RP 23. His booking photo shows shoulder-length hair, a full beard, and a neck tattoo with large, clearly legible text saying "bitches ain't shit." Ex 1.

The state charged Mr. Christensen with unlawful possession of a firearm. CP 1. He moved to suppress the gun as the product of an unconstitutional seizure. CP 3-8.

At the suppression hearing, the officers said that they could not tell if Mr. Christensen had cornrows in his hair because he was wearing a ball cap. RP 60. They said that they did not try to look at his hair. RP 97. They also said that he did not try to read Mr. Christensen's neck tattoos until later. RP 62, 97.

The court viewed a police dashcam video of the encounter. RP 42; Ex 4.

On the video, the officers never ask Mr. Christensen to remove his hat. Ex. 4. They also never ask him anything about his tattoos or request that he move his collar so they can see what is on his neck. Ex. 4.

They also do not ask him anything about the robbery even though he waives his *Miranda* rights, agrees to talk to them, and answers all of their questions about the gun. Ex. 4 at 03:19-04:00.

The officers eventually take Mr. Christensen's hat off (revealing his bald head) after finding the gun. Ex 4 at 04:09.

The officer testified that he always frisks people before conducting any additional investigation. RP 63.

The trial court denied Mr. Christensen's motion to suppress the gun. RP 109. The court found him guilty at a stipulated facts trial. RP 116-122.

Mr. Christensen timely appealed. CP 88. The Court of Appeals affirmed his conviction. Opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the police violated Mr. Christensen's rights under the Fourth Amendment and Wash. Const. art. I, § 7 when they stopped him simply because he was in the area they were investigating and the same race as a robbery suspect. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The police stopped Mr. Christensen – a black male over six feet tall with no hair and tattoos reading "ZyZy" and "Libra." RP 60, 97; CP 24. But they were looking for a black man who was approximately 5'9" with cornrows and a tattoo that said "bitches ain't shit". RP 36.

The description of the robbery suspect did not provide reasonable suspicion to stop Mr. Christensen. *State v. Z.U.E.*, 183 Wn.2d 610, 352 P.3d 796 (2015). The court should have granted his suppression motion. *Id.*

Warrantless searches and seizures are *per se* improper under the state and federal constitutions. *State v. Saggers*, 182 Wn. App. 832, 839, 332 P.3d 1034 (2014); U.S. Const. Amends. IV, XIV; art. I, § 7. The state bears the burden of establishing that the seizure falls within one of the

"carefully drawn exceptions to the warrant requirement." *Z.U.E.*, 183 Wn.2d at 617.

A brief *Terry* stop is permissible for investigative purposes if the state can show that the officers had a reasonable suspicion that the detained person was involved in a crime. *Id.* The suspicion must be grounded in "specific and articulable facts." *Id.*

Because art. I, § 7 provides greater privacy protection than the Fourth Amendment, the state constitution requires a stronger showing than the federal constitution. *Id.* at 618.

A valid *Terry* stop requires "a substantial possibility that the particular person has committed a specific crime or is about to do so." *State v. Cardenas-Muratalla*, 179 Wn. App. 307, 309, 319 P.3d 811 (2014).

The state must prove reasonable suspicion by clear, cogent, and convincing evidence. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

Here, the description of the robbery suspect did not provide "specific and articulable facts" upon which to stop Mr. Christensen. *Z.U.E.*, 183 Wn.2d at 617.

The table below clarifies the extent to which Mr. Christensen's appearance aligned with the description the officers had of the robbery suspect:

Description of robbery suspect	Mr. Christensen
Black male. RP 36.	Black male. RP 55.
About 5'9" tall. RP 36	Over 6' tall. RP 60.
Hair in cornrows. RP 36.	Completely bald. RP 97.
Neck tattoo including the word "bitches." RP 36.	Neck tattoos that say "ZyZy" and "Virgo." CP 24.
Nothing about clothing in description. RP 36.	n/a
No approximate age in description. RP 36.	n/a
No approximate weight or information about build in description. RP 36.	n/a
No information about facial hair in description. RP 36.	n/a

The only things that Mr. Christensen had in common with the alleged robber were that he was black and had a tattoo on roughly the same part of his body. Those two similarities do not rise to the level of specificity required for reasonable suspicion. *See United States v. Brown*, 448 F.3d 239, 246 (3d Cir. 2006).

The fact that Mr. Christensen was walking near Days Inn is also insufficient to provide reasonable suspicion. *Id.* Indeed, the officers' conjecture that the man would come to the hotel with the female robbery suspect did not give them license to frisk every tattooed black man in a busy area of Pacific Highway. *Id.*[1]

A person's presence in an area where the police expect to find a crime suspect is insufficient to justify a *Terry* stop when the person does not also sufficiently match the description of the suspect or when the description is too vague. *See e.g. Brown*, 448 F.3d 239. Still, the Court of Appeals found that the officers had reasonable suspicion to detain Mr. Christensen based only on his presence in the motel parking lot and tenuous relationship to the description of the robbery suspect. Opinion, pp. 8-9. The Court of Appeals' analysis is unpersuasive.

An attempt by the officers to collect enough information to justify a stop – such as asking Mr. Christensen to remove his hat so they could see his hair or to move his collar so they could read his tattoo – would have dispelled any suspicion that he was the robbery suspect within a few seconds. The state and federal constitutions did not permit the officers to

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[1] In fact, in *Brown*, the man the officers frisked was within several blocks of where the robbery had actually occurred very recently. *Brown*, 448 F.3d at 242. Even then, his mere presence in the area was insufficient to provide reasonable suspicion when he did not also substantially match a detailed description of the robber. *See generally Id.*

seize and frisk Mr. Christensen absent the "specific and particularized facts" those steps would have produced. *Z.U.E.*, 183 Wn.2d at 617.

An appellate court reviews *de novo* whether the state has met its burden to justify a *Terry* stop. *Saggers*, 182 Wn. App. at 839.

The state has not met that burden here.[2] *Id.* The officers did not have sufficient "specific and articulable facts" to justify stopping and frisking Mr. Christensen when his only similarities to the robbery suspect were his race and the location of a tattoo. *Z.U.E.*, 183 Wn.2d at 617.

The trial court erred by denying Mr. Christensen's motion to suppress the gun. *Id.* Mr. Christensen's conviction must be reversed. *Id.*

This significant issue of constitutional law is of substantial public interest. This court should grant review. RAP 13.4(b)(3) and (4).

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[2] The robbery suspect was also associated with a dark-colored Dodge Charger. RP 70. Mr. Christensen admitted *after he was stopped and searched* that he had been dropped off by a light-colored Charger. Ex. 4 at 10:03. But a *Terry* stop must be justified at its inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). Because the police did not know that Mr. Christensen had been in a Charger when they seized him, that information is not relevant to the analysis on appeal. *Id.*

One officer also testified that Mr. Christensen appeared startled to see him. RP 82. But "startled reactions to seeing the police" are, likewise, insufficient to amount to reasonable suspicion. *Gatewood*, 163 Wn.2d at 540.

B. The Supreme Court should accept review and hold that even if the original stop was lawful, the officers exceeded the scope of an allowable *Terry* detention by patting Mr. Christensen down and then locking him in a patrol car. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

1. The officers' suspicions that Mr. Christensen had committed the robbery could have been dispelled without patting him down.

Once they had stopped Mr. Christensen, the officers could have easily seen that he did not have cornrows and that his tattoo did not match the description of the robbery suspect. RP 36.

At that point, the justification for the stop had dissipated and the officers should have let Mr. Christensen go. Even if the initial detention of Mr. Christensen was lawful, the officers exceeded the scope of the permissible *Terry* stop by frisking him for weapons absent any indication that he was presently armed and dangerous.

A *Terry* stop must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Saggers*, 182 Wn. App. at 847 (*citing State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984)).

The officers attempted to justify stopping Mr. Christensen based on his limited similarities with the description of the robbery suspect. RP

55, 79. Once they got a closer look, though, the officers would have easily seen that Mr. Christensen did not have cornrows (in fact, he was bald) and that his tattoos did not include the word "bitches."

At that point, the justification for the interference had dissipated and the officers should have ended Mr. Christensen's detention. *Saggers*, 182 Wn. App. at 847. There was no reason to continue the seizure or to pat him down. Even so, the Court of Appeals affirmed Mr. Christensen's conviction because "the question is not simply whether some alternative was available [to a frisk], but whether the police acted unreasonably in failing to recognize or pursue it." Opinion, p. 10 (*citing United States v. Sharpe,* 470 U.S. 433, 447, 93 S.Ct. 1568, 84 L.Ed.2d 605 (1985)).

But the Court fails to explain how it could have been reasonable for the officers to do anything but determine whether Mr. Christensen actually matched the description of the robbery suspect after stopping him based on that description alone. The Court's reasoning is unavailing.

An officer may conduct a frisk for weapons only when s/he possesses specific and articulable facts creating an objectively reasonable suspicion that a person is armed and presently dangerous. *State v. Harrington*, 167 Wn.2d 656, 668, 222 P.3d 92 (2009).

Here, even if the initial seizure was constitutional, the officers exceeded its permissible scope by frisking Mr. Christensen after their

suspicion that he had committed the robbery was dispelled. *Saggers*, 182 Wn. App. at 847.

The court erred by denying Mr. Christensen's motion to suppress. *Id.* His conviction must be reversed. *Id.*

2. The fact that the *Terry* stop went beyond its constitutionally-permitted scope presents manifest error affecting a constitutional right.

Manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3).

The officers' actions beyond the permissible bounds of a *Terry* stop implicate Mr. Christensen's constitutional rights under the Fourth Amendment and art. I, § 7.

An error is manifest if it had "practical and identifiable consequences in the trial of the case." *State v. Harris*, 154 Wn. App. 87, 94, 224 P.3d 830 (2010).

An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Here, the dashcam video captured the entire encounter between the officers and Mr. Christensen. Ex 4. The video was played (apparently more than once) at the suppression hearing. RP 42-46, 53. The trial court

had access to all of the information necessary to conclude that the officers exceeded the scope of a permissible *Terry* stop. *Id.*

The issue had practical and identifiable consequences at trial. *Id.* Absent the evidence of the gun, the state would not have had the evidence necessary to convict Mr. Christensen.

Mr. Christensen may raise for the first time on appeal that the officers exceeded the permissible scope of a *Terry* stop by patting him down and locking him in the patrol car. RAP 2.5(a)(3). This court should consider the merits of the issue. *Id.*

3. Defense counsel's failure to raise the issue regarding the scope of the *Terry* stop at the suppression hearing represents ineffective assistance of counsel.

In the alternative, Mr. Christensen's attorney provided ineffective assistance of counsel by failing to argue that officers went beyond the constitutional scope of a *Terry* stop at the suppression hearing. *State v. Hamilton*, 179 Wn. App. 870, 878, 320 P.3d 142 (2014).

To prevail on an ineffective assistance claim, the accused must show that counsel provided deficient representation that prejudiced the outcome of the case. *Id.* Representation is deficient if it falls below an objective standard of reasonableness. *Id.* Prejudice occurs if there is a reasonable probability that counsel's errors affected the outcome of the proceeding. *Id.*

There can be no conceivable legitimate strategy behind counsel's failure to move to suppress based on a violation of his/her client's constitutional rights. *Id.* at 880. Mr. Christensen's attorney provided ineffective assistance by failing to move to suppress the evidence against him based on the officers' actions beyond the permissible bounds of the *Terry* stop. *Id.*

Mr. Christensen was prejudiced by his attorney's deficient performance because the court would likely have granted such a motion. *Id.* at 882.

The trial court knew of the obvious differences between Mr. Christensen and the robbery suspect. Even if the court thought that those differences may not have been visible at first blush (thereby requiring a brief *Terry* stop), they were certainly noticeable without frisking Mr. Christensen for weapons.

Also, as outlined above, the court was able to view a video of the entire encounter between the officers and Mr. Christensen. *Id.* On the video, the officers remove Mr. Christensen's hat (revealing his baldness and concomitant lack of cornrows) before he is placed in the patrol car. Ex 4 at 04:09. They also do not learn that he is not legally allowed to possess a gun until well after he has been locked in the vehicle. Ex. 4 at 12:05.

The court would likely have granted a motion to suppress based on the officer's actions beyond the scope of the allowable *Terry* stop. *Id.* at 882. Mr. Christensen received ineffective assistance of counsel. *Id.*

This significant question of constitutional law is of substantial public interest. This court should grant review. RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State and Federal Constitutions. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted September 22, 2016.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Richard Christensen/DOC#323151
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and I sent an electronic copy to

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through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on September 22, 2016.

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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

August 23, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD DWAYNE CHRISTENSEN, Appellant.	No. 47765-3-II UNPUBLISHED OPINION

MAXA, J. – Richard Christensen appeals his conviction of first degree unlawful possession of a firearm. Christensen argues that the trial court erred in denying his motion to suppress the firearm police officers found after detaining him. We hold that (1) the officers had authority to make an investigative *Terry*[1] stop because they had a reasonable suspicion to detain Christensen based on his shared characteristics with a male robbery suspect and Christensen's close proximity to the suspect's believed associate, (2) the officers did not exceed the scope of a permissible investigative stop by conducting a protective frisk of Christensen, (3) the officers had probable cause to arrest Christensen for carrying a concealed weapon without a license, and (4) Christensen's trial counsel was not ineffective in not challenging the scope of the investigative stop because the officers did not exceed the scope of the stop. Accordingly, we

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

affirm the trial court's denial of the motion to suppress, and therefore we affirm Christensen's conviction.

FACTS

Robbery Incident

On January 30, 2015, Timothy Anderson called the police and reported being robbed by the male associate of a prostitute named Shayna Vasser-Learn. The man, Vasser-Learn, and another woman confronted Anderson and the man took his money. Anderson told the police that man kept his hand in his right pocket during the altercation, which gave him the impression that he may have had a gun.

Anderson described the man to the police as a black male, five foot nine or ten inches tall, with cornrow styled hair, and a tattoo on his neck. The tattoo was described as having more than one word, which may have included the word "bitch." Anderson told law enforcement that the man left in a newer, dark colored Dodge Charger.

Detention of Christensen

Shortly after the robbery, law enforcement officers arranged a sting operation to try to identify the robbery suspect. Officers arranged an encounter with Vasser-Learn at the Days Inn hotel in Fife. Sergeant Kevin Farris and Officer Ryan Micenko were called in to the area to provide backup. The officers were informed that the robbery suspect (1) was a light-skinned black male, five feet nine inches tall, with cornrow style hair, (2) had written tattoos on both sides of his neck with the word "bitch" in one of them, (3) was associated with a black Dodge Charger, and (4) had implied to Anderson that he had a handgun.

Micenko arrived on scene and parked near the Days Inn where he could observe the motel. Detectives later radioed that Vasser-Learn had arrived at the Days Inn in a Dodge Charger. From Micenko's location in his vehicle, he observed a person later identified as Christensen walking through the Days Inn parking lot. Micenko did not see whether Christensen arrived in a Charger. Detectives then radioed that Vasser-Learn was in custody.

Micenko observed that Christensen was a light-skinned black male, had tattoos on his neck, and was wearing a hat. At that point, Micenko exited his patrol car and told Christensen to stop and put his hands on the vehicle. Micenko stated that Christensen was startled by his presence and appeared to be looking around for an avenue of escape.

Micenko noticed that Christensen was wearing baggy clothing, which appeared to be weighed down by an object. Farris arrived within a minute and informed Christensen that he was not under arrest but also was not free to leave. Farris then gave Christensen the *Miranda*[2] warnings. Farris asked Christensen if he had any weapons and he said no. Micenko frisked Christensen and felt an object that felt like a small handgun. He opened Christensen's coat pocket and discovered a handgun. The officers asked Christensen if he had a concealed weapons permit, and he admitted that he did not. At that time, Micenko noticed Christensen's neck tattoos said "Zyzy" and "Libra." Clerk's Papers (CP) at 24. Micenko also removed Christensen's hat, revealing a bald head.

Micenko handcuffed Christensen and placed him in the patrol car. The officers ran a records check on Christensen. While waiting for the results, Micenko asked Christensen if he

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

had a prior felony, and Christensen responded that he did. Shortly thereafter, the results of the background check confirmed that Christensen had previously been convicted of a felony. Micenko advised Christensen that he was under arrest for unlawful possession of a firearm.

Suppression Hearing

The State charged Christensen with first degree unlawful possession of a firearm. Christensen filed a motion to suppress the seized firearm, arguing that there was no lawful basis for Micenko's initial detention of him. After a CrR 3.6 hearing, the trial court denied Christensen's motion to suppress, concluding that the investigative detention was valid and the frisk was reasonable. The trial court entered detailed findings of fact and conclusions of law to support its ruling.

Conviction

Christensen's case then proceeded to a bench trial based on stipulated facts, and the trial court found him guilty of first degree unlawful possession of a firearm. Christensen appeals his conviction.

ANALYSIS

A. Standard of Review

When reviewing the trial court's denial of a CrR 3.6 suppression motion, we determine whether substantial evidence supports the challenged findings of fact and whether the findings of fact support the conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the finding. *Id.* at 866-67. Unchallenged findings of fact are considered verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). We review de novo the trial court's

conclusions of law pertaining to the suppression of evidence. *State v. Fuentes*, 183 Wn.2d 149, 157, 352 P.3d 152 (2015).

B. JUSTIFICATION FOR INVESTIGATIVE STOP

Christensen argues that his initial detention was not a permissible investigative stop because Micenko did not have a reasonable suspicion that he had committed a crime. We disagree.

1. Legal Principles

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, a police officer generally cannot seize a person without a warrant. *Fuentes*, 183 Wn.2d at 157-58. The State bears the burden of showing that the seizure falls within one of the carefully drawn exceptions to the warrant requirement. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). One established exception is a brief investigative detention of a person, known as a *Terry* stop. *Id.*

For an investigative stop to be permissible, a police officer must have had a "reasonable suspicion" based on specific and articulable facts that the detained person was or was about to be involved in a crime. *Id.* The available facts "must connect the particular person to the particular crime that the officer seeks to investigate." *Id.* at 618 (italics omitted).

We determine the propriety of an investigative stop – the reasonableness of the officer's suspicion – based on the "totality of the circumstances." *Fuentes*, 183 Wn.2d at 158. "The totality of circumstances includes the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion

on the suspect's liberty." *Id.* The focus is on what the officer knew at the inception of the stop. *Id.*

A police officer can rely on his or her experience to identify seemingly innocent facts as suspicious. *State v. Moreno*, 173 Wn. App. 479, 492, 294 P.3d 812 (2013). Facts that appear innocuous to an average person may appear suspicious to a police officer in light of past experience. *Id.* at 493.

If an officer did not have a reasonable suspicion of criminal activity under the totality of circumstances, a detention is unlawful and evidence discovered during the detention must be suppressed. *Fuentes*, 183 Wn.2d at 158.

2. Findings of Fact – Substantial Evidence

The trial court made three findings of fact relevant to whether Micenko had a reasonable suspicion based on specific and articulable facts to detain Christensen.[3] First, in finding of fact 17 the trial court found that Micenko saw Christensen in the parking lot of the Days Inn at the same time that detectives radioed that Vasser-Learn was at the hotel, and that Christensen's position was "consistent with having been dropped off at the hotel at the same time as Vasser-Learn." CP at 98. Christensen did not assign error to this finding, so it is a verity on appeal.

Second, in finding of fact 21 the trial court found that Micenko noticed that Christensen "had a tattoo of writing on his neck but could not read what the writing said." CP at 98. Christensen did not assign error to this finding, so it is a verity on appeal.

[3] The trial court also entered finding of fact 22, which stated that based on the totality of the circumstances, specific and articulable facts warranted Christensen's detention. But this clearly is a conclusion of law, and we treat it as such.

Third, in finding of fact 18, the trial court found that "Micenko noted that [Christensen] appeared to match the height, skin tone and general appearance of the male robber." CP at 98. This finding tracks Micenko's testimony. And there is no dispute that both the robbery suspect and Christensen were light skinned black males. Christensen challenges this finding because his height, tattoos, and hair were different than the suspect's.

Regarding height, officers were told that the suspect was approximately five foot nine inches tall. Christensen points out that Farris testified that during the stop he observed that Christensen was over six feet tall. But Micenko testified that Christensen's height "[was] there" compared to the suspect's description. Report of Proceedings (RP) at 79. Micenko obviously was not able to actually measure Christensen's height as he walked toward him. We hold that a few inches difference in height is close enough to support Micenko's estimate and provides substantial evidence that the trial court's finding that Christensen's height matched the suspect's height.

Regarding the neck tattoos, Christensen argues that his appearance was not similar to the suspect's because his tattoos included the words "ZyZy" and "Libra," CP at 24, and the suspect's tattoos included the word "bitch." But Micenko testified that he could not see the words in Christensen's tattoos before the detention. We hold that the fact that both Christensen and the suspect has neck tattoos of writing represents substantial evidence that Christensen matched the suspect's general appearance in that respect.

Regarding the hair, Christensen argues that his appearance was not similar to the suspect's because he was bald and the suspect had cornrows. But Micenko testified that he could not see Christensen's hair before the detention because Christensen was wearing a hat and a

hood. Therefore, we hold that substantial evidence supports the trial court's finding even though Micenko later realized Christensen was bald.

We hold that substantial evidence supports the three findings of fact upon which the trial court relied in concluding that Micenko had reasonable suspicion to detain Christensen.

3. Reasonable Suspicion Analysis

The ultimate question is whether the trial court's findings of fact support its legal conclusion that Micenko's detention of Christensen was based on reasonable suspicion and therefore was lawful.

First, Christensen shared some physical characteristics with the robbery suspect – both were light-skinned black males and were of similar height. But these physical characteristics also would describe a significant number of African American men.

Second, Christensen and the suspect both had writing tattooed on their necks. This is a much less common characteristic and therefore when coupled with the physical similarities could support a finding of reasonable suspicion. But the fact that the suspect's tattoo included the word "bitch" and Micenko could not see the words in Christensen's tattoo diminishes this factor to some extent.

Third, Micenko observed Christensen in the parking lot of the Days Inn at approximately the same time that Vasser-Learn arrived there, and the trial court made an unchallenged finding that the evidence was consistent with Christensen having been dropped off at the hotel at the same time as Vasser-Learn. The fact that Christensen and the robbery suspect's associate appeared to arrive at the same place at the same time gives rise to a reasonable inference that Christensen was connected with Vasser-Learn.

Under our totality of the circumstances analysis, the combination of these factors is sufficient to provide reasonable suspicion. Christensen's physical similarities to the robbery suspect – their similar gender, skin color, height, and neck tattoos – combined with Christensen's presence at the same time and place as the prostitute associated with the suspect gave officers a strong indication that Christensen was in fact the suspect.

We hold that Micenko's investigative detention of Christensen was lawful because he had a reasonable suspicion that Christensen was the robbery suspect. Therefore, we affirm the trial court's conclusion of law that Christensen's detention was lawful.

C. SCOPE OF DETENTION – PROTECTIVE FRISK

Christensen argues that Micenko exceeded the permissible scope of a *Terry* stop by frisking him when the officers easily could have determined that Christensen was not the robbery suspect. We disagree.

A valid investigative stop permits an officer to conduct "a brief frisk for weapons, but only if a reasonable safety concern exists to justify the protective frisk." *Fuentes*, 183 Wn.2d at 158. Specifically, the officer can "pat-down . . . the outer clothing of a person in an attempt to discover weapons that could cause harm." *Russell*, 180 Wn.2d at 867. To justify a protective frisk, the officer must be able point to specific and articulable facts that create an objectively reasonable belief that a suspect is armed and presently dangerous. *Id.* We are reluctant to substitute our judgment for that of police officers in the field, and a founded suspicion from which we can determine that the search was not arbitrary and harassing is all that is necessary. *Id.* at 867-68.

Christensen assigns error to findings of fact 27 and 29, in which the trial court found that the officers reasonably concluded that there was probable cause to believe that Christensen was armed and presently dangerous and a reasonable and objective safety concern justified a protective frisk. He also assigns error to the trial court's conclusion of law 2:

> In light of all the facts and circumstances in this case, the frisk of the defendant was a reasonable and minimal intrusion when balanced against the objectively observed facts/behaviors giving rise to reasonable concerns for officer safety.

CP at 100.

Here, after Christensen's initial detainment, Micenko observed that Christensen's clothes were weighed down by an object that could be a gun. Micenko knew that Christensen looked similar to the robbery suspect's description. Christensen appeared to be looking for an avenue of escape, which in Micenko's experience was a behavior that a detainee might exhibit before he or she attempted to fight a police officer. And Micenko knew that they were searching for an armed robbery suspect. Given this evidence, we hold that substantial evidence supports the trial court's findings of fact and that the findings supported the trial court's conclusion of law.

Christensen's primary argument is that Micenko did not *need* to frisk him because the officers easily could have removed his hat and closely examined his tattoo to confirm that he did not match the suspect's description. But " '[t]he fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, itself, render the search unreasonable.' " *United States v. Sharpe*, 470 U.S. 675, 687, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 447, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)). "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Sharpe*, 470 U.S. at 687.

Here, as discussed above the officers had an objectively reasonable belief that Christensen was armed and dangerous based on their observations and the violent crime they were investigating. We do not require officers to put themselves at risk by attempting to determine whether Christensen was or was not the robbery suspect *before* frisking him.

We will not second guess the judgment of the officers in the field, and we hold that specific and articulable facts created Micenko's objectively reasonable belief that Christensen was armed and dangerous. Accordingly, we hold that Micenko did not exceed the scope of the investigative stop by frisking him.

D. PROBABLE CAUSE TO ARREST

Christensen argues that his being handcuffed and placed in the patrol car amounted to a custodial arrest without probable cause that he had committed a crime. Based on this contention, Christensen seems to contend that any evidence gathered after the allegedly illegal arrest is inadmissible, including his admission and record check establishing that he had a prior felony. We disagree.

An arrest occurs when a police officer manifests an intent to take a person into custody and actually seizes that person. *State v. Bravo Ortega*, 177 Wn.2d 116, 128, 297 P.3d 57 (2013). The proper inquiry is whether a reasonable person under the circumstances would consider himself or herself under arrest. *Id.* Examples of conduct that would cause a reasonable person to believe he or she was under arrest include "handcuffing the suspect, placing the suspect in a patrol vehicle for transport, and telling the suspect that he or she is under arrest." *Id.*

Here, Christensen was detained, forced to stand with his hands on the patrol car, and then handcuffed and placed in the patrol car. Under the circumstances, we assume that the officers arrested Christensen.

The question is whether the officers had probable cause to arrest Christensen after finding the weapon concealed in his clothes. Christensen concedes that his admission that he did not have a concealed weapons permit established that he violated RCW 9.41.050(1). Under RCW 9.41.050(1)(a), "a person shall not carry a pistol concealed on his or her person without a license to carry a concealed pistol," unless in the person's abode or fixed place of business. Christensen argues without citation to authority that the officers would only be able to give him a civil citation for carrying a concealed weapon without a license. However, a violation of RCW 9.41.050(1)(a) is a misdemeanor. *See* RCW 9.41.810 ("Any violation of any provision of this chapter, except as otherwise provided, shall be a misdemeanor and punishable accordingly"); RCW 9.41.050(1)(a)-(b) (failing to list the penalty for violating RCW 9.41.050(1)(a)). RCW 10.31.100[4] permits an officer to make an arrest without a warrant for a misdemeanor when the offense is committed in the presence of the officer.

Christensen carried the concealed pistol without a license in the presence of the officers. So they had authority to arrest Christensen for that misdemeanor. Therefore, we hold that the officers had probable cause to arrest Christensen when they handcuffed him and placed him in the patrol car.

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[4] RCW 10.31.100 has been amended since the events of this case transpired, however, these amendments do not impact the statutory language relied on by this court. *See* LAWS OF 2016, ch. 203, § 9 and ch. 113, § 1. Accordingly, we do not include the word "former" before RCW 10.31.100.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Christensen argues that his trial counsel's failure to argue that the officers exceeded the scope of the investigative stop amounted to ineffective assistance of counsel. We disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). We presume that counsel's assistance was effective, until the defendant shows in the record the absence of legitimate or tactical reasons supporting counsel's conduct. *Id.* at 33-34.

We hold that Christensen's ineffective assistance claim fails because he cannot show that defense counsel's performance was deficient. As discussed above, the officers did not exceed the scope of the investigative stop by frisking him and even if Christensen was placed under custodial arrest, there was probable cause to arrest. Therefore, there was no basis on which defense counsel could have successfully objected. Because there was no basis for a sustainable objection, defense counsel was objectively reasonable in deciding not to object.

Accordingly, we hold that defense counsel was not ineffective for failing to argue that the officers exceeded the permissible scope of the investigative stop at the motion to suppress.

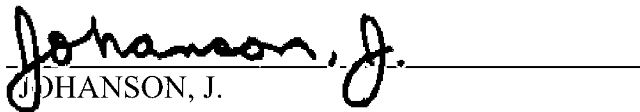
We affirm the trial court's denial of the motion to suppress, and therefore we affirm Christensen's conviction.

No. 47765-3-II

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.

MAXA, J.

We concur:



JOHANSON, J.

BJORGEN, C.J.

ELLNER LAW OFFICE

September 22, 2016 - 9:35 AM

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