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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
by_____

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III**

STATE OF WASHINGTON,

Appellant, No. 333124

vs.

ERIC DANIEL CRUZ

Respondent.

# RESPONDENT'S BRIEF

Submitted by:

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## A. STATEMENT OF THE CASE

### 1. Issue.

The issue in this case is whether the warrantless search of the defendant's pickup truck and the seizure of firearms found inside his truck at a time when the defendant was under arrest for illegally snagging fish, handcuffed and locked inside a police vehicle violates the Fourth Amendment and art. 1, section 7 of the Washington Constitution.

### 2. Facts:

On August 10, 2012, Officer McCormick of the Washington Department of Fish and Wildlife was patrolling the Similkameen River west of Oroville in Okanogan County. (RP 6-7, CP 9-12 -- Findings of Fact (FF) 1.) Officer McCormick hiked to the top of an elevated cliff overlooking the river and was conducting surveillance on fishermen below. (FF 2 RP 7 L 17). He observed the defendant, Mr. Eric Cruz, and a second fisherman, Mr. Rose, for about half

an hour. (RP 7). This was around 10:00 a.m. (RP 16 L 3). Mr. Cruz was wearing shorts, a blue shirt, and a hat. (RP 18 L 3).

Officer McCormick was patrolling alone. Down on the river there is no cellular phone service and the radio signal is "sketchy" ... (RP 8 L 11-18). Sometimes an officer must move his vehicle around to get a radio signal. (RP 8 L 17). "There was no indication of a delay in communications on this day." (FF 5).

Officer McCormick observed Mr. Cruz illegally snag a Chinook salmon. (RP 9 L 2). The officer witnessed no other criminal activity by Mr. Cruz. (RP 17 L 22). (RP 18 L 1). He had no reason to believe Mr. Rose was engaged in criminal activity. (RP 28 L 7-9).

Officer McCormick returned to his vehicle and drove down to the Enloe Dam parking lot and contacted Mr. Cruz. (RP 9 L 17-18). Mr. Cruz was attempting to fill out his "catch record card." The officer took it from him. (RP 10 L 3). His purpose in taking the card was "so he couldn't continue to fill

it out." (RP 19 L 9). Officer McCormick asked to see the fish, and Mr. Cruz opened a cooler for the officer. (RP 19 L 18). During this part of his investigation, Officer McCormick did not ask whether the accused had any firearms. (RP 20 L 4-11). Upon observing the fish, Officer McCormick placed Mr. Cruz in handcuffs and arrested him for the gross misdemeanor of unlawfully snagging salmon. (RP 10 L 14). He then searched Cruz incident to arrest and asked if he had any firearms. (RP 10 L 18).

According to Officer McCormick, his purpose in asking about firearms was to determine "if he had any firearms on his person when I was searching him I wanted to know where they were before I, you know, manipulated the firearm." (RP 11 L 8). At this point, Officer McCormick had no reason to believe having a firearm would constitute a crime by Mr. Cruz. (RP 11 L 16). "The defendant was cooperative with Officer McCormick." (FF 11). "Officer McCormick knows the defendant because the defendant owns a resort on Bonaparte Lake which is patrolled by

Officer McCormick. The officer testified he did not recognize the defendant on the day of his arrest." (FF 14; RP 16).

Mr. Cruz told the officer that there were firearms inside his vehicle. (RP 11 L 20). At this point, Officer McCormick placed Mr. Cruz inside the patrol vehicle to secure him and also to be able to look more closely at the fish. (RP 12 L 3).

While the officer was securing Mr. Cruz, another individual, Mr. Rose, approached the vehicle and asked what was going on. The officer asked him to stay away from the vehicle, which he did. (RP 12 L 6). After Mr. Cruz was placed in the patrol vehicle, Officer McCormick went to the Cruz vehicle and seized two rifles from the back seat and a pistol in the front seat. (RP 21 L 21). "At the time of the search and seizure of guns from the defendant's vehicle, the defendant was under arrest, handcuffed, and locked inside the officer's patrol vehicle where he could not access his vehicle or gain immediate control of the weapons." (FF 16). "Officer McCormick did not have a search warrant

authorizing the seizure of weapons from the defendant's vehicle, nor did he attempt to obtain a search warrant." (FF 17).

The officer said he seized the firearms to secure them during the contact. (RP 13 L 4). He said he planned to return the firearms to Mr. Cruz after the contact. (RP 13 L 8).

He then "ran the subject on the radio" and learned he had a prior felony, so he could not possess firearms. (RP 13 L 20). (RP 22 L 22).

Although Officer McCormick arrested Mr. Cruz and searched him incident to arrest, he claimed his intent was to cite and release him. (RP 23 L 14 – RP 25). "Officer McCormick cited the defendant for possession of marijuana and for the fishing violation and released him." (FF 20).

Over two years later, on December 15, 2014, the state filed felony charges against Mr. Cruz for possessing the firearms located inside his truck. (CP 53-55). He moved to suppress the evidence pursuant to CrR 3.6, and the trial

court granted the motion and suppressed the evidence. (CP 7-8).

## B. ARGUMENT

The exclusionary rule requires that evidence obtained directly or indirectly through government violations of the Fourth Amendment may not be introduced by the prosecution at trial. *Map v. Ohio*, 367 U.S. 643 (1961). "It is the first principal of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so." *New York v. Belton*, 453 U.S. 454, 457 (1981). "[S]earches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *State v. Hendrickson*, 129 Wn.2d 61, (1996). The burden is always on the state to prove one of these narrow exceptions. *Hendrickson,* 129 Wn.2d at 71.

This is no easy task because "[t]he exceptions to the requirement of a warrant, including consent, are '"jealously and carefully drawn."' *Hendrickson*, 129 Wn.2d 61 at 72 (1996) (quoting *State v. Bradley*, 105 Wn.2d 898, 902, 719 P.2d 546 (1986) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). *State v. Ferrier*, 136 Wn.2d 103 (1998). Article 1, section 7 provides greater protection of a person's right to privacy than the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d at 111 (1998); *State v. Hendrickson*, 129 Wn.2d 69 n. 1, (1996). The state provision recognizes a person's right to privacy with no express limitations. *Ferrier*, 136 Wn.2d at 111; *State v. White*, 97 Wn.2d 92, 110 (1982).

In the present case, because the police did not have a search warrant, the burden is on the State to prove an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250 (2009) and *State v. Doughty*, 170 Wn.2d 57, 62 (2010). The State has failed to do so.

Both the United States Supreme Court and the Washington State Supreme Court have repeatedly held, under facts similar to this case, that "after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon ..." *State v. Buelna Valdez*, 167 Wn.2d 761, 766 (2009); *Arizona v. Gant*, 566 U.S. 322, 129 S. Ct. 1710 (2009); *State v. Snapp*, 174 Wn.2d 177 (2012); *State v. Alfana*, 169 Wn.2d 169 (2010).

In *Valdez*, Clark County Sheriff's deputies stopped the defendant for a headlight violation. They learned Valdez had an outstanding warrant. They arrested Valdez, handcuffed him, and placed him in the backseat of a patrol vehicle. Valdez's passenger was asked to exit the vehicle.

They then searched the vehicle and found illegal drugs. The Court held, "... at the time of the search the arrestee was handcuffed and secured in the backseat of a patrol car. The arrestee no longer had access to any portion of the vehicle. The officer's search of his vehicle was therefore unconstitutional under both the Fourth Amendment and article 1, section 7." *Buelna Valdez*, at 778.

Likewise, in *Alfana*, a Spokane County deputy stopped a vehicle at 3:39 a.m. after learning there was an arrest warrant for the passenger. The passenger was taken into custody and the driver, Alfana, was asked to step out of the vehicle. The officer searched the vehicle and found drugs which caused the deputy to arrest Alfana. The Court said the deputy did not have reason to believe that the arrested passenger posed a safety risk since she was already in custody at the time of the search. *Id.* at 178. The Court held, "... the deputy had no authority of law to search Alfana's vehicle because it was out of the reach of the

arrestee at the time". *Alfana* at 179. "Thus, the search violated article 1, section 7 of our state constitution."

*Buelna Valdez, Snapp,* and *Alfana* rely on the United States Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009). Gant had been arrested for driving with a suspended license, handcuffed, and placed in the back of a patrol vehicle. Cocaine was found in a jacket on the backseat of his vehicle. Because Gant could not have accessed this car to retrieve weapons or evidence at the time of the search, the search incident to arrest exception did not justify the search.

The Court, in *Gant*, said, "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of the arrest." The Court held "... *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after

the arrestee has been secured and cannot access the interior of the vehicle."

The State argues that these cases merely dictate the rules regarding a search incident to arrest. The defendant, Mr. Cruz, argues that being arrested, handcuffed, and placed in the back of a patrol vehicle presents no different threat to officer safety if analyzed under *Terry v. Ohio.*

An investigatory stop or *Terry* stop is one exception the warrant requires. *Terry v. Ohio*, 392 U.S. 1 (1968). Such stops, which fall short of traditional arrests, are lawful when justified by a reasonable suspicion that a person is engaged in criminal activity. *Terry* at 21. Under *Terry*, if the officer who makes an investigatory stop has a reasonable belief that the detainee poses a threat to the officer's safety, he may conduct a limited pat-down, or frisk of a suspect's outer clothing. *Terry* at 27-28. The Court said the narrowly drawn authority to such a limited search exists where the officer has reason to believe that he is dealing with an armed "and dangerous" individual. *Terry* at 27.

In *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court expanded the area for a search incident to an investigatory stop to the inside of the passenger compartment of a vehicle. Once again, the Court pointed out the officer must believe that the person is armed "and presently dangerous". *Long* at 1047. The Court also limited such a search to situations where a suspect might gain immediate control of a weapon. The Court concluded that a search of the passenger area of a vehicle "... is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which taken together with the rational inferences from those facts, reasonably warrant' the officers in believing the suspect is dangerous and the suspect may gain immediate control of weapons." *Long* at 1049. The Court pointed out that an officer remains vulnerable during a *Terry* investigation "because a full custodial arrest has not been effected." *Terry* at 1052.

In the present case involving Mr. Cruz, the State presented no evidence that Mr. Cruz was believed to be

dangerous or that he could gain immediate access to the weapons while under arrest, handcuffed, and locked in the police vehicle. As indicated above, in *Gant*, *Buelna Valdez, Snapp,* and *Alfana*, it was held that when a suspect is arrested, handcuffed, and in a patrol vehicle, no "officer safety" issue is present.

Washington also adopted the expansion of a *Terry* investigation to include the area inside an automobile. *State v. Kennedy,* 107 Wn.2d 1 (1986). In *Kennedy*, police conducted an investigatory stop of Kennedy who made a suspicious furtive gesture by reaching under the front seat. Police looked under the seat where he had reached and discovered marijuana. The Court upheld the search on two grounds. First, the Court said the search was permissible under *State v. Stroud,* 106 Wn.2d 144 (1986), which authorized the search of a passenger compartment incident to arrest. *Stroud* was expressly overruled in *State v. Buelna Valdez*, 167 Wn.2d 761, 759 (2009). The second ground was a limited protective search under *Terry*. Like in *Terry*,

the Court limited the search to an area within the person's "immediate control."

In the present case, Mr. Cruz was arrested, handcuffed, and in the officer's vehicle at the time of the search. The inside of Mr. Cruz's vehicle was not within his immediate control, so the search exceeded what is allowed pursuant to *Terry, Long* and *Kennedy.*

The State next claims the officer had authority to search Mr. Cruz's vehicle and seize weapons because there was another individual in the area, Mr. Rose. The State produced no evidence that Mr. Rose was believed to be dangerous or a suspect of criminal activity. In fact, the evidence was that he complied with the officer's request to stay away and was not involved in criminal activity. (RP 27 L 22 - RP 28 L 9).

The State further argues that despite the fact that the officer arrested Mr. Cruz, searched him incident to arrest, placed him in the officer's vehicle, and seized firearms from his vehicle, the officer actually intended to only cite and

release the defendant, as well as return the seized firearms to him. The State argues as a result Mr. Cruz, once released, would have access to the firearms which would present an officer safety issue justifying their original seizure. Here, the state relies on *State v. Larson*, 88 Wn. App. 849 (1997). Its reliance on *Larson* is misplaced. *Larson*, like *Kennedy*, involved a furtive gesture made during a routine traffic stop where the driver was asked to exit the vehicle. The Court held that because the detainee would need to get back inside the vehicle to obtain his registration during the stop, the officer was entitled to search the passenger compartment in the area of the furtive movement. The Court said "[t]he scope of the search is limited to the area of the vehicle defined by the suspicious movement observed by the officer." *Larson* at 857.

In the present case, there was no evidence of furtive movements and no evidence the officer had reason to believe Mr. Cruz was dangerous, nor was there any indication that Mr. Cruz would be allowed back into his

vehicle to retrieve documents during the contact with the officer. The officer clearly did not have an objectively reasonable belief that he was in danger if he intended to release Mr. Cruz and return the firearms to him at the time of release.

The State also cites *State v. Chang*, 147 Wn. App. 409 (2008), a pre-*Gant* state decision upholding a vehicle search for weapons even though the suspect was in handcuffs but only two steps away from the vehicle door. The Court, in *Chang*, reiterated the rule that the search be only "within the investigatee's immediate control," citing *Kennedy* at 12.

Apparently, the Court felt the defendant in *Chang* was in the immediate control of the inside of his vehicle while handcuffed outside the vehicle. It is unclear whether such a result would be found after the United States Supreme Court's holding in *Gant*.

The State's next argument is that the search was lawful under the exigent circumstances exception of the warrant requirement. What is lacking is any exigency.

The State failed to show by clear and convincing evidence the existence of exigent circumstances sufficient to justify a warrantless search of the accused's vehicle.

The United States Supreme Court has recognized exigent circumstances as an exception to the warrant requirement of the Fourth Amendment. *Welsh v. Wisconsin*, 466 U.S. 740, 753-54 (1984). In *Welsh*, the Court pointed to *Dorman v. United States*, 435 F.2d 385 (D.C. 1970) as the leading case on factors a court may look to in determining whether exigent circumstances exist, but specifically approved only gravity of the offense as relevant to the analysis. See *Welsh* at 751-75.

Numerous federal cases hold exigent circumstances do no exist where the offense is not a grave or violent offense. *Loria v. Gorman*, 306 F.3d 1271 (2d Cir. 2002) (exigent circumstances not sufficient when offense obstructing governmental administration); *U.S. v.*

*Washington*, 573 F.3d 279 (6th Cir. 2009) (exigent circumstances not present when offense criminal trespass); *Patzner v. Burkett*, 779 F.3d 1363, 1368 (8th Cir. 1985) (exigent circumstances not present where offense DUI); *U.S. v. Johnson*, 256 F.3d 895, 908 (9th Cir. 2001) (exigent circumstances not present partly because only misdemeanor offense); and *Marshall v. Columbia Lea Regional Hospital*, 474 F.3d 733, 746 (10th Cir. 2007); (exigent circumstances not present when offense misdemeanor DUI).

In *State v. Tibbles*, 169 Wn.2d 364, 370 (2010), the Washington Supreme Court identified five circumstances that could be termed exigent circumstances: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence. The Court said the mere existence of exigent circumstances does not mean exigent circumstances justify a warrantless search.

"Exigent circumstances" involve a true emergency, i.e., "an immediate major crisis," requiring swift action to prevent imminent danger to life, forestall the imminent

escape of a suspect, or the destruction of evidence. *Dorman*, 435 F.2d 385.

The present case does not involve hot pursuit, flight, or possible destruction of evidence. Mr. Cruz, the defendant, was not a danger to the officer or a danger to flee because he was handcuffed in the back of the patrol car.

The present case involved a fishing violation. It was not a grave offense and it was not violent in nature.

For the exigent circumstances to apply, there must be a compelling need for immediate official action and no time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) and *Missouri v. McNeely*, 569 U.S. _____ (2013), 1333 S. Ct. 1552, 1572 (2013).

Here, the State has presented no evidence that there was no time to secure a warrant, nor have they proven that probable cause exists for the search or that a true emergency existed. While communications in the area of the arrest were sketchy at times, the trial court found "there was no indication of a delay in communications on this day."

(CP 9-12, Findings of Fact 5).

The State includes a discussion of protective sweeps in their argument concerning exigent circumstances. In *Maryland v. Buie*, 494 U.S. 325 (1990), the Supreme Court held that officers may conduct a limited protective sweep of "closets and other space immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334-337. This sweep may be conducted only if officers have a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Buie* at 337. The State presented no such evidence.

The State has failed to prove by clear and convincing evidence that a well delineated exception to the warrant requirement justified this search. The State failed to prove Mr. Cruz was dangerous and that he was in a position to gain immediate control over the firearms. It is undisputed that at the time of the search, Mr. Cruz was arrested, handcuffed, and placed inside a police vehicle where he was

not in reaching distance of the passenger compartment of his vehicle. He posed no danger to the officer.

It is clear that the search was not part of any investigatory - *Terry* stop, but was in fact incident to the arrest of the defendant. Even assuming the encounter could be characterized as a *Terry* stop, the State failed to prove by clear and convincing evidence that the officer possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inference from those facts, reasonably warranted the officer to believe that Mr. Cruz was dangerous and he might gain immediate control of the weapons at the time of the search as required by *Long.*

## C. CONCLUSION

The State has not proven an exception to the warrant requirement by clear and convincing evidence, and this Court should affirm the order of the trial court suppressing the evidence.

DATED this 10th day of December, 2015.

RONALD HAMMETT, WSBA No. 06164
Attorney for Respondent

I certify that on the 10th day of December, 2015, I caused a true and correct copy of this **Respondent's Brief** to be served on the following in the manner indicated below:

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