NO. 44107-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

PAVEL FEDOROVICH ZALOZH,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

By Information filed June 21, 2012, and later amended, the Clark County Prosecutor charged the defendant Pavel Fedorovich Zalozh with first degree burglary, two counts of theft of a firearm, and two counts of possession of stolen property in the second degree. CP 1-2, 4-5. The police obtained the physical evidence supporting the defendant's participation in these offenses after stopping and searching a vehicle in which the defendant was a back seat passenger. CP 7-12, 16-25. Following arraignment the defendant moved to suppress all of the physical evidence the police seized upon the argument that they did not have a reasonably articulable suspicion based upon objective facts sufficient to justify stopping the vehicle in which the defendant was a passenger. CP 7-12. The state responded by arguing that (1) the defendant did not have standing to contest the legality of the stop of the vehicle, and (2) there was a legal basis for the stop of the vehicle. CP 16-25.

The defendant's motion later came on for hearing with the state calling one Department of Corrections Officer and three Clark County Deputies as its witnesses. RP 2, 22, 53, 62. Following their testimony, the parties presented their arguments, after which the court granted the motion and suppressed all of the physical evidence seized as well as the identity of the driver and the defendant. RP 77-79. After this ruling, the state moved

to dismiss on the basis that it did not have sufficient evidence to proceed and the court granted the motion. CP 31-32. The court then entered the following Findings of Fact and Conclusions of Law in support of its ruling on the motion to suppress:

1. Findings of Fact

1. On June 11, 2012, Deputy Sheriff Robin Yakhour and Deputy Sheriff Richard Butler were attempting to locate the Defendant Pavel Zalozh. They had contacted the defendant's parents who related that he may be staying with friends or with his girlfriend.

2. The girlfriend of the defendant, Oleysa Maksimenko, resided at 12914 NE 54th Street, Vancouver, Washington. The officers were investigating a violation of a no contact order with the girlfriend, Ms. Maksimenko, for which there was probable cause for the arrest of the defendant and there was a no contact order still in effect. The defendant was also a suspect in a burglary Deputy Butler was investigating based on eye witnesses.

3. Department of Corrections (DOC) Officer Brian Ford was called for assistance because he had an undercover vehicle. When DOC Officer Ford arrived at the Defendant's girlfriend's residence, none of the officers had any first hand knowledge that the Defendant was at or inside the residence. Their belief was solely based upon prior no-contact violations between the Defendant and his girlfriend in which the Defendant had been located at the residence, that the Defendant had lived there in the past and that the Defendant's parents had indicated to Deputy Butler that he would be there in spite of the no contact order. Another person interviewed by the police had also indicated when interviewed that although the Defendant hung out with a couple of other guys, he pretty much was with Ms. Maksimenko.

4. Officer Ford was stationed in front of a house about 4-5 houses west of the residence under observation in an unmarked car. Other officers, including Officer Yakhour, were several blocks away, out of view.

5. Officer Ford observed an adult female open the front door in the morning and watch her two children go down the street to the bus stop and then close her door staying inside the house.

6. At approximately 9:30 a.m., Officer Ford noticed that a silver BMW was backing out of the garage. This vehicle was being driven by the same adult female and he observed that someone was laying down in the backseat.

7. He testified that he could not tell whether it was a male or a female lying down in the backseat but that he observed the backside of a hooded sweatshirt and it was an adult. He observed this as the vehicle drove past him.

8. Officer Ford did not know who was driving the car.

9. Officer Ford then proceeded to call the other CCSO officers and inform them that this vehicle was traveling southbound towards their location.

10. Deputy Yakhour testified that she was concerned about the safety of Ms. Maksimenko. She was aware of previous no contact order violations and about the fact that the Defendant may possibly be armed. That information was her awareness that the burglary Deputy Butler was investigating included theft of firearms. She did not know if other men lived at the residence of Ms. Maksimenko.

11. Before the contact with the BMW, Deputy Yakhour observed a man who she knew had a felony warrant for his arrest and she requested assistance in apprehending him. Deputy Butler arrived to do so as well as Deputy Buckner. Deputy Buckner arrived shortly before Ms. Maksimenko drove up to where the officers were located.

12. Because the officers were affecting an arrest on an unrelated person who had a felony warrant for his arrest, they had already activated their emergency equipment before Ms. Maksimenko arrived at their location.

13. Before the stop, no officer had identified the occupants in the vehicle. The officers did know what the defendant looked like because Deputy Yakhour had a photograph of him in her car. They

also did not know who [was] the registered owner of the BMW because they had not run the plate before the contact.

14. There were other vehicles passing by the officers and they slowed down to go through. The weather was clear.

15. When the vehicle approached the other officers, it was being driven consistent with the other vehicles that were passing through that location.

16. As the vehicle approached the officers and was about 12-15 feet from Deputy Buckner, Deputy Buckner stepped into the roadway and put his hand out to stop the vehicle. The female driver complied coming as close to him as 5-6 feet.

17. After the vehicle was stopped, the Defendant, who was in the backseat, sat up and was recognized and identified by Officer Yakhour and subsequently other officers and taken into custody.

18. A permissive search of the vehicle granted by Ms. Maksimenko resulted in the recovery of a backpack from the burglary that the defendant was a suspect in as well as jewelry from two other recent burglaries.

II. Conclusions of Law

1. There was no identification of the Defendant as being in the vehicle before it was stopped by Deputy Buckner nor was there any evidence that the Defendant was at the Maksimenko residence before the stop.

2. The officers did not have any information that Ms. Maksimenko was at risk.

3. The officers had no knowledge that there was a current violation of the no contact order with Ms. Maksimenko before the stop.

4. The testimony revealed that the traffic, including the BMW, went by the officer's location in the normal manner and there was nothing outstanding about the silver BMW.

5. There were no articulable facts established by the testimony that would warrant the stop of the vehicle.

Based upon the foregoing Findings of Fact and Conclusions of Law, the court finds that there was an unconstitutional seizure of the Defendant and therefore all evidence obtained from the stop is suppressed.

CP 26-30.

The state filed its Notice of Appeal 30 days after the court entered the order dismissing the charges. CP 37-38.

ARGUMENT

I. THE STATE'S FAILURE TO ASSIGN ERROR TO ANY FINDINGS OF FACT OR TO FACTUAL FINDINGS INCLUDED IN THE CONCLUSIONS OF LAW MAKES THOSE FACTS VERITIES ON APPEAL.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In addition, the placement of a finding of fact in the section marked "Conclusions of Law," or the placement of a conclusion of law in a section marked "Findings of Fact," is not dispositive on which standard of review applies to an error assigned to that "finding" or "conclusion." *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993). Rather, if the term or phrase

describes factual issues or determines credibility between two witnesses, it is a finding of fact and will be reviewed under the substantial evidence rule even if included in a section marked "Conclusions of Law." *Id.* By the same token, a term or phrase carrying legal implications is a conclusion of law and will be reviewed *de novo* even if included in a section marked "Findings of Fact." *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

In the case at bar, the state did not assign error to any of the facts included in the court's "Findings of Fact." Thus, they are verities on appeal. However, the court also made findings of fact within the conclusions of law. Indeed, a careful review of the court's "Conclusions of Law" indicates that the first four conclusions of law were actually factual findings. This section stated:

> II. Conclusions of Law
>
> 1. There was no identification of the Defendant as being in the vehicle before it was stopped by Deputy Buckner nor was there any evidence that the Defendant was at the Maksimenko residence before the stop.
>
> 2. The officers did not have any information that Ms. Maksimenko was at risk.
>
> 3. The officers had no knowledge that there was a current violation of the no contact order with Ms. Maksimenko before the stop.
>
> 4. The testimony revealed that the traffic, including the BMW, went by the officer's location in the normal manner and there was nothing outstanding about the silver BMW.

5. There were no articulable facts established by the testimony that would warrant the stop of the vehicle.

CP 29-30.

The first four conclusions of law deal exclusively with evaluating the officers' testimony and determining precisely what facts the officers knew at a discrete point in time and what facts they did not know. They also deal with precisely what happened at a specific point in time. Thus, the court's finding that "[t]here was no identification of the defendant as being in the vehicle before it was stopped" is purely a determination on the fact decided. Similarly, the court's finding that there wasn't "any evidence that the defendant was at the Maksimenko residence before the stop," is also a determination by the court on a purely factual issue. The same is true of the negative finding that there were no facts presented "that Ms. Maksimenko was at risk," or that the officers had no evidence of "a current violation of the no contact order." Finally, the court's finding that "the traffic, including the BMW, went by the officer's location in the normal manner and there was nothing outstanding about the silver BMW," is also a factual determination by the court about what did or did not happen." Thus, while all of these facts were included in the section called "Conclusions of Law," they were actually findings of fact which should be reviewed under the substantial evidence rule.

In this case, the state did nominally assign error to the trial court's conclusions of law. However, the state did this as if they were truly legal determinations constituting "Conclusions of Law." That is to say, the state did not evaluate the evidence presented during the suppression motion and explain or argue that there was not evidence presented to support the court's determination on these facts. Indeed, a review of the evidence presented through these officers, particularly on cross-examination, reveals that there is evidence, or the lack of evidence, presented to support each of the court's factual findings contained within the conclusions of law. For example, in her testimony Deputy Yakhour claimed that based upon the facts presented to her that day she was worried for Ms. Maksimenko's safety. The trial court, as the finder of fact at the suppression motion was free to reject this claim. This is precisely what the trial court did. This is uniquely a factual determination on a factual issue. Thus, the state's failure to argue that substantial evidence does not support these factual findings means that they stand as verities on appeal even if the court finds that the state did assign error to them sufficient to allow review.

II. THE STATE'S FAILURE TO ARGUE LACK OF STANDING ON APPEAL WAIVES THAT ISSUE.

Under RAP 10.3(a)(4), an appellant's brief must contain "[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." Thus, an appellate court will not consider the merits of an issue if the appellant fails to raise the issue in the assignments of error section. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

In the case at bar the state's first argument before the trial court in reply to the defendant's suppression motion was that the defendant lacked standing to argue the illegality of the officer's actions stopping the vehicle in which the defendant was a passenger. CP 19-22. However, the state has not assigned error to the trial court's ruling on this issue. Thus, this court should not consider this issue on appeal. However, even were this argument preserved on appeal, it should fail because Washington courts have consistently held that vehicle passengers have an independent, constitutionally protected privacy interest as a passenger and that this interest is impinged when an officer stops the vehicle regardless of the reason. *See State v. Byrd*, 110 Wn.App. 259, 262, 39 P.3d 1010 (2002).

III. THE TRIAL COURT DID NOT ERR WHEN IT GRANTED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE THE POLICE DID NOT HAVE A REASONABLY ARTICULABLE SUSPICION BASED UPON OBJECTIVE FACTS THAT AN OCCUPANT OF THE VEHICLE THEY STOPPED HAD BEEN INVOLVED IN ANY ILLEGAL ACTIVITY.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets it burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

As one of the exceptions to the warrant requirement, the police need not have probable cause in order to justify a brief investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, in order to justify such action, the police must have a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979) (emphasis added). Subjective good faith is not sufficient. *Terry v. Ohio*, 392 U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at 1880. *See generally* R. Utter,

Survey of Washington Search and Seizure Law: 1988 Edition, 11 U.P.S. Law Review 411, § 2.9(b) (1988). Furthermore, the stop is only reasonable to the point "the limited violation of individual privacy" is outweighed by the public's "interests in crime prevention and detection . . . ." *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

In the case at bar, the defense argued in its suppression motion that the evidence seized as a result of the stop of the BMW should be suppressed because the officers did not have a reasonably articulable suspicion upon which to base a *Terry* detention of either the driver or the passenger. In this case there was no question that one of the deputies detained the defendant and the driver when he put his hands up and gestured for the driver to stop. Thus, the issue before this court is whether or not the officer had a "reasonable suspicion, based on objective facts," that the defendant was "involved in criminal activity," at the time of that detention. The state argues that the trial court erred when it answered this question in the negative. As the following explains, the state is incorrect.

What constitutes a "reasonably articulable suspicion based upon objective facts" sufficient to justify a *Terry* stop has been the subject of numerous appellate decisions in this and other states, as well as numerous federal cases. While the level of proof necessary to meet this standard cannot be precisely quantified, it can be illustrated by this court's decision

in cases such as *State v. Larson*, 93 Wn.2d 638, 611 P.2d 711 (1980). The following examines this case.

In *State v. Larson*, *supra*, two police officers stopped an automobile in which four people were riding for commission of a minor traffic violation (parking too far from the curb). The officer then required all occupants to produce identification. As one of the passengers opened her purse to get some identification, one of the officers saw a baggie of marijuana in the purse. The officers then arrested the passenger for possession of marijuana.

Following her arrest, Defendant moved to suppress the evidence on the basis that the police had no reasonably articulable suspicion from which they could justify requiring her to produce identification. At the hearing on Defendant's motion the officers testified that: (1) they stopped the car in a high crime area near a closed park; (2) it was late at night; and (3) the car pulled away from the curb as they approached. Nonetheless, the trial court granted Defendant's motion. The State then sought review, and the Court of Appeals reversed, finding that the cited facts constituted a "reasonably articulable suspicion" that Defendant was involved in criminal activity.

On further review, the Washington State Supreme Court reversed the Court of Appeals and reinstated the dismissal by the trial court. In so ruling the Supreme Court noted: (1) nothing in the record indicated that anyone in the car acted in a suspicious manner; (2) no criminal activity had been

reported in the area for three weeks; (3) there was no indication that the occupants of the car had been cruising the area in contemplation of a criminal act; (4) there was no indication that the car had been stopped momentarily; and (5) although the car started to drive off as the officers approached, it immediately stopped when the police flashed their blue light. The Court then went on to conclude:

> When considered in totality, therefore, the circumstances known to the officers at the time they decided to stop the car did not give rise to a reasonable and articulable suspicion that the occupants were engaged or had engaged in criminal conduct, *Brown v. Texas, supra*, but at best amounted to nothing more substantial than an inarticulate hunch. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This does not meet the constitutional criteria of reasonableness for stopping a vehicle and questioning its occupants.

State v. Larson, 93 Wn.2d at 643.

In *Larson*, the court invalidated a *Terry* stop even though the suspect car was in a high crime area, late at night, and attempted to drive away as the officer approached. In the case at bar, there are even fewer facts to support a *Terry* stop than there were in *Larson*. In the case at bar the participants were not in a high crime area, it was in the later morning hours not late night, and the vehicle made absolutely no furtive movements at all in spite of the presence of police vehicles with their lights on. Although the state claimed that the defendant's lying down in the back of the vehicle was itself "furtive," the fact is that none of the witnesses claimed that the back seat passenger was

attempting to hide. Rather, the back seat passenger was simply lying down.

In fact, in this case the police based their actions on pure speculation. They were speculating that it was the defendant's girlfriend who was driving the BMW in spite of the fact that noone identified her as the driver and noone identified that vehicle as even being associated with her. The officers were also speculating that the person in the back seat of the vehicle was the defendant in spite of the fact that noone was even able to tell if the back seat passenger was a male or a female. The officers were also speculating that the defendant was having contact with his girlfriend that day in spite of no evidence to support this conclusion. It is particularly interesting to note that the findings of fact acknowledge that while a number of people believed the defendant was staying with his girlfriend, no witness claimed anything other than a general belief that the defendant was staying at that address much less made a claim that they had seen him at that residence that day, that week or even that month. Thus, in the case at bar, the trial court did not err when it found that the state had failed to prove that the police had a reasonably articulative suspicion based upon objective facts sufficient to legally justify a stop of the vehicle in which the defendant was riding. As a result, the trial court did not err when it granted the motion to suppress.

CONCLUSION

The trial court did not err when it granted the defendant's motion to suppress evidence.

DATED this 28th day of May, 2013.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 7

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

UNITED STATES CONSTITUTION,
FOURTH AMENDMENT

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 and things to be seized.

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. PAVEL FEDOROVICH ZALOZH, Appellant.	NO. 44107-1-II AFFIRMATION OF OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On May 28th, 2013, I personally placed the United States Mail and/or e-filed the following documents to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

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Dated this 28th day of May, 2013, at Longview, Washington.

/S/

Cathy Russell
Legal Assistant to John A. Hays
Attorney at Law

HAYS LAW OFFICE

May 28, 2013 - 11:58 AM

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