No. 31319-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RYAN WARD,

Appellant.

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

BRIEF OF APPELLANT

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2. The findings of fact and conclusions of law in support of the court's CrR 3.5 ruling that Mr. Ward's statements to a police officer were admissible are void because they were signed by a judge who did not preside over the motion hearing.

3. The trial court erred by ruling that the police officer had a reasonable articulable suspicion based upon specific objective facts that Mr. Ward had been engaged in criminal activity necessary to support the investigative stop.

4. The trial court erred by ruling that the officer's frisk of Mr. Ward did not exceed the permissible scope of a protective search pursuant to an investigative stop.

5. The trial court erred by finding that a glass pipe wrapped in a paper towel felt like weapon.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A judge may not enter findings of fact and conclusions of law in a case that he did not hear. RCW 2.28.030(2). Judge Craig Matheson presided over Mr. Ward's combined motion to suppress and CrR 3.5 hearing and entered a oral rulings, but the finding were signed by a different superior court judge. CP 4-7. Where both CrR 3.5(c) and CrR 3.6(b) require the entry of written findings of fact and conclusions of law, must this Court remand the case for new motion hearings or the entry of written findings of fact and conclusions of law signed by the judge who heard the motions? (Assignments of Error 1-2)

2. Article I, section 7 of the Washington Constitution protects citizens from warrantless searches and seizures. An exception to the warrant requirement exists for investigative stops when the officer has a reasonable, articulable suspicion based upon specific and objective facts that the person stopped committed or was about to commit a crime. The Pasco police received telephone calls reporting a fight involving about four men at a fast food restaurant and that the men left in a grey Maxima and a black BMW. A police officer stopped Mr. Ward after he left the parking lot in a black BMW. Where there was no

evidence of the informant's reliability, no corroboration of the information provided, and no reason to believe the person in the black car was a perpetrator rather than a victim, does de novo review demonstrate the officer lacked the reasonable articulable suspicion based upon specific and objective facts necessary to justify the stop? (Assignment of Error 3)

3. If a police officer conducts an investigative stop and believes the stopped individual may be armed or dangerous, the officer may briefly frisk the outside of his clothing for weapons. Only objects that feel like weapons may be removed from the clothing. After stopping Mr. Ward and learning he had pepper spray and a knife in his car, the officer had Mr. Ward exit the car where he patted down the outside of Mr. Ward's clothing and removed a glass pipe from Mr. Ward's front pocket. Does a de novo review demonstrate the officer exceeded the permissible scope of a pat down search where a round glass pipe does not feel like a knife? (Assignments of Error 4-5)

C. STATEMENT OF THE CASE

Ryan Ward was driving his car away from the Pasco Jack in the Box when he was stopped by Officer Ismael Cano. RP 7-8.[1] Police dispatch had sent the officer to the Jack in the Box based upon reports of a "fight brewing" between about four men and later reports that they "got physical." RP 6. Dispatch then reported that the men left the restaurant in a grey Maxima and a black BMW. RP 6. Officer Cano stopped Mr. Ward because he was driving a black BMW. RP 7-8.

Mr. Ward told the officer about the incident and revealed that he had pepper spray and knife under his car seat. RP 9, 10. When Mr. Ward started to reach under his seat to explain what he had, the officer instructed him to stop. The officer ordered Mr. Ward out of the car when he began to reach under the seat a second time. RP 9.

Mr. Ward got out of his car as requested, and the officer patted him down for weapons. RP 9-10. Officer Cano said he felt something in Mr. Ward's front pocket that was hard, wrapped in paper, and about the size of a knife. RP 11-12. He removed the item from Mr. Ward's pocket and determined it was a glass pipe. RP 12. A small baggie that

[1] The verbatim report of proceedings contains two volumes. RP refers to the volume prepared by Court Reporter Joseph D. King containing hearings on August 28, November 13, November 20, November 27, December 4, and December 11, 2012. The remaining volume will not be cited.

was later determined to contain methamphetamine fell out of Mr. Ward's pocket when the officer removed the pipe. RP 16, 23; CP 57.

After speaking to other officers who responded to the Jack in the Box, Officer Cano placed Mr. Ward under arrest for possession of drug paraphernalia and assault. RP 15, 25. Another baggie that was later determined to contain methamphetamine was found in Mr. Ward's rear pants pocket during the search incident to arrest. RP 17; CP 57.

The Franklin County Prosecutor charged Mr. Ward with possession of methamphetamine, contrary to RCW 69.50.4013. CP 51. The Honorable Craig Matheson heard Mr. Ward's CrR 3.6 motion to suppress the evidence obtain as a result of the investigative stop and a CrR 3.5 hearing. RP 5-36. The court orally denied Mr. Ward's motion to suppress and found his statements were admissible. RP 31-33, 35-36, 40-45.

Mr. Ward subsequently waived his right to a jury trial and agreed to a bench trial based upon stipulated facts, and the court found him guilty as charged. CP 23-26, 57RP 48. The court entered written findings of fact and conclusions of law supporting the guilty finding. CP 23-24. The court did not enter written findings and conclusions for its CrR 3.6 and CrR 3.5 rulings. RP 51. Instead, findings of fact and

conclusions of law addressing those rulings were signed by a different judge. CP 4-7.

Mr. Ward received a sentence of 30 days incarceration, with work crew if eligible, 12 months community custody, and legal financial obligations totaling $1,400. CP 4-22; RP 52, 53.

D. ARGUMENT

1. **Mr. Ward's case must be reversed because the Findings of Fact and Conclusions of Law supporting the court's rulings on the CrR 3.6 and CrR 3.5 hearings were not signed by the judge who heard and decided the motions.**

A superior court judge may not enter findings of fact and conclusions of law in a case where the judge did not hear the evidence. In Mr. Ward's case, a superior court judge signed findings of fact and conclusions of law denying Mr. Ward's motion to suppress evidence and admitting Mr. Ward's statements to the arresting police officer, but the judge did not preside over the hearing. As a result, the case must be remanded to the superior court for new hearings or the entry of findings by the correct judge.

Judge Matheson presided over the combined CrR 3.5 and CrR 3.6 hearings in this case and later found Mr. Ward guilty after a stipulated facts trial. CP 23-24, 57; 12/4/12 RP 48. The court had not

yet signed findings of fact and conclusions of law for the CrR 3.5 and CrR 3.5 hearing at the time of Mr. Ward's December 11, 2012, sentencing hearing. Judge Matheson stated he had proposed finding and conclusions from both parties and would review and sign one set later. 12/11/12 RP 51, 53-54. Instead, Judge Cameron Mitchell signed the Findings of Fact and Conclusions of Law on Hearing Pursuant to CrR 3.5 and 3.6, on December 11, indicating he was signing "for CJM." CP 4-7.

A judge may not act in a case where he did not preside. RCW 2.28.030(2). The statute reads, in pertinent part:

> A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he or she is a member, in any of the following cases: . . .
>
> (2) When he or she was not present and sitting as a member of the court at the hearing of a matter submitted for its decision.

RCW 2.28.030(2). Washington cases also establish the well-settled rule that "a successor judge is without authority to enter findings of fact on the basis of testimony heard by a predecessor judge . . . even where the prior judge had entered an oral decision." State v. Bryant, 65 Wn. App. 547, 549, 829 P.2d 209 (1992); see also CrR 6.11; CR 63.

In Bryant, a superior court judge found a manifest injustice and committed a juvenile for 8-12 weeks, but retired before entering written findings of fact and conclusions of law supporting the manifest injustice disposition. Bryant, 65 Wn. App. at 548. A court commissioner signed written findings of fact supporting the disposition after the judge retired. Id. After concluding that "only the judge who has heard evidence has the authority to find facts," the Court of Appeals reversed the disposition and remanded the case for a new disposition hearing or entry of finding and conclusions of law signed by the retired judge. Id.

In a civil case where a successor judge entered findings and conclusions denying a party's motion for a new trial after the death of the judge who heard the case, the Washington Supreme Court remanded for a new hearing on the motion for new trial. DGHI, Enterprises v. Pacific Cities, Inc., 137 Wn.2d 933, 951-52, 977 P.2d 1231 (1999). The court explained, "Only the deceased predecessor judge, who did hear the case, had authority to sign findings of fact and conclusions of law." DGHI, 137 Wn.2d at 950.

Judge Matheson entered an oral ruling, but an oral ruling is not binding, as the judge may change his decision at any time prior to the

final judgment. DGHI, 137 Wn.2d at 947-48 (citing State ex rel. Wilson v. Kay, 164 Wash. 685, 690-91, 4 P.2d 498 (1931)); State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). Judge Mitchell lacked authority to sign written findings of fact and conclusions of law in a case he did not hear. Mr. Ward's case must be reversed and remanded to superior court for new CrR 3.5 and CrR 3.6 hearings or the entry of findings and conclusions by Judge Matheson.[2]

2. **Mr. Ward's conviction must be reversed because the court improperly admitted evidence obtained as a result of an unconstitutional stop and frisk.**

A police officer unconstitutionally stopped Mr. Ward without the reasonable suspicion based upon articulable facts necessary to support an investigative stop, and the search of Mr. Ward's person exceeded the permissible scope of a protective search during an investigative stop. Mr. Ward's motion to suppress methamphetamine during the protective frisk for weapons and later search incident to arrest should have been granted, and this Court should reverse his conviction.[3]

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[2] Judge Matheson retired from the Benton-Franklin County bench on April 30, 2013. See www. judgepedia.org/index.php/Craig_Jay_Matheson; www.tri-cityherald.com/2013/02/12/2271979/Benton-franklin-superior-court.html (last viewed 7/1/13).

[3] As argued in Section 1, there are no valid written findings of fact and conclusions of law addressing Mr. Ward's suppression motion. In some cases, however,

a. Article 1, section 7 protects the right to privacy from government intrusion. The federal and state constitutions prohibit the government from detaining or searching an individual without a warrant or probable cause. U.S. Const. amends. IV, XIV; Const. art. I § 7. Article I, section 7 succinctly provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The protections of article I, section 7 are "qualitatively different" than those of the Fourth Amendment. State v. Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). It is well-settled that the Washington Constitution provides greater protection against warrantless seizures than the federal constitution. State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); see State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (state constitution "clearly recognizes an individual's right to privacy with no express limitations") (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). No Gunwall analysis is necessary before the appellate court will consider an article

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appellate courts have overlooked the absence of the written findings and conclusions required by CrR 3.6(b) because the court's oral ruling is clear and comprehensive. State v. Cruz, 88 Wn. App. 905, 907-08, 946 P.2d 1229 (1997). Mr. Ward therefore raises this alternative argument based upon the court's oral rulings.

I, section 7 claim.[4] State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).

Article I, section 7 "is grounded in a broad right to privacy and the need for legal authorization in order to disturb that right." State v. Arreloa, 176 Wn.2d 284, 291, 290 P.3d 983 (2013). Warrantless searches are per se unreasonable. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State has the burden of proving one of the narrowly-drawn exceptions to the warrant requirement applies. Arreola, 176 Wn.2d at 292; Ladson, 138 Wn.2d at 349-50. "Warrantless disturbances of private affairs are subject to a high degree of scrutiny," and this Court reviews the constitutionality of a warrantless stop de novo. Arreloa, 176 Wn.2d at 291; Gatewood, 163 Wn.2d at 539.

b. The stop was unconstitutional because the deputy did not have the information necessary to support an investigative stop. One exception to the warrant requirement is an investigative stop. Gatewood, 163 Wn.2d at 539; Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A police officer may briefly detain a citizen if the officer has "a reasonable, articulable suspicion, based

[4] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

upon specific, objective facts, that the person seized has committed or is about to commit a crime." Gatewood, 163 Wn.2d at 539 (emphasis in original) (quoting State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)). The officer's actions must be justified "at their inception." Gatewood, 163 Wn.2d at 539; Ladson, 138 Wn.2d at 350. The State has the burden of demonstrating the legality of a warrantless investigative stop. Gatewood, 163 Wn.2d at 539.

In Mr. Ward's case, Officer Cano stopped Mr. Ward based upon information he received from dispatch that men were arguing and pushing at the Pasco Jack in the Box and left the restaurant in a gray Maxim and a black BMW. 11/13/12 RP 6. The officer opined there may have been an assault or disorderly conduct. RP 7. Officer Cano stopped a black BMW he saw leaving the Jack in the Box parking lot and spoke to the driver, Mr. Ward. 11/13/12 RP 7-8. The stop was based upon information obtained by police dispatch from informants who called the police, not from the officer's observations. 11/13/12 RP 19-20.

The trial court ruled that the information provided by the informants was reliable because there was more than one call to the police, the reports were made by citizens trying to prevent violence,

and the reports were confirmed when the officer saw the car leaving the fast food restaurant. RP 40-42, 45. The court added that the police were investigating an "urgent situation with an allegation and reports of a violent crime taking place at the time." RP 44. The court believed it was irrelevant that the officer did not know if the black car contained the suspect or a victim or witness. RP 43.

The court's ruling was incorrect. First, an investigate stop must be based upon information showing the suspect has or is about to commit a crime. Gatewood, 163 Wn.2d at 539; Duncan, 146 Wn.2d at 172. Based upon the information provided by the informants, Officer Pano had no reason to believe that Mr. Ward was not the victim of the possible assault. RP 20. The officer lacked authority to stop Mr. Ward.

Second, an investigative stop may be based upon information from an informant only when the informant and the source of his information are reliable. State v. Sieler, 95 Wn.2d 43, 48-49, 621 P.2d 1272 (1980).

> While the police have a duty to investigate tips which sound reasonable, [1] absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either [2] the presence of criminal activity or [3] that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible.

Id. at 47 (quoting State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243, cert, denied, 423 U.S. 891 (1975)).

In Lesnick, the Kelso police received a telephone call claiming the driver of a van was attempting to sell illegal "punchboards" in the City of Kelso. The caller also provided a license plate number. Lesnick, 84 Wn.2d at 941. The police located a van with a similar license number and observed gambling paraphernalia in the car. Id. at 941-42. The Lesnick Court held the stop was unconstitutional, agreeing with the Court of Appeals that the tip was completely lacking in reliability. Id. at 944.

The Seiler Court also found a stop unconstitutional where the police stopped a man based upon an anonymous call to a school secretary stating that the caller observed what he believed was a drug transaction in car in the school parking lot and providing a license plate number. Sieler, 95 Wn.2d at 44-45, 49-51. The police officer found a car with a similar license plate in the parking lot and smelled marijuana when he approached the car. Id. at 45. The Supreme Court concluded that the unknown informant was not reliable and, even if the informant's reliability had been established, there was not factual support. "The police conducted an investigatory detention based upon

an informant's bare conclusion unsupported by any factual foundation known to the police." Id. at 49.

A similar conclusion should be reached in this case. As the trial court noted, citizen informants who claim to observe criminal activity are viewed as more reliable than an informant compensated by the police. State v. Jones, 85 Wn. App.797, 800, 934 P.2d 1224, rev. denied, 133 Wn.2d 1012 (1997). In Jones, a driver of a passing truck used hand signals to communicate to a police officer that a driver in front of him was weaving. Jones, 85 Wn. App. at 799. There was a company name of the side of the truck, but this Court found this was not significantly different than an anonymous caller. Id. at 800.

Here, one caller was anonymous and the other apparently gave his name. CP 48. But "[t]he reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant." Sieler, 95 Wn.2d at 48; CP 54. Without more than an informant's name and telephone number, a police officer may not detain an individual based only upon an informant's tip. Id.; State v. Hopkins, 128 Wn. App. 855, 864-64, 117 P.3d 377 (2005).

Officer Cano did not corroborate the information provided by the informant. The trial court ruled it was sufficient that the officer saw a black car of the same make described by the caller leaving the Jack in the Box parking lot, but this is not adequate verification. In Sieler, for example, the police found a vehicle that fit the description given by the telephone informant with a similar license plate in the school parking lot where the caller claimed he had observed a drug transaction. Sieler, 95 Wn.2d at 44-45. When the officer approached the car he smelled the faint odor of stale burnt marijuana. Id. at 45. This, however, was not sufficient corroboration of the tip to justify seizure of the car's occupants. "[P]olice observation of a vehicle which substantially conforms to the description given by an unknown informant does not constitute sufficient corroboration to indicate that the informant obtained his information in a reliable fashion." Id. at 49-50; accord, Lesnick, 84 Wn.2d at 943 (description of defendant's vehicle by anonymous tipster "is not such corroboration or indicia of reliability as to make reasonable the officer's action.").

The trial court relied upon the violent nature of the reported crime to relax the standard for an investigative stop. The nature of the crime may be considered in examining the information available to the

police. The Lesnick Court noted that the suspected crime, possession of gambling devices, posed little threat of harm to society whereas the Randall Court found a tip of an armed robbery required the police to act more quickly and had little time to evaluate the reliability of the tip. Lesnick, 84 Wn.2d at 944-45; State v. Randall, 73 Wn. App.225, 230, 868 P.2d 207 (1994). In this case, the reports were first of men yelling and later pushing each other; there was no mention of any weapons or injury. RP 6, CP 54. The trial court erred by utilizing this relaxed standard where the reports did not cause concern for the type of violence found in an armed robbery.

Finally, the stop of Mr. Ward cannot be justified based upon information discovered later. Gatewood, 163 Wn.2d at 539; Lesnick, 84 Wn.2d at 944. After he ordered Mr. Ward out of his car and patted him down, Officer Cano learned more about the incident at the Jack in the Box from other officers. RP 25; CP 53. This information, as well as Mr. Ward's statements to the officer and contraband found on his person cannot be used to justify the Terry stop.

The information available to Officer Cano did not establish the reliability of the informants or the information they provided. In addition, the information they provided did not show that Mr. Ward

was not the victim of the possible assault. The trial court thus erred by concluding the stop was a constitutional investigative stop.

c. The search of Mr. Ward's person exceeded the permissible scope of a protective frisk. When the police conduct a valid investigative stop, the officer may briefly frisk the individual for weapons if the officer believes he may be armed and dangerous. Terry, 392 U.S. at 26; State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). An officer may frisk a person for weapons "only if (1) he justifiably stopped the person before the frisk, (2) he has a reasonable concern of danger, and (3) the frisk's scope is limited to finding weapons." Setterstrom, 163 Wn.2d at 626; accord Duncan, 146 Wn.2d at 172. A frisk may not be used as a pretext to search for incriminating evidence. State v. Chatmon, 9 Wn. App. 741, 749, 515 P.2d 741 (1973) (citing Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968)).

A valid weapons search during an investigative stop is limited to a pat down of the suspect's outer clothing to discover weapons that might be used to hurt the officer. Terry, 392 U.S. at 29-30; State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). In some cases, if the pat down is inconclusive, the officer may reach into the clothing.

Hudson, 124 Wn.2d at 112-13. "'Once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent' and any continuing search becomes an unreasonable instruction into the individual's private affairs." Id. at 113 (quoting State v. Allen, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980)).

"Only objects that feel like they could be weapons in a superficial pat down of the outer clothing may be removed and examined under Terry." State v. Horton, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006), rev. denied, 162 Wn.2d 1014 (2008). When Officer Cano patted down Mr. Ward, he felt something hard in Mr. Ward's left front pocket that was wrapped in paper; he believed it was about the size of a pocket knife. RP 11-12. He squeezed the item and then removed it from Mr. Ward's pocket. RP 12, 22-23. When the officer removed the item, he realized it was a glass pipe in a paper towel. RP 12, 22.

A round glass pipe does not feel like a metal knife, even when wrapped in a paper towel. The office exceeded the scope of a permissible Terry frisk when he took the item out of Mr. Ward's pocket.

d. Mr. Ward's conviction must be reversed. For a permissible investigative stop, the State must show that "(1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the frisk for weapons, and (3) the scope of the frisk is limited to protective purposes." Duncan, 146 Wn.2d at 172. Mr. Ward's motion to suppress should have been granted because the State did not prove the legitimacy of the officer's stop of Mr. Ward and because officer's search exceeded the scope of a protective search for weapons.

"When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." Ladson, 138 Wn.2d at 359. Mr. Ward's conviction for possession of methamphetamine was based upon improperly seized evidence. CP 23-23, 57. His conviction must be reversed and dismissed. Hopkins, 128 Wn. App. at 866.

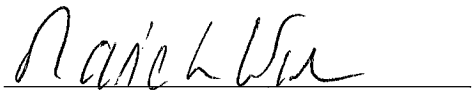
E. CONCLUSION

This court must remand Mr. Ward's case to the superior court for (1) new hearings on his motion to suppress and the admissibility of his statements to the police or (2) the entry of written findings of fact and conclusions of law by Judge Matheson.

In the alternative, the police lacked a reasonable articulable suspicion base upon specific and objective facts to justify stopping Mr. Ward. The evidence located as a result of the stop should have been suppressed, and Mr. Ward's convict must be reversed and dismissed.

Dated this 8th day of July 2013.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31319-1-III
	)	
RYAN WARD,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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