NO. 32233-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

APPELLANT,

v.

CODY RAY FLORES,

RESPONDENT.

BRIEF OF APPELLANT

D. ANGUS LEE
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I. ASSIGNMENT OF ERROR

A. Assignment of Error.

The Court erred in suppressing the firearm found on the defendant's person. The State assigns error to conclusion of law 3.6. CP 61.

B. Issues Pertaining to Assignment of Error.

1. Did the trial court err in failing to analyze the totality of the circumstances in deciding to suppress the firearm?

2. Did the trial court err in concluding that *State v. Adams*, 144 Wn. App. 100, 106-107, 181 P.3d 37 (2008), controls this case? CP 61.

II. STATEMENT OF THE CASE

Officer Kyle McCain was at the Moses Lake Police Department when 911 received a call from a person who initially gave her name, then changed her mind and said she wished to be anonymous. CP 59. She reported that Giovanni Powell had pointed a gun to someone's head and was at 1120 S. Alderwood in Moses Lake. *Id.* Officer McCain responded to the area. CP 60. Enroute he was informed that Giovanni Powell had a warrant for his arrest. *Id.* Upon arriving in the area he observed Giovani Powell and another individual, later identified as Cody Flores, walking down the street. *Id.* Both had their hands in their pockets. Giovanni

Powell is known to Officer McCain and he recognized him on site. *Id.* In addition Powell is a known gang member/associate. *Id.*

Officer McCain drew his weapon, held it at the low ready, and said "Geo, you need to stop." RP 72. Both Flores and Powell stopped. *Id.*, CP 60. Officer McCain ordered both men to their knees, and ordered them to separate from one another. *Id.* Officer McCain was soon joined by other officers, including Officer Paul Ouimette. CP 60. Officer McCain took Powell into custody. *Id.* Officer Ouimette then ordered Flores to walk towards him backwards with his hands up. CP 61. As Flores was walking back to Officer Ouimette he told the officer, without prompting, that he had a gun. *Id.* Officer Ouimette told Flores to just keep walking backwards and they would deal with it in a minute. *Id.* Officer Ouimette then detained Flores and removed the gun from his pants. *Id.* At this point the telephone tip was corroborated and officers had reasonable suspicion to detain Flores and investigate further. In doing so they discovered he had a felony conviction, justifying his arrest for unlawful possession of a firearm.

After a hearing conducted pursuant to CrR 3.6 the trial court issued an opinion suppressing the firearm found in Flores' pants. CP 56. The court relied on *State v. Adams*, 144 Wn. App. 100, 106-07, 181 P.3d 37 (2008), to conclude "there must be articulable circumstances indicating the

particular person in the arrestee's company poses a threat to officer safety to justify that person's detention and frisk." *Id.*

III. ARGUMENT

In reviewing suppression issues the court reviews findings of fact for substantial evidence in the record. *State v. Dykstra*, 84 Wn. App. 186, 190, 926 P.2d 929 (1996). The appellate court reviews conclusions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). Where an officer's conduct is connected to safety concerns rather than investigatory goals, [the court is] particularly reluctant to substitute [its] own judgment for that of the officer. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). A frisk for weapons is permissible if (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the frisk, and (3) the scope of the frisk is limited to the protective purpose. *Id.*

A. Washington Law requires a totality of the circumstances test as to when a search of a companion to an arrestee is justified.

Given the seizure of Powell was justified by the warrant for his arrest, the officers were justified in seizing Flores in order to secure the scene. The analogy of passengers in a car is a good one for this case, and most case law regarding this type of incident is related to vehicle passengers. Flores was right next to Powell when they were stopped. Flores stopped when Powell was told to stop. The situation faced by the

officers would not be materially changed if Officer McCain had come upon Powell and Flores about to drive away in a car rather than walking away down the street. However, the conclusion that the officers need individualized suspicion of criminal activity sufficient to meet the criteria for a Terry stop to detain and frisk a passenger for officer safety reasons is simply incorrect.

In *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999) (Overruled on other grounds by *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)), the court held "an officer must have an articulable rationale predicated upon safety considerations to order the passengers out of the car or to remain in the car." *Id.* at 212. The *Mendez* Court cited with approval *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977), and stated "The *Mimms* holding thus allows a limited police intrusion into a person's freedom from interference in order to preserve officer safety even in the absence of circumstances that would justify an investigatory Terry stop." *Mendez*, 137 Wn.2d at 215. The court then noted "the United States Supreme Court extended the *Mimms* holding to include passengers as well as drivers in *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997) (police officer may order passenger of lawfully stopped vehicle to exit for safety purposes). Numerous courts have followed *Wilson*."

Mendez, 137 Wn.2d at 215. The Court created the following test under Wash Cons't Art 1 § 7.

> With these matters in mind, we conclude Washington's constitutional policy of greater protection to the privacy of individuals in automobiles than the Fourth Amendment provides must carry the day. We fashion rules here to meet that State constitutional standard. Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a de minimis intrusion upon the driver's privacy under article I, section 7.
>
> However, with regard to passengers, we decline to adopt such a bright-line, categorical rule. A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy article I, section 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy. But to the extent such an objective rationale exists, the intrusion on the passenger is de minimis in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.
>
> To satisfy this objective rationale, *we do not mean that an officer must meet Terry's standard of reasonable suspicion of criminal activity.* Terry must be met if the purpose of the officer's interaction with the passenger is investigatory. For purposes of controlling the scene of the traffic stop and to preserve safety there, we apply the standard of an objective rationale. Factors warranting an officer's direction

> to a passenger at a traffic stop may include the following: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants. These factors are not meant to be exclusive; nor do we hold that any one factor, taken alone, automatically justifies an officer's direction to a passenger at a traffic stop. The inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop.

Id. at 220-221. (Emphasis added) *Mendez* involved a stop for a traffic infraction. In *State v. Parker*, 139 Wn.2d 486, 502, 987 P.2d 73 (1999), the Court created a per se application of the *Mendez* test, "conclude[ing], however, that whether or not articulable suspicion exists sufficient to justify a patdown for weapons, the circumstance of an arrest falls squarely within the rule of *Mendez*. Thus, vehicle stop and arrest in and of itself provides officers an objective basis to ensure their safety by "controlling the scene," including ordering passengers in or out of the vehicle as necessary.

Whether one applies *Parker's* per se analysis that officers may control the scene of arrest and detain and move the arrestee's companion, or actually applies the *Mendez* test in a systemic way, the seizure of Flores was justified. Powell was being arrested for his warrant. The officers had an anonymous tip that Powell had just pointed a gun at someone's head. While the tip alone may or may not be sufficient for a *Terry* stop,

Compare Navarette v. California, _____ U.S. _____, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014)(anonymous tip sufficient); *Florida v. J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000)(anonymous tip insufficient), officers are not required to ignore that information at their peril when conducting the legitimate stop of Powell pursuant to the warrant. *Terry* stop standards are not applicable in this case. The gun could have easily been handed to Flores in the intervening time. In addition Powell is known to associate with gang members, people who present a danger to officers. When applying *Mendez's* test to the facts in this case Flores' detention to control the scene was entirely reasonable and justified. The trial court erred in not conducting this analysis, instead relying on a per se rule it perceived in *State v. Adams*, 144 Wn. App. 100, 106-107, 181 P.3d 37 (2008).

B. *Adams* does not require individualized suspicion to seize a companion to the arrestee.

The U.S. Supreme Court, in *Brendlin*, 551 U.S. at 251, held that a passenger in a car is seized during a traffic stop, overruling *Mendez* on that point. Jennifer Adams was a passenger in a stolen car that officers stopped. After she was detained and removed from the car the officers searched her and found drugs on her. The two judge majority found that there was no articulable reason to believe she was armed, whereas the dissent felt there was consent for the pat down. Significantly, however,

no judge on the *Adams* court found that Ms. Adams' brief detention to secure the scene was unjustified. Indeed, the court noted that her lack of resistance to that detention is one of the reasons her pat down was unnecessary. If Ms. Adams had declared she had a gun in her pants as she was being taken out of the car, the case would have been completely different, and actually on point to this one. The only question *Adams* asked was whether the officers could search her after she had been peaceably removed from the car.

Adams summarized the applicable cases as follows:

> Washington courts have held that a reasonable concern for officer safety justifies a protective frisk in a number of factual circumstances. *State v. Horrace*, 144 Wn.2d 386, 393-96, 28 P.3d 753 (2001); *State v. Parker*, 139 Wn.2d 486, 501-04, 987 P.2d 73 (1999); *State v. Laskowski*, 88 Wn. App. 858, 860, 950 P.2d 950 (1997). One such situation is where, as here, police legitimately contact a suspect and incidentally come into contact with the suspect's companion or vehicle passenger and the conduct of the passenger justifies the frisk. *Horrace*, 144 Wn.2d at 395-96 (vehicle passenger properly frisked based on furtive movements by driver); *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). In *Laskowski*, the search was justified: "'[a]ny reasonable basis supporting an inference that the investigatee or a *companion* is armed will justify a protective search for weapons.'" *Laskowski*, 88 Wn. App. at 860 (emphasis added)

Id. at 104. Here there was more than a reasonable suspicion at the time of the search. First there was the anonymous tip that Powell had pointed a gun at a person's head. Second, prior to the search,

while he was being detained, Flores volunteered to Officer Ouimette that he had a gun. Officer Ouimette was more than justified in taking the gun from Flores for officer safety. To the extent *Adams* applies, it supports the State's case that the search was reasonable.

There is no bright line categorical rule when it comes to controlling companions of an arrestee. *Mendez*, 137 Wn.2d at 215. The court erred in applying one. [A] "vehicle stop and arrest in and of itself provides officers" an objective, reasonable basis to "ensure their safety by 'controlling the scene.'" *Adams*, 144 Wn. App. at 106, citing *Parker*, 139 Wn.2d at 502. This includes ordering the passenger in and out of the car. *Id.*

In this case the officers were justified in stopping Powell. Flores stopped when Officer McCain told Powell to stop. At this point the officers are justified in treating Flores just like a passenger in a car and moving him to where they needed him to be to secure the scene. The Officers also had information that Powell had recently used a gun in a crime, and Flores volunteered that he had the gun without being asked and before he was searched.

IV. CONCLUSION

In this case the stop of Flores was legitimately based on Powell's legitimate arrest and the need to secure the scene, the officers had reasonable safety concerns, and Flores' frisk was not more than necessary for their protection. *Collins,* 121 Wn.2d at 168. The suppression of the firearm and the attendant statements should be reversed and the case remanded back to the trial court for trial.

Dated this 9th day of June, 2014.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Appellant, v. CODY RAY FLORES, Respondent.	)	No. 32233-5-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I hand delivered a copy of the Brief of Appellant to the office of David Bustamante, attorney for Respondent, and served a copy by e-mail on David Bustamante, receipt confirmed, pursuant to the parties' agreement:

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That on this day I hand delivered to the Grant County Sheriff for service on Respondent, who is incarcerated in the Grant County Jail, a copy of the Brief of Appellant in the above-entitled matter.

Cody Ray Flores
Grant County Jail
PO Box 37
Ephrata WA 98823

Dated: June 9 2014.

Kaye Burns