FILED
Jul 22, 2015
Court of Appeals
Division III
State of Washington

**SUPREME COURT NO.:** _____

**COURT OF APPEALS NO. 32233-5-III**

91986-1

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**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**PETITIONER,**

**v.**

**CODY RAY FLORES,**

**RESPONDENT.**

FILED
JUL 29 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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# PETITION FOR REVIEW

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STATUTES AND OTHER AUTHORITIES

## A. IDENTITY OF PETITIONER

The State of Washington asks this court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

## B. COURT OF APPEALS' DECISION

The State seeks review of the decision upholding the trial court's order suppressing the gun found in Cody Flores' pants, dated May 21, 2015, with an order publishing dated June 25, 2015. A copy of the decision is in the appendix at pages A-1 through A-16.

## C. ISSUES PRESENTED FOR REVIEW

1. May officers, consistent with *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999), order a non-arrested companion of an arrestee to a position necessary to secure an arrest scene?

2. What is the proper standard of review of officer actions taken to ensure officer safety?

3. What is the proper role of appellate fact finding?

4. What is the proper role of the exclusionary rule in Washington where neither the officers nor the defendant did anything wrong?

## D. 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. En route 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 sight. *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 by ordering him to walk backwards towards him. *Id.* While Officer McCain was doing that Officer Ouimette ordered Flores to walk towards him backwards with his hands up. CP 61. As Flores was walking back to Officer Ouimette he volunteered, without

prompting, that he had a gun that Powell gave him. *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.

In a hearing conducted pursuant to CrR 3.6 Flores defended on the ground that a *Terry* stop of Flores was invalid. The State agreed that there was no justification for a *Terry* stop, but argued that officer safety, particularly *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999), justified Flores' brief detention and movement as a companion of the arrestee Powell. The trial court suppressed 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.*

The Court of Appeals affirmed the trial court in a published case. The majority agreed with the State that *Terry* stop standards were not relevant, but then went on to apply, without citation, a novel standard of review and to distort the facts to reach its holding. The concurrence held

that the case should have applied *Terry* standards, affirmed on that ground, and criticized the majority decision for its distortion of facts.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In determining whether to accept review from the Court of Appeals the Court looks at four factors: whether the Court of Appeals decision conflicts with other decisions of the Supreme Court or Courts of Appeals, RAP 13.4(b)(1),(2), whether the case involves a significant question of law under the Constitution of the State of Washington, RAP 13.4(b)(3), or whether the case involves an issue of substantial public interest that should be determined by the Supreme Court, RAP 13.4(b)(4). This case meets all four tests.

### 1. *The Court of Appeals' decision conflicts with multiple other appellate court decisions.*

#### a. ***State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999), and *State v. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999).**

*i. Analogy to passenger in car cases.*

Both parties and both courts who have reviewed this case analogized Flores' situation to that of a passenger in a car. This is the situation where a companion of an arrestee is detained the most often, thus all of the case law occurs in this context. While there is no automobile in this particular case, the situation faced by the officers would not have been

materially different had Powell been the driver in a car and Flores a passenger, thus the analogies are appropriate.

ii. *The trial court and Court of Appeals failed to follow Parker and Mendez.*

The trial court, in its written opinion, acknowledged that under the 4th Amendment companions of an arrestee were subject to frisk. In *Mendez*, 137 Wn.2d at 220, the Washington Supreme Court rejected that analysis under Art 1, Sec 7, and replaced it with an "objective rationale" test. Notably, the court held that this was not the same test as that required for a Terry stop. *Id.*

In *Parker*, decided a few months later, a four justice plurality created a per se application of the *Mendez* test. They held:

> We do conclude, 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, a 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.

The two justice dissent would have gone further, and allowed full searches of the passengers. *Id.* at 519-34 (Guy, J. Dissenting). Thus this holding in *Parker* is controlling law and on point.

In this case Flores was being ordered out of the metaphorical car and over to the officer to control the scene of Powell's arrest. While he

was being moved by the officers he announced, without prompting, that he had the gun Powell gave him, corroborating the anonymous report. Officer Ouimette then took the gun from Flores as soon as he had him secured. This is a clear and straight forward application of the holding in *Parker*. The opinions in this case ignored this clear precedent.

While not controlling, the concurrence also ignored *Mendez* when it held the case should be decided according to normal *Terry* stop principles. *Mendez* clearly holds that the standard for this situation is not *Terry*, but an objective rationale. This rationale was present in this case.

**b. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) and *State v. Pressley*, 64 Wn. App. 591, 825 P.2d 749 (1992).**

When officer's actions are justified by safety concerns the court in *Collins* held "[C]ourts are reluctant to substitute their judgment for that of police officers in the field. A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing." *Id.* at 173. "We agree that under certain conditions, officers must be afforded some leeway; when a tip involves a serious crime or potential danger, less reliability may be required for a stop than is required in other circumstances." *State v. Z.U.E.*, __Wn.2d__, __P.3d___, 2015 Wash. LEXIS 809 (2015) Slip op. at 18. Rather than

apply this deferential standard, Division III held "that in close calls challenged evidence should be suppressed." *Flores*, Slip op. at 8.

The standard of review for investigatory stops is a bit higher.

> In evaluating the reasonableness of an investigative stop, courts may take into account the totality of the circumstances presented to the investigating officer. While the circumstances must be more consistent with criminal than innocent conduct, reasonableness is measured not by exactitudes, but by probabilities. In reviewing those circumstances, courts may consider such factors as the officer's training and experience, the location of the stop, and the conduct of the person detained.

*State v. Pressley*, 64 Wn. App. 591, 595-96, 825 P.2d 749 (1992) (internal quotations and citations omitted). This higher standard is inapplicable in this case, because the stop and control of Flores was based on officer safety, not investigatory concerns. Yet the Court of Appeals went beyond this standard, instead inventing a new standard of review of officer actions from seemingly nowhere.

In analyzing this case the court, without citation to any authority, held "When reviewing claims of unlawful searches and seizures, we often must isolate discrete actions of a police officer during an extended encounter, as if the actions are separate frames in a movie." *Flores*, Slip op. at 6-7. First, this holding mischaracterizes the evidence. The time from when Officer McCain ordered Powell to stop, and Flores stopped with him to when Officer Ouimette called Flores back and Flores

indicated he had the gun was on the order of a few minutes at most, and can hardly be called extended. Second, reasonable officers do not have Adam Sandler's remote from 'Click' to pause time, *See Click* (Columbia Pictures 2006), nor can they slow time to see the bullets flying at them, like Keanu Reeves in The Matrix. *See The Matrix* (Village Roadshow Pictures 1999). The court applies a superhuman standard of review, looking at things not as they appear to a reasonable officer, but looking at things as they appear to an omniscient being who can pause time and focus in on one event to the exclusion of all else. The speed and simultaneity of events may well be part of the circumstances facing a reasonable officer. In this case, they were.

The Court of Appeals' decision uses a standard of review found nowhere else in jurisprudence. Even applying this standard, the court still should have reversed the trial court and upheld the search, had it not cherry picked facts and divorced simultaneous events. The appellate court agreed that the officers could seize Flores when they ordered Powell to stop. *Flores*, Slip op. at 13. When Officer Ouimette arrived on the scene he had heard the radio call about Powell pointing a gun at someone's head and he had heard of Powell's outstanding warrant. RP 86. He saw McCain, who was focused on Powell, calling Powell back. He then started calling Flores back. RP 87-88. There is nothing in the record to

indicate that Powell's detention was complete before Ouimette started calling Flores back as the appellate court seems to hold. *Slip* op at 14. Quite the opposite is true, Powell was in the process of being called back when Ouimette took charge of Flores and started calling him back. CP 61.

As Flores walked backward he told Ouimette that Powell had given him a gun. At that point there was substantiation for the tip and the seizure ripened into an investigatory stop, and the officers still needed to secure the scene so they could deal with Powell's arrest. The trial court expressly found that Officer Ouimette ordered Flores back while McCain was securing Powell. CP 61. This is supported by Officer Ouimette's testimony that Powell was in the process of walking back towards McCain, but not secured yet. RP 91.

Officer Ouimette described the situation through his eyes. RP 86-89. He responded to the call. He had heard on the radio that a caller had reported a gun was held to someone's head. When he got to the scene he saw Flores at a position of disadvantage and Powell being called back. The appellate court agreed that Officer McCain was justified in stopping Flores at this point. Officer Ouimette was unsure of the exact details of why Flores was stopped, he simply knew a gun was possibly involved and Flores was stopped. McCain was busy with Powell and there was not time to freeze everything and discuss the issue. Instead Ouimette did exactly

what any reasonable officer would do, he called Flores to him to take control of the situation, control everything, and then sort it out. While this was occurring Flores told Ouimette Powell had given him the gun.

It is only by separating the events that occurred simultaneously in time and space by using a "stop motion analysis" that the appellate court found a rationale to suppress in this case. But this god-like standard is unsupported in case law. Instead the court should have deferred to Officers McCain and Ouimette's reasonable actions on the scene, as they were intended to ensure officer and community safety. Even if the court applies the more searching analysis applicable to investigatory stops, which this situation was not, the officers still acted reasonably based on how the situation appeared to them. Speed and simultaneity of events are some of the circumstances officers deal with on a scene. The appellate court applied a novel standard of review to ignore these circumstances and decide for the officers when the scene was secure. This was completely unwarranted by prior case law, reason or the record.

**c. *State v. Adams*, 144 Wn. App. 100, 181 P.3d 37 (2008).**

The State's position is also supported by *Adams*, upon which the trial and Court of Appeals purport to rely. In *Adams* Officer Jensen stopped a reported stolen car. Ms. Adams was a passenger. He detained Ms. Adams and placed her in handcuffs. Later Officer McCasland arrived

to assist and decided to pat Ms. Adams down, although there was no articulable suspicion she had any weapon on her, or was responsible for the stolen car.

Both the majority and dissent in *Adams* took it as a given that Officer Jensen acted properly in detaining Ms. Adams, ordering her out of the car and putting her in handcuffs. Officer Jensen also secured the driver in handcuffs. The question was whether Ms. Adams could be patted down after that point. She was already secured by the time the search of her person occurred. There was no indication of any sort of violence associated with the stop. By contrast Flores announced he has the gun from Powell as he was being secured, before he was patted down or placed in handcuffs. The officers had information that the arrestee Powell, whom Flores was with, had pointed a gun at someone's head. Officers McCain and Ouimette were more than justified in securing Flores, as part of the process of securing Powell. Just as the *Adams* court implicitly held that the officers were justified in securing Ms. Adams as they were securing the car and driver. If Ms. Adams had stated that she had a gun when she was being pulled out of the car, before she was placed in handcuffs, and the gun was what was seized instead of drugs, *Adams* most likely would have had a far different outcome. Division III's opinion conflicts with the very decision it purports to rely upon.

### d. Internal Split in Division III.

In this case the concurring judge criticized the majority opinion for not deferring to the trial court's findings of facts and using loaded words to support its position. *Flores*, Slip op. at 17, (Brown J. Concurring). This is the second time recently that one judge of Division III has criticized another for engaging in appellate fact finding and supporting its opinions using facts not decided by the trial court. *See State v. Budd*, 186 Wn. App. 184, 208, 347 P.3d 49 (2015) (Korsmo J. dissenting), (citing *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), for the rule that appellate courts do not weigh facts).

Here the appellate court held that "once Powell was safely in custody, the officers' objective rationale for seizing Flores evaporated, and the officers could no longer lawfully detain and search Flores." *Flores*, Slip op. at 13. This would be a correct statement of law if it were clear that Powell was safely in custody before Flores was called back. He was not, and this finding is not supported in the record, and is directly contrary to the trial court's findings. The appellate court is inserting itself into the actions of the officers on the scene, and deciding the exact second when Powell was secured, with absolutely no support in the record to conclude that Powell was secured before Flores was called back or when Flores

admitted he had the gun. The trial court's findings state that Flores was called back by Ouimette while McCain was securing Powell. The record does not reveal exactly what happened first, Powell was secured or Flores admitted he had the gun. This question was never raised at the trial court level[1], as the standard of review applied by the Appellate court is novel and the defense did not challenge that the officers were motivated by officer safety, instead arguing that the initial stop and call back were invalid under *Terry*. If Powell was completely secured first, it would have been seconds before Flores stated he had the gun. Given that Officer McCain would have been reluctant to distract Officer Ouimette from what he was doing with Flores, it is not unreasonable that Officer Ouimette would finish what he was doing with Flores, even if Powell had been secured a few seconds before Flores admitted he had the gun.

However, if it is critical to know what happened first by a few seconds, Powell was secured or Flores stated he had the gun, the proper action is to remand to the trial court for that determination. Facts should not be created at the appellate court level. Given the deference owed to officers in this situation, it should not matter which happened first by a

[1] Flores has argued this case, both in the trial court and appellate court, from an investigative *Terry* stop perspective. This is a perspective the State and both courts have rejected. However, records are created in light of existing law. When the appellate court came up with a novel theory, it is not surprising the record does not directly address it.

few seconds, Officer Ouimette, as a reasonable officer, would finish what he was doing with Flores before ascertaining what was going on with Powell. It also inserts the court into deciding when, exactly, a scene is secure. In *Adams* timing was not an issue because it was obvious the scene was secure at the time of the search. In this case was Powell "secured" when he reached McCain? Was he "secured" when he had been handcuffed? Was he "secured" when he had been searched? Was he "secured" when he was in the back of a car? It is these kinds of decisions that the court properly defers to the officers on the scene to make.

Review of this case should be accepted to determine the amount of appellate fact finding permissible in an appellate opinion and resolve the dispute in Division III.

2. ***This case involves significant question under Art 1 §7 of the State Constitution as to the Standard of Review of Officer Actions on the Street and the Purpose of the Exclusionary Rule.***

As previously noted, the court of appeals adopted a novel standard of review. If the court is to adopt a standard of review that goes beyond the perceptions of a reasonable officer to stop motion analysis focused on only part of an incident this new standard involves a significant question under the State Constitution. The root of the exclusionary rule is to provide feedback to officers when they act beyond the scope of their

authority. However, they can only exercise their authority on the facts as they perceive them. If the court is to review officer actions based on a super human, 20/20 hindsight review, the exclusionary rule loses its feedback function for officers. As even defense counsel stated in this case "my comments, of course, are not intended to be advice to the officers on how to protect themselves, but from a strictly legal point of view." RP 102. But that is exactly what the original purpose of the exclusionary rule was, to give advice and feedback to officers when they go too far. The fact that the court is essentially giving up that feedback function in cases where the officer's primary concern is something other than investigation by applying super human standards of review and suppressing where officers act reasonably and in accordance with applicable law is a significant question under the constitution of the State.

### 3. *This case involves an issue of substantial public interest that should be determined by the Supreme Court, specifically whether the exclusionary rule is officer-focused or defendant-focused.*

The officers in this case did nothing wrong. Aside from possessing the gun, neither did Flores. He was cooperative with the police and did almost exactly what was asked of him. At the CrR 3.6 hearing the trial judge stated that Flores might feel a little bit grieved when he had done nothing wrong. RP 119. Defense counsel stated, as a preface to his

argument "Your Honor, my comments, of course, are not intended to be advice to the officers on how to protect themselves, but from a strictly legal point of view." RP 102.

The appellate court cherry picked facts, used loaded words and invented new doctrines in order to affirm the trial court. This also appears to be out of a misapplied sense of judicial fairness, rather than following applicable law. This sense of judicial fairness is not without support in the case law. "Our state's exclusionary rule, like its federal counterpart, aims to deter unlawful police conduct, but 'its paramount concern is protecting an individual's right of privacy." *State v. Eserjose*, 171 Wn.2d 907, 918, 259 P.3d 172 (2011). "[W]hile our state's exclusionary rule also aims to deter unlawful police action, its paramount concern is protecting an individual's right of privacy. *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

The roots of the exclusionary rule are officer focused. Did the Officer do something wrong that invaded the privacy rights of the individual? The exclusion rule "accomplishes this by closing the courtroom door to evidence gathered through illegal means." *Eserjose*, 171 Wn.2d at 918. "Therefore, if a police officer has disturbed a person's 'private affairs,' we do not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether

the officer had the requisite 'authority of law.' If not, any evidence seized unlawfully will be suppressed." *Afana*, 169 Wn.2d at 180. These statements imply that a defendant focused exclusionary rule may be appropriate, but do not clearly say so.

If the court wishes to engage in a policy that the exclusionary rule is to be defendant focused, and the State is to be required to point to a bad act by the defendant, such as a furtive movement, then that is a policy decision that needs to be addressed by the Supreme Court. The Court of Appeals pointed to the furtive movements in *State v. Horrace*, 144 Wn.2d 386, 28 P.3d 753 (2001), as an example of the bad act the State must point to to justify the seizure. *Flores*, Slip op. at 16.

This is contrary to *Parker*, which held that a passenger in a car may be moved when a companion is arrested. Flores was being moved when he volunteered he had a gun. As of now lower courts are left with the impression that the privacy interests of a defendant who did nothing wrong with respect to the seizure should be upheld, even when the officers acted within the authority provided by case law. (In this case *Mendez* and *Parker*.) The court has justified this novel holding with doctrines unsupported by and contrary to prior case law, but only after modifying the facts found by the trial court. This case provides an excellent vehicle to clarify on the use of the exclusionary rule where neither side did

anything wrong, and highlights confusion about policies that should be decided by the Supreme Court.

## F. CONCLUSION

The State asks that review be granted, the Court of Appeals' decision be reversed, and the case be remanded for trial.

Dated this 22 day of July 2015.

GARTH DANO
Prosecuting Attorney

By: _____
Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney

# APPENDIX A

**FILED**
**MAY 21, 2015**
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

| | | |
|---|---|---|
| STATE OF WASHINGTON, Appellant, | ) | No. 32233-5-III |
| v. | ) | |
| CODY RAY FLORES, Respondent. | ) | UNPUBLISHED OPINION |

FEARING, J. — We address under what circumstances and to what extent a law enforcement officer may detain and search a companion of another engaged in criminal activity. The trial court suppressed evidence of a gun on the person of Cody Flores, who accompanied one accused of a crime. Although the law enforcement officer had cause to detain Flores, the officer lacked reason to order Flores to walk toward him and to search him. We affirm the trial court.

## FACTS

On November 2, 2013, Moses Lake police dispatch sent all available patrol officers to 1120 Alderwood Drive. Dispatch relayed an anonymous report that Giovanni Powell held a gun to somebody's head at that address. Dispatch also reported an outstanding warrant for the arrest of Powell.

Officer Kyle McCain arrived at 1120 Alderwood Drive first and espied Giovanni Powell ambling with Cody Flores north of the address. The anonymous caller had not mentioned Flores. Officer McCain knew Powell to be a member of the "Base Block" gang. McCain identified Powell from pictures on Facebook, whereon Powell or his friends held firearms. McCain also knew Powell from the latter's testimony as a material witness after one of Powell's best friends was shot and killed in a fight at a Spokane motel. Officer McCain did not recognize or know Cody Flores.

After spotting Giovanni Powell, Officer Kyle McCain exited his car and drew his gun aimed at the ground or at a low ready position. An officer employs the low ready position when he has not identified a specific violent threat, but knows that danger may await in his immediate area. Kyle McCain ordered Giovanni Powell and Cody Flores to stop walking. Powell and Flores complied. Officer McCain ordered each man to place his respective hands on his head, face away from McCain, and kneel on the sidewalk. Powell and Flores obeyed and kneeled about five to seven feet from each other.

Office Kyle McCain stood next to his patrol car and utilized the car as cover, while he paused for other officers to arrive. Giovanni Powell and Cody Flores spoke to each other, and McCain ordered them to cease talking. Kyle McCain directed Flores to move further from Powell, and Flores complied while still on his knees. Another four officers arrived at the Alderwood address, and each drew his gun. Officer McCain and other officers ordered Powell to approach them by walking backward with his hands on

his head. Powell obeyed, and the officers arrested him without harm. Cody Flores never obstructed in the detaining of Giovanni Powell.

Moses Lake Officer Paul Oiumette was one of the other officers who arrived at the Alderwood address. Oiumette assumed control over Cody Flores, who remained kneeling on the street corner with his hands up, facing away from the officers. He had no knowledge of Cody Flores engaging in criminal activity. Nevertheless, Oiumette believed Flores to be involved in the gun incident that prompted the anonymous call to dispatch. Officer Oiumette drew his gun and held it at the low ready position. He instructed Flores to keep his hands where Oiumette could see them and to walk backward to the sound of his voice. Cody Flores rose from his knees and complied. As Flores walked backward, he saw Officer Oiumette's drawn gun.

After Cody Flores walked ten to fifteen feet and neared within twenty feet of Officer Paul Oiumette, Flores peered over his shoulder and notified the officer that Giovanni Powell gave him a gun. Oiumette commanded Flores to keep walking backward. Oiumette asked Flores about the location of the gun, and Flores responded that he carried the firearm in his pants under his jacket. Flores continued to promenade backward. When Flores approached within feet of Officer Oiumette, the officer ordered Flores to kneel, and other officers approached Flores and secured him in handcuffs. With his gun drawn, Oiumette removed the gun from Cody Flores' pants and detained Flores in the back of a patrol car.

Moses Lake law enforcement officers reviewed Cody Flores' criminal history and discovered a conviction in October 2012 for residential burglary, a felony disqualifying Flores from possessing a firearm.

PROCEDURE

The State of Washington charged Cody Flores with unlawful possession of a firearm in the first degree, in violation of RCW 9.41.040(1)(a). Cody Flores filed a CrR 3.6 motion to suppress the gun found on his person as the product of an unlawful seizure. Flores argued that the Moses Lake officers lacked an articulable suspicion essential to justify detaining him. At the motion to suppress hearing, Officers Kyle McCain and Paul Oiumette testified. Thereafter the trial court issued a letter opinion, including findings of fact and conclusions of law. Among other findings, the trial court found that the officers lacked individualized articulable suspicion to suspect Cody Flores of criminal activity.

The trial court granted Cody Flores' motion to suppress evidence of the gun found on his person and dismissed the charge against him without prejudice. In the letter opinion, the trial court observed that federal law assumes that all arrestee companions are dangerous and thus are subject to search. The court continued:

> In Washington, however, while a reasonable concern for officer safety justifies a brief detention and protective frisk of an arrestee's companion, proximity to the arrestee, even coupled with general circumstances, such as being in a high crime [area], are insufficient to create a reasonable concern. State v. Adams, 144 Wn. App. 100, 106-07, 181 P.3d 37 (2008). Rather, there must be articulable circumstances

> particular person in the arrestee's company poses a threat to officer safety to justify that person's detention and frisk. Id.
>
> Here, Mr. Flores was compliant, made no furtive movements, and there is no evidence the officers during the relevant time period were aware of any violent propensities the Defendant may have had. There were, therefore, no grounds under Washington law to detain the Defendant. His motion to suppress is granted.

Clerk's Papers at 56.

## LAW AND ANALYSIS

We outline the arguments raised by the parties in order to circumscribe our analysis. The State of Washington argues that a concern for officer safety justified the detention of Cody Flores and later seizure of the gun on Flores' person. The State contends that Officer Paul Oiumette had a legitimate concern that Giovanni Powell could have passed his gun to Cody Flores. The State, however, does not argue that the *Terry* investigatory stop rule validated Officer Oiumette's search of Flores' person. *Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

The State of Washington analogizes this appeal to a case involving the detaining of a passenger in a stopped car. We agree with this analogy, but our agreement harms, not advances, the State's position.

When reviewing claims of unlawful searches and seizures, we often must isolate discrete actions of a police officer during an extended encounter, as if the actions are separate frames in a movie. Cody Flores does not argue that Officer Kyle McCain lacked reason to detain him until officers accomplished the arrest of Giovanni Powell. Flores

does not need to assert this argument to be successful. Flores contends that Officer Paul Oiumette lacked grounds, after the arrest of Powell, to require him to walk toward the officer and to search his person. Flores emphasizes that he informed Oiumette of the gun on his person only after Oiumette unlawfully directed him to parade carefully toward the officer.

Cody Flores also argues that the law enforcement officers lacked reasonable suspicion to legitimize a *Terry* stop of Flores. We agree with the State that this latter contention is irrelevant since the State does not substantiate the detention and search of Flores under *Terry*.

As the trial court did, we rely on the Washington constitution, not the Fourth Amendment to the United States Constitution. Article I, section 7, provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." That protection encompasses and exceeds the protection guaranteed in the Fourth Amendment of the United States Constitution. *State v. Horrace*, 144 Wn.2d 386, 392 n.2, 28 P.3d 753 (2001); *State v. Parker*, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999).

The State of Washington does not assign error to any finding of fact of the trial court. Unchallenged findings, entered after a suppression motion hearing, are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized the person. *Terry v. Ohio*, 392 U.S. at, 16 (1968). Once an officer seizes an individual, no subsequent events or circumstances retroactively justify the seizure. *State v. Mendez*, 137 Wn.2d 208, 224, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). There are five jealously and carefully drawn exceptions to the warrant requirement, which include exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). This is a strict rule. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). Exceptions to the warrant requirement are limited and narrowly drawn. *White*, 135 Wn.2d at 769. Whereas, Washington courts repeatedly herald these principles, a court rarely hinges a decision thereon. The principles should teach us that in close calls challenged evidence should be suppressed.

Washington courts have not announced under which of the five exceptions to a search warrant arrestee companion search and seizure fall. One court refused to characterize a companion search as a search incident to arrest, since this exception only justifies the search of the arrestee and his immediate vicinity. *State v. Parker*, 139 Wn.2d at 497 (1999). When a person is not under arrest, there can be no search incident to arrest. *Parker*, 139 Wn.2d at 497. Perhaps the companion search should fall under the exigent circumstances exception or be its own exemption category.

We now outline those detailed rules that control our decision. Merely associating with a person suspected of criminal activity does not strip away the protections of the constitution. *State v. Broadnax*, 98 Wn. 2d 289, 296, 654 P.2d 96 (1982), *abrogated on other grounds by Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). In order for police to lawfully seize an otherwise innocent individual present with an arrestee, the arresting officer must articulate an "objective rationale" predicated specifically on safety concerns, for officers or other citizens to satisfy article I, section 7. *State* v. *Mendez*, 137 Wn.2d at 220 (1999). This "objective rationale" criterion is a less demanding standard than needed for a *Terry* stop. To justify a *Terry* stop, the police officer must identify specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion. *Terry*, 392 U.S. at 21; *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

The law recognizes that under certain circumstances, unarrested individuals may pose a threat to officer safety in an arrest situation. *State v. Horrace*, 144 Wn.2d at 392-93; *State v. Kennedy*, 107 Wn.2d 1, 11, 726 P.2d 445 (1986). An officer conducting a stop may be endangered not only by the suspect but by companions of the suspect. *Kennedy*, 107 Wn.2d at 11. This threat does not justify unlimited intrusions into the companion's privacy, however. To automatically authorize the search of nonarrested individuals because those individuals happen to be associated with the arrestee, or within the vicinity of the arrest, would distort the narrow limits of the warrant exceptions and offend fundamental constitutional principles. *State v. Parker*, 139 Wn.2d at 497 (1999). The authority to conduct a full blown evidentiary search cannot constitutionally derive from the need to secure officer safety alone. *Parker*, 139 Wn.2d at 499. Because the privacy interest of a nonarrested individual remains largely undiminished, full blown evidentiary searches of nonarrested individuals are constitutionally invalid even when officers may legitimately fear for their safety. *Parker*, 139 Wn.2d at 499. A generalized concern for officer safety has never justified a full search of a nonarrested person. *Parker*, 139 Wn.2d at 501.

When stopping a car for a traffic violation, the officer may take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. *State v. Mendez*, 137 Wn.2d at 220. But with regard to passengers, an officer must be able to articulate an objective rationale predicated

specifically on safety concerns for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy article I, section 7. *Mendez*, 137 Wn.2d at 220. Whether such an articulable, objective rationale exists depends on the circumstances at the scene of the traffic stop. *Mendez*, 137 Wn.2d at 221.

If the officer arrests the driver, the officer may then order an occupant from the car. *State v. Parker*, 139 Wn.2d at 502. Nevertheless, when the purpose of the officer's interaction with the passenger is investigatory, the officer must meet the higher *Terry* standard. *Mendez*, 137 Wn.2d at 220. Stated differently, if the officer searches the person of the nonarrested passenger, the officer must have objective suspicions that the person searched may be armed and dangerous. *State v. Parker*, 139 Wn.2d at 502. When the suspicion that an individual may be armed is based in part on the observable actions of others in a particular context, the officer must point to specific, articulable facts tying those observable movements and their circumstances directly and immediately to the individual to be frisked. *State v. Horrace*, 144 Wn.2d at 399-400 (2001). When officers do not have an articulable suspicion that an individual is armed or dangerous and have nothing to independently connect such person to illegal activity, a search of the person is invalid under article I, section 7. *State v. Parker*, 139 Wn.2d at 498.

Most, if not all, Washington decisions address the stop and frisk of an arrestee's companion in the context of a passenger in a car, rather than one walking on a sidewalk with the arrestee. We consider the passenger cases controlling.

In *State v. Mendez*, 137 Wn.2d 208 (1999), police officers detained a car for failing to stop at a stop sign. The car's passenger, Efrain Mendez, exited the vehicle and quickly walked from the scene. Mendez did not heed an officer's command to return to the car and reached inside his shirt two times while running away. Officers chased Mendez, grabbed him, placed him under arrest, and searched him. During the search, they found a marijuana pipe. After denying a CrR 3.6 motion to suppress the marijuana pipe, the trial court found Mendez guilty of possessing paraphernalia.

In reversing the trial court's denial of Efrain Mendez's motion to suppress, the Supreme Court held that the arresting officers possessed neither an objective rationale that would allow them to order Mendez back into the vehicle in order to secure the scene, nor a reasonable suspicion that Mendez had engaged or was about to engage in criminal conduct. Mendez's running from the scene, without evidence that he committed a crime or posed a threat to public safety, did not justify his detention. Moreover, Mendez's gesture of reaching inside his jacket while walking away with his back to the officers occurred after he had been seized by the officer's command to return to the car.

Moses Lake officers possessed reason to seize Cody Flores in order to secure the scene of Giovanni Powell's arrest. Officer McCain initially approached Powell and Flores alone and was entitled to take limited measures to ensure Flores would not interfere in his arrest of Powell. Nevertheless, the seizure exceeded the permissible scope of the objective rationale standard. Contrary to what the State asserts, the officers'

objective rationale for detaining Flores does not ripen into a reasonable suspicion of criminal activity sufficient to justify an investigatory seizure. Once Powell was safely in custody, the officers' objective rationale for seizing Flores evaporated, and the officers could no longer lawfully detain and search Flores because, as the trial court correctly found, they lacked a reasonable suspicion that Flores had committed, or was about to commit, a crime, or was a danger to the officers.

Cody Flores exhibited no threatening or aggressive behavior toward the officers. He immediately complied with Officer McCain's every command. Officer Oiumette testified that Flores was in a position of disadvantage by the time he arrived, kneeling on the ground with his hands behind his head, facing away from the officers. The anonymous tip made no mention of Flores, nor did any of the responding officers have reason to believe Flores had dangerous propensities.

Even though arresting law enforcement officers believed Giovanni Powell passed his gun to Flores after they could not find a gun on Powell's person, the record does not show officers forwarded this information to Officer Paul Oiumette. Anyway, any suspicion on Oiumette's part would not validate *Terry*'s reasonable suspicion standard, because Paul Oiumette had no reason to believe Flores could not lawfully possess a weapon. Officer Oiumette testified that he continued to detain Flores after others arrested Powell because he responded to a call about a firearm and he believed Flores was involved with the gun. Officer Oiumette thus admitted that Flores' extended detention

was premised on the same anonymous call that the State admits is insufficient to justify a *Terry* stop.

The trial court relied heavily on *State v. Adams*, 144 Wn. App. 100, 181 P.3d 37 (2008). The State argues that the trial court misinterpreted *Adams* as establishing a bright line rule that an officer must have individualized suspicion to seize an arrestee's companion in order for that seizure to comport with Washington's Constitution. We disagree that the trial court misapplied *Adams*.

In *State v. Adams*, we reversed a trial court's denial of a motion to suppress brought by the passenger of a vehicle detained by officers on suspicion of being stolen. 144 Wn. App. at 107. The arresting officer handcuffed both passenger and driver. He asked the passenger, Jennifer Adams, if anything would poke him if he frisked her person. Adams responded that she carried a syringe in her coat pocket, and she gave the officer permission to remove the syringe. When the officer reached in her pocket to retrieve the syringe, the officer found a bag of methamphetamine. The trial court denied her motion to suppress the drug evidence. In reversing the trial court, we held that, when a seized passenger poses no immediate threat to an officer's safety, nor appears armed, *Terry* requires the officer to "'point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger could be armed and dangerous'" in order to justify a protective frisk. *Adams*, 144 Wn. App. at 105 (quoting *State v. Horrace*, 144 Wn.2d 386, 399-400, 28 P.3d 753 (2001). *Adams* supports our holding in this appeal.

The State of Washington relies on *State v. Horrace*, 144 Wn.2d 386, in which the state Supreme Court affirmed the conviction of a car passenger for possession of a concealed weapon. The court sanctioned the pat-down frisk of the passenger because, while the officer returned to his patrol car to check for warrants for the driver, the officer noticed furtive movements between the driver and his passenger, Ronald Horrace. In this appeal, no Moses Lake officer saw Giovanni Powell hand Cody Flores an object, nor did Powell or Flores engage in furtive movements.

CONCLUSION

We affirm the trial court's suppression of evidence and dismissal of charges against Cody Flores.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

I CONCUR:

Korsmo, J.

BROWN, A.C.J. (concurring in result) — First, Mr. Flores' case was decided by the trial court applying solely the investigative stop principles of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). While fact finding, the judge unsuccessfully searched the record for "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." Clerk's Papers (CP) at 56. The judge did not find facts justifying Mr. Flores' continued detention and search after Mr. Powell's arrest. The judge applied *Terry* as did *State v. Adams*, 144 Wn. App. 100, 107, 181 P.3d 37 (2008), a passenger search case. But passenger cases are not distinct from *Terry* or separately "controlling" as the majority reasons. We should not depart from the principles established in *Terry*.

Second, we should defer to the trial court's discretionary fact finding and witness credibility decisions in both letter and spirit. The judge found Mr. Flores was ordered to "walk" backward and did not describe the walk as a "promenade" or "parade." CP at 61. The judge did not criticize the officers' need to safely control Mr. Powell's arrest scene and briefly detain his walking companion, Mr. Flores. Initial police interactions with individuals in *Terry* situations are generally and neutrally described as stops or encounters; thus in *Terry* situations, a police officer initially stops or encounters rather

than "accosts" individuals. "Accost" connotes challenging and aggressive, which is not always true in police encounters. I cannot join in the noted incorrect descriptions.

Accordingly, for these two reasons, I must respectfully concur solely in the result.

Brown, A.C.J.

SUPREME COURT NO.: _____
COURT OF APPEALS NO. 32233-5-III

SUPREME COURT
OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON, Petitioner, v. CODY RAY FLORES, Respondent. | ) | DECLARATION OF SERVICE |

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

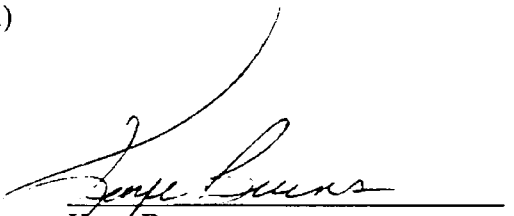
On this date I e-mailed and hand delivered to David Bustamante's Office (Grant County Public Defender's Office) a copy of the Petition for Review in this matter. On said date I also delivered to the Grant County Sheriff for service on Respondent at the Grant County Jail a copy of the Petition for Review in the above-entitled matter.

David Bustamante
Grant County Public Defense
35 C Street NW – 1st Floor Annex
Ephrata WA 98823

David Bustamante
dbustamante@grantcountywa.gov

Cody Ray Flores
c/o Grant County Sheriff
(for service at Grant County Jail)
35 C Street NW
Ephrata WA 98823

Dated: July 22, 2015.



Kaye Burns

## GRANT COUNTY PROSECUTOR

**July 22, 2015 - 1:26 PM**

**Transmittal Letter**

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State of Washington

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| Document Uploaded: | 322335-Petition for Review.pdf |
| Case Name: | State of Washington v. Cody Ray Flores |
| Court of Appeals Case Number: | 32233-5 |
| Party Respresented: | Petitioner |
| Is This a Personal Restraint Petition? | ☐ Yes ☑ No |

Trial Court County: Grant - Superior Court # 13-1-00691-2

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- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
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**Comments:**

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to dbustamante@grantcountywa.gov.

Sender Name: Kaye J Burns - Email: kburns@co.grant.wa.us