No. 93732-0

COA No. 33312-4-III

IN THE SUPREME COURT OF THE STATE OF WASHINGON

STATE OF WASHINGTON,

Petitioner.

vs.

ERIC DANIEL CRUZ,

Respondent.

DEFENDANT'S RESPONSE TO AMICUS BRIEF

Ronald Hammett wsba # 06164
Attorney for Respondent
P.O. Box 3940
Omak, Washington 98841
(509) 826-1918

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

CONSTITUTIONS

I. IDENTITY OF RESPONDENT

The respondent is Eric Daniel Cruz. Mr. Cruz is the defendant in this criminal matter. By and through his attorney, Ronald Hammett, he asks this Court to deny the State's Petition for Review.

II. STATEMENT OF THE CASE

The respondent's statement of facts were set out in the previous briefing.

III. ARGUMENT

The Court should deny the State's Petition for Review. The Court of Appeals applied well established legal precedent to the case. The law is well settled, under both the Fourth Amendment and under art. 1 Section 7, that a search of a detained suspect's vehicle for officer safety reasons is limited to the area within reaching distance of the suspect at the time of the search, and suspects who are arrested, handcuffed, and placed within a patrol vehicle do not pose a safety risk to police as would justify a search of the suspect's vehicle. The Court of Appeal's in this case decision is not in conflict with a decision of this Court nor is it in conflict with a decision of the Court of Appeals. This case presents neither new questions of Constitutional law nor

new questions of public interest which previously have not been well settled by this Court or by the Supreme Court of the United States.

A. The Question Whether a Criminal Suspect Who is Armed Must Also Show Signs Of Dangerousness Before a *Terry* Search

Contrary to the statements from the State and the Amicus, this case did not involve a *Terry* stop. A *Terry* stop is an investigatory stop or a brief seizure by police that falls short of a traditional arrest and is justified by a reasonable suspicion that the individual is engaged in criminal activity. *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868. 20 L.Ed.2d 889 (1968). The present case involves the actual arrest of the defendant. The defendant was told he was under arrest, placed in handcuffs, his person was searched incident to arrest, and he was placed inside a patrol vehicle prior to the search of his vehicle.

The question of whether police may conduct a frisk of a suspect detained during a *Terry* stop based solely upon the knowledge that the suspect is armed without an additional showing of dangerousness has drawn different responses from the federal circuits. As pointed out by the State, the Fourth Circuit has recently ruled merely being armed with a firearm is inherently dangerous and justifies the a frisk and seizure of the firearm from the person of the suspect during a *Terry* stop. *U.S. v. Robinson*, 14-4902

(4th Cir. Jan. 23 2017). At least three other circuits have ruled contrary to *Robinson* and held that police must reasonably believe the detainee is both armed and dangerous.. *See. U.S. v. Leo,* 792 F.3d 742 (7th Cir. 2015); *Northrup v. City of Toledo Police Department,* 785 F.3d 1128 (6th Cir. 2015); and *U.S. v. Ubiles*, 224 F.3d 213 (2000).

While this issue may the subject of legal debate, it adds little to the current case before the Court. Even if one were to assume, that mere possession of a firearm during a *Terry* stop justifies a pat down of his person. or in the case of a traffic stop a sweep for weapons within the reach of the suspect, it would not change the result. In this case, police exceeded the scope of any permissible search which might arguably be permitted if the officer reasonably believed Mr. Cruz was armed and dangerous. The firearms seized in this case were not within reaching distance of the defendant at the time of the search and seizure.

B. **Lack of Warrant**

Searches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - subject to a few specifically established and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576

(1967). The burden is on the State to prove one of these narrow exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996).

In this case the removal of the firearms from the defendant's vehicle was clearly a search and seizure without a search warrant, and the State failed to prove an exception to the warrant requirement.

A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, (1984), *State v. Jackson*, 82 Wn. App. 594, 603, 918 P.2d 945 (1996). An object is seized when government agents exercise "dominion and control" over the object. *Jacobsen,* 466 U.S. at 120, 104 S. Ct. 1652; *Jackson*, 82 Wn. App. at 603–04, 918 P.2d 945. In *State v. Cotton*, 75 Wn. App. 669, 682 879 P.2d 971 (1994), the Court held police asserted dominion and control over a shotgun, even though that control was temporary, by taking the shogun from the bedroom, unloading it, and carrying it into another room. Clearly the Wildlife officer in the present case exercised and dominion and control over the firearms and interfered with the defendant's possessory interest in those items.

In this case the removal of the firearms from the defendant's vehicle was clearly a search and seizure without a search warrant, and the State failed to prove an exception to the warrant requirement.

C. **The Search and Seizure Was Not Pursuant to One of the Few Specifically Established and Well Delineated Exceptions to the Warrant Requirement.**

(i) **Original Terry - Frisk of Person**

One well recognized exception to the warrant requirement is a frisk of a suspect's outer clothing for weapons during a brief Terry detention if the police have a reasonably belief the detainee is armed and dangerous. A *Terry* stop either progresses to probable cause to arrest, or it fails to develop into probable cause and requires the release of the suspect. Under *Terry*, a police officer who makes an investigatory stop may conduct a limited pat-down, or frisk, limited to a suspect's outer clothing. *Terry v. Ohio*, 392 U.S. 1,27,30 (1968). This narrowly drawn authority to such a limited search exists where the officer has reason to believe that he is dealing with an armed and dangerous individual. *Terry v. Ohio*, 392 U.S. at 27.

In the present the offending search was not a brief pat down of the suspect's outer clothing, and therefore the traditional *Terry* exception to the warrant requirement was not been proven.

(ii).**Terry as Extended to Vehicles**

The *Terry* search incident to an investigatory traffic stop is another recognized exception the warrant requirement, and it the one the State

most heavily rely on here. This exception also fails because such a search is limited to an area where a suspect might gain immediate access to a weapon.

The Supreme Court in *Michigan v. Long*, 463 U.S.1032, 103 S.Ct 3469, 77 L.Ed.2d 1201 (1983) expanded the area for a search incident to an investigatory stop to the inside of the passenger compartment of a vehicle. Once again, the Court pointed out the officer must believe the person is armed and dangerous. *Michigan v. Long*, 463 U.S, at 1047. The Court also limited such a search to the situations where a suspect might gain immediate access to a weapon. The Court concluded that a search of the passenger area of a vehicle, "is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts' which taken together with the rational inferences from those facts, reasonably warrant the officer in believing the suspect is dangerous and suspect may gain immediate control of weapons". *Michigan v. Long* , 463

Here, the trial court specifically found (FF 16), "At the time of the search and seizure of guns from the defendant's vehicle, the defendant was under arrest, handcuffed, and locked inside the officer's patrol vehicle where he could not access this vehicle to gain immediate control of the weapons" Washington also adopted the expansion of a *Terry* investigation to include the area inside an automobile. *State v. Kennedy*, 107 Wn. 2d 1,

726 P.2d 445 (1986). As in *Long*, the Court limited the search to an area within the detainee's immediate control.

The trial court correctly suppressed the evidence, and the Court of Appeals properly affirmed the trial court.

iii. Police Are Not Authorized to Search a Vehicle Incident To a Recent Occupant's Arrest After the Arrestee Has Been Secured and Cannot Access the Interior of the Vehicle.

Among the exceptions to the warrant requirement is a search incident to a lawful arrest. The exception derives from the interests in officer safety and evidence preservation. *Arizona v. Gant*, 556 U.S. 332 556 U.S. 1719, 173 L.Ed.2d 485 (2009). The Court in *Gant* said, "if there is no possibility that an arrestee could reach into the area where law enforcement officers seek to search, both justifications for the search-incident -to- arrest exception are absent and the rule does not apply". *Gant* at 339. In *Gant,* Mr. Gant was under arrest, handcuffed, and locked in the back of a police car at the time the search of his vehicle. The Court said, "Gant clearly was not within reaching distance of his car at the time of the search", and affirmed the suppression of evidence seized from his car. Under both a Fourth Amendment analysis and pursuant to an article I, section 7 independent state constitutional analysis, a warrantless vehicle search incident to arrest is authorized when the arrestee would be able to obtain a weapon from the

vehicle or reach evidence of the crime of arrest to conceal or destroy it. *Gant*, 129 S.Ct. at 1719; *Buelna Valdez* , 167 Wash.2d at 777, 224 P.3d 751. *State v. Snapp,* 174 Wn.2d 177,275 P.3d 289 (2012)

In *Buelna Valdez*, 167 Wash.2d at 777, 224 P.3d 751, this Court expressly held that " after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception."

Likewise in *State v. Afana*, 169 Wn.2d 169, 233 P.3d 879 (2010), this Court held, "the deputy had no authority of law to search Afana's vehicle because it was out of the reach of the arrestee at the time". *Afana* at 179.

The State also contends the seizure of the firearms was justified because the officer, although he arrested the defendant, supposedly intended to release him after citing him and therefore, the defendant would have access to the firearms.

As previously mentioned, the State in the present case was unable to present any facts justifying an objectively reasonable belief the defendant was dangerous, and as the Court of Appeals pointed out in its decision, the

officer himself when questioned by the prosecutor about how he felt at the time of the search agreed " he didn't feel that [Mr. Cruz] was a danger". *State v. Cruz*, 195 Wn. App. 120, ___P.3d ___(2016). If the defendant is not dangerous, then there is no justification for the seizure even if the defendant will be allowed to return to his vehicle.

The weakness in the State's argument is that is assumes the search must take place if the detainee is allowed or required to get back into the his vehicle. Conducting a warrantless search is not the government's right; it is an exception - - justified by necessity -- to a rule that would otherwise render the search unlawful. "If 'sensible police procedures' require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search." If an officer leaves a suspect unrestrained nearby just to manufacture authority to conduct to search, the search may be unreasonable because the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures. *Thornton v. United States,* 541 U.S.615, 627, 541 S.Ct. 2127, 158 L.Ed.2d 905 (2004)(Scalia, concurring).

IV. CONCLUSION

The trial court and Court of Appeals correctly followed well settled law, and this Court should deny the State's Petition for Review.

Respectfully Submitted this 13th day February,2017

Ronald Hammett WSBA# 06164
Attorney for Respondent/Defendant
P.O. Box 3940, Omak, WA 98841
(509)826-1819
E-Mail: ron@hammettlaw.com

PROOF OF SERVICE

CERTIFICATE

I certify that I mailed a copy of the foregoing Defendant's Answer to State's Petition for Review to the following individuals, postage prepaid, on February 13, 2017

Branden Platter
Okanogan Deputy Prosecutor
P.O. Bo 1130
Okanogan, WA 98840

Pamela Loginsky
Special Deputy Prosecutor
206 10th Ave. SE
Olympia, WA 98501

Michael Young
Office of the Attorney General
800 Fifth Ave. Suite 2000
Seattle WA 98104-3188

Eric Cruz
123 Fritz Road
Riverside, WA 98849

Ronald Hammett wsba# 06164
Attorney for Respondent