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 ANSWER TO PETITION FOR REVIEW

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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. COUNTER STATEMENT OF ISSUES

1. Whether the warrantless search of the defendant's pickup truck and the seizure of firearms found inside the truck at a time when the defendant was under arrest for illegally snagging fish, handcuffed, and locked inside a police vehicle where he could not access his truck or gain immediate control of the firearms violates the Fourth Amendment and art 1, section 7 of the Washington Constitution.

2. Whether the trial court erred in holding the State failed to prove an exception to the warrant requirement by clear and convincing evidence.

III. STATEMENT OF THE CASE

On August 10, 2012, Officer McCormick of the Washington Department of Fish and Wildlife was patrolling near the Enloe Dam on the Similkameen River west of Oroville in Okanogan County. (RP 7 L6) (FF 1) Officer McCormick hiked to the top of an elevated cliff overlooking the river and was conducting surveillance on fishermen below. (FF2)(RP7 L17). He observed the

defendant, Mr. Eric Cruz, and a second fisherman, Mr. Rose, for about half an hour. (RP 7 L 19). This was around 10:00 a.m. (RP16L3). Mr. Cruz was wearing shorts, a blue shirt, and a hat. (RP 18 L3).

Officer McCormick was patrolling alone. Down on the river there is no cellular phone service and the radio signal is "sketchy'. (RP 8 L 11-18). Sometimes an officer must move his vehicle around to get a radio signal. (RP 8 L 17). "There was no indication of a delay in communications on this day." (FF 5).

Officer McCormick observed Mr. Cruz illegally snag a Chinook salmon. (RP 9 L 2). The officer witnessed no other criminal activity by Mr. Cruz. (RP17 L22). (RP 18 L 1). He had no reason to believe Mr. Rose was engaged in criminal activity. (RP 28 L7-9).

Officer McCormick returned to his vehicle and drove down to the Enloe Dam parking lot and contacted Mr. Cruz. (RP 9 L 17-18). Mr. Cruz was attempting to fill out his "catch record card." The officer took it from him. (RP 10 L 3). His purpose in taking the card was "so he couldn't continue to fill it out." (RP19 L9). Officer McCormick asked to see the fish, and *Mr. Cruz* opened a cooler for the officer. (RP 19 L18). During this part of his investigation, Officer McCormick did not ask whether the accused had any firearms. (RP 20 L 4-11).

After observing the fish, Officer McCormick placed Mr. Cruz in handcuffs and arrested him for the gross misdemeanor of unlawfully snagging salmon. (RP

10 L 14). He then searched Cruz incident to arrest and asked if he had any firearms. (RP 10 L 18).

According to Officer McCormick, his purpose in asking about firearms was to determine "if he had any firearms on his person when I was searching him I wanted to know where they were before I, you know, manipulated the firearm." (RP 11 L 8). At this point, Officer McCormick had no reason to believe having a firearm would constitute a crime by Mr. Cruz. (RP 11 L 16).

Mr. Cruz told the officer that there were firearms inside his vehicle. (RP 11 L 20). At this point, Officer McCormick placed Mr. Cruz inside the patrol vehicle "to secure him and also to be able to look more closely at the fish". (RP12 L3).

While the officer was securing Mr. Cruz, the other fisherman, Mr. Rose, approached the vehicle and asked what was going on. The officer asked him to stay away from the vehicle, which he did. (RP 12 L 6). After Mr. Cruz was secured in the patrol vehicle, Officer McCormick went to the Cruz vehicle and seized two rifles from the back seat and a pistol in the front seat. (RP21 L21). "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 his vehicle or gain immediate control of the weapons." (FF 16). "Officer McCormick did not have a search warrant authorizing the seizure of weapons from the defendant's vehicle, nor did he attempt to obtain a search warrant." (FF 17)

The officer said he seized the firearms to secure them during the contact. (RP13 L4). He testified he planned to return the firearms to Mr. Cruz after the contact because he was cooperative and saw no reason to book him. (RP 13 L 8, RP 24 L 16, RP 25 L5) When he "ran the subject on the radio" and learned he had a prior felony and he could not legally possess firearms. (RP 13 L20). (RP22 L22). Officer McCormick cited the defendant and released him, but kept the firearms. (FF 20).

"The defendant was cooperative with Officer McCormick." (FF11). "Officer McCormick knows the defendant because the defendant owns a resort on Bonaparte Lake which is patrolled by Officer McCormick. The officer testified he did not recognize the defendant on the day of his arrest." (FF 14)(RP 16 :21).

Over two years later, on December 15, 2014, the state filed felony charges against Mr. Cruz for possessing the firearms located inside his truck. (CP 53-55). He moved to suppress the evidence pursuant to CrR 3.6, and the trial court granted the motion and suppressed the evidence. (CP 7-8). The State appealed, and Division III of the Court of Appeals affirmed the trial court. The State's motion for reconsideration was denied by the Court of Appeals, and the State filed this Petition for Review.

IV. ARGUMENT

The Court should deny the State's Petition for Review. The Court of Appeals applied well established legal precedent to the case. Its 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. Warrantless Searches Require the State to Prove a Well Established Exception to the Warrant Requirement by Clear and Convincing Evidence.

"{S}earches 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 the present case, the police did not have a search warrant, and the burden is on the state to prove an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn. 2d 242,260, 207 P.3d 1266 (2009).

B. 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. The Court held police are authorized to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. *Gant* at 343. 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. The same situation is present in the case involving the defendant, Mr. Cruz. At the time of the search, he was under arrest, handcuffed, and locked in a police vehicle.

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." In *Valdez,* Clark County Sheriff's deputies stopped the defendant for a headlight infraction. Upon learning of an outstanding warrant for the defendant, they arrested him, handcuffed him, and placed in the backseat of a patrol vehicle. They asked the passenger to step out of the vehicle. They then searched the vehicle and found illegal drugs. This Court held:

> at the time of the search the arrestee was handcuffed and secured in the backseat of a patrol car. The arrestee no longer had access to any portion of the vehicle. The officer's search of his vehicle was therefore unconstitutional under both the Fourth Amendment and article 1,section 7.

Buelna Valdez, at 778.

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. In that case, a Spokane County deputy stopped a vehicle at 3:39 a.m. after learning there was an arrest warrant for the passenger. The passenger was taken into custody and the driver, Afana, was asked to step out of the vehicle. The officer searched the vehicle and found drugs which caused the officer to arrest Afana. This Court said the deputy did not have reason to believe that the arrested passenger posed a safety risk since she was already in custody at the time of the search. *Afana* at 178. Similarly in the present case, the trial court found, "At the time of the search and seizure of guns from the defendant's vehicle, the defendant (Mr. Cruz) was under arrest, handcuffed, and locked inside the officer's patrol vehicle where he could not access his vehicle to gain immediate control of the weapons". (Finding of Fact 16). Under the rules set forth in *Gant*, *Valdez*, *Snapp*, *and Afana*, the search of the defendant's vehicle violated both the Fourth Amendment and art. 1 section 7.

C. Officers May Only Search the Passenger Compartment of a Vehicle Pursuant an Investigatory Stop When They Have Reasonable Suspicion the Individual is Dangerous and Might Gain Access to the Vehicle to Gain Immediate Control of Weapons.

The state attempts to characterize the arrest of the defendant, Mr. Cruz, as 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). 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). The frisk may only be conducted if the officer possesses a reasonable belief that the detainee poses a threat to the officer's safety or the safety of others. *Terry v. Ohio*, 392 U.S. at 28. 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.

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 U.S at 1049. The State asserts (State's Petition for Review pg. 13) this standard announced by the United States Supreme Court in *Long,* and found by the trial court to not have been met by the State, is not consistent with *Terry* and *State v. Collins*, 121 Wn.2d 486, 847 P.2d 919 (2001).

The defendant believes it is the correct standard and points out that such language was repeated by the Supreme Court in *Gant,* the Court said, "For instance, *Michigan v. Long*, 463 U.S. 1032,103 S.Ct 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons'. *Id.* at 1049".

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"

The State failed to prove by clear and convincing evidence that at the time of the search that the weapons were within reaching distance or that the defendant, Mr. Cruz, might gain immediate access to them. As this Court said in *Buelna Valdez* at 777, " after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon". Likewise, Mr. Cruz, the defendant posed no risk of obtaining weapons since, he too, was secured and removed from the vehicle at the time of the search.

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). In *Kennedy*, police conducted an investigatory stop of Kennedy who, when approached by police, made a suspicious furtive gesture by reaching under the front seat of the vehicle. Police looked under the seat and found marijuana. This Court upheld the search on two grounds.

First, the Court said the search was permissible under *State v. Stroud,* 106 Wn.2d 144, 720 P.2d 436 (1986), which authorized a search of the

passenger compartment incident to arrest. *Stroud* was later expressly overruled in *Buelna Valdez,* 167 Wn. 2d at 759 (2009). Secondly, the Court said the search was a limited protective sweep under *Terry.* As in *Terry*, the Court limited the search to an area within the detainee's immediate control.

The State's argument that the seizure of defendant's guns from his pickup truck while he was under arrest, handcuffed, and locked inside a police vehicle is authorized by both *Terry* and *Kennedy* fails for several reasons. First, the exception requires that the search be limited to the area within the detainee's immediate control. Here the defendant was clearly not within reaching distance of the weapons which were inside his vehicle while he was locked inside a police vehicle. Second, the State failed to prove the police officer possessed a reasonable belief based on specific and articulable facts, which taken together with the rational inferences from those facts, reasonably warranted the officer in believing the defendant was dangerous and the suspect may gain immediate control of weapons as required by *Long.* There was no evidence presented that the officer possessed a reasonable belief that the defendant might gain immediate control of the weapons, and no evidence was presented as to how that might occur while the defendant was handcuffed and locked inside the police vehicle. Lastly, the State failed to prove by clear and convincing evidence that the officer possessed a reasonable belief bases specific and articulable facts

that the defendant was dangerous. The defendant had spent the morning fishing, he was cooperative, neither the defendant or his companion engaged in suspicious conduct or made furtive movements, the event occurred mid-morning. the crime (snagging fish) did not involve the use of a firearm, there was no indication the officer had prior bad experiences with the defendant, there was no evidence of unusually behavior on the part of the defendant, there was no evidence of intoxication, there was no evidence of the area being a high crime area, and there no evidence which would lead a reasonable person to believe either the defendant or his companion were dangerous.

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

D. The State's Argument That a Protective Search is Justified Under Terry and Kennedy Because the Officer Intended to Release the Defendant Fails Because the State Failed to Prove the Defendant Was Dangerous.

The State contends the seizure of the firearms was justified because the officer, although he arrested the defendant, intended to release him after citing him and therefore, the defendant would have access to the firearms. This argument also fails in this case. The State relies on *State v. Larson*, 88 Wn. App. 849, 946 P. 2d. 1212 (1997) and *State v. Chang*, 147

Wn.App 409, 195 P.3d. 1008 (2008). Its reliance is misplaced. Both cases involved situations where the officer had a reasonable belief that the suspect was dangerous. In *Larson,* it was based upon furtive movements and in *Chang* upon suspicion he was involved in a felony inside a bank to which he had driven another suspect and the police had information that he had a gun in the car. Both cases were based on objectively reasonable suspicion the suspects were dangerous and were going to be let back into their vehicles because there was no basis to arrest them,

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).

In this case, if the officer's intent was, as he said, to return the firearms to the defendant after citing and releasing him, the officer clearly did not have an objectively reasonable belief that the defendant was dangerous. It would not be sensible to return a dangerous person to a vehicle within which there remained firearms when the officer had the defendant under arrest, handcuffed, and locked inside his patrol vehicle.

E. The Court of Appeals Did Not Establish a New "Recreational Sportsman Rule" as the State Contends.

The State contends the Court of Appeals in its decision created a new rule, the "recreational sportsman rule". This seems to be an exaggeration by the State. The Court of Appeal's decision certainly did not announce it was creating such a rule. The Court did state , "Context matters." A fair reading of the decision would indicate the Court found the mere

possession of a firearm in a nearby vehicle by a sportsman did not support a reasonable belief by police that the person was both dangerous and might gain immediate control of weapons. Any restrictions on an officer's ability to secure weapons during a non-consensual encounter are result legitimate constitutionally mandated constraints on warrantless searches and seizures. The State ignores the prerequisites for such warrantless seizures - reasonable suspicion that a suspect is both dangerous and may gain immediate control of weapons.

IV. CONCLUSION

This Court should deny the State's Petition for Review.

Respectfully Submitted this 7th day of December, 2016.

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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 December, 7, 2016:

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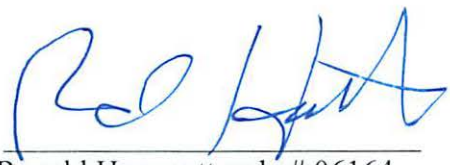

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