No. 98777-7

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

KRISTOPHER CHARLES MARTIN,

Respondent/Cross-Petitioner.

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# ANSWER TO STATE'S PETITION FOR DISCRETIONARY REVIEW AND CROSS-PETITION

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RICHARD W. LECHICH
Attorney for Respondent/Cross-Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
richard@washapp.org
wapofficemail@washap.org

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## A. SUMMARY

The prosecution seeks review of the Court of Appeals' opinion issued on June 15, 2020. Kristopher Martin, the appellant below and respondent in this matter, asks this Court to deny the prosecution's petition for review. If the Court grants the petition for review, Mr. Martin asks this Court to grant review of the issues raised in the cross-petition, which consists of the issues that the Court of Appeals did not reach. The Court of Appeals did not reach these issues because reversal of the denial of Mr. Martin's motion to suppress was dispositive.

## B. RESTATEMENT OF ISSUE FOR WHICH REVIEW IS SOUGHT

Mr. Martin was sleeping peacefully at a coffee shop. There was no evidence that employees or persons at the coffee shop believed Mr. Martin was in need of emergency aid. While Mr. Martin could not be roused, he was breathing. A police officer did not believe it was necessary to perform any life saving maneuvers. This officer did not believe there was an emergency and a reasonable person in his position would likewise conclude the same. Without conducting a pat-down, the officer removed a spoon from Mr. Martin's person, the handle of which had been protruding from Mr. Martin's pocket, Did the Court of Appeals properly conclude that the community caretaking exception did not justify the intrusion into

Mr. Martin's private affairs?

**C. ADDITIONAL ISSUES FOR REVIEW**

2. To arrest a person, there must be probable cause the person committed a crime. Mere possession of "drug paraphernalia" is not a crime. The officer concluded the spoon he removed from Mr. Martin's person was drug paraphernalia and arrested him based on this possession. Was the arrest unlawful?

3. The search incident to arrest exception to the warrant requirement requires a custodial arrest. Having probable cause that a crime has been committed is inadequate. After concluding the spoon was drug paraphernalia and that there was probable cause for arrest, the officer did not arrest Mr. Martin. He instead searched Mr. Martin and only arrested him after the search. Was the search unlawful?

4. Parties have a right to a decision based on the admitted evidence at the hearing. A court's use of extrinsic evidence is error. Judges may not insert their own personal experiences into the decision-making process. Doing so is equivalent to testifying. Based on the judge's own experience and evidence outside the proceedings, the judge found there had recently been an increase in open drug use and situations where store employees encountered conflict with people using drugs in bathrooms. Did the court err by making findings based on his personal experience or extrinsic

evidence?

5. Does the crime of drug possession require the prosecution to prove guilty knowledge? If yes, must Mr. Martin's conviction be reversed because the trial court did not find that the prosecution proved this essential element? If no, is the drug possession statute unconstitutional because it is a strict liability crime? See State v. Blake, 194 Wn.2d 1023, 456 P.3d 395 (2020) (No. 96873-0, oral argument 6/11/20).

6. Unless a person is indigent, a court must impose a $1,000 fine on a person convicted of felony possession of a controlled substance. If the person is indigent, the fine must be waived. The court found Mr. Martin was indigent, but waived only half of the fine. Should the $500 fine be stricken?

7. The $200 filing fee is not a mandatory legal financial obligation. It may not be imposed on an indigent person. Should this fee be stricken because Mr. Martin is indigent?

8. As part of community custody, a trial court may waive the requirement that the defendant pay supervision fees. Before imposing discretionary fees, the court must analyze the defendant's ability to pay. The court found Mr. Martin indigent, but ordered he pay supervision fees. Did the court err?

9. As of June 7, 2018, interest no longer accrues on non-restitution

legal financial obligations. The judgment and sentence, entered on September 12, 2018, states that interest accrues on all legal financial obligations. Must this provision be stricken or reformed?

## D. STATEMENT OF THE CASE

The prosecution charged Kristopher Martin with possession of a controlled substance, alleging he had unlawfully possessed controlled substances, specifically heroin and methamphetamine. CP 92.

Mr. Martin moved to suppress evidence, including the drugs, contending that the police had unlawfully searched his person. CP 78-84.

At the hearing on the motion, the court heard testimony from Officer Nicholas Bickar. RP 4.[1] Officer Bickar testified he had been dispatched to a Starbucks in Edmonds. RP 9. A Starbucks' employee had called about a person sleeping in the store and wanted the person to leave. RP 9.

Officer Bickar arrived around 9:00 a.m. RP 15. There were about a dozen people in the Starbucks, including staff. RP 15. Officer Bickar saw Mr. Martin sleeping in a lounge type chair. RP 9, 24-25. Other people sat nearby, going about their business. RP 25.

[1] Unless noted otherwise, citations to "RP" refer to the report of proceedings for May 18, 2018.

Officer Bickar testified that Mr. Martin looked normal to him. RP 25. No one had told the officer that Mr. Martin had been aggressive, loud, or done anything illegal. RP 24. All the officer knew was that Mr. Martin was sleeping. RP 25. Mr. Martin was breathing and did not appear to be in danger. RP 28.

Officer Bickar unsuccessfully tried to wake Mr. Martin verbally. RP 10, 26. He shook Mr. Martin on his shoulder, but this did not wake Mr. Martin either. RP 10, 26-27.

Officer Bickar then tried to wake Mr. Martin using a "light sternum rub." RP 11. Using this technique, Officer Bickar ran the knuckles of his hand across Mr. Martin's sternum. RP 12, 28. This caused Mr. Martin to briefly open his eyes, but they quickly closed and Mr. Martin continued his slumber. RP 13, 28.

Officer Bickar testified that he suspected drug use by Mr. Martin. RP 13. Because he had been unable to rouse Mr. Martin, Officer Bickar planned to use a more forceful sternum rub to wake Mr. Martin. RP 14.

Although he had not expressed concerns before about how Mr. Martin might react if suddenly awakened by the first sternum rub, Officer Bickar testified he was concerned about how Mr. Martin might react if awakened by the second, more intense, sternum rub. RP 14-15. He

testified that it was possible that a person who is suddenly waked might think he is being attacked and react violently. RP 7, 15.

Purportedly for this reason, Officer Bickar removed a utensil from the chest pocket of Mr. Martin's jacket. RP 16, 30. The handle of the utensil had been protruding, and the officer believed it could be a spoon or knife. RP 16, 30. Before removing it, he did not pat Mr. Martin down or feel the object from the outside. RP 30. The utensil was a larger than average spoon, about two inches in diameter. RP 17-18. There was a dark brown residue inside and burn marks on the bottom. RP 18. Officer Bickar concluded the spoon was drug paraphernalia. RP 18.

Officer Bickar decided he was going to arrest Mr. Martin. RP 19. Before placing Mr. Martin under arrest, however, the officer decided to search Mr. Martin. RP 19. While searching Mr. Martin, the officer found some small baggies containing what was later determined to be methamphetamine and heroin. RP 20-21.

After searching Mr. Martin, the officer successfully woke Mr. Martin using a more intense sternum rub. RP 21. Mr. Martin did not attack anyone.

The court denied Mr. Martin's motion to suppress. RP 44-45; CP 40-42. The trial court ruled that both the stop-and-frisk and the community caretaking exceptions to the warrant requirement justified the officer's

actions, including the removal of the spoon from Mr. Martin's pocket.

Mr. Martin proceeded to a stipulated bench trial on the charge of unlawful possession of a controlled substance. CP 43-70; 9/12/18RP 9-11. The court found Mr. Martin guilty. CP 38-39. The court sentenced Mr. Martin to 30 days' confinement. CP 28. The court imposed legal financial obligations, including a $200 filing fee and a $500 fine for violation of the uniform controlled substances act. CP 32.

The Court of Appeals held that the trial court erred in denying Mr. Martin's motion to suppress. Slip op. at 1 (attached in the appendix). The Court vacated the conviction and remanded.

## E. ARGUMENT ON WHY REVIEW SHOULD BE DENIED

### The Court of Appeals properly determined that the community caretaking exception to the warrant requirement did not apply. Review should be denied.

#### a. *The prosecution's alternative theory that the police may remove objects from a sleeping person's pockets without a warrant or exception to the warrant requirement is wholly frivolous.*

For the first time on appeal, the prosecution argued that the officer's "initial contact" with Mr. Martin in the Starbucks did not constitute a "seizure." Br. of Resp't at 6. Based on this new argument, the prosecution argued the denial of the motion to suppress should be affirmed on this alternative ground.

While the Court of Appeals did not address the prosecution's alternative argument, Mr. Martin did in his reply brief. Reply Br. of App. at 1-5. In short, the prosecution is incorrect in asserting that a "seizure" of Martin's person was necessary for article I, section 7 or the Fourth Amendment to apply. Removing an object from a person to determine the nature of the object is both a "search" under the Fourth amendment and an invasion of a person's private affairs under article I, section 7. Florida v. Jardines, 569 U.S. 1, 5, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (a search occurs if the government trespasses upon a constitutionally protected area to obtain information); Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968) ("it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search'"); State v. Russell, 180 Wn.2d 860, 871, 330 P.3d 151 (2014) (officer exceeded scope of Terry frisk exception to warrant requirement by opening container on defendant's person that was not a weapon and posed no threat).

The removal of the utensil protruding from Mr. Martin's pocket was both a "search" and a "seizure." It was a search because the (claimed) purpose was to learn if it was a weapon. It was a seizure because the officer took control over the item that Mr. Martin had in his possession.

See United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property.").

The superficially similar case cited by the State concerning an unconscious driver on a ferry is inapposite. State v. Knox, 86 Wn. App. 831, 939 P.2d 710 (1997), overruled by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). There, the Court rejected the argument that the police had "seized" *the defendant*. Id. at 838-840. The defendant was asleep behind a wheel in a vehicle that was blocking other vehicles from disembarking the ferry. Id. at 839. Just any citizen could do, the officer approached the man and engaged in conversation. Id. at 834-35, 839-40. There was no touching of the of man's person by the officer. Id. And Knox did not address whether a "search" had occurred.

For these reasons, the prosecution's alternative theory in support of the trial court's ruling should be rejected. The officer's actions in searching Mr. Martin and seizing the utensil protruding from his pocket were unlawful absent a warrant or exception to the warrant requirement. The Court of Appeals did not need to address this wholly frivolous argument.

*b. The Court of Appeals properly determined that the community caretaking exception to the warrant requirement did not apply.*

The trial court concluded that the removal of the spoon from Mr. Martin's pocket was authorized under the stop and frisk exception to the warrant requirement. Terry, 392 U.S. at 30; State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). At oral argument, the prosecution conceded that the stop and frisk exception did not apply. Slip op. at 4. The Court of Appeals accepted the prosecution's concession, agreeing that the stop and frisk exception did not apply. Slip op. at 4-6. This included a determination that, assuming a stop and frisk for weapons was authorized, the scope of the frisk was unlawful. Slip op. at 6. The prosecution does not seek review of the Court of Appeals' holding that the stop and frisk exception was inapplicable.

The Court of Appeals further held that the community caretaking exception to the warrant requirement did not apply. Slip op. at 7-9. The prosecution seeks review of this determination.

Review should be denied. The Court of Appeals properly applied this Court's recent formulation of the community caretaking exception in State v. Boisselle, 194 Wn.2d 1, 448 P.3d 19 (2019). "[F]or the community caretaking exception to apply, a court must first be satisfied that the officer's actions were 'totally divorced' from the detection and

investigation of criminal activity." Boisselle, 194 Wn.2d at 10. In other words, the court must first satisfy itself that the community caretaking exception is not being used as a pretext for a criminal investigation. Id. In Boisselle, because the officers' actions in entering a home "were not solely motivated by a perceived need to provide immediate aid," the community caretaking exception did not apply. Id. at 27.

Here, the trial court found that Officer Bickar was conducting a "criminal trespass investigation." CP 41 (FF 5). Officer Bickar also testified that he suspected drug use by Mr. Martin after conducting the light sternum rub and before removing the utensil. RP 13. Consequently, it follows that the officer's actions in searching Mr. Martin and removing the utensil were not totally divorced from the detection and investigation of criminal activity. Therefore, the community caretaking exception does not apply.

Additionally, even assuming the officer's actions were "totally divorced" from investigating crime, the evidence did not establish that the officer was conducting a routine check on health and safety or rendering emergency aid, as the Court of Appeals held. Slip. op at 8. The emergency aid function of the community caretaking exception applies when "(1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or

to prevent serious injury, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched." Boisselle, 194 Wn.2d at 12.

The Court of Appeals correctly held that this criteria was not satisfied. Slip op. at 8-9. After doing the "light" sternum rub on Mr. Martin, Mr. Martin awakened momentarily and then went back to sleep. RP 28. The officer did not feel the need to check Mr. Martin's pulse and testified that Mr. Martin was breathing. RP 28. The officer testified that it did not appear that imminent life-saving maneuvers were necessary. RP 28. Thus, the officer did not subjectively believe there was an emergency requiring immediate assistance to Mr. Martin if he did not wake up. A reasonable person in the same situation would similarly conclude there no need for emergency assistance. See State v. Loewen, 97 Wn.2d 562, 569, 647 P.2d 489 (1982) (officer's search of tote bag at hospital to obtain identification of person who had been in a car crash was objectively unreasonable because there was no emergency necessitating the action).

In seeking review, the prosecution appears to now agree there was no emergency. Instead, the prosecution argues that the officer's actions were "justified under the doctrine that recognizes officers also perform non-emergency aid as part of their community caretaking duties." Pet. for

Rev. at 12. The prosecution's contention that the officer's action fell within the "routine check on health and safety" aspect of community caretaking is unsupported by the record and is contrary to precedent. In Boiselle, this Court explained that the emergency aid function "arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm." Boisselle, 194 Wn.2d at 12 (internal quotation omitted) (emphasis added). "Compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion." Id. (cleaned up) (emphasis added). The officer's action in removing the utensil from Mr. Martin's pocket—in order for the officer to purportedly perform a more intense sternum rub without fear that Mr. Martin might have access to a weapon if he awakened—is not a "routine check on health and safety." This action was incredibly invasive and is properly analyzed under the emergency aid function criteria.

In any event, "where an encounter involves a routine check on health and safety, its reasonableness depends upon a balancing of a citizen's privacy interest in freedom from police intrusion against the public's interest in having police perform a 'community caretaking function." Boisselle, 194 Wn.2d at 12 (cleaned up). Only if the public's interest outweighs the citizen's privacy interest is the search valid. Id.

Here, even if properly viewed as the officer performing a routine check on health and safety, the Court of Appeals properly determined that that the search of Mr. Martin was unreasonable. Slip op. at 8. Contrary to prosecution's representations, the officer was not attempting to remove weapons from Mr. Martin's person so that someone else could provide medical attention safely. The officer wanted to remove any objects he thought were weapons because the officer speculated that a more intense sternum rub could cause Mr. Martin to suddenly attack him or someone if awakened by the sternum rub. But there was no evidence that Mr. Martin had caused a disturbance, threatened anyone, or had done anything illegal. RP 24. Mr. Martin was not aggressive when he was briefly awakened from the "light" sternum rub. RP 29. Given (as the prosecution concedes) there was no emergency necessitating action, the officer should have let Mr. Martin continue to sleep. It was an early morning in a Starbucks. And regardless, the evidence did not support the speculative conclusion that Mr. Martin would attack anyone if awakened by an intense sternum rub, so removing the utensil was unreasonable.

This case is unlike State v. Hutchison, 56 Wn. App. 863, 867, 785 P.2d 1154 (1990), a case predating much of this Court's jurisprudence on community caretaking. There, it was "undisputed that at the time of the search, Hutchison was in need of aid and assistance." Hutchison, 56 Wn.

App. at 867. Hutchison was unconscious on the ground in a parking lot. Id. at 564. If left in the parking lot, Hutchison "would have been in danger of injury or death." Id. at 867. In contrast, Mr. Martin was safely inside a coffee shop, asleep in a chair. He was not in danger of injury or death. There is no conflict in the precedent warranting review.

The prosecution contends that Court of Appeals improperly became a fact-finding court. To the contrary, the Court of Appeals simply determined that the findings and the evidence did not support the trial court's conclusion that the community caretaking exception justified the invasion into Mr. Martin's private affairs. The Court applied the test set out by this Court in Boiselle. The prosecution's contention that the Court of Appeals' review was improper is meritless.

Even if community caretaking justified an invasion into Mr. Martin's privacy, the officer exceeded the scope of that authorization by removing the utensil that was protruding from Mr. Martin's pocket. The officer testified it was obviously a utensil, and suspected it was a knife or spoon. RP 16, 30. The officer did not pat down Mr. Martin or feel the object to determine if it was a weapon. RP 30. Rather, he simply removed it. RP 16-17, 30. This was unlawful. See Garvin, 166 Wn.2d at 253 (because purpose of squeezing object during frisk was not to find weapons, scope of lawful frisk exceeded); State v. Allen, 93 Wn.2d 170,

172, 606 P.2d 1235 (1980) (once officer determined that object causing bulge was not a weapon, officer could not examine it further). As the Court of Appeals determined, removing the utensil, rather feel whether it was sharp or actually a weapon, was unreasonable. Contrary to the prosecution's representation of the record, the officer did not testify he feared a spoon was a potential weapon that could be used to attack him. Rather, he testified he was concerned because utensils could be "sharpened into something" or crafted into a weapon. RP 33.

The prosecution does not discuss why any of the RAP 13.4(b) criteria warrant this Court's review. This impliedly concedes that the criteria for review is not met.

The prosecution has not shown that discretionary review is warranted. This Court should deny the prosecution's petition for review. If so, the issues raised in Mr. Martin's cross-petition need not be considered.

## F. IF REVIEW IS GRANTED, THE COURT SHOULD ALSO REVIEW THE ADDITIONAL ISSUES THE COURT OF APPEALS DID NOT REACH.

If the Court grants review, the Court should grant review on the other issues Mr. Martin presented on appeal. The Court of Appeals did not address these issues because the Court's ruling that the stop and frisk and the community caretaking exceptions did not apply was dispositive.

1. **Mr. Martin was entitled to have his suppression motion granted because the officer lacked probable cause to arrest Mr. Martin and the search of his person preceded the custodial arrest.**

Mr. Martin presented two alternative arguments on why the search of Mr. Martin's person was unlawful. First, the officer's determination that the spoon was "drug paraphernalia" did not give probable cause to arrest Mr. Martin because bare are possession of "drug paraphernalia" is not a crime. Br. of App. at 19-20; State v. McKenna, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998). Second, the search of Mr. Martin's person was not justified under the search incident to arrest exception because the search preceded the custodial arrest. Br. of App. at 20-21; State v. O'Neill, 148 Wn.2d 564, 587, 62 P.3d 489 (2003). These issues should be addressed if the Court grants review.

2. **Alternatively, Mr. Martin is entitled to a new suppression hearing because the court improperly considered extrinsic evidence at the hearing and became a witness.**

Mr. Martin additionally argued below that he was entitled to a new suppression hearing because the trial court considered extrinsic evidence at the suppression hearing. Br. of App. at 22-25. Based on the judge's personal knowledge outside the evidence, the trial court found, "Recently, there has been an increase in open drug use." CP 40 (FF 2). The court further found, "There has also been an increase in situations where store employees have had to engage with people using drugs in bathrooms and

face conflict in attempting to get them to leave." CP 40 (FF 3). This consideration of extrinsic evidence was constitutional error. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). The remedy is a new suppression hearing. See RAP 12.2; Waller v. Georgia, 467 U.S. 39, 49-50, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (violation of public trial right required new suppression hearing). Review on this issue should be granted if the State's petition is granted.

**3. The drug possession statute must be construed to require guilty knowledge or be declared unconstitutional.**

In the Court of Appeals, Mr. Martin raised an issue that is pending in this Court regarding the drug possession statute. Mr. Martin was convicted of possession of a controlled substance without a finding that he knew he had possession of the substance. Br. of App. at 25-32. Properly construed, the statute requires the prosecution to prove guilty knowledge. If the statute does not have a mental element and is a strict liability crime, then the statute violates due process and is unconstitutional. See State v. A.M., 194 Wn.2d 33, 44-67, 448 P.3d 35 (2019) (Gordon-McCloud, J., concurring). This Court is reviewing this identical issue in State v. Blake, No. 96873-0 (Oral argument 6/11/20). Review on this issue should be granted if the State's petition is granted.

**4. The trial court made several errors related to the imposition of fines, fees, and legal financial obligations which should be remedied.**

Finally, if review is granted, the Court should review several issues related to fines, fees, and legal financial obligations.

Without a determination that Mr. Martin had the ability to pay, the trial court imposed a $500 fine against Mr. Martin under RCW 69.50.430(1). This was improper because fines under RCW 69.50.430(1) cannot be imposed on an indigent person and the trial court found Mr. Martin was indigent. Br. of App. at 32-36.

The trial court further imposed a $200 filing fee and ordered that interest accrue on legal financial obligations. Both of these were improper due to a change in the law in 2018. Br. of App. at 36-37; State v. Ramirez, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018); State v. Dillon, 12 Wn. App. 133, 153, 456 P.3d 1199 (2020).

And despite his indigency, the trial court ordered that Mr. Martin, as a condition of community custody, pay supervision fees. Br. of App. at 37-38. Because there was no determination of ability to pay and it is probable that the trial court intended to waive this requirement, Mr. Martin is entitled to have this requirement stricken. See Dillon, 12 Wn. App. at 152; State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018).

## G. CONCLUSION

Mr. Martin asks that the Court deny the State's petition for review. If the petition for review is granted, Mr. Martin asks that the Court grant his cross-petition and review the additional issues that the Court of Appeals did not reach.

Respectfully submitted this 12th day of August, 2020.

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Respondent/Cross-Petitioner

# Appendix

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>KRISTOPHER CHARLES MARTIN,<br><br>Appellant. | ) | No. 78958-9-I<br><br>DIVISION ONE<br><br>PUBLISHED OPINION |

MANN, C.J. — Absent an applicable exception, warrantless searches and seizures are per se unreasonable and violate both the United States and Washington Constitutions. While asleep in a Starbucks store, Kristopher Martin was subjected to a warrantless search. Based on the search, Martin was charged with and found guilty of possession of a controlled substance.

Martin appeals his conviction and contends that the trial court erred by denying his motion to suppress because the search did not meet either the Terry[1] stop or community custody exceptions to the warrant requirement. We agree, vacate Martin's conviction, and remand to the trial court for further proceedings consistent with this opinion.

[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

I.

On December 11, 2017, at 8:27 a.m., Officer Nicholas Bickar responded to a 911 call from a Starbucks employee, requesting assistance with the removal of a sleeping person inside the store. When Bickar arrived, he saw Martin sleeping in a chair. Bickar gestured to the Starbucks employee and received a responsive gesture from the employee that Martin was the person identified in the 911 call.

When Bickar approached Martin, he noticed Martin was wearing multiple jackets that had pockets. Bickar attempted to wake Martin, first by raising his voice and then by squeezing and shaking his left shoulder. Martin remained unresponsive. Trying not to startle Martin, Bickar then performed a "light sternum rub," using his knuckles to rub Martin's sternum. While Bickar attempted to wake Martin, he would briefly gain consciousness, but quickly lose consciousness before Bickar could communicate with him.

Bickar began to suspect that Martin was under the influence of drugs. Bickar determined that he would need to use a "hard sternum rub," but feared Martin might react violently because hard sternum rubs can be painful and startling for a person sleeping. During this encounter, Bickar noted that there were Starbucks customers sitting within four feet of Bickar and Martin and there were between seven and eight people, not including staff, in Starbucks.

Before Bickar proceeded with the hard sternum rub, Bickar noticed the end of a metal utensil sticking out of Martin's pocket. Bickar worried that the metal utensil could be a knife or another utensil sharpened into a weapon. Bickar also expressed concerns about sharp needles. Without feeling the outside of the pocket, Bickar removed the

utensil. The utensil was a cook spoon, had burn marks on the bottom, and a dark brown residue on the inside. At that point, Bickar determined that he had probable cause to arrest Martin for possession of drug paraphernalia and continued searching Martin. While searching Martin, Bickar found methamphetamine, heroin, cocaine, and other drug paraphernalia.

After removing the drugs from Martin, Bickar conducted a hard sternum rub. Once Martin woke up, Bickar told him that he was under arrest, proceeded to handcuff him, and brought him to an aid car. Because Martin did not wake up easily, he was transported to the hospital. Bickar called the aid car sometime prior to waking up Martin.

Martin moved to suppress all evidence collected as a result of the unlawful detention and search. The court heard testimony from Officer Bickar and denied Martin's motion to suppress concluding, "[c]ommunity caretaking and Terry authorized Officer Bickar to take necessary precautions to protect himself and others from a potentially dangerous situation. Officer Bickar was authorized to pat the Defendant down for potential weapons."

Martin proceeded to a stipulated bench trial on the charge of unlawful possession of a controlled substance. The court found Martin guilty. The court sentenced Martin to 30 days of confinement. Martin appeals.

II.

The Washington Constitution commands: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. The United States Constitution also protects people from unreasonable searches and

seizures. U.S. Const. amend. IV. Absent an applicable exception, warrantless searches and seizures are per se unreasonable, and violate these provisions. State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). "The State bears a heavy burden to prove by clear and convincing evidence that a warrantless search falls within one of those exceptions." Russell, 180 Wn.2d at 867.

When reviewing the denial of a motion to suppress, the appellate court determines whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law. State v. Boisselle, 194 Wn.2d 1, 14, 448 P.3d 19 (2019). We review the trial court's conclusions of law de novo. Boisselle, 194 Wn.2d at 14.

A.

Martin first contends that the trial court erred in finding the search permissible under Terry because "[f]irst, there was [no] reasonable suspicion that Mr. Martin was engaged in criminal activity. Second, there were not specific and articulable reasons to believe Mr. Martin was armed and dangerous. And third, even if Terry applied, the officer exceeded the lawful scope of the frisk."

The State argued before the trial court and in its brief before this court, that the search was lawful under Terry. At oral argument, however, the State conceded that the search was not lawful under Terry because Bickar did not testify that he was conducting a criminal trespass investigation.

We accept the State's concession that the search was not valid as a Terry stop. Terry stops are an exception to the warrant requirement. In a Terry stop, "[o]fficers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is

about to be, engaged in criminal conduct." State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). "While Terry does not authorize a search for evidence of a crime, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful Terry stop, 'a reasonable safety concern exists to justify the protective frisk for weapons' so long as the search goes no further than necessary for protective purposes." Day, 161 Wn.2d at 895. In making this determination, "we consider the totality of the circumstances, including the officer's subjective belief." Day, 161 Wn.2d at 896.

A protective frisk does not violate a defendant's rights when (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify a protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purpose. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). "The failure of any of these makes the frisk unlawful and the evidence seized inadmissible." State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). "A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" Collins, 121 Wn.2d at 173. Further, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety or that of others was in danger." Collins, 121 Wn.2d at 173.

This search fails to meet the requirements under Terry. Starbucks is open to the public. The record does not support the trial court's finding that Bickar was conducting a criminal investigation for trespass because there is no evidence in the record that Starbucks had trespassed Martin from the premises. Also absent from the record is

evidence supporting Bickar's claim that Martin sleeping created a reasonable safety concern. Bickar performed a hard sternum rub with several people seated in close proximity to Martin. While Bickar stated that, based on his training and experience as an officer, he feared Martin would react violently once awake, Bickar's actions do not support his attestation. Bickar did not ask patrons sitting less than three feet from Martin to move away before using a hard sternum rub to wake Martin.

Finally, even if Bickar were conducting a criminal investigation for trespass, the search exceeded the scope of a frisk under Terry. An officer may "conduct a limited pat-down of the outer clothing of a person in an attempt to discover weapons that could cause harm." State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). "The officer may not slide, squeeze or in any other manner manipulate the object to ascertain its incriminating nature. Such manipulation of the object will exceed the scope of a Terry frisk." State v. Garvin, 166 Wn.2d 242, 251, 207 P.3d 1266 (2009). Bickar did not pat-down the outside of Martin's pocket where the utensil handle was protruding. Instead, Bickar removed the utensil because he thought it could have been a knife or a metal utensil that had been sharpened into a weapon. Had Bickar felt the outside of Martin's pocket, he would have learned it was a spoon and not a sharp object. Removing the spoon without a pat down exceeded the scope of a Terry frisk.

The search was not lawful under Terry because there was no reasonable suspicion that a crime had been committed, there was not a reasonable safety concern, and the search exceeded the lawful scope of a frisk.

B.

Martin next contends that the community caretaking exception to the warrant requirement is also not applicable. We agree.

Recently, the Washington Supreme Court clarified the appropriate factors for determining whether an officer has exercised his or her emergency aid community caretaking function. Boisselle, 194 Wn.2d at 10. "[I]n order for the community caretaking exception to apply, a court must first be satisfied that the officer's actions were 'totally divorced' from the detection and investigation of criminal activity." Boisselle, 194 Wn.2d at 10. The threshold issue for the court is "whether the community caretaking exception was used as a pretext for a criminal investigation before applying the community caretaking exception test." Boisselle, 194 Wn.2d at 11.

Once the court is satisfied that officers did not use the exception as pretext for criminal investigation, the court must next determine whether the warrantless search was reasonable. Boisselle, 194 Wn.2d at 10. "When a warrantless search falls within an officer's general community caretaking function, such as the performance of a routine check on health and safety, courts must next determine whether the search was reasonable." Boisselle, 194 Wn.2d at 11-12. "Where . . . an encounter involves a routine check on health and safety, its reasonableness depends upon a balancing of a citizen's privacy interests in freedom from police intrusion against the public's interest in having police perform a 'community caretaking function.'" Boisselle, 194 Wn.2d at 12.

"An officer's emergency aid function, however arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm." Boisselle, 194 Wn.2d at 12 (internal quotations

omitted). "Compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion." Boisselle, 194 Wn.2d at 12. "Accordingly, courts apply additional factors to determine whether a warrantless search falls within the emergency aid function of the community caretaking exception." Boisselle, 194 Wn.2d at 12.

In Boisselle, the court clarified that the three-part emergency aid test announced in State v. Kinzy, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000) is the applicable test, but amended the three-part test "to make clear that there must be a present emergency for the emergency aid function test to apply." Boisselle, 194 Wn.2d at 13. Thus, the exception applies when "(1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched." Boisselle, 194 Wn.2d at 13-14. "If a warrantless search falls within the emergency aid function, a court resumes its analysis and weighs the public's interest against that of a citizen's." Boisselle, 194 Wn.2d at 12.

In balancing Martin's privacy interests against the public's interest in having the police perform a community caretaking function, we conclude that removing the spoon from Martin's pocket was unreasonable. There is insufficient evidence in the record to find that Bickar was conducting a routine check on health and safety or rendering emergency aid. Bickar stated that he was dispatched to Starbucks "for an individual they wanted to leave, who was sleeping." Absent from the record is any evidence

tending to show that Bickar was dispatched to assist with an unresponsive customer or customer in need of emergency aid. Bickar indicated that he could tell Martin was breathing and therefore, did not check his pulse. After Bickar performed a light sternum rub, Martin opened his eyes, but fell back to sleep before Bickar could communicate with Martin. Bickar did not feel like he needed to perform lifesaving maneuvers. Other Starbucks customers sat a few feet away from Martin as he slept and Bickar did not indicate that any customers or employees expressed concern that Martin was in danger of death or physical harm. Finally, Bickar did not ask the other Starbucks customers to back away from the area where Martin slept before performing the hard sternum rub. Bickar did not subjectively believe an emergency existed and a reasonable person in the same situation would not believe there was a need for assistance.

Furthermore, even if the community caretaking exception applied to this search, a simple pat-down on the outside of Martin's coat pocket would have alleviated any concern that the metal utensil was a sharp object or weapon. See State v. Acrey, 148 Wn.2d 738, 754, 64 P.3d 594 (2003) (concluding that a pat-down of a juvenile before putting him in a patrol car was reasonable for officer safety while performing their community caretaking function of transporting the juvenile home after his mother's request for officer assistance). Removing the spoon violated Martin's right to be free from unreasonable searches and seizures.

We vacate Martin's conviction and remand to the trial court for further proceedings consistent with this opinion.

Mann, C.J.

WE CONCUR:

Chun, J.

Smith, J.

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
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| STATE OF WASHINGTON,<br><br>Petitioner,<br><br>KRISTOPHER MARTIN,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NO. 98777-7-I |

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF AUGUST, 2020, I CAUSED THE ORIGINAL **RESPONDENT'S ANSWER TO PETITION FOR REVIEW** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] | KRISTOPHER MARTIN<br>19528 ECHO LK PL N<br>APT B301<br>SHORELINE, WA 98133 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 12TH DAY OF AUGUST, 2020.

X_____

**Washington Appellate Project**
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

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