NO. 99076-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN FREDERICK BUDIG II,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

II. STATEMENT OF THE CASE

The facts of this case have been accurately set out in the Brief of Respondent filed in the Court of Appeals, and in the Court of Appeals decision. Slip. Op. 1-4. The State relies on those two sources for the full outline of relevant facts of the case.

Briefly, late at night in a very secluded area, a woman called 911 to report a man shining lasers into passing cars. 5/3/19 RP 5-6; Finding of Fact (FF) 1. Deputy Leyda responded and contacted the reporting party at her car. She identified the suspect as standing a half-mile down the road. 5/3/19 RP 6-7, 19; FF 3-6. Budig was the man she identified. Id, FF 7. The area was extremely rural, dark and unlit. 5/3/19 RP 8.

As Leyda gathered information from the reporting party, Budig walked some distance and approached the deputy. 5/3/19 RP 8, 9, 18; FF 9. Leyda spoke with Budig for several minutes. Id. Budig admitted having a laser but denied shining it at cars. 5/3/19 RP 9. Leyda believed a crime was likely committed based on the

reporting party's information and Budig's nervous, edgy behavior, among other factors. 5/3/19 RP 8, 10-11, 19.

Budig was very nervous. 5/3/19 RP 8, 19. He was wide eyed and looked around skittishly. Budig was fidgeting and sweating. Id. He kept putting his hands out of view even when asked not to. 5/3/19 RP 8, 20; FF 19, 20. Budig wore multiple jackets and acted extremely nervous. 5/3/19 RP 11. Based on Budig's demeanor in the dark unlit area with no other officer present, Deputy Leyda became concerned for his safety and advised Budig he was going to pat him down. 5/3/19 RP 11.

Deputy Leyda felt two knives in Budig's pockets during the exterior pat down of his clothing. Id. One was an illegal switch blade. 5/3/19 RP 12; FF 26. Budig was arrested for the switch blade and advised of his constitutional rights. 5/3/19 RP 12-13. When searched incident to arrest, controlled substances were located on Budig. 5/3/19 RP 15; CP 51-52.

The defendant moved pretrial to suppress the evidence, alleging lack of sufficient facts to support a frisk for weapons under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). No other basis was claimed to justify suppressing the evidence. Both parties provided written briefing and argument relying on the

same three-part test to determine whether a Terry frisk was justified. CP 30, 36.

The trial court conducted a CrR 3.6 hearing and took testimony before suppressing the evidence and entering written findings and conclusions. CP 18-19. The trial court failed to answer the only question before it-- whether the three-part test applicable to Terry frisks was satisfied. Id. The court did not mention Terry at all, instead making unclear references to social contact and unlawful seizure issues which were neither raised nor argued at the suppression hearing. CP 18-19.

The State appealed the trial court's suppression of the evidence, which effectively terminated the State's case. The Court of Appeals determined that the trial court applied the wrong legal standard by raising its own social contact analysis and not focusing on the correct three-part Terry frisk test at issue. Slip. Op. 4-8. The Court of Appeals reversed the trial court's suppression order.

Budig filed a petition for review of the Court of Appeals decision. This court has directed the State to file an answer to the petitioner's motion for review.

III. ARGUMENT

A. THE COURT OF APPEALS DECISION APPLIED THE PROPER THREE-PART TEST REQUIRED FOR TERRY FRISK ANALYSIS. THAT DECISION RELIES ON THIS COURT'S PRECEDENT AND DOES NOT CONFLICT WITH IT IN ANY WAY.

1. Review Is Not Warranted Under RAP 13.4(b)(1).

Petitions for review must demonstrate that the case meets at least one of the four grounds set forth in RAP 13.4(b)(1)-(4). The defendant asserts that his case merits review under RAP 13.4(b)(1) by claiming that the Court of Appeals' decision "holds" that an officer may frisk a person without any reasonable suspicion of criminal activity. Pet. at 6. The Court of Appeals made no such determination, and its decision does not conflict with any identified precedent. Review is not warranted under RAP 13.4(b)(1).

The defendant repeats the arguments he made in the Court of Appeals, while reframing them to justify the trial court's reliance on the wrong legal standard of social contact cases. The Court of Appeals thoroughly addressed those arguments when it concluded that the social contact cases provided the wrong standard to evaluate the Terry frisk issue raised. The Court of Appeals decision applied established law to the facts of this case. The State relies on the court's decision and the following argument as the basis for which this court should deny review.

2. The Court Of Appeals Applied The Correct Legal Test, Which The Trial Court Failed To Do.

A warrantless Terry investigative detention is justified under Article I, § 7 and the Fourth Amendment if an officer can articulate a reasonable suspicion that the person stopped has been or is about to be involved in criminal activity. Terry, 392 U.S. 1, 21; State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). Investigative Terry detentions are an exception to the warrant requirement; their purpose is to allow officers to make an intermediate response to situations lacking probable cause to arrest but which call for further investigation. State v. Kennedy, 107 Wn.2d 1, 17, 726 P.2d 445 (1986).

Pursuant to Terry, an officer may make a brief pat down of a person's outer clothing to search for weapons in order to protect officer safety. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). Officers need not be absolutely certain that the person being detained is armed or dangerous, the issue is whether a reasonably prudent person would perceive his safety to be at risk. Terry, 392 U.S. at 30-31. Reviewing courts are reluctant to substitute their judgment for that of officers in the field. Collins, 121 Wn.2d at 174. "A well founded suspicion is all that is necessary,

some basis from which the court can determine that the [frisk] was not arbitrary or harassing." Id.

For such a frisk to be constitutional, the State must show that: (1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes. Collins, 121 Wn.2d at 173; State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

Although both parties provided the trial court this three-part test- where the sole issue raised for suppression was lack of a reasonable safety concern- the trial court's findings and conclusions make no reference to this correct legal standard. CP 18-19.

The Court of Appeals rightly rejected the claim that no Terry investigation was ongoing when Leyda frisked Budig. Slip. Op. 5. Leyda was gathering information from the reporting party, investigating if Budig shined lasers into cars. The trial court's own conclusions recognized that the evidence presented constituted a violation of RCW 9A.84.030(1)(c) (disorderly conduct) and RCW 9A.49.030(1)(a) (second degree unlawful discharge of a laser). CP 19 (COL 1). The reporting party described other facts, such as a

car pulling up and stopping where Budig stood several times, as unusual, and which struck the officer as possibly indicative of other articulated criminal activity. 5/3/19 RP 7.

Leyda continued gathering initial information from the reporting party, who identified Budig as the person pointing the laser. Budig began walking some distance toward the deputy and then identified himself. Slip. Op. 5. Leyda spoke with Budig for "several minutes." 5/3/19 RP 8, 9. Budig admitted having a laser during that interaction, but he denied shining it at anyone.

The Court of Appeals did not err in applying the facts here to determine that the Terry investigation of Budig allegedly shining lasers into passing cars constituted a lawful Terry investigation. Leyda was investigating the reporting party's 911 call. He had not finished talking to her when Budig then approached him. Leyda clearly questioned Budig about the allegation, since Budig stated that he did have a laser on him. This satisfied the first prong of the correct legal test-- whether the initial stop was legitimate. The trial court implicitly recognized this in concluding the circumstances reported violated the two criminal statutes cited in FF 1.

The trial court erred by focusing on Budig approaching the Deputy as somehow "stopping" or interrupting the investigative

Terry process. FF 9, 10, 11, COL 8. The Court of Appeals rejected this flawed analysis by determining that Budig was the subject of Leyda's investigation and Leyda would have "stopped" him to inquire about that activity regardless of Budig approaching first. Slip. Op. 5.

The Court of Appeals noted that determining the exact point at which this encounter became a Terry stop was not critical to this analysis because the totality of the circumstances clearly indicated that Terry applied by the time Leyda frisked Budig. Slip. Op. 5. The Court of Appeals rightly noted that Budig cannot avoid a stop or short-circuit the process by approaching the deputy first. Id.

Budig's attempt to frame the timing of the frisk as occurring after Leyda's reasonable suspicion had somehow dissipated are refuted by the record. Pet. 8. The two spoke for "several minutes." Budig's demeanor, among other factors during those several minutes, raised safety concerns to Leyda. The trial court concluded those safety concerns were legitimate. CP 18 (COL 3). Leyda testified that *at the time that he frisked Budig*, Leyda believed the defendant was potentially committing a crime as described by the reporting party. 5/3/19 RP 10. The Court of Appeals Terry stop analysis was correct and supported by the record.

Budig attempts to create a conflict with precedent by asserting that the Court of Appeals "disregarded" the very three-part test which it relied on in determining its result. Pet. 9. The record refutes that claim. Slip. Op. at 4. citing the same three-part test articulated in State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) and State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). The Court of Appeals applied the same test which Budig asserts it "disregarded." By contrast, the trial court's written findings and conclusions failed to mention the three-part test at all. CP 15-20.

Despite Budig's attempted framing, the Court of Appeals determined that there was a valid Terry investigative "stop" here preceding the frisk. "Considering the totality of the circumstances, it is clear to us that by the time Deputy Leyda frisked Budig this was a Terry encounter." Slip. Op. at 5. The trial court's conclusions also recognized that the circumstances reported constituted a violation of two criminal statutes. CP 18 (COL 1). The Court of Appeals decision does not conflict with cases Budig cites requiring a valid investigatory stop as a precondition of a lawful weapons frisk. Pet. 9-10.

Regarding the second prong of the test, the trial court concluded that Leyda had an actual, legitimate safety concern that Budig was armed based on his behavior, the time of night, and the dark rural conditions present during the encounter. CP 18 (COL 3). Yet the trial court appeared to ignore the required three-part Terry analysis by assuming that Budig approaching the officer first took the encounter out of a Terry investigation. CP 16, 19, FF 9, 10, 11, COL 8.

The Court of Appeals did not err in determining that Budig cannot avoid or preclude a Terry stop by approaching the officer first. Slip. Op. 5. Moreover, under these circumstances, Deputy Leyda had reasonable grounds to be concerned for his safety. Id. He was alone in a dark remote area with Budig exhibiting an alarming demeanor, including extreme nervousness, sweating, looking about wide eyed and repeatedly putting his hands where his movements could not be seen. 5/3/19 RP 8, 10, 11, 20.

Regarding Budig approaching the officer first, the Court of Appeals cited to City of Seattle v. Hall, 60 Wn. App. 645, 651, 806 P.2d 1246 (1991). This was to reinforce that when a person approaches an officer and behaves in a manner causing legitimate safety concerns, the officer may take protective measures including

a frisk. This rejected the trial court's implied reasoning that approaching an officer first somehow prevents a Terry "stop" from occurring. The Hall court rejected the same idea. Hall at 651. Contrary to Budig's assertions, Hall has not been "eclipsed" or overturned. Pet. at 9. The authority supporting Hall remains Terry itself. A protective frisk is justifiable if a reasonably prudent person would be warranted in the belief that their safety or that of others was in danger. Terry, 392 U.S. at 27.

The third prong of the test was satisfied when Leyda briefly patted down the exterior of Budig's clothing. RP 5/3/19 RP 11. This limited the scope of the frisk to the protective purpose at issue. The trial court made no mention of this when it failed to identify the correct legal test in its written findings and conclusions. CP 18-19. The Court of Appeals did not err by applying the correct standard in examining the Terry frisk analysis. Because that decision does not conflict with any constitutional authority, review is unwarranted.

3. The Trial Court Compounded Its Erroneous Decision To Suppress Evidence By Relying On Inapplicable Social Contact Cases.

The trial court not only failed to apply the correct test of the validity of a Terry frisk. It then compounded that mistake by apparently concluding that Deputy Leyda made a social contact

which somehow escalated to an unlawful seizure. The trial court declared that it was required to "look for the forest among the trees." CP 18 (COL 5, citing State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009)). It also cited a second social contact case, State v. Johnson, 8 Wn. App. 2d 726, 440 P.3d 1032 (2019).

The Court of Appeals did not err in concluding that the social contact issue was not raised by either party where the sole challenge was to the reasonableness of the safety concerns justifying the Terry frisk. Slip. Op. 6. Nor did that court err in identifying how Harrington and Johnson are significantly different from Budig's case.

Harrington focused on a progressively intrusive social contact which ultimately amounted to a seizure. 167 Wn.2d at 669-670. An officer questioned that defendant on the sidewalk about his activities and travel. A second officer arrived and stood near the defendant. The first officer directed Harrington to show his hands and then asked to frisk him. Id. This progressively intrusive display of authority by both officers amounted to a seizure when a reasonable person would not feel free to leave or decline the frisk. Id.

Johnson was similarly focused on multiple officers contacting the defendant (in a parked car), using a "ruse" to engage in conversation, shining a light into the car, and then requesting proof of identity. Johnson, 8 Wn. App. 2d at 733-734. The court reasoned that an innocent person in Johnson's position would not feel free to leave or terminate the encounter when asked for identification following that display of authority. Id. at 745.

The Court of Appeals did not err here in distinguishing those cases erroneously relied on by the trial court. Neither of those involved a Terry investigation. Neither of those defendants were the subject of investigation of a 911 call to which the officer responded. Slip. Op. at 8. Those cases did not involve applying the test of a Terry frisk analysis at issue here.

B. LANGUAGE REVERSING THE SUPPRESSION ORDER AND REMANDING FOR TRIAL DOES NOT WARRANT REVIEW.

The Court of Appeals decision concluded by stating: "Accordingly, we reverse the trial court's order granting Budig's motion to suppress and remand for trial." Slip. Op. 8. Budig chides the Court of Appeals that while such language is common, the "more prudent" language should be to "reverse and remand for further proceedings consistent with this opinion." Pet. at 15.

Budig is correct that the language used is commonly found in other opinions. See State v. Hansen, 99 Wn. App. 575, 579, 994 P.2d 855 (2000); State v. Cerillo, 122 Wn. App. 341, 351, 93 P.3d 960 (2004); Bowers v. Marzano, 170 Wn. App. 498, 518, 290 P.3d 134 (2012); State v. Cline, 180 Wn. App. 644, 655, 323 P.3d 614 (2014); Woo V. General Electric Co., 198 Wn. App. 496, 514, 393 P.3d 869 (2017).

Budig speculates that a trial court "could" interpret remanding for trial as possibly precluding additional motions. Pet. 14. This appears entirely speculative as the Court of Appeals included no such prohibitions in its decision. Returning a case to trial track cannot be fairly read to preclude the parties from making whatever motions are appropriate at or before trial.

Budig's reliance on McKee is misplaced. Pet. at 16. State v. McKee, 193 Wn.2d 271, 279, 438 P.3d 528 (2019). McKee focused not on the most prudent use of language, but on an error of law. The order dismissing counts there was improper because dismissal applies to convictions reversed for insufficient evidence or prejudicial misconduct; the proper remedy there was to remand to trial court with an order to suppress the evidence. Id. at 276, 279.

Remanding Budig's case back to trial track does not preclude any motions the parties may make in the future. A choice over the "more prudent" language used to accomplish the same result does not seem to be an issue of substantial public interest warranting this Court's review, despite Budig's framing of the issue.

IV. CONCLUSION

For these reasons, the State respectfully requests that this Court deny review.

Respectfully submitted this 6th day of January, 2021.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, JOHN FREDERICK BUDIG II, Petitioner.	No. 99076-0 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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The undersigned certifies that on the 6th day of January, 2021, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of January, 2021, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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