

NO. 66152-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES RICHARDSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Steven J. Mura, Judge

REPLY BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 JUL 27 PM 4:38

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A. ASSIGNMENT OF ERROR IN REPLY

The trial court failed to comply with CrR 3.6, filing written findings and conclusions only after Richardson's opening brief had been filed and making it impossible to assign error until now:

The trial court erred when it entered conclusions of law 6 and 7.¹

B. ARGUMENT IN REPLY

DEPUTY GERVOL DID NOT HAVE A LAWFUL BASIS TO SEARCH THE DURANGO FOR WEAPONS.

There is little debate regarding the facts or the relevant law in this case. One factual assertion in the State's brief, however, warrants a response. The State argues that Deputy Gervol "may, as a practical matter, have needed to access [Richardson's] vehicle at some point during the investigative stop." Brief of Respondent, at 7. Although the State cites finding of fact 16 as support, that finding simply indicates – consistent with the evidence below – that "Deputy Gervol intended to return Mr. Richardson to the vehicle once the traffic stop was complete but did not inform Mr. Richardson of that fact." CP 44 (emphasis added).

¹ The written findings and conclusions are attached to this brief as an appendix.

It is the State's burden to demonstrate a search falls within one of the narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State has not demonstrated that it was necessary to return Richardson to the vehicle during the stop, which is an important factor in deciding whether a warrantless search was justified. See Glossbrener, 146 Wn.2d 670, 684, 49 P.3d 128 (2002); State v. Bradley, 105 Wn. App. 30, 38, 18 P.3d 602 (2001); State v. Larson, 88 Wn. App. 849, 857, 946 P.2d 1212 (1997). The absence of this necessity, particularly since both Reid and Richardson had been removed from the SUV without incident, is a strong indicator there was no reasonable safety concern justifying a warrantless search of the vehicle's interior.

The State also notes the stop occurred at night, Richardson made a furtive movement inside the SUV, Richardson was known to have a violent criminal history, Gervol smelled marijuana, and Gervol was outnumbered two to one. See Brief of Respondent, at 9-10.

These circumstances justified the removal of Richardson and Reid from the vehicle, patting them down for possible weapons, and securing them away from the vehicle (Reid standing

a safe distance from the SUV and Richardson confined in the patrol car), where they no longer posed a threat to Deputy Gervol. At that point, however, Gervol did not have an objectively reasonable belief that Richardson was presently armed and dangerous or that he could gain access to a weapon and become armed and dangerous. Gervol had complete control of the scene. Therefore, the deputy's only option was to finish his investigation without a warrantless search of the vehicle, cite Richardson, and send him and Reid on their way.

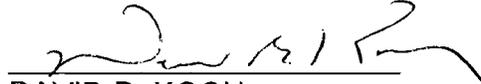
C. CONCLUSION

For the reasons argued in Richardson's opening brief and above, this Court should reverse his conviction.

DATED this 27th day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

1 mentioned to the jury at the trial unless he became a witness on the statement issue during the
trial.

3 The Court, having heard the evidence introduced, has examined the statement and the
5 files and records in the case and being fully advised in the premises, makes the following:

7
9 **FINDINGS OF FACT**

- 11 1. On October 14, 2009, during the hours of darkness and while alone on patrol, Deputy
13 Gervol contacted James Richardson for a traffic infraction on I-5 in Whatcom County
15 Washington. (Failing to signal for a lane change and following the vehicle in front of
17 him too closely.)
- 19 2. While directing the traffic stop with overhead lights, Deputy Gervol noticed that the
21 driver was making furtive movements, as if reaching under the seat below him.
- 23 3. Deputy Gervol had run the vehicle's license plate and James Richardson's name came
25 back as the registered owner.
- 27 4. Deputy Gervol was aware of Mr. Richardson's violent criminal history, including a
29 conviction for unlawful possession of a firearm.
- 31 5. When speaking, Deputy Gervol noted that Mr. Richardson answered questions in a
hesitant manner when he was outside his vehicle and in handcuffs for officer safety.
- 33 6. Deputy Gervol recognized Mr. Richardson but did ask Mr. Richardson for
35 identification.
- 37 7. Mr. Richardson passed his identification and vehicle registration through an open
39 window.
- 41 8. Mr. Richardson did not provide proof of insurance.
- 43 9. Deputy Gervol detected an odor of marijuana coming from inside the vehicle.
- 45 10. For officer safety reasons and to separate the defendant from any evidence, Deputy
Gervol asked Mr. Richardson to step out of his car to complete the traffic stop.
- 47 11. At that time, Deputy Gervol noticed a large club like item on the floor board between
the seat and the door.
- 49 12. When asked, Mr. Richardson identified this object as an African Walking Stick.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: CrR3.5 & CrR3.6

- 1 13. While speaking to Mr. Richardson outside the vehicle, Deputy Gervol could see a
3 knife top sticking out of Mr. Richardson's pocket.
- 5 14. Deputy Gervol took the knife from Mr. Richardson.
- 7 15. Mr. Richardson was placed in handcuffs, and placed in the back seat of Deputy
9 Gervol's patrol car for officer safety reasons while completing this traffic stop.
- 11 16. Deputy Gervol intended to return Mr. Richardson to the vehicle once the traffic stop
13 was complete but did not inform Mr. Richardson of that fact.
- 15 17. Like Deputy Gervol had done before, legal weapons would be returned to Mr.
17 Richardson by placing them in the trunk or back of the vehicle outside of Mr.
19 Richardson's reach.
- 21 18. Deputy Gervol patted down Mr. Richardson's lunge area in his car to check for
23 additional weapons and found a loaded firearm under the seat where Mr. Richardson
25 had been making furtive movements.
- 27 19. Deputy Gervol went back to Mr. Richardson, and read him Miranda rights from his
29 state issued Miranda right's card, placing him under arrest.
- 31 20. Mr. Richardson indicated that he understood his rights and was willing to speak to
33 Deputy Gervol.
- 35 21. Mr. Richardson stated that the firearm was his.

CONCLUSIONS OF LAW

- 33 1. Mr. Richardson was not in custody to a degree associated with formal arrest, prior to
35 being placed under arrest.
- 37 2. Any statements made by Mr. Richardson prior to arrest are admissible.
- 39 3. Deputy Gervol properly provided Miranda rights to Mr. Richardson.
- 41 4. Mr. Richardson knowingly, intelligently and voluntarily waived his Miranda rights.
- 43 5. Mr. Richardson's statements after Miranda are admissible.
- 45 6. The cursory search for weapons in the passenger compartment for officer safety
47 reasons is appropriate.
- 49 7. The firearm that was found under the seat shall be admissible in this trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: CrR3.5 & CrR3.6

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From the foregoing Conclusions of Law, the Court makes the following:

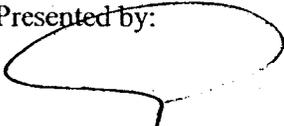
ORDER

It is hereby ordered, adjudged and decreed that the statements made by the defendant to or in the presence of law enforcement shall be admissible in the trial of the above-encaptioned cause.

DATED this 23rd day of February, 2011.



JUDGE STEVEN J. MURA

Presented by: 

Copy received and approved for entry:


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FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE: CrR3.5 & CrR3.6

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State V. James Richardson

No. 66152-3-I

Certificate of Service by Mail

On July 27, 2011, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Kimberly Thulin
Whatcom County Courthouse
311 Grand Ave
Bellingham WA 98225-4048

No current address for client

Containing a copy of the reply brief, re James Richardson
Cause No. 66152-3-I, in the Court of Appeals, Division I, for the state of Washington.

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



John Sloane
Office Manager
Nielsen, Broman & Koch
Done in Seattle, Washington

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Date
Done in Seattle, Washington

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