

NO. 66152-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES RICHARDSON,

Appellant.

2011 FEB 28 11:41:34  
COURT OF APPEALS  
CLERK OF COURT

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

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress evidence under CrR 3.6.

2. The trial court erred when it failed to enter written findings of fact and conclusions of law.

Issues Pertaining to Assignments of Error

1. Under article 1, § 7 of the Washington Constitution, police officers may not conduct a protective search of a car's interior during the course of an ongoing investigation unless they reasonably believe a suspect from the car presents a danger to officer safety. In appellant's case, the investigating officer stopped appellant for minor driving violations and initially feared appellant might access a weapon based on a furtive movement. The officer removed appellant from the car, removed a pocket knife clipped to appellant's pants, handcuffed appellant, and placed him in the back of the officer's patrol car. Given that appellant was safely restrained and appellant was not required to return to his vehicle until the conclusion of the officer's investigation, was there legal justification for the officer to search the vehicle for weapons?

2. Did the trial court err when it failed to enter mandatory written findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County Prosecutor's Office charged James Richardson with one count of Unlawful Possession of a Firearm in the First Degree. CP 38-39. Richardson moved under CrR 3.6 to suppress the evidence against him, arguing it was the product of an unlawful search. RP 3-4, 75-77, 79-80. The motion was denied. RP 69-73, 81-85. A jury convicted Richardson, the court imposed a 48-month standard range sentence, and Richardson timely filed his Notice of Appeal. CP 2-10, 14, 21.

2. CrR 3.6 Hearing

Whatcom County Sheriff's Deputy Magnus Gervol testified that on the evening of October 14, 2009, at approximately 8:45 p.m., he spotted a black Dodge Durango on I-5 following too closely behind another vehicle and changing lanes without signaling. RP 5-6, 8, 23. Deputy Gervol activated his emergency lights and siren, and the driver of the vehicle pulled over on the shoulder of the road. RP 6-7. According to Gervol, he could see the driver's silhouette as he leaned forward and reached toward the floorboard. RP 7-8, 31-32.

As Gervol approached the driver's door, he noticed the driver – James Richardson – “actively looking at me through his side mirror,” which Gervol testified he found concerning. RP 8-9. Richardson's girlfriend, Tiffany Reid, was a passenger in the Durango. RP 15-17, 66. Gervol was familiar with Richardson and knew that he had an extensive criminal history, which included assaults and possession of firearms. RP 9. According to Gervol, once at the driver's open window, he could smell burning marijuana. RP 10, 33.

Although Gervol had merely stopped Richardson for minor traffic infractions, for safety reasons, he had Richardson exit the Durango and stand behind it. RP 10. He wanted to separate Richardson from any weapons in the vehicle and, based on the odor of marijuana, determine his sobriety. RP 10.

Gervol asked Richardson to step out of the Durango with his license and registration, and Richardson complied. RP 33, 50. As Richardson exited the Durango, Deputy Gervol noted a large plastic walking stick with a knobbed handle at one end. Gervol testified the stick concerned him because it could be swung like a bat.<sup>1</sup> RP

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<sup>1</sup> Richardson testified a hernia required use of the walking stick. RP 52.

11. Gervol also noted that Richardson had a folding knife clipped to the front of his pants pocket, which elevated his concern. RP 12-14. According to Gervol, Richardson seemed reluctant to speak with him and paused for long periods during their conversation, which made Gervol wonder if "there was potentially crime afoot." RP 14.

Deputy Gervol placed Richardson in handcuffs, patted him down to make sure he had no other potential weapons, and removed the knife from his pants. RP 15. Gervol then secured Richardson in the back seat of his patrol car and returned to the Durango to speak with Reid. RP 15-16.

Gervol asked Reid to exit the vehicle. She grabbed her purse and complied. RP 17, 59. Reid consented to a pat down search and after determining she had no weapons, Gervol had her stand about 50 feet in front of the Durango. RP 17, 36.

With Richardson and Reid now safe and secure, Gervol searched the driver's "lunge area" inside the Durango. RP 17. His stated purpose for doing so was to ensure Richardson did not have access to any weapons. RP 37. He found a loaded revolver underneath the driver's seat. RP 17.

Gervol called for backup and, back at the patrol car, read Richardson his Miranda<sup>2</sup> rights. RP 19. Richardson agreed to speak with Gervol, admitted the revolver was his, admitted he knew it was in the Durango, and then asked for an attorney. RP 20.

Deputy Gervol testified that prior to finding the firearm, he had not decided to arrest Richardson. He had intended to question him about the marijuana odor and, based on that investigation, make an arrest decision.<sup>3</sup> RP 21. Had he not arrested Richardson, Gervol testified he would have secured the walking stick, removed the handcuffs, issued Richardson a citation for the driving infractions, returned the knife and walking stick to him, and sent him on his way. RP 43. Gervol may have simply issued the citation while Richardson sat in the patrol car. Alternatively, he may have allowed Richardson to go back to the Durango after first searching the interior to make sure there were no additional weapons. RP 43-44.

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

<sup>3</sup> No marijuana or drug paraphernalia was found inside the Durango. RP 39-40. Moreover, Gervol ultimately concluded there were no signs that Richardson was impaired by drug use. RP 14, 37.

In light of Gervol's testimony that he would have returned the knife and walking stick to Richardson after citing him, Judge Mura expressed confusion given Gervol's stated safety concerns. RP 45. Gervol explained that he would have had no lawful basis to keep the stick and knife once his investigation was concluded. Therefore, he would have asked permission to open the back hatch of the Durango and place the items behind the seats, where quick access would be more difficult. RP 46.

Gervol conceded that even when Richardson was in the Durango, he never reached for the walking stick. Nor did he ever reach for the pocketknife hanging from the outside of his pants. RP 34.

Defense counsel argued that once Deputy Gervol removed Richardson from the Durango, removed his pocketknife, handcuffed him, and placed him in the back of the patrol car, there was no longer a valid concern that Richardson posed a threat to his safety. If he wanted to search the interior of the Durango at that point, he needed to obtain a search warrant. RP 75-76, 79-80.

The State argued that because Gervol only intended to cite and release Richardson, he had a legitimate safety concern

justifying the search of the Durango before allowing Richard renewed access to the vehicle. RP 77-79.

Judge Mura found that even before stopping the Durango, Deputy Gervol knew the vehicle belonged to Richardson and knew Richardson had a prior criminal history. Gervol believed a traffic stop was warranted and activated his lights and siren. Richardson immediately complied, but Gervol did observe some furtive movements. RP 70-71.

For officer safety reasons, Gervol had Richardson exit the Durango and stand behind it. RP 71. He noticed the walking stick and the pocketknife, which he confiscated. Gervol then placed Richardson, in handcuffs, in the back of the patrol car. RP 71. Thereafter, he searched the interior of the Durango, found the handgun, and informed Richardson he was under arrest. RP 72. Had he not found the gun, he would have cited Richardson, returned the knife and walking stick, and sent him on his way. In doing so, he would have asked permission to place the knife and stick in the back of the Durango. RP 72-73.

Judge Mura concluded that Richardson's situation in the back of the patrol car was synonymous with arrest because he was in handcuffs and not free to go. RP 81. Were this an actual arrest

situation, where the search was conducted incident to that arrest, Judge Mura indicated he would suppress evidence of the gun. However, because – prior to finding the gun – Deputy Gervol intended to allow Richardson to return to his vehicle and had seen a furtive movement, Judge Mura found the search justified to ensure officer safety. Judge Mura believed that State v. Chang, 147 Wn. App. 490, 195 P.3d 1008 (2008), review denied, 166 Wn.2d 1002 (2009), was directly on point and controlled his decision. RP 83-89.

As of the date of this brief, no written findings and conclusions have been filed despite the fact they are required. See CrR 3.6(b) (“If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.”).

### 3. Trial Evidence

At trial, Deputy Gervol repeated his pretrial testimony concerning events leading up to discovery of the pistol and Richardson’s admissions concerning it. He also expressed his opinion that the gun was a real and operational firearm. RP 91-136. The State also introduced evidence that Richardson had a prior conviction for Robbery in the Second Degree (a serious

offense) and was prohibited from possessing a firearm. RP 136-163.

The defense called Tiffany Reid, who testified to the circumstances surrounding the traffic stop and some of the events leading up to and following the search of the Durango. RP 165-176. Richardson did not testify. RP 176; CP 34.

C. ARGUMENT

BECAUSE DEPUTY GERVOL DID NOT HAVE A LAWFUL BASIS TO SEARCH THE DURANGO FOR WEAPONS, EVIDENCE OF THE GUN SHOULD HAVE BEEN SUPPRESSED.

Article 1, § 7 of the Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” For automobiles and their contents, the privacy rights under this provision exceed those offered by the Fourth Amendment. State v. Parker, 139 Wn.2d 486, 493-495, 987 P.2d 73 (1999). Warrantless searches of automobiles are unreasonable per se, and the State bears the heavy burden to prove that such a search falls within one of the narrowly construed exceptions to the warrant requirement. Parker, 139 Wn.2d at 496.

One of these narrow exceptions is the "Terry investigatory stop," discussed in detail in Terry v. Ohio, 392 U.S. 1, 88 S. Ct.

1868, 20 L. Ed. 2d 889 (1968). Where officers have an objectively reasonable concern for their safety, Terry authorizes “an officer to make a limited search of the passenger compartment to assure a suspect person in the car does not have access to a weapon within the suspect’s or passenger’s area of control.” State v. Kennedy, 107 Wn.2d 1, 12-13, 726 P.2d 445 (1986); see also State v. Larson, 88 Wn. App. 849, 853-854, 946 P.2d 1212 (1997) (“A protective search for weapons must be objectively reasonable, though based on the officer’s subjective perception of events.”).

If there is no objectively reasonable belief that the defendant is presently armed and dangerous, or can gain access to a weapon and become so, police may not search the interior of the car. State v. Glossbrener, 146 Wn.2d 670, 684, 49 P.3d 128 (2002); State v. Williams, 102 Wn.2d 733, 738-739, 689 P.2d 1065 (1984); State v. Bradley, 105 Wn. App. 30, 38, 18 P.3d 602 (2001). A prior criminal record, even one that involves firearms, is insufficient to conclude the defendant is presently dangerous. State v. Hobart, 94 Wn.2d 437, 446-447, 617 P.2d 429 (1980). Moreover, an initial reasonable belief may be nullified by the subsequent actions of the driver or police. Glossbrener, 146 Wn.2d at 681-682.

In Glossbrener, police pulled over a vehicle driven by Glossbrener because one headlight was out. Before the vehicle came to a complete stop, police saw Glossbrener reach down toward the passenger side of the car for several seconds. Glossbrener, 146 Wn.2d at 673. Glossbrener, who smelled of alcohol and had bloodshot eyes, provided his driver's license, registration, and insurance upon request. When asked why he reached toward the passenger side of the car, Glossbrener said he was retrieving his registration from the glove box, a claim the officer knew to be false because he saw Glossbrener remove his registration after he had stopped. Id. The officer asked Glossbrener whether he had hidden any guns, knives, or other weapons, and Glossbrener said he had hidden an alcohol container. Id. at 673-74.

The officer told Glossbrener to stay in the car while he went back to his patrol car to check for warrants. None were found. Glossbrener agreed to perform field sobriety tests and stepped out of his car. He was patted down for weapons and none were found. Glossbrener passed the sobriety tests, but the officer called for backup and had Glossbrener stand to the side of his car. Id. at 674. Once a second officer arrived, the original officer searched

Glossbrener's car for weapons and other evidence. He found marijuana and arrested Glossbrener. In a search incident to arrest, officers found methamphetamine, which ultimately led to his conviction for possessing that substance. Id. at 674-675.

The Washington Supreme Court reversed, concluding the methamphetamine was the product of an unlawful warrantless search of the car. Id. at 684-85. Citing State v. Larson, the Supreme Court indicated that whether police may search the passenger compartment based on safety concerns does not strictly turn on whether a driver or passenger remains in the vehicle at the time of the search. Rather, it is based on the totality of the circumstances of the stop. Id. at 679.

In Larson, the defendant, who was speeding, was leaning forward and making movements toward the floor of his truck before finally heeding an officer's signal to pull over. The officer removed Larson from the truck and, concerned for his safety, stuck his head inside the cab to look inside. He saw items associated with heroin, resulting in Larson's arrest and prosecution. The officer testified that had he not seen the contraband, he would have allowed Larson back in the truck and proceeded with the usual process of issuing a speeding ticket. Larson, 88 Wn. App. at 851-852.

On appeal, this Court concluded that because Larson was stopped for speeding, and issuance of a speeding ticket required Larson to retrieve his registration – which by law must be kept inside the vehicle – it was “reasonable for [the officer] to anticipate that as he continued to carry out the traffic stop, sooner or later he would have to permit Larson to return to the truck to retrieve documents.” Larson, 88 Wn. App. at 856-857. Since the officer reasonably believed Larson would be required to re-enter the vehicle during the ongoing investigation, the officer acted reasonably in searching the interior for weapons. Id. at 857.

In contrast to Larson, in Glossbrener the Supreme Court found no such reasonable belief. The Court concluded that although the officer may have had a reasonable belief Glossbrener presented a threat when he first observed his furtive movements inside the car, based on intervening events, this belief was no longer objectively reasonable by the time he finally searched the car. Glossbrener, 146 Wn.2d at 681.

Several circumstances persuaded the Supreme Court. First, by the time of the search, Glossbrener had cooperated with the investigation, including submitting to a frisk outside the vehicle. Second, the officer allowed Glossbrener to sit in his own car while

he checked for warrants, indicating the officer was not truly concerned for his safety. Third, the officer found no weapons on Glossbrener when he did the pat-down search. And, finally, the officer did not call for a backup so that he could search the car until the end of his investigation. Id. at 681-682.

The Glossbrener Court found one fact in particular important in distinguishing Larson. In Larson the defendant necessarily had to return to the vehicle *during the continuing investigation*, warranting an interior search prior to that event. See Larson, 88 Wn. App. At 857 (arresting officer anticipated “that as he continued to carry out the traffic stop, sooner or later he would have to permit Larson to return to the truck to retrieve documents”); see also Bradley, 105 Wn. App. at 38 (distinguishing Larson because “the facts here did not require Bradley to later reenter the vehicle”; emphasis added). In contrast, citing Glossbrener for the traffic violations at issue in his case did not require his return to the vehicle until after the investigation was complete. And at that point, the only option for police was to send Glossbrener on his way without any further delay or intrusion into his private affairs. Glossbrener, 146 Wn.2d at 684.

Glossbrener controls in Richardson's case. Although initially Deputy Gervol may have reasonably feared Richardson could reach for a weapon because of his furtive movements and criminal history, based on intervening events, any such belief was no longer reasonable by the time of the search. In the interim, Richardson had cooperated with the investigation, been removed from the Durango, been placed in handcuffs, had his pocketknife confiscated, and been placed in the back of Gervol's patrol car. Ms. Reid also had been removed from the Durango. At that point there was no possible threat to Deputy Gervol's safety.

While Gervol would eventually be required to return control of the Durango to Richardson, this is no different from the situation in Glossbrener. There was simply no reason Richardson had to return to the Durango while Gervol cited him for the minor driving infractions or questioned him about possible marijuana use. Unlike Larson, the ongoing investigation did not *require* Richardson's access to the Durango's interior. Gervol already had Richardson's license and registration. Therefore, there was no legal basis for the search. Gervol's only option was to complete his investigation, cite Richardson, return his pocketknife, and release him.

Judge Mura believed he was required to uphold the vehicle search under State v. Chang. He was not. In Chang, police responded to a suspected forgery at a bank. The forgery suspect told officers Chang had given him a ride to the bank, he was sitting in a Subaru in the parking lot, and he had a handgun. 147 Wn. App. at 493-494. By the time officers in the parking lot got word of the gun, they had already removed Chang from the car. They cuffed him and patted him down, but did not find the gun. An officer looked inside the Subaru and found the gun under a floor mat. Id. at 494.

On appeal, Chang challenged the trial court's finding that officer safety concerns justified the warrantless search of the vehicle. Id. at 494. Citing State v. Glenn, 140 Wn. App. 627, 166 P.3d 1235 (2007), this Court reasoned that even if the driver does not have immediate access to the car, "police may conduct a protective search if the suspect will have a later opportunity to return to his vehicle." Id. at 496. As to Chang, this Court held:

the police did not necessarily intend to arrest him without further investigation. Without a formal arrest, the police could not detain Chang in handcuffs longer than necessary to investigate his possible connection to the forgery attempt. Securing the scene required ensuring that the reported weapon would not be available to Chang if the police eventually released

him to get back in his car. See *Glenn*, 140 Wn.App. at 636, 166 P.3d 1235.

Id. at 497.

Chang is distinguishable from Richardson's case because officers had reliable information the suspect was armed and therefore a threat to their safety as they investigated the situation. Only by locating and securing the known firearm could officers ensure the situation was under control. The reported firearm was the critical factor: "Because the police had information that Chang had a gun in his car, their safety concern was reasonable, and the trial court did not err in concluding that the warrantless search was valid." Chang, 147 Wn. App. at 497-498.

Glenn is distinguishable for the same reason. A witness saw Glenn with a firearm in his hand. Yet, that firearm was not located during a pat down search. Glenn, 140 Wn. App. at 631-632. In holding that "a credible report that a gun has been displayed from a vehicle" justifies a protective search of the vehicle's interior, the Glenn Court expressly distinguished cases involving reported firearms from the type of stop in Richardson's case:

A stop based on a report of a weapon sighting is markedly different from investigative stops based on reports of drug-related activities or traffic infractions. The latter were held lawful based on the suspects'

furtive movements and the presence of a passenger or the need to return to the vehicle to facilitate the investigation.

Id. at 635-636. Therefore, neither Glenn nor Chang, which is based on Glenn, controls the outcome here.

Where police have not received specific information indicating a suspect in a vehicle is armed, where the defendant is not *required* to return to the vehicle to facilitate an investigation, and where officers have the situation and the defendant fully under control, there is no justification for a protective sweep of an automobile's interior because there can be no objective fear the defendant is dangerous. Officers' only option is to complete the investigation, cite the individual if warranted, and send the individual on his way.

The warrantless search of Richardson's Durango violated article 1, § 7 of the Washington Constitution and the firearm found inside the vehicle had to be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) ("When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.").

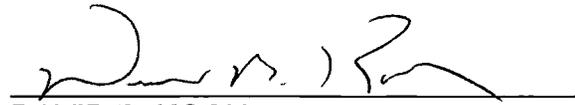
D. CONCLUSION

This Court should reverse Richardson's conviction and dismiss based on the trial court's erroneous denial of the defense motion to suppress.

DATED this 28<sup>th</sup> day of February 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66152-3-1
	)	
JAMES RICHARDSON,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF FEBRUARY, 2011 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]    WHATCOM COUNTY PROSECUTOR'S OFFICE  
         SUITE 201  
         311 GRAND AVENUE  
         BELLINGHAM, WA 98227

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2011.

x Patrick Mayovsky