

66406-9

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NO. 66406-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PAUL VILLALON,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in failing to suppress the fruits of a warrantless search.

2. The trial court erred in failing to enter findings sufficient for the purposes of effective appellate review.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Constitutional protections prohibit warrantless searches and seizures. This rule is subject to a few narrowly drawn and jealously guarded exceptions. Only an “actual custodial arrest” provides the authority of law necessary to justify a warrantless search incident to arrest. Here, Mr. Villalon was stopped and frisked, and then his pockets were searched by police. Did the warrantless search violate constitutional protections?

2. A trial court’s failure to enter findings of fact identifying the legal and factual justification for a warrantless search may require remand for entry of findings sufficient to permit meaningful appellate review. Here, following a suppression hearing, the trial court concluded that the officer’s actions were reasonable, but failed to enter written findings of fact. Where the evidence in contention remained in dispute and the central issue in the appeal pertains to

the stop and resulting frisk, is remand required for adequate factual findings and legal conclusions?

C. STATEMENT OF THE CASE.

At approximately 3:00 p.m. on July 30, 2010, Whatcom County Sheriff Department deputies drove by a vacant property in Whatcom County. RP 7-8. According to officers, the residence had a no trespassing sign on it and had formerly been seized by the Sheriff's Office. Id. Officers noticed people on the property and stopped to investigate. Id.

One of the young men stopped by the officers, Joseph Garcia, explained that he had not seen a no trespassing sign near the roadway. RP 10. The other man, Paul Villalon, stated he had no identification documents on him and gave a false name and date of birth. Id. Officers determined that Mr. Villalon appeared significantly older than this birthdate would imply, and noted that his demeanor seemed "peculiar" and nervous. RP 11-12.

According to Deputy Gervol, his stated purpose at this point was to determine if Mr. Villalon was trespassing on the property or what his activities were. RP 12-13. Deputy Gervol stated that due to the circumstances and his concern for his safety, he decided to frisk Mr. Villalon. RP 13. After Mr. Villalon refused the frisk,

Deputy Gervol grabbed one of his arms and another deputy grabbed his other arm; the deputies handcuffed Mr. Villalon and conducted a pat-down. RP 13-14.

After feeling a hard, square object in Mr. Villalon's front pants pocket, Deputy Gervol removed Mr. Villalon's cellular phone from his pocket. RP 14. Mr. Villalon's Washington State identification was clamped inside of his cell phone, which had a clamshell design. RP 15. Instead of returning the cell phone and identification to Mr. Villalon, Deputy Gervol retained both for further examination, claiming that .22 caliber handguns and stun guns can be designed to look like cell phones, although he had never seen one personally. RP 15-16, 25.

Further examination of Mr. Villalon's identification card revealed his actual name and date of birth, which officers then used to determine that he had an outstanding arrest warrant. RP 16-17. After a search incident to arrest on the warrant, a controlled substance was found. RP 17.

A suppression hearing was conducted, after which the trial court denied Mr. Villalon's motion to suppress. RP 59. Mr. Villalon then agreed to proceed by a bench trial on a stipulated record before the Honorable Ira J. Uhrig. RP 59. Mr. Villalon was found

guilty of unlawful possession of a controlled substance (VUCSA); the trial court issued no written findings of fact or conclusions of law. RP 61.

Mr. Villalon timely appeals. CP 4-14.

D. ARGUMENT

1. THE COURT ERRED IN DENYING MR. VILLALON'S MOTION TO SUPPRESS, AS THE WARRANTLESS SEARCH AND SEIZURE VIOLATED CONSTITUTIONAL PRINCIPLES.

a. Constitutional principles prohibit unreasonable searches and seizures. The state and federal constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. 4; Const. art. I, § 7. The Fourth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees: “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no warrants shall issue, but upon probable cause.” U.S. Const. amend. 4; U.S. Const. amend. 14; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Under the Washington Constitution, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

Washington courts have long recognized that article I, section 7 provides even greater protections to citizens' privacy rights than those afforded by the Fourth Amendment of the federal constitution. See, e.g., State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999); State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998); City of Seattle v. Mesiani, 110 Wn.2d 454, 457-58, 755 P.2d 775 (1988). The Washington provision "is not limited to subjective expectations of privacy, but, more broadly protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" Parker, 139 Wn.2d at 494 (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

A warrantless search is generally considered per se unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Thus, a warrantless search is presumed unlawful unless the search meets one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden of demonstrating

whether a search fits within one of these exceptions. Id. (citing State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)).

In the instant case, the trial court entered no written findings of fact or conclusions of law, and what oral findings it made are wholly ambiguous as to the basis for denying Mr. Villalon's suppression motion. RP 52-57 ("So I, I believe that the officer's actions were entirely reasonable and entirely appropriate. And I think that's about as much as I really need to say.") The findings fail to precisely identify which, if any, exception to the warrant requirement the court relied upon in admitting the evidence.

Given the ambiguity of the court's findings and conclusions, Mr. Villalon addresses two possible exceptions to the warrant requirement: (1) the search was somehow justified under Terry,⁵ or (2) the search was valid as a search incident to arrest, given the officer's alleged probable cause to arrest. As explained below, neither of these reasons justifies the warrantless seizure of Mr. Villalon or the search of his person. Accordingly, the search and seizure were unconstitutional and require reversal by this Court.

b. The warrantless search of Mr. Villalon did not meet the *Terry* exception to the warrant requirement. Although not clear

from the court's oral findings, it might be argued that Mr. Villalon was searched pursuant to Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). RP 52-57. This argument fails.

Police may briefly detain an individual to investigate suspicious activity where the officer has a reasonable suspicion that criminal conduct has occurred or is about to occur. Terry, 392 U.S. at 21. Under Terry, police may engage in a frisk or pat-down of the detainee for weapons only if the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

Terry, 392 U.S. at 21. As stated by the Terry Court:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30.

Such a pat-down does not throw open the doors to a full-scale search of the person. Rather, a pat-down under Terry is "strictly limited in its scope to a search of the outer clothing" of the

⁵ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

person detained. State v. Hudson, 124 Wn.2d 107, 113, 874 P.2d 160 (1994). If, pursuant to a Terry pat-down of an individual's outer clothing, an officer:

feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object.

Id.

A potential Terry pat-down involves three questions. First, did the officer have a reasonable basis to suspect criminal activity involving the detainee? Second, did the officer have reasonable grounds for suspecting the particular individual of being armed and presently dangerous? Terry, 392 U.S. at 30. Finally, did the scope of the search exceed that permitted by the constitution? State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (burden is on the State to show a seizure is legitimate, the safety concern is reasonable, and the scope of the frisk is limited to protective purposes).

i. The officers had an insufficient basis to suspect Mr. Villalon was involved in criminal activity. Here, police were investigating a suspected trespass at 3:00 in the afternoon. RP 7-8. Despite Deputy Gervol's stated concern that the property at

issue might be subject to vandalism or similar behavior, there was no indication that Mr. Villalon and Joseph Garcia were involved in any such behavior when the deputies arrived. RP 8-10. Deputy Gervol explained that Mr. Villalol appeared nervous and that his demeanor was “very peculiar.” RP 11-12. Based on Mr. Villalon’s apparent inability to answer the officer’s questions, the officer decided to “pat him down for weapons for our safety.” RP 13.

Under the circumstances, it was not reasonable to suspect Mr. Villalon was a threat to officer safety. Nor did the officers have a valid basis to stop and frisk Mr. Villalon, as there were no “specific and articulable facts” to suggest he was involved in criminal conduct that had occurred or was about to occur. Terry, 392 U.S. at 21. Mr. Villalon was simply not engaged in any “suspicious activity” at the time the officers arrived, nor did his allegedly “very peculiar” demeanor rise to the level justifying a search of his person.

The trial court erred to the extent it concluded, without identifying any factual support in the record, that the officer’s actions were “entirely reasonable and entirely appropriate.” RP 57. While Mr. Villalon was apparently physically located at the abandoned property where the two deputies were investigating,

and although he did apparently give a false name and incongruous date of birth, this was the only “specific and articulable fact” substantiated by the officers. Mr. Villalon’s mere presence at the location was insufficient to support an inference that he was engaged in criminal activity justifying further investigation. The officers’ detention of Mr. Villalon cannot be justified as a Terry stop.

ii. The officers had no basis to believe Mr. Villalon was presently armed or dangerous. If police reasonably believe criminal activity may be afoot and that the individual involved may be armed and dangerous, they may conduct a pat-down, pursuant to Terry, of the individual. Garvin, 166 Wn.2d at 250; Hudson, 124 Wn.2d at 112-13. Terry, however, strictly prohibits such a search based on “inchoate and unparticularized suspicion[s].” 392 U.S. at 27. Rather, a pat-down must be based on the reasonable and specific inferences to be drawn from such a hunch. Id.

Assuming for the sake of argument that police reasonably believed that it is actually possible to fashion a high-tech small-caliber handgun and conceal it in a cell phone, and that these concealed weapons have made their way onto the streets of Bellingham; nothing in the record supports the officers’ speculation

or suspicions that Mr. Villalon was actually armed with one of these incredible devices.

At the outset of the contact, the officers had no basis to suspect these persons might be armed or dangerous. Deputy Gervol indicated he was concerned about trespassing and vandalism. RP 7-8. Further, in contrast to violent offenses, there was no testimony to indicate that trespassers or vandals are typically armed. See e.g., Terry, 392 U.S. at 27 (where police suspected robbery, reasonable to assume suspects might use weapons).

The officers apparently asked for Mr. Villalon's name, and once they were given a (false) name, began to run the name for warrants. RP 16-17. The fact that officers immediately began to run this alias for outstanding warrants certainly indicates the pretextual nature of the subsequent search.

The evidence in this case cannot support a finding that a pat-down search was reasonable under Terry or its progeny. Because the officers did not have well-founded concerns that Mr. Villalon was armed or presently dangerous, they had no basis to pat him down, nor to "frisk" – or more aptly, "search" – him.

iii. The “frisk” was in fact a search, was excessive, and demands reversal. A pat-down for weapons under Terry is not without limits. Instead, such a search must be strictly limited to “discover weapons which might be used to assault the officer.” Hudson, 124 Wn.2d at 112; see also Garvin, 166 Wn.2d at 250.

As argued above, the officers in this case had no reason to suspect Mr. Villalon was armed. There was no testimony that trespassers or property vandals are known to carry weapons. The officers’ baseless and unfounded speculation that Mr. Villalon might have been armed was only conjecture that a cell phone – the hard, square object in his pocket -- might have been modified into a .22 caliber handgun – something both officers and even the trial court admitted they had never before seen done. RP 25-26, 47, 52-57. As such, the officers’ concerns would not even constitute a hunch, and certainly were insufficient to meet the Terry standard for a frisk for weapons.

Deputy Gervol explained that most “innocuous objects” can be used as weapons, and that if he found any object he believed could be used as a weapon, he would remove it – even from a wallet – when patting someone down. RP 26. When asked how far this logic would carry, the officer candidly stated the following:

[Defense counsel]: Is there any class of object that a person might carry that you wouldn't suspect as a weapon or a firearm?

[Deputy Gervol]: As I can think of it now, a piece of paper in their pocket.

RP 27.

This is not the "reasonable suspicion" contemplated by Terry. The slippery slope of this reasoning dangerously erodes the constitutional protections against unreasonable searches and seizures. U.S. Const. amend. 4; U.S. Const. amend. 14; Const. art. I, § 7; Terry, 392 U.S. at 21; Garvin, 166 Wn.2d at 250; Hudson, 124 Wn.2d at 112. Notwithstanding the officer's stated concern, the purpose of a Terry frisk "is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear." Hudson, 124 Wn.2d at 112 (citing Adams v. Williams, 407 U.S. 143, 145-46, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)).

While recognizing the dangers presented to officers confronting innocent citizens as well as criminal suspects, it strains credulity that the officers reasonably believed that the cell phone in Mr. Villalon's pocket was actually a small-caliber weapon. The phone should have been immediately returned to Mr. Villalon –

prior to the manipulation which resulted in the identification card being viewed.

Absent a reasonable concern for ensuring officer safety, removing the cell phone and examining it and its contents, including the identification card, falls well outside the scope of a Terry frisk for weapons. Officers are not entitled to blithely reach into pockets of clothing, feeling around for a weapon, evidence, or anything else they might find, absent reasonable suspicion. Garvin, 166 Wn.2d at 255; Hudson, 124 Wn.2d at 112. Constitutional principles are intended to curb against such intrusions.

c. The warrantless search of Mr. Villalon's person cannot be justified as a search incident to arrest. The court's oral findings might be construed to suggest that the search resulting in the discovery of the identification card (and later the controlled substance) was justified under the search incident to arrest exception to the warrant requirement.⁶ See e.g., State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). Under similar facts, the

⁶ Although it is not conceded that such a search was incident to a lawful arrest, to the extent the officers may have had probable cause to arrest Mr. Villalon due to the open arrest warrant or for obstruction (due to his giving a false name), this argument is presented.

Washington Supreme Court in State v. O'Neill addressed and soundly rejected such a claim. 148 Wn.2d 564, 585, 62 P.3d 489 (2003). The Supreme Court stressed the importance of an actual arrest in the search incident to arrest arena:

There must be an actual custodial arrest to provide the “authority” of law justifying a warrantless search incident to arrest under article 1, section 7.

O'Neill, 148 Wn.2d at 585. In other words, “a valid custodial arrest is a condition precedent to a search incident to arrest as an exception to the warrant requirement under article I, section 7.” Id. at 587.

i. An actual custodial arrest must precede any search incident to such an arrest. In O'Neill, the defendant was in a parked car in front of a closed store. Id. at 571. A police officer approached, shined a flashlight in O'Neill's face, and asked what he was doing. Id. at 571-72. O'Neill stated his car had broken down and he was waiting for a friend to assist him. Id. at 572. Consistent with this remark, O'Neill was unable to start the car pursuant to the officer's request. Id. In response to further questioning, O'Neill stated his driver's license had been revoked. Id. The officer had O'Neill step from the car and patted him down for identification. Id.

The officer observed what appeared to be drug paraphernalia in plain view as O'Neill stepped out of the car. Id. After persuading O'Neill he did not need a warrant, the officer entered the car and found additional evidence of drug possession. Id. at 573. At that point, O'Neill was arrested. Id.

The trial court suppressed the pipe and the cocaine, finding the search of the car did not comport with constitutional standards. Id. at 573. The Washington Supreme Court upheld the finding of the trial court, holding the search unconstitutional. Id. at 587.

The O'Neill Court found that even though the officer had probable cause to arrest O'Neill for driving without a valid license, he was not under arrest at the time the officer searched the car. Id. at 578-85. The Supreme Court found the search unlawful; in order to meet constitutional requirements, a search incident to arrest must be preceded by a lawful custodial arrest. Id. at 585. The Court reasoned "it is the arrest, not probable cause to arrest, that constitutes the necessary authority of law for a search incident to arrest." Id. Hence, where there is no arrest, there cannot be a search incident to arrest.

ii. Mr. Villalon was not under arrest when the officers opened his cell phone and found his identification card, resulting in the arrest warrant being found and culminating with his arrest. The record here is silent on when, exactly, Mr. Villalon was placed under arrest. Importantly, so are the trial court's limited findings. Deputy Gervol concedes that neither young man at the scene was arrested for trespass that day, RP 21, and the record is devoid of facts concerning the seizure of the controlled substance from Mr. Villalon's person.

To the extent the lack of specificity in the record insinuates the search was based on probable cause to arrest, rather than an actual arrest, O'Neill is squarely on point and demonstrates the illegal nature of the search. Both officers testified that although Mr. Villalon was frisked while in cuffs, that this is because he was resisting the pat-down, and not because he was under arrest. RP 13-14, 42-43. The officers stated that the frisk was due to safety concerns and was merely a pat-down for weapons. RP 13, 36, 42-43.

Thus, by all accounts, Mr. Villalon was not actually arrested until sometime after Deputy Gervol removed the cell phone from Mr. Villalon's pocket and began to manipulate it, allegedly fearing it

was a highly unusual small caliber pistol, cleverly disguised as a cell phone.⁷ The officer's manipulation of the phone thus dislodged the identification card. RP 16-17. At this point, Deputy Gervol stated that he was able to read Mr. Villalon's name and date of birth and check for warrants. RP 16-17. This scenario violated constitutional principles. O'Neill, 148 Wn.2d at 585-86; see also Armenta, 134 Wn.2d at 14.

iii. Under O'Neill, because Mr. Villalon's person was searched prior to his actual custodial arrest, the warrantless search cannot be justified as a search incident to arrest. Although not specifically identified as the exception to the warrant requirement upon which the court relied, it is clear the search of Mr. Villalon cannot be justified as a search incident to arrest, because the search preceded the arrest. O'Neill, 148 Wn.2d at 585. To the extent the court may have relied on this exception to the warrant requirement, it erred in denying Mr. Villalon's motion to suppress, requiring reversal by this Court. RP 52-57.

⁷ Both deputies admitted that they had never actually seen such a weapon, but had only seen pictures in training bulletins – and that no such modified weapons existed made from flip-phones, such as the one seized from Mr. Villalon. RP 24.

d. Mr. Villalon was searched in violation of constitutional principles, requiring suppression of the evidence and reversal of his conviction. If a search is unlawful, evidence obtained therefrom is deemed inadmissible as the “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Garvin, 166 Wn.2d at 254.

Here, police seized Mr. Villalon and searched his person and his pockets without a warrant.⁸ The record does not indicate that the search and seizure were based on an individualized suspicion that Mr. Villalon was involved in criminal activity and might be armed or dangerous, warranting a frisk under Terry. Moreover, the search of Mr. Villalon clearly preceded his arrest, thus it cannot be justified as a search incident to arrest. Furthermore, even if this Court finds the initial “frisk” of Mr. Villalon was permissible, the scope of the “frisk” was exceeded when police went into Mr. Villalon’s pockets and unreasonably expanded the search by removing and then manipulating his cell phone – allegedly in order to “protect” themselves during the investigation.

⁸ The record indicates that Mr. Villalon’s pockets were searched before the pending arrest warrant was located. RP 16-17.

As the Supreme Court noted in Garvin, “To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons [] searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment.” 166 Wn.2d at 254 (citing State v. Hobart, 94 Wn.2d 437, 447, 617 P.2d 429 (1980) (reversing due to illegal search) (emphasis added)).

In United States v. Gross, the Sixth Circuit recently held, “Where an officer engages in an illegal stop and then discovers through his own investigation or prompting that the individual or individuals he has illegally stopped have outstanding warrants, the evidentiary fruits of the subsequent arrest are tainted as fruit of the poisonous tree and must be suppressed.” 624 F.3d 309, 321-22 (6th Cir. 2010). In its decision, the Gross court noted the appropriateness of the exclusionary rule in this very situation, in order to deter law enforcement from making illegal stops in order to look for warrants. This would “create [] a system of post-hoc rationalization through which the Fourth Amendment’s prohibition against illegal searches and seizures can be nullified.” Id. at 321

(emphasis added).⁹ See also United States v. Lockett, 484 F.2d 89, 90-91 (9th Cir.1973) (detaining suspect to run warrant check was constitutionally impermissible search justifying suppression of fruits); United States v. Lopez, 443 F.3d 1280 (10th Cir.2006) (where police lacked reasonable suspicion, warrant check violated Fourth Amendment).

The warrantless search of Mr. Villalon violated basic constitutional principles. The court's failure to articulate a valid basis for circumventing the warrant requirement requires exclusion of the evidence and reversal of Mr. Villalon's conviction.

2. THE TRIAL COURT'S FAILURE TO ENTER FINDINGS SUFFICIENT TO PERMIT MEANINGFUL APPELLATE REVIEW REQUIRES REMAND.

Where a defendant has moved for suppression and a hearing on the merits is conducted, the trial court is obligated by court rule to "enter written findings of fact and conclusions of law." CrR 3.6(b); see also State v. Barber, 118 Wn.2d 335, 343, 823 P.2d 1068 (1992). Such findings are not inconsequential, as "where findings are required, they must be sufficiently specific to

⁹ See also Michael Kimberly, Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability, 118 YALE L.J. 177 (2008) (a rule where the discovery of an outstanding warrant constitutes an intervening circumstance has the perverse effect of encouraging law enforcement officials to engage in illegal

permit meaningful review.” In re LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986); see also State v. Head, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998).

In Barber, as here, one of the central issues was the propriety of the Terry stop of the defendant. 118 Wn.2d at 342. The trial court’s findings in Barber were held to contain a litany of conclusory legal statements, lacking the “specific and articulable facts, ... taken together with rational inferences from those facts, [to] reasonably warrant that intrusion.” Barber, 118 Wn.2d at 343 (quoting Terry v. Ohio, 392 U.S. at 21). The Barber Court criticized that trial court’s findings, noting the bare findings of fact left the appellate courts to guess at the facts relied upon by the trial court in finding the warrantless stop was justified. Id. at 344. The Court concluded:

The findings of fact following the suppression hearing did not sufficiently comply with the requirements of CrR 3.6 to permit a meaningful appellate review of the critical aspects of the trial court’s decision on the Terry-stop issue; therefore, the case must be remanded to the trial court for more specific findings as to the reasons that may justify the initial stop of the defendant ...

Id. at 342 (emphasis added).

stops based on an inarticulable hunch).

The trial court's factual findings and legal conclusions in the instant matter are even more inadequate. In Mr. Villalon's case, the trial court failed to follow the most rudimentary of requirements set out by CrR 3.6(b); no written findings of fact or conclusions of law were filed. The trial court's ostensible oral findings are devoid of separate sections devoted to facts and conclusions of law, and the court's oral findings are rife with conclusory statements unsupported by the record. Rather than discuss the reasonableness of the deputies' actions, the trial court muses for several pages about the potential use of different common objects as weapons – from Mont Blanc pens (“one of the finest writing instruments ever designed, ... [and] also a very formidable weapon in the proper hands”) to a roll of dimes as “an excellent fist load.” RP 53-54. The court discusses .22 caliber revolvers designed to fit into belt buckles, into wallets, and those designed to look like cell phones. RP 54. The trial judge shares his personal experience seeing former President Clinton in 1993 and being asked to operate both his video camera and his cell phone. RP 55.

However, the court's anecdotal comments are wholly unrelated to the reasonableness of the officers' conduct in elevating the scope of the search of Mr. Villalon when the officers

seized and examined Mr. Villalon's identification card.¹⁰ The trial court's apparent findings as to the reasonableness of the police conduct are ambiguous and insufficient to provide guidance to this Court and appellate counsel on review.

The absence of clear Findings of Fact and Conclusions of Law undermines the ability of appellate counsel and this Court to properly analyze Mr. Villalon's case. It is arguable that this interaction amounted to a Terry stop, precluding Mr. Villalon from leaving the scene, but requiring a sufficient justification to support the stop. The court's failure to elucidate the factual basis – the "information that would raise an articulable suspicion" for such a Terry stop, if this is indeed the court's basis for justifying the initial contact, warrants remand as in Barber. 118 Wn.2d at 343. Alternatively, if probable cause to arrest Mr. Villalon existed under O'Neill, these facts must be sufficiently set out in the court's findings. 148 Wn.2d at 585.

The imprecision of the trial court's findings have presented appellate counsel and this Court with significant challenges in

¹⁰ In its oral findings, the trial court finds that the officer's removal of the cell phone was reasonable, and that the officer "could find" that the identification card placed into the cell phone became visible to him when the phone was opened. No further findings concerning the officer's apparent manipulation of the identification card were made by the court. RP 56-57.

preparing this Opening Brief and in deciding this matter, respectively. Rather than repeat the mistakes of Barber, as an alternative to reversal of his conviction, Mr. Villalon asks this Court to remand for entry of findings and conclusions sufficient to permit meaningful appellate review.

E. CONCLUSION

For the foregoing reasons, Mr. Villalon respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 19th day of May, 2011.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

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

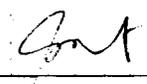
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 66406-9-I
)	
PAUL VILLALON,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MAY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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