

68057-9

68057-9

No. 68057-9-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSE CARDENAS-MURATALLA,

Appellant.

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

The Honorable Bruce Hilyer

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2007-05-14 11:44 AM
J. H. HILYER
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
1000 4TH AVENUE
SEATTLE, WA 98101
PH: 206-465-3000
FAX: 206-465-3001
WWW.COURTAPPELLATE.WA.GOV



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A. SUMMARY OF ARGUMENT

Jose Cardenas-Muratalla was shot in the chest and nearly killed by a Seattle police officer responding to an anonymous 911 report that a person at a bus shelter had a handgun. It is not illegal to carry a handgun in Washington. Nevertheless, the police shined a spotlight on Cardenas-Muratalla because he loosely matched the description from the 911 call, and immediately seized him by yelling "Police! Get down on the ground!" When Mr. Cardenas-Muratalla did not respond right away, an officer tased and then shot him. The entire exchange, from when Mr. Cardenas-Muratalla was illuminated by the spotlight until he was shot at point-blank range, lasted seven seconds.

These events were captured on video in real time. The video shows Mr. Cardenas-Muratalla walking slowly away from the police spotlight while talking on a cell phone. The officer who shot Mr. Cardenas-Muratalla claimed, variously, that Mr. Cardenas-Muratalla ran when he was commanded to stop, that he "fluffed" his sweatshirt as if to conceal a weapon, and that he brought his hands down to his

waistband as if to draw a gun. All of these claims are belied by the video and the testimony of the other officer who was present. Mr. Cardenas-Muratalla indeed had a gun but it was unloaded, and, as the trial court found, it was unlikely that Mr. Cardenas-Muratalla would have drawn an unloaded weapon upon armed police officers.

The United States Supreme Court and the Washington Supreme Court have held that seizures on such scant basis violate the Fourth Amendment and article I, section 7. The State nevertheless charged Mr. Cardenas-Muratalla with unlawful possession of a firearm (in an apparent concession that the facts did not support an assault charge) and the trial court denied Mr. Cardenas-Muratalla's motion to suppress. Mr. Cardenas-Muratalla seeks reversal and dismissal.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Cardenas-Muratalla's motion to suppress evidence, contrary to article I, section 7 and the Fourth Amendment.

2. The trial court erred in inferring from the mere fact of a 911 call that Mr. Cardenas-Muratalla displayed a handgun in a manner that warranted concern for public safety. CP 79.

3. To the extent the finding suggests Mr. Cardenas-Muratalla willfully failed to respond to the officers' commands to stop, the trial court erred in finding that Mr. Cardenas-Muratalla did not comply with police orders to "get on the ground."¹ CP 80.

4. The trial court erred in finding that Mr. Cardenas-Muratalla spun around counter-clockwise, rather than fell, when Officer Myers fired on him with his taser. CP 80.

5. In the absence of substantial evidence in the record, the trial court erred in finding that upon seeing the police, Mr. Cardenas-Muratalla "started to 'fluff' the front of his sweatshirt" and that this action was recognized by Myers as "an attempt to conceal the outline of an object hidden

¹ The trial court did not enter numbered findings of fact pursuant to CrR 3.6, so these assignments of error identify the portions of the trial court's findings of fact that are not supported by substantial evidence in the record.

beneath the defendant's hoodie, which in this case was a gun." CP 80, 81.

6. The trial court erred in finding that as Mr. Cardenas-Muratalla walked northbound on the sidewalk, he brought his hands in front of him at his waistline. CP 81.

7. The trial court erred in finding that Officer Myers believed Mr. Cardenas-Muratalla was attempting to draw his weapon. CP 81.

8. The trial court erred in finding that the officers could see that Mr. Cardenas-Muratalla's sweatshirt appeared "bulky" at the waistband. CP 82.

9. The trial court erred in finding that Mr. Cardenas-Muratalla "lifted the hem of his sweatshirt with his left hand and started to reach towards a gun shaped object in the front of his waistband with his right hand" and that he "continued to hold up the hem of his sweatshirt with his left hand and reached toward his waist with his right hand." CP 82.

10. The trial court erred in concluding that under article I, section 7, an officer's subjective belief is pertinent

under the “totality of the circumstances” test outside of the arena of pretext stops. CP 84.

11. The trial court erred in concluding that the 911 call, in which an anonymous caller had reported seeing a person with a gun without offering any further details, supported the inference that “the suspect in the blue hoodie had displayed the weapon in some manner to cause ...alarm.” CP 84.

12. The trial court erred in concluding that the officers had sufficient corroborating information to stop Mr. Cardenas-Muratalla. CP 84.

13. To the extent the conclusion is properly a finding of fact, the trial court erred in finding that:

[a]s soon as the defendant made eye contact with the officers (before the officers stopped him), he began looking nervous and ‘fluffing’ his sweatshirt in a manner the officers regarded as consistent with an attempt to conceal a weapon in his waistband. In their experience, the police knew that all of this behavior this [sic] was consistent with someone illegally concealing a weapon.

CP 85.

14. The trial court erred in finding that Mr. Cardenas-Muratalla's "look of surprise ... corroborated the officers' fear that the defendant possessed a weapon in this high crime area." CP 85.

15. The trial court erred in concluding that under the totality of the circumstances, the officers were justified in seizing Mr. Cardenas-Muratalla. CP 85.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions protect the right to bear arms. It is legal to carry a firearm in Washington unless the firearm is discharged unlawfully, or displayed in a threatening manner or in a manner that warrants alarm for public safety. Did an anonymous 911 report of a man with a gun, which provided no information regarding how the gun was displayed and did not indicate that the caller was threatened with the gun, fail to report criminal activity?

2. Under federal and state precedent, absent information which corroborates the call and establishes some illegality, an anonymous 911 call of a person with a gun does not supply a valid basis for a Terry stop and frisk.

Did the trial court err in finding that the mere fact of an anonymous report of a person with a gun supported the inference that there was alarm for public safety?

3. A person's presence in a high-crime area does not create a reasonable suspicion of criminal activity, and startled reactions to seeing the police do not supply a basis for a seizure. An anonymous 911 call reported a man with a gun in a high-crime area, not that a crime had occurred or was about to occur. Where Mr. Cardenas was seized because he matched the description in the 911 call and allegedly seemed startled when the police used a spotlight to illuminate the doorway where he was standing, were the facts insufficient for a seizure?

4. The trial court found that it was unlikely a person with an unloaded gun would attempt to use it against armed police officers. Should this Court conclude that an officer's claim that he shot Mr. Cardenas-Muratalla because he believed Mr. Cardenas-Muratalla was trying to draw his gun was not supported by substantial evidence in the record?

D. STATEMENT OF THE CASE

An anonymous caller telephoned 911 to report a man with a gun at Third Avenue and Yesler Way, in Seattle. 1RP 5-6. The caller did not provide information about the manner in which the gun was displayed and did not indicate that the man had pointed the weapon or used it to threaten or intimidate anyone.² 1RP 7, 67, 80. The man was described as Hispanic and wearing a light-blue “hoodie.” 1RP 7. The call was placed at approximately 10:00 p.m. Supp. CP __ (Pretrial Ex. 4). Seattle police officers Christopher Myers and Chriseley Lang responded to the call in their marked patrol car. 1RP 5-6.

The Downtown Emergency Service Center on Third Avenue has a security camera that is trained on the west side of the street. Appellant Jose Cardenas-Muratalla was one of a number of people standing near the bus shelter on Third Avenue and Yesler Way. Supp. CP __, Pretrial Ex. 10 (Side-by-Side Video, hereafter referred to as “Side-by-Side

² When specifically asked by the 911 operator, the caller stated that he had not been threatened. Supp. CP __ (Pretr. Ex. 4).

Video”).³ When the police cruiser passed by, Mr. Cardenas-Muratalla was standing in a doorway with two other people. 1RP 86. He was holding a cell phone to his ear. 1RP 88, Side-by-Side Video. He was not engaged in any suspicious behavior. 1RP 86. The police shined a spotlight on the doorway; as they did so, Mr. Cardenas-Muratalla started to move away northbound up the street in a “slow shuffle.” 1RP 88. He was still holding a cell phone to his ear. Id.

Officer Myers, who was driving the patrol car, jumped out with his gun drawn and yelled, “Police! Get down on the ground!” 1RP 18; Side-by-Side Video. Meanwhile Officer Lang circled in front of Mr. Cardenas-Muratalla and pointed a gun at him. 1RP 20. Within moments, Officer Myers drew his taser and discharged it, and then immediately drew his gun and shot Mr. Cardenas-Muratalla. 1RP 20-21; Side-by-Side Video. The entire episode, from when Officer Myers first shined a spotlight on Mr. Cardenas-Muratalla to when he shot him, lasted seven seconds. Side-by-Side Video.

The bullet entered Mr. Cardenas-Muratalla’s left shoulder and exited his right hip, an injury that could easily

³ The side-by-side video does not contain time stamps.

have been fatal. 1RP 99. Based on an unloaded gun found on Mr. Cardenas-Muratalla's person during a search incident to his arrest and a predicate offense of VUCSA – Conspiracy to Deliver Heroin, the King County Prosecuting Attorney charged Mr. Cardenas-Muratalla with unlawful possession of a firearm in the first degree. CP 91.

Mr. Cardenas-Muratalla moved to suppress the evidence arising from his unlawful seizure. CP 5-33. At a hearing on the motion, Officer Myers testified that when the spotlight illuminated Mr. Cardenas-Muratalla, he looked startled, displaying what Officer Myers characterized as “the ‘Oh crap’ look.” 1RP 12, 38. He also claimed that Mr. Cardenas-Muratalla's posture changed “dramatically” and he stood “upright.” 1RP 12. Officer Myers claimed that at the same time, Mr. Cardenas-Muratalla began to make a “fluffing” gesture with his sweatshirt by pulling it away from his body repeatedly and rapidly. 1RP 12, 38. Officer Myers

averred that he recognized the gesture as an attempt to hide something – such as a weapon – in his waistband.⁴ 1RP 39.

The DESC video shows that Mr. Cardenas-Muratalla was squatting near the doorway on the phone prior to the police arrival. Side-by-Side Video. Almost at the same time that the police directed the spotlight on the doorway, Mr. Cardenas-Muratalla walked out of the doorway northbound, holding a phone to his ear. Side-by-Side Video. In the video, Mr. Cardenas-Muratalla's hands are not by his waistband. Side-by-Side Video.

Officer Lang's account of Mr. Cardenas-Muratalla's actions after he was illuminated with the spotlight also conflicted with Officer Myers's version. Officer Lang confirmed that Mr. Cardenas-Muratalla was on a cell phone as the police car was driving up, and that he was still on the phone as he moved northbound up the street in a "slow shuffle." 1RP 88. Officer Lang testified that Mr. Cardenas-Muratalla was not doing anything suspicious when the police spotlight illuminated him; what she found suspicious

⁴ The alleged fluffing behavior is not mentioned in the certification for determination for probable cause prepared by the case detective, who met with Myers and Lang immediately after the incident. CP 3, 8-9.

was that he moved out of the doorway and did not immediately respond to Officer Myers's commands to "get down on the ground." 1RP 86-88. Officer Myers admitted that after he shot Mr. Cardenas-Muratalla, Mr. Cardenas-Muratalla's cell phone was on the ground, ringing. 1RP 65.

The State conceded that Mr. Cardenas-Muratalla was seized when the police ordered him to get on the ground. 1RP 140, 144. The State nevertheless contended that under the totality of the circumstances, which the State contended included the officers' subjective beliefs, a Terry stop was warranted. 1RP 141-42.

The trial court ruled that it was a "close question" but denied the motion to suppress evidence and a subsequent motion for reconsideration. 2RP 3-4; CP 67-71. The court entered written findings of fact and conclusions of law in support of its ruling. CP 79-85. Mr. Cardenas-Muratalla was tried on the unlawful possession of a firearm charge. After a first trial resulted in a hung jury, Mr. Cardenas-Muratalla was convicted as charged. CP 95. Mr. Cardenas-Muratalla appeals. CP 129.

E. ARGUMENT

The officers lacked a sufficient predicate to conduct a Terry stop: the information relayed to police dispatch did not describe a crime, and under *J.L.* and *Gatewood*, Officer Myers’s alleged observations did not support a reasonable, articulable suspicion of criminal activity.

1. Warrantless searches are presumptively unreasonable.

Under article I, section 7 and the Fourth Amendment to the United States Constitution, warrantless seizures are presumptively unreasonable. Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010); U.S. Const. amend. IV; Const. art. I, § 7. The Washington Supreme Court recognizes few exceptions to the warrant requirement, and those that are recognized “are jealously and carefully drawn.” State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

2. The narrow investigative detention exception to the warrant requirement requires a stop be justified at its inception and supported by a reasonable, articulable suspicion that a crime has occurred or is about to occur.

A Terry stop is one of the “jealously and carefully drawn” exceptions to the warrant requirement, and is constitutionally authorized only if (1) “the officer’s action was justified at its inception,” and (2) “it was reasonably related in scope to the circumstances which justified the interference in the first place.” Terry, 392 U.S. at 20; State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

For a Terry stop to be justified, an officer must have a “reasonable, articulable suspicion, based on specific, objective facts,⁵ that the person seized has committed or is about to commit a *crime*.” Id. (quoting State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (emphasis in original)); see also Duncan, 146 Wn.2d at 173 (“To effectuate the public policy of preventing criminal activity in progress,

⁵ The trial court ruled that under article I, section 7, an officer’s subjective beliefs are pertinent to Terry’s “totality of the circumstances” test. CP 84 (citing State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)). This is incorrect; the Washington Supreme Court has never extended Ladson’s rule beyond the narrow limits of pretextual traffic stops.

Terry and its progeny have predominantly analyzed the reasonable suspicion of an ensuing *crime*.” (emphasis in original)).

3. It is not a crime to carry a handgun in Washington, and the 911 call did not establish a basis to conclude that a gun had been unlawfully displayed.

Like the United States Constitution, the Washington Constitution protects the right to bear arms. U.S. Const. amend. II;⁶ Const. art. I, § 24.⁷ In Seattle, as in the rest of Washington state, a person has the right to carry a firearm. SMC 12A.14.080 (providing that it is unlawful for a person to “carry concealed on his or her person any deadly weapon other than a firearm”); see also SMC 12A.14.083 (proscribing the carrying of certain weapons in public places but not firearms).

Under state law, provided that a person has a license to carry a concealed weapon, he or she is permitted to carry a concealed pistol on his person. RCW 9.41.050(1)(a); See

⁶ The Second Amendment provides: “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”

⁷ Article I, section 24 provides in pertinent part: “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired...”

RCW 9.41.070 (firearm licensing statute proclaims, “[t]he ... constitutional right to bear arms shall not be denied” and sets forth narrow circumstances in which application for a license to carry a concealed pistol may be refused). Under local and state law, carrying a firearm is only a crime if it (a) is brandished in a manner that threatens other people or (b) is discharged in public. RCW 9.41.270; RCW 9A.36.011, .021; SMC 12A.14.071.

The anonymous 911 caller in this case reported a Hispanic man in a light-blue hoodie with a gun. 1RP 5, 7. There was no report that the man had pointed the gun at anyone and the caller denied that he had been threatened with the gun when specifically asked by the 911 operator. 1RP 67, 69, 81; Supp. CP __ (Pretrial Ex. 4). The caller’s identity was not known. 1RP 5, 81-82. Mr. Cardenas-Muratalla was not displaying a gun when the police arrived at the scene, and none of the several people around him appeared to be alarmed or concerned by his presence. 1RP 70, 100-01.

The trial court found,

Although the caller had not been threatened, [he] was apparently sufficiently alarmed that he wanted to warn the police of the man's presence with a gun, which caused alarm for public safety.

CP 79.

This finding is not borne out by the facts, nor is it a reasonable inference from the evidence. While it is certainly true that the caller wanted to alert the police of the man's presence, it does not naturally follow that the gun had been displayed in a manner which caused alarm for public safety, as no information was supplied to support this inference. The alternative construction of the trial court's finding is that a person with a gun will always cause alarm for public safety. This finding conflicts with and undermines the constitutional right to bear arms, which the Legislature has pronounced "shall not be denied." RCW 9.41.270.

4. The finding that an anonymous report of a person with a gun supplied a basis to reasonably suspect criminal activity conflicts with *Florida v. J.L.*

The trial court's finding also conflicts with United States Supreme Court precedent. In *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), the Supreme

Court held that an anonymous tip that a person is carrying a gun is, without more, insufficient to justify a police officer's stop and frisk of that person. 529 U.S. at 268. In J.L., an anonymous caller reported that a young man in a plaid shirt was carrying a gun. Id. The Court held that without more, the anonymous tip did not suffice to create a predicate for a stop and frisk. Id. at 269-72. While it acknowledged that “[f]irearms are dangerous, and extraordinary dangers sometimes justify unusual precautions”, the Court declined to craft an “automatic firearm exception” to its “established reliability analysis.” Id. at 272-73. The fact that the caller had accurately described the young man did not alter the analysis: “[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.” Id. at 272.

This Court followed J.L. in State v. O’Cain, 108 Wn. App. 542, 554-55, 31 P.3d 733 (2001) (anonymous tip provided “no means ... from which to measure the basis of knowledge and reliability” of person making stolen vehicle report) and State v. Hopkins, 128 Wn. App. 855, 117 P.3d

377 (2005). In Hopkins, a citizen informant reported to police his suspicion that a minor might be carrying a gun. 128 Wn. App. at 858. The police took no action to independently confirm the informant's reliability or his basis of knowledge; instead, the police simply assumed that the information supplied in the call was true. Id. at 858-59. The Court held that the State failed in its initial burden of proving the caller's reliability. Id. at 863. The Court further held that the information provided in the call, standing alone, could not supply a lawful predicate for a Terry stop. Id. at 865-66.

In Hopkins, in contrast to this case, the information supplied by the caller at least described a crime, specifically, unlawful possession of a firearm by a minor. See RCW 9.41.040. In this case, not only was there no effort to corroborate the caller's reliability, the report given by the anonymous caller did not even describe a crime. Nor did the officers' observations independently confirm the veracity of the caller's report, as the officers did not see Mr. Cardenas-Muratalla displaying a weapon and none of the people

around him appeared to be alarmed or concerned by his presence. 1RP 70, 100-01; Side-by-Side Video.

In short, under J.L. and this Court's precedent, it was improper for the trial court to infer from the mere fact of the anonymous call that the information relayed in the call was true or that it "caused alarm for public safety." CP 79. The finding must be stricken. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994) ("A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal").

5. The officers' remaining observations were insufficient to justify a Terry stop under Gatewood and Doughty.

The State appropriately conceded below that Mr. Cardenas-Muratalla was seized when Officer Myers yelled at him to "get down on the ground."⁸ 1RP 140, 144. The trial court nevertheless attempted to distinguish J.L. on the basis that the place where Mr. Cardenas-Muratalla was found was characterized as a high-crime area, and Mr. Cardenas-Muratalla's eyes allegedly widened when he saw

⁸ Commanding a person to stop is a seizure. Gatewood, 163 Wn.2d at 540 (citing State v. O'Neill, 148 Wn.2d 564, 577, 62 P.3d 489 (2003)).

the police. CP 85. However the Washington Supreme Court has refused to find that similar facts created a sufficient predicate for a Terry stop.

In Doughty, the defendant was stopped on suspicion of drug activity after he visited a suspected drug house late one night. 139 Wn.2d at 59. The Supreme Court held that these facts did not create a reasonable suspicion of criminal activity and reversed Mr. Doughty's convictions. Id. at 64. The Court emphasized: "A person's presence in a high-crime area at a 'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." Id. at 62.

In Gatewood, as police in a marked patrol car drove past a bus shelter, Mr. Gatewood's eyes widened, and he twisted his body to the left, according to the officer "as if he was trying to hide something." 163 Wn.2d at 537. In holding that these observations did not support a Terry stop, the Court held, "[s]tartled reactions to seeing the police do not amount to reasonable suspicion." Id. at 545.

Here, similarly, it is hardly surprising that a person might look startled when illuminated by a police stoplight,

even if the person is entirely innocent of criminal activity. A look of startlement does not gain added significance simply because the person happens to be in a so-called “high crime area.”⁹ See State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (“Presence in a high crime area at night is not enough. The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so.”) The trial court nevertheless found that Mr. Cardenas-Muratalla’s “look of surprise ... corroborated the officers’ fear that the defendant possessed a weapon in this high crime area.” CP 85.

This determination of the facts is contrary to Gatewood. Again, it must be emphasized that the information supplied by the anonymous 911 caller did not describe a crime. Cf. J.L., 529 U.S. at 272. Save for the alleged look of startlement, the officers’ observations did not corroborate the caller’s report; Mr. Cardenas-Muratalla was

⁹ It must be remembered that the area in question was Third Avenue and Yesler Way, across from the King County Courthouse, in downtown Seattle. To broadly designate swathes of downtown Seattle “high-crime areas” and in this way strip away constitutional protections sets a dangerous precedent. Further, Officers Myers and Lang called the location a “high-crime area” in part because it is an “epicenter of social services” for the poor, homeless, and mentally ill. 1RP 32, 104. It is not a crime to be poor, homeless, or mentally ill.

not displaying a weapon and the persons around him seemed neither alarmed nor concerned for their safety.

Officer Myers claimed that he observed Mr. Cardenas-Muratalla “fluffing” his sweatshirt, a gesture that he professed to recognize as an attempt to hide a weapon in his waistband. 1RP 12, 38-39. The trial court noted this testimony in its findings of fact. CP 80-82. There are several reasons these findings should be stricken, however.

First, and most importantly, the DESC video does not show any such behavior. Side-by-Side Video. In the video, from the time that the officers first noticed Mr. Cardenas-Muratalla until Officer Myers commanded him to “get down on the ground,” Mr. Cardenas-Muratalla appeared to be talking on a cell phone. His hand was not by his waistband and the video shows no “fluffing” gesture. Side-by-Side Video.

Second, Officer Lang did not corroborate Officer Myers’s account of what happened. Officer Lang said that Mr. Cardenas-Muratalla was standing in a doorway with two other people when the police drove up. 1RP 86. He was not

doing anything suspicious. Id. She said he was holding a cell phone to his ear as they approached and was still holding the phone as he moved away in a “slow shuffle.”¹⁰ 1RP 86-88. She said that one of Mr. Cardenas-Muratalla’s hands was “swinging free” and the other was holding a phone by his ear. 1RP 97. Officer Lang did testify that she found the fact that Mr. Cardenas-Muratalla walked away after being commanded to stop suspicious, but she conceded that there were several people present, and that Officer Myers never said anything to specifically call attention to Mr. Cardenas-Muratalla when he yelled the command to “get down on the ground.”¹¹ 1RP 88, 90.

Third, Detective Duffy’s statement for determination of probable cause did not mention the alleged “fluffing” behavior. CP 3, 8-9. Detective Duffy spoke with Officers

¹⁰ Officer Myers’ testimony differed in other material respects from the Side-by-Side Video and Officer Lang’s testimony. For example, Officer Myers claimed that Mr. Cardenas-Muratalla moved away from the doorway at a speed faster than a normal walking pace. 1RP 18. Officer Lang described Mr. Cardenas-Muratalla’s movements as a “slow shuffle” and the side-by-side video confirms the accuracy of her description. 1RP 88; Side-by-Side Video; See also Gatewood, 163 Wn.2d at 541 (holding that walking away after noticing a patrol car does not create a reasonable suspicion of criminal activity).

¹¹ Since the seizure occurred when Officer Myers ordered Mr. Cardenas-Muratalla to get down on the ground, his walking away is not relevant to the constitutional analysis. Gatewood, 163 Wn.2d at 540.

Myers and Lang almost immediately after the incident. Since Officer Myers later claimed the “fluffing” was an integral reason why he responded as he did, it can be strongly inferred that he failed to mention the “fluffing” to Detective Duffy. If he had, she would have included it in her certification.

Officer Myers was driving the patrol car as it went past Mr. Cardenas-Muratalla, made a “hard left”, and then pulled into position facing the doorway. 1RP 7, 16; Side-by-Side Video. Bare seconds elapsed before Officer Myers commanded Mr. Cardenas-Muratalla to “get down on the ground.” Side-by-Side Video. Even if it were credible that in this extremely brief period of time Officer Myers observed Mr. Cardenas-Muratalla “fluffing” his sweatshirt away from his body, “from his vantage point in the passing patrol car, [Officer Myers] could not have seen much.” Gatewood, 163 Wn.2d at 541.

Even assuming for the sake of argument that the “fluffing” behavior occurred, it does not supply a predicate for the stop. While no Washington court has addressed the

question, courts in other jurisdictions generally have held that “fluffing” behavior or adjustments to clothing as if to conceal a weapon is not a proper basis for a Terry stop absent (a) some facts tending to independently confirm that the suspect is indeed trying to conceal a weapon and (b) a reasonable suspicion of criminal activity. See In re Jeremy P., 11 A.3d 830, 838-43 (Md. App. 2011) (collecting and analyzing cases).

As the Maryland Supreme Court declared in a case similar to this one:

We are fully cognizant of dangers constantly lurking on our streets and of the plight of conscientious police officers who have to make split-second decisions in balancing their duties, on the one hand, to detect and prevent crime and assure their own safety while, on the other, respecting the dignity and Constitutional rights of persons they confront. The conduct here, on the record before us, crossed the line. If the police can stop and frisk any man found on the street at night in a high-crime area merely because he has a bulge in his pocket, stops to look at an unmarked car containing three un-uniformed men, and then, when those men alight suddenly from the car and approach the citizen, acts nervously, there would, indeed, be little Fourth Amendment protection left for those men who live in or have occasion to visit high-crime areas.

Ransome v. State, 816 A.2d 901, 908 (Md. 2003).

In sum, the various circumstances described by the officers failed to supply a lawful predicate to stop Mr. Cardenas-Muratalla. The 911 caller did not report illegal activity. Mr. Cardenas-Muratalla was not doing anything illegal or suspicious when the police arrived. He simply matched the description of the person alleged by the 911 caller to have a gun. This Court should conclude that the police exceeded their constitutional authority when they commanded Mr. Cardenas-Muratalla to get down on the ground.

6. Officer Myers's testimony regarding why he shot Mr. Cardenas-Muratalla is contradicted by the video evidence.

Given that Mr. Cardenas-Muratalla was seized when he was ordered to "get down on the ground," it is not clear why the trial court made factual findings regarding the shooting that followed immediately thereafter. To the extent that these facts are even relevant to the "totality of the circumstances" analysis (the State failed to persuade the trial court below that they were), this Court should conclude

that Officer Myers's testimony is contradicted by the weight of evidence in the record.

Most critically, Officer Myers claimed, and the trial court found, that Mr. Cardenas-Muratalla "lifted the hem of his sweatshirt with his left hand and started to reach towards a gun shaped object in the front of his waistband with his right hand" and that he "continued to hold up the hem of his sweatshirt with his left hand and reached toward his waist with his right hand." CP 82. Although the court adopted this proposed finding of fact, which had been drafted by the State, the court drew a line striking through an additional proposed finding that Officer Myers could see an item which was "clearly visible as a gun" and "tugged on the gun attempting to free it from his waistband." CP 83.

The trial judge stated during his oral ruling that he could not tell from the video whether Mr. Cardenas-Muratalla "made a move that the police interpreted as threatening" but commented that he found it "kind of implausible that the defendant would have drawn an

unloaded gun on a police officer.” 2RP 4-5. In its written findings of fact, the court found:

As the defendant walked northbound on the sidewalk, he brought his hands in front of him at his waist-line, where the police suspected he was concealing a weapon. And when told to stop by the Police, the Def continued advancing northbound, then when confronted by Officer Lang he spun away in a manner that Officer Myers perceived as threatening and as part of a movement to draw his weapon. Whether or not the Def in fact intended to draw his weapon, which was later determined to be unloaded, the Court cannot determine.

CP 82.

In the absence of a factual finding on a contested issue, this Court must indulge the presumption that the party with the burden of proof – here, the State – failed to sustain their burden on the issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). This Court should find that Officer Myers’s testimony about why he shot Mr. Cardenas-Muratalla lacks evidentiary support.¹² To the

¹² On this point, it is noteworthy that after reviewing the evidence, the State did not charge Mr. Cardenas-Muratalla with assault in the second degree. See King County Filing and Disposition Standards, Criminal Division 84 (Rev. 2005):

Assault cases will be filed if sufficient admissible evidence exists which when considered with the most plausible, reasonably foreseeable defense that could be raised under

extent that the trial court made conflicting findings, the court clearly did not find that Mr. Cardenas-Muratalla attempted to draw his gun. Findings reaching a contrary conclusion must be stricken.

7. The remedy is suppression.

Whenever the rights protected by article I, section 7 are violated, the exclusionary remedy must follow. Winterstein, 167 Wn.2d at 632. “The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.” State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). The same remedy is compelled under the Fourth Amendment. Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Under article I, section 7 and the Fourth Amendment, the evidence should have been suppressed. Since the evidence supplied the basis for Mr. Cardenas-Muratalla’s prosecution, his conviction must be reversed, and the charge dismissed with prejudice.

the evidence, would justify conviction by a reasonable and objective fact-finder.

F. CONCLUSION

The “totality of the circumstances” analysis squarely forecloses the stop that occurred here from being constitutional. Mr. Cardenas-Muratalla did nothing to warrant suspicion that he committed or was about to commit a crime. He did not display a gun in a threatening manner or a manner that warranted concern for the safety of others. He simply had the misfortune to be on Third Avenue near Yesler Way at 10:00 p.m., and he was startled when the police shined a spotlight on him. For this conduct he was ordered to the ground and, when he did not immediately comply, he was shot. This Court should conclude that the police command was an unlawful seizure and reverse his conviction.

DATED this 5th day of November, 2012.

Respectfully submitted:

Maura M. Cyr (28724) for

SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68057-92-I
v.)	
)	
JOSE CARDENAS-MURATALLA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF NOVEMBER, 2012, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] JOSE CARDENAS-MURATALLA 779035 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272-0777	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF NOVEMBER, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710