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COURT OF APPEALS

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NO. 34355-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

MARC WILLIAM RAILSBACK,

Appellant.

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BRIEF OF APPELLANT

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 ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it denied the defendant's motion to suppress evidence the police obtained after detaining the defendant in violation of his right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment.

2. The trial court erred when it found that "Sergeant Graaff confirmed through dispatch that Railsback was on probation" because substantial evidence does not support this finding.

### ***Issues Pertaining to Assignment of Error***

1. Does a court err if it denies a defendant's motion to suppress evidence when the police obtain that evidence as a result of detaining the defendant in violation of his or her right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment?

2. Does a trial court err when it enters a finding of fact unsupported by substantial evidence?

## STATEMENT OF THE CASE

Just after midnight on June 30, 2005, Vancouver Police Officer Graaff was driving his marked patrol car at the intersection of 104<sup>th</sup> Street and Mill Plain when he observed the defendant pull out of a gas station and commit two traffic infractions. RP 35-37.<sup>1</sup> Upon seeing this, he pulled behind the defendant's vehicle and turned on his overhead lights. *Id.* Instead of pulling over immediately the defendant pulled into the parking lot of an adjacent apartment complex and parked in front of one of the buildings. *Id.* Officer Graaff then stopped his car, waited about 15 seconds, and approached the driver's side of the defendant's vehicle. RP 37-38. The defendant was behind the wheel and a slightly buildt Asian male was in the front passenger seat. *Id.* Neither the defendant nor the passenger made any furtive moves and both had their hands in sight at all times. RP 76-77.

Upon reaching the driver's side of the vehicle, Officer Graaff asked for the defendant's licence and registration, which he produced without any problem. RP 37-38. Officer Graaff also asked the defendant if he had any drugs on him or in the car. RP 82. However, Officer Graaff noticed that the defendant appeared extremely nervous. RP 37-38. The defendant's

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<sup>1</sup>The record in this case includes five continuously numbered verbatim reports of the suppression hearing held on December 7, 8, 21, 23 and 27, 2005. It is referred to herein as "RP."

nervousness gave Officer Graaff a “really bad feeling.” RP 38-39. In the officer’s words, “I did not feel absolutely in danger. I felt I was worried.” RP 141. As a result, Officer Graaff asked the defendant to get out of the vehicle and accompany him back to the patrol car. RP 38-39. The defendant complied. *Id.* Officer Graaff claimed that he asked the defendant to accompany him back to his patrol vehicle for “officer safety.” *Id.* However, he did not articulate any reason for this need other than the defendant’s nervousness. RP 34-154. He stated that he did not suspect either person of committing a crime. RP 95. Neither person acted in any threatening manner. RP 141. In fact, both the defendant and the passenger were completely cooperative during their whole encounter with the police and Officer Graaff felt that he had no legal justification to place the defendant in handcuffs. RP 141-142..

Instead of running the defendant’s license and either issuing a citation or a warning, Officer Graaff decided to wait until a backup officer arrived. RP 42. As a result, Officer Graaff called for backup and then proceeded to interrogate the defendant as to why he was so nervous. RP 41-42. Initially the defendant indicated that he was on active probation and he was worried about getting in trouble with his probation officer. RP 40. Upon hearing this information, Officer Graaff ran the defendant’s name on his computer and verified that he was on probation. RP 41. Thinking that the defendant’s

probation officer might want to come to the scene, Officer Graaff also called for the probation officer. RP 42-43. Officer Graaff never explained just exactly why he could spend the time checking the defendant's probation status on the computer but couldn't just issue him a citation instead and let him go about his business. RP 34-154.

After checking the defendant's probation statutes, Officer Graaff returned to interrogating the defendant. RP 41-42. This time he asked the defendant to "really tell him" why he was so nervous. *Id.* The defendant then responded that when the officer had turned on his lights, the passenger had tossed him a baggie and told him to hide it. *Id.* The defendant thought the baggie might have ecstasy tablets in it. *Id.* About 10 minutes after placing the call for backup a second officer arrives, then two probation officers, then a further backup officer. RP 42-45. When the probation officers arrive Officer Graaff told him what the defendant had said. RP 50-52. Based upon this information, one of the probation officers searched the defendant's vehicle and found a baggie with five ecstasy tablets and a baggie of marijuana. RP 57-59. Officer Graaff then arrested the defendant for possession of the ecstasy tablets and the passenger for possession of the marijuana. *Id.*

After the officers arrested the defendant and the passenger, one of the upstairs apartment tenants came out and told the officers that the downstairs

tenants had tossed a baggie out of the back of their apartment after the passenger in the defendant's vehicle had made a cell phone call. RP 62. The officers then searched around the apartment and found a large baggie of marijuana. RP 160-744. The officers also searched the downstairs apartment and arrested two people inside. *Id.* The state did not charge the defendant out of these further searches. CP 1-2.

By information filed July 8, 2005, the Clark County Prosecutor charged the defendant with one count of possession of methylenedioxymethamphetamine (ecstasy) and the passenger with one count of possession of marijuana with intent to deliver and one count of conspiracy to deliver marijuana. CP 1-2. The state also charged the two residents of the downstairs apartment with possession of marijuana with intent to deliver and delivery of marijuana. CP 1-2. All four defendants filed motions to suppress arguing that Officer Graaff had exceeded the scope of a valid infraction stop. CP 13-20; RP 1-903. The other defendants also argued that the police violated their rights under Washington Constitution, Article 1, § 7, when they searched inside and outside their apartment. *Id.* The court later held a joint suppression motion with the state calling nine different witnesses and the defense calling one over six separate days of testimony. *Id.*

The trial court later entered an order denying the defendants' motions to suppress on the basis of the initial detention but granting the co-

defendants' motions to suppress as concerned the search inside and outside their apartment. CP 97-110. That portion of the court order relating to the defendant's motion stated as follows:

On June 30, 2005, Sgt. Joe Graaff, a patrol officer for the Vancouver Police Department was traveling northbound on 104<sup>th</sup> Avenue in Vancouver at approximately 12:05 a.m. when the car driven by the defendant Marc Railsback exited the parking lot of a nearby AM-PM market, pulling in front of the officer's patrol vehicle and proceeded northbound in the oncoming lane of traffic before making a left turn into the Maple Ridge Apartments on 104<sup>th</sup> Avenue. Based upon the Defendant's driving, Sgt. Graaff activated the overhead lights on his vehicle and followed the defendant's car into an apartment parking lot. The driver continued driving after entering the parking lot, made a turn, and then pulled into a parking spot. Sgt. Graaff made contact with the driver at his car and asked him for his driver's license, vehicle registration and proof of insurance. The driver produced his driver's license and vehicle registration.

Sgt. Graaff noticed that the driver, Defendant Railsback was acting extremely nervous, his head was moving from right to left, his eyes were darting back and forth to the floorboard of the car and his body was trembling. Based on Railsback's behavior, the fact that Sgt. Graaff was alone, that there was a passenger in the vehicle, the time of day which was approximately 12:07 a.m., the fact that Railsback did not stop immediately or shortly after Sgt. Graaff turned on his overhead lights, but continued traveling into the parking lot of an apartment complex, Sgt. Graaff asked Railsback to exit the car.

Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver a de minimus intrusion upon the drivers' privacy. *State v. Mendez*, 137 Wn. 2d 208 (1999).

After ordering Railsback out of his car, Sgt. Graaff asked him why he was acting so nervous. Railsback responded he was on probation and didn't want to get into trouble. As a result of Railsback's behavior, the fact that he was on probation and not being

able to fully watch the passenger in the car while he was talking to Railsback, Sgt. Graaff, concerned for his safety while controlling the scene, called dispatch for a back up officer. While waiting for the back up officer to arrive Sgt. Graaff confirmed through dispatch that Railsback was on probation and continued to talk to him. Sgt. Graaff asked Railsback if there was something in the car that might harm him. Railsback told Sgt. Graaff that the passenger in his car tossed him a bag after they saw the police car and told Railsback to stash the bag. Railsback said he thought the bag might have Ecstasy tablets in it. The back up officers, Wilken and Free arrived at the scene while Sgt. Graaff was talking to Railsback at approximately 12:19 a.m. according to the computer aided dispatch log (CAD). At approximately the same time Wilken and Free arrived Sgt. Graaff called dispatch asking for a Department of Corrections officer to come to the scene. This was based on Railsback's statements to Sgt. Graaff that he was on probation and there was a possibility drugs were involved in this incident. Sgt. Graaff then detained Railsback in the back of his patrol vehicle with the door left open. Railsback was not handcuffed. Sgt. Graaff and Officer Wilken have the passenger identified as Tin Trans. exit the car, pat him down for weapons and question him about Railsback's statement. While questioning Mr. Trans, DOC officers Campbell and Degrade arrive at approximately 12:28 a.m. After being advised by Sgt. Graaff what defendant Railsback said DOC Officer Campbell questions him. Based upon Railsback's statement, Campbell concluded that he had violated conditions of his probation by committing the traffic infractions and associating with a drug user or dealer, Tin Tran. Campbell then arrests Railsback and places him into custody. Campbell begins searching the vehicle pursuant to R.W. 9.94A.631 and discovers marijuana and Ecstasy during the search.

After the reading their constitutional rights to the defendants Railsback and Tin Tran, Railsback admitted that he was purchasing the marijuana from Than and that he was in possession of the Ecstasy tablets from earlier that day. Tran also admitted that he was selling the marijuana to Railsback.

This court concludes that it was reasonable for Sgt. Graaff to detain defendant Railsback for approximately ten minutes while the back up officers arrived. In balancing the privacy interest of defendant Railsback against Sgt Graaff's concern for his safety the

ten minute interval between the traffic stop and the back up officer's arrivals was a "minimal and insignificant intrusion."

Having concluded that the detention of Railsback while waiting for the backup officers was reasonable, the next issue is whether the detention of the Defendants Railsback and Tin Tran were reasonable while waiting for the arrival of the DOC officer. According to the testimony of Sgt. Graaff, Defendant Railsback was sitting in his patrol car when the DOC officers arrived. Defendant Tin Tran was being interviewed by officer Wilken and was laying on the ground, after being patted down for weapons, because he was feeling faint and light headed. This is all occurring simultaneously to the arrival of the DOC officers. Based upon these facts this court concludes that because the DOC officer's arrival occurred during the detention of the defendants by the law enforcement officers there was no discernible period of time that the Defendants were being detained solely for the purpose of awaiting the DOC officer's arrival. Thus, following the holding of *State v. Mendez* above, this court finds that any violation of the Defendants freedom from intrusion was "de minimus". Therefore the search of Defendant Railsback's car was lawful and the marijuana and Ecstasy seized as a result of the search is lawful.

CP 97-102.

The court later found the defendant guilty upon stipulated facts and sentenced him within the standard range. CP 139-141, 143-157. The defendant then filed timely notice of appeal. CP 142.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED AFTER DETAINING THE DEFENDANT IN VIOLATION OF HIS RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT

The stop of an automobile is a seizure of its occupants and must measure against the limitations found in Washington Constitution Article 1, § 7, and United States Constitution, Fourth Amendment. *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). In addition, although the initial stop of a vehicle might be valid, once the initial justification ends, any further detention violates the driver and occupant's right to privacy. *State v. Tijerina*, 61 Wn.App. 626, 811 P.2d 241, *review denied*, 118 Wn.2d 1007 (1991).

For example, in *State v. Tijerina, supra*, a police officer stopped the defendant's vehicle for crossing the fog line. After the stop, the driver produced a valid license and registration, and the officer decided not to issue a citation. The officer then asked the driver to consent to a search of the vehicle. After obtaining consent, the officer searched the vehicle, found drugs, and arrested the defendant. The Court of Appeals said the following concerning the validity of the search.

The stop of an automobile is a seizure of its occupants and must therefore be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d

445 (1986). In evaluating investigative stops, the court must determine: (1) Was the initial interference with the suspect's freedom of movement justified at its inception? (2) Was it reasonably related in scope to the circumstances which justified the interference in the first place? *Terry v. Ohio*, 392 U.S. 1, 19-20, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In determining the proper scope of the intrusion, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of time the suspect is detained. *Williams*, at 740.

Here, the initial stop of Mr. Tijerina for crossing over the fog line was justified. The sergeant's request to verify Mr. Tijerina's license and registration was reasonably related to the purpose of the stop. However, once the sergeant made the decision not to issue a citation and returned the driver's license and registration to Mr. Tijerina, any further detention had to be based on articulable facts from which the sergeant could reasonably suspect criminal activity. *State v. Gonzales*, 46 Wn.App. 388, 394, 731 P.2d 1101 (1986).

*State v. Tijerina*, 61 Wn.App. at 628-29.

Similarly, in *State v. Cantrell*, 70 Wn.App. 340, 853 P.2d 479 (1993), a state patrol officer stopped a vehicle for speeding, obtained the driver's license and registration, and issued a speeding citation. After issuing the citation, the officer asked the driver if he had any contraband in the vehicle. The officer then obtained the driver's consent to search, found drugs in the car, and arrested the passenger. The passenger later moved to suppress, which motion the trial court denied. Following conviction, the defendant appealed, and the Court of Appeals reversed. The court stated:

To this point, our case is essentially indistinguishable from *Tijerina*. Here, as in *Tijerina*, the initial traffic stop was justified. Once the purpose of the stop was fulfilled by issuance of a speeding

ticket, however, the trooper had no right to detain the car's occupants further absent articulable facts giving rise to a reasonable suspicion of criminal activity. As in *Tijerina*, the trooper failed to provide such facts. His unexplained desire to start searching the car for containers of alcohol is, if anything, even less defensible than the trooper's unreasonable suspicion in *Tijerina* that the presence of motel soap in a vehicle occupied by Hispanics indicated the presence of drugs.

*State v. Cantrell*, 70 Wn.App. at 344.

Similarly, in the case at bar, even if Officer Graaff was justified in stopping the defendant's vehicle for a suspected infraction, he only had the right to check the defendant's license, and either issue the citation or a warning. In this case, as in *Tijerina*, Officer Graaf exceeded the valid scope of the detention. Instead of issuing a citation, which he arguably had a right to do, as did the officer in *Tijerina*, he held the defendant outside his vehicle and interrogated him while he awaited the arrival of another police officer and a probation officer. Thus, in the same manner that the continued detention in *Tijerina* violated the defendant's right to privacy in *Tijerina*, thereby invalidating the subsequent consent to search, so the continued detention in the case at bar violated the defendant's right to privacy, thereby invalidating (1) the officer's continued interrogation of the defendant and (2) the probation officer's subsequent search of the defendant's vehicle. Consequently, in the same manner that the evidence should have been suppressed in *Tijerina*, so in the case at bar, the evidence should have been suppressed.

In this case the state argued and the court found that Officer Graaff's continued detention of the defendant was justified for "officer safety" reasons as outlined in *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999). However, as the following examination of this case explains, the claim of "officer safety" is not a magical incantation that the police and the prosecution can invoke to inevitably justify an unreasonable detention such as the one in this case. The following examines this case.

In *Mendez*, two police officers in a patrol car saw a vehicle run a stop sign. The officers pulled behind the vehicle and activated their overhead lights. The vehicle that had committed the infraction then stopped and two juvenile males got out. As the police officers approached, the passenger started to walk away. As he did, one of the officers ordered him to get back in the vehicle. The passenger then ran away and one of the officers pursued him. That officer eventually caught the passenger and arrested him for obstructing. In a search incident to arrest the officer found drug paraphernalia on the passenger. The state later charged the passenger with obstructing and possession of drug paraphernalia.

At a combined trial and motion hearing the defendant argued that the evidence seized during the search of his person should be suppressed because he had not committed a crime and his arrest was illegal. The court denied the motion and found him guilty of both counts. On review the court of appeals

affirmed, finding that under the decisions in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), and *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), ordering the passenger to stay in a vehicle during a stop for a traffic infraction was a de minimus intrusion into the passenger's privacy rights and did not violate the Fourth Amendment. The defendant then sought and obtained review by the Washington Supreme Court.

In its analysis the court declined to review the case solely under the Fourth Amendment. Rather, the court relied upon the enhanced privacy rights available under Washington Constitution, Article 1, § 7. Under this provision the court held as follows:

Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a de minimis intrusion upon the driver's privacy under Art. I, § 7. *See Kennedy*, 107 Wash.2d at 9, 726 P.2d 445.

However, with regard to passengers, we decline to adopt such a bright line, categorical rule. A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy Art. I, § 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy. But to the extent such an objective rationale exists, the intrusion on the passenger is de minimis in light of the larger need to protect officers

and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.

*State v. Mendez*, 137 Wn.2d at 220.

Applying this standard to the facts before it the court in *Mendez* vacated the conviction and remanded the case with instructions to grant the motion to suppress. The court held;

We hold the trial court erred in finding the stop of Mendez satisfied Terry. We further hold the officers did not meet the objective rationale test under Art. I, § 7 we have articulated in this case that would allow them to order Mendez back into the vehicle. Officer Hartman testified he had no suspicions Mendez had engaged or was about to engage in criminal conduct. Neither officer testified that Mendez's actions in reaching inside his clothing aroused any suspicion. Besides, Mendez did not reach inside his clothing until after he had been seized by Officer Hensley's command to return to the car. "Obviously, once an individual is 'seized,' no subsequent events or circumstances can retroactively justify the 'seizure.'" *State v. Stinnett*, 104 Nev. 398, 760 P.2d 124, 126 (1988).

*State v. Mendez*, 137 Wn.2d at 224.

In the case at bar, the trial court denied the defendant's motion to suppress finding that under *Mendez* an officer making a valid traffic stop may order the driver to either remain in the vehicle or exit the vehicle as the officer thinks best. In so holding the court misinterpreted both the holding in *Mendez* as well as the defendant's arguments. It misinterpreted *Mendez* because that case did not deal with the validity of the continued detention of the driver. The court's holding further misinterpreted the defendant's

argument because the defense did not claim that the officer violated Washington Constitution, Article 1, § 7, when he ordered the defendant out of the vehicle. Rather, the defense argued that the officer violated Washington Constitution, Article 1, § 7, when he exceeded the scope of a valid stop for a traffic offense by (1) failing to either issue the defendant a citation or a warning after he had him out of the vehicle, (2) by interrogating the defendant concerning the presence of drugs, and (3) by continuing to detain the defendant until another police officer and a probation officer could come to the scene. As reference to the decision in *State v. Henry*, 80 Wn.App. 544, 910 P.2d 1290 (1994), explains, these actions cannot be justified as either a *Terry* detention or as actions arising out of a concern for safety.

In *Henry, supra*, a deputy sheriff stopped the defendant's vehicle for failure to stop and failure to signal. Upon approaching the vehicle the deputy noticed a police scanner on the front seat and asked the defendant if he was involved in law enforcement. The defendant stated that he was not. The deputy also noted that the defendant had glassy eyes, moved slowly, and acted "kind of like he was in some type of a daze or something of that nature." At this point the deputy asked the defendant for his license, registration, and insurance. The defendant did not appear to know where these items were but eventually produced them. Noting that the defendant

was acting very nervous and being concerned for his safety, the deputy asked if he could search his person and the vehicle for weapons. The defendant consented and got out of the vehicle at the deputy's request. During this exchange the deputy called for backup. Once a backup officer arrived they searched the defendant for weapons and uncovered a drug pipe and methamphetamine. They then placed him under arrest.

The state later charged the defendant with possession of methamphetamine and the defendant moved to suppress the evidence seized on the basis that the deputy's continued detention exceeded the scope of a valid traffic stop. The trial court denied the motion and the defendant appealed his later conviction. On appeal the state argued that the defendant has consented to the search and that based upon the need for officer's safety the brief detention did not violate the defendant's rights to privacy. In addressing the officer safety portion of the argument the court quoted the following from the cross-examination of one of the officers.

Q. And you just sort of felt nervous or some feeling of anxiety as the whole matter progressed; is that correct?

A. Correct.

Q. That nervousness and anxiety wasn't anything you could point your finger on and say this is the reason he was nervous; do you understand what I mean?

A. Not really.

Q. You didn't see any particular action that Mr. Henry made, such as throwing something out of the car or deliberately reaching into his pocket or throwing something over the back seat of the car as you approached, anything of that nature?

A. No, sir.

Q. That's what I mean. There is nothing you can say this particular action or this gesture was the reason I started feeling nervous and worried about things; is that fair to say?

A. Correct.

Q. And likewise there wasn't any reason as your conversation with Mr. Henry progressed to think that any specific reason--I mean to think that he had just committed a crime?

A. Well, I just knew he was a lot more nervous than the majority of people I do stop, and like I say I have been involved with law enforcement now for six years between working at different places, two years as a Reserve down at Prosser as well as four years here.

I believe I have a very good feel for people, you know, upon contacting them. Yes, I have been pulled over before in my past before and I am nervous, too, but generally it will be for a traffic violation, like normal people.

*State v. Henry*, 80 Wn.App. at 547-548.

After quoting the following from the testimony at the suppression hearing, the court reversed the decision of the trial court finding that the facts did not set out a sufficient legal basis for the continued detention of the defendant beyond that time necessary to issue a citation. The court held:

However, it is not unusual for drivers to be unable immediately to find their vehicle's registration and proof of insurance. And "most persons stopped by law enforcement officers display some signs of nervousness." *State v. Barwick*, 66 Wn.App. 706, 710, 833 P.2d 421

(1992). Although Deputy Small testified, based on his experience, that Mr. Henry appeared more nervous than normal, the officer on cross-examination was not able to articulate a basis for his conclusion. Therefore, at the time Deputy Small escalated the routine traffic stop into a Terry stop, he had no objectively reasonable basis for the search. The detention was not a legitimate Terry stop.

Deputy Small hinted at what may have been his real motivation for the detention when he testified he told Mr. Henry he “was looking for weapons or anything else he had on him” and “I figured he had a multitude of things, maybe a weapon, which is my main concern. Who knows, maybe some drug paraphernalia, something of that nature.” (Emphasis ours.) A recent series of decisions from this court has confirmed the principle that, without sufficient justification, police officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches. Here, although Deputy Small justifiably stopped Mr. Henry for two traffic infractions, he converted the routine traffic stop into a more intrusive detention for which he had no objective basis.

*State v. Henry*, 80 Wn.App. at 552-553.

The facts in *Henry* are strikingly similar to the facts in the case at bar. In both cases an officer stopped the defendant during the hours of darkness for two minor traffic infractions. In both cases the defendant appeared to be in some sort of a daze, although the officer did not suspect the defendant of driving while intoxicated. In both cases the defendant appeared nervous well in excess of that associated with a normal traffic stop. In both cases the officer called for backup claiming officer safety concerns based upon the defendant’s nervousness. The one distinction between the two cases was that in *Henry* there was one person in the vehicle while in the case at bar there were two people. However, under the facts of the case at bar the presence of

the second person does not distinguish this case from *Henry* because the officer himself admitted in his testimony that the passenger did not appear nervous and did not pose a threat in any manner whatsoever. Thus, just as the officer in *Henry* could not justify his continued detention of the defendant based upon the rubric of "officer safety," so the officer in the case at bar cannot justify his continued detention of the defendant under the rubric of "officer safety."

The case at bar also contains another striking similarity to *Henry*. In *Henry* the court focused upon the fact that in his initial contact with the defendant the officer was asking about the presence of drugs. As noted above, the court in *Henry* stated:

Deputy Small hinted at what may have been his real motivation for the detention when he testified he told Mr. Henry he "was looking for weapons or anything else he had on him" and "I figured he had a multitude of things, maybe a weapon, which is my main concern. Who knows, maybe some drug paraphernalia, something of that nature."

*State v. Henry*, 80 Wn.App. at 553.

The very same thing happened in the case at bar with the officer asking the defendant if he had any drugs in the vehicle as the officer had the defendant get out. RP 82. The officer asked these questions even though he admitted on cross-examination that he did not have reasonable suspicion based upon objective facts that the defendant was engaged in any type of

criminal conduct. RP 95. Thus, in the same manner that the court in *Henry* found that the officer's continued detention of the defendant beyond that time necessary to issue a citation violated the defendant's right to privacy, so this court in the case at bar should hold that the officer's continued detention of the defendant beyond that time necessary to issue a citation violated the defendant's right to privacy.

**II. THE TRIAL COURT ERRED WHEN IT FOUND THAT "SERGEANT GRAAFF CONFIRMED THROUGH DISPATCH THAT RAILSBACK WAS ON PROBATION" BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS FINDING.**

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar the trial court did not enter formal findings of fact or conclusions of law. It did enter its own lengthy "Order Re: Defendants' Motions to Suppress." CP 97-110. This order does not list uncontested findings of fact, contested findings of fact, or conclusions of law. Rather, it is a narrative of mixed facts and findings. In this narrative the court stated the following.

While waiting for the back up officer to arrive Sgt. Graaff confirmed through dispatch that Railsback was on probation and continued to talk to him.

CP 97.

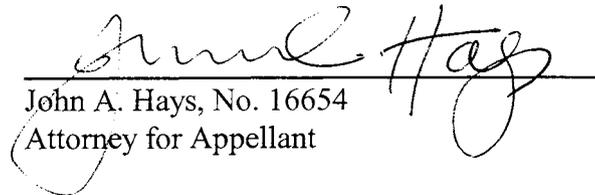
In fact what Officer Graaff testified was that he verified the defendant's probation status on the computer in his patrol vehicle. RP 41. Thus, substantial evidence does not support the court's finding. One can hardly fault the court for erring in this one particular out of 5 separate days of testimony over a 20 day period, particularly when Officer Graaff's testimony was first. However, the distinction between what the court found and what Officer Graaff actually said is critically important because few things Officer Graaff did during his detention of the defendant better support the conclusion that he was not detaining the defendant out of "officer safety" concerns. Certainly if he felt safe enough to verify the defendant's probation status on his computer he felt safe enough to simply write the defendant a citation and let him be about his business.

**CONCLUSION**

The trial court erred when it denied the defendant's motion to suppress. As a result, this court should vacate the defendant's conviction and remand with instructions to grant the defendant's motion.

DATED this 3<sup>rd</sup> day of October, 2006.

Respectfully submitted,

  
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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,  
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

FILED  
COURT OF APPEALS

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STATE OF WASHINGTON  
BY mm  
CITY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

6 STATE OF WASHINGTON, )  
7 Respondent, )  
8 vs. )  
9 MARC WILLIAM RAILSBACK, )  
10 Appellant, )

CLARK CO. NO.0505-1-00493-2  
APPEAL NO: 34291-0-II  
AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON )  
12 COUNTY OF CLARK ) vs.

13 CATHY RUSSELL, being duly sworn on oath, states that on the 31<sup>st</sup> day of OCTOBER,  
14 2006, affiant deposited into the mails of the United States of America, a properly stamped  
envelope directed to:

15 ARTHUR CURTIS  
16 CLARK COUNTY PROSECUTING ATTORNEY  
17 1200 FRANKLIN ST.  
VANCOUVER, WA 98668

MARC W. RAILSBACK  
15005 N.E. 47<sup>TH</sup> ST.  
VANCOUVER, WA 98682

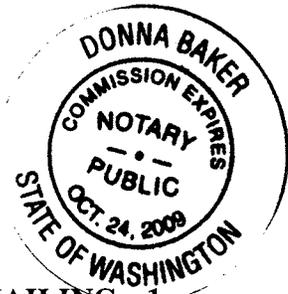
18 and that said envelope contained the following:

- 19 1. BRIEF OF APPELLANT
- 20 2. AFFIDAVIT OF MAILING

21 DATED this 31<sup>st</sup> day of OCTOBER, 2006.

Cathy Russell  
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 31<sup>st</sup> day of OCTOBER, 2006.



Rebecca  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: Kelso, WA 98626  
Commission expires: 10-24-09