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COURT OF APPEALS
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NO. 34668-1-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

LEIF ERIC COLE,

Appellant.

CORRECTED BRIEF OF APPELLANT

**LISA E. TABBUT/WSBA #21344
Attorney for Appellant**

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I. ASSIGNMENTS OF ERROR

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2. ERROR IS ASSIGNED TO FINDING OF FACT 8. WOODLAND POLICE OFFICER MURRAY DID NOT STOP THE TRUCK BECAUSE OF AN OBSCURED LICENSE PLATE.
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7. ERROR IS ASSIGNED TO CONCLUSION OF LAW 3. OFFICER MURRAY HAD NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY AS IT RELATED TO THE

¹ The Findings of Fact and Conclusions of Law referred to in the Assignments of Error are from the suppression motion held on March 14, 2006. They are attached at Appendix A.

**CHURCH. AS SUCH, MURRAY DID NOT HAVE ANY
LAWFUL BASIS FOR A TERRY² STOP.**

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Leif Cole was seized when the car in which he rode as a passenger was stopped by Woodland Police Officer Murray for purported investigative purposes. Because it was a warrantless seizure, the state tried to justify the stop as a Terry stop exception to the warrant requirement. To be a valid Terry stop, Murray would have had to have a reasonable and articulable suspicion that Cole or his companion had engaged or were about to engage in criminal activity at a Woodland church. Murray failed to articulate any such suspicion. Was the seizure of Cole legal?

III. STATEMENT OF THE CASE

A. Procedural History. The Cowlitz County prosecutor charged Leif Eric Cole with a single felony violation of a no contact, protection or restraining order in violation of RCW 26.50.110 and 10.99.020(3). CP 1-2. Cole filed a suppression motion arguing that his warrantless arrest was unlawful under the Fourth Amendment of the United States Constitution and Article 1, Section 7 of the Washington State Constitution. CP 3-5. He asked that all evidence

² Ohio v. Terry, 392 U.S. 1, 20 L. Ed. 2d 889, 99 S. Ct. 1868 (1968).

obtained following the warrantless arrest be suppressed. The state filed a responsive brief. CP 11. The court, Judge Johanson, heard the suppression motion on March 14, 2006. RP³ 4-94.

The court took the issue under advisement. On March 28, the court denied Cole's motion finding that Officer Murray's contact with Cole was a valid Terry stop and Murray also had a valid basis to make a traffic stop. RP 95-98. The court entered written Findings of Fact and Conclusions of Law after hearing argument on the proposed findings and conclusions. RP 99-104; CP 12-15. See Findings of Fact and Conclusions of Law attached as Appendix A.

On April 4, Cole was found guilty as charged at a stipulated facts trial. RP 99, 104-106. The state asserted that Cole's standard range was 15-20 months based upon two prior felony convictions plus an added point for being on community custody at the time of the offense. RP 104. Cole did not object to the inclusion of the two prior felony points in his criminal history. RP 105. He also agreed that he was on community custody at the time

³ There is only one volume of reported proceedings for this case. Within the one volume are all three of the requested verbatim records: the March 14, 2006 suppression motions, pages 4-94; the court's ruling on the suppression motion, pages 95-98; and the stipulated facts trial, pages 99-108.

of his arrest. RP 105. Cole was not, however, asked if he waived his right to a jury on the community custody point. RP 105. Cole was given an allocution opportunity. RP 106. The court imposed 15 months. RP 106.

Cole filed his notice of appeal On April 6. CP 29.

B. Factual History. At the March 14 suppression motion, Woodland police officer Murray testified that on January 17, 2006, at 6:41 a.m., he was on duty. RP 9, 11, 16. He had about 15 years of law enforcement experience. RP 9. He saw a man and woman walk from the back parking lot of the Woodland Christian Church to the front of the church and get into a dark pickup. RP 10, 12-13. Murray thought he recognized the woman as Saddanne Jackowiak. RP 12. He tried to run a warrants check on Jackowiak but was unsuccessful because he did not spell her name correctly. RP 12-13. Jackowiak frequently had felony warrants and he had arrested her in the past for burglaries⁴. Murray knew that Jackowiak was not associated with the truck and he suspected that the truck was stolen because it was “a little too nice for her.” RP 14. If Jackowiak was anywhere around Murray was convinced that a crime must

⁴ Nothing in the record confirmed that Jackowiak had any convictions for burglaries or other crimes.

have been committed because she was involved with “criminal aspects.” RP 19.

Murray fell in behind the truck as it left the parking lot. RP 14. He tried to run the license plate but the trailer hitch obstructed the center digit. RP 15-16. He had decided to contact the couple when he first saw them walking through the church parking lot. RP 17. Murray articulated that

They were pulling out – leaving – and it was just like, Fine, I am going to contact them. I can’t run the plate. I am going to stop them. I’m going to find out why they are back here behind the church.

RP 17. Over the Christmas holidays there had been one church burglary in Ridgefield and two church burglaries in Woodland. RP 17. One of the Woodland burglaries may have occurred after midnight. RP 18-19.

The truck pulled over as soon as Murray turned on the police lights of his patrol car. RP 20. There was no effort to run from Murray. RP 49. Murray further articulated what his intent was when he stopped the truck.

Well, again, I am thinking it was Saddanne Jackowiak; why are they here? Why are they in this vehicle? Why are they coming out from behind the church?

I was thinking – because typically I find her on foot or in someone else’s vehicle.

....

I thought I was going to be able to run her, check her, and then contact them walking down the street. When they got in the vehicle, it just sped things up, and my mind is I'm going to find out why they are here, and I know she's never had a license. She is suspended and so forth.

RP 20.

Murray testified that he would have pulled the truck over regardless of whether he had been able to read the license plate.⁵

RP 20. He was just that convinced that Jackowiak was in the truck; therefore, the truck must be stolen. RP 21. During cross-examination, Murray clarified that he was not pulling the truck over because he felt its occupants trespassed in the church parking lot. RP 48. Instead, he pulled the truck over because he "suspected they were up to no good." RP 48. At the moment Murray stopped the truck, the crime Murray suspected the occupants had committed was "Well, being there." RP 49.

When Murray contacted the driver it was not Saddanne Jackowiak. RP 21. It was Stacy Welker. RP 21. Welker provided her license and proof of insurance. RP 25. Murray shifted his focus to questioning Welker about why she and her passenger, Leif

⁵ Murray testified that he cited Welker for having an obscured license plate.

Cole, had walked behind the church. Murray did not know Cole. Welker explained that they had come from friend Pat Dunham's house. RP 21. Murray knew that Dunham lived down the street from the church. RP 22. Murray was familiar with Pat Dunham. RP 23. Dunham, per Murray, was "always up to his eyebrows with criminal activity."⁶ RP 23. Murray felt that Dunham's house was a drug house. RP 23. Prompted by Murray, Welker explained the path that she and Cole took from Dunham's house to get to her truck. RP 24. Welker acknowledged walking behind the church. RP 25. Murray found the path Welker and Cole took suspicious because it was not the most direct route from Dunham's to the truck. RP 32. The most direct route would have been at least 214 feet shorter than the route Welker and Cole actually took. RP 32. Also, people who visit at Dunham's house are "that type of people." RP 41. Although Murray was suspicious of the extra steps, he ultimately decided to believe Welker and Cole. As such, he never checked the church for any signs of a burglary. RP 20.

The state worked diligently on getting Murray to articulate a crime that he felt Cole might have committed to justify a Terry stop.

⁶ Nothing in the record established that Pat Dunham had ever been convicted of any crimes.

PROSECUTOR: At the time you contacted Mr. Cole, did you have any information that would lead you to believe that he had committed a crime?

MURRAY: I knew they couldn't get from Pat's house to the church without crossing people's yards.

RP 53.

After a time, Murray asked Cole for his name. Cole said that his name was David Cole. RP 26. Murray could not find any information under that name. RP 27. Welker's information returned from records that she was a protected person in a protection order. RP 28. Eric Leif Cole was the person who was not to have any contact with her. RP 26. After some prompting, Cole admitted that he was Eric Leif Cole. RP 29-31. This contact formed the basis of the felony charge as Cole had two prior convictions for violating the order. CP 1-2.

IV. STANDARD OF REVIEW

The appellate court reviews factual findings in a motion to suppress for substantial evidence; review is de novo for the suppression order's conclusions of law. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence in

the record of a sufficient quantity to persuade a fair-minded person of the truth of the finding. State v. Hill, 123 Wn.2d at 644.

V. ARGUMENT

I. LEIF COLE WAS IMPROPERLY SEIZED. OFFICER MURRAY HAD NO BASIS TO BELIEVE THAT COLE OR HIS COMPANION WERE ENGAGED OR ABOUT TO BE ENGAGED IN CRIMINAL ACTIVITY AT THE WOODLAND CHRISTIAN CHURCH.

Under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution, the state bears the burden of proving that a warrantless stop or seizure falls into one of the few 'jealously and carefully drawn' exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984) (quoting State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigative stops. State v. Ladson, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999) (citing Robert F. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, U. Puget Sound L. Rev. 411, 528-80 (1988)). The burden is always on the state to prove one of these

narrow exceptions. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). Here, the state argued and the trial court accepted that the warrantless seizure of Leif Cole was based upon a valid Terry stop. Both the state and the trial court are wrong.

(a) Leif Cole was seized when Office Murray stopped the car in which Cole was a passenger.

The first step in analyzing police-citizen interactions is to determine whether a seizure has occurred. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). It is elementary that all investigatory detentions constitute a seizure. State v. Armenta, 134 Wn2d. 1, 10, 948 Wn.2d 1280 (1997). Woodland Police Officer Murray's purported basis for stopping the car was to investigate why its driver and Cole were walking through the Woodland Christian Church's parking lot at 6:40 a.m. Murray testified that

They were pulling out – leaving – and it was just like, Fine, I am going to contact them. I can't run the plate. I am going to stop them. I'm going to find out why they are back here behind the church.

RP 17.

The trial court erred as a matter of law when it concluded that Cole was not seized until such time as Murray asked him for his name. Murray was investigating Cole equally as much as he was investigating the identity of the truck's driver and her purpose

for walking through the church parking lot. Cole was no more free to leave than the truck's driver, Stacy Welker.

(b) The seizure of Leif Cole was not justified at its inception.

A warrantless investigatory stop must be reasonable under the Fourth Amendment and Article I, Section 7 of the Washington State Constitution. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The state must prove an investigatory stop's reasonableness. Id. An investigatory stop is reasonable if the arresting officer can identify specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion, State v. Mendez, 137 Wn.2d at 223. Articulable suspicion means a "substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (citing 3 Wayne R. LaFave, *Search and Seizure*, section 9.2, at 65 (1978)). The suspicion must be individualized. Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). Mere proximity to others independently

suspected of a criminal activity does not justify a stop. Ybarra v. Illinois, 44 U.S. 85, 62 L. Ed. 2d. 238, 100 S. Ct. 338 (1979); State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980). An investigatory detention is only permissible if it is justified at its inception. Ladson, 138 Wn.2d at 350.

Apropos of nothing given the totality of his testimony, Woodland Police Officer Murray testified at the suppression motion that there had been three church burglaries over the Christmas holidays, one in Ridgefield and two in Woodland. At 6:40 a.m. on January 17, 2006, Murray saw a man that he did not recognize – Cole – and a woman he thought was Saddanne Zackowiak walk from the back of the Woodland Christian Church to the front of the Woodland Christian Church and get into a dark-colored truck. Murray did not articulate what specific and objective facts he had that made Cole’s walking through a church parking lot at 6:40 a.m. suggestive of criminal activity in progress or soon to be in progress. He did not tie any of the known facts of the other three church burglaries to anything Cole or his companion were doing. In other words, Murray did not articulate that a dark truck or any vehicle was linked to the other burglaries, or that the suspects had been on foot, or that it was suspected that the other burglaries had been

committed by a team of two. Furthermore, nothing about the way the couple walked was suspicious: they did not try to open doors, look in windows, walk in shadows, or sneak from bush to bush. They just walked around the building and got in a dark truck and drove away.

Murray's only suspicion was that the female half of the couple may have been Saddanne Jackowiak. He subjectively believed that Jackowiak was bad news, always up to no good, routinely had warrants, and that any reasonably nice vehicle associated with Jackowiak – and apparently the truck was nice – had to be stolen.⁷ It was on these facts alone that Murray decided that a Terry stop was reasonable.

The facts in Brown v. Texas, 443 U.S. 47, are similarly slim and did not support a Terry investigative stop. In Brown, police were patrolling in an area with a high incidence of drug crimes. While driving past an alley, both officers saw two men walking in opposite directions away from each other. The officers pulled into the alley and tried to contact Brown who refused to give information about himself to the officers in violation of a Texas statute making it

⁷ It is notable that no information was provided that Jackowiak was ever convicted of any crimes. Murray's testimony was as to arrests only.

a crime to refuse to give your name and address to law enforcement. Contrary to the Terry requirement of reasonable and articulable suspicion, neither officer could articulate any criminal activity they suspected Brown had engaged in or was about to be engaged in. The best the officers could come up with was that the situation looked suspicious so they wanted to identify Brown.

Brown is similar to our facts. Murray wanted to stop the truck just to see if Jackowiak was the driver and if she was up to some generic form of no good. Murray could articulate nothing to suggest Cole or his female companion had done or intended to do anything criminal at or near the Woodland Christian Church.

Questioning Welker and Cole about where they had been before walking through the church did nothing to legally support the Terry rationalization. Murray learned that they had come from Pat Dunham's house. He believed Welker to the point that he no longer felt that she or Cole had anything to do with a crime in progress at the church; in fact, Murray no longer felt a need to check and see if the church had been burglarized. Instead, Murray became suspicious about why Welker and Cole had been at Dunham's because he felt Dunham's home was a drug house without producing any evidence that it was. But Dunham's lifestyle

had nothing to do with any activities or lack of activities at the church. And certainly, taking what Murray saw as an illogical path from Dunham's to get to the church is not a crime or a future crime.

(c) The state's anticipated justification for the stop – that it was a traffic stop – fails.

It is anticipated that the state will argue that Officer Murray had a legitimate basis to stop the truck – a traffic infraction and that the Terry aspect of the stop came after the infraction stop. It is of course true that law enforcement can stop a motor vehicle for a traffic infraction and require the driver to produce her license, registration and proof of insurance. RCW 46.61.021(2). It is also true that it is an infraction to display a license plate that cannot be clearly seen and read. RCW 46.16.240. Murray testified that he could not clearly read one digit on the truck's rear plate because it was obscured by the trailer hitch. But Murray also testified that he planned to pull the truck over regardless of the infraction and that he had formed the intent to pull the truck over when he saw the couple walking in the church parking lot. In Ladson, the court disapproved of these type of pretextual stops: where an officer pulls over a citizen not to enforce the traffic code but to conduct a

criminal investigation unrelated to the driving. Ladson, 138 Wn.2d
at 349.

VI. CONCLUSION

The court should reverse the trial court and grant Leif Cole's
suppression motion.

Respectfully submitted this 10th day of October, 2006.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut", is written over a horizontal line. The signature is fluid and cursive.

LISA E. TABBUT/WSBA #21344
Attorney for Appellant

APPENDIX A

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
SUPPRESSION MOTION

- 1 5. Officer Murray knew Ms. Jackowiak typically did not drive a truck, and he did not
2 recognize the truck as belonging to her.
- 3 6. Officer Murray was suspicious of the man and woman's presence at the church and
4 thinking the woman was Ms. Jackowiak, was suspicious of her being in possession of the
5 truck.
- 6 7. Officer Murray pulled in behind the truck as it was driving out of the parking lot. He
7 attempted to run the license plate of the truck to see if it was stolen. Officer Murray was
8 unable to read the license plate because the vehicle trailer hitch obstructed the plate.
- 9 8. Officer Murray stopped the vehicle because of the obstructed license plate and the above
10 concerns.
- 11 9. When Officer Murray approached the female driver, he immediately realized she was not
12 Ms. Jackowiak.
- 13 10. Officer Murray asked the driver what she was doing at the church. The driver explained
14 that she was coming from Pat Dunham's residence to her vehicle.
- 15 11. Officer Murray was familiar with Pat Dunham and the residence referenced by the driver.
16 Murray knew Dunham was associated with criminal activity and his residence was
17 located several houses down the street from the church.
- 18 12. The driver explained that the two cut through the back yard of Dunham's house to get to
19 the church.
- 20 13. Officer Murray found the driver's explanation illogical and nonsensical because the path
21 she described was not the most direct route from Dunham's and actually increased the
22 distance to the truck.
- 23 14. Given the illogical path explanation and Dunham's reputation, Officer Murray was
24 suspicious of the man and woman's presence near the church.
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15. Officer Murray asked the driver for her identification, proof of insurance, and registration. He then asked the male passenger his name. Officer Murray had not spoken to the male passenger until that point. The passenger identified himself as "David Cole" although, he was later identified to be Leif Eric Cole, the defendant.

16. After learning both identities, Officer Murray ran a record's check of the driver. He learned she was a protected party in a no contact order, prohibiting Leif Eric Cole from contacting her.

17. Officer Murray asked for a records check of a David Cole born in the early 1970's. Dispatch replied they did not have any identifying information on such a person, but Leif Cole did have a warrant for his arrest.

1 **Conclusions of Law**

- 2 1. When Officer Murray asked the defendant his name, the defendant was seized. The
- 3 defendant was not seized up to this point.
- 4 2. Officer Murray's suspicions were reasonable and sufficient to believe that criminal
- 5 activity occurred or was occurring in relation to the man's presence at the church.
- 6 3. Officer Murray had reasonable articulable suspicion that criminal activity was occurring
- 7 or had occurred in regards to the church. Officer Murray was not required to rule out any
- 8 valid possible explanations for the presence of the passenger at the church. As such,
- 9 Officer Murray had sufficient facts to conduct a Terry investigation of the passenger, and
- 10 ask him his name.

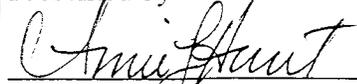
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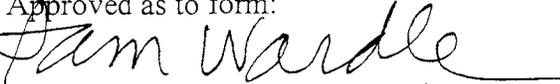
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J U D G E

15 Presented by:

16 
17 AMIE HUNT, WSB # 31375
18 Attorney for the State

19 Approved as to form:

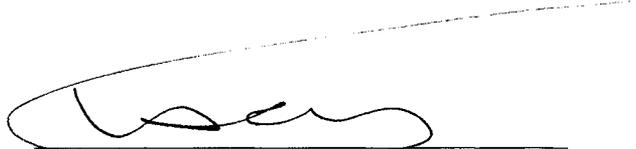
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22 Attorney for Defendant *noted on record*
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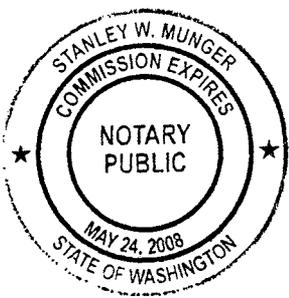
- (1) APPELLANT'S CORRECTED BRIEF
- (2) MOTION AND AFFIRMATION TO FILE CORRECTED BRIEF
- (3) AFFIDAVIT OF MAILING

Dated this 10th day of October 2006.



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 10th day of October 2006.



Notary Public in and for the
State of Washington
Residing at: *Longview*
My commission expires:
May 24, 2008