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DIVISION II

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

82-20-5 11/1

STATE OF WASHINGTON,
Respondent,

vs.

DONALD ABE VOLDEN,
Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the defendant's motion to suppress pursuant to CrR 3.6 in violation of the defendant's Fourth and Fourteenth Amendment and Const. Art. I, sec. 7 rights.
2. The trial court erred when it entered finding of fact I based on the following: "The vehicle displayed expired tabs. Deputy VanGesen also observed the passenger seated against the window was not wearing the shoulder portion of his seatbelt."
3. The trial court erred when it entered finding of fact II based on the following: "Volden questioned the request for identification because he was now wearing his seatbelt. Deputy VanGesen indicated that Volden did not have it on when he was first observed at the traffic light."
4. The trial court erred when it entered finding of fact IV which stated:

"As Deputy VanGesen was investigation (sic) the seatbelt violation center passenger Kinney(sic) sat up and temporarily blocked Deputy VanGesen's view of Volden. Volden then took this opportunity to immediately begin reaching across his body with both hands to his left and between his seat and the center console area."
5. The trial court erred when it entered finding of fact V which states:

"Volden was asked to step from the truck for a pat down for weapons and to investigate the area below the seat where he was reaching. Deputy Jansen conducted the pat down of Volden and located an

illegal weapon, a dagger with a 3" blade, in his right rear pant pocket.”

6. The trial court erred when it entered finding of fact VII which states in pertinent part as follows:

“Larson and Kinney were removed from the vehicle. In the area where Volden was seen reaching deputy VanGesen located a sharp triangular piece of metal which could be used as a weapon along with a couple of screwdrivers...”

7. The trial court erred when it entered conclusion of law II.
8. The trial court erred when it entered conclusion of law III.
9. The trial court erred when it entered conclusion of law IV.
10. The trial court erred when it entered conclusion of law V.
11. The defendant’s Fourth and Fourteenth Amendment and Const. Art. 1, sec. 7 rights were violated when the trial court entered stipulated fact (4):

“The facts detailing the Defendant’s arrest and possession are contained in the attached police reports and are incorporated by reference herein. The baggy located in the Defendant’s pant pocket was sent to the Washington State patrol crime laboratory where it was tested and determined to be methamphetamine. The lab report is attached and incorporated by reference.”

12. The trial court erred when it entered judgment and sentence for possession of a controlled substance; methamphetamine based upon stipulated trial facts to the extent that it relied on the evidentiary findings of the CrR 3.6 court.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it ruled that a Kitsap County Deputy sheriff was justified in seizing the defendant by asking the right front passenger for his identification and to emerge from the stopped vehicle, searching his person and thereby discovering methamphetamine?

(Assignments of Error 1, 5, 6,7, 9,11 and 12).

2. Whether the trial court erred when it entered findings of fact I, II and IV in spite of the defendant's and his witness's testimony that the defendant had his seat-belt on when he was riding in the motor vehicle?

(Assignments of Error 2, 3, 4, 11 and 12).

3. Whether the trial court erred when it entered finding of fact IV that Volden reached across his body with both hands to his left between his seat and the center console area when this was contrary to the defendant's and his witness's testimony? (Assignments of Error 4, 5,6, 7, 8 and 11).

4. Whether the trial court erred when it entered Conclusions of Law II:

“At the time of the stop in this case, Deputy VanGesen was faced with factors implicating his safety. First, there was one deputy and three occupants of the vehicle. Deputy VanGesen was alone in a busy parking lot with a lot of foot and vehicle traffic. Volden's moves were sudden with both hands. All of these factors, together, satisfy *Mendez*.”

(Assignments of Error 4, 5, 6, 7 and 11).

5. Whether the trial court erred when it entered Conclusions of Law III:

“That Deputy VanGesen was confronted with a safety concern not faced by the officers in *Mendez*. Deputy VanGesen had the right to ensure his safety and the safety of others by controlling the scene.”

(Assignments of Error 8 and 11).

6. Whether the trial court erred when it entered Conclusions of Law IV:

“That Deputy VanGesen had a founded suspicion that the defendant was armed and dangerous. The deputy observed Volden make a sudden movement with both hands the moment his vision was obscured by Kinney. (sic). Deputy VanGesen knew that all three occupants of the truck were convicted felons and that Volden was known to traffic in methamphetamine. Deputy VanGesen had justification to pat down Volden under *Terry*, which led to the discovery of an illegal weapon.”

(Assignments of Error 4,5,6, 9 and 11).

7. The trial court erred when it entered Conclusion of Law V:

“Deputy VanGesen’s actions did not violate the defendant’s privacy rights.”

(Assignments of Error 1-12).

B. Statement of the Case

The defendant, Donald Abe Volden, was charged with possession of a controlled substance: methamphetamine in violation of RCW 69.50.4013 and RCW 69.50.206(d)(2). CP 1. The possession was alleged to have occurred on September 20, 2006. id.

CrR 3.6 Hearing

Jon VanGesen, a deputy sheriff with Kitsap County Sheriff's Office, testified that on September 20, 2006 he was on patrol duty at approximately 10:30 a.m. 12/06/06 RP 3. He was southbound on Bethel Avenue approaching Sedgwick. RP 4. He observed a 1991 Chevrolet pickup truck in the left turn lane. He testified: "...and I noticed that the rear license plate, the tabs were expired, 8 of 2006." id. He also "...observed the defendant, seated in the passenger seat with no shoulder belt on...." RP 5.

As the vehicle turned left onto Sedgwick, the deputy followed as it entered the parking lot of Fred Meyer Stores. The vehicle was stopped in front of the store. Both vehicles were surrounded with "both foot and vehicle traffic." RP 7. VanGesen contacted the vehicle and noticed that there were three people inside. He requested driver's identification, vehicle registration and insurance as well as passenger identification. id. He noticed that the passenger was not wearing a seat belt. id. However, the belt was draped over the passenger's left arm and not attached.

VanGesen testified that during the contact: "...while the center passenger was getting her paperwork and showing me that she didn't have a seat to sit on, she sat up and obstructed my view of the passenger.

Mr. Volden, against the passenger door, and when she did this, sat up, she actually blocked my view and he dove into the area between the console and the left side of his body with both hands.” RP 8. The deputy explained “...and he reached across his body with both his left and right hand down to his left side between the seat and the console.” RP 9

Van Gesen testified that he was concerned “[t]hat the defendant could have obtained a weapon or was destroying evidence in that area.” RP 10. The deputy reached across the middle passenger and pushed her back into the seat and told the passenger to get his hands out. RP 9. Another deputy arrived and Mr. Volden was removed from the truck in order to pat him down for weapons. RP 10. He was patted down and a fixed-bladed knife three inches long was discovered as well as a baggie of white powder-that field tested for methamphetamine- and a glass smoking pipe. RP 11.

The deputy concluded his direct examination with testimony that he recognized the names of the three people he had contacted as involved with methamphetamine: Mrs. Kenney with conviction of “possession with intent”, Mr. Larson that he was involved in methamphetamine trade and Mr. Volden as someone involved in methamphetamine trafficking. RP 13.

On cross-examination he testified that before he saw the

identifications he did not recognized any of the occupants by sight. RP 20. VanGesen testified on cross-examination and re-direct that he was notified over the radio by CenCom that the vehicle's license had "Expired 8 of '06." RP 21-23.

The defendant, Donald Volden testified (without being read CrR 3.6 rights) that he was a passenger in a truck driven by Mr. Larson. RP 24. Volden testified that he was wearing his seat belt. RP 25. He remembered because: "We talked about it, because the center console doesn't have a seat belt for it." id. Once the vehicle stopped in front of Fred Meyer's store, he had taken his seat belt off and had it in his hands when Officer VanGesen appeared at the driver's window. id.

Volden testified that he was immediately asked for his identification after the officer had possession of the driver's information. According to Mr. Volden it was when "I went to put my wallet back in my pocket and that's when he got all flipped out and pushed – pinched her arm and pushed her back, and I was like, whoa." RP 26. According to Volden he was returning his wallet to his right pocket when the officer pushed Mrs. Kenney back into her seat. id.

On cross-examination Mr. Volden stated that he was "...using one hand to put my wallet in my pocket. It wasn't both hands. I wasn't diving for the center of the seat..." RP 29-30.

Krista L. Kenney testified that she was the front middle passenger on the center console in the truck driven by Mr. Larson. RP 31. Kenney testified that Mr. Volden was seatbelted before they stopped in front of Fred Meyer. Her testimony was:

“...he had it on for sure when we left because we talked about it. You know, because I didn’t have a seatbelt, and we had discussed it when we were just about down the road from where we—from Fred Meyer, so he did have a seat belt on.” RP 33-34.

When the truck stopped Volden was, “was taking if off, getting out.”

RP 34. Kenney described the deputy’s behavior as, “And he was more abrasive than anybody inside the vehicle I believe.” id.

Kenney testified that Volden got his identification out of his pocket; “The one that was next to me.” RP 35. She testified that when Volden was putting his wallet back:

“Officer VanGesen-I was taken by surprise-reached in and he didn’t just push me, he grabbed hold of my arm and pulled me back. I had a bruise from that, too, and I was like, ‘Why did you do that’ and he said because I was obstructing the view of the passenger.” RP 36.

Kenney testified that she saw Mr. Volden take off his seatbelt and prepare to, “get ready.” On cross-examination she testified that she was ordered to put her hands on the dash-as well as Mr. Volden. RP 37-8.

The trial court denied the motion to suppress and entered findings of fact and conclusions of law on March 2, 2007. CP 22. The case was

submitted to the trial court on stipulated facts. A verdict was entered finding the defendant guilty based on the stipulated facts. CP 26. On November 19, 2007 the court entered judgment and sentence. CP 36. On November 30, 2007 a notice of appeal was filed on the defendant's behalf. CP 47.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO DISMISS AND TO SUPPRESS PURSUANT TO CrR 3.6.

The defendant's Fourth and Fourteenth Amendment and Const. Art. I, s ec. 7 rights were violated when the trial court denied his CrR 3.6 motion to dismiss and to suppress the evidence the evidence.

Findings of Fact

According to *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999): "We review findings of fact on a motion to suppress under the substantial evidence standard. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *id.* at 644. ¹

¹ Finding of Fact 1 states in part: "Deputy VanGesen also observed the passenger seated against the window was not wearing the shoulder portion of his seatbelt."

Finding of Fact II states in part: "Deputy VanGesen indicated that Volden did not have it on when he was first observed at the traffic light."

Seat-Belt Controversy

Both Mr. Volden and Ms. Kenney testified that Volden was wearing a seatbelt before the truck first left its place of origin. Volden testified that he remembered wearing a seatbelt because: “We talked about it, because the center console doesn’t have a seat belt for it.” RP 25. Once the vehicle stopped in front of Fred Meyer’s store, he had taken his seatbelt off and had it in his hands when Officer VanGesen appeared at the driver’s window. id.

Ms. Kenney testified that Mr. Volden was seatbelted before they stopped in front of Fred Meyer. She testified: “...he had it on for sure when we left because we talked about it. You know, because I didn’t have a seatbelt, and we had discussed it when we were just about down the road from where we-from Fred Meyer, so he did have a seat belt on.” RP 33-34. When the truck stopped Volden was, “...taking it off, getting out.” id.

There was no finding of fact entered with regard to the defendant’s and with regard to Ms. Kenney’s testimony that contradicted VanGesen’s testimony. Nor was there any finding of fact that either Mr. Volden or Ms. Kenney were not credible witnesses. Ms. Kenney’s credibility was shown when she testified to Deputy VanGesen’s rudeness and use of vulgar language. This was not denied by Officer VanGesen. 12/06/06; RP 34,44 (infra). See generally, *Fed. Signal Corp. v. Safety Factors, Inc.*, 125

Wn. 2d. 413, 422-23, 886 P.2d 172 (1994).

Furtive Movement

Another area where the testimony was in conflict was where the trial court found: “As Deputy VanGesen was investigation (sic) the seatbelt violation center passenger Kinney (sic) sat up and temporarily blocked Deputy VanGesen’s view of Volden. Volden then took this opportunity to immediately begin reaching across his body with both hands to his left and between his seat and the center console area.” CP 23; ff IV.

According to Volden he was returning his wallet to his back pocket when the officer pushed Ms. Kenney back into her seat. 12/06/06 RP 26. On cross-examination Mr. Volden stated that he was “...using one hand to put my wallet in my pocket. It wasn’t both hands. I wasn’t diving for the center of the seat...” RP 29-30. According to Ms. Kenney, Volden was attempting to put his wallet back into his pocket: “...the one that was next to me.” RP 35. Ms. Kenney was asked:

“Q. And did you notice where Mr. Volden got his ID out of?

A. Out of his pocket that was right here, the one that was next to me.” RP 35.²

²Also, Mr. Volden was asked: “Q. Did you place your wallet back into your pocket? A. Yes. Q. Was it the same pocket that you got your ID out of? A. Yes.” RP 26.

The trial court did not enter any findings regarding which pocket Mr. Volden carried his wallet and his identification in. Nor did the trial court enter any findings about which pocket Mr. Volden was returning his wallet to when Ms. Kenney was pushed back by VanGesen. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn. 2d. at 422:

“[F]indings must be made on all material issues in order to inform the appellate court as to what questions were decided by the trial court, and the manner in which they were decided.”

(Quoting *Daughtry v. Jet Aeration Co.*, 91 Wash.2d 704,707, 592 P.2d 631 (1979) (internal quotation marks omitted). Exactness of required findings depends on the circumstances of the particular case. This court could remand the case for entry of findings of fact which would show an understanding of the conflicting positions and testimony. See *Fed. Signal*, 125 Wn.2d at 423.

Conclusions of Law

According to *State v. Mendez*, 137 Wn.2d at 214: “We review conclusions of law in an order pertaining to suppression of evidence de novo. *State v. Johnson*, 128 Wn.2d 431,443, 909 P.2d 293 (1996).” The trial court entered conclusion of law II ³ to the effect that all of the factors

³ Conclusion of Law II states: “At the time of the stop in this case, Deputy VanGesen was faced with factors implicating his safety. First, there was one deputy and three occupants of the vehicle. Deputy

of the stop “satisfy *Mendez*.” CP 24, CL II. VanGesen testified with regard to the location of the stop where there are citizens on foot and there is continual vehicular traffic: “Q. Did you have any concerns at that point as far as the location of the stop? A. No. I like doing it with other people around...” 12/6/06 RP 7. Clearly, the officer was not concerned about safety where he was located.

Yet, the trial court concluded: “That Deputy VanGesen was confronted with a safety concern not faced by the officers in *Mendez*.” CP 24, CL III. This concern was not stated in the trial court’s conclusion of law. The *Mendez* court found: “No specific safety concerns were present at the scene.” *id.* at 225. In *Mendez*, there were two officers and two occupants of a vehicle that was stopped at 12:50 in the afternoon in: “broad daylight in Yakima.” *id.* This was similar to the facts of the stop in this case.

State v. Mendez

According to *State v. Mendez*, *supra*, which was a unanimous decision, whenever a passenger is in a vehicle stopped for a traffic violation a police officer must have an “objective rationale predicated on

VanGesen was alone in a busy parking lot with a lot of foot and vehicle traffic. Volden’s moves were sudden and with both hands. All these factors, together, satisfy *Mendez*[.]” CP 24.

safety concerns” if the officer elects to order the passenger to either exit or to remain in the vehicle. *id.* at 220. The court held that “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 exist the vehicle to satisfy article I, section 7.” *id.*⁴

The rationale behind this rule is to prevent groundless intrusions on the privacy rights of passengers. In *Mendez*, the Supreme Court “...has held that a passenger is not seized by virtue of the vehicle stop alone (citation omitted) (holding that the passenger was not seized when the vehicle was stopped; he was seized when the officer demanded that he return to the vehicle after trying to walk away).” (concurring opinion) *State v. Rankin*, 151 Wn.2d 689, 701 n. 8, 92 P.3d 202 (2004).

According to *Mendez* the focus under a *Gunwall*⁵ analysis is not the actual or subjective expectation of privacy, but the focus is “...on those privacy interests Washington citizens held in the past and are

⁴Thus, the Washington Constitution provides greater protection to passengers than does the Fourth Amendment. See *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997) for passengers and *Pennsylvania v. Minns*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1997) for drivers.

⁵106 Wn.2d 54, 720 P.2d 808 (1986).

entitled to hold in the future.” *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998).” *Mendez* at 219. The court must balance the privacy interests with officer safety. In doing so the reviewing court will consider various factors comprising the totality of the circumstances. *Mendez*, at 219 n. 4; 220-21.

Mendez pointed out that stopping the motor vehicle in that case: “In broad daylight in Yakima” where the officers “had control of the situation as the driver remained where he was directed. The other passengers remained in the vehicle.” This is similar to the situation in the case at bench.⁶

The Supreme Court reversed the Court of Appeals’ decision that affirmed the juvenile trial court’s decision that denied a motion to suppress. And also reversed was the Court of Appeal’s conclusion that “the benefit of increased police protection outweighs the intrusion to passengers.” *Mendez*, 137 Wn.2d at 225 (quoting from 88 Wn.App. at 792). The *Mendez* court found that there were no specific safety concerns. *id.* at 225.

⁶ Other factors considered by the court were the number of officers, the number of occupants in the stopped vehicle, the behaviour of the occupants, the time of day, the location, nature of traffic at the scene, “affected citizens” and officer’s knowledge of the occupants among others. *State v. Mendez*, 137 Wn..2d at 220-21.

This court should apply a *Mendez* analysis and conclude that the benefit of the safety concerns of officer VanGesen did not outweigh the privacy rights of the defendant.

State v. Rankin

According to the landmark case of *State v. Rankin*, supra, it was a violation of Const. Art. 1, sec. 7 of the Washington Constitution for a police officer to request identification from a passenger in a lawfully stopped vehicle where the officer lacked “an articulable suspicion” that the passenger was engaged in criminal activity. *id.* at 691-2.

In these consolidated cases, Rankin was a passenger in a vehicle that was stopped for rolling over a marked stop line. Both the driver and the passenger were asked to produce their identification. A warrant check revealed that Rankin had an outstanding arrest warrant for violating a no-contact order. Rankin was placed under arrest and a search produced a knife and methamphetamine.

The trial court granted the defendant’s motion to suppress the evidence where Rankin was charged with possession of a controlled substance. The Court of Appeals reversed and remanded. The Supreme court reversed the Court of Appeals.

In the other consolidated case involving *State v. Staab* a motor vehicle was stopped for not having a license plate light. The officer asked

both the driver and Staab for their driver's licenses. "When Staab reached into his shirt pocket for his identification card, a clear plastic bag containing a white chalky substance fell out. Staab then put the bag back in his pocket and told the officer his name." id. at 693.

Staab was arrested for possession of cocaine. The trial court denied his motion to suppress. The Court of Appeal affirmed his conviction for a violation of the Uniform Controlled Substances Act. The Supreme Court reversed.. The High Court held in both cases:

"In conclusion, we hold that the freedom from disturbance in "private affairs" afforded to passengers in Washington by article I, section 7 prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent reason that justifies the request." id. at 699.

It is of note that Staab testified that the officer "was not politely asking when he wanted to see my driver's license," an assertion that the officer did not deny." *State v. Rankin*, at 693. In the case at bench, according to Mrs. Kenney's testimony when she told officer VanGesen that it was her understanding that once a driver produced his license, registration and insurance, "there wasn't a reason to talk to the passengers...." 12/06/06 RP 34. Officer VanGesen became "abrasive". When he pushed Mrs. Kenney back into the seat he allegedly said, "I don't know if you two can see my name tag like Mr. Larson can, but you

don't know who you are fucking with"...." 12/06/06 RP 37. VanGesen did not deny this. RP at 44. Clearly, this was a show of force.

Terry v. Ohio

According to the concurring opinion in *State v. Rankin*, supra at 701, *Terry* requires "an individualized articulable suspicion that the passengers were involved in criminal activity-an element that is required under the *Terry* exception to the warrant requirement." *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).⁷ See also, *State v. Mendez*, supra at 220: "*Terry* must be met if the purpose of the officer's interaction with the passenger is investigatory." A *Terry* stop is an investigative stop. An investigative detention based on a reasonable articulable suspicion of criminal activity is one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Terry*, 392 U.S. at 20.

It was stated in *State v. Ohio*, 67 Ohio St.3d 405, 618 N.E.2d 162, 166 (1993), *cert. denied*, 510 U.S. 1166 (1994) during an investigative stop "...the police officer involved "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion[.]" (quoting *Terry* at 21). An

⁷ According to *State v. Kennedy*, 107 Wn.2d 1,6, 726 P.2d 445 (1986) in order to reach the level of articulable suspicion that is necessary to support an investigative detention there must be "a substantial possibility that criminal conduct has occurred or is about to occur."

officer must be able to point to specific, articulable facts that criminal activity is afoot. *State v. White*, 97 Wn.2d 92, 105, 800 P.2d 1061 (1982).

According to the holding of *State v. Larson*, 93 Wn.2d 638, 642, 611 P.2d 711 (1980) a stop based on a parking violation committed by the driver does not provide law enforcement with separate grounds to request or to demand identification from passengers unless other circumstances give rise to an “independent cause to question passengers.” However, as stated above, an officer does not need to meet the *Terry* standard of reasonable suspicion of criminal activity, unless the purpose of the officer’s interaction with a passenger is investigatory. *Mendez*, at 220.

The trial court erred when it entered conclusion of law IV.⁸

The court concluded in part: “Deputy VanGesen had justification to pat down Volden under *Terry*, which led to the discovery of an illegal weapon.” CP 25, CL IV. One of the issues in this case is whether a passenger can be searched where he is stopped for not wearing a seat belt. According to VanGesen’s testimony at the CrR 3.6 hearing another deputy

⁸ “That Deputy VanGesen had a founded suspicion that the defendant was armed and dangerous. The deputy observed Volden make a sudden movement with both hands the moment his vision was obscured by Kinney (sic). Deputy VanGesen knew that all three occupants of the truck were convicted felons and that Volden was known to traffic in methamphetamine. Deputy VanGesen had justification to pat down Volden under *Terry*, which led to the discovery of an illegal weapon.” [and 10.5 grams of methamphetamine] (insert mine.) CP 24-25, CL IV.

arrived. Then Mr. Volden was removed from the truck in order to pat him down for weapons. 12/06/06 RP 10. The trial court entered conclusion of law IV justifying Volden's removal from the truck to be searched based on safety factors. He was patted down and a fixed-bladed knife, three inches long was discovered as well as a baggie of white powder-that field tested for methamphetamine- and a glass smoking pipe. RP 11; CP 23, ff. VI.. However, furtive movements, without more, do not give rise to a reasonable suspicion. *State v. Glossbrener*, 146 Wn.2d 670, 680-81, 49 P.3d 128 (2002).

Volden's movement of returning his wallet to his back, pant pocket was an innocuous event. According to *State v. Martinez*, 135 Wn.App. 174, 180, 143 P.3d 855 (2005) "[i]nnocuous facts do not justify a stop." This court should find that under *Terry's* objective standard, the prosecutor did not present sufficient evidence to support a reasonable, articulable suspicion of criminal activity.

In addition, the police officer that searched Volden did not testify. There was no testimony to determine if the manner of searching Volden's person was permissible under *Terry*. The state has this burden of proof and produced no evidence on this issue. According to *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994):

"A search pursuant to a *Terry* stop must be justified not

only in its inception, but also in its scope. *Terry*, at 20. A valid weapons frisk is strictly limited in its scope to a search of the outer clothing; a patdown to discover weapons which might be used to assault the officer. *Terry*, at 29-30.”

Hudson continued with this line of reasoning:

“The court warned that “[t]o approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons’ searches as a pretext for unwarranted searches. *Hobart*, at 447; *see also State v. Loewen*, 97 Wn.2d 562, 567, 647 P.2d 489 (1982) (discovery of drug paraphernalia during a weapons search was unreasonable because it exceeded the scope of the weapons search; officer intended to search for contraband); *State v. Biegel*, 57 Wn.App. 192, 195-96, 787 P.2d 577 (officer’s discovery of cocaine exceeded scope of weapons frisk), *review denied*, 115 Wn.2d 1004 (1990)....”

(citing and quoting *State v. Hobart*, 94 Wn.2d 437, 617 P.2d 429 (1980)).

Pretext

The essence of a pretextual stop is that the police stop a vehicle, not to enforce the traffic code, but to investigate other suspicious criminal conduct. *State v. DeSantiago*, 97 Wn.App. 446, 983 P.2d 1173 (1999).

When determining whether an arrest is a pretext for accomplishing a search, the court shall consider the totality of the circumstances, including the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). *Ladson* held that Const. Art. 1, sec. 7 forbids law enforcement

from relying on a pretext to conduct a search or seizure where the real reason for the seizure would not supply authority of law required by the state constitution compared to the Fourth Amendment rule.

In *Ladson* the State Supreme Court departed from the objective standard required for *Terry* under the Fourth and Fourteenth Amendments.⁹ *Ladson* set forth a new test:

“When determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.”

Ladson, 138 Wn.2d at 358-59.

In *Ladson*, the gang emphasis officers were familiar with his co-defendant because of unsubstantiated street rumors that he was involved in drugs. They stopped his vehicle on the grounds that his license plate tabs had expired. *id.* at 346. They used this pretext to arrest the co-defendant and to search Ladson. The Supreme Court reversed his conviction and held that the pretextual stop violated Const. Art. 1, sec. 7. *id.* at 352-53.

Here, Officer VanGesen had spent 12 of his 15 years as a police officer with West Sound Narcotics Enforcement. RP 3. He had been an

⁹The objective standard in *Terry* recommends that the court consider whether a police officer’s action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Terry*, 392 U.S. at 20.

instructor for patrol officers with regard to narcotics investigations. *Id.* On September 20, 2006 his duties included “self-initiated contacts” and “traffic enforcement.” RP 4. At the scene, once he was handed identification by the driver and the passengers, he recognized that all three people were convicted felons, involved in drug possession charges or as in Volden’s case with recent rumors of methamphetamine trafficking. RP 12-13; CP 23, ff. III.

It was when Mr. Volden was returning his wallet to his back pant pocket-after providing identification because he was allegedly not wearing a seat-belt-that Officer VanGesen showed a display of force when he pushed Kenney backwards and accused Volden of making a furtive movement between the seat and the center console area.

The initial stop may not have been entirely pretextual.¹⁰ However, like the seatbelt allegation this too was contradicted by the defense testimony. Ms. Kenney testified with regard to the license plate to the effect that proposed Exhibit 1 was a license plate, “that was the rear license plate of the truck.” RP 32. She recognized it as such because it was scratched because of an accident to the rear end; “like a week or two

¹⁰Evidence of improper subjective intent will invalidate an otherwise lawful stop. *Ladson*, at 353; *State v. DeSantiago*, 97 Wn.2d at 451-52.

prior” and it was bent down. id. She testified that the right side of the plate, where the year was shown (2006), had multiple dates, “on the 2006 display.” id. In other words, it looked like the year tag had been replaced multiple times. id. Also, Ms. Kenney and Mr. Volden both testified that he was wearing a seatbelt before being stopped and when the vehicle was moving.

Viewing the totality of the circumstances, the factors leading to the search and seizure of Mr. Volden were pretextual. VanGesen testified that he noticed that Volden did not have a seatbelt on when he drove past the Larson vehicle. RP 5. However, it was Ms. Kenney, the middle passenger, who did not have a seat belt on because there was none for that position in the truck. RP 40. There was no reason to ask for Volden’s identification if he was wearing a seatbelt.

It was after obtaining identification and recognizing the occupants that VanGesen became suspicious of drug involvement and alleged there was a furtive movement. It was at the same time of forming this improper subjective intent of suspected drug activity that VanGesen said: “I don’t know if you two can see my name tag like Mr. Larson can, but you don’t know who you are fucking with.” RP 37. This show of force, coupled with the behavior of pushing Ms. Kenney backwards, was objectively unreasonable when viewed in the totality of the circumstances of allegedly

expired license plate tabs and not wearing a seatbelt.

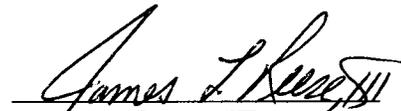
D. Conclusion

This Court should find that the officer's subjective intent and objective unreasonableness showed that Volden's search and seizure was pretextual, in violation of Cons. Art. 1, section 7. This Court should also find that the totality of the circumstances analysis does not support a reasonable suspicion of criminal activity.

Officer VanGesen exceeded the scope of his traffic duties by seizing Mr. Volden, when he was ordered to put his hands on the dashboard. This conduct was without lawful authority and therefore the evidence produced as a result of the subsequent search should be inadmissible as fruits of the poisonous tree doctrine.

Dated this 2nd day of May 2008.

Respectfully Submitted,



James L. Reese, III

WSBA #7806

Court Appointed Attorney
for Appellant

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IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 06-1-01407-1
Plaintiff,)	
)	FINDINGS OF FACT AND CONCLUSIONS
v.)	OF LAW FOR HEARING ON CrR 3.6
)	
DONALD ABE VOLDEN)	
)	
AGE 41; DOB: 01/05/1965,)	
)	
Defendant.)	

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled court pursuant to a hearing on CrR 3.6; the parties appearing by and through their attorneys of record below-named; and the court having considered the motion, briefing, testimony of witnesses and argument of counsel and the record and files herein, and being fully advised in the premises, now, therefore, makes the following-

FINDINGS OF FACT

I

On Wednesday, September 20th, 2006 at 10:39 A.M. KCSO deputy VanGesen was on patrol in the south end of Kitsap County. Deputy VanGesen observed a blue 1991 Chevrolet pickup truck on Sedgwick road stopped at the intersection of Bethel road. The vehicle displayed expired tabs. Deputy VanGesen also observed the passenger seated against the window was not wearing the shoulder portion of his seatbelt.

A



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II

Deputy VanGesen stopped the vehicle as it pulled in front of the Fred Meyer store. There were three people seated in the cab of the pickup truck. Deputy VanGesen approached the driver who was identified as Russel Larson. Larson then provided valid vehicle registration for the truck. Deputy VanGesen then requested identification from the center passenger Krista Kinney and the passenger seated against the door, Volden. Volden questioned the request for identification because he was now wearing his seatbelt. Deputy VanGesen indicated that Volden did not have it on when he was first observed at the traffic light.

III

After providing ID deputy VanGesen recognized all three individuals as convicted felons and deputy VanGesen also had intelligence that Volden was a methamphetamine trafficker. Because of this information Deputy VanGesen, who was out numbered, requested backup.

IV

As Deputy VanGesen was investigation the seatbelt violation center passenger Kinney sat up and temporarily blocked deputy VanGesen's view of Volden. Volden then took this opportunity to immediately begin reaching across his body with both hands to his left side and between his seat and the center console area. Deputy VanGesen pushed Kinney back against her seat and ordered Volden to keep his hands out from under the seat. Deputy Jansen arrived to assist.

V

Volden was asked to step from the truck for a pat down for weapons and to investigate the area below the seat where he was reaching. Deputy Jansen conducted the pat down of Volden and located an illegal weapon, a dagger with a 3" blade, in his right rear pant pocket.

VI

Volden was further searched and deputy Jansen located a baggy inside his right front pocket containing 10.5 grams of a white powder which later field tested positive for methamphetamine. In this same pocket was found a glass smoking pipe and two smaller zip lock baggies.



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VII

Larson and Kinney were removed from the vehicle. In the area where Volden was seen reaching deputy VanGesen located a sharp triangular piece of metal which could be used as a weapon along with a couple of screwdrivers. Volden as transported to jail and booked on Possession of Controlled Substance, Methamphetamine, Possession of Drug Paraphernalia, and Possession of a Dangerous Weapon.

CONCLUSIONS OF LAW

I

That the above-entitled court has jurisdiction over the parties and the subject matter of this action.

II

At the time of the stop in this case, Deputy VanGesen was faced with factors implicating his safety. First, there was one deputy and three occupants of the vehicle. Deputy VanGesen was alone in a busy parking lot with a lot of foot and vehicle traffic. Volden's moves were sudden and with both hands. All of these factors, together, satisfy *Mendez*

III

That Deputy VanGesen was confronted with a safety concern not faced by the officers in *Mendez*. Deputy VanGesen had the right to ensure his safety and the safety of others by controlling the scene.

IV

That Deputy VanGesen had a founded suspicion that the defendant was armed and dangerous. The deputy observed Volden make a sudden movement with both hands the moment



1 his vision was obscured by Kinney. Deputy VanGesen knew that all three occupants of the truck
2 were convicted felons and that Volden was known to traffic in methamphetamine. Deputy
3 VanGesen had justification to pat down Volden under *Terry*, which led to the discovery of an
4 illegal weapon.

5
6 V

7 Deputy VanGesen's actions did not violate the defendant's privacy rights.

8
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10 SO ORDERED this 2 day of March 2007.

11
12
13 _____
14 JUDGE

15 PRESENTED BY-

APPROVED FOR ENTRY-

16 STATE OF WASHINGTON

17 JK
18 KEVIN KELLY WSBA # 18804
19 Deputy Prosecuting Attorney

20 _____
21 _____, WSBA No. 33410
22 Attorney for Defendant

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Prosecutor's File Number-06-122571-13



(b) **Effect of Voluntary Absence.** The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by its lawyer for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

(c) **Defendant Not Present.** If in any case the defendant is not present when his or her personal attendance is necessary, the court may order the clerk to issue a bench warrant for the defendant's arrest, which may be served as a warrant of arrest in other cases.

(d) **Video Conference Proceedings.**

(1) *Authorization.* Preliminary appearances held pursuant to CrR 3.2.1, arraignments held pursuant to this rule and CrR 4.1, bail hearings held pursuant to CrR 3.2, and trial settings held pursuant to CrR 3.3, may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in person hearing, which may in the trial court judge's discretion be granted.

(2) *Agreement.* Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrR 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

(3) *Standards for Video Conference Proceedings.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.

[Amended effective September 1, 1995; December 28, 1999; April 3, 2001.]

Comment

Supersedes RCW 10.01.080; RCW 10.46.120, .130; RCW 10.64.020, .030.

RULE 3.5 CONFESSION PROCEDURE

(a) **Requirement for and Time of Hearing.** When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold

or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) **Duty of Court to Inform Defendant.** It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) **Duty of Court to Make a Record.** After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) **Rights of Defendant When Statement Is Ruled Admissible.** If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

**RULE 3.6 SUPPRESSION HEARINGS—
DUTY OF COURT**

(a) **Pleadings.** Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) **Hearing.** If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[Adopted effective May 15, 1978; amended effective January 2, 1997.]

4. PROCEDURES PRIOR TO TRIAL

RULE 4.1 ARRAIGNMENT

(a) **Time.**

(1) *Defendant Detained in Jail.* The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) *Defendant Not Detained in Jail.* The defendant shall be arraigned not later than 14 days after that appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in CrR 3.3(a)(3)(iii).

(b) **Objection to Arraignment Date—Loss of Right to Object.** A party who objects to the date of arraignment on the ground that it is not within the time limits prescribed by this rule must state the objection to the court at the time of the arraignment. If the court rules that the objection is correct, it shall establish and announce the proper date of arraignment. That date shall constitute the arraignment date for purposes of CrR 3.3. A party who fails to object as required shall lose the right to object, and the arraignment date shall be conclusively established as the date upon which the defendant was actually arraigned.

(c) **Counsel.** If the defendant appears without counsel, the court shall inform the defendant of his or her

right to have counsel before being arraigned. The court shall inquire if the defendant has counsel. If the defendant is not represented and is unable to obtain counsel, counsel shall be assigned by the court, unless otherwise provided.

(d) **Waiver of Counsel.** If the defendant chooses to proceed without counsel, the court shall ascertain whether this waiver is made voluntarily, competently and with knowledge of the consequences. If the court finds the waiver valid, an appropriate finding shall be entered in the minutes. Unless the waiver is valid, the court shall not proceed with the arraignment until counsel is provided. Waiver of counsel at arraignment shall not preclude the defendant from claiming the right to counsel in subsequent proceedings in the cause, and the defendant shall be so informed. If such claim for counsel is not timely, the court shall appoint counsel but may deny or limit a continuance.

(e) **Name.** Defendant shall be asked his or her true name. If the defendant alleges that the true name is one other than that by which he or she is charged, it must be entered in the minutes of the court, and subsequent proceedings shall be had by that name or other names relevant to the proceedings.

(f) **Reading.** The indictment or information shall be read to defendant, unless the reading is waived, and a copy shall be given to defendant.

[Amended effective September 1, 2003.]

Comment

Supersedes RCW 10.40.010, .030, .040; RCW 10.46.030 in part, .040.

RULE 4.2 PLEAS

(a) **Types.** A defendant may plead not guilty, not guilty by reason of insanity, or guilty.

(b) **Multiple Offenses.** Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) **Pleading Insanity.** Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) **Voluntariness.** The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) **Agreements.** If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is

AMENDMENT [IV]

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable 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 or things to be seized.

AMENDMENT (XIV)

ss.1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF WASHINGTON

ARTICLE 1 ss. 7. Invasion of Private Affairs or Home Prohibited

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

