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STATE OF WASHINGTON

BY
DEPUTY

NO. 38138-9-II
Thurston County No. 08-1-00567-8

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL SWEANEY

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 5

**I. THE TRIAL COURT ERRED IN DENYING MR. SWEANEY’S
MOTION TO SUPPRESS..... 5**

**II. THE EVIDENCE USED TO JUSTIFY THE SEARCH
WARRANT WAS OBTAINED AS THE RESULT OF AN
ILLEGAL SEIZURE OF MR. SWEANEY. 5**

**III. THE TRIAL COURT ERRED IN ENTERING FINDING OF
FACT NUMBER 3..... 5**

**IV. THE TRIAL COURT ERRED IN ENTERING FINDING OF
FACT NUMBER 5..... 5**

**V. THE TRIAL COURT ERRED IN ENTERING FINDING OF
FACT NUMBER 6..... 5**

**VI. THE TRIAL COURT ERRED IN ENTERING FINDING OF
FACT NUMBER 7..... 5**

**VII. THE TRIAL COURT ERRED IN ENTERING
CONCLUSION OF LAW NUMBER 1..... 5**

**VIII. THE TRIAL COURT ERRED IN ENTERING
CONCLUSION OF LAW NUMBER 2..... 5**

**IX. THE TRIAL COURT ERRED IN ENTERING CONCLUSION
OF LAW NUMBER 3..... 5**

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 5

**I. THE TRIAL COURT ERRED IN DENYING MR. SWEANEY’S
MOTION TO SUPPRESS WHERE THE EVIDENCE USED
AGAINST HIM WAS OBTAINED AS A RESULT OF AN
UNLAWFUL SEIZURE..... 5**

**II. IF THIS COURT WERE TO CONCLUDE THAT THE
SEIZURE CONCLUDED WHEN THE OFFICER HANDED**

BACK MR. SWEANEY'S DOCUMENTS AND TOLD HIM HE WAS FREE TO GO, MR. SWEANEY WAS RE-SEIZED WHEN TROOPER KERSHAW ASKED HIM IF HE HAD CONTROLLED SUBSTANCES IN THE CAR AND AT THAT POINT, REASONABLE SUSPICION DID NOT JUSTIFY THE DETENTION..... 6

III. THE ISSUANCE OF THE WARRANT DID NOT VALIDATE THIS SEARCH. 6

C. STATEMENT OF THE CASE..... 6

D. ARGUMENT..... 16

I. THE TRIAL COURT ERRED IN DENYING MR. SWEANEY'S MOTION TO SUPPRESS WHERE THE EVIDENCE USED AGAINST HIM WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEIZURE..... 16

II. IF THIS COURT WERE TO CONCLUDE THAT THE SEIZURE CONCLUDED WHEN THE OFFICER HANDED BACK MR. SWEANEY'S DOCUMENTS AND TOLD HIM HE WAS FREE TO GO, MR. SWEANEY WAS RE-SEIZED WHEN TROOPER KERSHAW ASKED HIM IF HE HAD CONTROLLED SUBSTANCES IN THE CAR AND AT THAT POINT, REASONABLE SUSPICION DID NOT JUSTIFY THE DETENTION..... 26

III. THE ISSUANCE OF THE WARRANT DID NOT VALIDATE THIS SEARCH. 31

E. CONCLUSION..... 32

TABLE OF AUTHORITIES

Cases

<i>State v. Allen</i> , 138 Wn.App. 463, 157 P.3d 893 (2007).....	16, 19, 25, 26
<i>State v. Aranguren</i> , 42 Wn.App. 452, 711 P.2d 1096 (1985).....	21
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	19
<i>State v. Cantrell</i> , 70 Wn.App. 340, 853 P.2d 479 (1993).....	18, 24, 25, 31
<i>State v. Carter</i> , 151 Wn.2d 118, 85 P.3d 887 (2004)	17
<i>State v. Gonzales</i> , 46 Wn.App. 388, 731 P.2d 1101 (1986)	18
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986)	17
<i>State v. Soto-Garcia</i> , 68 Wn.App. 20, 841 P.2d 1271 (1992)	28, 29, 34
<i>State v. Thorn</i> , 129 Wn.2d 347, 917 P.2d 108 (1996)	20
<i>State v. Tijerina</i> , 61 Wn.App. 626, 811 P.2d 241, <i>review denied</i> 118 Wn.2d 1007 (1991)	17, 18, 23, 24, 31
<i>State v. Veltri</i> , 136 Wn.App. 818, 150 P.3d 1178 (2007).....	18
<i>State v. Vickers</i> , 148 Wn.2d 91, 59 P.3d 58 (2002)	17
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	18
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681 (1998).....	21
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868 (1968)	18
<i>United States v. Dixon</i> , 51 F.d 1376, (8 th Cir. 1995)	20
<i>United States v. Kerr</i> , 817 F.2d 1384 (9 th Cir. 1987).....	21
<i>United States v. Mendenhall</i> , 446 U.S. 544, 100 S.Ct. 1870 (1980)	21
<i>United States v. Tehrani</i> , 49 F.3d 54 (2d. Cir. 1995).....	20
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407 (1963)	34

Other Authorities

<i>31 The Champion 34</i> , November 2007	23
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A. ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN DENYING MR. SWEANEY'S MOTION TO SUPPRESS.

II. THE EVIDENCE USED TO JUSTIFY THE SEARCH WARRANT WAS OBTAINED AS THE RESULT OF AN ILLEGAL SEIZURE OF MR. SWEANEY.

III. THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT NUMBER 3.

IV. THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT NUMBER 5.

V. THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT NUMBER 6.

VI. THE TRIAL COURT ERRED IN ENTERING FINDING OF FACT NUMBER 7.

VII. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW NUMBER 1.

VIII. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW NUMBER 2.

IX. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW NUMBER 3.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN DENYING MR. SWEANEY'S MOTION TO SUPPRESS WHERE THE EVIDENCE USED AGAINST HIM WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEIZURE.

II. IF THIS COURT WERE TO CONCLUDE THAT THE SEIZURE CONCLUDED WHEN THE OFFICER HANDED BACK MR. SWEANEY'S DOCUMENTS AND TOLD HIM HE WAS FREE TO GO, MR. SWEANEY WAS RE-SEIZED

WHEN TROOPER KERSHAW ASKED HIM IF HE HAD CONTROLLED SUBSTANCES IN THE CAR AND AT THAT POINT, REASONABLE SUSPICION DID NOT JUSTIFY THE DETENTION.

III. THE ISSUANCE OF THE WARRANT DID NOT VALIDATE THIS SEARCH.

C. STATEMENT OF THE CASE

Mr. Sweaney was charged with unlawful possession of a controlled substance. CP 1. Mr. Sweaney brought a motion to suppress the evidence used against him based upon his unlawful seizure by Trooper Kershaw of the Washington State Patrol. CP 2-8. Trooper Kershaw testified at the hearing on the motion that he has been with the state patrol for almost twenty years. RP (8-4-08), p.7. He was a full time narcotics officer in 2002, assisting drug task force agencies around the state. RP (8-4-08), p. 7. He also works as an instructor for a private company where he teaches drug interdiction, including teaching how to look for criminal activity in passenger cars. RP (8-4-08), p. 7. He also keeps track of all his drug arrests, logging 1300 drug arrests. RP (8-4-08), p. 7-8. Trooper Kershaw also believed he has been trained in detecting deception. RP (8-4-08), p. 9.

On March 26, 2008 Trooper Kershaw saw Mr. Sweaney driving on SR 507 between Bucoda and Tenino at around 8:00 a.m.. RP (8-4-08), p. 11.. Kershaw stopped Mr. Sweaney for driving 56 mph in a 45 mph zone.

RP (8-4-08), p. 12. Kershaw pulled Mr. Sweaney over and when contacted, Mr. Sweaney asked "Uh-Oh, what did I do now?" RP (8-4-08), p. 12. Kershaw found this strange. RP (8-4-08), p. 12-13. Mr. Sweaney acknowledged his speed, however Kershaw conceded that Mr. Sweaney was just about to enter a 55 mph zone. RP (8-4-08), p. 13. Mr. Sweaney was ready with his driver's license before Kershaw asked for it, which Kershaw also found strange. RP (8-4-08), p. 13. Because Kershaw usually has to ask a motorist for his license first, his attention was now drawn to Mr. Sweaney. RP (8-4-08), p. 13. During this contact there was a female passenger in the front seat who was sleeping. RP (8-4-08), p. 13. In Kershaw's opinion, this person merely had her eyes closed and was faking sleeping. RP (8-4-08), p. 13.

Kershaw asked Mr. Sweaney for his registration and proof of insurance but Mr. Sweaney initially was unable to find either item. RP (8-4-08), p. 13-14. Mr. Sweaney was "looking everywhere," and turned around in his seat to look behind the driver's seat. RP (8-4-08), p. 14. Kershaw felt this was a suspicious thing to do, and believed that Mr. Sweaney was "buying time." RP (8-4-08), p. 14. Kershaw was also suspicious of some garbage that Mr. Sweaney had in his front shirt pocket. RP (8-4-08), p. 14. Kershaw asked what was in his pocket and learned that it was garbage. RP (8-4-08), p. 14. As Kershaw went around to the

passenger side of the car Mr. Sweaney crawled into the back seat to continue looking for his insurance and registration. RP (8-4-08), p. 15. Kershaw found this strange because in his opinion, Mr. Sweaney should have opened the back hatch. RP (8-4-08), p. 15. Kershaw came back around to Mr. Sweaney and Mr. Sweaney had found his registration. RP (8-4-08), p. 15. Mr. Sweaney couldn't find his insurance, stating that he thought he left it somewhere else. RP (8-4-08), p. 15.

Kershaw felt that while Mr. Sweaney was looking for the documents Kershaw demanded he produce, he did so nervously. RP (8-4-08), p. 16. Kershaw felt that the amount of time it took Mr. Sweaney to successfully produce his registration meant that he was "trying to buy time." RP (8-4-08), p. 16. When asked if Mr. Sweaney did anything else that was "suspicious," Kershaw said:

...Dan never actually had gotten out of the car all the way when he was searching for his paperwork. He just sat in the driver seat with his feet on the ground. Again, he appeared to be pretty nervous about something. His body language, just fidgeting, looking, things that just didn't seem consistent with, to me, the innocent motoring public, somebody that would be looking for a document.

RP (8-4-08), p. 16. Kershaw was asked about a plastic bag in the backseat floorboard, and testified that when Mr. Sweaney was looking in that area he quickly shoved it up underneath the driver's seat. RP (8-4-08), p. 17.

Kershaw found this suspicious. RP (8-4-08), p. 17. The plastic bag had nothing in it. RP (8-4-08), p. 17.

Kershaw testified that he didn't want to write Mr. Sweaney a \$550 ticket for not having proof of insurance so he asked Mr. Sweaney to continue looking for his insurance card (despite, according to his testimony, believing that the amount of time Mr. Sweaney had already spent looking was unusual). RP (8-4-08), p. 17. Mr. Sweaney stepped out of his car and looked for his insurance card again, per Kershaw's request. RP (8-4-08), p. 17. He looked in the same area from where he had produced his registration, behind the driver's seat. RP (8-4-08), p. 17. Kershaw found this suspicious. RP (8-4-08), p. 17. Kershaw asked whether his insurance card was in the very back of his car (the hatchback area) and Mr. Sweaney said "no, it wouldn't be back there." RP (8-4-08), p. 17-18. Kershaw found it strange that Mr. Sweaney would know for certain that he doesn't keep his insurance card in the hatchback area of his car. RP (8-4-08), p. 18.

Mr. Sweaney's driving status was clear, but Kershaw claimed he got a hit indicating something to do with DOC status. RP (8-4-08), p. 18. Kershaw opted not to write Mr. Sweaney any infractions because his speed was consistent with how fast people travel in that area. RP (8-4-08),

p. 18-19. Kershaw was asked: "What happened after you informed him you weren't going to be issuing any infraction?" Kershaw replied:

You know, I had—actually, I had observed a blue backpack in the back of the hatch area, and that—because he did not want to go into that area to look for any type of paperwork, I kind of thought, well, it was kind of strange. But I walked back up to Mr. Sweaney...I handed back Mr. Sweaney his driver's license and registration, asked him if he got his driver's license back and his registration. He acknowledged he got his paperwork back. Advised Mr. Sweaney he was free to go, and then I asked Mr. Sweaney if he would mind answering some questions for me.

RP (8-4-08), p. 19. Asked why, Kershaw testified that the "totality of the the things" including his initial comment at the window, having his driver's license at the ready, his nervousness, and the plastic bag (which was empty) that he "shoved" underneath the driver's seat suggested "some type of criminal activity afoot." RP (8-4-08), p. 20.

After Kershaw asked if he would answer some questions, Mr. Sweaney replied "Like what?" RP (8-4-08), p. 20. Kershaw then said "Let me visit with you out here," with the intention of separating Mr. Sweaney from the woman in the car. RP (8-4-08), p. 20. Mr. Sweaney complied with the command and got out of the car. RP (8-4-08), p. 20. They stood at the back of the car and Mr. Sweaney began to make small talk, asking Kershaw if he liked the color of his car (which was multi-colored). RP (8-4-08), p. 21. At this point Kershaw noticed some body language that made him suspicious. RP (8-4-08), p. 21. Specifically, Mr.

Sweaney crossed his arms across his chest and this seemed strange and consistent with nervous behavior to Kershaw. RP (8-4-08), p. 21. These crossed arms raised Kershaw's suspicion of criminal activity. RP (8-4-08), p. 21.

Kershaw described the contact at this point as a social, regular contact, "as anybody might visit with anybody at that time." RP (8-4-08), p. 22. During this regular, social contact Kershaw told Mr. Sweaney that he seemed nervous. RP (8-4-08), p. 22. Mr. Sweaney said that he was a hyper person and had been driving a long way at that point having come from the peninsula. RP (8-4-08), p. 22. Kershaw asked Mr. Sweaney what he had been doing on the peninsula, and Mr. Sweaney said clamming. RP (8-4-08), p. 23. Kershaw then testified "I told Dan that I wanted to ask him some specific questions and that *I would then get him on down the road.*" RP (8-4-08), p. 23 (emphasis added).

The very next question Kershaw asked was whether Mr. Sweaney had any controlled substances in the car. RP (8-4-08), p. 23. Mr. Sweaney said "no" and shook his head. RP (8-4-08), p. 23. When he said "no," he did it with a weak, higher-toned voice and looked away. RP (8-4-08), p. 23. Kershaw determined that these characteristics meant that Mr. Sweaney was lying. RP (8-4-08), p. 23. Kershaw then asked if Mr. Sweaney had any marijuana in the car, and Mr. Sweaney said "no" in a

lower-toned voice. RP (8-4-08), p. 23. Because Mr. Sweaney's tone of voice was different when he answered the two questions, Kershaw concluded he was lying. RP (8-4-08), p. 24. Kershaw also testified that when he asked about controlled substances, Mr. Sweaney glanced toward the hatch-back area of his car. RP (8-4-08), p. 25. Kershaw testified that because of the glance toward the backpack combined with Mr. Sweaney's tone of voice, he "knew" that Mr. Sweaney was in possession of controlled substances, "probably in the backpack." RP (8-4-08), p. 26.

Kershaw was asked if there was anything else about Mr. Sweaney which caused him to be suspicious, and he said that Mr. Sweaney licked his lips as though they were dry, and swallowed hard several times. RP (8-4-08), p. 26. That, combined with the other things such as the folded arms and fast talking caused Kershaw to say "I just felt there was criminal activity going on." RP (8-4-08), p. 26.

Kershaw then moved his questioning to the blue backpack in the hatch-back area. RP (8-4-08), p. 27. Kershaw asked if he could look in the backpack and Mr. Sweaney replied that he "just wanted to go home." RP (8-4-08), p. 27. Kershaw testified that Mr. Sweaney didn't directly ask if he could leave, and made no attempt to get in his car and leave. RP (8-4-08), p. 27. That is just as well, because Kershaw testified that at that point, Mr. Sweaney was *not* free to leave. RP (8-4-08), p. 27-28, 47-48.

Kershaw again asked to search the backpack, and Mr. Sweaney said "no." RP (8-4-08), p. 28. Kershaw again asked if there was marijuana in the backpack, and Mr. Sweaney again said "no." RP (8-4-08), p. 28. Kershaw then asked, for a third time, to search the backpack and Mr. Sweaney again said "no." RP (8-4-08), p. 28.

At that point Kershaw informed Mr. Sweaney that he was being detained pending a "free-air" search by the drug dog. RP (8-4-08), p. 29. Mr. Sweaney asked "Do we have to go through all of that?" RP (8-4-08), p. 29. Kershaw replied that they could avoid it if Mr. Sweaney would just give consent to search the car. RP (8-4-08), p. 29. At that point Mr. Sweaney threw up his arms and said "go ahead and look." RP (8-4-08), p. 29. However, Mr. Sweaney expressed confusion and then revoked his consent. RP (8-4-08), p. 30. Kershaw then told Mr. Sweaney to return to his car and told him it would be 30 or 40 minutes before the dog arrived. RP (8-4-08), p. 30. When Mr. Sweaney expressed dismay that he would be detained another 30 to 40 minutes, Kershaw asked for consent for a fourth time, and Mr. Sweaney again declined, telling Kershaw to go ahead and bring the drug dog. RP (8-4-08), p. 31.

After about 20 or 25 minutes the drug dog arrived. RP (8-4-08), p. 35. The drug dog "alerted" to three areas around the car, but did not "indicate" or pinpoint the presence of drugs. RP (8-4-08), p. 32, 50. One

of the three areas the dog alerted to was the hatch-back area where the backpack was located, but by that time Kershaw had obtained a telephonic search warrant from a court commissioner. RP (8-4-08), p. 33. During the search of the car Kershaw found a pipe in the blue backpack and a rock of cocaine in Mr. Sweaney's front shirt pocket. RP (8-4-08), p. 34.

The court entered findings of fact and conclusions of after this appeal was filed. The court made the following findings of fact:

1. The original stop of the defendant by Trooper Kershaw was valid.
2. The defendant was told he was free to leave.
3. Trooper Kershaw did release the defendant and the defendant was truly free to go.
4. Trooper Kershaw asked the defendant if he could talk with him further.
5. The discussion thereafter between Trooper Kershaw and Mr. Sweaney occurred with the consent of Mr. Sweaney while he was free to go.
6. Mr. Sweaney displayed demeanor and body language which raised suspicion in Trooper Kershaw. Originally, Mr. Sweaney appeared nervous, produced his driver's license unprompted, continually searched in the same location as well as unlikely locations when he was unable to

find his proof of insurance, and refused to exit the vehicle to check back for the document saying it would not be there. Additionally, when Mr. Sweaney did agree to exit the vehicle, his nervous demeanor continued by him crossing his arms, swallowing hard numerous times, licking his lips and his mouth appeared dry. He also looked at his vehicle when asked whether or not he consented to a search of the vehicle, glanced at the blue pack at one point, and his method of speaking changed with his tone of voice going up when asked about drugs being present in the car and down when he was asked about marijuana.

7. Trooper Kershaw has shown himself to be an officer that is well acquainted with observing subtle changes in the demeanor and body language of an individual when they are being questioned.

CP 39-40.

The court made the following conclusions of law:

1. Mr. Sweaney was free to leave when he engaged in a discussion with Trooper Kershaw.
2. There were no factors found which would have led a reasonable person to believe that he or she could not leave.
3. As a result of this conversation, Trooper Kershaw had a reasonable suspicion to detain the defendant and call for a drug

recognition dog based on specific and articulable facts, the totality of the circumstances, and the officer's training and experience.

CP 40.

The court ordered that the motion to suppress was denied. CP 40.

Mr. Sweaney assigns error to findings of fact numbers 3, 4, 5, 6, and 7.

Mr. Sweaney assigns error to conclusions of law numbers 1, 2, and 3.

Mr. Sweaney proceeded to a stipulated facts bench trial so that he could preserve the issue of his illegal detention for appeal. RP (8-6-08).

Mr. Sweaney was convicted and given a standard range sentence. CP 9-16. This timely appeal followed. CP 17.

D. ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MR. SWEANEY'S MOTION TO SUPPRESS WHERE THE EVIDENCE USED AGAINST HIM WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEIZURE.

Mr. Sweaney brought a motion to suppress the evidence used to prosecute him for possession of a controlled substance because it would not have been discovered were it not for his illegal detention by Trooper Kershaw. The trial court's findings of fact were not thorough and were largely conclusions of law couched as factual findings. Challenged findings of fact are reviewed for substantial evidence. *State v. Allen*, 138 Wn.App. 463, 468, 157 P.3d 893 (2007); *State v. Vickers*, 148 Wn.2d 91,

116, 59 P.3d 58 (2002). Substantial evidence is evidence that would persuade a fair-minded rational person of the truth of the finding. *Id.* A trial court's conclusions of law are reviewed de novo. *Vickers* at 468; *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

When an officer stops a car it is a seizure of the occupants and the seizure must be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); *State v. Tijerina*, 61 Wn.App. 626, 628, 811 P.2d 241, *review denied* 118 Wn.2d 1007 (1991). In evaluating investigative stops, the court must determine: (1) was the initial detention justified at its inception? (2) Was it reasonably related in scope to the circumstances which justified the detention in the first place? *Tijerina* at 629; *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S.Ct. 1868 (1968). In evaluating the second prong of this inquiry, the proper scope of the intrusion, the court must consider: (1) the purpose of the stop, (2) the amount of physical intrusion and (3) the length of time the suspect is detained. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

Once an officer who has made a traffic stop decides not to issue a citation, or otherwise completes the purpose of the traffic stop, any further detention of the vehicle's occupants must be justified by articulable facts giving rise to a reasonable suspicion of criminal activity or probable cause. *State v. Cantrell*, 70 Wn.App. 340, 344, 853 P.2d 479 (1993); *State v.*

Tijerina at 629; *State v. Gonzales*, 46 Wn.App. 388, 394, 731 P.2d 1101 (1986); *State v. Veltri*, 136 Wn.App. 818, 822, 150 P.3d 1178 (2007); *State v. Armenta*, 134 Wn.2d 1, 15-16, 948 P.2d 1280 (1997); *State v. Allen*, 138 Wn.App. 463, 157 P.3d 893 (2007).

In our case, Trooper Kershaw, having evidently learned from his experience in *Cantrell* where Division II held he violated the defendant's rights under Article 1, Section 7 and the Fourth Amendment by continuing to detain the defendant after the purpose of the traffic stop had been fulfilled, engaged in pure trickery in this case by telling Mr. Sweaney he was free to go followed immediately by a request that Mr. Sweaney answer some questions. Kershaw testified that after deciding not to issue any citations:

You know, I had—actually, I had observed a blue backpack in the back of the hatch area, and that—because he did not want to go into that area to look for any type of paperwork, I kind of thought, well, it was kind of strange. But I walked back up to Mr. Sweaney...I handed back Mr. Sweaney his driver's license and registration, asked him if he got his driver's license back and his registration. He acknowledged he got his paperwork back. Advised Mr. Sweaney he was free to go, and then I asked Mr. Sweaney if he would mind answering some questions for me.

RP (8-4-08), p. 19. Thus, Kershaw had already decided he was going to conduct a criminal investigation when he supposedly terminated the traffic stop. To suggest that the detention ended, where Kershaw immediately asked Mr. Sweaney if he could ask him some questions after returning his

license to him and while Mr. Sweaney was still pulled over on the side of the road is, with due respect to the parties below, absurd. Surprisingly, neither party thought to ask Kershaw whether he turned off his emergency lights when he engaged in this “regular, social” encounter with Mr. Sweaney on the side of the road. Because emergency lights are used not simply as a show of force but to ensure safety from other motorists during traffic stops, common sense (if not State Patrol policy) dictates that Kershaw left some or all of his emergency lights on. Kershaw sought to circumvent the clear rule established by cases such as *Cantrell*, *Tijerina*, and *Allen* by engaging in a legal fiction of giving Mr. Sweaney his license back before immediately “asking” him if he would answer further questions. That Kershaw seeks to portray this encounter as a seizure that stopped for a period of time before starting again is not dispositive.

The question of whether a seizure has occurred is a mixed question of law and fact. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996); *United States v. Dixon*, 51 F.3d 1376, 1379 (8th Cir. 1995); *United States v. Tehrani*, 49 F.3d 54, 58 (2d. Cir. 1995); *United States v. Kerr*, 817 F.2d 1384, 1386 (9th Cir. 1987). “Not every encounter between an officer and an individual amounts to a seizure.” *State v. Aranguren*, 42 Wn.App. 452, 455, 711 P.2d 1096 (1985). A person is seized under the Fourth Amendment only if, “in view of all the circumstances surrounding

the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980).

A person is seized under Article 1, Section 7 of the state constitution only when, by means of physical force or a show of authority, his freedom of movement is restrained, or when in light of all the circumstances a reasonable person would not believe he is free to leave or to otherwise decline an officer’s request and end the encounter. *State v. Young*, 135 Wn.2d 498, 510-11, 957 P.2d 681 (1998). This is a purely objective standard defined by the actions of the law enforcement officer. *Id.*

Here, the trial court’s finding of fact (which was actually a conclusion of law) number 3, which stated that Kershaw released Mr. Sweaney and he was truly free to go is not supported by substantial evidence. Likewise, finding of fact number 5 which states that the encounter between Kershaw and Mr. Sweaney was consensual and that Mr. Sweaney was free to go is also not supported by substantial evidence. When Kershaw told Mr. Sweaney he wanted to ask him some questions Mr. Sweaney did not eagerly say “sure!” Instead, he said “Like what?” At that point, Kershaw instructed Mr. Sweaney to step out of the car, saying “Let me visit with you out here.” Viewed objectively, no

reasonable person would feel, after having just been stopped for speeding and while still parked on the side of the road with a trooper parked behind him (with his lights most likely still flashing) that he was free to leave when the trooper says he has more questions and asks the subject to step out of the car.

Professor Tracey Maclin of Boston University School of Law observed:

In many cases, the officer will ask the driver if there is anything illegal in the car or will inquire about the presence of drugs, guns or large amounts of cash in the vehicle. Inevitably, the motorist denies possessing such items, which then prompts the officer to ask for consent to conduct a search of the vehicle. Although this maneuver can be performed rather quickly and typically without prolonging the stop, this tactic serves no purpose relevant to a traffic stop. In many cases the request for a consent search is not based upon a reasonable belief that contraband is inside the vehicle. Instead, this routine is part of a carefully scripted practice designed to exploit the vulnerable status of a motorist enmeshed in a police seizure.

31 *The Champion* 34, November 2007. The fiction of the “clean break” wherein an officer seeks to circumvent search and seizure rules by telling a subject he is free to go, while intending to conduct a criminal investigation and maintaining the same level of authority and force over the subject as before he handed back the subject’s driver’s license back to him is just that, *fiction*. Mr. Sweaney was seized when Trooper Kershaw

asked to speak with him further while contemporaneously, and fictitiously, “releasing” him from the traffic stop.

In *State v. Tijerina*, 61 Wn.App. 626, 811 P.2d 241 (1991) the defendant’s car was stopped by two state troopers in Ritzville for speeding. Because Mr. Tijerina’s license and registration were valid the troopers decided not to issue a citation. *Tijerina* at 628. When Mr. Tijerina opened his glove box to get his registration one of the troopers noticed several small bars of soap, such as the kind given out at motels. *Id.* The troopers were familiar with the narcotics trade and testified that Hispanics in the Spokane area were the subject of dozens of investigations for selling narcotics in motel rooms. *Tijerina* at 628. The troopers then asked for permission to search the car and Mr. Tijerina gave them permission. *Tijerina* at 628. The troopers found drugs during the search. On appeal to Division Three, the Court ruled that the troopers had exceeded the scope of the traffic stop. *Tijerina* at 628-29. Because the purpose of the stop had terminated when the troopers decided not to issue citations, any further detention had to be based on articulable facts giving rise to reasonable suspicion. *Id.* The facts articulated by the troopers did not come close to meeting this standard and the Court reversed the conviction.

In *State v. Cantrell*, 70 Wn.App. 340, 853 P.2d 479 (1993) Trooper Kershaw (the same trooper in Mr. Sweaney's case) stopped a car for speeding and wrote the driver a speeding ticket. He then asked the two men in the car if they had any contraband or open containers of alcohol in the car. *Cantrell* at 341-42. They told Kershaw they had alcohol in closed containers. *Cantrell* at 342. Kershaw then asked if he could search the car and handed the driver a written consent to search card. *Cantrell* at 342. The driver gave consent to search and Kershaw found a marijuana pipe in the ashtray. *Cantrell* at 342. After placing both men under arrest for possessing the pipe Kershaw searched the rest of the car and found marijuana and methamphetamine. *Cantrell* at 342.

Division Two of the Court of Appeals reversed Cantrell's conviction, holding that once the initial purpose of the traffic stop was fulfilled Kershaw had no right to detain the car's occupants further absent articulable facts giving rise to reasonable suspicion of criminal activity. The Court opined that Kershaw's actions were even *less* defensible than the actions of the troopers in *Tijerina*. The driver's consent did not validate the unlawful detention and the evidence should have been suppressed.

In *State v. Allen*, 138 Wn.App. 463, 157 P.3d 893 (2007), Mr. Allen was a passenger in a car that was stopped for not having a working

license plate light. After removing the driver and questioning her outside of the car, the officer learned that Mr. Allen was the respondent in a protection order in which the driver was the protected party. *Allen* at 467-68. The Court reversed Mr. Allen's conviction for violating a no contact order because asking the driver to exit her car and accompany the officer to the rear of the vehicle, and twice asking the name of the passenger, went well beyond a routine investigation of a traffic violation. "This is essentially the fishing expedition that the exclusionary rule seeks to prohibit." *Allen* at 470.

Such is the case here. The conclusion that this was a continuing seizure is bolstered by the fact that the State sought to use facts observed during the traffic stop to justify the "later" detention of Mr. Sweaney. The State pointed to the fact that Mr. Sweaney offered up his driver's license unprompted (which, even if statistically unusual is not even remotely suspicious; a reasonable person knows he will be asked for his license and would have it at the ready), and the fact that he searched for his insurance card in the same place he searched for his registration. Kershaw made much of the fact that Mr. Sweaney looked behind the driver's seat for his registration and insurance, but conveniently ignores the fact that Mr. Sweaney in fact found his registration by looking there. The only reason Mr. Sweaney continued looking in that same area for his insurance was

because Kershaw instructed him to keep looking for his insurance card. Kershaw did this in an obvious attempt to get Mr. Sweaney to open the back hatch of the car, having already decided he wanted to search the car. Contrary to finding of fact number 6, Mr. Sweaney did not "refuse" to exit the vehicle and look in the back. He simply said, in response to Kershaw's blatant ruse to get him to open the back hatch, that the insurance card would not be back there. Then, because Mr. Sweaney could do no right with Kershaw, his statement that his insurance card would not be found in the back hatch area was used against him as an "articulable fact" giving rise to reasonable suspicion. In other words, Mr. Sweaney does not carry his insurance card in his trunk, nor would any reasonable person. Because he stated he doesn't keep his insurance card in his car's equivalent of a trunk, he was tagged with behaving suspiciously. To be sure, if he had looked in his trunk area for an insurance card, *that* would have been deemed suspicious activity by Kershaw because no reasonable person would keep it there.

Mr. Sweaney was enmeshed in Kershaw's seizure with no feasible way to get out; everything he did was identified as suspicious by Kershaw because Kershaw learned, after *Cantrell*, that if you want to search a person's car you better be able to come up with some reason to do it. Thus, the evolution of Trooper Kershaw as a human lie detector who can

detect lying by whether you cross your arms and whether you swallow and lick your lips. The original seizure never concluded and because it was not based upon reasonable suspicion once the purpose of the original detention was fulfilled, the court should have granted the motion to suppress.

II. IF THIS COURT WERE TO CONCLUDE THAT THE SEIZURE CONCLUDED WHEN THE OFFICER HANDED BACK MR. SWEANEY'S DOCUMENTS AND TOLD HIM HE WAS FREE TO GO, MR. SWEANEY WAS RE-SEIZED WHEN TROOPER KERSHAW ASKED HIM IF HE HAD CONTROLLED SUBSTANCES IN THE CAR AND AT THAT POINT, REASONABLE SUSPICION DID NOT JUSTIFY THE DETENTION.

The evidence adduced at the hearing established that after Kershaw instructed Mr. Sweaney to step out of the car they had a very brief conversation in which Mr. Sweaney asked Kershaw if he liked the paint job on his car, and Kershaw asked Mr. Sweaney where he had come from and Mr. Sweaney told him he had been clamming on the peninsula. Immediately thereafter Kershaw told Mr. Sweaney he wanted to ask him some specific questions, and then asked him if he had controlled substances in the car. At this point, Mr. Sweaney was seized.

In *State v. Soto-Garcia*, 68 Wn.App. 20, 841 P.2d 1271 (1992) a Kelso police officer approached Mr. Soto-Garcia late at night in an area of Kelso known for cocaine trafficking. Soto-Garcia was walking out of an

alley and when he saw the officer, Soto-Garcia quickly looked the other way. The officer pulled his car to the side of the road and Soto-Garcia voluntarily walked over to him. The officer did not turn on his emergency lights. The officer then asked Soto-Garcia for identification, which he produced. After running an identification check the officer asked Soto-Garcia if he had any cocaine on him and if he could search him. *Soto-Garcia* at 22. Division Two of the Court of Appeals agreed with the trial court that Mr. Soto-Garcia was seized at the point in which the officer asked him if he had cocaine on him and if he could search him. *Soto-Garcia* at 25. At that point, the only thing the officer observed was Mr. Soto-Garcia walking in an area known for cocaine trafficking, and saw him look quickly away after seeing the officer. These facts did not give rise to a reasonable suspicion of criminal activity and the illegal seizure of Mr. Soto-Garcia vitiated the consent he subsequently gave the officer to search him. *Soto-Garcia* at 25.

Here, Mr. Sweaney was likewise seized when Kershaw asked him if he had controlled substances in the vehicle. No reasonable person would have felt free to leave under the totality of these circumstances and in the face of these questions. Indeed, the State conceded in its brief to the trial court that Mr. Sweaney was seized at the point in which Kershaw asked him if he had controlled substances in the car. CP 36 (State's

Response to Motion to Suppress at page 7, paragraph 2). The seizure was not justified by articulable facts which gave rise to a reasonable suspicion of criminal activity. At the point at which Kershaw began interrogating Mr. Sweaney about controlled substances, the only thing he had observed was Mr. Sweaney crossing his arms over his chest, which Kershaw characterized as per se suspicious behavior, and acting "nervous" by talking fast. These facts do not even approach reasonable suspicion of criminal activity. With due respect to Trooper Kershaw, the State did not lay a foundation for him as a human lie detector. There was not a single thing Mr. Sweaney did through this entire contact that Kershaw did not describe as suspicious and consistent with deception. The officer in *Soto-Garcia* had more articulable facts of suspicious behavior (quickly looking away, walking in a drug trafficking area) than Kershaw did.

Kershaw also had substantially fewer articulable facts than the officer in *State v. Tijerina*, who saw bars of hotel soap in open view in a car stopped in a high drug trafficking area, knowing that drug deals often take place in hotels. Because the original purpose of the traffic stop had been fulfilled, any further detention had to be based on fresh facts giving rise to reasonable suspicion of criminal activity. *Tijerina* at 629, *Cantrell* at 344. At the point in which Kershaw asked Mr. Sweaney if he had controlled substances no such specific and articulable facts existed and the

seizure was unlawful. The trial court erred in denying the motion to suppress.

Should this court conclude that Mr. Sweaney was still not detained at the point where Kershaw asked him if he had controlled substances, Kershaw “officially” detained him mere seconds later when he asked Mr. Kershaw if he could search his backpack and Mr. Sweaney said “no.” At that point, Mr. Sweaney tried to end the encounter by saying “I just want to go home.” Kershaw did not give Mr. Sweaney what Mr. Sweaney believed he needed, namely permission to leave. Instead, Kershaw testified Mr. Sweaney was, at that point, not free to leave. The only additional facts adduced between the time Kershaw asked Mr. Sweaney if he had controlled substances and the request to search the backpack were that when Mr. Sweaney told Kershaw he didn’t have controlled substances or marijuana, he used different tones of voice and swallowed hard and licked his lips. This borders on offensive, that a motorist’s actions would be subjected to such unreasonable scrutiny. There was no expert testimony, beyond Kershaw’s “training and experience,” which suggests that licking one’s lips, swallowing, and using a tone of voice that fails to stay exactly the same is evidence of possessing controlled substances. Contrary to finding of fact number 7, Kershaw did not establish himself as an expert in determining when a person is lying. And as for Mr. Sweaney

glancing at his backpack, one is compelled to ask "So what?" To be sure, if Mr. Sweaney had *avoided* looking at the backpack Kershaw would have certainly testified that *that* was evidence Mr. Sweaney possessed controlled substances. Kershaw, by his own testimony, felt there was criminal activity before he decided not to issue Mr. Sweaney any citations. Everything that came after was a contrived plan to justify a search that Kershaw intended to conduct irrespective of Mr. Sweaney's wishes.

Regardless of whether this Court concludes the detention was a continuing seizure from the traffic stop, a new detention that began when Kershaw asked if Mr. Sweaney had any drugs in the car, or a detention that began when Kershaw asked for consent and determined that Mr. Sweaney was not free to leave, at no point was it based on articulable facts giving rise to reasonable suspicion of criminal activity. It was based on highly subjective, amorphous observations of crossed arms that shouldn't have been crossed, lips that shouldn't have been licked, tones of voice that should have remained exactly the same and nervousness in the face of interrogation on the side of the road by a police officer who is determined to search without justification. To call this a consensual encounter requires the willing suspension of disbelief. It was anything but a consensual encounter and it was not based upon reasonable suspicion. Kershaw did not have the right to detain Mr. Sweaney for thirty or forty

minutes (which was the original estimate given to Mr. Sweaney) so that he could be searched by a drug dog. The trial court erred in denying the motion to suppress.

III. THE ISSUANCE OF THE WARRANT DID NOT VALIDATE THIS SEARCH.

Should the State argue that the subsequent issuance of a search warrant validates, or sanitizes, the illegal detention of Mr. Sweaney this Court should reject such an argument. Trooper Kershaw testified he had never met Mr. Sweaney before this traffic stop. Thus, all of the information used to justify the search warrant was information gathered during the illegal detention of Mr. Sweaney. There was reference in the record at the stipulated facts trial that some information was gathered from Mr. Sweaney's passenger that was used to justify the search warrant. This is perhaps why defense counsel did not challenge the warrant itself but chose instead to challenge the method by which the facts supporting the warrant was obtained, namely the illegal detention of Mr. Sweaney. But for the illegal detention of Mr. Sweaney Kershaw would never have called for the drug dog, and the search warrant would not have been issued. This is classic "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407 (1963); *Soto-Garcia* at 26. Trooper Kershaw went on a fishing expedition in this case and it was not justified

by the Fourth Amendment or by Article 1, Section 7. The trial court should have suppressed the evidence and dismissed the prosecution.

E. CONCLUSION

Mr. Sweaney's conviction should be reversed and dismissed because the evidence upon which his conviction is based was obtained in violation of his constitutional rights.

RESPECTFULLY SUBMITTED this 20th day of February, 2009.


ANNE M. CRUSER, WSBA#27944
Attorney for Mr. Sweaney

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

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

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8 STATE OF WASHINGTON,) Court of Appeals No. 38138-9-II
9 Respondent,) Thurston County No. 08-1-00567-8
10 vs.) AFFIDAVIT OF MAILING
11 DANIEL SWEANEY,)
12 Appellant.)
13 _____)

14 ANNE M. CRUSER, being sworn on oath, states that on the 20th day of February
15 2009, affiant placed a properly stamped envelope in the mails of the United States
16 addressed to:

17 Carol La Verne
18 Thurston County Deputy Prosecuting Attorney
19 2000 Lakeridge Dr. S.W.
20 Olympia, WA 98502

21 AND

22 Mr. Daniel Sweaney
12929 Koeppen Rd.
Rainier, WA 98576

23 and that said envelope contained the following:

24 (1) BRIEF OF APPELLANT

25 AFFIDAVIT OF MAILING - 1 -

Anne M. Cruser

Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

- 1
2 (2) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS (TO MS. La
3 VERNE)
4 (3) VERBATIM REPORT OF PROCEEDINGS (TO MS. La VERNE)
5 (4) RAP 10.10 (TO MR. SWEANEY)
6 (5) AFFIDAVIT OF MAILING

7 affiant further states she placed a properly stamped envelope into the mails of the United
8 States addressed to:

9 Ms. Betty Gould, Clerk
10 Thurston County Clerk's Office
11 2000 Lakeridge Dr. S.W.
12 Olympia, WA 98502

13 and that said envelope contained the following

- 14 (1) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
15 (2) AFFIDAVIT OF MAILING

16 Dated this 20th day of February, 2009

17 
18 ANNE M. CRUSER, WSBA #27944
19 Attorney for Appellant

20 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
21 Washington that the foregoing is true and correct.

22 Date and Place: Feb. 20th, 2009, Kalama, WA

23
24 AFFIDAVIT OF MAILING - 2 -
25

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Signature: _____

Anne M. Cruser