

No. 28965-7-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

TRACY J. GAY,  
Appellant.

STATE OF WASHINGTON  
BY WILLIAM A. LERAAS  
ATTORNEY  
OCT 14 11:12:08  
COURT OF APPEALS  
DIVISION II

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE DAVID L. EDWARDS, JUDGE

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BRIEF OF RESPONDENT

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## **FACTS**

Shortly before midnight on August 23, 2008, Deputy Schrader of the Grays Harbor County Sheriff's Office was on patrol in Aberdeen when observed a vehicle, which was being operated by appellant Tracy Gay, make a right-hand turn onto Boone Street without signaling and then a left-hand turn onto Perry Street and a right-hand turn into a parking lot without signaling. (11-06-08, RP 6-7). Deputy Schrader conducted a traffic stop on the vehicle in the parking lot activating his overhead lights. Deputy Schrader was alone during this entire contact which occurred around midnight. (11-06-08, RP 14). Although there are lights in the parking lot, the parking lot was still "pretty dim" at that time of night. (11-06-08, RP 8). He contacted the driver and requested her license, registration and proof of insurance. She did not have any of the documents but verbally identified herself as Tracy Gay. (11-06-08, RP 6-7). Schrader then walked to the back of her car and kept an eye on her as he was running a driver's check on her. As he was doing so, he noticed her make movements in the vehicle toward the center console and "kind of her waist band area in the crevice of the seat there." (11-06-08, RP 8). He could initially see her hands, but once her hands went down toward the

console area next to the seat, he could not see them or what she was doing. To Schrader it looked like she was trying to grab something possibly a weapon, or stuff something down in there. (11-06-08, RP 8-9). (CP 4). Schrader quickly contacted her and asked her to get out of the vehicle. He had her keep her hands up and place them on top of the car. He asked her what she was reaching for and she said, "Nothing." (11-06-08, RP 9). Fearing that she may have a weapon, Schrader decided to do a pat-down search. Ms. Gay was wearing tight jeans and Schrader noticed a large bulge in her front pants pocket about 4 or 5 inches by 1 inch by 3 inches in size. He removed the objects which turned out to be a cell phone and a lighter. (11-06-08, RP 9). As Schrader was removing those items he inadvertently felt a bulge in the coin pocket adjacent to that pocket. Schrader testified that he just "kind of just put my fingers on it pointing to it and said, 'what is this?'" (11-06-08, RP 9). Ms. Gay responded that it was drugs. Schrader asked if it was methamphetamine and she said that it was cocaine. (11-06-08, RP 10).

Deputy Schrader estimates that during his law enforcement career he has made close to a thousand drug arrests. (11-06-08, RP 14). Based on his training and experience, he knows that it is common for persons to carry controlled substances in the coin pocket of their pants. As he was pulling the cell phone and the lighter out he inadvertently felt the bulge in the coin pocket which arose further suspicions on his part that she may be carrying controlled substances. Prior to Ms. Gay identifying the object as

controlled substances, he never reached in the pocket or grabbed it. (11-06-2008, RP 14).

## ARGUMENT

There are a number of narrow exceptions that allow the police to conduct searches and seizures without a warrant. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Crane, 105 Wn.App. 301, 312, 19 P.3d 1100 (2001), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 49 (2003). One such exception allows officers to briefly detain a person when they have a reasonable suspicion that the person is committing or is about to commit a crime or is a safety threat. Terry, 392 U.S. at 21; Crane, 105 Wn.App. at 312. Such a brief detention must be justified by “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.” Terry, 392 U.S. at 21. There is “no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.” Terry, 392 U.S. at 21. Rather, it is a case-by-case inquiry in which the totality of the circumstances presented to the officer are evaluated. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The court also takes into account the officer’s training and experience when evaluating the reasonableness of a Terry stop. Glover, at 514; State v. Mercer, 45 Wn.App. 769, 774, 727 P.2d 676 (1986).

As the U. S. Supreme Court noted in Terry:

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Terry, 392 U.S. at 27. The Washington Supreme Court has held as follows:

[C]ourts are reluctant to substitute their judgment for that of police officers in the field. ‘A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing.”

State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) citing State v. Belieu, 112 Wn.2d 587, 601-602, 773 P.2d 46 (1989).

A police officer may, incident to stopping a car for a traffic violation, “take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant....” State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999). Toward that end, a frisk for weapons is permissible if (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the frisk, and (3) the scope of the frisk is limited to the protective purpose. Collins, at 173. The scope of the intrusion may be enlarged if the contact itself confirms existing suspicions or arouses further suspicions. State v. Pressley, 64 Wn.App. 591, 825 P.2d 749 (1992).

“[I]nvestigatory stops are not custodial interrogations requiring Miranda. A suspect may be asked to identify himself or to explain his activities without first receiving a Miranda warning.” State v. Kolesnik, 146 Wn.App. 790, 192 P.3d.937, 948 (2008) (citations omitted).

In State v. Laskowski, 88 Wn.App. 858, 950 P.2d 950 (1997), the defendant and his companions matched the dispatcher’s description of suspects in a possible vehicle prowler. Laskowski was carrying a backpack capable of concealing a weapon and appeared to be nervous. Another individual in the group was known to have a criminal history involving weapons, and another was seen to have a live shotgun cartridge in plain view. The court held that the officer reasonably believed the defendant to be armed and dangerous, justifying a frisk for weapons. Additionally, because the backpack was accessible to him and his companions, the pat-down of the backpack was in the scope of the lawful frisk.” [A]ny reasonable basis supporting an inference that the investigatee or companion is armed will justify a protective search for weapons.” Laskowski, at 860, citing State v. Wilkinson, 56 Wn.App. 812, 818, 785 P.2d 1139 (1990).

In Collins, supra, officers in a marked patrol car stopped a vehicle after observing that the brake lights failed to come on when the car was stopped at a traffic light. As soon as the car was stopped, one of the officers approached the driver’s side of the vehicle. He recognized the defendant from an earlier arrest on a felony warrant approximately two months before. During that arrest, the defendant was stopped for riding a

bicycle at night without a light. The officer found an outstanding warrant for the defendant's arrest. The defendant was placed under arrest and the officers agreed to put the defendant's bike in the bed of his truck about three blocks away. When the officers arrived at the truck, they noticed a large amount of either .380 or .357 ammunition, a holster and a set of handcuffs in the passenger compartment of the truck. The officers did not find a gun when they searched the truck's passenger compartment. When the officer recognized the defendant and recalled these facts, he ordered the defendant out of the vehicle and conducted a brief pat-down frisk of his outer clothing to search for weapons. The officer felt a hard object in the defendant's left rear pocket. He pulled it out and it turned out to be a knife with a 3 inch blade. As he pulled out the knife, a baggie containing methamphetamine fell out. The court held that given the fact that the stop occurred during early morning hours, the prior felony arrest and the ammunition in the vehicle at the time of the prior arrest "gave Officer Kaffer objective reasonable grounds to be concerned for his personal safety and the safety of others, including his partner." Collins, at 177.

In State v. Horrace, 144 Wn.2d 386, 28 P.3d 753 (2001), a Washington State trooper stopped a vehicle in which Horrace was a passenger for speeding at about 1:15 a.m. on I-5 in Lewis County. The trooper illuminated the interior of the vehicle with the spotlight on his patrol car as the street lights on the off-ramp were too far away to shed any light on the vehicle. The trooper contacted the driver who handed him his

license. The license had a hole punched in it indicating the driver had been stopped before and was driving on a suspended license. The trooper then asked Horrace if he had a valid license and could drive the vehicle, eliminating the need to impound it. Horrace handed the trooper his license. The trooper then returned to his vehicle to do a warrant check and check on the status of both the driver's and Horrace's licenses. The trooper learned the Horrace's license was valid, that the driver was driving with a suspended license and that there were several outstanding warrants for the driver's arrest. The court described the officer's observations from that point:

While waiting for the results of the radio check, the trooper observed the driver leaning to his right, tipping his right shoulder down, as though he were "doing something down between the seats." The driver's "movements toward the center console of the vehicle and in [Horrace's] direction" concerned the trooper. The trooper believed that the driver "could have been retrieving a weapon." Returning to the vehicle and placing the driver under arrest, the trooper ask him "what all the movement was up there," and the driver responded, "My butt itches, I was scratching it." After placing the driver in his patrol car, the trooper returned to the passenger side of the vehicle, asked Horrace to step out, and told him he "was going to pat him down for weapons." Although the driver's movements had initially caused the trooper more concern, he had also been concerned about the passenger. The trooper wanted to do the pat-down search because of the driver's movements, which had raised the possibility of a concealed weapon, and because of Horrace's "close proximity to

the console area where the gestures were being made.” The trooper observed that it would have been “easy to conceal something behind or inside” Horrace’s heavy leather jacket with its numerous pockets.

Horrace, at 389 (citations to the record omitted). Horrace was searched and found to be in possession of a number of bullets, a loaded pistol magazine and a switchblade knife. When asked where the gun was, Horrace told the trooper it was under the passenger seat. Horrace was arrested and also found to be in possession of methamphetamine.

The trooper testified at the suppression hearing that “three particular observations” gave rise to his belief that the defendant was armed and dangerous: the driver making unexplained movements between the seats and in Horrace’s direction, Horrace was in close proximity to those movements, and Horrace was wearing a bulky zippered jacket. In upholding the validity of the search, the court stated that “[w]e could not conclude that the trooper’s objective, undisputed facts were insufficient or that his inferences were irrational.” Horrace, at 396.

In State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986), an officer stopped the defendant’s vehicle after he had left a suspected drug house. After seeing the defendant lean forward in his seat, the officer had the defendant get out of the vehicle, reached under the seat and found a bag of marijuana. There was a passenger in the front seat. In upholding the search, the court held as follows:

[The officer] saw a furtive gesture sufficient to give him an objective suspicion that

Kennedy was secreting something under the front seat of the car. From his vantage, in his own car behind Kennedy's, he had no way of knowing what Kennedy was hiding. When he ad Kennedy outside the car, he did not frisk him, as he could have had he suspected Kennedy might be armed. However, there remained the gesture, the unknown object under the front seat, and the passenger inside the car who had easy access to the object."

Kennedy, at 11.

Appellant cites State v. Allen, 138 Wn.App. 463, 157 P.3d 893 (2007) for the proposition that since Ms. Gay was stopped for a traffic infraction Deputy Schrader cannot conduct a Terry frisk if he became concerned for his safety. Nothing could be further from the truth. "A stop based on a traffic infraction is valid only if the officer had, from the beginning, a reasonable, articulable suspicion that the infraction had occurred and the stop was reasonably related in scope to the circumstances that justified the interference in the first place. Allen, at 470. In order for an officer to investigate beyond the scope of the justification for the initial stop, the officer must have acquired lawful, reasonable suspicion to further investigate. Allen, at 471. Here, there is no questions that the initial stop was justified. Once the stop was initiated, Ms. Gay began making movements in the vehicle that concerned Deputy Schrader. He was alone during hours of darkness and he was concerned that she may have been arming herself. He decided to do a pat-down frisk and she had a large bulge in her front pants pocket. As he was removing these items, he

inadvertently touched or swept his hand over the bulge in her coin pocket. This aroused further suspicions on his part. After removing the cell phone and the lighter from her pocket, Schrader “simply touched it [the bulge] from the outside of her jeans and - just to acknowledge what I was speaking about and asked her what it was.” (11-06-08, RP 14). As previously noted, the scope of the intrusion may be enlarged if the contact itself confirms existing suspicions or arouses further suspicions. Pressley, supra.

Nor are Deputy Schrader’s actions here comparable to the actions of the officer in State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009). In Garvin, the Supreme Court decried the continued manipulation of an item that the officer knew not to be a weapon. Schrader could have asked Ms. Gay what the item in her coin pocket was without touching it but, as he testified at the suppression hearing, he touched it on the outside of her jeans just to indicate what he was talking about. (11-06-08, RP 14). It was not his touch that identified the item as controlled substances, but her response to his question.

The State would agree that it appears that the search of Ms. Gay’s vehicle would have been barred under Arizona v. Gant, \_\_\_\_\_ U.S. \_\_\_\_\_, 129 S. Ct. 1710, 173 L.Ed.2d 45 (2009). Be that as it may, even though the search of the vehicle revealed more controlled substances, there was still sufficient evidence to convict Ms. Gay as she had controlled substances in her pocket.

## CONCLUSION

The initial stop herein was legitimate. The stop occurred during hours of darkness. Deputy Schrader was alone. As he was doing a radio check on the driver from the back of her vehicle Schrader saw the defendant make movements towards her right side. It appeared that she was trying to hide something between the seat or reach for the area of her waistband. Schrader was concerned that she might be arming herself. These are the “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry, 392 U.S. at 21. The frisk was limited to the protective purpose. Once the defendant identified the small bulge in her pocket as cocaine, Schrader had probable cause to believe that a crime had been committed, seized the cocaine and placed the defendant under arrest.

For all the foregoing reasons, the conviction of the appellant should be affirmed and this appeal dismissed.

Respectfully Submitted,

By: \_\_\_\_\_

  
WILLIAM A. LERAAS  
Deputy Prosecuting Attorney  
WSBA #15489

COURT OF APPEALS  
DIVISION II  
OCT 14 10:00 AM  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 38965-7-II

v.

**DECLARATION OF MAILING**

TRACY J. GAY,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 9<sup>th</sup> day of October, 2009, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry; Attorneys at Law; 203 Fourth Avenue East, Suite 404; Olympia, WA 98501-1189, and Tracy J. Gay; 921 West Cushing; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 9<sup>th</sup> day of October, 2009, at Montesano, Washington.

Barbara Chapman