

No. 39743-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Jill Markham,

Appellant

FILED
COURT OF APPEALS
OF THE STATE OF WASHINGTON
10 APR 26 AM 10:00
STATE OF WASHINGTON
BY *[Signature]*
JENNY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable, Judges Christine Pomeroy and Anne Hirsch
Cause No. 09-1-00003-8

BRIEF OF RESPONDENT

Heather Stone
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether, in the execution of an arrest warrant, the officers were justified in asking Markham to exit the shed based on officer safety.

2. Whether, in the course of a lawful detention for officer safety, the officers were justified in conducting a patdown of Markham based on a reasonable suspicion she was armed.

3. Whether the seizure of Markham violated her constitutional rights under the Fourth Amendment and Article I, Section 7 of the Washington Constitution.

4. Whether the protective patdown of Markham was justified based first on officer safety, and then on Terry, based on the totality of the circumstances, and the contraband found during the patdown was admissible at trial.

5. Whether Markham's statements made to police both during and after receiving Miranda rights were admissible at trial.

B. STATEMENT OF THE CASE.

1. In the interest of space, any relevant facts not discussed here, will be addressed in the State's argument. The State otherwise accepts the defendant's statement of the case with the following corrections, clarifications, and additions:

Deputy Malloy had been to Ms. Markham's property once prior to the day of the arrest but had not encountered anyone at the time, nor had he gone to the house. [8/3/09 RP 45]. Deputy Young had been to the property before on an unrelated issue, but was not

familiar with any of the people present on the day of the incident. [8/3/09 RP 52, 67, 71]. Officer Haggerty personally knew Teitzel from previous arrests, which included felony drug offenses, and had been to the residence once prior to this incident. [8/3/09 RP 84, 105].

Young noted he was the only officer available to contain the females in the shed at the time. [8/3/09 RP 55-57, 73]. Young testified he was extremely concerned with officer safety and was trying to contain the danger by asking the women to exit the shed, so that he could “deal with the situation when [he] was ready for it, not as [he was] walking away or when [they were] dealing with an individual on the ground.” [8/3/09 RP 78-79]. He also stated he handcuffed Markham and informed the other officers he thought he had seen contraband on the defendant. [8/3/09 RP 61]. Officer Haggerty then came over and read Markham her Miranda rights, which she proceeded to talk throughout. [8/3/09 RP 61]. After that, Young asked her what was in her pockets, to which Markham said, “drugs.” [8/3/09 RP 61]. The officers then did a patdown for “further weapons or further substance” and found more methamphetamine in the other jacket pocket, as well as a scale commonly used for weighing drugs. [8/3/09 RP 61-62].

C. ARGUMENT

1. The findings of fact and conclusions of law were appropriate and where they may have been mislabeled no substantive error exists.

On appeal, a trial court's unchallenged findings of fact are treated by a reviewing court as verities. State v. Moore, 161 Wn.2d 880, 884, 169 P.3d 469 (2007). A challenged finding will be upheld if it is supported by substantial evidence. State v. Alvarez, 105 Wn. App. 215, 220, 19 P.3d 485 (2001). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). Conclusions of law erroneously labeled findings of fact (and vice versa) are treated according to their substance, not their denominations. State v. Gaines, 122 Wn.2d 502, 508, 859 P.2d 36 (1993). Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo, State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), as is the determination of whether undisputed facts constitute a violation of the search-and-seizure provision of the state constitution. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); United States v. Limatoc, 807 F.2d 792,

794 (9th Cir. 1987) (citing United States v. Feldman, 788 F.2d 544, 550 (9th Cir. 1986)).

- a. There is sufficient evidence to support the trial court's findings of fact.

Markham assigns error to the following findings of fact: 11, 16, 17, 20, 21, and 22. She first argues the evidence is insufficient to support findings 11, 16, 17, 20, 21, and 22. She then argues finding of fact 19 is actually a conclusion of law, and if not, then there is insufficient evidence to support the finding. The State disagrees with Markham's characterization of the evidence and submits the court's findings were supported by the record.

To begin, a fact need not be undisputed by the defendant to be a valid finding of fact. In fact, it is more likely than not the defendant will have a different explanation for events than the State. For a disputed finding to stand, there need only be sufficient evidence to persuade a fair-minded and rational person of the truth of the finding. Alvarez, 105 Wn. App. at 220; Hill, 123 Wn.2d at 644. In a suppression hearing, the trial court has the responsibility of weighing the strength of the evidence presented as well as the credibility of the witnesses. In making such determinations, the court may make all reasonable inferences. That is exactly what

occurred in this case—the trial court found the officers’ version of events, along with reasonable inferences, more credible than Markham’s explanation.

First, the court found that “[t]he conversation between the shed occupants was about a drug deal.” CP 16. There is sufficient evidence in the record to support this finding. Haggerty testified to having extensive narcotics-related training and experience, with over 100 drug-specific cases in 2008 alone. [8/3/09 RP 83]. Markham does not challenge Haggerty’s specific training and experience in this area. Similarly, Malloy also testified he had narcotic-specific training and experience. [8/3/09 RP 11-12].

In addition, the court also heard that upon approaching the shed, Malloy testified to hearing an apparent phone conversation between a female and an unidentified party involving words Malloy was familiar with from drug investigations, such as “grams” and “quarters,” and that the female “could meet the person within a half hour.” [8/3/09 RP 16]. He also testified hearing a conversation between Teitzel and another female, but could not clearly make out the words. [8/3/09 RP 16].

Likewise, Haggerty testified he heard all three occupants conversing with each other on the same subject and that the

conversation was drug-related. [8/3/09 RP 87, 107-08]. He specifically testified to hearing the words “ounces,” “grams,” “making a delivery,” and “Vail, Vail Cutoff,” all of which he identified from his training and experience as drug-specific verbage. [8/3/09 RP 86-88, 99, 105]. Haggerty described the conversation as one in which the females were talking, “in general,” and in which “[Mr. Teitzel] would jump in.” [8/3/09 RP 87, 107-08]. All of this would lead a reasonable person to interpret the shed occupants were, at a minimum, discussing drugs, and more likely a drug delivery. Moreover, the testimony of the conversation combined with the discovery of drugs and drug paraphernalia at the scene and the credibility of the witnesses would likely lead a reasonable person to come to the same conclusion. [8.30/09 RP 17-18]. Thus, more than a scintilla of evidence exists to support this finding and Markham’s argument to the contrary is not only conclusory, but generalizes the evidence—seemingly in an attempt to minimize it. The court was well within its purview to use reasonable inferences and credibility determinations to find the shed occupants were talking about drugs.

Second, finding 16 is also amply supported in the record. All three officers expressed their concern for both their and the other officers’ safety with the females’ presence in the tool shed.

Haggerty testified to seeing the women in some stage of exiting the shed when he approached Teitzel for the arrest, but that they retreated backwards into the shed and “slam[med]” the door. [8/3/09 RP 90-91, 98-99, 101-02, 105, 106, 108]. Malloy testified that as he and Haggerty were wrestling with Teitzel he heard the “shed door slam shut and lock.” [8/3/09 RP 17]. He also noted seeing the defendant and the other female prior to the door shutting. [8/3/09 RP 18].

Young testified that when he ran into the backyard Haggerty told him, “watch the shed, watch the shed” and “there’s people in that shed.” [8/3/09 RP 55-56]. He told the court he heard “banging” in the shed, it was dark, they were in a rural area, the other two officers were on the ground wrestling with a felony warrant arrest (Teitzel), and Haggerty sounded “extremely worried,” so he took cover in an area off to the side and announced, “Police. Come out of the shed.” [8/3/09 RP 55-57, 73]. He expressly stated he was concerned with officer safety and was trying to contain the danger by asking the women to exit the shed, [8/3/09 RP 77-79], and said he was in fear, “of . . . someone [opening] [the] door and . . . shooting.” [8/3/09 RP 76]. He also testified, “I didn’t know what they were banging and what was going on.” [8/3/09 RP 56]. At that point

he was outnumbered two to one by the occupants of the shed since his partners were still entangled with Teitzel. [8/3/09 RP 57].

Likewise, Malloy testified he was concerned for his safety because he did not know what objects the shed might contain. [8/3/09 RP 19]. Additionally, he noted his prior training and experience in drug cases, informed him that sometimes weapons were involved. [8/3/09 RP 19]. Haggerty also testified his training and experience in narcotics cases, as well as the particular circumstances of this case, gave him the same concern regarding the shed occupants. [8/3/09 RP 91, 93].

Contrary to Markham's claim, all of this testimony is sufficient to support the trial court's finding. Young, alone, referenced his concern for officer safety on at least 13 separate occasions in the record. [8/3/09 RP 56-60, 72, 74, 76-77, 79, 81]. That testimony, combined with the statements of the other officers, is, again, more than a scintilla of evidence. The court was entitled to take the officers' training and experience into consideration, as well as the totality of the circumstances—the timing and location of events, the defendant's evasive actions in retreating into the shed, the noncompliant felon Haggerty and Malloy were wrestling with, the ratio of unoccupied officers to shed occupants, and the noise

coming from the tool shed—and find there was a strong likelihood Ms. Markham was armed or in the process of arming herself. It overwhelming meets the threshold of sufficiency and Markham must ignore the entirety of the record to claim otherwise.

Third, the evidence was sufficient to find Markham held the bottle in a “club-like fashion.” CP 17. Findings of fact need not quote the testimony verbatim to be valid. Markham’s argument here ignores Young’s repeated testimony the defendant emerged from the shed holding an empty wine bottle “by the neck area, upside-down” and that because it was not the typical fashion in which one holds a wine bottle it caused Young concern. [8/3/09 RP 57]. The trial court described it as being held by the neck “in a fist,” a motion Young apparently demonstrated in court to make the hold clear, and which the trial court noted “the Court of Appeals may not recognize” by reading it in the record. [8/3/09 RP 135]. The description in the record is consistent with the description in the finding of fact and thus sufficient to support it.

Fourth, Markham argues findings 20 and 21 mischaracterize the evidence in that it implies she was wholly uncooperative instead of merely partially uncooperative. The State disagrees. The record is replete with evidence Markham was flatly uncooperative. Young

requested she remove her hands from her pockets at least three, if not four, times and after initially ignoring the request, she then complied only momentarily, like a game of peek-a-boo.

The court's finding was that Markham was "noncompliant" with the requests, not that she never removed her hands from her pockets. CP 17. A reasonable person, given the same evidence, would likely find that a person either complies or does not comply with an officer's order. One does not partially comply. Young testified it was unusual for a person not to "keep their hands up where I tell them to" and "repeatedly not to follow an officer's orders." [8/3/09 RP 59, 72]. The order was to remove her hands from her pockets and keep them in plain sight. Markham did not do so. The evidence is overwhelming that she did not comply with Young's instructions. Her actions were wholly inconsistent with being cooperative and, like a reasonable trier of fact, the court was entitled to find Markham did not comply based on the evidence presented. Markham's claim fails.

Fifth, the evidence was sufficient for the court to find Young saw the drugs contemporaneous to pulling her hand from her pocket as described in finding 22. CP 17. Markham argues the court's use of "while" was incorrect, yet her assertion Young saw

the baggie only “after” he pulled her hand out is simply her preferred characterization of the events and one with which the court was not required to agree. [Appellant Brief, at 23].

Young testified to the contemporaneous nature of the events saying, “I grabbed on to her left hand and pulled it out of her pocket, and that’s when I noticed what appeared to be drugs in her jacket pocket, her vertical jacket pocket.” [8/3/09 RP 60]. Haggerty then testified Young told him “there was something white crystal or something [that] came out with it when her hand came out.” [8/3/09 RP 94]. While Young’s statement was potentially ambiguous as to the timing of discovery, Haggerty’s was not. The latter impression is apparently the one the court was left with and which Markham did not dispute, until now.

Moreover, at trial Young clearly stated, “As I started pulling her hands out of her pockets, she kind of slowly resisted, and I pulled her hand up, and could see what appeared to be a bag of white powdery substance” and “[a]s her hands came out, the bag came out partially with it.” [8/12/09 RP 33, 52]. Again, Markham did not challenge these statements at trial. While the statements at trial did not influence the court’s decision at the suppression hearing, it is consistent with the impression the hearing testimony left on the

court regarding the timing of events. At a minimum, the testimony supports the events happening so close in time that a reasonable person could determine they were contemporaneous, if not reasonably infer they were synchronous. Either way, the court was entitled to rely on the statements of the officers and define the discovery as “while” instead of Markham’s preferred “after.”

Sixth, it appears to the State finding 19 could be a mixed finding of fact and conclusion of law, but submits is likely more a finding of fact than otherwise, and one supported by sufficient evidence, as discussed regarding finding 16. First, the record is replete with testimony the officers had a reasonable concern for their safety with the women in the shed, as previously noted. Second, to be a conclusion, the State submits the statement would have to more clearly address the legal propriety of the officers’ actions, which this finding appears to only impliedly reference.

If the court determines either all or a part of the statement is a legal conclusion, however, then the State submits it is no less appropriate because it is one which could reasonably be drawn from the same evidence. If officers are involved in a felony arrest with an uncooperative person, in a dark and remote location, are aware an unknown number of acquaintances of the arrestee have

retreated into a tool shed in response, and can further hear the individuals banging around inside the shed, it is reasonable for the court to conclude the situation demanded “the shed occupants exit with their hands up[.]” CP 17. This conclusion is in line with the expectation that officers are expected to protect both the citizens they encounter as well as their right to protect themselves. State v. Collins, 121 Wn.2d 168, 175, 847 P.2d 919 (1993).

b. The trial court did not err in its conclusions of law.

Markham next assigns error to conclusions of law 1, 2, and 4. The State submits there is no error. First, conclusion of law no. 1 contains factual assertions fully supported by the record. It states, “Law enforcement had the right to ask the defendant to exit the shed based on officer safety concerns due to the remote location, late hour, combative arrestee, knowledge of drug deal, and escalating situation.” Markham misstates the officers’ related testimony. As previously noted, Young testified he heard a loud commotion, [8/3/09 RP 54], came around the corner, [8/3/09 RP 54], found Haggerty and Malloy wrestling with Teitzel on the ground, [8/3/09 RP 54-55], saw and heard the shed door shut, [8/3/09 RP 54], was told in an excited voice by Haggerty to “watch the shed, watch the shed,” [8/3/09 RP 55-56], it was a dark and

remote location, [8/3/09 RP 55-56], and then, *while* the other officers were still wrestling with Teitzel, he asked Markham to come out of the shed. [8/3/09 RP 57]. Expressly, Young stated, "I made that decision for their personal safety and mine. They had their hands full with Mr. Teitzel at the time. . . . He was still being noncompliant behind me, dealing with Officer Malloy and Haggerty." [8/3/09 RP 72]. In fact, when asked by defense counsel if Young felt Teitzel was no longer a risk at the time, Young stated, "I couldn't—I didn't deal with him, so I didn't know at what point they had him actually detained," and that things "had escalated when [he] came around the corner. They had definitely escalated." [8/3/09 RP 75, 77].

In addition, Malloy testified that at the point Young moved to detain Markham, which was clearly after he asked the women to exit the shed, he was *then* able to provide assistance to Young because Teitzel was in custody. [8/3/09 RP 21]. It is unlikely if Teitzel was under control and things had clearly deescalated prior to that event, Young would still have been attempting to control the situation alone and outnumbered against an unknown and potentially armed foe. As Young admitted, his timing in asking the women to come out of the shed was "not a smart choice on [his]

part” based on the ratio of officers available and the surrounding circumstances. [8/3/09 RP 81]. This testimony is consistent with the totality of the evidence and supportive of the court’s conclusion. As the court stated in making its ruling,

Both officers must deal with Mr. Teitzel at the same time Officer Young, who was in the front, hears the struggle, so the struggle was loud enough for the person at the front of the property to hear [it]. . . . The two officers are struggling, and they’re in the direct line of that shed. . . . They know they’re dealing with a felony suspect. They know the suspect is now resisting. They know the people who were with the suspect or at least talking have now backed in and shut the door and the resistance is continuing. Officer safety demands that they come out with their hands up[.] . . . They heard drug dealing lingo, language, but more importantly, . . the fear of officer safety became real . . . when [the women] did not continue to come out with Mr. Teitzel. . . . They closed the door. It heightens the officers [sic] that they are not being transparent, and at 11:30 at night in the dead of winter, in the dead of night . . . with no lighting around—this is a very dark area. . . . I think it was reasonable for officer safety—there’s two officers grappling within three feet of this—to ask them to come out with their hands up. It’s not unusual.

[8/3/09 RP 134-37]. Any comments made by Young that he believed the yelling behind him had stopped when he asked the women to exit the shed are overshadowed by 1) the speed with which events unfolded—the court described them as occurring “simultaneously,” 2) the evasive actions of the women in retreating

into the shed, and 3) the fact that it still required two officers to deal with Teitzel which left Young alone to manage the unknown threat from the shed. [8/3/09 RP 138]. A decrease in yelling is not dispositive of the issue and the court was correct in concluding to the contrary.

Conclusion of law no. 2 is also supported by sufficient evidence in the record—to the extent it is a factual finding regarding the need to seize Markham based on officer safety. The State submits this is so for the reasons stated at length previously; the totality of the circumstances combined with the defendant's own actions demonstrated a particularized suspicion she was armed and dangerous in the shed, as well as the rapidity with which the events unfolded.

Conclusion of law no. 4 is also supported by the record. The court stated, “When the pat-down occurred, they found the drugs. The drugs were then—she was Mirandized and the statements were given.” [8/3/09 RP 137]. Not only did the court expressly find Markham was read her Miranda rights, but it concluded it occurred before she gave the incriminating statements. In further support, the record reflects that even while she was being read her Miranda rights she continued to try and talk over Officer Haggerty. [8/3/09

RP 61, 95]. The record was sufficient for the court to make this determination that, at a minimum, the admission occurred contemporaneous to the reading of her rights, if not afterwards.

2. The admission of evidence seized from Markham did not violate her rights under either the Fourth Amendment or Article I, Section 7 of the Washington Constitution.

The Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution protect individuals from unreasonable searches and seizures by the government. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Under both the state and federal constitutions, a seizure is reasonable when it is based upon probable cause. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). However, an investigative or Terry stop is an exception to the general rule that warrantless searches and seizures are presumed invalid. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

While an investigatory detention is less intrusive than an arrest, it is nevertheless a form of seizure and, therefore, must be reasonable under the Fourth Amendment and article I, section 7 of the Washington Constitution. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Such a seizure is reasonable if the officer has “specific and articulable facts which, taken together with rational

inferences from those facts,” result in the reasonable suspicion that the person seized is participating, or is about to participate, in criminal activity or there is a reasonable suspicion the person is armed and dangerous. Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Broadnax, 98 Wn.2d 289, 301, 654 P.2d 96 (1982), *overruled on other grounds by Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). That said, “[n]ot 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 court looks to “the totality of the circumstances presented to the officer to decide whether the stop” meets the criteria of a permissible investigative or Terry stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). “The reasonableness of a stop [then], is a matter of probability, not a matter of certainty.” State v. Mercer, 45 Wn. App. 769, 774, 727 P.2d 676 (1986). As such, the court must consider an officer’s training and experience in the analysis. Id. at 774; State v. Samsel, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). “The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference,” but “the ultimate

determination of whether those facts constitute a seizure is one of law and is reviewed de novo.” State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), *overruled on other grounds by* State v. O’Neill, 148 Wn.2d 564, 62 P.2d 489 (2003).

- a. The officers were acting within the limited authority of a valid arrest warrant, as well as responding to a legitimate concern for officer safety, in asking the women to exit the shed.

The first issue to address is whether the deputy’s actions in asking or ordering the women out of the shed was “reasonably related in scope to the circumstances which justified the interference in the first place.” Williams, 102 Wn.2d at 739; State v. Bray, 143 Wn. App. 148, 154, 177 P.3d 154 (2008).

[A]n arrest warrant . . . constitutes “authority of law” which allows the police the limited power to enter a residence for an arrest, as long as (1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches of investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the time of the entry.

State v. Hatchie, 161 Wn.2d 390, 392-93, 166 P.3d 698 (2007).

Under both federal and Washington State law, a felony arrest warrant gives the police the authority to enter the house of the accused for a brief period of time. Id. at 395; see Payton v. New

York, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); see also Steagald v. United States, 451 U.S. 204, 214 n.7, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981); (“[A]n arrest warrant authorizes . . . a limited invasion of that person’s privacy interest when it is necessary to arrest him in his home.”); State v. Williams, 142 Wn.2d 17, 24, 11 P.3d 714 (2000) (relying on Payton for article I, section 7 analysis); State v. Hopkins, 113 Wn. App. 954, 958, 55 P.3d 691 (2002) (“[A]n arrest warrant, by itself, provides authority for the police to enter a person’s residence to effectuate his or her arrest.”). An analysis of the reasonableness of an intrusion under article I, section 7 of the Washington State constitution differs from the analysis under the Fourth Amendment in that the former relies on “whether a seizure is permitted by ‘authority of law’—in other words, a warrant” whereas the latter relies only on the reasonableness of the warrantless seizure. Michigan v. Summers, 452 U.S. 692, 702-03, 69 L. Ed. 2d 340, 350, 101 S. Ct. 2587 (1981).

In the instant case, Markham does not challenge the validity of the arrest warrant, does not claim the officers exceeded the scope of the arrest warrant by being on the property in the first place, that Teitzel was merely a guest (not a resident) of the

property, or that at any point the officers attempted to enter the main dwelling to effectuate the arrest, thus those arguments are now waived.

In line with the standard stated in Hatchie, the officers' entry in this case was reasonable—they only physically entered the backyard of the property—the minimal intrusion necessary for the arrest, the arrest of Teitzel was not a pretext for any other search or investigation, the police had probable cause to believe Teitzel was an actual resident, and he was actually present at the property at the time the officers entered it.

When officers execute a valid arrest warrant, they “may conduct a reasonable ‘protective sweep’ of the premises for security purposes.” Hopkins, 113 Wn. App. at 959; Maryland v. Buie, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). The officers are limited in scope to a “cursory visual inspection of places where a person may be hiding,” Hopkins, 113 Wn. App. at 959 (citing Buie, 494 U.S. at 334), and it “must last no longer than necessary to *dispel the reasonable suspicion of danger* or to complete the arrest, whichever occurs sooner.” State v. Boyer, 124 Wn. App. 593, 601, 102 P.3d 833 (2004) (emphasis added) (citation omitted).

If the area searched is immediately adjacent to the place of arrest, then the officers do not have to justify their actions by demonstrating a concern for officer safety. Hopkins, 113 Wn. App. at 959; Buie, 494 U.S. at 334. It is only when the area involved in the protective sweep extends significantly beyond the immediate area of the arrest that the officers must be able to articulate “facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Buie, at 334.

As the Supreme Court of the United States stated in Buie, “That [the defendant] had an expectation of privacy in those remaining areas of his house, however, does not mean such rooms were immune from entry.” Id. at 333. “The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter.” Id. This is because, unlike a Terry stop, a protective sweep

occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary’s “turf.” An ambush in a confined setting of unknown

configuration is more to be feared than it is in open, more familiar surroundings.

Id. The case law overwhelmingly recognizes the dangers law enforcement officers face daily, and notes the special potential for danger facing officers from the present associates of an arrestee. Terry, 392 U.S. at 23; United States v. Wiga, 662 F.2d 1325, 1331 n.5 (9th Cir. 1981) (“[T]he arresting officers have legitimate concerns that occupants not visible to them may imperil their safety.”); State v. Parker, 139 Wn.2d 486, 501, 987 P.2d 73 (1999) (“[U]nder certain circumstances nonarrested individuals may pose a treat to officer safety in an arrest situation.”); see Arizona v. Johnson, 129 S. Ct. 781, 788, 172 L. Ed. 2d 694 (2009) (officer safety concerns entitled an officer to ensure that before allowing a passenger to leave the scene he was not armed, “ensuring that, in doing so, she was not permitting a dangerous person to get behind her.”); Kennedy, 107 Wn.2d at 11 (noting “an officer conducting an investigatory stop may be endangered not only by the suspect but by all companions of the suspect as well”). Thus, it is well-established the “risk of harm to both the police and the [suspects] is minimized if the officers routinely exercise unquestioned command of the situation.” State v. Belieu, 112 Wn. 2d 587, 604,

773 P.2d 46 (1989) (quoting Summers, 452 U.S. at 702-03 (citations omitted)).

In the instant case, the evidence shows the incidents occurred in the dark, at night, and in a remote location. [8/30/09 RP 84]. Also, moments before the arrest the officers heard what they identified as, from their training and experience, a drug deal being discussed in the shed where a known drug offender was residing. [8/30/09 RP 16, 87, 107-08]. The officers then heard and saw Markham and another woman appear to be exiting the shed with Teitzel, but when the officers approached Teitzel, mere feet from the entrance to the shed, he immediately became combative and the women retreated back into the recesses of the shed, slamming the door behind them. [8/30/09 RP 17-18, 88-91, 98-99, 101-02, 105-06, 108]. While the officers were unsure if there was a window in the shed, the record indicates there was—an distinct advantage to the occupants over the officers. [8/30/09 RP 134].

The record further demonstrates the commotion was so loud Young had to abandon his position watching the residents visible in the main dwelling in order to assist his colleagues who were on the ground with Teitzel trying to get him under control. [8/30/09 RP 55-56]. Young testified he not only saw and heard the shed door

closing, but also that he saw the officers struggling with Teitzel directly in line with the shed door, and heard people in the tool shed banging around. All of this created a concern that was only corroborated by the pointedly excited direction of Haggerty who said “watch the shed, watch the shed.” [8/30/09 RP 55-56, 135].

In Hopkins, the court held the protective sweep done by officers into the defendant’s outbuildings, areas well-beyond the area of the arrest—the officers arrested Hopkins in her home—exceeded the scope of the warrant because only a generalized concern for officer safety existed. Hopkins, 113 Wn. App. at 960. Unlike in Hopkins, the area included in the protective sweep in the instant case was immediately adjacent to the area of the arrest. The shed and the shed door were only a few feet away from where the officers were trying to make the arrest. Buie clearly states the officers were entitled to do a protective sweep of the shed, even absent a particularized concern for officer safety (although the State adamantly submits such a concern existed). If case law authorizes the entry of the 10 x 10 foot shed to make a protective sweep—a reasonably dangerous act against potentially armed foes with an advantage, then it is nonsensical the officers could not ask, even order, the shed occupants to emerge, with their hands visible,

into an area markedly safer for the officers to control. Once Markham exited, her actions did not “dispel the reasonable suspicion of danger” before the arrest of Teitzel was completed. Boyer, 124 Wn. App. at 601. The law simply does not require officers to either walk foolishly into or turn their back on a scenario rife with the potential for an ambush.

Markham cites to State v. Holeman, but that case is distinguishable from the instant case. 103 Wn.2d 426, 693 P.2d 89 (1985). First and foremost, unlike here, in Holeman, the officers did not have an arrest warrant. Id. at 426-27. The court in Holeman held that because officers did not have an arrest warrant (i.e. no “authority of law”), and no exigent circumstances existed, the officers could not arrest a suspect who was standing in his doorway. Id. at 427. Moreover, unlike this case, no officer safety concerns existed. Id. The officers approached Holeman’s home without an arrest warrant, and then tried to enter his house by reaching across the threshold to grab him and reading him his Miranda rights, to arrest him. Id. at 428-29. There was no basis for the officers’ entry onto the property in the first place, let alone a protective sweep of the adjoining areas incident to arrest.

The facts of Holeman, thus, are inapplicable to the facts of Markham's case where the authority supports not only the officers' presence on the property but also supports the protective sweep of the immediate arrest area, particularly the shed. Even if one could construe the shed to be outside the immediate area of the arrest, the State submits the totality of the circumstances still overwhelmingly supported the officers' need to do a protective sweep of the shed and its occupants based on a particularized concern for officer safety. In stark contrast, the State adds, the residents of the main house were not contacted for exactly the reasons discussed previously, because a) it was not immediately adjacent to the arrest area and b) there was only a generalized concern for officer safety regarding the house occupants. The officers' protective sweep of the shed (versus the house) is directly in line with the authority on this issue. Markham's Fourth Amendment and article I, section 7 rights were not violated.

b. Probable cause existed to support Markham's arrest.

1. *Officer safety concerns justified Markham's detention.*

Once the women exited the shed, Markham's actions set off the chain of events which resulted in probable cause for her arrest. As previously noted, case law recognizes the danger inherent to

law enforcement officers on a daily basis and does not require the officers to foolishly subject themselves to unnecessary danger. See Terry, 392 U.S. at 23; Kennedy, 107 Wn.2d at 12.

As the women exited the shed, Markham came out holding an empty wine bottle upside-down and in a fist by the neck in one hand, and had her other hand shoved into her vertical coat pocket. [8/3/09 RP 57]. In contrast, the other female exited with her hands up, clearly demonstrating to the officers she was unarmed. [8/3/09 RP 58]. When instructed to put the wine bottle down and show her hands, the defendant not only was slow to comply, but once she did, she shoved her now empty hand into her other jacket pocket. [8/3/09 RP 57-58]. After repeatedly being told to show the officers her hands, a request directly related to the officer's concern for safety, Markham refused to comply, bringing her hands out only momentarily and then shoving immediately back into her pockets. [8/3/09 RP 58].

In State v. King, analogous to the instant case, the court stated "even without probable cause or reasonable suspicion of criminal activity, it is reasonable for an officer executing a search warrant at a residence to briefly detain occupants of that residence, to ensure officer safety and an orderly completion of the search." 89

Wn. App. 612, 618-19, 949 P.2d 856 (1998) (citing Summers, 452 U.S. at 702-03. State v. Galloway held that police may detain a person during the execution of a search warrant and frisk them for weapons based on reasonable suspicion the person is armed. 14 Wn. App. 200, 202, 540 P.2d 444 (1975).

The State submits this is because whether it is a detention incident to a search warrant or an arrest warrant, or simply an investigative or Terry stop, “there is [the] immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.” Terry, 392 U.S. at 23. In fact, the Washington Supreme Court emphasized the same concern in Belieu saying, “An officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” 112 Wn.2d at 602.

It appears no Washington court has expressly stated detention incident to a search warrant extends to detention incident to an arrest warrant, but notably, in United States v. Enslin, the Ninth Circuit cited to Summers, in analogizing a search pursuant to a search warrant with a consent search pursuant to an arrest

warrant. 327 F.3d 788, 797 n.32 (9th Cir. 2003); 425 U.S. at 702-03. The Enslin court noted that despite the difference in warrant types, “much of the analysis remains applicable” in analyzing officer safety concerns and the appropriate response in light of the authority the warrants granted the officers. Id. Thus, while King and Galloway are specific to detentions resulting from search warrants, the State submits the analysis is no less appropriate here where the detention was the reasonable result of the arrest warrant.

While the facts of Belieu are unlike Markham’s in many ways, namely in that the officers in Belieu drew their weapons on a car of four-men at the beginning of a Terry stop and there was no issue regarding the scope of a protective sweep, the court’s concern is no less applicable. Just as analogous, are comments by the court in Collins, “We deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat. . . .” 121 Wn.2d at 172 (quoting Terry, 392 U.S. at 20). The court in Belieu further noted the special position of officers where there is a particularized concern for officer safety and a suspect is noncompliant with requests to show his hands. Quoting this court, the Supreme Court of Washington said,

“The Constitution does not require an officer to wager his physical safety against the odds that a suspected assailant is actually unarmed.” We cannot in good conscience sit in the calm, reflective atmosphere of an appellate court and conclude, in an act of pointless hair-splitting, that a pat-down of a defendant incident to the stop would have been constitutional but the officer is legally precluded from attempting to seize a clenched or concealed hand to determine whether or not it might hold a weapon.

Belieu, 112 Wn.2d at 602 n.3. In support of its position, it cited to a rationale particularly applicable to the instant case, saying,

“[T]he use of force, other than deadly force, as is reasonably necessary to stop any person . . . , or cause them to remain in the officer’s company [is authorized]. . . . [I]t would be frustrating and humiliating to the officer to grant him an authority to order a person to stop, and then ask him to stand by while his order is flouted.”

Id. at 601 (citation omitted). This language is wholly appropriate in Markham’s case. The officers had an individualized officer safety concern that allowed them to ensure their safety by removing the women from the shed during the protective sweep. Upon exiting, Markham’s previous evasive action of retreating into the shed, combined with her further furtive, threatening, uncooperative and non-compliant actions outside the shed only increased the officers’ concern and created a reasonable suspicion she was armed,

especially since she exited the shed brandishing what a reasonable person would likely deem a weapon.

The protective sweep and the reasonable suspicion Markham was armed gave the officers the authority to ensure Markham was not a danger, even absent an articulable and reasonable suspicion criminal activity was afoot (which the State submits also existed). The officers had the right to move in and physically detain Markham for the reasons noted in King and Galloway, in completion of the protective sweep, and ensure she did not have weapons in her pockets. They did not need either reasonable suspicion of criminal activity or probable cause to detain the uncooperative Markham and control the scene as part of the sweep. See State v. Smith, 145 Wn. App. 268, 187 P.3d 768 (2008).

2. Once rightfully detained, the seizure of Markham did not equate to an arrest.

The State agrees, when the officer touched Markham's arm she was seized. However, a seizure does not inherently amount to an arrest as Markham seems to imply. She argues that, as stated in State v. Reichenbach, an arrest occurs whenever circumstances would cause a reasonable person to believe she is under arrest.

153 Wn.2d 126, 135, 101 P.3d 80 (2004). Therefore, she argues, being ordered out of the shed, directed to put down her weapon, keep her hands visible, and then physically seized would make a reasonable person believe she was under arrest.

In State v. Werth, a group of police officers, without a search or arrest warrant, twice showed up at Werth's home, once entered the home without her permission, and the second time, believing she was hiding an escapee, surrounded her home, told her it was surrounded, and ordered her out of it onto her lawn. 18 Wn. App. 530, 531-533, 571 P.2d 941 (1977). The officers then obtained Werth's coerced consent and entered her home to search. Id. at 533. Markham cites to Werth to support the proposition she too was arrested when the officer asked her to exit the shed and seized her, but that reliance is misplaced. In Werth, the court held the search unlawful because 1) the consent to search was coerced, 2) no warrant of any sort existed, and 3) no other exception to the warrant requirement existed. Id. at 533, 535.

Moreover, the court in Werth determined she was arrested at the time of the search because her "'liberty of movement or freedom to remain in the place of [her] lawful choice' (i.e. her home) was under restraint 'by conduct reasonably implying that force

[would] be used,” as it had held in State v. Byers, 88 Wn.2d 1, 559 P.2d 1334 (1977), not because she *reasonably believed* she was arrested. Werth, 18 Wn. App. at 535; Reichenbach, 153 Wn.2d at 135. In fact, Markham never testified she believed she was under arrest at the time she was asked to exit the shed, or even later when the officers had to handcuff her to force compliance.

Additionally, the Supreme Court overruled the definition of arrest relied on in Werth in Williams seven years later, because it was inconsistent with the standard that a detention involving force can occur without affecting an arrest. Williams, 102 Wn.2d at 741 n.5. The Williams court held that the “rule [from Byers] blur[red] the distinction between an arrest and a Terry stop,” like a detention and patdown incident to a protective sweep, because whether an arrest occurs is not based on the use of force to restrict one’s movement as the court had previously stated. Id. Thus, not only does the rule applied in Werth not apply to the instant case, but the facts are also unlike ours in that the officers here were acting under and within the scope of the limited authority of the arrest warrant for Teitzel, whereas the officers in Werth were not.

The State submits the sequence of events Markham references does not support the occurrence of an arrest. A

suspect's stubborn noncompliance during a protective sweep in a dark, isolated area involving a felony arrest inherently and reasonably raises the sensitivity and force response of the officers involved; it is likely to result in a physical seizure of some sort. But such a seizure does not equal an arrest or invalidate the officer's right to detain a suspect and pat them down for weapons. See Belieu, 112 Wn.2d at 593 (drawn gun and order for defendants to keep their hands visible at night did not transform stop into an arrest); see also United States v. Greene, 783 F.2d 1364 (9th Cir.) (where officers drew their weapons after a suspect in a vehicle failed to comply with instructions to raise his hands, it did not transform the stop into an arrest), *cert. denied*, 476 U.S. 1185 (1986); United States v. Thompson, 597 F.2d 187 (9th Cir. 1979) (where a suspect reached for his pocket after being warned not to, the officers use of handcuffs did not transform the stop into an arrest); United States v. Jacobs, 715 F.2d 1343 (9th Cir. 1983) (*per curiam*) (where an officer pointed his gun at a suspect and made her lie prone, the stop did not transform into an arrest). Rather, the circumstances make the necessity for a patdown of a suspect all the more imperative. The sheer increase in use of force does not automatically result in an arrest where the officer's response is in

direct proportion and countermeasure to the defendant's actions. Belieu, 112 Wn.2d at 599.

Markham's argument seems to imply, however, that a defendant need only be combative or uncooperative in such a scenario—forcing the officers' response to increase and thereby transforming the contact into an arrest under her definition—in order to prevent the police from patting him down for weapons without probable cause for an arrest. Case law simply does not bear that out and, more importantly, it blurs the line between an arrest and an authorized detention. *Cf. Williams*, 102 Wn.2d at 741 n.5 (noting the difference between an arrest and a Terry stop). See Smith, 145 Wn. App. 268, 276, 187 P.3d 768 (2008); Ybarra v. Illinois, 444 U.S. 85, 92-94, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *accord Galloway*, 14 Wn. App. at 202. Markham's actions, combined with the time of day, the combative felony arrest of Teitzel, and the location of events gave the officers the reasonable inference Markham was armed, and thus, the patdown and detention were a proportionate response to her actions and not disproportionately invasive. She was not under arrest when the officers seized her and the patdown began, thus the officers did not need probable cause for an arrest to conduct the patdown.

3. *The frisk was further authorized under Terry and resulted in probable cause to support Markham's arrest.*

Once the officers moved to detain her under officer safety concerns, the testimony indicates the baggy was seen contemporaneous to pulling her hands from her pockets, as the State has previously argued. The drug conversation combined with the defendant's refusal to show her hands and the plain view¹ discovery of the baggy containing the white powdery substance converted the detention for officer safety into a Terry investigatory stop.

Under Terry, a stop-and-frisk is justified when (1) the initial stop is legitimate; (2) there is a reasonable safety concern justifying a protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes. Collins, 121 Wn.2d at 173. A protective frisk is justified under the Fourth Amendment and article I, section 7 of the Washington Constitution only when the officer can point to "specific and articulable facts" that create an objective, reasonable belief that the suspect is armed and dangerous. Terry, 392 U.S. at 21-22; Collins, 121 Wn.2d at 173. "Reasonable suspicion requires 'considerably less than proof of wrongdoing by a

¹ Buje, 494 U.S. at 328; Wiga, 662 F.2d at 1333; Thompson, 151 Wn.2d at 807, State v. O'Neill, 148 Wn.2d 564, 570, 62 P.3d 489 (2003).

preponderance of the evidence.” State v. Ramirez, 560 F.3d 1012 (9th Cir. 2009).

Under article I, section 7 of the Washington Constitution, the court must determine whether the State unreasonably intruded into the defendant's private affairs. Mendez, 137 Wn.2d at 219. As in a protective sweep, in a Terry frisk “[a] police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the [person frisked], who was not stopped on the basis of probable cause by the police.” Mendez, 137 Wn.2d at 220.

A court should evaluate the totality of the circumstances in determining whether the search was reasonably based on officer safety concerns. Bray, 143 Wn. App. at 154; State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002). A generalized concern for officer safety does not justify a patdown for weapons. State v. Jones, 146 Wn.2d 328, 338, 45 P.3d 1062 (2002). Generally courts are reluctant to second-guess the judgment of officers in the field and will uphold the validity of most frisks that arise from a founded suspicion that is neither arbitrary nor harassing, Collins, 121 Wn.2d at 173, and based on facts specific to the individual suspect. State

v. Lennon, 94 Wn. App. 573, 580, 976 P.2d 121 (1999); State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992).

An investigative detention must last no longer than is necessary to satisfy the purpose of the stop and the court must ask whether “it [was] reasonably related in scope to the circumstances which justified the interference in the first place.” State v. Williams, 102 Wn.2d 733, 738-39, 689 P.2d 1065 (1984). However, the scope and duration of the stop may be extended if the investigation confirms the officer's suspicions and the suspect has done nothing to dispel them. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003); see State v. Horrace, 144 Wn.2d 386, 388-94, 28 P.3d 753 (2001).

The State submits Young's testimony, the primary responder to Markham, established he moved in for the initial detention and patdown based on a reasonable suspicion Markham was armed and upon plain view discovery of the drugs in her coat pocket, he handcuffed her and informed the other officers he believed she had contraband. [8/3/09 RP 61]. Officer Haggerty then read Markham her rights, which she talked throughout (and at which point a reasonable person would likely believe they were under arrest), and *then* the officers continued searching her incident to her arrest,

finding the remaining contraband in her other pocket. Reasonable suspicion existed to support the initial patdown and the plain view discovery of the drugs, combined with the overheard conversation, gave the officers probable cause to arrest her.

The officers did not need to definitively prove Markham was the one talking on the phone in the shed to have a reasonable and articulable suspicion for the patdown under either a protective sweep or Terry, nor did they need to prove it to have probable cause for the arrest. The mere discovery of the contraband in plain view created the probable cause for the arrest. Because the arrest was lawful, the search of Markham did not violate her rights under either the Fourth Amendment or article I, section 7.

c. Markham was lawfully seized.

While this point seems redundant in light of the above, the State reiterates Markham was constitutionally seized under a concern for officer safety supported by a reasonable suspicion she was armed. Unlike in Harrington, where the incident stemmed from a social contact and neither an arrest warrant, nor an objectively reasonable suspicion of danger existed, or Xiong, where the officers had an arrest warrant, but there was no objectively

reasonable suspicion the defendant was armed and dangerous,² the officers here had an arrest warrant and the overwhelming totality of the circumstances would indicate to a reasonable person Markham was armed. State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009); State v. Xiong, 164 Wn.2d 506, 191 P.3d 1278 (2008). Thus, while the State agrees Markham was seized when the officers grabbed her arm, it maintains the seizure was constitutional for the reasons previously discussed in issue 1a and 2b of this brief.

Finally, Markham's argument that she posed no threat to the officers and that they could have just let her remain in the shed and drink her wine is meritless. [Appellant Brief, at 16-17.] When she begrudgingly exited the shed, the testimony clearly indicates her wine bottle was already empty. In contrast to her claims, obviously she was quite capable of both consuming her wine and causing the officers distress. Moreover, the totality of the circumstances combined with *her* evasive actions in the shed, including banging around, and her noncompliance upon exiting were the reason for

² Xiong was seized outside his brother's home where the arrest was supposed to occur. The officers had not actually arrested the subject of the arrest warrant when they seized and searched Xiong and there were no circumstances leading the officers to believe he was armed and dangerous, and therefore warranting a frisk under either a protective sweep or Terry. Xiong, 164 Wn.2d at 508-09, 514.

her detention, not some killjoy or baseless desire of the police to seize her and ruin her evening.³

3. The admission of Markham's statements were appropriate and did not violate her fifth and fourteenth amendment rights.

The Fifth Amendment to the United States Constitution provides that no person "shall...be compelled in any criminal case to be a witness against himself." The privilege against self-incrimination applies to the states through the 14th Amendment. Malloy v. Hogan, 378 U.S. 1, 6, 84 s. Ct. 1489, 12 L. Ed. 2d 653 (1964). Similarly, under the Washington Constitution, "no person shall be compelled in any criminal case to give evidence against himself." Const. art. I, § 9. Courts interpret the federal and Washington State provisions equivalently. State v. Earls, 116 Wn.2d 466, 473, 589 P.2d 789 (1979). The right is "intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt." State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citing Doe v. United States, 487 U.S. 201, 210-12 (1988)).

³ The State is sure the officers would have rathered the events occurred on a warm July afternoon as well, but since that was not the situation they were presented with, they acted according to the natural and defendant-made circumstances as each occurred.

A person is "in custody" for the purposes of Miranda if, considering all the circumstances, a reasonable person would feel that his or her freedom was "curtailed to a 'degree associated with formal arrest.'" State v. Walton, 67 Wn. App. 127, 129-130, 834 P.2d 624 (1992) (quoting Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)); Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A person is not in custody, however, simply because they have been detained and questioned by police. State v. Heritage, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (citing Berkemer, 468 U.S. at 441-42). Although an investigatory detention involves a degree of restraint, it will usually not rise to the level of "custody" for Miranda purposes, simply because the person does not feel free to leave. Heritage, 152 Wn.2d at 218; Berkemer, 468 U.S. at 439-40 (A typical Terry stop is not "custody" for purposes of determining whether statements made during the stop are admissible under Miranda, even though the suspect may not be free to leave when the statements are made.). This is because, "unlike a formal arrest" such detentions generally lack the coercive power of intimidation inherent in the police interrogations contemplated by Miranda. Walton, 67 Wn. App. at 129-130 ("[it] does not easily lend itself to deceptive

interrogation tactics”). Therefore, an officer may allay his or her suspicions by asking a “moderate number of questions” without creating a custodial situation for the purposes of Miranda. Heritage, 152 Wn.2d at 218; see State v. Short, 113 Wn.2d 35, 40-41, 775 P.2d 458 (1989) (Miranda warnings are not required when police questioning is part of a routine, general investigation in which the defendant cooperates but is not yet charged.).

The scope of a Terry stop may be enlarged or prolonged as necessary to investigate unrelated suspicions that arise during the stop. State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990); State v. Guzman-Cuellar, 47 Wn. App. 326, 332, 734 P.2d 966 (1987); State v. Marshall, 47 Wn. App. 322, 325, 737 P.2d 265 (1987) (A suspect may be asked to identify himself and to explain his activities without first being given Miranda warnings.). During the stop, an officer may “maintain the status quo momentarily while obtaining more information” and “ask the detainee a moderate number of questions to determine his identity and to try and obtain information confirming or dispelling the officer’s suspicions.” Williams, 102 Wn.2d at 737 (quoting Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)); Berkemer, 468 U.S. at 439.

First, the State submits Markham made her statements post-Miranda, and thus waived her right to remain silent. The State submits Markham was arrested at the point which she was read her Miranda rights. Prior to that, the officers had lawfully approached and detained Markham under the reasonable suspicion she was armed and dangerous. Contemporaneous with trying to execute the detention, the nature of the detention expanded. It went from a concern for officer safety to one which also included the suspicion of contraband when drugs became visible while the officer was attempting to detain and pat Markham down for weapons.

The record indicates, and the trial court found, that when Young saw the baggy of drugs, he informed the other officers he believed Markham had contraband. [8/3/09 RP 61, 137]. In response, Officer Haggerty came over and read the defendant her Miranda rights, throughout which she denied the contraband was hers. [8/3/09 RP 61]. Young then asked Markham what was in her pockets, and post-Miranda warnings, she admitted it was “drugs.” [8/3/09 RP 61]. She waived her right to remain silent by continuing to make admissions to the officers about the contents of her pockets. While Markham states the record is vague and there is no evidence the statements were made post-Miranda, a) the State

submits Young's testimony is to the contrary and b) the trial court also believed the evidence indicated the statements were made after Markham was Mirandized. The trial court's findings of fact are entitled to deference as discussed in issue 1a of this brief. However, even if she said "drugs" prior to being Mirandized, then she did so when she was not formally arrested and Miranda warnings were not required (discussed more fully below). Moreover, the record is unambiguous, and it is undisputed, that her statements of denial were made contemporaneous to the reading of her Miranda rights as the officers testified.

Second, and in the alternative, even if Markham were correct that the record is too unclear as to whether she made the statements prior to Miranda warnings, or this court does not find the evidence sufficient to support the trial court's finding it occurred after Miranda warnings, then the officers were not required to give her the warnings during the investigatory stop. The record is clear that at that time the statements were made the officers were engaged in a lawful investigatory stop under first a protective sweep and then a Terry stop and the officers' investigatory detention of Markham did not ripen into a custodial interrogation until they formally arrested her (when they read her her Miranda

rights). Thus, under an investigatory stop, their questions did not exceed the scope of a permissible inquiry.

For example, in United States v. Davis, the Ninth Circuit held that where officers asked Davis a series of incriminating questions related to a search of a home where a marijuana growing operation was occurring, “law enforcement officers were not required to advise Davis of his Miranda rights.” 503 F.3d 1069 (9th Cir. 2008). The court in Davis held so because Davis was detained incident to the execution of a search warrant, the total number of questions (approximately four) by multiple law enforcement officers (at least two) was minimal, and the questions were “aimed at obtaining information to confirm or dispel [the officer’s] suspicion [Davis] might be part of the marijuana growing operation [based on the totality of the circumstances].” Id. at 1082.

Despite the difference in warrant-types, the State submits the analysis used in Davis is just as applicable to the instant case. If the detention is lawful, then the difference in warrant types from which it stems does not and should not affect the follow-on analysis of whether a person was in custody for Miranda purposes.

Davis is instructive in the instant case for a couple of reasons. For one thing, the State submits the magnitude of the

question posed to Markham was significantly less than the magnitude of the questions posed to Davis. In Davis, the questions were specific to his knowledge of and criminal participation in the drug operation. Id. at 1081-82. In contrast, Young asked Markham a single and non-specific question—“what” was in her pocket. Young’s question was well-within either the scope of the initial contact of officer safety (whether her pockets contained a weapon) or the scope of facts which arose during the lawful investigatory stop (i.e. the discovery of contraband) and can be described as the officer’s attempt to “obtain information confirming or dispelling” his suspicions the baggy Markham inadvertently pulled out of her pocket was drugs. The State submits Davis’s questions were much more likely to result in a self-incriminating statement and constitute the functional equivalent of an interrogation than the vague question asked of Markham, yet the Davis court did not hold so. If the nature of the questioning was within the constitutional scope of the investigatory stop in Davis, then the State submits it was here as well and Miranda rights were not required.

For another thing, the questioning and detention of Markham did not rise to the level of Davis. Here the questioning and detention were brief, questions came from a single officer, the

detention occurred entirely in Markham's own yard, and only three officers were present during the events. In contrast, Davis involved two separate officers asking questions, went inferably longer than Markham's, the detention occurred on someone else's property, and there were a multitude of officers present and executing the search warrant. Id. at 1075-76. While Markham was handcuffed and not free to leave during the detention because of safety concerns, neither was Davis (even though he actually requested to). Id. at 1075. The only other difference between the two was that Markham was handcuffed and Davis was not. Id. at 1076. Notably however, Davis was cooperative with the agents during his detention, making handcuffs unnecessary, while Markham was not. Id. at 1075-76, 1082.

The State submits if the atmosphere was not coercive in Davis in the manner which Miranda was intended to protect and the detention was not such that a person in the same scenario would have felt they had been formally arrested, then it was not reasonably so in Markham's case either. Thus, even if Markham said "drugs" prior to being Mirandized, during both an investigatory stop and Terry stop, Young could ask her to explain her activities (which were almost inarguably related only to "what" was in her

pockets) without approaching a formal arrest. The trial court did not err in denying her request to suppress her statements to police.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 23rd of April, 2010.



Heather Stone, WSBA# 42093
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

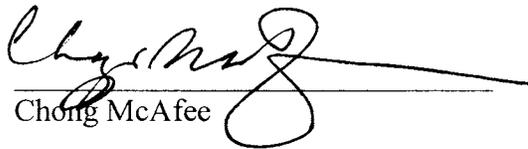
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TO: JODI R. BACKLUND
ATTORNEY FOR APPELLANT
203 EAST FOURTH AVE, SUITE 404
OLYMPIA, WA 98501

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BY Chong McAfee
DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 23^d day of April, 2010, at Olympia, Washington.


Chong McAfee