

No. 43034-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Tanner Russell,

Respondent.

Lewis County Superior Court Cause No. 11-1-00627-6

The Honorable Judge Richard Brosey

Brief of Respondent

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2

ARGUMENT..... 4

The trial court correctly suppressed the evidence because the prosecution failed to produce sufficient evidence to justify the warrantless search. 4

A. Standard of Review..... 4

B. Appellant fails to provide argument for several assignments of error..... 4

C. The state and federal constitutions prohibit warrantless searches and seizures absent an exception to the warrant requirement. 5

D. The state failed to establish an exception to the warrant requirement that would justify the search and seizure. 6

E. The prosecution failed to prove that the warrantless frisk was based on information lawfully obtained from the August encounter. 8

F. The trial court’s legal conclusion that Mr. Russell
“gave voluntary consent” following the illegal frisk is
erroneous..... 10

CONCLUSION 12

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) . 6

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) 6

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)..... 6

MHM & F, LLC v. Pryor, ___ Wash.App. ___, ___ P.3d ___ (2012) . 4, 10

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)
..... 1, 3, 12

United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d
(1975)..... 7

WASHINGTON STATE CASES

Casterline v. Roberts, ___ Wash.App. ___, ___ P.3d ___ (2012)..... 10

Ellerman v. Centerpoint Prepress, Inc., 143 Wash. 2d 514, 22 P.3d 795
(2001)..... 4, 9

State v. Abuan, 161 Wash. App. 135, 257 P.3d 1 (2011) 8, 9, 10

State v. Butler, 165 Wash. App. 820, 269 P.3d 315 (2012)..... 10

State v. Eisfeldt, 163 Wash.2d 628, 185 P.3d 580 (2008) 6

State v. Garvin, 166 Wash.2d 242, 207 P.3d 1266 (2009) 6, 8

State v. Gatewood, 163 Wash.2d 534, 182 P.3d 426 (2008) 4

State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986)..... 5

State v. Harrington, 167 Wash. 2d 656, 222 P.3d 92 (2009)..... 6, 7

State v. Ibarra-Cisneros, 172 Wash. 2d 880, 263 P.3d 591 (2011)..... 8

<i>State v. Lakotiy</i> , 151 Wash. App. 699, 214 P.3d 181 (2009).....	4
<i>State v. Lohr</i> , 164 Wash. App. 414, 263 P.3d 1287 (2011).....	4
<i>State v. Martinez</i> , 135 Wash.App. 174, 143 P.3d 855 (2006)	6
<i>State v. O'Neill</i> , 148 Wash. 2d 564, 62 P.3d 489 (2003)	10, 11
<i>State v. Parker</i> , 139 Wash.2d 486, 987 P.2d 73 (1999).....	5
<i>State v. Setterstrom</i> , 163 Wash.2d 621, 183 P.3d 1075 (2008)	6
<i>State v. Smith</i> , 165 Wash. App. 296, 266 P.3d 250 (2011).....	8
<i>State v. White</i> , 135 Wash.2d 761, 958 P.2d 962 (1998)	5

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV	5
Wash. Const. Article I, Section 7.....	5, 6, 7

OTHER AUTHORITIES

RAP 2.5.....	4
--------------	---

ASSIGNMENT OF ERROR

1. The trial court erred by adopting Finding of Fact No. 1.26.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A conclusion of law mislabeled a finding of fact is reviewed *de novo*, rather than for substantial evidence. Here, the trial court entered a finding that Mr. Russell “gave voluntary consent” to removal and inspection of the metal case found in his pocket following the illegal frisk. Is this “finding of fact” actually a legal conclusion, requiring review *de novo*?

2. Findings of fact must be supported by substantial evidence. Mr. Russell allegedly consented to removal and inspection of the metal case without benefit of *Miranda* warnings, and without being advised of his right to refuse consent; his acquiescence was obtained while he was in custody, and the prosecution introduced no evidence establishing his intelligence or educational level. Under the totality of these circumstances, did the trial court err by concluding that Mr. Russell’s alleged consent was voluntary?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Police stopped Tanner Russell as he rode his bike through Centralia at night.¹ The bicycle lacked a working headlight, and he had traveled for a short distance in the wrong lane. CP 72. The stop occurred at 11 pm in the well-lit parking lot of an AM/PM store, located on one of the busier streets in Centralia. CP 72. Mr. Russell seemed nervous, but not unusually so. He was compliant and cooperative. He had no felony history and no history of violence. RP 28-29; CP 73.

The officer who stopped Mr. Russell (Officer Makein) had met him the previous week during a traffic stop.² CP 72-73. Mr. Russell had been the passenger in a car containing burglary tools. CP 73. The driver had been arrested on a felony warrant; she told officers that she and Mr. Russell had planned to commit a vehicle prowl or car theft. CP 73. Mr. Russell had not behaved violently or belligerently during that encounter. CP 73. At some point he was frisked by another officer, not Officer Makein, and found to be in possession of a small two-shot derringer-type .22 caliber handgun. CP 73. Before the gun was discovered in his pocket,

¹ This will later be referred to as the September stop.

² This will be referenced as the August stop.

Mr. Russell had twice denied having any weapons. CP 73. The contact resulted in issuance of a misdemeanor citation. CP 73.

During the encounter at issue here, Makein asked Mr. Russell if he'd retrieved the derringer (which had apparently been seized during the earlier incident); Mr. Russell replied that he wanted nothing to do with the gun. CP 73. Makein then frisked Mr. Russell, and encountered in his pant pocket a rectangular object, approximately 6"x4"x1". CP 74. Makein asked what the object was, and Mr. Russell told him it was a box. CP 74. Makein knew that the box itself was not a weapon, but did know what might be in the box. CP 74. Makein asked if he could remove the box from the pocket; Mr. Russell acquiesced. CP 74. Mr. Russell had not been read his *Miranda* rights or told that he could refuse consent. CP 75; *See RP generally.*

The box contained a loaded syringe, which weighed only a fraction of what the derringer had weighed. CP 75. Mr. Russell acknowledged that the syringe contained methamphetamine. RP 20-21.

Mr. Russell was charged with possession, and he moved to suppress the evidence. CP 1, 4. Following a hearing, the court granted the motion and entered Findings of Fact and Conclusions of Law. CP 71. The prosecution appealed. CP 81.

ARGUMENT

THE TRIAL COURT CORRECTLY SUPPRESSED THE EVIDENCE BECAUSE THE PROSECUTION FAILED TO PRODUCE SUFFICIENT EVIDENCE TO JUSTIFY THE WARRANTLESS SEARCH.

A. Standard of Review

Unchallenged findings of fact are verities on appeal. *MHM & F, LLC v. Pryor*, ___ Wash.App. ___, ___, ___ P.3d ___ (2012). Challenged findings are reviewed for substantial evidence. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). The absence of a finding on a particular topic must be interpreted as a finding against the party with the burden of proof on that topic. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wash. 2d 514, 524, 22 P.3d 795 (2001).

A trial court's decision may be affirmed on any ground supported by the record. RAP 2.5(a); *State v. Lakotiy*, 151 Wash. App. 699, 707, 214 P.3d 181 (2009).

B. Appellant fails to provide argument for several assignments of error.

Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *State v. Lohr*, 164 Wash. App. 414, 419, 263 P.3d 1287 (2011).

Here, Appellant assigns error to numerous findings of fact; however, the remainder of the brief contains no reference to these

findings. Nor does Appellant ever explain which portions of each finding it believes are unsupported. Accordingly, these assignments of error cannot be reviewed on appeal. *Id.*

- C. The state and federal constitutions prohibit warrantless searches and seizures absent an exception to the warrant requirement.

The Fourth Amendment to the federal constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.³ Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.⁴

Under both provisions, searches and seizures conducted without authority of a search warrant ““are *per se* unreasonable...subject only to a

³ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

⁴ It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

few specifically established and well-delineated exceptions.”” *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

Both the Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v. Martinez*, 135 Wash.App. 174, 180, 143 P.3d 855 (2006).

D. The state failed to establish an exception to the warrant requirement that would justify the search and seizure.

A nonconsensual protective frisk for weapons is permitted only when a reasonable safety concern exists. *State v. Harrington*, 167 Wash. 2d 656, 667-68, 222 P.3d 92 (2009). The officer conducting the frisk must

be able to point to specific and articulable facts creating an objectively reasonable belief that the suspect is armed and presently dangerous. *Id.*

Here, the prosecution failed to establish sufficient facts to support a reasonable belief that Mr. Russell was armed and presently dangerous. Although Officer Makein knew that Mr. Russell had lied about carrying a small (and possibly antique) gun the previous week, that gun had been seized, and Makein had no reason to think Mr. Russell was armed on this occasion. CP 72-74.

Furthermore, during both encounters, Mr. Russell did as instructed; he never showed animosity, acted belligerently, or made suspicious or threatening movements. CP 73, 76. In addition, Mr. Russell was alone at the time he was stopped; he had no history of violence, and he lacked a felony record. CP 73. The encounter took place in a well-lit area, where businesses remained open late at night, adjacent to a busy street; the locale was not known as a heavy crime area. CP 76. Finally, the interaction did not involve a suspicion of any criminal activity; Makein stopped Mr. Russell because of infractions he'd committed while riding his bicycle. CP 75-76.

These circumstances did not give rise to an objectively reasonable belief that Mr. Russell was armed and presently dangerous. Accordingly, Officer Makein was not justified in frisking Mr. Russell. *Harrington, at*

667-668. The trial court's decision suppressing the evidence is supported by the record, and must be upheld. *Id.*

E. The prosecution failed to prove that the warrantless frisk was based on information lawfully obtained from the August encounter.

Any evidence obtained by exploitation of an illegal search must be suppressed. *See, e.g., State v. Abuan*, 161 Wash. App. 135, 147, 257 P.3d 1 (2011) (“The remedy for a violation of article I, section 7 is suppression of the evidence obtained either during or as a direct result of an unconstitutional search or seizure.”)⁵

In this case, the prosecution was tasked with proving the validity of Officer Makein's search. *Garvin*, at 250. The search was based on information obtained from the warrantless frisk that occurred during the earlier stop. Specifically, Makein's safety concerns were wholly derived from that prior contact and frisk, when Mr. Russell was found to be in possession of the miniature gun. CP 72-74.

Because the September 5th search was based on the August frisk, and because the August frisk was conducted without a warrant, the

⁵ The two exceptions to this rule are the “independent source doctrine” and the “attenuation doctrine.” *See, e.g., State v. Smith*, 165 Wash. App. 296, 266 P.3d 250 (2011) (addressing independent source doctrine); *State v. Ibarra-Cisneros*, 172 Wash. 2d 880, 263 P.3d 591 (2011) (addressing attenuation doctrine). As with all exceptions to the warrant requirement, the burden rests with the government to establish that either doctrine applies. *Ibarra-Cisneros*, at 884.

prosecution's heavy burden required the state to prove an exception justifying the August frisk. *Garvin, at 250.*

This it failed to do: the court specifically found that “[d]uring the prior stop on August 28, 2011, the Defendant did not try to reach for the gun, was not violent in any way, was not belligerent in any way, and the result of the August 28, 2011 incident was the issuance of a misdemeanor citation.” CP 73. The prosecution did not assign error to this finding; thus, it is a verity on appeal. *Pryor, at ___.*

Furthermore, the prosecution did not prove (and the court did not find) that officers performed a custodial arrest in connection with the issuance of the misdemeanor citation.⁶ *See RP generally; CP 71.* The absence of such a finding must be interpreted as a finding against the prosecution. *Ellerman, at 524.*

Under these circumstances, the August frisk—which resulted in discovery of the gun—was unlawful. Information relating to the gun could not be used to justify the warrantless frisk in September. *Abuan, at 147.* The prosecution made no attempt to establish an independent source for Makein's information, or any facts justifying application of the attenuation doctrine. *See RP generally; CP 71.*

⁶ Had Mr. Russell been taken into custody, the officers would have been permitted to search him incident to that arrest.

Because the September frisk was based on information unlawfully obtained, the evidence must be suppressed as fruits of the poisonous tree. *Abuan*, at 147. The trial court’s decision should be affirmed. *Id.*

F. The trial court’s legal conclusion that Mr. Russell “gave voluntary consent” following the illegal frisk is erroneous.

A conclusion of law mislabeled as a finding of fact is reviewed *de novo*. *Casterline v. Roberts*, ___ Wash.App. ___, ___, ___ P.3d ___ (2012). In general, ‘voluntariness’ is a legal conclusion. *See, e.g., State v. Butler*, 165 Wash. App. 820, 827, 269 P.3d 315 (2012) (voluntariness of confession is reviewed *de novo*).

To establish the validity of a person’s consent to search (as an exception to the warrant requirement) the prosecution “must prove that the consent was freely and voluntarily given.” *State v. O’Neill*, 148 Wash. 2d 564, 588-90, 62 P.3d 489 (2003). Consent is to be evaluated under the totality of the circumstances, including, *inter alia*, whether *Miranda* warnings⁷ were given to the person alleged to have consented, his/her degree of education and intelligence, whether s/he had been advised of the right to refuse consent, and any restraint imposed upon the person. *Id.*

⁷*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

In this case, the trial court concluded that Mr. Russell “gave voluntary consent to having the case removed from his pocket and searched.” CP 74. This conclusion (misabeled as a finding of fact) is inconsistent with the court’s conclusion that once Makein had the container, “any perceived threat... was eliminated and the search of [its] contents was therefore unreasonable and unjustified.” CP 76.

It is also unsupported by the record. Mr. Russell had not been given *Miranda* warnings or told of his right to refuse consent. CP 75. Furthermore, the prosecution did not establish his level of education or intelligence. *See RP generally*. Finally, he was restrained at the time he was asked for consent: although not under arrest, he had been temporarily detained for a bicycling infraction. *See O’Neill, at 589* (“O’Neill’s liberty was restrained in that while not in custody or under arrest, he was not free to leave...”)

Under these facts, Mr. Russell’s alleged consent was not voluntary. Accordingly, Finding No. 1.26 must be vacated, and cannot provide a basis for upholding the search if the initial warrantless frisk is held to be valid. *O’Neill, supra*. Furthermore, as the court noted, Officer Makein was not justified in opening the case once it was in his possession. Thus even if the initial warrantless frisk was justified, the officer had no basis to remove the case and inspect its contents. CP 76.

CONCLUSION

For the forgoing reasons, the trial court's decision suppressing the evidence must be affirmed.

Respectfully submitted on May 31, 2012.

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

A handwritten signature in cursive script that reads "Manek R. Mistry".

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Respondent's Brief, postage prepaid, to:

Tanner Russell
511 S King Street
Centralia, WA 98531

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Sara Beigh, Deputy Prosecuting Attorney
SIBeigh@co.lewis.wa.us

I filed the Respondent's Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 31, 2012



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY
May 31, 2012 - 3:40 PM

Transmittal Letter

Document Uploaded: 430347-Respondent's Brief.pdf

Case Name: State v. Russell

Court of Appeals Case Number: 43034-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

SIBeigh@co.lewis.wa.us