

No. 44848-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

JAMES MESSER, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 12-1-00054-9

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. APPELLANT’S ASSIGNMENTS OF ERROR.....	1
B. <u>STATE’S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENT OF ERROR</u>	1
C. <u>FACTS AND STATEMENT OF CASE</u>	2
D. <u>ARGUMENT</u>	5
1) Because the trial court’s findings of fact are supported by substantial evidence in the record, the trial court’s findings of fact numbers 4 and 5 are not error. (State’s response to Appellant’s assignment of error number 3).....	5
2) The trial court’s conclusions of law numbers 1, 2, 4, 5, and 6 are partially findings of fact that are labeled as conclusions of law. The findings of fact are supported by substantial evidence in the record and are not error. The conclusions of law are correct based upon the facts. (State’s response to Appellant’s assignment of error number 4).....	6
a) <u>Conclusion of Law No. 1</u>	6
b) <u>Conclusion of Law No. 2</u>	9
c) <u>Conclusion of Law No. 4</u>	11
d) <u>Conclusion of Law No. 5</u>	12
e) <u>Conclusion of Law No. 6</u>	14

State’s Response Brief
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

3) Messer asserts that the trial court erred by denying his motion to suppress evidence discovered on his person during a pat-down search for weapons. The State contends that on the facts of this case, no error occurred. (State’s answer to Messer’s assignment of error number one).....15

4) Evidence seized from Messer was lawfully seized after being discovered during a lawful pat-down search for weapons. (State’s answer to Messer’s assignment of error number 2).....18

E. CONCLUSION.....18

State’s Response Brief
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

State v. Evans, 80 Wn. App. 806, 911 P.2d 1344 (1996).....10

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).....7

Seattle v. Hall, 60 Wn. App. 645, 806 P.2d 1246 (1991).....14

State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009).....14

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).....6, 10

State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994).....16, 17

State v. Moore, 129 Wn. App. 870, 120 P.3d 635 (2005).....11

State v. Neeley, 113 Wn. App. 100, 52 P.3d 539 (2002).....16

State v. O'Neill, 148 Wn.2d 564,
62 P.3d 489 (2003).....5, 7, 8, 9, 10, 11, 12, 13

State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001).....16

Willener v. Sweeting, 107 Wn.2d 388, 730 P.2d 45 (1986).....9

State’s Response Brief
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. APPELLANT'S ASSIGNMENTS OF ERROR

- 1) The trial court erred by denying James Messer's motion to suppress evidence after a deputy sheriff patted down and subsequently searched Mr. Messer without lawful authority for doing so.
- 2) The evidence obtained during the pat down and subsequent search of Mr. Messer should have been excluded as "fruit of the poisonous tree."
- 3) The trial court erred in entering Findings of Fact 4 and 5 following the hearing on Mr. Messer's motion to suppress evidence.
- 4) The trial court erred in entering Conclusions of Law 1, 2, 4, 5 and 6 following the hearing on Mr. Messer's motion to suppress evidence.

B. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Because the trial court's findings of fact are supported by substantial evidence in the record, the trial court's findings of fact numbers 4 and 5 are not error. (State's response to Appellant's assignment of error number 3).
- 2) The trial court's conclusions of law numbers 1, 2, 4, 5, and 6 are partially findings of fact that are labeled as conclusions of law. The findings of fact are supported by substantial evidence in the record and are not error. The conclusions of law are correct based upon the facts. (State's response to Appellant's assignment of error number 4).

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

- 3) Messer asserts that the trial court erred by denying his motion to suppress evidence discovered on his person during a pat-down search for weapons. The State contends that on the facts of this case, no error occurred. (State's answer to Messer's assignment of error number one).
- 4) Evidence seized from Messer was lawfully seized after being discovered during a lawful pat-down search for weapons. (State's answer to Messer's assignment of error number 2).

C. FACTS AND STATEMENT OF THE CASE

On February 6, 2012, at about 3:00 a.m., Deputy Gray of the Mason County Sheriff's Office was patrolling rural Mason County when he saw a car parked on the private property of the KMAS radio station's radio tower. RP 2-3, 4. The car was blocking the gate that goes to the tower, and because of the time of night and the fact that there had been a history of thefts of wire and copper from the tower, Deputy Gray decided to check on the car. RP 2-3. Deputy Gray suspected that there may be a theft in progress, but, of course, he did not know why the car was there; so, he stopped to check to see whether it was broken-down, or whether there might be a theft in progress. RP 3, 9.

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Deputy Gray pulled his patrol car into a position that was bumper to bumper with the car, and he shined his spotlight through the windshield. RP 3. There was a male in the driver's seat and a female in the passenger's seat. RP 3. They both appeared to be asleep. RP 3. The spotlight was very bright, but neither of the occupants was awoken by the spotlight. RP 3-4. The deputy was concerned; so, he got out of his patrol car, approached the driver's side of the vehicle, and knocked on the window. RP 3-4.

The male in the driver's seat, who was latter identified as James Messer, was wakened by the knocking. RP 1-2, 4. In a voice loud enough to be heard through the window, Deputy Gray called out and motioned for Messer to roll down the window. RP 4, 10. Instead of rolling down the window, however, Messer opened the door, snickered, and told the deputy that the window was broken and wouldn't roll down. RP 4.

When Messer opened the door, Deputy Gray saw an unsheathed, fixed-blade knife on the left side of Messer's leg. RP 5.¹ The knife was a big, "Jim Bowie... type knife" with a bone handle and a five or six inch blade. RP 5. Deputy Gray's contact with Messer occurred in a rural, isolated area that was pitch black with darkness. RP 4-5. The nearest

business or residence was a few hundred yards down the road. RP 5.

There were no other officers nearby. RP 4.

So, to distance Messer from the knife, Deputy Gray asked Messer to step out and walk to the rear of the car. RP 6. When Messer complied and moved to rear of the car, Deputy Gray then patted him down in order to check for other weapons. RP 6.

During the pat-down, the first pocket that Deputy Gray patted was Messer's front, jacket pocket, and when patting this pocket, Deputy Gray felt a methamphetamine pipe. RP 6-7. Due to the shape and feel of the pipe, combined with twelve years of experience, Deputy Gray immediately recognized the methamphetamine pipe for what it was, "a methamphetamine pipe used to ingest methamphetamine." RP 6-7.

Upon discovery of the meth-pipe, Deputy Gray immediately placed Messer in handcuffs. RP 7. Because the pocket where the meth-pipe was discovered was the first and only pocket Deputy Gray had searched prior to placing Messer in handcuffs, he then continued the pat-down search of Messer's clothing and discovered a large amount of cash, digital scales, some plastic baggies, and a large amount of methamphetamine. RP 8.

¹ At the hearing to suppress evidence, Deputy Gray testified that he "believe[d] it was in

D. ARGUMENT

- 1) Because the trial court's findings of fact are supported by substantial evidence in the record, the trial court's findings of fact numbers 4 and 5 are not error. (Appellant's assignment of error number 3).

In his assignments of error on appeal, Messer contends that the trial court erred when it entered "Findings of Fact 4 and 5 following the hearing on Mr. Messer's motion to suppress evidence." Br. of Appellant at 1. The trial court's findings of fact 4 and 5 are as follows:

4. The Defendant opened the door to his vehicle, whereupon Deputy Gray observed a big knife near the defendant.
5. Upon observing the knife, Deputy Gray pulled the Defendant out of the vehicle and patted the Defendant down for officer safety, starting from the top and working his way down. Deputy Gray felt an unusually large pipe in the Defendant's shirt pocket by plain feel. The pipe was unusually large, in that it had a six-inch tube. Deputy Gray did not move or manipulate the drug pipe or any other contents of the Defendant's pocket.

CP 6.

Upon review of a motion to suppress, the reviewing court reviews challenged findings of fact for substantial evidence in the record. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Unchallenged findings of fact are verities on appeal. *Id.* "Substantial evidence exists where there

the door panel." RP 5, 6.

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
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360-427-9670 ext. 417

is a sufficient quantity of evidence in the record 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). In the context of suppression hearings, the reviewing court generally defers to the trial court’s determination regarding witness credibility, because “[t]he trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying.” *Id.* at 646.

While there may be conflicting testimony in the record in regard to findings of fact numbers 4 and 5, there is nevertheless substantial evidence in the record to support the trial court’s findings. RP 4-7, 15-17.

- 2) The trial court’s conclusions of law numbers 1, 2, 4, 5, and 6 are partially findings of fact that are labeled as conclusions of law. The findings of fact are supported by substantial evidence in the record and are not error. The conclusions of law are correct based upon the facts. (State’s response to Appellant’s assignment of error number 4).

a) Conclusion of Law No. 1

In conclusion of law number 1, the trial court found that:

Deputy Gray’s contact with the Defendant was not a violation of the U.S. Constitution, nor was it a violation of the

State’s Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Washington State Constitution.

CP 6.

“It is not improper for a law enforcement officer to engage a citizen in conversation in a public place.” *State v. O’Neill*, 148 Wn.2d 564, 579, 62 P.3d 489, 497 (2003). Where a car is parked in a place that is accessible to the public, open to be seen by any passerby, no seizure occurs if a police officer approaches the car and asks the occupants to roll down the window. *Id.* at 579.

In the instant case, Messer was parked on private property and was blocking the gate to the radio tower, but he was in a place that was accessible to the public and that was open to be seen by any passerby. RP 2-4. To the extent that Deputy Gray’s contact with Messer was a social contact, Messer was free to ignore Deputy Gray’s request that he roll down the window, and he was free to leave. *Id.* at 579. Even if Deputy Gray suspected criminal activity but lacked sufficient evidence to justify a Terry detention, he was nevertheless free to engage in a social contact with Messer prior to a seizure. *Id.* at 576-77.

The *O’Neill* Court affirmed that Article 1, section 7 of the Washington Constitution provides greater protections to an individual’s right to privacy than does the Fourth Amendment. *Id.* at 584, citing *State*

State’s Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). In *O'Neill*, a police officer approached a car that was parked in front of a store that had been burglarized twice in the previous month. *O'Neill* at 571-72. The officer shined his spotlight on the car and then approached the car, shined his flashlight into the car, and asked the driver to roll down the window. *Id.* at 72. The Court found that no seizure occurred under these circumstances and that there was, therefore, no need to discuss whether the officer's conduct was justified as a community caretaking function. *Id.* at 574.

The facts of the instant case are similar to *O'Neill*, except that here, Messer was parked in front of a place that had been burglarized at some point in the distant past rather one that had been burglarized twice in the past two weeks. RP 2-3. But the recency of criminal activity is not what justified contact with the defendant in *O'Neill*; instead, the officer's belief that there had been criminal activity merely explained the officer's motive for engaging in a social contact with the defendant. *Id.* at 574-75. The officer's motive was irrelevant to the question of whether the officer's contact with the defendant was a lawful social contact. *Id.*

Thus, in the instant case, whether any burglary had ever occurred at the radio tower is irrelevant to whether Deputy Gray's contact with Messer was initially justified as a social contact. *Id.* As the *O'Neill* Court

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

explained, “[c]itizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious....” *Id.* at 576. The mere fact that Deputy Gray’s suspicions might not have risen to the level of an articulable suspicion that would justify a *Terry* detention does not mean he was prohibited from engaging in a social contact with Messer. *Id.* at 574-75.

b) Conclusion of Law No. 2

In conclusion of law number 2, the trial court found that:

Deputy Gray had lawful reasons to approach the Defendant’s vehicle. First, Deputy Gray had reason to suspect the vehicle due to past theft complaints at the KMAS radio tower. Second, Deputy Gray had good cause to approach the vehicle to perform his community caretaking function. Deputy Gray had good cause to approach the vehicle and reason to be concerned for the passengers’ safety due to the fact that the bright light did not wake up the passengers.

CP 7.

This conclusion of law might more appropriately be characterized as a finding of fact, or as a mixed statement of fact and law. Where a finding of fact is erroneously characterized as a conclusion of law, it is reviewed as a finding of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394,

State’s Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

730 P.2d 45 (1986); *State v. Evans*, 80 Wn. App. 806, 820, 911 P.2d 1344 (1996). To the extent that this conclusion of law is actually a finding of fact, the argument in section 1, above, regarding the findings of fact is applicable here.

Where, as here, there is substantial evidence in the record to support a finding of fact, the finding is upheld on review. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The reviewing court defers to the trial court on matters of credibility. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The record of the instant case contains sufficient evidence that Deputy Gray was suspicious when he saw a car parked at 3:00 in the morning at the gate of the radio tower, where there had been a history of thefts, and the record supports a finding that Deputy Gray became concerned for the occupants of the car when they did not react to his bright spotlight. RP 2-4.

Finally, to the extent that this conclusion of law is correctly characterized as such, it stands for the conclusion of law that Deputy Gray was justified in conducting a social contact with Messer. But as discussed in the section addressing conclusion of law number 1, above, an initial social contact that did not arise to a seizure did not require a specific justification. *State v. O'Neill*, 148 Wn.2d 564, 579, 62 P.3d 489, 497

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

(2003). While Deputy Gray may have been motivated by his suspicions, or by his concern for the occupants, or both, his motives did not invalidate an otherwise lawful social contact. *Id.* Still more, Deputy Gray's concern for the safety of the occupants does not work to invalidate his initial contact with them, regardless whether his initial contact would be a valid exercise of the community caretaking function of law enforcement on these facts. *State v. Moore*, 129 Wn. App. 870, 880, 120 P.3d 635 (2005).

c) Conclusion of Law No. 4

In conclusion of law number 4, the trial court found that:

Deputy Gray patted the Defendant down for officer safety after observing a large knife within reaching distance of the Defendant.

CP 7.

As in the section above discussing conclusion of law number 2, conclusion number 4, also, might be better characterized as a finding of fact. Rather than repeat the arguments here, the State respectfully refers the Court to the discussions above, at sections "1" and "b)". There is substantial evidence in the record to support the trial court's finding. RP 4-6.

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

d) Conclusion of Law No. 5

In conclusion of law number 5, the trial court found that:

During the course of a lawful officer safety frisk, Deputy Gray detected a pipe that was immediately recognizable by plain feel to Deputy Gray as a drug pipe used smoke methamphetamine, a controlled substance.

CP 7.

Again, this conclusion of law might more appropriately be considered a finding of fact or mixed finding of fact and conclusion of law. To the extent that this conclusion of law is a finding of fact, the discussion above in other sections of the State's brief addressing findings of fact is applicable here. There is substantial evidence in the record to support these findings of fact. RP 6-7.

To the extent that this represents a conclusion of law, Messer challenges only the trial court's conclusion that Deputy Gray's pat-down search for weapons was lawful under the circumstances. Br. of Appellant at 1 ("Issues Arising from Assignments of Error").

On this point, the State refers to its arguments, above, that Deputy Gray's initial contact with Messer was a legitimate, social contact. *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). During the course of this contact, Deputy Gray also became concerned for the safety and welfare of

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Messer and his passenger. RP 3-4. Motivated by suspicions of criminal activity and by concern for Messer and his passenger, Deputy Gray engaged in a social contact by knocking on Messer's window. RP 3-4. Messer then voluntarily opened the car door. RP 4.

Messer contends that "it became apparent to Deputy Gray that neither Mr. Messer nor his passenger was engaged or about to be engaged in theft from the KMAS tower...." Br. of Appellant at 17. Messer then characterizes the deputy's contact with him as "an investigative stop." *Id.* But there is nothing in the record to suggest that Deputy Gray's suspicions were dispelled or that those suspicions should have been dispelled based only upon his brief observations or his brief contact with Messer. On these facts, in the moments of time that Deputy Gray had to assess the circumstances, it was not unreasonable that Messer could have been a lookout for an accomplice, or could have been a get-away driver, or could have been sick from carbon monoxide poisoning, or any of a number of other possibilities. Still more, a social contact with a vehicle that is already stopped and parked is not a "stop." But most importantly, with or without suspicion of criminal activity, Deputy Gray was not prohibited from making a social contact with Messer on these facts. *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

When Messer voluntarily opened the car door, Deputy Gray saw a weapon. RP 5. Even though he may have still suspected criminal activity, the facts do not suggest that the deputy's concern for the occupants would have diminished at that point or that his nascent community caretaking duties would have dissolved. What occurred there was instantaneous, while Deputy Gray was alone at 3:00 in the morning in a rural, isolated area, with an unknown male, who had a weapon, and a female who did not react to the deputy's bright lights. RP 2-5. Under these circumstances, the deputy acted appropriately when he separated Messer from the weapon and patted him down for more weapons. *State v. Harrington*, 167 Wn.2d 656, 667-68, 222 P.3d 92 (2009); *Seattle v. Hall*, 60 Wn. App. 645, 652-53, 806 P.2d 1246 (1991).

e) Conclusion of Law No. 6

In conclusion of law number 6, the trial court found that:

Based on the foregoing findings of fact and conclusions of law the court denies Defendant's Motion to Suppress.

CP 7.

Messer assigns error to this conclusion of law together with other conclusions. Br. of Appellant at 1 (Assignment of Error No. 4). But this

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

statement by the trial court is neither a finding of fact nor a conclusion of law. Instead, it appears to be the ruling of the court. As such, the State's response to this assignment of error is addressed in all sections of the State's brief.

- 3) Messer asserts that the trial court erred by denying his motion to suppress evidence discovered on his person during a pat-down search for weapons. The State contends that on the facts of this case, no error occurred. (State's answer to Messer's assignment of error number one).

This assignment of error by Messer appears premised upon his contention that it was unlawful for Deputy Gray to conduct a pat-down search for weapons after he observed a large knife in close proximity to Messer when he first contacted him. The lawfulness of the pat-down search is discussed, above, in the State's response to Messer's assignments of error in regard to the court's conclusions of law.

During the lawful pat-down of Messer, the deputy felt what he recognized to be a methamphetamine pipe. RP 6-7. Due to the shape and feel of the pipe, combined with twelve years of experience, Deputy Gray immediately recognized the methamphetamine pipe for what it was, "a

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

methamphetamine pipe used to ingest methamphetamine.” RP 6-7. Upon discovery of the methamphetamine pipe, Deputy Gray immediately arrested Messer and put him in handcuffs. RP 7. Deputy Gray then continued the search for weapons and during the search discovered more contraband and discovered evidence of illicit drug sales. RP 8.

Deputy Gray’s seizure of the drug pipe on these facts was lawful. *State v. Hudson*, 124 Wn.2d 107, 113, 874 P.2d 160 (1994). If Messer was lawfully arrested, then a subsequent search incident to arrest would also have been lawful. *State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); *State v. Neeley*, 113 Wn. App. 100, 106, 52 P.3d 539 (2002). But mere possession of paraphernalia, without evidence to suggest use of the paraphernalia to ingest or package drugs, or that the paraphernalia contains drugs, is not per se a crime. *Neeley* at 107. As in *Neeley*, however, other facts such as the timing and the location of Messer’s car might have given rise to probable cause to arrest for use of drug paraphernalia (see, *Neeley* at 108), except that these facts were not developed in the trial court because it appears that Deputy Gray’s discovery of further evidence resulted from a further search for weapons rather than from a search incident to arrest. RP 8.

State’s Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

At the trial court suppression hearing, Deputy Gray was asked,
“And then what happened after you secured him into handcuffs?” RP 8.

The following question and answers then occurred:

- A. I continued to pat him down for weapons, because I hadn't even began my search because the first pocket I grabbed was a methamphetamine pipe so I still needed search him for -- further for weapons.
- Q. And what else did you find?
- A. Large amounts of cash, large amounts of methamphetamine. I think he had a digital scale on him, a bunch of plastic baggies, which are consistent with distribution. I believe that's the gist of it. I can't recall. I haven't even had a chance to review the report.
- Q. And were all these items uncovered from his person?
- A. Yes.

RP 8-9. No further explanation or discussion about the discovery of the additional contraband and evidence was located in the record.

Presumably, the quantity of the contraband and other evidence suggests a great deal of bulk, and where Deputy Gray was alone with the suspect in a rural area during a search for weapons, it is reasonable that he would need to examine the material to verify that it was not a weapon. *State v. Hudson*, 124 Wn.2d 107, 113, 874 P.2d 160 (1994) (if officer feels an object that might or might not be a weapon, officer may take necessary action to identify the object).

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

- 4) Evidence seized from Messer was lawfully seized after being discovered during a lawful pat-down search for weapons. (State's answer to Messer's assignment of error number 2).

Messer's assignment of error number 2 refers to "fruit of the poisonous tree." Br. of Appellant at 1. But it is uncertain what Messer is referring to as "the poisonous tree." In regard to Messer's other assignments of error, the State has already briefed the legitimacy of the initial contact with Messer and the legitimacy of the pat-down search for weapons. Rather than duplicate the arguments here, the State respectfully refers the Court to the State's arguments, above, in regard to Messer's other assignments of error.

E. CONCLUSION

The trial court's findings of fact are supported by substantial evidence in the record and should, therefore, be sustained.

The trial court's conclusions of law are correct because the trial court was correct in holding that the evidence in this case was lawfully discovered and seized.

Deputy Gray's initial contact with Messer was a lawful social contact. When Deputy Gray first saw Messer's car, it was parked in a

State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

rural area at about 3:00 in the morning and was blocking the gate to a radio tower where there had been a history of burglaries. The car was in a place that was accessible to the public.

Deputy Gray approached the car by pulling bumper to bumper with it and shining his spotlight upon and into it, because there was no other light in the rural area. Despite the bright lights, neither Messer nor his occupant were stirred by the light. So, Deputy Gray merely approached the car and knocked on the window. Messer awoke and opened the door, at which point he instantly saw a large knife next to Messer's leg.

On these facts, the deputy was justified in separating Messer from the knife and the car to briefly secure the scene and pat him down for more weapons. At this point there was no way of knowing whether the female passenger was safe, whether Messer was involved in criminal activity, or any other possibility. It was reasonable for the deputy to take further action to determine whether all persons were safe and secure rather than to merely abandon his inquiry at that point. And the deputy was justified in preserving officer safety, and possibly the safety of the female occupant, by checking Messer for more weapons.

Presumably, after the deputy made the scene safe from weapons, he would have verified whether any persons were in danger, and if not, he

State's Response Brief (Amended)
Case No. 44848-3-II

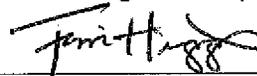
Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

would have left and carried on his business in an appropriately prompt manner. But, when he patted Messer for weapons, he inadvertently found drug paraphernalia, which he immediately recognized by its plain feel from years of experience in the field. And, upon completing the search for weapons, he then found methamphetamine, scales, large amounts of cash, and baggies for packaging drugs, all on Messer's person.

On these facts the trial court did not err by finding that the discovery and seizure of drugs from Messer's person was lawful in this case.

DATED: December 9, 2013.

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State's Response Brief (Amended)
Case No. 44848-3-II

Mason County Prosecutor
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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

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tim J Higgs - Email: timh@co.mason.wa.us

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

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