

No. 45766-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Debra Doering,**

Appellant.

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Mason County Superior Court Cause No. 13-1-00131-4

The Honorable Judge Amber Finlay

**Appellant's Reply Brief**

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## ARGUMENT

### **MS. DOERING WAS UNLAWFULLY SEIZED. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED.**

A. The officers did not have enough information to deduce whether the car in which Ms. Doering was a passenger had trespassed.

The police may not stop a car unless they have the specific and articulable facts necessary to justify a *Terry* stop. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Here, the officers stopped the car in which Ms. Doering was a passenger for trespassing, even though they did not have enough information to determine whether the road on which it was travelling was actually closed. Absent all of the relevant facts, the officers did not have reasonable suspicion that the driver had committed a crime. *Id.* at 61-62.

Though the logging road is generally closed at night, it was open as a flood route during the time of Ms. Doering's seizure. RP 19. A green dot on the sign indicated that it was open. RP 28. The gate at the entrance to the road stood open. RP 38. Ms. Doering presented uncontested evidence that the nearby river was on a flood watch on the night the car was stopped. RP 27.

At best, the officers did not have enough information to determine whether the road was closed. Accordingly, the officers did not have the

articulable facts necessary to determine whether the driver was trespassing. *Doughty*, 170 Wn.2d at 61-62.

Respondent does not meaningfully address this argument. Instead, the state points to testimony that one of the officers checked the USGS website after the fact and found that the area was not at flood stage on the day of Ms. Doering's arrest.<sup>1</sup> Brief of Respondent, p. 7. But that evidence adds nothing to the analysis. A *Terry* stop must be justified *at its inception*. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011). It is not illegal to be on the logging road during all hours of darkness; the road was used as a flood evacuation route, in daylight and darkness. RP 4, 16. Before pulling the car over, the officer should have ensured that the road was, in fact, closed.

The officer unlawfully seized Ms. Doering by stopping the car without the reasonable suspicion necessary for a traffic stop. *Id.* All of the evidence discovered as a result of the stop should have been suppressed at trial. *Id.* at 65. Ms. Doering's conviction must be reversed. *Id.*

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<sup>1</sup> The fact that the river was not actually at flood stage does not indicate that there was no flood watch or risk of flood on the night of Ms. Doering's arrest.

B. As a passenger in the car, Ms. Doering was not able to trespass upon the logging road. Her seizure cannot be justified as a *Terry* stop to investigate whether she had trespassed.

To commit trespass, a person must knowingly enter or remain unlawfully upon premises of another. RCW 9A.52.080.

A passenger is not criminally liable for the actions of the driver of a car. Accordingly, the police may not individually seize a passenger based only on reasonable suspicion that the driver has committed a traffic infraction or driving-related crime. *See e.g. State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004); *State v. Brown*, 154 Wn.2d 787, 799, 117 P.3d 336 (2005). This likely explains why the officer did not testify that he suspected Ms. Doering of trespass when he seized her. RP 2-25.

Even so, Respondent relies heavily on the argument that the officers had reasonable suspicion to seize Ms. Doering for trespassing. Brief of Respondent, pp. 5-9. But the state cannot point to any authority providing that a passenger – who does not have the power to perform the necessary *actus reus* – can trespass on a closed road. Brief of Respondent, pp. 5-9. Just as an officer would not have has the authority to seize a passenger based on a driver’s speeding or reckless driving, Ms. Doering’s seizure cannot be justified based on the suspicion that the driver of the car was trespassing.

- C. The officers did not have reasonable suspicion to seize Ms. Doering by asking for her identifying information.

Ms. Doering relies on the argument in her Opening Brief.

- D. The officers did not have reason to believe that Ms. Doering was armed and dangerous, and thus did not justify a frisk for weapons.

An officer may only frisk a person for weapons if s/he possesses “specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous.” *State v. Harrington*, 167 Wn.2d 656, 667-68, 222 P.3d 92 (2009) (internal citations omitted).

Here, the officer ordered Ms. Doering out of the car in order to frisk her even though the facts did not give rise to the reasonable belief that she was armed and dangerous. The driver of the car volunteered that he had a shotgun, which the officers confirmed was unloaded. RP 20-21. The shotgun was located above the driver’s seat. RP 7. The officers had already frisked the driver and confirmed that he did not have any other weapons. RP 7.

The evidence was insufficient to justify ordering Ms. Doering out of the car in order to frisk her for weapons as well. *Harrington*, 167 Wn.2d at 667-68. An objectively reasonable person would not have thought Ms. Doering was armed and dangerous. *Id.* Still, the state argues that the frisk was justified. Respondent relies almost exclusively on the

officer's statement that, in his experience, "most people that are in the woods and have shotguns have more than one weapon."<sup>2</sup> Brief of Respondent, pp. 9-11.

First, the officer's broad generalization about "people in the woods" is not reasonable. Second, the constitution "requires that the suspicion be individualized." *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). The officer's generality about people in the woods was not specific to Ms. Doering. Likewise, the presence of a single, un-loaded gun in the car, which the driver admitted to possessing, does not give rise to individualized suspicion that Ms. Doering, too, was armed. Even if the officer's assumption that anyone possessing a shotgun gun in the woods also carried other weapons was reasonable, that fear should have dispelled after frisking the driver.

Ms. Doering was unlawfully seized when the officers ordered her to get out of the car so he could frisk her for weapons absent any reason to believe that she was armed or dangerous. *Harrington*, 167 Wn.2d at 667-

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<sup>2</sup> The state also points to the large dog in the car's back seat. Brief of Respondent, p. 11. Respondent does not explain how the dog's presence made it more likely that Ms. Doering had a weapon hidden on her person. Brief of Respondent, p. 11. Respondent also argues that Ms. Doering made "unexplained, furtive movements." Brief of Respondent, p. 11 (citing RP 7-8). But the officer did not testify to any unexplained or furtive movements. RP 7-8. He simply described Ms. Doering turning around to soothe her dog and then complying when he asked her to keep her hands visible. RP 7-8.

68. Her conviction must be reversed and the evidence suppressed on remand. *Doughty*, 170 Wn.2d at 61-62.

E. Ms. Doering's consent to search the car – given after the officers had already located all of the evidence against her – does not change the fact that the evidence was discovered pursuant to her unlawful seizure.

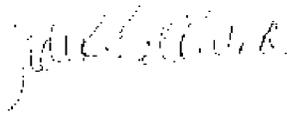
Ms. Doering relies on the argument set forth in her Opening Brief.

### **CONCLUSION**

For the reasons set forth above and in Ms. Doering's Opening Brief, the evidence seized pursuant to her unlawful seizure should have been suppressed. Ms. Doering's conviction must be reversed.

Respectfully submitted on September 30, 2014,

### **BACKLUND AND MISTRY**



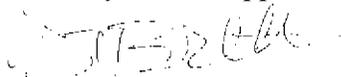
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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Debra Doering  
PO Box 495  
Hoodsport, WA 98548

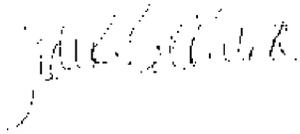
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney  
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I filed the Appellant's Reply 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 September 30, 2014.



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## BACKLUND & MISTRY

September 30, 2014 - 7:38 AM

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