

NO. 47691-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAQUAIL ROBERSON
Appellant.

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

The Honorable Philip Sorensen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Roberson's article 1, section 7 right to be free from unlawful invasion of his private affairs was violated by his seizure without a warrant or an exception to the warrant requirement.
2. Roberson's article 1, section 7 right to be free from unlawful invasion of his private affairs was violated by the police search of his backpack without a warrant or an exception to the warrant requirement.
3. Roberson's article 1, section 7 right to be free from unlawful invasion of his private affairs was violated by the police use of a ruse to justify a pat down frisk and search of a backpack.
4. Roberson's arrest was unlawful.
5. The trial court erred by denying the motion to dismiss the unlawful possession of a gun charge where evidence was obtained in violation of Roberson's article 1, section 7 rights.
6. The trial court erred by denying the motion to dismiss the illegal possession of narcotics charge where evidence was obtained in violation of Roberson's article 1, section 7 rights.
7. The trial court erred in denying the motion to dismiss unlawfully obtained evidence.
8. The trial court erred in denying the statements which were not adequately attenuated from his illegal detention.
9. The trial court erred by failing to enter written findings of fact and conclusions of law.

10. Roberson assigns error to the trial court's 3.6 oral findings of fact in their entirety.
11. Roberson assigns error to the trial court's 3.6 oral conclusions of law in their entirety.
12. Roberson assigns error to the trial court's 3.5 oral findings of fact in their entirety.
13. Roberson assigns error to the trial court's 3.5 oral conclusions of law in their entirety.
14. Roberson's detention, was unlawful under the Fourth Amendment.
15. Roberson's search was unlawful under the Fourth Amendment.
16. Roberson's seizure was unlawful under the Fourth Amendment.

Issues Presented on Appeal

1. Were Roberson's article 1, section 7 rights to be free from unlawful invasion of his private affairs violated by his seizure without a warrant or an exception to the warrant requirement?
2. Were Roberson's article 1, section 7 rights to be from unlawful invasion of his private affairs violated by the police search of his backpack without a warrant or an exception not the warrant requirement?
3. Were Roberson's article 1, section 7 rights to be from unlawful invasion of his private affairs violated by the police use of a ruse to justify a pat down frisk and search of a backpack?
4. Was Roberson's arrest unlawful because the police did

not have reasonable, articulable suspicion of criminal activity?

5. Did the trial court err by denying the motion to dismiss the unlawful possession of a gun charge where evidence was obtained in violation of Roberson's article 1, section 7 rights?
6. Did the trial court err by denying the motion to dismiss the illegal possession of narcotics charge where evidence was obtained in violation of Roberson's article 1, section 7 rights?
7. Did the trial court err in denying the motion to dismiss unlawfully obtained evidence?
8. Did the trial court err in denying the statements which were not adequately attenuated from his illegal detention?
9. Did the trial court err by failing to enter written findings of fact and conclusions of law?
10. Was the police detention of Roberson unlawful under the Fourth Amendment?
11. Was the police search of Roberson unlawful under the Fourth Amendment?
12. Was the police seizure of Roberson unlawful under the Fourth Amendment?

B. STATEMENT OF THE CASE

a. Summary

Mr. Roberson was illegally searched and seized based on a

hunch that he might have been a felon in possession of a firearm. Roberson called 911 to report that he was shot at by a known acquaintance. After observing Roberson shaky, officer Tennyson, who wanted to obtain Roberson's address, offered to give Roberson a ride home.

After walking to the patrol car, Tennyson conducted a pat down frisk for officer safety. After finding a bullet in Roberson's front pocket and Roberson wearing a bullet proof vest, Tennyson asked Roberson if he had a gun on his person, to which Roberson said "no". When asked if Roberson had a gun anywhere, Roberson replied that he had a gun in his backpack. Tennyson arrested Roberson on suspicion that he was a felon in unlawful possession of a firearm. After retrieving the gun, officer Bowers, who was assisting, continued to search the backpack. Inside, Bowers located a zipped nylon bag. Bowers opened the zipped bag and opened another baggie inside which contained methamphetamine.

Roberson moved to suppress and dismiss both the firearm charge and the possession of narcotics charge based on an illegal arrest and illegal search. The trial court denied both motions. Roberson was convicted of unlawful possession of a firearm and

illegal possession of methamphetamines.

b. 3.6 Hearing

Officer Tennyson responded to the Shilo hotel based on a dispatch regarding a shooting incident. RP 11-12. Tennyson met Jaquail Roberson in the lobby where Roberson explained that he was walking to the IHOP when he saw a car he recognized. RP 15-16. The driver of the car, a known acquaintance, exited the car, chased Roberson and shot at him. RP 15-16. When Tennyson spoke to Roberson, he was not a suspect. RP 17. After running, Roberson, who has asthma, was sweating profusely and had trouble standing up. RP 14-18. After obtaining information about the suspect, Tennyson offered to give Roberson a ride home to the Bryn Mar Apartment some 10 blocks away so that Tennyson could obtain Roberson's address, even though Tennyson had Roberson's apartment number and his actual address through the CAD report. RP 16, 29, 49.

When Roberson stood up in an unsteady manner, Tennyson grabbed Roberson's backpack to carry to the patrol car. RP 17-18. To safely provide Roberson with a ride home, Tennyson conducted a pat down frisk of Roberson and handed

the backpack to officer Bowers. RP 18.

Tennyson felt a bullet inside of Roberson's pocket and discovered that Roberson was wearing a bullet proof vest. RP 20-21, 38. Tennyson asked if Roberson had any weapons on his person, to which Roberson indicated "no". RP 18, 20, 35-36. After finding the bullet, Tennyson asked if Roberson had any weapons in the backpack, to which Roberson stated he had a pistol. RP 21.

Tennyson arrested Roberson and placed him in handcuffs for wearing the vest and for possessing the gun without having any knowledge of Roberson's status and ability to legally possess a gun. RP 37, 39. According to Tennyson, Roberson did not have easy access to his backpack before Tennyson ran a records check to determine if Roberson was a felon, because Roberson was already in handcuffs. RP 42-43.

Before determining if Roberson could legally possess a gun, Tennyson handed Roberson's backpack to officer Bowers who searched the backpack without permission. RP 40-42. Tennyson had a hunch that if Roberson had a bullet in his pocket, he also had a gun. RP 45. Tennyson agreed that Roberson did not have easy access to the backpack because he was in

handcuffs. RP 43.

Even though Roberson could not access the backpack, Bowers searched the backpack without permission and retrieved a gun which did not have rounds in the chamber. RP 43, 57, 92. A records check revealed that Roberson was a convicted felon who could not legally possess a gun. RP 57-58. Bowers never asked Roberson if he had a concealed weapons permit, rather he just assumed that Roberson was a felon because Roberson never informed him that he had a permit to carry a pistol. RP 93-94.

After Roberson was placed in the patrol car, Bowers read him his *Miranda* rights. RP Id. Bowers continued to search the backpack where he located a zipped closed nylon bag containing smaller bags of suspected narcotics. RP 61. Bowers believed that he could continue to search closed bags inside the backpack, incident to arrest. RP 99.

The trial court denied the motion to suppress the gun reasoning as follows:

I think it is reasonable to search the backpack once the chain of events has begun. I think it was appropriate to do the pat-down of his person at the outset, and I think, as more information became available to them, that the

nature of their inquiry changed and that the backpack was much more of a threat than it had been at the outset. I mean, I agree completely with the idea that Mr. Roberson was a reported crime victim here. He was not in custody at the outset. He was being treated as a witness, and a crime victim, and it's only after the character of the investigation changes, based on information he provided or his person provided, that his status changed, so I'm going to deny the defense motion.

RP 117-118. The court added that it believed that the police did not need a warrant pursuant to the community caretaking exception and under *Terry v. Ohio*. RP 118-19. The trial court did not issue written findings and conclusions following the 3.6 hearing.

The trial court denied the motion to suppress the narcotics rejecting Robertson's argument that the police exceeded the search of the backpack to clear the pack for officer safety, and engaged in an illegal search after the gun was retrieved. RP 139, 140. The court held that the police had a right to search the backpack for officer safety and once the gun was retrieved, the police were entitled to continue to search. RP 118, 139-140.

c. Trial Facts

In response to a dispatch Tennyson drove to the Shilo Inn

where he met and talked to Roberson, the victim, who reported that he had been shot at by a person known to him. RP 180-83. After obtaining information about the suspect, Tennyson offered to drive Roberson home because he wanted to obtain Roberson's exact address, even though he knew that Robertson lived at the Bryn Mar apartments and had the specific apartment number as well as Roberson's cell phone number. RP 16, 29, 49, 184-85, 206.

Tennyson took Roberson's backpack because Roberson appeared unsteady. According to Tennyson, Roberson walked alongside him to the police car. RP 184-85. According to Bowers, Roberson walked to the police car behind Tennyson. RP 228. Tennyson placed the backpack on the trunk and then handed it to Bowers while he conducted a pat down frisk of Roberson for officer safety. RP 186, 230. After Tennyson felt a 9mm bullet in Roberson's front pocket, he asked Roberson if he had a gun on his person, to which Roberson replied, "no". RP 186, 216. Tennyson also discovered that Roberson was wearing a bullet proof vest. Id.

After Tennyson discovered the vest, he stopped the frisk

and asked Roberson if he had any weapons at all, to which Roberson indicated he had a pistol in his backpack. RP 190. Bowers who overheard this statement, opened the backpack and retrieved a .380 pistol. RP 230-31, 251. Tennyson testified that a purple case was removed from a black nylon bag that was removed from the backpack, which contained methamphetamine. RP 197-198, 233--35; 1RP 9.1. After discovering the gun and drugs, Bowers advised Roberson of his Miranda rights. RP 203.

Bowers testified that Roberson was arrested before the police learned that Roberson could not legally possess a handgun and before the discovery of suspected narcotics. RP 232, 234-35, 242. Roberson informed Bowers that he wore a bullet proof vest because he had been shot in 2014. RP 233. Roberson stipulated to having prior juvenile felony convictions. CP 87.

Roberson filed a *Knapstad* motion to dismiss the gun charge. RP 61-63. Roberson filed a motion to suppress evidence and statements under ER 3.5 and 3.6. RP 5-11. Roberson also moved for a half time motion to dismiss the gun charge based on insufficient evidence that the gun was operable.1RP 12, 15; CP

1 1RP refers to the report of proceedings from April 15, 2015.

84-86.

The court denied the motion to dismiss finding that although the gun was presently inoperable and could not be fired, the fact that after some work it had been fired once, was sufficient to deem it operable. 1RP 15. The court agreed that the methamphetamine was in a closed zippered bag inside the backpack, but also deemed this to be in an “open container”. RP 16-18. The court ruled that the search of the pack for drugs was permissible for officer safety even though Roberson was in handcuffs. RP 1RP 16-18.

d. Gun Inoperable

The police presented the testimony of officer Brian Vold who informed the court that he was not a firearms expert. RP 247, 260. Vold tested the .380 retrieved from Roberson’s backpack on March 17, 2015, two months after Roberson was arrested. RP 249, 252; CP 1-2. Vold described the gun as being “in poor shape”. RP 253. The magazine was not operational. RP 253, 262. Vold was only able to get the gun to fire a single round by “opening the slide, dropping a cartridge directly into the chamber,

letting the slide go.” RP 254-55. Vold could fire the gun again using this process. RP 263-64.

QA. It took quite a while. I wasn't even sure I was going to get this weapon to fire, and eventually, it did fire.

Q. Okay. And then, after you got it to fire, then did you try again?

A. Yes. My standard is three successful tests because that's what the State Patrol would like for the IBIS computer system, is three examples of test fires, so I generally shoot three.

Q. But you were not able to do that in this case?

A. No, I only had one successful test fire.

Q. And so you weren't able to identify what exactly was wrong with that weapon?

RP 263-64.

Roberson was charged and convicted by a jury of illegal possession of methamphetamine and unlawful possession of a firearm in the first degree. CP 1-3; 142-163.

e. 3.5

Bowers read Roberson his Miranda rights while Roberson was in handcuffs seated in the back of the patrol car. RP 58. After being placed in handcuffs and arrested Roberson said he found the gun, wore the bullet proof vest for protection and used the methamphetamines for personal use. RP 60-62.

This timely appeal follows. CP 170. The trial court did not issue any findings of fact or conclusions of law. *Omnes clericis papers.*

B. ARGUMENT

1. APPELLANT'S STATE
CONSTITUTIONAL RIGHTS WERE
VIOLATED BY A SEARCH AND
SIEZURE OF A BACKPACK
WITHOUT CONSENT OR LAWFUL
AUTHORITY.

The state executed an unlawful search and seizure in violation of state and federal constitutional protections by arresting Roberson without probable cause, detaining him without reasonable, articulable suspicion of criminal activity under *Terry v. Ohio*, and by searching the items inside Roberson's backpack without a warrant and without any other authority of law. *State . Brock*, 184 Wn.2d 148, 153-154, 355 P.3d 1118 (2015).

Article I, section 7, is not concerned with the reasonableness of a search, but instead requires a warrant or an exception to the warrant requirement, such as an emergency, before any search, whether reasonable or not. *Brock*, 194 Wn.2d

at 154; *State v. Schultz*, 170 Wn.2d 746, 759-60, 248 P.3d 484 (2011); *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008); *State v. Monaghan*, 165 Wh.App.782, 787, 266 P.3d 222 (2012); *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). There was no valid emergency in this case and this was not a valid *Terry* stop.

Article I, section 7 of the state constitution provides: “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Thus, where the Fourth Amendment precludes only “unreasonable” searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs “without authority of law.” *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).

Article I, section 7 thus prohibits both unreasonable searches, including those that would be considered reasonable under the Fourth Amendment. See *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 305–06, 178 P.3d 995 (2008). The privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment. *York*, 163 Wn.2d at 306; *State v. White*, 97 Wn.2d 92, 109–10, 640 P.2d 1061 (1982),

overruling on other grounds recognized in State v. Graham, 130 Wn.2d 711, fn.2, 927 P.2d 227 (1996), *superseded by statute* by RCW 9A.76.020(1).

Article 1, section 7 creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions....” *Valdez*, 167 Wn.2d at 772. (internal quotation marks and citations omitted). Because article I, section 7, provides greater protection to individuals than the Fourth Amendment, it is the proper analytic framework for this issue. *Eisfeldt*, 163 Wn.2d at 636.

A backpack like a purse is a private affair which may not be searched without a warrant or an exception to the warrant requirement. *Brock*, 184 Wn.2d at 153; *State v. Hamilton*, 179 Wn.App. 870, 884, 886-88, 320 P.3d 142 (2014).

The Courts of Appeal review a trial court's denial of a motion to suppress for substantial evidence. *Schultz*, 170 Wn.2d at 753 (*citing, State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994)). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *Id.* The Courts

of Appeals review the legal conclusions of the trial court de novo. *Schultz*, 170 Wn.2d at 753 (citing *State v. Smith*, 165 Wn.2d 511, 516, 199 P.3d 386 (2009)).

a. No Community Caretaking/ Emergency

Under this court's cases, to justify intrusion under the emergency aid exception, the government must show that “(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched. (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search.”

(Citations omitted) *Schultz*, 170 Wn.2d at 754 (citing, *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000)).

In *Schultz*, in the context of investigating a domestic violence crime, the State Supreme Court held that police may not enter a home based on “mere acquiescence” without establishing an emergency aid exception. *Schultz*, 170 Wn.2d at 759-60. The Court held that the police violated Schultz’s privacy rights by

entering her home even though police had a good faith belief that an emergency existed where police entered the home after hearing angry voices and then saw that Schultz's neck was red and blotchy. *Schultz*, 170 Wn.2d at 760-61. Police noticed a handgun and an empty pipe and asked Schultz if they could search. Schultz consented and then withdrew her consent *Schultz*, 170 Wn.2d at 752.

The police handcuffed Schultz to stop her from picking up things. *Id.* The Supreme Court suppressed the drugs as the fruits of an illegal search, because the police were not authorized to enter the home based on an emergency. *Schultz*, 170 Wn.2d at 753, 762. Under *Schultz*, the police may not search a person without a warrant unless the state proves that an exception to the warrant requirement applies. *Id.*

Here the prosecutor argued and the court incorrectly agreed that Tennyson was justified in searching Roberson's backpack as part of his community care taking functions. RP 107, 118-19. The community caretaking exception is not available in this case because the state failed to meet the criteria set forth in *Kinzy*, and reiterated in *Schultz*. Specifically, the state failed to

establish that Tennyson subjectively believed Roberson needed assistance for health or safety reasons; that a reasonable person would have agreed; that there was an imminent danger to Roberson; that Tennyson believed that Roberson was in imminent danger; and that Tennyson and Bowers did not use the offer of a ride as a pretext to search Roberson and his backpack. *Schultz*, 170 Wn.2d at 488 (citations omitted).

Roberson was a victim in this case. Although he appeared wobbly when standing up, he declined medical aid for his asthma and was intent on taking a cab home until the police offered to give him a ride. RP 184-85, 209. Tennyson did not assert that he offered to give Tennyson a ride because he was worried about Roberson. Rather Tennyson stated that he offered to give Roberson a ride because it was only ten blocks away and Tennyson wanted to obtain Roberson's address. RP 185.

Under *Schultz*, contrary to the trial court's ruling, Tennyson's reasons for offering to give Roberson a ride do not meet the criteria for the emergency aid exception. Roberson did not need assistance and Tennyson was motivated to offer a ride to satisfy his own desire to obtain an address. *Schultz*, 170 Wn.2d

at 753.

c. Terry.

To justify a *Terry* stop under the Fourth Amendment and article 1, section 7 of the Washington State Constitution, a police officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Fuentes*, 183 Wn.2d 149, 156, 352 P.3d 152 (2015); *State v. Day*, 161 Wn.2d 889, 168 P.3d 1265 (2007). Without a warrant, an officer may briefly stop and detain a person he or she **reasonably suspects** has committed or is about to commit a crime. (Emphasis added) *Fuentes*, 183 Wn.2d at 156; *Day*, 161 Wn.2d at 896; *Terry*, 392 U.S. at 21. This suspicion must be individualized, rather than based on mere proximity to others independently suspected of criminal activity. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980).

To justify a protective frisk for weapons, the 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. *Fuentes*, 183 Wn.2d at 156; *Terry*, 392 U.S. at 27.

“[U]nder article 1, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a *Terry* stop. Once a seizure is found, however, the reasonableness of the officer's suspicion and the factual basis for it are relevant in deciding the validity of the seizure.”

State v. O'Neill, 148 Wn.2d 564, 577, 62 P.3d 489 (2003). Here, the police subjectively believed that Roberson was possibly involved in criminal activity: unlawful possession of a firearm. Objectively, the police knew that Roberson, a black man, ran away from someone trying to shoot him while he was walking to breakfast early in the morning in the Hosmer district, while wearing a bullet proof vest and carrying a bullet in his pocket, and a pistol in his backpack. RP 13, 15, 20-21, 179-83. There was however no objective evidence to support the hunch that Roberson was involved in criminal activity. Roberson was not a suspect, he was a victim; he had not committed a crime, he was shaken, likely from his asthma aggravated by running away from a shooter. The police

suspicion that Roberson could not legally possess a gun was not reasonable under *Terry* or article 1, Section 7.

The Second Amendment to the United States Constitution and article 1, section 24 of the Washington Constitution protect an individuals' right to bear arms. Being a black man in a bad neighborhood does not extinguish this right without specific, objectively reasonable information. *Terry*, 392 U.S. at 27; *Fuentes*, 183 Wn.2d at 156; *State v. Seiyes*, 168 Wn.2d 276, 291-92, 225 P.3d 995 (2010).

Under article 1, section 7, the reviewing Court considers the totality of the circumstances, including the officer's subjective belief. *Fuentes*, 183 Wn.2d at 156; *Day*, 161 Wn.2d at 896. If the initial stop is not lawful or if the officer's professed belief that the suspect was dangerous was not objectively believable, then the fruits of the search may not be admitted in court. *Day*, 161 Wn.2d at 895. Similarly, if the stop or detention was pretextual, it violates article 1, section 7. *Day*, 161 Wn.2d at 897.

In *Day*, the Supreme Court reversed a conviction based on a *Terry* stop for a civil traffic infraction, refusing to extend *Terry* to a situation in which the police did not have specific, objective facts

that the person seized has committed a crime or was about to commit a crime. *Day*, 161 Wn.2d at 897-98. A hunch is insufficient to meet this standard. *Fuentes*, 183 Wn.2d at 157 (citing, *State v. Doughty*, 170 Wn.2d, 57, 63, 239 P.3d 573 (2010)).

In *Fuentes*, the Supreme Court rejected a Terry stop based on the police assertions that: (1) Sandoz's surprise when he saw the officer, (2) the "conflicting" stories between Sandoz and the driver, (3) Sandoz's pale appearance and shaking, (4) the officer did not recognize the Jeep, and (5) the officer had authority to admonish non-occupants for "loitering" under a trespass agreement." *Fuentes*, 183 Wn.2d 156,

The Court reasoned that under the totality of the circumstances, these facts did not create a reasonable articulable suspicion of criminal activity because: (1) Sandoz' was walking late at night with his head down; (2) there were no conflicting stories between Sandoz and the driver about why the two were in each other's company; (3) the police did not attribute Sandoz shaking to "drugs or illicit conduct"; (4) the fact that the police did not recognize the jeep was not related to the passenger Sandoz; and (5) the trespass agreement only allowed the police to investigate

people who loitered, not people walking by. *Fuentes*, 183 Wn.2d at 156-57.

In this case, the police did not express a reasonable articulable suspicion based on specific facts that Roberson had committed a crime, or was about to commit a crime. RP 183-90, 209, 230, 232. Rather, after Tennyson found a bullet in Roberson's pocket, not a crime, and learned that Roberson had a gun in his backpack, which was not accessible to Roberson, Tennyson placed Roberson in handcuffs and arrested him because he and Bowers had a hunch that Roberson was guilty of illegal possession of a firearm because Roberson did not state that he had a weapons permit. RP 45-49. The search was not justified under Terry or article 1, section 7 because the police only had a hunch based on Roberson's skin color and the neighborhood in which he was encountered.

In this case, the trial court did not enter findings of fact or conclusions of law, but the trial court's oral ruling² regarding the validity of the *Terry* stop pointed to the following factors:

² Roberson does not concede that this is sufficient to justify the state's failure to present written findings and conclusions required under ER 3.6

I think it is reasonable to search the backpack once the chain of events has begun. I think it was appropriate to do the pat-down of his person at the outset, and I think, as more information became available to them, that the nature of their inquiry changed and that the backpack was much more of a threat than it had been at the outset. I mean, I agree completely with the idea that Mr. Roberson was a reported crime victim here. He was not in custody at the outset. He was being treated as a witness, and a crime victim, and it's only after the character of the investigation changes, based on information he provided or his person provided, that his status changed, so I'm going to deny the defense motion.

RP 117-119.

The trial court erred in finding a valid *Terry* stop under *Terry, Fuentes, and Day*, because the officer's specific facts were insufficient to establish that Tennyson or Bowers, had a "reasonable, articulable suspicion, based on specific, objective facts" that Roberson committed or was about to commit a crime. *Fuentes*, 183 Wn.2d at 156-57; *Day*, 161 Wn.2d at 898; *Terry*, 392 U.S. at 21. Accordingly, the evidence of the gun and narcotics should be suppressed.

Brock is worth discussing because the state may argue that *Brock* provides authority for the unlawful search in this case;

it does not. In *Brock*, the police observed Brock inside a closed bathroom at 3:00AM in Golden Gardens park. *Brock*, 184 Wn.2d at 151. The police had probable cause to arrest Brock for being in the park unlawfully, but police did not arrest Brock, rather they conducted a *Terry* stop, frisked Brock and searched Brock incident to arrest after Brock provided false information to the police, another crime. *Brock*, 184 Wn.2d at 151-52. The trial court denied Brock's motion to suppress based on an illegal search. *Brock*, 184 Wn.2d at 151-52.

The Supreme Court reversed the Court of Appeals holding that when the *Terry* stop ripened into a lawful arrest, based on Brock giving false identifying information, after illegally trespassing in the park, the police could search his backpack incident to lawful arrest. *Brock*, 184 Wn.2d at 151, 158-59. The Court explained the justification for the search of the backpack was that it was incident to lawful arrest. *Brock*, 184 Wn.2d at 157-59.

Brock is distinguishable because therein, the police had probable cause to arrest based on illegal trespass in the park late at night and for providing false information. *Brock*, 184 Wn.2d at

157-59. Here, by contrast, the police unlawfully arrested Roberson based on a hunch, rather than on a reasonable articulable suspicion of criminal activity, or probable cause. Accordingly, the state may not use evidence obtained by the illegal search and seizure.

c. Incident to Lawful Arrest

Police may search a backpack incident to a valid arrest. *State v. Ellison*, 172 Wn.App. 710, 722, 291 P.3d 921 (2013). In *Ellison*, police were permitted to search a backpack incident to a lawful arrest for outstanding warrants where the police had safety concerns based on a domestic violence call where the defendant was found hiding outside the victim's house, under a blanket with his backpack between his legs. *Ellison*, 172 Wn.App at 722. The Court in *Ellison* held that incident to arrest, the police could search the backpack for officer safety concerns, rather than transporting its contents, unknown to the police station. *Id.*

Ellison does not apply to Roberson's case because here the police did not have a valid reason to arrest Roberson. Accordingly, the police were not authorized to search Roberson's pack; and the discovery of the gun did not justify the illegal search and seizure.

O'Neill, 148 Wn.2d at 585. Moreover, general safety concerns do not justify an illegal search and seizure. *Id.*

Under article I, section 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. *State v. Cyr*, 40 Wash.2d 840, 843, 249 P.2d 480 (1952), *overruled on other grounds by State v. Ringer*, 100 Wash.2d 686, 674, P.2d 1240 (1983). It is the fact of arrest itself that provides the “authority of law” to search, therefore making the search permissible under article 1, section 7. *Cyr*, 40 Wash.2d at 843, 246 P.2d 480; *see also State v. Michaels*, 60 Wash.2d 638, 643, 374 P.2d 989 (1962) (citing with approval [*Cyr*]). Thus, while the search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, in the absence of a lawful custodial arrest a full blown search, regardless of the exigencies, may not validly be made. *See, e.g., State v. Johnson*, 71 Wash.2d 239, 242, 427 P.2d 705 (1967) (lawful arrest is a prerequisite to a lawful search); *State v. Miles*, 29 Wash.2d 921, 933, 190 P.2d 740 (1948) (if arrest is unlawful, search is unlawful).... It states the obvious to observe that where a person is not under arrest there can be no search incident thereto.

O'Neill, 148 Wn.2d at 585 (quoting, *State v. Parker*, 139 Wn.2d, 486, 496-97, 987 P.2d 73 (1999)). Accordingly, without probable cause for a custodial arrest, or valid exception, the police may not conduct a warrantless search under article I, section 7. *State v.*

Byrd, 178 Wn.2d 611, 616, 310 P.3d 793 (2013); *O'Neil*, 148 Wn.2d at 586-87.

d. Ruse.

Tennyson offered to give Roberson a ride home so that he could obtain Roberson's address and to justify the pat down frisk and search of the backpack. RP 49, 184-85, 201. Tennyson knew that he would be able to articulate a safety concern in an attempt to support of a pat down frisk and search because Tennyson was placing Roberson in the patrol car. This was a ruse.

A ruse or a pretext stop occurs when the police pull over a citizen, "not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving." *State v. Ladson*, 138 Wn.2d 343, 349, 353, 979 P.2d 833 (1999). This practice is illegal under article 1, section 7. *Ladson*, 138 Wn.2d at 353.

In *State v. DeSantiago*, 97 Wn.App. 446, 983 P.2d 1173 (1999), an officer watched an apartment complex known for narcotics. He saw the defendant enter the building and leave less than five minutes later. *DeSantiago*, 97 Wn.App. at 448-49. The officer then followed the defendant's vehicle for several blocks, looking for a reason to stop it. *DeSantiago*, 97 Wn.App. at 448-

49, 52. The officer eventually stopped the defendant for an improper left-hand turn. *DeSantiago*, 97 Wn.App. at 449.

The Court reversed the defendant's convictions for possession of methamphetamine and unlawful possession of a firearm, concluding that the officer 'was clearly 'looking for a basis to stop the vehicle' and subjectively intended to engage in a pretextual stop.' *DeSantiago*, 97 Wn.App. at 452–53(*quoting, Ladson*, 138 Wn.2d at 358-59).

In *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012), the Supreme Court recognized that a search of a handcuffed person under fear of officer safety was unreasonable because it “permitted the vehicle-search-incident-to-arrest exception to apply unmoored from its justifications”. *Snapp*, 174 Wn.2d at 190.

Unless there is a lawful arrest, the police may not use a ruse to invoke officer safety as grounds for searching a backpack. *Snapp*, 174 Wn.2d at 190; *DeSantiago*, 97 Wn.App. at 452-53; (*quoting, Ladson*, 138 Wn.2d at 358-59).Additionally, the police “handcuffs in the backseat of a patrol car [because he][is hardly in a position to grab a weapon or gain possession of evidence of the crime in the vehicle and conceal or destroy it.” *Snapp*, 174 Wn.2d

at 190.

In Roberson's case, the police created the need to search by offering Roberson a ride. This might have been a ruse, but in any event, the search of officer safety was not justified under article 1, section 7 because Roberson had not committed a crime, was not in need of aid, there was no reasonable suspicion of criminal activity, and Roberson was in handcuffs and could not access his backpack, therefore he was not a danger to the police. *Snapp*, 174 Wn.2d at 190; *DeSantiago*, 97 Wn.App. at 452-53; (quoting, *Ladson*, 138 Wn.2d at 358-59).

This Court must reverse the convictions and remand for suppression of the gun and narcotics and dismissal with prejudice.

2. APPELLANT'S FEDERAL
CONSTITUTIONAL RIGHTS WERE
VIOLATED BY A SEIZURE OF
WITHOUT CONSENT OR A
WARRANT OR AN EXCEPTION TO
THE WARRANT REQUIREMENT.

The Fourth Amendment to the federal constitution prohibits warrantless searches unless one of the narrow exceptions to the warrant requirement applies. *State v. Buelna Valdez*, 167 Wn.2d

761, 768, 771–72, 224 P.3d 751 (2009); *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); *State v. Swetz*, 160 Wn. App. 122, 127-128, 247 P.3d 802 (2011).

The Fourth Amendment protects against 'unreasonable searches' by the State. U.S. CONST. amend. IV ("The right of the people to be secure in their ... houses ... against unreasonable searches ... shall not be violated"). *Monaghan*, 165 at 787.

The Fourth Amendment thus guarantees that before a search of an individual's person or effects can be commenced, a magistrate must make a prior determination that probable cause exists for the search. *State v. Lohr*, 164 Wn. App. 414, 423-424, 263 P.3d 1287 (2011).

A warrantless search is per se unconstitutional absent an exception. *Buelna Valdez*, 167 Wn.2d at 761; *Swetz*, 160 Wn.App. at 127-128. Here, there were no exceptions to the warrant requirement, thus the search was unconstitutional. Under the Fourth Amendment to the U.S. constitution, "the community caretaking function exception is totally divorced from a criminal investigation." *Kinzy*, 141 Wn.2d at 385 (citing, *Cady v. Dombrosky*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706

(1973).

In this case, the community caretaking exception is not available under the U.S. constitution because under the facts of this case, the police were investigating a crime. *Kinzy*, 141 Wn.2d at 385.

Once Roberson was in handcuffs, the police were not permitted to search Roberson's backpack. *Buelna Valdez*, 167 Wn.2d at 768. Without a warrant or an exception to the warrant requirement, the police searched and seized Roberson's backpack where they retrieved a gun and suspected methamphetamine. These actions violated Roberson's constitutional protections against unreasonable searches. *Afana*, 169 Wn.2d at 177; *Winterstein*, 167 Wn.2d at 628; *Lohr*, 164 Wn. App. at 423-424. Without a warrant or an exception to the warrant requirement, the trial court should have suppressed the gun and drugs.

3. THE TRIAL COURT'S FAILURE TO ENTER WRITTEN FINDINGS AND CONCLUSIONS FOLLOWING THE 3.5 AND 3.6 HEARING REQUIRES REVERSAL OF THE CONVICTIONS AND REMAND FOR A NEW TRIAL.

Under the rules of criminal procedure, written findings of fact and conclusions of law are to be entered at the conclusion of a suppression hearing. CrR 3.6. *State v. Head*, 136 Wn. 2d 619, 621– 22, 964 P. 2d 1187 (1998; *State v. Otis*, 151 Wn.App. 572, 576, 213 P.3d 613 (2009)). The purpose of the rule is to enable the appellate court to review the questions raised on appeal. *Head*, 136 Wn. 2d at 622. “An appellate court should not have to comb an oral ruling to determine whether appropriate ‘ findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” *Head*, 136 Wn. 2d at 624.

Generally, the appellate Court will refuse to address issues raised on appeal in the absence of such findings and conclusions. *Head*, 136 Wn.2d at 964. CrR 3.6(a) states:

- a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is

required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

CrR 3.6.

When a trial court fails to enter written findings and conclusion following a bench trial, effective appellate review is precluded, unless the record is sufficient to facilitate review in the absence of written findings and conclusions. *Otis*, 151 Wn.App, at 577, citing, *State v. Denison*, 78 Wn.App. 566, 897 P.2d 437 *review denied*, 128 Wn.2d 1006, 907 P.2d 297 (1995). In *Denison*, the Court vacated the judgment and remanded for entry of findings and conclusions on the issues that could not be addressed without the findings of fact.

In *Otis*, because the record was sufficient to address the defendant's one challenge to his right to present an affirmative defense. *Otis*, 151 Wn.App. at 577. In *Head*, the Supreme Court remanded for entry of findings and refused to make do with the oral ruling. *Head*, 136 Wn. 2d at 624. The Court in *Head* cautioned that where findings are entered belatedly, reversal may be appropriate where a defendant can demonstrate actual prejudice, for example

where there is a strong indication that the findings ultimately entered have been tailored to meet issues raised on appeal. *Head*, 136 Wn. 2d at 624

Here the record is insufficient to permit effective appellate review. The case involved detailed constitutional issues all requiring significant scrutiny of the 3.6 evidence and rulings. Because the oral ruling is scant and without detail, the reviewing court cannot conduct meaningful appellate review. The remedy is reversal of the conviction and remand for a new trial. *Head*, 136 Wn.2d at 620–21; *Otis*, 151 Wn.App. at 576.

4. THE TRIAL COURT ERRED BY DENYING ROBERSON'S MOTION TO SUPPRESS HIS 3.5 STATEMENTS AND 3.6 EVIDENCE.

The Courts of Appeals review conclusions of law relating to the suppression of evidence de novo. *State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d (2011) (*quoting*, *State v. Gaines*, 154 Wn.2d 711, 717, 116 P.3d 993 (2005)). “Unchallenged findings of fact entered following a suppression hearing are verities on appeal.” *Id.* Here, the trial court did not enter any written findings of fact or conclusions of law following the 3.5 and 3.6 hearings, or following the *Knapstad* hearing. Notwithstanding the inability to properly

review these issues on appeal, the trial court nonetheless erred denying these motions because Roberson was illegally arrested.

Under article 1, section 7, our state's exclusionary rule, moreover, is generally less permissive than its federal counterpart, the rule having been described as "nearly categorical." *Winterstein*, 167 Wn.2d at 636. That rule is intended to protect individual privacy against unreasonable governmental intrusion, to deter police from acting unlawfully, and to preserve the dignity of the judiciary by refusing to consider evidence that has been obtained through illegal means. *State v. Bonds*, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982).

When a defendant is illegally arrested, under article 1, section 7, a confession is not admissible unless, the statement is sufficiently attenuated from the illegal arrest. *Eserjose*, 171 Wn.2d at 178-79, citing, *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (quoting, *Wong Sun v. United States*, 371 U.S.471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In *Brown*, the United States Supreme Court identified three factors, aside from the giving of Miranda warnings, that courts should consider in determining if a confession was sufficiently attenuated from an illegal arrest: "[t]he temporal proximity of the

arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.” *Brown*, 422 U.S. at 603-04 (footnote and citation omitted).

The Court in *Brown* concluded that the suspect’s confession was inadmissible, because “[t]he illegality ... had a quality of purposefulness. The impropriety of the arrest was obvious.... The manner in which Brown’s arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion.” *Brown*, 422 U.S. at 605.

In *Eserjose*, the State Supreme Court acknowledged that by applying the fruit of the poisonous tree doctrine, “we have, at least, implicitly adopted the attenuation doctrine, that doctrine being intimately related to the “fruit of the poisonous tree” doctrine.”. *Eserjose*, 171 Wn.2d at 179 (confession sufficiently attenuated).

Here, Roberson was illegally searched, seized and arrested. There was no attenuation between the timing of these events. Unlike in *Eserjose*, Roberson was not taken to the police station and interviewed. Rather, simultaneous with the illegal search and seizure he was interrogated. There was no attenuation and the

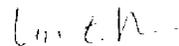
subsequent statements, along with the gun and methamphetamine were the fruits of the poisonous tree that should have been suppressed.

D. CONCLUSION

Mr. Roberson respectfully requests this Court remand for suppression of the gun, the methamphetamine and Roberson's statements, and for dismissal of the charges.

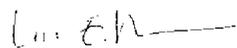
DATED this 16th day of January 2016

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor – pcpatcecf@co.pierce.wa.us and Jaquail W. Roberson DOC# 383361 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520 on January 15, 2016 Service was made electronically to the prosecutor and via U.S. postal to Mr. Roberson.



Signature

ELLNER LAW OFFICE

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