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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES LOUTHAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUE

- A. Did the trial court err when it denied Louthan's motion to suppress the evidence recovered from Deputy Heller's warrantless search of Louthan's person?

II. STATEMENT OF THE CASE

On June 19, 2017, Deputy Stephen Heller with the Lewis County Sheriff's Office responded to a report of a suspicious person at the Doty Store at approximately 3:00 a.m. RP 4, 7; CP 20; Ex. 1.¹ Deputy Heller had received information about a man wearing a camouflage jacket, who had been staring towards the reporting party's home but was now looking in the doors and windows at the Doty Store. RP 7; CP 20-21. Deputy Heller arrived at the Doty Store and contacted Louthan. RP 6-7; CP 21.

Trooper Iverson arrived at the Doty Store while Deputy Heller was making his initial contact with Louthan. RP 6-7; CP 21; Ex. 1.² Deputy Heller was attempting to find out what was going on with Louthan. RP 11; Ex. 1 (1:34-1:53). Deputy Heller found out that Louthan's cell phone was not working out in Doty. Ex. 1 (1:34). Louthan then told Deputy Heller he was a Type One diabetic, did

¹ The State will be citing to exhibit 1 throughout this briefing. It will attempt to cite to the time stamp of the part of the DVD that marks where the interaction occurred. The State acknowledges there are times it could be off a second or so in its citations. The State has attempted to exercise the utmost diligence with its notations of time.

² The beginning of the video shows Trooper Heller driving and pulling up to the Doty Store where Deputy Heller is outside speaking to Louthan.

not have his insulin with him, and he needed food. RP 9, 28-29; CP 21; Ex. 1 (1:38-1:42).

Deputy Heller went back to his patrol car to run Louthan's name. RP 7. While Deputy Heller was running Louthan's name Trooper Iverson stepped forward and began to talk to Louthan. Ex. 1 (2:11). Trooper Iverson inquires if Louthan was walking down the highway earlier and Louthan says, yes. Ex. 1 (2:17). Trooper Iverson explains that they had received "a call about you saying you were walking down the centerline, right in the middle of the road." *Id.* (2:22). Louthan replied, "Yeah, I've been diabetic for thirty-five years, so my vision at night time is not worth a shit." *Id.* (2:25); CP 21. Trooper Iverson asks Louthan if he has a light and Louthan responds that he had one from his phone, but his phone was about dead. Ex. 1 (2:47). Louthan also told Trooper Iverson that he was freezing. *Id.* (2:36).

Deputy Heller returned and asked Louthan if he knew he had a couple of warrants. Ex. 1 (4:47). Louthan replied that he did know, they were for driving with a suspended license in the third degree. *Id.* (4:49). Deputy Heller told Louthan the warrants were out of Shelton and Grays Harbor County. *Id.* (4:52).

Deputy Heller asked Louthan about his friend who he came out to Doty with and Louthan said his friend was probably out driving around. Ex. 1 (5:30). Deputy Heller then inquired if Louthan had a phone number for his friend, and Louthan retrieved his phone out of his pants pocket. *Id.* (5:35). Louthan asked Deputy Heller to read the number off the phone, stating “my eyes are terrible.” *Id.* (6:00). Deputy Heller attempted to call Louthan’s friend, “Dale” but no one answered the call. *Id.* (6:06).

Deputy Heller asked Louthan what his plan was, if Louthan wanted medical attention for his diabetes due to Louthan not eating anything for hours and his blood sugar being low? RP 14; Ex. 1 (7:26). Louthan declined to have medical aid called for him. RP 14, Ex. 1 (7:42). Louthan then stated, “I can’t stand out here in the cold, I’m freezing man.” Ex. 1 (7:44).

Deputy Heller asked Louthan again what his plan was and Louthan said he was going to try wake up his friend’s relatives to use the phone and try to find his friend. RP 15; Ex. 1 (7:51). Deputy Heller told Louthan that it was not a good idea for Louthan to hang out around there. RP 15; Ex. 1 (8:04). Louthan stated, “I guess I’m walking down the highway then.” Ex. 1 (8:06). Deputy Heller told

Louthan he did not want Louthan walking down the highway. *Id.* (8:07).

Deputy Heller then told Louthan,

I'm going to give you the option, I already know you have warrants. You have to go get them taken care of, kay [sic]? I'm willing to give you a ride into Chehalis, alright? If you are willing, I'm willing to do that. I have to go that way anyway...You have to listen to my shitty music, you have to wear a seatbelt, and I have to make sure you don't have any dope, weapons, or anything on you.

Id. (8:10). Deputy Heller asked Louthan if this arrangement sounded good and Louthan said, "Yeah." *Id.*

Louthan asked about Deputy Heller calling someone else to give Louthan a ride and Deputy Heller asked Louthan if there was someone else who could come get him. *Id.* (8:37). Deputy Heller explained to Louthan that due to the circumstances, Doty not being populated he was not comfortable leaving Louthan in Doty. *Id.*

Deputy Heller explained to Louthan that he was not going to take him to jail, that he was not going to confirm the warrants, it was not even an issue. *Id.* (9:10). Deputy Heller explains that in Chehalis there would be people around, a gas station, if Louthan needed help because of his blood sugar someone could call for help. *Id.* (9:26). Louthan said that sounded good. *Id.* (9:33).

Louthan allowed Deputy Heller to search him prior to getting a ride to Chehalis. *Id.* (9:40). Deputy Heller found a glove that contained a baggie of methamphetamine in Louthan's back pocket. RP 8-9.

The State charged Louthan with one count of Possession of a Controlled Substance – Methamphetamine. CP 1-2. Louthan filed a Motion to Suppress Evidence pursuant to CrR 3.6 and Brief in Support of his motion. CP 4-10. The State filed a response brief. CP 11-15. A hearing was conducted and the State prevailed. RP 1-47; CP 20-24. There was a stipulated bench trial and Louthan stipulated and agreed to an exceptional sentence of a year and day in the Department of Corrections. CP 17-19, 25-26, 32. Louthan timely appeals. CP 40.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY DENIED LOUTHAN'S MOTION TO SUPPRESS THE EVIDENCE.

Louthan argues the trial court incorrectly denied his motion to suppress the methamphetamine discovered when Deputy Heller searched Louthan prior to giving Louthan a ride in Deputy Heller's

patrol vehicle.³ The trial court appropriately ruled Deputy Heller was permitted to search Louthan after Louthan consented to the search as a condition of a ride into Chehalis. Louthan's arguments in regard to the community caretaking exception are without merit, as they misconstrue the trial court's ruling in regards to that exception. Further, there was substantial evidence to support all the findings of fact Louthan has challenged. This court should find the motion challenging the search was correctly denied.

1. Standard Of Review.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

³ Louthan breaks his argument into multiple sections. The State will respond to all of the arguments in this one section.

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

2. There Was Substantial Evidence Presented To Sustain The Challenged Findings Of Fact.

Louthan asserts the trial court erred by entering the following findings of fact: 1.7, 1.19, 1.21, 1.22, 1.25, 1.26, and 1.27. CP 21-22. Yet, in Louthan's brief he does not specifically address the lack of evidence to support each finding. See Brief of Appellant. The State will address finding of fact 1.7, "Up to the point of Louthan's arrest, he was never in custody" in the body of its brief below. CP 21. The remaining alleged errors are addressed here.

Deputy Heller testified he did not leave Louthan in Doty because based on Louthan's statements that he had not eaten for a while, he was Type 1 diabetic, Louthan stated he was freezing, Louthan's behavior, Louthan was lost, there was nothing in Doty and no one around that time of night if Louthan needed medical assistance, therefore Deputy Heller wanted to take Louthan into Chehalis. RP 20-21. This testimony, coupled with the conversation Deputy Heller had with Louthan on video support finding of fact 1.19. CP 22; Ex. 1 (8:40-9:30).

Finding of fact 1.21 is supported by Deputy Heller's testimony responding to a question from the deputy prosecutor, following up on the testimony above. RP 21; CP 22. The deputy prosecutor asked, "And did that contribute to your statement it's not a good idea for you to be in the area?" RP 21. Deputy Heller responded, "Yes, sir." RP 21.

Finding of fact 1.22, "Louthan had no other person to obtain a ride from other than Dep. Heller." is supported by Deputy Heller's attempt to contact the number Louthan gave Deputy Heller and getting no answer. CP 22; Ex. 1 (6:00). Louthan did not give Deputy Heller another person's number, although he did inquire if Deputy Heller could possibly call someone else for him. Ex. 1 (6:06-9:40).

Finding of fact 1.25 is supported by Exhibit 1 from 9:15 through 9:40. CP 22. Further, Deputy Heller testified that he did not get a sense of apprehension from Louthan when Louthan accepted the offer of a ride to Chehalis. RP 19.

Deputy Heller told Louthan that to ride in Deputy Heller's car, "You have to listen to my shitty music, you have to wear a seatbelt, and I have to make sure you don't have any dope, weapons, or anything on you." Ex. 1 (8:23). This supports finding of fact 1.26, "As a condition of getting a ride to Chehalis in his vehicle, Dep.

Heller advised Louthan that he would have to be searched for drugs and/or weapons.” CP 22.

Louthan did consent to the search of his person before he entered Deputy Heller’s patrol vehicle, as he accepted the ride and voluntarily stepped to the front of Deputy Heller’s patrol vehicle and allowed Deputy Heller to search him. CP 22 (Finding of Fact 1.27); Ex. 1 (9.26-10:39).

All the evidence outlined above is sufficient for this court to find substantial evidence to support the challenged findings of fact. This Court should find the trial court’s findings were supported by substantial evidence.

3. The Fourth Amendment And Article One, Section Seven, Protect Citizens From Warrantless Searches And Seizures By Police.

Citizens have the right to not be disturbed in their private affairs except under authority of the law. U.S. Const. amend IV; Const. art. I, § 7. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v.*

Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

A person is seized within the meaning of the Fourth Amendment when, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L. Ed.2d 497 (1980). Not every encounter between an officer and an individual amount to a seizure. *Mendenhall*, 446 U.S. at 551-55.

Generally, a search is not reasonable unless it is based on a warrant issued upon probable cause. *Skinner v. Ry Labor Executives’ Ass’n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989). “Under article 1, section 7, a warrantless search is per se unreasonable unless the State proves that one of the few carefully drawn and jealously guarded exceptions applies.” *Byrd*, 178 Wn.2d at 616 (internal quotations and citations omitted). The remedy for an unconstitutional search or seizure is exclusion of the evidence that was uncovered and obtained. *State v. Monaghan*, 165 Wn. App. 782, 789, 266 P.3d 222 (2012).

In evaluating investigative stops, the court must determine: (1) whether the initial interference with the suspect’s freedom of movement was justified at its inception, and (2) whether it was

reasonably related in scope to the circumstances that justified the interference in the first place. *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In evaluating the proper scope of a contact to determine whether the intrusion on a suspect's liberty is so substantial that its reasonableness is dependent upon probable cause, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of time the suspect is detained. *Williams*, 102 Wn.2d at 740. Courts have not adopted any specific outside time limitation for a permissible *Terry* stop. *Id.*

Courts generally recognize that crime prevention and crime detection are legitimate purposes for investigative stops or detentions. See, e.g., *Terry v. Ohio*, 392 U.S. at 22. Thus, exceptions to the warrant requirement exist to provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for prior recourse to a neutral magistrate. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). These exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *Id.* at 171-2. The State must show that the particular search

or seizure in question falls within one of these exceptions. *Id.* at 172.

To justify a seizure on less than probable cause, *Terry* requires a reasonable suspicion based on the totality of the circumstances that the person seized has committed or is about to commit a crime. *Duncan*, 146 Wn.2d at 172. An officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the detention. *State v. O'Neill*, 148 Wn.2d 564, 576, 62 P.3d 489 (2003).

Accordingly, the court determines the existence of reasonable suspicion for a *Terry* seizure based upon an objective view of the facts known to the officer. *State v. Mitchell*, 80 Wn. App. 143, 147, 906 P.2d 1013 (1995). Additionally, the court takes into account and gives deference to an officer's training and experience when determining the reasonableness of a *Terry* stop. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 60 (1991). While an inchoate hunch is insufficient to justify a stop, circumstances that appear innocuous to the average person may appear incriminating to a police officer in light of past experience. *State v. Samsel*, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985). The officer is not

required to ignore that experience. *Id.* Reasonableness is measured not by exactitudes, but by probabilities. *Id.*

Subsequent evidence that the officer was in error regarding some of the facts will not render a *Terry* stop unreasonable. *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) (“The Fourth Amendment does not proscribe ‘inaccurate’ searches only ‘unreasonable’ ones”). Also, before initiating a *Terry* stop, the officer need not rule out all possibilities of innocent behavior. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988). The means of investigation need not be the least intrusive available, but police must reasonably try to identify and pursue less intrusive alternatives. *State v. Mackey*, 117 Wn. App. 135, 139, 69 P.3d 375, 377 (2003).

There was no dispute in the trial court and there is no dispute here that the initial investigative contact with Louthan was a legitimate and lawful *Terry* stop. RP 10-12, 34-36; Brief of Appellant. Therefore, the disagreement between the parties comes from what occurs after Deputy Heller concluded Louthan was not engaged in criminal activity and returned to speak to Louthan about what was going to happen next.

a. Deputy Heller's continued detention of Louthan was lawful pursuant to the community caretaking exception to the warrant requirement.

An exception to the warrant requirement for a seizure of a person is when an officer is engaging in a community caretaking function. *State v. Acrey*, 148 Wn.2d 738, 749, 64 P.3d 594 (2003).

When police officers are engaged in noncriminal, noninvestigative community caretaking functions, whether a particular stop is *reasonable* depends not on the presence of probable cause or reasonable suspicion, but rather on a balancing of the competing interest involved in light of all the surrounding facts and circumstances.

Acrey, 148 Wn.2d at 748-49 (emphasis original and internal quotations omitted). A police officer can perform community caretaking functions in a multitude of circumstances, including routine checks on health and safety and emergency aid. *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000). The court, when determining whether a police officer's encounter with an individual is reasonable in regards to a check on health and safety, "must balance the individual's interest in freedom from the police interference against the public's interest in having the police officers perform a community caretaking function." *Acrey* at 750 (internal quotations and citations omitted).

The emergency aid function of community caretaking “involves circumstances greater urgency and searches of greater intrusion” than routine checks on health and safety. *Kinzy*, 141 Wn.2d at 386. The emergency aid exception applies when

- (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons;
- (2) a reasonable person in the same situation would similarly believe that there was a need for assistance;
- and (3) there was a reasonable basis to associate the need for assistance with the place searched.

Id. at 386-387 (internal quotations and citations omitted).

Due to the risk of abuse of allowing police the ability to conduct even well-intentioned stops to assist, the courts have cautiously applied the community caretaking exception. *Id.* at 388. The noncriminal investigation may be conducted by the police once the exception does apply, but it must be necessary and strictly relevant to the officer’s performance of his or her community caretaking function. *Id.* “The noncriminal investigation must end when reasons for initiating an encounter are fully dispelled.” *Id.*

In *Acrey*, at 12:41 a.m., officers received a report of youths fighting in an area and responded. *Acrey*, 148 Wn.2d at 742. An officer saw five young males in the area who fit the caller’s description so he stopped the young men and asked them if they had been fighting. *Id.* The youths stated they were just playing

around and were walking to a store approximately four miles away. *Id.* After the officer determined no fighting had occurred he became concerned because of the late hour, it was a week night, and the boys were in a commercial area where there were no residences or open businesses around. *Id.* at 743. The officer asked the boys for their names, home telephone numbers, and had the boys sit on the sidewalk while he called their homes. *Id.*

Acrey's mother requested the officer bring him home because she did not possess a car and could not pick Acrey up. *Id.* The officer honored the mother's request (Acrey was 12 years old) and asked another officer to transport Acrey home. *Id.* The second officer, following standard police procedure, conducted a pat-down of Acrey and it was discovered he had marijuana and crack cocaine in his possession. *Id.* The Supreme Court agreed with the Court of Appeals' reasoning that due to the totality of the circumstances the officer's actions were reasonable. *Id.* 752-53. The Court also noted that Acrey had already been legitimately detained during the investigation regarding the fighting call and the community caretaking only extended that seizure briefly. *Id.* at 752.

Louthan appears to argue that the trial court ruled that the community caretaking exception applied to Deputy Heller's offer of

an option of a ride to Chehalis and Louthan's acceptance of the offer and taking the step to get into the patrol vehicle. Brief of Appellant 10-14. Louthan repeatedly discusses how it is not proper medical assistance to force him to take a ride to a gas station. The trial court did not rule the option of a ride was the community caretaking. The trial court's rule regarding community caretaking was in regard to the detention of Louthan after Deputy Heller's initial *Terry* investigation ended. RP 41-42; CP 23. The initial contact and *Terry* investigation, which's validity has not been challenged, was regarding Louthan's suspicious behavior of looking into the windows of the closed Doty store was completed. RP 10-12, 36. The conclusion of law and the oral ruling from the judge make it clear the community caretaking ruling was the seizure of Louthan from the end of the *Terry* investigatory seizure up to the point that Louthan consented to being searched as a condition of a ride to Chehalis. *Id.*

Deputy Heller inquired twice if Louthan needed medical assistance due to Louthan's Type 1 diabetes. Ex. 1 (7:26, 8:34). Deputy Heller also attempted to help Louthan, who was lost and unable to call out on his phone, call a friend to come pick him up in Doty. Ex. 1 (6:00). Deputy Heller had further conversation with

Louthan about what they could do to remedy Louthan's situation. See Ex. 1 (7:26-9:40).

Louthan was cold, hungry, lost, without cell service, and could not name anyone who could help him. See Ex. 1. Deputy Heller was attempting to assist Louthan. The trial court correctly ruled that Deputy Heller's seizure of Louthan was purely a community caretaking exception to the warrant requirement up until Louthan consented to be searched after accepting the terms of the non-obligatory ride into Chehalis. The Court should affirm the trial court's finding that the community caretaking seizure of Louthan was permissible.

b. Louthan consented to a search of his person as a condition of entering Deputy Heller's patrol vehicle for a ride to Chehalis.

Contrary to Louthan's contention in his briefing, he did have the option to walk away and not accept Deputy Heller's offer of a ride to Chehalis. Louthan decided to accept the ride and Deputy Heller's conditions that he placed upon entering his patrol vehicle. Louthan consented to the search of his person.

One exception to the warrant requirement is consent to search. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). The State will have the burden to establish that a

defendant's consent to search was lawfully obtained. *Thompson*, 151 Wn.2d at 803. "In order to meet this burden, three requirements must be met: (1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of the consent." *Id.* The court must look at the totality of the circumstances to determine if consent was freely and voluntarily given. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The determination whether consent is voluntarily given is a question of fact. *Reichenbach*, 153 Wn.2d at 132.

The court may consider a number of factors when determining if consent was voluntary. *O'Neill*, 148 Wn.2d at 588. These factors include, but are not limited to: the intelligence or degree of education of the person, were *Miranda* warnings given and was the person advised of the right to refuse consent. *Id.* at 588. "While knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding voluntary consent, however." *Reichenbach*, 153 Wn.2d at 132 (citations omitted). The court may also weigh such factors as implied or express claims of police authority to search, a defendant's cooperation, an officer's

deception as to identity or purpose and previous illegal actions of the police. *Id.*

In *O'Neill*, the officer had O'Neill step out of the car after O'Neill gave a false name and told the officer his driver's license had been revoked. *O'Neill*, 148 Wn.2d at 572. The officer saw what he believed was a spoon used for cooking drugs when O'Neill stepped out of the vehicle. *Id.* The officer asked O'Neill for consent to search the vehicle. *Id.* at 573. O'Neill refused and told the officer he would need to get a warrant to search the car. *Id.* at 573. The officer responded he did not need a warrant and could arrest O'Neill for the drug paraphernalia and search the vehicle incident to O'Neill's arrest. *Id.* The conversation went back and forth. *Id.* The officer continued to ask for consent. *Id.* O'Neill continued to refuse. *Id.* Eventually, O'Neill consented to the search of the car. *Id.* The officer found drugs in the car. *Id.*

The Supreme Court held that consent can be given while a person is detained. *Id.* at 589. However, under the circumstances in *O'Neill*, where a defendant refused consent and only acquiesced after continued pressure by the police, consent cannot be valid because it was not freely and voluntarily given. *Id.* at 589-91.

Louthan's case is not one of a person who merely acquiesced after continued pressure by police to consent to a search. A review of the approximately 11-minute recording shows Louthan and Deputy Heller's contact. Ex. 1. From the point where Deputy Heller recontacted Louthan to the point where Deputy Heller told Louthan to put his hands behind his back is approximately six minutes and five seconds long. Ex. 1 (4:47 to 10:52).

In that six minutes Deputy Heller asked Louthan if he knew he had outstanding warrants. *Id.* (4:47). There was a discussion about the warrants and that Deputy Heller would not be attempting to confirm the warrants. *Id.* (4:49). Deputy Heller attempted to call a ride for Louthan. *Id.* (6:00). When Deputy Heller could not get anyone to answer the phone he asked Louthan what Louthan's plan was. *Id.* (7:26). Deputy Heller inquired if Louthan needed medical attention due to his diabetes. *Id.*

After some discussion Deputy Heller again asked Louthan what Louthan's plan was. *Id.* (7:48). It is at this time Louthan told Deputy Heller he was going to wake up his friend's relatives who live in town (yet he does not know their names). *Id.* (7:51). Deputy Heller told Louthan that it was not a good idea to hang around

there. *Id.* (8:04). Louthan next stated he was going to walk down the highway. *Id.* (8:06). This is the same highway that Louthan had been walking down the centerline of earlier because he could not see. *Id.* (2:22). Deputy Heller told Louthan, "I don't want you walking down the highway, man." *Id.* (8:07).

Then Deputy Heller offered the option, and that is what he called it, "the option" of a ride to Chehalis. *Id.* (8:10). Deputy Heller told Louthan that if he wanted the ride he had to listen to Deputy Heller's music and be searched for drugs and weapons. *Id.* (8:23). Louthan replied, "Yeah", Deputy Heller asked, "Sounds good?" and Louthan again replied, "Yeah." *Id.* (8:28).

Deputy Heller once more inquires about medical assistance. *Id.* (8:34). Then there is a discussion about the warrants again, and Deputy Heller explains that he is not going to take Louthan into custody, that he is not going to confirm the warrants because Louthan told Deputy Heller he was going to take care of the warrants. *Id.* (8:55-9:22). Deputy Heller again asks if it sounds good to be in Chehalis, and Louthan replies, "Yeah." *Id.* (9:26-9:33). Then at approximately 9:33 after nodding and agreeing that going to Chehalis with Deputy Heller sounds good, Louthan steps over to Deputy Heller's police vehicle with Deputy Heller.

Louthan's actions, along with his verbal statements show he has consented to the search as a condition to getting into Deputy Heller's patrol vehicle for a ride into Chehalis. Deputy Heller was not coercive. This is not a case like *O'Neill*, where Louthan denied consent and then over time Deputy Heller repeatedly badgered Louthan until he agreed to allow Deputy Heller to search Louthan.

Deputy Heller offered a ride back to a populated area where Louthan could get warm, hail medical assistance if he needed it, and possibly find someone who may be able to give him a ride. Louthan decided to take advantage of Deputy Heller's offer, which was conditional on Louthan agreeing to Deputy Heller searching Louthan prior to Louthan entering Deputy Heller's patrol vehicle. Louthan's consent was voluntarily and freely given. This Court should affirm the trial court's ruling that Louthan's consent to search was valid and Louthan's conviction.

c. The scope of Louthan's search was permissible because Louthan consented to the search.

Louthan asserts that even if his detention was lawful the scope of his search was not because it went beyond a protective sweep frisk for weapons Brief of Appellant 14-16. The State agrees that in the normal scope officer searches in regards to officer

safety, an officer must not only have justification for a protective frisk, but also for the scope of the frisk. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). *Terry* requires the scope of the protective frisk be outer clothing and the discovery of weapons that may be used in such a manner to assault the officer. *Id.* If an officer conducting a protective frisk feels an object that he or she cannot discern the identity of and the object is consistent in density and size of an item that may or may not be a weapon, the officer is permitted to remove the object to examine it. *Id.* at 114.

Once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent and any continuing search without probable cause becomes an unreasonable intrusion into the individual's private affairs.

Id., citing *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980) (internal quotations omitted).

Yet, Louthan's case does not fall under the normal "protective frisk" cases. Deputy Heller offered Louthan a ride, an offer that was predicated with certain conditions that had to be met before Deputy Heller would allow Louthan in his patrol vehicle. Deputy Heller's conditions included being searched not only for weapons but also for "dope." Deputy Heller also told Louthan he would have to listen to Deputy Heller's music and wear a seatbelt.

Deputy Heller clearly did not use his conditions as a pretext to search Louthan. If Deputy Heller wanted to search Louthan, he could have confirmed the warrants and arrested Louthan.

This is a consent case, not a protective frisk case. A person is free to consent to a search that is more intrusive than a protective frisk, as long as that consent is given freely and voluntarily. *Reichenbach*, 153 Wn.2d at 132. As argued above, Louthan freely and voluntarily consented to the search of his person, the scope of the search was permissible and this Court should affirm the trial court's ruling and Louthan's conviction.

IV. CONCLUSION

The trial court properly denied Louthan's motion to suppress the methamphetamine located in his back pocket. Louthan was lawfully seized pursuant to the community caretaking exception up until the point he consented to be searched by Deputy Heller as a condition of accepting a ride to Chehalis in Deputy Heller's patrol vehicle. The scope of the search was permissible because Deputy Heller was not doing a protective weapons frisk but a search with parameters agreed to by the parties. Further, the trial court's findings of fact are supported by substantial evidence. This Court

should affirm the trial court's rulings and Louthan's conviction and sentence.

RESPECTFULLY submitted this 29th day of January, 2018.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: _____
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