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NO. 53420-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CORY N. MASON,

Appellant.

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BRIEF OF APPELLANT,  
CORY N. MASON

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY  
THE HONORABLE KITTY-ANN VAN DOORNINCK, JUDGE

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## I. INTRODUCTION

Cory Mason was pulled over for driving with broken taillights. He provided the officer, Deputy Fry, with his license and told him that he believed it was suspended. Deputy Fry placed Mr. Mason under arrest and instructed him to exit his vehicle. Mr. Mason complied. He also let the officer know that he had a permitted concealed firearm on his person. Deputy Fry placed Mr. Mason in handcuffs, confiscated the firearm, and searched him. This search revealed several small objects in Mr. Mason's pockets, including a pipe, a ball of aluminum foil, and a small box containing methamphetamine. Deputy Fry placed Mr. Mason in the back of his patrol car. He then completed a records check on his computer. The records check revealed that Mr. Mason's license was not suspended.

The state charged Mr. Mason with possession of methamphetamine. He moved to suppress the evidence obtained from his person, but the motion was denied. The parties agreed to a stipulated bench trial, and Mr. Mason was convicted.

This Court must reverse because Mr. Mason was arrested without probable cause. Alternatively, Deputy Fry lacked a "reasonable concern of danger" justifying a *Terry* frisk, and the scope of that frisk far exceeded a search for weapons. The evidence obtained as a result of this illegal search must be suppressed, and Mr. Mason's conviction overturned.

## II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by admitting the evidence obtained as a result of the search of Mr. Mason's person. CP 36.

Assignment of Error 2: The trial court erred by concluding that police had probable cause to arrest Mr. Mason and thus search him incident to arrest. CP 35.

Assignment of Error 3: The trial court erred by concluding that police had justification for a *Terry* stop and frisk. CP 34.

Assignment of Error 4: The trial court erred by concluding that securing Mr. Mason in handcuffs was reasonable under the circumstances. CP 35.

Assignment of Error 5: The trial court erred by concluding that the pat down did not exceed the scope of Mr. Mason's detention or arrest. CP 36.

Assignment of Error 6: The trial court erred by concluding that searching Mr. Mason was reasonable for officer safety reasons. CP 36. This error burdened Mr. Mason's constitutionally protected right to bear arms.

Assignment of Error 7: The trial court erred by convicting Mr. Mason of unlawful possession of a controlled substance based on the evidence obtained from his person during the search and seizure. CP 31-32.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Did police lack probable cause to arrest Mr. Mason and search him incident to arrest when a quick records check would have revealed that his

license was not, in fact, suspended?

Issue 2: Did police have a “reasonable concern of danger” justifying a *Terry* frisk when Mr. Mason was cooperative, forthcoming about carrying a permitted concealed weapon, and gave no indication of posing a risk to the officer?

Issue 3: Did the trial court’s conclusion that police had a “reasonable concern of danger” justifying a *Terry* frisk infringe upon Mr. Mason’s constitutionally protected right to bear arms?

Issue 4: Did the search of Mr. Mason’s person exceed the scope of a *Terry* frisk when the officer removed items that were clearly not weapons from his pockets, including a small container, which the officer opened?

#### **IV. STATEMENT OF THE CASE**

On the evening of January 4, 2018, Cory Mason was driving on State Route 302 in Gig Harbor, WA. Ex. 1 at 1, 14. At around 11:45PM, he was pulled over by Deputy Mark Fry with the Pierce County Sheriff’s Department. *Id.* at 14. Deputy Fry noted that the vehicle had expired registration tabs and did not have working taillights. *Id.*

Mr. Mason cooperated with Deputy Fry. *Id.* He pulled over his vehicle and provided his driver’s license. *Id.* Mr. Mason then told Deputy Fry that he believed his license was suspended. *Id.* He said that he received a letter in the mail about failing to pay a fine. *Id.*

Deputy Fry placed Mr. Mason “under arrest for DWLS” and told him to step out of the vehicle. *Id.* Mr. Mason complied. *Id.* When he got out of his car, Mr. Mason told Deputy Fry that he had a concealed weapon permit and was armed. *Id.* Deputy Fry “placed Mason into handcuffs without incident.” *Id.* He also searched Mr. Mason “incident to arrest.” *Id.*

During the search, Deputy Fry found a loaded revolver holstered in Mr. Mason’s waistband. *Id.* In his right pants pocket, Deputy Fry found “a short piece of glass tubing with a piece of rubber attached, and a rolled up ball of aluminum foil,” which he believed were used to smoke narcotics. *Id.* In Mr. Mason’s left pants pocket, Deputy Fry found “a small rubber container of a type that I have recently found narcotics in.” *Id.* Deputy Fry opened this container and found a white crystalline substance, which later tested to be methamphetamine. *Id.*; Ex. 2 at 1. In his wallet, Deputy Fry found Mr. Mason’s concealed carry weapon permit. Ex. 1 at 14.

Deputy Fry read Mr. Mason his Miranda rights. *Id.* Mr. Mason admitted that the substance in his possession was methamphetamine. *Id.* He said that he used methamphetamine and heroin, and the paraphernalia in his possession were for smoking these substances. *Id.* Deputy Fry placed Mr. Mason in the back of his patrol car. *Id.* at 15.

At this point, Deputy Fry conducted a records check using the computer in his vehicle. *Id.* The records check revealed that Mr. Mason’s

driver's license was not, in fact, suspended.<sup>1</sup> *Id.* Deputy Fry transported Mr. Mason to jail for booking. *Id.* The state charged Mr. Mason with unlawful possession of a controlled substance, methamphetamine. CP 1.

Mr. Mason moved to suppress all evidence derived from the search of his person. CP 10-19. He argued that he was arrested without probable cause, thus there was no basis to search him incident to arrest. CP 14. Specifically, he argued that Deputy Fry could not reasonably rely on Mr. Mason's belief that his license was suspended. CP 13-14. Instead, Deputy Fry could have, and should have, done a quick records check to verify this information. *Id.*

On April 1, 2019, the trial court rejected this argument and denied the motion to suppress. RP 16-17. The court found two different bases for the search. First, the court found that Mr. Mason "could be detained to investigate the DWLS," and "for officer safety" he could be "patted down" for weapons. RP at 15. Second, the court found that Mr. Mason's statement that his license was suspended was "reasonably trustworthy information" amounting to probable cause, which justified an arrest. RP at 16. In other

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<sup>1</sup> After the records check, Deputy Fry searched Mr. Mason's vehicle. Ex. 1 at 15. He found weapons and pills. *Id.* However, the state did not press charges based on these items, and this evidence is not the subject of this appeal. *See* CP 1; RP at 4-5.

words, the court found the search valid as either a *Terry* frisk or as a search incident to arrest. CP 34-36.

After the court's ruling, the parties agreed to a stipulated bench trial. RP at 17-19; CP 31. The parties admitted Deputy Fry's report and a report from the Washington State Patrol laboratory as exhibits. Ex.s 1-2. Based on this evidence, the trial court found Mr. Mason guilty beyond a reasonable doubt. RP at 17. The court sentenced Mr. Mason to 6 days, time served, and 12 months of community custody. RP at 11; CP 37-47. Mr. Mason appeals. CP 52.

## V. ARGUMENT

Mr. Mason was seized and searched without a warrant and without a valid exception to the warrant requirement. The search incident to arrest exception does not apply because Mr. Mason was arrested without probable cause. The *Terry* stop and frisk exception does not apply because Deputy Fry did not reasonably fear for his safety, and the search exceeded the scope of a frisk for weapons.

The trial court denied Mr. Mason's motion to suppress. CP 34-36. Appellate courts review findings of fact on a motion to suppress under the substantial evidence standard. *State v. Montes-Malindas*, 144 Wn. App. 254, 259, 182 P.3d 999 (2008). "Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the

finding.” *Id.* (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007)). Courts review “conclusions of law in an order pertaining to suppression of evidence de novo.” *Mendez*, 137 Wn.2d at 214 (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

This Court must reverse the trial court and exclude all evidence derived from this unlawful search. Because Mr. Mason’s conviction was based entirely on inadmissible evidence, this Court must also reverse his conviction and sentence.

**A. Warrantless Searches and Seizures are Per Se Unconstitutional, with Only Limited Exceptions.**

This Court should reverse and exclude the challenged evidence because this search violated Mr. Mason’s constitutional rights. The Washington Constitution protects individuals from unlawful searches and seizures. Wash. Const. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”); *see also State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). It is well established that article I, section 7 “grants greater protection to individual privacy rights than the Fourth Amendment.” *Harrington*, 167 Wn.2d at 663 (citing U.S. Const. amend. IV). There is almost an absolute bar to

warrantless seizures, with only limited, “jealously guarded exceptions.” *State v. Valdez*, 167 Wn.2d 761, 773, 224 P.3d 751 (2009).

Exceptions to the warrant requirement fall into several categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). The burden is always on the state to prove one of these narrow exceptions. *Id.* If the state fails to meet this burden, “violation of [an individual’s] right of privacy under article I, section 7 automatically implies the exclusion of the evidence seized.” *State v. Afana*, 169 Wn.2d 169, 179, 233 P.3d 879 (2010).

Here, Deputy Fry seized and searched Mr. Mason without a warrant. Ex. 1 at 14. This state action was thus per se unreasonable and unconstitutional, unless the state proved an exception to the warrant requirement. *Valdez*, 167 Wn.2d at 773. As explained below, no exception applies in this case.

**B. Mr. Mason was Arrested Without Probable Cause, Requiring Suppression of All Evidence Obtained Incident to Arrest.**

In this case, Deputy Fry arrested Mr. Mason for driving with a suspended license. Ex. 1 at 14. The only basis for the arrest was Mr. Mason’s statement that he believed his license was suspended because he

received a letter from DOL. *Id.* Mr. Mason also provided Deputy Fry with a facially valid driver's license. *Id.*

All Deputy Fry had to do was go back to his patrol car and complete a records check on his computer to verify that Mr. Mason's license was not, in fact, suspended. *Id.* at 14-15. He failed to do this. *Id.* at 14. Instead, he arrested Mr. Mason on the spot and searched him. *Id.* The trial court upheld this search incident to arrest. CP 34-36; RP at 15-17. This Court should reverse because, without any corroboration, Mr. Mason's statement cannot amount to probable cause.

A valid custodial arrest is a condition precedent to the search incident to arrest exception to the warrant requirement under article I, section 7. *State v. O'Neill*, 148 Wn.2d 564, 587, 62 P.3d 489 (2003). Police may arrest a person without a warrant if they have probable cause to believe that the person is driving with a suspended license. RCW 10.31.100(3)(f). Evidence seized in violation of article I, section 7 is inadmissible at trial. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); *see also O'Neill*, 148 Wn.2d at 592.

Courts determine the existence of probable cause based on an objective standard. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). Probable cause exists when the arresting officer "is aware of facts or circumstances, based on reasonably trustworthy information, sufficient

to cause a reasonable officer to believe a crime has been committed.” *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004) (citing *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986)). The determination rests on “the totality of facts and circumstances within the officer’s knowledge at the time of the arrest.” *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

The Washington Supreme Court evaluated probable cause to arrest for driving with a suspended license in *Gaddy*, 152 Wn.2d 64. In that case, Ms. Gaddy was pulled over for failing to signal a turn. *Gaddy*, 152 Wn.2d at 67. She was initially unable to produce a valid driver’s license. *Id.* Officers completed a records check on the mobile data terminal (MDT) in their patrol car. *Id.* The records check showed that Ms. Gaddy’s license was suspended. *Id.* Officers arrested her for driving with a suspended license and searched her incident to arrest, finding cocaine in her purse. *Id.* At that point, Ms. Gaddy produced a driver’s license from her pocket, which was valid on its face. *Id.*

Ms. Gaddy argued that the MDT records check was not sufficiently reliable to provide probable cause for her arrest. *Id.* at 69-70. The Washington Supreme Court disagreed. *Id.* at 73. The Court applied the

*Aguilar-Spinelli* test, used to determine the reliability of informants.<sup>2</sup> *Id.* at 71-72. Under that test, an informant’s tip can furnish probable cause for an arrest if the state establishes (1) the basis of the informant’s information and (2) the credibility of the informant or the reliability of the informant’s information. *Id.* at 71 (citing *State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925 (1995)).

Applying this test, the Court in *Gaddy* determined that DOL records accessed by police are “presumptively reliable”:

. . . DOL is governed by extensive statutes and provisions and the Washington Administrative Code, which establishes its reliability. There are many statutes in place that mandate DOL to maintain current and accurate information. *See, e.g.*, RCW 46.20.270 (court must notify DOL within 10 days of conviction of offense requiring suspension or revocation of person’s driver’s license); RCW 46.20.308(6)(e) (police officers are required to notify DOL by sworn report of an arrest for driving under the influence within 72 hours of that arrest), (7). Furthermore, there are strict standards in place regarding DOL’s authorization to suspend a person’s driver’s license and how it reinstates driving privileges when it is appropriate to do so. *See, e.g.*, RCW 46.20.291 (numerated list of grounds on which DOL may suspend a person’s driver’s license); RCW 46.20.265(3) (when given notification by a court to do so, DOL must immediately reinstate a person’s driving privileges). Such standards support the presumption that the DOL records are accurate and reliable. *See* RCW 46.65.030 (DOL abstract of person’s

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<sup>2</sup> *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509 (1964); *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984).

driving record is presumed accurate, and it is the defendant's burden to prove its inaccuracy).

*Id.* at 73. At the suppression hearing, Ms. Gaddy presented some evidence that her DOL records were inaccurate, and in fact she had a valid driver's license at the time of her arrest. *Id.* The Court ruled that this was insufficient to rebut the presumption that DOL records in general were reliable. *Id.* at 73-74. Thus, the officers reasonably relied on these records and had probable cause for her arrest. *Id.*

In *Gaddy*, the driver did not produce a facially valid driver's license until after she was arrested. *Id.* at 67. Thus, the only evidence the officers relied upon was the presumptively valid DOL records. *Id.* at 67, 73. When applying the *Aguilar-Spinelli* test in cases with conflicting or deficient evidence, courts have relied on "corroboration of the informant's tip with information discovered through an independent police investigation." *State v. McCord*, 125 Wn. App. 888, 893, 106 P.3d 832 (2005).

Unlike in *Gaddy*, here police did not check the presumptively reliable DOL records until after arresting Mr. Mason. Ex. 1 at 14-15. In this case, Deputy Fry was confronted with two conflicting pieces of evidence. On the one hand, Mr. Mason produced a driver's license that was valid on its face. *Id.* at 14. A valid driver's license carries the presumption that a person is competent and qualified to drive. *See House v. Estate of*

*McCamey*, 162 Wn. App. 483, 491 264 P.3d 253 (2011) (presuming that a person is a “competent and qualified driver” based on a valid driver’s license). On the other hand, Mr. Mason told Deputy Fry that he thought his license was suspended because he received a letter from DOL. Ex. 1 at 14. Mr. Mason’s statement conflicted with his facially valid driver’s license.

At this point, applying the *Aguilar-Spinelli* test, Deputy Fry was obligated to try to corroborate Mr. Mason’s statement “through an independent police investigation.” *McCord*, 125 Wn. App. at 893. This investigation was easy to complete under the circumstances: Deputy Fry just had to go back to his patrol car and check the DOL records on his computer. Instead, Deputy Fry immediately placed Mr. Mason under arrest, ordered him out of the car, and handcuffed him. Ex. 1 at 14. Deputy Fry relied on Mr. Mason’s ultimately inaccurate statement without any corroboration, and despite the conflicting evidence of his facially valid driver’s license. He did not check DOL records until after arresting Mr. Mason. *Id.* at 15.

A person’s statement, without any corroboration and with conflicting evidence, cannot amount to probable cause to arrest. *See McCord*, 125 Wn. App. at 893. This is especially true when the person’s statement is easily verified using accessible records that the Washington Supreme Court has ruled are presumptively reliable. *See Gaddy*, 152 Wn.2d

at 73. Here, Deputy Fry could have and should have checked DOL records before arresting Mr. Mason. His failure to do so amounts to an arrest without probable cause, requiring suppression of all evidence obtained as a result of that arrest. *See O’Neill*, 148 Wn.2d at 592.

**C. The Search of Mr. Mason’s Person Exceeded the Scope of a Terry Stop, Requiring Suppression.**

The trial court also ruled that the search of Mr. Mason’s person was justified as a valid *Terry* stop and frisk. A *Terry* stop is a brief investigatory seizure, recognized as an exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968); *State v. Doughty*, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010). A *Terry* stop requires a well-founded suspicion that the defendant engaged in criminal conduct. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). “[I]n justifying the particular intrusion the 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*, 392 U.S. at 21.

*Terry* permits an officer to conduct a limited pat-down of the outer clothing of a person in an attempt to discover weapons that could cause harm. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014) (citing *Terry*, 392 U.S. at 30-31). An officer may “frisk a person for weapons, but only if (1) he justifiably stopped the person before the frisk, (2) he has a

reasonable concern of danger, and (3) the frisk's scope is limited to finding weapons.” *State v. Xiong*, 164 Wn.2d 506, 512, 191 P.3d 1278 (2008) (quoting *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008)).

Mr. Mason does not challenge the justification for the initial stop. However, the search of his person exceeded the bounds of *Terry*, for two reasons. First, Deputy Fry had no “reasonable concern of danger” because Mr. Mason was calm, cooperative, and forthright about his permitted concealed weapon. Second, even if a *Terry* frisk was reasonable, Deputy Fry far exceeded the scope of this limited pat-down for weapons.

**1. Deputy Fry did not have a reasonable concern of danger in this case.**

In this case, frisking Mr. Mason was not justified by reasonable officer safety concerns. Having a gun, without more, cannot subject a person to search. To hold otherwise would infringe on the constitutionally protected right to bear arms. This Court must reverse.

A protective frisk is justified “when an officer can point to ‘specific and articulable facts’ which create an objectively reasonable belief that a suspect is ‘armed and presently dangerous.’” *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry*, 392 U.S. at 21-24). For example, if an officer has reason to believe that an individual has a gun, that information, “*when combined with other circumstances that contribute to a*

*reasonable safety concern* . . . could lead a reasonably careful officer to believe that a protective frisk should be conducted to protect his or her own safety and the safety of others.” *Id.* at 177 (emphasis added).

The Washington Supreme Court upheld a *Terry* stop and frisk based on officer safety in *State v. Russell*, 180 Wn.2d 860, 330 P.3d 151 (2014). In that case, the officer “could point to specific and articulable facts that supported a belief that Russell could be armed and dangerous.” *Russell*, 180 Wn.2d at 868. Importantly, the officer had a previous encounter with Mr. Russell a week earlier, where Mr. Russell lied about carrying a gun. *Id.* Mr. Russell denied having a weapon when in fact he had a gun in his possession. *Id.* This “specific and articulable fact” made the officer reasonably “fear for his safety.” *Id.* Other factors included that the stop was late at night and the officer was alone. *Id.*

By contrast, the Fourth Circuit examined a *Terry* stop involving a firearm in *United States v. Black*, 707 F.3d 531 (4th Cir. 2013). In that case, police followed a person as he drove from a gas station to a parking lot. *Black*, 707 F.3d at 534. They suspected him of buying or selling drugs. *Id.* The driver parked and then walked up to a group of five other men. *Id.* at 534-35. Officers approached the group and noticed that the driver openly carried a gun, which was legal in North Carolina. *Id.* at 535. Police used

this as justification to conduct a *Terry* frisk of the driver and the other five men. *Id.* at 535-36.

The Fourth Circuit rejected the officer safety concerns under these circumstances. *Id.* at 540. The Court held that “where a state permits individuals to openly carry firearms, *the exercise of this right, without more, cannot justify an investigatory detention.*” *Id.* (emphasis added). Permitting such a justification “would eviscerate Fourth Amendment protections for lawfully armed individuals in those states.” *Id.* (citing *United States v. King*, 990 F.2d 1552, 1559 (10th Cir.1993)). The driver’s “lawful display of his lawfully possessed firearm cannot be the justification for [his] detention.” *Id.* (citing *St. John v. McColley*, 653 F.Supp.2d 1155, 1161 (D.N.M.2009) (finding no reasonable suspicion where the plaintiff arrived at a movie theater openly carrying a holstered handgun, an act which is legal in the State of New Mexico)). The Court also rejected the argument that being in a “high crime area at night” provided reasonable suspicion for a *Terry* frisk. *Id.* at 539.

Here, the trial court determined that frisking Mr. Mason was “reasonable under the circumstances” due to “officer safety” because Deputy Fry was the only officer on the scene, the stop occurred in a remote area, no other officers were nearby, and Mr. Mason reported carrying a gun. CP 35-36. Without more, these factors cannot justify frisking a person for

weapons because there were no “specific and articulable facts” that made the officer reasonably “fear for his safety.” *Russell*, 180 Wn.2d at 868.

In this case, the stop occurred at night, in a remote area, with only one officer. Ex. 1 at 14-15. However, none of those factors are “individualized” to Mr. Mason. *State v. Fuentes*, 183 Wn.2d 149, 159, 352 P.3d 152 (2015) (requiring “reasonable suspicion of criminal activity individualized to [a defendant] to justify [a] *Terry* stop”). The only individualized concern pertained to Mr. Mason’s permitted concealed weapon. However, unlike in *Russell*, Mr. Mason was forthright about this weapon. *See Russell*, 180 Wn.2d at 868. He did not lie or attempt to hide the gun. Ex. 1 at 14. He cooperated at every stage of this traffic stop. *Id.* at 14-15. Without “other circumstances that contribute to a reasonable safety concern,” lawful possession of a gun cannot justify a *Terry* frisk. *See Collins*, 121 Wn.2d at 177.

A contrary holding violates Mr. Mason’s constitutional rights. Both the United States Constitution’s Second Amendment and Washington’s Constitution article I, section 24 protect a citizen’s right to bear arms. U.S. Const. amend. II; Wash. Const. art. I, § 24. The trial court’s ruling would authorize officers to express fear for their safety in the presence of any firearm and then subject the owner of the weapon to a violation of privacy and personal autonomy. Permitting such an intrusion “would eviscerate

Fourth Amendment protections for lawfully armed individuals” in Washington. *See Black*, 707 F.3d at 540.

This Court should reverse because Mr. Mason did everything a responsible gun owner should do under the circumstances: he cooperated with police, he volunteered that he had a gun and a concealed carry permit, he did not make any furtive or sudden movements, and he was forthright throughout the traffic stop. He should not be penalized for exercising his constitutional right to bear arms.

**2. The scope of the frisk was not limited to finding weapons.**

Even if a protective search was warranted under the circumstances, this Court should reverse because the search exceeded the scope permissible under *Terry*. Deputy Fry did not complete a “limited pat-down” of Mr. Mason’s “outer clothing” in order to find “weapons that could cause harm.” *Russell*, 180 Wn.2d at 867 (citing *Terry*, 392 U.S. at 30-31). He immediately found and removed Mr. Mason’s gun. Ex. 1 at 14. Deputy Fry then went on to reach inside Mr. Mason’s pants pockets and remove small items that were clearly not weapons, including a small plastic container, which Deputy Fry opened. This search unlawfully exceeded a *Terry* frisk.

The scope of a valid *Terry* frisk is limited to protective purposes. *Garvin*, 166 Wn.2d at 250. The frisk must be brief and nonintrusive. *Id.* at

254. “If the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object.” *State v. Hudson*, 124 Wn.2d 107, 113, 874 P.2d 160 (1994). “[O]nce 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.” *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980).

Police cannot use a *Terry* frisk as an excuse to search a person for contraband. *See State v. Hobart*, 94 Wn.2d 437, 447, 617 P.2d 429 (1980) (reversed when officer conducted a pat-down search for weapons and found “spongy objects” suspected to be balloons containing narcotics); *State v. Loewen*, 97 Wn.2d 562, 567, 647 P.2d 489 (1982) (holding that officer’s search exceeded scope when he removed a small tube used for sniffing cocaine after determining the pocket contained no weapons). Allowing a *Terry* frisk to search for “evidence of some offense unrelated to weapons” would “invite the use of weapons’ searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment.” *Hobart*, 94 Wn.2d at 447.

This principle applies to containers as well. For example, in *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006), the Court held that a warrantless search of a cigarette pack was unconstitutional. *Horton*, 136

Wn. App. at 38-39. It rejected the state's argument that the cigarette pack could have contained a small weapon, fearing that the scope of a *Terry* frisk would be "essentially unlimited, since the tiniest object can conceivably be used offensively." *Id.* at 37-38.

The Washington Supreme Court examined the scope of a *Terry* frisk in both *Garvin*, 166 Wn.2d 242, and *Russell*, 180 Wn.2d 860. In *Garvin*, an officer squeezed Mr. Garvin's pocket until he discovered a packet of methamphetamine. 166 Wn.2d at 244. The Court reversed, holding that the search exceeded the bounds of *Terry* because the officer immediately determined the packet was not a weapon, and he lacked probable cause to search further. *Id.* at 254. Similarly, in *Russell*, the officer frisked Mr. Russell and found a small plastic container in his pocket. 180 Wn.2d at 865. The officer opened it and found drugs. *Id.* The Court reversed, holding that no reasonable person could believe the container held a gun, thus the officer's actions exceeded the scope of a permissible weapons search under *Terry*. *Id.* at 870.

Here, Deputy Fry immediately removed Mr. Mason's gun from his waistband holster. He then proceeded to reach into Mr. Mason's pockets. He pulled out "a short piece of glass tubing with a piece of rubber attached," "a rolled up ball of aluminum foil," and "a small rubber container," which

he suspected contained drugs. Ex. 1 at 14. Deputy Fry opened the container and found methamphetamine. *Id.*

None of the items in Mr. Mason's pockets remotely resembled a weapon. Deputy Fry never claimed that he believed one of these items could be a weapon. Instead, he suspected that the items were used for storing or consuming drugs. Ex. 1 at 14. However, once he "ascertained the objects were not weapons, the permissible scope of the search ended." *Garvin*, 166 Wn.2d at 254. Deputy Fry exceeded the scope of a *Terry* frisk by using it to search for contraband. *Id.* He also violated Mr. Mason's constitutional rights by opening the small container in his pocket. As the Court found in *Russell*, "the container itself was not a weapon, and the officer had no authority to search through it after realizing that it posed no threat." 180 Wn.2d at 870. This Court must reverse.

**D. All Evidence Obtained or Derived from this Illegal Search Must be Suppressed, and the Conviction Reversed.**

As explained above, Mr. Mason was arrested and searched without probable cause. Alternatively, Deputy Fry lacked reasonable cause to frisk Mr. Mason for weapons, and the scope of that frisk far exceeded the scope permitted by *Terry*.

All evidence derived from this unlawful search must be suppressed. "The exclusionary rule mandates the suppression of evidence gathered

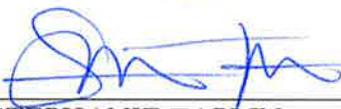
through unconstitutional means.” *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). “The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.” *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407 (1963).

Suppression of this evidence also requires reversal of Mr. Mason’s conviction. “The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). Without the evidence obtained from his person, Mr. Mason could not be convicted beyond a reasonable doubt. This Court must reverse.

## VI. CONCLUSION

For the foregoing reasons, Mr. Mason respectfully requests that this Court exclude the evidence obtained from an illegal search and reverse his conviction.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of September, 2019.

  
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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On September 23, 2019, I electronically filed a true and correct copy of the **Brief of Appellant, Cory N. Mason**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

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SIGNED in Port Orchard, Washington, this 23<sup>rd</sup> day of  
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