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NO. 53432-1-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

MATTHEW JOSEPH PERRON,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE DAVID L. MISTACHKIN, JUDGE

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APPELLANT'S REPLY

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## REPLY

**1. The trial court's decision was erroneous if it considered the unadmitted evidence or not, and the record shows that it did.**

The Defendant argues that the State misunderstands the trial court's decision, and that the trial court did not consider the unadmitted attachments to the Defendant's pleadings. This is contrary to the written Findings and Conclusions, which specifically state that the trial court specifically analyzed the stop under two possibilities: whether Officer Peterson did not know about the information in the unadmitted documents, or whether he did. The trial court's decision is erroneous under either possibility, because even if the trial court did not consider the information about the other callers in the unadmitted documents, it used other information from those documents in its reasoning. But even assuming, *arguendo*, that the trial court did not consider evidence that was not properly before it, the Defendant's argument that the 911 caller's description was too vague is unsupported by law. Rather it appears that the trial court used the standard of *probable cause*, rather than reasonable suspicion.

**Reasonable suspicion only requires a showing of fact that differentiates from an officers “hunch” or other conclusory reason to stop.**

Only a “minimal level of objective justification” is required for making a *Terry* stop. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217, 104 S.Ct. 1758, 1763, 80 L.Ed.2d 247 (1984).) The level of suspicion required is “considerably less” than a preponderance of the evidence, and “obviously less demanding” than the standard for probable cause. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) and *United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 544, 105 S.Ct. 3304, 3310, 3312, 87 L.Ed.2d 381 (1985).) It is only a “fair probability” that evidence of a crime will be found. *Id.* (citing *Gates*.) “The Supreme Court embraced the *Terry* rule to stop police from acting on mere hunches.” *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010).

In this case, there is no suggestion that Officer Peterson was working on a “hunch.” He had a description of the vehicle, had verified that there were multiple people in the vehicle, knew that there were multiple suspects in the shooting, and had travelled to the vicinity of the shooting, which had happened only moments before.

Although there appear to be no Washington cases with a similar fact pattern, the recent Indiana case of *Whitt v. State*, 91 N.E.3d 1082 (Ind. App. 2018) is a similar situation in which reasonable suspicion was established with a general (and partially incorrect) vehicle description.

The incident in *Whitt v. State* occurred near Madison, Indiana, which is connected to Kentucky by a bridge over the Ohio River. *Whitt* at 1085. During an altercation between two groups of teenagers, the defendant, who was in his 30s, shot a teenager named Brennan in the abdomen. *Id.* at 1087. The defendant and three others got into a Hyundai Santa Fe and fled the scene. *Id.* Another teen named Skylar called 911 at 8:55:55 PM. *Id.*

Two Madison, Indiana police officers heard from dispatch that a shooting had “just” occurred and the shooter was in a “gray SUV” heading towards Kentucky.<sup>1</sup> *Id.* at 1087. The dispatcher said the best description he could get was a gray SUV. *Id.*

The two officers headed towards the bridge to Kentucky. *Id.* The officers saw a dark SUV on the bridge as they approached, but lost it by the time they reached the bridge. *Id.* The officers crossed the bridge,

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<sup>1</sup> The officers also had a physical description of the shooter, but there is no indication that the officers could identify the occupants of the vehicle before the stop, or that the description was used in any way to identify the vehicle.

rounded a curve in the road, and, two miles from the shooting and four minutes after the 911 call, they found a *green* Hyundai Santa Fe.<sup>2</sup> *Id.* The officers stopped the SUV, identified the defendant inside, and arrested him. *Id.*

On appeal, the Defendant challenged the stop. *Id.* at 1089. He argued that if the stop violated Kentucky law, the stop violated the Fourth Amendment.<sup>3</sup> *Id.* The Court of Appeals of Indiana ruled that the state law question was irrelevant because, under the totality of the circumstances, including the description of the vehicle, the vehicle's proximity to the shooting, and the fact that it was seen soon after the shooting, that there was reasonable suspicion to stop the vehicle. *Id.* at 1091.

In this case, just as in *Whitt*, Officer Peterson had a description of the vehicle, went in the direction of the shooting, and found such a vehicle, close in physical and temporal proximity to the shooting. Officer Peterson also verified that there were multiple people in the vehicle, because he knew that the vehicle he sought contained more than one person. RP at 70.

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<sup>2</sup> One of the officers later testified the Santa Fe had a "grayish tint."

<sup>3</sup> A court below had already ruled that the Indiana officers could stop the vehicle in Kentucky if they were in "fresh pursuit," pursuant to Kentucky common law.

The *Whitt* decision, although in a foreign jurisdiction, is consistent with Washington's stated policy reasons for allowing police officers to make investigative detentions with less information that is needed to establish probable cause. Washington courts have repeatedly encouraged law enforcement to investigate suspicious situations. *State v. Mercer*, 45 Wn. App. 769, 775, 727 P.2d 676, 681 (1986) (citing *State v. White*, 97 Wn.2d at 105–06, 640 P.2d 1061; *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980) and *State v. Stroud*, 30 Wn.App. 392, 399, 634 P.2d 316 (1981), *review denied*, 96 Wn.2d 1025 (1982).)

“Merely because a police officer lacks probable cause to arrest an individual, he need not shrug his shoulders and allow suspected criminal activity to continue or to escape his further scrutiny.” *State v. Young*, 28 Wn.App. 412, 421, 624 P.2d 725, *review denied*, 95 Wn.2d 1024 (1981) citing *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).)

And police are afforded additional leeway when responding to serious crime or potential danger. *State v. Z.U.E.*, 183 Wn.2d 610, 623, 352 P.3d 796, 803 (2015) (citing *State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 (1980) and *State v. Lesnick*, 84 Wn.2d 940, 530 P.2d 243 (1975).) What better example of a serious crime with potential danger is a 4:00 AM

shooting with suspects fleeing the scene into a neighboring jurisdiction?

This must be especially true in exigent circumstances involving the use of firearms, which are easily concealed, transported, and disposed of.

This highlights another way in which the trial court's reasoning is flawed. The trial court stated that "the people involved were named" and "there was no emergency." RP at 85. This ignores the uncontested evidence that Officer Peterson was responding to reports of gunshots in a residential area at 4:00 AM, and Officer Peterson's unchallenged testimony that he did not know the names of the suspects. RP at 69. The only information the trial court possessed that the police knew the names of those involved was from the unadmitted documents attached to the Defendant's pleadings.<sup>4</sup> CP at 32-33. This demonstrates the trial court's unwillingness to partition the unadmitted evidence from what was properly before the court.

**Investigatory detentions exist so the police can investigate, and may result in the momentary detention of innocent persons.**

It is certainly true that Officer Peterson may have come across a small gray car with multiple occupants, only to find that the occupants had nothing to do with the shooting. However, the courts of this state have

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<sup>4</sup> "CAD Call info/comments" section listing "DRIVER MATT PERON" [*sic*], "BLV OTHER IS CALVIN BUHL" and "THE SUBJ THAT RAN ON FOOT IS BILLY CARR."

recognized that “[i]n allowing such detentions, *Terry* accepts the risk that officers may stop innocent people.” *State v. Lee*, 147 Wn.App. 912, 918, 199 P.3d 445 (2008) (citing *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), alteration in original.) This is because a “*Terry*” stop is an *investigative* detention, specifically for the purpose of allowing the police to confirm or dispel whether a person or persons are those being sought.

Further, this argument ignores that the stop in question was not in a major city or on an interstate freeway, where there might be numerous similar vehicles. This was 4:00 AM in a residential neighborhood in Hoquiam, a town of only 8000 people. RP at 67. Officer Peterson testified that he responded from his police station, and, on the way to where he found the Defendant’s car, he saw only one or two other cars. RP at 67. Under these circumstances, any car that fit the description should have attracted his consideration.

The Defendant cites to no case that says that a vehicle description alone is insufficient to perform a *Terry* stop. Rather, he cites to *United States v. Lyons*, 7 F.3d 973 (10<sup>th</sup> Cir. 1993)<sup>5</sup>, a case in which a Utah

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<sup>5</sup> Federal circuit court opinions are persuasive, but not binding authority on the appellate courts of Washington. *Feis v. King Cty. Sheriff's Dep't*, 165 Wn.App. 525, 547, 267

highway patrolman stopped the defendant on suspicion of impaired driving based on weaving in the lane and avoiding eye-contact.

In *Lyon*, a Utah highway patrol officer stopped the defendant on suspicion of impaired driving because the defendant weaved three to four times in its lane within two miles, and the defendant looked “withdrawn,” and would not make eye contact, apparently while driving. *Lyon* at 974. When pressed why he thought the defendant was impaired, the officer said, he relied upon his “sixth sense as an experienced highway patrolman” and the refusal to make eye contact. *Id.* at 975. After the stop, the officer found forty-three pounds of marijuana and stopped investigating the driver for DUI. *Id.* at 974-75.

The Tenth Circuit, relying on *United States v. Guzman*, 864 F.2d 1512 (1988)<sup>6</sup> found that the stop was pretextual, and ordered the evidence suppressed. *Id.* at 976.

Although the *Lyons* court did note that if a “failure to follow a perfect vector” was enough to justify a traffic stop, then more traffic stops would undoubtedly ensure, this was simply to point out that the highway

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P.3d 1022, 1034 (2011) (citing *Home Ins. Co. of New York v. N. Pac. Ry. Co.*, 18 Wn.2d 798, 808, 140 P.2d 507 (1943).)

<sup>6</sup> The standard enunciated by *Guzman* was expressly rejected by *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995).

patrol officer's "sixth sense" was really the basis for the stop. Obviously, this "sixth sense" is the "hunch" that *Terry* forbids.

**The trial court found Officer Peterson acted in good faith.**

In this case there is no allegation that Officer Peterson had a "hunch." To the contrary, the trial court here specifically found that Officer Peterson acted in good faith. RP at 86. In other words, the court believed that Officer Peterson actually believed he had found the people that had fled the scene of the shooting, based upon the information he had at the time.

The court's finding that Officer Peterson acted in good faith highlights an additional reasoning error. Washington courts take the officer's subjective belief into account when examining the totality of the circumstances. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265, 1269 (2007) (citing *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999) and *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986).) If Officer Peterson acted in good faith, he believed that he had probably found the car he was looking for.

If the court's ruling was that the description of the car, together with the temporal and physical proximity to the shooting, the hour, the fact that there were few cars around, and that there were multiple suspects in

the car were not enough, then there are only two possibilities; that the court's findings are based upon the unadmitted evidence of additional 911 callers, or that the court was applying a standard of *probable cause* to Officer Peterson's traffic stop.

“[R]easonable suspicion can arise from information that is less reliable than that required to establish probable cause.’ *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445, 447 (2008) (citing *Alabama v. White*, 496 U.S. 325, 330, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).)

In a bench trial there is a presumption that a trial judge, sitting as both an arbiter of law and as a factfinder, will make a decision based only on the admissible evidence presented. *State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26 (2002) (citing *State v. Miles*, 77 Wn.2d 593, 464 P.2d 723 (1970).) The trial judge is assumed to ignore any inadmissible evidence that might have been elicited. *Id.* (citing *Harris v. Rivera*, 454 U.S. 339, 346, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981).) This is called the “*Miles* presumption.” *Id.*

The *Miles* presumption can be rebutted by one of two ways: 1) by showing the verdict is not supported by sufficient admissible evidence; or, 2) by showing that the trial court relied on inadmissible evidence to make findings that it otherwise would not have made. *Id.* (citing *Greater Kan.*

*City Laborers Pension Fund v. Superior Gen. Contractors, Inc.*, 104 F.3d 1050, 1057 (8th Cir.1997).)

In his Reply, the Defendant attempts to justify the trial court's decision by using the first option. However, the written findings, the trial court's oral ruling, and its announced reasoning, make it clear that the trial court relied on the documents attached to the pleadings in formulating its decision.

The court clearly considered unadmitted evidence, that the State had previously pointed out was inadmissible, in making its decision. To any extent that the decision was, in the alternative, untainted by the consideration of the unadmitted evidence, it is clearly erroneous. The hearing was irreparably flawed. This Court should vacate the trial court's Order and remand the matter for a new hearing.

**2. The State objected to the trial court's stated intent to use the unadmitted documents as substantive evidence.**

The Defendant states that the State did not object to the trial court's use of the document attached to the Defendant's motion as substantive evidence. This claim ignores what happened earlier in the hearing.

There were three Motions heard at the same hearing: a “*Knapstad*” CrR 8.3(c) motion<sup>7</sup>, a motion made pursuant to CrR 3.5<sup>8</sup>, and the CrR 3.6 suppression hearing at issue here.

When the trial court decided to take up the Defendant’s CrR 3.5 motion, before hearing from the parties, the trial court began by explaining that it had already made a decision based on what it believed was a transcript of the statements. RP at 31. Again, this was a document simply attached to the defense brief as an appendix. *See* CP at 46. That document was never authenticated, stipulated to, admitted, or even offered into evidence.

The State then objected by stating that the trial court could not make such a ruling without a testimonial hearing. RP at 32. The State also pointed out that the motion was not properly before the court because the State was not offering the statements in evidence.<sup>9</sup> The trial court responded that it could make its ruling based on this unadmitted document, and that it would make such a ruling. RP at 31-32.

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<sup>7</sup> Beginning at RP at 4.

<sup>8</sup> Beginning at RP at 31.

<sup>9</sup> CrR 3.5(a) provides for a hearing to determine the admissibility of a defendant’s statements “[w]hen a statement of the accused is to be offered into evidence.” In this case, the state expressly stated that the statements would not be used in its case-in-chief and was willing to stipulate to it.

This demonstrates the depth of the trial court's error. This was not an unintentional muddle of the evidence that was properly admitted and the documents attached to the Defendant's motions. The trial court plainly stated that it believed that it could make findings based upon these documents, and that they apparently supersede live testimony.

The Defendant claims that the State has no objections to the documents, and that they would be admitted anyway, so any error is harmless. Brief of Respondent at 17. This is speculative.

Presumably, the Defendant assumes the State has no objection to the documents because the State did not object to the fact that they were attached to the brief at all. However, CrR 3.6, which governs the procedures at such a suppression hearing, requires that any motion to suppress be "supported by an affidavit or document setting forth the facts the moving party *anticipates will be elicited* at a hearing..." CrR 3.6(a).

Further, the documents in question were never even *offered*, so there is no way for the Defendant to know whether the State had an objection.

Here, the trial court disregarded the basic rules and procedures that govern suppression hearings, and hearings in general. It announced that it would make its decision off unadmitted hearsay writings, civil-law style.

This Court must reverse the trial court's unlawful decision. To do otherwise would establish a method of making an end-run around the basic traditions of live testimony subject to adversarial testimony that are a bedrock foundation to the common law traditions of the United States and England. *See Crawford v. Washington*, 541 U.S. 36, 43, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004).

**3. Evidence that is suppressed as to one defendant may be admissible against a co-defendant.**

The Defendant argues that the trial court correctly suppressed a cell phone (and its data) found in the hand of a man who was hiding in the trunk of the Defendant's car, arguing that the exclusionary rule requires suppression of all physical evidence resulting from the stop, regardless of who owns or has a privacy interest in that evidence.

Fourth Amendment rights are personal, and may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S. Ct. 421, 425, 58 L. Ed. 2d 387 (1978) (citing *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).)

Evidence that is suppressed as to one defendant is often admissible as to another. For example, in *State v. Walker*, police officers obtained consent from Ellen Walker to search the home she shared with her husband, Gus Walker. *Walker*, 136 Wn.2d 678, 680-81, 965 P.2d 1079

(1998). As the police were searching, Gus arrived at the home. *Id.* at 681. Gus did not consent, nor voice any objection to, the search. *Id.* The police officers found marijuana in the Walkers' bedroom. *Id.* They were subsequently charged. *Id.*

The Defendants both moved to suppress the evidence. The trial court granted Gus Walker's motion and the State appealed. *Id.* A different judge denied Ellen Walker's motion and she appealed. *Id.*

Our Supreme Court upheld the trial court's decision, holding that, "Fourth Amendment rights are personal rights that cannot be vicariously asserted." *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).)

In this case, the Defendant's vehicle was stopped by Officer Peterson while the Defendant was driving. Another person was found hiding in the trunk of the Defendant's car, holding a cell phone in his hand. RP at 88. The cell phone was left in the vehicle and seized later pursuant to a search warrant. RP at 88. The trial court specifically declined to suppress any information gathered from the arrest of the persons, holding that it was from an "independent source."<sup>10</sup> RP at 87.

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<sup>10</sup> The trial court did not explain what the "independent source" of the arrests was, or how this exception applied. The trial court may have been relying on its erroneous belief that the police knew the names of the suspects. Again, this information could

However, it did suppress the cell phone that was in the hands of the person hiding in the trunk, which happened to be left in the car when its owner was arrested. Since the phone was in the trunk passenger's hand, the police could have simply seized it at the scene. *See State v. Byrd*, 178 Wn.2d 611, 618, 310 P.3d 793 (2013) (holding that police may always search an arrestee's person and seize items closely associated with him or her at the time of arrest.) Why the independent source doctrine did not apply here is a mystery.

The trial court's Order suppressing the cell phone of a passenger, without any analysis of the Defendant's privacy right in the phone, was error. This Court should vacate that Order and remand for consideration as to whether the Defendant can assert a privacy right in the phone, or the data subsequently seized from it.

### **CONCLUSION**

The proceedings at the trial court were fraught with fundamental error. Allowing courts to make rulings based on unadmitted evidence in criminal cases is contrary to the foundation of the common-law legal system. For that reason, as well as the others stated, this Court should

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have come from the unadmitted documents attached to the Defendant's Suppression Motion. *See* CP at 32-33 (CAD Call Info listing "Matt Peron" [*sic*]).

vacate the trial court's Order suppressing and dismissing, and remand the matter back to the Superior Court for a new hearing that complies with the rules of evidence and procedure.

DATED this 20<sup>th</sup> day of November, 2019.

Respectfully Submitted,

BY



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# GRAYS HARBOR PROSECUTING ATTORNEY

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## Transmittal Information

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