

No. 286894

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ETHEL PAULA QUIROZ,

Appellant.

BRIEF OF RESPONDENT

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Special Deputy Prosecuting Attorney
Attorney for Respondent

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes two assignments of error. These can be summarized as follows;

- 1.) The court erred when it denied the motion to suppress.
- 2.) The court erred when it failed to enter written findings of fact and conclusions of law after the evidentiary hearing.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court properly denied the motion to suppress.
2. The court entered findings albeit late.

II. STATEMENT OF THE CASE

The incident report the officers were responding to was a volatile situation were there had been a 911 phone call indicating there was a domestic violence situation between the daughter of the caller and her brother. The caller stated the daughter had been assaulted and then shot by the caller's son. (RP 12/10/01, pg. 10) Five separate police officers responded to this emergency. (RP 12/10/01, pg. 10, 19) The call the officers were responding to "was at night.. in the early morning hours." (RP 12/10/09 pg 12, 18) When asked if she was given the name of the party assaulted the officer stated she was not certain if at the time of the initial response that she had that name. The officer then stated that there

was more concern with whether or not there was a gun and if the suspect was still located at the residence. (RP 12/10/09 pr 21-22)

At the location of the call the officers observed a vehicle with the engine running with two individuals within; one of whom was the appellant, the other was an adult male who was observed to be in possession of a drug pipe. This vehicle had no driver. Both individuals were removed from the car, patted down and handcuffed and questioned with regard to the reported assault and shooting. The female from that car, the appellant herein, disavowed any knowledge of the assault. The officer “ran” the name of this person, the appellant, and it was discovered that she had an outstanding warrant. (RP 12/10/09 pg. 13, 26)

The officer who took Quiroz into custody stated she “padded” (it would appear the record is in error and this should indicate “patted” down.) down Quiroz to locate any dangerous weapons. The officer did this because she was responding to a situation involving domestic violence and the report was there was a weapon involved and, Quiroz was in a vehicle which was running at night, directly in front of the house were the 911 call originated. (RP 12/10/09 pg 14)

Officer Saldana states the reason she identified Quiroz was because; the officer needed to determine Quiroz’s relationship to this house, who she was, was she involved with this potential assault, why was

she sitting in a running car in the middle of the night in from of this house where five officers had been called. (RP 12/10/09 14-15) It was almost immediately found that Quiroz had a warrant for her arrest, she was then handcuffed and placed in a patrol vehicle. (RP 12/10/09 pg 15)

Quiroz was arrested for the outstanding warrant. The officer determined that Quiroz had been using drugs or alcohol and knew that detention would not take her into custody without having been checked at the hospital. (RP 12/10/09 pg 16-17)

At the hospital Quiroz was placed in a small holding cell, next to that cell is a bathroom. Quiroz asked the officer if she could use that bathroom, prior to allowing Quiroz to use this facility the officer indicated that she needed to empty the contents of her pockets. When Quiroz took out a package of cigarettes the officer was able to clearly see a small plastic baggy of white substance. (RP 12/10/09 pg 176-18) The officer immediately recognized this as methamphetamine.

On cross examination Officer Saldana testified that as she was in route they were trying to determine the location of the assault, the weapon and the parties. That at the time of the initial call; “we were at the time trying to focus on safety issues.” (RP 12/10/22)

Officer Saldana further testified that it was unclear from the 911 emergency call if the assault had occurred at the location she was

dispatched to or at a 4th and Pine location or if there was a separate assault at that location. When defense counsel stated “so you didn’t actually know why you were responding to the house you were responding to then. Is that fair to say? Officer Saldana responded “Aside from the fact that there was a report of an assault and a gun, correct.” (RP 12/10/09 pg 23-24)

Officer Saldana states “Um at the time I handcuffed her not knowing who she was or who’s in the house. How she was related and I even told her at the time that um while I was figuring out what was going on I was going to put her in handcuffs uh for my safety.” (RP 12.10/09 pg 27-28) The officer ran her name through dispatch and learned that Quiroz had a warrant for her arrest. The officer placed her in the patrol car “because then I knew I would be holding on to her indefinitely because of the warrant.” (RP 12/10/09 pg 28)

The officer testified the reason she contacted Quiroz was to determine her connection to the assault “and to secure her for my safety.” (RP 12/10/09 pg 31)

On redirect the Officer was allowed to explain why she took the physical action she had with regard to Quiroz. When ask if it was routine to detain someone in handcuffs in this type of situation the officer replied, “Absolutely.” She then made the following statement; ...”there was talk of

an assault, a weapon. I need to know who was involved and how their involved and I have a situation where I have two essentially two separate locations now and a third possible at 4th and Pine. I have the car and then I have the house. I have unknown subjects in the house. I got two people in the car um my job is first to create safety so I'm going to detain them until I can figure out their role. And also part of detaining them is knowing that they cannot um gain access to any weapons um they cannot leave and return un they can't flee if it turns out hat they are actually involved and wanted for any reason." (RP 12/10/09 pg 31-31) When asked " did you feel that there could be a threat to your safety at that time? Saldana testified "Yes I did."

The court addressed the facts the officer was faced with when she arrived at this location. The court ultimately ruled that there was a terry stop which was valid based on the report of the assault and the weapon, that parties to the assault were a male and a female and that was who were in this car. The officer while attempting to get more information regarding this Quiroz, who was at the time and unknown, is told by dispatch that there was a warrant. The court then ruled this now changed from a Terry stop to a "full blown seizure" There was then a valid warrant found and the arrest was valid. The court states "I don't see any

illegality in this at all and I am not going to grant the motion to suppress.”

(RP 12/10/09 pgs. 43-47) (VRP Supplemental 06/03/2010)

The parties eventually memorialized this hearing with findings of fact and conclusions of law. (CP 57-61)

III. ARGUMENT.

The issues presented pertain to the findings of fact and conclusions of law which were presented to and adopted by the court. The court found there were sufficient articulable facts to support the actions of the deputy. The court found that the facts set forth by both parties by way of their submissions to the court were sufficient to allow the court to deny the motion to suppress.

The trial court indicates in the letter opinion “I have closely reviewed the submissions of both parties in and effort to determine whether testimony from Officer Wells will be needed to assist the court in deciding the issue presented by the defendant’s motion. Because there does not appear to be a material difference between the narratives offered by the defendant and the plaintiff, the officer’s testimony will not add to the debate and the court will consider the issues without further testimony.

The actions of the trial court were clearly discretionary in nature. The court followed the court rule, CrR 3.6, requested and received briefing from all parties and upon that information as well as testimony from one

officer made a discretionary decision with regard the suppression of the search in this case. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) is applicable “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” (Citations omitted.)

RESPONSE TO ALLEGATION TWO.

The State shall address the second issue first. This is a case where at the time appellant filed her brief the Findings of Fact and Conclusions of Law had not been entered. Subsequently they were entered and the State was allowed to file a supplemental designation of clerk’s papers. The State then ascertained that there was a hearing held at the time the findings and conclusions were entered and this too was subsequently filed with this court. VRP 06/03/2010.

Due to no fault or failure on the part of counsel for Appellant the second allegation is now moot. The findings and conclusions have been produced, argued and filed with regard to the fact finding in this case.

This court may consider the oral findings presented by the court as well as the written findings and conclusions; State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008). The findings are unchallenged, unchallenged findings are verities on appeal. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997) It would appear from the supplemental VRP that trial counsel for Quiroz did object to some of the conclusions but it does not appear that she objected to that actual findings. (VRP 06/03/2010 et seq.)

The findings of fact and conclusions of law accurately reflect the testimony presented to the court. Because these findings and conclusions are now a portion of the record before this court this allegation as presently set forth in the appellants opening brief is moot.

In anticipation of an allegation that this court should not consider the written findings and conclusions which have now been entered, State v. Glenn, 140 Wn. App. 627, 639-40, 166 P.3d 1235 (2007) states the following;

Glenn filed his appellate brief before the trial court issued written findings of fact and conclusions of law. He claims that because he was unable to assign error to these findings, he is prejudiced by their status as verities on appeal.

In reviewing findings of fact entered following a motion to suppress, this court reviews only those facts to which error has been

assigned. State v. Hill, 123 Wash.2d 641, 647, 870 P.2d 313 (1994). "Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal." Hill, 123 Wash.2d at 647, 870 P.2d 313.

When findings and conclusions are not entered until after parties submit their appellate briefs, the opportunity to assign error to a finding of fact is foreclosed. But there is no error if the trial court's oral findings are sufficient to permit appellate review, and the defendant does not demonstrate any prejudice arising from the belated finding. *See State v. McGary*, 37 Wash.App. 856, 861, 683 P.2d 1125, (noting that the primary purpose of requiring findings is to allow the appellate court to fully review the questions raised on appeal); *see also State v. Byrd*, 83 Wash.App. 509, 922 P.2d 168 (1996). This court has reversed a conviction for failure to comply with Criminal Rule 3.6 when *no* findings and conclusions were ever entered. *See State v. Smith*, 68 Wash.App. 201, 208, 842 P.2d 494 (1992). Moreover, in that case, the trial court's oral opinion was a "far cry from the 'comprehensive opinion' which has been fundamental to every case in which the court proceeded to address the merits of a . . . suppression issue in the absence of findings required by . . . CrR 3.6." *Id.*

See also, State v. Chang, 147 Wn. App. 490, 195 P.3d 1008

(2008):

Chang assigns error to the denial of his motion to suppress. He correctly notes that the trial court did not enter CrR 3.5 and 3.6 findings until after he filed his appellate brief. When findings and conclusions are not entered until after the appellant files his brief, his opportunity to assign an error to a finding of fact is

foreclosed. But there is no error if the trial court's oral findings are sufficient to permit appellate review, and the defendant does not demonstrate any prejudice arising from the belated findings. State v. Glenn, 140 Wash.App. 627, 639-40, 166 P.3d 1235 (2007). That is the case here.

The trial court's ruling on a motion to suppress evidence must be affirmed if substantial evidence supports the court's findings of fact, and those findings support the court's conclusions of law. State v. Ross, 106 Wash.App. 876, 880, 26 P.3d 298 (2001). Here, Chang does not challenge the findings of fact. The trial court's conclusion of law is reviewed de novo. Ross, 106 Wash.App. at 880, 26 P.3d 298.

RESPONSE TO ALLEGATION ONE.

Quiroz alleges she was unlawfully seized and searched even though she had not committed any crime. As noted above this encounter between appellant and the officers occurred late at night or in the early morning hours. The encounter was in front of a residence officers were responding to because of a 911 call that earlier referenced an assault by a brother on a sister that subsequently resulted in the female being shot. Five officers responded to this call.

In front of the home where the 911 call originated Officers observed a vehicle with the engine running, two individuals inside; one was the appellant, the other an adult male in possession of a meth pipe. This vehicle had no driver. Both individuals were removed from the car,

patted down and handcuffed and questioned with regard to the reported assault and shooting. The female from that car, the appellant herein, disavowed any knowledge of the assault. The officer who patted down Quiroz states the reason she was removed and patted down was, “again the situation was calling for (sic) it was a domestic violence call, potential weapon involved.” Quiroz disavowed any knowledge of the assault. The officer could not recall if there name of the person who had allegedly been assaulted had been given to her prior to her contact with Quiroz. The officer stated “I identified her because I needed to know what her relationship was to this house. Who she was? Was she involved in this potential assault um you know why was she sitting in a running car in the middle of the night in front of this house where like five officers had been called.” (PR 12/10/09 14-15)

The officer “ran” the name of this young female who appeared to be about sixteen years old. It was discovered that she had an outstanding warrant. Quiroz was then placed in handcuffs and placed in the nearest patrol car until the officers could determine the rest of the situation at the house where the 911 call originated. (RP 12/10/09 pg. 13-26)

State v. Bray, 143 Wn. App. 148, 177 P.3d 154 (2008);

Mr. Bray does not challenge any of the court's findings of fact as unsupported by the evidence, and those findings are therefore verities here on

appeal. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Whether the warrantless Terry stop here passes constitutional muster is a question of law and our review is then de novo. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); Martinez, 135 Wash.App. at 179, 143 P.3d 855.

Police may stop a citizen to investigate with less than probable cause to believe a crime has been committed. State v. Glover, 116 Wn.2d 509, 513, 806 P.2d 760 (1991). But the stop is permissible only if the officer "has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime." State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). We look at the totality of the circumstances known to the officer to decide whether the stop meets these criteria. Glover, 116 Wn.2d at 514, 806 P.2d 760. The level of articulable suspicion necessary to support an investigatory detention is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The reasonableness of a stop is a matter of probability not a matter of certainty. State v. Mercer, 45 Wn. App. 769, 774, 727 P.2d 676 (1986). Again, the police may stop a suspect and ask for identification and an explanation of his or her activities if they have a well-founded suspicion of criminal activity. State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982).

There are few factual situations which clearly set forth a valid basis for a "Terry" stop than those presently before the court. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This was a dangerous situation, at night involving more than one location, an assault,

allegations that a gun had been used, a car situated directly in front of the home from which the 911 call originated within which there are clearly observable a male and a female. The male is in possession of a drug pipe and there is no driver in this running vehicle. There are five officers swarming into this area and as the Officer Saldana testified her job was to make the location safe. Officer Saldana merely patted down Quiroz before the valid arrest warrant was found. At that time the officer has every right to complete a full search and state as much “because then I knew I would be holding on to her indefinitely because of the warrant.”

The fact that the actual search did not take place at that time or location has no bearing on the validity of this search. There was no “warrantless search” as claimed by Quiroz. There was a warrantless detention and pat down, but the actual search only occurred AFTER the officer was informed of the valid warrant. This search occurred after a valid arrest warrant was determined to exist for Quiroz. There has been no challenge nor question of the validity of that warrant.

Quiroz cites State v. Larson, 93 Wn. 2d 642, 611 P.2d 771 (1980) as indicative of the extent which an officer is allowed to contact the passenger of a vehicle. This completely misses the actual action of the officer here; the initial contact was for officer safety.

Quiroz cites State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) which states; “We review findings of fact on a motion to suppress under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644. We review conclusions of law in an order pertaining to suppression of evidence de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)” Mendes is however a case where the officers had probable cause to detain the driver of the car, here the car was running with two persons in it however, there was no driver.

The findings as set forth should not be disturbed by this court. State v. Hill, 123 Wn.2d 641, 647-48, 870 P.2d 313 (1994). 1982).

Within our appellate court system there is no reason to make a distinction between constitutional claims, such as those involved in a suppression hearing, and other claims of right. The trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. See Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 405, 858 P.2d 494 (1993); Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369- 70, 798 P.2d 799 (1990). This remains true regardless of the nature of the rights involved.

There is adequate opportunity for review of trial court findings within the

ordinary bounds of review. A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. Nord v. Eastside Ass'n Ltd., 34 Wn. App. 796, 798, 664 P.2d 4, review denied, 100 Wn.2d 1014 (1983); cf. Halstien. This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual determinations of the actual trier of fact. We hold that in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal.

The record set forth above is replete with testimony from Officer Saldana testifying that, with the limited information she had about the parties involved in the reported assault, her job at that scene of this crime which, once again was at night and involved a gun, to identify the involved parties and insure the safety of officers at the scene. The facts set forth are evidence sufficient to persuade as fair-minded, rational person of the truth of the finding.”

With the information she had it is inconceivable that this officer would bypass or ignore this car and its occupants.

State v. Horrace, 144 Wn.2d 386, 399-400, 28 P.3d 753 (2001);

Citizens of this state do not expect to surrender their article I, section 7, privacy guaranty when they step into an automobile with others, for as E.B. White put it, "Everything in life is somewhere else, and you get there in a car." Any intrusion upon the constitutionally protected privacy interest of vehicle passengers must meet the requirements we have previously set forth. Only where a police officer is able to articulate an objective rationale based specifically on officer safety concerns, may the officer, as a means of controlling the scene, direct passengers to remain in or exit a vehicle stopped for a traffic infraction. *See Mendez*, 137 Wash.2d at 220-21, 970 P.2d 722. Where an officer's purpose is to investigate a passenger, the higher Terry standard must be met. *Id.* at 220, 970 P.2d 722. The frisk of a vehicle passenger will be justifiable only where the officer is able to point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger could be armed and dangerous. Where the suspicion that an individual may be armed is based in part on the observable actions of others in a particular context, the officer must point to specific, articulable facts tying those observable movements and their circumstances directly and immediately to the individual to be frisked. In those cases where the Terry requirements are met, it necessarily becomes "unreasonable to limit an officer's ability to assure his own safety." Kennedy, 107 Wash.2d at 12, 726 P.2d 445.

The officer testified the reason she contacted Quiroz was to determine her connection to the assault "and to secure her for my safety." The officer did not know all of the facts "aside from the fact that there was

a report of an assault and a gun, correct”...“Um at the time I handcuffed her not knowing who she was or who’s in the house. How she was related and I even told her at the time that um while I was figuring out what was going on I was going to put her in handcuffs uh for my safety”...”there was talk of an assault, a weapon. I need to know who was involved and how their involved and I have a situation where I have two essentially two separate locations now and a third possible at 4th and Pine. I have the car and then I have the house. I have unknown subjects in the house. I got two people in the car um my job is first to create safety so I’m going to detain them until I can figure out their role. And also part of detaining them is knowing that they cannot um gain access to any weapons um they cannot leave and return un they can’t flee if it turns out hat they are actually involved and wanted for any reason.” And finally when asked “did you feel that there could be a threat to your safety at that time? Saldana testified “Yes I did.”

To claim the officer here did not articulate an objective rationale predicated on safety concerns is ludicrous. The claim the officer did not have the right to handcuff a person in this fact pattern where the officer arrives at the scene of a 911 call at night where the call involved assaults and guns and the officer observes two unknown persons occupying a

running car parked in front of the location of the call for officer safety does not does not comport with the law.

State v. Glenn, 140 Wn. App. 627, 635, 166 P.3d 1235 (2007);

Importantly, in each case, a "determination of the reasonableness of an officer's intrusion depends in some degree on the seriousness of the apprehended criminal conduct. An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not." *State v. Rice*, 59 Wash.App. 23, 27, 795 P.2d 739 (1990) (citing *State v. McCord*, 19 Wash.App. 250, 253, 576 P.2d 892 (1978)).

Additionally, "[t]here is no constitutional violation in allowing a police officer to assume a citizen's report has some basis when he is conducting an initial investigation of that complaint." *State v. Rice*, 59 Wash.App. at 28, 795 P.2d 739

IV. CONCLUSION

The trial court heard the testimony and found there was a legal basis for the officer contact and that the officer was justified in detaining Quiroz. The court made findings of fact and conclusions of law which Quiroz had occasion to comment on and which were changed to reflect some of the issues and concerns raised by Quiroz's trial counsel.

The trial court made a proper determination with regard to the stop and detention. There were sufficient facts to support this finding.

The actions of the trial court should be upheld and this appeal should be dismissed.

The trial court made well reasoned decisions with regard to these allegations and appellant has not demonstrated any basis for this court to overturn those rulings. The record is clear that the trial court was well within its discretion when it denied the motion to suppress. The trial court set forth a record that demonstrates that these discretionary rulings were well reasoned, based on facts presented and current case law.

Respectfully submitted this 28th day of February 2011,

A handwritten signature in black ink, appearing to read "David B. Trefry". The signature is written in a cursive style with a large, looping initial "D".

David B. Trefry WSBA # 16050
Special Deputy Prosecuting Attorney
Yakima County, Washington

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FILED
COURT OF APPEALS
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DIVISION III

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Respondent,
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ETHEL PAUL QUIROZ,
Appellant

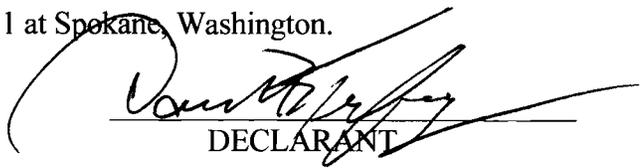
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DECLARATION OF SERVICE

I, David B. Trefry state that on February 28, 2011, sent a copy of the Respondent's brief and Motion for Extension of time by email, by agreement of the parties to : Tanesha L. Canzater, Attorney At Law, canz2@aol.com and I deposited in the United States mails by first class mail, proper postage affixed a copy of the Respondent's brief to Ethel P. Quiroz 13 S. I Street, Toppenish, WA 98948

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of February, 2011 at Spokane, Washington.


DECLARANT