

**FILED**

APR 14 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 28777-7-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

---

**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**ERIC CHRISTOPHER GANTT,**

Defendant/Appellant.

---

**APPELLANT'S BRIEF**

---

Dennis W. Morgan    WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
(509) 659-0600

**FILED**

APR 14 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 28777-7-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

---

**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**ERIC CHRISTOPHER GANTT,**

Defendant/Appellant.

---

**APPELLANT'S BRIEF**

---

Dennis W. Morgan    WSBA #5286  
Attorney for Appellant  
120 West Main  
Ritzville, Washington 99169  
(509) 659-0600

## TABLE OF CONTENTS

TABLE OF AUTHORITIES	
TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS	ii
ASSIGNMENTS OF ERROR	1
ISSUES RELATING TO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
CONCLUSION	12

## TABLE OF AUTHORITIES

### CASES

<i>Cady v. Dombrowski</i> , 413 U.S. 433, 37 L. Ed.2d 706, 93 S. Ct. 2523 (1973).....	10
<i>Miranda v. Arizona</i> , 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966).....	3
<i>State v. Beito</i> , 147 Wn. App. 504, 195 P.3d 1023 (2008).....	9
<i>State v. DeArman</i> , 54 Wn. App. 621, 774 P.2d 1247 (1989).....	8
<i>State v. Henry</i> , 80 Wn. App. 544, 910 P.2d 1290 (1996) .....	10, 11
<i>State v. Julian</i> , 102 Wn. App. 296, 9 P.3d 851 (2000) .....	12
<i>State v. Lemus</i> , 103 Wn. App. 94, 11 P.3d 326 (2000).....	11
<i>State v. O’Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003) .....	9
<i>State v. Radka</i> , 120 Wn. App. 43, 83 P.3d 1038 (2004).....	7
<i>State v. Tijerina</i> , 61 Wn. App. 626, 811 P.2d 241 (1991) .....	11
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681 (1998).....	9
<i>Terry v. Ohio</i> , 392 U.S. 1, 20 L. Ed.2d 889, 88 S. Ct. 1868 (1968) .....	10

### CONSTITUTIONAL PROVISIONS

Const. art. I, § 7.....	1, 7, 8, 9, 12, 13
United States Constitution, Fourth Amendment.....	1, 7, 8, 12, 13

## **ASSIGNMENTS OF ERROR**

1. The trial court's determination that an officer's contact with Eric Christopher Gantt did not constitute a "seizure" at its inception, and that the subsequent warrantless search of a minivan was valid, violates Mr. Gantt's constitutional right to privacy under the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

2. The no possession or consumption of alcohol condition in the Judgment and Sentence is not supported by the record. (CP 7)

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did an officer's initial contact of Mr. Gantt, or his subsequent detention, without an articulable suspicion of criminal activity, constitute an illegal seizure of Mr. Gantt's person under the Fourth Amendment to the United States Constitution and Const. art. I, § 7?

2. Did a subsequent search of the minivan amount to a warrantless unconstitutional search in violation of the same constitutional provisions?

3. Is the no possession or consumption of alcohol condition in the Judgment and Sentence valid?

## STATEMENT OF CASE

Officer Valencia of the Selah Police Department was patrolling WB on Goodlander Road on May 7, 2009. He saw a minivan stopped on the street a few yards north of Goodlander on Goodlander Drive. (RP 5, ll. 21-24; CP 39)

When the officer returned EB on Goodlander Road he saw that the van had moved to an area in front of a driveway at the corner of Crestview Drive and Goodlander Road. This was at approximately 9:50 p.m. (RP 6, ll. 2-7)

Officer Valencia saw a male walking towards a residence. He decided to make a social contact. He activated his patrol car's lights and pulled up behind the van. (RP 6, ll. 8-18)

There was a female passenger in the van. The male returned from the area of the residence. Officer Valencia asked the male, later identified as Mr. Gantt, what he was doing there. Mr. Gantt appeared nervous and stated that he was looking for a friend. (CP 39)

The officer told Mr. Gantt he did not believe what he was being told. At this point he noticed that there was an expired trip permit in the rear window of the van. (RP 6, l. 25 to RP 7, l. 1; CP 39)

Officer Valencia requested backup. Officer Brumley later arrived. Shortly after his arrival Officer Brumley walked over to the minivan and

looked through the cargo area rear window. He observed mail, unused checkbooks, a video camera, an automobile stereo with a missing face, and a flashlight. He saw the name Willa Chamberlin of 3709 Commonwealth Road, Yakima, Washington on an item of mail. He then looked through the side windows and saw two (2) large sized duffle bags, a small ice chest, a silver platter and a pearl necklace. He continued to look through the windows of the van. At the front passenger window, which was rolled down, he saw a laptop computer between the two (2) seats. He also saw a small baggie lying on the passenger side floor containing a green vegetable matter. (RP 8, ll. 9-11; RP 9, ll. 1-4; CP 41)

Consent to search was denied. Officer Brumley contacted the Yakima County Sheriff's Office to run a check on the name of Willa Chamberlin. The dispatch officer advised that Ms. Chamberlin had reported a burglary earlier in the evening. (CP 41)

Officer Brumley requested that a deputy respond to his location. Deputy Frye arrived, *Miranda*<sup>1</sup> warnings were given. A telephonic search warrant was obtained. (CP 42)

An Information was filed on May 12, 2009 charging Mr. Gantt with residential burglary and possession of stolen property second degree. (CP 73)

---

<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966)

A Second Amended Information was filed on October 1, 2009 adding five (5) counts of second degree identity theft. (CP 28)

A suppression hearing was conducted on July 28, 2009. Mr. Gantt stipulated to the facts as contained in the police reports. An additional stipulation was that Officer Valencia had activated his patrol car lights. (RP 4, ll. 13-18)

The trial court issued an oral ruling. No findings of fact and conclusions of law were entered. The oral ruling states:

THE COURT: Okay. Well, this is -- I think under the circumstances that **this actually is a pretty good example of good police work with nothing more than that.** I think that the **Officer Valencia's contact**, which he describes as being a social contact with the van, **was, in fact**, you know, **a social contact** or a -- or -- of a nature of innocuous, that he certainly -- **the circumstances he observed, although somewhat suspicious, certainly** would have **warranted a belief that perhaps the occupants of the van were either lost or having car trouble or needed assistance.** And I think

that those were the primary reasons that motivated him to contact the van.

I think **turning on his lights under the circumstances given**, it was during the hours of darkness, is -- **doesn't change this into a detention** or illegal detention. I think that **it was a -- the -- appropriate as a social contact or a [sic] attempt to assist**.

In any event -- and then **from that point things just flow in a fairly logical sequence**. The trip permit, which has been altered is noted. Officer Brumley is contacted, who -- and he knows Mr. Gantt, and knows Mr. Gantt's -- has criminal history involving burglaries and thefts. He arrives at the scene and looks in through the window and sees material, mail and what-not, in the back of the van, noting a name and an address. Contact the Sheriff's Office, determines that the person who is listed as the addressee on the mail that's readily visible in the back of the van had rec -- had that same evening reported a burglary, and

then applies for a search warrant, is granted and evidence is seized from the van.

I believe that **under these circumstances** is that **the officers acted appropriately** and I don't think that they acted illegally and **I don't think** that they -- that **Mr. Gantt was seized until sufficient evidence was developed to warrant that seizure.** And so I will deny the motion to suppress.

(RP 14, l. 19 to RP 16, l. 4) (Emphasis supplied.)

A stipulated facts trial was conducted on December 3, 2009. Mr. Gantt was found guilty on all counts. (RP 18, l. 20 to RP 19, l. 10; RP 22, ll. 16-22; CP 15)

Judgment and Sentence was entered on January 21, 2010. Mr. Gantt filed his Notice of Appeal the same date. (CP 3; CP 4)

### **SUMMARY OF ARGUMENT**

A seizure of Mr. Gantt's person occurred prior to the discovery of any incriminating evidence.

The seizure was a warrantless seizure. No recognized exception to the search warrant requirement applies.

The trial court's finding that the initial contact was social is negated by the officer's activating his patrol car's emergency equipment.

The seizure of Mr. Gantt exceeded the parameters of the community caretaking function.

All evidence seized is subject to suppression.

The no possession or consumption of alcohol provision in the Judgment and Sentence is invalid.

## **ARGUMENT**

### **I. WARRANTLESS SEIZURE/SEARCH**

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Const. art. I, § 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of the law."

Initially, Mr. Gantt contends that the trial court's oral opinion is sufficient to allow appellate review of his case. Absence of findings of fact and conclusions of law does not preclude review. *See: State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004).

The critical components of the oral opinion consist of:

1. Nothing more than good police work;
2. Officer Valencia made a social contact;
3. Circumstances were somewhat suspicious;
4. Exercise of the community caretaking function;
5. Activating emergency equipment does not constitute a detention;
6. The expired trip permit allowed further investigation;
7. Officer Brumley's arrival and knowledge of Mr. Gantt's prior criminal history;
8. Officer Brumley's observation through the van windows did not constitute a search since the objects were in plain view;
9. No seizure occurred until sufficient evidence was developed to warrant the seizure.

The law is clear. When a police officer pulls up behind a parked car, activates the patrol car's emergency equipment, and then contacts any occupant(s) of the car, a seizure occurs. *See: State v. DeArman*, 54 Wn. App. 621, 624, 774 P.2d 1247 (1989).

Officer Valencia seized Mr. Gantt upon the initial contact. Any individual, when a police officer pulls up behind his/her car and activates the patrol car's emergency equipment, knows that he/she is not free to leave the scene.

Const. art. I, § 7 provides greater protection than the Fourth Amendment. There are no express limitations under the state constitu-

tional provision. Const. art. I, § 7 applies to automobiles and their contents. *See: State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

Mr. Gantt recognizes that he bears the burden of establishing that the seizure is unconstitutional. *State v. Young*, 135 Wn.2d 498, 509-10, 957 P.2d 681 (1998).

**A seizure under article I, section 7 occurs when, due to an officer's use of physical force or display of authority, an individual's freedom of movement is restrained and the individual would not believe he is free to leave or decline a request.** "This determination is made by looking objectively at the actions of the law enforcement officer." *State v. Mote*, 129 Wn. App. 276, 282-83, 120 P.3d 596 (2005).

*State v. Beito*, 147 Wn. App. 504, 508, 195 P.3d 1023 (2008). (Emphasis supplied.)

Activation of a patrol car's emergency equipment constitutes a "display of authority."

The trial court's determination that this was a social contact and/or the exercise of the community caretaking function is not supported by the officer's actions.

Whether an encounter with police is permissive or a seizure is a mixed question of law and fact, but whether the facts may be characterized as a seizure is a legal question that the Court reviews *de novo*. *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004).

*State v. Beito, supra*, 508-09.

The community caretaking function derives from *Cady v. Dombrowski*, 413 U.S. 433, 441, 37 L. Ed.2d 706, 93 S. Ct. 2523 (1973). It is to be applied cautiously so as to avoid abuse by law enforcement.

Under the facts and circumstances of Mr. Gantt's case, Officer Valencia wanted to find out what was going on with the minivan. He observed it parked at two (2) different locations. He also observed Mr. Gantt walking to a nearby residence.

Officer Valencia did not see a crime being committed.

Officer Valencia did not see a traffic infraction being committed.

The officer had a mere hunch that aroused his suspicion. This was not a "Hi! How are you?" type of contact.

Further evidence that Officer Valencia exceeded the community caretaking function is his statement to Mr. Gantt that he did not believe Mr. Gantt's reason as to why he was in the area.

The fact that Mr. Gantt appeared nervous does not constitute a sufficient basis to detain him.

In *State v. Henry*, 80 Wn. App. 544, 910 P.2d 1290 (1996) the Court comprehensively discussed a person's nervousness in relation to escalating a routine traffic stop into a *Terry*<sup>2</sup> stop. The Court held at 552: "... 'Most persons stopped by law enforcement officers display some sign of nervousness.'" *State v. Barwick*, 66 Wn. App. 706, 710, 833 P.2d 421 (1992).

---

<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed.2d 889, 88 S. Ct. 1868 (1968)

The facts in the *Henry* case are eerily similar to Mr. Gantt's case. In *Henry* the officer observed a pickup parked at a convenience store late at night. The officer had a suspicion that a burglary might be occurring. Contact with the driver, who exhibited nervousness, led to an unauthorized warrantless search.

As noted in *State v. Lemus*, 103 Wn. App. 94, 101, 11 P.3d 326 (2000):

A stop for a traffic infraction can be extended solely when an officer has articulable facts from which the officer "could reasonably suspect criminal activity." *Tijerina* [*State v. Tijerina*, 61 Wn. App. 626, 811 P.2d 241 (1991)] at 629 (citing *State v. Gonzales*, 46 Wn. App. 388, 394, 731 P.2d 1101 (1986)). And ... continued detention must be "limited to the length of time needed to investigate ... increasingly suspicious circumstances." *Gonzales*, 46 Wn. App. 395 (citing *State v. McIntosh*, 42 Wn. App. 579, 712 P.2d 323 (1986)).

Officer Valencia did not make contact for a traffic infraction.

Officer Valencia did not make contact because of any observed criminal activity.

The officer's stated purpose for the contact was "a social contact." "A social contact" does not involve the use of emergency equipment.

The combination of Officer Valencia's use of emergency equipment, confrontation of Mr. Gantt, disbelief of his explanation, call for backup and lack of an articulable basis for a criminal suspicion all dictate that the contact and seizure were unconstitutional.

## II. ALCOHOL CONDITION

The Judgment and Sentence places the following condition upon Mr. Gantt: “Do not possess or consume any alcohol or intoxicating beverages, and submit to a breath alcohol analysis upon the request of the supervising Community Corrections Officer.”

There is no factual information set forth in the stipulation and/or the police reports to substantiate that alcohol was involved with the charged offenses.

In the absence of a finding that use or possession of alcohol contributed to the offense, the court exceed[s] its statutory authority by imposing the condition.

*State v. Julian*, 102 Wn. App. 296, 305, 9 P.3d 851 (2000), *citing State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

## CONCLUSION

Officer Valencia seized Mr. Gantt when he activated his patrol car’s emergency equipment as he pulled behind the van. No social contact occurred.

The seizure of Mr. Gantt constituted a violation of his right to privacy under the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

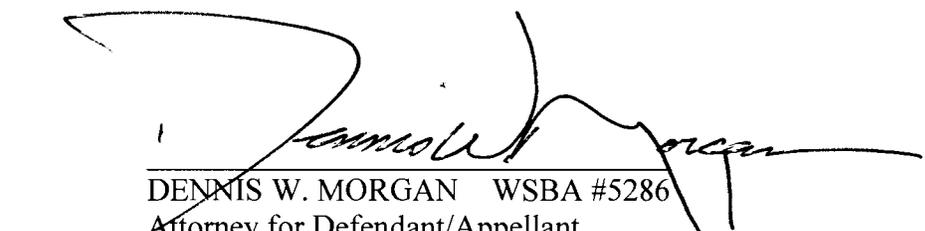
The continued detention of Mr. Gantt, which allowed Officer Brumley to do a cursory search by means of looking through the windows of the van, further violated Mr. Gantt's constitutional rights under the Fourth Amendment and Const. art. I, § 7. In addition, it exceeded the scope of the community caretaking function.

The trial court erred in not suppressing the evidence. Mr. Gantt requests that the trial court's ruling be reversed and the evidence suppressed.

Additionally, if the evidence is not suppressed, then Mr. Gantt contends that the no possession or consumption of alcohol provision of the Judgment and Sentence is invalid. It should be deleted.

DATED this 13<sup>th</sup> day of April, 2010.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286  
Attorney for Defendant/Appellant.  
120 West Main  
Ritzville, Washington 99169  
(509) 659-0600

**FILED**

APR 14 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**NO. 28777-7-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	YAKIMA COUNTY
Plaintiff,	)	NO. 09 1 00951 7
Respondent,	)	
	)	<b>AFFIDAVIT OF MAILING</b>
v.	)	
	)	
ERIC CHRISTOPHER GANTT,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

STATE OF WASHINGTON )  
: ss.  
County of Adams )

CONNIE HILLE, being first duly sworn upon oath, deposes and says:

That on this date I mailed in the mails of the United States of America a properly stamped and addressed envelope directed to:

RENEE S. TOWNSLEY, CLERK  
Court of Appeals, Division III  
500 North Cedar Street  
Spokane, Washington 99201

AFFIDAVIT OF MAILING

YAKIMA COUNTY PROSECUTOR'S OFFICE  
Attention: Kevin Eilmes  
128 North 2<sup>nd</sup> Street, Room 211  
Yakima, Washington 98901-2639

ERIC CHRISTOPHER GANTT #313510  
Washington State Correction Center  
PO Box 900  
Shelton, Washington 98584

Containing a copy of the *APPELLANT'S BRIEF*.

*Connie Hille*

CONNIE HILLE

SUBSCRIBED AND SWORN to before me this 13<sup>th</sup> day of April, 2010.



*Tina M. Steinmetz*  
NOTARY PUBLIC in and for the State of  
Washington, residing at Ritzville.  
My commission expires: 11/10/2013.