

FILED
April 24, 2012
Court of Appeals
Division III
State of Washington

NO. 296717

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ULISES IBARRA GUEVARA,

Appellant.

BRIEF OF 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) Did the court err when it denied the appellant's motion to suppress the evidence seized from appellant?
- 2) Did the trial court properly rule that the contact between the resource officer and appellant was a social contact and therefore not a seizure?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) The court correctly denied appellant's motion to suppress.
- 2) The trial court properly ruled the contact social in nature and was therefore not a seizure.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

RESPONSE TO ASSIGNMENT OF ERROR ONE.

The trial court entered Findings of Fact and Conclusions of Law in this case. Those have not been challenged in this appeal therefore they are verities. (CP 42-47)

The primary purpose of findings of fact is to aid appellate courts in

their review. Port Townsend Publ'g Co. v. Brown, 18 Wn.App. 80, 85, 567 P.2d 664 (1977). These findings were unassailed by either party on appeal and, consequently, they are verities on appeal, State v. Handburgh, 61 Wn. App. 763, 766, 812 P.2d 131 (1991); See also State v Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)], when the defendant does not challenge any of the trial court's findings of fact, this court will consider them verities on appeal. See also State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); where the findings are unchallenged, they are verities on appeal. Conclusions of law relating to the suppression of evidence are reviewed de novo. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); This court will review the trial court's legal conclusions resulting from a suppression hearing de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

There was only one person who testified at this hearing, Officer Graves; appellant did not take the stand, therefore the statements of the officer are unrefuted. (It should be noted that Guevara did testify however this was only at the CrR .35 hearing.) The testimony was summarized in the findings; also stated in those finding in the first paragraph "...and further incorporating by reference the oral decision made by the court following a 3.6 hearing held Monday, January 3rd, does make and enter the following:"(CP 42-47) These findings and conclusions

were objected to at the trial court however they have not been challenged in this appeal.

Appellant states that the actions of the officer were “indistinguishable” from State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009), the State would completely disagree. The facts here are clearly distinguishable from Harrington.

Harrington was an encounter at 10:00 PM between an officer and an adult citizen in a residential neighborhood the officer made a U-turn and drove past Harrington and pulled into a driveway, at this point Harrington was walking toward the officer. The conversation between the officer and Harrington made the officer suspicious he noticed bulges in Harrington’s pockets and asked him to remove his hands from his pockets. Soon after the initial contact another officer arrived on the scene, parked his car and walked to within seven or eight feet of Harrington. After the arrival of the second officer the initial officer asked if could pat Harrington down for officer safety. During this hands on pat down the officer felt an object in Harrington’s pocket, when asked what it was Harrington stated it was his meth pipe.

In stark contrast here there is one officer who is the “resource officer” at the school which is one and one half blocks from the scene of this encounter. This resource officer is a familiar person at the school

where the appellant goes to school. This type of officer is placed into the schools to an extent which allows them to become for all intents and purposes part of the faculty. This allows them the ability to interact with students in a way that puts forth the security of having an officer while at the same time giving that officer the familiarity with the student body to allow those students to have a level of comfort and interaction which allows for the officer to address issues before they become problems.

The officer states the primary reason for the initial contact was because of the time of day, who the three individuals were, their location and direction of travel the officer believed they would not make it to class on time. The officer parked his car behind the three students no lights were activated, he approached them to the side, not blocking their path. This officer addressed all of these juveniles in the open in the daylight by himself. He never touched any of them until he developed probable cause to arrest appellant. The three stood the entire time on a public sidewalk.

The School Resource Officer, (SRO) stated his first concern was that these students would not make back to school and to their classes on time, one of the areas of enforcement that a resource officer is tasked to ensure, he was also concerned that these three students were skipping school and going to go to an area known for smoking marijuana

The officer did not search these three people he requested that they turn out their pocket that they “bunny ear” the pockets, clearly for officer safety. They consented to this act. The officer never laid a hand on them prior to finding the controlled substance on appellant.

These three people were headed to an area that was known for criminal activity. The three were never seized and appellant admits that the initial encounter was a social contact. Appellant merely needed to walk away, he did not. He chose to continue this consensual contact and he consented to pull out his pockets. This one request by the lone resource officer did not somehow suddenly transform this social contact into a seizure.

Harrington stated the following;

Pursuant to article I, section 7 seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." Rankin, 151 Wash.2d at 695, 92 P.3d 202 (citing O'Neill, 148 Wash.2d at 574, 62 P.3d 489). The standard is "a purely objective one, looking to the actions of the law enforcement officer...." State v. Young, 135 Wash.2d 498, 501, 957 P.2d 681 (1998). The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. O'Neill, 148 Wash.2d at 581, 62 P.3d 489. An encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away. [167

Wn.2d 664] United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

In Young we embraced a nonexclusive list of police actions likely resulting in seizure: " 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.' " Young, 135 Wash.2d at 512, 957 P.2d 681 (quoting Mendenhall, 446 U.S. at 554-55, 100 S.Ct. 1870)." 'In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.' " Id. Harrington bears the burden of proving a seizure occurred in violation of article I, section 7. Id. at 510, 957 P.2d 681. (Footnote omitted.)

The court then went on to state;

Washington courts have not set in stone a definition for so-called social contact. It occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying "hello" to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop). See generally Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The phrase's plain meaning seems somewhat misplaced. "Social contact" suggests idle conversation about, presumably, the weather or last night's ball game-trivial niceties that have no likelihood of triggering an officer's suspicion of criminality. The term "social contact" does not suggest an investigative component.

However its application in the field-and in this court-appears different. For example we have categorized interactions where officers ask for an individual's identification as social contact. See Young, 135 Wash.2d at 511, 957 P.2d 681. " Article I, section 7 does not forbid social contacts between police and citizens: ' [A] police officer's conduct in engaging a defendant in conversation in a public place and asking

for identification does not, alone, raise the encounter to an investigative detention.” Id. (alteration in original) (quoting Armenta, 134 Wash.2d at 11, 948 P.2d 1280); see also State v. Belanger, 36 Wash.App. 818, 820, 677 P.2d 781 (1984) (“ [N]ot every public street encounter between a citizen and the police rises to the stature of a seizure. Law enforcement officers do not ‘seize’ a person by merely approaching that individual on the street or in another public place, or by engaging him in conversation.”). In Young we found effective law enforcement techniques not only require passive police observation, but also necessitate interaction with citizens on the streets.

In a recently decided case State v. Johnson, 156 Wn.App. 82, 89-92, 231 P.3d 225 (2010) (review was granted, State v. Johnson, 257 P.3d 1112 (Wash. 2011) reversed on other grounds in an unpublished opinion)) the court set forth this issue as follows:

We review a trial court's denial of a CrR 3.6 suppression motion "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." State v. Cole, 122 Wash.App. 319, 322-23, 93 P.3d 209 (2004). Unchallenged findings of fact are verities on appeal. State v. Balch, 114 Wash.App. 55, 60, 55 P.3d 1199 (2002). We review de novo conclusions of law, "including mischaracterized ‘ findings.’ " Cole, 122 Wash.App. at 323, 93 P.3d 209. We defer to the fact finder on witness credibility issues. State v. Thomas, 150 Wash.2d 821, 874-75, 83 P.3d 970 (2004).

Whether a law enforcement officer has seized a person is a mixed question of law and fact. State v. Harrington, 167 Wash.2d 656, 662, 222 P.3d 92 (2009). The defendant bears the burden of proving that an unlawful seizure occurred. State v. Young, 135 Wash.2d 498, 501, 957 P.2d 681 (1998). To determine

whether a seizure occurred, Washington courts use an objective standard to examine the police officer's actions. State v. O'Neill, 148 Wash.2d 564, 574, 62 P.3d 489 (2003). Not every encounter between a law enforcement officer and an individual amounts to a seizure. State v. Armenta, 134 Wash.2d 1, 10, 948 P.2d 1280 (1997) (quoting State v. Aranguren, 42 Wash.App. 452, 455, 711 P.2d 1096 (1985)).

Wash. Const. art. I, § 7 permits social contacts between police and citizens. Young, 135 Wash.2d at 511, 957 P.2d 681. Thus, an officer's mere social contact with an individual in a public place with a request for identifying information, without more, is not a seizure. Young, 135 Wash.2d at 511, 957 P.2d 681; Armenta, 134 Wash.2d at 11, 948 P.2d 1280. The Washington Supreme Court recently clarified the limitations of a "social contact" in Harrington, 167 Wash.2d at 656, 222 P.3d 92. That court held that a series of police actions that might pass constitutional muster separately, may, when viewed cumulatively, constitute an impermissible progressive intrusion into a person's private affairs and, thus, an unlawful seizure. Harrington, 167 Wash.2d at 660, 222 P.3d 92. An officer asked Harrington to remove his hands from his pockets. A second officer arrived and stood nearby. And, of particular significance, the first officer asked Harrington for permission to pat him down (" When [officer] requested a frisk, the officers' series of actions matured into a progressive intrusion substantial enough to seize Harrington."). Harrington, 167 Wash.2d at 669-70, 222 P.3d 92. Here, in contrast, the degree of officer intrusion was less because contact was limited to questions about the vehicle occupants' presence in the disabled parking spot and a request for identification.

When an officer subjectively suspects the possibility of criminal activity but does not have suspicion justifying an investigative detention (Terry stop), officer contact does not constitute seizure. O'Neill, 148 Wash.2d at 574-75, 62 P.3d 489. Thus, it is not a seizure when a law enforcement officer parks behind a vehicle parked in a public place, asks an

occupant to roll down a window, questions him, and requests identification. *See O'Neill*, 148 Wash.2d at 572, 577, 579-581, 62 P.3d 489. (Emphasis mine)

Once again the findings of fact and conclusions of law were not disputed *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, 168 L. Ed. 2d 132 (2007) states “We review findings of fact on a motion to suppress under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. We review conclusions of law in an order pertaining to suppression of evidence de novo.” (Citations omitted.)

This court has before it all of the information which was considered by the trial court. The findings of fact and conclusions of law support the actions of the officer and are based on the information presented to the trial court. They are further supported by the oral ruling made by the trial court. (RP 32-36) The conclusions contained therein are supported by the testimony and the facts and should not be disturbed by this court. "Even if inadequate, written findings may be supplemented by the trial court's oral decision or statements in the record." *In re Det. of LaBelle*, 107 Wn.2d 196, 219, 728 P.2d 138 (1986).

The parties submitted briefing, the facts which were later used for the findings of fact and conclusions of law were drawn from those

documents as well as the testimony of the officer. The defendant bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

It is clear this contact was consensual. This was an officer acting not as the typical police officer but he was on duty in his capacity as a Resource officer. This is an officer who is assigned to a school.

The trial court received extensive briefing by the parties prior to making its decision. (CP 13-26, 27-33) Both of the documents submitted to the trial court addressed Harrington.

The court and the parties elicited testimony from the officer that he was the “resource officer” for Eisenhower school which was one and one-half blocks from where the contact occurred. (RP 2, 9, 19, 32) The State of Washington has specific laws regarding children and attendance in school, “RCW 28A.225. Compulsory school attendance and admission.” The laws governing attendance also allow actions which place this contact in a category which is not identical to those addressed in the cases cited at the trial court.

As the deputy prosecutor stated;

Let's not fool ourselves. I think the whole case law is, the idea -- it sort of stems from the idea that if you

have an articulable suspicion, you can detain someone for a Terry stop. This case is a little bit of a hybrid because the officer, through his job as a resource officer, is supposed to look for people who are skipping. And, as we all know, if you catch someone skipping, you can detain them and take them back to school, which is what happened in this case.

But one of the things in the law of search and seizure when it comes to Terry stops is the idea that you can't do it on a hunch. But everybody has hunches, officers have hunches. And what we see in all the case law here is, many of these social contacts are -- contacts are done on a hunch. Someone is out walking at a time that's a little bit odd and the officer comes and says, hey, what's going on, what are you doing out here?

You know, it's not a seizure per se, it's just asking a question, starting a dialogue with citizenry. This is what happened in this case. He saw these students, which would appear to be they were skipping school. Through his training and experience, where they were located, which direction they were heading were obviously, to him, skipping school. This is the hunch. That is not a criminal activity. So we're outside of the rule of Terry stop. But under these circumstances, this is a time and a place where our society says, no, you need to make a social contact, you need to find out what's going on with these students -- with these juveniles who are moving away from school in the opposite direction, which the officer did. (RP 19-20)

This exchange occurred during direct examination of the School Resource Officer, Officer Graves, at the hearing this testimony clearly factually distinguishes this case from Harrington;

Q Were you concerned that they were possibly skipping school?

A Yes, sir.

Q And why is that?

A The bell had rung five minutes -- approximately five minutes before, and if

they had turned around at the moment that I saw them, they would be hard pressed, if it was even possible, to make it to their class on time. (RP 4)

Q Having seen this, what did you do next?

A I pulled up my patrol car behind the juveniles.

Q How far behind the juveniles?

A Twenty feet.

Q And what did you do then?

A Exited my patrol car and addressed the students.

Q Okay. And did you ask them what they were doing?

A Yes, I did.

Q And how did they reply?

A Told me they were going for a walk.

Q Were there any other officers with you?

A No, sir.

Q Did you activate your overhead lights or siren?

A No, I did not.

Q Okay. Where were you positioned in reference to the juveniles -- if you could explain to the Court where you were standing compared to where they were standing?

A They were walking eastbound on Webster Avenue. I pulled up behind them facing eastbound, exited my patrol car and came up from behind them from the direction they were walking.

Q Did you stand in front of their -- on the sidewalk in front of them?

A No, sir.

Q Okay. Were you to the side of them?

A Yes.

Q Okay. Did you explain to the juveniles your concerns

A I did.

Q What did you tell them?

A I told them that I believed that they were skipping school and I suspected that they were going to smoke marijuana.

Q Okay. And what was their response?

A I don't recall what their exact response was at that time.

Q Did you request anything from them at that time?

A I did. I asked them if they'd be willing to show me the contents of their pockets.

Q And what did they -- how did they respond?

- A In the affirmative.
- Q And in the affirmative as in yes or were they --
- A Yeah. Well, in one way or another saying, yeah, that's fine. They were -- they started immediately showing me the contents of their pockets.
- Q Okay. Who showed -- in what -- there were three people there?
- A Correct.
- Q In what order did they show their --
- A I'd have to refer to my report to get the order. I don't recall.
- Q Please do.
- A. It appears that Joseph Gutierrez was the first one who showed me the miscellaneous objects in his pocket. Okay. Do you want me to keep going through?
- Q Yes, please.
- A Okay. Looks like Jose I. Sanchez, miscellaneous items in his pocket. And then it was Ulises.
- Q So who was the final person to show?
- A Ulises.
- Q Okay. Now, in your conversation -- during your conversation with the juveniles, did you ever order the juveniles in any way to restrict their movement through command or physical force?
- A Not to my recollection.
- Q Okay. And while speaking to them, what was your demeanor towards the students?
- A Polite.

Subsequent to Harrington this court decided State v. Bailey, 154

Wn.App. 295, 224 P.3d 852, 856 (2010). This court analyzed Harrington as follows:

" [A] police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting that information necessary to perform that function has not 'seized' the citizen." State v. Gleason, 70 Wash.App. 13, 16, 851 P.2d 731 (1993). And an officer may ask for an

individual's identification in the course of a casual conversation. State v. Young, 135 Wash.2d 498, 511, 957 P.2d 681 (1998); Armenta, 134 Wash.2d at 11, 948 P.2d 1280; State v. Afana, 147 Wash.App. 843, 846, 196 P.3d 770 (2008), review granted, 166 Wash.2d 1001, 208 P.3d 1123 (2009). Again, the key inquiry is whether the officer either uses force or displays authority in a way that would cause a reasonable person to feel compelled to continue the contact. Rankin, 151 Wash.2d at 695, 92 P.3d 202.

The Washington Supreme Court recently clarified the limitations of a "social contact" in Harrington, 167 Wash.2d 656, 222 P.3d 92. There, the court held that, viewed cumulatively, a series of police actions that constitute a progressive intrusion into a person's private affairs are an unlawful seizure, even where the actions may separately pass constitutional muster. Harrington, 167 Wash.2d at 669-70, 222 P.3d at 98-99. Although there are similarities between the facts of this case and those in Harrington, the degree of intrusion by the officer is less here.

Guevara compares his case to State v. Soto-Garcia, 68 Wash.App. 20, 841 P.2d 1271 (1992) Division II of this court has also had occasion to consider the issue of when a social contact may become a seizure, that court discussed both Harrington and Soto-Garcia.

In State v. Smith 154 Wn. App. 695, 226 P.3d 195 (2010) the court held that no seizure occurred under the following facts:

On July 13, 2007, officers from the Department of Corrections and Detective Floyd May visited the Chieftain Motel in Bremerton. After arresting one client with an outstanding warrant, they decided to check on another client, Christina Ohnemus, who had a room in the same motel. Kevin Joseph Smith and Ron De'Bose

were in Ohnemus's room, and the officers asked the men to leave while they briefly searched the room. Smith walked outside, but De'Bose chose to remain.

While Smith was standing outside the room, Detective May approached and asked his name. Detective May then stepped back a few feet to check for warrants on his hand-held radio. The officer found no outstanding warrants, but the physical description associated with Smith's name stated his eye color was hazel. The detective observed Smith's eyes were blue. Detective May testified that it is common for people with warrants to give a false name, so he asked if Smith had any identification with him. Smith handed the detective a check cashing card that described Smith's eyes as blue. Due to the continued discrepancy, Detective May asked if Smith had any other identification. While Smith was holding his wallet open, the detective asked if he could look in the wallet and Smith handed it to him.

Detective May looked through Smith's wallet and found several cards with different names. After arresting Smith for identity theft, Detective May searched Smith's wallet and found a small plastic bag containing methamphetamine. The State charged Smith with unlawful possession of methamphetamine. At trial, Smith moved to suppress the evidence found in his wallet. The trial court denied his motion, and a jury found him guilty.

The court in Smith distinguished the case before them from Soto-Garcia and Harrington as follows:

The Harrington court summarized Soto-Garcia, describing the independent elements that amounted to a seizure as: "[the officer's] inquiry about Soto-Garcia's identification, warrant check, direct question about drug possession, and request to search [Soto-Garcia]-all of which, combined, formed a seizure." Harrington, 167 Wash.2d 656, 668-69, 222 P.3d 92, 97-98. The *Harrington* court compared Soto-Garcia to Harrington's case, and held

that Harrington was also seized by an officer's progressive intrusion into his privacy:

...

“The circumstances supporting a seizure in Soto-Garcia and Harrington are not present here. In Soto-Garcia, we emphasized that the officer asked a direct question about drug possession. Soto-Garcia, 68 Wn. App. At 25, 841 P.2d 1271. The Harrington court reasoned that the officer asked Harrington to remove his hands from his pockets “to control Harrington’s actions.” Harrington, 167 Wn.2d at 669. In both cases, the progressive intrusion into the defendants’ privacy culminated in a request to frisk. The Harrington court emphasized that “[r]equesting to frisk is inconsistent with a mere social contact” and held that “[w]hen Reiber requested a frisk, the officers’ series of actions matured into a progressive intrusion substantial enough to seize Harrington.” Harrington, 167 Wn.2d at 669-70. In contrast, Detective May did not question [the defendant] about illegal activity, attempt to control his actions, or request to frisk him. The detective simply asked for identification, and then asked to look through Smith’s wallet, which Smith was holding open at the time.” Smith, 154 Wn. App. at 701-702.

This court then sets forth step by step how the “police intrusion progressed” in Harrington and compared and contrasted that against the facts set forth in Bailey and found the “intrusion” in Bailey did not arise to the level in Harrington. Bailey at 856 This court need only conduct a similar step by step analyses of the actions of the officer herein to come to the same result as it did in Bailey. As can be seen from the testimony set forth above the action of SRO Graves did not amount to a seizure of appellant or the other two students.

It needs to be reiterated that “[t]he defendant bears the burden of proving that an unlawful seizure occurred. State v. Young, 135 Wash.2d 498, 501, 957 P.2d 681 (1998).”

Further as stated in Harrington at 663... seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." The standard is "a purely objective one, looking to the actions of the law enforcement officer...." The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. An encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away. (Emphasis mine, citation omitted)

A seizure occurs under article I, section 7 when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

Guevara has not met his burden. He has not demonstrated from the facts elicited at trial that he; the “reasonable person” did not feel free to leave.

APPLICABILITY OF RCW 28A.225.060.

The officer testified as follows;

Q Now, what would you have done if they just continued to walk away after you asked them to stop?

A Well, because I identified -- once I did have them to stop, one of the juveniles I knew was an Eisenhower student, I would have detained them.

Q You would have detained all three of them?

A Yes.

(RP 11)

In the argument presented to the court the State indicated;

The Respondent can't read the officer's mind. He may very well have detained them based on the fact that they were obviously -- if they would have continued, let's say, to just walk away, we're going for a walk, we're going to leave. Based on his job as a School Resource Officer, yes, he possibly could detain them. They do not know that. Now, so that question is a question possibly for another day, but not for here. (RP 27)

...

MR. CAMP: Your Honor, if I may? The officer never said he was going to arrest, he was going to detain. You can't be arrested for skipping school. You can be detained and taken back to the school, where he properly belonged.(RP 31)

The court states in its ruling;

I think this is -- I characterize it as a social contact and he had the right to talk to them about it, and he saw that one of them was an Eisenhower student. He knew they couldn't get back to -- he couldn't get back to school in time. He did have a right to determine whether they were all Eisenhower students or not.(RP 35)

An area not fully addressed in the trial court is set forth in RCW 28A.225.060. "Custody and disposition of child absent from school without excuse" which allowed the officer to take the following action;

Any school district official, sheriff, deputy sheriff, marshal, police officer, or any other officer authorized to make arrests, may take into custody without a warrant a child who is required under the provisions of RCW 28A.225.010 through 28A.225.140 to attend school and is absent from school without an approved excuse, and shall deliver the child to: (1) The custody of a person in parental relation to the child; (2) the school from which the child is absent; or (3) a program designated by the school district.

This law enabled this officer to take these students into custody, place them in his patrol car if he so desired and return them to the school. The parties as well as the court seem to dismiss this facet of the officer's duties and address this factual situation using the standards of Terry.

The fact is this court and the trial court should address this factual situation with any and all applicable law. It is clear from the facts presented at this brief hearing that the officer was acting in his specific capacity as a resource officer.

While not considered at the trial court it would appear that the actions of the officer, based on his testimony that he was concerned about and would have stopped the three students based on the truancy issue alone, that the actions of the officer would fall within the guidelines set forth in State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (Wash. 2000) where the Washington State Supreme Court sets forth its analysis of that

requirements for the community caretaking function exception to be applicable.

This was the school resource officer initially contacting these three students based on the simple fact that he believed they were skipping school and could not make it to their classes before the second bell had rung thus making them truant. In Kinzy the court indicates the officers could not justify the contact under the Family Reconciliation Act, in contrast here the officer was authorized under RCW 28A to take these students into custody. Further, in Kinzy the court made it clear that in reviewing the stop the court must consider whether the person stopped would perceive they were seized. Here appellant admits the initial encounter was consensual.

Here as opposed to Kinzy appellant could have just walked away. He was not seized, he was on the side walk in the daylight and the officer had taken no action to infringe on his ability to move. This is not an individual who is a stranger to this officer as can be seen from the record where the same officer was involved in another case with stunningly similar facts were appellant plead guilty.

To paraphrase Kinzy rendering aid or assistance through RCW 28A.225.060 is a hallmark of the community caretaking function exception. Otherwise a police "officer could be considered derelict by *not*

acting promptly to ascertain if these students were in fact in violation of RCW 28A.225.060. In contrast, Petitioner's interest in freedom from police intrusion was minimal as long as there was no seizure. Balancing the interests indicates the pre-seizure encounter was reasonable and justified under the community caretaking function exception. (Kinzy at 387)

Those factors which the Court found missing in Kinzy which therefore disallowed an analysis under the community care taking function are factually present in this case therefore the actions taken by this resource officer with regard to these students and appellant specially fall within the parameters of the community care taking function.

IV. CONCLUSION

The appellant has failed meet his burden. The facts in this case are very distinguishable from those in Harrington. It is the position of the State that the facts clearly indicate this was a social contact between the School Resource Officer from the school were these three students attended.

This resource officer made contact with three students from his school who to him, were obviously not going to make it to class on time otherwise known as being truant. He was legally able to detain and transport but he chose to make this contact on which fit the typical actions

of a resource officer, as detailed in more than one contact between this officer and this appellant. This contact was social. It remained so until the resource officer observed what he knew to be a controlled substance being concealed by appellant.

The trial court was fully apprised of all of the facts. That court made a discretionary decision which was supported by unchallenged findings of fact and conclusions of law.

The facts which were presented to the court and adopted by the court were fully supported by the record and support the ruling of the court. The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 24th day of April 2012

s/ David B. Trefry

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I, David B. Trefry state that on April 24, 2012, emailed by agreement of the parties, a copy of the Amended Respondent's Brief to : Jan Trasen, Washington Appellate Project, jan@washapp.org and to the office manager for WAP at wapofficemail@washapp.org I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.