

**FILED**  
Jan 12, 2015  
Court of Appeals  
Division III  
State of Washington

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

STATE OF WASHINGTON,	)	
	)	NO. 32219-0-III
Respondent,	)	
	)	MOTION ON THE MERITS
vs.	)	
	)	
ADRIAN PIMENTAL, JR.,	)	
	)	
Appellant.	)	
_____	)	

I. IDENTITY OF MOVING PARTY.

The respondent, State of Washington, asks for the relief designated in Paragraph II.

II. STATEMENT OF RELIEF SOUGHT.

The respondent requests that the Court of Appeals, Division III, grant the respondent's request as set forth in this Motion on the Merits affirming the actions of the Superior Court of the State of Washington in and for the County of Yakima pursuant to RAP 18.14(e)(1) and dismiss this appeal.

III. FACTS RELEVANT TO THE MOTION.

The facts set forth by appellant give this court a general outline of the case. The State shall set forth specific portions of the record as needed. Therefore, pursuant to RAP 10.3(b); the State shall not set forth additional facts section in this motion.

#### IV. ARGUMENT.

##### Assignments of Error

1. The trial court erred in finding the police had a reason to believe criminal activity had occurred. Finding of Fact No. 7.
2. The trial court erred when it concluded that State v. Horace 144 Wn.2d 386

##### Response to Assignment of Errors.

1. The trial court was correct when it determined the officers had reason to believe there was criminal activity occurring.
2. The court properly relied on the State v. Horace, supra, when it determined that the actions of the officers at the scene were justified. In the alternative even if the court improperly relied on Horace the decision of the trial court was correct and supported by law.

The actions of the trial court were controlled by clearly settled case law, were of a factual nature and were supported by the evidence and/or were a matter of judicial discretion. This case is one for which RAP 18.14 is applicable and this motion on the merits fits within the existing guidelines for Motions on the Merit. This Motion on the Merits meets the requirements of the general rule regarding the use and filing of motions of this type, the record in total less than five hundred pages; including clerk's papers.

RESPONSE TO ALLEGATIONS ONE –TWO.

Appellant has challenged only one finding of fact, No. 7; “Based on their observations the police have reason to believe that criminal activity has occurred or is about to occur and have an obligation to investigate that situation further.” (CP 3) Because he only challenges this one fact the other ten findings of fact are verities for this appeal. Unchallenged findings of fact following a CrR 3.6 suppression hearing are accepted as verities on appeal, and will not be reviewed by the appellate court. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). "Unchallenged findings of fact entered following a suppression hearing are verities on appeal." State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005); "our review in this case is limited to a de novo determination of whether the trial court derived proper conclusions of law from those [unchallenged] findings." State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (citing Hill, 123 Wn.2d at 647, 870 P.2d 313). Upon a trial court's denial of a suppression motion, this court will review challenged findings of fact for substantial evidence, review challenged conclusions of law de novo, and determine whether the findings support the conclusions. State v. Garvin, 166 Wn.2d 242, 249,207 P.3d 1266 (2009). Substantial evidence is "a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644,870 P.2d 313 (1994). Further, "conclusions entered ...

following a suppression hearing carry great significance for a reviewing court." State v. Collins, 121 Wn.2d 168, 174,847 P.2d 919 (1993).

This court may affirm a trial court's denial of a suppression motion "on any ground supported by the record, even if the trial court made an erroneous legal conclusion." State v. Avery, 103 Wn. App. 527,537, 13 P.3d 226 (2000).

The sequence of the actions of these two police officers is very important in this case. This is not a situation where the police on some hunch actually pulled over a moving vehicle. This factual setting was no different than an officer walking up to a citizen sitting a bench on the street at night and shining his flashlight or has been addressed in numerous cases a car that was just sitting when the officers approach. The actions of the officers and reactions and flight of the two of the occupants of the vehicle in question were almost simultaneous.

In State v. Mote, 129 Wn.App. 276, 120 P.3d 596 (2005) a police officer observed a car at night parked with the dome light on and two occupants this was in an area experiencing drug activity. The officer testified that the actions of the car/occupants were not in and of themselves consistent with "criminal activity" but that his hunches about this type of factual setting had resulted in criminal activity being found in about half of the contacts. The officer made these "social contacts" as a routine. The court in Mote ruled;

Not every encounter between a police officer and a private individual constitutes an official intrusion requiring objective justification. United States v. Mendenhall, 446 U.S. 544, 551-55,

100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Article I, section 7 permits social contacts between police and citizens. Young, 135 Wn.2d at 511, 957 P.2d 681. 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 or an investigative detention. Young, 135 Wn.2d at 511, 957 P.2d 681; Mendenhall, 446 U.S. at 555, 100 S.Ct. 1870; State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). This is true even when the officer subjectively suspects the possibility of criminal activity, but does not have suspicion justifying a Terry stop. O'Neill, 148 Wn.2d at 574-75, 62 P.3d 489. Police officers must be able to approach citizens and permissively inquire into whether they will answer questions as part of their "community caretaking" function. State v. Nettles, 70 Wn.App. 706, 712, 855 P.2d 699 (1993).

Pimental bears the burden of establishing that a seizure occurred in violation of article I, section 7. State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009). Under article 1, section 7 of the Washington State Constitution, a person is "seized" when by means of physical force or show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter. State v. O'Neill. 148 Wn.2d 564, 574, 62 P.3d 489 (2003). This standard is "a purely objective one, looking to the actions of the law enforcement officer." State v. Young. 135 Wn.2d 498, 501, 957 P.2d 681 (1998). Police actions that will likely result in a seizure include:

"[T]he 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 Wn.2d at 512 (quoting United States v.

Mendenhall. 446 U.S. 544, 554-55, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)).

A "social contact" does not amount to a seizure. Harrington, 167 Wn.2d at 664- 65. A social contact is a type of interaction that "occupies an amorphous area 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." Harrington, 167 Wn.2d at 664. Without more, engaging a pedestrian in conversation in a public place does not raise the encounter to an investigatory detention requiring an articulable suspicion of wrongdoing. Young, 135 Wn.2d at 511; State v. Ellwood, 52 Wn.App. 70, 73, 757 P.2d 547 (1988). Likewise, no seizure occurs when an officer approaches a parked car, asks an occupant to roll the window down, and asks questions or asks for identification. See e.g., O'Neill. 148 Wn.2d at 579-81 (occupant not seized when officer asked him to roll down the window, asked him to try to start his vehicle, then asked for identification); State v. Thorn. 129 Wn.2d 347, 354, 917 P.2d 108 (1996), overruled on other grounds by O'Neill. 148 Wn.2d at 579 (no seizure when police officer asked the driver of a parked car, "'Where is the pipe?'" after seeing a flicker of light); State v. Mote. 129 Wn.App. 276, 292, 120 P.3d 596 (2005) (no seizure when officer asked occupants of a parked car what they were doing and for identification). The focus of the inquiry is not on whether the defendant's movements are confined due to circumstances independent of the police action, but on whether the police conduct was coercive. Thorn. 129 Wn.2d at 353.

The question of whether police conduct amounts to a seizure is a mixed question of law and fact. Harrington, 167 Wn.2d at 662. This court will give great deference to the trial court in resolving the facts, but the ultimate determination of whether those facts constitute a seizure is one of law that we review de novo. Thorn, 129 Wn.2d at 351. Unchallenged factual findings are treated as verities on appeal. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

Pimental contends that the officer's action of pulling in behind the vehicle elevated the encounter to a seizure and further that there was no basis for this "seizure." But in deciding what constitutes a seizure, our courts have consistently required some overt show of force or intrusive action above and beyond an officer approaching a vehicle and for example asking questions or asking for identification. See e.g., State v. DeArman, 54 Wn.App. 621, 624, 774 P.2d 1247 (1989) (seizure occurred when police pulled behind another vehicle and activated emergency lights); Ellwood, 52 Wn.App. at 73 (seizure occurred when police told suspect to "[w]ait right here' "); State v. Sweet, 44 Wn.App. 226, 230, 721 P.2d 560 (1986) (seizure occurred when officer called out, "Halt! Police"). Here this initial encounter was changed by the actions of the other occupants of the car there was no progressive intrusion by the officer. In Harrington, a police officer made a U-turn, got out of his patrol car, and approached the defendant Harrington while he was walking on the sidewalk. The officer asked to speak with Harrington and began asking him questions. A second officer arrived and stood seven or eight feet from Harrington.

Harrington, 167 Wn.2d at 660-61. The first officer asked Harrington to remove his hands from his pockets "to control Mr. Harrington's actions." Harrington, 167 Wn.2d at 667. The court determined at that point that a "reasonable person would not have felt free to leave due to the officers' display of authority." Harrington, 167 Wn.2d at 669-70. Likewise, in Soto-Garcia, the encounter became a seizure when the officer asked Soto-Garcia if he had cocaine on him and asked to search him. Soto-Garcia, 68 Wn.App. at 25.

The officer's initial intrusion, stopping near the suspect vehicle and turning on a spot light to illuminate the car, it was nighttime, was no more than necessary to ascertain what the occupants were doing. The officers would not have seized the occupants even if the driver had remained with his vehicle and the officers had approached and asked him for identification. this information.

The Supreme Court decision in O'Neill is analogous. In O'Neill, an officer approached a car parked in front of a store that was closed and had been recently burglarized. O'Neill, 148 Wn.2d at 571-72. The officer pulled up behind the car, activated his spotlight, and ran a computer check on the license plate. The officer learned that the car had been impounded within the last two months. O'Neill, 148 Wn.2d at 572. The windows of the car were fogged up, leading the officer to believe someone was in the car. The officer walked up to the driver's side door, shined his flashlight in the driver's face, and asked him to roll down the window. O'Neill, 148 Wn.2d at 572. After some discussion about what the driver was doing there, the

officer asked for identification. The driver, O'Neill, said he had no identification and his license had been revoked, and gave the officer a name that turned out to be false. O'Neill, 148 Wn.2d at 572. The officer asked O'Neill to step out of the vehicle, and subsequent events led to O'Neill's arrest. O'Neill, 148 Wn.2d at 572-73.

The court held that under article I, section 7, O'Neill was not seized until he was asked to step out of the vehicle. O'Neill, 148 Wn.2d at 574. The court "reject[ed] the premise that under article I, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a Terry stop." O'Neill, 148 Wn.2d at 577. The court concluded that before that point, the officer did not use physical force nor display any show of authority.

O'Neill, 148 Wn.2d at 577-78. The court observed:

The reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to rise to the level of a Terry stop. If that were true, then the vast majority of encounters between citizens and law enforcement officers would be seizures. O'Neill. 148Wn.2dat581.

Similarly in Mote, a police officer approached two people who sat in a car legally parked on a residential street late at night. The taillights and the interior lights of the car were on. Mote, 129 Wn.App. at 279-80. The officer parked behind the vehicle, approached the driver's-side window, and asked for identification from both occupants, who complied. Mote, 129 Wn.App. at 280-81. This court held that even

assuming that the officer used a spotlight when he approached the car, his actions would not constitute a seizure at that point:

[The officer] did not turn on his siren or overhead lights. He did not display his weapon or make any physical contact with [the defendant], and he was alone. [The defendant] was in a car parked in a public place .... [The officer] requested and did not demand [the defendant's identification. Thus his use of language and tone of voice did not change this encounter from a social contact into a seizure. Mote, 129 Wn.App. at 292.

It is important that this court remember that this totality of the actions on the part of the officers in this case prior to the flight of the two occupants was to turn on the spotlight and activate lights on the rear of the police vehicle, there were no similar lights activated on the front of the police car.

These four people were sitting in a car that was not running on a cold dark night, in high crime gang area and the **instant** the officer turned on the spotlight, occupants started to flee. Before the officers even made any physical contact with this car, before they even exited their vehicle, half of the occupants had run from the scene, one with what was probably a gun in the waist band of his pants, this person was identified as a known gang member with a violent past. Thereafter the remaining two occupants are seen both making furtive movements. And finally there was no actual search of Appellant that resulted in the seizure of the weapon in question. That weapon was observed in plain view by officers on the

opposite side of the car from where Appellant was seated. It was wedged between the back seat and a child seat as the officers were requesting Appellant exit the vehicle. Further investigation and testimony of the owner of the car, the first person who ran, tied the weapon to Appellant.

1. YPD Officers Morfin and Diaz were patrolling a high crime area known for gang activity.
2. OFC Morfin saw something suspicious and shined a spotlight on a parked car.
3. OFC Morfin someone run away from the car into a nearby apartment.
4. The officers saw someone exit the front passenger seat and run into the same apartment as the other person.
5. OFC Morfin thought he recognized the second person as a known gang member with a violent history.
6. The second person was running with his hands in front of him. Based on the training and experience of the officers this movement was consistent with someone trying to conceal a weapon in their waistband.

The challenged finding of fact is numerically the seventh fact listed it was preceded by the facts listed above. There is no doubt that the totality of the actions of the individuals associated with this car gave rise to an reasoned suspicion that some type of criminal activity had taken place or was taking place or had been interrupted by the officers. At the trial court and here again on appeal Mr. Pimental would have the court ignore all of the information that was before the officers and focus solely on the actions of he and the other remaining occupant of the car, the law does not dictate that type of review.

Appellant goes to great length to address the “stop” made by these officers. There was no stop made, there was obviously detention of the two

remaining occupants but by the time that had occurred there was more than sufficient articulable information before the officers to justify this detention. The officers were not required to simply ignore the two individuals in the car because their actions in isolation did not rise to a level which in and of itself would justify further detention. Obviously if the officers had rolled up on this car and the only thing that was presented to them were two persons in the back of a car this would be an illegal detention. Clearly that was not the case.

This situation literally erupted, in an instant, in front of these two officers and in the blink of an eye four persons become two in hiding in an apartment (one probably armed) and two making obvious movements as if they were attempting to hide or conceal or access something. There is no indication that the furtive movements of the two rear seat passengers was occurring prior to the other two individuals running from the scene. The chaos of the scene along with the time, location and knowledge regarding some of the persons from the vehicle justified the proactive actions of the officers to insure their safety. This court must remember that the two who fled entered the same apartment the other occupants of that residence were not known. From the record it is clear that this all occurred in a matter of a few minutes.

As elicited by defense counsel;

A I stopped short of the driveway so I wasn't directly behind the car. I was still facing southbound. My headlights were facing southbound. There is -- I was not blocking them in. The car was left on the street

essentially – (RP 19)

...

Q Okay. So at the time you activated your emergency lights and illuminated the spotlight you exited the car with your weapon drawn.

A Yes.

Q If Mr. Pimental chose to exit the car and leave was he free to do so at that time?

A He's free to leave at that point. He's free to leave -- when we park up to the car, a spotlight comes on, he's free to go. There's no detention, there's no traffic stop there. What's going on is there's an investigation. Something's going on that's obviously out of the normal. We get out of the car, the dude takes off running, the second guy takes off running, there's a little bit more. Something else is going on. After I say, this guy's, you know, over the air this guy's a gang member, okay. There's something more, okay, based off my gang experience, gang contacts, and knowing the area, at that point I don't know if he's being victimized in back of the car or what's going on. At the point they start reaching down to the ground, the show stops. I don't know what you're doing, you better put your hands back there. Now, you're not free to go because I don't know what you're doing. (RP 19-20)

...

Q And at that time that you illuminated your spotlight you were able to see the backseat passengers make movements, correct?

A Yes.

Q And at that time you were still in your vehicle?

A No. I'd gotten out of my vehicle -- **as my light came on the first subject comes -- takes off running from the right front fender. The second subject exits the car and begins running with something -- carrying something in front of him. At that point I'm out of my vehicle,** so I'm right around the front side of my car still on the street about 20 feet away from the rear of the vehicle and Mr. Pimentel is in, and I see them reaching down, him and Guillen reaching down to the floorboard of the car. (RP 17)

...

A They're sitting right next to each other. No separation between both bodies. Mr. Pimentel was sitting on the left side of the rear seat closer to the center, not completely to the door and the other guy later identified as Marcos Mendoza Guillen, who goes by Felon, another documented Sureno gang member who was sitting right next to him

on the seat. There was -- so they were sitting -- Marcos was in the middle of the car and in the back was Mr. Pimental to the left of him.

Q And so they appeared to sitting abnormally close together?

A Very, yes.

Q Alright. Tell us what happened after they put their hands up.

A My attention was split in two different directions here so I these subjects in the back who I don't know what's going on yet. I just know this is a huge safety concern. My partner is to the north and to the west. She's keeping an eye on where the subject ran into, so the subject eventually comes out of the apartment complex. He starts asking questions as to who we are, what we're going, who are you guys, alluding to the fact that he didn't know who we were when we pulled up. Now, he is taken into custody, pulled back for questioning, subjects in the car, I approach, other officers arrive. Now, as I come around the left side of the car, I opened -- I opened the door. They still had their hands on the backseat of the car. I asked Mr. Pimental to slide out of the car. He leans forward and threw the backside, the view that I have, I see a gun pointing upwards with the barrel pointing upwards behind the child seat. I knew then that was the explanation for why they were sitting close. There was a child seat on the right rear side of the car. So -- but you could still -- there was a gap in the backside of that child seat where you could see the gun. So I asked him to come out of the car, get out of the car. This is definitely has alerted the situation to a higher degree. He is taken into custody, put in cuffs. (RP 13-14)(Emphasis mine.)

A reasonable safety concern exists "when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting Terry v. Ohio, 392 U.S. 1, 21-24, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." Id. (alterations in original) (quoting Terry, 392 U.S. at 27).

"A founded suspicion is all that is necessary." State v. Harrington, 167 Wn.2d 656, 668, 222 P.3d 92 (2009) (emphasis omitted) (quoting State v. Belieu, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989)). While "generalized suspicion is insufficient to justify a frisk," State v. Bee Xiong, 164 Wn.2d 506, 511, 191 P.3d 1278 (2008) (quoting State v. Galbert, 70 Wn.App. 721, 725, 855 P.2d 310 (1993)), "officers in the field must routinely look at the potentially criminal roles of individuals in context, not in isolation," State v. Horrace, 144 Wn.2d 386, 397, 28 P.3d 753 (2001). Officers may direct passengers out of a vehicle stopped for a traffic infraction without implicating privacy rights if the officers are able to "articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens." State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999).

It is hard to imagine a factual scenario that embodies safety concerns more than the one presented to the trial court. Two officers at night in a high crime gang area facing four persons, two who run, one with what was apparently a gun in his waistband and two more still in the car making furtive movements, not just the Appellant but both remaining occupants. To quote the officer "I just know this is a huge safety concern." In this progressing situation once the officers observed on two persons flee into a nearby residence and the two remaining individual moving furtively they were able to justify an investigatory detention because they could point to "specific and articulable facts which, taken together

with rational inferences from those facts, reasonably warrant that intrusion." Mendez, 137 Wn.2d at 223 (quoting Terry, 392 U.S. at 21). The necessary level of articulable suspicion 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 State is fully aware that it has the burden at a suppression hearing to produce facts justifying the police action. State v. Armenta, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); State v. McCord, 19 Wash.App. 250, 255, 576 P.2d 892 (1978) that was done so in this case.

Even if this court were to strike the one challenged fact, the remaining facts, which are now verities, are in and of themselves sufficient to warrant the actions of the officers and sufficient to allow the trial court and this court to find the actions of the officers were justified and support the denial of the suppression motion. Once again those facts include;

The officers "were patrolling a high crime area known for gang activity; one occupant of the vehicle immediately ran from the car upon the officers turning on their spotlight; this was followed by a second occupant of the vehicle exiting the car and running into the same apartment as the first individual, this second runner was thought, by one of the officers, to be a known gang member with a violent history; the second runner was holding his hands in a manner that was consistent, based on the officers' training and knowledge, that was consistent

with a person hiding a weapon; the officers noticed furtive movements by both remaining occupants of the car that these movements provided safety concerns for the officers and that on the officers' training and experience led them to reasonably believe that one of the individual remaining may be armed with a firearm. (It is very noteworthy that this unchallenged finding states "firearm" not "weapon."); the remaining backseat passengers were removed from the car, "[t]his was also done for safety reasons because the previously witnessed furtive movements lead to the reasonable belief that a weapon might be located in the vehicle." (CP 3)

Before the officers were able to even touch the Appellant for any type of pat down they observed the weapon in a location which corroborated the furtive movements as well as placing before the officers one more fact that established the detention and continued detention of Pimental was based on reasoned suspicion.

This court is aware and has previously ruled that flight is may be admitted as evidence of guilt, the interpretation of the actions of the passengers of this car by the officers should not be judge by a different standard, State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27 (2005), review denied 155 Wn.2d 1018, 124 P.3d 659 (2005) Evidence of flight is generally admissible as tending to show guilt, but the inference of flight must be "substantial and real" not "speculative, conjectural, or fanciful." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The

evidence must be sufficient so as to create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Bruton, 66 Wn.2d at 112-13. Here we have seasoned officers who are familiar with the area and the residents of the area, most specifically the gang that inhabits that section of town and the members of that gang.

State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (Wash. 2004), “This court may affirm a lower court's ruling on any grounds adequately supported in the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).”

While Appellant does not challenge the actual finding of guilt the same standards apply regarding the information, facts, exhibits and testimony presented to the trial court during the CrR 3.6 hearing. The State can prove its argument through the use of both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986) one form of evidence is no less valuable than the other. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here there was proof of possession of the weapon by an actual occupant of the car. This gun was observed by the officers from the exterior of the car, there was no physical search of the Appellant which resulted in the

seizure of the weapon. State v. Blewitt, 37 Wn. App. 397, 680 P.2d 457 (1984);

Whether a person had constructive possession of property, and thus dominion and control over it, is determined by viewing "the totality of the situation." State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Zeno was proved to be an employee of the owner of the stolen property. As such, he had the implied responsibility of exercising control over the employer's property as against all others. The evidence presented was sufficient to support the conviction. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

## V. CONCLUSION

For the reasons set forth above this court should deny allegation. The trial courts reliance on Horace, supra, was not misplaced and even if this court were to determine that reliance was misplaced the law cited above supports those actions. The actions of the trial court were controlled by clearly settled case law, were of a factual nature and were supported by the evidence and/or were a matter of judicial discretion. The actions of the trial court should be upheld, the State's Motion on the Merits should be granted, and this appeal should be dismissed.

Respectfully submitted this 12<sup>th</sup> day of January 2015,

s/ David B. Trefry  
David B. Trefry WSBA # 16050  
Deputy Prosecuting Attorney  
Yakima County, Washington  
P.O. Box 4846, Spokane, WA 99220  
Telephone (509) 534-3505  
Fax (509) 534-3505  
[David.Trefry@co.yakima.wa.us](mailto:David.Trefry@co.yakima.wa.us)

DECLARATION OF SERVICE

I, David B. Trefry state that on January 12, 2015, emailed a copy, by agreement of the parties, of the Respondent's Brief, to Mr. David Gasch at [gaschlaw@msn.com](mailto:gaschlaw@msn.com) and deposited in the United States mail on this date to;

Adrian Pimental, Jr.  
c/o Green Hill Training School  
375 SW 11<sup>th</sup> Street  
Chehalis WA 98532

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

DATED this 12<sup>th</sup> day of January January, 2015 at Spokane, Washington,

s/David B. Trefry  
By: DAVID B. TREFRY WSBA# 16050  
Deputy Prosecuting Attorney  
Yakima County  
P.O. Box 4846 Spokane, WA 99220  
Telephone: 1-509-534-3505  
Fax: 1-509-534-3505  
E-mail: [David.Trefry@co.yakima.wa.us](mailto:David.Trefry@co.yakima.wa.us)