

**FILED**

JUN 23, 2016  
Court of Appeals  
Division III  
State of Washington

NO. 33723-5-III

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

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STATE OF WASHINGTON,

Respondent,

v.

BRUCE ADAM MASON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR STEVENS COUNTY

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APPELLANT'S REPLY BRIEF

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Travis Stearns  
Attorney for Bruce Mason

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## A. INTRODUCTION

When the deputies approached Bruce Mason, they were only acting in the capacity as community caretakers. Instead, the deputies seized Mr. Mason and conducted a search of his person. The result of the search for weapons yielded a small pill bottle, which the deputies removed from Mr. Mason's pocket without attempting to determine whether it was a weapon. The officers then opened the bottle, removed the plastic bag and tested the contents for controlled substance, despite this not being immediately apparent from the outside of the bottle.

Because the State exceeded the scope of their ability to seize and search Mr. Mason, this Court should reverse.

## B. ARGUMENT IN REPLY

*1. Mr. Mason was seized when the police ordered him to turn around, not move and show the deputies his hands.*

The State does not contest that a seizure took place when the police ordered Mr. Mason turn around, not move and show them his hands. This is consistent with the law, which recognizes it is reasonable for a person to believe a show of force is a seizure. *State v. Thorn*, 129 Wn.2d 347, 351–52, 917 P.2d 108 (1996) (citing *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

When law enforcement arrived at the house, they immediately

attempted to seize Mr. Mason, ordering him to “turn around, don’t move, show me your hands.” CP 55. This Court should analyze the propriety of the stop from this agreed point of seizure.

The seizure of Mr. Mason exceeded the scope of article I, § 7. Because Mr. Mason was not engaged in criminal activity when he was detained, the State must justify the stop under the community caretaking function exception to the warrant requirement, and not under the *Terry* standard, as the State attempts to do in the reply brief. Respondent’s brief, 4.

The community caretaking function allows law enforcement to respond to emergency calls for aid and to conduct routine checks for health and safety. It does not authorize the immediate seizure which occurred here. The State failed to justify law enforcement’s actions with facts sufficient to support a belief Mr. Mason’s immediate, warrantless seizure was necessary for them to perform their community caretaking function. As such, Mr. Mason’s seizure was constitutionally improper and the evidence seized following the impermissible stop should be suppressed.

2. *Bruce Mason was not suspected of committing a crime.*

The State argues law enforcement had the right to forcibly detain and search Mr. Mason because he was causing a disturbance. Respondent's brief, 4. The State justifies the search of Mr. Mason, relying upon *Terry v. Ohio*, which restricts police conduct by allowing them to briefly stop and detain a person without a warrant if the officer has reasonable, articulable based on specific, objective facts, that the person is armed. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

This standard has been recognized in Washington, however, to allow for a search where there is reasonable suspicion a person has committed a crime. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Here, Mr. Mason was only alleged to have been involved in a loud argument with his father before the police arrived, conduct which does not amount to criminal activity. CP 4, 55.

The argument that the police were engaged in a criminal investigation when they detained Mr. Mason is unsupported by the record. Respondent's brief, 5. The record instead indicates the police were engaged in a non-criminal investigation. CP 55, RP 29. The record established the police were called to the house investigate a "Disturbance – Loud argument in progress." CP 55. Dispatch had

informed the officers Mr. Mason's father had called because he and his son were yelling at each other and he wanted his son to leave. CP 4. By the time the police had arrived at the house, Mr. Mason's father had already called back to inform dispatch the argument he and his son were having was over. RP 29-30. There is no suggestion Mr. Mason was either armed or ever engaged in criminal conduct before he was detained. No information appears to have ever been provided to police to suggest Mr. Mason was either committing a crime or a danger to others.

3. *The proper standard for analyzing non-criminal stops is the community caretaking function.*

Because Mr. Mason was not a criminal suspect, the police only have the limited authority provided to them as community caretakers. The community caretaking function allows law enforcement to provide emergency aid to persons in need or to conduct routine checks on health and safety. *See State v. Kinzy*, 141 Wn.2d 373, 387, 5 P.3d 668 (2000).

Police officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function, such as rendering aid or assistance through a health and safety check. *Id.* at 389. The community caretaking function will

not generally permit a seizure unless the police provide reasons which support an actual and reasonable belief there is a risk to a person's health and safety. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

It is important to emphasize that when law enforcement arrived at Mr. Mason's father's house, the officers saw Mr. Mason standing by himself in the driveway. CP 55. No one else was present. RP 6. No argument was taking place and there was no indication of any assaultive behavior. *Id.* Even analyzed in conjunction with the dispatch and other knowledge the officers had when they arrived at the house, there is no indication Mr. Mason was or had been engaged in any criminal activity.

Because the police were only dispatched to deal with a "disturbance" and not a criminal action, police action must be justified under the community caretaking function. Reliance upon the "reasonable suspicion" standard is misplaced.

4. *The police did not have the right to remove the small pill bottle from Mr. Mason's pocket.*

Even under *Terry*, the police exceeded the scope of a lawful search. For a *Terry* frisk to be permissible, the State must show (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify

the protective frisk for weapons, and (3) the scope of the frisk is limited to protective purposes. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (citing *Duncan*, 146 Wn.2d at 172). The officer must have a reasonable suspicion the suspect presents a risk to safety to justify a frisk. *See id.*

A *Terry* frisk is strictly limited in its scope to a “pat down” search of the outer clothing for weapons. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994) (citing *Terry*, 392 U.S. at 29–30). If the officer feels an item of questionable identity that has the size and density which suggests it may be a weapon, the officer may only take such action as is necessary to examine such object. *Id.* at 113. While manipulation of the items is allowed to the extent necessary to determine if the object is a weapon, “[o]nce it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent.” *See id.* (quoting *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980)).

The State argues Mr. Mason’s refusal to show his hands and step away from a vehicle created a reasonable belief he had armed himself. Respondent’s brief, 7. For a search to be sustained, however, the State must be able to point to aggressive or threatening words or

behavior which suggest Mr. Mason was armed and presented a safety risk. *See, e.g. State v. Setterstrom*, 163 Wn.2d 621, 183 P.3d 1075 (2008) (no safety risk where the defendant displayed nervous and fidgety behavior and lied about his name, but did not do or say anything threatening). Instead, the State seeks to justify the search of Mr. Mason because of his surprised look and disobedient behavior. Instead, this Court should look to the lack of any aggressive or hostile words or actions directed at the police or others which may have justified a frisk. *See Id.*, 626-27. With no reason to believe Mr. Mason was a danger, the search of his pocket was unjustified.

5. *The small pill bottle removed from Mr. Mason's pocket could not have been a weapon.*

The State justifies the removal of the small pill bottle from Mr. Mason's pocket because the police were unable to determine whether it was a weapon. Respondent's brief, 7.

A police officer may only reach into a suspect's clothing to investigate if the suspected object "*has the size and density* such that it might or might not be a weapon." *See Hudson*, 124 Wn.2d at 112 (emphasis added). The State has the burden of demonstrating specific and articulable facts, following an investigation of the object, which led

the police to believe the object might be a weapon. *See, e.g., State v. Fowler*, 76 Wn. App. 168, 170, 883 P.2d 338 (1998).

The State failed to meet this burden. The record established the deputy did not attempt to determine the size, density, shape, weight, or any other measure of the small pill bottle before removing it from Mr. Mason's pocket. RP 8-10. Unlike the officers in *Fowler*, the deputy did not report any characteristics of the object which might lead to belief it was a weapon other than that it was "hard." RP 8-10, 24. The deputy even admitted he did not manipulate the object at all. RP 8-11.

Instead, the deputy removed the small pill bottle within two seconds of searching Mr. Mason. RP 23. Without some determination that the size and density of the small pill bottle was similar to a possible weapon, the deputy should not have removed it. *See Hudson*, 124 Wn.2d at 112. The record does not support the conclusion Deputy Coon thought the object could have been a weapon.<sup>1</sup> CP 55. Deputy Coon removed the small pill bottle from Mr. Mason's pocket without having any reason to believe it was a weapon and without taking the time to

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<sup>1</sup> To the extent it holds otherwise, finding of fact D is not supported by the evidence.

investigate whether or not the small pill bottle had any weapon-like characteristics. RP 8-11.

6. *The plain view exception does not apply to the contents of the small pill bottle.*

While the State exclaims the small pill bottle seized from Mr. Mason was transparent, this is not supported by the record. The record instead establishes that it was not until the deputy had engaged in a multitude of steps detailed in the Court's findings of fact that this was actually verified. CP 56.

To satisfy the immediate recognition prong of the *Terry* exception, the State must prove the officer had probable cause to believe the item was contraband. *State v. Tzintzun-Jimenez*, 72 Wn. App. 852, 857, 866 P.2d 667 (1994) (citing *Arizona v. Hicks*, 480 U.S. 321, 325, 107 S. Ct. 1149, 1153, 94 L. Ed. 2d 347 (1987)). This means probable cause to believe the item was contraband was developed while simultaneously determining the item was not a weapon. *Id.* (citing *Minnesota v. Dickerson*, 508 U.S. 366, 376, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)); *see also State v. Hobart*, 94 Wn.2d 437, 440, 617 P.2d 429 (1980) (once the officer had ascertained the objects were not weapons, the permissible scope of the search ended and any further search required probable cause).

The record does not establish this immediate recognition. It is not clear the deputy could see what was inside the small pill bottle, other than a plastic bag. RP 17-19; CP 56. It was only by removing the plastic bag from within the small pill bottle, removing the suspected substance from within the bag, then performing a chemical test on the substance to determine whether the substance was illegal that the deputy knew the substance he had seized was contraband. *Id.* The nature of the object as contraband was not immediately apparent and these facts do not support a conclusion to the contrary.

Once the deputy knew the small pill bottle he removed from Mr. Mason's pocket was not a weapon, the investigation should have stopped. RP 14; *see Hobart*, 94 Wn.2d at 440. The plain view exception to the warrant requirement did not justify the warrantless seizure and opening of the small pill bottle seized from Mr. Mason. Mr. Mason's right to privacy was invaded by this seizure and the evidence seized from within the small pill bottle should have been excluded at trial.

### C. CONCLUSION

The police lacked the cause necessary to seize and search Mr. Mason. He was convicted solely on evidence which was taken from

him after he was seized, put into handcuffs, and searched without a warrant.

The deputies removed the small pill bottle from Mr. Mason's pocket without justification. It did not present as a weapon and the deputy did not take the time to determine otherwise.

Once it had been removed, it was not immediately apparent the contents of the bottle contained contraband. Because this is a requirement of the plain view exception, the State has also failed to justify the deputy's decision to open the pill bottle without a warrant.

Because Mr. Mason's right to privacy was violated in order to seize the evidence used against him, Mr. Mason's conviction should be reversed.

DATED this 22<sup>nd</sup> day of June, 2016.

Respectfully submitted,



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TRAVIS STEARNS (WSBA 29935)  
Attorney for Bruce Mason

Washington Appellate Project (91052)  
1511 Third Avenue, Suite 701  
Seattle, WA 98101

Telephone: (206) 587-2711  
Fax: (206) 587-2710

Email: [travis@washapp.org](mailto:travis@washapp.org)

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	)	
v.	)	NO. 33723-5-III
	)	
BRUCE MASON,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23<sup>RD</sup> DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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COLVILLE, WA 99114-2862		

**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF JUNE, 2016.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
Phone (206) 587-2711  
Fax (206) 587-2710