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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.

---

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

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APPELLANT'S OPENING BRIEF

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## A. INTRODUCTION

The State invaded Bruce Mason's right to privacy when law enforcement ordered him to stop and put his hands up and then subjected him to a frisk without reason to believe he had committed or was about to commit an illegal act. When law enforcement arrived at the house, Mr. Mason was standing by himself in the driveway. Despite there being no danger, the police immediately ordered Mr. Mason to turn around, not move and show them his hands. When he failed to respond to the officer's order, he was taken to the ground.

The Officers then detained Mr. Mason and further violated Mr. Mason's privacy rights when they conducted a "weapons search," finding only a small, plastic pill bottle. Despite the fact this bottle was clearly not a weapon, the police removed it from Mr. Mason's pocket and searched it, finding a controlled substance.

The trial court erred in concluding that the police had sufficient facts to support reasonable suspicion to conduct a stop. The trial court further erred when it found the plain view seizure of the evidence was justified. The court's ruling is contrary to the strong privacy protections of article I, section 7 and should be reversed.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress the controlled substances contained in the small, plastic pill bottle seized from Mr. Mason's pocket by police.

2. The trial court erred in concluding there was sufficient suspicion to conduct a *Terry*-stop. (Conclusions of Law, footnote 4).

3. The trial court erred in finding that Mr. Mason was "escalated." (Finding of fact C).

4. The trial court erred in concluding the frisk of Mr. Mason was lawful. (Conclusion of Law A).

5. The trial court erred in finding Mr. Mason was "still not under control" after two officers put him on the ground, face down, and cuffed him. (Finding of fact D).

6. The trial court erred in finding "The defendant was face down, with his arms under his body as Deputy Coon removed the hard object" when testimony established Mr. Mason had his hands cuffed behind his back before the frisk began. (Finding of fact E).

7. The trial court erred in concluding the pill bottle Deputy Coon felt in Mr. Mason's pocket had the size and density of a possible

weapon and “was within the scope of the pat down.” (Conclusion of law A).

8. The trial court erred in finding that Deputy Coon thought the pill bottle in Mr. Mason’s pocket “could have been a weapon” when the court also found Deputy Coon did not know what the object was before removing it and heard testimony that Deputy Coon did not manipulate the object at all before removing it two seconds after touching it. (Finding of Fact D).

9. The trial court erred in concluding the plain view exception to the warrant requirement justified the seizure of evidence. (Conclusion of Law B).

10. The trial court erred in entering findings of fact F, G, and H.

12. The trial court erred in concluding that there was probable cause for a warrantless arrest of Mr. Mason. (Conclusion of law C).

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Law enforcement has authority to perform an investigatory stop only if it has reasonable suspicion based on specific and articulable facts the person they have seized has or is about to commit a crime. Did the police lack reasonable suspicion based upon clear and articulable facts a crime had or was about to be committed to conduct a stop when

they were called to a non-criminal investigation of a “loud argument in progress?”

2. Law enforcement may perform a frisk if they have reasonable suspicion the person they have seized in an investigatory stop is armed and dangerous. The scope of this search is strictly limited to a cursory pat down for weapons. Did the police exceed the scope of a lawful *Terry* frisk when they removed a small pill bottle from Mr. Mason’s pocket two seconds after the officer touched it, prior to the officer making a determination the pill bottle was a weapon or could be dangerous?

3. The plain view exception to the warrant requirement only justifies the seizure of evidence if the police had prior justification for the intrusion and the items seized are immediately recognizable as contraband. Did the police fail to meet the standards for the plain view exception to apply when the police exceeded their authority to seize evidence and the evidence was not immediately apparent as contraband?

#### D. STATEMENT OF THE CASE

On April 18, 2015, Bruce Mason was at Ray Mason's home in Chewelah, Washington, when an argument broke out between them. CP 55, RP 29<sup>1</sup>. Ray is Mr. Mason's father.<sup>2</sup> At some point, Ray decided to call the police. RP 29. Mr. Mason and his father continued talking and within five to ten minutes, prior to the arrival of the police, Ray called the police back telling them to disregard his first call because the conflict between he and his son had been resolved by promises Mr. Mason had made to his father. RP 29-30.

Deputy Coon and Officer Pankey were dispatched to the "Disturbance – Loud argument in progress" complaint in separate vehicles. CP 55. Deputy Coon's report reflected that dispatch had advised him that "RP Raymond H Mason 02/03/33 called and stated that his son Bruce Mason was there and yelling at him and that he wanted him to leave" CP 4. Before they arrived, the police did not have notice Ray had called back asking to disregard his call. CP 55. Ray told

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<sup>1</sup> The transcript is contained in one volume. All references to the transcript will be referred to as "RP" and then by page number within the volume. All references to the clerk's papers will be referred to as "CP" and then by page number.

<sup>2</sup> Counsel will refer to Bruce Mason's father Ray Mason by his first name to avoid confusion as Bruce Mason and Ray Mason share the same last name. No disrespect is intended.

the police the argument was no longer a problem soon after they arrived. RP 30-31.

When the officers arrived, Mr. Mason was alone in the driveway standing near his pickup. CP 4, 55. While Deputy Coon did not know Mr. Mason before this encounter, Officer Pankey had “quite the history with him.” RP 6. Deputy Coon said that when he and Officer Pankey approached, Mr. Mason’s eyes were big and he looked desperate. CP 55. There is no record of how Officer Pankey knows Mr. Mason or in what context.

Officer Pankey immediately ordered Mr. Mason to “turn around, don’t move, show me your hands.” CP 55. Mr. Mason ignored the order, turned, opened his car door, and reached inside. CP 55. Officer Pankey grabbed Mr. Mason and put him on the ground, face down. RP 6-7. Deputy Coon then “double locked” Mr. Mason’s hands in handcuffs behind his back. CP 4; RP 7.

Deputy Coon proceeded to search Mr. Mason while he was face-down on the ground, in what Deputy Coon described as a “weapons frisk.” RP 7. Deputy Coon felt the pill bottle that was in Mr. Mason’s right pants pocket, and removed it. CP 4; RP 9, 22.

Deputy Coon testified that when performing the pat-down, he could not tell what the object was. RP 8, 22-24. He said “I felt a hard object that I couldn’t identify,” and that “I didn’t know what it was.” RP 8. In fact, when defense counsel asked Deputy Coon about what size he estimated the object to be, the following interaction took place:

Q: Did you make an attempt to try to get an idea of . . .

A: Nope

Q . . . the dimensions of it?

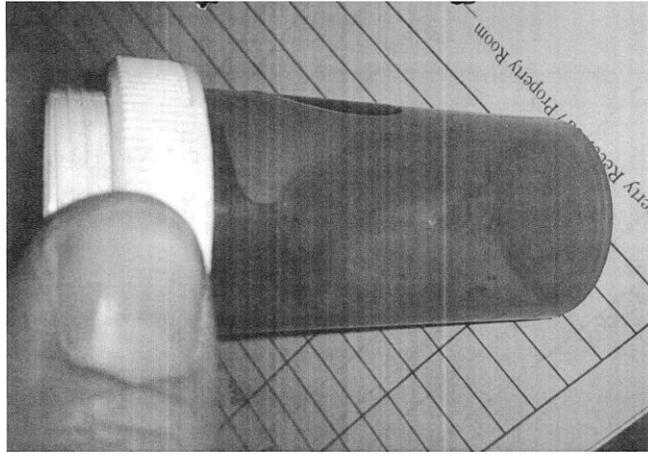
A: Nope, I didn’t manipulate it at all. I felt something hard, worked it up the pocket, removed it.

Q: So before – before you made a decision that it could’ve been a weapon, you didn’t touch it at all to see whether or not it was a – a big item or get any idea of the size of it?

A: Nope.

RP 9.

Deputy Coon testified he merely touched the hard object, then worked it out of the pocket in about two seconds. RP 23. The “hard object” Deputy Coon removed from Mr. Mason’s pocket turned out to be a small, plastic pill bottle:



CP 38.

Once removed, Deputy Coon knew the pill bottle was not a weapon. RP 14. Deputy Coon noticed that the pill bottle was unlabeled. CP 4. Deputy Coon also noticed that the vial had a Monster Energy Drink label on it, and believed that was a common practice for marking narcotics. RP 16. The amber pill bottle had a plastic baggie inside of it, which in turn had a small crystal-like substance in it. RP 15-16. Deputy Coon asked Mr. Mason what was in the pill bottle, and Mr. Mason answered it was his personal smoking tobacco. CP 4; RP 14. Deputy Coon believed the pill bottle contained methamphetamine, so he arrested Mr. Mason for possession of a controlled substance and took him to the police station. CP4; RP 19.

Later, at the station, Deputy Coon opened the pill bottle, removed the plastic bag within, opened the bag, and removed a piece of

the substance. RP 18. Deputy Coon performed a field test to determine whether the substance could be a controlled substance. RP 18.

According to Deputy Coon, the test showed the substance he found inside the pill bottle tested presumptively positive for methamphetamine. RP 18.

Mr. Mason moved to suppress the evidence unlawfully seized from him. CP 6. After hearing evidence, the court denied Mr. Mason's motion to suppress. CP 54, 59; RP 52.

#### E. ARGUMENT

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. Because the police violated Mr. Mason's right to privacy in order to seize this evidence, Mr. Mason's conviction should be reversed.

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. Article 1, section 7 is “grounded in a broad right to privacy” to protect citizens from governmental intrusion into their private affairs without a valid warrant. *See State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014).

Only if the State is able to show that a search or seizure falls within one of the jealously guarded and carefully drawn exceptions to the warrant requirement will the failure to secure a warrant be excused. *See id.* at 868-69 (citing *State v. Miles*, 160 Wn.2d 236, 244, 156 P.3d 864 (2007); *State v. Rife*, 133 Wn.2d 140, 150–51, 943 P.2d 266 (1997)).

Suppression of the illegally seized evidence is required where there is no warrant or recognized exception. *See, e.g., In re Maxfield*, 133 Wn.2d 332, 343, 945 P.2d 196 (1997) (citing *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). Under the exclusionary rule, if the initial stop was unlawful, evidence obtained in the subsequent search is inadmissible as “fruit of the poisonous tree.” *State v. Eisfeldt*, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) (citing *Wong Sun v. U.S.*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

When reviewing a trial court's denial of a CrR 3.6 suppression motion, the appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings of fact support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (citing *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). The Court of Appeals reviews the trial court's

conclusions of law de novo. *Garvin*, 166 Wn.2d at 249 (citing *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002)).

**1. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS THE PILL BOTTLE SEIZED FROM MR. MASON BECAUSE THE POLICE EXCEEDED THE LIMITED SCOPE OF THE COMMUNITY CARETAKING FUNCTION.**

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). “[W]hether an encounter made for noncriminal, non-investigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform the ‘community caretaking function.’” *Id.* (citing *Kalmas v. Wagner*, 133 Wn.2d 210, 216-17, 943 P.2d 1369 (1997)). The risk of abuse requires courts to cautiously apply the community caretaking exception. *Id.*

The community caretaking function is totally divorced from criminal investigation. *Kinzy*, 141 Wn.2d at 385 (citing *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980)). 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. *See Kinzy*, 141 Wn.2d 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. *See State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004) (community caretaking function did not permit the police to enter defendant's trailer even after the property owner called police to have defendant removed, informed the police of defendant's outstanding arrest warrant, and police entered after hearing shuffling sounds); *see also State v. Williams*, 148 Wn. App. 678, 201 P.3d 371 (2009) (impermissible application of the community caretaking function when police failed to point to factors which supported their assertion someone required immediate medical assistance when the 911 caller never mentioned that anyone else was injured and the police did not see or hear anyone who needed assistance).

The State exceeded the permissible scope of their community caretaking function while responding to Ray's disturbance complaint. While law enforcement had the authority to investigate Ray's call regarding a "loud argument", their investigation should have been

strictly limited to rendering aid or performing a health and safety check. *See Kinzy*, 141 Wn.2d at 389.

When law enforcement arrived at Ray's house, Deputy Coon and Officer Pankey saw Mr. Mason, standing by himself in the driveway. CP 55. They did not see anyone else present. RP 6. There was no indication of an ongoing argument. *Id.* They did not witness any assaultive behavior. *Id.* Like *Williams*, where the police could not point to any reason to justify their subjective belief someone was in immediate need for medical assistance, the lack of anyone's need for assistance here requires this Court to find the State exceeded the scope of the community caretaking function when they ordered Mr. Mason to turn around, not move, and show the officers his hands. CP 55.

A reasonable person would believe that this 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 conducted this seizure of Mr. Mason, law enforcement only had authority to *permissively* ask Mr. Mason if he would stop and answer questions about the call they had received. *See Kinzy*, 141 Wn.2d at 389. Instead, Officer Pankey and Officer Coon immediately treated Mr. Mason like a criminal suspect by

ordering him to “turn around, don’t move, show me your hands.” CP 55. They did not ask any questions about the health and safety of anyone present in the house nor did they express any reason that they believed anyone was in an immediate need of aid, as required for a permissible application of the community caretaking function.

In their initial seizure of Mr. Mason, law enforcement exceeded the scope of article I, section 7. 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 an immediate seizure, as occurred here, when the police seized Mr. Mason upon arriving to a non-criminal call for aid. 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. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE SEIZED FROM MR. MASON BECAUSE LAW ENFORCEMENT DID NOT HAVE A SUFFICIENT BASIS FOR AN INVESTIGATIVE STOP.**

*Terry* investigative stops are one of the few 'jealously and carefully drawn exceptions' to the warrant requirement" which permit police to briefly stop and detain a person without a warrant if the officer has "reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*." See *Duncan*, 146 Wn.2d at 171–72 (citing *Rife*, 133 Wn.2d at 150–51); see also *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The *Terry* stop exception does not apply to non-traffic civil infractions. See *Duncan*, 146 Wn.2d at 174-175. The available facts must substantiate more than a mere generalized suspicion the person detained is "up to no good." *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015) (citing *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009)). Rather, the facts must connect the particular person detained to the *particular crime* the officer seeks to investigate. *Id.*

A stop must be justified by specific and articulable facts "at its inception" in order to be constitutionally permissible. See *State v.*

*Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); *see also State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing *Terry*, 392 U.S. at 20). Following either the use of physical force or a show of authority by the police, a person is seized when a reasonable person would not believe that he or she was free to go or otherwise end the encounter. *State v. O'Neill*, 148 Wn.2d 564, 575, 62 P.3d 489 (2003); *Mendenhall*, 446 U.S. at 554.

- a. The police did not have reasonable suspicion Mr. Mason was engaged in criminal activity when he was seized.

A *Terry* stop is only constitutionally permissible when law enforcement has information which suggest a suspect is or is about to be engaged in criminal activity before the stop is initiated. In *State v. Gatewood*, after driving by in a patrol car, the police spotted Gatewood in a bus shelter and reported seeing Gatewood's eyes get big as if he was surprised to see them. *Gatewood*, 163 Wn.2d at 537. Gatewood then twisted his whole body as if he was trying to hide something. *Id.* The police then followed Gatewood after he left the bus shelter and saw him jaywalk across the road, at which point they pulled their car in front of him, blocking his path, got out, and said "Stop. I want to talk to you." *Id.* at 537-38.

The court held this order to stop, which is similar to the order made to Mr. Mason, was a seizure. *See id.* at 540 (citing *O’Neill*, 148 Wn.2d at 577 (commanding a person to stop is a seizure)). With only Gatewood's look of surprise, twisting as if to hide something, walking away, and jaywalking, the court held that the seizure of Gatewood was “premature and not justified by specific and articulable facts indicating criminal activity.” *Id.* at 540-41.

*Gatewood* applies here. The State failed to identify specific and articulable facts suggesting Mr. Mason was engaged in criminal activity, nor even minor criminal conduct like the jaywalking the police used to justify Gatewood’s stop, at the time Mr. Mason was seized.

The police were not responding to criminal activity when law enforcement arrived at Ray’s house in response to a “loud argument in progress” complaint. CP 55. When the police arrived, Mr. Mason was not engaged in an argument but “standing in the driveway next to a pickup” alone. *Id.* Acting only upon this non-criminal disturbance complaint and Mr. Mason’s surprise, law enforcement immediately seized Mr. Mason when they ordered him to turn around, not move, and show the police his hands. CP 55; *see Gatewood*, 163 Wn.2d at 540. This show of force is a seizure and a reasonable person would not feel

free to leave when told by the police to not move and to raise their hands. *See O'Neill*, 148 Wn.2d at 575. Actions which occurred after this command, particularly Mr. Mason reaching into his car, cannot be used to justify Mr. Mason's seizure. *See Gatewood*, 163 Wn.2d at 540.

The other fact the State uses to justify the stop was that Mr. Mason "looked desperate." CP 55. While he may have been startled to see the police suddenly pull into his father's driveway, startled reactions to seeing the police, such as eyes widening or looking nervous, do not amount to reasonable suspicion or justify Mr. Mason's seizure. *Gatewood*, 163 Wn.2d at 540; *see also State v. Fuentes*, 183 Wn.2d 149, 159, 352 P.3d 152 (2015) (no reasonable suspicion to stop when Fuentes was in a high-crime area; looked surprised, turned pale, and began shaking when he saw the officer; gave a "conflicting" story from another suspect; and the officer believed he had authority to admonish defendant for "loitering"). Again, the police did not articulate sufficient facts to justify a belief Mr. Mason was involved in criminal activity when they decided to seize him.

- b. Law enforcement did not have reasonable suspicion that Mr. Mason was connected to any particular crime that they were seeking to investigate.

In addition to the fact that Mr. Mason's conduct did not suggest he was involved in criminal activity, the police had no facts to connect Mr. Mason to a *particular crime* the officers were investigating. *See Z.U.E*, 183 Wn.2d at 618. Neither a "disturbance" nor a "loud argument in progress" is a crime. The police did not give an explanation for what their investigative goals were. When they drove up to Ray's house, they saw Mr. Mason standing by himself next to his truck. CP 55. He was not engaged in an argument. There were not even any other persons present. *See* CP 4, 55.

At most, the disturbance complaint would have justified some social contact like talking to Mr. Mason. *See e.g., Fuentes*, 183 Wn.2d at 160. Instead, the police seized Mr. Mason without completing their investigation.

The police investigation which took place prior to Mr. Mason's seizure indicated no crime had occurred. Ray came out of his house to talk with the police and told them they could disregard the call because the argument between him and his son had been resolved. RP 30. While the police may have had cause to respond to the initial complaint once

it had been made, this did not justify them putting Mr. Mason face-down on the ground and handcuffing him. RP 30-31. There was no present crime to investigate nor any other assertion of rights that could have given the police the authority to seize Mr. Mason.

The seizure of Mr. Mason cannot be justified as a lawful *Terry* stop because the police lacked specific and articulable facts warranting Mr. Mason's seizure when he was ordered to stop and put his hands up. Because the initial seizure was unconstitutional, every action that followed, including the frisk and the subsequent seizure of the pill bottle were fruits of the poisonous tree and should have been excluded. *See Eisfeldt*, 163 Wn.2d at 640. Therefore, Mr. Mason's conviction should be reversed.

**3. THE POLICE DID NOT HAVE REASONABLE SAFETY CONCERNS TO JUSTIFY A TERRY FRISK. LAW ENFORCEMENT EXCEEDED THE SCOPE ALLOWED IN A TERRY FRISK BY GOING BEYOND A CURSORY PATDOWN OF MR. MASON'S OUTER CLOTHING WITHOUT SUFFICIENT JUSTIFICATION.**

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 *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513

(2002)). 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 “patdown” 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)).

- a. The police did not have sufficient specific and articulable facts to suggest Mr. Mason was armed or dangerous.

In order for a *Terry* frisk to be legitimate, the State is required to establish specific and articulable facts that Mr. Mason might be armed and dangerous. *See Garvin*, 166 Wn.2d at 250.

A *Terry* frisk is only justified if the stop was legitimate in the first place. *See Id.* Even assuming Mr. Mason’s seizure was valid, it did not justify the police frisking him. To be sustained, 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). Because the State failed to establish sufficient facts to establish Mr. Mason was armed and presented a safety risk, the small pill bottle recovered from his pocket as a result of the *Terry* frisk should be suppressed.

The State attempted to prove Mr. Mason was a safety risk through the testimony of Deputy Coon. Deputy Coon testified he thought Mr. Mason created an officer safety risk when he arrived on scene, but Deputy Coon did not provide specific and articulable facts to establish Mr. Mason was armed or presented a safety risk.<sup>3</sup> RP 11. Deputy Coon never spotted an object in Mr. Mason's hands when Mr. Mason was in the vehicle. RP 26. Deputy Coon did not see anything in Mr. Mason's hands when Officer Pankey pulled him from the vehicle. RP 9-10. Deputy Coon knew there was nothing in Mr. Mason's hands

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<sup>3</sup> To the extent they hold otherwise, findings of fact C, D, and E are not supported by the evidence

once Mr. Mason was handcuffed. RP 10. The police primarily based their frisk of Mr. Mason on his initial surprised look and disobedient behavior instead of on any aggressive or hostile words or actions directed at the police which may have justified a frisk. *See Setterstrom*, 163 Wn.2d at 626-27.

The State has failed to provide a sufficient reasonable belief Mr. Mason might have been armed and dangerous or presented any threat to the officers' safety. Frisking Mr. Mason violated his constitutional right to privacy. Any evidence discovered as a result of the unconstitutional frisk should have been suppressed.

- b. The search of Mr. Mason was not limited to objects that had the size and density of potential weapons when Deputy Coon removed a small pill bottle from Mr. Mason's pocket.

Even if a *Terry* frisk was lawful, Deputy Coon's search of Mr. Mason exceeded the proper scope of a *Terry* frisk when he removed the small pill bottle from Mr. Mason's pocket.

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 must demonstrate 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) (frisk was improper when trooper “felt a hard object about 2 inches by 3 inches and two soft objects of indeterminate shape,” then removed all three. The trooper had the “time and ability to differentiate between the hard object, which might have been a weapon, and the soft ones which clearly were not”).

While a frisk may be sustained where the police can articulate reasons why determining the identity of the object was impossible, such as that a pat-down was inconclusive due to the defendant wearing heavy or bulky clothing, this did not happen here. *See, e.g., Hudson*, 124 Wn.2d at 110 (police reported feeling a “quite substantial bulge, hard something” in one of the “large” pockets of defendant’s “heavy leather jacket”).

Deputy Coon testified he did nothing 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*, Deputy Coon did not report any characteristics of the object which might be attributable to a suspected weapon other than that it was “hard.” RP 8-10, 24. In fact, Deputy Coon admits on several occasions that he did not manipulate the object at all. RP 8-11.

Instead, Deputy Coon patted Mr. Mason's pocket, feeling something hard, and removed the small pill bottle within two seconds RP 23. Without some determination that the size and density of the pill bottle was similar to a possible weapon, Deputy Coon was not justified in removing 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>4</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 investigate whether or not the small pill bottle had any weapon-like characteristics. RP 8-11.

Furthermore, the officers did not report any reason why an external pat-down was inconclusive, as *Hudson* requires, to justify reaching into a defendant's clothing. *See Hudson*, 124 Wn.2d at 112. Deputy Coon could not remember what Mr. Mason was wearing that day, and the trial court made no finding of fact about Mr. Mason's clothing. RP 6; CP 55-57. The State has failed to point to specific and articulable reasons for why an external pat-down of Mr. Mason's

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<sup>4</sup> To the extent it holds otherwise, finding of fact D is not supported by the evidence.

clothing was inconclusive in determining if the small pill bottle might have been a weapon.

The trial court erred in concluding the scope of the *Terry* frisk was permissible. The State failed to establish specific and articulable facts Mr. Mason presented a threat to the officer's safety or that the object in Mr. Mason's pocket might have been a weapon. Reaching into Mr. Mason's clothing was an impermissible violation of his right to privacy exceeding the protective scope of a *Terry* frisk. For these reasons, the small pill bottle recovered from Mr. Mason's pocket should have been suppressed by the trial court.

**4. THE PLAIN VIEW EXCEPTION DID NOT JUSTIFY OPENING AND REMOVING OBJECTS FROM THE SMALL PILL BOTTLE SEIZED FROM MR. MASON BECAUSE THE ILLEGAL NATURE OF THE EVIDENCE WITHIN THE SMALL PILL BOTTLE WAS NOT IMMEDIATELY APPARENT.**

Because the stop and frisk of Mr. Mason were improper, the plain view exception to the warrant requirement cannot apply. Furthermore, even if it is assumed that the *Terry* stop was justified, the plain view exception would still not apply because the illegal nature of the evidence inside the pill bottle was not immediately apparent.

The plain view doctrine requires a prior justification for the intrusion, an inadvertent discovery of the incriminating evidence and an

immediate recognition the item is contraband. *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761 (1991) (citing *State v. Kennedy*, 107 Wn.2d 1, 13, 726 P.2d 445 (1986)).

Prior justification generally means law enforcement is required to have a valid warrant or a recognized exception to the warrant requirement which justifies their presence. *See Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Law enforcement must have validly seized the evidence before it can be searched. *See id.*

Discovery is inadvertent if the officer “discovered the evidence while in a position that does not infringe upon any reasonable expectation of privacy, and did not take any further unreasonable steps to find the evidence from that position.” *Myers*, Wn.2d at 346 (citing *State v. Patterson*, 37 Wn. App. 275, 281, 679 P.2d 416, review denied, 103 Wn.2d 1005 (1984)).

To satisfy the immediate recognition prong, 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)). When *Terry* is the underlying

exception, the officer must have developed probable cause to believe the item was contraband while simultaneously determining the item was not a weapon. *Tzintzun-Jimenez*, 72 Wn. App. at 857. (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 support that the officers could immediately recognize the contents of the small pill bottle seized from Mr. Mason contained contraband.<sup>5</sup> Despite the finding that Deputy Coon “instantly” believed the substance inside the baggie that was inside the amber pill bottle was a controlled substance, the record shows Deputy Coon was not able to determine the contents of the small pill bottle contained contraband until he had engaged in a multitude of steps detailed in the Court’s findings of fact. CP 56.

Deputy Coon was not able to establish the contents of the bottle as contraband until it had been removed, investigated, and field tested

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<sup>5</sup> To the extent they hold otherwise, finding of fact F, G, and H are not supported by the evidence

for controlled substances. *Id.* After Deputy Coon removed the object and immediately recognized it was not a weapon, he continued to scrutinize the small pill bottle, examine it closely, and question Mr. Mason about it. RP 17-19; CP 56. Later, Deputy Coon removed the plastic bag from within the small pill bottle and then removed the suspected substance from within the bag, then performed a chemical test on the substance to determine whether the substance was illegal. *Id.* The nature of the object as contraband was not immediately apparent and these facts do not support a conclusion to the contrary.

Once Deputy Coon knew “immediately” the object he felt was not a weapon, his investigation should have stopped. RP 14; *see Hobart*, 94 Wn.2d at 440. Plain view did not justify the warrantless seizure and opening of the small pill bottle. 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.

#### F. CONCLUSION

Mr. Mason requests this Court reverse his conviction. The police did not have a specific and articulable reason to stop Mr. Mason when they first made contact with him after responding to reports of a non-criminal “disturbance.” The police conducted an unlawful frisk of

Mr. Mason and removed a small pill bottle without establishing it might have been a weapon, which would have become apparent if the frisk had been performed in a way that did not intentionally avoid confirming the small pill bottle was not a weapon.

The trial court erred in denying Mr. Mason's suppression motion and allowing the controlled substances found within the small pill bottle to be admissible at trial. Because this was the only evidence Mr. Mason had committed a crime, its admission was not harmless and Mr. Mason's conviction should be reversed.

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

Respectfully submitted,



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Samuel Olive – Rule 9 # 9513061  
Rule 9 Intern for Bruce Mason



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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
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 22<sup>ND</sup> DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING 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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[X] BRUCE MASON 2295 STOLP RD CHEWELAH, WA 99109	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 22<sup>ND</sup> DAY OF MARCH, 2016.

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