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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 33723-5-III

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

STATE OF WASHINGTON,

RESPONDENT,

vs.

BRUCE ADAM MASON,

APPELLANT.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

I.	<u>STATEMENT OF THE CASE</u>	3
II.	<u>ISSUE</u>	3
III.	<u>ANALYSIS CONCLUSION</u>	3

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).....	4
<u>State v. Kinzy</u> , 141 Wn.2d 373, 387, 5 P.3d 668 (2000).....	5
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	5
<u>Seattle v. Hall</u> , 60 Wn. App. 645, 806 P.2d 1246 (1991).....	5
<u>State v. Harvey</u> , 41 Wn. App 870, 707 P.2d 146 (1985).....	6
<u>State v. Collins</u> , 121 Wn.2d 168, 847 P.2d 919 (1993).....	6
<u>State v. Belieu</u> , 112 Wn.2d 587, 773 P.2d 46 (1989).....	6
<u>Wilson v. Pryor</u> , 361 F.2d 412 (9 th Cir. 1966).....	6
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	6
<u>State v. Harper</u> , 33 Wn. App. 507, 655 P.2d 1199 (1982).....	6
<u>State v. Ibrahim</u> , 164 Wn. App. 503, 269 P.3d 292 (2011).....	7
<u>State v. Hudson</u> , 124 Wn.2d 107, 874 P.2d. 160 (1994).....	7
<u>State v. Myers</u> , 117 Wash 2nd 332, 815 P.2d 761 (1991).....	8
<u>State v. Kennedy</u> , 107 Wash 2nd 1, 726 P.2d 445 (1986).....	8
<u>State v. Courcy</u> , 466 Wash. App. 326 (1987).....	8
<u>State v. Lair</u> , 95 Wash.2nd 706, 630 P.2d 427 (1981).....	9
<u>State v. Myrick</u> , 102 Wash.2d 506, 688 P.2d 151 (1984).....	9
<u>State v. Owens</u> , 302 Or 196, 729 P.2d 524 (1986).....	10

I. STATEMENT OF THE CASE

On April 18, 2015, at 1:17 p.m., Stevens County Sheriff's Office Deputy Coon was dispatched to a disturbance in progress at 2295 Stolp Road in Chewelah, Washington. CP 4. The reporting party, Ray Mason called dispatch and reported that his son, Bruce Mason, was at the residence yelling at Ray, and that Ray wanted his son to leave. CP 4.

Deputy Coon arrived at the residence and was joined by City of Chewelah Police Department Officer Pankey who had responded to assist. CP 4. Deputy Coon saw Bruce Mason standing in the driveway next to his vehicle. After seeing the law enforcement officers, Bruce Mason immediately opened the driver's side door of the vehicle and lunged into the vehicle. CP 4, RP 6.

Officer Pankey told Bruce Mason to turn around and show his hands. Bruce Mason refused and continued to reach inside the vehicle. CP 4. Officer Pankey grabbed Bruce Mason and pulled him away from the vehicle. CP 4. Deputy Coon assisted Officer Pankey, and Bruce Mason was placed on the ground so that the officers could gain control over him. CP 4. Deputy Coon placed Bruce Mason into handcuffs and advised him that he was being detained. CP 4.

For officer safety, Deputy Coon conducted a weapons frisk of Bruce Mason. CP 4, RP 11. During the search Deputy Coon felt a hard object in Bruce Mason's right front pants pocket. CP 4. Deputy Coon was unable to determine what the object was and removed it from the pocket to ensure it was not a weapon. CP 4, RP 22. Deputy Coon saw that the object was a

transparent pill bottle that contained a small clear plastic bag with a white crystal substance inside. CP 4.

Deputy Coon asked Bruce Mason about the object removed from his pocket. Bruce Mason told the deputy, "It's my personal smoking tobacco." CP 4. Based on his training and experience, Deputy Coon recognized the white crystal substance as methamphetamine. CP 4. Deputy Coon later conducted a field test of the white crystal substance which confirmed the identification of the substance as methamphetamine. CP 4.

II. ISSUE

Did the trial court err in denying the defendant's motion to suppress admission of evidence seized by law enforcement during the detention and weapons search of the defendant?

III. ANALYSIS AND CONCLUSION

The responding law enforcement officers received a report from the defendant's father that the defendant was causing a disturbance and requested law enforcement assistance in getting the defendant to leave the property. After the defendant refused to obey an order to step away from a vehicle and show his hands, Officer Pankey and Deputy Coon detained the defendant and conducted a frisk for weapons for their own protection. Pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), police officers may detain a person to conduct an investigation and may make limited searches for the purpose of protecting the officer's safety during an investigative detention.

Petitioner bases his argument on the premise that the officers exceeded the limited scope of the community caretaking function authorized under *State v. Kinzy*, 141 Wn.2d 373, 387, 5 P.3d 668 (2000). This reliance is misplaced in that the officers here were conducting an investigation into criminal conduct reported by Ray Mason. A *Terry* detention is a seizure for investigative purposes. To justify a *Terry* stop under the Fourth Amendment, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The report received by Deputy Coon, made by the defendant's father, reported a disturbance, with the implication that the defendant would not leave without the assistance of law enforcement. This is indicative of potential criminal misconduct ranging from trespass, disorderly conduct or domestic violence harassment and supports an investigation under *Terry*. See RCW 9A.84.030, RCW 9A.52.080 and RCW 9A.46.020. The law enforcement action here was a criminal investigation and not a community caretaking function.

Even if the officers' actions were found to be community caretaking, Deputy Coon and Officer Pankey were still justified in taking reasonable steps to ensure the safety of all involved. If during a community caretaking contact, a citizen behaves in a manner that causes the officer a legitimate concern for his or her safety, that officer is entitled to take immediate protective measures. *Seattle v. Hall*, 60 Wn. App. 645, 652-53, 806 P.2d 1246 (1991) (officer permitted to frisk citizen who exhibited hostile and nervous behavior and kept his hands in his pockets).

An officer need not be absolutely certain the detained person the officer is investigating at close range is armed and dangerous; the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. *Terry*, 88 S.Ct. at 1883; *State v. Harvey*, 41 Wn. App. 870, 874-75, 707 P.2d 146 (1985).

The Washington Supreme Court has said:

[C]ourts are reluctant to substitute their judgment for that of police officers in the field. “A founded suspicion is all that is necessary, some basis from which the court can determine that the frisk was not arbitrary or harassing”

State v. Collins, 121 Wn.2d 168, 174, 847 P.2d 919 (1993)(quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989) quoting *Wilson v. Pryor*, 361 F.2d 412, 415 (9th Cir. 1966)).

Washington requires the following for a valid weapons search: (1) the initial stop is legitimate; (2) there is a reasonable safety concern justifying a protective frisk for weapons; and (3) the scope of the frisk is limited to protective purposes. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

Factors that will support a frisk for weapons include a suspect who refuses to keep hands in plain view. See, e.g., *State v. Harper*, 33 Wn.App. 507, 655 P.2d 1199 (1982) (frisk justified where defendant thrust his hands into his coat pockets during questioning). Similarly, sufficient grounds for a search were found in a case in which the defendant placed his hands in his pockets after being advised to keep his hands visible, turned sideways away from the officer, and entered

the officer's space after being advised to step away. *State v. Ibrahim*, 164 Wn.App. 503, 509-510, 269 P.3d 292 (2011).

Here, when the defendant refused to show his hands and step away from the vehicle, he created a circumstance where the officers were reasonable in the belief that he may have armed himself. As a result, their detention and frisk of the defendant for weapons was justified and lawful.

A protective frisk of a person is strictly limited to a pat-down to discover weapons that might be used against the officer. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d. 160 (1994). However, in cases where a pat-down search is inconclusive, an officer may reach into a detainee's clothes and may withdraw an object in order to ascertain whether it is a weapon. *Hudson* at 112-13.

While conducting the weapons frisk, Deputy Coon felt a hard object in the defendant's right front pants pocket. Unable to determine if the object was a weapon, the deputy removed the object for a visual inspection. Deputy Coon's actions did not exceed the limits established by the courts for a valid weapons search.

The object removed from the defendant's pocket was a transparent plastic pill bottle with a clear plastic baggie inside. Inside, Deputy Coon observed a white crystal like substance which based on his training and experience he recognized as methamphetamine.

Seizure of contraband authorized under “plain view” exception to warrant requirement

The Washington Supreme Court has found that if an officer discovers contraband incident to a justifiable *Terry* stop and weapons frisk, warrantless seizure of the substance may be justified if the discovery meets the requirements of the “plain view” exception to the warrant requirement. *Hudson* at 114, citing *State v. Myers*, 117 Wash 2nd 332, 346, 815 P.2d 761 (1991), (citations omitted.) Under the plain view doctrine, an officer must: (1) have a prior justification for the intrusion; (2) inadvertently discover the incriminating evidence; and (3) immediately recognize the item as contraband. *State v. Kennedy*, 107 Wash.2d 1, 13, 726 P.2d 445 (1986). Here the intrusion was a justified frisk for weapons, which discovered a clear plastic container holding a substance that Deputy Coon, an experienced law enforcement officer, immediately recognized as methamphetamine. Given the opportunity to explain, the defendant told the deputy that the substance was tobacco. Under these circumstances, Deputy Coon had probable cause to seize the pill bottle and place the defendant under arrest.

A similar set of facts was considered in *State v. Courcy*, 466 Wash.App 326 (1987). Courcy produced a transparent identification holder in response to a lawful request from a law enforcement officer to identify himself. The officer observed a paper bindle which he knew to be a common method of carrying contraband controlled substances. The court found that no search violation had occurred because the bindle was observed in open view. *Courcy* at 328. The court considered the question of whether the officer had probable cause to believe the item was contraband, justifying seizure. *Courcy* at 329. The officer testified that he had no formal

police training related to drug identification, but that he had on the job training and had observed bindles during street arrests, and that in his experience the bindles always contained drugs. *Courcy* at 329. The officer said that in three years with the Yakima Police Department, he had personally made four or five cocaine arrests and in almost every case, cocaine was packaged in paper bindles like the one seen in the identification holder. A second officer also testified that upon seeing the bindle, he also immediately recognized it as a cocaine bindle. The officers also testified that when Courcy realized the officer had seen the bindle, he pulled it back to his chest. The court ruled that under these circumstances, the officer had probable cause to seize the object. *Courcy* at 329, *State v. Lair*, 95 Wash.2d 706, 716-17, 630 P.2d 427 (1981). Because of the evidence that the package contained contraband, any reasonable expectation of privacy as to its contents was lost. *Courcy* at 331-32.

After seizing the bindle in *Courcy*, the officer opened the paper container to confirm that the package contained contraband. In conducting an analysis of whether this action violated Courcy's expectation of privacy the court said:

Although Washington's Constitution article 1, section 7 affords greater protection to individuals against searches and seizures than does the Fourth Amendment, the result reached here is the same under either constitution. The focus under article 1, section 7 analysis is on a person's right to privacy and whether his private affairs have been intruded upon. *State v. Myrick*, 102 Wash.2d 506, 514, 688 P.2d 151 (1984). Essentially, this involves asking whether the individual has any legitimate expectation of privacy subject to intrusion. The courts require virtual certainty that the container, in the circumstances viewed, holds contraband, *as if transparent*. (italics added). This requirement provides the necessary added protection guaranteed by article 1, section 7. The distinctive nature of his container, coupled with the defendant's furtive gesture when it became apparent the officer had seen it, left Mr. Courcy no legitimate expectation of privacy in the contents of the bindle. *Courcy* at 332.

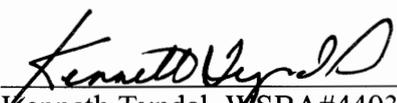
In *Courcy*, the court also looked to the Oregon Supreme Court for guidance based on the decision in *State v. Owens*, 302 Or. 196, 729 P.2d 524, 530 (1986) which upheld this approach in construing Oregon's state constitution which is similarly concerned with privacy. The Oregon court found no warrant requirement for "opening and seizing the contents of transparent containers or containers that otherwise announce their contents". *Courcy* at 332, quoting *Owens* 729 P.2d at 530.

Here, it was apparent to Deputy Coon that the pill bottle contained contraband because both the bottle and the plastic bag inside were transparent! This allowed Deputy Coon to see inside and visually identify the contents, a white crystal like substance, which based on his training and experience, he identified as methamphetamine. As a result, the defendant had no legitimate expectation of privacy regarding the contents of the bottle, and Deputy Coon had probable cause to seize the bottle and place the defendant under arrest.

As detailed above, the trial court was correct in allowing the admission of evidence seized by law enforcement during the detention and search of the defendant, and we urge the court to find against the appellant.

Dated: May 31, 2016

Respectfully Submitted,


Kenneth Tyndal, WSBA#44031
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, ~~500 N. Cedar St.~~, Spokane, WA 99201, and to, Travis Stearns and Samuel Olive, Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101; on June 1, 2016..

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