

FILED  
Court of Appeals  
Division III  
State of Washington  
2/28/2018 9:53 AM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35305-2-III

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STATE OF WASHINGTON, Respondent,

v.

ISMAEL TARANGO, Appellant.

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**APPELLANT'S REPLY BRIEF**

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**TABLE OF CONTENTS**

**AUTHORITIES CITED**.....ii

**I. ARGUMENT**.....1

**II. CONCLUSION**.....4

**CERTIFICATE OF SERVICE** .....6

**AUTHORITIES CITED**

**Federal Cases**

*Florida v. J.L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000).....1

**State Cases**

*State v. Cardenas-Muratella*, 179 Wn. App. 307, 319 P.3d 811 (2014).....4

*State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984).....3

*State v. Spencer*, 75 Wn. App. 118, 876 P.2d 939 (1994).....2, 3

**Statutes**

RCW 9.41.270.....1, 3

## I. ARGUMENT

1. The State's position provides no ascertainable standard to distinguish between potential criminal activity and lawful constitutional activity.

The State argues that because the citizen informant was identified and presumptively reliable, the information he provided was a sufficient basis to justify the stop and search of the vehicle. *Respondent's Brief*, at 17. But the problem the State never addresses is that Matthews's information did not contain an assertion of illegality. *Florida v. J.L.*, 529 U.S. 266, 272, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). The State asserts that Tarango's conduct in sitting passively in a car while armed constitutes a violation of RCW 9.41.270 or justifies a *Terry* stop to determine if a robbery of the store is underway or about to transpire. *Respondent's Brief*, at 13-14, 18. But these allegations, on the facts presented, are deeply problematic.

First, as to the allegation that Tarango was guilty of unlawful display of a weapon under RCW 9.41.270 because Matthews was alarmed to see a gun, the statute requires that Tarango carry or display the firearm "in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." The standard of warranting alarm incorporates a

“reasonable person” standard, not a subjective standard of whether Matthews personally felt alarmed. *State v. Spencer*, 75 Wn. App. 118, 126, 876 P.2d 939 (1994). Moreover, Matthews’s testimony, cited by the State in its brief, reflects that after a brief exchange of words, he looked into the Tahoe and only then saw that Tarango had a gun in his lap. CP 33-34. Matthews clearly reported that Tarango did not raise the gun or point it, nor issue any threat with it. CP 26; I RP 36, 40, 53, 56. In other words, Tarango was minding his own business in his car when Matthews approached, looked inside, and saw the firearm, which then motivated his call to the police. To the extent Matthews was alarmed by what he saw, it was his own conduct that brought it on, not any action Tarango engaged in to manifest an intent to intimidate anybody or to warrant alarm.

Indeed, if minding one’s business while being armed in public is grounds to warrant a high risk stop and investigation by police, it is difficult, if not impossible, to know where the line is drawn between constitutionally permissible activity and activity that is sufficiently threatening to warrant police response. In *Spencer*, the defendant was walking his dog at 10:00 p.m. while carrying an AK-47 rifle in “a hostile, assaultive type manner with the weapon ready.” 75 Wn. App. at 120-21. In upholding Spencer’s conviction against his constitutional challenge, the court observed, “In the vast majority of situations, a person of common

intelligence would be able to ascertain when the carrying of a particular weapon would reasonably warrant alarm in others.” *Id.* at 123-24. But how can one anticipate another person’s actions in approaching and observing a firearm that one had no intention, and took no action, to display?

Indeed, in recognition of the slippery slope posed by the State’s broad interpretation of RCW 9.41.270, the Washington Supreme Court has offered a narrow interpretation of what conduct the statute prohibits: Using a weapon to threaten another. *State v. Maciolek*, 101 Wn.2d 259, 265, 268 n. 3, 676 P.2d 996 (1984); *Spencer*, 75 Wn. App. at 126 n. 6. But Tarango’s conduct falls outside of this core defined by the statute; he did nothing to direct a threat toward Matthews or anybody else.

Similarly, the State’s argument that a *Terry* investigation was warranted because Tarango might be about to rob the store must fail. *Respondent’s Brief*, at 18. The State points to its characterization of the neighborhood as “high crime” to suggest that being armed in such an area indicates an intent to engage in criminal activity, but it is in precisely such areas where the need to defend oneself is likely to be highest. Moreover, there was absolutely nothing beyond the fact of Tarango being armed that would substantiate a belief that he was about to commit a robbery – no

preparatory or furtive activity, no verbal admissions, not even any indication that Tarango planned to get out of the Tahoe.

It is this lack of any indication of “a substantial possibility that the particular person has committed a specific crime or is about to do so” that brings Tarango’s case squarely within *State v. Cardenas-Muratella*. 179 Wn. App. 307, 309, 319 P.3d 811 (2014). The question is not whether Matthews was a more reliable source of information than an anonymous tipster, the question is whether the information he provided simply reported the presence of a firearm in public, rather than actual or threatened use of a firearm sufficient to support an investigatory stop. *Id.* at 313. The information he provided to police prior to the stop clearly reported nothing more than the presence of a firearm in the man’s lap while he was sitting inside the car. CP 26, 33, 43; *Respondent’s Brief*, at 12. Under *Florida v. J.L.* and *Cardenas-Muratella*, this information did not rise to the level of suspicion sufficient to justify the stop.

## **II. CONCLUSION**

For the foregoing reasons, Tarango respectfully requests that the court REVERSE his convictions for unlawfully possessing a firearm and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 28 day of February, 2018.

A handwritten signature in cursive script, appearing to read "Andrea Burkhart", written over a horizontal line.

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Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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And, pursuant to prior agreement of the parties, I served via e-mail a copy of the foregoing Appellant's Reply Brief to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 28 day of February, 2018 in Walla Walla,  
Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

**February 28, 2018 - 9:53 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35305-2  
**Appellate Court Case Title:** State of Washington v. Ismael M. Tarango  
**Superior Court Case Number:** 16-1-00923-0

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