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No. 35560-8-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Otoniel Carrero,**

Appellant.

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Yakima County Superior Court Cause No. 15-1-01114-1

The Honorable Judge Michael G. McCarthy

**Appellant's Reply Brief**

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## **REPLY TO RESPONDENT'S STATEMENT OF FACTS**

Two officers approached Mr. Carriero's parked car. CP 38-39. They had blocked him, so he could not leave the alley where he was parked. CP 38-39. They asked Mr. Carriero and his passenger for identification. CP 38-39. The requests were made simultaneously. RP 18-19, 34-35.

Respondent erroneously suggests that Officer Gronewald only requested identification from Mr. Carriero after Officer Walk had confirmed that the passenger had outstanding warrants. Brief of Respondent, p. 4. This is incorrect.

In fact, the officers asked both occupants for their identification at the same time. RP 18-19, 34-35. This is consistent with the court's findings. CP 39. Respondent has not assigned error to those findings. Brief of Respondent, p. 1.

## **ARGUMENT**

**POLICE LACKED A REASONABLE SUSPICION WHEN THEY PREVENTED MR. CARRIERO FROM LEAVING, DEMANDED IDENTIFICATION, AND RETAINED HIS ID WHILE CHECKING FOR WARRANTS.**

Police must have a reasonable suspicion of criminal activity before conducting an investigatory stop. *State v. Weyand*, 188 Wn.2d 804, 811-

812, 399 P.3d 530 (2017). Police suspicion must be individualized to the person stopped. *Id.*

The suspicion must also be well-founded and must be based on specific and articulable facts suggesting the person has committed a crime. *State v. Doughty*, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010). Presence in a high crime area at night is not enough to support a reasonable suspicion. *Id.*; *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006). Instead, there must be “a *substantial possibility* that a *crime* has occurred or is about to occur.” *State v. Duncan*, 146 Wn.2d 166, 179, 43 P.3d 513 (2002) (emphasis in original).

Here, police blocked Mr. Carriero’s car<sup>1</sup> and asked him to identify himself.<sup>2</sup> CP 37-38; RP 38-39. They retained his identification to check for a warrant. RP 34, 35; CP 39.

Police seized Mr. Carriero by blocking his car from leaving and requesting identification. CP 38-39; *see State v. Penfield*, 106 Wn. App. 157, 163, 22 P.3d 293 (2001); *State v. Brown*, 154 Wn.2d 787, 797, 117 P.3d 336 (2005) *State v. Beito*, 147 Wn. App. 504, 510, 195 P.3d 1023

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<sup>1</sup> Respondent erroneously suggests that the police did not block Mr. Carriero from driving away. Brief of Respondent, p. 11. The court found otherwise, and Respondent has not assigned error to this finding. CP 38; RP 64; *see* Brief of Respondent, p. 1.

<sup>2</sup> Respondent erroneously suggests the contact was not “officer initiated.” Brief of Respondent, p. 11. Neither Mr. Carriero nor his passenger initiated the contact. It was initiated by the two officers. CP 37-38; RP 38-39.

(2008); *State v. Moreno*, 173 Wn. App. 479, 491, 294 P.3d 812 (2013). No reasonable person in Mr. Carriero’s position would have felt free to leave—indeed, no one would have been physically able to leave. CP 38; *see State v. Fuentes*, 183 Wn.2d 149, 158 n. 7, 352 P.3d 152 (2015); *Penfield*, 106 Wn. App. at 161-163.

Respondent erroneously suggests that no seizure occurred. Brief of Respondent, pp. 9-11. First, Respondent argues that officer contact does not constitute a seizure when the officer lacks suspicion justifying an investigative detention. Brief of Respondent, p. 12 (citing *State v. O’Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)). This is false: “[w]hether a seizure *occurs* does not turn upon the officer’s suspicions.” *O’Neill*, 148 Wn.2d at 575 (emphasis in original). Instead, it is the interaction that determines whether a seizure occurs. *Id.*

Second, Respondent claims the encounter was a mere social contact. Brief of Respondent, pp. 10-11, 15-17. Under proper circumstances, a request for identification from a pedestrian does not, by itself, amount to a seizure. *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). In some situations, this rule extends to occupants of a parked car who can drive away from the contact. *See State v. Mote*, 129 Wn. App. 276, 289, 120 P.3d 596 (2005).

However, in some circumstances, a mere request for identification amounts to a seizure. *See, e.g., State v. Rankin*, 151 Wn.2d 689, 697, 92 P.3d 202 (2004). Such a request amounts to a seizure whenever “a reasonable person would not feel free to leave or to decline the officer's request and terminate the encounter.” *Fuentes*, 183 Wn.2d at 158 n. 7.

As noted, the officers blocked Mr. Carriero and his companion from leaving. CP 38. He could not physically depart. CP 38. A reasonable person would not feel free to leave or to decline the officers’ request. *Id.*

This distinguishes Mr. Carriero’s case from the numerous authorities cited by Respondent. *See* Brief of Respondent, pp. 10-11, 15-21. In each of the cited cases, the person approached by police had the ability to walk or drive away from the encounter. *See, e.g., O’Neill*, 148 Wn.2d at 570 (defendant parked in a parking lot when approached by police); *Young*, 135 Wn.2d at 502 (defendant standing on a street corner when approached by police); *Mote*, 129 Wn. App. at 279-280 (defendant approached by police while in a car legally parked near an intersection); *State v. Bailey*, 154 Wn. App. 295, 298, 224 P.3d 852 (2010) (defendant walking along an otherwise deserted street when he encountered police); *State v. Smith*, 154 Wn. App. 695, 700, 226 P.3d 195 (2010) (defendant free to walk away during a police encounter in a hotel).

According to Respondent, one case that is “factually similar to the present case” is *State v. Hansen*, 99 Wn. App. 575, 994 P.2d 855 (2000). Brief of Respondent, p. 17. But in *Hansen*, the defendant was sitting on the curb near a gas station when police spoke to him. *Id.*, at 576-575. Nothing prevented the defendant in *Hansen* from ignoring the police and walking away from the encounter. *Id.*

Here, by contrast, Mr. Carriero could not leave the scene: police had blocked his car from leaving. CP 38. After blocking him in, they approached his car from both sides, asked him and his passenger for identification, and retained their IDs while checking for warrants. CP 38-39. No reasonable person would have felt free to leave.

The seizure was not justified. The officers lacked a reasonable, well-founded suspicion based on specific articulable facts. *Weyand*, 188 Wn.2d at 811-812; *Doughty*, 170 Wn.2d at 62-63. Nothing suggested a “a *substantial possibility* that a *crime* ha[d] occurred or [was] about to occur.” *Duncan*, 146 Wn.2d at 179; *see also State v. Larson*, 93 Wn.2d 638, 642–43, 611 P.2d 771 (1980).

In *Larson*, officers encountered a car “parked in a high crime area near a closed park late at night;” the car “started to pull away as the police car approached.” *Larson*, 93 Wn.2d at 642–643. The Supreme Court found

these facts insufficient to create a reasonable suspicion justifying seizure. *Id.*, at 645-646.

Respondent does not argue that the seizure was justified by a reasonable suspicion of criminal activity. Brief of Respondent, pp. 5-21. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009).

Respondent implies that the seizure was justified “to address officer safety.” Brief of Respondent, p. 11. Officer safety does not justify the seizure. An officer conducting a valid investigatory stop based on reasonable suspicion may take steps to ensure officer safety. *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). A valid stop is a precondition: if the officer has no basis to stop the person, officer safety concerns do not come into play. *Id.*; *see also Weyand*, 188 Wn.2d at 811.

The unconstitutional seizure tainted all that followed. This is so because “[u]nder the exclusionary rule, ‘[i]f the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree.’” *State v. Creed*, 179 Wn. App. 534, 543, 319 P.3d 80 (2014) (quoting *Kennedy*, 107 Wn.2d at 4).

Mr. Carriero’s charge for unlawful possession of a firearm must be reversed. *Id.* The evidence must be suppressed, and the charge dismissed with prejudice. *Id.*

**CONCLUSION**

The Court of Appeals must reverse Mr. Carriero's UPF conviction, suppress the evidence unlawfully seized, and remand for dismissal.<sup>3</sup>

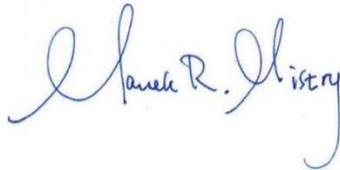
Respectfully submitted on August 15, 2018,

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<sup>3</sup> Respondent argues at length to the effect that appellate counsel failed to address the assignments of error. Review of the Opening Brief should reveal that the entirety of the brief is focused on these assignments of error.

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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david.trefry@co.yakima.wa.us and  
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 15, 2018.



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**August 15, 2018 - 9:06 AM**

**Transmittal Information**

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