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No. 35560-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT,

v.

OTONEIL CARRIERO,
APPELLANT.

BRIEF OF RESPONDENT

David B. Trefry, WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2nd St. Rm. 329
Yakima, WA 98901

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR	1
1. The trial erred when it denied the defendant’s motion to suppress pursuant to CrR 3.6. And therefore, erred when it allowed the admission of the evidence seized from the defendant’s car.	
II. STATEMENT OF THE CASE.....	1-4
III. ARGUMENT	5-21
IV. CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

<u>Avellaneda v. State</u> , 167 Wn. App. 474, 273 P.3d 477 (2012).....	5
<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 828 P.2d 549 (1992)	6
<u>Escude v. King County Public Hospital District No. 2</u> , 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003)	6
<u>Hollis v. Garwall, Inc.</u> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	5
<u>Holland v. City of Tacoma</u> , 90 Wn. App. 533, 954 P.2d 290 (1998).....	6
<u>In re Marriage of Rideout</u> , 150 Wn.2d 337, 77 P.3d 1174 (2003).....	7
<u>Joy v. Department of Labor & Industries</u> , 170 Wn. App. 614, 285 P.3d 187 (2012).	6
<u>Meeks v. Meeks</u> , 61 Wn.2d 697, 379 P.2d 982 (1963).....	5
<u>Nast v. Michels</u> , 107 Wn.2d 300, 730 P.2d 54 (1986).....	7
<u>State v. Alden</u> , 73 Wn.2d 360, 438 P.2d 620 (1968).	5.
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	7,10, 15
<u>State v. Bailey</u> , 154 Wn.App. 295, 224 P.3d 852, 856 (2010).....	5,18,20
<u>State v. Brockob</u> , 159 Wash.2d 311, 150 P.3d 59 (2006).....	6
<u>State v. Bradley</u> , 105 Wn.App. 30, 18 P.3d 602 (2001)	11
<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	5
<u>State v. Dudas</u> , 52 Wn.App. 832, 764 P.2d 1012 (1988).....	9
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002)	9
<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012).	7
<u>State v. Hansen</u> , 99 Wn.App. 575, 994 P.2d 855 (2000).....	17
<u>State v. Harrington</u> , 56 Wn.App. 176, 782 P.2d 1101 (1989)	passim
<u>State v. Henderson</u> , 114 Wash.2d 867, 792 P.2d 514 (1990)	4

<u>State v. Larson</u> , 88 Wn.App 849, 946 P.2d 1212, (1997).....	11
<u>State v. Little</u> , 116 Wn.2d 488, 806 P.2d 749 (1991).....	9
<u>State v. McLaughlin</u> , 74 Wn.2d 301, 444 P.2d 699 (1968).....	8
<u>State v. Mote</u> , 129 Wn.App. 276, 120 P.3d 596 (2005).....	16
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003)	10,12,15
<u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004).	21
<u>State v. Robertson</u> , 88 Wn.App. 836, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998).....	7
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	8
<u>State v. Sinclair</u> , 192 Wn.App. 380, 367 P.3d 612, review denied 185 Wn.2d 1034 (2016)	9
<u>State v. Smith</u> 154 Wn. App. 695, 226 P.3d 195 (2010)	18
<u>State v. Stevenson</u> , 128 Wn. App. 179, 114 P.3d 699 (2005).....	6
<u>State v. Wolken</u> , 103 Wn.2d 823, 829, 700 P.2d 319 (1985)	8
<u>State v. Young</u> , 135 Wn.2d 656, 957 P.3d 681 (1998).....	passim
<u>State v. Young</u> , 63 Wn.App. 324, 818 P.2d 1375 (1991)	4, 5, 7
<u>Valente v. Bailey</u> , 74 Wn.2d 857, 447 P.2d 589 (1968).....	5
<u>West v. Thurston County</u> , 168 Wn. App. 162, 275 P.3d 1200 (2012)	6
Federal Cases.	
<u>Terry v. Ohio</u> , 395 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	9
Rules	
RAP 10.3(b)	5
RAP 10.3(a)(6).....	6
RAP 2.5(a)(3).....	8

I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENT OF ERROR.

1. The trial court erred when it denied Appellant's motion pursuant to CrR 3.6 to suppress the evidence seized from his car.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial court correctly denied Appellant's motion to suppress.

II. STATEMENT OF THE CASE

The facts that pertain to this appeal can all be found in the hearing conducted by the court and the parties which addressed Appellant's motion to suppress pursuant to CrR 3.6. The totality of this hearing will be found at RP 3-62, the actual testimony is found at RP 10-45. At this hearing the court watched the video of this interaction between two Yakima City Police Officers, Officer Garrett Walk and Officer Scott Gronewald. RP 8. The officers both had a video recording system running at the time of the encounter. RP 40. The system is known as COBAN¹ This video was played to the judge sitting on this hearing prior to the testimony of the two responding officers.²

It should be noted that the defendant chose to stand on his right to remain silent and did not testify at this hearing, nor did he testify at trial, therefore the testimony of the officers has not been rebutted.

The two officers were dispatched to this location after an individual called

¹ This is the name of the manufacturer.

² This exhibit has been designated by the State and is a portion of the record before this court.

911 to report a suspicious car. RP 12, 33. Officer Walk testified “[i]t was a suspicious circumstances call...[t]hrough dispatch they advised that in the alleyway between Cherry and Roosevelt there was a car all dark out, backed up into the alleyway. It's a dead-end, and the neighbor didn't recognize or the reporting party didn't recognize the vehicle to the area. So they wanted it to be checked on.” RP 13, 33

This call out from dispatch was at nearly 2 AM, down a dead-end alley to check on a blacked-out car that was parked facing head on to the officer as they entered and approached, in a high crime area of town. RP 13, 15, 31

An aerial photograph of this location was shown to the two officers. RP 16, CP 35.

The officers described this area as a high crime area. There are many calls which originate from this area, including shots fired, suspicious activity, gang activity is high, drive-by shootings are constant, burglaries, vehicle prowls and vehicle thefts... “pretty busy...very often violent felonies including homicides, robberies, drive-by shootings, gang activity, thefts...vehicle prowls...stolen cars dumped...sometimes in alleyways...very active for police” RP 12-13, 34

Both officers testified that this was a dead-end and the only means to access the location of the defendant’s car was to travel down this alley. RP 14 The alley was dark and Officer Walk, when asked about contacting this vehicle on foot, stated it would not be his first choice because if something happened he would have “nothing in my reach.” RP 14. Officer Gronewald stated that he

would not have felt comfortable walking down the alley given there was not adequate lighting. RP 37.

Officer Walk and Gronewald both responded to the call; Walk arrived first and drove his car down the alley and Gronewald was right behind him. Their patrol cars were facing the front of Carriero's car which had been backed into the alley. PR 13-14 31. Officer Gronewald testified the reason he was parked in the manner he was, was because it was a dead-end alley and there was no other manner to park and no means to get behind Carriero's car and for him to have gotten behind he would have had to drive immediately past the side of Carriero's car and that [g]eneral practice, "I don't try to pull right next to the car when I contact who I'm there to speak with. I don't know what I have at that point. I have no idea. I also don't want to block any way of their own." RP 18, 39

The officers drove into the alley with their patrol vehicles facing westbound, facing the defendant's car. This according to Officer Gronewald "...isn't a particularly safe way to approach a vehicle but it was the only option we had." RP 13-14, 32. Both officers testified they did not have any emergency lights on, only headlights. Officer Gronewald testified he had on his directional lights on so that someone would notice them if they entered the alley. RP 28-9, 31. When they approached this car they noticed there was not a license plate on the front of the car. It was later determined there was a temporary paper license in the back window of the car. RP 31. Both officers testified that because of the circumstances and facts of this call they were obligated to investigate. RP 33

When asked directly about his suspicions regarding this contact, Officer Walk testified “[w]ell, it always catches my eye when it's 2:00 in the morning and a vehicle is all blacked out. Even neighbors are reporting saying the vehicle is not familiar to them. So given that there is the crime, there is that history in that area, yes, it kind of puts me in a little bit of alert, kind of wanting to see what's going on.” RP 15.

Officer Walk ran the identification of the female passenger and that report came back that she had outstanding warrants. That process lasted less than a minute. RP 20, 35. Officer Gronewald then asked the defendant for his identification and had the ID for maybe a minute and a half or two minutes. When Carriero's information came back clean, Officer Gronewald handed the identification back to the Appellant. RP 34-35.

At some point after Officer Gronewald handed the defendant's ID back to him, the officer observed what he knew to be a hand gun in the pouch area on the back of the driver's seat. RP 21-22, 23, 36. Officer Gronewald testified that after he saw the weapon, he drew his service weapon and ordered Carriero to keep his hands on the steering wheel, but did not point the gun out to the defendant because in his experience this usually leads to the individual reaching for that weapon. 36-7. Carriero was removed from the car after this weapon was seen. A search warrant was subsequently issued and served on the car.

Eventually Officer Gronewald spoke to the concerned citizen, who was a neighbor and wanted to remain anonymous. This contact was also caught on

COBAN. RP 37-8.

III. ARGUMENT

1. The totality of the facts presented at the CrR 3.6 hearing were sufficient for the trial court to determine that the actions of the two officers did not violate Carriero's rights under the Fourth and Fourteenth Amendments and Wash. Const. art. I, § 7.

Carriero states in the "Issues and Assignments of Error" section of his brief that the trial court erred when it entered Finding of Fact 3 and Conclusions of Law 2,4,5,6,7 and 9. Thereafter, he literally never mentions or discusses these challenges again. He cites to no portion of the record nor to any authority to support this bare assertion.

"Where no authority is cited in support of a proposition, the court is not required to search for authority and will not give consideration to such errors unless it is apparent on the face of the assignments that they have merit." State v. Alden, 73 Wn.2d 360, 363, 438 P.2d 620 (1968). See also, State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) "Finally, Dennison claims, for the first time, cumulative error. He neither briefs the issue nor cites to authority. The issue will not be reviewed. See Smith v. King, 106 Wn.2d 443, 722 P.2d 796 (1986)."

This court does not review errors alleged but not argued, briefed, or supported with citation to authority. RAP 10.3; Valente v. Bailey, 74 Wn.2d 857,858,447 P.2d 589 (1968); Meeks v. Meeks, 61 Wn.2d 697, 698, 379 P.2d 982 (1963); Avellaneda v. State, 167 Wn. App. 474, 485 n.5, 273 P.3d 477 (2012). Appellate courts are precluded from considering such alleged errors. Hollis v. Garwall, Inc., 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999); Escude v. King

County Public Hospital District No. 2, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003).

RAP 10.3(a)(6) directs each party to supply, in his brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." This court does not consider conclusory arguments that are unsupported by citation to authority. Joy v. Department of Labor & Industries, 170 Wn. App. 614,629,285 P.3d 187 (2012). Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. West v. Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012); Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998). Therefore, this court must decline to address this assignment of error.

State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Even when a party challenges the findings of fact that were entered, this court's scope of review would still be limited in scope. This court would determine whether substantial evidence supports the challenged findings of fact and, if so, whether the findings support the conclusions of law.

Carriero only challenges Finding 3, therefore, this court will consider the remaining findings verities on appeal. State v. Brockob, 159 Wash.2d 311, 343, 150 P.3d 59 (2006) (citing State v. Hill, 123 Wash.2d 641, 647, 870 P.2d 313 (1994)). See also Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992), unchallenged findings of fact are verities on appeal.

Further, this court may in addition, even where a trial court's written findings are incomplete or inadequate, look to the trial court's oral findings to aid review. State v. Robertson, 88 Wn.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998). This court reviews the trial court's conclusions of law de novo. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

In addition, even if the trial court's written findings are incomplete or inadequate, this court can look to the trial court's oral findings to aid our review. State v. Robertson, 88 Wn.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998). In its oral ruling before issuing its written findings and conclusions, the trial court here discussed (1) the relevant facts in relation to the law and (2) the way in which the facts and testimony supported the actions of the officers. After review of the trial court's written findings and conclusions, together with its oral ruling, this court can come to no other conclusion than that the trial court's ruling denying Appellant's motion to suppress was proper.

State v. Gresham, 173 Wn.2d 405,419, 269 P.3d 207 (2012). We may affirm the trial court on any correct ground, Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); "This court may affirm a lower court's ruling on any grounds adequately supported in the record." In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003); Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) " [A]n appellate court may sustain a trial court on any correct ground, even

though that ground was not considered by the trial court.”

Even if the findings had been properly challenged this court need only review these findings, including the oral ruling and the hearing at which the court reviewed these findings and conclusions, to determine that all of them are supported by the testimony of the officers, the video shown to the court and the aerial photograph that was admitted.

Further, the one conclusion which has been challenged is supported by this same testimony and the findings which were entered.

CrR 3.6(a) permits an evidentiary hearing at the court's discretion. 'It is within the discretion of the trial court to allow oral testimony, in addition to affidavits, when hearing a motion to suppress evidence.' State v. McLaughlin, 74 Wn.2d 301, 303, 444 P.2d 699 (1968). Generally, the trial court has wide discretion to fashion a hearing at a stage of the proceedings where guilt is not an issue. State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985). This court will then review the actions of the trial court for abuse of discretion. Id. However, CrR 3.6(a) requires the moving party to support a suppression motion with an affidavit or document 'setting forth the facts the moving party anticipates will be elicited at a hearing.' The trial court decides whether a hearing is required based on those materials together with any response. CrR 3.6(a). The judge then enters an order denying a hearing and stating the reasons. CrR 3.6(a). The court is not required to enter findings of fact and conclusions of law on a motion to suppress unless an evidentiary hearing is held. CrR 3.6(b).

Terry v. Ohio, 395 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and the innumerable cases which followed apply the reasonable articulable suspicion standard for a brief investigatory stop to both crimes and traffic infractions. State v. Duncan, 146 Wn.2d 166, 173-74, 43 P.3d 513 (2002).

Here the officers had sufficient information for them to have a reasonable suspicion to stop and detain the Defendant. Going back to Terry v. Ohio, supra, the Supreme Court has made it clear that a police officer can detain a person in an investigative stop even though the officer does not have *probable cause* to believe that the suspect is involved in criminal activity. When police officers have a “well-founded suspicion not amounting to probable cause” to arrest, they may nonetheless stop a suspected person, identify themselves, and ask that person for identification and an explanation of his or her activities.” State v. Little, 116 Wn.2d 488, 495, 806 P.2d 749 (1991)

To justify an investigatory stop, the officer must have “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” State v. Dudas, 52 Wn.App. 832, 833-34, 764 P.2d 1012 (1988); citing State v. Kennedy, 107 Wn.2d 1, 5, 726 P.2d (1986).

The facts set forth here were that a neighbor had called 911 to report that there was a car backed into a long dead-end alley, at nearly 3:00 AM, with its lights off in a high crime neighborhood that is known for various crime to include burglaries, car thefts, car prowls and gang related activities.

Whether a law enforcement officer has seized a person is a mixed question

of law and fact. State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). Carriero bore the burden of proving that an unlawful seizure occurred. State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). To determine whether a seizure occurred, Washington courts use an objective standard to examine the police officer's actions. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). Not every encounter between a law enforcement officer and an individual amounts to a seizure. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997) (quoting State v. Aranguren, 42 Wn.App. 452, 455, 711 P.2d 1096 (1985)).

The Washington State Constitution, art. I, § 7 permits social contacts between police and citizens. Young, supra, 135 Wn.2d at 511. An officer's mere social contact with an individual in a public place, with a request for identifying information, without more, is not a seizure. Young, 135 Wn.2d at 511, 957 P.2d 681; Armenta, 134 Wn.2d at 11, 948 P.2d 1280.

The Washington Supreme Court recently clarified the limitations of a "social contact" in Harrington, 167 Wash.2d at 656. That court held that a series of police actions that might pass constitutional muster separately, may, when viewed cumulatively, constitute an impermissible progressive intrusion into a person's private affairs and, thus, an unlawful seizure. Harrington, 167 Wash.2d at 660, 222 P.3d 92. An officer asked Harrington to remove his hands from his pockets. A second officer arrived and stood nearby. And, of particular significance, the first officer asked Harrington for permission to pat him down. "When [officer] requested a frisk, the officers' series of actions matured into a

progressive intrusion substantial enough to seize Harrington." Harrington, 167 Wash.2d at 669-70

Here, in contrast, the degree of officer intrusion was less because contact was limited to questions about the vehicle occupants' presence in a car backed into the very end of a dark, dead-end alley, in a residential neighborhood at nearly 3:00 AM. This was not an officer initiated contact but one which occurred after a person who lived adjacent to the alley called 911 to report this suspicious car.

The court can see from the testimony and from the exhibits submitted to this court for review that the officers were cordial and their actions were such that the initial contact was social in nature.

Carriero emphasized that this contact occurred in a manner that may have blocked the defendant from driving away (Although Officer Walk specifically testified that he parked such that another car could pass by and "not block their way." RP 13-15.) However, the trial court heard testimony that this was a nearly block long dead-end alley and that for the officer to walk down that alley at that time of the morning to contact an unknown vehicle would not have been safe. RP 14. This court is well aware that the courts have carved out exceptions in the areas of search and seizure to address officer safety. One such exception applies when a valid Terry stop includes a vehicle search to ensure officer safety. State v. Bradley, 105 Wn.App. 30, 36, 18 P.3d 602 (2001) (citing State v. Kennedy, 107 Wn.2d 1, 12, 726 P.2d 445 (1986); State v. Larson, 88 Wn.App 849, 853, 946 P.2d 1212, (1997) "...it is clear that a reasonable concern for officer safety,

sufficient to justify the search of an automobile incident to a Terry stop, may arise even in circumstances where a lone driver is outside the automobile and has no immediate access to the car.” State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002) stated, “[a] court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns.”

Based on the facts presented, facts which were not disputed in the CrR 3.6 hearing, no court would require an officer to initiate a contact of this nature by walking down this this unlighted alley at 3:00 AM so that the officer would not “block in” the occupants of this car and thereby seize the occupants.

When an officer subjectively suspects the possibility of criminal activity but does not have suspicion justifying an investigative detention (*Terry* stop), officer contact does not constitute seizure. O'Neill, 148 Wash.2d at 574-75, 62 P.3d 489. Thus, it is not a seizure when a law enforcement officer parks behind a vehicle parked in a public place, asks an occupant to roll down a window, questions him, and requests identification. See O'Neill, 148 Wash.2d at 572, 577, 579-581, 62 P.3d 489.

In evaluating the reasonableness of such a stop, a court must look to the totality of the circumstances known to the officer at the time of the stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991) “[T]he totality of the circumstances . . . include[s] factors such as] the officer's training and experience, the location of the stop, and

the conduct of the person detained;” as well as “ ‘the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained.’ ” State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (quoting Williams, 102 Wn.2d at 740). The nature of the crime is also an important factor in examining the totality of the circumstances. State v. Randall, 73 Wn.App. 225, 229, 868 P.2d 207 (1994). Although innocuous explanations might exist, circumstances appearing innocuous to the average person may appear incriminating to a police officer, based on the officer's experience. State v. Samsel, 39 Wn.App. 564, 570, 694 P.2d 670 (1985) A “determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.” United States v. Arvizu, 534 U.S. 266, 277, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002); see also State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (activity consistent with both criminal and noncriminal activity may justify a brief detention).

As the court in State v. Marcum, 149 Wn.App. 894, 907, 205 P.3d 969 (2009) pointed out “[t]he United States Supreme Court has specifically criticized viewing incriminating police observations, one by one, in a manner divorced from their context as a ‘divide-and-conquer’ approach that is inconsistent with the totality of the circumstances test. In State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991). There was an apartment complex that was having problems with drug and gang activity and was taking certain proactive steps to curtail trespassing by unwelcome visitors. *Id.* The court held that “the investigating officers possessed

sufficient suspicion to believe that appellants were involved in a criminal trespass of the apartment complex to justify an investigatory stop.” Little at 497-98. In his concurring opinion, Justice Guy stated that “The totality of the circumstances allowed experienced officers to make rational inferences, thus arousing suspicion of criminal trespass.” Id. at 498-99. He then stated that the location of a stopped party may help to justify the stop under *Terry*. Justice Guy observed that, “[p]eople do not have to be observed flattening themselves against a wall to provoke reasonable suspicion of their unauthorized presence in a restricted area” and that “[a]mbiguous conduct does not vitiate the validity of a *Terry* Stop.” Little at 499.

State v. Dudas, 52 Wn.App. 832, 764 P.2d 1012 (1988). In Dudas, the officer saw a man emerge from a dark parking lot late at night where the adjoining businesses were not open. The area in which this occurred had seen many recent property crimes. The officer drove up to the man and asked him to identify himself and explain his presence. The court held that this was a justifiable *Terry* Stop based upon the totality of circumstances. Id. at 834.

Many of the cases cited above where the court found the stop of a defendant was valid occurred in areas normally considered public or of a much more public nature than a dead-end alley which only abuts private residences. There were no commercial properties that were even in this area, only private homes. The police had reasonable articulable suspicion that criminal conduct had occurred or was about to occur and would have been derelict in their duties

had they declined to investigate.

Cases for decades have made it clear that not every encounter between a police officer and a private individual constitutes an official intrusion requiring objective justification. United States v. Mendenhall, 446 U.S. 544, 551-55, 100 S.Ct. 1870, 64 L.Ed. 497 (1980). The courts have often labeled contact between citizens and the police as “social contacts.” An officer’s social contact with an individual in a public place, even with a request for identifying information, without more, is not a seizure or an investigative detention. State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). Our courts have ruled that in most instances without more, police questioning relating to one’s identity or a request for identification is unlikely to result in a seizure. State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). This is true even when the officer subjectively suspects the possibility of criminal activity, but does not have suspicion justifying a *Terry* Stop. State v. O’Neill, 148 Wn.2d 564, 574-75, 62 P.3d 489 (2003).

A seizure under Article 1, Section 7 occurs only when an individual’s freedom of movement is restrained and the individual does not believe he is free to leave or decline a request due to an officer’s use of physical force or a display of authority. O’Neill, 148 Wn.2d at 574. This determination is made by looking objectively at the actions of the police officer. Young, 135 Wn.2d at 501-03, 504-06, 510-11. The relevant question is whether a reasonable person in the individual’s position would feel he was being detained. O’Neill at 581. However, “[t]he reasonable person standard does not mean that when a uniformed

law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to rise to the level of a *Terry Stop*.” *Id.* at 581.

Circumstances that might indicate a show of authority constituting a seizure include the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person of the citizen; (4) the use of language or a tone of voice indicating compliance with the officer’s request might be compelled... *Id.*; citing Young, 135 Wn.2d at 512.

Absent such circumstances, inoffensive contact between the police and a private citizen cannot, as a matter of law, amount to a seizure of that person. State v. Mote, 129 Wn.App. 276, 283, 120 P.3d 596 (2005); Young, 135 Wn.2d at 512 (quoting Mendenhall, 446 U.S. at 554-55). In State v. Mote, the court differentiated between situations where law enforcement contacted a passenger in a vehicle they had stopped and asked them for identification and one where the vehicle was already parked when law enforcement made contact with its occupants. *Id.* The court held that occupants of cars parked in public places should be treated like pedestrians for article 1, section 7 purposes. Mote, 129 Wn.App.at 290.

In Young, for example, the police officer made a social contact with an individual who was standing on a sidewalk at night. State v. Young, 135 Wn.2d 498, 957 P.2d 681 (1998). Although the officer didn’t see anything suspicious about this individual, he contacted him because he didn’t know the individual and

the area had a high incidence of narcotic activity. *Id.* The officer in Young stopped his patrol car and got out and spoke to the individual who identified himself. The Court in Young found that this was simply a social contact. *Id.* The officer began driving away and then did a records check which revealed that the individual had an extensive background in narcotics sales. *Id.*

Here officers drove up to Appellant's location without emergency lights or sirens activated. They walked up to the Defendant's vehicle and addressed them in a very friendly and casual manner. They didn't use a commanding form of voice or order the occupants to do anything. Instead, officer Walk's tone was both friendly and casual but wanted to verify the truth of who they were and what they were up to. After initially taking Carriero's ID the officer returned it to his possession. Appellant was in possession of that ID at the time the officer observed the weapon from the exterior of the car.

State v. Hansen, 99 Wn.App. 575, 577, 994 P.2d 855 (2000) is factually similar to the present case. In the Hansen case, one officer requested to see the defendant's driver's license, the defendant gave it to that officer who then handed the license to a second officer standing by them. This officer in turn wrote down the defendant's name and date of birth holding the license anywhere between five and thirty seconds before returning it to the defendant. The Hansen court found that "[t]here is no reason handing the license to another officer standing beside the first would have led a reasonable person to believe that he was not free to leave. The initial consensual encounter thus did not ripen into an unlawful detention."

Hansen, at 579.

Subsequent to Harrington this court decided State v. Bailey, 154 Wn.App. 295, 224 P.3d 852, 856 (2010). The court analyzed Harrington as follows:

" [A] police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting that information necessary to perform that function has not 'seized' the citizen. And an officer may ask for an individual's identification in the course of a casual conversation. Again, the key inquiry is whether the officer either uses force or displays authority in a way that would cause a reasonable person to feel compelled to continue the contact.

The Washington Supreme Court recently clarified the limitations of a "social contact" in Harrington... There, the court held that, viewed cumulatively, a series of police actions that constitute a progressive intrusion into a person's private affairs are an unlawful seizure, even where the actions may separately pass constitutional muster. Although there are similarities between the facts of this case and those in Harrington, the degree of intrusion by the officer is less here. (Citations omitted)

In State v. Smith 154 Wn. App. 695, 226 P.3d 195 (2010) the court held that no seizure occurred under the following facts:

On July 13, 2007, officers from the Department of Corrections and Detective Floyd May visited the Chieftain Motel in Bremerton. After arresting one client with an outstanding warrant, they decided to check on another client, Christina Ohnemus, who had a room in the same motel. Kevin Joseph Smith and Ron De'Bose were in Ohnemus's room, and the officers asked the men to leave while they briefly searched the room. Smith walked outside, but De'Bose chose to remain.

While Smith was standing outside the room, Detective May approached and asked his name. Detective May then stepped back a few feet to check for warrants on his hand-held radio. The officer found no outstanding warrants, but the physical description associated with Smith's name stated his eye color was hazel. The detective observed Smith's eyes were blue. Detective May testified that it is common for people with

warrants to give a false name, so he asked if Smith had any identification with him. Smith handed the detective a check cashing card that described Smith's eyes as blue. Due to the continued discrepancy, Detective May asked if Smith had any other identification. While Smith was holding his wallet open, the detective asked if he could look in the wallet and Smith handed it to him.

Detective May looked through Smith's wallet and found several cards with different names. After arresting Smith for identity theft, Detective May searched Smith's wallet and found a small plastic bag containing methamphetamine. The State charged Smith with unlawful possession of methamphetamine. At trial, Smith moved to suppress the evidence found in his wallet. The trial court denied his motion, and a jury found him guilty.

The court in Smith distinguished the case before them from Soto-Garcia and

Harrington as follows:

The Harrington court summarized Soto-Garcia, describing the independent elements that amounted to a seizure as: " [the officer's] inquiry about Soto-Garcia's identification, warrant check, direct question about drug possession, and request to search [Soto-Garcia]-all of which, combined, formed a seizure." *Harrington*, 167 Wash.2d 656, 668-69, 222 P.3d 92, 97-98. The *Harrington* court compared Soto-Garcia to Harrington's case, and held that Harrington was also seized by an officer's progressive intrusion into his privacy:

...

“The circumstances supporting a seizure in Soto-Garcia and Harrington are not present here. In Soto-Garcia, we emphasized that the officer asked a direct question about drug possession. Soto-Garcia, 68 Wn. App. At 25, 841 P.2d 1271. The Harrington court reasoned that the officer asked Harrington to remove his hands from his pockets “to control Harrington's actions.” Harrington, 167 Wn.2d at 669. In both cases, the progressive intrusion into the defendants’ privacy culminated in a request to frisk. The Harrington court emphasized that “[r]equesting to frisk is inconsistent with a mere social contact” and held that “[w]hen Reiber requested a frisk, the officers’ series of actions matured into a progressive intrusion substantial enough to seize Harrington.” Harrington, 167 Wn.2d at 669-70. In contrast, Detective May did not question [the defendant] about illegal activity, attempt to control his actions, or request to frisk

him. The detective simply asked for identification, and then asked to look through Smith's wallet, which Smith was holding open at the time." Smith, 154 Wn. App. at 701-702.

This court then sets forth step by step how the "police intrusion progressed" in Harrington and compared and contrasted those facts against the facts set forth in Bailey and found the "intrusion" in Bailey did not arise to the level in Harrington. Bailey at 856 This court need only conduct a similar step by step analyses of the actions of the officer herein to come to the same result as it did in Bailey. As can be seen from the testimony set forth above, the actions of these two officers did not amount to a seizure of Appellant at the time of the initial contact, it did become that upon viewing the weapon.

"The defendant bears the burden of proving that an unlawful seizure occurred. State v. Young, 135 Wash.2d 498, 501, 957 P.2d 681 (1998)." He has not done so here. Harrington at 663 "... seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." The standard is "a purely objective one, looking to the actions of the law enforcement officer..." The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. An encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away.

A seizure occurs under article I, section 7 when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

Carriero did not meet his burden in the original CrR 3.6 hearing and he has not done so here again in this appeal. He has not demonstrated from the facts elicited at trial that he, the "reasonable person" did not feel free to leave.

IV. CONCLUSION

This court should uphold the actions of the trial court, this appeal should be denied.

Respectfully submitted this 18th day of July 2018,

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
David.Trefry@co.wa.yakima.us

DECLARATION OF SERVICE

I, David B. Trefry, state that on July 18, 2018, I emailed a copy of the Respondent's Brief to: Jodi R. Backlund and Manek R. Mistry at backlundmistry@gmail.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of July, 2018 at Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
David.Trefry@co.wa.yakima.us

YAKIMA COUNTY PROSECUTORS OFFICE

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