

FILED
Court of Appeals
Division III
State of Washington
3/21/2019 11:05 AM

NO. 36377-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

CHARLES GIBSON,
Appellant.

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

The Honorable Jessica T. Reeves, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering the following finding of fact that was not supported by substantial evidence:

... the court finds the *Terry* pat-down search of the defendant was justified. (CP 28).

2. The trial court erred when it entered the following conclusion of law:

The subsequent discovery of the suspected narcotics was proper. (CP 28).

3. The trial court erred when it denied Gibson's motion to suppress the suspected narcotics because the police did not have reasonable articulable suspicion of criminal activity to justify a *Terry* stop or search.

4. Gibson challenges his conviction.

B. ISSUES PRESENTED ON APPEAL

1. Were Gibson's State and Federal Constitutional rights violated by an unlawful intrusion into his private affairs without authority of law and an unreasonable search and seizure when Deputy Russell detained Gibson and searched his pockets without reasonable articulable suspicion Gibson had been or was about to be engaged in criminal activity?

2. Was the trial court's finding that "the *Terry* pat-down search of the defendant was justified", supported by substantial evidence when Officer Russell stopped and searched Gibson based on an informant's uncorroborated statement that the informant observed Gibson cutting a white powdery substance?

3. Did the trial court err in concluding the subsequent discovery of the suspected narcotics was proper when Deputy Russell exceeded the permissible scope of the *Terry* exception to the warrant requirement?

C. STATEMENT OF THE CASE

1. Procedural History

Charles Gibson was charged by information with one count of Violation of the Uniform Controlled Substances Act – Possession of Methamphetamine (RCW 69.50.4013(1)). CP 6. Gibson moved to suppress the narcotics based on a warrantless search that did not fall under any exception to the warrant requirement. CP 12. After a CrR 3.6 hearing the trial court denied Gibson's motion. CP 28. Gibson waived his right to a jury trial and agreed to present the case on the record. CP 38. The trial court found Gibson guilty as charged.

CP 47. Gibson timely appeals the trial court's denial of his motion to suppress. CP 60.

2. Substantive Facts

Deputy Randall Russell responded to an incident in which a property owner, Brian Reinhart, reported a trespasser on his property who he allegedly observed cutting a white powdery substance inside the trespasser's vehicle. RP 8. When Russell arrived on the premises, Reinhart reported that a man named Charlie (later identified as Gibson) – had been assisting a female in moving her property out of Reinhart's barn. CP 17. Reinhart requested they leave, but Gibson's vehicle would not start. CP 17; RP 18.

Russell approached Gibson and asked whether he was Charlie. CP 17. Gibson confirmed he was Charlie and explained that his vehicle would not start. CP 17; RP 18. Gibson did not pose any type of threat to Russell, and never threatened Russell at any time. RP 10, 22. Russell testified that in general "you never know" if someone is a threat, but that Gibson was not at all aggressive. RP 10, 22.

Russell asked Gibson "about being seen with a baggie of white powdery substance" (CP 17) and Gibson responded that "he

didn't know or didn't have anything" (RP 20). Dissatisfied with that answer, Russell requested Gibson's identification. RP 9. Gibson complied with Russell's request and provided a driver's license identifying him as Charles Gibson. RP 9.

As Gibson reached in his back pocket for his wallet Russell observed two sheaths on his belt that each contained a pocket knife. RP 10. Russell observed that Gibson kept placing his hand in his right pocket. RP 9. After observing the sheaths, Russell ordered Gibson to turn around and place his hands on the vehicle. Gibson complied and Russell removed Gibson's belt. RP 10.

While Gibson's hands were placed on the vehicle, Russell asked if Gibson had any knives in his pockets. RP 11. Gibson responded that he did because he likes folded pocket knives. RP 10, 26. Russell then patted Gibson's two front pockets, and shined a flashlight into Gibson's left front pocket which revealed several folded pocket knives. RP 24. Russell removed five small pocket knives from that pocket. RP 11. Russell then shined his flashlight in Gibson's right pocket and observed a clear plastic baggie containing a white powdery substance with small pocket knives underneath it. RP 11.

Russel placed Gibson in custody, removed the substance,

knives, and two more containers located inside Gibson's pocket. RP 12-13. The substance tested positive for methamphetamine. CP 44.

a. Testimony at the CrR 3.6 Hearing

When the prosecutor asked whether Gibson posed any threat Russell answered that Gibson was not aggressive but "You never know." RP 10, 22. After the CrR 3.6 hearing the trial court denied Gibson's motion to suppress and because the parties agreed to a trial by affidavit the court entered a guilty finding. CP 28. This timely appeal follows. CP 60.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS BECAUSE IT WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE

a. Standard of Review For Trial Court's Denial Of a CrR 3.6 Suppression motion

This court reviews a trial court's denial of a CrR 3.6 suppression motion to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law. *State v. Cole*, 122 Wn. App. 319, 322–23, 93 P.3d 209 (2004) (citing *State*

v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Conclusions of law are reviewed de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *Cole*, 122 Wn. App. at 323.

b. Illegal Search

The Fourth Amendment of the United States Constitution provides, “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause...” U.S. Const. Amend. IV. Article I, section 7 of the Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Warrantless searches are per se unreasonable under both the Fourth Amendment and Article I, section 7. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).

i. Fourth Amendment

When the state seeks to introduce evidence obtained through a warrantless search or seizure, the state bears the burden to prove one of the narrowly drawn and jealously guarded exceptions to the warrant requirement applies. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

A so-called *Terry* stop is one of those exceptions. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014) (citing *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Under the *Terry* exception to the warrant requirement, officers may briefly detain a suspect for investigation where there is a “reasonable articulable suspicion” that the detained person is or has been involved in a crime. *State v. Alexander*, 5 Wn. App. 2d 154, 159, 425 P.3d 920 (2018); *Terry*, 392 U.S. at 21.

Additionally, the *Terry* stop is “limited in scope and duration to fulfilling the investigative purpose of the stop.” *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). And “[t]he investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.” *Williams*, 102 Wn.2d at 738 (citing *Florida v. Royer*, 460 U.S. 491, 499, 103 S.Ct. 1319 (1983)).

When an officer makes a lawful investigatory stop of a person he has no general authorization to search that person. *Russell*, 180 Wn.2d at 867. Further, “*Terry* does not authorize a search for evidence of a crime...” *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). An officer may conduct a protective frisk to search for

weapons, but only if he can point to “specific and articulable facts’ which create an objectively reasonable belief that a suspect is ‘armed and presently dangerous.’” *Russell*, 180 Wn.2d at 867-68; (quoting *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry*, 392 U.S. at 21–24)).

And even when a protective frisk is justified an officer may only conduct a limited pat-down of the outer clothing of a person in an attempt to discover weapons that could cause harm.” *Russell*, 180 Wn.2d at 867 (citing *Terry*, 392 U.S. at 30-31. Possession of small, folded pocket knives does not establish that Gibson was armed and dangerous because these knives are not considered dangerous weapons. RCW 9.41.250, .270. See also *United States v. House*, 463 F. Appx. 783, 785, 788, 790 (10th Cir. 2012) (reasonable officer could conclude the suspect was armed because the officer observed a folded knife in the suspects pocket and a bulge under his jacket, but there was no indication suspect was presently dangerous when the officer observed the folded knife from several feet away, the officer removed the knife and the suspect was cooperative).

ii. Article I, section 7

It is well established that art. I, § 7 is more protective than the

Fourth Amendment. *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). While the Fourth Amendment is grounded in “notions of reasonableness,” Article 1 Section 7 “prohibits any disturbance of an individual's private affairs without authority of law.” *State v. Wisdom*, 187 Wn. App. 652, 668, 349 P.3d 953 (2015) (citations omitted).

Because art. I, § 7 is more protective than the Fourth Amendment, it “generally requires a stronger showing by the State” that the search or seizure was justified. *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015).

- c. Deputy Russell conducted an impermissible Terry stop in violation of the Fourth Amendment and Art. I, § 7 because he did not have reasonable articulable suspicion based on objective facts that Gibson had been or was about to be engaged in criminal activity

Deputy Russell conducted an impermissible *Terry* stop in violation of the Fourth Amendment and art. I, § 7 because he did not have reasonable articulable suspicion based on objective facts that Gibson had been or was about to be engaged in criminal conduct. *United States v. Castle*, 825 F.3d 625, 634 (D.C. Cir. 2016) (citing *Reid v. Georgia*, 448 U.S. 438, 440, 100 S.Ct. 2752 (1980)).

When an officer bases his or her suspicion on an informant's tip, the state must show that the tip bears some “indicia of reliability”

under the totality of the circumstances. *Z.U.E.*, 183 Wn.2d at 618. This requires either (1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion. *Z.U.E.*, 183 Wn.2d at 618 (citing *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980)). The officer's observation must corroborate more than just innocuous facts. *Z.U.E.*, 183 Wn.2d at 618.

Z.U.E. is illustrative. There, the Washington Supreme Court held the state failed to establish a series of 911 calls provided the officers with any articulable reason to suspect any of the passengers in *Z.U.E.*'s car were engaged in criminal activity and, thus, a *Terry* stop was not justified. *Z.U.E.*, 183 Wn.2d at 624.

First, the officers asserted they were investigating a minor in possession of a firearm, but this suspicion was based solely on one 911 caller who offered no factual basis for her allegation the female was 17 rather than 18 or some other age. *Z.U.E.*, 183 Wn.2d at 622-23. Thus, the officers had no basis on which to evaluate the accuracy of the informant's information. *Z.U.E.*, 183 Wn.2d at 623. Further, the officers could not corroborate the presence of criminal activity

because they did not observe the female passenger with a gun, nor could they reasonably confirm the female's age prior to the stop. *Z.U.E.*, 183 Wn.2d at 623.

Second, the officers asserted they stopped Z.U.E.'s car because they were investigating a gang-related assault with a deadly weapon and had reasonable suspicion the suspect was in the car because: (1) the car was located near where the 911 callers indicated the suspect was headed; and (2) one of the female passengers matched the description of the female who gave the suspect the gun. *Z.U.E.*, 183 Wn.2d at 615, 622. However, Z.U.E.'s car did not match the description of the car into which the 911 callers reported observing the suspect enter. None of the male passengers matched the description of the suspect and Z.U.E.'s car did not have eight passengers as the 911 callers described. *Z.U.E.*, 183 Wn.2d at 614. These facts were insufficient to support a reasonable suspicion that the suspect was in the car. *Z.U.E.*, 183 Wn.2d at 622.

In contrast, in *State v. Lee* the *Terry* stop was justified by the informant's statements and the circumstances corroborated by the officer's own observations. *State v. Lee*, 147 Wn. App. 912, 922, 199 P.3d 445 (2008). There, the informant reported that two individuals

in a specific car pulled over and told her to get in the vehicle to smoke crack cocaine, showed her they possessed crack cocaine and a crack pipe, and the officer saw the car pull up to the informant in a high-crime area, saw the occupants speak with her briefly and saw her walk away quickly appearing frightened. *Lee*, 147 Wn. App. at 922.

Here, the circumstances are more like *Z.U.E.* than *Lee*. Like in *Z.U.E.*, Russell's justification for the narcotics investigation was based solely on Reinhart's information that he saw Gibson sitting in his vehicle cutting a white powdery substance. RP 8. However, just like the officers in *Z.U.E.*, and unlike the officer in *Lee*, Russell could not corroborate Reinhart's statement with any of his own observations. Unlike in *Lee*, here, Gibson did not tell the informant he possessed narcotics and the informant did not observe any drug paraphernalia to aid in consuming the narcotics.

Further, cutting a white powdery substance is not a crime unless it is a controlled substance. Just like the officers in *Z.U.E.* did not observe the female give the suspect the gun and could not reasonably confirm the female's age prior to the stop, here Russell did not observe any white powdery substance nor could he

reasonably confirm the white powdery substance was narcotics prior to the stop. *Z.U.E.*, 183 Wn.2d at 623.

Therefore, the state failed to establish that Reinhart's statement about the white powdery substance provided Russell with reasonable articulable suspicion Gibson was engaged in criminal activity, thus, the *Terry* stop was not justified. *Z.U.E.*, 183 Wn.2d at 624. And the trial court's finding that "the *Terry* pat-down search of the defendant was justified" was not supported by substantial evidence. RP 28.

- i. Possessing a lawful small folded pocket knife does not create reasonable articulable suspicion that Gibson was engaged in criminal activity

Not only was there no reasonable articulable suspicion of criminal activity to justify the initial *Terry* stop, but there was no reasonable articulable suspicion to continue to detain Gibson after Russell failed to corroborate Reinhart's statements and Gibson denied possession of any narcotics.

The Court of Appeals recently affirmed that possessing a lawful weapon, standing alone, is insufficient to support an investigatory stop. *State v. Tarango*, __ Wn. App. __, 434 P.3d 77,

83 (2019), published in part¹. The Court of Appeals reversed Tarango's conviction for unlawful possession of a firearm because, at the time of the *Terry* stop, the only information the officers had was that a customer reported seeing a man in a Chevrolet Suburban playing his music loudly and holding a semiautomatic, Glock-style gun in his right hand. *Tarrango*, 434 P.3d at 78-79. Because Washington is an open carry state, and it is not unlawful to simply carry an unconcealed firearm, this information did not create a reasonable suspicion that Tarango had engaged in, or was about to engage in, criminal activity. *Tarango*, 434 P.3d at 81, 84 (citing RCW 9.41.050, .270) (other citations omitted).

Similarly here, after Russell was unable to corroborate Reinhart's statement or confirm that Gibson possessed narcotics, the initial suspicion was dispelled. Russell continued to detain Gibson based solely on Gibson's possession of two sheathed knives, which were not unlawful to possess. The two sheathed knives, standing alone, are insufficient to justify detention or a search as a

¹ This brief only cites to the published portion of *State v. Tarango*. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

matter of law. *Tarango*, 434 P.3d at 83.

Therefore, the trial court's finding that "the *Terry* pat-down search of the defendant was justified" was not supported by substantial evidence and the trial court's conclusion that the subsequent discovery of the suspected narcotics was proper was erroneous. RP 28. *Cole*, 122 Wn. App. at 322–23; (citing *Mendez*, 137 Wn.2d at 214).

- d. Even if the initial *Terry* stop Was justified Deputy Russell violated the Fourth Amendment and art. I, § 7 when he searched Gibson's pockets because the search exceeded the scope of the investigatory stop permitted by the *Terry* exception to the warrant requirement

When Deputy Russell searched Gibson's pockets, he violated the Fourth Amendment and art. I, § 7 because the search exceeded the scope of the initial investigatory stop permitted by the *Terry* exception to the warrant requirement.

Even if the initial *Terry* stop is properly initiated by suspicion of illegal activity, it violates art. I, § 7 if it exceeds the permissible scope. *Williams*, 102 Wn.2d at 736. A *Terry* search exceeds the permissible scope "if the officer's professed belief that the suspect was dangerous was not objectively believable." *Day*, 161 Wn.2d at 895 (citing *State v. Glossbrener*, 146 Wn.2d 670, 684-85, 49 P.3d

128 (2002)).

Glossbrener is illustrative. There, the Washington Supreme Court reversed the defendant's conviction and held the methamphetamine should have been suppressed. *Glossbrener*, 146 Wn.2d at 685. The officer's articulated reasons for justifying his belief the defendant was armed and dangerous were not objectively reasonable under the circumstances. *Glossbrener*, 146 Wn.2d at 684.

When officer Carlos Trevino conducted a traffic stop for a headlight infraction, he observed the defendant make a furtive movement and reach toward the passenger side of the car. *Glossbrener*, 146 Wn.2d at 673. When Trevino approached the vehicle, he smelled alcohol and observed that Glossbrener's eyes were bloodshot. *Glossbrener*, 146 Wn.2d at 673.

Trevino testified the furtive movement, along with Glossbrener's initial false explanation for reaching led Trevino to believe Glossbrener was armed and dangerous. However, after Glossbrener admitted he reached over to hide an open container of alcohol Trevino allowed Glossbrener to sit in the vehicle while he checked for warrants. *Glossbrener*, 146 Wn.2d at 673-74. Therefore,

Trevino's own actions dispelled the notion he thought Glossbrener was armed and dangerous. *Glossbrener*, 146 Wn.2d at 681-82. Further, Glossbrener cooperated with the investigation and Trevino did not search the passenger area until after he determined Glossbrener was not legally intoxicated. *Glossbrener*, 146 Wn.2d at 682.

Similarly, in *Williams*, the Washington Supreme Court found there was no reasonable inference the defendant was dangerous when he made no furtive gestures or violent responses and did not threaten the police. *Williams*, 102 Wn.2d at 740. Despite the absence of reasonable articulable facts to justify a belief that Williams was armed and dangerous, officers physically obstructed the defendant's vehicle, told him to turn off his car, throw the keys out the window, and put his hands on the roof. *Williams* 102 Wn.2d at 734-35. Officers then patted down Williams for weapons, handcuffed him, and placed him in a patrol car. *Williams* 102 Wn.2d at 735.

The *Williams* court held the officer's response was not warranted given the nature of the crime they were investigating – residential burglary. *Williams*, 102 Wn.2d at 740. Therefore, the officers exceeded the proper scope of a *Terry* stop. *Williams*, 102

Wn.2d at 736.

Again, in *Henry*, the Court of Appeals reversed the defendant's conviction when the deputy frisked the defendant for "officer safety reasons" but could not articulate any specific concern. *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995). The Court of Appeals found that "Deputy Small hinted at his real motivation for the detention when he testified he told Henry he 'was looking for weapons *or anything else he had on him*' and 'I figured he had a multitude of things, maybe a weapon, which is my main concern. *Who knows, maybe some drug paraphernalia, something of that nature.*" *Henry*, 80 Wn. App. at 552-53. (emphasis in original).

While the Court of Appeals has upheld a protective frisk for more weapons after the discovery of one weapon, it has not held that the presence of a weapon alone justifies a protective frisk. *State v. Olsson*, 78 Wn. App. 202, 208, 895 P.2d 867 (1995). In *Olsson*, the Court of Appeals held the protective frisk was justified because the presence of one weapon posed a threat to the officers under the circumstances. The presence of that weapon, coupled with the officer's reasonable belief the defendant was under the influence of drugs and the presence of two other people in the suspect's vehicle,

posed a “legitimate safety concern[]”. *Olsson*, 78 Wn. App. at 208.

Here, however, unlike *Olsson*, Gibson did not threaten Russell and Russell did not state he was afraid of Gibson. RP 10, 22. Rather, Russell testified that Gibson was not aggressive. RP 10, 22. Gibson had several legal, small pocket knives in his possession that he never tried to use or access to threaten Russell. Gibson made no furtive gestures or violent responses and did not make any threats. RP 9-10. Russell responded to a potential trespass – not a narcotics investigation, and later learned, but could not verify that the reporting party thought he saw the man cutting a white substance. RP 8, 16. The reporting party did not testify and there is no specific information about the substance Gibson was supposedly “cutting”.

Although the level of detention here was not as severe as in *Williams*, it was unwarranted given the nature of a trespass complaint and the absence of any evidence Gibson had, or was about to, consume narcotics or that Gibson was under the influence of narcotics. RP 9-10.

Like in *Glossbrener*, here, Russell could not articulate any facts to support an objectively reasonable belief his safety was jeopardized, or that Gibson was dangerous. Although Russell

testified that Gibson placed his hand in his right pocket, Russell did not testify this caused him to fear for his safety. RP 10. (See also *People v. Davis*, 352 Ill. App. 3d 576, 580-83, 286 Ill.Dec. 882, 815 N.E.2d 92 (2004) (discussing several cases considering whether reasonable suspicion was properly developed)). The *Davis* court cited *People v. Dotson*, 37 Ill. App. 3d 176, 345 N.E.2d 721 (1976), to conclude the simple fact an individual attempts to put his hands in his pockets does not necessarily create reasonable suspicion the individual is armed or dangerous. *Davis*, 352 Ill. App. 3d at 581. The *Dotson* court determined many innocuous reasons explain placing one's hands in one's pockets, such as the desire to keep warm. *Dotson*, 37 Ill. App. 3d at 177.

And when the prosecutor asked whether Gibson posed “any type of threat” to him Russell responded, “You never know” but whenever “I’m by myself, and I see that they have weapons I’m going to remove those weapons.” RP 10-11. But a police officer may not exceed the scope of a carefully drawn exception to the warrant requirement without articulating specific facts that support his reasonable belief the suspect is armed and presently dangerous. *Russell*, 180 Wn. 2d at 867.

Allowing an officer to conduct a search merely because he is alone, without articulating a specific safety concern, creates a search incident to a *Terry* stop which is not authorized by the Fourth Amendment or art. I, § 7. See *Russell*, 180 Wn.2d at 867 (When an officer makes a lawful investigatory stop of a person he has no general authorization to search that person).

Even if Russell had testified he felt threatened by Gibson placing a hand in his pocket, Russell's own conduct and testimony dispelled that notion. For example, Russell testified he was not conducting a drug investigation, yet, similar to the officer in *Glossbrener*, Russell only searched Gibson after he found no immediate evidence of drug use or possession. RP 10, 15-16, 20. Further, Russell admitted he continued the drug investigation because he did not believe Gibson had no narcotics. RP 20.

Just like the officer in *Henry*, Russell hinted at his real motivation for the search when he testified that he intended to return the knives to Gibson if he did not find "anything justifiably as drug use or anything like that." RP 27.

Because Russell did not and could not articulate specific facts that would support an objectively reasonable belief that Gibson was

dangerous, Russell exceed the permissible scope of a *Terry* stop in violation of Gibson's Fourth Amendment right to be free from unreasonable warrantless searches and his art. I, § 7 right to free from a search without authority of law. *Russell*, 180 Wn.2d at 867-68.

The remedy for a violation of the Fourth Amendment and art. I, § 7, is suppression of the fruits of the improper search or seizure. *State v. Gatewood*, 163 Wn.2d 534, 542, 182 P.3d 426 (2008) (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). When the government cannot proceed with the remaining evidence after suppression, the remedy is dismissal.

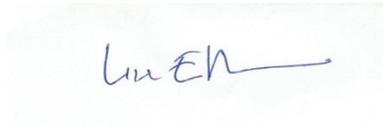
In this case the search of Gibson's pockets was unconstitutional and the methamphetamine should have been suppressed. *Gatewood*, 163 Wn.2d at 542. Therefore, the trial court's finding that "the *Terry* pat-down search of the defendant was justified" was not supported by substantial evidence and this court should reverse Gibson's conviction and remand to the trial court to suppress the methamphetamine, and reverse his conviction because without the contraband, the state cannot proceed to prosecute. *Cole*, 122 Wn. App. at 322-23; (citing *Mendez*, 137 Wn.2d at 214).

E. CONCLUSION

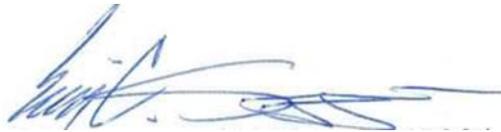
Charles Gibson respectfully request that this court reverse his conviction and remand to the trial court for suppression of the methamphetamine, and reversal of his conviction based on the state's inability to proceed to retrial without the suppressed evidence.

DATED this 21st day of March 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is enclosed in a light blue rectangular box.

LISE ELLNER, WSBA No. 20955
Attorney for Appellant

A handwritten signature in blue ink, appearing to read "Erin C. Sperger", is enclosed in a light blue rectangular box.

ERIN C. SPERGER, WSBA No. 45931
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Stevens County Prosecutor's Office trasmussen@stevenscountywa.gov and Charles Gibson, PO Box 267, Springdale, WA 99173 a true copy of the document to which this certificate is affixed on March 21, 2019. Service was made by electronically to the prosecutor and Charles Gibson by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

March 21, 2019 - 11:05 AM

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Superior Court Case Number: 18-1-00192-1

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