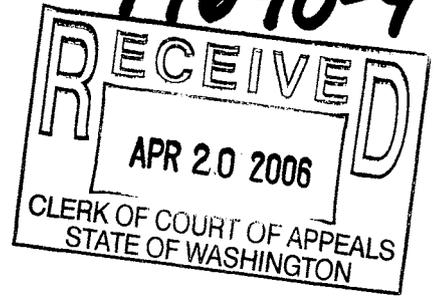


COPY
79690-4



NO. 33846-7-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

MICHAEL DEREK SETTERSTROM

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Richard D. Hicks, Judge, and the Honorable
William Thomas McPhee, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

PM 4/19/06

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
C. STATEMENT OF THE CASE.....	5
1. <u>Procedural Facts</u>	5
2. <u>CrR 3.6 Suppression Hearing</u>	6
3. <u>Trial Testimony</u>	10
4. <u>Sentencing</u>	12
D. ARGUMENT	12
1. <u>THE OFFICER DID NOT HAVE A REASONABLE AND ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE INITIAL CONTACT WITH MR. SETTERSTROM</u>	12
a. Standard of Review.....	15
b. Mr. Setterstrom was seized when Lt. Stevens contacted him and questioned him regarding his name	15
c. The officer's seizure of Mr. Setterstrom was not based on a reasonable or articulable suspicion of wrongdoing	14
d. Once the officer confirmed Mr. Setterstrom was not involved in criminal activity, he should not have been frisked or further detained.....	20

e.	The pat down search was unreasonably intrusive and not limited to a search for weapons to promote the goal of officer safety.....	21
f.	All evidence obtained as a result of the initial stop and detention must be suppressed.....	22
E.	CONCLUSION	22
F.	APPENDIX.....	A-1

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Acrey</i> , 148 Wn.2d 738, 64 P.3d 594 (2003).....	13
<i>State v. Armenta</i> , 134 Wn2d 1, 948 P.2d 1280 (1997).....	14, 15
<i>State v. Baro</i> , 55 Wn. App. 443, 777 P.2d 1086 (1989).....	14
<i>State v. Blair</i> , 65 Wn. App. 64, 827 P.2d 356 (1992).....	21
<i>State v. Collins</i> , 121 Wn.2d 168, 847 P.2d 919 (1993)	18
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002)	13, 14
<i>State v. Glover</i> , 116 Wn.2d 509, 806 P.2d 760 (1991).....	13, 17, 18
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	18, 22
<i>State v. L.K.</i> , 95 Wn. App. 686, 977 P.2d 39 (1999)	18
<i>State v. Larson</i> , 93 Wn.2d 638, 611 P.2d 771 (1980).....	22
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	14
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003)	15
<i>State v. Richardson</i> , 64 Wn. App. 693, 825 P.2d 754 (1992)	18
<i>State v. Sistrunk</i> , 57 Wn. App. 210, 787 P.2d 937 (1990)	21
<i>State v. Stroud</i> , 30 Wn. App. 392, 634 P.2d 316 (1981)	15, 18
<i>State v. Thorn</i> , 129 Wn.2d 347, 917 P.2d 108 (1996)	15, 16
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	14, 18
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681 (1998).....	15
<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Florida v. Bostick</i> , 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).....	15
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	3, 13, 14, 17

<i>United States v. Cortez</i> , 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).....	17
<i>United States v. Hensley</i> , 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985).....	17
<i>United States v. Mendenhall</i> , 446 U.S. 544, 00 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).....	15
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).....	22
<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 69.50.4013	5
RCW 69.50.4014	6
<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. Amend. IV	13
Wash. Const. Art. I, § 7	13, 15
<u>COURT RULES</u>	<u>Page</u>
CrR 3.6.....	1, 5, 6, 20
<u>OTHER AUTHORITIES</u>	<u>Page</u>
4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.4, 177-78 (3rd ed. 1996)	19

A. ASSIGNMENTS OF ERROR

1. The trial court judge erred in denying the Appellant's Motion to suppress evidence pursuant to Criminal Rule 3.6.

2. The trial court erred in concluding that law enforcement had a reasonable and articulable suspicion of criminal activity at the time he confronted the Appellant.

3. The trial court erred in concluding that it was reasonable under the circumstances for the officer to be suspicious that the Appellant had been or was involved in an offense or was under the influence of a controlled substance.

4. The trial court erred in entering Finding of Fact 1:

1. Lt. Stevens of the Tumwater Police Department had contact with Michael Setterstrom as a result of a call from his dispatcher stating that two unwanted people were in the DSHS building. One of the person's appeared to be on drugs and the other appeared to be sleeping.

5. The trial court erred in entering Finding of Fact 3:

3. Michael Setterstrom was unable to stand still and Lt. Stevens thought that he was possibly under the influence of a drug.

6. The trial court erred in entering Finding of Fact 4:

4. Lt. Stevens has extensive education, training and experience in the effects drugs have on

people as well as identifying illegal drugs.

7. The trial court erred in entering Finding of Fact 5:

5. Due to the behavior exhibited by Michael Setterstrom, Lt. Stevens patted him down for officer safety to determine if Setterstrom had any weapons.

8. The trial court erred in entering Finding of Fact 6:

6. Lt. Stevens felt a hard object that may create danger in a pocket of Michael Setterstrom.

9. The trial court erred entering Finding of Fact 7:

7. Lt. Stevens was not sure if the object was a weapon or not, so he pulled the item out of Setterstrom's pocket.

10. The trial court erred entering Finding of Fact 8:

8. While pulling the hard item out of Michael Setterstrom's pocket, a baggy of suspected methamphetamine came out of the pocket along with the hard object.

11. The trial court erred entering Finding of Fact 9:

9. Lt. Stevens cannot recall what the hard object was.

12. The trial court erred in entering Conclusion of Law 1:

1. Lt. Stevens was justified in patting down Setterstrom for officer safety.

13. The trial court erred in entering Conclusion of Law 2:
 2. Stevens did not have to have in mind a particular weapon when he pulled the hard object out of the pocket since weapons can take many forms.
14. The trial court erred in entering Conclusions of Law 3:
 3. Lt. Stevens was justified in pulling the hard object from the pocket of Setterstrom.
15. The trial court erred in entering Conclusions of Law 4:
 4. The discovery of the baggie of methamphetamine, which followed from pulling the hard object from Setterstrom's pocket was justified as part of the pat down for weapons.
16. The trial court erred in entering Conclusions of Law 5:
 5. The motion to suppress is denied.
17. The Appellant was seized for purposes of detention pursuant to *Terry v. Ohio*.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in concluding that the officer had a reasonable and articulable suspicion of criminal activity justifying questioning the Appellant, where the officer received a report of a man in the lobby of a government building, and where the man appeared to be nervous and fidgety, and where the man "escalated" his behavior when being

questioned by law enforcement, and where the man gave the false name of Victor Garcia, and where the man was filling out a form to submit to DSHS for benefits at the time he was confronted by law enforcement? Assignments of Error No. 1, 2, 7, 11, 12, 13, and 16.

2. Did the trial court err in concluding that the officer had a reasonable and articulable suspicion of criminal activity justifying confronting and questioning of the Appellant, where the officer received a report of a man in the lobby of a government building, and where the man appeared to be nervous and fidgety, and where the officer has had training regarding drug usage and where there was no evidence the Appellant was under the influence of drugs? Assignments of Error No. 3, 4, 5, 6, 12, and 16.

3. Whether the Appellant was seized when he was on foot and where the Appellant was seated on a bench in the lobby of a building at the time he was contacted by law enforcement? Assignments of Error No. 17.

4. Did the trial court err in denying the motion to suppress where the evidence was obtained pursuant to a detention for which the officer did not have a reasonable, articulable suspicion of criminal activity at the time he observed the Appellant in the lobby of the building? Assignments of Error No. 1, 12, 14, and 16.

5. Did the trial court err in entering the Findings of Fact and Conclusions of Law to which error has been assigned, where the information used to make the findings was obtained pursuant to a detention for which the officer did not have a reasonable, articulable suspicion of criminal activity at the time he observed the Appellant in the lobby of the building? Assignments of Error No. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16.

6. Did the trial court err in finding that law enforcement did not exceed the scope of a lawful search when he removed the Ziploc baggie from the Appellant's pants pocket where the officer testified that he felt "hard objects" in his pocket and testified that he removed all the objects from the Appellant's pocket, including the Ziploc baggie. Assignments of Error No. 7, 8, 9, 10, 11, 12, 13, 14, and 15

C. STATEMENT OF THE CASE¹

The Appellant, Michael Setterstrom, appeals his conviction for possession of methamphetamine. The issue presented is whether the trial court judge erred in denying Mr. Setterstrom's Criminal Rule 3.6 Motion to Suppress Evidence.

1. Procedural Facts:

Mr. Setterstrom was charged by Information filed in Thurston County

¹This Court should note that in compliance with RAP 10.3(a)(4), the Statement of the Case set forth relates solely to the issues presented.

Superior Court² on March 28, 2005, with one count of unlawful possession of a controlled substance, contrary to RCW 69.50.4013(1).³ Clerk's Papers [CP] at 4. The State alleged that Mr. Setterstrom possessed methamphetamine on February 28, 2005. CP at 4.

2. CrR 3.6 Suppression Hearing:

The defense moved pursuant to Criminal Rule 3.6 to suppress methamphetamines found by Lieutenant Don Stevens during a search of Mr. Setterstrom on February 28, 2005, and to dismiss the charge. CP at 8-12. The motion was heard by the Honorable William Thomas McPhee on August 22, 2005. Report of Proceedings [RP] (8.22.05) at 1-44.

Don Stevens, a lieutenant employed by the Tumwater Police Department, testified that he was dispatched to a Department of Social and Health Services building located at 6860 Capitol Boulevard in Olympia regarding a complaint of two individuals in the lobby of the building. RP

²Thurston County Cause No. 05-1-00518-5.

³RCW 69.50.4013 provides:

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

(8.22.05) at 9. Lt. Stevens stated that Mr. Setterstrom was sitting on a bench in the lobby filling out a form, and the second man appeared to be asleep. RP (8.22.05) at 10. He described Mr. Setterstrom as having “fidgeting, uncontrollable behavior, up and down in his activities.” RP (8.22.05) at 10.

Lt. Stevens stated that he looked at the form Mr. Setterstrom was filling out and noted that his name appeared to be Michael Setterstrom. RP (8.22.05) at 10. Lt. Stevens asked him if that was his name, and Mr. Setterstrom stated that it was not him and that he was filling out the form for a friend. RP (8.22.05) at 10. Lt. Stevens testified that he stated that his name was Victor M. Garcia. RP (8.22.05) at 10.

Lt. Stevens stated that he believed that Mr. Setterstrom “was high on some kind of drugs, methamphetamine.” RP (8.22.05) at 11. He stated that Mr. Setterstrom's behavior of “twitching and fidgeting” was escalating and that as he was being questioned, Mr. Setterstrom “started to become nervous.” RP (8.22.05) at 19. Lt. Stevens stated that Mr. Setterstrom had started to make “me feel like I was in some sort of threat there and I needed to take control of the subject.” RP (8.22.05) at 19. Lt. Stevens separated him from the other individual—later identified as Joseph Rice—who was now awake. RP (8.22.05) at 11. Lt. Stevens performed a “pat down” search of Mr. Setterstrom “to make sure there was no danger to me as far as weapons

were involved.” RP (8.22.05) at 12. He stated that he felt “hard objects” in Mr. Setterstrom’s right front pants pocket. RP (8.22.05) at 12. He removed the objects, which involved a small Ziploc baggie containing a white crystalline powder substance. RP (8.22.05) at 12. Lt. Stevens testified that he “didn’t document” the other objects that he stated he removed from Mr. Setterstrom’s pocket. RP (8.22.05) at 13. He testified that did not “recall feeling a gun” in Mr. Setterstrom’s pocket. RP (8.22.05) at 22. The “hard objects” that Lt. Stevens referred to were not placed in evidence. RP (8.22.05) at 23. He denied that he was looking for drugs at the time of the search. RP (8.22.05) at 23-24.

As Lt. Stevens was handcuffing Mr. Setterstrom, he “dropped down to his knees and sucked the baggie into his mouth” and swallowed it. RP (8.22.05) at 14. The baggie was not recovered. Trial RP at 33.

The other man was identified as Joseph Rice. RP (8.22.05) at 27. Mr. Rice was not arrested as a result of the contact. Trial RP at 57.

After hearing testimony, Judge McPhee denied the motion to suppress evidence obtained by the officer, and ruled that Lt. Stevens was justified in detaining Mr. Setterstrom and patting him down. RP (8.22.05) at 40. Judge McPhee found that the officer’s action of removing all the contents of the pants pocket was not unreasonable under the circumstances. RP (8.22.05) at

41.

The court entered the following findings and conclusions:

FINDINGS OF FACT

1. Lt. Stevens of the Tumwater Police Department had contact with Michael Setterstrom as a result of a call from his dispatcher stating that two unwanted people were in the DSHS building. One of the person's appeared to be on drugs and the other appeared to be sleeping.
2. Lt. Stevens contacted the individuals in the lobby of the DSHS building.
3. Michael Setterstrom was unable to stand still and Lt. Stevens thought that he was possibly under the influence of a drug.
4. Lt. Stevens has extensive education, training and experience in the effects drugs have on people as well as identifying illegal drugs.
5. Due to the behavior exhibited by Michael, Lt. Stevens patted him down for officer safety to determine if Setterstrom had any weapons.
6. Lt. Stevens felt a hard object that may create danger in a pocket of Michael Setterstrom.
7. Lt. Stevens was not sure if the object was a weapon or not, so he pulled the item out of Setterstrom's pocket.
8. While pulling the hard item out of Michael Setterstrom's pocket, a baggy of suspected methamphetamine came out of the pocket along with the hard object.

9. Lt. Stevens cannot recall what the hard object was.

CONCLUSIONS OF LAW

1. Lt. Stevens was justified in patting down Setterstrom for officer safety.
2. Lt. Stevens did not have to have in mind a particular weapon when he pulled the hard object out of the pocket since weapons can take many forms.
3. Lt. Stevens was justified in pulling the hard object from the pocket of Setterstrom.
4. The discovery of the baggie of methamphetamine, which followed from pulling the hard object from Setterstrom's pocket was justified as part of the pat down for weapons.
5. The motion to suppress is denied.

CP at 85-86. Appendix A-1 through A-2.

3. Trial testimony:

Trial to a jury commenced on August 28, 2005, the Honorable Richard D. Hicks presiding.

Lt. Stevens testified regarding his contact with Mr. Stevens in the lobby of the DSHS building, the discovery of the Ziploc baggie in Mr. Setterstrom's pocket, and the eventual swallowing of the same. Trial RP at 23-49. Lt. Stevens also searched a black bag, which he stated that Mr. Setterstrom identified as his own. Trial RP at 33. Inside the black bag he

found a small Sentry safe and other items. Trial RP at 34. Lt. Stevens obtained a search warrant and opened the locked safe on March 3, 2005. Trial RP at 34. Exhibit 6. Inside the safe he found a Ziploc baggie. Exhibit 2. The defense stipulated that the baggie contained methamphetamine. Trial RP at 66. Exhibits 1 and 7. Lt. Stevens also found a syringe containing a clear liquid substance in the safe. Trial RP at 36. Exhibit 5.

Mr. Setterstrom testified that he was diagnosed with Attention Deficit Disorder and that he suffers from anxiety and depression. Trial RP at 69. He stated that he was the DSHS building in order to apply for medical benefits and disability benefits. Trial RP at 69. He stated that he owned the black bag and a fishing box seized by police at the time of his arrest, but stated the safe inside the black bag belonged to his roommate Joseph Rice the morning of the arrest. Trial RP at 70, 76. He stated that Mr. Rice put it in the bag the morning of the arrest when he was holding the black bag. Trial RP at 70. He stated that he was unaware of the contents of the safe, but thought it contained equipment used to sanitize tattoo needles. Trial RP at 70, 79. He stated he did not have access to the safe and did not have a key to open it. Trial RP at 70.

Mr. Setterstrom testified that he originally thought he was swallowing a bag of methamphetamine when he was arrested and thought that he might

get high from it. Trial RP at 74. He stated that he did not know what was in the baggie, and that “as it turns out it wasn’t a bag of meth so there was nothing to get high off of.” Trial RP at 73, 74.

The prosecution moved to reopen its case after the defense rested. Trial RP at 83-87. Judge Hicks granted the motion and Lt. Stevens testified that inside the safe he found several items that contained the name Michael Setterstrom, including two bank checks, and a document written to Mr. Setterstrom from the Social Security Administration. Trial RP at 91. Mr. Setterstrom testified that he did not know how the items got in the safe. Trial RP at 94.

No objections to jury instructions given or exceptions to instructions proposed but not given were made by either counsel. Trial RP at 98. CP at 38-50.

The jury returned a verdict of guilty as charged in the Information on August 30. CP at 51.

4. Sentencing

The matter proceeded to sentencing that afternoon. Trial RP at 127-132. Both parties acknowledged that Mr. Setterstrom faced a standard range of 0 to 6 months. CP at 67; Trial RP at 127. The State recommended a sentence at the top of the range, followed by 12 months of community

custody. Trial RP at 128. Mr. Setterstrom was afforded an opportunity for allocution. Trial RP at 129.

Judge Hicks imposed six months with credit for time served. CP at 69; Trial RP at 129. The court also imposed court costs of \$110.00, a victim assessment of \$500.00, attorney's fee of \$500.00, a \$250.00 fine, a \$100 felony DNA collection fee, \$100.00 crime lab fee, and a \$250.00 jail fee, for a total of \$1910.00. CP at 68; Trial RP at 129.

Timely notice of appeal was filed on September 27, 2005. CP at 74-82. This appeal follows.

D. ARGUMENT

1. **THE OFFICER DID NOT HAVE A REASONABLE AND ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY TO JUSTIFY THE INITIAL CONTACT WITH MR. SETTERSTROM**

Generally, warrantless searches and seizures “are per se unreasonable” and violate the Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn .2d 166, 171, 43 P.3d 513 (2002). Courts recognize a few carefully drawn exceptions to the warrant requirement. Among those exceptions to the warrant requirement in which it is predetermined that a warrantless seizure is reasonable are brief investigative stops, also referred to as “stop and frisk”

searches or “*Terry* stops.” *State v. Acrey*, 148 Wn.2d 738, 64 P.3d 594 (2003). The United States Supreme Court held in *Terry v. Ohio* that police officers “in appropriate circumstances and in an appropriate manner [may] approach a person for purposes of investigating possibly criminal behavior even if there is no probable cause to make an arrest.” *Terry v. Ohio*, 392 U.S. 1, 22, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). See also, *State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991). An officer may conduct a *Terry* investigative stop if he or she has “a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime.” *Duncan*, 146 Wn.2d at 172 (emphasis omitted); See also, *State v. Jacobs*, 121 Wn. App. 669, 679, 89 P.3d 232 (2004).

If the initial stop is justified, the officer may make a limited search for weapons if he or she reasonably believes that his or her safety or the safety of others is endangered. *Terry v. Ohio*, 392 U.S. at 21. *Duncan*, 146 Wn.2d at 172; *State v. Baro*, 55 Wn. App. 443, 777 P.2d 1086 (1989).

A warrantless investigatory stop must be reasonable under the state and federal constitutions. *Duncan*, 146 Wn.2d at 171. The burden is on the State to prove that an investigatory stop is reasonable. *Id.*, 146 Wn.2d at 171.

An investigatory stop is reasonable if the arresting officer can attest to specific and objective facts that provide a reasonable suspicion that the

person stopped has committed or is about to commit a crime. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). An investigatory stop occurs at the moment when, given the incident's circumstances, a reasonable person would not feel free to leave. *Armenta*, 134 Wn.2d at 10; *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).

a. Standard of review.

Factual findings in a motion to suppress are reviewed to determine if substantial evidence exists. A lower court's conclusions of law in a suppression motion are reviewed de novo. *Duncan*, 146 Wn.2d at 171; *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

b. Mr. Setterstrom was seized when Lt. Stevens contacted him and questioned him regarding his name.

The threshold determination that must be made is when Mr. Setterstrom was seized. Whether a stop is a permissive encounter or a seizure is a question of mixed law and fact. *Armenta*, 134 Wn.2d at 9; *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

Under Article I, § 7, a person is seized when, in view of all the objective circumstances, a reasonable person would not feel free to leave. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). In a police-questioning context, this means that a seizure occurs if a reasonable person would not feel

free to refuse the officer's request for identification and end the encounter. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (citing *Florida v. Bostick*, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)). Under Article I, § 7, a person is seized “only when, by means of physical force or a show of authority” his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, (*Young*, 135 Wn.2d at 511, (quoting *State v. Stroud*, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981) and citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980))), or (2) would not feel free to otherwise decline an officer's request and terminate the encounter. See *Thorn*, 129 Wn.2d at 352.

In the case at bar, Mr. Setterstrom was contacted by Lt. Stevens while he was sitting in the lobby of a DSHS building in Olympia. Lt. Stevens testified that he appeared nervous and fidgeted, and that his behavior escalated when he was asked about his name. Trial RP at 29. The officer testified that Mr. Setterstrom was exhibiting “fidgeting, controllable behavior,” and that he appeared nervous and appeared to be under the influence of methamphetamine. Trial RP at 29, 33. He stated that Mr. Setterstrom gave him a false name and date of birth. Trial RP at 29-30.

When contacted by the officer, Mr. Setterstrom was filling out a form to

apply for benefits from the DSHS office. Trial RP at 69. There was no indication that he was not permitted on the premises or that he did not have legitimate business there. Lt. Stevens stated that he believed that Mr. Setterstrom was under the influence of drugs. Despite this, there was no evidence that he exhibited dangerous or unlawful behavior, or was otherwise acting in a manner to merit police contact. Moreover, there was no evidence that he was under the influence of drugs other than the allegation that he was acting twitchy, nervous, fidgety, and that he was sweating.

From an objective viewpoint, Mr. Setterstrom was not free to leave. He was on foot in a building. The officer believed that Mr. Setterstrom was under the influence of drugs. It is manifestly unreasonable to believe that Mr. Setterstrom would have been permitted to simply walk away. Mr. Setterstrom was seized at the point that the officer repeated asked him his name. It was clear that Mr. Setterstrom did not want to give his name and that he did not want to talk to Lt. Stevens.

c. The officer's seizure of Mr. Setterstrom was not based on a reasonable or articulable suspicion of wrongdoing.

Evaluation of a *Terry* stop is four step process: a reviewing court must determine whether (1) the officer's stop was justified, (2) whether the defendant was "seized," (3) whether the delay (duration) of the stop was

excessive; and (4) whether the frisk was "too intrusive".

As noted *supra*, a brief investigative stop is permissible whenever the police officer has a reasonable suspicion, grounded in specific and articulable facts, that the person stopped has been or is about to be involved in a crime. *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985). In evaluating the reasonableness of an investigative stop, courts consider the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained. *Glover*, 116 Wn.2d at 514 (citing *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). Other factors that may be considered in determining whether a stop was reasonable include "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. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).

The officer must point to specific and articulable facts which, coupled with rational inferences, create an objectively reasonable belief or well founded suspicion that the person is a safety risk. *Terry*, 392 U.S. at 24-25, 88 S. Ct. 1868; *State v. Collins*, 121 Wn.2d 168, 173-74, 847 P.2d 919 (1993); *State v. L.K.*, 95 Wn. App. 686, 695, 977 P.2d 39 (1999); *State v. Richardson*, 64 Wn. App. 693, 697, 825 P.2d 754 (1992). The court may consider the totality of the

circumstances surrounding the stop, including the officer's training and experience, the location of the suspect-officer contact, the time of day, the suspect's conduct and response to the officer, and any other circumstances. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); *L.K.*, 95 Wash.App. at 695-96.

An investigative stop must be based on an *articulable suspicion* of criminal activity, *i.e.*, the totality of the circumstances must give rise to a substantial possibility that criminal activity has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). A seizure is unreasonable if an officer is unable to articulate specific, objective facts upon which a reasonable suspicion that the person stopped was engaged in criminal activity. *Stroud*, 30 Wn. App. at 399.

In the case at bar, no crime took place. The officer received a report of a man who was allegedly under the influence of drugs and was “unwanted” in the building, but it is clear that his behavior, although suspicious, was not sufficient to indicate that a crime was occurring; he was not running around or otherwise acting dangerously. Instead, he was seating and filling out a form. Moreover, it is clear that he was there legitimately—he was a potential client of the agency and was filling out a form in order to seek benefits. There is no evidence that he was trespassing or otherwise breaking the law.

Courts have held that when persons who are already suspected to some degree are watched by the police, turn to conceal something, hide themselves, change direction, or walk off at a fast pace, may justify an investigatory stop. 4 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 9.4, 177-78 (3rd ed. 1996). Mr. Setterstrom remained seated and did not attempt to leave after the officer approached him. He was not acting furtively; he made no attempt to leave or hide.

d. Once the officer confirmed Mr. Setterstrom was not involved in criminal activity, he should not have been frisked or further detained.

After he was contacted, he was subjected to a pat down search. The officer testified that he felt "hard objects" in Mr. Setterstrom's pants, which he removed. The Ziploc baggie containing a white substance was removed from Mr. Setterstrom's pants pocket at that time. The baggie was subsequently swallowed by Mr. Setterstrom. None of the "hard objects" described by Lt. Stevens were entered into evidence, and in fact the officer was not able to describe the items during the CrR 3.6 hearing or the trial. Mr. Setterstrom argues that the officer did not have a reasonable, articulable suspicion of criminal activity to support the initial stop and that the officer's activity beyond that point, including questioning Mr. Setterstrom and performing the initial

frisk search, was unlawful.

- e. **The pat down search was unreasonably intrusive and not limited to a search for weapons to promote the goal of officer safety.**

The stop and frisk intrusion is limited only to a pat-down for weapons which arises when the officer does not receive satisfactory answers to dispel his initial fears for personal safety. It is an intrusion that only lets the officer seize objects that feel like a weapon; not a cigarette pack or match box or wallet or anything else that does not feel hard like a gun, knife, or other weapon that is hard, heavy, and bulky. A limited search for weapons on a person detained for questioning is not justified unless the police officer has a reasonable and articulable suspicion that the person is involved in criminal activity and that the person is armed and dangerous. *State v. Sistrunk*, 57 Wn. App. 210, 787 P.2d 937 (1990).

When conducting an investigatory stop, a police officer may not search the person for weapons absent a reasonable suspicion that the person is armed and dangerous. *State v. Blair*, 65 Wn. App. 64, 827 P.2d 356 (1992). In *Blair*, the officer had previously warned the defendant not to return to apartment complex. *Id.* at 66. Upon seeing the defendant on the apartment complex grounds, the officer stopped defendant, placed him under arrest and searched

him. Division 1 held there was no basis to justify investigatory stop and no basis for weapons search. *Id.* at 71. In the case at bar, there was no basis to believe that Mr. Setterstrom was armed or presented a danger to law enforcement. Instead, the State's argument is based entirely upon Lt. Steven's contention that Mr. Setterstrom's behavior was "escalating" and that he "was in some sort of threat" and "needed to take control of the subjects" and his assertion that he felt "hard objects" in Mr. Setterstrom's pants. RP (8.22.05) at 19. The identity of these hard objects was not determined. Moreover, even assuming that the hard objects existed, the Appellant disputes whether the officer was privileged to remove *all* objects from Mr. Setterstrom's pants at that time, including an object such as the baggie that could not reasonably be construed as being a weapon of any type.

f. All evidence obtained as a result of the initial stop and detention must be suppressed.

Because Lt. Stevens did not have the authority to make an arrest, a pat down search cannot be justified under these circumstances. The basis for the initial stop or contact was unlawful, and therefore the subsequent search and evidence discovered during that search, as well the evidence found in the black bag and safe, are inadmissible as fruits of the poisonous tree. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Wong Sun v. United*

States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980)).

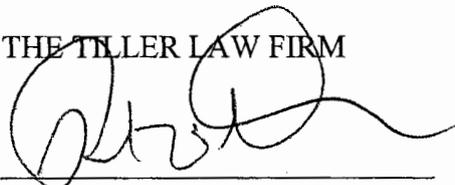
E. CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse his conviction and suppress the evidence obtained as a result of the detention and resulting search of Mr. Setterstrom's person and personal items, and resulting search warrant used to open the locked safe.

DATED: April 19, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for Mr. Setterstrom

A

05 OCT -4 AM 10:45

BETTY J. SOULE, CLERK

BY _____ 2
DEPUTY

**IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,
Plaintiff,

vs.

MICHAEL DEREK SETTERSTROM,
Respondent.

NO. 05-1-00518-5

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

THIS MATTER has come on before the above-entitled Court for an motion to suppress under Criminal Rule 3.5 and 3.6, this 22nd day of August, 2005. Present before the Court were the above-named Defendant, Deputy Prosecuting Attorney in and for the County of Thurston, State of Washington, Donald J. Smith, Jr., and Deborah Murphy, attorney for Respondent. The Court, having considered the testimony of witnesses and the arguments of counsel now hereby enters the following:

FINDINGS OF FACT

1. Lt. Stevens of the Tumwater Police Department had contact with Michael Setterstrom as a result of a call from his dispatcher stating that two unwanted people were in the DSHS building. One of the person's appeared to be on drugs and the other appeared to be sleeping.
2. Lt. Stevens contacted the individuals in the lobby of the DSHS building.
3. Michael Setterstrom was unable to stand still and Lt. Stevens thought that he was possibly under the influence of a drug.
4. Lt. Stevens has extensive education, training and experience in the effects drugs have on people as well as identifying illegal drugs.
5. Due to the behavior exhibited by Michael Setterstrom, Lt. Stevens patted him down for officer safety to determine if Setterstrom had any weapons.

Edward G. Holm
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
360/786-5540 Fax 360/754-3358

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

6. Lt. Stevens felt a hard object that may create danger in a pocket of Michael Setterstrom.
7. Lt. Stevens was not sure if the object was a weapon or not, so he pulled the item out of Setterstrom's pocket.
8. While pulling the hard item out of Michael Setterstrom's pocket, a baggy of suspected methamphetamine came out of the pocket along with the hard object.
9. Lt. Stevens cannot recall what the hard object was.

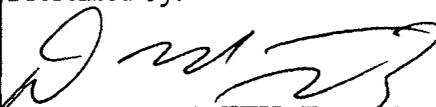
CONCLUSION OF LAW

1. Lt. Stevens was justified in patting down Setterstrom for officer safety
2. Lt. Stevens did not have to have in mind a particular weapon when he pulled the hard object out of the pocket since weapons can take many forms.
3. Lt. Stevens was justified in pulling the hard object from the pocket of Setterstrom.
4. The discovery of the baggie of methamphetamine, which followed from pulling the hard object from Setterstrom's pocket was justified as part of the pat down for weapons.
5. The motion to suppress is denied.

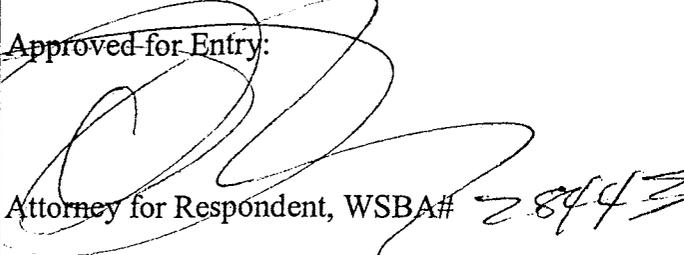
DATED this 3 day of October 2005.


JUDGE/COURT COMMISSIONER

Presented by:


DONALD J. SMITH, JR., WSBA #24665
Deputy Prosecuting Attorney

Approved for Entry:


Attorney for Respondent, WSBA# 28443

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Edward G. Holm
Thurston County Prosecuting Attorney
2000 Lakeridge Drive S.W.
Olympia, WA 98502
360/786-5540 Fax 360/754-3358