

NO. 79690-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DEREK SETTERSTROM,

Petitioner.

COURT OF APPEALS No. 33846-7-II

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 05-1-00518-5

HONORABLE JUDGE WM. THOMAS MCPHEE, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT - STATE OF
WASHINGTON

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
ARGUMENT	7
1. <u>Based on the defendant's increasing agitation and apparent drug intoxication, Officer Stevens had a reasonable, articulable basis to fear for his safety and to therefore conduct a pat-down search of the defendant to check for weapons.</u>	7
2. <u>The scope of the pat-down search of the defendant in this case was limited to actions necessary to determine whether the defendant was in possession of a weapon.</u>	16
CONCLUSION	20

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>City of Seattle v. Hall</u> , 60 Wn. App. 645, 806 P.2d 1246 (1991)	14,15
<u>State v. Bolieu</u> , 112 Wn.2d 587, 773 P.2d 46 (1989)	11
<u>State v. Collins</u> , 121 Wn.2d 168, 847 P.2d 919 (1993).	16,19
<u>State v. Fowler</u> , 76 Wn. App. 168, 883 P.2d 338 (1994).	15
<u>State v. Glossbrener</u> , 146 Wn.2d 670, 49 P.3d 128 (2002)	13
<u>State v. Horrace</u> , 144 Wn.2d 386, 28 P.3d 753 (2001)	11,12
<u>State v. Hudson</u> , 124 Wn.2d 107, 874 P.2d 160 (1994)	16,19
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986)	12
<u>State v. Larson</u> , 88 Wn. App. 849, 946 P.2d 1212 (1997)	13
<u>State v. Macon</u> , 128 Wn.2d 784, 911 P.2d 1004 (1996)	17
<u>State v. Olsson</u> , 78 Wn. App. 202, 895 P.3d 867 (1995)	15,16
<u>State v. Wilkinson</u> , 56 Wn. App. 812, 785 P.2d 1139 (1990)	13
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	12

<u>CONSTITUTIONAL</u>	<u>PAGE</u>
Art. I, s. 7, Washington Const.	11
<u>COURT RULES</u>	<u>PAGE</u>
CrR 3.6	5,6

A. STATEMENT OF THE ISSUES

1. Whether Officer Stevens had a reasonable, articulable basis to fear for his safety, thereby justifying a pat-down search of the defendant to check for weapons.

2. Whether the pat-down search of the defendant was limited to actions necessary to determine whether the defendant was in possession of a weapon.

B. STATEMENT OF THE CASE

On February 28, 2005, at about 8 a.m., Tumwater Police Lieutenant Don Stevens and Tumwater Police Officer Glen Staley were dispatched to a building which housed offices of the Washington Department of Social and Health Services (DSHS). Police were being asked to deal with two unwanted individuals in the lobby of the building, one who was sleeping and the other who appeared to be on drugs. 8-22-05 Hearing RP 9, 26.

Stevens and Staley arrived at the building at about the same time. They observed two individuals on a bench in the front lobby. One was sleeping, consistent with the report requesting assistance. The other, defendant

Michael Setterstrom, was filling out a form, possibly for DSHS support. 8-22-05 Hearing RP 10.

When the two individuals were first contacted, Stevens noted that the defendant was exhibiting fidgety, uncontrollable behavior, and was having difficulty focusing as Stevens attempted to speak with him. 8-22-05 Hearing RP 10. When Stevens asked for the defendant's name, the defendant first said his name was Setterstrom, but then claimed his name was Victor Garcia, and that he was filling out the form for a friend. 8-22-05 Hearing RP 10.

At about this time, the other individual with the defendant began to wake up. Given the defendant's inconsistent responses, Stevens asked the other individual who the defendant was. The defendant then intervened, blurting out the name "Victor", and encouraging the other person to remain silent. 8-22-05 Hearing RP 11.

Stevens had extensive knowledge regarding illegal controlled substances, from his training as a DARE officer and from his three years as a

detective with the county's Narcotics Task Force.
8-22-05 Hearing RP 8. Based on the defendant's
physical behavior and apparent mental condition,
as well as his possible deception regarding his
true identity, Stevens' experience and training
caused him to become convinced the defendant was
under the influence of illegal drugs, most likely
methamphetamine. 8-22-05 Hearing RP 11.
Therefore, he had Officer Staley escort the other
individual outside so that he could continue his
investigation with the defendant. 8-22-05 Hearing
RP 11.

At that point, the defendant's agitated
behavior began to escalate. Given Stevens' belief
that the defendant was high on methamphetamine,
and that the defendant's increasing agitation
could cause a violent response toward the officer,
Stevens chose to pat down the defendant to make
sure he did not have a weapon on him. 8-22-05
Hearing RP 12. During the pat down, Stevens felt
several hard objects in the defendant's right
front pants pocket. He could not tell what the

objects were. Therefore, he reached into the pocket and removed all of the objects at one time.

8-22-05 Hearing RP 12.

When Stevens did so, a Ziploc baggie of powder came out of the defendant's pocket along with the other items. Stevens recognized what he believed to be methamphetamine in the baggie, and focused in on that baggie to the exclusion of the other objects. He also focused on the defendant to watch for his reaction to the discovery of the baggie. 8-22-05 Hearing RP 12-13.

Stevens placed the baggie on the nearby bench, and ordered the defendant to place his hands behind his back, so that Stevens could make a probable cause arrest of the defendant for unlawful possession of a controlled substance. However, while Stevens was attempting to place handcuffs on the defendant, Setterstrom dropped down to his knees and sucked the baggie into his mouth. Stevens was unable to recover the baggie from the defendant. 8-22-05 Hearing RP 13-14.

While Staley was outside with the other

individual, named Rice, he looked through a window into the building and observed Stevens with the defendant down on the bench. Staley then went inside to assist Stevens. At that point, the search had already occurred. 8-22-05 Hearing RP 28.

On March 28, 2005, an Information was filed in Thurston County Superior Court charging the defendant with one count of unlawful possession of a controlled substance, to wit: methamphetamine. CP 4. On August 22, 2005, a CrR 3.6 hearing was held before the Honorable Judge Wm. Thomas McPhee. At the beginning of the hearing, defense counsel specifically agreed that Lieutenant Stevens had acted properly up to the point of the pat down search, but that the search thereafter was unlawful. The trial court concluded that the pat-down search, including the subsequent removal of the items from the defendant's pocket, was justified for reasons of officer safety, based on the information available to Lieutenant Stevens at the time. 8-22-05 Hearing RP 39-44. Written

Findings of Fact and Conclusions of Law were entered by the trial court on October 4, 2005. CP 85-86.

The case proceeded to a jury trial on August 29-30, 2005. The defendant was convicted of one count of unlawful possession of a controlled substance. A Judgment and Sentence was imposed on August 30th, in which the defendant was given a standard range sentence of 6 months in custody and 12 months of community custody. CP 66-73.

Thereafter, the defendant appealed the trial court's denial of the defendant's motion to suppress evidence pursuant to CrR 3.6. On October 3, 2006, the Commissioner of the Court of Appeals entered a Ruling Affirming Judgment. See Appendix A. The Commissioner ruled that Officer Stevens did not restrain the defendant, nor did he display a show of authority sufficient for Setterstrom to have reasonably believed he was not free to leave, and therefore Setterstrom was not seized prior to the pat-down search in this case. The Commissioner further concluded that Officer

Stevens had a reasonable safety concern when he frisked the defendant for weapons. Finally, the Commissioner found that when Stevens felt certain hard objects which he could not identify, he acted reasonably in extracting them from the defendant's pocket to determine if any of them was a weapon, and that the baggie of methamphetamine inadvertently came out with these hard objects because it was mixed in with them. Consequently, the search of the defendant was lawful.

The defendant subsequently petitioned to this court for review. On October 30, 2007, this court granted review, instructing the parties to address not only the scope of Officer Stevens' search of the defendant, but also whether that search was initially justified.

C. ARGUMENT

1. Based on the defendant's increasing agitation and apparent drug intoxication, Officer Stevens had a reasonable, articulable basis to fear for his safety and to therefore conduct a pat-down search of the defendant to check for weapons.

In the present case, Officer Stevens patted

down the defendant on the outside of his clothing to determine if the defendant had a weapon. 8-22-05 Hearing RP 12. He was concerned that the defendant might react violently to him at any moment, and wanted to protect himself from such a reaction involving a weapon. 8-12-05 Hearing RP 12.

This concern was based on specific observations Stevens had made of the defendant. From the beginning of the contact, Setterstrom was exhibiting "fidgeting, uncontrollable behavior, up and down in his activities". 8-22-05 Hearing RP 10. The defendant was also having difficulty focusing. 8-22-05 Hearing RP 10.

Stevens had considerable training and experience with regard to the affects of controlled substances, including methamphetamine. He had been a drug abuse educational instructor for three years. He had then spent approximately three more years as an investigator with the Thurston County Narcotics Task Force, receiving many hours of training and working on hundreds of

cases involving drug users. 8-22-05 Hearing RP 8. Based on that training and experience, Stevens concluded that Setterstrom's behavior was the result of drug intoxication, most likely methamphetamine. 8-22-05 Hearing RP 11.

As Stevens continued his contact with Setterstrom, he observed the defendant's nervousness and fidgeting continue to build. 8-22-05 Hearing RP 11-12. His prior experience had taught him that methamphetamine intoxication can easily result in sudden uncontrollable violence. 8-22-05. It was at this point that Stevens determined he needed to pat down the defendant for weapons in order to protect his safety. 8-22-05 Hearing RP 12.

A law enforcement officer without probable cause to arrest may lawfully conduct a protective pat-down of the outer clothing of a suspect when, given the totality of the circumstances known to the officer, the officer has a reasonable concern for his safety or that of others. Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889

(1968). In developing such a safety concern, the officer is entitled to draw reasonable inferences from the facts in the light of his experience. Terry, 392 U.S. at 27. The officer's authority to conduct such a pat-down reflects a balance drawn between protecting against unreasonable searches on the one hand and the strong governmental interest in police officer safety on the other.

. . . We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

Terry, 392 U.S. at 23.

The officer need not be certain that the individual is armed. The issue is whether a reasonably prudent person in the same circumstances would be warranted in a belief that his or her safety, or that of others, was in danger. Terry, 392 U.S. at 27. As this court has previously explained:

Thus, the issue is further refined to determine how much justification officers must have in fearing for their personal safety when confronting unknown persons in an emergent investigative stop. On this question, courts are reluctant to substitute their judgment for that of police officers in the field. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing.

State v. Bolieu, 112 Wn.2d 587, 601-602, 773 P.2d 46 (1989). These same principles apply under Article I, section 7, of the Washington State Constitution. State v. Horrace, 144 Wn.2d 386, 394, 28 P.3d 753 (2001).

Unlike the facts in the present case, a "Terry" frisk has generally been upheld when the facts led the officer to reasonably believe that an individual present during an investigatory contact was in actual possession or had immediate access to a weapon, even though there has been no showing of aggressive or volatile behavior on the part of that individual. This approach makes sense, as it would hardly be conducive to officer safety if the officer was required to wait until a dangerously volatile situation arose before taking

possession of a weapon present at the scene.

For example, in State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986), a stop of Kennedy's vehicle was conducted based on suspicion that Kennedy had purchased marijuana. As the vehicle pulled over, Kennedy was observed leaning forward as if to place something under the seat. After Kennedy exited the vehicle, the officer reached in and seized a plastic bag of marijuana from under the front seat. The State Supreme Court found that Kennedy's furtive gesture supported a reasonable belief he had secreted something under the seat, creating the possibility that a weapon had been placed there. That was deemed a sufficient basis to justify the officer's search under the seat to assure the officer's safety. Kennedy, 107 Wn.2d at 10-13.

In subsequent cases, the Washington appellate court has repeatedly upheld pat-downs of individuals or searches of a vehicle's interior, or both, based on similar furtive movements. State v. Horrace, 144 Wn.2d 386, 395-397, 28 P.3d

753 (2001); State v. Larson, 88 Wn. App. 849, 855-857, 946 P.2d 1212 (1997); State v. Wilkinson, 56 Wn. App. 812, 818-819, 785 P.2d 1139 (1990). In State v. Glossbrener, 146 Wn.2d 670, 681-682 and 685, 49 P.3d 128 (2002), the court applied the same analysis but concluded that the officer in that case did not have an objectively reasonable belief that Glossbrener concern for his safety at the time the search was conducted.

Thus, an officer observing furtive movements need not wait until the situation turns actively dangerous to take preventive action. The reasonable possibility that a weapon is present creates a legitimate safety concern that justifies a pat-down of the individual, since such a weapon could cause the situation to become deadly should the individual suddenly turn violent. If that is so, surely an officer faced with an individual's alarmingly agitated behavior need not wait until violence actually erupts in order to determine whether the individual is armed with a weapon. Such agitated behavior justifies a pat-down of the

individual, since the volatility of the situation is no longer merely theoretical, and if a weapon is present the same deadly potential is even more apparent.

For example, in City of Seattle v. Hall, 60 Wn. App. 645, 806 P.2d 1246 (1991), an officer observed Hall engaged in suspicious behavior with several others. While the officer spoke to one of the others involved, Hall approached and spoke to the officer. Hall became "sort of hostile", "antsy", and "nervous" and kept his hands in his pockets. The officer used the term "antsy" to refer to the way Hall bobbed around, talking defensively. This behavior caused the officer to become concerned for his safety, resulting in a pat-down search of Hall for weapons. An open blade knife and razor blade were found in Hall's pockets. Hall, 60 Wn. App. at 647.

The Court of Appeals upheld the pat-down search as a justifiable protective frisk pursuant to Terry v. Ohio. Hall, 60 Wn. App. at 652-653.

. . . Terry authorizes officers to take the necessary precautions to protect themselves

and others from a potentially dangerous individual. Such authorization is particularly significant when a person voluntarily approaches an officer and displays behavior that arouses legitimate safety concerns. Thus, if specific objective facts lead an officer to believe that a person poses a danger to the officer, Terry does not require the officer to delay frisking the person for weapons.

Hall, 60 Wn. App. at 652.

In the present case, Officer Stevens did not observe furtive behavior or other indication that a weapon might be present. However, he did have a reasonable concern that the situation was becoming potentially dangerous based on the specific and articulable facts of the defendant's agitation and the indications of drug intoxication. Certainly a reasonably prudent person with the officer's training and experience would, under those circumstances, have reached that same conclusion. Given the goal of officer safety that justifies a "Terry" search, a protective pat-down search to determine if the defendant possessed a weapon was justified under these facts.

2. The scope of the pat-down search of the defendant in this case was limited to actions necessary to determine whether the defendant was in possession of a weapon.

A "Terry" pat-down search must not only be justified in its inception, but also in its scope. Terry, 392 U.S. at 20. That scope must be limited to the protective purpose of determining whether a weapon is present. Collins, 121 Wn.2d at 173. When an officer conducts a pat-down search and feels an item of questionable identity which could be a weapon, he may take such action as is necessary to examine the object and determine its identity. State v. Hudson, 124 Wn.2d 107, 112-113, 874 P.2d 160 (1994).

In the present case, Stevens patted the right front pants pocket of the defendant and felt several hard objects. Stevens could not tell what they were. He removed all of the hard objects at one time. When he did that, he inadvertently removed a baggie of powder which appeared to be methamphetamine. 8-22-05 Hearing RP 12-13, 21-24.

The defendant argues on appeal that, even if

the officer had the right to remove the hard objects to determine their identity, he did not have the right to remove the baggie. However, this argument assumes he purposely removed that baggie of powder, which is contrary to the evidence and the facts as determined by the court. See Findings of Fact 6, 7, and 8 in CP 85-86. The court determined that the officer inadvertently removed the baggie while purposely removing the hard objects. Finding of Fact No. 8 in CP 86; 8-22-05 Hearing RP 42.

On appeal, review of a trial court's factual finding is to determine whether it is supported by substantial evidence. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). Here, the testimony of Lieutenant Stevens, which was determined to be credible by the trial court, provided the evidentiary basis for the court's finding. 8-22-05 Hearing RP 12, 41.

Thus, this case is distinguishable from State v. Fowler, 76 Wn. App. 168, 883 P.2d 338 (1994). In that case, the officer did a pat-down of a

subject and felt one hard object and two soft objects in a single pocket. Rather than separate the items with his hand and remove only the hard object, the officer removed all three objects at once. This was deemed by the appellate court to have been an unreasonable search because the officer could tell that the two soft objects were not weapons, and could have separated the items and removed only the hard one. Fowler, 76 Wn. App. at 169, 173. Here, Stevens felt only the hard objects. The fact that the baggie came out with those objects was not anticipated by the officer.

The present case is similar to State v. Olsson, 78 Wn. App. 202, 895 P.2d 867 (1995). In that case, during a pat-down search, the officer felt a hard object in the suspect's pocket, which the suspect said was a knife. When the officer removed the knife, he inadvertently came across a substance later identified as cocaine. The scope of the search was found to have been reasonably limited to the officer's safety concern. Olsson,

78 Wn. App. at 208.

Similarly, in State v. Collins, 121 Wn.2d 168, 847 P.2d 919 (1993), the officer conducted a pat-down search of Collins and discovered a hard object in his left rear pocket, but could not determine the nature of the object. As the officer pulled the hard object out of the pocket, a baggie containing a powder inadvertently fell out of the pocket. The powder was later determined to be methamphetamine. The legality of this search was upheld. Collins, 121 Wn.2d at 171-172, 177.

Thus, there was a basis for the search which occurred in this case, and the scope of the resulting search was reasonable under the circumstances.

D. CONCLUSION

The purpose of a "Terry" search is not to discover evidence of a crime, but rather to allow the officer to pursue his investigation without fear. Hudson, 124 Wn.2d at 112. Here, Officer

Stevens conducted a pat-down search as a preventive measure in reaction to the increasing agitation of the defendant, coupled with the defendant's apparent drug intoxication, during the investigative contact in this case. The pat-down and the removal of items from the defendant's pocket were conducted to determine if the defendant had a weapon that could threaten Stevens' safety should the defendant's agitation turn into violence. The discovery of methamphetamine in the defendant's possession was the inadvertent result of the officer's safety measures.

Based on the arguments set forth above, the State respectfully requests that this court affirm the defendant's conviction for unlawful possession of a controlled substance.

DATED this 26th day of November, 2007.

Respectfully submitted,



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DEPUTY PROSECUTING ATTORNEY

APPENDIX

A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DEREK SETTERSTROM,

Appellant.

No. 33846-7-II

RULING AFFIRMING
JUDGMENT

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STATE OF WASHINGTON
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DIVISION II

Michael Derek Setterstrom appeals his Thurston County conviction of possession of methamphetamine, RCW 69.50.4013(1). Setterstrom argues that the trial court erred in denying his motion to suppress the drugs, contending that the officer did not have a reasonable, articulable suspicion of criminal activity to support the initial seizure; the pat-down search for weapons was not justified, and the search was not reasonable in scope. This court reviewed the matter pursuant to its own motion on the merits. RAP 18.14.

FACTS

Someone at the Department of Social and Health Services building requested Tumwater Police assistance in dealing with two unwanted individuals in the lobby. One of the individuals was sleeping, and the other appeared to be

on drugs. Lieutenant Don Stevens and Officer Glen Staley responded at approximately 8 A.M. They observed two individuals sitting on a bench inside the lobby. One individual (Joseph Rice) appeared to them to be sleeping, and the other (Setterstrom) was filling out a DSHS form. Lt. Stevens contacted Setterstrom while Officer Staley tried to wake up Rice. Stevens noticed that Setterstrom was twitchy, nervous, and fidgety, and he had trouble focusing on the officer's questions. When Stevens asked Setterstrom for his name, he first gave it as Setterstrom, but then claimed to be Victor Garcia. Around this time, Rice began to wake up, and Stevens asked Rice for Setterstrom's name. Setterstrom quickly said that his name was Victor before Rice had the opportunity to answer. Officer Staley then took Rice outside to talk to him.

Based on his observations, Stevens believed that Setterstrom was probably under the influence of methamphetamine. Setterstrom was becoming increasingly agitated. Stevens believed that because of the effect of the drugs, he might become violent, and he performed a pat-down search for weapons. He felt several hard objects in Setterstrom's right front pants pocket, but could not tell what they were. He reached into the pocket and removed all of the objects at one time. Among them was a small baggie containing a white crystalline substance that Stevens believed to be methamphetamine. Stevens placed this baggie and the other items on the bench.

Lt. Stevens then arrested Setterstrom and told him to place his hands behind his back. While he was attempting to handcuff Setterstrom, Setterstrom dropped to his knees and sucked the baggie into his mouth. Stevens was unable

to recover the baggie. A subsequent search of a black bag belonging to Setterstrom turned up more methamphetamine.

Setterstrom sought to suppress the drugs from his bag, contending that the arrest was based on an unlawful detention and search. At the suppression hearing, Stevens testified that he could not recall what the hard objects in Setterstrom's pocket were. He explained that sometimes when defendants know their drugs have been discovered and they are likely to be arrested, they become more violent, and so he was focused on Setterstrom.

The court denied the motion to suppress, finding that Lt. Stevens had reasonable safety concerns to justify the search. A jury convicted Setterstrom as charged, and this appeal followed.

DISCUSSION

An appellate court reviews findings of fact on a motion to suppress under a substantial evidence standard. *State v. Mendez*, 137 Wn.2d 208, 214 (1999). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644 (1994).

Setterstrom first contends that Stevens did not have a reasonable, articulable suspicion of criminal activity to support the initial detention.¹ Not every encounter between a police officer and a citizen constitutes a seizure. An officer

¹ At the suppression hearing, however, Setterstrom's counsel stated very clearly that everything Stevens did prior to the pat-down search was done correctly. Nevertheless, Setterstrom may raise the issue here for the first time. See *State v. Contreras*, 92 Wn. App. 307, 311-12 (1998).

may engage a person in conversation in a public place and ask for identification without that contact becoming a seizure, and may do so without an articulable suspicion of wrongdoing. *State v. Young*, 135 Wn.2d 498, 511 (1998) *Young*, 135 Wn.2d at 511; see also *State v. Armenta*, 134 Wn.2d 1, 11 (1997). A seizure occurs only when, by physical force or a show of authority, law enforcement has in some way restrained the liberty of the citizen. There is a seizure when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Young*, 135 Wn.2d at 509-10. The defendant has the burden of showing that a contact between a police officer and a citizen amounted to a seizure. *Young*, 135, Wn.2d at 510.

Setterstrom has not satisfied that burden. Lt. Stevens legitimately responded to a call for assistance, and made contact with Setterstrom by approaching him in a public place and asking his name. There was no attempt to restrain Setterstrom, and Setterstrom describes no show of authority sufficient to justify a belief that he was not free to leave.

Setterstrom next contends that Stevens did not have a reasonable safety concern to support the frisk for weapons. A weapons search is justified at its inception if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). When Lt. Stevens contacted him, Setterstrom was fidgety, nervous, and unable to focus, indications of the influence of methamphetamine. Setterstrom's agitation escalated as Stevens questioned him. Based on his narcotics training and his experience, Stevens knew that people under the influence of methamphetamine

can become uncontrollable and violent at any moment. Additionally, Setterstrom lied to Stevens about his name. Stevens testified that this behavior indicated that Setterstrom might be "wanted" by some law enforcement authority.² This combination of events provided a reasonable basis for Stevens's concerns.

Finally, Setterstrom contends that the search for weapons was unreasonably intrusive and not limited to a search to promote officer safety. A weapons frisk is adequately limited if "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry*, 392 U.S. at 29); see also *State v. Hudson*, 124 Wn.2d 107, 112 (1994). During the course of a protective sweep, the police may not intentionally seize items they know not to be weapons. *State v. Fowler*, 76 Wn. App. 168, 173 (1994), review denied, 126 Wn.2d 1009 (1995). However, when an officer conducts a pat-down search and feels an item of questionable identity which could be a weapon, he may take such action as is necessary to examine the object and determine its identity. *Hudson*, 124 Wn.2d at 112-13.

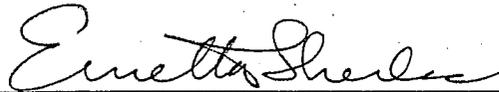
Stevens testified that he pulled the objects out of Setterstrom's pocket in order to determine if any of them were weapons. The law permits him to take that action. See *Hudson*, 124 Wn.2d at 112-13. He further testified that he did not perceive that there was a "soft" item mixed in with the hard objects he felt in Setterstrom's pocket until he pulled all of the items out. As the baggie of

² Report of Proceedings Aug. 22, 2005 at 11.

methamphetamine was discovered during a lawful search, it provided a proper basis for the arrest and subsequent search.³ Accordingly, it is hereby

ORDERED that the judgment is affirmed.

DATED this 3rd day of October, 2006.



Ernetta G. Skerlec
Court Commissioner

cc: Peter Tiller
James Powers
Hon. Richard D. Hicks
Hon. Wm. Thomas McPhee

³ Notably, Setterstrom did not disagree below that the drugs would be admissible under these circumstances. He argued that those were not the actual circumstances, that the officer felt the baggie and emptied his pocket to retrieve the contraband. The trial court found the officer credible, and that determination is not subject to review. See *State v. Camarillo*, 115 Wn.2d 60, 71 (1990).