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NO. 56896-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GARY GATEWOOD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. An otherwise valid stop for a traffic infraction cannot be used as a pretext to search for evidence of criminal activity. Here, officers with the Anti-Crime Team of the Seattle Police Department stopped Gatewood after he jaywalked across Rainier Avenue South both because he had previously acted in a suspicious manner when the officers drove by, and because he was a danger to himself and others in crossing a major arterial in the dark. Did the trial court properly conclude that the stop was not pretextual?

2. Absent an arrest warrant, officers must demonstrate a reasonable articulable suspicion of criminal activity to justify an investigative detention. Here, Gatewood appeared visibly surprised at the arrival of officers, made furtive movements that suggested he was hiding contraband, immediately left the bus shelter where he had been sitting after officers drove by, and jaywalked in front of them. Did the trial court properly find that the detention of Gatewood was proper?

3. A trial court may enter the findings and conclusions under CrR 3.6 while an appeal is pending if there is no appearance of unfairness or prejudice to a defendant. The court entered its

findings of fact and conclusions of law on June 22, 2006. There is no indication that the findings were tailored to issues on appeal. Has Gatewood failed to establish prejudice from the delayed entry of findings?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

Defendant Gary Gatewood was charged by second amended information with unlawful possession of a firearm in the second degree, violation of the uniform controlled substances act (possession of cocaine), and violation of the uniform controlled substances act (possession of less than forty grams of marijuana), all alleged to have occurred on or about June 26, 2004. CP 86-87. A CrR 3.6 hearing was held, wherein Gatewood unsuccessfully moved to suppress all evidence stemming from a traffic stop that led to his eventual arrest. CP 64-85.

A jury trial commenced before the Honorable Judge Douglass North on July 7, 2005. 1RP 1.<sup>1</sup> The jury found Gatewood guilty of the firearm and marijuana charges, but acquitted him of the

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<sup>1</sup> The Verbatim Report of Proceedings consists of a total of four volumes, referred to in this brief as follows: 1RP (July 7, 2005 and Sept. 2, 2005), 2RP (July 12, 2005), 3RP (July 13, 2005) and 4RP (July 14, 2005).

cocaine charge. CP 47-49. Gatewood received a standard range sentence of six months in custody with thirty days converted to community service for the firearm charge, and ninety days in custody on the marijuana charge. CP 13-19, 20-22.

## **2. SUBSTANTIVE FACTS FROM THE CrR 3.6 HEARING.<sup>2</sup>**

In June 2004, Seattle Police Officers Larry Longley and Edward Chan were both members of the department's Anti-Crime Team.<sup>3</sup> 1RP 5-6. Both officers had been with the police force for some time: Chan for eleven years, and Longley for eight. 1RP 2, 34. Prior to his tenure with the Seattle Police, Longley also served with the Enumclaw Police Department and as a military police

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<sup>2</sup> The testimony at trial largely mirrored the testimony offered by the State at the CrR 3.6 hearing as discussed below. At trial, in addition to the two officers, the State also called Edward Suzuki from the Washington State Patrol Crime Lab. 3RP 150. He testified that he tested the various suspected controlled substances seized from the defendant and the bus shelter on the night in question. 3RP 159. He further testified that the substance found in the bus shelter was cocaine, and that one of the baggies recovered from Gatewood contained marijuana. 3RP 171, 173. The other items recovered from Gatewood, however, did not contain any detectable controlled substances. 3RP 170, 172. Further, the parties stipulated at trial that Gatewood had previously been convicted of a felony (unnamed) and therefore was not eligible to possess a firearm on the day in question. 3RP 150.

<sup>3</sup> The Anti-Crime Team ("ACT") is a unit of specialized officers who patrol areas of high criminal activity in an effort to intercept street-level crime as it occurs. 1RP 36. Their duties are not unlike those of a regular patrol officer, except that they are not generally required to respond to 911 calls. 1RP 4.

officer in the reserves. 1RP 3. In order to become members of ACT, both officers went through specialized training. 1RP 3, 35. Further, Longley attended “undercover school” for narcotics investigation, and took classes where he learned to recognize different types of narcotics activities, including furtive movements, drug loitering, and the like. 1RP 4. By July of 2005, after six years as a member of ACT, Longley had performed “hundreds and hundreds” of narcotics arrests, participated in undercover buys, and served over 400 narcotics search warrants. 1RP 3-5; 3RP 12.

On June 26 at about 12:20 a.m., the two officers, partnered for the night, were on patrol in the Rainier Valley area of Seattle. 1RP 5-6, CP 90. As they drove northbound on Rainier Avenue South, at just after midnight, Longley’s attention was drawn to a bus shelter near the intersection of Rainier Avenue South and 39<sup>th</sup> Avenue South. 1RP 6, 37-38. There were several people sitting in the bus shelter. 1RP 6. A man, later identified as Gatewood, was sitting on the bench at the south end of the shelter. CP 90. He looked up as the officers’ marked patrol car approached the shelter. 1RP 7. As he did so, his expression turned to immediate surprise—his eyes got big and he looked “shocked like he was surprised to see [the officers].” 1RP 7. Longley then watched as

Gatewood twisted his whole body to the left, and reached his left hand around, as if hiding or sloughing something. 1RP 7. Having seen others throw drugs behind bus shelters with similar furtive movements in the past, Longley's interest was piqued. 1RP 8, 13.

Longley notified Chan, who was driving, of what he had seen, and asked him to drive around the block so they could try to discern what was going on. 1RP 8. Chan did so, and as they came back around the block, Gatewood, apparently seeing the officers return, got up, walked a short way north of the bus shelter and then crossed Rainier Avenue midblock. 1RP 8. Because Rainier Avenue is a major arterial, the officers immediately made the decision to contact Gatewood for "jaywalking."<sup>4</sup> 1RP 56. Given the nature of the street, and presumably also the darkness, it was clear to Chan that Gatewood's illegal choice to cross where he did posed not only a risk to traffic, but also to himself. 1RP 56. To effectuate the stop, the officers pulled their patrol car just in front of Gatewood, as if to cut him off. 1RP 11. Longley got out of the car

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<sup>4</sup> There is no offense actually designated as "jaywalking" under the Revised Code of Washington or the Seattle Municipal Code ("SMC"). The parties and the trial court, however, referred to the event as "jaywalking" and this brief will do the same. Seattle Municipal Code §11.40.140 provides that "no pedestrian shall cross an arterial street other than in a crosswalk except upon [designated] streets within the Pike Place Market Historical District..." Regardless of what it is called, violations of SMC §11.40.140 are considered traffic infractions. See State v. Rife, 133 Wn.2d 140, 142, 943 P.2d 266 (1997).

first and told Gatewood, "Stop, I need to talk to you." 1RP 11. Gatewood, who was facing Longley, looked at the officer, then turned 180 degrees and walked in the opposite direction. 1RP 11, 42.

Despite repeated orders to stop, Gatewood refused to comply. 1RP 11, 42. Instead, the officers watched as Gatewood turned toward a large bush, bent over, and stuck both his hands into the waistband of his pants. 1RP 11, 42. Concerned that Gatewood was reaching for a gun, both officers drew their service weapons. 1RP 12, 23, 42-43. Gatewood then appeared to pull something out of his pants, and reached his arms into the nearby bush. 1RP 14, 42-43. The officers repeatedly yelled at Gatewood to show his hands, but only after he discarded something in the bush did he finally turn and face the officers with empty hands. 1RP 12, 43. He was then immediately told to get on the ground, and handcuffs were placed on him. 1RP 43.

After arrest, a search of the ground under the bush located a loaded .22 caliber semiautomatic handgun with a bullet in the chamber. 1RP 14. A search incident to arrest of Gatewood revealed both suspected cocaine and suspected marijuana. 1RP 46. Finally, when Longley returned to the bus shelter to determine

what Gatewood had discarded there, he found suspected crack cocaine in the area where Gatewood had appeared to throw something. 1RP 14-15.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY DENIED GATEWOOD'S MOTION TO SUPPRESS HIS FIREARM, COCAINE AND MARIJUANA, AS THEY WERE NOT FRUITS OF A PRETEXTUAL STOP.**

Gatewood maintains that the trial court erred when it denied his motion to suppress the evidence of unlawful possession of a firearm and violations of the uniform controlled substances act, because it was the fruit of a pretextual stop. This claim should be rejected. The trial court's findings of fact that support its implied conclusion that the stop was not pretextual are either unchallenged or are supported by substantial evidence.<sup>5</sup>

A trial court's findings of fact from a CrR 3.6 suppression hearing are binding and must stand when supported by substantial

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<sup>5</sup> The trial court did not make explicit findings regarding Gatewood's argument that the stop by Officers Longley and Chan was pretextual. Rather, this conclusion can be inferred from the court's ruling that the officers had reasonable articulable suspicion of criminal activity to justify their stop. Supp. CP \_\_\_\_ (sub no. 102); 2RP 76.

evidence. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. Hill, 123 Wn.2d at 664. Unchallenged factual findings are considered verities on appeal. Id. Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Under the Washington Constitution an otherwise valid traffic stop of a motorist for a non-criminal infraction cannot be used by police as a pretext to search for evidence of criminal activity.<sup>6</sup> Const. art. 1, §7; State v. Ladson, 138 Wn.2d 343, 347, 979 P.2d 833 (1999). To determine whether a traffic stop is pretextual, a court should apply the following test: "[T]he court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." Id. at 358-59.

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<sup>6</sup> Under federal law, police may perform valid traffic stops to investigate unrelated criminal activity without violating the Fourth Amendment of the United States Constitution. Whren v. United States, 517 U.S. 806, 811-19, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

Washington's prohibition of pretextual stops and arrests is not without logical limits. These limits ensure that legitimate law enforcement is not unduly restricted. Thus, this Court has noted that under Ladson, "even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop." State v. Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), rev. denied, 142 Wn.2d 1027 (2001).

In Ladson, an officer and a detective were on proactive gang patrol together. 138 Wn.2d at 345-46. They spotted a car occupied by two men, one of whom they suspected of being a drug dealer. Id. at 346. The officers followed the vehicle for several blocks, specifically looking for a reason to pull the car over; they eventually stopped the car because it had expired tabs. Id. They discovered that the driver's license was suspended, and arrested him. The officers subsequently searched the vehicle incident to arrest, and found a handgun inside a jacket on the passenger's seat. Id. at 346-47.

At trial, the officers specifically testified that they did not make traffic stops as a routine part of their duties while on gang patrol, and that they used traffic stops as a means to pull people

over to initiate contact and questioning. Id. at 346. The officers did not deny that the traffic stop in Ladson's case was pretextual. Id. The trial court suppressed the fruits of the illegal search, but the Court of Appeals reversed. Id. at 347. The Supreme Court ultimately affirmed the trial court's suppression order on state constitutional grounds. Id.

Several Court of Appeals cases have addressed pretext stops in the wake of Ladson. In State v. DeSantiago, 97 Wn. App. 446, 983 P.2d 1173 (1999), an officer observed a car pull up to an apartment complex in a "narcotics hot spot." DeSantiago, 97 Wn. App. at 448. The driver, DeSantiago, entered an apartment, then returned a few minutes later and drove away. Id. Because the officer suspected that DeSantiago purchased drugs inside the apartment, he followed the car for several blocks, and stopped the vehicle for two minor traffic infractions. Id. at 448-49. The officer learned that DeSantiago's license was suspended and that he had a warrant. Id. at 449. A subsequent search of the car incident to arrest turned up illegal narcotics and a handgun. Id.

Following a suppression hearing, the trial court specifically found that the officer followed DeSantiago away from the narcotics hot spot for several blocks because he was "looking for a basis to

stop the vehicle.” Id. at 452-53. However, the trial court denied DeSantiago’s suppression motion. Id. at 449. Based on the trial court’s findings of fact, Division Three reversed, holding that the officer was clearly looking for a basis to stop the vehicle, and that he subjectively intended to engage in a pretextual stop. Id. at 452-53. The court held that although the officer was a patrol officer, as opposed to a narcotics detective, he was nonetheless engaged in a narcotics investigation at the time he stopped DeSantiago. Id. at 453.

In State v. Hoang, an officer was parked with his lights out on Rainier Avenue South, an area known to be a narcotics hotspot. Hoang, 101 Wn. App. at 735. He suspected that “a drug deal might be going down” after watching Hoang drive through the area and twice stop to contact groups of individuals “milling about the street.” Id. After Hoang failed to signal before making a left-hand turn through an intersection, the officer stopped Hoang for the traffic infraction. Id. After learning that Hoang’s license was suspended, the officer arrested him and searched Hoang’s car; the officer found a small rock of cocaine. Id. at 736. The officer did not cite Hoang for having a suspended license or for the traffic infraction. Id.

Hoang later moved to suppress the cocaine by arguing that the traffic stop was pretextual. The officer testified that he would not have pulled Hoang's car over but for the traffic infraction. Id. The officer further explained that it was not his practice to cite individuals for traffic violations when felony charges would ultimately be filed against them. Id. The trial court found that the officer's testimony was credible, and the traffic stop was not pretextual, and denied Hoang's suppression motion. Id. at 737-38.

In reaching its decision, the trial court relied on the fact that the officer did not follow Hoang in an effort to find a reason to stop him, and that he immediately stopped Hoang upon witnessing the traffic infraction. Id. at 741-42. The court also recognized that the officer's questioning of Hoang after the stop was typical of what an officer would ask after stopping a motorist for a traffic violation: Do you have a license, vehicle registration, and proof of insurance? Id. at 741. Division One agreed, and affirmed the trial court. Id. at 743.

In the present case, application of the totality of the circumstances analysis called for in Ladson reveals that Longley and Chan had an objective basis to stop Gatewood for an

infraction.<sup>7</sup> Both officers testified that Gatewood crossed Rainier Avenue, a major arterial, in the middle of the block. 1RP 9, 38-40. This testimony was accepted as true by the court. Supp. CP \_\_\_\_ (sub no. 102). Gatewood does not challenge the court's finding that he did indeed jaywalk.<sup>8</sup> Thus, it is a verity on appeal.

Furthermore, a review of Longley's and Chan's subjective intents does not change the pretext analysis. Here, the officers were not using Gatewood's jaywalking as an *excuse* to speak with him, but rather testified that they stopped Gatewood *both* for jaywalking, *and* because they believed they had reasonable articulable suspicion of criminal activity sufficient to justify an investigatory stop.<sup>9</sup> 1RP 10, 13, 25, 56. The fact that, in addition to a desire to investigate Gatewood's furtive movements, the officers were also concerned by his jaywalking (which they believed put him

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<sup>7</sup> The State concedes, for purposes of this appeal, that when Longley said "Stop, I need to talk to you," it was a seizure. State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).

<sup>8</sup> Throughout his brief, Gatewood refers to his jaywalking as a fact, and at no point specifically contests that finding by the court.

<sup>9</sup> This latter basis for the stop will be discussed in detail in section 2 below.

and others at risk) does not invalidate the stop.<sup>10</sup> Hoang, 101 Wn. App. at 739 (holding that police may still enforce the traffic code so long as it is not used as a pretext to avoid the warrant requirement for an unrelated criminal investigation). Unlike the officers in DeSantiago and Ladson, Longley and Chan here did not follow Gatewood looking for an infraction upon which to base a stop. Rather, they stopped him as soon as possible after they drove they returned to Rainier Avenue South after making their way back around the block. 1RP 10-11. Further, stopping individuals for jaywalking was not something out of the ordinary for Longley, as he testified he had issued some jaywalking tickets and a number of warnings. 1RP 5. Accordingly, a suggestion that the officers merely used the jaywalking incident in this case as a basis to justify

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<sup>10</sup> Further, Gatewood's argument that the officers' safety concerns were fabricated is without merit. Contrary to Gatewood's brief, Officer Chan did not testify that there was no traffic that evening. He testified *only* that there were no cars between the officer and Gatewood at the time the officer crossed Rainier, in response to a very specific question to that effect by defense counsel. 1RP 56. In fact, at trial, Officer Longley testified that there was traffic on Rainier at that time. 3RP 20. Further, given the early hour, it was presumably dark out, increasing the risk that passing cars would not see a pedestrian.

stopping Gatewood is without merit.<sup>11</sup> See Ladson, 138 Wn.2d at 346.

In the end, the facts and circumstances in the instant case do not present the same concerns raised by the court in Ladson and DeSantiago. Rather, because the stop for jaywalking was not used to mask some hidden agenda on the part of the officers, the facts here more closely parallel the situation in Hoang. The record is sufficient to persuade a fair-minded, rational person of the truth of the trial court's implied finding that the officers here did not stop Gatewood for an infraction as a pretext to investigate their belief that he sloughed contraband at the bus shelter. Accordingly, the trial court properly denied Gatewood's motion to suppress on those grounds.

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<sup>11</sup> Should the Court agree, and hold that the jaywalking incident formed a legitimate, independent basis by which to justify the stop of Gatewood, the inquiry need go no further. Once officers effectuated a valid stop for a traffic infraction, Gatewood's actions in and of themselves, justified the expansion of the scope of the traffic stop. In other words, because Gatewood made furtive gestures upon being seized that were extremely concerning to officer safety, Longley and Chan were justified in drawing their service weapons, ordering Gatewood to the ground, and handcuffing him. See, e.g., State v. Wheeler, 108 Wn.2d 230, 259, 737 P.2d 1005 (1987). This is true regardless of the inquiry of whether there was reasonable articulable suspicion to justify an investigative stop as discussed in section 2 below.

**2. THE TRIAL COURT PROPERLY FOUND THAT THERE WERE SPECIFIC AND ARTICULABLE FACTS, WHICH TAKEN TOGETHER WITH THEIR RATIONAL INFERENCES, REASONABLY JUSTIFIED AN INVESTIGATORY STOP OF GATEWOOD.**

Gatewood further contends that the trial court erred in finding that there were sufficient facts to justify an investigatory stop. He bases this contention primarily on the fact that officers could not see what he sloughed at the bus shelter prior to contacting him. Because officers had far more to justify their stop of Gatewood, however, his claim should be rejected. The trial court's ruling was proper.

In order to justify a seizure for investigatory purposes, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The level of articulable suspicion necessary to support an investigatory detention is "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

To determine whether an investigatory stop was justified at its inception, courts "must first ascertain at what point during the

continuum of events [a defendant] was seized.” State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560, rev. denied, 107 Wn.2d 1001 (1986). Once that time is pinpointed, courts must then inquire whether, leading up to that point, officers had specific and articulable facts upon which to base the stop. Id. If they did, the court must also analyze whether the stop was reasonably related in scope to the circumstances that justified the interference in the first place. Id. at 229.

In determining what constitutes reasonable articulable suspicion, Washington courts have identified a number of factors that may be considered. In State v. Pressley, a case not unlike this one, this Court found the officer had articulated specific facts to justify their stop of Pressley based upon his testimony that Pressley was seen in a high-narcotics area with another woman, pointing at something in her upturned palm. 64 Wn. App. 591, 593-94, 825 P.2d 749 (1992). When the officer drove up, Pressley closed her hand, said “Oh, shit,” and walked away from the other woman. Id. Upon contact, Pressley appeared to the officer to be trying to hide something in her pocket. Id. In ruling the stop justified, this Court stated that, among other things, factors that play into reasonableness include the officer’s training and experience, the

location of the stop, and the conduct of the person detained. Id. at 596. With regard to that last factor, the Pressley court stated that “it was the defendant’s behavior itself which supplied the additional inferences necessary to provide an articulable basis for the officer’s suspicion that what he was witnessing was probably illegal activity.” Id. at 597. In the end, the Court found that the officer’s basis for the stop “did amount to more than simply an ‘inarticulable hunch.’” Id.

Other courts have relied on similar factors. In both State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) and State v. Samsel, 39 Wn. App. 564, 570-71, 694 P.2d 670 (1985), the experience of the arresting officer was an important factor to be considered: “While an inchoate hunch is insufficient to justify a stop, circumstances which appear innocuous to the average person may appear incriminating to a police officer in light of past experience. The officer is not required to ignore that experience.” Samsel, 39 Wn. App. at 570-71.

Flight by a suspect may also play into an officer’s basis for a stop. In Pressley, one factor considered among the totality of the circumstances was that the defendant walked away as soon as the officer entered the area. Pressley, 64 Wn. App. at 597. The court

also considered flight as a factor in State v. Sweet, 44 Wn. App. 226, 230, 721, P.2d 560 (1986), a case relied on by the trial court in this case. 2RP 42. In Sweet, where the defendant fled as soon as the investigating officers turned their car toward him, the court stated: "Courts have generally regarded flight in the presence of police officers to be a circumstance that may be considered along with other factors in determining whether an investigatory stop is justified." Sweet, 44 Wn. App. at 230. There is no rule articulated in case law as to how quickly a suspect must flee, or how far they must go, for the fact of his flight to be considered relevant. See, e.g., Pressley, 64 Wn. App. at 597; see also, State v. Swaite, 33 Wn. App. 477, 481, 656 P.2d 520 (1982) (using the fact that the defendant jumped into bushes upon seeing police officers, and thus "fled," to justify a Terry stop).

In addition to the above, the time of the stop, any furtive gestures made by a suspect, and a suspect's reaction to the presence of officers may be, and often are, considered. State v. Graham, 130 Wn.2d 711, 715, 927 P.2d 227 (1996); Pressley, 64 Wn. App. at 597; Sweet, 44 Wn. App. at 230. A defendant's nervousness in the presence of officers may also be considered

when evaluating the legitimacy of a given stop. Glover, 116 Wn.2d at 512-14 (holding that the mere fact that the defendant, who was not recognized by officers, turned away from them when he saw them and acted nervous by playing with his baseball cap provided reasonable articulable suspicion sufficient to justify a Terry stop for trespassing); Graham, 130 Wn.2d at 715. The factors discussed above, however, are not exhaustive.

In this case, as conceded above, Gatewood was seized when Officer Longley exited the patrol car and ordered him to stop. Friederick, 34 Wn. App. at 541. Accordingly, we must next evaluate the information Officers Chan and Longley had available to them at the time they elected to stop Gatewood. Doing so reveals that many of the factors justifying the stops discussed above are also present here. First, the two officers involved had a combined twenty-five years of law enforcement experience. 1RP 2-3, 34, 3RP 11. Both were members of a specialized unit where they had received extensive training on identifying narcotics, various types of narcotics activities, and recognizing furtive movements. 1RP 4. Officer Longley alone had completed hundreds and hundreds of narcotics-related arrests. 1RP 3.

Second, it was very early in the morning, and thus presumably dark, when the officers contacted Gatewood. 1RP 47. Further, they contacted him on Rainier Avenue South, which has been noted to be a high narcotics area.<sup>12</sup> See Hoang, 101 Wn. App. at 735.

Third, when Gatewood spotted the officers in their marked patrol car, his demeanor noticeably changed: his eyes got big and he appeared shocked to see the officers there. 1RP 7. He then made blatantly furtive gestures by twisting his body around and appearing to toss or slough something, presumably contraband. 1RP 7. Given his extensive experience in investigating drug offenses, this caught Officer Longley's attention. 1RP 7. He had previously seen other suspects slough drugs behind a bus shelter in a similar manner, and recognized the behavior as such. 1RP 13.

Further, in considering all the circumstances justifying a stop, the officers considered the fact that Gatewood almost immediately departed the bus shelter after their arrival in the area.

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<sup>12</sup> Although testimony regarding the nature or character of the area in which Gatewood was stopped was not specifically elicited during the CrR 3.6 hearing, Officer Chan testified that, as a member of ACT, he is assigned to investigate street-level crimes in areas of high criminal activity. 1RP 36, 47. We can reasonably infer, given that assignment and the description of Rainier Avenue South in Hoang, that the area where Gatewood was contacted was indeed a high-crime area.

1RP 38-39. Not only is this, in essence, flight, but it also is suggestive of the fact that Gatewood had no legitimate reason to be in the bus shelter in the first place. Had he truly been simply waiting there for a bus, as one would expect of people sitting in a bus shelter, he likely would have continued to do so regardless of whether the officers drove by. Then, to add to the officers' suspicions, not only did he leave the area quickly, but he appeared to be in such a hurry to get away that he risked breaking the law by jaywalking in front of the officers. 1RP 38-39. Here, the fact that Gatewood jaywalked was important to the officers not just because it was a traffic infraction, but also because in light of all his other actions, it constituted further evidence of criminal activity.

Accordingly, in light of the multiple factors considered by Officers Longley and Chan as discussed above, and the rational inferences that can be drawn from them, there clearly were specific and articulable facts that justified a Terry stop in this case, and the trial court's ruling to that effect was both appropriate and supported by the record.

Once courts determine that reasonable articulable suspicion exists to justify an investigative stop, the next question is whether the officers properly limited the scope of the detention to the

circumstances that justified the stop at its inception. Sweet, 44 Wn. App. 230. An investigative detention must last no longer than is necessary to verify or dispel the officer's suspicion, and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. State v. Williams, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984). What constitutes a reasonable intrusion is a fact-specific consideration that may turn on information given to the officer, observations the officer makes, and inferences and deductions drawn from the officer's training and experience. United States v. Cortez, 449 U.S. 411, 417-20, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). Some stops may justify a minimal intrusion only, whereas others may justify an officer approaching a subject with gun drawn and pointed at the suspect, ordering the suspect to the ground, and handcuffing and frisking the suspect if officers have a reason to fear for their safety. See McKinney v. City of Tukwila, 103 Wn. App. 391, 406, 13 P.3d 631 (2000) (citing United States v. Taylor, 716 F.2d 701, 707-09 (9<sup>th</sup> Cir. 1983)); see also State v. Wheeler, 108 Wn.2d 230, 259, 737 P.2d 1005 (1987); Sweet, 44 Wn. App. at 233.

The scope of the stop conducted by Longley and Chan here was completely appropriate. Once they contacted him, Gatewood elevated the risk of the situation, and thus the officers' response, by reaching into his pants for what the officers perceived to be, and what in fact turned out to be, a loaded gun. 1RP 12, 14, 42-43. In light of officer safety concerns and the discussion in United States v. Taylor, 716 F.2d at 707-09, Longley and Chan responded in the only appropriate fashion reasonably available, and went only so far as was necessary to protect themselves.<sup>13</sup> Once the gun was located in the bushes nearby, officers had probable cause to arrest Gatewood, and appropriately did so. 1RP 43.

The above discussion makes clear that Officer Longley and Officer Chan had ample evidence with which to establish specific, articulable facts, which, when taken together with the rational inferences drawn from those facts, justified a brief detention for investigative purposes of Gatewood. Once stopped, Gatewood's own actions required a more intrusive stop than originally anticipated or intended. Because the trial court properly found that the stop was justified, Gatewood's claim should be rejected.

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<sup>13</sup> Notably, Gatewood does not contest the actual scope of the detention, but only whether there were reasonable articulable facts justifying it.

**3. THE TRIAL COURT PROPERLY ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO CrR 3.6.**

Finally, Gatewood alleges error in the court's failure to enter written findings of fact and conclusions of law pursuant to CrR 3.6. On June 22, 2006, however, the trial court did enter required written findings of fact and conclusions of law. (See Appendix A).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369, rev. denied, 120 Wn.2d 1011 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125, rev. denied, 102 Wn.2d 1024 (1984).

Gatewood cannot establish unfairness or prejudice resulting from the delayed entry of these findings. A review of the findings illustrates that the State did not engage in tailoring to address the defendant's claims on appeal. (See Appendix A). The language of the findings mirrors the trial court's oral ruling. 2RP 76-78. Moreover, the declaration filed on July 18, 2006 by trial deputy Nicole Weston demonstrates that she did not discuss the substance of the appeal with anyone prior to the filing of the

findings and conclusions. Supp. CP \_\_\_\_ (sub no. 104). In light of all of the above, Gatewood cannot claim that the delayed findings appear unfair.

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992), the court found that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. Unlike Smith, the entered findings here have not delayed resolution of Gatewood's appeal. There is no resulting prejudice.

Since Gatewood cannot demonstrate an appearance of unfairness nor resultant prejudice, the trial court's CrR 3.6 findings of facts and conclusions of law are properly before this court. This claim of error should therefore be denied.

**D. CONCLUSION**

The stop conducted on June 26, 2004, of Gary Gatewood was not pretextual in nature, and was supported by reasonable articulable suspicion. Gatewood has suffered no prejudice stemming from the fact that the trial court neglected to enter findings until after his appeal had been filed. Accordingly, for all the

foregoing reasons, the State respectfully asks this Court to affirm Gatewood's convictions for both unlawful possession of a firearm in the second degree and violation of the uniform controlled substances act, possession of marijuana.

DATED this 27<sup>th</sup> day of July, 2006.

Respectfully submitted,

NORM MALENG  
King County Prosecuting Attorney

By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GARY GATEWOOD, Cause No. 56896-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame  
Name  
Done in Seattle, Washington

7/27/06  
Date

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