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24553-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

BEE XIONG, RESPONDENT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

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REPLY BRIEF OF APPELLANT

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STEVEN J. TUCKER  
Prosecuting Attorney

Kevin M. Korsmo  
Deputy Prosecuting Attorney  
Attorneys for Appellant

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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I.

INTRODUCTORY STATEMENT

Appellant, State of Washington, respectfully submits this reply brief on various aspects of the Brief of Respondent.

II.

ISSUES PRESENTED

(1) Where defendant did not challenge in the trial court the validity of the seizure based on the misidentification and the police did not arrest and search on that ground, does this court have any basis for considering the claim here?

(2) Did the officers articulate the basis for seizing the hard item in defendant's pocket?

III.

ARGUMENT

A. THE OFFICERS ARTICULATED THE BASIS FOR SEIZING THE PIPE IN DEFENDANT'S POCKET.

Defendant presents several arguments concerning issues not pursued by appellant in its appeal; appellant will briefly address those arguments. Appellant will then, again in a brief fashion, address

respondent's comments to the actual issue presented by this case. Respondent criticizes the appellant's brief as being overly simplistic, but he ignores the fact that this is truly a simple case.

While both lengthy and presented with customary skill, respondent's two new claims – that the trial court erred in upholding the seizure of Mr. Xiong by officers seeking to arrest his brother and that a reasonable mistake of fact is not recognized in Washington – were not presented to the trial court and, understandably, were not argued by appellant in its opening brief. These fallback arguments are mere distractions that are not truly present here.

Defendant's entire motion to the trial court was predicated on a claim that the *frisk* was not justified. CP 4-7. The prosecutor's response was directed solely to that issue. CP 8-10. Defendant's reply brief likewise focused primarily on the frisk, but did claim the seizure was not justified *once defendant had identified himself*. CP 11-15. The prosecutor thus had no particular reason to develop all of the evidence bearing on the initial seizure of the defendant. While defense counsel did argue that topic to the judge in closing, it simply was not the focus of the hearing. RP 33-35. Understandably, the trial court had no problem finding that the initial seizure was justified. RP 42.

Under those circumstances, the issue of the validity of a mistaken arrest is not truly before this court and the criticisms over supposedly missing evidence ring quite hollow. Defendant's action in assigning error to a finding that he drafted and did not object to entering would also be seriously in question. But, there simply is no need to go into the topic. There was evidence to support the judge's determination and defendant's attempts to have this court now re-weigh that evidence go nowhere. The question is whether the finding is supported by substantial evidence, not whether the evidence should have been found differently. Evidence is sufficient in this context if it persuades a fair-minded person of the truth of the finding. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). The evidence here supported the trial court's determination that the officers thought Bee Xiong was Kheng Xiong when they seized him.

In a similar vein is defendant's reliance on State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005). While the entire argument could be ignored given the undeveloped record, defendant's overstatement of the holding of Morse deserves of a brief rejoinder. Morse involved the search

of a residence pursuant to consent from a guest who did not have the legal authority to permit the search. The State argued that the officers relied in good faith on the apparent authority of the guest. The Washington Supreme Court rejected the argument, finding that mistakes of *law* simply can not be excused by the officer's good faith. This is apparent from the opening paragraph of the opinion:

‘Authority’ to consent is a matter of status or control and a question of law. The subjective beliefs and understandings of law enforcement officers are irrelevant to the question of ‘authority.’

Id. at 4.

The Court compared the protections of the Fourth Amendment with those of Article I, §7, and explained why a mistake would not necessarily invalidate a search or seizure under the federal constitution, but would never provide *legal* justification under the state constitution. Id. at 8-10. The court also summarized its prior rulings on the topic of “good faith”: “We have also long declined to create ‘good faith’ exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement.” Id. at 9-10. In short, Morse, as with the other authority noted in the original Brief of Appellant, determined that “good

faith” did not provide *legal* justification for an arrest. Nothing in Morse or any other case suggests that mistakes of *fact* must be treated the same way. Here, there was legal authority to arrest Kheng Xiong – an arrest warrant issued by a federal judge. The good faith factual mistake of confusing Bee Xiong with Kheng Xiong is simply not the legal question that Washington courts have already determined.<sup>1</sup>

While interesting, those issues are not presented by this case as they were not argued below. They also are not presented here because the officers did not search Bee Xiong incident to arrest.<sup>2</sup> If they had done so, then at least the issue of the validity of the arrest would possibly be available if the record were sufficiently developed to consider it. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988). The officers did not so act and, accordingly, the issue is not presented now. Because there was no search immediately incident to an arrest, that doctrine has no play here. State v. O’Neill, 148 Wn.2d 564, 583-586,

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<sup>1</sup> Similarly, the cases cited on page 35 of the Brief of Respondent are of the same variety – an invalid warrant did not become valid simply because an officer believed in the warrant. They are not this case.

<sup>2</sup> The Brief of Appellant never claimed that the officers validly searched incident to arrest. Rather, the topic was discussed solely to explain the basis for the detention of the defendant and to note the silliness of criticizing the frisk when the officers could have arrested and searched incident thereto. *See* Brief of Appellant at 5. However, since the officers did not search incident to an arrest, that argument was not available to appellant.

62 P.3d 489 (2003). Thus, defendant's efforts to treat mistakes of law the same as mistakes of fact likewise is not at issue here.

What is at issue here is whether articulable facts justified the frisk of the defendant. He addressed that issue in his brief and some of his comments will be addressed in this reply.

Respondent mistakenly contends that "the officers initially patted down Xiong and the driver and that initial pat-down revealed nothing of concern." (Brief of Respondent at 17, including fn. 12 which cites to RP 24). In fact, it was the initial pat-down that revealed the hard object that led to the officer doing a more thorough check of the object once the finding had been discussed with the sergeant at the scene. There was no delay in the discovery of the potential weapon; what was delayed was the confirmation of the item. RP 8, 11-12, 24.

Defendant repeats the arguments that successfully carried the day with the trial court. There he argued there was no basis for a frisk since he was in police custody and was not doing anything overtly threatening at the time the officer decided to remove the hard object. That is an exceptionally narrow and unreasonable reading of Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). The facts and holding of Terry are discussed at length in the Brief of Appellant and will not be recited again here other than to note that the officer there never saw

a weapon nor did the suspects act in a way that made him think they were carrying weapons. Rather, the whole inference that they might be armed was based simply on the fact that it looked like the two men were preparing to rob a store. The United States Supreme Court required nothing more.

Here, neither should the trial court have required more. Unlike Terry, here the officer *knew* there was a potential weapon in the defendant's pocket from his initial patdown. To protect the officers, a la Terry, the seizure of the hard object was justified. There was no need to await evidence of impending aggression. Similarly, the suspects in Terry were seized before being patted down. The fact that Xiong had already been restrained did not detract from the officer's ability to identify the hard object discovered in the course of the patdown.

Defendant also attacks appellant's reliance on Terry, essentially saying the principles of that case are too generic to govern<sup>3</sup> his case and that more recent authority should have been used. His position is humorous given his own reliance on Terry as one of the two main sources of his original argument to the trial court. CP 4-7. It also ignores the fact

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<sup>3</sup> Presumably he also would argue that the principles of Miranda v. Arizona, 384 U.S. 435, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), would not apply to his arrest for possession of a controlled substance since the crimes at issue there, kidnapping and rape and robbery, were not the crimes he was charged with here.

that the Terry rule is much broader than he gives it credit for being. Presumably he did not challenge Terry because he could not. As argued previously, Terry is dispositive here.

Defendant also challenges appellant's failure to assign error to finding of fact number 5. The second sentence of this finding, which is what respondent appears to want to rely upon, is actually a conclusion of law: "However, the Court was unable to find from the testimony any articulable facts specific and detailed or [sic] which the officer could reasonably infer the detained individual was armed and dangerous." CP 17. There is no need to assign error to a conclusion of law. *See* RAP 10.3(g) [requiring assignments of error for challenged factual findings]. A finding of fact that is actually a conclusion of law will be treated as a conclusion of law, just as a conclusion of law which is actually a factual finding will be treated as a finding of fact. *E.g.*, State v. Luther, 157 Wn.2d 63, 78, --- P.3d --- (2006) [discussing cases]. A finding of fact is a determination that something happened; the process of reasoning from a fact is a conclusion of law. State v. Niedergang, 43 Wn. App. 656, 658, 719 P.2d 576 (1986). The court's determination in finding 4 here is a conclusion drawn from the evidence, not a determination of what happened. It also is the same conclusion that appellant has already

assigned error to. *See* Brief of Appellant at 1. There is no danger of respondent being misled concerning the issues presented here.

This is actually a simple case despite the significant efforts made to complicate it. Officers found a hard object during a patdown and decided to clarify what it was. That was proper. The trial court erred in requiring more specific articulation than the existence of hard object of potentially dangerous size. There was no need to wait until defendant acted in a threatening manner before seizing the object.

The trial court erred in requiring more before allowing the protective frisk.

#### IV.

#### CONCLUSION

For the reasons stated herein and previously, the trial court should be reversed and the case remanded for trial.

Respectfully submitted this 2<sup>nd</sup> day of August, 2006.

  
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Kevin M. Korsmo #12934  
Deputy Prosecuting Attorney

Attorney for Appellant