

80236-0

NO. 24553-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

BEE XIONG,

Appellant.

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

The Honorable Jerome L. Levaque, Judge

BRIEF OF RESPONDENT

ERIC BROMAN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>RESPONSES TO ASSIGNMENTS OF ERROR</u>	2
<u>ASSIGNMENT OF ERROR IN RESPONSE</u>	2
<u>Counterstatement of Issues</u>	3
C. <u>STATEMENT OF THE CASE</u>	4
1. <u>The Parties' Written Motions</u>	4
2. <u>Evidence Presented -- and not Presented -- at the Suppression Hearing</u>	5
3. <u>The Parties' Arguments and the Court's Findings</u>	10
D. <u>ARGUMENT</u>	13
1. THE TRIAL COURT PROPERLY FOUND THE FRISK SEARCH WAS UNLAWFUL BECAUSE THERE WAS NO REASONABLE BASIS TO BELIEVE THAT BEE XIONG WAS ARMED AND PRESENTLY DANGEROUS.	13
2. THE STATE HAS FAILED TO ASSIGN ERROR TO FINDING 5 OR TO CITE APPLICABLE AUTHORITY. THESE FAILURES SHOULD BE FATAL TO THE STATE'S CLAIM THAT THE FRISK SEARCH WAS JUSTIFIED.	19

TABLE OF CONTENTS (CONT'D)

	Page
3. THE TRIAL COURT PROPERLY FOUND THE OFFICERS SHOULD HAVE DETERMINED THAT BEE XIONG WAS NOT THE SUBJECT OF THE ARREST WARRANT. THE TRIAL COURT ERRED, HOWEVER, IN FINDING ON THIS RECORD THAT THE OFFICERS INITIALLY HAD REASONABLE GROUNDS TO DETAIN XIONG.	21
4. REVERSAL OF THE TRIAL COURT'S SUPPRESSION ORDER WOULD VIOLATE ARTICLE 1, § 7 OF THE WASHINGTON CONSTITUTION.	31
E. <u>CONCLUSION</u>	37

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Bullard v. Bailey,
91 Wn. App. 750, 959 P.2d 1122 (1998),
rev. denied, 137 Wn.2d 1014 (1999) 20

Cowiche Canyon Conservancy v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992) 21

Emmerson v. Weilep,
126 Wn. App. 930, 110 P.3d 214 (2005) 20

Ertman v. City of Olympia,
95 Wn.2d 105, 621 P.2d 724 (1980) 21

Guffey v. State,
103 Wn.2d 144, 690 P.2d 1163 (1984),
overruled in part on other grounds,
Savage v. State,
127 Wn.2d 434, 899 P.2d 1270 (1995) 31

Savage v. State,
127 Wn.2d 434, 899 P.2d 1270 (1995) 31

State v. Barnes,
96 Wn. App. 217, 978 P.2d 1131 (1999) 35

State v. Blair,
117 Wn.2d 479, 816 P.2d 718 (1991) 27

State v. Canady,
116 Wn.2d 853, 909 P.2d 203 (1991) 35

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Chenoweth and Wood</u> , 127 Wn. App. 444, 111 P.3d 1217 (2005), rev. granted, 2006 Wash. LEXIS 393 (No. 77615-6, May. 2, 2006)	22
<u>State v. Collins</u> , 121 Wn.2d 168, 847 P.2d 919 (1993)	4, 5, 14-18, 20
<u>State v. Davis</u> , 73 Wn.2d 271, 438 P.2d 185 (1968)	14, 27, 29
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002)	14
<u>State v. Ferguson</u> , 131 Wn. App. 694, 128 P.3d 1271 (2006)	19
<u>State v. Fowler</u> , 76 Wn. App. 168, 883 P.2d 338 (1994), rev. denied, 126 Wn.2d 1009 (1995)	17
<u>State v. Galbert</u> , 70 Wn. App. 721, 855 P.2d 310 (1993)	4, 17, 18
<u>State v. Gibbons</u> , 118 Wash. 171, 203 P. 390 (1922)	35
<u>State v. Glossbrener</u> , 146 Wn.2d 670, 49 P.3d 128 (2002)	14, 18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	32
<u>State v. Jackson</u> , 150 Wn.2d 251, 76 P.3d 217 (2003)	32
<u>State v. Johnson</u> , 75 Wn. App. 692, 879 P.2d 984 (1994), <u>rev. denied</u> , 126 Wn.2d 1004 (1995)	36
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986)	20
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999)	32
<u>State v. Loewen</u> , 97 Wn.2d 562, 647 P.2d 489 (1982)	17
<u>State v. Moore</u> , 129 Wn. App. 870, 120 P.3d 635 (2005)	27
<u>State v. Morse</u> , 156 Wn.2d 1, 123 P.3d 832 (2005)	5, 13, 14, 31-34, 36
<u>State v. Nall</u> , 117 Wn. App. 647, 72 P.3d 200 (2003)	35
<u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004)	32

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Seagull,
95 Wn.2d 898, 632 P.2d 44 (1981) 22

State v. Smith,
102 Wn.2d 449, 688 P.2d 146 (1984) 22, 24-30, 32

State v. Swaite,
33 Wn. App. 477, 656 P.2d 520 (1982) 18

State v. Terrazas,
71 Wn. App. 873, 863 P.2d 75 (1993) 18

State v. White,
97 Wn.2d 92, 640 P.2d 1061 (1982) 34

FEDERAL CASES

Fairly v. Luman,
281 F.3d 913 (9th Cir. 2002) 28

Franks v. Delaware,
438 U.S. 154, 57 L. Ed. 2d 667,
98 S. Ct. 2674 (1978) 22

Hill v. California,
401 U.S. 797, 91 S. Ct. 1106,
28 L. Ed. 2d 484 (1971) 22-26, 29, 30, 32, 33, 36

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES (CONT'D)

Lee v. Gregory,
363 F.3d 931 (9th Cir. 2004) 29

Payton v. New York,
445 U.S. 573, 63 L. Ed. 2d 639,
100 S. Ct. 1371 (1980) 13

Sanders v. United States,
339 A.2d 373 (D.C.App. 1975) 25, 30, 32

Terry v. Ohio,
392 U.S. 1, 88 S. Ct. 1868,
20 L. Ed. 2d 889 (1968) 14, 20

United States v. Hudson,
405 F.3d 425 (6th Cir. 2005) 30

OTHER JURISDICTIONS

Dennis v. State,
927 So.2d 173 (Fla. App. 2006) 30

People v. Hill,
69 Cal.2d 550, 72 Cal.Rptr.2d 641,
446 P.2d 521 (1968) 23

State v. Frazier,
318 N.W.2d 42 (Minn. 1982) 22, 28

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER JURISDICTIONS (CONT'D)

State v. Lee,
97 Wis. 679, 294 N.W.2d 547 (App. 1980) 28

RULES, STATUTES AND OTHERS

Comment, The Origin And Development of
Washington's Independent Exclusionary
Rule: Constitutional Right and

Constitutional Compelled Remedy,
61 Wash. L. Rev. 459 (1986) 35

U.S. Const. amend. 4 1-3, 13, 22, 24-26, 29, 31-33, 36

Wash. Const. art. 1, § 7 2, 13, 31-33, 35

A. INTRODUCTION

This case involves the warrantless search of appellant Bee Xiong. Several officers serving an arrest warrant for his brother Kheng mistakenly identified Bee as the subject of the warrant. During the course of their detention they frisk searched him and discovered contraband.

The trial court suppressed evidence seized following the unlawful search. The court found that the officers lacked a basis to reasonably infer Xiong was armed and dangerous. The court also found the officers had cause to doubt their identification of Xiong and lacked cause to arrest him under the warrant.

The state's theorized justifications for this warrantless frisk search have changed from the trial court to this Court. In the trial court, the state theorized that the officers had an articulable and reasonable basis to justify the frisk. CP 9-10; RP 30-31.

In this Court, relying solely on Fourth Amendment case law, the state now theorizes that the officers, although mistaken, could reasonably search Xiong incident to arrest. The state did not ask the trial court to make such a finding, however, and the trial court made no such findings to support this theory.

This Court should reject the state's claim and affirm the trial court on any of four different grounds. First, under the Fourth Amendment, the trial court correctly found as a matter of fact the officers lacked grounds to support the frisk. Second, the state has failed to assign error to this factual finding or to cite pertinent authority on this legal question. Third, under the Fourth Amendment, the record fails to show that the officers' mistaken identification was reasonable. And fourth, under Wash. Const. art. 1, § 7, the officers lacked authority of law to search or arrest Xiong.

B. RESPONSES TO ASSIGNMENTS OF ERROR

1. Finding of fact 6 is supported by the record and the applicable case law. CP 17.

2. The court's conclusion of law, based primarily on unchallenged finding of fact 5, is fully supported by persuasive and controlling authority. CP 17-18.

ASSIGNMENT OF ERROR IN RESPONSE

The trial court erred in entering finding of fact 4 because the record fails to establish a reasonable belief that Xiong was the person wanted by the warrant.¹

¹ Finding of fact 4 states: "The stopping and cuffing of Bee Xiong and the detention of him at that time were appropriate." CP 17; see appendix A to the Brief of Appellant.

Counterstatement of Issues

1. Does the record support the trial court's finding that the state failed to present specific and articulable facts to show the officers had a reasonable belief that respondent Xiong was armed and presently dangerous?

2. Has the state failed to assign error or to cite pertinent authority, such that this Court should decline to review the state's claim?

3. Where the state failed to provide substantial evidence to support a finding that Xiong was the person identified in the warrant, and where the officers lacked reason to believe he was armed and presently dangerous, did the trial court properly find and conclude that the officers were required to determine whether Xiong was the subject of the arrest warrant before they searched him?

4. Where the officers lacked actual authority of law to arrest Xiong, and where the Washington Supreme Court recently affirmed that the Fourth Amendment's "reasonableness" inquiry does not govern police mistakes under the Washington Constitution, should this Court affirm the trial court's order as a matter of state constitutional law?

C. STATEMENT OF THE CASE

1. The Parties' Written Motions

On July 25, 2005, Respondent Bee Xiong filed a motion to suppress evidence seized during a frisk search occurring September 14, 2004. In the motion, Xiong relied on the discovery provided and argued the officers lacked a reasonable suspicion to believe he was armed and presently dangerous. CP 5-6. They therefore lacked grounds to search him for weapons and should have merely detained him without further search until further investigation revealed he was not the person listed on the warrant. CP 6-7.

The state responded by asserting that the officers had a reasonable safety concern supported by specific and articulable facts that created an objectively reasonable belief that Xiong was armed and presently dangerous. CP 9 (citing, inter alia, State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). The state attempted to distinguish State v. Galbert, 70 Wn. App. 721, 855 P.2d 310 (1993), asserting that Galbert involved two separate frisk searches, while this case involved only one. CP 10.

In reply, Xiong argued he did not fit the description of the person sought in the warrant. Once he properly identified himself there was no longer a basis for his detention. The frisk search therefore was unlawful

and all evidence seized from the unlawful detention should be suppressed.

CP 13.

2. Evidence Presented -- and not Presented -- at the Suppression Hearing

At the start of the hearing, the deputy prosecutor recognized the state's burden to justify the warrantless search of Xiong. RP 3.² Nonetheless, significant factual gaps plague this record.

On September 14, 2004, five police officers attempted to arrest Kheng Xiong based on a federal warrant. The state called only two of the officers to testify: David McCabe, a sergeant with the Spokane Police Department, RP 21-28, and William "Bud" Ramsey, an agent with the Bureau of Alcohol, Tobacco and Firearms (BATF). RP 4-20.

Neither witness identified the underlying basis for the arrest warrant. Ramsey suggested it was an outstanding "felony warrant[]," (RP 5, 20), while McCabe said it was a "federal warrant." RP 23.

The officers worked for a variety of agencies, one each from the Spokane Police and Sheriff's office, one from BATF, one from the United States Marshall's Office, and one from the Department of Corrections. RP 5, 23. They had gotten together as part of a routine "warrant roundup"

² See State v. Collins, 121 Wn.2d 168, 172, 847 P.2d 919 (1993) (state bears the burden to justify a warrantless seizure); accord, State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005).

to try to bring into custody people with arrest warrants. RP 5. They were riding in a truck driven by Spokane County Police Detective Tofsrud. RP 8.

About 8:00 p.m., the officers went to 3150 East 30th to look for Kheng Xiong. They had a black and white photograph of Kheng. RP 5-6, 23. Curiously, however, the state offered into evidence a photo of Kheng that was not the same one the officers had the night of the arrest. RP 15, 33; EX 1.

According to Ramsey, a mini-van pulled up in front of the house. Deputy US Marshal Kilgore radioed the team that he thought the passenger was Kheng Xiong. According to Ramsey, by the time the officers got out of their cars and up to the mini-van, the passenger was halfway to the house. RP 7. In contrast, McCabe said that Kilgore got to the mini-van before anyone got out and ordered the passenger and driver out of the car. RP 24.

Kilgore took the driver into custody. Ramsey "contacted" the passenger. RP 7. As part of this "contact," Ramsey "immediately handcuffed" the passenger behind the back. RP 7-8, 20-21. Although nothing suggests the officers had any reason to suspect the driver of anything, he too was handcuffed. RP 17-18, 24. McCabe said both were

also "pat searched for weapons" at that time. RP 24.³ McCabe said Ramsey had "secured" the passenger. RP 24.

Ramsey asked the passenger for identification. The passenger, appellant Bee Xiong, told Ramsey his true name. Ramsey said they were there to arrest Kheng Xiong, and Bee Xiong truthfully told Ramsey that Kheng was his older brother. Bee had no identification papers on his person, but he did have a "B" tattooed on his arm. Ramsey admitted Xiong showed the tattoo to the officers before any frisk or search. RP 7-8, 16-17.⁴

Perplexed by the absence of identification papers, the officers tried "to determine whether we should go to the door and see if there was someone there, because he didn't have any i.d. on him, we were trying to figure out a way to i.d. him." RP 8. Ramsey said officer Tofsrud and Sergeant McCabe were on the radio trying to identify Xiong. Ramsey claimed they were unable to determine they had the right or the wrong person based on their photo of Kheng. RP 10-11. Ramsey said they had called another patrol vehicle with computer dispatch so they could pull up

³ The Court asked Ramsey if the driver also was frisked. Ramsey said he did not know. RP 18.

⁴ McCabe, on the other hand, claimed not to remember any discussion about a tattoo. RP 28.

a photo of Bee Xiong. For unexplained reasons, this team of five warrant-serving officers apparently lacked that basic capability. RP 13-14.

While the others were trying to find out if they had the wrong Xiong in handcuffs, Ramsey said he noticed a bulge in Xiong's front pants pocket. Ramsey touched it and Xiong pulled away. Ramsey asked if there was anything in the pocket that would hurt Ramsey, and Xiong truthfully answered no. RP 8, 11-12.

Ramsey was persistent, however, and squeezed the object harder. Ramsey said it was definitely a hard object, what he called "a potential weapon." RP 12. Xiong said he had no weapons but did not wish to be searched. RP 12. Ramsey summoned McCabe and Tofsrud and said he thought there might be a weapon in the pocket. RP 12. Xiong pulled away again "and told us he did not want us to search him" but the officers "went ahead and did so." RP 12.

Ramsey pulled out a glass pipe used for smoking. The pipe had residue that the officers suspected was a controlled substance. RP 12, 25-26. The officers arrested Xiong at that point and found an "Altoid" mint tin containing methamphetamine. RP 13, 26. This evidence formed the basis for the state's charge of possession with intent to deliver. CP 1.

About the same time, Xiong's mother appeared.⁵ She confirmed the officers had arrested Bee, not Kheng. RP 14, 27. Ramsey admitted that Xiong would not have been frisked if they had identified him first. RP 19.

At the prosecutor's prompting, Ramsey said it was "possible" for a handcuffed suspect to still be able to get to a weapon in a front pocket. RP 18, 21. The state made no effort to flesh out that "possible" factual scenario, or to compare it with the present situation. RP 18, 21.

McCabe offered a few additional facts related to the frisk and search. McCabe said he saw Ramsey pat search Xiong and stop at the right front pants pocket. RP 24. In response to Ramsey's question, Xiong said "I don't want you searching me but I don't have any weapons." RP 25. After listening to this verbal exchange for about a minute, McCabe told Ramsey just to search Xiong's pocket for weapons. RP 25.

McCabe admitted he was not "immediately concerned" about the possibility of Xiong using a weapon. RP 25.⁶ He instead thought they would need to know if it was a weapon when Xiong's handcuffs were removed. RP 25. McCabe gave no reason why five armed officers might

⁵ McCabe said Detective Tofsrud finally knocked on the door to the house and Xiong's mother came outside. RP 27.

⁶ See also, CP 15 (McCabe's written statement).

consider Xiong dangerous if he was released after they concluded he was not the subject of the warrant.

McCabe estimated the pipe was 4-5 inches long. RP 25. The state did not offer it as an exhibit. RP 25. When asked why he still searched Xiong, even after Xiong said he had no weapons, Ramsey said:

Because I just felt it was an officer safety issue and his overreaction, and I just thought he had -- quite frankly, thought he -- I wondered if he had a small pistol in his head -- in his pocket, not in his head, excuse me, in his pocket.

RP 14.⁷

Deputy Marshal Kilgore, the officer who allegedly identified the passenger as Kheng Xiong,⁸ did not testify.

Neither Ramsey nor McCabe testified that either of them personally believed they had taken Kheng Xiong into custody. Neither testified that he personally believed Xiong was armed and presently dangerous.

3. The Parties' Arguments and the Court's Findings

At the suppression hearing, the state argued the officers simply did not know if they had Kheng or Bee in custody. The state suggested the

⁷ The state did not ask the trial court to find this testimony credible.

⁸ RP 5-6, 23-24.

confusion somehow favored its legal position. RP 29-30, 38-40.⁹ The state contended that the frisk was justified because the officers "believed he was Mr. Kheng Xiong and because he had a felony warrant for his arrest[.]" RP 31.

The state further claimed Xiong's honest answers to the police were essentially irrelevant:

The fact that he turned out to be right, ultimately to be right, and to be honest, doesn't affect what constitutional rights he does or doesn't have.

RP 39. Ultimately, the state asserted the officers had a "right to frisk [Xiong]" because of the bulge in his pocket. RP 40.

The defense argued the officers lacked a reasonable basis to believe Bee Xiong was the subject of the arrest warrant. RP 33-35. Xiong was only arrested because he was not carrying identification, but, the defense contended, our society does not yet require people to carry identity papers. RP 35.

Perhaps most importantly, defense counsel pointed out that the court could take judicial notice that the person in the photo "does not look even close to what Mr. Xiong looks like, who is seated at counsel table." RP

⁹ The state's burden-shifting effort became slightly more obvious when the prosecutor offered this double-negative: "[t]here is nothing in this record that indicates that there were no warrants or wants for Mr. Bee Xiong." RP 40.

33. The trial deputy made no argument in response, effectively conceding the point. RP 38-41. The trial court orally found that it could "certainly see a difference[] in the two." RP 43.

The defense further argued that the officers simply lacked any reasonable, articulable basis to believe that Xiong was armed and presently dangerous. He was handcuffed in the presence of five armed officers. It is not unreasonable for a person to say he does not want to be searched, particularly when he is not the person the officers have cause to arrest. Without reasonable and articulable facts showing that Xiong was armed and presently dangerous, the frisk was unconstitutional and the resulting evidence must be suppressed. RP 35-37.

In its oral ruling, the trial court recognized the two main questions. First, did the officers have a reasonable and articulable basis to believe that Xiong was armed and presently dangerous? Second, did the officers have justification to believe that Bee Xiong was Kheng Xiong? RP 42.

Ultimately, the court ruled that the officers had a sufficient basis to briefly detain Xiong and to try to determine his identity. RP 42.

The court also found, however, that Ramsey merely assumed that the item in the pocket might be a weapon. The court further found there

were no reasonable and articulable facts to support a finding that Xiong was armed and presently dangerous. RP 43-44; CP 17 (FOF 5).

The trial court recognized the dispute between Ramsey's and McCabe's testimony on the question whether the driver and passenger were inside or outside the car when the officers seized them. RP 33. The trial court made no specific credibility findings.

The court's written findings and conclusions track its oral ruling. CP 16-22 (attached as an appendix to the appellant's opening brief).

D. ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND THE FRISK SEARCH WAS UNLAWFUL BECAUSE THERE WAS NO REASONABLE BASIS TO BELIEVE THAT BEE XIONG WAS ARMED AND PRESENTLY DANGEROUS.

The state's brief offers a short argument that the officers could frisk Xiong because they reasonably believed he was armed and presently dangerous. Brief of Appellant (BOA) at 7-8. The state's cursory analysis is unpersuasive.

The federal constitution protects against unreasonable searches and seizures and the Washington Constitution provides even broader protection against government intrusion into private affairs. U.S. Const. amend. 4; Const. art. 1, § 7; State v. Morse, 156 Wn.2d 1, 9-15, 123 P.3d 832 (2005). A warrantless search is presumptively unreasonable. Payton v.

New York, 445 U.S. 573, 586, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980); Morse, at 7. The state has the burden to show that a warrantless search and seizure is justified under one of the narrowly defined and jealously guarded exceptions to the warrant requirement. Morse, at 7 (citations omitted).

The Washington Supreme Court has addressed the requirements for a frisk search. First, the police conducting the search must have a reasonable safety concern that the person searched is armed and presently dangerous. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993); accord, State v. Glossbrener, 146 Wn.2d 670, 680-82, 49 P.3d 128 (2002). Second, those facts supporting the officers' belief must appear in the record.

A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to "specific and articulable facts" which create an objectively reasonable belief that a suspect is "armed and presently dangerous."

Collins, at 173 (quoting Terry v. Ohio, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). The state bears the burden to justify the search, on the record. Collins, at 172; State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002); see generally, State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968) (appeals are decided on the factual record developed in the trial court).

In Collins, a single officer stopped Collins at 4:00 a.m. for a traffic infraction. The officer immediately recognized Collins from a stop about two months earlier. On that earlier night, Collins was stopped by two officers for an infraction on his bicycle and then arrested on a felony warrant. When the officers dropped the bicycle off in the back of Collins' truck at Collins' request, they noticed "a large amount of either .38 or .357 ammunition, a holster, and a set of handcuffs in the passenger compartment of the truck." Collins, at 171.

The court then analyzed the legal question, based on the state's proof of those specific and articulable facts. The court first reasoned that a single police officer at that time of the morning faces the possibility of significant danger. Collins, at 175. Second, the court gave little weight to the existence of the prior felony warrant. Collins, at 175-76. Third, the court placed great emphasis on the ammunition and holster, recognizing the likelihood that Collins had a gun. Collins, at 176-77. Given these facts, the court held the state provided specific and articulated facts to conclude that a single officer, stopping Collins at 4:00 a.m., had a subjective and objectively reasonable safety concern to justify a frisk. Collins, at 175-77.

The specific and articulated facts in this record, however, which are unchallenged and found by the trial court, stand in stark contrast to those

in Collins. There were no facts to suggest there was any objective reason to believe Xiong was dangerous, nor that the officers even subjectively believed he was presently dangerous.

Unlike the lone officer in Collins, the five officers outnumbered Xiong. Xiong's hands were cuffed behind his back. Although Ramsey said it still might be "possible" for Xiong to retrieve a weapon, this speculative "possibility" was never related to the facts of this case. RP 18, 21. Furthermore, Xiong vocally objected to the search, but the officers "went ahead and did so." RP 12. There was nothing he could do about it. These facts show any objectively reasonable threat from Xiong was fully neutralized and the state can make no credible contrary argument on this record.¹⁰

The state failed to offer any facts to show the warrant for Kheng Xiong's arrest was for a dangerous offense. The warrant could have merely resulted from a white collar offense or a probation violation. See RP 5 (Department of Corrections officer was part of the routine warrant roundup). No testimony suggested the officers were concerned for their safety or had taken precautions because Kheng Xiong was considered

¹⁰ The state's brief does not analyze these facts. BOR at 8.

particularly dangerous. This factor is as weak or weaker than it was in Collins.

The sole articulated fact the state offered was Ramsey's testimony about a hard tube-like object in Xiong's pocket. Curiously, however, the state did not offer that object into evidence. The state therefore failed to give the trial court the opportunity to determine whether Ramsey's speculative belief that the tube could have been a weapon was reasonable.¹¹ Ramsey's testimony on this point was weak ("I wondered if he had a small pistol in his head -- in his pocket, not in his head, excuse me, in his pocket", RP 14), and the state did not ask the trial court to find Ramsey's speculative testimony credible. More importantly, however, the officers initially patted down Xiong and the driver and that initial pat-down revealed nothing of concern.¹² See State v. Galbert, 70 Wn. App. 721, 726, 729, 855 P.2d 310 (1993) (where Galbert was initially frisked, his

¹¹ As with the state's other failures discussed in argument 3, infra, the inference from the absence of this evidence is strong. See, e.g., State v. Fowler, 76 Wn. App. 168, 170, 883 P.2d 338 (1994) (officers exceeded the legitimate scope of a frisk by seizing a two-by-three inch hard object that could not reasonably be a weapon), rev. denied, 126 Wn.2d 1009 (1995); State v. Loewen, 97 Wn.2d 562, 567, 647 P.2d 489 (1982) (seizure of small lipstick-sized object was not within proper scope of frisk for weapons).

¹² McCabe said "[b]oth men were handcuffed and they were pat searched for weapons." RP 24.

hands were cuffed behind his back, and he never made any gesture that could be construed as attempting to retrieve a weapon, the second frisk and search of a small one-by-three inch item in his pocket was not reasonable).

On these facts, the tube-like object, in and of itself, is far weaker than the actual existence of ammunition, a holster and handcuffs in Collins. It also does not justify a search, as shown by other Washington cases. Cf. State v. Glossbrener, 146 Wn.2d 670, 680-82 & n.9, 49 P.3d 128 (2002) (despite Glossbrener's furtive movement, the state failed to justify frisk of passenger compartment for weapons where officer lacked "an objectively reasonable belief that Glossbrener was armed and dangerous"); State v. Terrazas, 71 Wn. App. 873, 878, 863 P.2d 75 (1993) (state failed to show frisk was reasonable where officer was concerned that a passenger had his hands under a blanket on a cold night); State v. Galbert, *supra*; cf. State v. Swaite, 33 Wn. App. 477, 481-82, 656 P.2d 520 (1982) (pre-Collins case, upholding a frisk where officers had information that Swaite matched the description of a burglary suspect; after officers found a buck knife in plain view on Swaite's belt, it was appropriate to look further to determine whether several 3"-4" hard cylindrical objects in his pocket might be additional weapons).

In the final analysis, the trial court found the state failed to provide "any articulable facts specific and detailed [from] which the officer could reasonably infer the detained individual was armed and dangerous." CP 17 (FOF 5). Because the trial court's finding is supported by the record and the applicable law, the suppression order should be affirmed.

2. THE STATE HAS FAILED TO ASSIGN ERROR TO FINDING 5 OR TO CITE APPLICABLE AUTHORITY. THESE FAILURES SHOULD BE FATAL TO THE STATE'S CLAIM THAT THE FRISK SEARCH WAS JUSTIFIED.

The trial court found:

Agent Ramsey testified that he wondered if the bulge felt in the right front pants pocket was a weapon and that he assumed it was. 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 (FOF 5). The state did not assign error to this finding (BOA at 1), which is now a verity on appeal. State v. Ferguson, 131 Wn. App. 694, 701, 128 P.3d 1271 (2006) (citations omitted). Absent articulable facts to support an inference that Xiong was armed and dangerous, the frisk was unlawful. See argument 1, infra.

The state's brief nonetheless includes a short argument that the frisk search was justified as part of an investigative stop. BOA at 7-8. The argument is odd in several respects.

First, its text includes citations to two cases, State v. Kennedy and Terry v. Ohio.¹³ Both cases stand for the broad and now-unremarkable proposition that police may stop someone for investigatory purposes if the officers have a reasonable and articulable suspicion that criminal conduct has occurred or is about to occur. Neither case, however, addresses in any detail when a frisk search is appropriate.

Second, Washington courts have written much on the subject of frisk searches since Terry and Kennedy. See, e.g., argument 1, supra (citing applicable authority).¹⁴ The state, however, has discussed none of this controlling authority. Its claim therefore should be rejected. Emmerson v. Weilep, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005) (court may decline to address the appellant's claim where the appellant fails to cite applicable authority). The state should not be permitted to rectify these failures in a reply brief, which would deprive Xiong of the opportunity for fair response. Bullard v. Bailey, 91 Wn. App. 750, 755 n.2, 959 P.2d

¹³ BOA at 6-7 (citing Terry and State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986)).

¹⁴ State v. Collins, for example, might be seen as a leading case in Washington, having been cited approximately 80 times on this question. The state's failure to discuss Collins in this Court is perplexing, particularly where the state cited Collins in its trial court pleadings. CP 9.

1122 (1998), rev. denied, 137 Wn.2d 1014 (1999) (citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).

3. THE TRIAL COURT PROPERLY FOUND THE OFFICERS SHOULD HAVE DETERMINED THAT BEE XIONG WAS NOT THE SUBJECT OF THE ARREST WARRANT. THE TRIAL COURT ERRED, HOWEVER, IN FINDING ON THIS RECORD THAT THE OFFICERS INITIALLY HAD REASONABLE GROUNDS TO DETAIN XIONG.¹⁵

In the trial court, the state recognized the officers did not know whether they had seized the wrong person. RP 29-30, 38-40. On appeal, however, the state asserts the officers could have arrested Xiong and therefore the search was valid as incident to this arrest. BOA at 5. This claim, however, overlooks substantial authority supporting the trial court's well-reasoned finding and conclusion that the officers were required to determine Xiong's identity before searching him. CP 17 (FOF 6); see authority discussed infra.

Furthermore, where the state failed to prove the factual basis of Kilgore's alleged belief that Xiong was the subject of the warrant, the trial court erred in finding that the stopping, cuffing and detention of Xiong was "appropriate." CP 17 (FOF 4). This Court therefore can affirm the trial court's suppression order on this alternative basis. See Ertman v. City of

¹⁵ If this Court affirms the trial court's suppression order based on arguments 1 or 2, supra, it need not address this argument.

Olympia, 95 Wn.2d 105, 108, 621 P.2d 724 (1980) (appellate court may affirm trial court order on alternative grounds); State v. Frazier, 318 N.W.2d 42, 43 (Minn. 1982) (trial court's suppression order was not sustainable on asserted grounds, but was affirmed because the state failed to establish on the record the officers made a reasonable mistake in arresting the wrong person).

The state cites three cases to support its position. Only two address the situation where officers make a mistake in arresting a person who is not the subject of the arrest warrant: Hill v. California, 401 U.S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971), and State v. Smith, 102 Wn.2d 449, 688 P.2d 146 (1984).¹⁶

In Hill v. California, the United States Supreme Court faced the question whether a mistaken arrest can support a search. Hill conceded

¹⁶ The third case is irrelevant, as it addresses an "open view" and Franks issue under the Fourth Amendment. State v. Seagull, 95 Wn.2d 898, 906-08, 632 P.2d 44 (1981). The officer in Seagull mistakenly identified a tomato plant as marijuana and secured a warrant based on that mistaken belief. The court concluded that the officer's mistake was not made deliberately or with reckless disregard for the truth and therefore did not violate the Fourth Amendment. Seagull, at 908 (citing, *inter alia*, Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)). This case does not involve a Franks issue. The question whether Franks even states an appropriate rule under the Washington Constitution is currently pending in the Washington Supreme Court, State v. Chenoweth and Wood, 127 Wn. App. 444, 111 P.3d 1217 (2005), *rev. granted*, 2006 Wash. LEXIS 393 (No. 77615-6, May. 2, 2006).

that the officers had probable cause to arrest him as a robbery suspect. When the officers went to Hill's apartment, they found Miller, who matched Hill's description. Miller had an unconvincing story as to how he entered the apartment. Thinking he was Hill, the officers arrested Miller and searched the apartment incident to the arrest. Hill later moved to suppress the incriminating evidence, arguing that the police lacked probable cause to arrest Miller. Hill, 401 U.S. at 798-800.

In Hill, the state presented the testimony of the specific officer who mistakenly identified Miller as Hill. Hill, 401 U.S. at 800 (expressly noting that Officer Gastaldo testified). The California court relied on Gastaldo's testimony: "[t]he door was opened and a person who fit the description exactly of Archie Hill as I had received it [from several sources], answered the door. . .". People v. Hill, 69 Cal.2d 550, 72 Cal.Rptr.2d 641, 446 P.2d 521, 522 (1968) (emphasis added). The United States Supreme Court therefore did not disturb the California courts' factual finding there was cause to believe the arrestee was in fact Hill. Hill, 401 U.S. at 802-03.

On these facts, the Supreme Court held that the officers' mistake was reasonable. Miller matched Hill's description and his story conflicted

with evidence the officers could see in the apartment. The search therefore did not violate the Fourth Amendment. Hill, at 799, 802-04.

In State v. Smith, the court addressed Hill in the context of a police stop in Seattle. Two officers testified there was a warrant to arrest Kevin Perrin, a 16-year-old white male, 5 feet 10 inches tall, 145 pounds, with a tattoo on each hand. One tattoo was of a fruit bowl, the other a cross. They had a tip suggesting he might be in the area near First and Union in Seattle. Smith, at 451-52.

Shortly thereafter, the officers stopped a 16-year-old male in that area who fit the general description. They frisk-searched him and found chako sticks. After the search, they checked his tattoos and made efforts to determine whether he was Kevin Perrin. He was not. Smith, at 452.

At the suppression hearing, the officers essentially admitted they searched Smith because they routinely searched people in that area. Smith, at 451-52. The court invalidated the frisk, holding the officers failed to articulate any facts which led them to believe Smith was armed and dangerous. Smith, at 452-53.

Anticipating that possibility, the state made the same fall-back argument the state makes here, asserting the police had probable cause to

arrest Smith based on the warrant for Perrin's arrest. According to the state, the search was valid as incident to that arrest.

The Smith court again disagreed with the state. Citing Hill and Sanders v. United States,¹⁷ the court recognized that evidence may be admitted against a mistakenly arrested person, "as long as the officers act in good faith and have reasonable, articulable grounds to believe that the suspect is the intended arrestee." Smith, at 453-54.

Should doubt as to the correct identity of the subject of warrant arise, the arresting officer obviously should make immediate reasonable efforts to confirm or deny the applicability of the warrant to the detained individual. If, after such reasonable efforts, the officer reasonably and in good faith believes that the suspect is the one against whom the warrant is outstanding, a protective frisk pursuant to the arrest of that person is not in contravention of the Fourth Amendment.

Smith, at 453-54 (emphasis added).

The Smith court held that officers had only a generalized belief that Smith was Perrin. Their initial observations "corroborated only that Smith matched the general physical description of Perrin. The officers did not attempt to verify the more specific information concerning the tattoos until after they conducted the search." Smith, at 454.

¹⁷ Sanders v. United States, 339 A.2d 373, 379 (D.C.App. 1975).

The court therefore held that the officers lacked reasonable, articulable grounds to believe Smith was the intended arrestee. Smith, at 454-55. Where the state failed to establish the officer's mistake was reasonable, the frisk was unlawful.

Here, the state essentially asks this Court to assume that the officers' mistake was reasonable under the Fourth Amendment. But viewing the totality of the circumstances, the state failed to produce sufficient facts to support such a finding or conclusion.

The facts on this skeletal record are even less favorable to the state than those in Smith or Hill. First, as defense counsel stated and the deputy prosecutor's silence conceded, the photo of Kheng did not look like Bee. RP 33-34. In a polite way, the trial court essentially found as much. RP 42-43.

Second, the state failed to offer a complete description of Kheng into evidence and it failed to offer the warrant.¹⁸ The state presented no testimony about the warrant's description of Kheng. Nothing in this record shows that Bee shared the same height, weight, build, hair color, eye color, tattoos or other identifying characteristics as Kheng. The state offered no

¹⁸ The black-and-white "mug-shot" photo the state offered did not include identifying information like height, weight, tattoos, or other distinguishing marks that could have excluded Bee from being mistaken for Kheng. EX 1.

facts to show the officers expected Kheng to have a "B" tattoo, or that Kheng had other tattoos that Bee did not have. Cf. Smith, at 451 (describing the numerous characteristics shared by the target of the warrant and the person mistakenly arrested under it, but still holding the state had failed to establish the officers' mistake was reasonable). There is no question that tattoos are important distinguishing characteristics and that warrant information will often include such characteristics.¹⁹ This obvious and glaring omission supports the inference that the missing but available evidence would have undermined the state's theory. See generally, State v. Davis, 73 Wn.2d at 276-78 (where the state fails to present evidence that it naturally and customarily would be expected to present, the fact finder may infer that the missing evidence would not favor the state); accord, State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991).²⁰

Applying the missing witness inference against the state is fully appropriate. In other cases, the state's failure to adequately describe the

¹⁹ See, e.g., State v. Moore, 129 Wn. App. 870, 887-89, 120 P.3d 635 (2005) (officers could demand that Moore show his forearms, because warrant indicated the suspect named Moore had tattoos on his forearms).

²⁰ In reply, the state may suggest that Bee and Kheng were brothers and can be assumed to have a similar appearance. Nothing in the record would support this suggestion, however, and an appellate court cannot take judicial notice of disputed allegations. Siblings can be adopted or have different parents -- and siblings with the same parents do not necessarily look alike.

suspect provided the grounds to invalidate the arrest. See, e.g., Smith, 102 Wn.2d at 454 (matching a general description was insufficient to give officers reasonable grounds to believe Smith was the subject of the warrant); State v. Lee, 97 Wis. 679, 294 N.W.2d 547, 550 (App. 1980) (broad description of suspect as a young white male was insufficient to justify the mistaken arrest of Lee); State v. Frazier, 318 N.W.2d 42, 43-44 (Minn. 1982) (difference in description showed that officers lacked a reasonable basis to mistake Frazier for the person wanted by the warrant); Fairly v. Luman, 281 F.3d 913, 915 (9th Cir. 2002) (even when arresting a suspect's twin brother, the physical description is important in determining whether the police had reasonable suspicion; brothers' weights were substantially different). In those cases, the state provided the description and the evidence was still suppressed. It would make no sense for an appellate court to place the state in a better position here, where it provided no description.

Third, the state did not present testimony from Deputy Marshal Kilgore. According to Ramsey and McCabe, it was Kilgore who said "he thought" the passenger "appeared to be" Kheng Xiong. RP 6, 24. But Kilgore's subjective level of certainty was never identified, nor did the state give the trial court the opportunity to observe him, measure his credibility,

and determine the reasonableness (or truthfulness) of any subjective belief. This omission supports the inference that Kilgore's testimony would not have helped the state.²¹

Fourth, the state did not offer the same picture of Kheng that the officers used on the night of the arrest. This odd switch supports a reasonable inference that the actual picture looked even less like Bee than Exhibit 1.²²

Finally, Xiong told the officers the truth. While this may not be conclusive, he gave his true name and his brother's true name. It is undisputed he showed them a tattoo confirming his statement, before the frisk. This dispelled any reasonable belief he was the person sought by the warrant. At that time, the officers were bound under Smith and Shepard to carefully narrow their inquiry to determining whether Xiong was the person wanted by the warrant. The trial court properly concluded the

²¹ See Davis, 73 Wn.2d at 276 (applying the missing witness inference); cf. Hill v. California, supra (the officer who made the mistaken identification actually testified and gave the trial court the ability to measure his credibility); Lee v. Gregory, 363 F.3d 931, 935 (9th Cir. 2004) (officer's knowledge that warrant was for defendant's brother, not the defendant, was a relevant factor in determining whether arrest of defendant violated the Fourth Amendment; defendant was described as 6' 3" and 270 pounds, while his brother was 6' 0" and 160 pounds).

²² The prosecutor asked Ramsey if the picture was "very similar to the picture that you used," but Ramsey carefully replied "it is the same person, yes." RP 15.

officers were not simply free to arrest and search Xiong given the uncertainty of his identification. Smith, at 453-54.

The record also shows the officers had not taken reasonable efforts to confirm identity before searching Xiong. They did not go to the door, nor did they have a computer available to compare a picture of Xiong. The minimal evidence to justify the mistake, coupled with even less effort to confirm identity, failed to meet the state's burden under Smith and Sanders.

The state's brief glosses over these telling facts and persuasive cases, instead reducing the rule of Hill and Smith to this paraphrase: "police, having probable cause to arrest a person, can validly arrest the wrong person in a case of mistaken identity." BOA at 5. As the above cases show, the state's paraphrase is not just misleading -- it is wrong. And the state cannot seriously contend an arrest warrant entitles police to arrest and search anyone. As the Sixth Circuit recently noted,

The existence of an arrest warrant is of no moment on the question whether a particular person police officers come across is in fact the subject of the warrant. The warrant supplies the officers with probable cause to arrest the person it names and describes, not a license to duck the reasonable suspicion requirement and stop someone they only have a subjective hunch is that person.

United States v. Hudson, 405 F.3d 425, 439 n.9 (6th Cir. 2005); accord, Dennis v. State, 927 So.2d 173 (Fla. App. 2006).

As a matter of policy, this Court need not be concerned that the Fourth Amendment rule this Court may apply will invalidate mistaken arrests when the state provides substantial evidence to show the mistake is reasonable.²³ Other cases will involve different facts. In this case, however, the state simply failed to meet its burden. The trial court correctly suppressed the unlawfully seized evidence and this Court should affirm the suppression order.

4. REVERSAL OF THE TRIAL COURT'S SUPPRESSION ORDER WOULD VIOLATE ARTICLE 1, § 7 OF THE WASHINGTON CONSTITUTION.²⁴

Article 1, § 7 of the Washington Constitution provides: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." This section protects more privacy rights than the Fourth Amendment. Const. art. 1, § 7; State v. Morse, 156 Wn.2d at 10 (citing cases). Because the court has held that article 1, § 7 provides broader

²³ See, e.g., Guffey v. State, 103 Wn.2d 144, 153, 690 P.2d 1163 (1984) (brief detention did not violate the Fourth Amendment where the state proved "the names were nearly identical and the descriptions were identical"), overruled in part on other grounds, Savage v. State, 127 Wn.2d 434, 899 P.2d 1270 (1995).

²⁴ Although there is authority on both sides of the question, this Court need not address this argument if it affirms for any of the reasons set forth in arguments 1-3. See State v. Morse, 156 Wn.2d at 16 n.1 (Fairhurst, J., concurring) (if a court can decide case on the federal constitution, it need not decide a state constitutional claim).

protection on many occasions, a mechanical Gunwall²⁵ analysis is not necessary to raise this state constitutional claim. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

Under the Fourth Amendment, the question is whether a search is "reasonable." In contrast, under article 1, § 7, the question is whether the police have authority of law to justify an intrusion into a person's private affairs. Morse, at 9-10.

The Washington Supreme Court has not adopted the "reasonable mistake" rationale of Hill v. California to uphold a search based on an officer's mistaken arrest. Instead, in Smith, the court cited Hill and Sanders while holding the seizure and search invalid. Smith, 102 Wn.2d at 453-54. Most recently, the Supreme Court in Morse made it crystal clear that Hill's "reasonable mistake" inquiry is irrelevant under the Washington Constitution. Morse, at 9 (expressly contrasting Hill's Fourth Amendment approach with that required under the state constitution).

The Supreme Court's recent decision in Morse also provides substantial grounds to reject the state's claim that the officers could lawfully

²⁵ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

search Xiong despite their mistake. In Morse, the court addressed the question whether a warrantless search of a residence can be supported by consent where officers mistakenly conclude an occupant has authority to consent. Morse, at 9-13 (discussing the Fourth Amendment "apparent authority" doctrine). The court held that article 1, § 7 instead requires actual authority. Morse, at 12.

In Morse, the officers mistakenly believed that a short-term resident of Morse's apartment could consent to a search and that they did not need Morse's consent. Citing Hill, the Morse court noted that the Fourth Amendment question would be whether the officers reasonably believed the resident had apparent authority to consent. Morse, at 9. But the state constitution requires the officers to secure consent from someone with actual authority. The court specifically held

a police officer's subjective belief made in good faith about the scope of a consenting party's authority to consent cannot be used to validate a warrantless search under article 1, § 7.

Morse, at 12. The court repeated this holding:

simply inquiring into whether a police officer's subjective beliefs are reasonable is not sufficient under article 1, § 7.

Morse, at 13. "The subjective beliefs and understandings of law enforcement officers are irrelevant to the question of 'authority.'" Morse, at 5.

We have . . . 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. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

Morse, at 9-10.

Based on the facts in Morse, the court held that the state failed to meet its burden to justify the warrantless search of Morse's bedroom. Morse, at 14-15. The evidence secured from the unlawful search was suppressed as fruit of the poisonous tree. Morse, at 16.

When applied to this parallel situation, the Morse court's analysis similarly requires suppression. The state is making the same claim it made in Morse -- that an officer's reasonable mistake in believing there was authority of law is enough to satisfy the state constitution. The Morse court made it clear that such mistakes, even if made in good faith, are not enough.

The Morse court's analysis finds further support in the specific context of Washington warrant cases. This Court has recognized that an officer's mistaken belief in a warrant's existence will not justify a seizure.

State v. Barnes, 96 Wn. App. 217, 220-22, 978 P.2d 1131 (1999). An officer's mistaken belief that a warrant is valid will not justify a search or arrest. State v. Canady, 116 Wn.2d 853, 857-58, 909 P.2d 203 (1991) (where court lacked actual authority to issue a search warrant, an officer's good faith belief that the warrant was valid was irrelevant under the state constitution); State v. Nall, 117 Wn. App. 647, 651-54, 72 P.3d 200 (2003) (officer's mistaken belief that an invalid warrant was valid did not constitute "authority of law" to justify an arrest). The Washington Supreme Court has long held that the state constitution requires a suppression remedy for violations of article 1, § 7. State v. Gibbons, 118 Wash. 171, 184, 203 P. 390 (1922); Comment, The Origin And Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutional Compelled Remedy, 61 Wash. L. Rev. 459 (1986). Therefore, when an officer seizes a person pursuant to a mistaken belief that the person is the subject of an arrest warrant, evidence seized pursuant to that seizure must be suppressed as it is seized without authority of law.

In reply, the state may claim the officers could ignore the state constitution entirely. To support the claim, the state would have to prove the officers were not acting as state officers while serving an otherwise unidentified "federal" warrant. Where the state did not ask the trial court

to find such facts, however, and where the record would not support such findings, this potential reply lacks merit.²⁶

For these reasons, the Fourth Amendment "reasonable mistake" jurisprudence from Hill v. California does not apply under the Washington Constitution. Morse and the authority cited above requires suppression. This is yet another independent reason to affirm the trial court's suppression order.

²⁶ Such a reply would require this Court to overlook the intertwined state/federal nature of the warrant serving team. The team drove to the scene in Spokane County Detective Tofsrud's truck. RP 8. Ramsey discussed the search with two state officers, Tofsrud and McCabe, before searching Xiong's pocket. RP 12. State officer McCabe told Ramsey to search Xiong. RP 25. On these facts, state action is clearly present and the state constitution cannot be ignored. See, e.g., State v. Johnson, 75 Wn. App. 692, 700-01, 879 P.2d 984 (1994) (the "silver platter" doctrine will not apply unless federal officers are acting independently of state officers), rev. denied, 126 Wn.2d 1004 (1995).

E. CONCLUSION

For the reasons set forth above, this Court should affirm the trial court's order suppressing evidence.

DATED this 30th day of June, 2006.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'Eric Broman', written over a horizontal line.

ERIC BROMAN, WSBA No. 18487
Office ID No. 91051

Attorneys for Appellant