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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Supreme Court No. _____
Court of Appeals No. 25497-6-III

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DUSTIN WARREN HARRINGTON,
Defendant/Petitioner

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
HONORABLE CARRIE L. RUNGE

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER.

Petitioner, Dustin Warren Harrington, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

II. COURT OF APPEALS DECISION.

The Petitioner seeks review of the Court of Appeals' decision filed May 13, 2008, which affirmed his conviction. A copy of the Court's published opinion is attached hereto as *Appendix A*. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW.

Was the stop and continued detention of Mr. Harrington a seizure prior to arrest, in violation of his constitutional rights under U.S. Const., amend. 4 and WA Const., art. 1, § 7?

IV. STATEMENT OF THE CASE.

Dustin Warren Harrington was convicted after a stipulated facts bench trial of possession of a controlled substance – methamphetamine. 8/28/06 2-5; RP CP 23-25. The possession charge arose from a search incident to arrest, following a weapons frisk of Mr. Harrington made pursuant to an alleged social contact. 8/24/06 RP 2-35.

Defense counsel moved to suppress evidence based upon an unlawful seizure. 8/24/06 RP 2-29; CP 39-50. At the suppression hearing, the State presented the following evidence.

On August 13, 2005, around 11:00 p.m., Richland Police Officer Reiber was driving north on Jadwin Avenue in a fully marked police car. He saw a male later determined to be the defendant walking south. 8/24/06 RP 11, 18. When asked why he decided to stop the pedestrian, Reiber said, "That area, late at night, a gentleman walking - - social contact, " and to see what he was up to, just to talk. 8/24/06 RP 12, 19.

Without activating his lights, Reiber made a u-turn and parked 20 to 30 feet into a driveway, approximately 75 to 100 feet in front of Mr. Harrington, and walked toward him. 8/24/06 RP 12, 18. When Reiber asked, "hey, can I talk to you," or "mind if I talk to you for a minute," Mr. Harrington responded, "yeah or yes." 8/24/06 RP 13. Mr. Harrington stopped and faced Reiber. 8/24/06 RP 13. They were about five feet apart. 8/24/06 RP 5.

Reiber testified Mr. Harrington, who was standing on the sidewalk while he stood on the grass, was free to leave and the officer was not blocking his travel. 8/24/06 RP 13-14. During the two to five minutes

they talked, Reiber asked Mr. Harrington things like what he was up to and where was he going. (8/24/06 RP 14.

At about the same time, Trooper Bryan, of the Washington State Patrol, was driving his marked police car in the area. 8/24/06 RP 4, 8. Deciding to stop for officer safety, he drove by them and made a u-turn. The trooper drove back and parked to the side of the road 10 to 30 feet away from Reiber and Mr. Harrington. 8/24/06 RP 5. Although he didn't specifically recall, the trooper would usually have activated his patrol car flashing or strobe lights when parking as he did, which he believes was blocking a lane of the street. 8/24/06 RP 5-7. The trooper walked toward Reiber and Mr. Harrington, and stood a distance of 7 to 8 feet away from them. 8/24/06 RP 7-8. The trooper was in uniform, and silently observed them conversing for an estimated two to four minutes. 8/24/06 RP 7, 9.

Both officers were in uniform and armed with weapons. 8/24/06 RP 8.

When Reiber asked where he was coming from, Mr. Harrington said, "his sister's." When asked where his sister lived, Mr. Harrington said he didn't know. 8/24/06 RP 13-14.

Reiber thought these two answers were a "little suspicious."

8/24/06 RP 13-14. While talking, the officer saw a couple of bulges in Mr. Harrington's pockets and noticed he was acting quite nervous and pretty fidgety. When Mr. Harrington put his hands in his pockets, Reiber asked him to take them out, wanting to control his actions and testifying this was for "officer safety purposes. I hadn't patted him down, so he could potentially have a weapon in his pocket." 8/24/06 RP 15, 21. Mr. Harrington complied, but several times he quickly put his hands in and then took them out of his pockets. 8/24/06 RP 15.

Trooper Bryan arrived some time before the pat down. 8/24/06 RP 18, 20). Reiber saw the trooper go by, make a u-turn and come back, and walk up behind them. 8/24/06 RP 18, 20.

Reiber asked to pat Mr. Harrington down for officer safety, and told him he was not under arrest. Mr. Harrington said, "Yeah." 8/24/06 RP 15-16.

As he started the pat down, Reiber felt a hard, cylindrical-type object in the front right pocket. When asked, Mr. Harrington said it was "my glass." When asked what he meant, Mr. Harrington said it was "my meth pipe." 8/24/06 RP 16-17. Reiber told him he was going to be arrested and to place his hands behind his back. 8/24/06 RP 17. Mr.

Harrington ran off and was thereafter caught and arrested. 8/24/06 RP 7, 17. A pipe later determined to contain methamphetamine and a baggie containing methamphetamine were found during the search incident to arrest. 8/24/06 RP 17, CP 24.

Reiber and the trooper didn't talk to or acknowledge each other prior to Mr. Harrington running off. 8/24/06 RP 8, 18. The trooper didn't talk to Mr. Harrington during the encounter. 8/24/06 RP , 7-8, 18.

The trial court denied the suppression motion. (8/24/06 RP 35; CP 20. Written findings of fact and conclusions of law were entered regarding the suppression hearing. (CP 15-20.

On August 28, 2006, Mr. Harrington was found guilty, after a stipulated facts trial, of possession of methamphetamine. 8/28/06 RP 2-5; CP 23-25.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes this Court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court, the U.S. Supreme Court and the Court of Appeals (RAP 13.4(b)(1) and (2)); involves a significant question

of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)), and/or involves issues of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

The stop and continued detention of Mr. Harrington was a seizure prior to arrest, in violation of his constitutional rights under U.S. Const., amend. 4 and WA Const., art. 1, § 7.

A person is "seized" within the meaning of the Fourth Amendment of the United States Constitution when restrained by means of physical force or a show of authority. State v. Stroud, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981) (citing United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)), *rev. denied*, 96 Wn.2d 1025 (1982). A seizure occurs "when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (citing State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)). This is an objective standard, and the officer's subjective suspicions and intents are irrelevant unless reflected in his or her actions. O'Neill, 148 Wn.2d at 574-77.

An encounter between a citizen and the police is consensual or permissive only if a reasonable person under the totality of the

circumstances would feel free to walk away. United States v. Mendenhall, 446 U.S. at 554, 100 S.Ct. 1870; State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347, *overruled in part by* State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994). The objective circumstances surrounding the encounter must be looked at to determine what a reasonable person would believe. State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988). The question is whether a reasonable person would have felt free to decline the officer's request and terminate the encounter. State v. Armenta, 134 Wn.2d 1, 10-11, 948 P.2d 1280 (1997) (*citing* Florida v. Bostick, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)). A permissive encounter may ripen into a prohibited seizure. See, e.g., State v. Ellwood, *supra*; State v. O'Day, 91 Wn.App. 244, 955 P.2d 860 (1998); State v. Coyne, 99 Wn. App. 566, 995 P.2d 78 (2000); State v. Soto-Garcia, 68 Wn. App. 20, 841 P.2d 1271 (1992).

Herein, Reiber was on patrol duty at night. Seeing a lone male walking, he decided to see what the person was up to. The officer made a u-turn, drove 70-100 feet past Mr. Harrington, parked his marked police car, and walked back towards Mr. Harrington. He initiated a contact with Mr. Harrington, who agreed to talk with him. Reiber asked questions about where Mr. Harrington had been and where he was going.

The Court of Appeals, Division III, ruled that this encounter was a consensual encounter rather than a seizure. *Slip Opinion*, p. 1, 3. However, there is “no legally supportable reason” in the record for the stop of Mr. Harrington. *Slip Opinion*, Sweeney, J. dissenting, p. 2. The record contains no suggestion that the officer knew Mr. Harrington, that Mr. Harrington needed help, or that the officer was looking for someone on the street at eleven o’clock at night to visit with.

Further, Mr. Harrington was not in a high crime area. State v. Miller, 91 Wn. App. 181, 183, 955 P.2d 810, 961 P.2d 973 (1998). There was no suspicion (reasonable or otherwise) of criminal activity in or around the area where Mr. Harrington was seized. State v. Armenta, 134 Wn.2d at 8; State v. Hopkins, 128 Wn. App. 855, 867, 117 P.3d 377 (2005). Mr. Harrington was not and did not appear to be sick, injured, disabled, drunk, or lost. State v. Acrey, 110 Wn. App. 769, 773, 45 P.3d 553 (2002), *aff’d*, 148 Wn.2d 738, 64 P.3d 594 (2003). As noted by Judge Sweeney, “We do a disservice to the public and to police [and to our constitutional rights] by moving the so-called “social contact” into just another form of seizure, albeit without any cause or suspicion of crime or danger to the public or the police.” *Slip Opinion*, Sweeney, J. dissenting, p. 2 [bracketed material added].

Within a minute or so after Reiber began talking to Mr. Harrington, a trooper drove by (8/24/06 RP 7, 9, 14) and immediately made a u-turn, parking in the street a little distance behind them. The trooper says he may or may not have had his emergency lights on. While the officers did not acknowledge each other, the trooper stood silently observing within a short distance of seven to eight feet from Reiber and Mr. Harrington.

The Court of Appeals, Division III ruled the arrival of Trooper Bryan at the scene did not change the nature of the encounter as a social contact. *Slip Opinion*, p. 3. Backup is certainly an important police safety procedure for any investigation. But this was, according to the trial court, not an investigation, it was a “social contact.” CP 19 (Conclusion of Law 1). This immediate arrival of a second uniformed officer and the trooper’s continued hovering presence constituted a further seizure of Mr. Harrington. See, State v. Markgraf, 59 Wn. App. 509, 511, 798 P.2d 1180 (1990).

At this point, a reasonable person such as Mr. Harrington would not have felt free to leave. Reiber’s subjective belief that Mr. Harrington was free to walk away is immaterial on the issue of whether a reasonable person would feel free to leave, unless Reiber had communicated that information to Mr. Harrington. State v. Richardson, 64 Wn. App. 693,

697 n.1, 825 P.2d 754 (1992); State v. Ellwood, 52 Wn. App. at 73. At no time during the entire five minute encounter did Reiber tell Mr. Harrington he was free to leave or to decline to talk to him.

Reiber then became suspicious because although he had just come from his sister's house, Mr. Harrington said he didn't know where the sister lived. 8/24/06 RP 13-14. The trial court's conclusion that the answers themselves were suspicious and supported the officer's "continuing the contact" negates the court's conclusion that all of this amounted merely to a "social contact." CP 19 (Conclusions of Law 1 and 2). Furthermore, failure to recall a street address is not indicative of criminal activity, and being fidgety and nervous is an understandable reaction given the encounter here. Reiber had no justification for continuing the encounter. This was a further prohibited seizure of Mr. Harrington.

Reiber asked Mr. Harrington several times to refrain from putting his hands quickly in and then out of his pockets. Reiber then asked if he could search Mr. Harrington for weapons. At this point, any permissive encounter had unquestionably changed into a prohibited seizure for several reasons.

In Soto-Garcia, a social encounter between a policeman and Soto-Garcia turned into a seizure when the officer asked Soto-Garcia if he would consent to a search of his person for cocaine. State v. Soto-Garcia, 68 Wn. App. at 25. The court held that Soto-Garcia was seized when the officer asked to search for cocaine because a reasonable person would not have felt free to decline the police officer's request. Id.

If the stop was at this time still merely a social contact, the request to search Mr. Harrington for weapons turned the encounter into a seizure, just as the request to search for cocaine created a seizure in Soto-Garcia. Reiber wanted to take control of the encounter that he had initiated, and intended to investigate further.

An investigative stop is a seizure and is constitutional only if the officer has an articulable and well-founded suspicion, based on objective facts, that the seized person has committed, is committing, or is about to commit a crime. *E.g.*, State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002); State v. Kennedy, 107 Wn.2d 1, 4, 6-7, 726 P.2d 445 (1986); State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). Here, Reiber had no reasonable articulable suspicion of crime to justify a seizure of Mr. Harrington. Fidgeting and nervousness exhibited by quickly putting one's

hands in a pocket and just as quickly removing them do not suggest a crime is afoot.

More importantly, because there was no valid investigatory stop, Reiber had no derivative right to conduct a protective frisk. *See, State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)); *accord State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

Contrary to the trial court's conclusion, Reiber's statement to Mr. Harrington that he was not under arrest at this time is not germane. CP 19-20 (Conclusion of Law 5). The issue is whether a reasonable person would feel free to leave in the face of a request to search his person. Reiber's subjective belief that Mr. Harrington *was* free to decline the search is immaterial because Reiber never communicated that information to Mr. Harrington. *State v. Richardson*, 64 Wn. App. at 697 n.1; *State v. Ellwood*, 52 Wn.App. at 73.

Finally, the trial court's conclusion that Mr. Harrington validly consented to the search is erroneous. CP 19-20 (Conclusion of Law 5). Reiber's unlawful seizure tainted Mr. Harrington's consent to a pat down search of his person under *Soto-Garcia*. The *Soto-Garcia* court gave several non-exclusive factors for considering the legitimacy of a grant of

consent: (1) temporal proximity of the illegality and the subsequent consent; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of Miranda warnings. Soto-Garcia, 68 Wn. App. at 27; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

Here, the illegal seizures – with the arrival and nearby presence of a second officer, the continued detention without a reasonable suspicion of criminal activity, and the unjustified request to search his person - vitiated Mr. Harrington's later given consent. Mr. Harrington was not advised of his Miranda rights. Furthermore, the unlawful seizure was intrusive because there was no other indication or suspicion of criminal activity. The officer asked to search Mr. Harrington only minutes after a second trooper arrived to supervise the encounter. Once asked the question and “when considering all the circumstances, [Mr. Harrington]'s freedom of movement [was] restrained and [Mr. Harrington] would not believe he [was] free to leave or decline [the] request” to be searched. See, State v. Rankin, 151 Wn.2d at 695 (citing State v. O'Neill, 148 Wn.2d at 574).

In summation, Mr. Harrington was illegally seized. This police encounter was not a “social contact” and Mr. Harrington was not free to just walk away. “Two police officers, two patrol cars, late at night, orders

to remove his hands from his pockets, and finally a request to search over the course of up to five minutes does not add up to a conclusion that a reasonable person would have felt free to just walk off." *Slip Opinion*, Sweeney, J. dissenting, p. 4. The trial court erred in determining that no seizure took place, and erred in denying Mr. Harrington's motion to suppress all evidence.

VI. CONCLUSION.

For the reasons stated, this Court should grant the petition for review, reverse the decision of the Court of Appeals, and vacate the conviction and dismiss the charge with prejudice.

Respectfully submitted June 12, 2008.



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FILED

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 25497-6-III
)	
Respondent,)	
)	
v.)	Division Three
)	
DUSTIN WARREN HARRINGTON,)	
)	
Appellant.)	PUBLISHED OPINION

KORSMO, J.—Dustin Harrington appeals his conviction for possession of methamphetamine discovered during a pat down of his pockets. The trial court found that Mr. Harrington's meeting with Officer Scott Reiber was a consensual encounter. The arrival of an additional officer did not convert the situation into a seizure. Accordingly, we affirm the conviction.

Officer Reiber, while on patrol in Richland, saw Mr. Harrington walking at 11:00 p.m. and decided to talk to him. He turned his patrol car around and parked in a driveway ahead of Harrington. He then got out of his car and, standing away from the sidewalk, asked to speak with Mr. Harrington. Harrington agreed to talk and Reiber advised him that he was not under arrest.

APPENDIX "A"

The officer asked Mr. Harrington what he was doing; he also noted several objects were in Harrington's pockets. Told that Harrington had just visited his sister, the officer asked where she lived. Mr. Harrington replied that he did not know where she lived. The officer became suspicious.

During the conversation, Trooper William Bryan drove by and decided to stop. He parked on the street and walked up to where the two men were talking. Neither participant acknowledged the trooper's presence; Bryan did not involve himself in the conversation.

Mr. Harrington was nervous and kept putting his hands in his pockets despite the officer's request that he not do so. Eventually Officer Reiber asked if he could check Mr. Harrington's pockets. Harrington agreed. A pat down of the outside of the pocket revealed a hard cylindrical object. When asked what it was, Mr. Harrington candidly told the officer it was a "meth pipe." Officer Reiber told Mr. Harrington he was now under arrest. Harrington fled but was apprehended by the two officers a short distance away.

A search incident to the arrest revealed a small amount of methamphetamine in the pipe. Mr. Harrington moved to suppress, contending that he had been seized when the officer approached him. The trial court disagreed, finding that there was a consensual meeting and that defendant's actions in repeatedly putting his hands in the pockets justified a pat down for officer safety. After his motion to suppress the evidence was

denied, Mr. Harrington was found guilty during a stipulated facts trial. He then appealed to this court.

A seizure occurs when a person's movements have been restrained to the extent that a reasonable person would believe he was not free to walk away from an officer. *United States v. Mendenhall*, 446 U.S. 544, 553-554, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980); *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990), *overruled in part by State v. Hill*, 123 Wn.2d 641, 645, 870 P.2d 313 (1994). The record supports the trial court's determination that the encounter between Mr. Harrington and Officer Reiber was not a seizure. Officer Reiber parked his car out of the way and did not impede Mr. Harrington's ability to use the sidewalk. The officer *asked* if Harrington would talk with him. There was simply no show of authority that would support a finding that Mr. Harrington was seized.

The appearance of Trooper Bryan at the scene did not change the assessment. The trooper stood a respectful distance away without becoming part of the encounter. His presence did not seize Mr. Harrington. Law enforcement officers routinely back each other up. An additional officer, arriving without a show of force, simply does not change the nature of the original encounter.

Appellant also contends that the request to check the pockets constituted a seizure, citing to *State v. Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271 (1992), *abrogated in part*

by *State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996).¹ There an officer had contacted Mr. Soto-Garcia walking from the “little Tijuana” section of Kelso known for cocaine dealing. After learning his name, the officer ran a warrants check in his presence. When that came back negative, the officer asked Mr. Soto-Garcia whether he had any cocaine. After receiving a negative response, the officer asked and received permission to search. The search revealed cocaine. *Id.* at 22. The trial court found that under these facts the officer had seized Soto-Garcia by asking to conduct the search. *Id.* at 23. Division Two of this court agreed, finding that the Fourth Amendment standard for seizure had been established under this combination of facts. *Id.* at 25. It then ruled that the consent to search was invalid due to the improper seizure. *Id.* at 26-28.

The facts of this case do not rise to the level of *Soto-Garcia*. There the combination of the records check, the inquiry about illegal drug possession, and the request to search constituted a seizure. In contrast, this was a consensual encounter not marred by inquiries concerning warrant status and illegal activity. Rather, the encounter was more like that in *State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996), *overruled on other grounds by State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). There an officer, after observing suspicious behavior, walked up to a parked car and asked, “Where

¹ Asking a person engaged in a voluntary encounter with an officer to keep his hands out of his pockets and in plain sight also does not constitute a seizure. *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993), *review denied* 123 Wn.2d 1010 (1994).

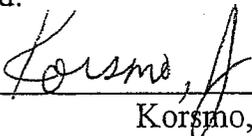
is the pipe?" *Id.* at 349. The trial court had found the question constituted a seizure and suppressed the controlled substances found during a subsequent arrest and search. *Id.* at 350. The Washington Supreme Court reversed, concluding that the totality of the circumstances did not show a seizure had occurred when the officer asked the question about the pipe. *Id.* at 353-354.

Similarly here, asking for consent to search did not turn a voluntary meeting into a seizure. Appellant's position, if accepted, would essentially vitiate any consent to search where probable cause to search did not already exist. Such is not the state of the law.

The appellant's repeated placing of his hands in the object-laden pockets, after repeated requests not to do so, also justified the pat down independent of the consent. *See City of Seattle v. Hall*, 60 Wn. App. 645, 806 P.2d 1246 (1991) (officer could pat down person engaged in voluntary conversation who was "antsy" and caused legitimate concern for officer safety).

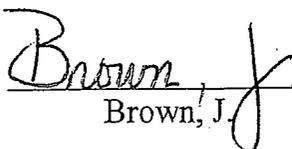
The trial court correctly determined that no seizure took place.

Accordingly, the conviction is affirmed.



Korsmo, J.

I CONCUR:



Brown, J.

No. 25497-6-III

SWEENEY, J. (dissenting)—This police encounter was not a “social contact” and Dustin Harrington was not free to just walk away. And so I respectfully dissent.

Mr. Harrington was confronted by two uniformed officers and two squad cars, at eleven o'clock at night. The state trooper stopped to provide “backup.” The police officer ordered Mr. Harrington to remove his hands from his pockets and then asked whether he could search him. The court concluded, nonetheless, that this contact was a “social contact.” Clerk’s Papers (CP) at 19 (Conclusion of Law 1). But there is no suggestion that the officer knew Mr. Harrington, that Mr. Harrington needed help, or that the officer was looking for someone on the street at eleven o'clock at night to visit with. And moreover, any suggestion that this was a “social contact” evaporated when the state trooper showed up and stood nearby, or when the officer ordered Mr. Harrington not to put his hands in his pockets.

Mr. Harrington was not in a high crime area. *State v. Miller*, 91 Wn. App. 181, 183, 955 P.2d 810, 961 P.2d 973 (1998). There was no suspicion (reasonable or otherwise) of criminal activity in or around the area where Mr. Harrington was seized. *State v. Armenta*, 134 Wn.2d 1, 8, 948 P.2d 1280 (1997); *State v. Hopkins*, 128 Wn. App. 855, 867, 117 P.3d 377 (2005). Mr. Harrington was not and did not appear to be sick,

injured, disabled, drunk, or lost. *State v. Acrey*, 110 Wn. App. 769, 773, 45 P.3d 553 (2002), *aff'd*, 148 Wn.2d 738, 64 P.3d 594 (2003). In short, there was no legally supportable reason for this encounter/stop/confrontation/seizure and labeling it a “social contact” does not change the reality. There simply was no reason to contact Mr. Harrington.

We do a disservice to the public and to police by moving the so-called “social contact” into just another form of seizure, albeit without any cause or suspicion of crime or danger to the public or the police. Backup is certainly an important police safety procedure for any investigation. But this was, according to the court, not an investigation, it was a “social contact.” The trooper says he may or may not have had his emergency lights on.

I would conclude that this stop by a police officer, along with the presence of backup by a state trooper and the presence of two marked police cars at this time of night, put Mr. Harrington in a position that he was not free to simply walk away.

The court’s conclusion that Mr. Harrington’s conduct was “suspicious, and supported Officer [Scott] Reiber continuing the contact” (Conclusion of Law 2) flies in the face of the court’s conclusion that all of this amounted to a “social contact” (Conclusion of Law 1). CP at 19. Fidgety and nervous is an understandable reaction given the encounter here.

A social contact should be just that—a social contact—not an opportunity for police to investigate, provoke, or “find” criminal activity. This may have started as a casual encounter but it escalated into something more, without probable cause or even a reasonable suspicion that Mr. Harrington had done anything wrong.

I intend no criticism of the police work here. Indeed, it may well have been good police work. I conclude simply that there was not adequate constitutional sanction for the conduct here, and the evidence should then have been suppressed. Our holding in *State v. Soto-Garcia* is on point. *State v. Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271 (1992), *abrogated on other grounds by State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996).

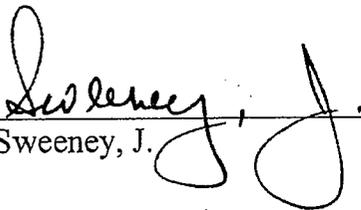
I have read *State v. Nettles* and respectfully disagree with the conclusion the majority of the court reaches there. *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993). There, the court concluded that orders from an armed policeman to remove one’s hands from one’s pockets was not a sufficient showing of authority to convert a social contact into a seizure. That aside, the police contact in *Nettles* was at least prompted by reports of and a request to investigate drug activity in the area where police found Mr. Nettles. *Id.* at 707-08.

State v. Thorn is also distinguishable. *State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996), *overruled on other grounds by State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). There, the court concluded that the question, “where is the pipe,” did not

constitute a seizure because it was capable of more than one interpretation. *Id.* at 354.

But the court was clear: “Our holding should not be construed as a blanket rule that an officer does not seize a person merely by asking a question.” *Id.*

Here, two police officers, two patrol cars, late at night, orders to remove his hands from his pockets, and finally a request to search over the course of up to five minutes does not add up to a conclusion that a reasonable person would have felt free to just walk off. Mr. Harrington was not free to just walk off. There was a sufficient show of authority that no citizen would have felt free to just walk away from the police officers.


Sweeney, J.