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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

FILED  
JAN 15 2009  
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STATE OF WASHINGTON  
*[Signature]*

NO. 26541-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Plaintiff/Appellant,

v.

MARK JOSEPH AFANA,

Defendant/Respondent.

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**RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW**

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**1. IDENTITY OF PETITIONER**

MARK JOSEPH AFANA requests the relief designated in Part 2 of this Petition.

**2. STATEMENT OF RELIEF SOUGHT**

Mr. Afana seeks review of a published opinion entered by Division III of the Court of Appeals on December 4, 2008 (Appendix "A" 1-5).

**3. ISSUE PRESENTED FOR REVIEW**

Should *State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005) be overruled as being in contravention of the Fourth Amendment to the United States Constitution and Const. art. I, § 7 by creating the legal fiction that a passenger in a motor vehicle is the same as a pedestrian for purposes of a so-called "social contact" by a police officer?

**4. STATEMENT OF THE CASE**

Mr. Afana agrees that the Court of Appeals decision succinctly states the facts involved with his case.

Moreover, Mr. Afana relies upon the undisputed findings of fact entered by the trial court following a CrR 3.6 hearing. (Appendix "B")

**5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Conclusions of law entered following a suppression hearing are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The trial court concluded that the contact between Deputy Miller and the occupants of the parked car was not a “social contact.” Rather, it was an investigation.

The State does not challenge Conclusion of Law 1 which states:

1. The defendant and the female passenger were parked watching a movie, **not violating any law. The deputy treated this as a suspicious circumstance.** There is no evidence either person in the car acted nervously or furtively.

(Emphasis supplied.)

The Court of Appeals relies upon *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997) for the proposition that a request for identification, without more, does not result in a seizure. What the Court of Appeals decision fails to recognize is that neither of the individuals in the *Armenta* case were inside their car at the time the request for identification was made.

Another case relied upon by the Court of Appeals, *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998), also involved a pedestrian as opposed to a passenger in a parked car.

Even though the Court recognized that *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980) would make the request for the passenger’s identification unlawful, it then determined, in essence, that the *Larson* case was overruled by *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). *See also: State v. Holmes*, 569 N.W.2d 181, 185 (1997) (a police

officer who merely has reasonable suspicion that a parking violation has occurred cannot seize an individual for the purpose of investigation).

Mr. Afana contends that the *O'Neill* case is inapplicable due to its distinguishable facts. In *O'Neill*, the driver of a parked car advised the officer that he had a revoked driver's license. This admission allowed the officer to have the driver exit the car and conduct a search incident to arrest. However, even prior to conducting a search incident to arrest, the officer noted the presence of used drug paraphernalia in plain view.

Finally, the Court of Appeals decision rests upon the validity of *State v. Mote, supra*.

The Fourth Amendment provides, in part:

The right of the people to be secure in their persons ... against unreasonable searches and seizures, shall not be violated ....

Const. art. I, § 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

It is apparent from recent cases that a lack of consensus exists as to what constitutes a "stop" for both Fourth Amendment and Const. art. I, § 7 analysis. See: *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005) (stop of vehicle having an Oregon trip permit and continual escalation of contact with passenger over identification); *State v. Mote, supra* (parked car in high crime area with interior lights on and occupants appear nervous); *State v. O'Neill, supra*, (driver parked in lot of business recently burgla-

rized, revoked driver's license, plain view of drug paraphernalia); *State v. Young, supra*, (initial social contact; but abandoned property issue determinative) and *State v. Carney*, 142 Wn. App. 197 (2007) (majority, concurring and dissenting opinions)

A "stop" is defined as follows by BLACK'S LAW DICTIONARY (8<sup>th</sup> ed.): "Under the Fourth Amendment, a temporary restraint that prevents a person from walking away."

When Deputy Miller asked for Mr. Afana's identification, and also obtained identification from the passenger, neither was free to leave. They were stopped.

Moreover, since there was no observation of any criminal activity a request for the passenger's identification was clearly unwarranted. *See: State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004).

As was set forth by the Court in *State v. Larson, supra*:

... [A] stop based on a parking violation *committed by the driver* does not reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other circumstances give the police independent cause to question passengers.

Mr. Afana additionally contends that much of the supposed distinction between a passenger and a pedestrian is mere semantics. It is necessary to revert to source material in ascertaining whether or not a legitimate contact occurs between law enforcement and a citizen.

In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968), a comprehensive analysis of the citizen-law enforcement dichotomy was conducted. The first paragraph of the decision reads:

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

*Terry v. Ohio*, *supra*, 392 U.S. @ 4.

Contact between law enforcement and a citizen on the street may be a vehicle stop or a pedestrian stop.

“The Fourth Amendment provides ... [an] inestimable right of personal security [which] belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study ....” *Terry v. Ohio*, *supra*, 392 U.S. 8-9.

Moreover

“[N]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). We have recently held that the Fourth Amendment protects people, not places,” *Katz v. United States*, 389 U.S. 347, 351 (1967) ....

*Terry v. Ohio*, *supra* 9.

It is clear that any attempt to dismantle the distinction between a pedestrian and a passenger is fraught with difficulty and cannot withstand constitutional scrutiny.

The trial court applied a “totality of the circumstances” test and determined that the passenger was indeed a passenger, and not a pedestrian.

... “under article I, section 7 [of the Washington Constitution], law enforcement officers are not permitted to request identification from a passenger for investigatory purposes unless there is an independent basis to support the request.” *Rankin* [*State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004)] at 699. *Rankin* further stated, “**a mere request for identification from the passenger for investigatory purposes constitutes a seizure.**” *Id.* at 697. An “independent basis” is an “articulable suspicion of criminal activity.” *Id.* at 699.

*State v. Brown, supra*, 796. (Emphasis supplied.)

There can be no legitimate basis to contact a legally parked vehicle without observing some type of activity inside the vehicle indicative of the presence of contraband or a crime.

Automobiles provide a protective barrier around the person. Invasion of that protective layer by the police, without authority of law, is constitutionally impermissible.

Deputy Miller had no reasonable articulable suspicion of criminal activity. He did not even know there were any passengers in the car until he spot-lighted it.

There must be some articulable suspicion of connecting a particular crime to a particular person in order to validate either a stop of a person or the vehicle in which the person is riding. *See: State v. Martinez*, 135 Wn. App. 174, 182, 143 P.3d 855 (2006).

If the State's argument that "reasonless contacts are at the heart of social contacts by police" is to be accepted, then both the Fourth Amendment and Const. art. I, § 7 will have no future efficacy.

## **6. CONCLUSION**

Mr. Afana respectfully requests review under RAP 13.4(b)(1), (2) and (3).

Deputy Miller's contact was not a social contact.

There is no evidence that he was seeking to help either occupant of the car.

There is no evidence to indicate that there had been any ongoing problems in this area of the County.

There is no evidence to indicate any criminal activity on the part of either occupant of the car.

Deputy Miller's contact was not a "Hi! How are you?" type of contact.

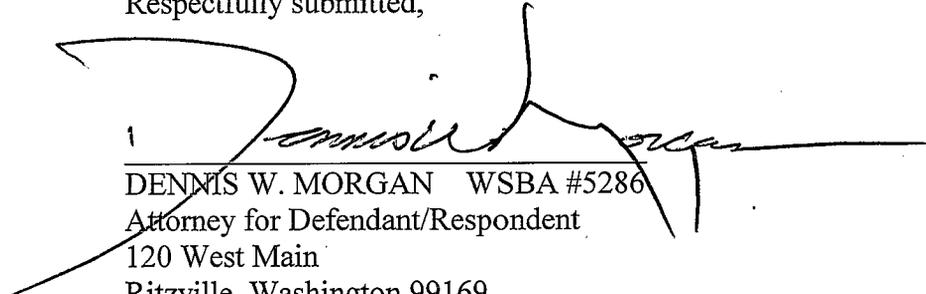
The trial court's findings of fact and conclusions of law are comprehensive and well-founded.

The trial court's order suppressing the evidence should be affirmed.

The Court of Appeals decision reversing the trial court's suppression of the evidence should be reversed and the case remanded to Superior Court.

DATED this 5<sup>th</sup> day of January, 2009.

Respectfully submitted,



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# APPENDIX "A"



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Opinion in PDF Format

Court of Appeals Division III  
State of Washington

Opinion Information Sheet

Docket Number: 26541-2

Title of Case: State of Washington v. Mark Joseph Afana

File Date: 12/04/2008

SOURCE OF APPEAL

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Appeal from Spokane Superior Court

Docket No: 07-1-03053-1

Judgment or order under review

Date filed: 10/05/2007

Judge signing: Honorable Ellen Kalama Clark

JUDGES

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Authored by Teresa C. Kulik

Concurring: Dennis J. Sweeney

Stephen M. Brown

COUNSEL OF RECORD

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**View the Opinion in PDF Format**

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 26541-2-III

Appellant,

)

)

)

Division Three

v.

)

)

MARK JOSEPH AFANA,

)

PUBLISHED OPINION

)

Respondent.

)

)

Kulik, A.C.J.—The question we decide is whether a police officer seized a driver and passenger in a legally parked car when the officer approached and requested identification. Here, Deputy Miller approached Joseph Afana’s legally parked car and asked Mr. Afana and his passenger, Jennifer Bergeron, what they were doing and requested identification. As Mr. Afana began to drive away, Deputy Miller discovered a warrant for Ms. Bergeron and stopped Mr. Afana. A search incident to Ms. Bergeron’s arrest uncovered illegal drugs. The trial court suppressed this evidence, concluding that Ms. Bergeron was unlawfully seized when Deputy Miller asked for identification. We disagree. Under these facts, the deputy’s actions and, request for identification, did not constitute a seizure. Accordingly, we reverse the suppression of the drug evidence and

remand.

## FACTS

On June 13, 2007, at 3:39 am, Deputy Miller noticed a legally parked car at the corner of Rimrock and Houston in Spokane County. Deputy Miller pulled his car behind the parked car and shined his spotlight into it, revealing two occupants in the vehicle. Deputy Miller then approached the vehicle and asked the occupants what they were doing. The driver, Mr. Afana, responded that they were watching a movie. Deputy Miller asked for identification from both Mr. Afana and the other occupant, Jennifer Bergeron. Mr. Afana gave the deputy his driver's license and Ms. Bergeron gave her name. Deputy Miller wrote down both names, gave Mr. Afana back his license, and suggested they go elsewhere to watch their movie.

Deputy Miller returned to his vehicle and ran warrant checks on both names. Ms. Bergeron's check came back with a local misdemeanor warrant. Mr. Afana began to pull away. At this point, Deputy Miller activated his emergency lights to prevent the car from leaving. He walked back to the car, arrested Ms. Bergeron, and had Mr. Afana exit the vehicle. Deputy Miller searched the vehicle incident to arrest and found a bag which contained methamphetamine, marijuana, and drug paraphernalia. Mr. Afana was arrested and charged with possession of a controlled substance.

Prior to trial, Mr. Afana brought a CrR 3.6 motion to suppress the drugs found in the search incident to the arrest of the passenger in the vehicle. The trial court granted the motion to suppress and dismissed the case. The State appeals.

#### ANALYSIS

We review de novo a trial court's conclusions of law following a suppression hearing. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). The Fourth Amendment to the United States Constitution protects individuals against unwarranted searches and seizures. Article I, section 7 of the Washington Constitution provides greater protection to individuals than the Fourth Amendment. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). A seizure occurs when "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." *Id.* at 695. This is an objective standard. *Id.*

In *Armenta*, the Supreme Court held that an officer asking for identification during a casual conversation did not constitute a seizure because the officer's request for identification was not accompanied by force or a display of authority, such that the citizens did not feel free to leave. *Armenta*, 134 Wn.2d at 11. A police officer's manner and tone are important in determining, objectively, whether a person would feel free to

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*State v. Afana*

leave in a particular situation. *State v. Thorn*, 129 Wn.2d 347, 353-54, 917 P.2d 108 (1996), *rev'd on other grounds by State v. O'Neill*, 148 Wn.2d 564, 579, 62 P.3d 489 (2003). Moreover, police are permitted to converse and ask for identification even without an articulable suspicion of wrongdoing. *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998).

While a request for identification of a pedestrian is not automatically a seizure, the Supreme Court determined that asking for identification from a passenger in a car that was parked more than one foot away from the curb violated the Fourth Amendment and article I, section 7 of the Washington Constitution. *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980). Based on *Larson*, the request for identification here would be unlawful.

However, later in *O'Neill*, the court stated that “where a vehicle is parked in a public place, the distinction between a pedestrian and the occupant of a vehicle dissipates.” *O'Neill*, 148 Wn.2d at 579. *O'Neill* involved a conversation between police and a citizen but did not follow either a parking or a traffic violation. *O'Neill* held that when a car is parked in a public place, occupants of the car should be treated as pedestrians for search and seizure purposes. *Id.* Here, Mr. Afana’s car was parked in a public place and Deputy Miller did not seek contact with Mr. Afana and his passenger because of any violation. Based on *O'Neill*, any request that Deputy Miller could

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*State v. Afana*

lawfully make of a pedestrian, he could make of Mr. Afana's passenger, including asking for her identification. *See id.*

Later, in *State v. Rankin*, the court held that law enforcement officers were not allowed to ask for identification from passengers for investigatory purposes, during a traffic stop, without an independent basis. *Rankin*, 151 Wn.2d at 699. *Rankin*, however, did not overrule *O'Neill*.

Here, the trial court based its decision on *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005). However, in *Brown*, the defendant was a passenger in a vehicle that was stopped because a police officer believed the vehicle's trip permit was faulty. The result in *Brown* is consistent with the other cases in which the officers made contact with citizens in a car because of a violation.

In accepting *Brown*, the trial court rejected *State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005). But *Mote* is directly on point.

In *Mote*, two people were sitting in a legally parked car at 11:45 pm when a police officer approached the car to ask what the occupants were doing. The officer asked for identification from the driver, and for the name and date of birth of the passenger, Curtis Mote. *Id.* at 279-80. Division One makes clear the distinction between stopping a car for a violation, in which case the police want to talk to the person who violated the law, as

opposed to making a social contact with people in a parked car where police want to talk to everyone in the car about what was going on. *Id.* at 289-90. When the police make a social contact with a group of people on the street, they are free to ask for names without their inquiry automatically constituting a seizure. *Id.* at 290-92. Because the purpose of making a social contact with a group of pedestrians is the same as making a social contact with people inside a parked car, it does not automatically constitute a seizure when an officer asks people in a car for their identification. *Id.*

We agree with the reasoning in *Mote*. *Rankin* did not overrule *O'Neill*. *Brown* simply followed the analysis laid out in *Rankin*. Here, *O'Neill* and *Mote* should control. The passenger in Mr. Afana's car should be treated the same as pedestrians for search and seizure purposes. Under this standard, the court erred by suppressing the drug evidence.

We reverse the trial court's suppression order and remand.

---

Kulik, A.C.J.

WE CONCUR:

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Sweeney, J.

---

Brown, J.

## **APPENDIX "B"**

**FILED**  
**OCT 05 2007**  
THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 07-1-03053-1
	)	
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW REGARDING
MARK J. AFANA,	)	3.6 MOTION, AND ORDER
	)	DISMISSING CASE
Defendant.	)	(FNFL)

THIS MATTER having come before the court on the defendant's motion to suppress and dismiss on September 6, 2007, before the Honorable Ellen Clark and the defendant, MARK J. AFANA, represented by his attorney JOHN P. STINE and the State of Washington, represented by its attorney MARK LAIMINGER, deputy prosecuting attorney, and the Court having heard from the above parties and having reviewed the file, now makes the following:

**I. UNDISPUTED FINDINGS OF FACT**

1. On June 13, 2007 at 3:39 a.m. Deputy Miller spotted a vehicle he felt was suspicious parked at the corner of Rimrock and Houston in Spokane County.
2. He pulled in behind the vehicle and shined his spotlight on it, and saw two people inside.

3. He approached the vehicle and asked what they were doing. The driver said he and the passenger were watching a movie on his portable DVD player.

4. The deputy asked the defendant for his driver's license, wrote down the information, and returned the license. He then asked the passenger for her identification and the passenger verbally provided her name. The deputy then told the two that they should go someplace else to watch their movie.

5. The deputy returned to his car and ran checks on the defendant and the passenger. The passenger had a local misdemeanor warrant. The deputy then turned on his overhead emergency lights to prevent the vehicle from leaving.

6. He reapproached the vehicle and arrested the passenger on the warrant. The deputy then had the defendant exit the vehicle. He searched it incident to the arrest of the passenger and found suspected meth, marijuana, and paraphernalia in a bag in the defendant's car. The defendant was arrested for possession of a controlled substance and subsequently charged.

## **II. DISPUTED FINDINGS OF FACT**

1. There were no disputed facts.

## **III. CONCLUSIONS OF LAW**

1. The defendant and the female passenger were parked watching a movie, not violating any law. The deputy treated this as a suspicious circumstance. There is no evidence either person in the car acted nervously or furtively.

2. This was not a "social contact" when the deputy asked for identification for no apparent reason and told the driver and passenger to go somewhere else to watch the movie. This was part of an investigation by the deputy.

3. Given the totality of circumstances of the time, location, and nature of the contact

Ms. Bergeron was a passenger in a vehicle and not a pedestrian.

4. Therefore, the holding in State v. Brown, 154 Wn.2d 787; 117 P.3d 336 (2005), applies rather than the holding in State v. Mote, 129 Wn. App. 276; 120 P.3d 596 (2005).

5. Mote is a Division I case and is not binding on this court.

6. The arrest of the passenger resulted from an unlawful detention of the passenger and the evidence discovered as a result is suppressed.

**IV. ORDER**

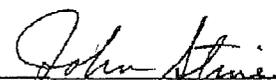
The evidence obtained during a search of the defendant's vehicle is suppressed. The practical effect of the ruling is to terminate the State's case. The case is therefore dismissed.

DATED this 31 day of October, 2007

  
\_\_\_\_\_  
HONORABLE ELLEN CLARK,  
Superior Court Judge

Presented By:

Approved as to form:

  
\_\_\_\_\_  
JOHN P. STINE, WSBA 26391  
Attorney at Law

  
\_\_\_\_\_  
MARK A. LAIMINGER, WSBA 16492  
Deputy Prosecuting Attorney