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THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TANNER ZACHARY ROY RUSSELL,

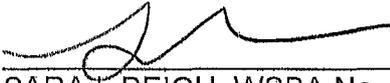
Petitioner.

Review from Court of Appeals, Division Two, Case No. 43034-7-II

Respondent's Supplemental Brief

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By:


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 ORIGINAL

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I. ISSUES

- A. Did the trial court err when it decided that Officer Makein's frisk of Russell, under the particular facts and circumstances, was unjustified?
- B. Did Officer Makein have a valid basis for opening the mini maglite case he found in Russell's pocket and if so, was it permissible under Article 1, § 7 of the Washington State Constitution?
- C. Was the State required to prove the lawfulness of the warrantless frisk on August 28, 2011, which provided the basis for Officer Makein's knowledge that Russell had previously had a small loaded gun in his pants pocket?
- D. Did the State fail to prove that Officer Makein obtained valid consent to search the container?

II. STATEMENT OF THE CASE

On September 5, 2011, around 11:00 p.m., Officer Makein of the Centralia Police Department was on patrol in Centralia, Washington, when he saw a bicycle traveling without a headlamp, which is a traffic infraction. RP 8.¹ Officer Makein also noticed the bicycle improperly traveled into the oncoming lane of traffic. RP 8. Officer Makein conducted a traffic stop on the bicyclist in the well-lit parking lot of an AM/PM. RP 26. Officer Makein was alone and there were not any civilian witnesses close by when he contacted the bicyclist. RP 9, 17, 46. Officer Makein immediately recognized

¹ There are two verbatim report of proceedings. The report of proceedings from the 3.6 hearing held on 11-16-11 will be cited as RP. The report of proceedings from the 12-29-11 hearing will be cited as 2RP.

the bicyclist as Tanner Russell. RP 9. Officer Makein had encountered Russell eight days earlier. RP 10.

On August 28, 2011, around midnight, Officer Makein pulled over a vehicle for an equipment violation. RP 10, 12-13; CP 72. The driver of the vehicle had a felony warrant for her arrest and was taken into custody. RP 11. The vehicle was also occupied by Russell. RP 10. Officer Withrow, who arrived to assist Officer Makein, found out through statements of the driver that she and Russell were casing the area and planning on returning to steal a car. RP 11-13. The driver and Russell were found to be in possession of burglary tools. RP 11. Officer Makein asked Russell if he was in possession of any weapons and Russell stated he was not. RP 12. Officer Withrow, upon frisking Russell, discovered a small, loaded .22 caliber pistol in Russell's right front pants pocket. RP 13, 15, 34; Ex. 3, 4, 5.² The gun could easily be concealed in the palm of a person's hand. RP 15

Due to the circumstances of Officer Makein's August 28th encounter with Russell, where Russell lied about having a weapon and was found with a loaded firearm, Officer Makein was concerned for his safety. RP 16-17, 39-40. Officer Makein

² The exhibits are part of the Court of Appeals file but are attached as Appendix A for the Court's convenience.

determined, for his safety, it was necessary to frisk Russell for weapons. RP 17. Officer Makein conducted a protective frisk and found in Russell's pocket a case that was about six inches long, four inches wide and two inches deep. RP 18. Officer Makein knew the case was not a firearm but due to the size of the weapon found on Russell eight days prior, was concerned the case held a weapon. RP 18: Ex. 2. To eliminate the threat of a weapon, Officer Makein removed the case from Russell's pocket and opened it up. RP 18-19. Inside the case was a loaded syringe that was later found to contain methamphetamine. RP 19-21, Ex. 1, 2.

Russell, through his trial counsel, brought a motion to suppress the evidence obtained from the protective frisk. CP 4-8. Russell attached the police report from the September arrest to his motion. CP 4-8. The State filed a response to Russell's motion, which included a copy of Officer Withrow's police report from the August 28th incident. CP 9-27. Russell filed a reply brief. CP 28-63. A suppression hearing was held on November 16, 2011. RP 1. The trial court ruled that the frisk was unreasonable and that even if the frisk was reasonable, the officer was not justified in opening the

case to inspect the contents. RP 60-61; CP 75-76.³ The trial court suppressed the evidence which effectively terminated the State's case. RP 61; CP 76. The trial court entered written findings of fact and conclusions of law and order dismissing the State's case. CP 71-76.

The State appealed the trial court's suppression of evidence and the Court of Appeals in an unpublished decision reversed the trial court and remanded the case for trial. CP 81-88; COA Opinion for Case No. 43034-7-II. The unpublished opinion was not unanimous. Judge Quinn-Brintnall authored a dissent in part, finding that the initial frisk was permissible but the opening of the case was beyond the scope of a *Terry* frisk. Judge Quinn-Brintnall also discussed the issue regarding whether Russell consented to the removal and opening of the case. Russell petitioned for review, which was granted.

III. ARGUMENT

A. OFFICER MAKEIN'S PROTECTIVE FRISK OF RUSSELL FOR WEAPONS WAS JUSTIFIED.

Officer Makein's knowledge of Russell's possession of a loaded firearm eight days prior to the September 5, 2011 traffic

³ The Findings of Fact and Conclusions of Law are attached as Appendix B for the Court's convenience.

stop, combined with the facts and circumstances surrounding the August 28, 2011 encounter and the September stop provided sufficient justification for Officer Makein to perform a protective frisk for weapons.

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008). The general rule is that warrantless searches are considered per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2026, 29 L.Ed.2d 564 (1971). It is the State's burden to show that a warrantless search falls within an exception to this rule. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980), citing *Arkansas v. Sanders*, 448 U.S. 753, 759, 99 S.Ct. 2586, 2590, 61 L.Ed.2d 235 (1979). The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Einfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). An officer may stop a vehicle for investigatory purposes upon reasonable suspicion that the driver has committed a traffic offense. *State v. Duncan*, 146 Wn.2d 166, 173-75, 43 P.3d 513 (2002), citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

An officer is justified in performing a protective frisk for weapons when there is a reasonable safety concern. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). The strong governmental interest in protecting a police officer's safety is why the courts follow a reasonableness standard instead of a probable cause standard in regards to assessing lawfulness of a protective frisk for weapons. *Collins* at 172-73. Therefore, the Fourth Amendment will be satisfied if the following three requirements are met: "(1) the initial stop must be legitimate; (2) a reasonable safety concern must exist to justify a protective frisk for weapons; and (3) the scope of the frisk must be limited to the protective purpose." *Id.* at 173, *citing Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). The law does not require an officer to take unnecessary risks while performing his or her official duties. *Collins*, 121 Wn.2d at 173.

For a protective frisk to be justified the officer must be able to point to "specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous." *Id.*, *citing Terry*, 392 U.S. at 21-24 (internal quotations omitted). An officer need not be absolutely certain that a person they are contacting is armed before doing a protective frisk, "The

issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 395 U.S. at 27.

A court is reluctant to substitute its judgment for that of an officer out in the field. *Collins*, 121 Wn.2d at 173 (citation omitted). The officer's suspicion must be founded; giving the court a basis from which it can determine that the protective frisk was not harassing or arbitrary. *Id.* (citation omitted). In *Collins* the Court held that the protective frisk of Collins was permissible under the circumstances of that case. *Collins*, 121 Wn.2d 174-77. In *Collins*, an officer and his partner conducted a traffic stop in darkness and the officer recognized Collins from a prior arrest two months earlier on an unspecified felony warrant. *Collins*, 121 Wn.2d. at 170-71. During that prior arrest, the officer noticed a large amount of either .38 or .357 ammunition, a gun holster, and handcuffs in the passenger compartment of the Collins' truck but no gun was located. *Id.* Upon recognizing Collins and recalling the prior arrest, the officer ordered Collins out of the vehicle and conducted a brief pat-down frisk of Collins's outer clothing to search for weapons. *Id.* During the frisk, the officer discovered a hard object in Collins's left

rear pocket. *Id.* While removing the unknown object, the officer discovered drugs. *Id.*

The Court evaluated the reasonableness of the protective frisk by considering the timing of the stop, Collins's prior felony arrest, and the presence of ammunition and a holster in a vehicle associated with Collins during a prior felony arrest. *Id.* 174-76. The Court stated:

The Court of Appeals properly recognized the significant impact information that an individual stopped might have a gun would have on a reasonably careful officer's assessment of the dangers involved in a stop. We hold that, when combined with other circumstances that contribute to a reasonable safety concern, such information could lead a reasonably careful officer to believe that a protective frisk should be conducted to protect his or her own safety and the safety of others... we limit our holding to circumstances where the information the officer possesses is reliable.

Id. at 177.

Officer Makein lawfully stopped Russell for a traffic infraction around 11:00 p.m. on September 5, 2011. RP 7-10. While the contact took place in a well-lit parking lot of an open convenience store, there were no civilian witnesses and Officer Makein was the only officer present. RP 9, 17, 26, 46. Officer Makein immediately recognized Russell from a traffic stop eight days prior which immediately caused Officer Makein concern for his safety due the

circumstances surrounding his encounter with Russell on August 28, 2011. RP 16.

During the August encounter Russell was armed, and when asked if he had any weapons, he looked directly at Officer Makein and said, no. RP 12. A loaded two shot Dillinger style gun was found in Russell's right front pants pocket. RP 13, 15, 34; Ex. 3, 4, 5. When describing the gun Officer Makein explained:

I mean, it's a very small, little weapon that can be - - you know, can be concealed, can be kept in the palm of your hand. You wouldn't even see it depending on how it's held. It's just a very small weapon. It's a deadly weapon basically. I mean, it's made - - it appears to be made for close range. It's not a long-range type of weapon by any means. It's an up-close-and-personal type of shot if that was going to happen.

RP 15.

The facts of this case are similar to those in *Collins*, and perhaps even better suited for a justified frisking of a person for a weapon. In *Collins*, the defendant had been stopped two months earlier and while there was indication of a gun, none was found. Further in *Collins* there were two officers present on the scene but it was late at night in a poorly lit area.

Officer Makein's encounter with Russell was only eight days prior to the September 5, 2011 traffic stop. Officer Makein was

justified in being particularly concerned because, while Russell had been cooperative during the August stop, Russell had also lied to the officers about being currently armed with a loaded gun. The size and type of gun found on Russell could be easily concealed in a small place and that caused Officer Makein great concern for his safety. RP 17. Further, while in a well-lit area, Officer Makein was alone with Russell late at night. RP 17. To ensure his safety, Officer Makein conducted a frisk of Russell for weapons. RP 17. A reasonably prudent officer in the same circumstances would have believed his safety was in danger and the frisk was therefore permissible.

B. OFFICER MAKEIN'S REMOVAL AND OPENING OF THE MINI MAGLITE CASE WAS PERMISSIBLE UNDER ARTICLE 1, § 7, OF THE WASHINGTON STATE CONSTITUTION.

Due to the type of weapon Russell had concealed on his person a week before the September traffic incident, it was permissible under Article 1, § 7 of the Washington State Constitution for Officer Makein to not only remove the mini Maglite case from Russell's pocket but to also open the case.

An officer must not only have justification for a protective frisk, but also for the scope of the frisk. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). *Terry* requires the scope of the

protective frisk be outer clothing and the discovery of weapons that may be used in such a manner to assault the officer. *Id.* If an officer conducting a protective frisk feels an object that he or she cannot discern the identity of and the object is consistent in density and size of an item that may or may not be a weapon, the officer is permitted to remove the object to examine it. *Id.* at 114.

Once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent and any continuing search without probable cause becomes an unreasonable intrusion into the individual's private affairs.

Id., citing *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980) (internal quotations omitted).

It has been held that removing objects such as cigarette packs or other small containers to search for miniature weapons, such as razor blades or other small objects that could be used as a weapon is not reasonable. *State v. Horton*, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006).

In *Horton* officers conducted a protective frisk on Horton and discovered an open cigarette pack in his jacket pocket. *Horton*, 136 Wn. App. at 33. The officer searched inside the cigarette package and found methamphetamine. *Id.* The State argued that the cigarette pack could contain small objects such as razor blades that

could conceivably be used as a weapon against an officer. *Id.* at 37-38. The Court of Appeals rejected the State's argument. The court held that an officer may withdraw an object that feels like a weapon but once the object is removed and the officer sees the object is a cigarette pack and not a weapon, the justification for the intrusion ends. *Id.* at 38. The court stated, "[n]othing in the particular circumstances here suggested that Mr. Horton's weapon of choice was likely to be a razor blade or a paper clip." *Id.* The court also noted that the officer could have protected himself against such miniature weapons by tossing the cigarette pack out of reach. *Id.*

In the case at hand, Russell was known to carry a loaded gun that could easily be concealed in the palm of one's hand, let alone the case that was removed from his pocket. See RP 13, 15, 34; Ex. 2, 3, 4, 5. Officer Makein stated he would not shake the case because if it contained a loaded gun, such as the one found on Russell eight days earlier, it would not be a good idea, presumably for safety reasons. RP 33. Officer Makein also clarified his earlier testimony stating that while he knew the case was not a weapon, he did not know if the case could contain a weapon, such as the one Russell had possessed eight days earlier, therefore the

officer safety concern was not alleviated by simply removing the case from Russell's pocket. RP 18, 45.

Russell was being issued a traffic infraction for lane travel and not having a headlamp on his bike during hours of darkness. Once Officer Makein was finished issuing the citation Russell would be free to leave. It would be an unnecessary and unreasonable risk to Officer Makein's safety to not open the mini Maglite case he removed from Russell's pocket. First, given the size and character of the loaded gun taken off Russell eight days earlier, the case could have easily contained a gun similar to the one discovered eight days prior. Second, perhaps one could argue while the case was in Officer Makein's possession his safety was not in danger, Officer Makein would have had to hand the case back to Russell when he finished issuing Russell the citation. It is unreasonable under the facts and circumstances of this case to expect Officer Makein to hand Russell back the case, which could contain a loaded firearm, without first looking inside of it to ensure Officer Makein's safety as he terminates his contact with Russell. In this case, unlike *Horton*, Russell was known to carry a loaded firearm that could be concealed within the object removed from his clothing

and therefore looking inside the case to make sure there was no weapon was justified.

**C. THE STATE IS NOT REQUIRED TO PROVE THE
LAWFULNESS OF THE AUGUST 28, 2011
WARRANTLESS SEARCH.**

Russell argues that the State has not met its burden to show that Officer Makein's actions were reasonable because the State did not prove that the August frisk was legal and therefore any information obtained during that frisk is the fruit of the poisonous tree and cannot be used to justify Officer Makein's protective frisk during the September stop. Brief of Respondent 8-10; Petition for Review 7-10. Russell also argues that once the case was removed from his person any threat to Officer Makein's safety dissipated and the opening of the case was beyond the scope of a protective frisk and impermissible. Petition for Review 10-11. The State is not required to prove that the August frisk was lawful because Officer Makein is not required to disregard information when determining if he has a legitimate concern for his safety.

For an officer to have a reasonable belief that an individual is armed and presently dangerous there must be "some basis from which the court can determine that the detention was not arbitrary or harassing." *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d

1075 (2008) (internal quotations and citations omitted). A reviewing court is "reluctant to substitute their judgment for that of police officers in the field" in regards to the necessary amount of justification an officer must possess in order to fear for his or her personal safety. *State v. Belieu*, 112 Wn.2d 587, 773 P.2d 46 (1989).

It is not necessary to determine if the information Officer Makein was basing his officer safety concern upon was obtained through a lawful search. When there is a concern for officer safety, an officer does not need to disregard information he or she has obtained if the officer cannot articulate a lawful basis for knowing the information or does not know how the information was obtained. *See, State v. Holbrook*, 33 Wn. App. 692, 695, 657 P.2d 797, *review denied* 99 Wn.2d 1023 (1983). In *Holbrook* the court found the following persuasive when determining a standard for the reliability of the information an officer relies upon when evaluating safety:

When the investigatory stop itself is based on information supplied by another person, rather than on the officer's personal observation, the information must carry some indicia of reliability to justify the initial stop. *However, when an officer has made a reasonable investigatory stop and realizes that he has information that the individual carries a gun, the officer has a right to neutralize the threat of physical*

harm to himself and others during the investigative stop by patting the individual down for weapons— regardless of whether his information that the individual carries a gun has been verified or came from a “reliable” informant.

State v. Holbrook, 33 Wn. App. at 695 (italics original).

In this case Officer Makein made a legitimate stop on Russell for a traffic infraction. Officer Makein is allowed to use the information he had, from personal knowledge, that a week earlier Russell had a loaded firearm in his possession. It would be absurd to tell an officer that they must disregard personal knowledge of a possible threat to their safety because they could not articulate the legal means for which they obtained the information.

The State maintains that it is not required to prove the lawfulness of the August frisk, *arguendo*, Officer Makein’s knowledge of the gun was obtained by a lawful search. One exception to the warrant requirement to search a person is a person’s lawful custodial arrest. *State v. Craig*, 115 Wn. App. 191, 194-95, 61 P.3d 340 (2002).

Making or possessing burglary tools is a gross misdemeanor offense. RCW 9A.53.020. A misdemeanor or gross misdemeanor offense may be charged by an issuance of a citation from the arresting officer or any other peace officer. RCW 10.37.015(1);

CrRLJ 2.1(b)(1). A person may be under custodial arrest and still issued a criminal citation for the crime they are arrested for if that crime is a misdemeanor or gross misdemeanor. CrRLJ 2.1(b)(1).

Russell argues that the August 28, 2011 incident resulted in the issuance of a misdemeanor that the State did not prove that the evidence obtained from search of Russell's person was lawful. Brief of Respondent 9; Petition for Review 7-10. Russell and the driver of the car were casing other cars and had burglary tools in the vehicle when it was stopped on August 28, 2011. RP 13, 22-23. The testimony during the CrR 3.6 hearing went as follows:

Q. And just so we know what's going on here, just - - my understanding is that on that day it looked like the arrest was for some misdemeanors; is that right.

A [by Officer Makein]. The female, yes.

Q. And Mr. Russell.

A. Mr. Russell, I didn't do that part of the investigation. I believe it was a misdemeanor.

RP 22.

While Officer Makein's knowledge of the exact crime Russell was arrested for is obviously vague, he testified that Russell was arrested, for what he believed was a misdemeanor offense. RP 22. This is the only reference to the arrest of Russell on August 28, 2011 in the report of proceedings. See RP. The State satisfactorily

proved the information Officer Makein based his officer safety concern upon was lawfully obtained.

D. OFFICER MAKEIN RECEIVED CONSENT FROM RUSSELL TO REMOVE THE CASE FROM RUSSELL'S POCKET AND OPEN THE CASE.

The State does not believe this Court needs to reach the issue of consent because Officer Makein's actions were lawful when he removed the case from Russell's jacket and opened the case to make sure it did not contain a weapon. If this Court does determine it must decide if Russell gave consent to Officer Makein to remove and open the case, the State argues in the alternative that there was valid consent.

A person can consent to being searched by an officer. The State must show that the consent was voluntarily and freely given. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). The determination whether consent is voluntarily given is a question of fact. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The court must look at the totality of the circumstances. *Reichenbach*, 153 Wn.2d at 132. The court may consider a number of factors when determining if consent was voluntary. *O'Neill*, 148 Wn.2d at 588. These factors include, but are not limited to: the intelligence or degree of education of the person, were Miranda

warnings given and was the person advised of the right to consent. *Id.* at 588. "While knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding voluntary consent, however." *Reichenbach*, 153 Wn.2d at 132 (citations omitted). The court may also weigh such factors as implied or express claims of police authority to search, a defendant's cooperation, an officer's deception as to identity or purpose and previous illegal actions of the police. *Id.*

Russell consented to having the case removed from his pocket and the officer's subsequent search of the case. Russell had prior interaction with law enforcement on August 28, 2011. RP 10. Russell's contact with Officer Makein on September 5, 2011 had been cooperative. RP 28. Officer Makein told Russell he was not free to leave and he was going to be frisked due to the previous contact Russell had with Officer Makein. RP 30. Russell was detained but not in handcuffs. RP 45. When Officer Makein frisked Russell he felt a box in Russell's pocket and asked, "What's this[?]" to which Russell responded it was a box. RP 18. Officer Makein asked, "[d]o you mind if I take it out?" and Russell replied, "Okay." RP 18-19. Once the box, a Maglite case, was removed from

Russell's pocket, Officer Makein asked Russell for consent to search the case, which Russell granted. RP 19.

The totality of the circumstances in this case demonstrates Russell consented to not only the removal of the case from his pocket but also Officer Makein's opening of the case. Unlike, *Reichenbach*, there was no illegal activity by Officer Makein that would invalidate Russell's consent. Also, unlike *O'Neill*, Russell did not object or say, "no" nor did Officer Makein pressure Russell or threaten him with a warrant. This Court should find Russell's consent valid and voluntary.

IV. CONCLUSION

The State proved Officer Makein had a legitimate officer safety concern when he stopped Russell in September 2011. This Court should affirm the Court of Appeals and reverse and remand the case back to the trial court so the State may proceed to trial.

RESPECTFULLY submitted this 17th day of January, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

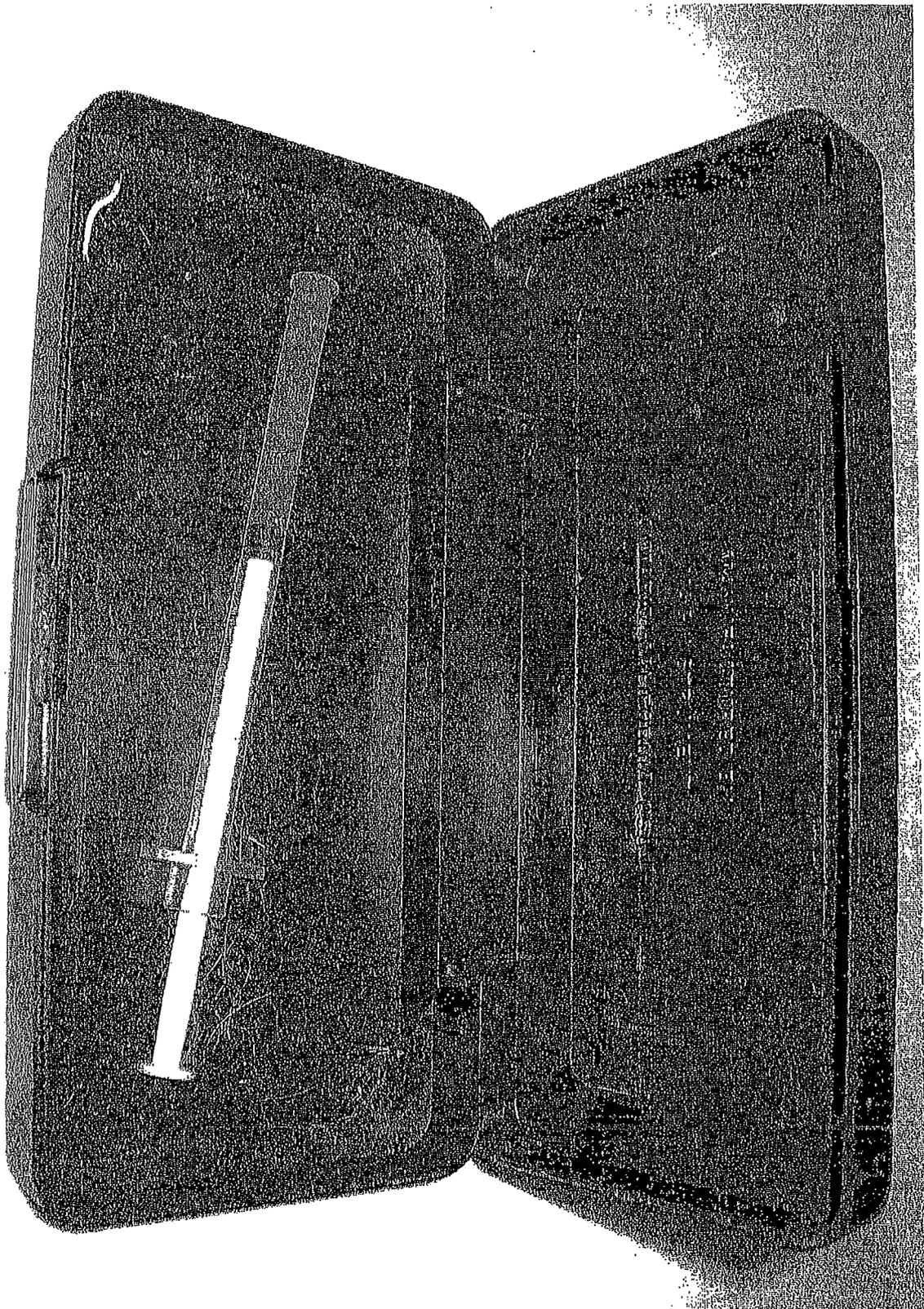
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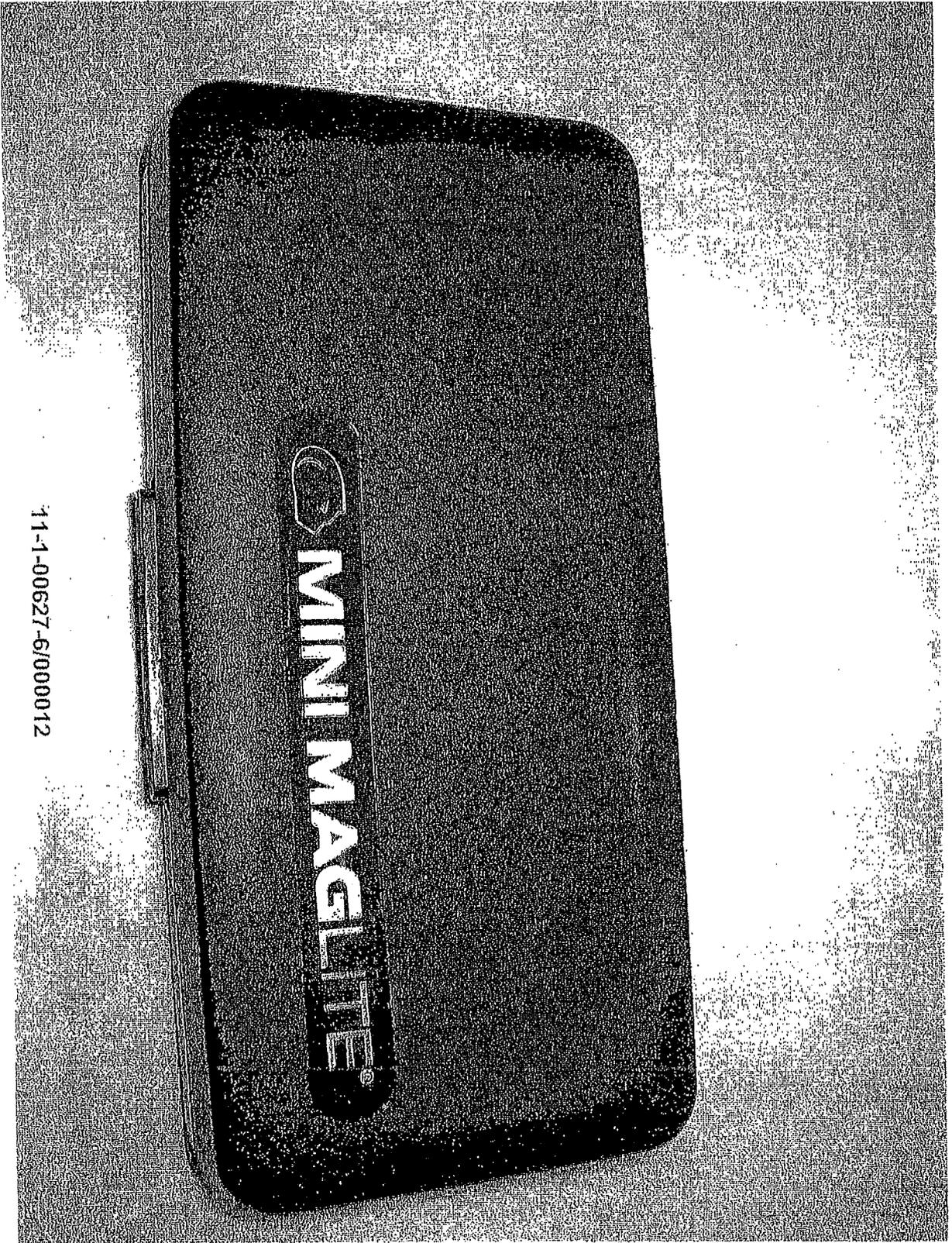

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Appendix A

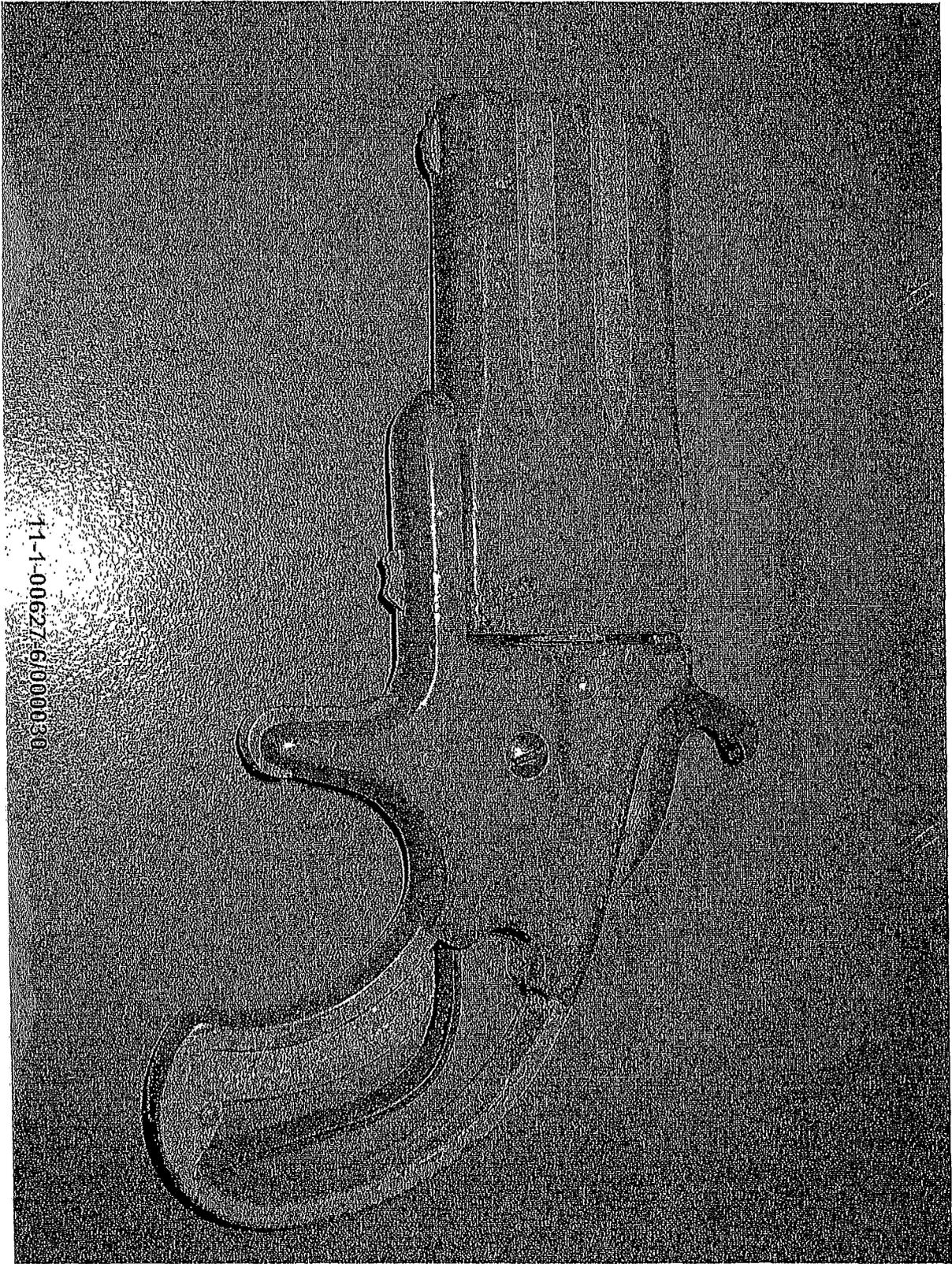
Exhibits

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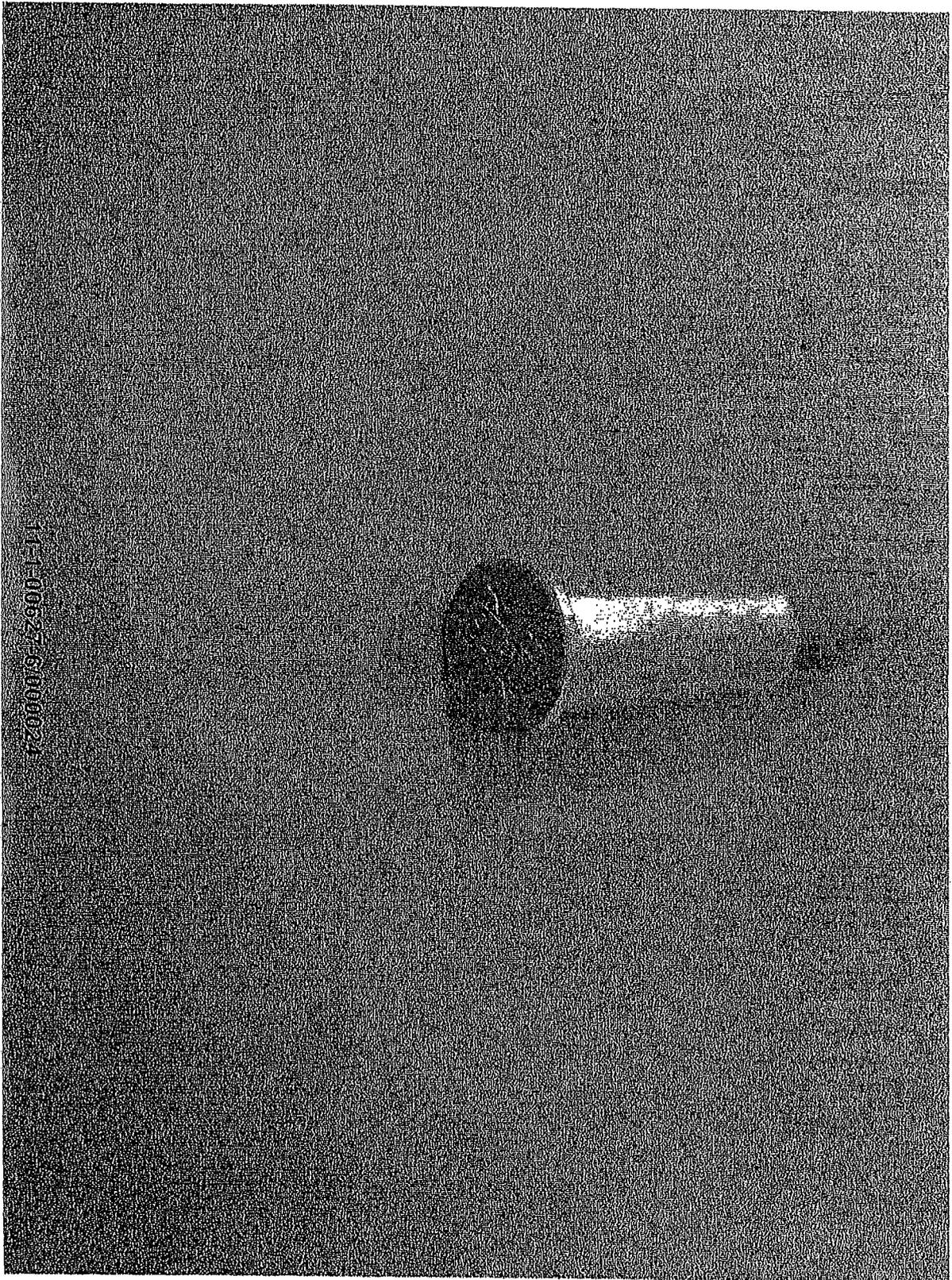


11-1-00627-6/000012



11-1-00627-61000030





11-110627-600021

Appendix B

Findings of Fact and Conclusions of Law

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

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KATHY BRACK, CLERK

BY
DEPUTY

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

STATE OF WASHINGTON,

Plaintiff,

vs.

TANNER RUSSELL,

Defendant.

NO. 11-1-00627-6

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER SUPPRESSING
EVIDENCE AND DISMISSING CASE
WITH PREJUDICE AFTER 3.6
SUPPRESSION HEARING

On November 16, 2011, a Suppression Hearing was held following the filing of Defendant's motion to suppress evidence. The hearing was held before the Honorable Richard Brosey. The above-named Defendant, his attorney of record Joseph P. Enbody, and Deputy Prosecuting Attorney Shane O'Rourke were all present. The Defendant alleged that Officer Deric Makein unlawfully seized the Defendant and then unlawfully searched the Defendant's person and property subsequent to his seizure. The Court reviewed the court file and briefing of the parties, heard testimony from Officer Makein and the Defendant, heard argument from both parties, and now makes the following findings of fact, conclusions of law, and orders:

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDERS REGARDING
SUPPRESSION HEARING

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I. FINDINGS OF FACT

- 1.1 Officer Deric Makein is a trained law enforcement officer that works for the City of Centralia Police Department. The parties do not dispute that Officer Makein is a fully trained and experienced law enforcement officer.
- 1.2 On September 5, 2011, Officer Makein was working patrol within the city limits of Centralia in Lewis County, Washington.
- 1.3 On September 5, 2011 at approximately 11:00 p.m., Officer Makein was traveling westbound on Harrison Avenue in Centralia in his patrol vehicle when he observed a bicycle passing him in an eastbound lane at the intersection just before the I-5 freeway overpass.
- 1.4 Officer Makein noticed that the bicycle did not have an activated headlamp during hours of darkness as required by RCW 46.61.780.
- 1.5 After the bicyclist passed him, Officer Makein noticed that the bicyclist crossed over into the westbound lane while still in the intersection and continued to travel in an eastbound direction, which would be into oncoming traffic.
- 1.6 The bicyclist continued to travel eastbound in the westbound lane under the I-5 freeway overpass, through the next intersection, past the freeway onramps, and up about another block to the AM/PM. The AM/PM was well lit and on one of the busier streets in Centralia.
- 1.7 Based upon observing the bicyclist had no headlamp and lane travel in the opposite lane, Officer Makein decided to make a traffic stop and turned his vehicle around. Once he caught up to the bicyclist, Officer Makein made the traffic stop in the AM/PM parking lot.
- 1.8 Officer Makein got out of his patrol vehicle and told the bicyclist that he was being stopped and detained for the traffic infractions of riding a bicycle after darkness and for his lane travel.
- 1.9 Almost immediately after telling the bicyclist why he was being stopped, Officer Makein recognized the bicyclist from a prior investigation as the above-named Defendant, Tanner Russell.
- 1.10 On August 28, 2011 after midnight, Officer Makein stopped a motor vehicle in which the Defendant was a passenger for an equipment violation.

- 1 1.11 The driver of the vehicle in the August 28 incident had a
2 felony warrant for her arrest and further investigation
3 revealed that the driver and Defendant were in possession of
4 burglary tools. The investigation and interview with the
5 female driver revealed that the Defendant and female driver
6 were casing a car and a place in the area to go back to later
7 to steal a car.
- 8 1.12 During the criminal investigation on August 28 into the
9 burglary tools the Defendant was detained and questioned by
10 Officer Makein. During the questioning of the Defendant,
11 Officer Makein asked the Defendant very clearly on two
12 separate occasions whether he had any weapons on his person
13 and the Defendant lied and said he did not.
- 14 1.13 During the August 28 incident while Officer Makein was
15 present, another officer frisked the Defendant for weapons and
16 found a very small two chamber .22 caliber pistol (Derringer
17 type) that was loaded with one round in the Defendant's right
18 pant pocket. The pistol was a thin, lightweight pistol that
19 could be fully concealed in the palm of one's hand. The
20 pistol appeared to be designed for close range shooting.
- 21 1.14 During the prior stop on August 28, 2011, the Defendant did
22 not try to reach for the gun, was not violent in any way, was
23 not belligerent in any way, and the result of the August 28,
24 2011 incident was the issuance of a misdemeanor citation.
- 25 1.15 Exhibits 3, 4, and 5 that were admitted into evidence fairly
26 and accurately depict the very small two chamber .22 caliber
pistol (Derringer type) that was located on the Defendant's
person on August 28, 2011.
- 1.16 On September 5, 2011, when Officer Makein recognized that the
bicyclist was the Defendant and someone that had lied about
having a loaded gun on him eight days earlier, Officer Makein
told the Defendant that he was going to search him for weapons
for officer safety reasons. Officer Makein asked the
Defendant, "Did you go and get your firearm back yet?" and the
Defendant replied, "No. I don't want nothing to do with it."
That conversation took place prior to the search.
- 1.17 At the time of the stop, however, Officer Makein had no
knowledge or information that the Defendant was a felon or a
violent felon.
- 1.18 In deciding that he reasonably believed the Defendant may be
presently armed, Officer Makein considered: that the previous
August 28 incident was still fresh in his mind, he was
concerned about the Defendant's prior deception, the time of

1 day, the fact that there were no other officers present with
2 him, and that the gun found previously was small enough to be
3 readily concealed and could result in a lethal shot if used at
4 close range. Officer Makein testified that he was also
concerned that the Defendant could not only be presently armed
with a handgun, but also with a weapon that could harm him,
but what that weapon could have been was not identified by
Officer Makein.

5 1.19 Officer Makein began to frisk the Defendant for weapons and in
6 the Defendant's right front pocket he felt a hard boxy type
7 item that was approximately six inches in length, four inches
in width, and an inch or two deep.

8 1.20 Exhibits 1 and 2 that were admitted into evidence fairly and
9 accurately depict the case that was felt by Officer Makein and
found in the Defendant's pocket.

10 1.21 Officer Makein believed the box felt large enough to contain
11 a weapon such as found on the Defendant's person on August 28
as well as another weapon that could harm him.

12 1.22 Based on the initial feel of the case, Officer Makein felt he
13 was not able to immediately eliminate the contents of the case
as a possible threat and believed he needed to check what was
in the box for his safety.

14 1.23 At the time the frisk was occurring, Officer Makein was the
15 only officer present. During the initial contact the
16 Defendant appeared somewhat nervous. The road that the
17 Defendant had been traveling the opposite direction is one of
the busiest thoroughfares in Centralia, but not too busy late
at night.

18 1.24 Officer Makein then asked the Defendant what the object was
19 and the Defendant said it was a box. However, when the case
was felt by Officer Makein, he knew that the box itself was
not a weapon.

20 1.25 Once the case was in the officer's hands, Officer Makein
21 testified that any perceived danger of what may have been in
the case was eliminated.

22 1.26 Officer Makein then asked the Defendant if it was okay if he
23 removed the case from the Defendant's pocket and search the
24 case's contents. The Defendant gave voluntary consent to
having the case removed from his pocket and searched.

- 1 1.27 Based upon the dimensions of the box Officer Makein believed
2 it could have contained a weapon such as the Derringer type
3 pistol seized on August 28, 2011.
- 4 1.28 The pistol from the August 28, 2011 incident appeared to be an
5 older type pistol and did not have any sort of trigger guard.
- 6 1.29 Officer Makein did not shake the case prior to opening it
7 because of a concern that the case might contain a loaded
8 firearm.
- 9 1.30 Because of the very small size of the pistol (Derringer type)
10 from the prior incident and the size of the case that he was
11 holding, Officer Makein believed the case could contain a
12 weapon that could harm him though he stated that the syringe
13 weighed only a fraction of what the pistol weighed.
- 14 1.31 Once the case was opened, Officer Makein located a syringe
15 full of methamphetamine. This evidence found in the case
16 constitutes the entirety of the State's evidence against the
17 Defendant in the above-captioned matter.
- 18 1.32 The Defendant was not advised he could withhold his consent to
19 being searched or the container opened following the frisk.
- 20 1.33 The order of the Court in paragraph 3.1 suppressing evidence
21 found in the case in the Defendant's pocket effectively
22 terminates the State's case.

23 II. CONCLUSIONS OF LAW

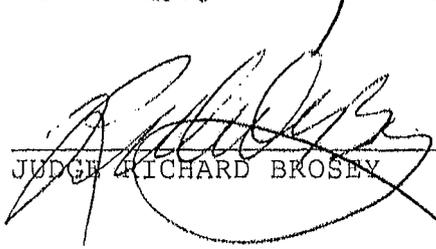
- 24 2.1 Officer Makein had a reasonable suspicion that two traffic
25 infractions were committed by the Defendant. Specifically,
26 riding a bicycle without a headlamp after darkness and
improper lane travel.
- 2.2 Given that Officer Makein had a reasonable suspicion that the
Defendant committed traffic infractions, the stop of the
Defendant and the initial detention and seizure of the
Defendant to enforce those traffic infractions was lawful.
- 2.3 Officer Makein was only lawfully entitled to detain the
Defendant long enough to ask the Defendant for identification,
check the Defendant's identification through dispatch, and
issue the traffic infractions.
- 2.4 Other than riding his bicycle without a mounted headlamp and
improper bicycle lane travel, Officer Makein had no
articulable suspicion of any criminal activity.

- 1 2.5 Since there were no movements that could be interpreted as an
 2 attempt to retrieve a weapon, since the Defendant made no
 3 threatening gestures or words, since the location of the stop
 4 was in a busy and well lit area without any evidence that the
 5 area was a high crime area, and since there was no other
 6 suspicious conduct, the search of the Defendant was
 7 unjustified under these particular circumstances.
- 8 2.6 Even if the search was justifiable, once the container was
 9 removed and in the control of Officer Makein, Officer Makein
 10 acknowledged and the Court so concludes that any perceived
 11 threat to Officer Makein from the container was eliminated and
 12 the search of it's contents was therefore unreasonable and
 13 unjustified.

14 **III. ORDERS**

- 15 3.1 The Defendant's motion to suppress all evidence found in the
 16 case located on the Defendant's person by Officer Makein is
 17 hereby granted.
- 18 3.2 The Court's Order suppressing all evidence under paragraph 3.1
 19 effectively terminates the State's case prior to trial.
- 20 3.3 Since the Court's Order effectively terminates the State's
 21 case prior to trial, this criminal matter is hereby dismissed
 22 with prejudice as the suppression order of this Court leaves
 23 the State with insufficient evidence to proceed.

24 DONE IN OPEN COURT this 5th day of January, ~~2011~~ 2012

25 
 26 JUDGE RICHARD BROSLY

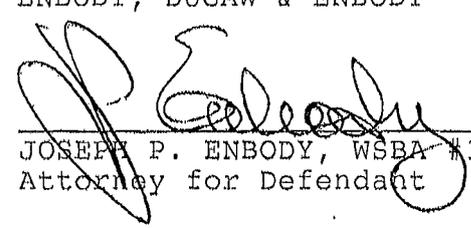
Presented by: 

Approved as to form; Notice
 of presentation waived:

LEWIS COUNTY PROSECUTOR

ENBODY, DUGAW & ENBODY


 SHANE M. O'ROURKE, WSBA #39927
 Deputy Prosecuting Attorney

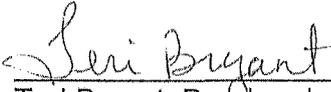

 JOSEPH P. ENBODY, WSBA #1796
 Attorney for Defendant

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 89253-9
Respondent,)	
vs.)	DECLARATION OF
)	EMAILING
TANNER ZACHARY ROY RUSSELL,)	
Petitioner.)	
)	
)	
)	
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 17, 2014, the Petitioner was served with a copy of the **Respondent's Supplemental Brief** by emailing same to Backlund & Mistry, counsel for the Petitioner at: Backlundmistry@gmail.com.

DATED this 17th day of January, 2014, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

OFFICE RECEPTIONIST, CLERK

From: Teri Bryant <Teri.Bryant@lewiscountywa.gov>
Sent: Friday, January 17, 2014 11:53 AM
To: OFFICE RECEPTIONIST, CLERK; Backlund & Mistry (backlundmistry@gmail.com)
Subject: State of Washington vs. Tanner Zachary Roy Russell, No. 89253-9
Attachments: Russell.tan Supp. Brief 89253-9.pdf

Attached for filing in the above referenced case is the Respondent's Supplemental Brief.

Thanks,

Teri Bryant, Paralegal
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