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SUPREME COURT NO. 91986-1

(COURT OF APPEALS NO. 32233-5-III)

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**SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

PETITIONER,

v.

CODY RAY FLORES,

RESPONDENT.

**PETITIONER'S SUPPLEMENTAL BRIEF
TO PETITION FOR REVIEW**

**GARTH DANO
PROSECUTING ATTORNEY**

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 ORIGINAL

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A. ISSUES PRESENTED

Did the trial court error in suppressing a gun found in Flores' pants when he was stopped pursuant to the lawful arrest of his companion, officers briefly moved him where they needed him to secure the scene, and the gun was discovered during that process?

B. STATEMENT OF THE CASE

Officer Kyle McCain was at the Moses Lake Police Department when 911 received a call from a person who initially gave her name, then changed her mind and said she wished to be anonymous. CP 59. She reported that Giovanni Powell had pointed a gun to someone's head and was at 1120 S. Alderwood in Moses Lake. *Id.* Officer McCain responded to the area. CP 60. En route he was informed that Giovanni Powell had a warrant for his arrest. *Id.* Upon arriving in the area he observed Giovanni Powell and another individual, later identified as Cody Flores, walking down the street. *Id.* Both had their hands in their pockets. Giovanni Powell is known to Officer McCain and he recognized him on sight. *Id.* In addition Powell is a known gang member/associate. *Id.*

Officer McCain drew his weapon, held it at the low ready, and said "Geo, you need to stop." RP 72. Both Flores and Powell stopped. *Id.*, CP 60. Officer McCain ordered both men to their knees, and ordered

them to separate from one another. *Id.* Officer McCain was soon joined by other officers, including Officer Paul Ouimette. CP 60. Officer McCain took Powell into custody by ordering him to walk backwards towards him. *Id.* While Officer McCain was doing that Officer Ouimette ordered Flores to walk towards him backwards with his hands up. CP 61. As Flores was walking back to Officer Ouimette he volunteered, without prompting, that he had a gun that Powell gave him. *Id.* Officer Ouimette told Flores to just keep walking backwards and they would deal with it in a minute. *Id.* Officer Ouimette then detained Flores and removed the gun from his pants. *Id.* At this point the telephone tip was corroborated and officers had reasonable suspicion to detain Flores and investigate further. In doing so they discovered he had a felony conviction, justifying his arrest for unlawful possession of a firearm.

In a hearing conducted pursuant to CrR 3.6 Flores defended on the ground that a *Terry* stop of Flores was invalid. The State agreed that there was no justification for a *Terry* stop, but argued that officer safety, particularly *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999), justified Flores' brief detention and movement as a companion of the arrestee Powell. The trial court suppressed the firearm found in Flores' pants. CP 56. The court relied on *State v. Adams*, 144 Wn. App. 100, 106-07, 181 P.3d 37 (2008), to conclude "there must be articulable circumstances

indicating the particular person in the arrestee's company poses a threat to officer safety to justify that person's detention and frisk.” *Id.*

The Court of Appeals affirmed the trial court in a published case. The majority agreed with the State that *Terry* stop standards were not relevant, but then went on to apply, without citation, a novel standard of review and to distort the facts to reach its holding. The concurrence held that the case should have applied *Terry* standards, affirmed on that ground, and criticized the majority decision for its distortion of facts.

C. ARGUMENT

Officers McCain stopped Powell legitimately pursuant to a warrant. He ordered Powell to stop and Flores stopped with him. McCain had information that Powell was just involved in a violent crime involving a gun. Officer McCain acted reasonably in securing Powell and Flores. Officer Ouimette acted reasonably in assisting McCain and ordering Flores back to him. Flores told Ouimette that he had a gun Powell gave to him. Ouimette did not search Flores until after he had reasonable articulable suspicion that Flores had the gun. Officers acted well within their discretion in securing the scene of Powell's arrest. The lower courts should be reversed and the case remanded for trial.

1. The State does not raise issues for the first time in its petition for review.

a. The appropriate remedy for a new legal standard is remand.

The State does not raise issues for the first time in its petition for review; instead the Court of Appeals raised them for the first time in its opinion. When the Court of Appeals decides a case on a basis not argued by either party, and not supported by previous case law the first place a party has to address it is in a petition for review to the Supreme Court.

In the trial court and Court of Appeals Flores argued that the stop was an invalid *Terry* stop, and never addressed *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), and *State v. Parker*, 139 Wn.2d 486, 502, 987 P.2d 73 (1999). The first time Flores addressed those cases was in its answer to a petition for review. The trial court based its decision on a misreading of *State v. Adams*, 144 Wn. App. 100, 106-07, 181 P.3d 37 (2008), and never addressed the *Mendez/Parker* cases. In other words, no one prior to the Court of Appeals decision contemplated the standard used. In this case the Court of Appeals applied a novel standard, instead of a reasonable officer standard; they applied a new “stop motion” standard. Parties develop facts in accordance with existing case law. If an appellate court changes the legal standard in a case, the appropriate action is to remand in light of the new standard if the facts were not adequately developed to meet that standard.

The Court of Appeals ruling seems to hold that Officer Ouimette's authority over Flores disappeared the second Powell was secured. This is different than a reasonable officer standard, because a reasonable officer would finish what he was doing with Flores (calling him back) before diverting his attention to communicate with a fellow officer and finding out Powell was secured. However, assuming the Court of Appeals standard is correct, the trial court never made a finding that Powell was secured before Flores said he had the gun. The State did not ask for it, as it was focused on the *Mendez/Parker* reasonable officer standard. Flores did not ask for it, as he was focused on arguing this was not a valid *Terry* stop.

The Court of Appeals departed from the existing legal standard. Flores never addressed the *Mendez/Parker* standard until his answer to the petition for review, instead insisting this was an invalid *Terry* stop. The State never argued this case as a valid *Terry* stop, instead arguing *Mendez/Parker*. Thus neither side argued for the standard developed by the Court of Appeals, and the facts developed below did not reflect that standard. If the Court of Appeals standard is upheld, the case should be remanded for factual development in light of that standard. *See Guillen v. Pierce County*, 144 Wn.2d 696, 746, 31 P.3d 628 (2001).

b. The State is not asking for a new remedy.

The State is not asking for a remedy other than suppression if the officers acted without authority of law. The State is asserting that is the proper question is whether the Officers acted with authority of law, not, as the Court of Appeals held in part, whether Flores did something wrong during the stop. In *State v. Horrace*, 144 Wn.2d 386, 28 P.3d 753 (2001), the Officer noted furtive movement of a passenger in a car. While furtive movements are certainly relevant to the analysis, they are not a necessary prerequisite to moving a companion of an arrestee under *Parker*. The focus should be on the Officer's actions, not Flores'.

2. Officer Ouimette acted appropriately to move Flores where he needed him, and did not expand the scope or duration of the stop until after he found out Flores had the gun.

Flores does not argue that McCain's stop of Flores was unreasonable. Instead he contends that Ouimette expanded the scope and duration of the stop in an attempt to investigate the crime reported by the anonymous caller. But that conclusion, that Officer Ouimette was solely interested in investigating the crime, does not follow from the evidence Flores cites. Officer Ouimette testified his concern was that "there was a firearm we were responding to. It appeared to me he (Flores) was involved in that somehow." RP 88. The fact that Officer Ouimette was concerned about the gun was perfectly consistent with securing the scene

of Powell's arrest. The reported gun was the major articulable threat to that scene.

In addition, from Officer Ouimette's point of view, there was reasonable suspicion that Flores was somehow involved. When Ouimette arrived the information available to him was that McCain had placed Flores at a position of disadvantage, Powell was in the process of being called back, Powell had a warrant and there was a report of a gun. McCain was busy dealing with Powell; Ouimette did not have the opportunity to clarify with McCain what exactly was going on at that moment. No doubt had McCain and Ouimette had a few moments to talk about what was going on Ouimette would have found out Flores simply stopped when Powell stopped. But McCain was busy dealing with Powell when Ouimette arrived. By the time those few moments became available to discuss the situation Flores had already told Ouimette he had the gun and Ouimette had removed it from Flores' pants.

Officer Ouimette did not extend the duration of Flores' stop. Flores was stopped until Powell was secured. Ouimette started calling Flores back before Powell was secure. Flores would have been stopped and held at a position of disadvantage for the amount of time it took to secure Powell. Officer Ouimette calling Flores back did not add any appreciable amount of time to the stop. Nor did Officer Ouimette

unreasonably or unnecessarily extend the scope of the stop. Flores seems to argue the Officers should have let him sit out there some distance from the Officers while they dealt with Powell instead of ordering Flores back to them. First, Flores was already lawfully seized; it is hard to see how his privacy rights are more invaded by the Officers bringing Flores to them than leaving him out at a distance. In addition having Flores come back to the Officers means they can better observe him, better secure the scene, and communicate with each other and Flores. Ordering Flores to come back to the Officers does not extend the duration or scope of the stop. Flores is detained for the same amount of time, and his privacy is impacted in the same amount, whether or not Ouimette calls Flores back.

Flores cites *State v. Cole*, 73 Wn. App. 844, 871 P.2d 656 (1994), as supporting his case. But *Cole* was based on an infraction. *Parker* explicitly acknowledges that the circumstances of an arrest are different. Not only that, but Officers had an articulable reason to believe a gun was at play in Flores' stop. There was no such indication of danger in *Cole*. *Cole* is simply not on point. Flores was not frisked or searched in any way until after he stated he had the gun. By the time anything happened to Flores that could reasonably be called a search, Officer Ouimette had sufficient grounds for a *Terry* stop. He had the anonymous tip that Powell had pointed a gun at someone's head and Flores' statement that he had a

gun Powell had given him. At that point there was reasonable suspicion that Flores was somehow involved in a crime, and Ouimette could seize the gun, both to secure the scene and investigate further.

Officer Ouimette's interest in the gun was exactly what one would expect him to be interested in in securing the scene. Officer Ouimette's actions did not extend the scope or duration of the stop until he had reasonable suspicion sufficient to support a *Terry* stop. Both officers acted within their authority under the law in briefly detaining Flores and moving him to facilitate Powell's arrest.

D. CONCLUSION

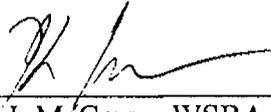
One of the tragic iconic images of our time is a group of people, often students, being led by officers out of a building in a line with their hands up after a mass shooting. Officers do not do this because they think each individual student has a gun or participated in the shooting, but because they need to control the scene and move people to a secure place in a safe manner. Until this case courts have routinely deferred to officers on the need to secure a scene of arrest and move bystanders to where they need to be. This court should reaffirm its precedents that Officers may move the companion of an arrestee during an arrest, that courts view a scene through the eyes of a reasonable officer, and that courts defer to Officers where safety is a primary issue. The lower courts should be

reversed and the case remanded back for trial. Alternatively, if the court changes its precedent and uses the stop motion standard applied by the Court of Appeals, it should send the case back for fact finding under that standard.

Dated this 31st day of December 2015.

Respectfully submitted,

GARTH DANO
Prosecuting Attorney

By: 
Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney

No. 91986-1

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Petitioner,)	
)	
v.)	
)	
CODY RAY FLORES,)	DECLARATION OF
)	SERVICE
Respondent.)	

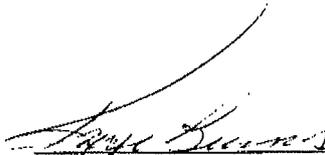
Under penalty of perjury of the laws of the State of Washington,
the undersigned declares:

On this date I e-mailed to David Bustamante, Attorney for Respondent, and hand delivered to David Bustamante's Office (Grant County Public Defender's Office), a copy of the Petitioner's Supplemental Brief to Petition for Review in this matter.

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Dated: January 4, 2016.


Kaye Burns

OFFICE RECEPTIONIST, CLERK

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Subject: State of Washington v. Cody Ray Flores - Case No. 91986-1

Attached for filing is Petitioner's Supplemental Brief to Petition for Review in the above matter. Thank you.

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