

66406-9

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NO. 66406-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PAUL VILLALON,

Appellant.

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

REPLY BRIEF OF APPELLANT

JAN TRASEN
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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 SEP 21 PM 4:56

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A. ARGUMENT

1. BECAUSE THE TERRY STOP WAS UNREASONABLE AND EXCESSIVE, REVERSAL IS REQUIRED.

a. The warrantless search of Mr. Villalon did not meet the Terry exception to the warrant requirement. Since the State has belatedly filed its findings in the instant case, it has apparently settled on Terry as a justification for the stop of Mr. Villalon. Resp. Brief. Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This argument must fail.

The State implies that Mr. Villalon somehow misconstrues the record. The State argues that Deputy Gervol felt a hard, square object in Mr. Villalon's pocket and did not immediately recognize it as a cell phone. Resp. Brief at 11. This, the State continues, required the officer not only to remove the phone from Mr. Villalon's pocket, but to manipulate the phone in order to ascertain whether the phone was, according to Deputy Gervol, one of those rare "cellular phones that are .22 caliber handguns." RP 14.

This manipulation and handling of the phone, which caused Mr. Villalon's identification card to fall out, was excessive, under Terry and its progeny. Terry, 392 U.S. at 21. It strains credibility

that this simple clamshell model cell phone could have endangered the officer – far from the type of “rational inferences” reasonably warranting an intrusion under Terry. 392 U.S. at 21.

Deputy Gervol, after all, testified that nothing less than “a piece of paper in [a suspect’s] pocket” would be considered a possible firearm, as far as he was concerned, so this officer’s conclusions would need to be assessed in this context. RP 27.

This is not the “reasonable suspicion” contemplated by Terry and the Washington and United States Constitutions. U.S. Const. amend. 4; U.S. Const. amend. 14; Const. art. I, § 7; Terry, 392 U.S. at 21; State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

b. Because Mr. Villalon was searched in violation of the Fourth Amendment and Article I Section 7, reversal of his conviction is required. If a search is unlawful, evidence obtained therefrom is deemed inadmissible as the “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Garvin, 166 Wn.2d at 254.

Even if this Court finds the Terry stop of Mr. Villalon was permissible, the scope of the “frisk” was exceeded when police went into Mr. Villalon’s pockets and unreasonably expanded the

search by removing and then manipulating his cell phone – allegedly in order to “protect” themselves during the investigation.

As the Supreme Court noted in Garvin, “To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons [] searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment.” 166 Wn.2d at 254 (citing State v. Hobart, 94 Wn.2d 437, 447, 617 P.2d 429 (1980) (reversing due to illegal search) (emphasis added)).

2. THE STATE’S LATE FILING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUIRES REMAND.

Where a defendant has moved for suppression and a hearing on the merits is conducted, the trial court is obligated by court rule to “enter written findings of fact and conclusions of law.” CrR 3.6(b); see also State v. Barber, 118 Wn.2d 335, 343, 823 P.2d 1068 (1992). Such findings are not inconsequential, as “where findings are required, they must be sufficiently specific to permit meaningful review.” In re LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986); see also State v. Head, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998).

Here, the State failed to file Findings of Fact and Conclusions of Law until June 6, 2011, although the suppression and hearing and trial on the matter were conducted almost seven months earlier, on November 22, 2010, before the Honorable Ira J. Uhrig.

On December 13, 2010, Mr. Villalon filed notice of right to appeal.

On May 19, 2011, Mr. Villalon filed his Opening Brief in the instant appeal, relying by necessity only on the trial court's oral findings. As argued in the Opening Brief, the trial court's anecdotal comments in its oral findings were wholly inadequate as to the reasonableness of the officers' conduct in elevating the scope of the search of Mr. Villalon when the officers seized and examined Mr. Villalon's identification card.⁵ The trial court's apparent findings as to the reasonableness of the police conduct were ambiguous and insufficient to provide guidance to this Court and to appellate counsel on review. It was not even clear whether the trial court had denied suppression based upon Terry or upon another body of law.

⁵ In its oral findings, the trial court finds that the officer's removal of the cell phone was reasonable, and that the officer "could find" that the identification card placed into the cell phone became visible to him when the phone was opened. No further findings concerning the officer's apparent manipulation of the identification card were made by the court. RP 56-57.

The filing of written findings by the State on June 6, 2011 – more than two weeks following the filing of Mr. Villalon’s Opening Brief – raises the specter that the Findings might have been tailored. This is a practice frowned upon in this state. See State v. Cannon, 130 Wn.2d 313, 330, 922 P.2d 1293 (1996).

In an affidavit filed by the State, it is denied that the Deputy Prosecutor had any opportunity to examine the appellate brief in this case before preparation of the findings in this matter. However, the fact that the findings were filed so late in the appellate process, and that the trial court’s oral findings concerning the removal of the cell phone were so sparse, lead Mr. Villalon to argue that the late filing cause undue prejudice, requiring reversal. See Cannon, 130 Wn.2d at 330.

B. CONCLUSION

For the foregoing reasons, Mr. Villalon respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 21th day of September, 2011.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 66406-9-I
)	
PAUL VILLALON,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF SEPTEMBER, 2011.

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