

No. 68057-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSE CARDENAS-MURATALLA,

Appellant.

FILED  
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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bruce Hilyer

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

A police officer tased and then shot Jose Cardenas-Muratalla in the torso when he did not immediately respond to a command to “get down on the ground.”

It is legal to carry a gun in Washington State. The anonymous 911 caller who told a police dispatcher that he saw a Hispanic man with a gun in downtown Seattle did not describe the commission of any crime. Nor could the police officers who responded to the 911 call identify the crime they believed had been committed when they ordered Cardenas-Muratalla to “get down on the ground.” Under controlling precedent from the United States Supreme Court and the Washington Supreme Court, the command was illegal, and the after-acquired evidence should have been suppressed.

The State nevertheless attempts to defend the seizure on a variety of grounds, all of which depend on a mischaracterization of the facts or the relevant decisional law. The State’s arguments are unconvincing. The lower court should be reversed.

1. The State misstates or omits salient facts.

The State's response is rife with mischaracterizations and omits critical facts. In particular:

- The State repeatedly notes that the 911 caller described seeing a gun with a silver handle, see Br. Resp. at 3, 17, and even notes that "he described the weapon for the police," in support of its claim that the anonymous caller was reliable, Br. Resp. at 23, but does not mention anywhere that the gun that was recovered was not a silver weapon, but a solid black Ruger. 1RP 69.
- Although the video evidence is concededly the best evidence of what occurred, the State faults the quality of the DESC video because it records one to two frames per second. Br. Resp. at 13-14. The State asserts that it is "hardly surprising that the fluffing gesture [described by Myers] cannot be clearly seen on the video." Br. Resp. at 14. Since Cardenas-Muratalla did not alter his stance at any time, no fluffing gestures are observable. The video shows that Cardenas-Muratalla has one hand by his side and one by his ear, apparently holding a cell phone. Moreover, the State omits mention of the fact that in the police dash-cam video, which the State defends as accurately depicting the events it recorded, Cardenas-Muratalla remained in this same posture during the approach of the police, up until the time he was illuminated by a spotlight and began to walk away. It is not physically possible, nor is it plausible, that Cardenas-Muratalla would have moved his hands in the gesture described by Myers to coincide with the gaps in the video.
- The State claims that Lang's view of Cardenas-Muratalla was obstructed. Br. Resp. at 14 (citing RP

109). This is incorrect: Lang agreed that she had a “very clear view of this person, meaning nothing obstructing the view.” 1RP 86. She agreed that “he was not doing anything with his hands at all that was suspicious.” *Id.* She agreed there were “no concealing motions he was making with his hands ... as he stood in the doorway.” 1RP 88. She agreed that he was holding a cell phone even as the police car was driving up to him. 1RP 87-88. She agreed, in fact, that until he started walking away, he did nothing that she considered suspicious. 1RP 87. The portion of the record cited by the State in support of its erroneous factual claim is Lang’s explanation for why she initially mistook Cardenas-Muratalla’s gender. 1RP 109. The State did not establish that due to these minor and temporary obstructions, Lang was unable to observe Cardenas-Muratalla’s stance, actions, and movements, and Lang herself did not so testify.

- The State claims Cardenas-Muratalla’s account of Lang’s testimony regarding the manner in which he walked from the doorway (“a slow shuffle”) does not correctly describe her testimony. Br. Resp. at 14 n. 9. But defense counsel offered the words “slow shuffle” based upon Lang’s recorded interview; the words were apparently a quote, and Lang agreed with this characterization. 1RP 87-88.
- The State claims that Cardenas-Muratalla sought to ensure the gun’s ready accessibility. Br. Resp. at 24. The trial court, however, believed it was “implausible” that Cardenas-Muratalla would have tried to draw an unloaded gun on an armed police officer. 2RP 3-4. The court’s written findings reflect this belief: the court expressly struck the State’s proposed finding that Cardenas-Muratalla attempted to free the gun from his waistband, and, despite the State’s vigorous argument, refused to find that Cardenas-Muratalla intended to draw the weapon. CP 82-83.

The State suggests that Cardenas-Muratalla has accused Myers of “lying.” Br. Resp. at 15. As the above recitation establishes, whether Myers “lied,” or whether his memory of what occurred was inaccurate, the fact remains that his testimony was expressly contradicted by that of his officer partner and by the two videos that depicted the events leading to Cardenas-Muratalla’s shooting.

Substantial evidence is “evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Myers may have been extremely credible – i.e., the court may have reasonably found he believed he was testifying truthfully. Given the conflict with Lang’s testimony and the decisive video evidence, however, substantial evidence did not support his testimony, no matter how credible.

The State’s brief is misleading in additional ways. For example, the State only admits that Cardenas-Muratalla’s gun was unloaded once, in a lengthy talking footnote. Br. Resp. at 28 n. 16. The State refers to the personal

knowledge of “every person in the courtroom” regarding the neighborhood where the seizure occurred, Br. Resp. at 11 n. 7, in violation of judicial notice rules. See ER 201.

In another violation of judicial notice provisions, the State makes the unsupported claim that “in ordinary experience, citizens do not call 911 to report on the mundane and lawful activities of their compatriots.” Br. Resp. at 18. In addition to lacking citation, this assertion is simply untrue. See Parija v. Kavilanz, Report: 20 Percent of 911 Calls are Non-Emergencies, CNN (2009);<sup>1</sup> United States Department of Justice, Office of Community-Oriented Policing Services, Problem-Oriented Guides for Police Series 19 Misuse and Abuse of 911, by Rana Sampson, at 5-6 (detailing problem of non-emergency calls, prank calls, and diversionary calls (in which caller’s intent is to send police to a location where no criminal activity occurred to divert them away from caller’s own criminal activity)).<sup>2</sup>

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<sup>1</sup> Available at <http://www.ems1.com/ems-products/ambulances/articles/585783-Report-20-percent-of-911-calls-are-non-emergencies/>, last accessed April 1, 2013.

<sup>2</sup> Available at [http://pssb.mt.gov/content/docs/misuse\\_and\\_abuse\\_of\\_911.pdf](http://pssb.mt.gov/content/docs/misuse_and_abuse_of_911.pdf), last accessed April 1, 2013.

The State's unsupported leap that "[a] person with a valid concealed weapons permit and a lawful purpose would not have provoked a call to 911 nor reacted to the presence of police as Cardenas-Muratalla did" suffers from the same defect.<sup>3</sup> The 911 caller may have contacted the police because he did not realize that it was lawful to carry a firearm in Seattle. He may have been provoked by racial animus against Hispanics. He may have sought to divert police away from his own unlawful activities.

Additionally, as noted in Cardenas-Muratalla's opening brief, ordinary citizens may be nervous around police officers. Or Cardenas-Muratalla may have been concerned because he had been harassed by the police before. The State cannot speculate that the 911 call, on its own, enhanced the reasonableness of the officers' actions.

2. The mere fact that the possession of a gun was reported in the 911 call does not support relaxing the constitutional right to privacy.

The State claims that Cardenas-Muratalla ignores the principle that the reasonableness of a Terry stop is to be

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<sup>3</sup> The trial court committed the same error in making its oral ruling denying Cardenas-Muratalla's motion to suppress. 2RP 3-4.

judged by totality of circumstances and the reasonable inferences to be drawn therefrom. Br. Resp. at 16. In fact, it is the State who ignores and misrepresents controlling precedents.

Citing State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002), the State first contends that a higher level of intrusion is warranted where the conduct presents higher risk and a greater crime. Br. Resp. at 9. But in articulating this principle in Duncan, the Court simply was explaining the varying levels of intrusion permitted for felonies, misdemeanors, and civil infractions in the context of Washington's strictly-applied constitutional warrant requirement. Duncan, 146 Wn.2d at 176-77. The statement does not support the premise for which it is impliedly cited by the State, i.e., that a mere allegation of possession of a firearm permits constitutional safeguards to be diminished. Id. at 177. Indeed, in Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000), the Supreme Court rejected a "firearm exception." Id. at 272-73.

The State has failed to identify any basis the officers may have had for suspecting that Cardenas-Muratalla had committed a felony when they ordered him to “get on the ground.” And, assuming no independent basis to suspect criminal activity exists, there is no authority, statutory or otherwise, that permits the police to effect a greater intrusion into personal privacy because of some general suspicion that a person may be carrying a firearm. J.L., 529 U.S. at 272-73; cf., RCW 10.31.100 (authorizing warrantless misdemeanor arrest only where police has “probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon on private or public elementary or secondary school premises” (emphasis added)); State v. Ortega, \_\_ Wn.2d \_\_, \_\_ P.3d \_\_, 2013 WL 1163954 at 3 (March 21, 2013) (the exceptions to the “presence” requirement of RCW 10.31.100 are exclusive).

The State makes the related contention that “when the potential danger posed by a suspect is significant, a greater intrusion on lesser suspicion will be tolerated.” Br. Resp. at 19. But in so claiming, the State confuses two distinct

constitutional concepts: the actions a police officer may take to assure his or her safety versus whether evidence so recovered will be admissible at trial. No matter the crime suspected, an initial detention must always be supported by a reasonable, well-founded suspicion based on specific articulable facts of criminal activity. State v. Doughty, 170 Wn.2d 57, 72, 239 P.3d 573 (2010). The State bears the burden of proving a reasonable suspicion exists by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The State did not meet its burden here.

The State principally cites State v. McCord, 19 Wn. App. 250, 576 P.2d 892 (1978) for the proposition that “because gun crimes pose a greater risk to public safety than other offenses, a greater degree of intrusion on lesser suspicion may be permissible.” Br. Resp. at 16-17. Setting aside for the moment the fact that it is not a crime to carry a gun, McCord does not support the State’s argument. In McCord, no gun crime was reported. Officers effected an investigatory stop based on the suspicion that the

defendants had stolen cedar blocks. 19 Wn. App. at 252-53. In holding that the stop was unconstitutional, the Court observed, “[a]n officer may do far more if the suspected misconduct endangers life or personal safety than if it does not.” *Id.* at 253. The Court compared *Terry*, in which the officer’s direct personal observations supported “a strong possibility of an impending crime of violence,” to the facts of the case at bar, where the stop in question was based on no more than a hunch of criminal activity. *Id.* at 253-54.

5.8% of Washingtonians have a license to carry a concealed gun, and in some areas, the number is far greater. In Seattle, 2.8% of residents have a concealed weapons permit. Chris Halsne, “Seattle Residents Refuse to Arm Themselves, [Kiro TV.Com](http://www.kirotv.com/news/news/seattle-resident-refuse-arm-themselves/nSq4B/), October 29, 2012.<sup>4</sup> The State has not shown how the mere fact that a person has been reported to be carrying a gun endangers life or personal safety. The State has also failed to cite any case in which a Washington court has held that a mere hunch that a person

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<sup>4</sup> Available at <http://www.kirotv.com/news/news/seattle-resident-refuse-arm-themselves/nSq4B/>, last visited April 8, 2013.

may be carrying a firearm permits the erosion of constitutional protections.

State v. Wakeley, 29 Wn. App. 238, 628 P.2d 835 (1981), cited by the State at Br. Resp. 20, does not supply a foundation for a contrary proposition. In that case, “the information known to the officers indicated that Wakeley had been involved in a shooting incident.” Wakeley, 29 Wn. App. at 243. In light of this circumstance, the officers “were justified in conducting a self-protective search ... based on less than probable cause.”

Here, by contrast, an anonymous 911 caller reported seeing a person with a gun. There was no claim that the gun had been pointed at anyone, the caller denied that he had been threatened when specifically asked, and he otherwise did not report any criminal activity. 1RP 67, 69, 81; Supp. CP \_\_ (Pretrial Ex. 4). The State cannot identify any case that holds such circumstances justify a high level of intrusion by police.

3. The Supreme Courts of Washington and the United States have held that virtually identical sets of facts do not support a *Terry* stop.

Decisions from the Supreme Courts of the United States and Washington support Cardenas-Muratalla's argument that the stop was illegal.

In J.L., the Supreme Court held that an anonymous tip that a person is carrying a gun is, without more, insufficient to justify a police officer's stop and frisk of that person. 529 U.S. at 268. The State attempts to distinguish J.L. by making the unusual claim that the 911 caller "was not wholly anonymous." Br. Resp. at 22. The State argues that because the 911 dispatch center was able to record the caller's telephone number, "although the tipster was unknown, his identity was not unknowable." Br. Resp. at 22 (emphasis in original).

In support of the contention that this ability made the tip more reliable, the State cites to a dissenting opinion. Id. at 22-23 (citing to Judge Quinn-Brintnall's dissent in State v. Hopkins, 123 Wn. App. 855, 117 P.3d 377 (2005)). The State cites to no majority holding that a person's mere use of

a telephone is sufficient to shift him into some intermedial category between an anonymous and a known informant. Cf. Wakeley, 29 Wn. App. at 241 (emphasizing that “if a citizen-informant refuses to give his name ... or if only the name of the informant has been relayed to the police ... the police may not be justified in concluding the tip comes from a reliable source” (internal citations omitted)). Further, as the State concedes, despite possessing his number and attempting to call him back, the police never succeeded in reaching the anonymous caller, see Br. Resp. at 22, further undermining the hypothesis that the mere fact of a 911 call rendered the substance of the call reliable.

The tipster here was anonymous, and the State’s Rumsfeldian attempt to parse out the “unknown” from the “unknowable” is unconvincing.<sup>5</sup> Under J.L., the 911 call did not supply a basis to seize Cardenas-Muratalla.

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<sup>5</sup> The State also urges this Court to apply the federal standard to assess the reliability of a citizen informant. Br. Resp. at 23. The Washington Supreme Court has held the federal test is incompatible with article I, section 7. State v. Jackson, 102 Wn.2d 432, 435-38, 688 P.2d 136 (1988); see also State v. Sieler, 95 Wn.2d 43, 621 P.2d 1292 (1980) (applying Aguilar-Spinelli rule to Terry stops). Under either standard, however, the tip lacked reliability.

The State's efforts to distinguish State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008) are similarly unpersuasive. The State maintains that unlike Gatewood, Cardenas-Muratalla fled from the police. Br. Resp. at 19. The State admits that in contrast to cases where a suspect's actions were construed as flight, Cardenas-Muratalla did not run from police; he walked. Br. Resp. at 19 n. 12; cf., State v. Sweet, 44 Wn. App. 226, 721 P.2d 560 (1986); see also 1RP 100 (Lang testifies that Cardenas-Muratalla never ran and never looked like he was about to run).

The State erroneously believes, however, that it is significant that in Gatewood, one of the officers testified he was not sure whether Gatewood saw them return to the scene. Id. (citing Gatewood, 163 Wn.2d at 540).<sup>6</sup> But the Court did not find this dispositive; the Court more broadly held that walking away from police officers does not equate to flight. See Gatewood, 163 Wn.2d at 540 (citing Outlaw v.

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<sup>6</sup> The State notes that Cardenas-Muratalla did not assign error to the court's finding of fact that after the police shined a spotlight on the doorway, Cardenas-Muratalla immediately walked away. Br. Resp. at 19 n. 12. The video evidence establishes that this occurred, however the finding of fact is neutral, and does not determine that Cardenas-Muratalla walked away in response to the officers' actions in illuminating the doorway with a spotlight.

People, 17 P.3d 150, 157 (Colo. 2001) for the principle that a defendant walking away after noticing a police car fails to provide a reasonable suspicion).

In short, there is no principled basis to distinguish J.L. and Gatewood from this case. The trial court erred in denying Cardenas-Muratalla's motion to suppress.

4. Probable cause did not exist to arrest Cardenas-Muratalla for assault; as the trial court found, since Cardenas-Muratalla's gun was not loaded, it was implausible that he would have attempted to draw his weapon on the officers.

The State last tries to salvage the search by arguing that even if the stop was unlawful, the officers had probable cause to arrest Cardenas-Muratalla for assault. This theory is implausible, was rejected by the trial court, and is unsupported by both the facts and the State's strained legal analysis.

The State begins by contending that even if the officers' command to stop was unlawful, Cardenas-Muratalla had a legal duty to comply. This assertion is false.

Cardenas-Muratalla had the legal right to walk away from

the police.<sup>7</sup> Police may only prohibit flight from an unlawful detention “where that flight indicates a wanton and wilful disregard for the life and property of others.” State v. Mather, 28 Wn. App. 700, 703, 626 P.2d 44 (1981). The State does not and cannot make the claim that Mr. Cardenas-Muratalla’s “slow shuffle” up the sidewalk exhibited such disregard. As in Gatewood, the officers could have continued to follow Cardenas-Muratalla or attempted to initiate a consensual encounter with him, but since he “did not flee from the officers, it was not necessary to take swift measures.” Gatewood, 163 Wn.2d at 541.

Probable cause did not exist to arrest Cardenas-Muratalla for assault or attempted assault, and the trial court explicitly declined to so find.<sup>8</sup> 2RP 4. The most the trial court was willing to grant the State based on the

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<sup>7</sup> Since Cardenas-Muratalla appeared to still be on the phone when he walked away and Myers did not identify him by an article of clothing or other means when he shouted his command, it is not clear that Cardenas-Muratalla understood that the command was being directed at him. See 1RP 88, 93 (Lang testifies that Cardenas-Muratalla was holding a phone to his ear as he walked away and that his expression was neutral).

<sup>8</sup> Lang’s testimony again discounted this theory, as she said that Cardenas-Muratalla did not lift his sweatshirt. 1RP 120-122. The video evidence also failed to confirm Myers’ claim that Cardenas-Muratalla was going for his gun. The State cannot pick and choose among the officers’ testimony where the court’s factual findings were in opposition to the State’s theory.

exhaustive record was that Cardenas-Muratalla “made a move that the police officer interpreted as threatening.” Id. The court stressed, “I can’t tell from the video whether it was or not, and it seems kind of implausible that the defendant would have drawn an unloaded gun on a police officer.” Id. The court thus distinguished State v. Valentine, 132 Wn.2d 21, 935 P.2d 1294 (1997), in which it was clear that the defendant had attempted deadly force, and this case, in which the State failed to meet its burden of proof. 2RP 4.

It is well settled that where the trial court does not make a factual finding on a contested issue, the reviewing Court indulges the presumption that the party with the burden of proof failed to sustain their burden on the issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).<sup>9</sup> The court refused to find that Cardenas-Muratalla attempted to draw his gun or that he intended to do so. The State did not prosecute Cardenas-Muratalla for assault, and probable

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<sup>9</sup> The State claims that Cardenas-Muratalla’s citation to Armenta is “irrelevant”, contending that “the factual findings that the trial court did make” support a conclusion that probable cause existed for Cardenas-Muratalla’s arrest. Although probable cause is a legal question, the facts found by the trial court did not establish probable cause to arrest.

cause did not exist to arrest him for this crime. The State's theory, already discounted by the trial court, should be rejected by this Court.

B. CONCLUSION

For the foregoing reasons and based on the arguments in Cardenas-Muratalla's opening brief, this Court should conclude the trial court erred in denying his motion to suppress. The trial court should be reversed, and Cardenas-Muratalla's conviction vacated and dismissed.

DATED this 9<sup>th</sup> day of April, 2013.

Respectfully submitted:



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68057-9-I
v.	)	
	)	
JOSE CARDENAS-MURATALLA,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **REPLY 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 9<sup>TH</sup> DAY OF APRIL, 2013.

X \_\_\_\_\_ 

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