No. 43738-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SAM NANG YOU,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-00789-8
The Honorable Vicki Hogan, Judge

OPENING BRIEF OF APPELLANT

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4. The State failed to present sufficient evidence to prove beyond a reasonable doubt that Sam You constructively possessed the firearm found under the passenger seat on which he was sitting.
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II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the police officer fail to articulate sufficient facts to establish a reasonable suspicion of criminal behavior which could justify a Terry stop of the vehicle, where the officer's

only observations were that the vehicle was: in a high crime area late at night; contained several male occupants; and appeared to be circling a neighborhood that was several miles away from a recent drive-by shooting? (Assignments of Error 1, 2, 3)

2. Where the evidence showed only that Sam You was a passenger in a vehicle owned by the mother of the driver, and that a firearm was located partially tucked under the seat where You was sitting, did State failed to present sufficient evidence to prove beyond a reasonable doubt that You constructively possessed the firearm? (Assignment of Error 4)

3. Where the sentencing statute specifically directs sentencing courts to consider whether or not an offender's prior convictions are the same criminal conduct, did the trial court err when it denied Sam You's request to continue sentencing and concluded that it could not conduct a same criminal conduct analysis? (Assignments of Error 5 & 6)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Sam Nang You with one count of

unlawful possession of a firearm (RCW 9.41.040). (CP 1) The trial court denied You's pretrial motion to suppress. (RP 73; CP 4-5, 6-20, 99-102) A jury convicted You as charged. (RP 220; CP 62) The trial court denied You's request to continue sentencing in order for You's counsel to file a motion and supporting documentation regarding whether some of You's prior convictions were the same criminal conduct. (RP 228, 232-33, 235) The court sentenced You to 90 months of confinement, which is within the standard range calculated by the State. (RP 236, 237; CP 82, 88, 91) This appeal timely follows. (CP 103)

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.6 Motion to Suppress*

Puyallup Tribal Police Officer Joey Tracy was on patrol duty in east Tacoma on the night on March 4, 2012. Officer Tracy is part of his department's gang unit, and through his training he knows that Tacoma's eastside has significant gang activity and gang violence. (RP 6-7)

Shortly after 11:00 that night, Tacoma Police requested assistance locating a car believed to have been involved in a just-reported drive-by shooting on the 6400 block of East Portland Street. (RP 5, 7, 8) Tacoma dispatch described the suspect car as

a black Pontiac Grand Prix last seen heading northbound on East Portland Street. (RP 8, 10, 27-28)

Officer Tracy testified that he was driving northbound on East Roosevelt Avenue, approaching the intersection with East Fairbanks Street,[1] when he noticed behind him a blue sedan with its high beams on carrying three occupants. (RP 10) The vehicle did not match the description of the suspect car so Officer Tracy continued to drive north on East Roosevelt. (RP 10, 11, 30-31) As he drove away, he saw the blue vehicle stop at the stop sign, then turn left onto East Fairbanks. (RP 10, 11)

About five minutes later and one mile away, as Officer Tracy was now traveling northbound on East Portland, he saw the blue car again. (RP 10, 12-13) The car turned in front of Officer Tracy from East 35th Street, which is a dead-end street, onto East Portland. (RP 12-13) Officer Tracy thought that it "didn't make sense" that the car turned from a dead end street but still contained three occupants. (RP 13) Officer Tracy followed the blue car for several blocks. The driver did not violate any traffic codes, and Officer Tracy observed no furtive movements within the car, but the

[1] According to Google Maps, this intersection is about 2.5 miles north of the reported drive-by location.

driver appeared to be circling back towards East Portland and East 35th. (RP 13-14, 31-32, 36-37)

Officer Tracy testified that often more than one vehicle will be involved in a drive-by shooting. (RP 35-36) Based on that knowledge, plus the lateness of the hour, the roundabout route the driver appeared to be taking, and the fact that there were multiple occupants in the vehicle, he decided to stop the vehicle and investigate. (RP 14, 33, 35, 42) Officer Tracy testified that, "with the limited information I had, I believed that possibly this vehicle was related to the drive by shooting." (RP 14) At that point in time, the driver and occupants were not free to leave. (RP 40, 41)

Officer Tracy approached the driver, Azias Ross, who was anxiously waiting with his license and registration paperwork. (RP 14-15; CP 2) Even though Ross had committed no traffic infractions but was still being pulled over by the police, Officer Tracy thought it was "odd" that Ross was "agitated." (RP 15) According to Officer Tracy, Ross was chatty and seemed to be trying to distract the officer. (RP 15)

Officer Tracy noticed that Ross had the number "44" tattooed on his arm, which Tracy understood to be a gang-related symbol. (RP 15) The passengers were also wearing red, which is the color

associated with one of the east Tacoma gangs. (RP 15) Officer Tracy was concerned that the occupants might have weapons, so he asked Ross to exit the car in order to conduct a pat-down. (RP 19) Ross was not armed, so Officer Tracy walked around to the passenger side of the car and asked the two passengers to exit the car for a weapons frisk. (RP 19-20, 21) When the front passenger, Sam You, exited the car, Officer Tracy noticed the butt of a gun poking out from under the seat. (RP 22-23) The weapon was blocked from going completely under the seat by an empty plastic bottle, and the butt was also partially covered by some sort of Kleenex or tissue paper. (RP 23-24) Officer Tracy placed the three men under arrest and obtained a search warrant for the car. (RP 24) Officers found another weapon and ammunition in the car. (RP 25)

2. *Facts from Trial*

Officer Tracy's trial testimony was essentially consistent with his suppression motion testimony. (RP 111-164) At trial, he also testified that the blue car was registered to Ross' mother. (RP 153, 164) A firearms expert testified that the gun found under the passenger seat was operational and capable of being fired. (RP 168-69) You also stipulated that he has a prior felony conviction

and is therefore unable to possess a firearm. (RP 172; CP 57-58)

IV. ARGUMENT & AUTHORITIES

A. YOU'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE OFFICER TRACY FAILED TO ARTICULATE SUFFICIENT FACTS TO ESTABLISH A REASONABLE SUSPICION OF CRIMINAL BEHAVIOR WHICH COULD JUSTIFY A TERRY STOP.

Generally, a warrantless search is unreasonable under both our Federal and State constitutions, unless the search falls within one or more specific exceptions to the warrant requirement. U.S. Const. Amd. IV; Wash. Const. art. I, § 7 State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The State has the burden of proving that a warrant exception applies. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); State v. Ladson, 138 Wn.2d 343, 349–50, 979 P.2d 833 (1999). One exception to the warrant requirement is that an officer may briefly detain a vehicle's driver for investigation if the circumstances satisfy the "reasonable suspicion" standard under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999).

The State must show by clear and convincing evidence that the Terry stop was justified. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). A Terry stop requires a well-founded

suspicion that the defendant engaged in criminal conduct. Terry, 392 U.S. at 21; Garvin, 166 Wn.2d at 250. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21.

"The circumstances must suggest a substantial possibility that the particular person has committed a specific crime or is about to do so." State v. Martinez, 135 Wn. App. 174, 180, 143 P.3d 855 (2006) (citing State v. Garcia, 125 Wn.2d 239, 242, 883 P.2d 1369 (1994)). But an important safeguard to individual liberty in Terry stop analysis is the principle that the circumstances justifying a Terry stop must be more consistent with criminal conduct than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992); State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991).

"A person's presence in a high-crime area at a 'late hour' does not, by itself, give rise to a reasonable suspicion to detain that person." State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (citing State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988)). "Similarly, a person's 'mere proximity to others independently

suspected of criminal activity does not justify the stop.'" Doughty, 170 Wn.2d at 62 (quoting State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). And "a hunch alone" does not warrant police intrusion into people's everyday lives. Doughty, 170 Wn.2d at 63.

For example, in Doughty, the defendant was stopped "for the suspicion of drug activity" and subsequently arrested for driving with a suspended license. 170 Wn.2d at 60. Doughty challenged his seizure and arrest at trial. 170 Wn.2d at 61. The facts relied upon by the State to support Doughty's seizure included: (1) that Doughty was seen leaving a house that law enforcement had identified as a drug house; (2) there had been recent complaints from neighbors; (3) Doughty visited the house at 3:20 a.m.; and (4) his visit lasted less than two minutes. 170 Wn.2d at 62. Doughty's challenge to this seizure was rejected by the trial court, but on appeal the Supreme Court reversed, stating:

> These facts fall short of the reasonable and articulable suspicion required to justify an investigative seizure under both the Fourth Amendment and article I, section 7. Police may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes.
>
> The Terry–stop threshold was created to stop police from this very brand of interference with people's everyday lives.

170 Wn.2d at 62-63.

Other cases where vehicle stops conducted on suspicion of gang activity were affirmed are distinguishable from the current case. For example, in State v. Moreno, __ Wn. App. __, 286 P.3d 725 (2012), police received multiple reports of gunfire in an area claimed as turf by the Sureño gang. Sureño's are known to wear the color blue. A few moments later, about one block away from where the gunfire had been reported, a Yakima Police Sergeant saw a car leaving an alley faster than usual given the poor state of the alleyway. The Sergeant was struck by the fact that one of the passengers was wearing a red shirt. Red is the color claimed by a rival gang, the Norteños, and the Sergeant knew that people did not usually wear red in a Sureño neighborhood. 286 P.3d at 728-29.

Based on the nature of the neighborhood, the proximity to the crime, the speed of the car, the late hour, the type of crime reported, and the red shirt, the Sergeant thought that "this car is somehow involved or . . . they can tell me more about what's happened." The Sergeant stopped the car and detained its occupants. Moreno, 286 P.3d at 728-29. After further investigation, a search warrant was obtained and the car searched. 286 P.3d at 729-30. Police found several firearms and other

incriminating evidence in the trunk of the car. 286 P.3d at 730.

The State charged Moreno with first degree assault and unlawful possession of a firearm. Moreno moved to suppress all of the evidence found in the trunk, arguing that the stop was based on nothing more than a hunch. Moreno, 286 P.3d at 732. The trial court denied the motion and Division Three affirmed, stating "here there was a particularized suspicion that an actual crime had been committed. . . . It was reasonable to stop the car considering the totality of the circumstances." 286 P.3d at 732-33.

In Thierry, which the trial court here relied upon in reaching its decision in this case (RP 73), Pierce Transit security officers observed Thierry and a passenger driving slowly past the 10th and Commerce transit stop in downtown Tacoma, which is a high crime area with a high incidence of gang activity, drug traffic, and violence. 60 Wn. App. at 446-47. Despite the forty-degree weather, Thierry had the windows rolled down, and the radio was playing loud enough to draw the attention of people in the area. 60 Wn. App. at 447. Thierry and the passenger were both slouched down in the front seat of the car. Thierry drove into a parking lot on Commerce adjacent to the transit area, made no attempt to park, and then stopped instead of exiting when he arrived back at the

entrance. 60 Wn. App. at 447.

Because this activity fit the Tacoma Police Department's profile of drive-by shootings, the officers approached the car. Thierry, 60 Wn. App. at 447. As they came closer, Thierry immediately turned down his radio, and one of the officers saw a two-foot-long wooden bat on the floor of the car at Thierry's feet. He also noticed that the passenger was making furtive hand motions. As an officer walked to the driver's side of the car, he immediately saw a cocked semiautomatic pistol between the front armrests. During a subsequent search of the car the officers found an additional gun and weapons. 60 Wn. App. at 447.

Thierry's motion to suppress was denied, and he was convicted of carrying a loaded pistol without a license. Thierry, 60 Wn. App. at 446-47. On appeal, this Court rejected his argument that the initial stop made by the officers was invalid, because "the officers, working a high crime area, observed behavior consistent with the profile of drive-by shootings." But the court also noted: "Even if Thierry's behavior might arguably be viewed as innocent, the ultimate test for reasonableness of an investigative stop involves weighing the invasion of personal liberty against the public interest to be advanced. . . . The officers' intrusion in this case was

negligible, and their seizure of the pistol and additional weapons was valid." Thierry, 60 Wn. App. at 449.

In this case, the trial court concluded that the stop was justified based on the following:

> Officer Tracy suspected that the vehicle was involved or about to be involved in a drive-by shooting. His suspicion was based on the following behavior (1) the vehicle circled around the neighborhood moments following a drive-by shooting; (2) the time of night—11:00 pm; (3) the vehicle operated its high beams; (4) the neighborhood's high incidents of gang related crimes and violence; (5) the number of passengers; and (6) the driver's behavior changed upon noticing the officer.

(CP 100, 102).[2]

It is not clear from the trial court's findings how Ross' "behavior changed" after noticing Officer Tracy, as Tracy testified that he did not observe Ross violate any traffic codes or notice any of the occupants make furtive movements. (RP 32, 37, 41) The court may be referring to Officer Tracy's testimony that Ross repeatedly looked at the officer in his rearview mirror. (RP 47) Nevertheless, the facts articulated by Officer Tracy and found by the trial court do not reasonably warrant a well-founded suspicion

[2] When reviewing the denial of a motion to suppress, the trial court's conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

sufficient to justify a Terry stop.

Officer Tracy repeatedly stated that Ross' driving behavior "didn't make sense." (RP 13) But odd behavior is a far cry from behavior indicating that a crime has or is about to take place. And, when pressed to explain what specific facts indicated to the officer that Ross' vehicle and its occupants were involved in the recently reported drive-by shooting, Officer Tracy admitted "I have nothing that would tell me that they were involved at that time." (RP 37)

Unlike in Moreno and Thierry, all of the behavior observed by Officer Tracy—driving at night in a high crime neighborhood with multiple passengers and no obvious destination—is more consistent with innocent conduct than with criminal conduct. Drivers circle a block or turn out of dead-end streets for all sorts of non-criminal reasons: they are lost, they are having trouble locating an unfamiliar address; or they are simply out driving for pleasure.

In Moreno, the car sped out of an alley one block away from a just-reported shooting and an occupant was wearing rival gang colors. In this case, Ross' car was several miles away from the reported shooting, was not observed speeding away from the scene, did not match the description of the car reportedly involved

in the shooting, and the occupants were not initially observed wearing gang-related items. In Thierry the windows were rolled down despite very cold weather, the driver and passenger were slouched down so their bodies were concealed, and they drove slowly around a parking lot in an area known for gang violence, actions understood by police to be consistent with gang shootings. In this case, Ross simply drove in a manner that appeared to Officer Tracy to be aimless.

Unlike in Moreno and Thierry, Officer Tracy's suspicions were aroused primarily by facts not specifically related to Ross' or You's behavior—more than one car often involved in drive-by shootings, high crime neighborhood, car in relative proximity to recently reported shooting—rather than by specific actions taken by Ross or You or the third passenger. This is the "very brand of interference with people's everyday lives" that the Terry stop threshold was created to prevent. Doughty,170 Wn.2d at 63.

Furthermore, unlike in Thierry, where the officers simply approached Thierry's already stationary car and observed weapons in plain view, the initial stop in this case was highly intrusive. Officer Tracy followed and then stopped Ross' vehicle even though Ross had not committed any immediate traffic infraction, and

ordered Ross and You and the third passenger out of the vehicle in order to conduct weapons pat-downs. (RP 31-32, 19-22)

The initial stop, and everything that followed, was improper.[3] If the initial stop was unlawful, any subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963); State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980)). The trial court erred when it denied You's motion to suppress, and You's conviction must be reversed.

B. THE STATE'S EVIDENCE SHOWED NOTHING MORE THAN YOU'S PROXIMITY TO THE FIREARM, WHICH IS INUSFFICIENT TO PROVE DOMINION AND CONTROL AND CONSTRUCTIVE POSSESSION OF THE FIREARM.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the

[3] You may object to any search of Ross' vehicle because automatic standing applies when a passenger is charged with possessory offense. See State v. Jones, 146 Wn.2d 328, 332-33, 45 P.3d 1062 (2002); State v. Coss, 87 Wn. App. 891, 895-96, 943 P.2d 1126 (1997).

prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

Under RCW 9.41.040, a person is guilty of unlawful possession of a firearm "if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense[.]" Possession of property may be either actual or constructive. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969); State v. Ibarra-Raya, 145 Wn. App. 516, 524, 187 P.3d 301 (2008).

Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods. Callahan, 77 Wn.2d at 29 (citing State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967)). Constructive possession can be established by showing the defendant had dominion and control over the item or the premises

where the item was found. See Ibarra-Raya, 145 Wn. App. at 524; State v. Portrey, 102 Wn. App. 898, 904, 10 P.3d 481 (2000).

However, mere proximity to the contraband is insufficient to show dominion and control to establish constructive possession. State v. Raleigh, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). Knowledge of the presence of contraband, without more, is also insufficient to show dominion and control. State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793 (1983).

In cases in which the defendant was the driver or owner of the vehicle where contraband was found, courts have routinely found sufficient evidence of constructive possession, and dominion and control.[4] "But courts hesitate to find sufficient evidence of dominion or control where the State charges passengers with constructive possession." State v. Chouinard, 169 Wn. App. 895, 900, 282 P.3d 117 (2012).

For example, in State v. Cote, the evidence showed that the defendant arrived at a residence as a passenger in a stolen truck and his fingerprints were on mason jars containing

[4] *See e.g.,* State v. Bowen, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010); State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); State v. McFarland, 73 Wn. App. 57, 70, 867 P.2d 660 (1994); State v. Reid, 40 Wn. App. 319, 326, 698 P.2d 588 (1985); State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

methamphetamine precursor chemicals, found in the back of the truck. 123 Wn. App. 546, 550, 96 P.3d 410 (2004). Division Three reversed Cote's unlawful possession conviction, stating: "The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it . . . this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession." 123 Wn. App. at 550.

And in State v. George, the State's evidence showed that George rode in the driver's side backseat while the vehicle's owner rode in the front passenger seat, and troopers found a glass pipe with burnt marijuana and empty beer cans and bottles on the floorboard behind the driver's seat, where George had been sitting. 146 Wn. App. 906, 912-13, 193 P.3d 693 (2008). Division One reversed George's drug possession convictions, holding that George's mere proximity to the pipe and drugs, and knowledge of its presence, was insufficient to convict George of constructive possession. 146 Wn. App. at 923.

Most recently, in Chouinard, this Court found insufficient evidence to establish constructive possession of a firearm by a backseat passenger in another person's vehicle. 169 Wn. App. at 903. Officers could see a firearm in the trunk of the car, and the

firearm was visible and accessible to the passenger compartment because the backrest on the backseat had been detached from the car. 169 Wn. App. at 898. The State presented evidence that Chouinard was the backseat passenger, and Chouinard also acknowledged to the arresting officer that he saw the firearm in the trunk. 169 Wn. App. at 898. This Court reversed Chouinard's unlawful possession of a firearm conviction, noting the lack of evidence that Chouinard owned or used the firearm, and stating: "the State demonstrated Chouinard's mere proximity to the weapon and his knowledge of its presence in the vehicle. This evidence, alone, does not sustain a conviction for constructive possession of a firearm." 169 Wn. App. at 903.

The State's evidence in this case is even weaker than the insufficient evidence in Cote, George and Chouinard. Like the defendants in Cote, George and Chouinard, You was a passenger in the vehicle where the contraband was found, and was not the owner or driver of the vehicle. (RP 118, 153) Like the defendants in Cote, George and Chouinard, You was sitting in close proximity to the contraband. (RP 122, 125) But unlike in Cote, George and Chouinard, there was no additional evidence in this case that You saw the firearm, knew the firearm was under the seat, or ever

touched the firearm. Unlike in Cote, there were no fingerprints on the firearm to indicate that You handled the firearm. Unlike in George, the firearm was not out in the open where any passenger would be aware of its presence. And unlike in Chouinard, You did not make any statements indicating that he knew the firearm was in the vehicle. And Officer Tracy did not observe You make any movements that might indicate he was placing a firearm under the seat. (RP 122)

The State's only evidence to support the conviction was You's proximity to the firearm. This is not sufficient proof of dominion and control or constructive possession, and cannot sustain a conviction for unlawful possession of a firearm. You's conviction must be reversed.

C. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED YOU'S REQUEST TO CONTINUE SENTENCING BASED ON ITS INCORRECT BELIEF THAT A SAME CRIMINAL CONDUCT ANALYSIS COULD NOT BE UNDERTAKEN.

An appellate court will review a standard range sentence resulting form constitutional error, procedural error, an error of law, or the trial court's failure to exercise its discretion. *See e.g.* State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003); State v. Watson, 120 Wn. App. 521, 527, 86 P.3d 158 (2004); State v.

McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002). "[I]t is well established that appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." Williams, 149 Wn.2d at 147 (and cases cited therein).

When a court mistakenly believes it is precluded by law from following a procedure that is within its discretion, it fails to exercise discretion. *See* McGill, 112 Wn. App. at 100. A trial court's failure to exercise discretion constitutes an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

In this case, You did not stipulate to his offender score because he has several prior convictions with the same offense date and same sentencing date, and he believed some of those convictions may have been the same criminal conduct. (RP 228, 232-33, 237-38; CP 82-84) The trial court denied You's request to continue sentencing in order for You's counsel to file a motion and supporting documentation on the issue. (RP 228, 232-33, 235) The court explained its ruling as follows:

> The Court, in exercising its discretion will not do an analysis, whether by plea or jury trial as to same course of conduct. That's not a lateral [*sic.*] review.

> That's an appellate review. And this is not the courtroom for that.
>
> It doesn't mean that your issue, Mr. You, isn't preserved, but this Court is not going to entertain that. It's not appropriate before this Court. . . . we are going to go forward with sentencing. I'm not going to go through that exercise here.

(RP 235) But the trial court based its denial on its mistaken belief that it could not conduct a same criminal conduct analysis as part of sentencing in this case.

Washington's sentencing statute specifically directs a sentencing court to conduct a same criminal conduct analysis of prior convictions at a sentencing hearing:

> The current sentencing court **shall determine with respect to other prior adult offenses for which sentences were served concurrently** or prior juvenile offenses for which sentences were served consecutively, **whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis** found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used.

RCW 9.94A.525(5)(a)(i) (emphasis added). This statute clearly directs a trial court to review prior convictions to determine whether or not any of them are the same criminal conduct for the purpose of calculating the offender score. The trial court's failure to grant the continuance or to conduct a same criminal conduct analysis was an

abuse of discretion. Therefore, You's sentence must be stricken and his case remanded for a same criminal conduct hearing and resentencing.

V. CONCLUSION

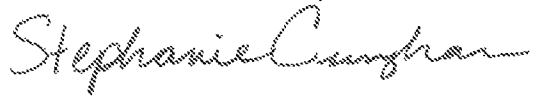
Driving around at night in a high crime area within a few miles of a recently reported crime does not provide a basis for an investigative detention. The Terry stop in this case was not based on articulable facts that reasonably warrant a well-founded suspicion that the blue vehicle or its occupants were involved in criminal activity. This error requires that You's conviction be reversed and remanded for a new trial.

Furthermore, mere proximity to a firearm in another person's vehicle does not establish that a passenger has dominion and control, and therefore constructive possession of a firearm. The State did not prove anything more than You's proximity to the firearm, and therefore did not prove that You unlawfully possessed the firearm. This requires that You's conviction be reversed and the charge dismissed with prejudice.

Alternatively, the trial court mistakenly believed it could not consider whether You's prior convictions were the same criminal conduct for the purpose of calculating his offender score. On this

alternative ground, You's case should be remanded for resentencing.

DATED: November 26, 2012



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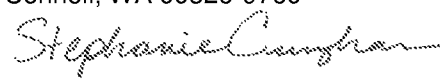

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- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Appellant's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

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A copy of this document has been emailed to the following addresses:

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