NO. 31319-1-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

RYAN WARD

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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I. FACTS

On May 26, 2012 at approximately 4:44 p.m., two callers phoned Franklin County Dispatch to report a disturbance involving 3 to 4 people who were pushing and arguing with each other at Jack in the Box. CP 39. One caller was identified as Eric Whitemarsh and the other is not named but identified as a clerk at Jack in the Box. CP 39. Officer Ismael Cano of the Pasco Police Department was dispatched to the disturbance believing there was a fight in progress. RP 11/13/12 6:19. On his way, Officer Cano was advised that some of the males involved in the altercation were leaving in a gray Maxima and in a black BMW. RP 11/13/12 6:22. Officer Cano believed that he was going to investigate potential criminal activity such as an assault or disorderly conduct. RP 11/13/12 7:6.

As Officer Cano arrived at Jack in the Box he observed a black BMW leaving the parking lot. RP 11/13/12 7:14. Believing that person or persons inside the vehicle may have been involved in a crime Officer Cano conducted a traffic stop on the vehicle. RP 11/13/12 7:15-8:6. At the time of the stop Officer Cano was alone and was not accompanied or assisted by any other officer. RP 11/13/12 8:7.

Officer Cano approached the vehicle and spoke to the driver and sole occupant whom he later identified as Ryan Ward, the defendant. RP 11/13/12 8:11. Not knowing if Mr. Ward was a suspect or victim Officer Cano asked Mr. Ward about what had happened at Jack in the Box. RP 11/13/12 8:21.

During the conversation between Mr. Ward and Officer Cano, Ward mentioned pepper spray and tried to reach under his

car seat. RP 11/13/12 9:6. Officer Cano asked him to keep his hands up and visible but Ward again attempted to reach under the seat. RP 11/13/12 9:8. Out of concern for his safety, Officer Cano asked Ward to exit the vehicle to pat him down for weapons. RP 11/13/12 9:11. Prior to the pat search, Officer Cano asked Ward if he had any weapons on his person and Ward responded that there was pepper spray and a knife in the vehicle under the seat. RP 11/13/12 10:9.

During the frisk Ward repeatedly took his hands off his head. RP 11/13/12 10:1. Officer Cano began the frisk by patting Ward's front pants pocket area. RP 11/13/12 10:21. The frisk was limited to the outer surface area of Ward's clothing. RP 11/13/12 11:17. Officer Cano felt a hard object in Ward's left-front pants pocket, similar in size to a pocket knife and felt as if it was wrapped in something. RP 11/13/12 11:23. Concerned that it might be a weapon, Officer Cano removed the object from Ward's pocket and discovered that it was a glass smoking pipe wrapped in paper. RP 11/13/12 22. When the pipe was pulled from Ward's pocket a small baggie containing white residue came out with the pipe. RP 11/13/12 16:9. Ward was handcuffed at this point. RP 11/13/12 12:25. Ward made statements to Officer Cano and was ultimately placed under arrest for simple assault and "possession of drug paraphernalia." RP 11/13/12 15:14. During the search of Ward incident to arrest Officer Cano discovered an additional baggie containing a crystalline substance in Ward's rear pocket along with a screw driver. RP 11/13/12 17:1.

Mr. Ward was charged with Unlawful Possession of a Controlled Substance. CP 51. On November 13, 2012, the

Honorable Craig J. Matheson heard Mr. Ward's CrR 3.6 motion to suppress evidence and also conducted a CrR 3.5 hearing. RP 11/13/12 5-36. The Court denied the motion to suppress and found the statements admissible. RP 11/13/12 31-33, 35-36, 40-45. On November 27, 2012, Judge Matheson made oral findings on the CrR 3.5 and 3.6 motions. RP 11/27/12 40-46.

Pursuant to a stipulated facts trial the defendant was found guilty as charged. CP 23-26. Judge Matheson did not enter written findings on its CrR 3.6 and CrR 3.5 rulings, instead choosing to consider both the State's and Defendant's proposed findings and conclusions during a break following sentencing. RP 12/11/12 51-58. The Court indicated it would consider the findings and adopt one or the other. RP 12/11/12 53-54.

The defendant's Findings of Fact and Conclusions of Law on Hearing Pursuant to CrR 3.5 and 3.6 were signed ex parte by Judge Cameron Mitchell for CJM (Craig J. Matheson). CP 4-7. The record does not reflect why the document was signed by Judge Mitchell on behalf of Judge Matheson but it does indicate that the findings of fact and conclusions of law entered were those presented by the Defendant and approved as to form by the State. CP 7.

II. QUESTIONS PRESENTED

1. **SHOULD APPELLANT'S CONVICTION BE REVERSED WHERE THE WRITTEN FINDINGS OF FACT ON A CRR 3.6 AND 3.6 HEARING WERE SIGNED BY A JUDGE FOR THE JUDGE THAT ACTUALLY HEARD THE TESTIMONY AND EVIDENCE?**

2. DID THE OFFICER HAVE A REASONABLE, ARTICULABLE SUSPICION THAT THE APPELLANT WAS INVOLVED IN CRIMINAL ACTIVITY WHEN HE DETAINED THE APPELLANT IN A TRAFFIC STOP?

3. WAS A PROTECTIVE FRISK OF THE APPELLANT JUSTIFIED WHERE THE APPELLANT WAS SUSPECTED OF BEING INVOLVED IN AN ASSAULT, POSSESSING WEAPONS AND WAS OBSERVED MAKING FURTIVE GESTURES?

III. BRIEF ANSWERS

1. APPELLANT IS NOT ENTITLED TO HAVE HIS CONVICTION REVERSED WHERE ONE JUDGE MERELY SIGNED FINDINGS OF FACT FOR ANOTHER JUDGE WITHOUT ACTUALLY MAKING THE FINDINGS HIMSELF.

2. THE APPELLANT WAS LAWFULLY DETAINED PURSUANT TO *TERRY V. OHIO* WHERE THE OFFICER BELIEVED THAT HE WAS INVOLVED IN A PHYSICAL ALTERCATION INVOLVING AT LEAST FOUR PEOPLE IMMEDIATELY PRIOR TO THE STOP.

3. A PROTECTIVE FRISK OF APPELLANT WAS JUSTIFIED WHERE APPELLANT WAS SUSPECTED OF BEING INVOLVED IN AN

ASSAULT, POSSESSING WEAPONS AND MAKING FURTIVE GESTURES DURING THE TRAFFIC STOP.

IV. ARGUMENT

1. APPELLANT IS NOT ENTITLED TO HAVE HIS CONVICTION REVERSED WHERE ONE JUDGE MERELY SIGNED FINDINGS OF FACT FOR ANOTHER JUDGE WITHOUT ACTUALLY MAKING THE FINDINGS HIMSELF.

Appellant argues that his conviction must be reversed because the trial court's written Findings of Fact and Conclusions of Law in support of the court's oral ruling on the CrR 3.5 and CrR 3.6 hearings were not signed by the judge that heard and decided the motions.

It is well settled that a successor judge is without authority to enter findings of fact on the basis of testimony heard by a predecessor judge. *State v. Bryant*, 65 Wn.App 547, 549, 829 P.2d 209 (1992). Only the judge that has heard the evidence has the authority to find facts. *Id.* at 550. This rule is applied even where the prior judge has entered an oral decision. *Id.* at 549. A successor judge may make findings of fact based on the original record when the parties agree to allow the successor judge to rely on the record. *In the Matter of the Marriage of Crosetto*, 101 Wn.App. 89, 97-98, 1 P.3d 1180 (2000).

The State takes no issue with Appellant's recitation of the law on successor judges. There is no doubt that Judge Mitchell was not permitted to make findings of fact without the agreement of

the parties and a review of the record. However, Judge Mitchell did not make findings of fact in this case. He merely signed agreed, written findings on behalf of Judge Matheson, as evidence by his signature which read Cameron Mitchell for CJM. CP 7. In addition, it should be noted that the findings signed by Judge Mitchell and approved by Judge Matheson were those of the Appellant, not those of the State. Appellant is not entitled to reversal of his conviction and a new hearing.

2. THE APPELLANT WAS LAWFULLY DETAINED PURSUANT TO *TERRY V. OHIO* WHERE THE OFFICER BELIEVED THAT HE WAS INVOLVED IN A PHYSICAL ALTERCATION INVOLVING AT LEAST FOUR PEOPLE IMMEDIATELY PRIOR TO THE STOP.

Appellant argues that the traffic stop and detention was unconstitutional because the officer did not have the information necessary to support an investigative stop. The record shows that the officer, acting quickly, on minimal information from citizen callers, had sufficient specific and articulable facts and inferences to warrant the detention.

To justify a *Terry* stop under the Fourth Amendment and art. I § 7, a 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 v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.ED. 2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). The level of articulable suspicion necessary to support an investigative

detention is "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Probable cause is not required for a Terry stop because a stop is significantly less intrusive than an arrest. Id.

In this case, Officer Cano, along with a number of other officers, was responding to a report of about four men arguing and then engaging in a physical altercation. He was advised by dispatch that at least one of the participants was leaving the scene in a black BMW. Officer Cano observed a black BMW vehicle leaving the location of the altercation. With this information alone he had reached the level of articulable suspicion necessary to support an investigative detention of the vehicle and its occupants. At this point, there was a substantial possibility that the occupant of the vehicle was involved in an assault, riot or some type of public disturbance. All of these are criminal acts which justify an investigative detention until the scene can be controlled and a proper investigation can be made into what happened. Officer Cano clearly did not unlawfully or improperly detain the defendant under the circumstances.

Appellant argues that there is no evidence that he was suspected of criminal activity and that he could not be detained merely as a witness, citing *State v. Gatewood*. 163 Wn.2d 621, 183 P.3d 1075 (2008). This position assumes that the only possible crime being investigated was an assault. Even at this early point in the investigation, the totality of the circumstances show that Appellant could have been a suspect in the crime of Riot pursuant to RCW 9A.84.010 or Disorderly Conduct pursuant to RCW 9A.84.030, not merely a suspect in an assault.

Even if Appellant was merely a witness or victim, there existed sufficient exigent circumstances to stop Appellant as a victim or witness where the three other individuals involved in the altercation had not been identified, contacted or detained at the time of the traffic stop. *See State v. Dorey*, 145 Wash.App. 423, 186 P.3d 363 (2008) (Police may not stop a potential witness when investigating a disturbance complaint where there exists no exigent circumstances). The exigent circumstance here is that all parties involved in the altercation were dispersing and without stopping the one involved party observed leaving the scene, officers would have no way to know who was involved and what happened.

Finally, Appellant argues that the investigative stop and detention could not have been conducted based upon information from an informant, citing *State v. Sieler.* 95 Wn.2d 43, 48-49, 621 P.2d 1272 (1980).

An informant's tip can provide police a reasonable suspicion to make an investigatory stop. *State v. Sieler*, 95 Wash.2d 43, 47, 621 P.2d 1272 (1980). But the informant's tip must be reliable. *Sieler*, 95 Wash.2d at 47, 621 P.2d 1272. The State establishes a tip's reliability when "(1) the informant is reliable and (2) the informant's tip contains enough objective facts to justify the pursuit and detention of the suspect or the noninnocuous details of the tip have been corroborated by the police thus suggesting that the information was obtained in a reliable fashion." *State v. Hart*, 66 Wash.App. 1, 7, 830 P.2d 696 (1992).

Generally, a tip from a citizen informant is presumed reliable. *State v. Wakeley*, 29 Wash.App. 238, 241, 628 P.2d 835 (1981). In this case, we have two citizen informants, one is a named witness

who left a phone number and the other is clerk at the location of the disturbance. Even if the unnamed citizen informant would normally be unreliable, his or her information corroborated a similar tip from the named informant who gave his phone number. Finally, the informant tips alone were not the basis for the detention of the Appellant. The detention of the Appellant was based upon the observations of Officer Cano which corroborated and confirmed the tips, making the tip reliable as well.

3. A PROTECTIVE FRISK OF APPELLANT WAS JUSTIFIED WHERE APPELLANT WAS SUSPECTED OF BEING INVOLVED IN AN ASSAULT, POSSESSING WEAPONS AND MAKING FURTIVE GESTURES DURING THE TRAFFIC STOP.

Appellant argues that Officer Cano's frisk of the Appellant's person exceeded the scope of a protective frisk.

Pursuant to *Terry*, a police officer may make limited searches of the suspect for purposes of protecting the officer's safety during an investigative detention. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.ED. 2d 889 (1968). An officer who observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous is permitted to stop such person and to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. *Id.* at 30-31. An officer need not be absolutely certain that the detained person the officer is investigating at close range is armed

or dangerous; the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. *Id.* at 27; *State v. Harvey*, 41 Wn.App. 870, 874-75, 707 P.2d 146 (1985).

The Washington Supreme Court has stated the following:

> [C]ourts are reluctant to substitute their judgment for that of police officers in the field. "A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing."

State v. Collins, 121 Wn.2d 168, 174, 847 P.2d 919 (1982).

There are multiple factors that will support a frisk for weapons. A frisk is supported where the suspect, as in this case, refuses to keep his hands in plain view. *See, e.g., State v. Harper*, 33 Wn.App. 507, 655 P.2d 1199 (1982) (frisk justified where defendant thrust his hands into his coat pockets during questioning). A frisk is supported where the suspect's clothing would allow for concealment of a weapon. *See, e.g., State v. Xiong*, 137 Wn.App. 720, 154 P.3d 318 (2007) (bulge in front pocket of suspect who had no identification and who resembled his brother who had outstanding felony arrest warrants). A frisk is supported where the reported crime involved the use of a weapon. *State v. Belieu*, 112 Wn.2d 587, 773 P.2d 46 (1989) (report of numerous burglaries where guns were stolen); *State v. Harvey*, 41 Wn.App. 870, 707 P.2d 146 (1985) (frisk upheld where detainee was stopped near the scene of a burglary because "[i]t is well known that burglars often carry weapons."). A frisk is supported where the officer has past experience with a suspect. *See State v.*

Collins, 121 Wn.2d 168, 847 P.2d 919 (1993) (the fact that the officer had two months previously arrested the suspect and at that time discovered the suspect to be in possession of a holster and bullets provides a reasonable basis to believe the suspect is presently armed and dangerous). A frisk is supported where one weapon is already discovered. *See, e.g., State v. Olsson*, 78 Wn.App. 202, 895 P.2d 867 (1995) (officer who was informed by a driver that he was carrying a knife had grounds for frisking the driver to determine whether he was carrying additional weapons).

A valid protective frisk is strictly limited to a search of the outer clothing for weapons that might be used to assault the officer. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). There are, however, cases where the patdown is inconclusive and an officer may then reach into a detainee's clothes and may withdraw an object in order to ascertain whether it is a weapon. *Id.* 112-13. Under this rule, courts have held that it was proper to remove a cigarette pack, a wallet and a pager. *See State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980); *State v. Horton*, 136 Wn.App. 29, 38, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008); and *State v. Fowler*, 76 Wn.App 168, 170-72, 883 P.2d 338 (1994), *review denied*, 126 Wn.2d 1009 (1995). Evidence gathered during a frisk will be admissible if (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify a protective frisk for weapons, and (3) the scope of the frisk was limited to the protective purpose. *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

In this case, Officer Cano made a legitimate stop of the Appellant's vehicle while investigating a potential assault or disturbance case. The Appellant admitted to being armed with a

knife and pepper spray. The Appellant failed to keep his hands on his head for the officer's safety, as instructed. Upon an initial pat down of the Appellant's clothes Officer Cano felt a hard object in his pocket consistent with the size of a pocket knife. Unable to discern what the item was Officer Cano pulled it out of the Appellant's pocket at which time it became obvious that it was a meth pipe wrapped in a napkin. The napkin also contained a plastic bag which contained methamphetamine. The scope of the frisk was very limited and done exclusively for the protection of the investigating officer. So limited in fact that Officer Cano found a screwdriver in the defendant's back pocket that he had not noticed on the initial frisk. The evidence seized pursuant to the frisk and evidence seized pursuant to a search incident to arrest should not be suppressed.

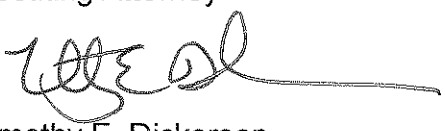
V. CONCLUSION

The State respectfully requests this Court to affirm the conviction of the Appellant.

Dated this 5th day of September 2013

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By: 
Timothy E. Dickerson,
WSBA #32036
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 5th day of September, 2013, a copy of the foregoing was delivered to Ryan Ward, Appellant, 4604 West Wernett Road, Pasco WA 99301 and to Elaine L. Winters, opposing counsel, 1511 Third Ave Suite 701, Seattle WA 98101 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Abigail Iracheta

Signed and sworn to before me this 5th of September, 2013

Deborah L. Ford
Notary Public in and for
the State of Washington,
residing at Kennewick.
My appointment expires:
May 19, 2014.

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