No. 46960-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

THEODORE ROOSEVELT RHONE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 03-1-02581-1
The Honorable Edmund Murphy, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Theodore Rhone's Motion to Suppress after the case was remanded for reconsideration.
2. The trial court erred when it concluded that Theodore Rhone was not under arrest when he was handcuffed and detained in a patrol car, and when it concluded that the arresting officer was conducting a protective search of the vehicle to look for weapons.
3. The trial court violated the law of the case doctrine when it ignored the legal rulings made by this Court in Theodore Rhone's direct appeal.
4. The trial court erred when it failed to find that the search of the vehicle in which Theodore Rhone had been a passenger was a search incident to arrest.
5. The trial court erred when it failed to apply current search and seizure law to the search of the vehicle incident to arrest of its occupants, including Theodore Rhone.
6. The trial court erred when it concluded that the search of the vehicle in which Theodore Rhone had been a passenger was justified under the protective search exception to the warrant requirement.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where this Court found in Theodore Rhone's direct appeal that Rhone and the other occupants of the vehicle were under arrest at the time the vehicle was searched and found that the search was conducted incident to arrest, and where the Supreme Court remanded Rhone's case to the Superior Court to reconsider the denial of the motion to suppress in light of substantial changes in the law regarding when an officer may conduct a warrantless search of a vehicle incident to arrest, did the trial court err and violate the law of the case doctrine when it found that Rhone was not under arrest and that the search was a protective search conducted during a Terry stop investigation? (Assignments of Error 1, 2, 3 & 4)

2. Where Theodore Rhone and the other two occupants of the vehicle were handcuffed and secured in police vehicles at the time of the search, did the search of the vehicle exceed the proper scope of the search incident to arrest exception to the warrant requirement? (Assignments of Error 1 & 5)

3. Where Theodore Rhone and the other two occupants of the vehicle were handcuffed and secured in police vehicles at the time of the search, and there was no evidence that any of the

three occupants could have accessed a weapon or were presently dangerous, did the search of the vehicle exceed the proper scope of the protective search exception to the warrant requirement? (Assignments of Error 1 & 6)

III. STATEMENT OF THE CASE

On May 30, 2003, Pierce County Sheriff's Deputy David Shaffer overheard a dispatch reporting an incident at a Jack in the Box restaurant in Lakewood. (CP 40, 541) An employee had reported that a red Camaro with three occupants (two black men and a white woman) had been through the drive-thru window looking for an employee who owed them money. (CP 40, 541) The car had a license plate number of 677-HCS. The employee also reported that the front seat passenger had displayed a gun. (CP 40, 541)

Deputy Shaffer recognized the car description and license plate as a vehicle he had previously seen parked at a suspected drug house on South Tacoma Way. (CP 41, 541; 04/25/05 RP 155)[1] Deputy Shaffer drove to the house and saw the red Camaro parked outside. (CP 41, 541; 04/25/05 RP 155-56)

As he pulled behind the Camaro, Deputy Shaffer saw a man,

[1] The transcripts will be referred to by the date of the proceeding.

later identified as Theodore Rhone, exiting the car's passenger side. (CP 41, 541; 04/25/05 RP 156, 157) When Deputy Shaffer ordered him to show his hands, Rhone slowly and deliberately looked at Deputy Shaffer and then leaned back into the car. (CP 41, 541) These movements made Deputy Shaffer believe that Rhone had a weapon or was reaching for one. (CP 41, 541) Rhone finally complied with the deputy's commands and Deputy Shaffer detained him. (CP 41, 541)

By this time, other officers arrived and removed the other two occupants, Phyllis Burg and Cortez Brown, from the Camaro. (CP 42, 542) As the officers removed Burg, she told them that they had just returned from the Jack in the Box. (CP 42, 542) The officers patted down all three occupants. (CP 42, 542) Rhone had a knife without a handle, someone else's checkbook, and a $20 bill. (04/25/05 RP 163) All three were handcuffed and placed in separate police cars. (CP 42, 542; 04/25/05 RP 165; 09/26/14 RP 25-26) As Deputy Shaffer started to return to the Camaro, Burg told him that there was a gun in the car. (CP 42, 542; 09/26/14 RP 26)

At this point, Deputy Shaffer decided to search the Camaro to locate and secure the gun. (CP 42, 542; 04/25/05 RP 165-66) He found the gun in a plastic bag wrapped inside a towel, and found a

purple Crown Royal bag containing crack cocaine. (CP 42, 542)

Subsequently, Deputy Shaffer received a call from Deputy Darren Miller, who relayed information he had gathered from witnesses at the Jack in the Box. (CP 42, 542; 04/25/05 RP 167-68) The witnesses told Deputy Miller that the Camaro had gone through the drive-thru window, contacted an employee, and demanded money from him. The occupants displayed a gun and the employee threw money into the vehicle. (CP 42-43, 542-43) After receiving this information, Deputy Shaffer officially arrested all three for armed robbery. (CP 43, 543)

Rhone was charged with and convicted of first degree robbery with a firearm enhancement, unlawful possession of a controlled substance with intent to deliver also with a firearm enhancement, and first degree unlawful possession of a firearm. (CP 34-36, 47-48) The trial court found that Rhone was a persistent offender and imposed a sentence of life without the possibility of parole. (CP 52(

Before trial, Rhone moved to suppress the evidence seized during the search of the Camaro. The trial court denied the motion, and entered the following relevant conclusions of law:

> 1) Deputy Shaffer possessed specific and articulable facts and a reasonable suspicion of criminal activity that warranted his contact of the suspect

vehicle for investigative purposes. . . .

2) Deputy Shaffer's contact with the vehicle and subsequent detention of the defendant was a lawful investigatory stop and detention.

3) Deputy Shaffer had a reasonable concern for his safety and a reasonable suspicion that the defendant was dangerous and may gain access to a weapon . . . .

4) Deputy Shaffer's search of the vehicle was lawful based on his reasonable safety concern and suspicion that the defendant was dangerous and might gain access to a weapon in the vehicle. . . .

6) Deputy Miller obtained sufficient information from [witnesses] to establish probable cause to arrest the defendant for robbery. . . .

7) After receiving the information from Deputy Miller, Deputy Shaffer had probable cause to arrest the defendant for robbery. Assuming Deputy Shaffer had not searched the vehicle based on his safety concerns, he would have used proper and predictable procedures to arrest the defendant for robbery and search[ed] the vehicle incident to the defendant's arrest.

. . . .

9) The defendant's motion to suppress evidence is denied.

(CP 43-44)

Rhone filed a Notice of Appeal on November 21, 2005. (CP 61-62) In an unpublished opinion filed on March 20, 2007, this Court affirmed the denial of the motion to suppress and affirmed Rhone's conviction. (See State v. Rhone, 137 Wn. App. 1046 (2007))[2] Though this Court ultimately agreed with the trial court's findings of

[2] The relevant portion of this opinion is attached in Appendix A.

fact and with its ruling that the search was valid, the Court did not agree with the trial court's legal reasoning. (137 Wn. App. 1046 at *4) This Court stated:

> First, the trial court concluded that Deputy Shaffer did not have probable cause to arrest Rhone and the other occupants until Officer Miller reported to him. Second, the trial court determined that Rhone was not arrested until Deputy Shaffer said the words of arrest. We disagree with both conclusions and hold that Deputy Shaffer had probable cause once Burg confirmed there was a gun in the car and that the occupants had just come from the Jack in the Box. We also hold that Deputy Shaffer arrested Rhone and the other occupants before the search.

(Rhone, 137 Wn. App. 1046 at *4) The Mandate ending Rhone's direct appeal was filed on June 17, 2010.[3] (CP 63)

On January 14, 2013, Rhone filed a pro se Personal Restraint Petition, asserting that the vehicle search was unlawful pursuant to the United States Supreme Court's 2009 decision in Arizona v. Gant, which limited the circumstances in which police may conduct a warrantless search of an automobile incident to arrest.[4] (CP 149-55) By order dated April 2, 2014, the Washington Supreme Court granted Rhone's petition, and remanded for reconsideration of the

[3] The Supreme Court accepted review of a jury voir dire issue raised in Rhone's direct appeal, but affirmed this Court's decision on that issue and affirmed Rhone's conviction. See State v. Rhone, 168 Wn.2d 645, 658, 229 P.3d 752 (2010).
[4] 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

suppression order "in light of Arizona v. Gant . . . and State v. Patton[.]"[5] (CP 98)

On remand, the trial court adopted its 2005 findings of fact and legal reasoning, and again upheld the vehicle search. (10/10/14 RP 51-55; CP 540-43) The court entered the following relevant conclusions of law:

> 1. This case did not involve a search incident to arrest, as Deputy Shaffer did not have probable cause to arrest the defendant or any occupants of the vehicle at the time that he conducted the search that was at issue in this case.
> 2. This case involved an investigative stop and detention under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A *Terry* stop is a well-established exception to the requirement for a warrant.
>
> . . . .
>
> 8. Since this was a *Terry* detention, and not an arrest, if after further investigation the witnesses and alleged victim at the Jack in the Box did not provide evidence that would give the police probable cause to arrest the defendant and the other two occupants of the vehicle, the police would have been required to end the *Terry* detention and let them go. If the three individuals had been released, they would have had access to the vehicle and its contents, endangering the safety of the officers present on the scene at that time.
>
> . . . .
>
> 11. Deputy Shaffer acted lawfully in searching inside the rear area under *Terry v. Ohio*, and his search was properly limited in scope.

[5] 167 Wn.2d 379, 394-95, 219 P .3d 651 (2009).

12. The defendant's renewed motion to suppress under CrR 3.6 is denied.

(CP 543-44)[6] Rhone timely appealed. (CP 546)

IV. ARGUMENT & AUTHORITIES

A warrantless search is unreasonable under both the Fourth Amendment and article I, section 7 of the Washington State Constitution, unless the search falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The unique language of article I, section 7, generally provides greater protection to persons under the Washington Constitution than the Fourth Amendment provides. State v. Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). The Washington Constitution, article I, section 7, clearly recognizes an individual's right to privacy with no express limitations. State v. Ferrier, 136 Wn.2d 103, 110, 960 P.2d 927 (1998). This broader reading of individual solitude extends to the area of search warrants. Snapp, 174 Wn.2d at 187.

The State has the burden to prove 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

[6] A copy of the findings and conclusions is attached in Appendix B.

such exception is a search incident to a lawful arrest. State v. Nelson, 89 Wn. App. 179, 181, 948 P.2d 1314 (1997). Another is the protective search exception, which permits officers to search for weapons during traffic stops if the officer "has a reasonable belief that the suspect in a Terry [investigative] stop might be able to obtain weapons from a vehicle." State v. Chang, 147 Wn. App. 490, 495, 195 P.3d 1008 (2008); 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).

A. THE SUPERIOR COURT IGNORED THIS COURT'S RULING THAT DEPUTY SHAFFER CONDUCTED A SEARCH INCIDENT TO ARREST, AND SHOULD HAVE SUPPRESSED THE EVIDENCE FOUND DURING THE SEARCH BASED ON CURRENT SEARCH AND SEIZURE LAW.

In 2005, the Superior Court found that the search of the Camaro fell under the Terry stop/protective search exception to the warrant requirement. The Court found that the search occurred while Deputy Shaffer was still investigating the robbery and before Rhone was placed under arrest. (CP 43-44) But this Court specifically rejected the Superior Court's conclusion, stating:

> Here, the three occupants of the car were removed at gunpoint, frisked, handcuffed, and placed in separate police cars. One of the occupants apparently threw a weapon into the car and another admitted to police that there was a gun in the car. An

> objective person seeing this amount of force and knowing that the police knew of an illegal gun in the car would believe that he or she was being detained indefinitely in these circumstances. Therefore, on the facts of this case, **we hold that Deputy Shaffer arrested the occupants even though he did not use the formal words**. He then articulated the arrest of the three for robbery when Officer Miller contacted him from the Jack in the Box.
>
> Having determined that the occupants had been arrested and that probable cause supported the arrest, we turn to the validity of the search. Absent an exception to the warrant requirement, a warrantless search violates the federal and state constitution. One such exception to the warrant requirement is a search incident to arrest. A valid arrest allows an officer to search incident to that arrest.
>
> **Here, there was a search incident to a valid arrest.** Therefore, we hold that the trial court did not err when it denied the motion to suppress the fruits of that search.

(Rhone, 137 Wn. App. 1046 at *5-6. (citations omitted) (emphasis added)). This Court upheld the search, but as a search incident to arrest. (Rhone, 137 Wn. App. 1046 at *6)

This Court's opinion in Rhone was issued before the United States Supreme Court and subsequent Washington State appellate courts limited the application of the search incident to arrest exception. The exception had, over time, been broadened to allow officers to search a suspect's car at the time of the arrest even when the suspect was removed and secured away from the vehicle. See State v. Stroud, 106 Wn. 2d 144, 152, 720 P.2d 436 (1986) ("During

the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle.")

But in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the United States Supreme Court rejected such a broad application of the search incident to arrest exception. The Supreme Court first rejected the prevailing interpretation of the exception as authorizing a vehicle search incident to every recent occupant's arrest. 129 S. Ct. at 1714. The Court specifically held:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

129 S. Ct. at 1723.

Our State Supreme Court first addressed the Gant holding in State v. Patton, observing:

> [T]he Court in Gant issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

167 Wn.2d 379, 394, 219 P.3d 651 (2009) (quoting Gant, 129 S. Ct. at 1719). The Court held that likewise, under Washington's Article I, section 7:

> [A]n automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

167 Wn.2d at 383. The risk to officer safety or the possibility that evidence will be destroyed must "exist at the time of the search." 167 Wn.2d at 395.

Then in State v. Valdez, the Washington Supreme Court again acknowledged the overexpansion of the search incident to arrest exception, holding:

> after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception.

167 Wn.2d 761, 773, 224 P.3d 751 (2009).

Thus, after Gant and Patton, officers may still search a vehicle incident to arrest, but "only where there is 'a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or

destroyed, **and that these concerns exist at the time of the search**.'" State v. Robinson, 171 Wn.2d 292, 302, 253 P.3d 84 (2011) (quoting Patton, 167 Wn.2d at 394-95)) (emphasis added); Gant, 129 S. Ct. at 1723.

On remand, the Superior Court was obligated to apply this new law to the search conducted in Rhone's case. The Superior Court, however, determined that Gant and its progeny did not apply because the search was not a search incident to arrest. The Superior Court again found that Deputy Shaffer did not have probable cause to arrest the occupants of the Camaro, that they were not under arrest at the time of the search, and that the search was a protective Terry search.[7] (CP 543-44)

The Superior Court ignored this Court's decision in Rhone's direct appeal that, as a matter of law, Deputy Shaffer had probable cause to arrest the occupants of the Camaro; that Deputy Shaffer had in reality arrested the occupants before the search; and that it was a search incident to arrest.[8] (Rhone, 137 Wn. App. 1046 at *4-

[7] 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)).

[8] On remand, neither defense counsel nor the prosecutor brought the Rhone decision to the attention of the Superior Court. The State continued to argue that the search was a valid Terry protective search. (CP 282-88; 09/26/14 RP 36-37)

6)

The Superior Court, on remand, was bound by this Court's holding in Rhone's direct appeal because it is the law of the case. The law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (citing Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992) (citing 15 Lewis H. Orland & Karl B. Tegland, WASHINGTON PRACTICE: JUDGMENTS § 380, at 55–56 (4th ed.1986))). The law of Rhone's case is that he was under arrest at the time of the vehicle search and the search was conducted as a search incident to arrest.

So the question below, and now on appeal, is how Gant and the subsequent cases apply to this particular search incident to arrest. The answer is simple: the search incident to arrest conducted by Deputy Shaffer violated both the State and Federal constitutions, because Washington's post-Gant cases have held that a search incident to arrest is not allowed if, at the time of the search, the arrestee is handcuffed and secured in the backseat of a patrol car. See e.g. Valdez, 167 Wn.2d at 778. At that point, "the arrestee no

longer ha[s] access to any portion of his vehicle, so neither officer safety nor preservation of evidence of the crime of arrest [warrant] the search." Valdez, 167 Wn.2d at 778.

In this case, Rhone, Burg and Brown were all handcuffed and secured in the back of police vehicles at the time of the search. The Camaro was legally parked on the street in front of a house. The driver was present with keys. There is nothing in the record to indicate that the Deputies could not have simply locked and secured the Camaro and obtained a search warrant.[9]

The Superior Court's finding that Deputy Shaffer was conducting a protective Terry search is not supported by the facts or the law. Deputy Shaffer was conducting a search incident to arrest when he searched the Camaro. This is obvious from the record and is supported by this Court's decision in Rhone's direct appeal.

But again, Deputy Shaffer exceeded the scope of a proper search incident to arrest because Rhone, Burg and Brown were all handcuffed and secured in police vehicles at the time of the search, and therefore could not have accessed a weapon or destroyed

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[9] "When a search can be delayed without running afoul of concerns for officer safety or to preserve evidence of the crime of arrest from concealment or destruction by the arrestee, and does not fall within another applicable exception, the warrant must be obtained." State v. Wisdom, __ Wn. App. __, Slip Op. 31832-0-III at 18-19 (2015) (citing Snapp, 174 Wn.2d at 195).

evidence. The Superior Court erred when it adopted the same rationale as the 2005 Superior Court, and when it failed to apply post-Gant and Patton law and suppress the evidence found during the search of the Camaro.

At the hearing on remand, the State called Deputy Schaffer to testify that he would necessarily have to secure and clear any firearm in the Camaro before the vehicle could be impounded or towed. (09/26/14 RP 27) But any attempt by the State to argue that the evidence would have been inevitably discovered is misguided. Washington courts have rejected the inevitable discovery doctrine because it is "incompatible with the nearly categorical exclusionary rule under article I, section 7." State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009); State v. Afana, 169 Wn.2d 169, 180-81, 233 P.3d 879, 884 (2010) (also rejecting a "good faith" exception to the exclusionary rule).

Thus, the State has failed to meet its "heavy burden" of establishing an exception to the warrant requirement by a preponderance of the evidence. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). "Unless it can be shown that the search in question fell within one of the carefully drawn exceptions to the warrant requirement, [this Court] must conclude that it was made

without authority of law." Afana, 169 Wn.2d at 177. Evidence seized during an illegal search must be suppressed under the exclusionary rule. State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) (citing Ladson, 138 Wn.2d at 359). Accordingly, the evidence obtained by Deputy Shaffer during the search of the Camaro must be suppressed.

B. DEPUTY SHAFFER'S SEARCH EXCEEDED THE SCOPE OF A VALID TERRY PROTECTIVE SEARCH.

This Court is also bound by the law of the case, and by its prior holding that Rhone was under arrest and the search of the Camaro was a search incident to arrest.[10] Nevertheless, even if the search is viewed as a protective Terry search, Deputy Shaffer exceeded the proper scope of that exception and the evidence still should be suppressed.

The Terry protective search exception to the warrant requirement permits officers to search for weapons during traffic stops. State v. Larson, 88 Wn. App. 849, 855, 946 P.2d 1212 (1997); State v. Kennedy, 107 Wn.2d, 1, 12, 726 P.2d 445 (1986); Terry, 392 U.S. at 21; Chang, 147 Wn. App. at 495. Specifically, an officer who "has a reasonable belief that the suspect in a Terry stop might be

[10] Roberson, 156 Wn.2d at 41.

able to obtain weapons from a vehicle" may perform a search to determine whether a suspect's furtive gesture hid a weapon. Chang, 147 Wn. App. at 497 (citing State v. Holbrook, 33 Wn. App. 692, 696, 657 P.2d 797 (1983)).

The purpose of a search under the Terry stop exception is to ensure officer safety, and the scope of the search "is limited to the area 'within the investigatee's immediate control.'" Chang, 147 Wn .App. at 496 (quoting Kennedy, 107 Wn.2d at 12); Larson, 88 Wn. App. at 855. The search must be premised upon a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle. State v. Williams, 102 Wn.2d 733, 738-39, 689 P.2d 1065 (1984) (citing Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983)). But a search is not justified unless the officer has reason to believe "that the individual whose suspicious behavior he is investigating at close range is armed and **presently dangerous** to the officer or to others." Terry, 392 U.S. at 24 (emphasis added); State v. Galbert, 70 Wn. App. 721, 725, 855 P.2d 310 (1993).[11]

[11] "There is no evidence that Galbert made any gestures or threats that would have led the officers to believe that he was presently dangerous, and it is not likely that Galbert could have done so while handcuffed and lying prone on his face on the floor." Galbert, 70 Wn. App. at 725.

In this case, there was no reason to believe, at the time of the search, that Rhone, Burg or Brown were **presently** dangerous, as they were all handcuffed and secured in the back of patrol vehicles. (04/25/05 RP 165; 09/26/14 RP 25-26) The interior of the Camaro was not within their immediate control and they could not have gained access to any weapon inside. There was no threat to officer safety at the time that Deputy Shaffer conducted the search of the vehicle.

In its written conclusions, the trial court seems to address this flaw in its logic by noting that there would have been a danger to the officers if they had completed their investigation and decided to release the occupants. (CP 544) If that had come to pass, then arguably there could have been a sufficient concern for officer safety to justify a protective search at that time. But that did not come to pass, and the search was conducted when there was no danger to the officers because the occupants were all handcuffed and secured in police vehicles.

Furthermore, it is nonsensical to say that a search incident to arrest for officer safety is not justified when the vehicle occupants are handcuffed and secured, but a Terry search for officer safety is justified when the vehicle occupants are handcuffed and secured.

There is no rational reason for giving an arrestee suspected of committing a crime a higher level of privacy protection than that given to a mere Terry detainee. If a Terry detainee is to be released, then the risk to officer safety at that point in time can be evaluated and may, under certain circumstances, justify a protective search. But that did not happen in this case, and there was no need for a protective search.

In summary, even if this search is characterized as a protective Terry search, it still exceeded the scope of that exception because no reasonable safety concern existed at the time of the search. There were no "specific and articulable facts" which created an objectively reasonable belief that the occupants of the Camaro were "presently dangerous." State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (quoting Terry, 392 U.S. at 21-24). Therefore, the search cannot be upheld under the protective Terry search exception to the warrant requirement.

V. CONCLUSION

The trial court erred when it found that the search of the Camaro was not incident to arrest but instead a protective Terry search. But the search, conducted when all three occupants of the Camaro were handcuffed and secured in police vehicles, is not

justified under either exception to the warrant requirement. None of the occupants could have accessed the interior of the vehicle, and none of the occupants posed a threat to the safety of the officers, at the time of the search. And the State presented no alternative grounds that would justify the warrantless search. Accordingly, Rhone's convictions and firearm enhancements should be vacated, the Superior Court's denial of Rhone's motion to suppress should be reversed, and the evidence collected as a result of the warrantless search should be suppressed.

DATED: May 20, 2015

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CERTIFICATE OF MAILING

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APPENDIX A

COURT OF APPEALS UNPUBLISHED OPINION IN STATE V. THEODORE R. RHONE, NO. 34063-1-II, 137 WN. APP. 1046 (2007)

137 Wash.App. 1046

NOTE: UNPUBLISHED OPINION. SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent.
v.
Theodore Roosevelt RHONE, Appellant.

No. 34063-1-II. | March 20, 2007.

Appeal from Pierce County Superior Court: Honorable Linda Cj Lee, J.

Attorneys and Law Firms

Rita Joan Griffith, Attorney at Law, Seattle, WA, for Appellant.

Todd Andrew Campbell, Pierce Co. Pros. Attorneys Ofc., Tacoma, WA, for Respondent.

UNPUBLISHED OPINION

BRIDGEWATER, P.J.

*1 Theodore Roosevelt Rhone appeals his convictions of first degree robbery with a firearm enhancement, unlawful possession of a controlled substance with intent to deliver also with a firearm enhancement, and first degree unlawful possession of a firearm. We hold that the police arrested Rhone when they seized him by force, handcuffed him, and placed him in a patrol car, the arresting officer had confirming information that there was a gun in the car, and the car had just come from the robbery site. We further hold that the officer had probable cause to arrest and that an arrest took place, even though he did not formally enunciate an arrest until after the search. Thus, he properly seized the firearm and drugs in a search incident to arrest. We also hold that his trial was fair, evidence was properly admitted, substantial evidence supports the controlled substance conviction, there was no ineffective assistance of counsel, and his sentence as a persistent offender was appropriate. We affirm.

FACTS

On May 30, 2003, Pierce County Sheriff's Deputy David Shaffer received a dispatch indicating that there had been a suspicious vehicle in the Jack in the Box drive-thru window. The dispatch relayed that a red Camaro with three occupants, two black men and a white woman, had been through the drive-thru window. The car had a license plate number of 677 HCS. The dispatch also informed Deputy Shaffer that one of the occupants had displayed a gun and demanded money for a debt.

Fortuitously, Deputy Shaffer recognized the car description and license plate. He was a neighborhood patrol officer in Lakewood and had seen that car in his district at a known drug house. [1] Acting on that knowledge, Deputy Shaffer drove to the house and found the red Camaro.

Concerned that the occupants of the car might have a weapon because of the dispatch and the location in Lakewood, Deputy Shaffer executed a felony stop with his weapon drawn. At the time of the stop, Rhone was getting out of the car's passenger side. When Deputy Shaffer ordered him to show his hands, Rhone slowly and deliberately looked at Deputy Shaffer and then leaned back into the car. These movements made Deputy Shaffer believe that Rhone had a weapon or was reaching for one. Rhone finally complied with the deputy's commands and Deputy Shaffer detained him.

By this time, other officers arrived and they removed the other two occupants, Phyllis Burg and Cortez Brown, from the car. As the officers removed Burg, she told them that they had just come from the Jack in the Box. The officer patted down all three occupants. Rhone had a knife without a handle, someone else's checkbook, and a $20 bill. All three were handcuffed and placed in separate police cars. As Deputy Shaffer started to return to the Camaro, Burg told him that there was a gun in the car. [2] At some point during this process, Officer Darin Miller left to investigate the Jack in the Box events.

At this point, Deputy Shaffer decided to search the Camaro to locate and secure the gun. As he approached the car, he did not see anything in plain sight. After he began searching, he found the gun in a plastic bag wrapped inside a towel. Deputy Shaffer did not stop searching at that point and found a purple Crown Royal bag and small plastic tube. Inside these containers, he found crack cocaine.

*2 Deputy Shaffer did not, however, declare that he was arresting the occupants until Officer Miller called him from the Jack in the Box. Officer Miller relayed that the

Camaro had gone through the drive-thru window, contacted an employee, and demanded money from him. When the employee refused, the occupants displayed a gun and the employee threw $30 into the vehicle. After receiving this information, Deputy Shaffer arrested all three for armed robbery.

At trial, Isaac Miller testified that he worked at Jack in the Box. He admitted that he had owed Rhone money but claimed that Brown, the Camaro's other male occupant, had already collected it. Miller noticed, however, that Rhone was holding a gun in his lap and pointing it at him. Miller decided to give Rhone the money and threw what he had in his pocket into the car.

Burg testified that Rhone had asked Brown and her for a ride to Jack in the Box in her Camaro. Although she could not see Rhone's lap, she heard Rhone demanding $40, and saw money thrown into the car. She also testified that she saw Rhone with a plastic bag and that she saw a gun in that bag when Rhone threw it into the back seat after the police surrounded the Camaro. Both she and Brown denied placing the Crown Royal bag in the car.

Deputy Shaffer testified at length about the Crown Royal bag's contents. Inside the bag, he found five small baggies of crack cocaine. In addition, Deputy Shaffer testified that there was a handwritten note with "40's" written on it. 8 RP (Apr. 29, 2005) at 624–25. There was also $30 in cash in the bag.

Detective Oliver Hickman testified as an expert on street level crack cocaine transactions. He noted that a typical street sale involved selling amounts in $20 or $40 values. The crack cocaine rocks in this case were uniform in size, suggesting that they had been weighed and measured by a drug dealer. And the note with "40's" indicated that it was likely the drugs were packaged for sale in $40 increments. 10 RP (May 3, 2005) at 852. Detective Hickman conceded that a user could use all five packages in a week and that a dealer normally had a cell phone, pager, scale, and crib notes.

Based on these events, the State charged Rhone with unlawful possession of a controlled substance with intent to deliver and first degree robbery. Both of these counts included a firearm enhancement. [3]

Before trial, Rhone moved to suppress the evidence Deputy Shaffer seized during his search of the Camaro. The trial court denied the motion to suppress. The trial court found that Deputy Shaffer had a reasonable suspicion from the dispatch to stop the Camaro. After that lawful stop, he had a reasonable concern for his safety as well as a reasonable suspicion that Rhone had a weapon in the vehicle. Thus, the trial court found that Deputy Shaffer's search was lawful.

At the State's urging, the trial court also found that Deputy Shaffer had probable cause and lawfully arrested the Camaro's occupants after Officer Miller reported from the Jack in the Box. The trial court also concluded that Shaffer would have searched the vehicle had he waited until making a formal arrest and would have inevitably discovered the evidence.

*3 Before trial, Rhone disputed the fairness of the jury selection process. The jury venire included two African Americans. One was excused for cause by agreement of both parties. The State used a peremptory challenge on the other. Rhone, acting pro se, challenged the jury panel on the grounds that the prosecutor made this decision on the basis of the potential juror's race. The trial court determined that Rhone failed to make a prima facie showing of racial discrimination and denied Rhone's motion for a new jury panel.

At trial, the witnesses testified as indicated above, with one notable incident. After he was excused, Miller walked by the defense table and said, "I could make it real easy on everybody and just say that I didn't recognize the gun." 7 RP (Apr. 28, 2005) at 529. The trial court determined that the jurors could not have heard the comment. Therefore, the trial court denied Rhone's motion for a mistrial.

The jury convicted Rhone of all counts. In addition, by special verdict, the jury found that Rhone was armed with a firearm during the drug and robbery crimes.

At sentencing, Rhone stipulated that he had three prior felony convictions: a 1993 first degree robbery conviction in Washington, a 1988 second degree assault in Oregon, and a 1981 Oregon first degree robbery conviction. The trial court determined that all three convictions were most serious offenses for the purposes of the persistent offender accountability act (POAA). RCW 9.94A.030(29). Thus, the trial court sentenced Rhone to life without the possibility of parole for the unlawful possession of a controlled substance with intent to deliver while armed with a firearm charge and the first degree robbery charge.

ANALYSIS

I. Illegal Search

Rhone's primary issue on appeal is that the trial court should have suppressed the evidence Deputy Shaffer seized before he formally arrested Rhone. We hold that Deputy Shaffer had probable cause to arrest Rhone and the other occupants of the vehicle before he searched the car. We also hold that although Deputy Shaffer did not actually state that he was arresting Rhone and the others, he did place them under custodial arrest. Therefore, the search he conducted was a search incident to arrest, and the trial court properly denied Rhone's motion to suppress.

Because a trial court's suppression decision under CrR 3.6 involves both factual and legal questions, our review is in two parts. We review challenged findings of fact for substantial evidence, which is enough evidence to persuade a fair-minded rational person of the truth of the finding. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). We treat unchallenged findings as verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

If substantial evidence supports the challenged findings, we determine if the findings support the conclusions of law. *Vickers*, 148 Wn.2d at 116. We review de novo a trial court's conclusions of law after a suppression hearing. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Specifically, we review whether the evidence known to an officer constitutes probable cause de novo. *In re Det. of Peterson*, 145 Wn.2d 789, 799, 42 P .2d 952 (2002). Similarly, whether an officer arrested or seized a suspect is a mixed question of law and fact. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). We defer to the trial court's factual findings and then determine de novo whether those facts constitute a seizure. *Thorn*, 129 Wn.2d at 351. And we may affirm on a different ground than the trial court considered so long as the record is sufficiently developed. *State v. Villarreal*, 97 Wn.App. 636, 643, 984 P.2d 1064 (1999), *review denied*, 140 Wn.2d 1008 (2000).

*4 We turn first to the findings of facts that Rhone challenges. We hold that these challenges are without merit. First, he argues that there was no evidence Deputy Shaffer was aware that robberies of fast food restaurants were common in Lakewood. But the deputy testified that it was common for fast food restaurants in Lakewood to be robbed. That testimony is sufficient to support this finding.

Second, Rhone challenges the trial court's finding that Rhone reached into the rear interior when he initially disobeyed Deputy Shaffer's commands. While Rhone is correct that Deputy Shaffer did not specify the rear interior, it is hard to see the significance of this error. The trial court properly found that Rhone did lean back into the car.

Third, Rhone argues that there is no evidence that Burg told Deputy Shaffer about the gun or that the deputy entered the car to find it. But Deputy Shaffer testified that as he was walking back to search the car, Burg told him that there was gun in the car. The record therefore supports the finding that Shaffer's subjective intent at the time he entered the car was to secure the gun.

Fourth, Rhone argues that the findings are misleading because they do not describe the order in which Deputy Shaffer discovered the items in the car. We agree with the State that these findings imply the correct order of discovery—the gun, the cigarette tube, and the Crown Royal bag. As we explain below however, this is irrelevant for our analysis, and the error, if any, is harmless.

Rhone's last challenge to the findings of fact also fails. He argues there was no evidence that the trial court erred in finding that Officer Miller immediately contacted Deputy Shaffer after interviewing the Jack in the Box employees. Rhone argues that Officer Miller could not remember exactly when he called Shaffer. But the record belies Rhone's claim. Officer Miller testified that his interviews took about 20 minutes. He then testified that although he could not remember whether he called Deputy Shaffer or vice versa, he relayed the victim's information to Deputy Shaffer. And Deputy Shaffer testified that he received Officer Miller's information before making the robbery arrest. Although Rhone may quibble with the trial court's use of the adjective "immediately," CP at 124, this record supports a finding that Officer Miller acted reasonably quickly.

Having determined that the trial court's factual findings were appropriate, we turn next to the trial court's legal conclusions. First, the trial court concluded that Deputy Shaffer did not have probable cause to arrest Rhone and the other occupants until Officer Miller reported to him. Second, the trial court determined that Rhone was not arrested until Deputy Shaffer said the words of arrest. We disagree with both conclusions

and hold that Deputy Shaffer had probable cause once Burg confirmed there was a gun in the car and that the occupants had just come from the Jack in the Box. We also hold that Deputy Shaffer arrested Rhone and the other occupants before the search.

*5 An officer has probable cause when he knows facts sufficient to warrant a prudent person's belief that the suspect has committed an offense. *Furfaro v. City of Seattle*, 144 Wn.2d 363, 379, 27 P.3d 1160 (2001), *cert. denied*, 536 U.S. 922 (2002). The officer's subjective intentions are not relevant so long as the circumstances, viewed objectively, support the arrest. *Furfaro*, 144 Wn.2d at 380.

Here, although Deputy Shaffer testified that he did not believe that he had probable cause to arrest the suspects, the objective facts dictate that he did. The police dispatch reported that there was a suspicious vehicle in the drive-thru window at the Jack in the Box with two black men in the front and a white woman in the back seat. One of the occupants displayed a gun and asked about money. The dispatch also described the car and gave the license plate number of the car, and the Camaro matched the description and had the reported license plate number. At this point, Deputy Shaffer had a strong reasonable suspicion to stop the car on suspicion of armed robbery and second degree assault.

When Deputy Shaffer found the car a short time after the dispatch, that reasonable suspicion was elevated to probable cause. Because of the matching license plate number, a reasonable officer would have known this was the car from the Jack in the Box. And Rhone's furtive movement back into the car further confirmed that Shaffer had stopped the correct car. Moreover, when Shaffer removed the occupants of the car, Burg told him that the car had come from the Jack in the Box. At some point before the search took place, Burg also told the officer that there was a gun in the car. Thus, before the search took place, Deputy Shaffer had probable cause to believe that the Camaro's occupants had been involved in at least a second degree assault or an attempted robbery.

We next examine when Deputy Shaffer arrested Rhone. Rhone and the occupants of the Camaro were definitely seized because, under an objective test, the officer restrained their freedom of movement. *State v. Young*, 135 Wn.2d 498, 513–14, 957 P.2d 681 (1998). And, we may find that a person is arrested at the point at which an objective person would reasonably believe that they were being detained indefinitely. *State v. Bellieu*, 112 Wn.2d 587, 599, 773 P.2d 46 (1989) (citing *United States v. Patterson*, 648 F.2d 625, 634 (9th Cir.1981)).

Here, the three occupants of the car were removed at gunpoint, frisked, handcuffed, and placed in separate police cars. One of the occupants apparently threw a weapon into the car and another admitted to police that there was a gun in the car. An objective person seeing this amount of force and knowing that the police knew of an illegal gun in the car would believe that he or she was being detained indefinitely in these circumstances. Therefore, on the facts of this case, we hold that Deputy Shaffer arrested the occupants even though he did not use the formal words. He then articulated the arrest of the three for robbery when Officer Miller contacted him from the Jack in the Box.

*6 Having determined that the occupants had been arrested and that probable cause supported the arrest, we turn to the validity of the search. Absent an exception to the warrant requirement, a warrantless search violates the federal and state constitution. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). One such exception to the warrant requirement is a search incident to arrest. A valid arrest allows an officer to search incident to that arrest. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

Here, there was a search incident to a valid arrest. Therefore, we hold that the trial court did not err when it denied the motion to suppress the fruits of that search. Because we resolve this issue on these grounds, we do not reach the remainder of Rhone's arguments (e.g., inevitable discovery).

II. *Batson* Challenge

Rhone's next argument is that the trial court erred when it denied his *Batson*[4] challenge. He argues that where a prosecutor uses a peremptory challenge to dismiss one of two African Americans and both parties and the trial court agreed that the other African American juror should be dismissed for cause, the trial court should require the State to provide a nondiscriminatory reason for the challenge. The State responds that the trial court did not abuse its discretion in finding that the numbers alone were not enough to establish a prima facie case of discrimination. We agree with the State.

The Equal Protection Clause of the federal constitution prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified persons from a jury

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING 2014 CRR 3.6 HEARING

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. THEODORE ROOSEVELT RHONE, Defendant.	CAUSE NO. 03-1-02581-1 FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING 2014 CrR 3.6 HEARING

THIS MATTER having come before the Honorable Edmund Murphy on the 26th day of September, 2014, for a 3.6 hearing after the Washington Supreme Court granted the defendant's personal restraint petition, the defendant having been present and represented by Desmond Kolke, and the State being represented by Deputy Prosecuting Attorney Bryce Nelson, and the court having considered the arguments of counsel and being duly advised in all matters, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

I. FINDINGS OF FACT

1. On May 30th, 2003, at 5:23 p.m., Pierce County Sheriff's Deputy Shaffer responded to a call involving an incident at a Jack in the Box restaurant located at 8814 S. Tacoma Way in Lakewood, WA.
2. Workers from the restaurant reported to 911 that a red 1990 T-top Camaro, Washington license plate number 677 HCS, with three occupants, two black males in the front and one white female in the rear, had been at the restaurant on two occasions looking for an employee that owed them money. The report indicated that the front passenger was armed with a gun.
3. Deputy Shaffer recognized the vehicle description and license number as a vehicle he previously had seen at a house located at 10701 S. Tacoma Way. Upon arriving in the area of 10701 S. Tacoma Way at 5:27 p.m., Deputy Shaffer saw the suspect vehicle. As Deputy Shaffer pulled in behind the vehicle, the passenger door opened and the front passenger, later identified as the defendant, Theodore Rhone, began to step from the vehicle.
4. Due to the report that the front passenger was armed with a gun, Deputy Shaffer, who was alone at that time, stepped from his patrol car, drew his weapon, and gave loud verbal commands to the defendant to put his hands where they could be seen. The defendant made eye contact with the deputy, but failed to comply with the deputy's oral commands.
5. Instead, the defendant reached back into the rear interior of the vehicle. Deputy Shaffer feared the defendant was reaching for a gun, and continued to give verbal commands to the defendant. The defendant eventually complied with the deputy's commands. The defendant was frisked, handcuffed, and detained in a patrol car by another officer who had just arrived on the scene.

6. While Deputy Shaffer was dealing with the defendant, the rear passenger of the vehicle, later identified as Phyllis Burg, was extremely belligerent, uncooperative, and agitated. Ms. Burg stated the individuals in the vehicle had just come from the Jack in the Box. Ms. Burg was asked to step from the vehicle and was frisked, handcuffed, and detained by another officer who had arrived on the scene. The driver of the vehicle, later identified as Cortez Brown, was also asked to step from the vehicle and was frisked, handcuffed, and detained by another officer who had arrived on the scene.
7. As Deputy Shaffer approached the vehicle to determine if there was a gun in the vehicle that could pose a threat to law enforcement officers, Phyllis Burg stated that there was a gun in the car. Deputy Shaffer then entered the vehicle.
8. Inside the vehicle, Deputy Shaffer found a .22 caliber Smith and Wesson revolver in a white plastic bag on a floorboard behind the driver's seat. He also located a white plastic tube containing two pieces of suspected crack cocaine under the driver's seat and a purple Crown Royal bag that contained five bundles of suspected rock cocaine individually wrapped in plastic, $30 in cash, and a note that says "40s" under the back passenger seat. At the time of this search, all three occupants of the vehicle were being detained in patrol cars.
9. As the occupants of the vehicle were being detained, Deputy Darin Miller, who had initially also responded to the location of the stop, contacted the Jack in the Box restaurant and spoke with Isaac Miller at approximately 6:00 p.m.. Isaac Miller reported that the occupants of the Camaro came through the drive through claiming he owed them money. Miller said the front seat

passenger pointed a gun at him, and he threw what little money he had into the vehicle. Deputy Miller relayed this information to Deputy Shaffer immediately, and Deputy Shaffer arrested all three occupants of the Camaro sometime after 6:13 p.m.

II. CONCLUSIONS OF LAW

1. This case did not involve a search incident to arrest, as Deputy Shaffer did not have probable cause to arrest the defendant or any occupants of the vehicle at the time that he conducted the search that was at issue in this case.
2. This case involved an investigative stop and detention under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A *Terry* stop is a well-established exception to the requirement for a search warrant.
3. Deputy Shaffer had a reasonable concern for his safety and had a reasonable suspicion that the defendant was dangerous and may gain access to a weapon in the vehicle at the time of the investigative stop and detention. This concern was based on the prior report of the defendant possessing a gun, and the defendant's furtive movements in reaching back into the vehicle after being initially contacted by Deputy Shaffer.
4. It was reasonable for Deputy Shaffer and other deputies to use force, detain, and handcuff all three occupants of the vehicle during the investigatory stop.
5. The rear passenger of the vehicle, Phyllis Burg, was belligerent and uncooperative.
6. Deputy Shaffer had reason to believe that there was an unsecured firearm in the vehicle.

7. Deputy Shaffer could not leave the three occupants (the defendant, Ms. Burg, and Mr. Brown) inside of the vehicle while he investigated what had occurred at the Jack in the Box.
8. Since this was a *Terry* detention, and not an arrest, if after further investigation the witness and alleged victim at the Jack in the Box did not provide evidence that would give the police probable cause to arrest the defendant and the other two occupants of the vehicle, the police would have been required to end the *Terry* detention and let them go. If the three individuals had been released, they would have had access to the vehicle and its contents, endangering the safety of the officers present on the scene at that time.
9. The purpose of Deputy Shaffer's search was to discover whether the defendant's furtive gesture of reaching back into the rear interior of the vehicle hid a weapon.
10. The scope of Deputy Shaffer's search was limited to the rear interior of the vehicle, which is the area where the defendant had been reaching when he made the above described furtive movements.
11. Deputy Shaffer acted lawfully in searching inside the rear area under *Terry v. Ohio*, and his search was properly limited in scope.
12. The defendant's renewed motion to suppress under CrR 3.6 is denied.

The court's oral ruling on this motion was given on October 10th, 2014, in open court in the presence of the defendant.

DONE IN OPEN COURT this 24th day of November, 2014.

EDMUND MURPHY,
JUDGE

PRESENTED BY:

BRYCE NELSON
Deputy Prosecuting Attorney
WSB # 33142

APPROVED AS TO FORM:

DESMOND KOLKE
Attorney for Defendant
WSB # 23563

CUNNINGHAM LAW OFFICE

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