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State of Washington
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Supreme Court No. 96590-1
(COA No. 76506-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Appellant,

v.

Mark Wade Alexander, Jr.,

Respondent.

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

RESPONDENT'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1)-RAP 13.4(b)(4), Mark Wade Alexander, Jr., petitioner here and respondent below, asks this Court to accept review of a published decision reversing a trial court ruling that suppressed the fruits of his unlawfully prolonged *Terry*[1] stop. A copy of the Court of Appeals' opinion[2] and a November 1, 2018, order denying Mr. Alexander's motion to reconsider[3] is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

A *Terry* stop that exceeds the time needed to address its original purpose is unlawful, and the fruits of an excessively prolonged seizure must be suppressed. Somebody called 911 and reported than a man punched a woman. Shortly after this call, a police officer detained Mark Alexander because he matched the 911 caller's description of the alleged perpetrator and he was walking close to a woman who matched the 911 caller's description of the alleged victim. Both Mr. Alexander and the woman denied any assault occurred, and the police officer did not observe any injuries on the woman. The woman also did not appear in any emotional distress.

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[1] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
[2] Appendix A.
[3] Appendix B.

Nevertheless, the police officer prolonged the seizure and ran Mr. Alexander's name through a law enforcement database. This led to the officer discovering Mr. Alexander was in violation of a no-contact order.

1. Fact-finders may draw logical inferences from the facts of any case. On appeal, courts must only assess whether substantial evidence supports the trial court's findings, and a court may not substitute its judgment for that of the trial court.

Here, due to the lack of any corroborating evidence supporting an assault, the trial court found that the police officer who detained Mr. Alexander concluded no assault occurred *before* he ran Mr. Alexander's name through a law enforcement database. The Court of Appeals concluded the evidence failed to support this finding because the officer never explicitly stated he concluded no assault occurred before he ran Mr. Alexander's name through a law-enforcement database.

Does the Court of Appeals' opinion conflict with cases that hold the trier of fact possesses the discretion to draw inferences from the facts presented to it, and does the Court of Appeals' opinion conflict with numerous cases that hold appellate courts cannot substitute their judgment for that of the trial court? RAP 13.4(b)(1), RAP 13.4(b)(2)?

2. Unchallenged findings are verities on appeal. Here, the Court of Appeals' opinion holds that a finding the State neither assigned error to

nor argued was unsupported in its opening brief was unsupported. This lent credence to the court's mistaken conclusion that the State did not infringe on Mr. Alexander's right to be free from unreasonable searches and seizures.

Should this Court accept review because the Court of Appeals' opinion essentially waives the appellant's obligation to conform to long-established appellate rules and procedures? RAP 13.4(b)(1); RAP 13.4(b)(4).

3. Under the *Terry* exception to the warrant requirement, officers may detain an individual only if the officer possesses a reasonable, *articulable suspicion, based on specific and objective facts,* that the individual seized has committed, or is about to commit a crime. The State bears the burden of proving a seizure was sufficiently limited in scope and duration. And this Court has repeatedly held that officers themselves must articulate the reasons supporting their course of conduct during a *Terry* stop; neither a prosecutor nor an appellate court can use facts the police officer never him/herself articulated to justify an individual's warrantless detention.

The officer who detained Mr. Alexander never articulated his reason for running Mr. Alexander's name through a law enforcement database. The same officer never articulated his reason for believing the

woman accompanying Mr. Alexander was the protected party in the no-contact order. However, the Court of Appeals reversed the trial court's ruling suppressing the fruits of Mr. Alexander's detention based largely on facts Officer Lemberg never himself articulated to support Mr. Alexander's prolonged detention.

a. Does the Court of Appeals opinion conflict with cases from this Court and the Court of Appeals that specifically require officers to articulate the facts that contribute to their suspicion? RAP 13.4(b)(1)-RAP 13.4(b)(3).

b. Can the State prove the scope of a warrantless search was lawful when it fails to elicit testimony from police officers that allow them to articulate the facts that support their continuing suspicion of criminal activity? RAP 13.4(b)(3).

c. Does the Court of Appeals' opinion conflict with *Rodriguez v. United States*, __ U.S. __, 135 S. Ct. 1609, 1614-15, 191 L. Ed. 2d (2015) because it finds Mr. Alexander's extended detention was lawful despite the mission of the stop being over once the officer concluded no assault occurred? RAP 13.4(b)(3).

4. The Washington Constitution jealously protects a person's privacy and does not permit a police officer to arrest someone without authority of law. Our Legislature granted police officers the authority to

check for outstanding warrants during a traffic stop. However, our Legislature has not passed legislation allowing police officers to check for outstanding warrants or no-contact orders during a pedestrian stop.

Because no statute grants police officers the authority to check for warrants or no-contact orders during a pedestrian stop, did the officer involved in Mr. Alexander's *Terry* search act with any lawful authority when he ran Mr. Alexander's name through a law enforcement database during the *Terry* stop? RAP 13.4(b)(3); RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Mark Alexander was walking down Aurora Avenue with Danyail Carlson trailing behind him when police officers surrounded and seized him. Ex. 1 (5:10-6:10).[4] One of the police officers, Officer Nathan Lemberg, told Mr. Alexander that he was not free to leave and instructed him to sit on some steps. RP 8, 24.

Officer Lemberg explained to Mr. Alexander the reason for the stop: someone driving down Aurora Avenue called 911 and reported seeing a thin, 20-30 year old White male wearing a red hooded sweatshirt and a baseball cap punch a thin, 20-30 year old White female wearing a red sweatshirt and black pajama-like pants on 85th and Aurora Avenue.

[4] Exhibit 1 consists of a dashcam video of Mr. Alexander's detention. The numbers indicated in the parenthesis correspond to the minutes indicated in the video.

Ex. 2; RP 24. Mr. Alexander and Ms. Carlson happened to match the caller's description and were also walking close to the area where the alleged assault occurred. RP 22-23. Due to these circumstances, Officer Lemberg believed Mr. Alexander and Ms. Carlson were the persons involved in the alleged assault, which resulted in Mr. Alexander's seizure. RP 22-23.

When Officer Lemberg approached Ms. Carlson, he looked closely at her face. RP 36. He did not see any signs of injury, and Ms. Carlson denied being assaulted. RP 37. Officer Lemberg did not take any pictures of Ms. Carlson's face during Mr. Alexander's detention. RP 36.

Upon Officer Lemberg's request, Mr. Alexander told the officer his name. RP 24. Although Mr. Alexander admitted to getting into an argument with Ms. Carlson before Officer Lemberg detained him, Mr. Alexander denied assaulting Ms. Carlson. RP 29.

After receiving this information, Officer Lemberg did not arrest Mr. Alexander for assaulting Ms. Carlson. Instead, Officer Lemberg returned to his car and ran Mr. Alexander's name through a database. RP 25; Ex. 1 (8:35-8:42). Upon conducting this search, Officer Lemberg discovered Mr. Alexander was the restrained party in a no-contact order. RP 27. The protected party was Ms. Carlson. RP 44.

While Mr. Alexander remained detained, police officers continuously questioned Ms. Carlson about her identity and her relationship to Mr. Alexander. Ex. 1 (10:47-14:07). Up to this point, Ms. Carlson gave the police her sister's name rather than her true name. RP 26. Through another records search, the police pulled up Ms. Carlson's photo, which allowed the police to determine her true identity. RP 26. Officer Lemberg arrested Mr. Alexander "when [he] developed probable cause that a no contact order violation had occurred." RP 28, 49.

The State charged Mr. Alexander with domestic violence felony violation of a no-contact order. CP 1.

At Mr. Alexander's joint CR 3.5/3.6 motion to suppress hearing, Officer Lemberg articulated no basis for running Mr. Alexander's name through a database after his initial questioning. He also articulated no basis for believing that Ms. Carlson was the protected party in the restraining order. The court ruled the police had no articulable basis to continue to the detention after discovering no evidence of an assault. CP 48. Accordingly, the court suppressed the fruits of Mr. Alexander's detention: the no-contact order. CP 47-48.

The State appealed, and the Court of Appeals reversed. Opinion at 1. Mr. Alexander now petitions this Court for review.

D. ARGUMENT

1. This Court should accept review because the Court of Appeals' opinion fails to conform to long-standing principles regarding an appellate court's deference to the trier of fact.

This Court should accept review because the Court of Appeals' opinion conflicts with cases that hold the trier of fact possesses the discretion to draw inferences from the facts presented to it. It also conflicts with cases that hold appellate courts cannot substitute its judgment for that of the trial court. RAP 13.4(b)(1), RAP 13.4(b)(2).

The Court of Appeals' opinion mistakenly concludes insufficient evidence supported the trial court's finding that Officer Lemberg concluded no assault occurred before he decided to run Mr. Alexander's name to check for warrants. Opinion at 6-7. This Court reviews findings of fact in suppression hearings by first assessing whether substantial evidence supports the findings. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when *it is enough to persuade a fair minded person of the truth of the stated premise.*" (internal citations omitted) (referencing *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)) (emphasis added). "It is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence of the credibility of the witnesses." *Davis v. Dep't of Labor & Industries*,

94 Wn.2d 119, 124, 615 P.2d 1279 (1980). Instead, "the logical inferences drawn from the facts of any case are a *matter for the finder of fact.*" *State v. Baker*, 136 Wn. App. 878, 882, 151 P.3d 237 (2007) (emphasis added).

Here, the trial court's finding regarding Officer Lemberg's conclusion that no assault occurred is supported by *enough evidence to persuade a fair minded person of the stated premise*. Before Officer Lemberg decided to run Mr. Alexander's name through a law enforcement database, he did not see any signs of injury on Ms. Carlson's face. RP 36. He did not immediately summon medical assistance for Ms. Carlson, and in fact, he never summoned medical assistance for Ms. Carlson. He did not offer her any first aid. Both Ms. Carlson and Mr. Alexander denied the assault. RP 29, 37. Ms. Carlson was not crying or emotional when Officer Lemberg stopped her. When Officer Lemberg approached Mr. Alexander and Ms. Carlson, he did not see signs of a struggle. RP 39. Officer Lemberg never articulated that although he did not see physical signs of an assault, he still suspected an assault occurred based on Mr. Alexander's demeanor or based on Ms. Carlson's demeanor.

Accordingly, a fair minded person could certainly find that Officer Lemberg concluded no assault occurred by the time he decided to run Mr. Alexander's name through the database.

The Court of Appeals' opinion points to no authority that requires a police officer to explicitly state he concluded no assault occurred before a court can make such a finding, yet this is precisely what the Court of Appeals' opinion appears to require. Opinion at 6-7. Such explicit assertions are unnecessary and contrary to law. Accordingly, this Court should accept review. RAP 13.4(b)(1); RAP 13.4(b)(2).

2. This Court should accept review because the Court of Appeals' opinion essentially waives the appellant's obligation to conform to long-established appellate rules and procedures.

This Court should accept review because the Court of Appeals' opinion overlooks long established appellate rules and procedures. RAP 13.4(b)(1); RAP 13.4(b)(4).

When it concluded insufficient evidence supported the court's finding that Officer Lemberg concluded no assault occurred, the Court of Appeals' opinion points to another finding that states Officer Lemberg only ran Mr. Alexander's name *after* Officer Lemberg spoke to Ms. Carlson. Opinion at 7; CP 47 (Finding of Fact H). The Court of Appeals concluded this unchallenged finding was unsupported because "[Officer Lemberg] only interacted with Carlson after he ran Alexander's name," and this lent credence to the Court of Appeals' mistaken conclusion that

Officer Lemberg continued to suspect an assault occurred when he ran Mr. Alexander's name through a law enforcement database. Opinion at 7.

This was in error for two reasons. First, the video of the *Terry* stop fails to conclusively demonstrate that Officer Lemberg never observed Ms. Carlson's face or spoke to Ms. Carlson before he ran Mr. Alexander's name. This is another example of the Court substituting its judgment for that of the trial court. *See supra*, part 1. Second, and most importantly, the State's opening brief neither assigns any error to this finding nor argues that the finding is unsupported; thus, the finding was a verity on appeal. *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). While the State began to argue this finding was unsupported in its reply, "an issue raised for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 828 P.2d 549 (1992).

The Court of Appeals' opinion essentially waives the appellant's obligation to conform to long-established rules and principles. Accordingly, this Court should accept review. RAP 13.4(b)(1); RAP 13.4(b)(4).

3. This Court should accept review because the Court of Appeals' opinion conflicts with cases that expressly require officers to articulate the facts that contribute to their suspicion.

This Court should accept review because the Court of Appeals' opinion conflicts with numerous cases that require a police officer to specifically articulate the facts contributing to his or her suspicion. RAP 13.4(b)(1)-RAP 13.4(b)(3).

Under the *Terry* exception to the warrant requirement, officers may briefly detain an individual only if the officer possesses a reasonable, *articulable suspicion, based on specific and objective facts*, that the individual seized has committed, or is about to commit a crime. *State v. Day*, 161 Wn.2d 889, 895-96, 168 P.3d 1265 (2007). The State bears the burden of proving that a seizure was sufficiently limited in *scope and duration*. *Royer*, 406 U.S. at 500; *see also State v. Collins*, 121 Wn.2d 168, 172, 847 P.2d 919 (1993) (emphasis added). An officer's decision to continue to detain an individual must be based on "more than a mere generalized suspicion that the person detained 'is up to no good;' the facts must connect the particular person to the *particular crime* that the officer seeks to investigate." *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015) (emphasis in original).

A *Terry* stop that exceeds the time needed to address its mission is unlawful, and the fruits of such excessively prolonged stops must be suppressed. *Rodriguez v. United States*, __ U.S. __, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d (2015).

This Court has expressly ruled that appellate courts cannot rely on facts or circumstances the police themselves never articulated when either upholding or reversing a ruling suppressing evidence obtained during a *Terry* stop. *See State v. Fuentes*, 183 Wn.2d 149, 353 P.3d 152 (2015) (refusing to find that the defendant's pale appearance and shaking contributed to a reasonable suspicion of criminal activity because the officer did not attribute the defendant's appearance to drugs or to any illegal conduct; this Court ruled that "while we evaluate the totality of the circumstances to determine whether a reasonable suspicion of criminal activity exists, we do so, in part, by examining *each fact identified by the officer as contributing to that suspicion.*") (emphasis added); *accord State v. Glossbrener*, 146 Wn.2d 670, n.8, 49 P.3d 128 (2002) (rejecting State's argument, posed only in the State's briefing, that the officer's decision to prolong a search was justified due to the time of day because the police officer who detained the defendant did not cite the time of day as a reason for prolonging the search).

See also State v. Ibarra-Cisneros, 172 Wn.2d 880, 263 P.3d 591 (2011) (declining to consider arguments the State failed to raise in a CrR 3.6 hearing because "courts should not consider grounds to limit application of an exclusionary rule when the State at a CrR 3.6 hearing offers no supporting facts or arguments.").

Contrary to this Court's rulings, the Court of Appeals' opinion continuously relies on facts Officer Lemberg never himself articulated to reverse the trial court's ruling suppressing the fruits of Mr. Alexander's unlawfully prolonged detention. Officer Lemberg never *articulated* why he believed Ms. Carlson was the restrained party in the no-contact order, yet the Court of Appeals used the facts Officer Lemberg articulated to support his *initial detention* of Mr. Alexander to conclude Mr. Alexander's *prolonged detention* was proper. Opinion at 13.

The Court of Appeals' opinion concludes this case is similar to *State v. Pettit*, but it is materially distinguishable from this case because (1) *Pettit* specifically recognizes that "*officer[s] must be able to identify specific and articulable facts* that, taken together with rational inferences from those facts, reasonably warrant [a] detention;" and (2) the officer in *Pettit* knew about the age, sex, and appearance of the protected party. *See* Opinion at 13-14.

In *Pettit*, a police officer stopped the defendant-driver due to his loud exhaust. 160 Wn. App. 716, 718, 251 P.3d 896 (2011). A record check of the defendant revealed he was the restrained party in a no-contact order issued to protect a 16-year-old girl. *Id*. The officer noticed a passenger in Mr. Pettit's car that appeared to be 16. *Id*. The police officer asked the passenger for her name and birthday, and she initially gave the officer a false name and birthday. *Id*. The passenger gave the officer a birth date that was inconsistent with her apparent age. *Id*. at 720. The officer asked dispatch for more information about the 16-year-old girl protected in the no-contact order, and the passenger fit that description. *Id*. The officer arrested the defendant for violating the no-contact order. *Id*. at 719.

Here, unlike in *Pettit*, Officer Lemberg pointed to no articulable facts supporting Mr. Alexander's extended detention. CP 48. And nothing in the record indicates that Officer Lemberg learned the sex, age, or appearance of the protected party when he discovered the no-contact order. He only learned the name of the protected party: Danyail Carlson. Thus, nothing in the record indicates Ms. Carlson matched the description of the protected party in the no-contact order. The Court of Appeals' reliance on *Pettit* was misplaced.

In sum, the Court of Appeals' opinion simply fails to appreciate that the State had an obligation to specifically elicit testimony from Officer Lemberg that explained his course of conduct during Mr. Alexander's detention. Officer Lemberg never articulated why he needed to run Mr. Alexander's name in order to determine whether an assault occurred. It is difficult to imagine how Mr. Alexander's name and warrant status could help the officer learn whether Mr. Alexander assaulted Ms. Carlson. This was Officer Lemberg's "mission" when he detained Mr. Alexander; thus, he needed to explain *how* this step would further his mission in order for the State to prove the propriety of the scope of the stop. RP 21-22. The Court of Appeals' opinion ignores the State's failure to elicit testimony from Officer Lemberg describing how running Mr. Alexander's name through a law enforcement database was necessary in order to determine whether an assault occurred.

Without Officer Lemberg articulating each individual fact that contributed to his suspicion, the State simply failed to meet its burden in proving that the scope of the search comported with both the federal and state constitution's prohibition on unreasonable searches and seizures.

Moreover, a seizure's mission determines its lawful duration, and a seizure may last no longer than is necessary to effectuate its mission. *Rodriguez*, 135 S. Ct. at 1614-15. According to Officer Lemberg, he

detained Mr. Alexander because "[he] had reasonable suspicion at that point to believe an assault had occurred, and [he] needed to conduct a further investigation into *that* potential crime." RP 21-22 (emphasis added). The Court of Appeals' opinion overlooks the fact that the only purpose for Mr. Alexander's stop was to determine whether an assault occurred.

But after discerning that no assault occurred, Officer Lemberg possessed no authority to prolong Mr. Alexander's detention. The stop should have ended before Officer Lemberg decided to run Mr. Alexander's name through a law enforcement database. By this point, Officer Lemberg engaged in an unwarranted "fishing expedition" to discover evidence of other criminal acts. However, the exclusionary rule is designed to prohibit the State from engaging in such endeavors. *State v. Allen*, 138 Wn. App. 463, 471, 157 P.3d 898 (2007).

This Court should accept review. RAP 13.4(b)(1)-RAP 13.4(b)(3).

4. This Court should accept review because the Court of Appeals' opinion raises an important issue of first impression.

This Court should accept review to address an important issue of first impression for this Court: during a pedestrian stop, can a law enforcement officer run someone's name through a law enforcement database? RAP 13.4(b)(3); RAP 13.4(b)(4).

While both the United State Constitution and our state constitution prohibit unreasonable searches and seizures, "our state constitution goes further and requires actual authority of law before the State may disturb the individual's private affairs." *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007); U.S. CONST. amend. IV; Const. art. I, § 7. Because article I, section 7 provides greater privacy protections than the Fourth Amendment, our constitution demands that the State provide an even stronger justification than that required by the Fourth Amendment before it intrudes on a person's private affairs. *See State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d96 (2015).

RCW 46.61.021(2) expressly allows police officers to check for warrants during a *traffic* stop. However, our Legislature has not passed any legislation granting police officers with the authority to use law enforcement databases to check for warrants or no-contact orders during a *pedestrian* stop. Nevertheless, the Court of Appeals held that Officer Lemberg did not exceed the scope of the scope when he ran Mr. Alexander's name through a law enforcement database because "Washington courts have often held that police may check for outstanding warrants during valid criminal investigatory stops." Opinion at 8. But this Court should infer that because the Legislature expressly granted police officers with the authority to conduct certain checks during *traffic* stops, it

expressly chose not to grant such authority during *pedestrian* stops. *See In re Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (the legislative inclusion of certain items in a category implies that the legislature intended to exclude other items in that category).

This Court should accept review. RAP 13.4(b)(3); RAP 13.4(b)(4).

E. CONCLUSION

Based on the foregoing, Mr. Alexander respectfully requests that this Court grant review.

DATED this 3rd day of December, 2018.

Respectfully submitted,

/s Sara S. Taboada
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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. MARK WADE ALEXANDER, JR., Respondent.	No. 76506-0-I DIVISION ONE PUBLISHED OPINION FILED: September 4, 2018

LEACH, J. — The State appeals the trial court's decision to suppress evidence of no-contact orders discovered by police during a Terry[1] stop. The State challenges the court's findings and conclusions related to the scope of the Terry stop. Because we agree that the investigating officer did not exceed the scope of the Terry stop, we reverse and remand.

FACTS

On October 24, 2016, at about 6:44 p.m., a motorist driving on Aurora Avenue called 911. The motorist identified herself and reported that she saw a man punch a woman at North 85th Street and Aurora Avenue North. She described the man as a white male, 20 to 30 years old, thin, wearing a baseball cap and a red hooded sweatshirt. She described the victim as a white female, 20

[1] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

to 30 years old, five feet seven, slender, with long, dark, curly hair in a ponytail, wearing a red sweatshirt with plaid pajama pants. She reported they were traveling northbound.

A dispatcher relayed the information provided by the 911 caller to Officer Nathan Lemberg. Officer Lemberg saw a man and woman matching this information walking northbound near 88th and Aurora. After following them for a short while, he stopped them. When he first saw them, they were walking and talking together. When Officer Lemberg started to follow them, the man began to walk in front of the woman.

Officer Lemberg saw no assault or struggle between the man and the woman. He pulled his car off the road and detained the man and woman.

The man identified himself as Mark Alexander. The man admitted to getting "into the face of the woman" and arguing with her but denied assaulting her. He also denied having any relationship with the woman. Officer Lemberg ran the name through the law enforcement database. The search confirmed Alexander's identity. The search revealed no outstanding warrants but did reveal two active domestic violence no-contact orders. The orders prohibited Alexander from contacting a person named Danyail Carlson.

At that time, Officer Lemberg did not know the identity of the woman with Alexander. While Officer Lemberg searched the law enforcement database, the

other officers spoke to the woman. She denied that she had been assaulted. When the officers asked her name, she gave a false name. Almost immediately, the officers discovered this after learning the woman's true identity as Carlson by looking at a booking photo.

Officer Lemberg arrested Alexander for violating the domestic violence no-contact orders. The State charged Alexander with domestic violence felony violation of a court order. Alexander asked the court to suppress evidence of the no-contact orders, claiming that Officer Lemberg did not have the required reasonable suspicion needed to justify the initial stop.

After a joint CrR 3.5/3.6 hearing, the trial court suppressed the no-contact orders on a different ground. It found that Officer Lemberg was justified in detaining Alexander but exceeded the scope of the initial Terry stop when (1) he ran Alexander's name through a law enforcement database and (2) he conducted a second round of questioning of the woman about her identity and the no-contact orders.

The State appeals.

ANALYSIS

The State challenges one of the trial court's findings of fact and two conclusions of law. When reviewing a trial court's suppression decision, this court examines whether substantial evidence supports the challenged findings

and whether those findings support the conclusions of law.[2] Substantial evidence is enough evidence to persuade a fair-minded person of the truth of the finding.[3] This court treats unchallenged findings as true for purposes of the appeal and reviews the trial court's conclusions of law de novo.[4] Whether a warrantless stop is constitutional presents a question of law this court also reviews de novo.[5]

Both the federal and Washington constitutions bar warrantless searches unless they fall within one of several narrow exceptions.[6] A Terry investigatory stop is one exception to the warrant requirement.[7] A Terry stop allows officers to seize a person briefly if specific articulable facts give rise to a reasonable suspicion that the person stopped is or has been involved in criminal activity.[8] "A reasonable, articulable suspicion means that there 'is a substantial possibility that criminal conduct has occurred or is about to occur.'"[9] When reviewing a Terry stop's validity, courts consider the totality of the circumstances,[10] delicately

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[2] State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).
[3] State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).
[4] Ross, 106 Wn. App. at 880.
[5] State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).
[6] U.S. CONST. amend. IV; WASH. CONST. art. 1, § 7; State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).
[7] Terry, 392 U.S. at 21, 30.
[8] State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).
[9] State v. Snapp, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012) (quoting State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)).
[10] Glover, 116 Wn.2d at 514.

"balancing the interest of society in the enforcement of its laws against the individual's right to protection against unreasonable searches and seizures."[11]

"'[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.'"[12] Courts consider factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained.[13] Our Supreme Court has acknowledged that officers must be given some leeway when a stop involves a serious crime or potential danger.[14]

"A lawful Terry stop is limited in scope and duration to fulfilling the investigative purpose of the stop."[15] Similar to the analysis for determining the validity of the stop, the proper scope of a Terry stop depends on "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained."[16] If the initial investigation dispels the

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[11] State v. Lesnick, 84 Wn.2d 940, 942, 530 P.2d 243 (1975).

[12] State v. Saggers, 182 Wn. App. 832, 840, 332 P.3d 1034 (2014) (quoting Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)).

[13] State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

[14] State v. Z.U.E., 183 Wn.2d 610, 623, 352 P.3d 796 (2015).

[15] Acrey, 148 Wn.2d at 747; see also Terry, 392 U.S. at 20 (stating that determining the reasonableness of a seizure involves a dual inquiry about "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place").

[16] State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984).

officer's suspicions, the stop must end.[17] But if it confirms or further arouses the officer's suspicions, the officer may lawfully extend the scope and duration of the stop.[18]

Challenge to Finding of Fact

The State first challenges the trial court's finding that Officer Lemberg concluded that no assault had occurred. The trial court made the following finding of fact:

> Officer Lemberg observed no struggle between the man and woman or assault occurring prior to the stop. The defendant, Mark Alexander, and the woman denied an assault had occurred. Officer Lemberg inspected the woman's face for injury but did not observe any signs of injury. Officer Lemberg did not take any photographs of the woman's face. The defendant Alexander denied any relationship with the woman. Based on this, Officer Lemberg concluded that no assault had occurred.

The trial court relied on this finding to conclude that at this point, the purpose of the stop—to investigate an assault—was satisfied and Officer Lemberg no longer had authority to detain Alexander.

The State contends that the record does not support a finding that Officer Lemberg concluded that no assault occurred. The State notes that when the trial court made its oral ruling, the prosecuting attorney asked the court to clarify whether it was finding that Officer Lemberg testified that he concluded that no

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[17] Acrey, 148 Wn.2d at 747.
[18] Acrey, 148 Wn.2d at 747.

assault had taken place. The court clarified that it "did not hear the officer state that he determined an assault had occurred; that he determined that there were no signs of injury at the time, after inspecting her for an injury, and that there were no statements from the victim . . . that . . . there had been physical contact with Mr. Alexander." The court accurately characterized Officer Lemberg's testimony. He never stated that he concluded that no assault had occurred.

Alexander argues that the court was entitled to draw this inference from the facts presented. We disagree. Evidence that the officer found no additional evidence to corroborate the assault described in the 911 call does not show that the officer concluded that no assault occurred. The court's finding that Officer Lemberg concluded no assault occurred is not supported by substantial evidence.

In addition, the State points out in its reply brief that the court based its inference on a misstatement of the facts. The court found that Officer Lemberg concluded that no assault occurred after he inspected Carlson's face. But he only interacted with Carlson after he ran Alexander's name. Thus, Officer Lemberg could not have determined that no assault occurred based on the lack of visible injury until after he searched for and found Alexander's records.

Challenges to Conclusions of Law (b)

Next, the State challenges the trial court's conclusion that Officer Lemberg exceeded the scope of the Terry stop when he ran Alexander's name through the law enforcement database. The trial court reasoned,

> The scope of the Terry stop was exceeded when Officer Lemberg ran the defendant Alexander's name though a law enforcement database. At this point, Officer Lemberg had conducted an investigation of the allegation of assault and determined no assault had occurred. The purpose of the Terry stop to investigate and determine whether an assault had likely occurred was satisfied. Determining there was not probable cause to arrest for assault, Officer Lemberg no longer had the authority to detain the defendant Alexander.[19]

Washington courts have often held that police may check for outstanding warrants during valid criminal investigatory stops.[20] These checks are

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[19] This finding conflicts with the trial court's statement at the hearing that "through the process of the investigatory stop, [Officer Lemberg] was entitled to run . . . Mr. Alexander's information."

[20] State v. Williams, 50 Wn. App. 696, 700, 700 n.1, 750 P.2d 278 (1988) (citing State v. Kerens, 9 Wn. App. 449, 513 P.2d 63 (1973); State v. Thompson, 24 Wn. App. 321, 601 P.2d 1284 (1979), rev'd on other grounds, 93 Wn.2d 838, 613 P.2d 525 (1980)); see also State v. Chelly, 94 Wn. App. 254, 261, 970 P.2d 376 (1999) ("Checking for outstanding warrants during a valid criminal investigatory stop is a reasonable routine police practice, and warrant checks are permissible as long as the duration of the check does not unreasonably extend the initially valid contact."); State v. Madrigal, 65 Wn. App. 279, 283, 827 P.2d 1105 (1992) (holding that checking for outstanding warrant checks during valid criminal investigatory stop which took only about two minutes was not an unreasonable extension of the initial contact); State v. Reeb, 63 Wn. App. 678, 681-82, 821 P.2d 84 (1992); cf. State v. Rife, 133 Wn.2d 140, 146, 150, 943 P.2d 266 (1997) (holding that law enforcement had no statutory authority to run a warrant check after stopping someone for a routine traffic infraction without reaching the constitutional issues).

reasonable routine police procedures as long as they do not unreasonably extend the initial valid stop.[21] Federal courts have also held that law enforcement may run warrant checks during Terry stops.[22]

Here, the trial court concluded that the initial stop was a valid investigatory stop. Our legislature has directed that "[t]he primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the complaining party."[23] A report of a man assaulting a woman along the roadway presents a potential domestic violence situation. The history of domestic violence in our society informs police officers about the risk of serious harm to its victims.

After stopping Alexander, Officer Lemberg questioned him for about two minutes before returning to his car to run the name. The computer search that revealed the no-contact orders took approximately two minutes. The other

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[21] Williams, 50 Wn. App. at 700.

[22] E.g., United States v. Young, 707 F.3d 598, 606 (6th Cir. 2012) (holding that the officers did not exceed the scope of a Terry stop by running a warrant check); Klaucke v. Daly, 595 F.3d 20, 26 (1st Cir. 2010) (noting that "most circuits have held that an officer does not impermissibly expand the scope of a Terry stop by performing a background and warrant check, even where that search is unrelated to the circumstances that initially drew the officer's attention"); United States v. Villagrana-Flores, 467 F.3d 1269, 1275 (10th Cir. 2006) (holding that a police officer did not violate the Fourth Amendment by obtaining a suspect's identity and performing a warrants check while conducting a valid investigative stop where the suspect was detained for a relatively short period).

[23] RCW 10.99.030(5).

officers then questioned Carlson about her identity. Within a few more minutes, they discovered Carlson's identity by looking up her picture. Officer Lemberg then arrested Alexander for violating a protection order approximately nine minutes after the initial stop.

When an officer conducts a valid investigatory stop to determine whether an assault occurred following a reliable informant tip, that officer may check for outstanding warrants. Under these facts, Officer Lemberg properly ran Alexander's name through the law enforcement database during the investigative stop.

The State also challenges the trial court's conclusion that Officer Lemberg exceeded the scope of the Terry stop when he questioned Carlson about her identity. The court reasoned,

> [T]he scope of the stop was certainly exceeded when Officer Lemberg, with the defendant Alexander still detained, conducted a second round of questioning of the woman regarding her identity and the no contact orders. Officer Lemberg provided no articulable facts that supported his hunch that the woman was the subject of the no contact orders. At no point during her interaction with Officer Lemberg or the other officers did she say anything or act in a manner that would indicate there was an active no contact order with the defendant Alexander. Nor was her giving of a false name without more, reason to believe she was the subject of the no-contact orders. Her reluctance to give her true name to the police could reasonably have been attributed to her having a criminal record.

Two cases provide help in deciding whether Officer Lemberg had sufficient articulable facts to continue his search. The State compares the facts of this case to State v. Pettit.[24] Alexander distinguishes Pettit and claims this case is more like State v. Allen.[25] From our comparison of these two cases, we conclude that the facts here gave Officer Lemberg reasonable suspicion that Alexander was violating a no-contact order and justified an inquiry into the identity of the woman with him.

In Pettit, a sheriff's deputy stopped Pettit because his car had a loud exhaust.[26] A record check revealed that no-contact orders restrained him from contacting a 16-year-old girl, Michelle Whitmarsh.[27] A female passenger in the front seat appeared to be about 16.[28] The passenger gave the deputy the name Samantha Wright and a birth date.[29] He ran that name and found no record.[30] Dispatch also provided him information about Michelle Whitmarsh.[31] The passenger matched the description from dispatch.[32] The deputy arrested Pettit

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[24] 160 Wn. App. 716, 251 P.3d 896 (2011).
[25] 138 Wn. App. 463, 157 P.3d 893 (2007).
[26] Pettit 160 Wn. App. at 718.
[27] Pettit, 160 Wn. App. at 718.
[28] Pettit, 160 Wn. App. at 718.
[29] Pettit, 160 Wn. App. at 719.
[30] Pettit, 160 Wn. App. at 719.
[31] Pettit, 160 Wn. App. at 719.
[32] Pettit, 160 Wn. App. at 719.

for violating the no-contact order. Division Two affirmed the trial court's decision to deny Pettit's motion to suppress Whitmarsh's identity.[33] The court reasoned,

> Deputy Watson knew that the no-contact order protected a 16-year-old girl named Michelle Whitmarsh from Pettit and that Pettit's front seat female passenger appeared to be 16. These facts were sufficient to support a rational inference warranting the officer's initial request for the passenger's identification to determine whether she was the person whom the no-contact order sought to protect. Pettit's female passenger provided a birth date that was not consistent with her apparent age, justifying the subsequent records check, which then led to the corroborating physical description, including the identifying tattoo on her left hand. The additional investigation was brief and did not significantly extend the duration beyond that of a typical traffic stop.[34]

The court also noted that Whitmarsh's status as a minor who had been reported missing presented exigent circumstances warranting the brief detention.[35]

In Allen, police stopped a car for failure to have a working license plate light.[36] Allen was a passenger in the car.[37] The officer checked the driver's information and discovered that she was "'a [petitioner] in a protection order.'"[38] The officer also learned that the restrained party was named Allen but did not know the gender or have a description.[39] The officer asked for Allen's identity;

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[33] Pettit, 160 Wn. App. at 719, 722.
[34] Pettit, 160 Wn. App. at 720-21.
[35] Pettit, 160 Wn. App. at 721-22.
[36] Allen, 138 Wn. App. at 465-66.
[37] Allen, 138 Wn. App. at 465.
[38] Allen, 138 Wn. App. at 466.
[39] Allen, 138 Wn. App. at 466.

both Allen and the driver gave a false name.[40] After checking the given name with dispatch and discovering it was false, the officer questioned the driver further about the passenger's identity.[41] The driver eventually identified the passenger as Allen.[42] Division Two decided that the trial court should have suppressed the identification of Allen.[43] It reasoned, in part, that "[w]ithout knowledge that the passenger provided a false name, [the officer] did not possess reasonable articulable facts to believe that the no-contact order referred to the passenger."[44]

This case differs from Pettit because Officer Lemberg had no description of the protected person. But unlike in Allen, he had other articulable facts to suggest that the woman with Alexander was the protected party. Officer Lemberg was following up on a reliable informant tip reporting an assault when he discovered the domestic violence no-contact orders. Although he found no corroborating evidence to support the assault, based on his experience investigating assaults and domestic violence incidents, he knew that victims often stay with the assaulter. In addition, Alexander denied any relationship with the woman with whom he had been walking and talking, admitted that the two had

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[40] Allen, 138 Wn. App. at 466.
[41] Allen, 138 Wn. App. at 466-67.
[42] Allen, 138 Wn. App. at 467.
[43] Allen, 138 Wn. App. at 472.
[44] Allen, 138 Wn. App. at 471.

been arguing, and that he had gotten into her face. And both Alexander and the woman demonstrated unwillingness to reveal her identity. Thus, unlike in Allen, but like in Pettit, Officer Lemberg had enough facts to raise a reasonable suspicion that a no-contact order was being violated.

Unlike in Pettit, this case does not involve a missing child. But it does involve an alleged recent assault, admitted quarreling, and a domestic violence no-contact order, thus warranting Officer Lemberg's investigation into the woman's identity.[45]

Here, the Terry stop involved detention of an alleged assailant and victim, a very recent assault, a warrant check disclosing a protection order, admitted quarreling, and unwillingness to disclose the alleged victim's identity. These facts provided Officer Lemberg with sufficient reasonable suspicion to investigate whether the woman with Alexander was the protected person. Indeed, the public policy expressed by our legislature in RCW 10.99.030(5) makes the protection of that victim a primary duty of the officer. Officer Lemberg did not exceed the proper scope of the Terry stop.

CONCLUSION

The trial court erred in concluding that Officer Lemberg exceeded the

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[45] See State v. Jacobs, 101 Wn. App. 80, 89 n.3, 2 P.3d 974 (2000) (where the existence of a domestic violence no-contact order was relevant to the court finding exigent circumstances justified a warrantless search of a home).

scope of the Terry stop. It should not have suppressed the evidence of the no-contact orders. We reverse and remand for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Spearman, J.P.T.

Schindler, J.

Appendix B

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. MARK WADE ALEXANDER, JR., Respondent.	No. 76506-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Mark Wade Alexander, Jr., having filed a motion for reconsideration herein, and a majority of the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Leach, J.
Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76506-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: December 3, 2018
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