NO. 98777-7
COURT OF APPEALS NO. 78958-9-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KRISTOPHER CHARLES MARTIN,

Respondent.

PETITION FOR REVIEW

ADAM CORNELL
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Petitioner

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

The State of Washington, respondent in the Court of Appeals, seeks review of the Court of Appeals decision designated in part II.

II. COURT OF APPEALS DECISION

The Court of Appeals reversed the order of the trial court denying the defendant's motion to suppress evidence found in a search of his person. A citation to the published opinion is not yet available. A copy of the slip opinion is attached as Appendix A.

III. ISSUE

1. Is a police officer exercising his community caretaking function when he responds to a call from a business owner to remove an unwanted guest and during the course of that contact learns that the guest is in need of medical attention?

2. Is an officer required to pat down a person for weapons when he observes an item protruding from the person's pocket that the officer immediately recognizes as a potential weapon?

IV. STATEMENT OF THE CASE

On December 11, 2017 Kristopher Martin was sleeping in Starbucks store in Edmonds. An employee of that store called police for assistance in removing him from the premises. RP 9.

Starbucks' employees had previously sought police assistance to remove unwanted persons. RP 24. Officer Bicker responded to the call. He confirmed with an employee that the defendant was the person that they were seeking to have removed. In addition to the three employees there were seven or eight other patrons in the store. RP 9, 15.

Bicker saw that the defendant was slumped back in a chair. RP 10-11. He appeared to be sleeping. RP 9. The defendant was wearing multiple layers of clothing. That clothing had multiple pockets, some zipped closed and others open. RP 9-10.

Bicker attempted to wake up the defendant first by talking to him in a raised voice. The defendant did not wake up or respond. Bicker then grabbed the defendant's shoulder, squeezing and shaking him, but the defendant remained unresponsive. RP 10. Bicker proceeded to rub the defendant's sternum with his knuckles. Bicker was aware that a sternum rub could be painful, so he started with a light rub in order to mitigate the defendant's potential startle response. RP 11-12. The defendant began waking up in response to the light rub, but did not wake up enough to allow Bicker to communicate with him. At this point Bicker began to suspect the defendant was unconscious due to drug use. RP 13. He became

concerned that the defendant might need medical attention. RP 19, 21.

Bicker decided his next step was to use a harder sternum rub. Bicker was aware that it could be painful, and that if someone were woken from a deep sleep by a hard rub that person could react unpredictably. RP 14-15. He did not think the earlier attempts to wake the defendant were sufficient to elicit an aggressive or violent reaction. RP 31. But by progressing to a more intense method or rousing the defendant Bicker was concerned that the harder sternum rub could endanger himself as well as other patrons in the store. RP 15-16.

Bicker noted that the defendant had a piece of metal sticking up out of a pocket of the defendant's outer jacket. The item appeared to be the end of piece of cutlery, like a knife or spoon. RP 16. Whether it was a knife, fork, or spoon it could be used as a weapon. RP 33. Bicker was concerned that whatever it was that it could be used as a weapon if the defendant suddenly woke and thought he was being attacked. RP 15-17.

Bicker removed the metal object from the defendant's pocket because of the potential danger it presented. RP 17. The metal object turned out to be a large spoon; the bowl was about 2" in

diameter. RP 17-18. Bicker noticed that it had burn marks on the bottom of the bowl, and a dark brown residue in the bowl of the spoon. Based on his training and experience Bicker recognized the spoon as having been used as drug paraphernalia. RP 18.

At that point Bicker determined to arrest the defendant for possession of drug paraphernalia. RP 18. Officer Bicker proceeded to search the defendant while he was still asleep and it was safe to do so. His intent was to remove any other object that could potentially be used as a weapon. RP 19. He was also concerned about the presence of needles that could be used to stab the officer. RP 20. During the search incident to arrest Officer Bicker found suspected controlled substances in the defendant's pockets. Field testing revealed those substances were methamphetamine, heroin, and cocaine. RP 20-21.

The defendant was charged with possession of a controlled substance, heroin and methamphetamine. 1 CP 92-93. The trial court denied the defendant's motion to suppress evidence. It concluded that "Community caretaking and Terry authorized Officer Bicker to take the necessary precautions to protect himself and others from a potentially dangerous situation. Officer Bicker was authorized to pat the defendant down for weapons." 1 CP 42. The

defendant was then convicted at a bench trial on stipulated evidence. 1 CP 38-39.

V. ARGUMENT

This Court will only take review of a decision of the Court of Appeals in four circumstances. Review in this case is justified because the decision of the Court of Appeals conflicts with decisions from this court, from published opinions of the Court of Appeals, and it presents and issue of substantial public interest that should be determined by the Supreme Court RAP 13.4(b)(1),(2), (4).

A. THE COURT OF APPEALS DECISION FAILED TO ADDRESS WHETHER THE DEFENDANT HAD BEEN SEIZED WHEN THE OFFICER APPROACHED HIM.

The Court of Appeals held that Officer Bicker's search of the defendant was not justified under either the Terry or community caretaking exception to the warrant requirement. Slip Op. at 5, 8-9. However, the court failed to address the question of whether the defendant had been seized when Officer Bricker contacted him. In order for either the Fourth Amendment or Article 1, § 7 to apply there must be a seizure. State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998). To constitute a seizure the officer's conduct must be a show of authority that would lead a reasonable person to

believe that he is not free to leave or terminate the encounter with the officer. State v. O'Neill, 148 Wn.2d 564, 577, 62 P.3d 489 (2003). Whether a person is seized depends on the totality of the circumstances. Young, 135 Wn.2d at 501. Those circumstances could include the threatening presence of multiple officers, displaying a weapon, an officer touching a person, or a tone of voice indicating that compliance with an officer's request would be compelled. "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." Id. at 512 quoting, U.S. v. Mendehall, 446 U.S. 544, 555, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Here the defendant was unconscious during the entire contact with Officer Bicker until after the officer discovered the cook spoon and drugs. A reasonable person in that condition would be unaware of any of the officer's actions. He would not have any information on which to conclude that he was either not free to leave.

The facts in this case are similar to the facts in State v. Knox, 86 Wn. App. 831, 939 P.2d 710 (1997), overruled on other grounds, State v. O'Neill, 148 Wn.2d at 571. There a defendant

was passed out in his vehicle blocking ferry traffic. An officer approached him, and initially could not get the driver to wake up. When the driver did wake up the officer instructed the driver to roll down the window. At that point the officer detected an odor of intoxicants. Under these circumstances the court held the officer had not seized driver of the vehicle. Id. 840.

The decision of the Court of Appeals conflicts with these authorities because it assumes without analysis that the defendant had been seized. Since the totality of the circumstances indicate that he had not been seized, the officer's contact with him did not violate either the Fourth Amendment or Art. 1, § 7 warrant requirement. Thus, up to the point that the officer removed the spoon from the defendant's pocket, whether the officer was performing a community caretaking function does not control the outcome of the case.

B. THE OFFICER WAS CONDUCTING HIS COMMUNITY CARETAKING FUNCTION IN RESPONSE TO A CALL TO REMOVE AN UNWANTED GUEST. HE ALSO PERFORMED THAT FUNCTION WHEN HE DETERMINED THE DEFENDANT REQUIRED MEDICAL AID.

Although the defendant was not initially seized, once the officer removed the metal object from his pocket the officer had

conducted a search. That search was justified because the officer was conducting his community caretaking duties.

The community caretaking exception to the warrant requirement was articulated in Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). That doctrine recognized that police officers often perform non-criminal, non-investigative duties which are "totally divorced" from detection, investigation or acquisition of evidence of a crime. Id. at 441. A non-exclusive list of those functions include "delivering messages, giving directions, searching for lost children, assisting stranded motorists, and rendering first aid." State v. Boisselle, 194 Wn.2d 1, 10, 448 P.3d 19 (2019). When officers conduct their community caretaking function the reasonableness of the stop depends on balancing the competing interests involved in light of all of the surrounding circumstances. State v. Acrey, 148 Wn.2d 738, 748-49, 64 P.3d 594 (2003). Those interests are the defendant's desire to remain free from police intervention and the public interest in having the police perform the community caretaking function. Id. at 750.

A police officer's community caretaking duties include dealing with medical or other types of emergencies and preserving public safety. State v. Kinzy, 141 Wn.2d 373, 400, 5 P.3d 668

(2000). (Talmadge dissenting). Whether the police officer is conducting a community caretaking function is analyzed based on the information known to the officer at the time. "When an officer believes in good faith that someone's health or safety may be endangered, particularly if that person is known to have physical or mental problems, public policy does not demand that the officer delay any attempt to determine if assistance is needed and offer that assistance while a warrant is obtained. To the contrary, the officer could be considered derelict by not acting promptly to ascertain if someone needed help." State v. Gocken, 71 Wn. App. 267, 277, 857 P.2d 1074, 1080 (1993).

The first Washington case to apply the community caretaking doctrine fell under the category of preserving public safety. State v. Lund, 10 Wn. App. 709, 519 P.2d 1325 (1974). There police entry into an arrestee's vehicle was justified to protect the community as a whole from the danger presented by an unsecured firearm in that vehicle when police did not intend to impound the vehicle. The Court held the limited intrusion into the vehicle to secure the gun was constitutionally permissible. Id. at 712.

Under the emergency aid doctrine three factors must be present. First the officer must subjectively believe that an emergency existed requiring him to provide immediate assistance to protect or preserve life. Second, a reasonable person in the same situation would similarly believe that there is a need for assistance. Third, there is a reasonable basis to associate the need for assistance with the place to be searched. Boisselle 194 Wn.2d at 14.

Officers also perform community caretaking duties when they render assistance in non-emergency situations where a person may need help although not on an emergency basis. Thus, police were performing their community caretaking duties when they were called to assist a man who was lying unconscious in a parking lot in State v. Hutchinson, 56 Wn. App. 863, 785 P.2d 1154 (1990). The officer reasonably searched the defendant for his identification to help locate a place to take him. Under these circumstances the drugs found in his pocket while looking for his wallet were admissible. Id. at 867.

1. The Officer Became Concerned That The Defendant Needed Medical Attention Due to Drug Use.

The Court of Appeals held that Bricker's conduct was not justified under the community caretaking exception to the warrant requirement. It limited its analysis to the emergency aid doctrine when the officer removed the metal object from the defendant's pocket. Slip Op. 8-9. It relied on the original reason for the 911 call, and evidence that the defendant was breathing and that Bricker did not check the defendant's pulse when Bricker contacted the defendant.

But the Court ignored evidence that after contacting the defendant Bicker became concerned that the defendant was unconscious due to drug use. RP 19, 21. Bicker called an aid car in order to assist the defendant by taking him to the hospital. RP 21-22. He also disarmed the defendant of any potential weapons because aid personnel would not approach unless the scene was safe and secured. RP 32.

Although the original call was to remove the defendant from the store, upon contact it became clear to the officer that the defendant required aid. In this respect the case is similar to Hutchison. Without aid it is possible the defendant's condition could

have deteriorated. Providing help by calling an aid car was a non-investigative community caretaking duty. Disarming the defendant of potential weapons to facilitate that aid was justified under the circumstances.

The Court of Appeals decision erred when it failed to consider the officer's community caretaking function in light of all of the surrounding circumstances. The officer conduct was not justified under the emergency aid doctrine. Rather it was justified under the doctrine that recognizes officers also perform non-emergency aid as part of their community caretaking duties.

The Court of Appeals decision limits an officer's non-criminal investigative functions solely to emergencies. In circumstances such as this that holding puts officers in an untenable position. Where it is clear that someone needs medical attention, which cannot be provided absent disarming the person the officer has two equally undesirable choices.

First, the officer could leave the person as he is and walk away. Doing so would run the risk that the person's condition would deteriorate, and he would suffer more extensive injury or damage from a drug overdose. As discussed below, that choice would also

fail to address the legitimate concerns of the shop owner in keeping a desirable place for other patrons.

Second the officer could attempt to wake the person, and risk a violent confrontation. This option would not only put the officer in danger, but other patrons in the store as well.

2. The Officer's Response To Remove An Unwanted Guest From The Store Was A Non-Criminal, Non-Investigative Duty.

The Court of Appeals decision also focuses solely on the relationship between Officer Bicker and the defendant. It completely ignores the request for assistance from Starbuck employees. That request was not to "trespass" the defendant from the store. It was merely to remove an unwanted guest; a guest whose behavior could be disturbing to other guests, and who was using the store for an unintended purpose. This was a completely non-criminal, non-investigative duty to deliver the message to the defendant that he was no longer welcome in the store at that time.

By ignoring the interests of the Starbucks employees the court failed to recognize that the officer was performing an additional non-criminal, non-investigative duty that fell under his community caretaking duties. The employees of that store had an interest in maintaining a place of business that the public would

come to and feel comfortable in. A person using the store as a place to sleep, rather than it intended purpose as a coffee shop, could be off-putting to customers. The employees had a right to revoke the defendant's license to be in the building. State v. Collins, 110 Wn.2d 253, 261, 751 P.2d 837 (1988). Consistent with the interest of providing a welcoming place for customers, the employees also had an interest in removing an unwanted guest in the least disruptive way possible. As the officer testified, a person deeply unconsciousness could become violent or aggressive if suddenly awakened. RP 7. Removing items that the defendant could use as a weapon would promote that interest.

By not considering the interests of the public or the Starbucks company the court's decision conflicts with other decisions of this Court which have held that those interests must be balanced against the defendant's interests. This court should accept review to consider whether the officer's community caretaking function as it related to the public present at the store justified taking a potential weapon from the defendant before waking him.

3. The Court Of Appeals Conducted An Independent Review Of The Record And Relied On Facts That Were Not Supported By The Record.

The court's also erred in relying on facts that were neither found by the trial court nor supported by the record. The court stated that Bicker did not indicate that anyone other than himself were concerned about the defendant's physical harm. It also stated that Bicker did not ask any customers to back away before he performed the hard sternum rub. It concluded that Bicker did not subjectively believe there was an actual emergency requiring assistance. Slip Op. at 9. The trial court did not make any of these findings. 1 CP 40-42. These findings amount to an independent review of the record. This Court rejected that standard of review in State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

Moreover, the findings are not supported by the record. Bicker was never asked whether employees or customers expressed concern about the defendant's welfare. Nor was he asked if he directed customers to clear the area before performing the hard sternum rub. There is no direct or circumstantial evidence from which to infer that either of these "facts" exist.

C. THE OFFICER DID NOT HAVE TO PAT DOWN THE DEFENDANT WHEN A VISUAL OBSERVATION GAVE HIM REASON TO SUSPECT THE DEFENDANT HAD A WEAPON.

The Court of Appeals further held that even if the officer's contact with the defendant were justified as community caretaking, removing the spoon from his pocket was an unlawful seizure because a simple pat down would have revealed the nature of the object. Slip Op. at 9. The court relied on Acrey to require a pat down even when a visual inspection revealed the metal object could possibly be a weapon. Id.

In Acrey this Court found a pat down of the defendant was a reasonable to protect the safety of the officers before putting him in the patrol car. Acrey, 148 Wn.2d at 754. An officer may conduct a weapons frisk if he has reason to believe the defendant is armed and presently dangerous. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994); State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). The purpose of the frisk is to protect the officer and bystanders. Russell, 180 Wn.2d at 869. If during a pat down an officer perceives an object but cannot determine if it a weapon or not the officer may take such action as is necessary to examine it. Hudson, 124 Wn.2d at 113. Once it is determined that the item is

not a weapon the officer's authority to search the person ends. Russell, 180 Wn.2d at 869-70.

This case presents a question of whether police may rely on visual rather than tactile observations to perceive objects which may be a weapon. It also presents the question of whether the officer must conduct an additional pat down before removing a potential weapon to examine it. These questions relate to the scope of an officer's authority to disarm individuals suspected of carrying weapons in order to protect the officer and the public. For that reason it is an issue of substantial public interest that this Court should review.

Permitting a frisk for weapons based on the officer's visual observations is consistent with the plain view doctrine. Under that doctrine police may seize items when (1) they have a valid justification for being in an otherwise protected area and (2) they are immediately able to realize the evidence they see is associated with a crime. State v. Morgan, 193 Wn.2d 365, 371, 440 P.2d 136 (2019), cert. denied, 140 S.Ct. 1243 (2020). A weapons frisk is authorized when conducting either a Terry detention or community caretaking function. And as this case demonstrates the officer could

see an item which he immediately recognized as something the defendant could use as a potential weapon.

This Court has said that when a frisk is inconclusive for weapons an officer may take such action as necessary to examine a questionable item. Hudson, 124 Wn.2d at 112. This court did not articulate what those necessary actions were. Other courts have interpreted this to mean the officer is authorized to remove the item from the person's pocket to examine it. State v. Fowler, 76 Wn. App. 168, 172, 883 P.2d 338 (1994); State v. Miller, 91 Wn. App. 181, 185, 955 P.2d 810 (1998).

The Court of Appeals decision assumes that a pat down would have revealed that the object in the defendant's pocket was a spoon, and that spoon could not be used as a weapon. To the extent the record was developed this conclusion is based on speculation. The defendant was wearing multiple layers of clothing. RP 9-10. There was no evidence describing how heavy those layers were. Since it was December it is likely that his clothing was fairly thick. RP 8. There is no reason to think that the officer would have known any more about the object in the defendant's pocket from a pat down than he knew from a visual observation.

The decision also unnecessarily narrows the scope of an officer's discretion to determine what could be used as a weapon. Cases which have found the officer's search unreasonable involve items that were obviously not weapons. Russell, 180 Wn.2d at 870 (search of a small container removed from the defendant's pocket unreasonable where the size and weight of the container could not hold a weapon); State v. Allen, 93 Wn.2d 170, 606 P.2d 1235 (1980) (search of the defendant's wallet removed from his pocket unreasonable); State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009) (officer squeezed object he knew was not a weapon to determine if it was a bag of controlled substances).

Here however, the metal object protruding from the defendant's pocket did not fall in that category. The officer testified whether the object belonged to a knife, a spoon, or a fork that item could be used to stab someone. The officer was concerned about the possibility of the item being item could be used as a weapon whether it was sharpened or not. RP 33. The officer wanted to remove any item from the defendant's grasp that could be used as a weapon beyond his own two hands. RP 17.

The Court of Appeals held that a pat down would have alleviated any concern that the metal utensil was a sharp object or a weapon. Slip Op. at 9. But given the testimony that the object could be used as a weapon even if it were an ordinary table utensil, a pat down that could reveal the object was a large spoon would not have put to rest any of the officer's concerns.

VI. CONCLUSION

For the foregoing reasons this Court should accept review of the decision of the Court of Appeals reversing the trial court's order denying the defendant's motion to suppress.

Respectfully submitted on July 14, 2020.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: _____
KATHLEEN WEBBER, WSBA #16040
Deputy Prosecuting Attorney
Attorney for Petitioner

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Petitioner, v. KRISTOPHER CHARLES MARTIN, Respondent.	No. 78958-9-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 14th day of July, 2020, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Washington Appellate Project; wapofficemail@washapp.org; richard@washapp.org

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of July, 2020, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

FILED
6/15/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KRISTOPHER CHARLES MARTIN, Appellant.	)	No. 78958-9-I DIVISION ONE PUBLISHED OPINION

MANN, C.J. — Absent an applicable exception, warrantless searches and seizures are per se unreasonable and violate both the United States and Washington Constitutions. While asleep in a Starbucks store, Kristopher Martin was subjected to a warrantless search. Based on the search, Martin was charged with and found guilty of possession of a controlled substance.

Martin appeals his conviction and contends that the trial court erred by denying his motion to suppress because the search did not meet either the Terry[1] stop or community custody exceptions to the warrant requirement. We agree, vacate Martin's conviction, and remand to the trial court for further proceedings consistent with this opinion.

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

APPENDIX A

I.

On December 11, 2017, at 8:27 a.m., Officer Nicholas Bickar responded to a 911 call from a Starbucks employee, requesting assistance with the removal of a sleeping person inside the store. When Bickar arrived, he saw Martin sleeping in a chair. Bickar gestured to the Starbucks employee and received a responsive gesture from the employee that Martin was the person identified in the 911 call.

When Bickar approached Martin, he noticed Martin was wearing multiple jackets that had pockets. Bickar attempted to wake Martin, first by raising his voice and then by squeezing and shaking his left shoulder. Martin remained unresponsive. Trying not to startle Martin, Bickar then performed a "light sternum rub," using his knuckles to rub Martin's sternum. While Bickar attempted to wake Martin, he would briefly gain consciousness, but quickly lose consciousness before Bickar could communicate with him.

Bickar began to suspect that Martin was under the influence of drugs. Bickar determined that he would need to use a "hard sternum rub," but feared Martin might react violently because hard sternum rubs can be painful and startling for a person sleeping. During this encounter, Bickar noted that there were Starbucks customers sitting within four feet of Bickar and Martin and there were between seven and eight people, not including staff, in Starbucks.

Before Bickar proceeded with the hard sternum rub, Bickar noticed the end of a metal utensil sticking out of Martin's pocket. Bickar worried that the metal utensil could be a knife or another utensil sharpened into a weapon. Bickar also expressed concerns about sharp needles. Without feeling the outside of the pocket, Bickar removed the

utensil. The utensil was a cook spoon, had burn marks on the bottom, and a dark brown residue on the inside. At that point, Bickar determined that he had probable cause to arrest Martin for possession of drug paraphernalia and continued searching Martin. While searching Martin, Bickar found methamphetamine, heroin, cocaine, and other drug paraphernalia.

After removing the drugs from Martin, Bickar conducted a hard sternum rub. Once Martin woke up, Bickar told him that he was under arrest, proceeded to handcuff him, and brought him to an aid car. Because Martin did not wake up easily, he was transported to the hospital. Bickar called the aid car sometime prior to waking up Martin.

Martin moved to suppress all evidence collected as a result of the unlawful detention and search. The court heard testimony from Officer Bickar and denied Martin's motion to suppress concluding, "[c]ommunity caretaking and Terry authorized Officer Bickar to take necessary precautions to protect himself and others from a potentially dangerous situation. Officer Bickar was authorized to pat the Defendant down for potential weapons."

Martin proceeded to a stipulated bench trial on the charge of unlawful possession of a controlled substance. The court found Martin guilty. The court sentenced Martin to 30 days of confinement. Martin appeals.

II.

The Washington Constitution commands: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. The United States Constitution also protects people from unreasonable searches and

seizures. U.S. Const. amend. IV. Absent an applicable exception, warrantless searches and seizures are per se unreasonable, and violate these provisions. State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). "The State bears a heavy burden to prove by clear and convincing evidence that a warrantless search falls within one of those exceptions." Russell, 180 Wn.2d at 867.

When reviewing the denial of a motion to suppress, the appellate court determines whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law. State v. Boisselle, 194 Wn.2d 1, 14, 448 P.3d 19 (2019). We review the trial court's conclusions of law de novo. Boisselle, 194 Wn.2d at 14.

A.

Martin first contends that the trial court erred in finding the search permissible under Terry because "[f]irst, there was [no] reasonable suspicion that Mr. Martin was engaged in criminal activity. Second, there were not specific and articulable reasons to believe Mr. Martin was armed and dangerous. And third, even if Terry applied, the officer exceeded the lawful scope of the frisk."

The State argued before the trial court and in its brief before this court, that the search was lawful under Terry. At oral argument, however, the State conceded that the search was not lawful under Terry because Bickar did not testify that he was conducting a criminal trespass investigation.

We accept the State's concession that the search was not valid as a Terry stop. Terry stops are an exception to the warrant requirement. In a Terry stop, "[o]fficers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is

about to be, engaged in criminal conduct." State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). "While Terry does not authorize a search for evidence of a crime, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful Terry stop, 'a reasonable safety concern exists to justify the protective frisk for weapons' so long as the search goes no further than necessary for protective purposes." Day, 161 Wn.2d at 895. In making this determination, "we consider the totality of the circumstances, including the officer's subjective belief." Day, 161 Wn.2d at 896.

A protective frisk does not violate a defendant's rights when (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify a protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purpose. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). "The failure of any of these makes the frisk unlawful and the evidence seized inadmissible." State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). "A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" Collins, 121 Wn.2d at 173. Further, "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his or her safety or that of others was in danger." Collins, 121 Wn.2d at 173.

This search fails to meet the requirements under Terry. Starbucks is open to the public. The record does not support the trial court's finding that Bickar was conducting a criminal investigation for trespass because there is no evidence in the record that Starbucks had trespassed Martin from the premises. Also absent from the record is

evidence supporting Bickar's claim that Martin sleeping created a reasonable safety concern. Bickar performed a hard sternum rub with several people seated in close proximity to Martin. While Bickar stated that, based on his training and experience as an officer, he feared Martin would react violently once awake, Bickar's actions do not support his attestation. Bickar did not ask patrons sitting less than three feet from Martin to move away before using a hard sternum rub to wake Martin.

Finally, even if Bickar were conducting a criminal investigation for trespass, the search exceeded the scope of a frisk under Terry. An officer may "conduct a limited pat-down of the outer clothing of a person in an attempt to discover weapons that could cause harm." State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). "The officer may not slide, squeeze or in any other manner manipulate the object to ascertain its incriminating nature. Such manipulation of the object will exceed the scope of a Terry frisk." State v. Garvin, 166 Wn.2d 242, 251, 207 P.3d 1266 (2009). Bickar did not pat-down the outside of Martin's pocket where the utensil handle was protruding. Instead, Bickar removed the utensil because he thought it could have been a knife or a metal utensil that had been sharpened into a weapon. Had Bickar felt the outside of Martin's pocket, he would have learned it was a spoon and not a sharp object. Removing the spoon without a pat down exceeded the scope of a Terry frisk.

The search was not lawful under Terry because there was no reasonable suspicion that a crime had been committed, there was not a reasonable safety concern, and the search exceeded the lawful scope of a frisk.

B.

Martin next contends that the community caretaking exception to the warrant requirement is also not applicable. We agree.

Recently, the Washington Supreme Court clarified the appropriate factors for determining whether an officer has exercised his or her emergency aid community caretaking function. Boisselle, 194 Wn.2d at 10. "[I]n order for the community caretaking exception to apply, a court must first be satisfied that the officer's actions were 'totally divorced' from the detection and investigation of criminal activity." Boisselle, 194 Wn.2d at 10. The threshold issue for the court is "whether the community caretaking exception was used as a pretext for a criminal investigation before applying the community caretaking exception test." Boisselle, 194 Wn.2d at 11.

Once the court is satisfied that officers did not use the exception as pretext for criminal investigation, the court must next determine whether the warrantless search was reasonable. Boisselle, 194 Wn.2d at 10. "When a warrantless search falls within an officer's general community caretaking function, such as the performance of a routine check on health and safety, courts must next determine whether the search was reasonable." Boisselle, 194 Wn.2d at 11-12. "Where . . . an encounter involves a routine check on health and safety, its reasonableness depends upon a balancing of a citizen's privacy interests in freedom from police intrusion against the public's interest in having police perform a 'community caretaking function.'" Boisselle, 194 Wn.2d at 12.

"An officer's emergency aid function, however arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm." Boisselle, 194 Wn.2d at 12 (internal quotations

omitted). "Compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion." Boisselle, 194 Wn.2d at 12. "Accordingly, courts apply additional factors to determine whether a warrantless search falls within the emergency aid function of the community caretaking exception." Boisselle, 194 Wn.2d at 12.

In Boisselle, the court clarified that the three-part emergency aid test announced in State v. Kinzy, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000) is the applicable test, but amended the three-part test "to make clear that there must be a present emergency for the emergency aid function test to apply." Boisselle, 194 Wn.2d at 13. Thus, the exception applies when "(1) the officer subjectively believed that an emergency existed requiring that he or she provide immediate assistance to protect or preserve life or property, or to prevent serious injury, (2) a reasonable person in the same situation would similarly believe that there was a need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place searched." Boisselle, 194 Wn.2d at 13-14. "If a warrantless search falls within the emergency aid function, a court resumes its analysis and weighs the public's interest against that of a citizen's." Boisselle, 194 Wn.2d at 12.

In balancing Martin's privacy interests against the public's interest in having the police perform a community caretaking function, we conclude that removing the spoon from Martin's pocket was unreasonable. There is insufficient evidence in the record to find that Bickar was conducting a routine check on health and safety or rendering emergency aid. Bickar stated that he was dispatched to Starbucks "for an individual they wanted to leave, who was sleeping." Absent from the record is any evidence

tending to show that Bickar was dispatched to assist with an unresponsive customer or customer in need of emergency aid. Bickar indicated that he could tell Martin was breathing and therefore, did not check his pulse. After Bickar performed a light sternum rub, Martin opened his eyes, but fell back to sleep before Bickar could communicate with Martin. Bickar did not feel like he needed to perform lifesaving maneuvers. Other Starbucks customers sat a few feet away from Martin as he slept and Bickar did not indicate that any customers or employees expressed concern that Martin was in danger of death or physical harm. Finally, Bickar did not ask the other Starbucks customers to back away from the area where Martin slept before performing the hard sternum rub. Bickar did not subjectively believe an emergency existed and a reasonable person in the same situation would not believe there was a need for assistance.

Furthermore, even if the community caretaking exception applied to this search, a simple pat-down on the outside of Martin's coat pocket would have alleviated any concern that the metal utensil was a sharp object or weapon. See State v. Acrey, 148 Wn.2d 738, 754, 64 P.3d 594 (2003) (concluding that a pat-down of a juvenile before putting him in a patrol car was reasonable for officer safety while performing their community caretaking function of transporting the juvenile home after his mother's request for officer assistance). Removing the spoon violated Martin's right to be free from unreasonable searches and seizures.

We vacate Martin's conviction and remand to the trial court for further proceedings consistent with this opinion.

Mann, C.J.

WE CONCUR:

Cox, J.

Dwyer, J.

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

July 14, 2020 - 2:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78958-9
Appellate Court Case Title:	State of Washington, Resp/Cross-App v. Kristopher C. Martin, App/Cross-Resp
Superior Court Case Number:	17-1-03175-0

The following documents have been uploaded:

- 789589_Petition_for_Review_20200714135636D1889014_5126.pdf
  This File Contains:
  Petition for Review
  The Original File Name was martin kristopher prv.pdf

A copy of the uploaded files will be sent to:

- richard@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Diane Kremenich - Email: diane.kremenich@co.snohomish.wa.us
Filing on Behalf of: Mary Kathleen Webber - Email: kwebber@co.snohomish.wa.us (Alternate Email: diane.kremenich@snoco.org)

Address:
3000 Rockefeller Avenue, M/S 504
Everett, WA, 98201
Phone: (425) 388-3333 EXT 3501

Note: The Filing Id is 20200714135636D1889014