

NOTICE: SLIP OPINION
(not the court’s final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court’s final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously “unpublished” opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court’s opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: <https://www.lexisnexis.com/clients/wareports>.

For more information about precedential (published) opinions, nonprecedential (unpublished) opinions, slip opinions, and the official reports, see <https://www.courts.wa.gov/opinions> and the information that is linked there.

FILED
SEPTEMBER 22, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 33312-4-III
Appellant,)	
)	ORDER GRANTING
v.)	MOTION FOR LEAVE TO FILE
)	AMICUS CURIAE BRIEF,
ERIC DANIEL CRUZ,)	DENYING MOTION FOR
)	RECONSIDERATION AND
Respondent.)	AMENDING OPINION
)	

THE COURT has considered appellant's motion for reconsideration of our July 19, 2016 opinion, the respondent's answer thereto, the Washington State Patrol and Washington Department of Fish and Wildlife's motion for leave to file an amicus curiae brief in support of the appellant's motion for reconsideration, and the amicus curiae brief filed by the Washington State Patrol and Washington Department of Fish and Wildlife on August 9, 2016.

IT IS ORDERED that the motion for leave to file amicus curiae brief in support of the appellant's motion for reconsideration is granted.

IT IS FURTHER ORDERED that the appellant's motion for reconsideration of this court's July 19, 2016 opinion is denied.

IT IS FURTHER ORDERED that the court's July 19, 2016 opinion is amended as follows:

No. 33312-4-III

State v. Cruz

In the first paragraph on page five, the following is added after the sentence “Both components must be present.”:

Neither the plain wording of *Terry* nor our case law permit reducing the standard to a disjunctive test.³

³ See *State v. Russell*, 180 Wn.2d 860, 868, 330 P.3d 151 (2014) (“stop was justified because [the officer] could point to specific and articulable facts that supported a belief that [defendant] could be armed *and* dangerous”) (emphasis added); *State v. Collins*, 121 Wn.2d 168, 847 P.2d 919 (1993) (protective frisk of driver was lawful as the officer had a reasonable suspicion the driver was armed and dangerous where there was a reliable informant tip the driver had a gun, the stop occurred early in the morning, and the officer previously arrested the driver for a felony); *State v. Horrace*, 144 Wn.2d 386, 28 P.3d 753 (2001) (frisk of vehicle passenger supported by specific and articulable facts giving rise to an objectively reasonable belief that passenger could be armed and dangerous where trooper saw driver lean in passenger’s direction, passenger was in close proximity to driver’s movements, passenger was wearing a bulky jacket in which driver could have concealed a weapon, and the stop occurred in a relatively isolated spot in the middle of night); *Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986) (where driver made suspicious furtive movements and passenger remained in the car, officer’s *Terry* search of car justified); *Larson*, 88 Wn. App. 849 (driver’s furtive movements combined with the officer’s knowledge he would have to let driver back into his car justified *Terry* frisk of car).

In the first paragraph on page six, the following footnote is added after the citation “RP at 27.”:

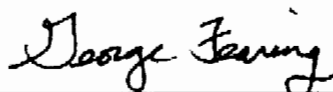
⁴ Although Officer McCormick’s subjective impressions are not dispositive, they are relevant to the court’s objective assessment of how a reasonable officer would assess the situation. See *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996) (in making determinations of reasonable suspicion and probable cause, “due weight” should be given to inferences drawn by “local law enforcement officers”).

No. 33312-4-III
State v. Cruz

With the addition of the two above-referenced footnotes, the footnote on page eight will be renumbered from “3” to “5.”

PANEL: Judges Fearing, Lawrence-Berrey and Pennell

FOR THE COURT:



GEORGE FEARING
Chief Judge

FILED
July 19, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 33312-4-III
)	
Appellant,)	
)	PUBLISHED OPINION
v.)	
)	
ERIC DANIEL CRUZ,)	
)	
Respondent.)	

PENNELL, J. — Law enforcement need not obtain a warrant prior to conducting a protective vehicle search, so long as there is reasonable suspicion a suspect is dangerous and may gain immediate control of weapons. We are confronted with whether a suspect's potential access to firearms alone satisfies these prerequisites. Under the circumstances presented here, involving a recreational sportsman cited for a fishing violation, we hold it does not. We thus affirm the superior court's order of suppression.

No. 33312-4-III

State v. Cruz

FACTS

Late one August morning in 2012, Washington Department of Fish and Wildlife officer Troy McCormick was alone on patrol near the Similkameen River. From his vantage point on a cliff above the river, Officer McCormick was able to watch the activities of fishermen below. According to Officer McCormick, there was no cellular service and only a “sketchy” radio signal at a parking lot where most of the fishermen would leave their vehicles or down on the river itself. Report of Proceedings (RP) at 8.

Eric Cruz and a male companion were fishing on the river that morning and caught Officer McCormick’s eye. After about a half hour, Officer McCormick saw Mr. Cruz illegally snag¹ a Chinook salmon and pull it from the river. The offense was a gross misdemeanor. Officer McCormick got into his car and drove down to the parking area to make contact with Mr. Cruz.

Officer McCormick found Mr. Cruz by himself, standing near the open door of his truck. He was filling out his catch record card. After a brief interaction, Officer McCormick arrested Mr. Cruz for illegal snagging and placed him in handcuffs. Mr. Cruz was cooperative. Officer McCormick performed a search incident to arrest of Mr.

¹ Snagging is a method of fishing that involves catching a fish by use of a hook, but without the hook being baited and the fish taking the bait with their mouth.

No. 33312-4-III

State v. Cruz

Cruz's person. While doing so, he asked Mr. Cruz if he had any firearms on him. Mr. Cruz volunteered that he had firearms in his truck. There was no discussion of what type of firearms were in the truck or whether they were loaded.

Officer McCormick placed Mr. Cruz in his patrol vehicle. As he did so, Mr. Cruz's companion appeared, curious about what was happening. Mr. Cruz's companion was told to stay away from the truck, to which he complied. At no point did Officer McCormick observe Mr. Cruz's companion do anything illegal or engage in any suspicious or obstructive conduct.

With Mr. Cruz secure in the police vehicle and his companion 15-20 feet away, Officer McCormick entered Mr. Cruz's truck and removed three firearms. According to Officer McCormick, he wanted to secure the firearms for the duration of his contact with Mr. Cruz, as he intended to release Mr. Cruz with only a citation. After placing the firearms in his patrol vehicle, Officer McCormick ran Mr. Cruz's name through dispatch. Officer McCormick learned Mr. Cruz had a prior felony conviction and was ineligible to possess firearms. Officer McCormick then retained the firearms as evidence.

The State charged Mr. Cruz with three counts of unlawful possession of a firearm in the second degree. The superior court granted Mr. Cruz's motion to suppress evidence of the firearms and dismissed the charges against Mr. Cruz without prejudice. The State

No. 33312-4-III
State v. Cruz

appeals.

ANALYSIS

Warrantless searches are presumptively unreasonable outside of a few “‘jealously and carefully drawn’ exceptions.” *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 2 L. Ed. 2d 1514 (1979)). The State bears the burden of establishing the applicability of an exception by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). If no exception applies, the fruits of a warrantless search must be suppressed.

As the parties agree, Officer McCormick’s seizure of the firearms cannot be justified under the search incident to arrest exception. But this does not end the matter. The search may still be justified if another exception applies. The State suggests the search can be justified as either an officer safety/*Terry*² search or an exigent circumstances search. We address each in turn.

Terry Search

A *Terry* frisk extends to a car “‘if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle.’” *State v. Glossbrener*, 146 Wn.2d 670, 680-81, 49 P.3d 128 (2002) (emphasis added) (quoting *State v. Terrazas*, 71

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

No. 33312-4-III

State v. Cruz

Wn. App. 873, 879, 863 P.2d 75 (1993)). Both components must be present. If either the suspect cannot access a weapon or there is no suspicion of dangerousness, a warrantless vehicle search violates *Terry*.

Officer McCormick's search fails under *Terry* because, despite possible access to firearms, there was no reasonable suspicion Mr. Cruz or his companion were dangerous. The right to bear arms is constitutionally protected. Standing alone, the mere fact an individual possesses firearms does not make him dangerous or justify intrusion into his private space. Context matters. Unless the circumstances suggest a suspect may use firearms to harm himself or others, a vehicle *Terry* frisk is not warranted based simply on the presence of firearms.

There was no indication here of dangerousness. At the time of the search, Mr. Cruz and his companion had just spent the morning fishing. The fact that there were firearms present in this recreational setting was neither surprising nor alarming. Mr. Cruz's law violation did not create any specific safety concerns. He was not under investigation for a crime of violence or other felonious conduct. He was in the process of being cited for a misdemeanor fishing violation. Nothing about these general circumstances suggested a risk to officer or public safety.

The individual circumstances of Mr. Cruz and his companion were likewise

No. 33312-4-III

State v. Cruz

benign. Neither man had engaged in any suspicious conduct or made any concerning or furtive movements. Both fully complied with Officer McCormick's instructions. When asked by the State how he felt at the time of the search, Officer McCormick agreed he "didn't feel that [Mr. Cruz] was a danger." RP at 27. These circumstances support the superior court's finding the search was improper.

The authorities cited by the State are inapposite. Both *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986), and *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997), involved vehicle occupants who had made suspicious, furtive movements. Such movements typically provide strong justification for a protective search. *Glossbrener*, 146 Wn.2d at 681-83. *State v. Chang*, 147 Wn. App. 490, 195 P.3d 1008 (2008), involved an individual known to possess a concealed handgun while parked in the lot of a bank as his companion committed a crime inside. This was not an innocuous circumstance. In the context of an ongoing felony investigation, the presence of firearms justifies protective action under *Terry*.

As recognized in the authorities cited by the State, once a firearm is present, not much more is needed to justify a frisk. Had Mr. Cruz or his companion been noncompliant, had they appeared evasive or antagonistic, or had the presence of firearms seemed unusual given the circumstances or time of day, the balance likely would have

No. 33312-4-III

State v. Cruz

tipped to favor a protective search. *See State v. Carter*, 151 Wn.2d 118, 123-24, 129, 85 P.3d 887 (2004). But under the facts found by the superior court, Mr. Cruz and his companion were completely cooperative. They posed no more threat than the average sportsmen. To allow a search in this case would mean anyone transporting firearms in a vehicle for sporting purposes would be vulnerable to a law enforcement search. That level of intrusion is incompatible with our constitutional principles.

Exigent Circumstances

The State also attempts to justify Officer McCormick's search under the exigent circumstances exception to the warrant requirement. This exception applies where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." *State v. Smith*, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). Exigent circumstances involve a true emergency. *State v. Hinshaw*, 149 Wn. App. 747, 753, 205 P.3d 178 (2009) (such as "an immediate major crisis" requiring swift action to prevent harm) (quoting *Dorman v. United States*, 140 U.S. App. D.C. 313, 319, 435 F.2d 385 (1970)). Danger to an arresting officer is a potentially exigent circumstance. *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010).

No. 33312-4-III

State v. Cruz

The State fails to establish exigent circumstances for the same reasons it cannot establish dangerousness under *Terry*. Exigent circumstances are ones presenting a true potential for an emergency or destruction of evidence. *Tibbles*, 169 Wn.2d at 369-70. No such circumstances were present here. The hypothetical concern that Mr. Cruz or his companion *could* have posed a threat *if* they were dangerous applies to every individual contacted by law enforcement. We agree with the superior court that such generalized concerns are insufficient to permit intruding on an individual's constitutionally protected private space. *Tibbles*, 169 Wn.2d at 372; *State v. Swetz*, 160 Wn. App. 122, 136, 247 P.3d 802 (2011).³

CONCLUSION

Once Officer McCormick learned about the presence of firearms, it was appropriate for him to proceed with caution. But this did not justify a warrantless search. Other less intrusive options were available. Officer McCormick could have asked Mr. Cruz for consent to retrieve and secure the firearms. Alternatively, he may have been able to access Mr. Cruz's keys and lock the vehicle during the citation process. Had Officer McCormick believed Mr. Cruz's companion was too close to the truck, he could

³ Had Officer McCormick sought to impound Mr. Cruz's car, our analysis might well be different. *State v. Duncan*, 185 Wn.2d 430, 441, ___ P.3d ___ (2016).

No. 33312-4-III

State v. Cruz

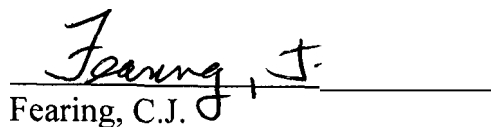
have instructed him to stand further away and keep his hands visible. If, during any of these interactions, Officer McCormick developed a suspicion that Mr. Cruz and his companion were being evasive or non-compliant, then he would have had grounds to go further and conduct a protective search.

Our country's freedoms undoubtedly make police work more difficult. Over the years, courts have accommodated law enforcement's safety and investigative needs by crafting several exceptions to the constitution's warrant requirement. However, none of these exceptions extends to generalized safety concerns applicable to interactions with large sectors of the public. Because Officer McCormick's safety concerns were too general, the order of suppression must be affirmed.

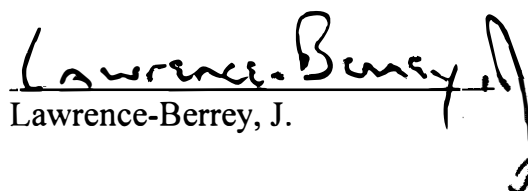


Pennell, J.

WE CONCUR:



Fearing, C.J.



Lawrence-Berrey, J.