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NO. 64474-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HARRIS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE, JUDGE

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

Was the search of the appellant's car within a lawful exception to the warrant requirement?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On August 10, 2009, the State charged the appellant, Christopher Harris, with one count of Unlawful Possession of a Firearm in the Second Degree. CP 1. Harris was arraigned on August 24, 2009. At the first case setting on September 14, 2009, the case was set for trial for October 20, 2009. The charge was amended on September 15, 2009, to Unlawful Possession of a Firearm in the First Degree. CP 6.

Prior to trial Harris stipulated to the admissibility of his statements under CrR 3.5. CP 183. During a CrR 3.6 hearing, the Honorable Judge Richard Eadie denied Harris' motion to suppress evidence of the firearm in question due to an unlawful search and to dismiss the case. CP 189-93. Harris waived a jury trial and stipulated to the facts contained in the police reports. CP 81-85. He was convicted as charged of Unlawful Possession of a Firearm

in the First Degree by Judge Eadie on October 29, 2009.

CP 86-93, 184-88.

## 2. SUBSTANTIVE FACTS

On the evening of July 10, 2009, Seattle Police Officers Thomas Horning and Michael Freese were on an "emphasis patrol," targeting a high crime area in South Seattle. CP 189. At 8:46 PM, while the sun was setting but it was still somewhat light out, both officers observed a black Chevy Tahoe run a stop sign at a high rate of speed. CP 189-90. The officers pulled their patrol car behind the Tahoe and activated their emergency lights. CP 190. The Tahoe pulled over and the driver, appellant Harris, without prompting proceeded to place both of his hands outside of the window. CP 190. The officers found that action unusual and it heightened concern for their safety. CP 190.

Officer Freese approached the driver's side of the Tahoe while Officer Horning approached the passenger side. CP 190. Harris was cooperative and claimed that he put his hands out the window because that is what he had seen on television. CP 190. Harris, with his hands shaking and voice trembling, appeared unusually nervous during the stop, beyond any normal anxiety

associated with coming into contact with police. CP 190. Although Harris did not have a driver's license, he accurately relayed his name and date of birth to Officer Horning, who discovered that Harris was a convicted felon and had been driving while his license was suspended in the second degree, an arrestable offense. CP 190.

Officers Horning and Freese walked to the back of the Tahoe to discuss the situation. CP 190. Although the Tahoe's windows were tinted, the officers could see Harris' movements inside the car, and Officer Freese kept his eyes on Harris. CP 190. Officer Freese observed Harris appear to reach with his right hand between the two front seats and into the back seat area of the Tahoe. CP 191. Fearing that Harris may be reaching for a weapon, Officer Freese quickly ordered Harris to stop and to place his hands back on the steering wheel. CP 191. Officer Horning then immediately turned towards Harris and also observed him reaching into the back seat area of the Tahoe with his right arm. CP 191. Harris hesitated to respond to the order, and Officer Freese again commanded Harris to place his hands on the steering wheel; only at that point did Harris comply. CP 191.

Officer Freese re-approached the driver's side window and placed one of his hands on one of Harris' wrists on the steering wheel. CP 191. Officer Horning then opened the rear driver's side door to check the area that the officers saw Harris reaching into. CP 191. Using a flashlight, but not moving or touching anything inside the car, Officer Horning observed what appeared to be a black semi-automatic handgun under the back seat in the area they had seen Harris' arm reaching. CP 191. Officer Horning announced that he had found a gun, and Officer Freese removed Harris from the car and placed him in handcuffs. CP 191.

The officers impounded the Tahoe to the Seattle Police Department Evidence Unit and obtained a search warrant for the car. CP 191. A subsequent search revealed a Smith & Wesson 9 millimeter semi-automatic handgun in the location observed by Officer Horning, under the rear passenger seat. CP 192.

After being provided Miranda rights, Harris admitted to having purchased the handgun earlier in the day. CP 192. He stated that when the officers walked to the back of his car, he reached into the glove compartment and tried to throw the gun

under the back seat. CP 186. Harris claimed that he only intended to hide the gun and did not mean to pose a threat to the officers. CP 186. Months later at the CrR 3.6 hearing, Harris testified that the movement observed by officers was actually him picking up his car keys from the ground, but the Court found this explanation to not be credible and, even if true, it would still have been a movement that justified the officers' reasonable safety concerns. CP 192.

**C. ARGUMENT**

**1. STANDARD OF REVIEW**

Following a suppression hearing, the trial court's findings of fact are reviewed for substantial evidence. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. Id. at 644. Unchallenged findings are verities on appeal. Id. Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

**2. THE TRIAL COURT PROPERLY RULED THAT THE BRIEF SEARCH OF THE APPELLANT'S CAR, WHICH YIELDED A FIREARM, WAS A LAWFUL "TERRY SEARCH" FOR WEAPONS UNDER THE WARRANT EXCEPTION.**

The Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. As a result, police are generally required, where practicable, to obtain advance judicial approval of searches and seizures through the warrant procedure. See, e.g., Terry v. Ohio, 391 U.S. 1, 20, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Warrantless searches are presumed to be unconstitutional. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). There are, however, several well-established exceptions to this general rule, particularly when what is at issue is "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat, which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." Terry, 391 U.S. at 20.

In Michigan v. Long, the United States Supreme Court recognized that "roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect."

463 U.S. 1032, 1049, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). Accordingly, the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant” the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. Id. (citing Terry, 392 U.S. at 21).<sup>1</sup>

This exception to the warrant requirement has long been recognized in Washington. In State v. Kennedy, an officer stopped the defendant driver, who then leaned forward “as if to put something under the seat.” 107 Wn.2d 1, 3, 726 P.2d 445 (1986). The officer had the defendant exit the car, leaving one front passenger in the car. Id. at 3-4. While leaning into the car to identify the passenger, the officer also reached under the front seat, finding a plastic bag containing marijuana. Id.

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<sup>1</sup> This exception to the warrant requirement was not affected by the United States Supreme Court’s recent decision in Arizona v. Gant, 129 S. Ct. 1710, 1721 (2009), where the Court specifically cited the continued validity of Michigan v. Long.

The Washington Supreme Court stated that “[t]he scope of the search should be sufficient to assure the officer’s safety. This means that the officer may search for weapons within the investigatee’s immediate control.” Id. at 12. Because the officer did not know whether a potential weapon was concealed under the front seat, and the passenger still had access to that area, the Kennedy Court held that the officer’s “limited search for weapons” was reasonable and that “[i]t would be unreasonable to limit an officer’s ability to assure his own safety.” Id.

In State v. Larson, the Court of Appeals extended the holding of Kennedy to a situation where the defendant driver had been removed from the car, and no other occupants remained in the car at the time of the search, based on the fact that the defendant would likely have been required to return to his car to retrieve his vehicle registration at some point. 88 Wn. App. 849, 857, 946 P.2d 1212 (1997).<sup>2</sup> After an officer caught Larson speeding and activated his emergency lights, Larson did not immediately pull over and was observed leaning forward and

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<sup>2</sup> In State v. Bradley, the Court of Appeals refused to extend this holding to a situation where there was no reason for the defendant to return to the car and there were no additional passengers in the car. 105 Wn. App. 30 (2001), Amended on Denial of Reconsideration, 27 P.3d 613 (2001).

making movements toward the floorboard of his truck. Id. at 851. Larson eventually stopped and was immediately commanded to exit his vehicle. Id. The officer proceeded to search the inside of the truck cab and found heroin where he saw Larson leaning. Id. The officer also testified that he would have let Larson return to his truck had the search not revealed anything illegal. Id.

In upholding the validity of the search, the Court reasoned that “[b]ecause Larson would then have had access to any weapon he might have concealed inside [the car] before getting out, the protective search to discover such a weapon was not unreasonably intrusive.” Id. The Court stated that “[a]s in Kennedy, the purpose of such a search is ‘to discover whether the suspect’s furtive gesture hid a weapon.’ The scope of the search, therefore, is limited to the area of the vehicle defined by the suspicious movements observed by the officer.” Id. at 857 (quoting Kennedy, 107 Wn.2d at 12).

In the case at hand, the trial court’s undisputed findings of fact amply support the officers’ limited protective search under Harris’ back seat. From the beginning, officers noted that Harris curiously stuck his hands out of his window when pulled over, and

Harris appeared unusually nervous. CP 190. The officers were aware that Harris was a convicted felon. CP 190. Then, similar to officers in Kennedy and Larson, officers here observed a clear furtive movement that caused them immediate safety concerns. Both Officers Freese and Horning observed Harris reaching between the front two seats and into the back seat area of the Tahoe. CP 191. Fearing that Harris may be reaching for a weapon, Officer Freese immediately commanded Harris to place his hands on the steering wheel; Harris was slow to listen to Officer Freese and only after the second command did Harris actually place his hands back on the steering wheel. CP 191.

All of these concerns amounted to an objectively reasonable, articulable suspicion that Harris was potentially dangerous and “may gain immediate control of a weapon.” Michigan, 463 U.S. at 1049. The officers’ search was also within the scope of a permissible sweep for weapons, as it was limited to the precise area – the rear back seat – where “the suspicious movements were observed by the officer.” Larson, 88 Wn. App. at 857. This location was within arm’s reach of Harris at the time. CP 191.

a. **Glossbrener Is Clearly Distinguishable And Does Not Support Reversal.**

Appellant, relying on State v. Glossbrener, argues that any officer safety concerns were dissipated by the time of the search and the search was therefore illegal. Brief of Appellant at 11-12. Appellant's reliance is misplaced. In Glossbrener, the State Supreme Court refused to uphold the validity of a protective sweep where *numerous* and *significant* "intervening actions" made it unreasonable. 146 Wn.2d 670, 49 P.3d 128 (2002). First, the Glossbrener Court observed that the defendant had given a reasonable explanation for his furtive movement. Id. at 673-74. The defendant, who was being investigated for driving under the influence of alcohol, explained that the furtive movement the officer observed was him hiding an open alcohol container. Id.

Second, after seeing the furtive movement, the officer allowed the defendant to sit in his car while the officer checked for warrants. Id. at 682. The Glossbrener Court noted that in Larson, the officer had the driver immediately exit the truck after observing the furtive movement and the driver was required to remain outside the truck for the duration of the search. Id. Third, the officer did eventually remove the defendant from the car and conducted a

pat-down search of his person, which did not reveal any weapons.

Id. Finally, the Court noted that it was only after the officer completed field sobriety tests and determined the defendant was not legally intoxicated that he decided to call for back-up and search the passenger area of the defendant's car.<sup>3</sup> Id.

No comparable intervening actions are present in this case. Unlike in Glossbrener, here no time passed between the suspicious movement and the search, and the suspect did not provide any explanation for his movements (until later when he acknowledged he was concealing a firearm). Officer Freese immediately ordered Harris to place his hands back on the steering wheel after observing the furtive movement. Officer Freese then approached the driver's side open window and immediately placed a hand on one of Harris' wrists, attempting to provide some measure of security while Officer Horning searched the rear seat area of the car. CP 191.

Here, unlike in Glossbrener, after observing the furtive movements, the officers did not continue with their previous

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<sup>3</sup> Another issue with the search in Glossbrener is that the officer described it as a search "for weapons and ***other evidence***." Glossbrener, 146 Wn.2d at 674 (emphasis added). However, this exception to the warrant requirement applies to searches intended solely for weapons, not drugs or evidence of other crimes. See, e.g., Kennedy, 107 Wn.2d at 12.

investigation; they instead shifted all of their focus and attention to the question of whether Harris was reaching for a weapon. At no point did either officer act as if Harris did not pose a legitimate threat – a threat necessitating an urgent and cautious response. The threat continued until the officers were able to determine whether Harris concealed a weapon in the area behind his seat.

Appellant argues that at the moment where Officer Freese had a hand on Harris, and Officer Horning was looking in the backseat of the car, the officers had sufficient control of the situation and the threat no longer continued. Brief of Appellant at 13-15. This argument ignores the fact that Harris had one arm free and was still within arm's reach of a potential weapon at the time.

Most importantly, this argument ignores the fact that the search was not yet completed. If the officers were to terminate the search at that point, they would not have fully searched the area in which Harris was furtively moving, and they could not have alleviated their reasonable suspicion that Harris had access to a weapon. Similar to Larson, where the defendant was not even in his truck at the time of the search, 88 Wn. App. at 856-57, if the officers terminated the search the suspect here would regain full access to the potential weapon and the danger would remain.

**b. "Fruit Of The Poisonous Tree" Doctrine  
Consequently Does Not Apply.**

The exclusionary rule requires evidence acquired subsequent to an unconstitutional search to be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). In the case at hand, the search that revealed the hidden firearm was an appropriate and constitutional Terry search for weapons. As a result, the exclusionary rule does not apply, and both the recovered firearm and Harris' statements regarding purchasing and attempting to hide the firearm were properly admitted by the trial court.

**D. CONCLUSION**

For the above reasons, the appellant's conviction for Unlawful Possession of a Firearm in the First Degree should be upheld.

DATED this 16<sup>th</sup> day of June, 2010.

Respectfully submitted,

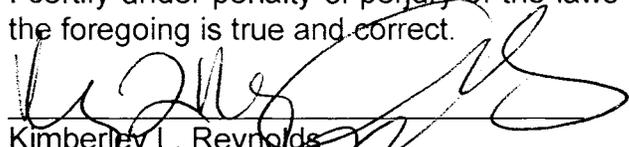
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jonathan Palmer and Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CHRISTOPHER HARRIS, Cause No. 64474-2-1, in the Court of Appeals, Division I, for the State of Washington.

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

  
\_\_\_\_\_  
Kimberley L. Reynolds  
Done in Seattle, Washington

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