

No. 66152-3-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**JAMES RICHARDSON, Appellant.**

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**BRIEF OF RESPONDENT**

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COURT OF APPEALS  
DIVISION ONE  
CLERK OF COURT

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether Deputy Gervol's safety concerns justified conducting a protective search of the driver compartment of Richardson's vehicle after Richardson and his passenger were safely removed from the vehicle and where, the traffic stop was not yet completed?

**C. FACTS**

**1. Procedural Facts**

James Richardson was charged with one count of unlawful possession of a firearm in the first degree. CP 38-39. Prior to trial, Richardson verbally moved to suppress found in his vehicle pursuant to Arizona v. Gant, 566 U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). RP 3-4, 75. After reviewing the facts and hearing argument, the trial court denied Richardson's motion concluding Gant was inapplicable and that the officer had authority to search the driver compartment of Richardson's vehicle based on officer safety based on Richardson's furtive movements and violent criminal history. RP 84, Supp. CP \_\_\_\_ (findings of fact/conclusions of law).

At trial, Richardson was convicted as charged and given a standard range sentence. CP 11-18. Richardson timely appeals. CP 2-10.

## **2. Substantive Facts**

On October 14<sup>th</sup>, 2009 Deputy Gervol conducted a traffic stop of a black Dodge Durango after observing the driver commit two traffic infractions while patrolling I-5 in Whatcom County. FF 1, RP 6. After initiating the traffic stop, Deputy Gervol noticed the driver, later identified as James Richardson, was making furtive movements, as if reaching under the seat below him, prior to stopping his vehicle. FF 2. A license and registration check revealed the Durango was registered to James Richardson, a person known to Deputy Gervol as having violent criminal history, including a conviction for unlawful possession of a firearm. FF 3, 4, RP 9.

When Deputy Gervol approached the vehicle he immediately noticed an odor of marijuana and that Richardson had a passenger. RP 10. Deputy Gervol also noticed a large black stick-later identified as a walking stick in the vehicle. FF 11, 12, RP 11. Richardson was asked to exit his vehicle at which time Deputy Gervol noticed Richardson also had a large folding knife clipped to his person and that Richardson was acting hesitantly. RP 12, FF 13, 14. Gervol patted Richardson down for his safety, removed the knife from Richardson's person and secured Richardson in his patrol vehicle. RP 15, 16, FF 15. Richardson was not

under arrest but Deputy Gervol nonetheless placed him in his patrol vehicle to secure the scene and ensure his safety during the stop. RP 16.

Next, Deputy Gervol conducted a consensual pat down of the passenger and then did a quick protective search of the driver compartment of Richardson's vehicle. RP 18, FF 18. Deputy Gervol found a loaded firearm under the seat where Richardson had been making furtive movements. FF 18, RP 19-20. Prior to finding the firearm, Deputy Gervol intended to return Richardson to his vehicle once the traffic stop was complete. FF 16. After Richardson was arrested and Mirandized, he acknowledged the loaded firearm found under the driver's seat was his. RP 19-20, FF 21.

**D. ARGUMENT**

- 1. Deputy Gervol was authorized to conduct a protective search of the driver compartment of Richardson's vehicle for safety reasons even though Richardson was no longer in the vehicle and may or may not have needed access to his vehicle during the remainder of the traffic stop.**

Contrary to Richardson's argument, application of Article 1, §7 of the Washington State Constitution and State v. Glossbrener, 146 Wn.2d 168, 847 P.2d 919 (1993), does not warrant reversal of this case. Law enforcement officers are permitted to take reasonable steps during traffic stops to ensure their safety. Deputy Gervol was reasonably concerned for

his safety in this case because Richardson made furtive movements as he was being stopped and was known to Gervol for his violent criminal history. Under the totality of these circumstances, Gervol lawfully completed a protective sweep of the driver's compartment of Richardson's vehicle at the first reasonable opportunity after Richardson and his passenger were removed and safely secured away from the vehicle. Moreover, because nothing happened in the time that transpired between the initial stop and the protective search of the driver compartment to reduce Gervol's safety concerns and the stop was not yet complete, Gervol's protective search was lawful.

Warrantless searches are per se unreasonable under Article 1, §7 of the Washington State Constitution. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). An officer is, however, permitted under our State Constitution to search the interior of a vehicle for weapons during a traffic stop to ensure the officer safety. State v. Kennedy, 107 Wn.2d 1, 11, 726 P.2d 244 (1986). It is the state's burden to show the challenged search falls within an exception. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

A trial court's findings of fact on a motion to suppress are reviewed under the substantial evidence test. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is that amount

sufficient to persuade a rational person of the truth of the finding. *Id.* at 644. If that standard is satisfied, an appellate court may not substitute its judgment for that of the trial court, even if the appellate court would resolve a factual dispute differently. State v. Stimson, 41 Wn.App. 385, 390-91, 704 P.2d 1220 (1985). Unchallenged findings are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). Questions of law are reviewed de novo. *Id.*

In order to warrant a protective search of a vehicle an officer must point to specific and articulable facts that create an objective belief that an occupant is armed. State v. Horrace, 144 Wn.2d 386, 28 P.3d 753 (2001). When an occupant bends at the waist all the way toward the floor, as Richardson did in this case, in a manner consistent with hiding a weapon, such conduct does provide a sufficient specific and articulable facts that create an objective belief the occupant is armed. State v. Collins, 121 Wn.2d 168, 847 P.2d 919 (1993).

Richardson argues pursuant to Glossbrener and State v. Larson, 88 Wn.App. 946 P.2d 1212 (1997), however, that Deputy Gervol had no basis to complete a protective search of the driver's area in Richardson's vehicle for safety reasons because all he was going to do at the time of the search was "complete his investigation, cite Richardson, return his pocket knife and release him." Br. of App. at 14. He contends that because Richardson

likely did not need to return to his vehicle until the investigation was complete, there was no ongoing safety issue that required a protective search to secure the scene. *Id.* Neither Glossbrener nor Larson preclude officers from conducting a protective frisk of the driver's compartment even after the driver is removed so long as the protective search is made at the first reasonable opportunity and the objective safety concern continues to exist at the time the protective search is performed. Moreover, nothing in the record evidences the traffic stop was complete or that Richardson would not need to access his vehicle before Gervol completed investigating the marijuana smell or processing the traffic infractions.

In Larson, the defendant was pulled over for a traffic infraction. Larson neither slowed down nor pulled over after the officer initiated the traffic stop. Instead, the officer observed Larson leaning forward and making movements toward his floorboard before Larson finally got off the highway and pulled over into a hotel parking lot. Once stopped, the officer ordered Larson out of his vehicle, patted him down and then did a visual search of Larson's vehicle compartment by sticking his head inside the cab window. The officer immediately noticed a "syringe, blackened spoon and cotton ball" in a pocket in front of the driver's seat. Larson, 88 Wn.App. at 856-7. Larson moved to suppress the evidence obtained as a result of this vehicle search. The Court of Appeals upheld the search

determining that the officer continued to have reasonable safety concerns based on Larson's furtive movements even after Larson was removed from his vehicle since Larson would likely need to access his vehicle during the traffic stop to obtain vehicle registration documents.

Similar to Larson, the traffic infraction stop in this case was not complete when Gervol conducted the limited protective search of the vehicle compartment and Richardson may, as a practical matter, have needed to access his vehicle at some point during the investigative stop. FF 16. Pursuant to RCW 46.61.021(2), an officer may detain a person stopped for a traffic infraction for a reasonable period of time necessary "to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction". RCW 46.61.021(2)). The fact that Richardson provided his license and registration but not proof of insurance at the onset of the traffic stop does not definitively demonstrate Richardson would not otherwise need access to his vehicle during the remainder of the traffic stop. FF 7, 8. Particularly here, where Deputy Gervol, in addition to processing the observed traffic infractions, also intended to follow up with Richardson about the smell of marijuana coming from his vehicle. Regardless, the dispositive fact is not whether or not Richardson would have or needed

access to his vehicle during the stop but whether safety remained a reasonable concern when Deputy Gervol conducted the protective search of the driver compartment of Richardson's vehicle.

In Glossbrener, an officer pulled the defendant, the sole occupant of a car, over for a defective headlight. Glossbrener, 146 Wn.2d at 673. Before stopping, the defendant reached over beneath the passenger seat for several seconds. *Id.* The officer approached the car and smelled alcohol. *Id.* He requested identification from the driver and asked him why he had reached under the seat. *Id.* The defendant initially lied but eventually admitted that he was trying to hide a container of alcohol. *Id.* at 673-74. The officer then told Glossbrener to remain in his vehicle while he returned to his patrol car and checked for warrants. *Id.* at 674.

Upon returning to the vehicle, the officer had the defendant step from his car, patted him down, and asked him to perform field sobriety tests. *Id.* After Glossbrener passed the tests, the officer called for backup. *Id.* Once backup arrived, the officer searched the defendant's car "for weapons and 'other evidence.'" *Id.* He discovered a brass pipe containing marijuana inside the vehicle and, in a subsequent search incident to arrest, found methamphetamine on the defendant's person. *Id.*

The Glossbrener court determined that the officer's search of the interior of the vehicle was not justified because, while the officer "may

have had a reasonable belief that Glossbrener was armed and dangerous when he first observed the furtive movement, any such belief was no longer objectively reasonable at the time he actually conducted the search because of the intervening actions of both [the officer] and Glossbrener.” Id. at 662.

Glossbrener is distinguishable from this case for several reasons. First, unlike Glossbrener, the traffic stop in this case was made at night with a driver known to have violent criminal history who made concerning furtive movements as he was being stopped. The safety implications in this case were therefore significant. Second, while the officer in Glossbrener was dealing with one vehicle occupant, Deputy Gervol was confronting two vehicle occupants and an odor of marijuana. See, FF 2, 4, 9. In light of these circumstances Deputy Gervol took reasonable steps to secure this traffic stop sequentially to ensure his safety by first removing Richardson, then his companion and then conducting a brief protective sweep of the driver’s compartment. Officers should be permitted to control the scene. State v. Mendez, 137 Wn.2d 208, 220-21, 970 P.2d 722 (1999). “The constitution does not require an officer to wager his physical safety against the odds that a suspected assailant is actually unarmed.” State v. Wilkinson, 56 Wn. App. 56 Wn. App. 812, 818, 785 P.2d 1139

(1990) (*quoting State v. Serrano*, 14 Wn. App. 462, 469-70, 544 P.2d 101 (1975)).

Moreover, unlike in Glossbrener nothing Richardson or Deputy Gervol said or did between the initial stop and subsequent protective search objectively demonstrates Deputy Gervol's traffic stop was complete or that his safety concerns were no longer reasonable when he initiated the protective search of the driver's compartment of Richardson's vehicle. Gervol was dealing with a known violent criminal who was acting hesitantly who had engaged in furtive movements in his vehicle, had a companion and whose vehicle smelled of marijuana. This stands in stark contrast to Glossbrener where, prior to the vehicle search, Glossbrener explained to the officer why he had reached under his seat, was left sitting in the vehicle while the officer checked for warrants and then cooperated fully with the officer's investigation including submitting to a field sobriety test and a frisk of his person, prior to the officer initiating a protective search of the vehicle at the end of the stop.

The fact that Richardson may or may not have needed to have access to his vehicle to complete his traffic stop does not dictate whether Gervol's limited protective search was reasonable or warranted. Both Larson and Glossbrener rejected the argument that vehicle searches predicated on officer safety should be limited only to situations where

either the driver or passenger remain or will have access to the vehicle during the stop. Instead, Glossbrener directed courts to “evaluate the entire circumstances of the traffic stop in determining whether the search was reasonable based on safety concerns.” Glossbrener, 146 Wn.2d at 676. Whether or not a suspect may have access to his vehicle during a traffic stop is but one factor to consider and is therefore not dispositive to this issue. The thrust of Glossbrener’s analysis focused not on whether the stop was over but whether the officer’s safety concerns remained objectively reasonable given the time and circumstances that had transpired between the initial stop and subsequent protective vehicle search. Application of the analysis directed to be used in Glossbrener requires upholding the protective search in this case.

In addition to arguing that Glossbrener is dispositive-which the State agrees but asserts requires a different result, Richardson contends the trial court erroneously relied on State v. Chang, 147 Wn.App. 490, 195 P.3d 1008 (2008), *review denied*, 166 Wn.2d 1002 (2009) to uphold the search in this case. In Chang, the court applied the Glossbrener analysis and upheld a protective search of a forgery suspect’s vehicle for a handgun even though the forgery suspect had already been removed from the vehicle. Applying Glossbrener, Larson and State v. Glen, 140 Wn.App. 627, 166 P.3d 1235 (2007), the Chang court determined that even when

the suspect does not have access to his vehicle, “police may conduct a protective search if the suspect will later have the opportunity to return to his vehicle.” State v. Glen, 140 Wn.App. at 627.

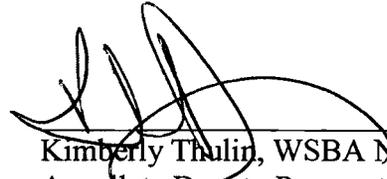
Richardson argues Chang and Glen are distinguishable because in both instances officers had reliable information that the suspect was armed with a weapon and therefore a remained a safety threat until the weapon concern was dispelled. Br. of App. at 17. But in this instance, the safety concerns facing Deputy Gervol were of similar concern and reliability. Richardson was a known violent criminal, was acting hesitantly and was personally armed with a knife. Given his history and behavior and circumstances of the stop, Gervol had reliable safety concerns that could not be reasonably satisfied by simply removing Richardson and his companion from the vehicle while he completed his stop and investigation. In order to reasonably secure the scene, as in Larson, Glen and Chang, the circumstances facing Gervol required a brief protective search of the driver’s compartment of Richardson’s vehicle. In relying on Chang, the trial court was appropriately applying the analysis required by Glossbrener. The trial court therefore lawfully concluded the loaded gun found under Richardson’s driver seat was found pursuant to a lawful protective search and was admissible below. *See*, Glossbrener, 146 Wn.2d at 677, State v. Kennedy, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). The trial

court did not err denying Richardson's motion to suppress. Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

**E. CONCLUSION**

For the foregoing reasons, the State requests that Richardson's appeal be denied and his conviction for unlawful possession of a firearm in the first degree be affirmed.

Respectfully submitted this 13 day of May, 2011.

  
\_\_\_\_\_  
Kimberly Thulin, WSBA No. 21210  
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**CERTIFICATE**

I certify that on this date I placed in the United States mail a properly stamped and addressed envelope, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, David B. Koch, addressed as follows:

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Sydney A. Ross 05/26/2011  
LEGAL ASSISTANT DATE