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No. 66566-9-I
(consolidated
w/66604-5-I)

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

STATE OF WASHINGTON, Respondent,

v.

**MICHAEL EDWARD CONNER and
SALLI SUZANNE BOSMA, Appellants.**

BRIEF OF RESPONDENT

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A. ISSUES

1. Whether Bosma and Conner validly waived their right to a jury trial where the record reflects their intent, through their respective attorneys, to proceed to a bench trial to pursue suppression issues on appeal but the record fails to reflect any personal expression or consideration that they waived this right.
2. Whether the trial court appropriately denied Bosma's motion to suppress evidence found in her purse when the facts objectively reflect Bosma consented to a search of her purse during a consensual citizen encounter with Deputy Taddonio.
3. Whether the trial court appropriately denied Conner's motion to suppress evidence found in his pants pocket when Deputy Taddonio had express consent from Conner to look into the pocket, following a frisk predicated on officer safety concerns.

B. FACTS

On February 26th, 2011, Whatcom County Sheriff Deputy Taddonio, on patrol, observed two vehicles parked in a Department of Natural Resources parking lot that was restricted and required a parking permit. FF 1. As Deputy Taddonio pulled into this parking lot he observed two Honda vehicles parked in the southwest area of the parking lot, one vehicle contained two individuals and neither vehicle appeared to have the required parking permit displayed. RP 7, FF 2. The ground below both vehicles appeared dry despite it being a very rainy day,

indicating to Deputy Taddonio that both vehicles had been parked in this lot for a significant period of time. FF 2.

Deputy Taddonio pulled into the parking lot from a south entrance and parked his marked patrol car at least fifteen feet from either parked car in a manner that did not block either car from leaving. FF 2, RP 11. He determined that one of the vehicles was registered to Salli Bosma and the other to a Nancy Conner. FF 2. As he walked towards the first vehicle Bosma, who was seated in the driver's seat, unrolled her driver's door window to contact the officer. FF 3.

Deputy Taddonio engaged in general conversation with Bosma and her passenger, later identified as Michael Conner, asking them why the two were in the DNR parking lot and if either had a parking permit. FF 3, RP 11, 12. Conner explained he had just come from the casino and Bosma had driven out from Everson to meet with him. FF 3. Bosma explained they met in the DNR parking lot because her current boyfriend did not approve of her having contact with Conner. FF 3, RP 13. During this conversation, Deputy Taddonio asked Bosma for her identification and Conner voluntarily offered his identification. FF 3. Taddonio stood by the

Bosma's door, called in a warrant check for both Bosma and Conner and then promptly returned both identifications. FF 3.

Deputy Taddonio then asked Bosma if there were any drugs or drug paraphernalia in her vehicle. FF 3. Bosma became very nervous and started looking around the interior of her vehicle as if worried a hidden object could be seen. FF 3. Deputy Taddonio then asked Bosma if she would consent to a search of her car. FF 5. Bosma hesitated and looked at Conner but then turned back to Deputy Taddonio and authorized the search. RP 13-15. When Bosma began to exit the vehicle clutching her purse Taddonio became concerned for his safety based on Bosma's observed nervousness and clutching of her purse. FF 5, RP 14-15. Consequently, Taddonio requested permission to search Bosma's purse. FF 5, RP 14-15. Bosma said yes, opened her purse and handed it to deputy Taddonio. FF 5. Inside Bosma's purse, Taddonio opened a sunglass case and observed a glass pipe containing what appeared to Taddonio, who was trained and experienced in drug detection, to be methamphetamine residue. FF 5. Bosma was thereafter placed under arrest, advised of her Miranda warnings and placed in the back of the patrol car. FF 5.

Deputy Taddonio then noticed that Conner was outside of Bosma's vehicle pacing back and forth. FF 7. Taddonio observed Conner repeatedly put his hands in and out of his pant pockets and that one of the pockets appeared to have a large bulge. FF 7. After observing Conner repeatedly touch this bulging pocket, Taddonio asked Conner if he could frisk him for weapons and Conner consented. FF 7. During the pat down, Taddonio confirmed Conner had a large firm item in his pocket but that it was not necessarily a weapon. FF 8. Taddonio asked Conner what the item was and Conner stated it was a large wad of money. FF 8. Deputy Taddonio then asked Conner if he could look inside to confirm the large bulky item was only money. FF 8. Conner again consented. Id. When the deputy looked into Conner's pocket, he immediately observed a plastic bag that contained 'shards' of methamphetamine. FF 9. Conner was thereafter arrested. FF 9. At this point Ferndale Police officer Johnson arrived as back-up. FF 9. As Conner was being escorted to a patrol car a methamphetamine pipe fell from Conner's pant leg. FF 9. The pipe appeared to have a coating, recognized by officers as methamphetamine. FF 9. Conner subsequently confirmed he and Bosma had been smoking methamphetamine in the parking lot earlier in the day. FF 10.

C. ARGUMENT

1. **Deputy Taddonio's consensual citizen encounter with Bosma and Conner was not a progressive intrusion that culminated in an unlawful seizure because the objective facts demonstrate Bosma and Conner were free to leave or end the contact at any time during the encounter.**

Bosma and Conner contend the trial court erred when it denied their motions to suppress evidence below. Both Bosma and Conner assert they were unlawfully seized prior to giving Deputy Taddonio consent in Bosma's case, to search her purse and, with respect to Conner, to examine the contents of a bulky pant pocket during a safety frisk. Both Bosma and Conner contend the unlawful seizure of their person during their encounter with Deputy Taddonio vitiated their subsequent consent to search based on a progressive intrusion analysis set forth in State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009).

The uncontested facts however, demonstrate neither Bosma or Conner were unlawfully seized when Deputy Taddonio lawfully engaged in a consensual citizen encounter with them when he approached Bosma's illegally parked vehicle or that this encounter, when viewed cumulatively demonstrates an unlawful progression into either Bosma or Conner's private affairs when the deputy obtained consent to search Bosma's purse or subsequently, Conner's bulging pant pocket.

When reviewing a motion to suppress, the appellate court determines whether substantial evidence supports the findings of fact and whether the findings of fact support the conclusion of law. State v. Stevenson, 128 Wn.App. 179, 193, 114 P.3d 699 (2005). Neither Bosma nor Conner challenge the trial court's findings of fact, therefore they are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The Washington State Constitution provides "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. Art. I, §7. A warrantless search or seizure is considered per se unconstitutional unless it falls within one of the few exceptions to the warrant requirement. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). One of the few exceptions to the warrant requirements is consent. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998).

Bosma and Conner have the burden of proving that a seizure occurred. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The determination of whether a seizure has occurred is a mixed question of law and fact. The ultimate determination of whether the facts constitute a seizure is a legal question, subject to de novo review. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

Pursuant to Art. I, §7 a person is seized when restrained by means of physical force or a show of authority. State v. O’Neill, 148 Wn.2d at 574. Whether or not someone is seized depends upon whether a reasonable person would believe, looking at the totality of the circumstances, that he or she was free to go or otherwise end the encounter. *Id.* This determination is made by objectively looking at the actions of the law enforcement officer. *Id.*

Not every encounter between a police officer and a citizen is an intrusion requiring an objective justification. State v. Rankin, 151 Wn.2d 689, *quoting* United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed 2d 497 (1980). A police officer has not seized an individual merely by approaching him in a public place and asking him questions, as long as the individual need not answer questions and may walk away. State v. Thomas, 91 Wn.App. 195, 200, 955 P.2d 420, *review denied*, 136 Wn.2d 1030, 972 P.2d 467 (1988). Simply asking questions related to identity, without more, does not result in a seizure. State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). A person is seized only if, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. State v. Aranguren, 42 Wn.App. 452, 711 P.2d 1096 (1980).

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or the use of language or tone of voice indicating that compliance with the officers is required. None of these factors were present in this case. *See, State v. Young*, 135 Wn.2d 498, 506, 957 P.2d (1998), *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

There may be times when a series of police actions when viewed cumulatively, constitute an impermissible progressive intrusion into a person’s private affairs and therefore constitute an unlawful seizure. *See, State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009), *State v. Soto-Garcia*, 68 Wn.App. 20, 841 P.2d 1271 (1992). In *Soto-Garcia*, for example, an officer observed the defendant in an area known for drug activity, pulled his car over and engaged in conversation about the defendant’s activities. Soto-Garcia responded appropriately but the officer nonetheless asked the defendant if he had drugs on his person and obtained permission to search his person.

On appeal, the Court held that the progressive nature of the officer’s actions-engaging in conversation with the defendant by stopping him on the street, asking for identification, then asking whether he had

drugs on his person and then, obtaining permission to search transformed the consensual social encounter to an unlawful seizure of Soto-Garcia -- concluding that a reasonable person in Soto-Garcia's shoes would not believe he was free to end the encounter. The Court then determined the unlawful seizure consequently vitiated the lawfulness of Soto-Garcia's subsequent consent to search his person.

In Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009), the court approved of the progressive intrusion analysis set forth in Soto-Garcia and clarified the factors to examine in determining, based on the totality of the circumstances, when a consensual citizen encounter has progressively intruded unlawfully into a defendant's private affairs such that the encounter transforms into an unlawful seizure of that person. In Harrington, the progressive intrusion occurred when an officer approached Harrington on foot and initiated a conversation by asking the defendant if he had a minute to talk. The officer asked Harrington where he was coming from and asked him to remove his hands from his pockets. Then, after a second officer arrived and stood near by, the first officer asked and received permission from Harrington to frisk him. The Court determined these facts objectively demonstrated a progressive intrusion that cumulatively resulted in an unlawful seizure of Harrington's person:

[Officer] Reiber initiated contact with Harrington on a dark street. He asked questions about Harrington's activities and travel that evening and found Harrington's answers suspicious. A second officer arrived at the scene and stood nearby. Reiber asked Harrington to remove his hands from his pockets to control Harrington's actions. Then Reiber asked to frisk, without any "specific and articulable facts" that would create an objectively reasonable belief that Harrington was "armed and presently dangerous." The facts in both Soto-Garcia and this case create an atmosphere of police intrusion, culminating in a request to frisk.

Harrington at 668-669.

Soto-Garcia and Harrington are distinguishable from the facts of this case. Here, Conner and Bosma were sitting in a parked vehicle and approached by a lone officer over concerns their vehicles were parked unlawfully-without a valid parking permit for the parking lot. This circumstance is very different from the initial officer contact in Soto-Garcia and Harrington, where the officers encountered and engaged citizens on foot thereby interrupting their activity and from the inception of the contact, began intruding upon their private affairs. Here, Deputy Taddonio approached an occupied vehicle that appeared to be unlawfully parked-his consensual encounter under these circumstances minimally intruded, if at all into Bosma or Conner's activities or consequently, reasonable expectation of privacy. An occupant of a vehicle in a public place lot does not have the same expectation of privacy in a vehicle parked

in a private place because he or she is accessible to anyone approaching.

State v. O'Neill, 148 Wn.2d at 579.

Moreover, Deputy Taddonio had a lawful basis to discuss whether Bosma or Conner had the requisite permits to park their vehicles in the DNR parking lot. *See*, State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002) (seizure may be appropriate where the detention is to issue a notice of a civil infraction occurring in the officer's presence.) Regardless, an officer's social contact with an individual in a public place with a request for identifying information, without more, is not a seizure or an investigative detention. State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998), State v. Thorn, 129 Wn.2d 347. Police officers must be able to approach citizens and engage in conversation as part of their "community caretaking function." State v. Nettles, 70 Wn.App. 706, 712, 855 P.2d 699 (1993). Certainly, the findings of fact reflect Deputy Taddonio lawfully engaged Bosma and consequently, Conner at Bosma's vehicle as part of his community caretaking function.

Additionally, unlike in Harrington, Deputy Taddonio was alone, did not block either Bosma or Conner's vehicle in the parking lot, was not demanding or otherwise behave in a manner that would lead any reasonable person to believe they were not free to leave, decline to answer questions or end the encounter. In fact, when Bosma exited her vehicle,

Conner exited and simply paced on the other side of the vehicle and did not leave but instead waited making contact with Deputy Taddonio after Bosma was arrested. See, RP 19.

- a) *Deputy Taddonio did not transform his consensual contact with Bosma into an unlawful seizure by asking Bosma for permission to search her vehicle or purse where the objective facts reflect a reasonable person in Bosm's position would have reasonably believed she could decline Taddonio's request.*

Deputy Taddonio's isolated question to Bosma regarding drugs in the context of the contact in this case, in contrast to Soto-Garcia or Harrington, did not convert this social encounter into an unlawful seizure. Deputy Taddonio was perplexed as to why Bosma and Conner were parked for a prolonged period of time, on a rainy day in an obscure parking lot and sensed Bosma was nervous. When Taddonio inquired about the drugs and requested consent to search, Bosma did not readily agree but instead looked around her car and at Conner before deciding she would consent. These facts objectively reflect that Bosma still reasonably believed she could decline Deputy Taddonio's request and that her consent was knowing and voluntary. Nothing in the findings of fact evidences Taddonio made any demands during their encounter, that there was a threatening presence of officers, that Taddonio displayed his weapon or

otherwise acted in a manner which like Harrington or Soto-Garcia, created an ‘atmosphere’ where a reasonable person would not believe they could end the encounter or decline Taddonio’s request. Instead, the objective facts demonstrate deputy Taddonio was engaged in an appropriate consensual citizen encounter when he asked for permission to search Bosma’s car and purse. Harrington and Soto-Garcia confirm that it is the cumulative nature of the contact-the atmosphere that is created- that may convert a social encounter to an unlawful seizure not the fact that an officer, during a social contact reasonably asks and is granted consent to conduct a search. The trial court did not err concluding that Bosma was not unlawfully seized when she consented to a search of her vehicle and purse.

b) *Bosma voluntarily and knowingly consented to a search of her purse by agreeing, then opening and handing her purse over to the Deputy.*

In the context of a search, consent equates to a waiver of the warrant requirement under our state Constitution. State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). For consent to be valid the state must demonstrate the person voluntarily gave consent, the person granting consent had authority to do so and finally, that the search did not exceed the scope of the consent. *Id.* at 682. A consensual search may go no

further than the limits for which consent was given. State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999); State v. Jensen, 44 Wn.App. 485, 491 723 P.2d 443 (1986). Any express or implied limitations or qualifications may reduce the scope of consent in duration, area or intensity. State v. Cotten, 75 Wn.App. 669, 679, 879 P.2d 971 (1994).

In State v. Mueller, 63 Wn. App. 720, 721-22, 821 P.2d 1267 (1992) a vehicle was stopped for suspicion of driving while intoxicated. General and unqualified consent was thereafter given to the officer to search the vehicle for guns or drugs. During the search, officers found and opened a closed gym bag finding drugs, drug paraphernalia and cash inside. The court held that “[a] general and unqualified consent to search an area for particular items permits a search of personal property within the area in which the material could be concealed. *Id.* at 722, *see also*, State v. Rison, 116 Wn.App. 955, 69 P.3d 362 (2003), State v. Jensen, 44 Wn.App. 485, 492, 723 P.2d 443 (1986) (holding consent to search a vehicle authorized the officer to search the pockets of a jacket in the back seat).

As in Mueller, Bosma gave her unqualified voluntary consent to search her purse when, in response to Deputy Taddonio’s request, she opened her purse up and handed it to him. Additionally, when initially

asked for permission to search her vehicle, Bosma paused, looked over at Conner and considered the request before agreeing. These facts evidence Bosma understood the request and moreover, understood she didn't have to agree. Under these circumstances, the trial court appropriately concluded the drug evidence found in the sunglass case was admissible below because it was lawfully obtained pursuant to the consent exception to the warrant requirement under our State constitution. State v. Mueller, 63 Wn.Ap. 720.

- c) *Deputy Taddonio lawfully frisked Conner following Bosma's arrest because Conner remained at the scene and was behaving in a manner that raised concerns he could be a threat to Deputy Taddonio's safety.*

Next, Conner contends he was unlawfully seized when Deputy Taddonio asked if he could frisk him for weapons following Bosma's arrest. Deputy Taddonio's incidental contact Conner, who was initially sitting in the passenger seat of Bosma's vehicle, was as in Bosma's case, constituted a consensual social encounter because nothing in the record demonstrates Conner was not free to walk away from Bosma's vehicle or decline to talk to Taddonio. See, Br. of Resp. at 4-11, State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009). To the contrary, the findings of fact reflect Conner volunteered his identification even though Taddonio only requested Bosma's identification when he first approached Bosma's

vehicle. And, that Conner voluntarily remained at the scene, pacing on the other side of Bosma's vehicle after he exited her vehicle. These facts demonstrate Conner was not seized until he was frisked following Bosma's arrest.

Conner contends nevertheless, the trial court erred concluding Taddonio had reasonable grounds to detain him after Bosma was arrested for drugs found in her purse. See, Br. of App. at 3. The State concedes that Bosma's arrest for drug possession, standing alone, did not give Deputy Taddonio grounds to detain Conner for investigatory purposes. To justify an investigatory detention under Article 1, section 7, an officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). Washington requires individualized suspicion to support an investigative detention of an individual. State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004).

This court can however, affirm on any ground supported by the record. State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998). The stipulated record demonstrates that following Bosma's arrest, Conner voluntarily remained in the parking lot was pacing near Bosma's vehicle, placing his hands repeatedly in his pockets and had a large bulge in one of

the front pockets that was large enough to contain a weapon. FF 7. Under these circumstances, Deputy Taddonio was lawfully permitted to frisk Conner for officer safety purposes. See, RP 19, FF 7. See, State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999) (Officers have a right to safely control a scene and a person who chooses to remain at a scene can be detained and frisked for safety reasons if acting in a manner that the police viewed as threatening or potentially dangerous).

An officer may conduct a warrantless, protective frisk of a individual if (1) the initial contact is lawful, (2) a reasonable safety concern exists to justify the frisk 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). To justify a protective frisk an officer must be able to point to ‘specific and articulable facts’ which create an objectively reasonable belief that a person is ‘armed and presently dangerous.’ State v. Harrington, 167 Wn.2d at 662, *citing*, State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (*quoting* Terry v. Ohio, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). An officer does not need to be absolutely certain that an individual is armed; the question is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his safety was in danger. State v. Collins, 121 Wn.2d at 173. Courts are reluctant to substitute their judgment for that of police officers in the

field. Id. A “founded suspicion” is all that is necessary, or some basis from which the court can determine that the frisk was not arbitrary or harassing. Id. at 173-174, *citing* State v. Belieu, 112 Wn.2d 587, 601-602, 773 P.2d 46 (1989).

Deputy Taddonio observed Conner pacing on the other side of Bosma’s vehicle, saw that he was repeatedly placing his hands in his pockets and that one pocket was bulging in a manner consistent with containing a weapon. FF 7. Deputy Taddonio, regardless of whether Conner consented to a protective search, was entitled to frisk Conner for safety reasons under these circumstances.

d) Conner expressly consented to expand the scope of the frisk to enable Deputy Taddonio to lawfully look into his pant pocket and confirm it did not contain a weapon.

Conner argues nonetheless, that even if Deputy Taddonio was justified in conducting a frisk for safety purposes, the frisk was nevertheless unlawful because Taddonio exceeded the lawful scope of the search. See, Br. of Conner at 18.

A valid weapons frisk is justified if its scope is limited to a pat down search of the outer clothing of a person to discover weapons that might be used to assault the officer. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 46 (1989). If the pat down search is inconclusive, and an

officer feels an item of questionable identity that might or might not be a weapon, the officer may investigate further to take such action as necessary to examine such an object. Hudson, 124 Wn.2d at 112-113.

If the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may [take only] such action as is necessary to examine such object. Once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent and any continuing search without probable cause becomes an unreasonable intrusion into the individual's private affairs.

Terry v. Ohio, 392 U.S. at 30, State v. Allen, 93 Wn.2d 170, 606 P.2d 1235 (1980), *See also*, State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009).

In State v. Collins, 121 Wn.2d 168, 171, 847 P.2d 919 (1993) for example, an officer felt a hard object in the defendant's pocket while frisking him. The officer believed the object could be a weapon, and completed the protective search by pulling the object out. As he did this a plastic bag containing drugs fell out too. The Supreme Court upheld this search as reasonable based on the officer's founded suspicion that his safety was threatened. State v. Collins, 121 Wn.2d at 174-177.

In this case, Deputy Taddonio determined the bulge in Conner's pocket was fairly firm, but not to a degree associated with a weapon. FF 6. Instead of searching beyond the scope of the protective frisk, Deputy

Taddonio stopped, asked about the identity of the object and then, after being told it was a wad of money, requested permission to look into the pocket to verify it was only money. FF 8. Conner thereafter gave Deputy Taddonio express permission to look into his pocket.

In the context of a search, consent equates to a waiver of the warrant requirement. State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). For consent to be valid the state must demonstrate the person voluntarily gave consent, the person granting consent had authority to do so and finally, that the search did not exceed the scope of the consent. *Id.* at 682. A consensual search may go no further than the limits for which consent was given. State v. Bustamante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999); State v. Jensen, 44 Wn.App. 485, 491 723 P.2d 443 (1986). By expressly, voluntarily consenting to an expansion of Deputy Taddonio's protective frisk to include looking into his pant pocket, Conner waived his right to assert that examining the content of his pocket exceeded the lawful scope of the protective frisk. Conner's consent authorized deputy Taddonio to look into his pocket and the evidence obtained pursuant to this lawful consensual search was therefore admissible. State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). The trial court therefore did not err denying Conner's motion to suppress

evidence found pursuant to Deputy Taddonio's examination of his pant pocket, and subsequent arrest.

2. **Conner and Bosma elected to proceed with a stipulated bench trial to preserve their right appeal the trial court's denial of each of their motions to suppress but the record does not reflect their consideration or waiver of their right to a jury trial.**

Conner and Bosma both argue for the first time on appeal that they failed to knowingly, intelligently and voluntarily waive each of their right to a jury trial below. Br. of App. at 5.

Criminal defendants charged in superior court have the constitutional right to be tried by jury. Const. Art. 1, §21, CrR 6.1(a), State v. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994). A defendant may, however, knowingly, intelligently and voluntarily waive this constitutional right. The validity of the waiver of a constitutional right, as well as the inquiry required by the court to establish the waiver, depends on the nature of the constitutional right being waived, the circumstances of each case and the experience and capabilities of the defendant. Stegall, 124 Wn.2d 719. For example, courts demand a rigorous inquiry of any defendant seeking to waive the right to counsel or to enter a guilty plea but a less demanding inquiry is required when a defendant seeks to waive his right to trial before a jury. *Id.* at 720. Unlike the inquiry that must

precede a defendant's guilty plea or his decision to proceed pro se, an on-the-record colloquy or written waiver is not required before a defendant is allowed to forfeit his constitutional right to a jury. State v. Stegall, 124 Wn.2d 719, State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979). The State bears the burden of proving that the waiver is valid. Stegall, 124 Wn.2d 719, 723, 881 P.2d 979 (1994).

In this case Conner and Bosma both elected to proceed with a stipulated bench trial following their joint suppression hearing. While neither Bosma or Conner failed to verbally state on the record their desire to proceed with a bench trial instead of a jury trial, the transcript reflects each of their attorney's repeatedly affirmatively agreed in the presence both defendant's they were both electing to proceed with a stipulated bench trial. Neither Bosma, Conner nor each of their attorney contradicted this intent or expressed any concerns in proceeding with a bench trial before or after the suppression hearing and subsequent bench trial. Mr. Conner's attorney unequivocally stated:

Ms. Paige: I would be prepared to go forward and I explained to Mr. Chambers on the lunch recess, on behalf of Mr. Conner, we would be prepared to proceed to a stipulated bench trial preserving the issues that the court has just ruled on here, but allowing the state to proceed on whatever is in the evidence that' in the report, so..

RP 126 (12/07/10).

Pursuant to State v. Wicke, 91 Wn.2d 638 and State v. Hos, 154 Wn.App. 238, 244, 225 P.3d 389, *rev. denied*, 169 Wn.2d 1008 (2010), the record here does not adequately demonstrate, despite the obvious intent of each defendant through each of their attorneys, that either Bosma or Conner knowingly and voluntarily waived their right to a jury trial, that the trial court explained the bench trial process or that Bosma or Conner were given time to consult with their attorneys on the issue prior to proceeding to a bench trial. As in Wicke and Hos both stood by silently while their attorneys asserted they had agreed to waive his right to jury trial. In Wicke, the court held in that case that absent some evidence in the record to demonstrate Wicke concurred with the waiver or that Wicke's attorneys had consulted with their client, there was insufficient evidence Wicke knowingly and voluntarily waived his right to a jury trial.

While the record infers the intent of Conner and Bosma to pursue a bench trial to expedite appealing their suppression issues, the record evidences the parties and the trial court's failed to ensure the waiver of their right to a jury trial was placed on the record. Remand to confirm the parties intent or for a new trial in light of the violation of their right to a jury trial is therefore appropriate.

D. CONCLUSION

The State of Washington respectfully requests this court to affirm defendant's conviction and dismiss this appeal.

DATED this 7 day of October, 2011.



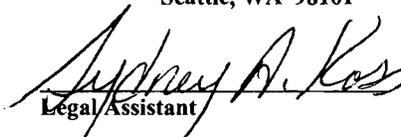
KIMBERBY THULIN, WSBA #21210
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Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I placed in the U.S. mail with proper postage thereon, or otherwise caused delivery of Brief of Respondent to Appellant's counsel, addressed as follows:

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10/07/2011
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