

669.72-9

66972-9

NO. 66972-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROYALE THORNTON,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 FEB 14 PM 3:33

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

**BRIEF OF RESPONDENT**

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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**A. ISSUES PRESENTED**

1. Officers may conduct an investigatory stop when they have a reasonable, articulable suspicion that a suspect is involved in criminal activity. When determining whether an investigatory stop is proper, courts balance the seriousness of the criminal conduct against an individual's right to be free from unreasonable searches and seizures. Here, Thornton matched the general description of suspects seen fleeing a nearby shooting, he was found within the search perimeter, and he studiously avoided eye contact with police. Did officers have a sufficient basis to stop Thornton in light of the serious, ongoing threat to public safety?

2. During an investigatory stop, an officer may conduct a protective frisk for weapons if the officer has a reasonable safety concern. A reasonable concern exists when an officer can point to facts that create an objectively reasonable belief that a suspect is armed and presently dangerous. Here, officers were searching for multiple suspects who recently fled the scene of a fight after shots were fired. Were the officers reasonably concerned that Thornton presented a safety risk when he was found in the area where the suspects had fled, matched the general description of the suspects, and avoided making eye contact with officers?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Juvenile respondent Royale Thornton was charged by information with unlawful possession of a firearm in the first degree. CP 1. The case proceeded by way of a bench trial. The parties agreed that the State could present its evidence for CrR 3.5 and 3.6 motions contemporaneously with the trial evidence.

In his CrR 3.6 motion, Thornton argued that Officer Boyd unlawfully stopped him and that the subsequent weapon frisk was also unlawful. 2RP 97-103.<sup>1</sup> The trial court denied Thornton's motion to suppress.<sup>2</sup> CP 33-35. After Thornton testified, the court found him guilty as charged. CP 28, 36-39. The court imposed a standard-range disposition. CP 29-31.

2. SUBSTANTIVE FACTS.

On December 26, 2010, Tukwila Police Sgt. Dunlap was on duty at Southcenter Mall. 2RP 6-7. The mall was very busy, as it

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<sup>1</sup> The verbatim report of proceedings consists of two volumes: 1RP (2/23/2011) and 2RP (2/24/2011, 3/18/2011, 3/23/2011, and 4/6/2011).

<sup>2</sup> The court found that Thornton's statements to police were inadmissible in the State's case-in-chief, but admissible for impeachment purposes. 2RP 92.

was the day after Christmas. 2RP 12. At around 5:30 p.m., Dunlap heard mall security ask for help with a fight "brewing" in a parking lot. 2RP 10-11. Dunlap asked that any officers in the area respond to the mall in order to assist. 1RP 10.

Dunlap and his partner, Officer Prasad, headed to the area of the fight. 2RP 15. As they approached, they saw five to six males running away. Id. Dunlap yelled, "Police, stop," and announced over his police radio to "send everyone." 1RP 11-12, 17. Because the sun had set, and the group was facing away from him, Dunlap was unable to see their race, but he thought that the fleeing suspects were in their "late teens." 2RP 16-17. As Dunlap and Prasad chased the group, they heard five to six shots fired and called for additional officers. 2RP 18.

Dunlap and Prasad caught up to three of the suspects. 2RP 19. Prasad detained those three, while Dunlap chased another suspect toward Acme Bowl. Id. Dunlap did not see where the other two members of the original group went. Id. Dunlap advised other officers by radio that he was chasing an African-American male, wearing dark clothing, and a long, black jacket. 2RP 21. As Dunlap followed the suspect, a citizen yelled out, "he went that way," and pointed behind the citizen. 2RP 20.

Officers established a perimeter, focusing on the area around Acme Bowl and Lowe's, where the suspect was last seen. 2RP 22. Officer Boyd arrived at the Acme Bowl parking lot several minutes after the original broadcast of "shots fired." 1RP 15. The area was still fairly busy and the parking lot was "pretty occupied." 1RP 16-17.

Boyd walked through the area, checking between and under cars. 1RP 17. Boyd knew that a large group of teenage-looking African-American males had been reported running from the scene. 1RP 21. Boyd began to investigate an alley, but because of poor lighting, decided to wait for the K-9 to arrive. 1RP 20.

As he was waiting, Boyd saw two African-American male teenagers, later identified as Royale Thornton and Trevonne James, walking toward him on the walkway. 1RP 21. It had been 10 to 30 minutes since the original "shots fired" dispatch. 1RP 42; 2RP 23. Prior to seeing the males, Boyd did not see anyone in the immediate area, and while he could not tell from which direction Thornton and James had emerged, it appeared that they had come from the dark alley. 1RP 21, 26. The males looked like they were trying to avoid eye contact with him; Boyd described their demeanor as "conspicuous inconspicuous." 1RP 21-22. In Boyd's

experience, their behavior was consistent with somebody who was trying not to get caught by police. 1RP 22.

Because he was alone, Boyd pointed his AR-15 at the "low and ready" position,<sup>3</sup> ordered the two males down on the ground, and yelled for back-up. 1RP 23-24. As Boyd provided cover, another officer handcuffed Thornton and James, stood them up, and escorted them to the patrol car. 1RP 25-26. Boyd wanted them handcuffed because it appeared that they had come from a dark alleyway, and he believed they may be armed. 1RP 26. Sergeant Steven Gurr patted down Thornton and found a .380 in his pant pocket. 2RP 47. Gurr frisked Thornton because he believed that Thornton was likely armed. 2RP 44, 53.

A few minutes after Thornton and James were detained, a K-9 identified a suspect 150 feet away in the alley, hiding behind a dumpster. 2RP 24. The third suspect was wearing a long jacket and appeared to be the one who Dunlap had been chasing. 2RP 33-34. All three suspects were found within the perimeter established by the police. 2RP 56.

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<sup>3</sup> "Low and ready" means the officer's gun is pointed towards a suspect's feet, rather than directly at him. 1RP 23.

At trial,<sup>4</sup> Thornton testified that he and friends were shopping in the mall when someone warned him that members of a rival gang were in the mall looking for him. 2RP 113-14. Thornton did not specify which gang he belonged to, but explained that he was from the “south end,” and that the rival gang was from the Central District. 2RP 132. One of the Central District gang members grabbed Thornton by the collar and started yelling at him, while a few others circled around him. 2RP 114-15. Although only four people originally approached Thornton, the group grew to about 30 people. 2RP 115. Mall security eventually forced both groups out of the mall and into the parking lot. 2RP 116. Once in the parking lot, Thornton’s cousin, Carlos Pace, pulled out a gun, pointed it at the other group, and cocked the chamber. 2RP 118. Kamal, a member of the Central District gang who was wearing a long, black pea coat, started shooting. 2RP 119. Thornton did not know whether Pace fired his gun. 2RP 119. Thornton claimed that Pace tossed his gun on the ground and ran away. 2RP 119-20.

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<sup>4</sup> Thornton did not testify for the purposes of the CrR 3.5 and 3.6 hearings. 2RP 65. Rather, he testified after the court denied the motion to suppress. 2RP 112.

Thornton picked up the gun and, together with James, ran across Andover Drive. 2RP 120.

Thornton was previously convicted of robbery in the second degree, a serious offense under RCW 9.41.010. 2RP 143. At trial, Thornton agreed that his prior conviction made him ineligible to possess a firearm. 2RP 143.

**C. ARGUMENT**

1. OFFICER BOYD HAD A REASONABLE, ARTICULABLE SUSPICION THAT THORNTON WAS INVOLVED WITH CRIMINAL ACTIVITY.

Thornton argues that Officer Boyd's stop was unlawful because the officer did not have a reasonable, articulable suspicion that he was involved with the shooting. Thornton's argument should be rejected. Thornton matched the general description of suspects seen fleeing the shooting and he was found in the area where a suspect was last seen. Thornton deliberately avoided eye contact with police and appeared to have emerged from a dark, empty alley where, minutes later, another suspect was found hiding behind a dumpster. Considering the totality of the circumstances, Boyd had a sufficient basis to stop Thornton.

When reviewing the denial of a motion to suppress, appellate courts review findings of fact for substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). A trial court's conclusions of law are reviewed de novo. Mendez, at 214.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, warrantless seizures are per se unreasonable, unless they fall under one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 62 L. Ed. 2d 235 (1979)). An investigatory stop is one such exception to the warrant requirement. Doughty, 170 Wn.2d at 61 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). An investigatory stop must be supported by reasonable suspicion of criminal activity based on objective, articulable facts. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing Terry, 392 U.S. at 21).

Because no single rule can be fashioned to meet every encounter between the police and citizens, courts evaluate the reasonableness of police action in light of the particular circumstances facing the officer. State v. Kennedy, 107 Wn.2d 1, 7-8, 726 P.2d 445 (1986). The reasonableness of the officer's suspicion is determined by the totality of the circumstances known at the inception of the stop. State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008), review denied, 166 Wn.2d 1016 (2009).

When assessing the totality of the circumstances, the nature of the crime is an important factor. In each case, the court must balance the interest of society in enforcing the laws against the individual's right to protection against unreasonable searches and seizures. State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990). A determination of the reasonableness of an officer's intrusion depends in some degree on the seriousness of the criminal conduct. Id. at 27. An officer may do far more if the suspected misconduct endangers life or personal safety than if it does not. Id.

This Court's opinion in Rice illustrates how the suspected criminal activity factors into the totality of the circumstances. In Rice, an officer responded to a building where there had been a report of "shots fired" at around 7:00 p.m. Rice, 59 Wn. App. at 24.

When the officer arrived, the only people in sight were Rice and some friends. Id. Rice's friends started leaving upon seeing the officer. Id. at 25. Meanwhile, Rice acted as if he was deciding whether to run or stay, and kept moving his hands toward his pocket or waistband. Id. The officer directed Rice to come talk to him. Id. As Rice approached the officer, he continued to move his hands toward his waistband, and eventually stuck his hand into his pocket. Id. The officer grabbed Rice's wrists, told him to open his hand, and found cocaine in his hand. Id.

On appeal, Rice argued that the officer did not have a reasonable suspicion to detain him. Id. at 26. This Court assumed that Rice was seized and held that, in the context of a recent report of gunshots, "the officer had to talk to the only person who seemed available to him at the time," and that "a police officer investigating a report of shots fired can do no less if a responsible response to the citizen's report is to take place." Id. at 27-28. Therefore, the officer had a sufficient basis to stop Rice. Id. at 28. This Court also held that the officer was justified in grabbing Rice's wrists and ordering him to open his hands. Id. at 29.

Other jurisdictions also recognize that serious crimes, such as shootings, require swift law enforcement action. See United

States v. Williams, 619 F.3d 1269 (11th Cir. 2010) (grounds for stop where officer saw a lone vehicle hurry out of a housing project in the middle of the night within seconds of a gunshot); United States v. Henning, 906 F.2d 1392 (10th Cir. 1990) (officers could not reasonably be expected to ignore vehicle emerging from general vicinity where police heard gunshots); Balentine v. State, 71 S.W.3d 763 (2002) (officers had basis to stop defendant who was walking briskly away from the reported direction of the gunfire while constantly looking back over his shoulder in the officer's direction); State v. Brown, 232 Neb. 224, 439 N.W.2d 792 (1989) (officer could stop car seen in vicinity where gunshots were heard).

Just as in Rice, Officer Boyd was responding to a report of a shooting, which required a quick response. In fact, some of the circumstances in this case weighed even more heavily in favor of a swift response. Unlike in Rice, the area around Southcenter Mall was still crowded with shoppers, increasing the public-safety risk if the suspects were not apprehended. The fact that there was a radio call to "send everyone" shows that police considered this incident a significant ongoing emergency. Whereas in Rice there was a citizen report with few details about the circumstances leading up to the gunshots, here the shots-fired call followed a fight,

which was bad enough to require both mall security *and* police involvement. And, police continued to report back as pursuit of suspects continued around the mall area. In that situation, it was reasonable for police to suspect that multiple suspects--rather than just one shooter--posed an ongoing risk to public safety.

In light of the significant public safety risk posed in this situation, Boyd had sufficient reason to stop Thornton and his friend, and was not required to ignore his observations. State v. Thierry, 60 Wn. App. 445, 448, 803 P.2d 844 (1991) (officer not required to ignore behavior consistent with the initial stages of a drive-by shooting). The fleeing suspects were described as young, African-American males; Thornton and his friend matched that description. Based on Dunlap's description of where the suspect had run, police set up a search perimeter around Acme Bowl and Lowe's; Thornton and his friend were found within that search perimeter. Although Dunlap saw only one person running towards Acme Bowl, because the shots had followed a fight and multiple suspects were on the run, it was reasonable to believe that other suspects would have followed, albeit unseen. Although the area around the mall was generally busy, the walkway where Thornton was seen was dark and nobody else was in the immediate area.

Finally, both Thornton and James appeared to deliberately avoid eye contact and, based on his years of experience, Boyd believed that they were behaving like people who were trying not to get caught by police.

Officer Boyd did not stop Thornton based merely on an inchoate hunch; rather, he reasonably suspected that Thornton was one of the suspects who had fled from Dunlap and Prasad. In order to conduct a responsible investigation, Boyd was required to follow up on his suspicions. Rice, 59 Wn. App. at 27-28. Indeed, the alternative--not conducting an investigatory stop--would have been untenable given the serious public safety risk posed by armed suspects running around a busy mall.

Thornton argues that he was stopped simply because he was a young, African-American male. Thornton is incorrect. He was stopped because the shots-fired calls reported that multiple African-American males were fleeing a large fight and Thornton matched the general description of the fleeing suspects.<sup>5</sup> He was

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<sup>5</sup> Thornton also assigns error to the trial court's finding that he "matched" the description of the suspects involved in the shooting. Assignment of Error 5. Thornton argues that the finding is erroneous "to the extent 'match' implies anything beyond age and ethnicity." App. Br. At 16. Boyd described Thornton and James as young, African-American males, and Thornton does not challenge this description. 2RP 21. Therefore, Thornton and James matched the general description and the trial court's finding is supported by the record.

found in the area where at least one suspect had been seen minutes after the shooting, and he appeared to be deliberately avoiding eye contact with the officer. It was wholly reasonable for the officer to believe, based on his first-hand observations, that Thornton was involved in the shooting.

Thornton appears to be arguing that Gatewood shows the stop was unlawful. Gatewood is easily distinguished. There, officers driving by a bus shelter saw Gatewood visibly react to their presence. Gatewood, 163 Wn.2d at 537. He twisted to the left as if to hide something, got up and walked away from the bus shelter, and then crossed the street in mid-block. Id. The Supreme Court held that "the officers' seizure of Gatewood was premature and not justified by specific, articulable facts indicating criminal activity. Although circling back to investigate Gatewood's furtive movements was proper, the officers did not have reasonable suspicion that he committed or was about to commit a crime." Id. at 541. In other words, the issue in Gatewood was whether the officers had a basis to believe that a crime had *occurred* at all.

Here, there is no question that a serious crime had just been committed and that Boyd suspected Thornton was involved. While the Supreme Court noted that Gatewood was not in a suspicious

area, id. at 541, this observation was relevant to the holding that the officers did not know whether Gatewood had committed any crime. When investigating a shooting, however, the relevant inquiry is proximity to the shooting, not the general character of the neighborhood. Thornton and his friend were walking down a dark, empty pathway, within the search perimeter set up immediately after multiple shots were fired in a crowded shopping area. Thornton's proximity to the shooting, the fact that his friend also matched the general description of the suspects, and the fact that Thornton studiously attempted to avoid eye contact with the officer, distinguishes this case from Gatewood.

Thornton also argues that under United States v. Brown, 448 F.3d 239 (3<sup>rd</sup> Cir. 2006), the description of the suspects in this case was too general to provide a reasonable, articulable suspicion justifying the stop. Brown is also distinguishable. Officers stopped Brown and a friend in connection with a report of a robbery, in which the suspects had been described as African-American males between 15 and 20 years of age, wearing dark, hooded sweatshirts. Id. at 241. One suspect was reported to be five foot and eight inches tall; the other was six feet tall. Id.

The State argued that the officer's stop was justified because Brown and his friend matched the description of the suspects and officers found them in an area where an informant had reported seeing them. Id. at 247. The Third Circuit addressed each factor individually. First, the court held that the description--without any other basis for suspicion--was too general to satisfy the Fourth Amendment's "demand for specificity." Id. at 247 (quoting Terry, 392 U.S. at 21 n.18). The court also compared descriptions of Brown and Smith to the broadcast description and said that it was "wildly wide of the target." Brown, at 248. The court next held that the informant's location tip was so unreliable that it "would not have established reasonable suspicion in the mind of a reasonable, trained officer." Id. at 251. Based on these findings, the court concluded that a general description, combined with an unreliable location tip in the absence of any other basis for suspicion, does not constitute reasonable suspicion. Id. at 252.

Here, Officer Boyd did not stop Thornton based solely on the fact that he matched the general description of the suspects. Rather, Thornton matched the description, was within the area where officers believed they would find the suspects, he avoided eye contact with Boyd, and the police were relying on information

relayed by responding officers, not on an unreliable informant. For these reasons, Thornton's case is distinguishable from Brown.

Much closer to these facts is Commonwealth v. Depina, 456 Mass. 238, 246, 922 N.E.2d 778 (2010). In that case, the Massachusetts Supreme Court held that although a general description alone was not particularized enough to justify an investigatory stop, when combined with the gravity of the crime, the fact that the defendant was in the vicinity of the shooting ten minutes after the initial report, and defendant's attempt to avoid crossing paths with officers, officers were justified stopping defendant.

Finally, Thornton assigns error to a number of the trial court's findings of fact. Thornton is correct that the trial court's finding that he was "wearing blue and white sneakers, a black sweater, and jeans," is not supported by the CrR 3.6 record; Thornton was the only witness to testify about what he was wearing, and Thornton did not testify for CrR 3.6 purposes. Assignment of Error 2. Thornton is also correct that the record does not support the trial court's finding that Thornton was "coming from an area where businesses were already closed." Assignment of Error 6. Boyd testified that he did not believe that Lowe's was

open because it was very dark in the area adjacent to the store, but he did not know for sure.<sup>6</sup> Lastly, Thornton assigns error to the court's finding that "Officer Prasad and Sergeant Dunlap observed some of the suspects fleeing towards the area of Acme Bowl." Assignment of Error 3. Dunlap testified that he saw one suspect fleeing towards the area, but did not know where the other suspects went. However, the trial court had the benefit of seeing Dunlap's use of the aerial photos to describe the path of the chase and could have reasonably inferred that all three fleeing suspects headed in the same direction. Even if some of these findings are flawed, the flaws are minor and do not undermine the court's ultimate conclusion. For the reasons stated above, the trial court properly denied Thornton's motion to suppress.

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<sup>6</sup> Thornton assigns error to the trial court's finding that Officer Boyd "saw movement in the alleyway." Assignment of Error 4. Boyd never said that he saw movement in the alley. Instead, he testified that he was waiting for back-up right outside the alley, and that he noticed Thornton and James after catching movement in the corner of his eye. 1RP 20-22. He also said that he could not figure out where "they emerged from," but it appeared that they had come from the dark alley. 1RP 21-22, 26. Although not a verbatim transcript of Boyd's testimony, the trial court's finding is supported by the record.

2. THE OFFICER'S FRISK OF THORNTON WAS BASED ON A REASONABLE SUSPICION THAT HE POSED A THREAT TO OFFICER SAFETY.

Thornton next argues that officers unlawfully frisked him because they did not have a reasonable suspicion that he was armed. Thornton's challenge to the weapons frisk fails because multiple officers testified that they were concerned that Thornton was armed, and their suspicion was reasonable. Therefore, officers lawfully frisked Thornton for weapons.

Although probable cause is generally required to perform a search, under narrowly drawn and carefully circumscribed circumstances, lesser cause suffices. See Terry, 392 U.S. at 21; State v. Broadnax, 98 Wn.2d 289, 293-94, 654 P.2d 96 (1982). The Constitution does not require an officer to wager his physical safety against the odds that a suspect is actually unarmed or not otherwise dangerous. State v. Belieu, 112 Wn.2d 587, 602 n.3, 773 P.2d 46 (1989). As part of an investigatory stop, an officer may conduct a protective frisk for weapons if the officer has a reasonable safety concern. State v. Bailey, 109 Wn. App. 1, 5, 34 P.3d 239 (2000) (citing State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). A reasonable safety concern exists when an officer can point to specific and articulable facts that create an

objectively reasonable belief that a suspect is armed and presently dangerous. Collins, 121 Wn.2d at 173. An officer need not be absolutely certain that the suspect is armed. Id. Rather, the test is whether a reasonably prudent person in those circumstances would be warranted in believing that someone's safety was in danger. Id. (citing Terry, 392 U.S. at 27).

Courts are reluctant to substitute their judgment for that of police officers in the field. Bailey, 109 Wn. App. at 6. "Because American criminals have a long tradition of armed violence and every year many police officers are killed or wounded in the line of duty," it would be unreasonable to require that officers take unnecessary risks in the performance of their duties. Collins, 121 Wn.2d at 173 (quoting Terry, 392 U.S. at 23). Therefore, an officer needs only a founded suspicion from which the court can determine that the search was not arbitrary and harassing. Bailey, 109 Wn. App. at 6; Collins, 121 Wn.2d at 173-74, 84. Once a valid weapons frisk during a Terry stop is justified, its scope is limited to a pat down search of the outer clothing to discover weapons that might be used to assault the officer.<sup>7</sup> Bailey, 109 Wn. App. at 6.

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<sup>7</sup> Thornton does not argue that the scope of the frisk was excessive.

The facts of Terry are particularly instructive in this case. In Terry, an officer saw two men repeatedly walking past a store. Id. at 6. Based on his experience, the officer suspected that the two men may have been planning to rob the store. Id. He also feared that they may have a gun. Id. The officer approached the men and asked for their names. Id. at 6-7. When they mumbled something in response, the officer spun Terry around, and patted him down. Id. at 7. The officer found a gun. Id. The Supreme Court's opinion does not mention that Terry or the other suspects made furtive movements or gave the officer any other reason--beyond the fact that they appeared to be planning a robbery--to suspect that they were armed. Still, the Supreme Court held that a reasonably prudent man would have been warranted in believing that Terry was armed and presented a threat to the officer. Id. at 28.

Here, officers knew that gunshots had followed a fight. They did not know how many guns were involved, but it was reasonable to suspect that any person involved with the fight was armed and dangerous. Indeed, Officer Boyd testified that he suspected that they had multiple subjects with guns on the run. 1RP 26. Under these circumstances, officers were justified in conducting a limited frisk to ensure that Thornton did not pose a risk to their safety or

the safety of the many shoppers in the area. Much like in Terry, the record shows that in the course of his investigation, Boyd "had to make a quick decision as to how to protect himself and others from possible danger...." Terry, at 28.

Thornton relies on State v. Xiong, 164 Wn.2d 506, 191 P.3d 1278 (2008), State v. Setterstrom, 163 Wn.2d 621, 183 P.3d 1075 (2008), and State v. Galbert, 70 Wn. App. 721, 855 P.3d 310 (1993), to support his argument that the frisk was not justified because Thornton did not make any furtive movements or resist detention. Thornton's reliance on these cases is misplaced.

In Xiong, officers serving an arrest warrant for Xiong's brother detained him until they could confirm that he was not the subject of the arrest warrant. Xiong, 164 Wn.2d at 509. The officers handcuffed Xiong and performed a pat-down frisk, during which time an officer noticed a bulge in Xiong's pocket, but did not remove it. Id. Later, the officer conducted a second frisk, squeezing the bulge and determining that there was a "potential weapon" in Xiong's pocket. Id. The officer removed the bulge and found drug paraphernalia. Id. The Supreme Court approved the initial frisk, but held that the subsequent frisk was unlawful because, as the officers admitted, they were not immediately concerned that Xiong presented a threat. Id. at 513-14.

In Setterstrom, the court concluded that, although Setterstrom appeared nervous and under the influence of drugs, the officer did not have a reasonable belief that he was armed and presently dangerous when he was sitting in a public area of a DSHS building, filling out a benefits form. Setterstrom, 163 Wn.2d at 626-27.

Galbert addressed a fact pattern similar to Xiong involving a challenge to a second frisk. There, an officer executing a search warrant re-frisked Galbert, who had already been handcuffed and frisked, immediately after the officer discovered marijuana near him. 70 Wn. App. at 723. Because the second frisk was not based on a reasonable suspicion that Galbert was armed and dangerous, the court held it unlawful. Id. at 725-26.

In the cases cited by Thornton, officers encountered the defendants in less-dangerous situations where there was no objective reason to believe the suspect was armed. Indeed, the court in Setterstrom even acknowledged that the case did not involve “a situation where the officers encountered Setterstrom in a dark alley in a crime-ridden area.” Setterstrom, 163 Wn.2d at 627. The officers in those cases had cited only general concerns that defendants could be armed.

In contrast, there was specific reason to believe that Thornton was armed and dangerous. Both Boyd and Gurr testified that they

were concerned that Thornton had a weapon. Their concern was magnified since they had been told that shots had been fired, not simply that someone suspected the suspects had a gun. Given that Thornton was a suspect in the shooting, their concern that he or his associate might be armed was eminently reasonable. Consequently, the trial court properly ruled that the weapons frisk was lawful.

**D. CONCLUSION**

For all of the foregoing reasons, the State asks this court to affirm Thornton's convictions.

DATED this 14 day of February, 2012.

Respectfully submitted,

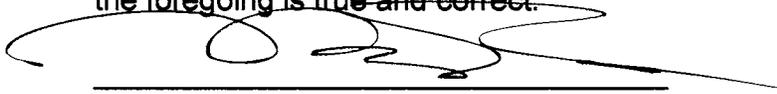
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By: Bridgette E Maryman  
BRIDGETTE E. MARYMAN, WSBA #38720  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 David Koch, 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. ROYALE THORNTON, Cause No. 66972-9-1, 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.



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Name  
Done in Seattle, Washington

02/14/12  
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Date