

6-8-14-1

68274-1

NO. 68274-1-I

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

REC'D
JUN 29 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DERRON WIGGINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary I. Yu, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress under CrR 3.6. CP 12-14.

2. The court erred in concluding police had a reasonable suspicion of criminal activity prior to seizing appellant. CP 14 (Conclusions of Law b & c).

3. The trial court erred in finding police noticed the presence of a potential weapon before seizing appellant. CP 13 (Findings of Fact i & j).

Issue Pertaining to Assignment of Error

Police must have reasonable suspicion of criminal activity to seize an individual. Reasonable suspicion requires a substantial possibility that criminal activity has occurred or is about to occur. Did the court err in finding that a Seattle Police Officer lawfully seized appellant based on a reasonable suspicion of criminal activity?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Appellant Derron Wiggins with unlawful possession of cocaine. CP 1; RCW 69.50.4013. Following pretrial proceedings, Wiggins was convicted as charged on stipulated facts. CP 9-

11, 23-26. The court imposed a standard range sentence. CP 15-22. Wiggins appeals. CP 27.

2. Substantive Facts

Wiggins moved pretrial to suppress the evidence that was the basis for the charge. Supp CP __ (Sub No. __, Motion and Declaration in Support of CrR 3.6 Hearing, 6/27/12).¹ Wiggins argued he was unlawfully seized and therefore the fruits of that seizure should be suppressed. Id. The State argued in response that Wiggins was lawfully seized under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Supp CP __ (Sub No. 48, State's Response to the Defendant's Motion to Suppress, 12/8/11).

A hearing on the suppression motion was held December 8, 2011, before the Honorable Mary I. Yu. 1RP.² The only witness testimony was from the officer who initially seized Wiggins, Seattle Police Officer Daniel Auderer. 1RP 6-47

According to Auderer, shortly after midnight on February 26, 2010, he was alone in a patrol car on routine patrol in the vicinity of 13th

¹ Per an e-mail from Wiggins's trial counsel, Hong Tran, she submitted the motion to the trial court, but did not formally file a copy with the superior court clerk's office until June 27, 2012. A copy of the motion is attached as an appendix hereto, and has been designated for transmittal to this Court by way of a supplemental designation of clerk's papers filed contemporaneously with this brief.

² There are three volumes of verbatim report of proceedings referenced as follows: 1RP - 12/8/11; 2RP - 12/12/11; and 3RP - 1/6/12.

and East Jefferson in Seattle, which he described as a "hot bed of activity" for drug-related crimes. 1RP 10-11, 36. Auderer noticed two people in a car parked with other cars in a zone that precludes stopping or parking between 10 pm and 5 am. 1RP 16, 19, 21-22, 24, 36.

Auderer parked his patrol car at one end of the line of illegally parked cars, shined his car spotlight on the row of parked cars and then approached on foot the occupied car from the passenger side intending to tell them they needed to move. 1RP 21-24, 38-39. As Auderer approached the car he used his hand-held flashlight to illuminate the interior of the car and noticed the person in the front passenger seat was a well-dressed Asian female, who looked surprised to see him approaching. 1RP 25-26, 39, 42.

Auderer also saw Wiggins, also nicely dressed, in the driver's seat "frantically moving around money on his lap, flash out and flashing in the car, stuffing money under his buttocks and in the center console, anywhere that he could get it, frantically moving around." 1RP 24-25, 29, 40. Auderer recalled it seemed like a "a lot of currency[,]" but he could not recall the "exact denominations." 1RP 27, 40. Auderer said he had "never seen anything like it walking up to . . . a vehicle that was just going to ask the folks to move along." 1RP 27. Auderer said he found Wiggins' actions "alarming." 1RP 29. Auderer admitted that he did not know why

Wiggins was doing what he was doing, and that that was his "cause for alarm." 1RP 44.

Thinking he had "stumbled upon narcotics activity or prostitution activity," Auderer ordered Wiggins "to stop moving his hands" and to "remain still until . . . told . . . to do otherwise." 1RP 31. Wiggins remained as ordered until another police officer, Officer Blase, arrived and removed him from the car. 1RP 31-32. Wiggins was subsequently handcuffed by Blase and read his Miranda rights by Auderer.³ 1RP 33-34.

After reviewing his police report and with prompting from the prosecutor, Auderer also testified that he noted Wiggins' fly was open when he approached the car, and that there was a "walking stick" shoved between the center console and the passenger seat. 1RP 30. Auderer admitted, however, that neither Wiggins nor the female passenger ever appeared to reach for the walking stick, and that he only noticed the walking stick after he had ordered Wiggins to not to move. 1RP 42, 46.

Auderer could not recall if Wiggins's car was running, whether the windows were up or down, or whether the headlights were on or off. 1RP 39-40.

³ In response to defense objections, the State was precluded from eliciting at the suppression hearing the basis for Wiggins' arrest, or the scenario leading to the discovery of the cocaine used to charge and prosecute. 1RP 33-35. On cross examination, however, Wiggins' counsel did elicit from Auderer that he heard a "commotion" after Blase removed Wiggins from the car and that when he looked up he saw Wiggins was being handcuffed. 1RP 43.

On redirect examination the prosecutor asked Auderer "to specifically enumerate the factors that led [him] to tell [Wiggins] to freeze and to keep his hands still." 1RP 45. Auderer gave the following list of reasons:

- that it was "very unusual" for someone to be moving quickly to stuff money between their legs and in different places, 1RP 45;

- that when he saw Wiggins' actions he immediately thought of weapons and wondered what Wiggins was reaching for and why he was "stuffing money", 1RP 45;

- that Wiggins's car was parked at 13th and Jefferson, 1RP 45;

- that it was an unusual "place to have money spread around your lap", 1RP 46;

- that there was a male and female in the car, 1RP 46;

- that it was late at night in a high crime area, 1RP 46; and

- that he was alone and out-numbered by the people in the car.

1RP 47.

In its oral ruling denying the motion to suppress, the trial court stated:

The real question for [the court], then, is to look at the totality of circumstances in terms of what the officer sees and make a determination as to whether or not there is at least some facts to support a belief that criminal conduct or criminal activity is occurring or about to occur.

While this may be somewhat thin, I am finding that it is sufficient and that there are sufficient facts for this officer to have been concerned such that it was a reasonable concern that criminal activity had occurred, was occurring or was underway, when he approached and observed what he said was quickly, fast movements of trying to hide money and he emphasized more than once, significant amounts of currency.

In addition, just noticing the presence of the stick, or whatever that was, just that that at least drew his attention to ask the question in his own mind about whether or not this was a narcotic activity. That is all this court has to find. I am finding it.

I am going to deny the motion to suppress. . . .

1RP 67. Written finding and conclusions were subsequently filed. CP 12-14.

C. ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE AUDERER DID NOT HAVE A REASONABLE BASIS TO SEIZE WIGGINS UNDER TERRY.

Auderer was understandably perplexed by Wiggins' efforts to quickly conceal the money strewn across his lap. Wiggins' behavior in doing so, however, was no more indicative of criminal behavior than it was of simply trying to secure his money from the prying eyes of those who might otherwise attempt to take it from him. As such, while maybe unusual, Wiggins conduct did not provide a reasonable basis for Auderer to seize him for investigative purposes.

Similarly, that Wiggins was illegally parked late at night in an area known for criminal activity may have given Auderer good reason to be cautious as he approached Wiggins' car. It did not, however, provide a specific and articulable basis to seize Wiggins on suspicion of criminal activity.

Finally, to the extent the trial court relied on the presence of the walking stick to justify Auderer's seizure of Wiggins, it was plain error because Auderer specifically admitted he did not see it until after he had seized Wiggins. A investigative seizure must be justified at its inception, and information learned after the fact is irrelevant to assessing the lawfulness of the seizure.

As a general rule, a warrantless seizure is per se unreasonable under both the Fourth Amendment and article I, section 7, of the Washington Constitution unless it falls within one or more specific exceptions to the warrant requirement. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008); State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). One exception to the warrant requirement is where a police officer makes a brief investigatory stop. Terry v. Ohio, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L. Ed.2d 889 (1968); State v. Doughty, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010). This is commonly referred to as a "Terry stop." State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

A police officer may conduct a Terry stop if the officer has a reasonable suspicion that there is a substantial possibility that criminal activity has occurred or is about to occur based on specific and articulable objective facts and the rational inferences from those facts. Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); Doughty, 170 Wn.2d at 63; Gatewood, 163 Wn.2d at 539; Day, 161 Wn.2d at 895. The officers' actions must be justified at their inception. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

The facts justifying a Terry stop must be more consistent with criminal than with innocent conduct. State v. Pressley, 64 Wn. App. 591, 596, 825 P.2d 749 (1992). While an officer is not required to rule out all possibilities of innocent behavior before detaining someone, the detention must be based on more than an inarticulable hunch. State v. Tarica, 59 Wn. App. 368, 375, 798 P.2d 296 (1990). Any evidence obtained in connection with an illegal Terry stop is suppressed as fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 487 88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Doughty, 170 Wn.2d at 65. Here, the trial court's conclusion that Auderer properly conducted a Terry stop lacks legal support.

As an initial matter, there is no doubt Wiggins was seized at the moment Officer Auderer ordered him not to move. A person is seized

"when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted).

Commands such as "halt," "stop, I want to talk to you," "wait right here," and the like qualify as seizures. See State v. Whitaker, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028 (1991); State v. Ellwood, 52 Wn. App. 70, 73-74, 757 P.2d 547 (1988); State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986); State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983). No reasonable person would have felt free to leave or otherwise terminate the encounter in this case in light of Auderer's commands to Wiggins.

Moving on to the legality of the seizure, it is clear in Washington that commission of a parking infraction does not provide the basis for a Terry stop. Day, 162 Wn.2d at 898. As such, although Auderer was fully justified in approaching Wiggins' car because it was illegally parked, it did not justify a seizure under Terry.

Likewise, presence in a high-crime area, even late at night, does not alone justify an investigative detention. Doughty, 170 Wn.2d at 62. It may warrant officer caution, but does not allow for seizure.

Furthermore, adding Wiggins' money-stuffing behavior to the calculus did not make Auderer's suspicion reasonable. Pressley is instructive on this point. There the officer observed Pressley and another girl "huddling" in an area well known to the police for narcotics transactions. Pressley, 64 Wn. App. at 593-94, 597. The girl was intently looking at something in Pressley's hand that could have been a narcotic such as crack cocaine. The officer had observed drug transactions where the seller and buyer examined the drugs before the transaction was completed and believed he was witnessing a drug deal. Pressley, 64 Wn. App. at 593-94. When the officer approached, Pressley exclaimed, "Oh [s]hit" and she and her companion walked off in different directions. Id. at 594.

Even taking the officer's training and experience into account, this Court concluded the conduct the officer observed before his approach was insufficient to support a Terry stop because it was "susceptible to a number of innocent explanations." Id. at 597. In holding the girls' behavior after the officer approached them gave rise to a reasonable suspicion, this Court stated: "Had their behavior after they saw [the

officer] but before he stopped Pressley not been entirely consistent with an incipient drug deal, there would not have been a sufficient basis for a valid Terry stop." Id. at 597. Even then, the articulated grounds for suspicion "hover[ed] near the line between sufficient and insufficient grounds for a Terry stop." Id.

As in Pressley, Wiggins "frantically moving around money on his lap, flash out and flashing in the car, stuffing money under his buttocks and in the center console, anywhere that he could get it, frantically moving around" (1RP 24-25), without additional suspicious behavior, is susceptible to a number of innocent explanations. For example, as defense counsel noted at the suppression hearing, Wiggins may have been "frantically" trying to hide his money out of fear that whoever was approaching the car might take it from him if he left it out. 1RP 54.

Alternatively, even if Wiggins knew it was a police officer approaching, as a black man in a high crime area late at night with a pile of cash on his lap, he may have reasonably feared that the officer would hassle him, even though he was simply showing off his riches to his date. In any event, possessing and stuffing money into unusual places within view of a police officer does not lead to a reasonable suspicion of criminal activity. It may be weird, but it is not reasonably interpreted as indicative of a crime in progress.

Similarly, that Wiggins' zipper was undone when Auderer approached does not equate to a reasonable suspicion of criminal activity. The most obvious innocent explanation is that Wiggins simply forgot to zip up when he put his pants on, or the last time he urinated. While it is possible it was down in preparation for sexual activity, there is no basis to conclude such activity would be criminal.

Further, Auderer did not say he recognized Wiggins or his car as previously being involved in criminal activity. Nor did he say he checked the license plate number in advance to see if Wiggins' car was associated with any criminal activity. Absent such evidence linking Wiggins or his car to crime, the behavior Auderer observed was no more consistent with criminal than innocent activity. The observed conduct was thus too innocuous to support a reasonable suspicion of criminal activity.

Innocuous facts contribute little to the "reasonable suspicion" calculus. See State v. Armenta, 134 Wn.2d 1, 5, 13, 948 P.2d 1280 (1997) (possession of four bundles of currency totaling a purported \$4,000, as well as accused's inability to produce a pay stub despite a claim he had just cashed a paycheck for work on a ranch he could not name, not "inherently suspicious" for purposes of determining whether reasonable suspicion supported detention); State v. Tijerina, 61 Wn. App. 626, 629, 811 P.2d 241 (1991) (presence of motel-sized bars of soap in car driven by

Hispanics was "innocuous" and did not give rise to a reasonable suspicion of criminal activity to justify a Terry stop, even though the arresting officer testified Hispanics were known to engage in drug trafficking in area motels), review denied, 118 Wn.2d 1007 (1991).

Finally, the presence of a walking stick between the passenger seat and the console did not justify the Terry stop. First, although identified by the trial court as a basis for Auderer's decision to order Wiggins not to move, (CP 13, finding of fact j.vii.; 1RP 67), this is simply not supported by the record. Auderer specifically admitted that he did not see the walking stick until after he ordered Wiggins not to move. 1RP 46. "A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal." State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

And even if Auderer saw the walking stick before ordering Wiggins not to move, that fact does not support a basis to believe Wiggins was engaged in criminal activity. Like every other fact Auderer identified as the basis for his decision to seize Wiggins, there is an innocent explanation for the presence of the walking stick. The most obvious is that either Wiggins or his companion used it to assist them when walking. There is no basis to reasonably believe it was instead part of a criminal enterprise.

None of the reasons identified by Auderer and relied on by the trial court to deny Wiggins' motion to suppress amount to a specific and articulable factual basis to reasonable suspect Wiggins was engaged in criminal activity before he was seized by Auderer, whether view individually or in combination. It may be unusual to find a well-dressed couple illegally parked in a high crime area after midnight with the man frantically trying to hide the pile of cash on his lap, but unusual does not equate to criminally suspicious. For this reason, the trial court erred in concluding Auderer's initial detention of Wiggins was supported by a reasonable articulable suspicion of criminality.

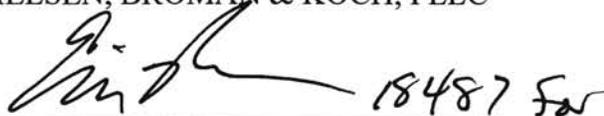
The evidence resulting from the unconstitutional detention must be suppressed. Doughty, 170 Wn.2d at 65. Without the seized evidence, the State cannot sustain the charge. This Court should therefore reverse the trial court's denial of Wiggins' motion to suppress, reverse the conviction, and remand for dismissal with prejudice. Armenta, 134 Wn.2d at 17-18.

D. CONCLUSION

For the reasons stated, the Court should reverse.

Respectfully submitted this ^{29th}27 day of June 2012.

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Gibson", with the number "18487" and the word "for" written to its right.

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, vs. DERRON WIGGINS, Defendant.	NO. 11-1-00035-1 SEA MOTION AND DECLARATION IN SUPPORT OF CrR 3.6 HEARING
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I. MOTION

The defendant requests that the court suppress evidence obtained during the search and seizure of Mr. Wiggins person and his property. The arresting officer did not have a basis to conduct a lawful *Terry* stop. The fact that Mr. Wiggins was illegally parked in a high narcotics area does satisfy the *Terry* exception to the warrant requirement, which does not extend to parking infractions under the state constitution.

II. DECLARATION

1. I am counsel for the defendant Derron Wiggins.

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2. Included in the discovery materials was a copy of Officer Daniel Auderer’s written report, dated February 26, 2010. Officer Auderer reports the following:

- On Friday February 26, 2010 at approximately 0019 I was on routine patrol traveling southbound on 13 Av [sic] approaching the intersection with E Jefferson St. . . . I know this area to be a high narcotics trafficking area.
- I observed a vehicle bearing the Washington License plate 774ZTY illegally parked on the east side of the street. The vehicle was parked within 20 ft of a city sign that read “No Parking Between 10 pm and 5 am.”
- I approached the vehicle and saw a black male in the driver’s seat and an Asian female in the passenger seat.
- In the lap of the black male (later ID’d as Wiggins, Derron J 10/3/84) was a large pile of US currency. The money was spread over his lap.
- As I approached the vehicle the male began to stuff the money between his legs and into the center console of the vehicle.
- I was concerned the male was hiding a weapon or destroying evidence.
- I ordered him to stop moving him hands. The male did not immediately comply. I ordered him again to stop moving and to place his hands on the steering wheel.
- Next to the Asian female up against the center console of the vehicle was a large wooden stick.
- I asked both o the occupants to keep their hands still

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- Ofc. Blasé #7553 arrived and I asked him to escort S/Wiggins out of the vehicle.
3. On November 30, 2011, Deb Scott, a staff investigator with The Defender Association, conducted follow up interview with Officer Auderer. That interview was tape recorded and a copy of the recording was provided to DPA Lindsey Grieve.
4. I listened to the audio recording of Officer Auderer’s interview with Ms. Scott. In the interview he clarified statements that appear in his February 26, 2010 report:
- Officer Auderer is a native Seattleite and the area he was patrolling was known for narcotics activity even when he was a kid.
 - Mr. Wiggins’ vehicle was the first in a line of cars that was illegally parked in this parking strip.
 - The area was illuminated by street lights and the lights from the area businesses.
 - Officer Auderer did not recall if Mr. Wiggins’ vehicle was running, if the headlights were on, if the windows were up, or if the music was on.
 - When he decided to approached the car the “ parking issue went away...it was no longer a *Terry* stop.”
 - Officer Auderer did not recall the denominations of the bills that were spread over Mr. Wiggins lap or how many bills there were.

- 1 • As he approached the vehicle he observed Mr. Wiggins shoulders moving
2 quickly back and forth.
- 3 • Officer Auderer assumed that Mr. Wiggins knew the police were there based
4 on his behavior.
- 5 • The female passenger sat in her seat as Mr. Wiggin stuff the money into the
6 center console.
- 7 • Based on how she was dressed, Officer Auderer did not believe that the
8 female was a prostitute.
- 9 • There appeared to be a long stick also stuff between the center console. The
10 stick was about 1 ½ inches in diameter and about 1 foot was exposed.
11 Neither Mr. Wiggins nor the passenger did anything with the stick during
12 the officer contact.
- 13 • After Mr. Wiggins was asked to step out of the car, Officer Auderer did not
14 search the car because he was not concern that there was a gun or other
15 weapon in the car.
- 16 • Officer Auderer did not identify the driver or the passenger until after they
17 were removed from the vehicle. A records check indicated that Mr.
18 Wiggins had 6 outstanding misdemeanor warrants.
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1 I declare under penalty of perjury under the laws of the state of Washington that the
2 foregoing is true and correct.

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5 _____
6 Hong Tran, WSBA #25198
7 Attorney for Derron Wiggins

8 **III. ARGUMENT AND AUTHORITY**

9 ***Terry stops do not extend to parking infractions.***

10 Officer Auderer approached Mr. Wiggins' vehicle because it was illegally
11 parked in a high narcotics area. The *Terry* exception to the warrant requirement does not
12 extend to parking infractions.

13 The right to be free from searches by government agents is deeply rooted into our
14 nation's history and is enshrined in our state and national constitutions. "The United
15 States Constitution prohibits unreasonable searches and seizures; our state constitution
16 goes further and requires actual authority of law before the State may disturb the
17 individual's private affairs." *State v. Day*, 161 Wn.2d 889, 168 P.3d 1265 (2007)(citing
18 U.S. Const. amend. IV; Const. art. I, § 7)(other citations omitted). Generally, officers of
19 the State need a warrant before intruding on the private affairs of others. That
20 presumption can be rebutted if the State can show the search falls within certain
21 "narrowly and jealously drawn exceptions to the warrant requirement." *State v. Day*,
22 161 Wn.2d at 894, 168 P.3d at 1267 (quoting *State v. Stroud*, 106 Wn.2d 144, 147, 720
23 P.2d 436 (1986)). "But we jealously guard these exceptions lest they swallow what our
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1 constitution enshrines.” *State v. Day*, 161 Wn.2d at 894, 168 P.3d at 1268 (citations
2 omitted).

3 The *Terry* stop is an exception to the warrant requirement. Under *Terry*,
4 officers may briefly stop and detain a person they reasonably suspect is, or is about to
5 engage in criminal activity. *Id.* “While *Terry* does not authorize a search for evidence of
6 a crime, officers are allowed to make a brief, nonintrusive search for weapons, if, after a
7 *Terry* stop, ‘a reasonable safety concern exists to justify the protective frisk for weapons’
8 so long as the search goes no further than necessary for protective purposes.” *Id.* at 895,
9 1268 (quoting *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)). This brief
10 search is referred to as a “*Terry* frisk.” *Id.* (citations omitted). “If the initial stop is not
11 lawful or if the search exceeds its proper bounds or if the officer’s professed belief that
12 the suspect was dangerous was not objectively believable, then the fruits of the search may
13 not be admitted in court.” *State v. Day*, 161 Wn.2d at 895, 168 P.3d at 1268 (citations
14 omitted).

15 “A *Terry* investigative stop only authorizes police to briefly detain a person for
16 questioning without grounds for arrest if they reasonably suspect, based on ‘specific,
17 objective facts’ that the person detained is engaged in criminal activity or a traffic
18 violation.” *State v. Day*, 161 Wn.2d at 896, 168 P.3d at 1268-69 (quoting *State v.*
19 *Duncan*, 146 Wn.2d at 172-74, 43 P.3d 513)(citing *Terry v. Ohio*, 392 U.S. 1, 21, 88
20 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). *Terry* has been extended to traffic violations due to
21 governmental interests in ensuring safe travel. *State v. Day*, 161 Wn.2d at 897, 168 P.3d
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1 at 1269. However, the governmental interests underlying extending *Terry* to traffic
2 violations “simply lose force in the parking [infractions] context.” *Id.*

3 In *State v. Day*, an officer, on routine patrol, approached the defendant’s
4 vehicle because, it appeared to be illegally parked. *Id.* at 892, 1266. As the officer
5 approached the vehicle the he observed the defendant moving his head around as if
6 searching for something. *Id.* at 892, 1267. As the officer got closer, he observed
7 materials in the vehicle that he suspected were involved in illegal drug use. *Id.* He also
8 saw an empty handgun case on the floor near defendant’s foot. *Id.* He asked the
9 defendant if there was a gun in the car and the defendant indicated there was. *Id.* A
10 handgun was located under the passenger’s seat, where defendant’s wife, Alice Day,
11 sat. *Id.*

12 Dispatch reported that the gun was reported stolen and there was an outstanding
13 warrant for Alice Day. *Id.* The couple was placed under arrest. *Id.* A search conducted
14 incident to arrest, revealed materials for the manufacture of methamphetamines. *Id.* Mr.
15 Day was charged with the manufacture of methamphetamines and convicted. *Id.*

16 At trial, Mr. Day moved to suppress the evidence seized during the search. *Id.* at
17 893, 1267. The trial court denied the motion. *Id.* The Supreme Court reversed and
18 vacated the conviction, holding, “[w]hen officers merely suspect a civil infraction has been
19 committed, there is no ground for a *Terry* stop. Since there is no ground for a *Terry* stop,
20 there was no ground for a *Terry* frisk.” *Id.* at 898, 1270 (citations omitted).

1 Similarly, Officer Auderer was on routine patrol when he observed Mr. Wiggins’
2 vehicle illegally parked in a parking strip where the posted signs warned “No Parking
3 Between 10 pm and 5 am.” There are no further observations noted in Officer Auderer’s
4 written report to support why he initially approached Mr. Wiggins’ vehicle on February
5 26, 2010. As described by the officer, the only reasons for Officer Auderer to initially
6 approach Mr. Wiggins was to cite him for a parking infraction. There are no facts to
7 support a *Terry* investigatory stop or frisk. Any evidence obtained by the officers as the
8 result of a subsequent stop and frisk should be suppressed.
9

10 The State may argue that Officer Auderer had reasonable suspicion to conduct a
11 *Terry* stop given that Mr. Wiggins was illegally parked in an area known for narcotics
12 activity late at night. However, “[a] *Terry* stop requires a well-founded suspicion that the
13 defendant engaged in criminal conduct.” *State v. Diluzio*, 162 Wn. App. 585, 590, 254
14 P.3d 218, 220 (2011)(quoting *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010)).
15 “A person’s presence in a high-crime area at a ‘late-hour,’ does not, by itself, give rise
16 to a reasonable suspicion to detain that person.” *Id.*
17

18 In *State v. Diluzio*, the court held that the officer’s “incomplete” observations did
19 not provide the basis for a *Terry* stop. 162 Wn. App. at 593, 254 P.3d at 221. The court
20 noted there was no police informant, the police officer did not see any money changing
21 hands, the officer did not overhear any conversations, and the individuals were not known
22 for their involvement in prostitution or other criminal activities. *Id.*
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1 So, while Officer Auderer may recount his observations of the money he observed
2 spread over Mr. Wiggins lap and Mr. Wiggins efforts to stuff the money between his legs
3 and in the center console as evidence of criminal activity, this behavior without more does
4 not provide a basis for a *Terry* stop. See, e.g., *State v. Diluzio, supra*. (defendant speaking
5 to a woman who gets into his car not basis for *Terry* stop); *State v. Richardson*, 64 Wn.
6 App. 693, 696, 825 P.2d 754 (1992)(officer' s observation of defendant walking with
7 individual suspected of criminal activity in high crime area does not support *Terry* stop);
8 *State v. Gleason*, 70 Wn. App. 13, 851, P.2d 731 (1993)(defendant's exit from building
9 known for drug sales does not support *Terry* stop).

10
11
12 The linchpin in the court's analysis is whether the investigatory [*Terry*] stop
13 was "justified at its inception." Officer Auderer written report and his anticipated testimony
14 at a 3.6 hearing will be that he approached Mr. Wiggins vehicle because he was illegally
15 parked late at night in a high narcotics area. Those facts do not support a *Terry* stop. All
16 evidence obtained by the officers following the stop should be suppressed.

17
18 DATED this 7th day of December, 2011.

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21 
22 _____
23 **Hong Tran, WSBA #25198**
24 **Attorney for Defendant**
25

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68274-1-1
)	
DERRON WIGGINS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JUNE 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DERRON WIGGINS
3407 36TH AVENUE S.
SEATTLE, WA 98144

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE 2012.

x *Patrick Mayovsky*

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STATE OF WASHINGTON
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