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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 33930-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

MILO SHAWN THORNE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Chris Wickham, Judge, and
the Honorable Wm. Thomas McPhee, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF THE CASE

The facts of this case are fully set forth in the Appellant's opening brief.

B. STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his opening brief.

C. ARGUMENT

1. THORNE WAS SEIZED WITHOUT REASONABLE SUSPICION WHEN THE OFFICER QUESTIONED HIM AND ASKED FOR HIS IDENTIFICATION.

In order to prevail on his appeal of the lower court's CrR 3.6 ruling and subsequent conviction, Milo Thorne must establish at what point a seizure of his person occurred, and must demonstrate that the seizure was not supported by reasonable articulable suspicion based on objective facts. *State v. Stroud*, 30 Wn. App. 392, 394, 634 P.2d 316 (1981), *review denied*, 96 Wn.2d 1025 (1982); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

In Washington, a police officer has not seized an individual merely by approaching him in a public place and asking him questions, if a reasonable

person would have felt free to leave. *State v. Belanger*, 36 Wn. App. 818, 677 P.2d 781 (1984). A seizure occurs, however, 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, 455, 711 P.2d 1096 (1985) (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980)). A seizure is reasonable only if an officer has “a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.” *State v. Larson*, 93 Wn.2d 638, 644, 611 P.2d 771 (1980) (citing *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357 (1979)); *See also State v. Kennedy*, 107 Wn.2d 1, 5, 726 P.2d 445 (1986).

In the case at bar, Officer Quiles did not have a reasonable suspicion of criminal activity; he was investigating a suspicious vehicle complaint at the time he contacted Thorne. Thorne disputes that he was “scurrying away from the crime scene,” as portrayed by the State in its response. Brief of Respondent at 1. To the contrary, the record shows that Officer Quiles testified that that Thorne was “walking very fast, very hurriedly[,]” was “sweating profusely[,]” and “almost walked into the front” of the officer’s car as the car emerged from the alley. RP (8.15.05) at 12, 14; RP at 276.

Contrary to the court's factual finding and the State's assertion in its Response Brief as to when the seizure occurred, under Washington law Thorne was seized when the officer asked him to produce identification.

A person is not seized when a police officer simply engages a person in conversation in a public place. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2381, 115 L. Ed. 2d 389 (1990); *State v. Richardson*, 64 Wn. App. 693, 696, 825 P.2d 754 (1992). The inquiry is whether, in view of all of the circumstances, a reasonable person would have believed he was not free to leave. *State v. Young*, 135 Wn.2d 498, 509-10, 957 P.2d 681 (1998) (recognizing Washington State Constitution provides greater privacy protections than federal constitutional provisions).

Even if an initial contact is permissible, the conduct of the officer may transform the contact into a seizure. *Richardson*, 64 Wn. App. at 695-96. The *Richardson* Court found that an officer's request that pedestrians empty their pockets and place their hand on a patrol car during questioning in an area of "high drug activity" was a "show of authority" which transformed the initially consensual police encounter into an unlawful seizure. 64 Wn. App. at 695-97.

On the other hand, while the *Young* Court recognized Washington Constitution article I, § 7 provides greater privacy protections than the Fourth Amendment to the federal constitution, it rejected Young’s claims that the police use a spotlight constituted a “show of authority” that would lead a reasonable person to believe she was not free to leave, and was therefore a seizure. 135 Wn.2d at 509-12. The Court enumerated examples of a “show of authority” by police which could signify a seizure:

the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.

...

135 Wn.2d at 512 (*quoting United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

Under the totality of the circumstances, it is evident that Thorne’s seizure took place when he was questioned by Officer Quiles. An officer engaging a citizen in conversation is not a seizure. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), *overruled on other grounds*, *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). A police spotlight on a person is not a sufficient “show of authority” to constitute a seizure. *Young*, 135 Wn.2d at 512-13. A police request to remove one’s hands from one’s

pockets may not rise to the level of a seizure. *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993), *rev. denied*, 123 Wn.2d 1010 (1994). Standing alone, an officer's request for identification does not transform an encounter into a seizure. *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). However, no reasonable person under such circumstances in total presented in this case would feel free to terminate such an encounter and leave.

Under the totality of the circumstances present here, it is apparent Thorne was seized by the time the officer asked him to produce identification. In such circumstances, no reasonable person would have felt free to leave.

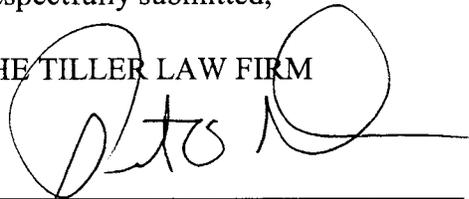
C. CONCLUSION

For the above-stated reasons, and those set forth in Thorne's Opening Brief, this Court should grant the relief requested in the opening brief.

DATED: August 10, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. Tiller', is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE

I certify that I mailed a copy of the foregoing Reply Brief of Appellant, postage pre-paid on August 10, 2006, at the Centralia, Washington post office addressed as follows:

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