

FILED  
COURT OF APPEALS

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NO. 34592-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ROGER NEIL HAGER,

Appellant.

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

The Honorable James E. Warne

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BRIEF OF APPELLANT

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*S.M. 10-20-06*

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issue Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural Facts</u> .....	1
2. <u>Substantive Facts</u> .....	2
C. <u>ARGUMENT</u> .....	4
THE TRIAL COURT ERRED IN DENYING HAGER’S MOTION TO SUPPRESS EVIDENCE OBTAINED AFTER AN UNLAWFUL SEIZURE OF HAGER WHO WAS A PASSENGER IN A VEHICLE .....	4
1. <u>Unlawful seizure occurred when Trooper Black            directed Hager to get out            of the vehicle.</u> .....	6
2. <u>Unlawful seizure occurred when Trooper Black            patted down Hager and instructed him            to stand by Sergeant Schmit.</u> .....	10
3. <u>Trial court erred in denying motion to            suppress evidence from unlawful seizure.</u> .....	13
D. <u>CONCLUSION</u> .....	14

**TABLE OF AUTHORITIES (CONT'D)**

Page

**RULES, STATUTES, AND OTHERS**

RAP 10.3 (a)(4) .....	1
Const. art. I, sect. 7 .....	5, 13

A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering findings of fact 1, 2, 3, 4, and 5 and conclusions of law 2 and 3. CP 20-22.

2. The trial court erred in denying appellant's motion to suppress evidence obtained after an unlawful seizure of appellant who was a passenger in a vehicle.

Issue Pertaining to Assignments of Error

Did the trial court err in denying appellant's motion to suppress evidence because the evidence was obtained after an unlawful seizure of appellant who was a passenger in a vehicle when no articulable danger justified the seizure?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

On June 28, 2005, the State charged appellant, Roger Neil Hager, with possession of cocaine in violation of the Uniform Controlled Substance Act. CP 4-5; RCW 69.50.4013(1)(2). On December 6, 2005, the court held a CrR 3.6 hearing and denied appellant's motion to suppress evidence.<sup>2</sup> 6RP<sup>3</sup> 32-34. Hager agreed to a stipulated trial before the

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<sup>1</sup> In accord with RAP 10.3(a)(4), the Statement of the Case addresses facts and procedure relevant to the issues presented for review.

<sup>2</sup> The court's belated written findings of fact and conclusions of law on appellant's motion to suppress entered on March 22, 2005 is attached as an appendix. CP 20-22.

Honorable James E. Warne on March 22, 2006. CP 23-26; 9RP 50. The court found Hager guilty and sentenced him to 30 days of confinement. CP 32; RP 53. Hager filed this timely appeal. CP 37.

2. Substantive Facts

At the CrR 3.6 evidentiary hearing, State Trooper Frank Black testified that he was working on June 23, 2005. At 5:21 p.m., he was in his patrol car atop Kalama River Road using a laser speed measuring device to monitor traffic on I-5. 6RP 12. Black stopped a pickup truck for going eighty-nine miles an hour in a seventy mile an hour zone while continuously changing lanes. 6RP 13. Hager was a passenger and owner of the truck. Hager and a female passenger were sitting in the front seat of the truck with the driver. 6RP 12-14, 16.

Black arrested the driver for drunk driving and asked Hager and the other passenger to step out of the vehicle. During this time, Sergeant Schmit arrived at the scene. 6RP 14-16, 21. Black then asked to see Hager's driver's license and patted him down for weapons. After patting Hager down, Black instructed him to stand by Sergeant Schmit. 6RP 20-21.

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<sup>3</sup> There are nine verbatim report of proceedings: 1RP - 6/24/05; 2RP - 6/28/05; 3RP - 8/9/05; 4RP - 9/13/05; 5RP - 11/15/05; 6RP - 12/6/05; 7RP - 1/25/06; 8RP - 2/1/06; 9RP - 3/22/06.

Black searched the truck and found a camouflage jacket. When he picked up the jacket, he noticed the tip of a glass pipe, which he concluded was a "smoking device." 6RP 17-18. Black tucked the glass pipe back in the pocket and asked Hager if "he knew anything about it." 6RP 18-19. When Hager said the jacket was his, Black removed the pipe from the pocket and noticed quite a bit of residue. The residue tested positive for methamphetamine. 6RP 18-19.

Thereafter, Black handcuffed and arrested Hager. While searching Hager, Black found a "white powder substance" in his pocket, which Black concluded was cocaine. 6RP 18-20.

Black admitted that Hager made no furtive movements to cause suspicion before he told him to get out of the truck. He asked to see Hager's driver's license so that Hager could drive the truck rather than have it impounded. Black claimed that he patted Hager down to ensure the safety of Sergeant Schmit and himself. 6RP 25-26.

Hager testified that after the stop, Black asked him to step out of the vehicle and asked for his driver's license, insurance, and registration. Hager thought at that point everything was "straightforward." 6RP 28-29.

Defense counsel argued that the evidence was unlawfully obtained because the State failed to show there was an articulable suspicion to warrant a search and seizure of Hager who was a passenger and not under

arrest. 6RP 29-32. The State argued that the officer conducted a valid search incident to arrest of the driver and the residue on the pipe in the jacket raised a “reasonable suspicion” of drug involvement implicating Hager who was in the vehicle. 6RP 30-31.

The court denied the motion to suppress, ruling that the officer had “the right to search the vehicle, the passenger compartment, and any unlocked containers, including clothes, incident to the arrest.” 6RP 32-33. When questioned by defense counsel, the court reiterated that the officer could lawfully search the passenger’s clothing left in the vehicle. 6RP 33-34.

C. ARGUMENT

THE TRIAL COURT ERRED IN DENYING HAGER’S MOTION TO SUPPRESS EVIDENCE OBTAINED AFTER AN UNLAWFUL SEIZURE OF HAGER WHO WAS A PASSENGER IN A VEHICLE.

Reversal is required because the court erred in denying Hager’s motion to suppress evidence obtained after he was unlawfully seized as a passenger in a vehicle when no articulable danger justified the seizure.<sup>4</sup>

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<sup>4</sup> An appellate court reviews findings of fact on a motion to suppress under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Id. at 644. An appellate court reviews de novo conclusions of law pertaining to suppression of evidence. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution.<sup>5</sup> State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Article I, section 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

“Not every encounter between a police officer and a citizen is an intrusion requiring an objective justification.” Rankin, 151 Wn.2d at 695 (quoting United States v. Mendenhall, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). However, a seizure occurs, under article I, section 7, when considering all the circumstances, an individual’s freedom of movement is restrained and a reasonable person would not believe he or she is free to leave or decline a request due to an officer’s use of force or

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<sup>5</sup> Therefore, an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is not required. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998).

display of authority. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003).

A traffic stop does not automatically result in a seizure of the concerned passengers. State v. Cook, 104 Wn. App. 186, 189, 15 P.3d 677 (2001). Passengers are not automatically seized by the stop. They may get out of the car and walk away. State v. Rehn, 117 Wn. App. 142, 150, 69 P.3d 379 (2003). “To extend their authority beyond the initial seizure of the car and driver and to extend control over the passengers, police officers must have an independent, articulable, and lawful basis for their actions.” State v. Byrd, 110 Wn. App. 259, 263, 39 P.3d 1010 (2002)(citing State v. Larson, 93 Wn.2d 638, 642-45, 611 P.2d 771 (1980)).

When the initial seizure is unlawful, evidence obtained subsequent to the seizure must be suppressed. State v. Brown, 154 Wn.2d 787, 799, 117 P.3d 336 (2005) (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

1. Unlawful seizure occurred when Trooper Black directed Hager to get out of the vehicle.

In State v. Mendez, 137 Wn.2d 208, 212, 970 P.2d 722 (1999), the Supreme Court reversed the trial court’s denial of a motion to suppress evidence obtained from a passenger of a car stopped for a traffic

infraction. In Mendez, two police officers on routine patrol stopped a car for running a stop sign. Mendez, a passenger, got out of the car and began walking away. When one of the officers told him to get back in the car, he ran and was chased down by the officer. The officer arrested Mendez and found a marijuana pipe after searching him. The trial court denied Mendez's motion to suppress evidence of the pipe. Id. at 212-13. The officer testified that prior to ordering Mendez back in the car, he had no suspicions Mendez had engaged or was about to engage in criminal conduct. Id. at 224.

The Supreme Court framed an objective rationale standard with regard to passengers in vehicles:

A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy art. I, sect 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy.

Id. at 220.

The Court reasoned that factors warranting an officer's direction to a passenger include the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of

the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants. The officer must establish facts that would create in an objectively reasonable officer “a heightened awareness of danger.” *Id.* at 220-21.

The Court determined that an unlawful seizure of Mendez occurred when the officer first told him to get back in the car. *Id.* at 222-24. Accordingly, the Court concluded that evidence of the pipe should have been suppressed because the police failed to articulate facts “that reasonably suggested a problematic situation at the scene of the traffic stop that warranted stopping Mendez from leaving.” *Id.* at 226.

Conversely, in *City of Spokane v. Hays*, 99 Wn. App. 653, 659-60, 995 P.2d 88 (2000), this Court held that the seizure of a passenger during a stop for a traffic infraction was reasonable. In *Hays*, two officers were watching a multi-unit complex familiar to police as a gang hangout, known for criminal activity. A person came out of the complex, got into a car parked on the curb, and entered into traffic without signaling. While following the car, the officers saw the driver and a passenger “manipulating an article of clothing” on the bench-style seat between them. *Id.* at 655. The officers were concerned that they appeared to be concealing a weapon. The officers pulled the car over and one of them approached Hays in the front passenger seat. Hays locked the door and

refused to roll down the window. He eventually cracked the window but continued to be confrontational. After several warnings he opened the door and the officer pulled him from the car. *Id.* at 655-56. The officer testified that because of Hays' furtive movements and hostility toward him and the area they were in, he was concerned for his safety. *Id.* at 656. This Court concluded that the seizure of Hays by telling him to get out of the car was lawful because the officers were rightfully nervous about Hays' intentions and their safety concerns were reasonable. *Id.* at 659-60.

Similar to Mendez and unlike Hays, Hager was a passenger in a pickup truck stopped for speeding by Trooper Black.<sup>6</sup> 6RP 12-14. After arresting the driver for drunk driving, Black told Hager to step out of the truck. Hager was not under arrest or under investigation. 6RP 15-16. During cross-examination by defense counsel, Eleanor Couto, Black admitted that he had no reason to suspect criminal activity:

BY MS. COUTO:

Q. Did you see any furtive movements by Mr. Hager when you pulled him over -- when you pulled the car over?

A. No.

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<sup>6</sup> The court erred in entering finding of fact one stating that the pickup changed lanes without signals because Black testified that the vehicle sometimes used signals. 6RP 13. The court erred in entering finding of fact two because Black never named the driver nor did he state that the occupants had bloodshot eyes and appeared tired. 6RP 14. The court erred in entering finding of fact three because no such testimony or evidence was presented. 6RP 11-26.

Q. And you didn't see any furtive movements or anything of any suspicion at all when you were taking them out the car; correct?

A. No.

6RP 26.

The record substantiates that Black gave no objective rationale predicated specifically on safety concerns for telling Hager to get out of the truck. Furthermore, under the Mendez factors, no articulable, objective rationale existed because Sergeant Schmit arrived at the scene to assist Black; there was no heightened danger due to time of day, location, and traffic; the behavior of the occupants in the truck raised no suspicion of criminal activity; the safety of citizens was not a concern; and the officers did not know the occupants. 6RP 14-17. Applying the standard of objective rationale, Hager was unlawfully seized when Black directed him out of the truck.<sup>7</sup>

2. Unlawful seizure occurred when Trooper Black patted down Hager and instructed him to stand by Sergeant Schmit.

Passengers in a vehicle to be searched incident to the driver's arrest cannot automatically be subjected to a pat-down for weapons. State

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<sup>7</sup> The court erred in entering finding of fact four because substantial evidence does not support the finding that Hager was free to leave and voluntarily chose to remain at the scene.

v. Horrace, 144 Wn.2d 386, 398, 28 P.3d 753 (2001). The frisk of a vehicle passenger will be justifiable only where the officer is able to point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger could be armed and dangerous. Horrace, 144 Wn.2d at 399-400.

In Horrace, the Supreme Court held that a trooper's pat-down search of a passenger was lawful. Id. at 388. Horrace was a passenger in a vehicle stopped for speeding at around 1:15 a.m. on I-5. The driver admitted that his license was suspended. While conducting a radio check, the trooper saw the driver leaning toward Horrace and tipping his shoulder down as though he were retrieving something from between the seats. The trooper became concerned that the driver and Horrace were concealing a weapon. The trooper returned to the vehicle and asked Horrace to step out for a pat-down search. Id. at 388-89. The trooper testified that he patted Horrace down because it would have been easy to conceal a weapon inside Horrace's heavy leather jacket that had numerous pockets. Id. at 389. This Court held that the officer's pat-down of Horrace was lawful because the driver's suspicious movement toward Horrace aroused a reasonable belief that Horrace may have a concealed weapon. Id. at 399-400.

unlawfully seized when Black patted him down and instructed him to stand by Sergeant Schmit.<sup>8</sup>

3. Trial court erred in denying motion to suppress evidence from unlawful seizure.

Black seized Hager by directing him out of the truck and patting him down then instructing him to stand by Schmit because no reasonable person in his position would feel free to leave or decline to comply.<sup>9</sup> O'Neill, 148 Wn.2d at 574. The seizure was unlawful in violation of article I, section 7 because there was no articulable danger to justify the seizure. Mendez, 137 Wn.2d at 226; Horrace, 144 Wn.2d at 399-400. The unlawful seizure kept Hager at the scene of the stop which led to his arrest and discovery of the cocaine. The trial court therefore erred in denying Hager's motion to suppress the evidence obtained after the unlawful seizure. Brown, 154 Wn.2d at 799. The court's error requires reversal.

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<sup>8</sup> The court erred in entering finding of fact five because substantial evidence does not support the finding that Black patted down Hager for safety reasons.

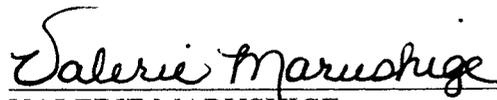
<sup>9</sup> The court erred in entering conclusions of law two and three because Hager was unlawfully seized before his arrest.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Hager's conviction.<sup>10</sup>

DATED this 20<sup>th</sup> day of October, 2006.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant

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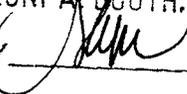
<sup>10</sup> Individual constitutional rights are not extinguished by mere presence in a lawfully stopped vehicle. Parker, 139 Wn.2d at 498.

## **APPENDIX**

FILED  
SUPERIOR COURT

2006 MAR 22 P 2:35

COWLITZ COUNTY  
RONI A. BOOTH, CLERK

BY 

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON, )

Plaintiff, )

v. )

ROGER NEIL HAGER, )

Defendant, )

NO. 05-1-00768-8

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
ON DEFENDANT'S MOTION  
TO SUPPRESS

On December 6, 2005, the Honorable James Warme, Superior Court Judge, presided over the defendant's motion to suppress. The court heard testimonies witnesses, considered the evidence presented, and found the following:

**Findings of Fact**

1. On June 23, 2005, at 5:21 PM, Trooper Frank Black observed a standard cab pickup speeding southbound on I-5 at 89 mph in a 70 mph zone and changing lanes without signals in the County of Cowlitz.
2. Trooper Black stopped the pickup at milepost 30. There were three occupants in the vehicle. The driver was William Cole, the middle passenger was Ginnie Pender, and the far right passenger was the defendant. All three occupants had bloodshot watery eyes and appeared tired.
3. The driver had constricted pupils and a flushed face, spoke on tangents, was slow to respond to Trooper Black's questions, and had a suspended license. The driver

1 performed poorly on voluntarily field sobriety tests and was arrested for driving under the  
2 influence. Trooper Black is a drug recognition expert and trained to administer field  
3 sobriety tests.

4 4. Ms. Pender and the defendant were asked to step out of the vehicle so that Trooper Black  
5 could search the vehicle incident to the driver's arrest. Ms. Pender and the defendant  
6 were not under arrest, were free to leave scene, and voluntarily chose to remain at the  
7 scene. The defendant was the owner of the pickup.

8 5. Prior to searching the vehicle, Trooper Black patted down the defendant for officer safety  
9 reasons and asked the defendant about his driving status to avoid impounding the pickup.  
10 Defendant showed Trooper Black his driver's license and Trooper Black handed the  
11 driver's license back to the defendant.

12 6. During the search of the vehicle, Trooper Black found a loose used syringe and a  
13 camouflage jacket with a glass pipe sticking out of the front breast pocket. The pipe had  
14 testable white residue. Trooper Black recognized the pipe as being a drug paraphernalia  
15 and the white residue as being a controlled substance.

16 7. The defendant indicated that he was the owner of the jacket and was arrested for violating  
17 the Uniform Controlled Substances Act.

#### 18 **Conclusions of Law**

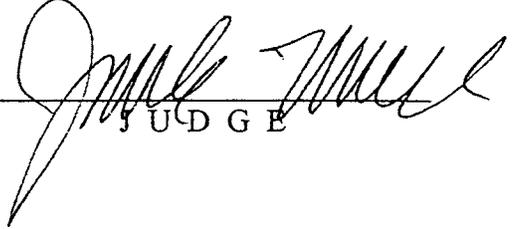
19 1. Trooper Black had probably caused to arrest the driver for driving under the influence  
20 and was authorized to search the vehicle incident to the driver's arrest.

21 2. The Defendant was not seized prior to his arrest because Trooper Black did not exert any  
22 force or show of authority to restrain the defendant's movement and a reasonable person  
23 in the defendant's position, in light of all the circumstances, would believe he or she is  
24 free to go or otherwise end the encounter.

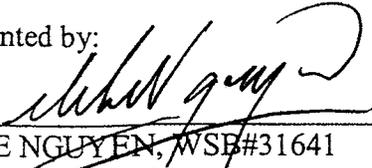
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1 3. Trooper Black had probable cause to arrest the defendant upon finding a glass pipe with a  
2 controlled substance in the defendant's jacket during the search of the vehicle and  
3 incident to the driver's arrest.

4 DATED this 22 day of Mar 2006.

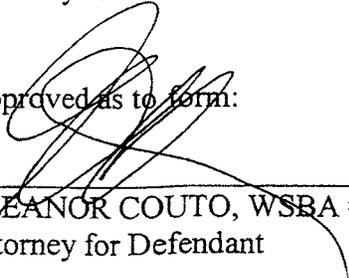
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6   
7 J U D G E

8 Presented by:



9 MIKE NGUYEN, WSB#31641  
10 Attorney for the State

11 Approved as to form:



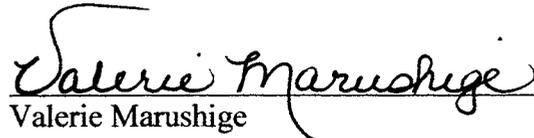
13 ELEANOR COUTO, WSBA # 19544  
14 Attorney for Defendant

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Susan Baur, 312 SW First Avenue, Kelso, Washington 98626 and Roger Neil Hager, 12829 24<sup>th</sup> Avenue South, Seattle, Washington 98168.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20<sup>th</sup> day of October, 2006 in Des Moines, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

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