

No. 35333-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Appellant,

vs.

Gregory Casad,

Respondent.

Clallam County Superior Court

Cause No. 05-1-00578-4

The Honorable Judge Ken Williams

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... ii

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 2

A. The trial court’s unchallenged findings establish that the officers lacked a well-founded suspicion of criminal activity when they stopped Mr. Casad..... 2

B. A concern for “officer safety” did not justify the warrantless seizure..... 6

C. & D. The trial court’s unchallenged findings establish that the officers were not justified in stopping Mr. Casad under the community caretaking exception to the warrant requirement. 7

E. The trial court’s unchallenged findings of facts distinguish this case from *State v. Spencer*. 9

F. Appellant failed to establish that the scope of the detention was reasonably related to the circumstances..... 11

CONCLUSION 12

TABLE OF AUTHORITIES

FEDERAL CASES

Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939) 3

O’Cain..... 6

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 4

United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d (1975)..... 3

WASHINGTON CASES

State v. Balch, 114 Wn. App. 55, 55 P. 3d 1199 (2002)..... 4, 5, 6

State v. Brockob, ___ Wn.2d ___, ___ P.3d ___, 2006 Wash. LEXIS 981 (2006)..... 4

State v. Crane, 105 Wn. App. 301, 19 P.3d 1100 (2001) 3

State v. Evans, ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 50 (2007)..... 11

State v. Glossbrener. 146 Wn.2d 670, 49 P.3d 128 (2002) 3

State v. Link, ___ Wn.App. ___, ___ P.3d ___ 2007 Wash. App. LEXIS 70 (2007)..... 7, 8

State v. O’Cain, 108 Wn. App. 542, 31 P.3d 733 (2001)..... 4, 11

State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003)..... 3

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999)..... 3, 11

State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004)..... 11

State v. Spencer, 75 Wn.App. 118, 876 P.2d 939 (1994) 9, 10

<i>State v. Thompson</i> , 151 Wn.2d 793, 92 P.3d 228 (2004)	7
<i>State v. Valentine</i> , 132 Wn.2d 1, 935 P.2d 1294 (1997).....	4, 5, 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. II.....	6
U.S. Const. Amend. IV	2, 3
Wash. Const. Article I, Section 24.....	6
Wash. Const. Article I, Section 7.....	2, 3

STATUTES

RCW 9.41.270	4, 5, 6, 7, 9
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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

With their guns drawn, three officers stopped Gregory Casad on a public street. RP 18-19; Appellant's Opening Brief, pp. 2-3. They frisked him and ordered him to put down a bundle he was carrying. RP 25, 29, 54; Appellant's Opening Brief, p. 3. *See also* Court's Memorandum Opinion, CP 18-19. The sole reason for the contact was that Mr. Casad was carrying a rifle, pointed down, in broad daylight on a public street. RP 5-64; Memorandum Opinion, CP 18-19; Supplemental Memorandum Opinion, CP 7.

The officers subsequently learned Mr. Casad's identity, determined that he was a convicted felon, and confirmed that he had not had his firearm rights restored. CP 19. Mr. Casad was arrested and searched, and the police found contraband in his backpack. CP 19. He was charged with Possession of a Controlled Substance and two counts of Unlawful Possession of a Firearm in the Second Degree. CP 28-31.

Mr. Casad moved to suppress the evidence. CP 28. In a Memorandum Opinion, the trial court (1) granted the motion (in part) without an evidentiary hearing, (2) allowed either party to request an evidentiary hearing, (3) reserved ruling on whether or not the seizure was justified under the community caretaking exception to the warrant

requirement, and (4) requested supplemental briefing from the defense on the reserved ruling. Memorandum Opinion, CP 18.

The prosecution sought reconsideration, and requested an evidentiary hearing. CP 14. Testimony was taken, and the court issued a Supplemental Memorandum Opinion, granting the motion in full. CP 7. The state appealed.

ARGUMENT

- A. The trial court's unchallenged findings establish that the officers lacked a well-founded suspicion of criminal activity when they stopped Mr. Casad.

The Fourth Amendment to the Federal Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

Article I, Section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7. The Supreme Court has stated that "it is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486

at 493, 987 P.2d 73 (1999). Under Article I, Section 7, warrantless searches are unreasonable *per se*. *Parker*, at 494. Exceptions to the warrant requirement are limited and narrowly drawn. *Parker*, at 494. The State, therefore, bears a heavy burden to prove that a warrantless search falls within an exception. *Parker*, at 494.

One such exception is where the search is performed incident to a lawful custodial arrest. *Parker*, at 496. The exception is narrower under Article I, Section 7 than it is under the Fourth Amendment. *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). The legality of a search incident to arrest turns on the lawfulness of the arrest. Where the arrest is derived (directly or indirectly) from a violation of the Fourth Amendment or Article I, Section 7, the seized items must be suppressed as “fruits of the poisonous tree.” *Nardone v. United States*, 308 U.S. 338 at 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *State v. Glossbrener*, 146 Wn.2d 670, 685, 49 P.3d 128 (2002).

The Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v. Crane*, 105 Wn. App. 301, 311, 19 P.3d 1100 (2001). In order to justify a brief investigative detention, the police must have a well-founded suspicion of criminal activity based on specific and articulable facts; there

must be a substantial possibility that criminal conduct has occurred or is about to occur.¹ *State v. O'Cain*, 108 Wn. App. 542, 548, 31 P.3d 733 (2001).

Unchallenged findings of fact are verities on appeal, and an appellate court reviews only those facts to which the appellant has assigned error. *State v. Brockob*, ___ Wn.2d ___, ___ P.3d ___, 2006 Wash. LEXIS 981 (2006). Where a memorandum opinion outlines facts established at a CrR 3.6 hearing, failure to assign error to those facts precludes review of those facts. *State v. Balch*, 114 Wn. App. 55 at 58, 55 P. 3d 1199 (2002). Furthermore, the trier of fact is in a better position than an appellate court to assess the credibility of witnesses and take evidence. *State v. Lawson*, 135 Wn. App. 430 at 439 (2006); *see also State v. Valentine*, 132 Wn.2d 1 at 23, 935 P.2d 1294 (1997) (“Resolution of factual disputes is a task for the trier of fact, not this court.”)

In this case, Appellant first seeks to justify the seizure on the grounds that Mr. Casad was unlawfully displaying a weapon under RCW 9.41.270. Appellant’s Opening Brief, p. 7. This argument is without merit, because the trial court’s unchallenged factual findings establish that

¹ The standard is based on the U.S. Supreme Court’s holding in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

the officers did not have a reasonable suspicion that Mr. Casad was unlawfully displaying a weapon.

The trial court set out the facts in two Memorandum Opinions, and the Appellant has not assigned error to any of the facts. Appellant's Opening Brief, p. 1. Accordingly, the trial court's recitation of the facts is not subject to review. *Balch, supra; Valentine, supra*. After hearing the testimony, the trial court concluded that Mr. Casad was not carrying the weapon "in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons," as required by RCW 9.41.270.

Instead, the court found that Mr. Casad was carrying the rifles "in broad daylight... pointing downward, and walking on a main street..." Supplemental Memorandum Opinion, CP 7. The court also found that Mr. Casad was "seized by law enforcement officers... without any basis to believe a crime has been committed..." CP 7.

[t]here is nothing to indicate that the officers had any reasonable belief that the Defendant constituted a danger, even though the Defendant was armed... The defendants' [sic] action of simply carrying a weapon in and of itself would not have raised a reasonable fear that the Defendant was dangerous... [T]here was no more reason to seize Mr. Casad for walking down the street carrying a rifle pointed at the ground, than there would to be seized [sic] any sportsman during hunting season who might have a rifle in his car.
Supplemental Memorandum Opinion, CP 7-8

Since Appellant has not assigned error to any of these facts, and since the facts are therefore verities on review, Appellant cannot assert that Mr. Casad was carrying the rifles “in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” RCW 9.41.270. *Balch, supra; Valentine, supra.*

The seizure of Mr. Casad was not justified as an investigative detention because the police lacked a well-founded suspicion that Mr. Casad was engaged in any criminal activity. Upon these facts, any other conclusion would infringe the constitutional right to keep and bear arms under U.S. Const. Amend. II and Wash. Const. Article I, Section 24.

B. A concern for “officer safety” did not justify the warrantless seizure.

Appellant next argues that the officers were justified in patting Mr. Casad for weapons because of concerns for officer safety. Appellant’s Opening Brief, p. 7-8. Whether or not this is so, officer safety does not by itself justify the initial seizure of Mr. Casad. *O’Cain, supra.* Furthermore, nothing of evidentiary value was discovered during the frisk. CP 7, 8, 18-21. Accordingly, Appellant’s argument is irrelevant to the issues here.

C. & D. The trial court's unchallenged findings establish that the officers were not justified in stopping Mr. Casad under the community caretaking exception to the warrant requirement.

Appellant seeks to justify the detention under the "community caretaking" exception to the warrant requirement. Appellant's Opening Brief, pp. 9-13. This argument is without merit.

The community caretaking exception "allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." *State v. Thompson*, 151 Wn.2d 793 at 802, 92 P.3d 228 (2004). The exception applies only if (1) the officers subjectively believe that someone likely needed assistance for health or safety concerns, (2) a reasonable person in the same situation would similarly believe that there was need for assistance, and (3) there is a reasonable basis to associate the need for assistance with the place being searched. *Thompson*, at 802. The community caretaking function "must be divorced from a criminal investigation." *State v. Link*, ___ Wn.App. ___, ___ P.3d ___ 2007 Wash. App. LEXIS 70, pp. 17-19 (2007).

In this case, the state has argued that the seizure was a legitimate stop for investigation of Unlawful Display of a Weapon under RCW 9.41.270. Appellant's Opening Brief, pp. 5-9. If the officers were investigating a crime, then the stop was not "divorced from a criminal

investigation,” and the community caretaking function does not apply.

Link, supra.

Furthermore, there is no indication in the police reports, in the testimony, or in the court’s findings that either officer subjectively believed contact with Mr. Casad was necessary to provide assistance for health and safety concerns. CP 7, 18, 33-34; RP 5-65. Nor would a reasonable person believe that Mr. Casad (or anyone else) required assistance. Thus the standard is not met, and the exception does not apply.

Link, supra.

Appellant’s argument-- that the stop can be justified by a general concern for the safety of the community-- has been rejected:

Broadly stated, a law enforcement officer's job is always to serve and protect the community. But where an officer's primary motivation is to search for evidence or make an arrest, this broader purpose does not create an exception to the search warrant requirement.

Link, supra, at p. 18.

Any concern the officers had for the safety of the community was based on the unwarranted suspicion that Mr. Casad might injure someone by committing a crime. Because of this, the stop cannot be justified under the community caretaking exception to the warrant requirement. *Link, supra.*

E. The trial court's unchallenged findings of facts distinguish this case from *State v. Spencer*.

The state argues that this case is indistinguishable from *State v. Spencer*, 75 Wn.App. 118, 876 P.2d 939 (1994). This is incorrect.

First, *Spencer* did not involve a ruling on a suppression hearing. Instead, it involved a challenge to the constitutionality of RCW 9.41.270 (Unlawful Display of a Weapon), and thus was decided under standards wholly irrelevant here. The *Spencer* court presumed the statute constitutional, determined that it was narrowly drawn, did not violate the right to bear arms, and was not vague or overbroad. *Spencer*, at 123, 128. As the court noted, the statute does not restrict people from carrying weapons; it only requires that "people who carry weapons to do so in a manner that will not warrant alarm." *Spencer*, at 124.

Second, the facts in *Spencer* are different from the facts here. In particular, the person charged in *Spencer* carried an assault rifle at night, with a visible ammunition clip, in a manner that was described as "threatening," and in a "hostile, assaultive type manner with the weapon ready." *Spencer*, at 121. Clearly, when taken in a light most favorable to the state, these facts were sufficient to sustain the defendant's conviction. They also were sufficient to survive an "as applied" challenge to the statute for vagueness. *Spencer*, at 127.

Here, by contrast. Mr. Casad was stopped in broad daylight, there was no clip visible, and he was never described as threatening, hostile, or assaultive, and did not have the weapon “ready.” RP 5-65. Even if the facts of *Spencer* were relevant to this case, *Spencer* would not require admission of the evidence.

Finally, Appellant implies that the court applied the wrong legal standard in suppressing the evidence. Appellant’s Opening Brief, pp. 16-17, citing RP 70. Appellant quotes only a portion of the court’s statement, and quotes it out of context. The full statement in context is as follows:

...I think certainly law enforcement can contact people under this circumstance. They may contact people under the circumstance that there’s somebody walking a Pitbull who has perhaps growled at somebody and say what’s the story with your dog?

But, the difference here is that clearly Mr. Casad was seized. At the point of initial contact he was not free to go and in order to do that, officers must either have a concern for their safety of the public safety that is based on more than their possession of a weapon, mere possession of a weapon or must have probable cause to believe a crime (sic) has been committed *or a reasonable suspicion that a crime has been committed* to justify a *Terry* stop...
RP 70, *emphasis added*.

Clearly, the trial judge was well aware of the proper standard. *See also* Memorandum Opinion, CP 18; Supplemental Memorandum Opinion, CP 7.

Furthermore, even if the trial court had erroneously applied the wrong legal standard, review of a decision suppressing evidence is *de*

novo. State v. Evans, ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 50 at p. 4 (2007). In other words, the trial court's legal conclusions should not affect this court's analysis.

As noted in an earlier section, the trial court's unchallenged findings do not provide the basis for a well-founded suspicion that Mr. Casad was engaged in criminal activity. *O'Cain, supra*.

- F. Appellant failed to establish that the scope of the detention was reasonably related to the circumstances.

Appellant next argues that the stop did not exceed the permissible scope of a *Terry* stop. But Appellant concedes that the duration of the stop was not established. Appellant's Opening Brief, p. 19. According to Appellant, this is proof that "the length of the stop was not challenged." Appellant's Opening Brief, p. 19.

The state bears a heavy burden to prove that any warrantless search falls within an exception. *Parker*, at 494. If the state asserts that the seizure was justified as a *Terry* stop, it must demonstrate that the officers' actions were (1) justified at their inception, and (2) reasonably related in scope to the circumstances which justified the interference in the first place. *State v. Rankin*, 151 Wn.2d 689 at 704, 92 P.3d 202 (2004). The absence of any proof as to the length of the detention must be held against the state. Given the state's heavy burden and the absence of such proof,

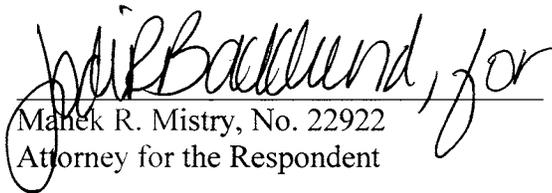
the prosecution failed to show that the scope of the detention was reasonably related to the circumstances, and the detention cannot be justified under *Terry*. This provides an alternate basis for upholding the trial court's order suppressing the evidence.

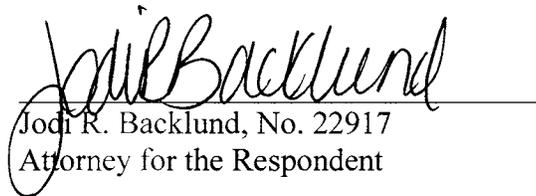
CONCLUSION

For the foregoing reasons, this court should affirm the trial court's decision suppressing the evidence and dismissing the case.

Respectfully submitted on February 7, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Respondent's Brief to:

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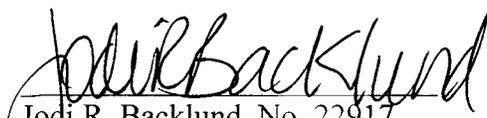
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 7, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 7, 2007.



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