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STATE OF WASHINGTON  
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No. 37590-7-II  
(consolidated case)

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

STEVEN J. MIRANDA II, BASHINE RUTLEDGE,  
& DESMOND JOHNSON

Respondents.

On Appeal from the Pierce County Superior Court  
Cause Nos. 08-1-00294-4, 08-1-00295-2 & 08-1-00296-1  
The Honorable D. Gary Steiner, Judge

JOINT BRIEF OF RESPONDENTS MIRANDA & RUTLEDGE

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**I. COUNTER-STATEMENT OF THE ISSUES**

1. Where *State v. Hopkins* follows and applies long-standing State and Federal precedent, did the trial court correctly apply *State v. Hopkins* to this case, and correctly grant the defense's motion to suppress?
2. Where the facts of this case are nearly identical to the facts in *State v. Hopkins*, and where the State failed to establish the reliability of the caller informant, did the trial court correctly grant the defense's motion to suppress?
3. Where no actual or potential criminal activity was reported by the caller informant or observed by the responding officers, was the trial court incorrect when it concluded in Reasons for Inadmissibility of the Evidence Numbers 7, 8, 10 and 13 that the detention and subsequent search of the Appellants was otherwise lawful, and does this error provide an alternative ground to affirm the suppression of the evidence?
4. Where the search of Appellant Miranda and Appellant Rutledge exceeded the legitimate scope of a protective weapons frisk, was the trial court incorrect when it concluded in Reasons for Inadmissibility of the Evidence Numbers 7, 8, 10 and 13 that the detention and subsequent search of the

defendants was otherwise lawful, and does this reason provide an alternative ground to affirm the suppression of the evidence?

## **II. STATEMENT OF THE CASE**

On the afternoon of January 15, 2008, 911 dispatch received a call reporting that a citizen had observed a man walking down a Tacoma street carrying a gun. (Exh. 9) At first, a male caller told the dispatch operator that his wife saw a group of men, and one of the men was carrying a gun. (Exh. 9) The man gave dispatch an address that he claimed to be calling from. (Exh. 9) Because the man had not seen the suspects, the dispatch operator asked him to put his wife on the line. (Exh. 9)

A woman then took the phone, told the operator that her name was Deborah Hibbs, and described the three men. (Exh. 9) Consequently, police units received a verbal and computer (CAD) dispatch reporting that an 18-22 year old black male wearing a blue or purple knit cap, a green backpack and blue jeans was walking southbound on East 35th Street, and was seen carrying a silver handgun. (RP 6, 10, 104) The man was accompanied by another black male wearing all blue clothing, and by another no-description male. The men were also observed walking dogs. (RP 6, 10, 104)

Tacoma Police Officer Daniell Griswold received the dispatch, and had seen three men resembling the female caller's description in the same area a few minutes earlier. (RP 6) Without following-up on the report or making any attempt to contact the female caller, Griswold immediately drove her patrol car around the area looking for the men, and found them about two to three minutes later. (RP 6, 10, 55, 73-74) The men were standing on the street corner, and were not engaged in criminal behavior or acting suspicious. (RP 38) Griswold did not see a gun. (RP 26)

Griswold ordered the man with the knit cap and green backpack to the ground, placed him in handcuffs, and conducted a pat-down search. (RP 7-8) She felt a hard object in his waistband, and removed what turned out to be a glass pipe. (RP 8) She placed the man, later identified as Desmond Johnson, under arrest, and proceeded to search his backpack. (RP 9) Inside the backpack she found a silver handgun wrapped in a wig. (RP 9) A search incident to arrest also revealed marijuana and a white powder substance. (RP 97-98)

Sergeant Ross Mueller also received the dispatch, and arrived at the scene slightly after Griswold. (RP 90, 93) He saw Johnson sitting on the curb, and Bashine Rutledge and Steven

Miranda standing on the sidewalk. (RP 93) He did not observe any criminal or suspicious behavior when he arrived. (RP 111)

Mueller took custody of Miranda, placed him into handcuffs, and conducted a search. (RP 93, 95) Mueller felt some “unidentifiable” hard objects, and reached into various pockets to remove them. (RP 94) He found a plastic prescription pill container, which contained a controlled substance, and a switchblade knife. (RP 94) He placed Miranda under arrest for possession of the knife, which he said was a violation of city code. (RP 96)

Detective Steven Roepelle also responded to the dispatch. (RP 124) He did not observe the three men engaging in any suspicious or criminal activities. (RP 172) He contacted Rutledge, placed him in handcuffs, and conducted a search. (RP 127-28) During the search, Roepelle discovered several baggies of marijuana and cocaine. (RP 128)

The State charged the three men with various weapons and controlled substance crimes. (CP 1-3, 73-75) The three men moved pursuant to CrR 3.6 to suppress the evidence, arguing that the detention and search was improper. (CP 6-10, 79-86) Following a hearing, the trial court agreed and suppressed all the

evidence discovered during the searches of the three men. (RP 214-15; CP 60-66, 141-47) As a result, the State moved to dismiss the charges because there was insufficient evidence to prosecute. (RP 215-16) The court agreed and dismissed the charges with prejudice. (CP 43, 128, 215-16) The State now appeals. (CP 44-46, 129-31)

### III. ARGUMENT & AUTHORITIES

When reviewing a trial court's decision following a motion to suppress, any unchallenged findings of fact are treated as verities on appeal. *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). The trial court's conclusions of law are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

In this case, the trial court entered the following relevant Reasons for Inadmissibility of the Evidence:

5. Because the officers did not independently verify the identity of the caller before contacting the suspects, the officers did not have a valid basis to contact the suspects, because they had no reason to believe the report was reliable.

7. Reasonably believing the three suspects were together, the officers had a reasonable basis to detain all three, pursuant to a Terry detention while they conducted the investigation.

8. The officers therefore were entitled to conduct

a pat-down search of each individual for officer safety.

.....  
10. Each of the defendants was then lawfully arrested as a result of the items found.

.....  
13. This court therefore concludes that while the contact of the defendants and the subsequent search of them was lawful in every other regard, it was unlawful for the officers to initially contact and investigate the suspects because the identity of the 911 caller had not been independently verified by the officers. Where the caller's identity was not independently verified, the reporting party was not established as a reliable citizen informant.

(CP 64-65, 145-46) Trial court ruled in favor of suppression primarily because the State did not establish the reliability of the informant. As argued in detail below, the trial court was correct in this regard, and it rightly applied the nearly-identical case of *State v. Hopkins*, 128 Wn. App. 855, 117 P.3d 377 (2005).

The defense also argued below that the detention of the three men was improper because no actual or potential criminal activity was reported by the informant or observed by the officers, and because the search exceeded the legitimate scope of a weapons frisk. (CP 8-10, 83-85; RP 197, 201, 203-05) The trial court did not make specific findings addressing these arguments. The court simply found that, but for the unreliability of the informant, the detention and search of each of the men was otherwise proper.

(CP 64-65, 145-46) As argued in detail below, the court was incorrect, and the alternative grounds for suppression advanced by the defense below also provide alternative grounds to affirm on appeal.<sup>1</sup>

1. Hopkins is good law because it follows and applies long-standing State and Federal precedent.

Generally, warrantless searches and seizures "are per se unreasonable." U.S. Const., Amend. IV; Wash. Const. art. I, § 7; *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Both the Fourth Amendment and art. 1, § 7 are applicable to investigatory stops and require that such stops be reasonable. *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 1877-1879, 20 L. Ed. 2d 889 (1968); *State v. Lesnick*, 84 Wn.2d 940, 530 P.2d 243, cert. denied, 423 U.S. 891, 96 S. Ct. 187, 46 L. Ed. 2d 122 (1975). Police may briefly detain and question an individual if they have a well-founded suspicion based on objective facts that he is connected to actual or potential criminal activity. *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980) (citing *Brown v. Texas*, 443

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<sup>1</sup> See *State v. Sondergaard*, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997) (an appellate court may affirm on alternate grounds, as long as the record is sufficiently developed); *State v. Michielli*, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997) (appellate court can affirm the lower court's judgment on any ground within the pleadings and proof).

U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979); *Terry, supra.*; *State v. Gluck*, 83 Wn.2d 424, 426, 518 P.2d 703 (1974)).

An informant's tip can form the basis of the "well-founded suspicion" as long as the informant and the tip possess sufficient "indicia of reliability." *Sieler*, 95 Wn.2d at 47 (citing *Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612 (1972); *Lesnick*, 84 Wn.2d at 943).

In granting the defense's suppression motion, the trial court followed this Court's holding in *State v. Hopkins, supra.* (CP 63, 65, 144, 146) The State contends that *Hopkins* was wrongly decided, and argues that it strays from established State and Federal case law. (Appellant's Brief at 16, 17, 29) The State is incorrect.

The *Hopkins* court addressed whether police had sufficient grounds to conduct an investigatory detention (*Terry* stop) based on a 911 call from a named but unknown citizen informant alleging that a minor was carrying a firearm. 128 Wn. App. at 858. This Court first addressed whether the State provided sufficient facts to establish the informant's reliability. 128 Wn. App. at 863-64. In finding that it did not, this Court relied on *State v. Sieler, supra.*, a 1980 Washington Supreme Court decision.

In *Sieler*, police officers received information provided by a named but unknown informant that criminal activity was occurring at a high school parking lot. 95 Wn.2d at 45. A school secretary telephoned police and stated that “a Mr. Tuntland” had called the school to report that he had observed what he believed to be a drug sale in a black-over-gold Dodge with a certain license number in the school parking lot. 95 Wn.2d at 44-45. The officers proceeded to the scene and, without corroborating any sign of criminal activity, detained the occupants of the vehicle matching the description given by the informant. 95 Wn.2d at 45. The *Sieler* court held that the State failed to establish the reliability of the informant, and that the investigatory detention constituted a violation of the Fourth Amendment. 95 Wn.2d at 48, 51.

The State argues that because the informants in *Hopkins* and in the instant case were named rather than anonymous, they should be presumed reliable and any other conclusion is contrary to established case law. (Appellant’s Brief at 18, 29) But *Sieler* addressed and rejected this argument:

The reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant. Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable.

95 Wn.2d at 48.

The State also argues that the *Hopkins* court erred when it relied on *Florida v. J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), because the informant in that case was completely anonymous. (Appellant's Brief at 16-17) However, the *Hopkins* court's reliance on *J.L.* related not to whether the informant was reliable, but to whether the informant's tip was reliable. 128 Wn. App. at 864-65.

The *Hopkins* opinion is based on, and does not conflict with, established and unchallenged case law. *Hopkins* did not hold that a named but unknown informant is never reliable. It simply affirmed that a named but unknown informant cannot be not presumed reliable in the absence of any additional factors supporting reliability. 128 Wn. App. at 863-64. *Hopkins* simply holds the State to its long-established burden of providing facts to establish the reliability of an informant. 128 Wn. App. at 864; *see also Duncan*, 146 Wn.2d at 171 (State must prove an investigatory stop's reasonableness).

2. *Hopkins* is nearly identical to the facts of this case, and supports the trial court's finding that the State did not establish the informant's reliability.

The State contends that *Hopkins* is distinguishable on its facts and does not support the trial court's ruling in this case.

(Appellant's Brief at 15) The State argues that the additional facts provided to the 911 dispatch operator, specifically the caller informant's name, address and phone number, and her detailed description of the three men, distinguish this case from *Hopkins*.

(Appellant's Brief at 15) Again, the State is incorrect.

In *Hopkins*, the officers also obtained the informant's name and telephone number. But they did not know the informant, did not know anything about the informant, and made no attempt to contact the informant. 128 Wn. App. at 858-59. The informant also gave a detailed physical description of both the informant and his movements. 128 Wn. App. at 858. The *Hopkins* court found that on these facts, the State failed to establish the informant's reliability. 128 Wn. App. at 863-64.

Similarly here, the officers testified they did not know the informant, did not know anything about the informant, and did not attempt to contact the informant. (RP 10, 28, 55, 70-71, 73-74, 106, 173-74) Although the informant gave the dispatch operator a

name, address and phone number, there was no evidence or testimony establishing that the information given was authentic.

This case is nearly identical to *Hopkins*, and the same outcome is required. The State failed to provide sufficient facts to establish that the informant was reliable, and the trial court correctly found that the “reporting party was not established as a reliable citizen informant.” (CP 65, 146)

3. The detention and search of the three men was also improper because the informant did not report any facts, and the officers did not observe any behavior, that provided a reasonable suspicion of actual or potential criminal activity.

To justify an investigative detention, the substance of the informant's tip must contain enough objective facts to justify the pursuit and detention of the suspect. *Hopkins*, 128 Wn. App. at 862-63 (citing *State v. Hart*, 66 Wn. App. 1, 7, 830 P.2d 696 (1992)). An investigatory stop is also reasonable if the arresting officer can attest to specific and objective facts that provide a reasonable suspicion that the person stopped has committed or is about to commit a crime. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). The officer must have well-founded suspicion based on the tip or personal observation indicating that a suspect is connected to actual or potential criminal activity. *Sieler*, 95 Wn.2d

at 46; *Hopkins*, 128 Wn. App. at 862-63.

In *Hopkins*, the informant said he saw a man scratching his leg with a gun, and the informant inaccurately described the man as a juvenile. 128 Wn. App. at 864. In finding that the detention of *Hopkins* was improper, this Court noted:

these facts alone fail to reliably provide an officer with reasonable suspicion of criminal behavior. It is undisputed that *Hopkins* was not a minor and that neither officer observed a gun. The officers did not observe any criminal or suspicious behavior because they saw *Hopkins* merely standing at a pay phone.

128 Wn. App. at 864.

Similarly here, the officers were informed that the caller saw an 18 to 22 year old male walking down the street carrying a gun. (RP 6, 59, 91, 124) The officers received no additional information that that the individual or his companions were engaged in any other suspicious or potentially criminal behavior. (RP 148, 149) When they initially contacted the three men, the officers did not see a gun and did not observe any suspicious or criminal activities. (RP 38, 111, 172) The three men were merely standing on the street corner with two small dogs. (RP 7) The officers admitted that they observed no actual crime in progress, they did not have any articulable facts to suggest that a crime had been committed, and

that it is not a crime to merely possess a gun. (RP 33, 35, 103, 105, 106-07)

The State argues that the informant's detailed description of two of the three men and of the weapon distinguish it from the tip in *Hopkins*, and support a finding of reliability. (Appellants Brief at 15) But in order to support an investigative detention, the tip must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *J.L.*, 529 U.S. at 272. The informant here described no criminal act, and the fact that she accurately described two of the three men and their dogs simply does not provide the officers with a reasonable suspicion of criminal activity. *See also Lesnick*, 84 Wn.2d at 943 (fact that the tipster accurately described the defendant's vehicle is not sufficient indicia of reliability).

Because the detention and search of the three men were conducted without a reasonable and articulable suspicion of criminal activity, all evidence and statements obtained as a result of the contact and search was properly suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L.Ed.2d 441 (1963)).

4. The trial court's suppression of the evidence found in the searches of Rutledge and Miranda can be affirmed on alternate grounds because the searches exceeded the legitimate scope of a protective weapons frisk.

This court may affirm on alternate grounds, as long as the record is sufficiently developed. See *State v. Sondergaard*, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997); *State v. Michielli*, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997). If this court finds that the detentions of Johnson, Miranda and Rutledge were justified, the court should still affirm the suppression of the evidence obtained during the searches of Miranda and Rutledge because the searches performed on those men far exceeded the scope of a reasonable weapons pat down.<sup>2</sup>

Without probable cause and a warrant, an officer is limited in what he can do. He cannot arrest a suspect; he cannot conduct a broad search. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). An officer may, though, frisk a person for weapons, but only if (1) he justifiably stopped the person before the frisk, (2) he has a reasonable concern of danger, and (3) the frisk's scope is limited to finding weapons. *State v. Setterstrom*, 163 Wn.2d 621,

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<sup>2</sup> Both of these grounds were argued in the defendants' motions for suppression of the evidence. (CP 8-10, 84-85)

626, 183 P.3d. 1075 (2008) (citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). The failure of any of these factors makes the frisk unlawful and the evidence seized inadmissible. "The courts must be jealous guardians of the exception in order to protect the rights of citizens." *Setterstrom*, 163 Wn.2d at 627 (citing *Hudson*, 124 Wn.2d at 112).

A valid weapons frisk is strictly limited in its scope to a search of the outer clothing; a pat-down to discover weapons that might be used to assault the officer. *Terry*, 392 U.S. at 29-30. If the officer feels an item of questionable identity that has a size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object. *Terry*, 392 U.S. at 30. "Once it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent" and any continuing search without probable cause becomes an unreasonable intrusion into the individual's private affairs. *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980).

In *State v. Hobart*, 94 Wn.2d 437, 440, 617 P.2d 429 (1980), a police officer felt spongy objects in the suspect's pockets during a

Rutledge was searched by Detective Roepelle. (RP 127) Roepelle, upon arriving at the scene, immediately handcuffed Rutledge and searched him. (RP 127-28) Roepelle said he was searching for the gun or something that could hurt the officers. (RP 142, 152) He felt the outside of Rutledge's coat and felt something in the pocket. (RP 152) He could not identify what he felt, but he admitted that it did not have the feel of a handgun. (RP 152) Roepelle never said he felt something he believed was a weapon. He decided to look inside the shirt pocket and found some baggies of marijuana. (RP 128) He then placed Rutledge under arrest. (RP 128) He continued to search and found some baggies of cocaine in Rutledge's pants pocket. (RP 128)

A permissible weapons frisk is limited to a pat down of the outer clothing unless the officer feels an unidentified object that could be a weapon. *Terry*, 392 U.S. at 29-30. Just like *Hobart*, the search of Rutledge exceeded the scope of valid weapons frisk. Although Roepelle admitted that he did not feel anything resembling a weapon, he opened the pocket and looked inside. It is clear that, like the officers in *Hobart*, Roepelle was actually looking for more than weapons and therefore the fruits of his illegal

search of Rutledge must be suppressed.<sup>3</sup>

Likewise, the search of Miranda exceeded the scope of a valid weapons frisk. Sergeant Mueller specifically testified that nothing Miranda did caused him to have concern for his safety. (RP 112) Despite that lack of reason, he immediately handcuffed Miranda and began to search him. (RP 93) In answer to Mueller's question, Miranda denied having any weapons. (RP 94) Mueller felt the outside of the pockets and said he felt "some hard objects," which he could not identify with gloves on. (RP 94) Mueller testified that he wore gloves during the search, which limited his ability to perceive the nature of items—making it difficult to identify if an item was a possible weapon. (RP 94) Instead of removing the gloves to get a better idea of what he was feeling, Mueller reached in and pulled out a pocket knife. (RP 94) Then, he continued to search Miranda's pants and reached into his pockets to remove and a "standard prescription pill container," which he later determined contained "two small plastic baggies and some type of substance." (RP 94-95) Mueller then arrested Miranda. (RP 96)

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<sup>3</sup> This would include both the marijuana and the cocaine because without the discovery of the marijuana, the officer would not have had probable cause for arrest and could not have searched inside Rutledge's pockets to find the cocaine—both were fruit of the poisonous tree.

A weapons frisk is supposed to be limited to a pat down of the outer clothing unless the officer feels something that could be a weapon. Even then, the officer is limited in taking only such action as is necessary to determine if the object could be a weapon. *Terry*, 392 U.S. at 30. Mueller testified, essentially, that he could not have identified any object with certainty while wearing the gloves he had on. (RP 94) Yet, he used that as his excuse to basically turn all of Miranda's pockets out and conduct a full search. Mueller had no specific reason to suspect that Miranda posed a danger—he was cooperative and handcuffed. And, Mueller never testified that he felt something he believed was a weapon before he reached into Miranda's pocket. Therefore, Mueller exceeded the proper scope of a weapons frisk and the fruits of that illegal search must be suppressed.

#### IV. CONCLUSION

*Hopkins* is good law and is controlling. The State failed to establish that the caller was reliable, and the caller's tip failed to provide the officers with a reasonable suspicion of criminal activity. The officers did not independently observe any suspicious activity. The investigatory stop of the three men was therefore improper. The officers also exceeded the proper scope of a protective

weapons search. The trial court's decision to grant the defense's motion to suppress should be therefore be affirmed.

In the alternative, if this court decides that the detention of these three men was permissible, the court should still affirm the trial court's suppression of the evidence obtained in the searches of Rutledge and Miranda because these searches exceeded the proper scope of a weapons frisk and were therefore unconstitutional. Therefore, the trial court's suppression of the evidence obtained in these illegal searches was proper and should be affirmed.

DATED: November 12, 2008

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**CERTIFICATE OF MAILING**

I certify that on 11/12/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Stephen Trinen, Deputy Prosecuting Attorney, Pierce County Prosecutor's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; (2) Bashine Rutledge, 4610 S. Park, Tacoma, WA 98405; and (3) Steven J. Miranda II, 1014 South Sprague, Apt. B, Tacoma, WA 98405.

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