

Res. Johnson

FILED
COURT OF APPEALS
DIVISION II

03 DEC -8 AM 9:24

NO. 37590-7-II

STATE OF WASHINGTON

BY *Cs*

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

STATE OF WASHINGTON,

Appellant,

v.

STEVEN JOSEPH MIRANDA II,
DESMOND RAY JOHNSON,
BASHINE LAMAR RUTLEDGE,

Respondents.

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

The Honorable D. Gary Steiner

BRIEF OF RESPONDENT DESMOND RAY JOHNSON

VALERIE MARUSHIGE
Attorney for Respondent
23619 55th Place South
Kent, Washington 98032
(253) 520-2637

TIM 1415/08

TABLE OF CONTENTS

	Page
A. <u>COUNTER-STATEMENT OF THE ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
a. <u>Testimony at CrR 3.6 Hearing</u>	2
b. <u>Argument at CrR 3.6 Hearing</u>	6
C. <u>ARGUMENT</u>	8
THE TRIAL COURT CORRECTLY GRANTED THE DEFENSE’S MOTION TO SUPPRESS THE EVIDENCE WHERE THE STATE FAILED TO ESTABLISH THE RELIABILITY OF THE INFORMANT AND THE INFORMANT’S TIP DID NOT CONTAIN ENOUGH OBJECTIVE FACTS TO JUSTIFY AN INVESTIGATORY STOP.....	8
1. <u>The trial court correctly applied <i>State v. Hopkins</i> which follows state and federal precedent and is controlling</u>	9
2. <u>The trial court correctly granted the defense’s motion to suppress the evidence because the facts of this case are all but identical to the facts in <i>Hopkins</i></u>	13
3. <u>The trial court correctly granted the defense’s motion to suppress because the frisk for weapons was unlawful</u>	17

D. CONCLUSION 19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	9
<u>State v. Collins</u> , 121 Wn.2d 168, 847 P.2d 919 (1993)	18
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002)	8
<u>State v. Hart</u> , 66 Wn. App. 1, 830 P.2d 696 (1992)	9
<u>State v. Hopkins</u> , 128 Wn. App. 855, 117 P.3d 377 (2005)	9, 10, 11, 13, 14, 16, 18
<u>State v. Hudson</u> , 79 Wn. App. 193, 900 P.2d 1130 (1995), <u>affirmed</u> , 130 Wn.2d 48, 921 P.2d 538 (1996)	19
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986)	9
<u>State v. Lesnick</u> , 84 Wn.2d 940, 530 P.2d 243, <u>cert. denied</u> , 423 U.S. 891, 96 S. Ct. 187, 46 L. Ed. 2d 122 (1975) ...	9, 12
<u>State v. Michielli</u> , 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997)	8, 19
<u>State v. Randall</u> , 73 Wn. App. 225, 868 P.2d 207 (1994)	9, 10, 11

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES

State v. Rankin,
151 Wn.2d 689, 92 P.3d 202 (2004) 8

State v. Sieler,
95 Wn.2d 43, 621 P.2d 1271 (1980) 10, 12, 19

State v. Stenson,
132 Wn.2d 668, 940 P.2d 1239 (1997) 8

State v. Setterstrom,
163 Wn.2d 621, 183 P.3d 1075 (2008) 18

FEDERAL CASES

Adams v. Williams,
407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972) 9

Florida v. J.L.,
529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) 11, 12, 16

Terry v. Ohio,
392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 8

RULES, STATUTES, OTHERS

U.S. Const. amend. IV 8

Const. art. I, section 7 8

A. COUNTER-STATEMENT OF THE ISSUES

1. Did the trial court correctly grant the defense's motion to suppress the evidence where the State failed to establish the reliability of the informant and the informant's tip did not contain enough objective facts to justify an investigatory stop?

2. Did the trial court correctly grant the defense's motion to suppress the evidence by properly applying State v. Hopkins which follows state and federal precedent and is controlling?

3. Did the trial court correctly grant the defense's motion to suppress the evidence where the facts of this case are all but identical to the facts in State v. Hopkins?

4. Did the trial court correctly grant the defense's motion to suppress the evidence where the frisk for weapons was unlawful?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On January 16, 2008, the State charged respondent, Desmond Ray Johnson, with three counts of unlawful possession of a controlled substance with intent to deliver and one count of unlawful possession of a firearm in the first degree. CP 150-52. The State also brought related

¹ There are two volumes of verbatim report of proceedings: 1RP - 3/11/08; 2RP - 3/14/08.

charges against respondents, Steven Joseph Miranda and Bashine Lamar Rutledge, on January 16, 2008. CP 1-3, 73-75. Pursuant to CrR 3.6, the defense moved to suppress evidence seized during an investigatory stop and search. 1RP 3-4, 2RP 183-92; CP 6-10, 79-86. Following a hearing on March 11 and 13, 2008, the trial court granted the defense's motion to suppress and dismissed the case with prejudice. 2RP 214-16; CP 60-66, 141-47, 189. The State appeals. CP 190-92.

2. Substantive Facts

a. Testimony at CrR 3.6 Hearing

At about 1 p.m. on January 15, 2008, 911 dispatch received a call and the operator spoke with a woman who identified herself and provided a phone number and address. 1RP 6, 26-27, 58. The caller described seeing three men walking on a street and one of the men carrying a gun. 1RP 58-59. Within minutes, police units received a radio and computer generated dispatch (CAD) reporting that an 18 to 22 year old black male wearing a blue or purple knit cap, a green backpack, and blue jeans walking south on A Street carrying a silver handgun. Ex. 9; 1RP 6, 10, 26-27, 58-59, 2RP 104, 125-26. The man was with another black male wearing all blue clothing and another "no-description" male. Ex. 9; 1RP 59, 2RP 104. The men were walking two small dogs. Ex. 9; 1RP 6.

Sergeant Daniell Griswold responded to the dispatch realizing that she had seen three men resembling the description given by the 911 caller. 1RP 6. When Griswold saw the men a few minutes earlier, they were not acting suspiciously and she did not see a gun or hear gunfire in the area. 1RP 6, 25-26, 40. Although she did not know whether the caller was reliable, she made no effort to follow up with dispatch or attempt to contact the caller. 1RP 70-71. Griswold "self-dispatched and immediately began an area check to search for these armed suspects." 1RP 6, 10. Two or three minutes later, Griswold found the three men standing on a street corner with two small dogs. 1RP 6-7. The men were not engaged in any criminal behavior but Griswold was "suspicious of just about everybody" because of the high crime rate in Tacoma. 1RP 39-40, 47-48.

Griswold and Detective Krancich were the first officers at the scene. 1RP 7. Griswold "immediately" got out of her patrol car and walked toward the three men. 1RP 7. She believed the man later identified as Desmond Johnson was the man with the gun based on the description given by the 911 caller. 1RP 7, 11. Griswold directed Johnson to the ground, handcuffed him, and "immediately patted him down for weapons." 1RP 8. Johnson was "initially somewhat non-compliant." 1RP 8. During the search, Griswold felt a hard object in his

waistband which she believed was a weapon. She removed what "appeared to be a glass drug pipe." 1RP 8. Griswold placed Johnson under arrest for possession and searched his bag incident to arrest. She found a wig and handgun in his bag, and narcotics fell out when she reached into his pocket to remove his driver's license. 1RP 9.

Sergeant Ross Mueller arrived at the scene just after Griswold and Krancich and did not notice any criminal or suspicious activity. 2RP 92, 111-12. Mueller saw Johnson sitting down on the sidewalk and Bashine Rutledge and Steven Miranda were standing. 2RP 92-93. He took custody of Miranda, handcuffed him, and conducted a weapons search. 2RP 93. Mueller felt some hard objects that were "[n]ot clearly identifiable" because he had on gloves. 2RP 94. He reached into Miranda's pockets and found a switchblade knife and a plastic prescription pill container filled with "some type of substance." 2RP 94-95. Mueller placed Miranda under arrest for possession of the knife, which was a violation of city code because it was spring activated and had a double edge blade. 2RP 96. After securing Miranda in his patrol car, Mueller conducted a "complete pat-down" of Johnson and found some small bindles of marijuana in his pants pocket. 2RP 96-97

When Mueller received the call from dispatch, "[t]here was nothing that said an actual crime had been committed." 2RP 122. The

CAD log had the 911 caller's phone number, but he "did not look at it" even though he had a phone and could have contacted the caller. 2RP 119. None of the officers who responded to dispatch knew of any crime being committed because there was no report of the man displaying the gun or threatening somebody with the gun. 2RP 105-06.

Sergeant Steven Reopelle arrived at the scene when Griswold and Krancich were contacting the three men and Mueller had just gotten out of his patrol car to assist. 2RP 126-27. All three men were cooperating with the officers and he saw no criminal or suspicious activity. 2RP 160-61. Reopelle approached Rutledge and advised him that he "was going to perform a pat-down search." 2RP 128. Rutledge was compliant when Reopelle handcuffed him and conducted a search. 2RP 128. During the search of Rutledge's jacket, Reopelle felt something in a pocket but it did not feel like a handgun. He opened the pocket and found several baggies of marijuana. 2RP 128, 152. He placed Rutledge under arrest and searched his pants pocket incident to arrest. Reopelle found bags of what field-tested positive as cocaine. 2RP 128-29.

When Reopelle responded to the dispatch, he did not attempt to contact the 911 caller. 2RP 173-74. Reopelle received the CAD log that provided the caller's name but he did not look at it that closely because

“[w]e don’t have time to investigate a caller’s response before we respond to the incident.” 2RP 178.

b. Argument at CrR 3.6 Hearing

Defense counsel urged that the court to follow State v. Hopkins and suppress the evidence because “our fact pattern is pretty much indistinguishable from *Hopkins*.” 2RP 188, 192. Defense counsel also argued that the evidence against Johnson should be suppressed because Griswold’s unjustifiable actions violated Terry, “Officer Griswold comes on the scene, doesn’t ask him for ID, doesn’t ask him any questions, orders him to the ground, puts handcuffs on him, arrests him, and then searches him.” 2RP 189.

The State argued that Hopkins is distinguishable because the 911 caller provided more information in this case than in Hopkins and that the court should apply the totality of the circumstances test articulated in State v. Randall. The State asserted that Randall and Hopkins “are not incompatible, but rather, that they’re complimentary.” 2RP 206-08. The State also argued that the officers properly searched the men because they had an “articulable suspicion about criminal activity, and they were entitled to investigate that.” 2RP 211-12.

The court granted the defense’s motion to suppress, concluding that “*Hopkins* is the law” and that “the holding in *Hopkins* reasonably

applies to this case.” 2RP 214-15. The court filed written findings of fact and conclusions of law, entering the following relevant “Reasons for Inadmissibility of the Evidence”:

4. The officers on the scene did not know more than was contained in the dispatch call and the CAD log.

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.

C. ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED THE DEFENSE'S MOTION TO SUPPRESS THE EVIDENCE WHERE THE STATE FAILED TO ESTABLISH THE RELIABILITY OF THE INFORMANT AND THE INFORMANT'S TIP DID NOT CONTAIN ENOUGH OBJECTIVE FACTS TO JUSTIFY AN INVESTIGATORY STOP.

On a motion to suppress, an appellate court reviews disputed findings of fact under the substantial evidence standard and reviews a trial court's conclusions of law *de novo*. State v. Rankin, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). Any unchallenged findings of fact are treated as verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). An appellate court may affirm a trial court on any ground within the pleadings and proof. State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

“As a general rule, warrantless searches and seizures are per se unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution.” State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The Fourth Amendment and Const. article I, section 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, 20 L. Ed. 2d 889 (1968); State v. Lesnick, 84 Wn.2d 940, 942-44, 530 P.2d 243, cert. denied, 423 U.S. 891, 96 S. Ct. 187, 46 L. Ed. 2d 122 (1975). An investigatory stop occurs at the moment when, given the incident's circumstances, a reasonable person would not feel free to leave. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

A police officer may conduct an investigatory 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 facts" and the rational inferences from those facts. State v. Kennedy, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986); Terry, 392 U.S. at 20-21. An officer's reasonable suspicion may be based on information supplied by an informant but an informant's tip cannot constitutionally provide police with such a suspicion unless it possesses sufficient "indicia of reliability." State v. Hart, 66 Wn. App. 1, 7, 830 P.2d 696 (1992) (citing Adams v. Williams, 407 U.S. 143, 147, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

1. The trial court correctly applied *State v. Hopkins* which follows state and federal precedent and is controlling.

The State asserts that State v. Hopkins, 128 Wn. App. 855, 117 P.3d 377 (2005) was wrongly decided and is contrary to established

precedent. The State argues that Hopkins “conflicts” with State v. Randall, 73 Wn. App. 225, 868 P.2d 207 (1994), but fails to provide any analysis to support its argument. Brief of Appellant (BOA) at 16-17. Contrary to the State’s assertion, Hopkins followed state and federal precedent and does not conflict with Randall.²

In Hopkins, the appellant argued that the trial court erred when it denied his suppression motion based on an unreliable informant’s 911 tip to justify the officers’ investigatory stop. The State responded that citizen informants are generally presumed to be reliable and that an informant’s tip alleging unlawful firearm possession requires immediate police response. Hopkins, 128 Wn. App. at 862. This Court relied on the two-prong test formulated in State v. Sieler, 95 Wn. 2d 43, 47, 621 P.2d 1271 (1980), to determine whether the informant’s tip was reliable. Under Sieler, the State establishes a tip’s reliability when (1) the *informant* is reliable and (2) the informant’s *tip* contains enough objective facts to justify the pursuit and detention of the suspect or the noninnocuous details of the tip have been corroborated by the police thus suggesting that the information was obtained in a reliable fashion. Hopkins, 128 Wn. App. at 862-63 (emphasis added by the Court).

² Notably, before the trial court, the State argued that Hopkins and Randall were “complimentary.” 2RP 206.

Under the first prong, this Court held that the State failed to establish the informant's reliability because although the caller gave a name and number, the officers did not know the informant or the circumstances of the call and made no attempt to call the informant back to obtain more information. This Court reasoned that "a named and unknown telephone informant is unreliable because such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable." *Id.* at 863-64 (citing *Sieler*, 95 Wn.2d at 48).

Under the second prong, this Court held that the informant's tip alone failed to provide a reasonable suspicion for an investigatory stop because although the caller reasonably identified Hopkins, his only allegation of criminal activity was that a minor appeared to have a gun and the officers did not observe any criminal behavior when they confronted Hopkins. Citing *Florida v. J.L.*, 529 U.S. 266, 272, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), this Court concluded that "[t]he reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.* at 864-66. The State argues that this Court mistakenly relied on *J.L.* because the informant in *J.L.* was completely anonymous. BOA at 16-17. However, the State misapprehends this Court's holding because this Court's reliance

on J.L. related not to whether the informant was reliable, but to whether the informant's tip was reliable.

Consistent with Sieler and J. L., this Court reversed the trial court's denial of Hopkin's motion to suppress the evidence, holding that the officers did not have a reasonable suspicion to seize Hopkins. Hopkins, 128 Wn. App. at 858, 866. Contrary to the State's argument, this Court's holding does not conflict with Randall. In Randall, 73 Wn. App. at 228, Division One of this Court relied on State v. Lesnik, 84 Wn.2d at 944, which recognized that "no single rule can be fashioned to meet every conceivable confrontation between the police and citizen." Our Supreme Court determined that when "[e]valuating the reasonableness of the police action and the extent of the intrusion, each case must be considered in light of the particular circumstances facing the law enforcement officer." Id. The Randall Court therefore held that "where an investigatory stop is based on information given the detaining officer by another person, the stop is valid if under the totality of the circumstances the officer has a reasonable suspicion that the defendant was engaged in criminal activity." Randall, 73 Wn. App. at 228-29. It is evident that this Court did consider the totality of the circumstances in applying the long-established Sieler test to conclude that the officers did not have a reasonable suspicion that Hopkins was engaged in criminal activity.

The State cites several federal cases asserting that Hopkins “runs contrary to the full weight of federal law,” but the cases are clearly distinguishable and consequently have no bearing on this case. BOA at 17-29. Accordingly, the trial court properly relied on Hopkins, which holds the State to its burden under our state and federal constitutions, to articulate specific and objective facts that raise a reasonable suspicion that the person seized has committed or is about to commit a crime.

2. The trial court correctly granted the defense’s motion to suppress the evidence because the facts of this case are all but identical to the facts in *Hopkins*.

The State argues that Hopkins is distinguishable from this case because the 911 informant gave her phone number, address, and specific details of the three men. BOA at 15. To the contrary, the record substantiates that the facts of this case are all but identical to the facts in Hopkins.

In Hopkins, dispatch informed officers that a 911 citizen informant reported a minor might be carrying a gun. The informant described a black male, 17 [years of age], wearing a dark shirt and tan pants, and carrying a green backpack and a black backpack. The informant saw the person scratching his leg with what looked like a gun. Approximately seven minutes later, the informant called again reporting that the person was now at a pay phone at a certain address and he put the gun in his

pocket. A computer in the officers' patrol car provided the informant's name and phone numbers. Hopkins, 128 Wn. App. at 858-59. The officers testified that they did not know the informant, did not know anything about the informant, and did not know if the informant knew Hopkins. The officers made no attempt to contact the informant. Id. at 859.

Based solely on the informant's tip, the officers went to the public pay phone and saw a black male who resembled the informant's description. The officers did not observe a gun or any criminal or suspicious activity. The officers approached Hopkins and told him to put his hands up in the air. They asked him if he had a gun and when he said he might have a gun in his pocket, they frisked him and found a revolver in his pants pocket. Id. The officers handcuffed Hopkins, placed him in the patrol car, and advised him of his rights. After learning that he had several outstanding warrants and a felony conviction, they arrested him. During a search incident to arrest, they found a small baggie containing a white substance that later tested as methamphetamine. Id.

Here, 911 dispatch received a call from a citizen informant reporting three men walking on a street with two small dogs and that one of the men was carrying a gun. The informant described a black male wearing a blue or purple knit cap, a green backpack, and blue jeans carrying a silver handgun; another black male wearing all blue clothing;

and another no-description male. 1RP 6, 10, 26-27, 58-59, 2RP 104, 125-26. The informant provided a name, address and phone number. 1RP 6, 26-27, 58. The officers who responded to the dispatch did not know the informant, did not know anything about the informant, and did not attempt to contact the informant. 1RP 10, 28, 55-56, 70-71, 73-74, 2RP 105-06, 119-22, 173-78.

Sergeant Griswold testified that she "self-dispatched and immediately began an area check to search for these armed suspects." 1RP 6, 10. She admitted that she made no effort to contact the caller:

Q. Now, you had no way of -- you didn't make any effort to contact the individual that made the report?

A. Correct.

Q. Do you know this individual that made the report?

A. No.

Q. Do you know whether this individual is reliable?

A. No.

Q. Do you know whether this individual actually knows these three individuals?

A. No.

Q. Do you know whether the individual that made the report may have called in a report to try to get these three individuals in trouble?

A. I have no idea where this person got their information, although it was accurate.

1RP 70-71.

Sergeant Mueller testified that when he received the dispatch, “[t]here was nothing that said an actual crime had been committed.” 2RP 122. The CAD log had the caller’s phone number but he “did not look at it” even though he had a cell phone and could have contacted the caller. 2RP 119. Mueller admitted that “[i]t could be done.” 2RP 119. He acknowledged that none of the officers who responded to the dispatch knew of any crime being committed because there was no report of the man displaying the gun or threatening somebody with the gun. 2RP 105-06. Sergeant Reopelle admitted that when he responded to the dispatch, he made no attempt to contact the caller. 2RP 173-74. Reopelle received the CAD log that provided the caller’s name but he did not look at it that closely because “[w]e don’t have time to investigate a caller’s response.” 2RP 178.

An officer’s reasonable suspicion “must be measured by what the officers knew *before* they conducted their search.” Hopkins, 128 Wn. App. at 865 (citing J.L., 529 U.S. at 271)(emphasis added by the Court). The officers acknowledged that there was no crime in progress and that is was not a crime to merely possess a gun. 1RP 33, 35, 2RP 103, 105-07. When

the officers initially contacted Johnson, Miranda, and Rutledge, the officers did not see a gun and did not notice any suspicious or criminal activity. 1RP 47-48, 2RP 111, 172. The three men were nonchalantly standing on a street corner with two small dogs. 1RP 6-7. Griswold "immediately" got out of her patrol car and confronted the three men. 1RP 7. She directed Johnson to the ground, handcuffed him, and "immediately patted him down." 1RP 8. Griswold admitted that she always suspects criminal activity:

Q. Tacoma is divided into four sectors?

A. Correct.

Q. Have you patrolled all four sectors?

A. Yes.

R. Is there crime in all four sectors?

B. Yes.

Q. Are you suspicious of everyone that resides in Tacoma because there is crime in all four sectors?

A. Yes.

1RP 39-40.

As in Hopkins, the officers had no reasonable suspicion to seize Johnson because the informant was not reliable and the informant's tip did not contain enough objective facts to justify an investigatory stop.

Hopkins, 128 Wn. App. at 862-63. The trial court therefore properly granted the defense's motion to suppress the evidence.

3. The trial court correctly granted the defense's motion to suppress because the frisk for weapons was unlawful.

An officer may 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, 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 makes the frisk unlawful and the evidence seized inadmissible. Id.

Here, the record substantiates that the investigatory stop of Johnson was unjustified and there was no reasonable concern of present danger. 1RP 10, 28, 33, 35, 55-56, 70-71, 73-74, 2RP 103, 105-07, 119-22, 173-78. Consequently, the pat down was unlawful and the evidence seized from Johnson is inadmissible. As our Supreme Court emphasized, "[A] frisk is a narrow exception to the rule that searches require warrants. The courts must be jealous guardians of the exception in order to protect the right of citizens." Setterstrom, 163 Wn.2d at 627.

Although the trial correctly granted the defense's motion to suppress the evidence, it erroneously concluded that the investigatory stop

and subsequent search was lawful. CP 64-65, 145-46. Nonetheless, this Court may affirm the trial court on any ground within the pleadings and proof. State v. Michielli, 132 Wn.2d at 242-43, State v. Hudson, 79 Wn. App. 193, 194, 900 P.2d 1130 (1995), affirmed, 130 Wn.2d 48, 921 P.2d 538 (1996).

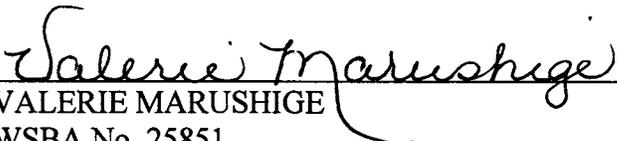
D. CONCLUSION

“Some underlying factual justification for the informant’s conclusion must be revealed so that an assessment of the probable accuracy of the informant’s conclusions can be made. It simply makes no sense to require some indicia of reliability that the informer is personally reliable but nothing at all concerning the source of his information.” Sieler, 95 Wn.2d at 48.

For the reasons stated, this Court should affirm the trial court’s decision granting the defense’s motion to suppress the evidence.

DATED this 5th day of December, 2008.

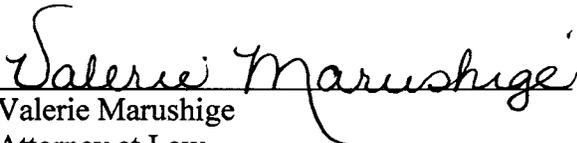
Respectfully submitted,


VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Respondent Desmond Ray Johnson

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 Steven Trinen, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Desmond Ray Johnson, 614 S 48th Street, Tacoma, Washington 98408. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5th day of December, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

FILED
COURT OF APPEALS
DIVISION II
08 DEC -8 AM 9:24
STATE OF WASHINGTON
BY  DEPUTY