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DIVISION II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

REMANDEZ M. NELSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Judge John McCarthy and Judge Bryan Chushcoff

No. 09-1-02169-6

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court correctly find that Officer Grant properly stopped the vehicle for a traffic infraction?
2. Did the trial court properly admit evidence defendant voluntarily abandoned by placing it under the vehicle with no unlawful police action prompting the abandonment?
3. Did Officer Grant properly assert control of a potentially dangerous scene when he requested that all occupants of the vehicle move to the front of his patrol car?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Remandez Matthew Nelson, on April 24, 2009, with one count of unlawful possession of a controlled substance with intent to deliver, and one count of carrying a firearm without a permit. CP 1-2.

On October 29, 2009, the court held a CrR 3.5 and 3.6 hearing to determine whether evidence and confession acquired during a vehicular stop by law enforcement could be admitted. CP 8. After hearing testimony from the arresting officer, the court determined that the evidence was admissible. CP 8-11.

On February 1, 2010, in an amended information, the State dropped count II, carrying a firearm without a permit. CP 12-13. The court found defendant guilty of unlawful possession of a controlled substance with intent to deliver at the conclusion of the bench trial on February 1, 2010. CP 31-33.

The court sentenced defendant to 24 months confinement on March 5, 2010. CP 17-30. Defendant filed a notice of appeal on March 31, 2010. CP 34-35.

## 2. Facts

On April 23, 2009, Officer Aaron Grant of the Lakewood Police Department, proceeding north on South Tacoma way, observed a burgundy Chevy Impala and several other vehicles proceeding southbound. RP<sup>1</sup> 9. Wanting to observe several of the vehicles further, he performed a legal u-turn, intending to monitor the vehicles. *Id.*

Upon completing the turn and positioning himself behind the Chevy Impala, the car accelerated rapidly away from him. RP 9. The car exceeded the posted speed limit of 35 mph and made a quick right turn down an alley. RP 9-10. Officer Grant considered this behavior very unusual since, based on his experience as a patrol officer, most people

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<sup>1</sup> The Report of Proceedings from October 29, 2009, will be referred to as RP throughout this brief.

slow down when they see his vehicle. RP 15. Based on this unusual behavior, he pursued the vehicle. RP 11.

As Officer Grant turned down the alley in pursuit of the Impala, he activated his lights and siren. RP 14. Although he briefly lost sight of the vehicle when it turned into the alley, he quickly found it further down the alley as it stopped. RP 13. He considered the area to be a “high crime area.” RP 14. Immediately after the vehicle stopped, defendant and another person exited the vehicle. *Id.* Officer Grant testified that while most people, when seeing a police car with its lights and sirens active, pull to the right immediately and stay in their vehicle, the car in this instance parked sideways in the street and multiple people immediately jumped out of the car. RP 13-15. Defendant proceeded to the front of the vehicle and bent down near the front driver’s side tire. RP 14.

Concerned with the fact that people had exited the vehicle, the conduct of the vehicle’s occupants, the high crime nature of the surrounding area, and the fact that he was by himself, Officer Grant directed them to stay near the hood of the patrol car while he contacted backup. RP 15-16. Officer Grant spoke to the defendant and the others while he waited. RP 16.

When Officer Babcock arrived, Officer Grant directed him to investigate under the front tire, the location to which he had seen defendant go. RP 16. Officer Babcock found a plastic baggy containing nine smaller bags of marijuana. RP 17. Officer Grant spoke to one of the

occupants of the vehicle, a woman who claimed to be the owner. RP 19. She explained that they had picked up defendant who showed them the bag of marijuana and asked for suggestions on where to sell it. RP 19-20.

Officer Grant read defendant his *Miranda*<sup>2</sup> warnings from a standard rights advisement card. RP 20. Defendant stated that he understood the rights as Officer Grant read them. RP 22. When asked about the marijuana, defendant claimed ownership of it but denied that it was marijuana, saying it was only “weed.” *Id.* At no point did defendant invoke his right to remain silent or his right to an attorney. RP 23.

After speaking to defendant, Officer Grant arrested him and booked him into jail. RP 23-24.

C. ARGUMENT.

1. LAW ENFORCEMENT, BASED ON EXPERIENCE, LOCATION, GENERAL CONDUCT OF THE SUSPECT VEHICLE, AND COMMISSION OF A TRAFFIC INFRACTION, CONDUCTED AN APPROPRIATE INVESTIGATIVE DETENTION WHICH ULTIMATELY LEAD TO THE ARREST OF DEFENDANT.

It is a well established exception to the warrant requirement under both the Fourth Amendment and the Washington Constitution, Article I § 7, that an officer may conduct an investigative detention where there is a substantial possibility that criminal activity has occurred or is about to

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<sup>2</sup> *Miranda v. Arizona*, 396 U.S. 868, 90 S. Ct. 140, 24 L.Ed.2d 122 (1969).

occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). See also *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997) (holding *Terry* stops permissible under the Washington Constitution); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968). Probable cause is not required for a *Terry* investigation because it is significantly less intrusive than an arrest. *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed.2d 357 (1979); *Kennedy*, 107 Wn.2d at 6. See also, *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

“To justify a seizure on less than probable cause, *Terry* requires a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a *crime*.” *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002), *citing Terry*, 392 U.S. at 21 (emphasis in original). However, under the Washington Constitution, the question of whether an officer had grounds for a *Terry* investigation is tested against the totality of the circumstances, including the officer’s subjective belief. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007), *citing State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). “When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention.” *Kennedy*, 107 Wn.2d at 6.

A law enforcement officer only requires a reasonable suspicion to stop a vehicle to investigate a possible traffic violation. *State v. Duncan*, 146 Wn.2d 166, 174-175, 43 P.3d 513 (2002). In this regard, the Washington Supreme Court has analogized a traffic stop with the reasonableness criteria of a *Terry* stop. *Ladson*, 138 Wn.2d at 350. It is well established that police may stop a car for speeding or any other infraction. *Day*, 161 Wn.2d at 897, quoting *State v. Johnson*, 128 Wn.2d 431, 454, 909 P.2d 293 (1996).

In determining whether or not law enforcement conducted a proper *Terry* investigation, the court must consider everything up until the initial seizure. *State v. Sweet*, 44 Wn. App. 226, 230, 721 P.2d 560 (1986). “A person is ‘seized’ within the meaning of the Fourth Amendment of the United States Constitution when restrained by means of physical force or show of authority.” *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds by *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). The Supreme Court of the United States held that, at the time the seizure begins, the law enforcement officer seizes all occupants of the vehicle; the Supreme Court does not distinguish between the driver and passengers with respect to the Fourth Amendment analysis. *Brendlin v. California*, 551 U.S. 249, 256, 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007).

Although the court views a suspect's presence in a high crime area a relative consideration in conducting a *Terry* investigation, it cannot be the sole reason in justifying it. *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L.Ed.2d 570 (2000), citing *Brown*, 443 U.S. 47. See *State v. Larson*, 93 Wn.2d 638, 642-643, 611 P.2d 771 (1980). When considering suspects who evade law enforcement, "[h]eadlong flight-wherever it occurs-is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.*

When reviewing a trial court's ruling after a suppression hearing, unchallenged findings of fact are verities on appeal; challenged findings will be upheld so long as they are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). "A trial court's conclusions of law on a motion to suppress evidence are reviewed de novo." *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009), citing *State v. Carneh*, 153 Wn.2d 274, 281, 193 P.3d 743 (2004).

Here, Officer Grant observed the vehicle rapidly accelerate and make an immediate right turn once his patrol car came up behind them on the roadway, behavior inconsistent with Officer Grant's expectation of typical driving behavior. CP 9 (Finding of Fact #6); RP 9-10, 15. When the vehicle accelerated away, Officer Grant observed it exceed the posted speed limit. CP 9 (Finding of Fact #4); RP 10. At minimum at this point, Officer Grant had lawful authority to stop the car for speeding.

He observed the vehicle as it turned down an alley, a route a driver would not normally take “as a general matter driving about[.]” RP 12-13. Officer Grant knew the area to be designated a high crime area by law enforcement. CP 9 (Finding of Fact #7). He also knew the frequent gang activity, narcotics crime, and arrests occurred in the area. RP 14. All of the behaviors exhibited by the vehicle appeared suspicious to Officer Grant, leading him to believe that some sort of criminal activity occurred or would soon occur. RP 15. The court concluded that based on his experience, the location, and the conduct of the suspect, Officer Grant executed an appropriate *Terry* investigation. CP 11 (Conclusion of Law #1).

In *State v. Gatewood*, law enforcement conducted a *Terry* investigation based on “(1) Gatewood's widened eyes upon seeing the patrol car, (2) his twist to the left like he was trying to hide something, (3) his departure from the bus shelter, and (4) his crossing the street mid-block.” 163 Wn.2d 534, 540, 182 P.3d 426 (2008). The court held that the officers had insufficient information to conduct a proper *Terry* investigation. Here, contrasting *Gatewood*, the car rapidly accelerated away upon seeing the police vehicle, exceeded the speed limit, and turned quickly down an alley. RP 9-10, 12-13. In *Gatewood*, the court could not conclude that the suspect behaved in a manner inconsistent with normal,

law-abiding behavior. Here, Officer Grant observed behavior consistent with, at the least, a traffic violation for which he had full authority to detain the suspect vehicle.

Defendant argues that “[a]lthough Grant had general unspecified experience as a police officer, the trial court did not enter a finding that his professional expertise contributed to his suspicion.” App. Br. at 9. The court specified Officer Grant’s experience, describing him as “an experienced patrol officer with 3 years service for the Lakewood Police Department and 2 years service for the Seattle Police Department.” CP 8 (Finding of Fact #1). Further, the court states that “[t]he officer believed based on his training and experience that the vehicle was purposefully fleeing or avoiding him. The officer noted that the vehicle’s driving was unusual and inconsistent with how people normally drive when a police car is present, i.e. reduced speeds and complying with all traffic laws.” CP 9 (Finding of Fact #6). When the court concluded that Officer Grant had conducted a lawful *Terry* investigation, it stated that “[b]ased on the totality of the circumstances listed above, the officer had a reasonable suspicion that a traffic infraction and/or a crime had occurred or was ongoing.” CP 11 (Conclusion of Law #1). Contrary to defendant’s claim that the State failed to “prove the officer’s training and experience factored into the reasonable suspicion calculus[,]” the trial court documented sufficient findings of fact for the court to properly conclude that Officer Grant conducted a valid *Terry* investigation. App. Br. at 10.

Officer Grant had legal authority to stop the car for speeding. Officer Grant also observed suspicious behavior, including driving at speed in excess of the limit, which lead him to believe that the occupants of the suspect vehicle had committed a crime or would soon commit one. Consistent with *Terry*, Officer Grant properly stopped the suspect vehicle. Thus, the court properly admitted the evidence obtained from the properly conducted *Terry* investigation.

2. DEFENDANT ABANDONED EVIDENCE WITHOUT ANY DIRECTION OR SIEZURE BY LAW ENFORCEMENT AND THUS THE TRIAL COURT PROPERLY ADMITTED THE ABANDONED EVIDENCE AT TRIAL.

Law enforcement officers do not require a warrant or probable cause to retrieve voluntarily abandoned property. *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001). When a defendant discards property, it “is not voluntarily abandoned where the defendant shows (1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment.” *State v. Nettles*, 70 Wn. App. 706, 708, 855 P.2d 699 (1993). See *State v. Whitaker*, 58 Wn. App. 851, 795 P.2d 182 (1990). Here, defendant has failed to show that his abandonment of the marijuana occurred involuntarily.

In *Reynolds*, a deputy marshal stopped a vehicle for a cracked windshield. 144 Wn.2d at 201. Reynolds, the passenger in the vehicle,

had a coat on the floorboard in front of him. *Id.* When the deputy arrested the driver for driving with a suspended license, Reynolds exited the vehicle. *Id.* at 202. The deputy asked Reynolds to return to the vehicle until he finished processing the driver. *Id.* When the deputy returned to the vehicle, he no longer saw the coat in the vehicle. *Id.* Circling to the passenger side of the vehicle, the deputy saw the coat stuffed under the vehicle. *Id.* Inside, the deputy found drug paraphernalia and a controlled substance. *Id.* The deputy promptly arrested Reynolds. *Id.*

At trial, Reynolds attempted to suppress the evidence. *Id.* at 202. The trial court denied the motion. *Id.* On appeal, the Washington Supreme Court affirmed the lower decision, holding that the deputy did not unlawfully detain Reynolds, thus rendering Reynolds' abandoning of the coat voluntary. *Id.* at 205. The trial court properly admitted the evidence. *Id.*

The case at bar does not differ substantially from the case in *Reynolds*. Here, Officer Grant testified that defendant exited the vehicle after it stopped with no direction from law enforcement: "As I [sic] driving up on it, a couple of people are jumping out of the car real quick." RP 14. Defendant proceeded to the driver's side tire and discarded the bag of marijuana under the car. RP 14. This abandonment occurred subsequent to Officer Grant's lawful traffic stop of the vehicle. CP 11 (Conclusion of Law #1). However, Officer Grant had not, at the time of the abandonment, directed defendant to the hood of his car. RP 14. Thus,

when Officer Babcock found the bag, he recovered voluntarily abandoned property.

Since defendant voluntarily abandoned the evidence found by Officer Babcock, he retained no privacy interest in it. Neither the federal nor state constitutions provide protection for voluntarily abandoned property with respect to admission at trial. Therefore, the trial court did not err in denying defendant's motion to suppress the evidence.

3. LAW ENFORCEMENT HAD AUTHORITY TO DIRECT DEFENDANT AND OTHER OCCUPANTS OF THE VEHICLE IN ORDER TO MAINTAIN SAFE CONTROL OF THE SCENE UNTIL AN ADDITIONAL OFFICER ARRIVED.

Washington Constitution, Article I § 7 often provides greater privacy protections than the Fourth Amendment of the United States Constitution. *State v. Mendez*, 137 Wn.2d 208, 217, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007)<sup>3</sup>. Generally, it prevents law enforcement officers from seizing passengers in a legally stopped automobile. *Mendez*, 137 Wn.2d at 220.

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<sup>3</sup> In *Brendlin v. California*, the Supreme Court of the United States held that when a police officer conducts a traffic stop, passengers in the vehicle are also seized at the commencement of the stop and therefore may challenge the appropriateness of the stop. 551 U.S. 249, 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007).

When officers “do not have articulable suspicion that an individual is armed or dangerous and have nothing to *independently* connect such person to illegal activity, a search of the person is invalid under article I, section 7.” *State v. Parker*, 139 Wn.2d 486, 498, 987 P.2d 73 (1999) (emphasis in original). However, a law enforcement officer may order passengers to either stay in the vehicle or exit the vehicle if she can “articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens.” *Mendez*, 137 Wn.2d at 220.

“To satisfy this objective rationale, we do not mean that an officer must meet *Terry* 's standard of reasonable suspicion of criminal activity.” *Mendez*, 137 Wn.2d at 220. The Washington Supreme Court set forth a number of non-exclusive factors which an officer may have to direct passengers during a traffic stop. *Mendez*, 137 Wn.2d at 220. These 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.” *Id.* at 221.

When Officer Grant pulled up behind the stopped suspect vehicle, defendant and another immediately exited the vehicle. RP 14. Defendant exited from the driver’s side rear door of the vehicle. RP 14. Officer Grant testified that most people, when seeing a police car with its lights and sirens active, pull to the right immediately and stay in their vehicle.

The car in this instance parked sideways in the street and multiple people immediately exited the car. RP 13-15. Officer Grant observed defendant proceed to the front of the vehicle and bend down near the front driver's side tire: "He was bending down and reaching under the car." RP 14.

Officer Grant considered the area a "high crime" area. RP 14. Although he described the it as "reasonably light outside[,] " the alleyway had no streetlights or any other sort of lighting. RP 16. Concerned with the fact that the occupants had left the vehicle, he knew the area to be a "high crime" area, the suspicious behavior of defendant, and the fact the he was the only officer on the scene, Officer Grant directed the occupants of the vehicle to stay near the hood of his patrol car while he contacted backup. RP 14-16. His actions, based on the circumstances he observed, merely placed all of the suspects into a safe position until an additional officer could arrive on the scene.

Consistent with the factors held in *Mendez*, Officer Grant directed the occupants of the suspect vehicle out of the car and to a visible location at the front of his patrol vehicle. His temporary detention of defendant and the other occupants of the vehicle, separate from the initial traffic stop, comported to the rule set forth in *Mendez* for an officer controlling the scene of an automotive stop. Thus, it did not constitute an illegal seizure.

D. CONCLUSION.

Officer Grant conducted a proper *Terry* stop based on his observation of driving, experience, training, and the totality of the circumstances. During the stop, he discovered a significant amount of marijuana, voluntarily abandoned by defendant, and arrested him. The court, on reviewing the circumstances, properly admitted the evidence against defendant. For the reasons argued, the State respectfully requests that defendant's sentence be affirmed.

DATED: March 9, 2011.

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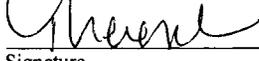


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\_\_\_\_\_  
Andrew Asplund  
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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