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C. H. H. H.

NO. 40937-2-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

AUGUST IRA BASS,

Appellant.

BRIEF OF RESPONDENT

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I. FACTS

On April 11, 2010, Sergeant Scott Neves of the Castle Rock Police Department stopped Mr. Bass for suspicion of hit and run. He was informed by Cowlitz County Communications Center that State Patrol was looking for a vehicle involved in a hit and run. He was positioned at the Park and Ride near Exit 49 on I-5. RP 7, 1-5. While waiting at the park and ride, Sergeant Neves observed a white passenger car, travelling at a high rate of speed, fail to stop for a stoplight as it passed his location. RP 7, 9-12. The passenger car then entered I-5, southbound. RP 7, 13. At the same time Sergeant Neves started his patrol vehicle, a vehicle pulled in front of him and the female passenger was indicating that the white passenger car had just struck their vehicle. RP 7, 18-24.

Sergeant Neves then pursued the white passenger vehicle. RP 8, 6-7. After observing damage on the driver's side of the white vehicle, Sergeant Neves pulled behind it and followed as the driver took Exit 48. RP 8, 12-15. Sergeant Neves initiated a stop at the bottom of the off ramp.

Sergeant Neves contacted the driver, informing him of the reason for the stop. RP 9, 1. He obtained the driver's license. RP 8, 24-25. The driver of the vehicle was Mr. Bass. RP 10: 3-12. When performing a check on Mr. Bass's driving record, the other vehicle involved in the hit and run pulled in behind him. RP 9, 6-7; 10, 8-23.

Sergeant Neves made a brief contact with the passengers of the victim vehicle. He confirmed the vehicle was the same vehicle that approached him at exit 49, and informed the passengers to remain in their vehicle. RP 28-29.

He then went to return to Bass, when he noticed he was reaching around in the passenger compartment of the vehicle, underneath the driver's seat, the center console, and the glove box area. RP 11, 10-16. Because of the movements, Sergeant Neves was alerted to concerns of officer safety, believing Bass might have a weapon. RP 11, 20-22. At that point, he became fearful for his safety and that Mr. Bass may harm him, because these were not normal actions for a traffic stop, where most people simply sit in their vehicle and wait for contact to be made rather than reach around in the vehicle. RP 11, 23-25; RP 12, 6-11. He believed Mr. Bass was attempting to hide a weapon. RP 13, 16.

Based on his concerns for his safety, Sergeant Neves chose to wait until a second police unit arrived before re-contacting Bass. RP 12, 20-23. Indeed, the movements were so concerning that Sergeant Neves moved to the front side, passenger quarter panel of his vehicle for protection, where he remained until a second unit arrived 15 minutes later. RP 14, 20-23; 15, 5-6. That position gave him the ability to see the defendant, view his

movements, and provide cover and an area of retreat if Mr. Bass took out a weapon. RP 15, 1-4.

Prior to his arrival, Washington State Patrol Trooper, Brad Moon, had a phone conversation with Sergeant Neves. Sergeant Neves informed Trooper Moon of the urgency of the situation. RP 16, 4-9. When Trooper Moon arrived, he noticed Sergeant Neves, who was out of his vehicle, begin to retreat behind his patrol vehicle and walk towards him. RP 39, 1-12. Moon then walked past the victim's vehicle and the two officers made contact near the rear of Neves' patrol car. RP 39, 13-17. Sergeant Neves never made eye contact with Trooper Moon, his eyes remained trained on Bass, who was still in his vehicle. RP 39, 19-22.

Trooper Moon was alerted by Sergeant Neves' behavior. He had a working rapport with Sergeant Neves, and understood through his contact with Sergeant Neves that the situation was serious. RP 40-1.

Sergeant Neves informed him that they needed to get Bass out of the vehicle because he has been moving around in the vehicle and might have a weapon. RP 16, 12-15. Trooper Moon approached the vehicle and Bass, while Sergeant Neves took a contact cover position at the rear trunk of the vehicle in case something bad happened. RP 17, 1-7.

Trooper Moon contacted Bass and advised him that, based on his movements, he was not under arrest but was being detained to ensure

officer safety and the safety of those in the area. RP 17, 15-19; He performed a protective frisk of Bass, informed him of his Miranda rights, placed him in handcuffs, and then had him sit in the back seat of a patrol car. RP 18, 1-12. Trooper Moon made clear to Bass that he was not under arrest and that he needed to perform a search to determine whether or not weapons were present in his vehicle.

Sergeant Neves directed Moon as he searched the vehicle, limited to those areas where Bass made movements. During that search, Sergeant Neves observed what he thought were narcotics paraphernalia. He informed trooper Moon. However, neither officer had completed the search for weapons within the front area of the vehicle. RP 25, 1-13; 26, 8-11.

At the time of the search, neither Sergeant Neves nor Trooper Moon had determined whether they would be releasing Bass to his vehicle. The decision to release would have been Trooper Moon's, because it was his investigation. RP 20, 24-25. Typically, if the offense is not substantial, like possession of marijuana or a hit and run, Trooper Moon would cite for the offense and then release the subject. RP 21, 6-8.

The search of the vehicle did not reveal any weapons. The search did result in the discovery of multiple packages of marijuana, cash and

other paraphernalia. RP 26, 13-16. Bass was charged with possession of marijuana with intent to distribute.

Testimony at Motion Hearing

At motion hearing, Sergeant Neves described the movements as furtive. He defined “furtive movements” as hidden, erratic in behavior, quick, rapid movements, that are not usually expected, which indicate either an attempt to hide something. RP 32-33. In fact, the movement observed by Sergeant Neves was the most he had observed in his nearly 20 year career in law enforcement. RP 12, 14-15. He stated that he believed Bass was attempting to hide a weapon. RP 13, 16.

Trooper Moon described that one of his primary concerns is to make certain he goes home at night. While there are numerous hazards, weapons are the biggest one inside a vehicle. Consequently, he needs to know where they are. Indeed, if he observes furtive movements or another officer describes that type of movement, where hands are going into areas he cannot see, he may not know what possible threat they present. RP 33, 7-18. He has observed furtive movements and has performed searches for weapons based on those movements. RP 33. He has also retrieved weapons from those areas in which movements were made. RP 34, 1-15. He testified that he has found handguns, knives, brass knuckles, and that

all those weapons present a risk to the safety of the officer and the people in the area of the stop. RP 34-35. He also testified that he has retrieved weapons from the very spots in which other people were lunging or making hurried movements towards. RP 34, 11-15.

Trooper Moon testified that he has worked with Sergeant Neves for a number of years. RP 37, 15. Trooper Moon stated that in a very short conversation Sergeant Neves advised him that he needed to get to the scene immediately. Based on that, he responded with emergency lights and sirens and attempted to arrive as quickly as possible. RP 37-8. Trooper Moon knew that because he is not one to overreact to situations, that when Sergeant Neves called him, informed him to hurry to his position, that the situation could be serious. RP 39-40.

Trooper Moon stated that when he arrived at the scene, Sergeant Neves informed him that he saw Bass making furtive movements within the vehicle. RP 41, 1-9. Trooper stated that based on Sergeant Neves' observations the two officers had concerns whether weapons might be involved. RP 41, 7-9. Because they were intent on determining what was happening in Bass's vehicle, Trooper Moon told Sergeant Neves they needed to get Bass contained, preventing any further chance for him to either obtain a weapon or flee the scene of the stop. RP 42, 1-6. Indeed,

Trooper Moon admitted that his concerns were heightened based on the recent shootings of the Lakewood police officers. RP 41, 23-5.

The officers walked to the back of Bass's vehicle. Trooper Moon asked Bass to show his hands and Bass raised his hands. RP 42, 13-15. Moon then told Bass to exit the vehicle and, once Bass had exited, placed him in handcuffs. Moon then advised Bass of his rights. RP 42, 23-4. Once he advised Bass of his rights, Moon specifically stated; "you're not under arrest at this time, you're being detained for officer safety." RP 43, 1-3; RP 53, 4-8. He then informed Bass that Officer Neves had observed him diving all over the vehicle, and that he wanted Bass to understand his rights. RP 43, 3-5. Bass stated that he understood. RP 43, 6. Moon then performed a frisk of Bass, which resulted in the recovery of a baggie filled with marijuana. RP 43, 14-8. Though he would have normally arrested Bass for the marijuana, Moon did not because he was focused on whether there were any weapons in the vehicle, and determining the safety of the situation. RP 44, 1-5. Moon testified that he wanted to secure the vehicle in case Bass was to return to the vehicle, because it was a possibility that Bass might get back into the vehicle. RP 44, 4-8.

Trooper Moon then testified that when he detained Bass he had not determined probable cause to arrest him on any charges. RP 44, 10-17. Acknowledging that the stop was to investigate whether Bass was

involved in a hit and run, the investigation had not begun because the focus was on the vehicle and officer safety, Moon stated “I was mostly concerned about making sure that the vehicle is safe, because if we do let him go, what is he going to have access to as we are walking back to the car.” RP 44, 19-11.

Moon described his practice in determining whether to arrest and book or cite and release a defendant for an offense. RP 45, 1-25. He considers many things when making that determination. And was candid that he does let people go, but it depends on the situation. RP 45, 6-7. He described his thought process because it was a possibility that Bass was going to return to his vehicle. RP 45, 13-15.

At the time they detained Bass, Trooper Moon was unaware that Bass had been driving on a suspended license. RP 46, 1-3. He was only aware that Bass had been stopped for hit and run, an investigation had not occurred, and that Sergeant Neves had observed furtive movements. RP 46, 6-13; RP 58, 6-21.

Moon testified that he performed a search or frisk of the areas along with Sergeant Neves. RP 47-49; RP 54-55. He testified that multiple items of marijuana and paraphernalia were found. He testified that Sergeant Neves had informed him he had found marijuana. RP 48, 23-25. Moon further testified that even though they found drug paraphernalia he

would not stop his search within the areas Sergeant Neves observed the furtive movements, because there still could be a weapon. RP 50, 8. He testified that even when finding the marijuana and paraphernalia it was “still a real possibility that, that [Bass] may end up getting to drive away depending on how cooperative he is and those kinds of things. So this is somebody I may be putting back in this vehicle. I need to make sure that I’m still safe if he goes back in the car.” RP 50, 8-18.

Moon also described the difference between a search and a frisk. He stated that a search can include opening an Altoids container, but a cursory frisk of the vehicle for weapons does not include opening up small items and searching every little thing. RP 55, 6-11. He was looking under the seat, but not under pieces of paper; he was not opening up Bass’s backpack, but did look in the center console. RP 55, 1-25. He testified that he looked in the areas that would likely contain a weapon. RP 55, 19-25.

Moon did arrest Bass following the search for weapons. RP 59. However, no further search of the vehicle was performed after Bass was arrested. RP 60, 9-17.

After hearing the testimony, the trial court held that the stop was justified, and that both officers had legitimate safety concerns. CP 40, FF 1-2. The court held that neither the search of Bass nor the search of the car

was pretextual and that the search of the vehicle was reasonable. CP40, FF 3-4. The court denied the motion to suppress. CP 40.

Bass was then tried by jury for possession of marijuana with the intent to deliver. The jury found Bass guilty of the charge.

II. ISSUES

1. Whether officers were reasonable to search a vehicle after observing multiple and continued furtive movements made by the appellant, which caused the officers to have concern for their safety, prior to conducting an investigation for hit and run?

III. ARGUMENT

At the time the protective search was performed, Trooper Moon had not conducted a criminal investigation. His response to the vehicle and his interaction with Mr. Bass was based on the observations made by Sergeant Neves and the safety concerns which developed. Before a criminal investigation could be performed, both officers had to insure that their safety and the safety of the community were not at risk. Given the furtive movements of the defendant, the fears that those movements were directed to places where weapons could be hidden or accessed, the fact Trooper Moon had not determined whether the defendant had in fact committed a crime, which would require some investigation, and the fact

the officers had not determined whether Bass would be cited and released or booked in jail for a crime they had not yet investigated, their actions were reasonable to assuage their safety concerns prior to conducting any criminal investigation or returning Bass to his vehicle. Consequently, there was a prior justification for the intrusion into Bass's vehicle due to officer safety, the trial court was justified in determining the admissibility of the inadvertently discovered marijuana and other evidence of distribution. *State v. Lair*, 95 Wn.2d 706, 714, 630 P.2d 427 (1981) Therefore, the ruling on the motion to suppress evidence must be affirmed because substantial evidence supports the findings of fact and those findings of fact support the conclusions of law. *State v. Ross*, 106 Wn.App. 876, 880, 26 P.3d 298 (2001).

1. The search did not violate article 1, section 7, because the officers had reasonable fear for their safety based on the furtive movements made by Bass.

Article 1, section 7 protects against warrantless searches. It is a strict rule with narrowly drawn exceptions, which the State has the burden of proving. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

The court should evaluate the entire circumstances of the traffic stop when determining whether the search was reasonably based on officer safety concerns. *State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128

(2002). If a police officer has a reasonable belief that the suspect in a *Terry* stop might be able to obtain weapons from a vehicle, the officer may search the vehicle without a warrant to secure his own safety, limited to those areas in which a weapon may be placed or hidden. *State v. Holbrook*, 33 Wn.App. 692, 696, 657 P.2d 797, *rev. denied*, 99 Wn.2d 1023 (1983). Searches are generally allowed if a suspect was observed making a furtive movement where it appeared he was concealing a weapon in the passenger compartment of a vehicle. *State v. Chang*, 147 Wn.App. 490, 496, 195 P.3d 1008 (2008); *Kennedy*, 107 Wn.2d at 12, 726 P.2d 445; *Larson*, 88 Wn.App. at 857, 946 P.2d 1212; *Glossbrener*, 146 Wn.2d at 679, 49 P.3d 128.

Further restrictions have been placed on the protective search exception to search without a warrant in order to assure that searches are reasonably related to concerns for officer safety. When an officer reasonably believes that a suspect's vehicle contains a weapon, the ability to search is limited to the area within the immediate control of the suspect. *Chang*, 147 Wn.App. at 496, 195 P.3d 1008, *quoting Kennedy*, 107 Wn.2d at 12, 726 P.2d 445.

In *Chang*, where the defendant challenged the protective search of his vehicle for weapons, the court of appeals upheld the defendant's conviction for unlawful possession of a firearm. 147 Wn.App. 490. In that

case, police responded to a suspected forgery at a local bank. A suspect inside the bank stated that he had arrived in a car driven by the defendant, who was observed in a vehicle in the bank's parking lot. The suspect informed police that the defendant had a gun on his person. Police detained the defendant, placed the defendant in handcuffs, and performed a search of the vehicle for weapons. Officers found a weapon underneath a floor mat. The defendant was then arrested for carrying a concealed weapon. 147 Wn. App. at 493-4.

The defendant challenged the warrantless search of the vehicle. The trial court denied suppression of the weapon, concluding the search was justified by officer safety concerns. 147 Wn.App at 494. The defendant was convicted by jury of unlawful possession of a firearm in second degree and three counts of possession of stolen property second degree.

The defendant appealed the search of the vehicle and the sufficiency of evidence. He argued that the handgun should have been suppressed because he was outside his vehicle and handcuffed. He claimed that because he was outside the vehicle and handcuffed he did not have immediate access to any weapon that might be inside the vehicle. Consequently, he did not present a risk of harm to the officers. 147 Wn.App. at 496. The court disagreed. It reasoned that even if a suspect has

no immediate access to a weapon, police may conduct a protective search of a vehicle if the suspect would have a later opportunity to return to his vehicle. 147 Wn.App. at 496, *citing Larson*, 88 Wn.App. at 857, 946 P.2d 1212; *Glenn*, 140 Wn.App. at 636, 166 P.3d 1235. It further considered that securing the scene required ensuring that the reported weapon would not be available to the defendant if the police eventually released him to get back in the car. 147 Wn.App. at 497, *citing Glenn*, 140 Wn.app. at 636, 166 P.3d 1235.

In *State v. Glenn*, 140 Wn.App. at 636, 166 P.3d 1235., where the officers would have returned the defendant to his vehicle had they not found marijuana, the Court held the protective search was reasonable under article 1, section 7 of the Washington Constitution, because legitimate concerns for officer safety existed. In that case, officers stopped the defendant for suspicion that he had pointed a gun at an adolescent boy while driving. The defendant was ordered out of the vehicle at gunpoint, ordered to get down on his knees, handcuffed, read his Miranda warnings, and then placed in the back of a patrol car with an officer as other officers performed a protective search of his vehicle. The vehicle was searched and no gun was found, but officers did find a large quantity of marijuana.

The defendant moved to suppress the marijuana. The trial court held that the search was a minimally intrusive effort to establish whether

or not there was a weapon in the vehicle and that the marijuana was discovered in the course of that search. 140 Wn. App. at 652. The defendant was tried and acquitted on the weapons charge, but convicted of possession of marijuana over 40 grams. Id. at 633. The defendant appealed his conviction.

On appeal, the defendant argued the search of his vehicle violated Article 1, section 7 of the Washington Constitution, because the facts did not support the officer safety exception when officers testified the defendant made no furtive or threatening movements. 140 Wn.App. at 631. Even though the officers testified that they were not concerned for their safety because the defendant was in handcuffs at the time of the search, the court felt their beliefs that returning the defendant to his vehicle would increase the risk of officer safety because of the report that a gun had been pointed from the defendant's vehicle were reasonable. 140 Wn.App. at 635-6.

In the present case, both officers were concerned for their safety. Given the duration of the movements, the areas in which the movements were made, to return Bass to the vehicle, or to allow him to remain in the vehicle would have increased any risks to the safety of the officers. The likelihood of Bass being returned to his vehicle was present; therefore the search was reasonable and connected to their safety concerns.

2. Though detained, Bass was informed that he was not under arrest.

When trooper Moon removed Bass from his vehicle, he informed Bass that Sergeant Neves had observed several movements, and that there was concern he had a weapon. He then informed Bass that he was not under arrest, but he was being detained and placed in handcuffs, for officer safety, while the officers performed a protective sweep of the vehicle.

Under the Washington Constitution, a valid *Terry* stop may include a search of the interior of the suspect's vehicle when there is a concern for officer safety. *State v. Larson*, 88 Wn.App. 849, 853, 946 P.2d 1212 (1997). A protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events. *Larson*, 88 Wash.App. at 854, 946 P.2d 1212, citing *State v. Henry*, 80 Wn.App. 544, 552, 910 P.2d 1290 (1995).

In contrast to an arrest, a *Terry* stop does not present the same dangers to the police or to evidence of a crime. Because those risks are reduced, the degree of intrusion into the compartment of a vehicle is also reduced. Consequently, to limit the boundaries of a *Terry* stop in the same way as that of an arrest undermines the purpose of *Terry* and is unsupportable under article 1, section 7 of the Washington Constitution. *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986).

In *State v. Cunningham*, 116 Wn.App. 219, 223, 65 P.3d 325 (2003), an officer detained a jogger who matched the description of the driver of a stolen car which left the scene of a stop. The officer was unable to determine the identity of the jogger, who provided inconsistent and false answers regarding his name and date of birth. The officer placed the jogger in handcuffs and detained him for 45 minutes until another officer brought the passenger from the stolen vehicle so that they could determine the jogger's identity. The officer testified that his questions were to ascertain the man's true identity. *Id.* at 229.

The appellant in that case argued that because he was handcuffed the contact was not a *Terry* stop, but an arrest. The court noted that "handcuffing or secluding [a] suspect may be appropriate in some circumstances, but must be justified by [a] reasonable belief [the] suspect is dangerous or may flee the scene." *Id.* at 229, citing *State v. Williams*, 102 Wn.2d 733, 740-741, 689 P.2d 1065 (1984).

While the analysis in *Cunningham* was performed for purposes of determining whether or not the appellant's Fifth Amendment rights had been abused, the case is instructive. A suspect is deemed in custody for Miranda purposes as soon as his freedom is curtailed in any way associated with formal arrest. *State v. Watkins*, 53 Wn.App. 264, 274, 766 P.2d 484 (1989). However, the fact that a suspect is not free to leave

during the course of an investigative stop does not make the encounter comparable to formal arrest. *State v. Walton*, 67 Wash.App. 127, 130, 834 P.2d 624 (1992). An investigative encounter, or *Terry* stop, is not coercive since the detention is presumptively temporary and brief and less dominated by police. *Id.* At 130, 834 P.2d 624. *Terry* stops must be reasonably related in scope to the justification for its initiation. *Terry v. Ohio*, 392 U.s. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

In the current case, both officers had definite concerns for their safety. Their concerns were based on the multiple and continued, furtive movements of Bass. His movements were towards lunge areas and other areas similar to where both officers have found weapons in the past. The limited intrusion into the passenger compartment of the vehicle was for the specific purpose of assuring the safety of the officers.

Prior to performing the protective search, Bass was informed that even though he was being placed in handcuffs he was not under arrest. In this case, handcuffing Bass was appropriate to assure the safety of the officers, preventing any opportunity for Bass to obtain a weapon and then place the officers in peril. In addition, placing Bass in handcuffs was also appropriate because Bass failed to remain at the scene of a collision.

Further, it was necessary to have Bass in handcuffs and in the back seat of Trooper Moon's vehicle because Sergeant Neves was required to

direct Trooper Moon's search, limiting it to only those areas where he had seen Bass make movements. It was impracticable to have Bass outside of the vehicle and make those directions without being secured. Even during the protective search the officers need to insure their safety. Consequently, while inconvenient, securing Bass in handcuffs was reasonable, appropriate and not an arrest.

3. Even if the court finds Bass was under custodial arrest, officers were still justified to search based on reasonable officer safety concerns.

The Supreme Court has not disposed of the officer safety exception to the warrant requirement. In fact, the Court in *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751(2009) stated that a warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent the destruction or concealment of evidence of the crime of arrest. The Court did state that if a search can be delayed to obtain a warrant, the warrant must be obtained.

In *Valdez*, the Court held the search of the defendant's vehicle incident to arrest was in violation of the Fourth Amendment and Article 1, section 7, because at the time of arrest the defendant was handcuffed in the back seat of a police vehicle and did not have access to his vehicle at the time of the search. 167 Wn.2d at 760. There the defendant was arrested on

an outstanding warrant and was going to be transferred to jail. The officers had not reason to search the vehicle, because it was not reasonable to believe that evidence of the crime of arrest would be found in the vehicle. *Id* at 759.

In the current case, when asked to exit his vehicle Bass was told that he was not under arrest but was being detained because the officers had concerns for their safety. He was detained in the back seat of Trooper Moon's patrol car, while in handcuffs. Trooper Moon testified that he did not know whether the defendant would be returned to his vehicle, but it was his practice in certain investigations to release suspects. Indeed, Moon stated it was a definite possibility that Bass would have been returned to his vehicle.

Unlike *Valdez*, where the defendant was arrested on an outstanding warrant, without possibility of being returned to his vehicle, the likelihood Bass would return to his vehicle still existed at the time of the protective search. Indeed, Trooper Moon had not determined whether or not Bass had committed a crime, regardless of whether he was going to arrest Bass. Had Trooper Moon not performed the protective search and returned Bass to his vehicle, with the knowledge that Bass had been making furtive movements throughout the passenger compartment, he would have placed himself, Sergeant Neves, the victims, who were parked two vehicles away,

and the broad community in danger. *Glenn*, 140 Wn.App. at 636, 166 P.3d 1235; *Chang*, 147 Wn.App. at 497, 195 P.3d 1008. This is the sort of search *Valdez* accepts as necessary and permissible. It was not a search of locked containers, which officers could prevent access, it was a search of lunge areas and other places where weapons were likely to be hidden and obtained once Bass was returned to his vehicle.

In *Larsen*, after having been taken out of his vehicle at gunpoint, ordered to get on his knees, handcuffed and then placed in the back of a patrol car, the court did rule that it was reasonable to search the vehicle even though the defendant would likely consider himself to be under custodial arrest. 140 Wn.App. at 639. The court found that because officers limited their search to lunge areas and those areas easily accessible to the defendant, and did not search any locked containers, the search was valid incident to arrest, even if the officer did not subjectively consider the suspect formally under arrest but merely detained. 140 Wn.App. at 637, citing *State v. Bradley*, 105 Wn.App. 30, 39, 18 P.3d 602(2001).

In the current case, probable cause to arrest had not yet been determined and the search was not performed to obtain evidence of the crime of arrest. Instead, the protective search was performed in response to the furtive movements observed by Sergeant Neves and was intended to

eliminate any concern regarding the possibility of weapons. It would be unreasonable to limit an officer's ability to assure his own safety prior to investigating criminal activity. *See Kennedy*, 107 Wn.2d at 12.

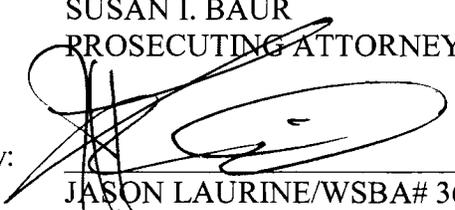
IV. CONCLUSION

Because the officers needed to ensure their safety, the safety of the victims of a hit and run, and the safety of the broader community, it was reasonable for them to perform a protective search of the vehicle, limited to only those areas in which Bass was observed making furtive movements. Based on the above, the State respectfully requests the Court affirm the conviction and deny the appeal.

Respectively submitted this 15th day of May, 2011.

SUSAN I. BAUR
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By:



JASON LAURINE/WSBA# 36871
Attorney for Respondent

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
11 MAY 25 PM 04:04
STATE OF WASHINGTON
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**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)
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 Respondent,)
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 vs.)
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 AUGUST IRA BASS,)
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 Appellant.)
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**NO. 40937-2-II
Cowlitz County No.
10-1-00349-2**

**CERTIFICATE OF
MAILING**

I, Michelle Sasser, certify and declare:

That on the 23rd day of May, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Thomas M. Kummerow
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of May, 2011.



Michelle M. Sasser