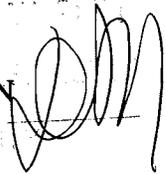


NO. 41202-1-II

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

FILED
APR 21 2011
BY 

STATE OF WASHINGTON, Respondent

v.

RYAN MICHAEL WARD, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00303-7

BRIEF OF RESPONDENT

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Even if properly challenged here, Defendant’s statement was the result of a question asked solely for officer safety purposes and the fruits of that statement are admissible under *New York v. Quarles*. Therefore, the statement remains a second independent basis for the admission of the evidence against Appellant.1

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. Police had authority to detain Appellant for a few minutes during the execution of a high-risk search warrant because he was reasonably identified with the target apartment and was reasonably suspected to be an un-named individual to be searched.
- II. Police had authority to frisk Appellant for the reasons stated above. This authority to frisk provides an independent basis for the admissibility of the evidence against Appellant. Analysis may end here.
- III. Appellant failed to raise any objection at the trial court level that Appellant's statement that he had a pen was obtained in violation of his *Miranda* rights. Appellant argued only that he was unlawfully seized and that all evidence flowing from the seizure must be suppressed. There was no argument about whether Appellant was subjected to a custodial interrogation.

The trial court held—without hearing argument—that Appellant did not need to be *Mirandized* before making the statement he made. This un-challenged conclusion provides a second independent basis for the admission of the evidence against Appellant because Appellant acknowledged he had a potential weapon on him.

Even if properly challenged here, Defendant's statement was the result of a question asked solely for officer safety purposes and the fruits of that statement are admissible under *New York v. Quarles*. Therefore, the statement remains a second independent basis for the admission of the evidence against Appellant.

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- II. DID APPELLANT PRESERVE THE MIRANDA ISSUE? IF NOT, MAY IT BE RAISED ON APPEAL?
- III. IF THE MIRANDA QUESTION IS PROPERLY BEFORE THIS COURT, WAS THE APPELLANT'S STATEMENT TAKEN IN VIOLATION OF MIRANDA?
- IV. IF THE MIRANDA QUESTION IS NOT PROPERLY BEFORE THIS COURT, DOES APPELLANT'S VOLUNTARY STATEMENT THAT HE HAD A PEN ON HIM PROVIDE AN INDEPENDENT BASIS FOR ADMISSIBILITY OF THE PEN?

C. STATEMENT OF THE CASE

On October 30, 2009, a warrant was issued authorizing the search of a Vancouver apartment for evidence of the crime of possession of a controlled substance with intent to deliver. 1 Report of Proceedings ("1RP") at 6. The warrant also authorized the search of three occupants of the apartment: Jesse Hubbell, age 18, Kayla Strabeck, age 18, and John Doe. John Doe was described as a white male, 18 years old, five feet nine inches tall, weighing 150 pounds, with brown hair, and a tattoo of two feet on his left forearm and a tattoo of a rose on his right shoulder. 1RP 7.

A warrant service team was assembled. 1RP 8. At a pre-search briefing, the officers who participated in serving the warrant were shown photographs of Hubbell and Strabeck and given the description of John Doe. 1RP 8, 21–22, 25. Vancouver Police Officer Brian Billingsley and Detective Eric Swenson with the Clark County Sheriff's office were members of the search team. 1RP 26. The warrant was served by five to eight officers. 1RP 43. As the team headed up the stairs of the apartment complex, the first officer in line, Officer Billingsley, observed an unknown male and a female seated on the stairs outside the target apartment. 1RP 58. As he got closer, Officer Billingsley observed a third male on the stairs outside the door of the target apartment. 1RP 58. Officer Billingsly recognized this individual as Jesse Hubbell, one of the subjects of the search warrant. 1RP 58. All three subjects appeared to be smoking and talking. 1RP 64.

Officer Billingsly and Detective Swenson issued oral commands identifying the approaching officers as police and ordering the subjects to get on the ground. 1RP 27. Officer Billingsly detained the female, later identified as 22 year old Ashley McNabb. Moments later, Detective Swenson guided the 23 year old Appellant onto his chest and placed him in handcuffs. 1RP 44. A third officer dealt with 18 year old Jesse Hubbell. 1RP 59. Still other officers passed and were making their knock

and announce at the target door—mere feet away—yelling “Police. Search Warrant.” 1RP 27, 51. The officers could hear still more individuals running around inside the target apartment. CP 31. Due to the unexpected contacts, the—now substantially smaller—entry team had to take over the initial entry duties from the now indisposed officers. 1RP 57–59.

Officer Billingsly testified that he believed the subjects that were detained were associated with the target apartment. 1RP 60. Officer Billingsly patted-down Ms. McNabb. 1RP 62. Detective Swenson testified that he identified the individuals associated with the apartment the same way he would identify them with a house if they were standing on the porch. 1RP 30. Detective Swenson further testified that he believed that the male he detained could be the “John Doe” individual listed in the search warrant. 1RP 34. Detective Swenson did not attempt to determine whether Appellant was the “John Doe” individual himself. 1RP 35. Detective Swenson testified that it was his intent to allow an officer more familiar with the case to determine whether Appellant really was the “John Doe.” 1RP 35, 79–80.

Both officers testified that the individuals outside of the residence were detained for officer safety reasons. 1RP 30, 60. Detective Swenson in particular testified that he was “responsible for essentially rendering

those people safe [] so that the entry team members don't have their back to an unknown threat as they are making an entry on this apartment on a drug warrant." 1RP 30. He described his "function essentially is to maintain safety and security for the other members who are passing behind me and entering the apartment." 1RP 30.

Detective Swenson placed handcuffs on Appellant and Appellant was not free to leave. 1RP 41. Detective Swenson stood Appellant up and asked him his name. 1RP 32. Appellant identified himself as Ryan Ward. 1RP 32–33. Ward said he had identification on him and Detective Swenson said he was going to remove it. Appellant said: "Go ahead." 1RP 33. Detective Swenson removed Appellant's wallet and confirmed that he was Ryan Ward. 1RP 33. Detective Swenson "ran" Appellant's name and determined that Appellant did not have any outstanding warrants. 1RP 33.

Detective Swenson informed Appellant that he was going to pat down Appellant to make sure he was not armed. 1RP 33. Detective Swenson asked Appellant whether he had anything dangerous or illegal on his person. 1RP 33. Appellant replied that he had a pen in his pocket. 1RP 33. Detective Swenson testified that his 20 years of experience indicate that many weapons are shaped like pens. 1RP 33. Detective Swenson located the object and removed it from Appellant's pocket. 1RP

37. Detective Swenson completed his pat-down of Appellant. 1RP 39. The pen that was removed from Appellant's pocket had heroin residue on it which forms the basis for the charges against Appellant. CP 21–23.

Detective Swenson was conducting his pat-down search of Appellant around the time the officers in the apartment declared the apartment “clear.” 1RP 51. The trial court found as a matter of fact that this was a quickly unfolding series of events. 1RP 79–80, 83.

D. CONCLUSIONS OF LAW OF THE TRIAL COURT

The trial court held that the officers were justified in seizing the people outside the door because of their physical proximity to the target apartment, the presence of Mr. Hubbell (having been named in the warrant), and the possibility that Appellant was the unknown “John Doe” individual. CP 33–34; 1RP 66. Associating Appellant with the target apartment made stopping and identifying Appellant reasonable. *Id.* The trial court observed that it would be unreasonable under the circumstances to expect Detective Swenson to survey portions of Appellant's anatomy looking for identifiable tattoos. 1RP 83–84. The trial court also observed that a *search* of Appellant would become unreasonable if Appellant had been positively excluded as the “John Doe” individual by someone with knowledge. 1RP 80.

Once Appellant was reasonably associated with the target apartment, the trial court further held that due to the nature of the search warrant—searching the apartment for evidence of use and distribution of controlled substances—and Detective Swenson’s concerns for officer safety during the warrant’s execution, it was reasonable to place Appellant in handcuffs during the officers’ entry into the apartment. CP 33–34. These same concerns made it reasonable for Detective Swenson to tell Appellant that he would be frisked for weapons. CP 34–35; 1RP 80.

While Appellant was seized and handcuffed, the trial court held that Detective Swenson’s question to Appellant whether he had anything illegal or dangerous on his person did not have to be preceded by *Miranda* warnings and that Appellant’s response that he had a pen was voluntary, not the product of custodial interrogation, and not coerced. CP 34. Once Appellant made this statement, it was reasonable for Detective Swenson to actually obtain the referenced object because a pen might be used as a weapon. CP 34. The trial court denied Appellant’s Motion to Suppress. CP 35. On September 13, 2010, Appellant stipulated to the facts found by the trial court during the suppression hearing and was found guilty of the crime of Possession of a Controlled Substance – Heroin, in violation of RCW 69.50.4013(1). 2RP 2–12. Appellant appeals.

E. STANDARD OF REVIEW

The trial court's findings of fact are reviewed under a clearly erroneous standard and will be reversed only if not supported by substantial evidence. *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). Substantial evidence exists if there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citation omitted). In Washington, where findings of fact are unchallenged, they are verities on appeal. *Id.* Conversely, the Appellate Court reviews challenges to the trial court's conclusions of law *de novo*. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002).

F. SUMMARY OF THE ARGUMENT

The critical piece of evidence for the purposes of determining the guilt or innocence of Appellant is the pen with heroin residue that was on Appellant's person when he was contacted by officers. There are two independent bases for the admissibility of the pen. First, the pen was obtained pursuant to Detective Swenson's lawful authority to pat-down Appellant for weapons while immediately outside an apartment being searched during a high-risk drug search warrant, because he fit the

description of an unknown individual to be searched, and was because he was in the presence of a known individual to be searched.

Second—as the trial court held—the pen was lawfully obtained when Detective Swenson asked the lawfully seized and handcuffed Appellant whether he was armed or had anything illegal on him and Appellant responded that he had a pen on him. This question was a legitimate way for the officer to determine whether Appellant had any weapons, needles, or other objects that Detective Swenson needed to be concerned about. In Detective Swenson’s experience, objects shaped like pens can be used as weapons. Detective Swenson was justified in removing the pen. This was not a frisk or a search.

G. ANALYSIS

I. **THE INITIAL SEIZURE OF APPELLANT WAS REASONABLE**

If a police officer conducts a warrantless stop of a citizen, the Fourth Amendment requires that the stop be reasonable. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, L.Ed.2d 607 (1975). When officers are awaiting a search warrant for a given location and seize people at the scene, a standard Fourth Amendment seizure analysis is appropriate. *State v. Crane*, 105 Wn. App. 301, 307–08, 19 P.3d 1100 (2001). However, a different set of rules is adopted when a search warrant

is obtained. Where a valid search warrant for a given location has been obtained, officers may stop and detain people inside the premises. *State v. Broadnax*, 98 Wn.2d 289, 304, 654 P.2d 96 (1982) (“an occupant may be detained during the execution of a residential search warrant”). Officers may also seize persons reasonably identified with the premises to be searched. *See State v. Flores-Moreno*, 72 Wn. App. 733, 739, 866 P.2d 648 (1994) (citing *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587 (1981)). Officers must be able to exercise sound discretion about who to seize when a person is not inside the location, but may fairly be associated with the premises. This discretion is limited. *Crane*, 105 Wn. App. at 307–08 (“even where there is a warrant, such a limited stop is not a license to detain and frisk all persons approaching within 100 feet of the location of a search in the absence of an articulable reason.”) (quotation marks and citations omitted); *Cf. Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338 (1979) (officers lacked probable cause to *search* an individual in a public place merely because the public place was to be searched). Officers do not require probable cause to frisk, however, the articulable reason proffered by the State must reasonably—under the circumstances—justify the detention and frisk in question. *Crane*, 105 Wn. App. at 307–08.

While officers clearly may not seize and frisk all persons approaching within 100 feet, officers may seize someone reasonably

associated with the premises. Detective Swenson's and Officer Billingsly's assumptions that the individuals contacted were associated with the place to be searched were reasonable under the totality of the circumstances. The warrant in this case listed three individuals: Jesse Hubbell, age 23, Kayla Strabeck, age 18, and John Doe, estimated age 18. As officers moved rapidly to the target apartment, they encountered three individuals approximately the same age as the listed individuals outside the door of the target apartment. Those three individuals were Mr. Hubbell, age 23, Ashley McNabb, age 22, and Appellant, age 23.

Appellant and his companions were located immediately outside the target apartment smoking and talking. Officer Billingsly recognized Mr. Hubbell as an individual listed in the search warrant. Officer Billingsly was the first officer in line and his knowledge may be imputed to the officers behind him under the "fellow officer rule." *State v. Ortega*, 159 Wn. App. 889, 896, 248 P.3d 1062 (2011) ("in those circumstances where police officers are acting together as a unit, the cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect").

Therefore, it was not only Appellant's location that made it reasonable to believe he was associated with the apartment, but also his

likely association with Jesse Hubbell, but his age, and the relatively unlikely chance that people un-associated with the apartment would also be in their late teens or early twenties and standing outside this apartment. Had the individuals outside the door been in their forties officer's would not have as strong a case for association. However, the State asserts that their actions would still be justified by their concerns for safety as they prepared to break down the target door and conduct a room-to-room protective sweep.

Regarding the scope of the detention, Detective Swenson testified that other officers—more familiar with the case—would be in a better position to determine whether Appellant was the “John Doe” individual named in the warrant. Therefore, it was reasonable for Detective Swenson to assume—for a reasonable time only—that Appellant *was* associated with the apartment in question.

Ultimately, however, it must be within the approaching officer's sound discretion whether to order an individual to leave or go back in their apartment—as they might with a nosy neighbor; remove an individual from the area—as they might with playing children; or detain and frisk an individual—as they might if encountering an individual while serving a warrant on a suspected drug distribution house.

All three officers who seized individuals outside the apartment's door acted reasonably under the circumstances. Officers had "well-founded suspicion[s] not amounting to probable cause" that justified the detainment of Appellant. *State v. Gluck*, 83 Wn.2d 424, 426, 518 P.2d 703 (1974).

Because officers lawfully seized Appellant, the relevant question becomes: Under what lawful bases was the pen discovered? The State asserts that two independent bases exist to support the admissibility of the pen, only one of which was challenged below. Those two bases are 1) a lawful weapons frisk; and 2) a lawful question asked of Appellant that led to the lawful seizure of a potential weapon.

II. UNDER CERTAIN CIRCUMSTANCES—THESE CIRCUMSTANCES—OFFICERS MAY PAT-DOWN INDIVIDUALS WHILE THEY SECURE AN AREA

The State submits that police officers in Detective Swenson's position can reasonably pursue three goals once they seized the individuals: Identification, investigation, and safety. The first potential path is for officers to determine whether people outside an apartment are actually associated with the apartment to be searched. Pursuing this question primarily bears on the reasonable scope of any seizure that individual is subjected to. This path takes precious time and is hindered by activities such as clearing the apartment itself.

The second legitimate goal of officers is to determine whether any individuals detained are associated with any illegal activity or have on their persons evidence of illegal activity. This second question can be addressed at any time, with anyone, whether detained or not. However, it may not be pursued by *searching* an individual unless officers otherwise develop probable cause to arrest or that a search will reveal evidence of particular criminal conduct. This is why the search in *Ybarra* was illegitimate—officers in that case searched everyone in the place to be searched with no regard to association with the place to be searched and no regard to individualized probable cause. Because Appellant was not *searched*, his reliance on *Ybarra* is—to a certain extent—misplaced. Similarly, if an individual is in custody, officers may not pursue this second goal by arresting and interrogating the individual without first having probable cause to arrest and providing the suspect with his or her *Miranda* warnings.

Finally, an officer's primary focus will always be on officer safety. Whether or not the identity of the subject has been verified—in the context of an ongoing high-risk apartment search—officers must be able to reasonably react to any potentially dangerous situation and investigate whether any detained individuals pose a danger to officers. Under certain limited circumstances this includes conducting a weapons frisk of all

individuals found in, or reasonably associated with, the place to be searched—for example where officers are outnumbered, or weapons are known to be present.

Such a search must still be justified under the circumstances but need not be based solely on a suspicion that the individual is armed. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868 (1968) (“the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger”); *Crane*, 105 Wn. App. at 312 (“An officer making such an investigatory stop, however, is required by the Fourth Amendment to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal conduct *or is a safety threat.*”) (italics added, quotation marks and citations omitted); *State v. Horton*, 136 Wn. App. 29, 37, 146 P.3d 1227 (2006) (“the officer need not be convinced the person is in fact armed and dangerous; it is sufficient that he or she can articulate an objective rationale to support a frisk. *The officer must be able to point to particular facts from which we can reasonably infer legitimate safety concerns.* The rationale must be based on the particular circumstances at the scene.”) (italics added, quotation marks and citations omitted).

Appellant relies heavily on *State v. Broadnax*, 98 Wn.2d 289 (1982). In *Broadnax*, officers served a search warrant on a residence. *Id.*

at 291–92. The warrant listed no individuals to be searched. One officer watched the back door while several other officers entered the front door. Eventually, the officer observed that other officers had made entry and he went around the residence and entered the front door. He observed two males standing with their hands on their heads. The officer asked if one of the males should be *searched*, assuming that the males were under arrest. Another officer responded that the male had not been *frisked*. In fact, the defendant had only been seized and was not under arrest. The other officer also testified that he *did not feel that the defendant was a safety risk*. The first officer conducted a *search* of the defendant locating and removing an item he believed was drugs. *Id.* The Washington Supreme Court vacated the conviction holding that the officer had failed to articulate a reason to frisk, and had exceeded the scope of a *Terry* frisk by searching the defendant in any case. *Id.* at 304. The facts at bar are distinguishable.

The question before the court is simply: “would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?” *Terry v. Ohio*, 392 U.S. 1, 22 (1968). Specific and articulable facts reasonably warranted Detective Swenson’s intrusion because Detective Swenson reasonably believed that Appellant represented a safety threat.

First, Detective Swenson's suspicion that Appellant was actually the "John Doe" individual listed to be searched was reasonable. He was approximately the same age as "John Doe" and was with Mr. Hubbell, a listed individual. Second, officers were conducting a search of a location known to be involved in the distribution of narcotics. Third, when officers approached, they heard individuals running around inside the target apartment. Fourth, roughly half of the entry team was unexpectedly occupied with three individuals outside the apartment. Fifth, Detective Swenson testified that it was his responsibility to "render[] those people safe" and that the actions he undertook were explicitly based on his concern for his own safety, and the safety of the officers whose back he was covering. 1RP 30. In contrast, the officers in *Broadnax* testified that they did not believe that the defendant was a safety risk.

There was also testimony in the case at bar, that the apartment was not declared "clear" until *after* Detective Swenson has obtained the pen from Appellant's pocket. 1RP 51. The trial court found as a matter of fact that the situation was a fast developing series of events. 1RP 79-80, 83. In *Broadnax* there was no indication that officers were still clearing the residence. In fact, the officer in *Broadnax* left his post at the back of the house because he observed other officers inside the residence, presumably through the back window. It may be assumed he no longer felt there was a

risk of someone escaping out the back door and that he felt the residence was secure.

Un-secured individuals associated with premises being searched for evidence of drugs and drug-dealing are universally presumed to be dangerous by police officers. In these fast-developing situations, if an officer reasonably feels that a weapons frisk is appropriate, he or she must have the discretion to conduct the frisk. If Appellant was found to have a handgun in his waistband, Detective Swenson's fears would have been vindicated. If a gun-battle were to take place and Detective Swenson was needed in the apartment, he must be aware of all weapons at the scene and be sure he did not have armed individuals behind him. Officers must always be prepared to react both for their own safety and the safety of bystanders. Officers simply must be prepared for all eventualities.

Here, three suspects were reasonably identified with the target apartment: one being positively identified as an individual to be *searched*, and Appellant himself suspected to be an individual to be *searched*. Until these suspects have been frisked or the situation is "clear" these suspects will objectively pose a safety threat to officers. The apartment in question was not declared "clear" until after the events in question. While Detective Swenson did not explicitly testify that he believed Appellant was armed, his concerns for officer safety justified his limited pat-down

because the officer's safety concerns were legitimate. *Crane*, 105 Wn. App. at 312; *Horton*, 136 Wn. App. at 37.

Appellant argues that because Appellant was cooperative, he could not be seen as a risk. Brief of Appellant at 12. This argument presupposes that every *other* subject will remain cooperative and that the police must assume that this will be so. In fact, police are trained to plan for the worst possible scenario, not the best. The State asserts that under the circumstances, officers determined that they could not risk the chance that the *three* individuals outside the door were armed while other officers were still conducting a search of the adjacent apartment. The individuals were patted down. Their decision to conduct a limited pat-down of these individuals for weapons was reasonable.

If Detective Swenson was justified in frisking Appellant, this Court's analysis should end. This is because Detective Swenson was going to frisk Appellant without regard to Appellant's answer to his inquiry about weapons or illegal items on his person. Detective Swenson testified that "I have found a lot of things that were shaped like a pen that weren't a pen and that were in fact a weapon." 1RP 33. Pens—or objects like them—can unquestionably be used as weapons. *E.g.*, *State v. Barragan*, 102 Wn. App. 754, 9 P.3d 942 (2000) (inmate convicted of Assault in the First Degree for stabbing a fellow inmate with a pencil).

Had Appellant remained silent or responded with expletives, Detective Swenson still would have patted down Appellant and still would have removed the pen. This presents an independent basis for the seizure of the pen.

III. APPELLANT DID NOT RAISE A MIRANDA ISSUE BELOW

Appellate courts will “not ordinarily consider evidentiary objections that were not presented to the trial court.” *State v. Horton*, 136 Wn. App. 29, 36 (2006) (citing RAP 2.5(a)(3); *State v. Mendoza-Solorio*, 108 Wn. App. 823, 834, 33 P.3d 411 (2001)).

The record is bereft of any defense objection based on a potential *Miranda* violation. It is impossible to be sure about Appellant’s written submissions to the trial court, but there certainly is no clear *Miranda* based argument. CP 5–8. Rather, it appears that Appellant’s written argument was limited to the assertion that the stop, seizure, and search—though the proper issue is frisk—of Appellant was illegal. CP 5.

Similarly, Appellant’s oral argument was limited to the issues of search, seizure, and frisk. 1RP 74–77; 2RP 5–7 (for example: “his statements, we believe they were the fruit of an illegal *search*”) (emphasis added). The trial court assumed without argument that the statements were not obtained in violation of *Miranda*. CP 34.

If this conclusion of law was not properly challenged below, then the pen is admissible and provides an independent basis for the admissibility of the pen. This is because 1) Appellant was lawfully seized; 2) The question was properly asked; and 3) Appellant's answer justified Officer Swenson's limited seizure of the pen.

If this conclusion of law was not raised below but is challenged on appeal, Appellant must show manifest constitutional error. However, Appellant has not addressed this issue and has not asserted that the statements made by Appellant were involuntary or the product of coercion.

For these reasons Appellant's statement that he had a pen on him provided an independent basis for the removal of that pen and Appellant's arrest. This Court should not consider the *Miranda* issue unless to determine whether an independent basis for the introduction of evidence exists. I address the issues here in case this analysis is conducted.

IV. THIS SEIZURE DID NOT RISE TO THE LEVEL OF ARREST

Assuming the issue must be considered, Appellant was not in custody for *Miranda* purposes. That a suspect is not "free to leave" during the course of a *Terry* or investigative stop does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton*, 67

Wn. App. 127, 130, 834 P.2d 624 (1992). This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less “police dominated,” and does not lend itself to deceptive interrogation tactics. *State v. Cunningham*, 116 Wn. App. 219, 228, 64 P.3d 325 (2003); *Walton*, 67 Wn. App. at 130.

The trial court held that although Appellant “was in handcuffs and lawfully detained, he was not under arrest, and not in custody for purposes of Miranda requirements.” Even acknowledging that this legal conclusion was assumed without argument, it is still a defensible conclusion because a reasonable *innocent* person would have understood that they were seized only because officers were serving a search warrant on the target apartment. *See, E.g. Florida v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382 (1991) (“the ‘reasonable person’ test presupposes an innocent person.”) (citation omitted).

Reasonable innocent people would have known that while they were not free to leave, the encounter would only last as long as necessary to establish their identity and that they were not associated with the target apartment. Appellant was ordered to the ground as officers rapidly approached in a line with weapons drawn. As officers reached him, they only “guided” Appellant to the ground. Once other officers were inside

the apartment, Appellant was immediately stood back up and subsequent conversation occurred in a normal voice. An innocent person—for example an occupant of the adjacent apartment—would understand that they were not under arrest as that term is traditionally used, but rather had been detained for the safety of officers and for their own safety during the service of a search warrant.

While the situation at bar was highly police dominated, it was not inherently coercive. If Appellant was not in custody for *Miranda* purposes, a wealth of investigative tools may be employed including non-custodial interrogation. *See, e.g.*, 3 W. LaFare, Search and Seizure § 9.2, pp. 36–37 (1978). If Appellant was not “in custody” the pen is admissible because the pen’s presence was volunteered by Appellant and it was removed for officer safety reasons.

V. OFFICERS MAY ASK QUESTIONS OF DETAINED SUBJECTS FOR OFFICER SAFETY REASONS WITHOUT VIOLATING MIRANDA

Even when an individual is in custody for the purposes of *Miranda*, not every question asked by an officer violates the individual’s rights. Instead, there is a continuum of police questioning that is either appropriate or objectionable with a somewhat hazy line in-between. The extremes are easy to understand. On the inadmissible side, in *Orozco v. Texas*, 394 U.S. 324, 89 S. Ct. 1095 (1969), officers arrested the defendant

in his bedroom at four in the morning and asked him where he was at the time of a murder and whether he owned a pistol. *Id.* at 325. The defendant was in custody, the questions were investigatory, and the questions sought to elicit testimonial evidence. Meanwhile, in cases following *New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626 (1984), courts have found questioning based upon an officer's desire to contain a potentially dangerous situation, as opposed to questioning designed to elicit incriminating statements, to be admissible if voluntary.

For example, in *United States v. Brady*, 819 F.2d 884, 888–89 (9th Cir. 1987), officers were investigating a call about a man beating a woman. Upon contact with defendant, the officer handcuffed and frisked the defendant. The officer then asked the defendant whether he had a gun—without any evidence that firearms were involved and without a *Miranda* warning. The Ninth Circuit held that the officer's interest “arose from his concern with public safety, his desire to obtain control of what could be a dangerous situation. They were not designed to obtain evidence of a crime.” *Id.* at 888.

In Washington, where the officer's concern is with controlling an immediate threat to public safety, an officer's questions are entirely appropriate. In *State v. Lane*, 77 Wn.2d 860, 467 P.2d 304 (1970), officers kicked down the door of an apartment looking for a suspect in a

robbery. *Id.* at 860–61. After the defendant was handcuffed, but before he was *Mirandized*, the defendant was asked if he had a gun. The Washington Supreme Court held that because the question was asked to ensure “the physical protection of the police,” there was no *Miranda* violation. *Id.* at 862. In sum: “A very brief, noncoercive, nondeceptive, single question during the course of an investigative stop does not amount to custodial interrogation.” *State v. Wilkinson*, 56 Wn. App. 812, 820, 785 P.2d 1139 (1990) (quoting *State v. Hensler*, 109 Wn.2d 357, 363, 745 P.2d 34 (1987)).

In the case at bar, assuming that Appellant was in custody, Detective Swenson still did not violate Appellant’s *Miranda* rights. Detective Swenson testified that his interest was to “maintain safety and security for the other members who are passing behind me and entering the apartment.” 1RP 30. He asked Appellant whether he had anything dangerous or illegal on him. Detective Swenson’s “question was for the purpose of self-protection,” *Wilkinson*, 56 Wn. App. at 820, and is not objectionable.

Questions like: “Do you have any weapons? Do you have anything that is going to stick me? Or Do you have anything illegal? Are designed to aid in a frisk and help the officer remain safe while conducting the pat-down. They are not designed to—though they certainly do at

times—elicit incriminating statements from individuals. Detective Swenson’s question was justified.

Once Detective Swenson determined that Appellant had a potential weapon on him, the Detective was justified in removing it. *Cf. State v. Horton*, 136 Wn. App. 29, 38 (2006) (“objects that feel like they could be used as weapons in a superficial pat-down of the outer clothing may be removed and examined”). Thus, Detective Swenson’s legitimate question and Appellant’s answer provide another independent basis for the admissibility of the evidence in question.

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H. CONCLUSION

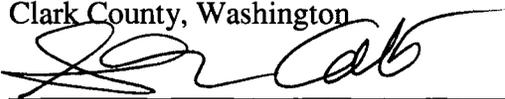
Two independent bases support the admissibility of the pen in question. Because the pen was admissible as the product of a lawful *Terry* frisk and as the result of a voluntary statement by Appellant, the trial court should be affirmed in all respects.

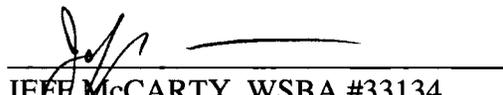
DATED this 21st day of April, 2011.

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