

NO. 43310-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH M. LEVINE,

Appellant.

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

The Honorable Barbara Johnson, Judge

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. To the extent that it may be construed as a finding of fact, and in the absence of substantial evidence to support it, the trial court erred in entering Conclusions of Law 4.

Those unusual and suspicious circumstances would lead a police officer to reasonably believe that what they were witnessing was a drug transaction or some other transaction in contraband items.

2. To the extent that it may be construed as a finding of fact, and in the absence of substantial evidence to support it, the trial court erred in entering Conclusions of Law 5.

Those circumstances were sufficient for the detectives to briefly detain the defendant and ask him what was in his hand.

3. To the extent that it may be construed as a finding of fact, and in the absence of substantial evidence to support it, the trial court erred in entering Conclusions of Law 6.

When the defendant showed the detectives what appeared to be heroin in his hand, the detectives were entitled to detain and investigate further or to place the defendant under arrest.

4. The trial court erred in failing to grant Mr. Levine's suppression motion.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether there were sufficient facts to justify a *Terry* stop?

C. APPENDIX

The Findings of Fact and Conclusions of Law entered in support of the trial court's oral ruling on the suppression motion are attached at the Appendix.

D. STATEMENT OF THE CASE AND PROCEEDING BELOW

Joseph Levine is a young man. On a May afternoon, he and another young man, Cory Strunk, were walking together in an alley near the Lacamas shopping center. RP ("Report of Proceedings) 7-8, 46.

Camas police detectives Robison and Nadgwick were parked near the alley in an unmarked police car. They were watching what was happening on the shopping center property. They had received reports of drug activity on and near the shopping center. RP at 7-9, 43-46. Both detectives were experienced in drug investigations. RP at 6-7, 51-52. The detectives were not dressed in traditional-type police uniforms. Instead, they had on polo shirts with police markings and on their hips they had a badge and gun. RP at 19.

The detectives noticed Mr. Levine and Mr. Strunk walking toward them. RP 10, 47. The two young men were about 20 feet from the detective's car and seemingly had not noticed the car. RP at 10, 18. The detectives saw Mr. Levine take what appeared to be a silver and blue can

out of his jacket pocket. It looked like a can of Red Bull.¹ RP at 10, 48-49. Rather than pulling a tab to open the can, Mr. Levine unscrewed the can's top. Mr. Levine then tipped something from the can into his hand. That something did not appear to be liquid. Mr. Levine showed Mr. Strunk what was in his hand. RP at 10, 39.

The two detectives were surprised by the screw top Red Bull can. They believed it must be some sort of disguised container. Neither detective had seen anything like it before. It caught their attention. They instantly concluded Mr. Levine must be using the can to disguise contraband. RP at 11, 13, 29, 49-50.

The detectives got out of their car, identified themselves as police officers, and ordered Mr. Levine to stop and show them what was in his hand. Levine stopped and then opened his hand to reveal a suspected bundle of heroin. RP at 13-14.

Neither detective knew either Mr. Levine or Mr. Strunk. RP at 11, 48.

The detectives separated Mr. Levine and Mr. Strunk before interviewing them. RP at 20. Detective Robison testified he advised Mr.

¹ Red Bull is the name brand of a canned, non-alcoholic beverage marketed and sold as an "energy" drink.

Levine of his *Miranda*² rights and thereafter Mr. Levine made incriminating statements about selling heroin. RP at 20.

The state charged Mr. Levine with possession with intent to deliver heroin within 1,000 feet of a school bus stop route. CP (“Clerk’s Papers”) 1. Mr. Levine challenged the police contact in a suppression motion. In the motion, he argued he was seized when the police told him to stop and open his hand and that there was no legal basis for the seizure. He moved to suppress all of the evidence. CP 2-10; RP 1-107.

The trial court heard the combined CrR 3.6 suppression and the CrR 3.5 confession hearing. The court refused to suppress the evidence holding that the detectives’ seizure of Mr. Levine was a valid stop under *Terry v. Ohio*. The court found Mr. Levine was seized as soon as the detectives told him to stop. RP at 98-106. The court entered written findings of fact and conclusions of law to support its ruling. CP 11-14.

Mr. Levine waived his right to a jury trial. CP 15; RP at 115-16. The court found Mr. Levine guilty as charged on stipulated facts. CP 16-27, 28-30; RP at 120. Mr. Levine who had never had a felony conviction is now serving 40 months with the Department of Corrections. CP 32, 33, 43.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 694 (1966)

E. ARGUMENT

THE POLICE SEIZED MR. LEVINE UNLAWFULLY.

When the police ordered Mr. Levine to stop, Mr. Levine was seized. The seizure was illegal because the police had no lawful basis to seize Mr. Levine. The appropriate remedy is suppression of all the subsequently seized evidence.

The Fourth Amendment to the United States Constitution protects against unlawful search and seizure.³ Article I, Section 7⁴ of the Washington Constitution protects against unwarranted government intrusions into private affairs. Warrantless seizures are per se unreasonable. The state bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). These exceptions are “‘jealously and carefully drawn.’” *State v. Williams*, 102 Wn.2d 733,

³ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

⁴ No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Washington Const. art. I, § 7.

736, 689 P.2d 1065 (1984) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979)).

A *Terry* stop is one such exception to the warrant requirement. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A *Terry* stop is a brief investigatory seizure and requires a well-founded suspicion that an accused is engaged in criminal conduct. *Terry*, 392 U.S. at 21. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21.

A *Terry* stop must be reasonable. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). When reviewing the merits of a *Terry* investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (citing *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). It is the state’s burden to show by clear and convincing evidence that a *Terry stop* was justified at its inception. *Doughty*, 170 Wn.2d at 61-62.

On review of a denial of a motion to suppress, the court must determine “whether substantial evidence supports the challenged findings

of fact and whether the findings support the conclusions of law.” *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence is “enough ‘to persuade a fair-minded person of the truth of the stated premise.’ ” *Id.* (quoting *State v. Reid*, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). A trial court’s conclusions of law following a suppression hearing are reviewed de novo. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218, *review denied*, 272 P.3d 850 (2011); *State v. Bailey*, 154 Wn. App. 295, 299, 224 P.3d 852, *review denied*, 169 Wn.2d 1004 (2010); *Terry*, 392 U.S. at 21. While the findings of the trial court following a suppression hearing are of great significance, the constitutional rights at issue require this court to undertake an independent evaluation of the record. *State v. Rowe*, 63 Wn. App. 750, 753, 822 P.2d 290 (1991).

1. The police seized Mr. Levine when they ordered him to stop.

As soon as the police ordered Mr. Levine to stop and show them what was in his hand, he was seized. There is no dispute on this point. The trial court entered the following conclusion of law: “The detectives detained the defendant when they stated, “Stop. What is in your hand?,” and identified themselves as police officers. CP 12 (Conclusion of Law 1).

A “seizure” occurs when the circumstances surrounding the encounter between the police and a citizen demonstrate that a reasonable person would not feel free to disregard the officer and go about his business. *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 1551, 113 L.Ed.2d 690 (1991); *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980); *State v. Gleason*, 70 Wn. App. 13, 16, 851 P.2d 731, 733 (1993). A person may be “seized” by a show of authority as well as by physical force. *Mendenhall*, 446 U.S. at 553. An investigatory stop must be justified at its inception. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

Here, the detectives’ testimony establishes that Mr. Levine was seized as soon as they ordered him to stop and show then what was in his hand. A reasonable person in Mr. Levine’s position would believe he was not free to disregard the officers and go about his business.

2. The warrantless seizure of Mr. Levine is not justifiable under the *Terry* exception.

The *Terry* stop threshold was created to stop police from interfering with people’s everyday lives. *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573, 575 (2010). The Supreme Court embraced the *Terry* rule to stop police from acting on mere hunches. “Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing

more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.” *Terry*, 392 U.S. at 22.

Incongruous circumstances, like hunches, do not support a *Terry* stop.

Racial incongruity does not justify a *Terry* stop.

In *Gleason*, 70 Wn App. 13, the police saw Gleason, a Caucasian man, at an apartment complex occupied primarily by low income Hispanics. The police knew a high number of illegal drug transactions occurred at the complex. Some officers believed the only reason why a Caucasian person would go to the complex would be to purchase drugs. This was the first time Gleason was seen at the apartment complex. No officer saw Gleason involved in the purchase of drugs. Under the auspices of *Terry*, a police officer used the perceived racial incongruity to stop Gleason and ask for identification. The police arrested Gleason after seeing cocaine and marijuana in Gleason’s wallet. After an unsuccessful bid to suppress the evidence and his subsequent conviction, Gleason challenged the seizure. *Gleason*, 70 Wn. App. at 14-16.

On appeal, the court found the officer’s suspicions based on racial incongruity was not a valid justification for a *Terry* stop and suppressed the evidence. *Gleason*, 70 Wn App. at 18.

An incongruous late-night stop at a suspected drug house does not justify a *Terry* stop.

In *Doughty*, it was 3:20 a.m. when a police officer saw Doughty park his car, approach a house, return to his car less than two minutes later, and drive away. *State v. Doughty*, 170 Wn.2d 57, 60, 239 P.3d 573 (2010). The officer did not see what Doughty did at the house. Neighbors previously complained of short stay traffic at the house, prompting police to identify it as a drug house. After the two-minute visit, the officer stopped Doughty “for the suspicion of drug activity.” The officer arrested Doughty after discovering Doughty’s license was suspended. Methamphetamine and a methamphetamine pipe were found in Doughty’s shoe and car. *Doughty*, 170 Wn.2d at 60-62.

Doughty moved to suppress the evidence arguing that it was the result of an unlawful *Terry* stop. The motion was unsuccessful. Doughty appealed his conviction. *Doughty*, 170 Wn.2d at 60-61. On review, the court found no legal basis for a *Terry* investigative stop illegal. The incongruous facts of a person's presence in a high-crime area, even combined with a person's proximity to others independently suspected of criminal activity, did not justify the stop. *Doughty*, 170 Wn.2d at 63

Something just not looking right did not justify a *Terry* stop.

In *Diluzio*, a police officer saw a car stop in an area known for prostitution. *State v. Diluzio*, 162 Wn. App. 585, 588, 254 P.3d 218 (2011). A woman walked up to Diluzio's car and leaned in the window. After a short conversation, the woman got into the car and Diluzio drove away. Seeing this, and suspecting prostitution activity, a police officer stopped Diluzio to investigate. The officer discovered methamphetamine in Diluzio's pocket while arresting him on an outstanding warrant. Diluzio unsuccessfully moved to suppress the discovery of the methamphetamine. He argued under *Terry* that the officer lacked reasonable suspicion to seize. *Id.*

On review, the court agreed with Diluzio. *Terry* did not justify the seizure. Although the area was known for prostitution, the officer did not see any actual evidence of prostitution. There was no informant. The officer did not see money exchanged or overhear any conversation between Diluzio and the female pedestrian. Neither party was known to be involved in prostitution. All the officer had were his suspicious observations. *Diluzio*, 162 Wn. App. at 593.

Just as the limited facts did not amount to reasonable articulable suspicion of criminal activity in *Gleason*, *Doughty*, and *Diluzio*, the same hold true in Mr. Levine's case. Like *Gleason's* racial incongruity in a drug area and *Doughty's* late-night short stay stop at a drug house, there

was nothing inherently suspicious or even criminal about Mr. Levine's afternoon walk in a purportedly high drug activity area.

Mr. Levine challenged the detectives' expectations when he took what, in their minds, appeared to be a Red Bull can from his pocket and tipped a non-liquid item into his hand. But like the woman getting into the car in *Dilizio*, the police have to have more than a hunch, more than a belief that "there is something wrong with this picture" before they can seize a person. It was the incongruity between a Red Bull can as a storage container and a Red Bull can as a beverage container that inspired the detectives to act. "This immediately caught the detectives' attention." (Findings of Fact 6, CP 11.)

What the detectives saw was nothing more than a safe in a can, or a "cansafe." See www.cansafe.net/. Storage containers are fashioned into what appear to be a common household item like a lint brush or a can of WD-40. The idea is you can store your valued possessions in the container and no one will steal them or disturb them because who would steal a can of Ajax? Like most containers, the purpose of a "cansafe" is to contain and conceal possessions.

The dual purpose of concealing and containing items is not unusual and it is not typically criminal. People carry items in which to contain and conceal their possessions all the time – backpacks, purses, wallets,

briefcases, messenger bags. These containers are usually not transparent as people want to have some privacy in their possessions. A cansafe serves the same function. Image all the circumstances of Mr. Levine's case being the same except that it was two young women walking down the alley oblivious to the police presence. If one of the women reached into her purse and pulled out a small item and showed it to her friend, would that have given the detectives reasonable articulable suspicion to seize the woman with the purse? The precedent set in *Gleason, Doughty*, and *Dilizio* tell us they would not.

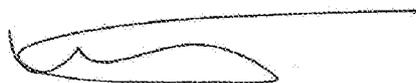
3. All the evidence must be dismissed.

If a *Terry* stop is unlawful, the fruits obtained as a result must be suppressed. *Garvin*, 166 Wn.2d at 254. “ ‘The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means.’ ” *Id.* (quoting *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)); see also *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

F. CONCLUSION

Mr. Levine is entitled to suppression of the evidence and remand with instructions to dismiss.

Respectfully submitted this 14th day of November 2012.



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Attorney for Joseph M. Levine

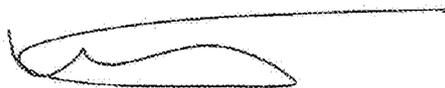
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Brief to: (1) Abigail Bartlett, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Joseph M. Levine, DOC#356995, Cedar Creek Corrections Center, P.O. 37, Littlerock, WA 98556-0037.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 14, 2012, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Joseph M. Levine

COWLITZ COUNTY ASSIGNED COUNSEL

November 14, 2012 - 4:20 PM

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APPENDIX

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JOSEPH MICHAEL LEVINE,

Defendant.

No. 11-1-00808-8

FINDINGS OF FACT AND CONCLUSIONS
OF LAW – CrR 3.5 AND 3.6 HEARINGS;
ORDER DENYING MOTION TO
SUPPRESS

CrR 3.6 HEARING

FINDINGS OF FACT

1. On May 17th, 2011, at about 4:30 p.m., Camas Police Detective Robison and Sergeant Nadgwick were stationed in an unmarked police vehicle in an alley running along the back side of the Lacamas Shopping Center in the city of Camas, Clark County, State of Washington.
2. The detectives (Robison and Nadgwick) were investigating reports of drug activity that had been occurring in that alley.
3. The detectives observed two young, adult males walking down the alley in front of them.
4. The detectives observed the defendant, Joseph Levine, unscrew the top of a Red Bull beverage can and tip some of the contents into his hand.
5. The Red Bull beverage can is designed to have a pull tab and not a screw-on lid.
6. This immediately caught the detectives' attention. Detective Robison testified he believed the can was a disguised container. Sergeant Nadgwick testified that he "had never seen anything like that before" and that he exclaimed, "Isn't that odd!?" to Detective Robison.
7. The detectives watched the defendant show the item in his hand to the male he was with, Cory Strunk.

RESPONSE TO MOTION TO DISMISS DUE TO SPEEDY
TRIAL - 1

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- 1 8. The defendant and Mr. Strunk were somewhere between 10-25 feet from the front of
2 the detectives vehicle when this happened.
- 3 9. The detectives could not see what was in Mr. Levine's or Mr. Strunk's hands at the
4 time of this transaction. They also could not see if an exchange had taken place.
- 5 10. The detectives exited their vehicle and stated, "Stop. What is in your hand?" The
6 detectives identified themselves as police officers by showing their badges.
- 7 11. The defendant opened his hand.
- 8 12. He was holding what Detective Robison recognized from his training and experience
9 in drug enforcement to be a suspected quantity of heroin.
- 10 13. Sergeant Nadgwick questioned Mr. Strunk. Detective Robison questioned the
11 defendant.
- 12 14. The defendant admitted possessing heroin and admitted trying to sell it.
- 13 15. Detective Robison called for a uniformed officer to assist. When that officer arrived,
14 the defendant was read his Miranda rights and placed in the back of the patrol car.
- 15 16. Detective Robison looked inside the Red Bull can and discovered additional bindles
16 of heroin.
- 17 17. The defendant acknowledged understanding his Miranda rights, waived his rights,
18 and subsequently, made additional incriminating statements concerning the heroin
19 found by Detective Robison.

CONCLUSIONS OF LAW

- 19 1. The detectives detained the defendant when they stated, "Stop. What is in your hand?"
20 and identified themselves as police officers.
- 21 2. Their initial detention of the defendant was brief and immediately addressed whether
22 there was a suspected controlled substance in the defendant's hand.
- 23 3. The basis for this detention of the defendant is a classic example of a reasonable,
24 articulable suspicion of criminal activity: police observed the defendant immediately in
25 front of them; in an alley under observation, and known for, drug transactions; the
26 defendant dumped something out of a beverage can that had been specifically designed
27 to disguise its actual contents; the defendant showed those contents to the other
individual and discussed them with the other individual; nothing suggested the two
individuals were associated with any legitimate business bordering the alleyway.

- 1 4. Those unusual and suspicious circumstances would lead a police officer to reasonably
2 believe that what they were witnessing was a drug transaction or some other transaction
in contraband items.
- 3 5. Those circumstances were sufficient for the detectives to briefly detain the defendant
4 and ask him what was in his hand.
- 5 6. When the defendant showed the detectives what appeared to be heroin in his hand, the
6 detectives were entitled to detain and investigate further or to place the defendant under
7 arrest.
- 8 7. The defendant's continued detention was functionally equivalent to arrest.
- 9 8. The search of the beverage can that took place following the defendant's placement in
10 the patrol car and reading of Miranda rights was a valid search incident to arrest.
- 11 9. Furthermore, the defendant had no expectation of privacy in the contents of the
12 beverage can pursuant to the Single Purpose Container doctrine. *See generally,*
13 *Arkansas v. Sanders*, 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586, 2593 (1979) and
14 *State v. Courcy*, 48 Wn. App. 326, 739 P.2d 98 (1987).
- 15 10. The Single Purpose Container doctrine applies because the contents of the beverage
16 can announced themselves because the can was specifically designed for holding
17 contraband, the detectives observed the defendant dumping the contents into his hand
18 and those contents were later identified as heroin, and the defendant had already
19 admitted that what he was doing was attempting to sell heroin.
- 20 11. For these reasons, the defendant did not have an expectation of privacy in the remaining
21 contents of the counterfeit can when Detective Robison located additional bindles of
22 heroin inside.
- 23 12. This case is distinguished from the facts of *State v. Byrd*, 162 Wn. App. 612; 258 P.3d
24 686 (2011); *rvw. granted*, 173 Wn.2d 1001 (2011), because in *Byrd* a person was
25 arrested solely for an outstanding bench warrant and police did not have a confession
26 and direct observations of a container that they had watched illegal drugs being removed
27 from.
13. This court declines to address the issue of whether *State v. Byrd* and *Arizona v. Gant*,
556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), are in conflict. That is a properly
a matter for the State Supreme Court to decide.
14. This court need not reach that issue because the facts of this case are distinguishable
from *Byrd*, and additionally the application of the Single Purpose Container doctrine
makes reference to *Gant* and *Byrd* moot.

CrR 3.5 HEARING

1. The testimony of the detectives in this CrR3.5 hearing was credible.
2. That testimony, in summary, was that the defendant made statements in response to police questioning while being detained on suspicion of being involved in a heroin transaction; the defendant was not in handcuffs; police did not draw weapons; police did not physically restrain the defendant; the time of day was 4:30 p.m.; the location was an alley behind a shopping center; and the defendant, his companion, and two police detectives in plain clothes were standing in the alley.
3. The circumstances of these statements indicate that, at that time, the defendant's liberty had not been curtailed to a degree equivalent to formal arrest and that his statements were voluntary in nature.
4. After being read his Miranda rights, the defendant was placed in the back of a police car. This action was equivalent to formal arrest.
5. The testimony presented indicates that the defendant was properly read his Miranda rights from a police standard issue card; he acknowledged understanding his Miranda rights, and made a knowing, intelligent and voluntary waiver of those rights before making further statements.
6. All statements made by the defendant to police are admissible for purposes of the CrR 3.5 hearing.

ORDER

The court denies the defendant's motion to suppress evidence gained as a result of his detention and arrest.

DATED this 22nd day of March, 2012.


The Honorable Barbara D. Johnson
Judge Of The Superior Court

Agreed to:


Michael W. Vaughn, WSBA #27145
Deputy Prosecuting Attorney


Christopher J. Dumm, WSBA # 28555
Defense Attorney


Joseph Michael Levine, Defendant

COWLITZ COUNTY ASSIGNED COUNSEL

November 14, 2012 - 4:21 PM

Transmittal Letter

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Case Name: State v. Joseph M. Levine

Court of Appeals Case Number: 43310-9

Is this a Personal Restraint Petition? Yes No

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- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
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- Affidavit
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- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: Appendix

Comments:

attached to brief, please

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