

No. 45766-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Debra Doering,

Appellant.

Mason County Superior Court Cause No. 13-1-00131-4

The Honorable Judge Amber Finlay

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Ms. Doering's motion to suppress the evidence found in the car.
2. The officers violated Ms. Doering's Fourth and Fourteenth Amendment right to be free from unreasonable seizures when they seized her without probable cause or reasonable suspicion.
3. The officers invaded Ms. Doering's right to privacy under Wash. Const. art. I, § 7 by seizing her without probable cause or reasonable suspicion.
4. The evidence admitted against Ms. Doering at trial was fruit of the poisonous tree of her unconstitutional seizure.
5. The unconstitutionally seized Ms. Doering when they stopped car, in which she was a passenger, without reasonable suspicion to believe that Ms. Doering or the driver had broken the law.
6. The officer stopped the car without specific and articulable facts necessary to determine whether the driver was trespassing.
7. The court erred by entering finding of fact 1.
8. The court erred by entering conclusion of law 2.
9. The court erred by entering conclusion of law 4.

ISSUE 1: A traffic stop constitutes an unlawful seizure unless the officer has specific, articulable facts creating the reasonable belief that the driver is breaking the law. Here, the police pulled over a car in which Ms. Doering was a passenger for driving a closed road even though the road was open as a flood route. Did the traffic stop violate Ms. Doering's rights under the Fourth and Fourteenth Amendments and art. I, § 7?

10. Ms. Doering was unconstitutionally seized when the officers demanded her identifying information absent reason to believe that she had committed a crime.

ISSUE 2: An officer unlawfully seizes a passenger in a car by asking him/her for identifying information absent an independent reason to believe that s/he has violated the law. Here, the officer asked Ms. Doering for her name and birthdate without any reason to believe she had committed a crime. Did the officer seize Ms. Doering in violation of her constitutional rights?

11. Ms. Doering was unconstitutionally seized when the officers patted her down for weapons without articulable facts that would lead a reasonable person to believe that she was armed and dangerous.
12. The court erred by entering finding of fact 3.
13. The court erred by entering finding of fact 5.
14. The court erred by entering conclusion of law 3.

ISSUE 3: An officer may only frisk a person for weapons if s/he has articulable facts that the person is armed and dangerous. Here, an officer ordered Ms. Doering to get out of the car so he could frisk her because she had tools and a dog in the car, and had turned around in her seat. Were the circumstances insufficient to justify a frisk for weapons under the Fourth and Fourteenth Amendments and art. I, § 7?

15. Ms. Doering's consent to search the car was vitiated by her previous unlawful seizure.
16. Ms. Doering's consent to search the car was invalid because it was not given knowingly and voluntarily.
17. The evidence admitted against Ms. Doering was discovered pursuant to her unlawful seizure, not as a result of the consent search of the car.
18. The court erred by entering finding of fact 7.
19. The court erred by entering conclusion of law 5.
20. The court erred by entering conclusion of law 6.
21. The court erred by entering conclusion of law 7.

ISSUE 4: An unlawful seizure can vitiate subsequent consent to search. Here, Ms. Doering consented to search of the car after she had been unlawfully seized and after the police had already discovered all of the evidence against her. Did the facts require suppression of the evidence despite Ms. Doering's later consent to search the car?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In Mason County, privately owned logging roads are used as emergency evacuation routes for severe weather. RP 4, 16. Officers of the Department of Fish and Wildlife patrol these roads. RP 18.

Thomas Tobey was returning from Forks on March 16, 2013 with passenger Debra Doering. Ms. Doering had tied up her dog in the back seat. RP 6, 26, 40. The news warned of flooding, so Tobey took the evacuation route. RP 26-27. He saw a green dot on the sign at the entrance to the road, which he took to mean the road was open. RP 28. He saw the open gate at the entrance to this road. RP 38.

Department of Fish and Wildlife Officer Smith stopped Tobey's vehicle around 11 pm. RP 2-5. He pulled the car over because even though the road serves as an evacuation route, it is also closed after dark.¹ RP 4, 14-15, 19. Another officer assisted Smith. RP 5.

In response to the officer's question, Tobey said that he had a gun and the officers checked and returned it. RP 7, 39. The other officer had Tobey get out so that he could be patted down; he had no other weapons. RP 7. Tobey had a suspended license. RP 6. Smith demanded identification information from Ms. Doering. RP 8. While she didn't

have her license with her, the officers verified it was valid and decided to let her drive the car away. RP 8. The officers did not intend to arrest Tobey or take him into custody. RP 19, 115.

During this conversation, Ms. Doering reached back, to calm her dog. The officer instructed her to keep her hands visible. RP 8, 40. The officer had Ms. Doering get out and walk around to the driver side. RP 8, 45. He patted her down. RP 8, 42. As she got back into the car, she reached over. RP 8, 22. At this point, while pointing his flashlight into the car, Smith saw what he believed to be a methamphetamine pipe. RP 8, 22-23, 43.

Another officer detained Ms. Doering, and Smith looked through the car again with his flashlight. RP 9-10. This time, he saw a baggy behind the passenger seat with crystals inside. RP 10, 43.

The officers reviewed a consent to search form. RP 10-11. Both Tobey and Ms. Doering consented to a search of the car after the officers explained that if they had to get a warrant, they would tear the car apart. RP 12, 35.

¹ The officer didn't know when he stopped the car that Mr. Tobey was the driver and that he had been "trespassed" from Green Diamond property. RP 36.

The state charged Ms. Doering with possession of methamphetamine. CP 61. Ms. Doering moved to suppress, and the court held an evidentiary hearing. CP 42-44, 48-60.

Smith described the signs and warnings at the entrance to the road. He testified that during the month of March, the signs said that the evacuation route was open. RP 19, 54. He also said that all entrances to the area were posted no trespassing at night. RP 4, 20.

Ms. Doering argued that the initial stop lacked probable cause, that the officers had no basis to remove Ms. Doering from the car, and that the investigatory portion of the stop had concluded by the time Ms. Doering exited the car. CP 48-60, 42-44; RP 65-66.

The court denied the suppression motion. Judge Finlay found that the road was closed. She made no reference to the evacuation route or that signs may have indicated that the road was open. CP 45. The court also found that Ms. Doering's movements to soothe her dog were "furtive", and held that her consent to search valid. CP 46. The court ruled that both occupants of the car were trespassing and therefore subject to arrest.² CP 46-47. Judge Finlay upheld the search as based on articulable concerns

² Only Smith testified at the suppression hearing. He told the court that he stopped the car for trespass, but that he did not plan to arrest or cite Tobey for the alleged violation. He did not testify that he had any cause to stop or seize or cite Ms. Doering for trespass. RP 2-25.

for officer safety. CP 47. The defense moved to reconsider. The motion was denied. CP 41-44.

A jury convicted Ms. Doering as charged. After sentencing, Ms. Doering timely appealed. CP 6-22, 5.

ARGUMENT

THE COURT ERRED BY ADMITTING EVIDENCE SEIZED IN VIOLATION OF MS. DOERING’S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, § 7.

A. Standard of review

Appellate courts review *de novo* the issue of whether a warrantless seizure violates the constitution. *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218 (2011).

B. The officers unlawfully seized Ms. Doering when they stopped the car, asked for her identification, and ordered her to exit the car, all without reasonable suspicion.

The federal and state constitutions both protect against unlawful seizure of persons. U.S. Const. Amends. IV, XIV; Wash. Const. art. I, § 7; *Diluzio*, 162 Wn. App. at 590. Warrantless seizures are *per se* unreasonable. *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). The state bears the burden of proving that a warrantless seizure falls into one of the “jealously and carefully drawn” exceptions to the warrant requirement. *Id.*

A *Terry* stop, or brief investigatory seizure, falls within an exception to the warrant requirement. *Id.* at 61-62. The state must prove that a *Terry* stop was justified by clear, cogent, and convincing evidence. *Id.* at 62. Such a seizure requires a showing that the officer had well-founded suspicion that the person seized was engaged in criminal activity. *Id.* The officer must have “specific and articulable facts” to support that suspicion. *Id.* A *Terry* stop must be justified at its inception. *Diluzio*, 162 Wn. App. at 590.

Unlike the Fourth Amendment, the analysis under art. I, § 7 “focuses on the rights of the individual rather than on the reasonableness of the government action.” *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008).

The exclusionary rule requires suppression of all evidence obtained pursuant to a person’s unlawful seizure. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009).

1. The officers did not have reasonable suspicion to stop the car in which Ms. Doering was a passenger.

A traffic stop constitutes a seizure for constitutional purposes. *Doughty*, 170 Wn.2d at 62. The police may not stop a car unless they have the specific and articulable facts necessary to justify a *Terry* stop. *Id.*

The police unlawfully seized Ms. Doering when they stopped the car in which she was a passenger. *Id.* The officers did not have valid reason to believe that the driver had committed a traffic infraction.³ *Id.*

It was contested at the suppression hearing whether the road on which the car travelled was closed. RP 19, 27. Though the road is generally closed at night, it was open as a flood route during the time of Ms. Doering's seizure. RP 19.

Ms. Doering presented uncontested evidence that the nearby river was on a flood watch on the night the car was stopped. RP 27. In response, the state argued that it did not matter whether the road was closed or not. RP 67. Instead, the state claimed that the officer's belief that the road was closed was sufficient to support the seizure. RP 67-68.⁴

But art. I, § 7 of the state constitution protects individual privacy, not an officer's reasonable mistake. *Eisfeldt*, 163 Wn.2d at 639. Before

³ The court concluded that the officers had reasonable suspicion that *both* the driver *and* Ms. Doering were trespassing on the logging road. CP 46 (Conclusion of Law No.2). But Ms. Doering was merely a passenger in the vehicle. Without control over the car, she had no ability to engage in the *actus reus* of knowingly entering the area. *See* RCW 9A.52.080. Indeed, the officer did not testify that he suspected Ms. Doering of trespassing, only that he suspected the driver. RP 2-25. Conclusion of Law No. 2 must be vacated.

⁴ In its findings of fact, the court does not address the evidence that the road was open as a flood route on the night of Ms. Doering's seizure. CP 45-46. Instead, the court makes a blanket finding that the road is closed during the hours of darkness. CP 45 (finding 1). But the officer admitted that there were signs posted saying that the flood evacuation route was open. RP 19. The court's finding that the road is always closed at night is unsupported by the evidence and must be vacated. *See e.g. State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (A court errs by entering a factual finding that does not have adequate support in the record).

pulling the car over, the officer should have radioed dispatch or taken some other step to ensure that the road was, in fact, closed. Absent the information necessary to determine whether the road was closed, the officer did not have the articulable facts necessary to deduce whether the driver was breaking the law. *Doughty*, 170 Wn.2d at 61-62.

The officer unlawfully seized Ms. Doering by stopping the car without the reasonable suspicion necessary for a traffic stop. *Id.* All of the evidence discovered as a result of the stop should have been suppressed at trial. *Id.* at 65. Ms. Doering's conviction must be reversed. *Id.*

2. The officers did not have reasonable suspicion to seize Ms. Doering by asking for her identifying information.

The police seize a passenger in a car by asking for identification. *State v. Brown*, 154 Wn.2d 787, 796, 117 P.3d 336 (2005). This includes asking for the passenger's name and birthdate. *Id.* at 797. Officers may not seize a passenger in this manner without an "independent basis," such as an articulable suspicion that the passenger has committed a crime. *Id.* at 796.

Here, the officers unlawfully seized Ms. Doering when they asked for her name and date of birth without any reason to believe that she was engaged in criminal activity. RP 6, 100. No officer claimed that he had

any reason to believe that Ms. Doering had committed a crime at that point.⁵ RP 2-8, 98-100. Instead, the officer appears to have asked Ms. Doering for her information in order to assess whether she could drive the car. RP 6-7.

But the state and federal constitutions do not permit a *Terry* stop of any person who is about to drive a car in order to check for a valid license. Instead, seizure is only justified if the officers have facts leading them to reasonably believe that the person is engaged in illegal activity. *Brown*, 154 Wn.2d at 796-97. The fact that the driver of the car had a suspended license does not give rise to a reasonable suspicion that Ms. Doering's driver's license was invalid. *See e.g. Doughty*, 170 Wn.2d at 62 (a person's proximity to others suspected of illegal activity does not create the articulable facts necessary for a *Terry* stop).

The officer did not have the articulable suspicion necessary to seize Ms. Doering by asking for her identifying information. *Brown*, 154 Wn.2d at 796-97. The trial court violated Ms. Doering's constitutional rights by admitting the evidence discovered pursuant to her unlawful seizure. *Id.* at 799. Ms. Doering's conviction must be reversed and the evidence suppressed on remand. *Id.*

⁵ As noted above, as a passenger in the car, Ms. Doering did not have the power to commit the *actus reus* necessary for trespass. *See* RCW 9A.52.080

3. The officers did not have reasonable suspicion to justify ordering Ms. Doering out of the car so they could frisk her for weapons.

An officer may only frisk a person for weapons if s/he possesses “specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous.” *Harrington*, 167 Wn.2d at 667-68 (internal citations omitted). A person putting his/her hands into his/her pockets, even repeatedly, is not sufficient to justify a frisk for weapons. *Id.* at 667-70.

Here, the officer ordered Ms. Doering out of the car in order to frisk her even though the facts did not give rise to the reasonable belief that she was armed and dangerous. The driver of the car volunteered that he had a shotgun, which the officers confirmed was unloaded. RP 20-21. There was also a large dog and some tools in the back of the car. RP 8. Ms. Doering turned around to soothe the dog. RP 40. When the officer asked her to show her hands, she complied. RP 8.

The evidence was insufficient to justify ordering Ms. Doering out of the car in order to frisk her for weapons. *Harrington*, 167 Wn.2d at 667-68. The presence of a dog or tools in the car did not make Ms. Doering more likely armed and dangerous. Like putting one’s hands in one’s pockets, turning around in her seat did not make Ms. Doering more likely armed and dangerous. *Id.* Indeed, Ms. Doering showed the officer

her hands when asked. RP 8. At that point, any reasonable fear on the part of the officer should have abated. An objectively reasonable person would not have thought Ms. Doering was armed and dangerous. *Id.*

Ms. Doering was unlawfully seized when she was ordered to get out of the car so the officer could frisk her for weapons absent any reason to believe that she was armed or dangerous. *Harrington*, 167 Wn.2d at 667-68. Her conviction must be reversed and the evidence suppressed on remand. *Doughty*, 170 Wn.2d at 61-62.

C. Ms. Doering's consent to search the car – given after the officers had already located all of the evidence against her – does not change the fact that the evidence was discovered pursuant to her unlawful seizure.

Unlawful seizure of a person can vitiate any subsequent consent given to search. *State v. Coyne*, 99 Wn. App. 566, 574, 995 P.2d 78

(2000). The court looks to four non-exclusive factors:

(1) temporal proximity of the illegality and the subsequent consent; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of *Miranda* warnings.

Id.

Here, Ms. Doering consented to the search of her car after the police had discovered a pipe and bag of drugs. RP 8-10. The search also occurred after she had been unlawfully seized in three different ways. The police did not locate any new evidence pursuant to the consent search.

Ms. Doering's ongoing unlawful seizure vitiated her consent to search the car. *Coyne*, 99 Wn. App. at 574. First, Ms. Doering was asked for consent immediately following her third and final unlawful seizure. Second, no significant circumstances intervened between her unlawful seizure and the request for her consent. In fact, the police had just seen contraband through the car window. Third, the only possible purpose of the officers' repeated and escalating unlawful seizure was to conduct an exploratory investigation of Ms. Doering, despite the fact that no evidence suggested that she had committed any crime. Fourth, though the officers read Ms. Doering her *Miranda* warnings after they had already discovered the evidence, that advisement was insufficient to undo the combined effect of the previous unlawful seizures. RP 106-07; *Id.*

Additionally, the police did not discover any additional evidence upon searching the car. They found the pipe and bag of drugs pursuant to Ms. Doering's unlawful seizure, not pursuant to the search of the car. RP 8.

Ms. Doering's unlawful seizure vitiated her subsequent consent to search the car. *Coyne*, 99 Wn. App. at 574. Furthermore, the police discovered the evidence against Ms. Doering as a result of her unlawful seizure, not because of her consent to search. Ms. Doering's consent to search the car does not change the suppression analysis in this case. *Id.*

Her conviction must be reversed and the evidence suppressed on remand.

Id.

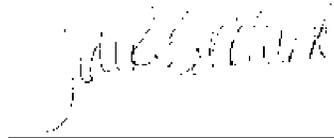
CONCLUSION

The officers unlawfully seized Ms. Doering three times. First, by pulling over the car without the specific, articulable facts necessary to determine whether it was trespassing. Second, the officers unlawfully seized her by asking for her identifying information without reason to believe that she had committed any crime. And, third, the officers unlawfully seized Ms. Doering by ordering her out of the car in order to frisk her without any facts that would lead an objective person to believe she was armed and dangerous. Ms. Doering's consent to search the car – given after the officers had discovered all of the evidence against her – does not change the analysis.

The trial court should have suppressed the evidence discovered pursuant to Ms. Doering's unlawful seizure. Her conviction must be reversed.

Respectfully submitted on June 5, 2014,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Debra Doering
PO Box 495
Hoodsport, WA 98548

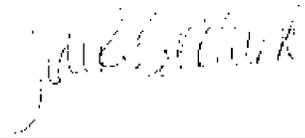
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Mason County Prosecuting Attorney
timw@co.mason.wa.us

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

Signed at Olympia, Washington on June 5, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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