

NO. 47775-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH THOMAS, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 15-1-00730-2

BRIEF OF RESPONDENT

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

1. Did the trial court correctly apply the law to the facts and evidence at the end of the suppression hearing?
2. Were the court's findings of fact supported by substantial evidence?
3. Did the trial court err in denying the defendant's motion to suppress evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On February 23, 2015, the Pierce County Prosecuting Attorney (State) filed an Information charging Kenneth Thomas, Jr., with one count of unlawful possession of a firearm in the first degree (UPF1). CP 1. As the case progressed, the defendant filed a motion to suppress the evidence. CP 3-12.

On May 19, 2015, the case was assigned to the Hon. Kitty-Ann van Doorninck for the suppression hearing under CrR 3.6. RP 5ff. After hearing testimony and argument, the court denied the defendant's motion. RP 85-86; CP 25. After the court denied the motion to suppress, the defendant waived jury and proceeded to a bench trial. RP 87-89; CP 26. After hearing testimony and viewing the evidence, the court found the defendant guilty, as charged. RP 167; CP 162.

The court sentenced the defendant within the standard range, to 40 months in prison. CP 33. The defendant filed a timely notice of appeal. CP 44.

2. Facts

On February 21, 2015, at approximately 2:00 a.m., Lakewood Police officers Feldman and Wiley were on patrol in their squad car. RP 8. A car passed them going in the other direction on South 84th St. RP 8. The officers saw that the front license plate of the car was on the front dashboard, a traffic infraction. RP 8, 10.

The police turned around to follow the car. *Id.* The car turned north onto South Tacoma Way. RP 8. Officer Wiley activated the emergency lights to signal the car to pull over. RP 11. The car pulled into a parking lot and stopped. RP 13.

Officer Wiley approached the car and contacted the driver. RP 14. Officer Feldman approached the passenger side and stood by the center of the car, so that he could monitor the three passengers. RP 16. Officer Feldman saw the front passenger moving his hands. RP 17. Feldman ordered him to keep his hands visible. RP 18. Officer Feldman drew his gun and held it in the low- ready position by his side. RP 20.

Lakewood Police Officers Criss and Moody arrived as a back-up unit. RP 21. Officer Moody approached Officer Feldman on the passenger side and saw that Feldman had his gun drawn. RP 40. After Feldman

explained the circumstances, Moody opened the passenger door and directed the passengers to step out. RP 41. Moody frisked the front passenger for weapons. He had none. *Id.*

The defendant, who was sitting behind the front passenger, was next. RP 44, 104. When Officer Moody frisked him, Moody discovered a .380 pistol in the defendant's waistband. RP 45-46, 106-107, 152.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE.

a. Standard of review.

When reviewing a trial court's ruling on a motion to suppress, the reviewing court determines whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the trial court's conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

The defendant points out that some of the Findings of Fact are mislabeled, and are actually conclusions of law. App. Br. at 1. A finding of fact is an assertion that evidence shows something has or will occur or exist, independent of an assertion of its legal effect. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981); *State v. Niedergang*, 43 Wn. App. 656, 658–59, 719 P.2d 576 (1986). The statement is a conclusion of law if

the determination is made by a process of legal reasoning from the facts. *Niedergang*, at 658–659.

Appellate courts often encounter mixed findings and conclusions. Because “a conclusion of law is a conclusion of law wherever it appears,” the court reviews the conclusions of law in such mixed findings de novo. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002). A conclusion of law erroneously labeled as a finding of fact is reviewed as a conclusion of law and likewise, a finding of fact erroneously labeled as a conclusion of law is reviewed as a finding of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986); see also *In re Estate of Haviland*, 162 Wn. App. 548, 561, 255 P.3d 854 (2011).

Here, Finding 29 is a mixed finding and conclusion. The word “lawful” is a legal conclusion. The rest of the statements are factual findings. Finding 31; that the evidence “proves” and resulted in “probable cause” are legal conclusions. Finding 32; “justifying a protective frisk” is a legal conclusion.

- b. Police had reason to suspect the defendant was armed.

The Fourth Amendment of the United States Constitution and Article 1, §7 of the Washington Constitution require authority of law, generally a search warrant, before government agents may intrude into one’s private affairs. One exception to the warrant requirement is an

investigative detention, or the so-called *Terry* stop and frisk that was first articulated by the Supreme Court of the United States in *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *Arizona v. Johnson*, 555 U.S. 323, 327, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009), the Supreme Court extended the *Terry* holding and analysis to a patdown of the driver or a passenger during a lawful traffic stop.

Police work is dangerous. Even a stop for a minor reason or infraction can turn into a violent encounter. The appellate courts have recognized this risk to police, but mindful of the right of citizens to be free from intrusion into their private affairs under Article 1, §7, have carefully balanced the two concerns. *See, e.g., State v. Belieu*, 112 Wn.2d 587, 601–602, 773 P.2d 46 (1989); *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

Because the circumstances leading to police encounters with citizens are extremely varied, “courts are reluctant to substitute their judgment for that of police officers in the field.” *Belieu*, 112 Wn.2d at 601. Because the circumstances for a stop or weapons frisk are so varied, these cases are highly fact-dependent.

“A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing.” *Id.*, at 602 (additional internal cite omitted). A reasonable safety concern exists “when an officer can point to ‘specific and articulable facts’ which create an objectively reasonable belief that a

suspect is ‘armed and presently dangerous.’ The officer need not be absolutely certain the individual is armed, only that a reasonably prudent person in the same circumstances would be warranted that their safety, or that of others, was in danger.” *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)(including partial quote from *Terry*, 392 U.S. at 27).

In determining whether the search was reasonably based on officer safety concerns, a court should evaluate “the entire circumstances” surrounding the *Terry* stop. *State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128 (2002); *see also State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

If a suspect made a furtive movement appearing to be concealing a weapon or contraband in the passenger compartment, a protective search is generally allowed. *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). This is also true where a suspect is ordered and fails to keep his hands visible. *State v. Ibrahim*, 164 Wn.2d 503, 509, 269 P. 3d 292 (2011). Early morning darkness is another circumstance taken into account. *State v. Horrace*, 144 Wn.2d 386, 394, 28 P.3d 753, 758 (2001); *Collins*, 121 Wn.2d at 174.

In *State v. Mendez*, 137 Wn.2d 208, 200-221, 970 P.2d 722 (1999), the Supreme Court recognized both the privacy interests of the passenger and the necessity of the police officer to maintain security of the situation:

Factors warranting an officer's direction to a passenger at a traffic stop may include the following: the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants. These factors are not meant to be exclusive; nor do we hold that any one factor, taken alone, automatically justifies an officer's direction to a passenger at a traffic stop. The inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop.

Id. (abrogated on other grounds by **Brendlin v. California**, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)).

The defendant cites **State v. Setterstrom**, 163 Wn.2d 621, 183 P.3d 1075 (2008), as he did in the trial court. App. Br. at 9-12. In **Setterstrom**, police received a complaint about two young men in the lobby of the Department of Social and Health Services (DSHS) building in Tumwater. The caller alleged one of them was sleeping and the other appeared under the influence of drugs.

Two police officers arrived to find Joseph Rice, asleep on a bench in the lobby. *Id.*, at 624. The other man, Michael Setterstrom, sat next to Rice, filling out a benefits application. Setterstrom was nervous and fidgeting, behavior that quickly escalated. *Id.* One of the officers believed Setterstrom was under the influence of drugs, probably methamphetamine. *Id.* Setterstrom did not stand up, put his hands in his pockets, or do or say anything threatening. *Id.*

The officer feared danger, so he patted down Setterstrom for weapons. In Setterstrom's right front pants pocket he felt hard objects. The officer reached into Setterstrom's pocket where he discovered a small plastic baggie filled with white powder. He arrested Setterstrom for possession of suspected drugs. *Id.*

Applying both *Collins* and *Belieu*, the Supreme Court found that the weapons frisk failed to meet the necessary requirements. 183 Wn.2d at 626-627. The *Setterstrom* decision was fact-based; it did not announce a new rule stricter than the existing framework of review.

In the present case, the trial court read and considered the cases cited by the parties in this case. When rendering its decision, the judge discussed the application of many of the cases to the facts in this case. The court considered *Setterstrom* and specifically distinguished it on the facts. RP 82-83. The court went on to compare the facts and circumstances presented in *State v. Horrace*. RP 83. The court considered the legal principles and factors from *Mendez* and *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). RP 83-84.

As the trial court here pointed out, *State v. Horrace*, 144 Wn.2d 386, 394, 28 P.3d 753, 758 (2001) is much closer in facts than *Setterstrom*. RP 83. There, a trooper stopped a vehicle for speeding. *Horrace* at 388. The driver's license was "punched," so the trooper performed a radio records check to see if the license was valid. *Id.* at 388-89. While performing the records check the trooper saw the driver lean to

his right in the direction of the center console as though he was “doing something down between the seats.” *Id.* at 388-89. The driver of the vehicle was eventually arrested because his license was suspended. *Id.* at 388-89.

After placing the driver in the patrol car, the trooper went back to the vehicle and contacted Horrace, the passenger, and asked him to step out of the vehicle so he could pat him down for weapons because of the furtive movements of the driver near the center console, which was in close proximity to Horrace as well. Another factor was that Horrace was wearing a heavy jacket with numerous pockets. *Id.* During the frisk of Horrace the trooper discovered a container of bullets and a pistol magazine. Horrace eventually admitted there was a gun under the seat. *Id.*

The Supreme Court rejected Horrace’s challenges to the frisk and found the trooper’s actions were appropriate: “three particular observations gave rise to his belief that Horrace was armed and presently dangerous: the driver was making unexplained movements between the seats and in Horrace’s direction, Horrace was in close proximity to those movements, and Horrace was wearing a bulky, zippered jacket.” *Id.* at 395.

Here, the defendant and the other rear passenger glanced nervously at the patrol car before police even activated the emergency lights. RP 11. The two continued to appear nervous throughout the encounter. RP 20.

The defendant and the front seat passenger made furtive movements with their hands. RP 17-19. Officer Feldman saw the front passenger move his hands toward his side. RP 17-18. Officer Feldman had to direct him to stop. RP 18. After Officer Feldman had directed the front passenger to keep his hands visible, Feldman saw the defendant move his hands from his lap to his left hip, out of sight. RP 19. Feldman was concerned that the defendant had a gun under his thigh on the left. *Id.*

Officers Wiley and Feldman were initially outnumbered by the occupants of the car. RP 13, 40. The officers noted that the passengers' clothing was sufficiently bulky to conceal a weapon. RP 35, 42. It was late at night in a high crime area. RP 24, 41. In fact, during a recent investigative detention at a gas station near the scene of the current stop, Officer Feldman had removed a gun from a suspect. RP 24.

The factors considered by the trial court were those recommended by the Supreme Court in *Mendez* and *Belieu*. The facts in this case were similar to those in *Horrace* and different than those in *Setterstrom*. The trial court did not commit error in denying the motion to suppress.

D. CONCLUSION.

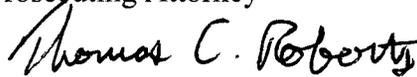
The trial court heard the testimony of the police officers and carefully applied the proper cases to the facts. There was substantial

evidence to support the findings. The court's conclusions followed the law.

The State respectfully requests that the conviction be affirmed.

DATED: February 17, 2016

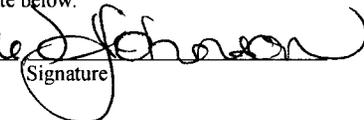
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The undersigned certifies that on this day she delivered by ^{efile} U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached.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

2/17/16 
Date Signature

PIERCE COUNTY PROSECUTOR

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