

FILED

FEB 10 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B

No. 28309-7-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MARLOWE CLAUDE OLNEY, JR.,

Appellant.

On Appeal from the Yakima County Superior Court
Cause No. 09-1-00302-1
The Honorable Michael McCarthy & James Lust, Judges

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

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Seattle, Washington 98105
Phone (206) 526-5001

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TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | ASSIGNMENTS OF ERROR..... | 1 |
| II. | ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR..... | 1 |
| III. | STATEMENT OF THE CASE..... | 2 |
| IV. | ARGUMENT & AUTHORITIES | 5 |
| | A. <u>Significant portions of Findings of Fact 1, 2 and 3 are not supported by substantial evidence in the record.</u> | 6 |
| | B. <u>Officer Walls did not have specific and articulable facts sufficient to support a well-founded suspicion of criminal activity justifying a warrantless investigative detention.</u> | 8 |
| V. | CONCLUSION | 12 |

TABLE OF AUTHORITIES

CASES

| | |
|--|--------|
| <u>State v. Acrey</u> , 148 Wn.2d 738, 64 P.3d 594 (2003) | 10 |
| <u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997) | 9 |
| <u>State v. Crane</u> , 105 Wn. App. 301, 19 P.3d 1100 (2001) | 10 |
| <u>State v. Ferrier</u> , 136 Wn.2d 103, 960 P.2d 927 (1998) | 9 |
| <u>State v. Gluck</u> , 83 Wn.2d 424, 518 P.2d 703 (1974) | 10 |
| <u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)..... | 9 |
| <u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994)..... | 5, 6 |
| <u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986) | 10, 12 |
| <u>State v. Kinzy</u> , 141 Wn.2d 373, 5 P.3d 668 (2000)..... | 9 |
| <u>State v. Larson</u> , 93 Wn.2d 638, 611 P.2d 771 (1980)..... | 11 |
| <u>State v. Little</u> , 116 Wn.2d 488, 806 P.2d 749 (1991) | 10 |
| <u>State v. Martinez</u> , 135 Wn. App. 174, 143 P.3d 855 (2006)..... | 10, 11 |
| <u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999)..... | 5, 6 |
| <u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003) | 9 |
| <u>State v. Richardson</u> , 64 Wn. App. 693, 825 P.2d 754 (1992) | 10 |
| <u>State v. Soto-Garcia</u> , 68 Wn. App. 20, 841 P.2d 1271 (1992) | 10 |
| <u>State v. Tocki</u> , 32 Wn. App. 457, 648 P.2d 99 (1982)..... | 11, 12 |
| <u>State v. Young</u> , 135 Wn.2d 498, 957 P.2d 681 (1998) | 9 |

Terry v. Ohio,
392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 9

OTHER AUTHORITIES

U.S. Const. amd. IV 9
Wash. Const. Art. I, § 7 9

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered Findings of Fact 1, 2 & 3 following its denial of Appellant's CrR 3.6 motion to suppress, because significant portions of those findings are not supported by substantial evidence in the record.
2. The trial court erred when it concluded that there were specific and articulable facts supporting a well-founded suspicion of criminal activity and that the investigatory detention of Appellant was therefore justified.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Are Findings of Fact 1, 2 & 3 supported by substantial evidence, where the testimony and pleading that the trial court specifically relied upon in deciding the motion to suppress does not contain certain facts included in those findings? (Assignment of Error 1)
2. Did the officer have a well-founded suspicion of criminal activity justifying a warrantless investigative detention, when the officer's only observations were that Appellant was a passenger in a legally parked car, that several people ran away from the car when the officer approached, and that Appellant appeared to be trying to conceal something?

(Assignment of Error 2)

III. STATEMENT OF THE CASE

Yakima Police Officer Eric Walls was on patrol in his marked police vehicle late at night on February 6, 2009. (06/15/09 RP 16)¹ When he turned southbound into an alley behind an apartment complex on North 7th Street, Officer Walls saw several people standing around a white sedan, legally parked in the alley. (06/15/09 RP 17) When he approached, the people standing around the car ran away. (06/15/09 RP 17)

Officer Walls had recovered stolen vehicles in that alley before, so he thought the white sedan might be stolen as well. (06/15/09 RP 18) Officer Walls illuminated the sedan with his headlights and spotlight, and stepped out of his patrol car. (06/15/09 RP 18)

Officer Walls checked to see if the sedan had been reported stolen, which it had not. (06/15/09 RP 34, 45) He drew his gun, and approached the sedan. (06/15/09 RP 18, 20) Officer Walls noticed a man sitting in the driver's seat, and another man sitting directly behind him in the rear passenger area of the sedan.

¹ Citations to the transcripts will be to the date of the proceeding followed by the page number.

(06/15/09 RP 20) The driver did not make any unusual movements, but the passenger appeared to be looking at the floor and leaning towards the right passenger side of the sedan. (06/15/09 RP 22-23) Officer Walls called for a backup patrol unit, and contacted the two men in the sedan. (06/15/09 RP 23)

Officer Claudia Kingman arrived a few minutes later. (06/15/09 RP 24, 51) As she ran a warrant check on the passenger, Marlowe Claude Olney, she walked around to the passenger side of the sedan to look for weapons or contraband. (06/15/09 RP 53, 54) Officer Kingman shone her flashlight into the sedan, and saw a gun on the floorboard behind the front passenger seat. (06/15/09 RP 55) The officers took Olney and the driver into custody, and secured them in their patrol cars. (06/15/09 RP 24, 25, 55)

Dispatch advised Officer Kingman that Olney had a felony conviction, so he was placed under arrest. (06/15/09 RP 55) During a subsequent search of the sedan, the officers observed a red sweatshirt on the rear floorboard, and a purse and makeup case on the rear passenger seat. (06/15/09 RP 67, 68) Olney also had an open beer bottle between his feet. (06/15/09 RP 31, 76) The officers were not able to see the gun or the other items without

the aid of their flashlights. (06/15/09 RP 59, 68, 74)

The State charged Olney with second degree unlawful possession of a firearm. (CP 64) Before trial, Olney moved to suppress the firearm, arguing that the stop, detention and search were unjustified. (CP 49-53, 54-58) The trial court denied the motion. (CP 37-38, 6-9)

At trial, Olney testified that he was walking home from his aunt's house, when he saw his friend sitting in the driver's seat of the sedan. (06/16/09 RP 116) He asked for a ride, and his friend agreed. (06/16/09 RP 116) There were several other people in the sedan when Olney got in. (06/16/09 RP 116) A few moments later, Officer Walls arrived and everyone ran away, including the other occupants of the sedan. (06/16/09 RP 117, 124) Olney had no reason to run away, so he stayed in the sedan. (06/16/09 RP 118) He testified that the gun was not his, and that he did not know it was in the sedan. (06/16/09 RP 118) He was reaching down to put his beer on the floor, not reaching to conceal the gun. (06/16/09 RP 118)

The jury convicted Olney as charged. (CP 17; 06/17/09 RP 163) The trial court imposed a standard range sentence of 16 months. (07/22/09 RP 4; CP 11) This appeal follows. (CP 2)

IV. ARGUMENT & AUTHORITIES

When the parties gathered before the trial court for a hearing on Olney's CrR 3.6 motion, Officer Walls did not appear to testify. (05/05/09 RP 2) The State urged the court to decide the matter without a hearing, claiming that the relevant facts were not disputed. (05/05/09 RP 2-3) The court decided to hear testimony from Officer Kingman, who was present. (05/05/09 RP 8) The court then recessed to consider whether Officer Walls' testimony was necessary, or whether it could decide the motion based only on the pleadings and Officer Kingman's testimony. (05/05/09 RP 7-8, 15) The court subsequently decided that Officer Walls' testimony was not necessary, because the material facts were not in dispute. (CP 37) The court ruled that the stop and detention was legal, and denied the motion to suppress. (CP 8-9, 37)

When reviewing the denial of a motion to suppress, the reviewing court should first determine whether substantial evidence supports the challenged findings of fact. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Mendez, 137 Wn.2d at 214 (citing Hill, 123

Wn.2d at 644). “A trial court’s erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal.” Hill, 123 Wn.2d at 647. The trial court’s conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214 (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

A. Significant portions of Findings of Fact 1, 2 and 3 are not supported by substantial evidence in the record.

The trial court did not make an oral ruling on the motion to suppress. But the court’s written findings state that, in deciding the motion, the court considered “Officer Kingman’s testimony and defense counsel’s supporting affidavit[.]” (CP 6)² The court then entered the following relevant Findings of Fact:

I.

On February 6, 2009 at 11:35 p.m. Officer Eric Walls of the Yakima Police Department was on duty in uniform, patrolling his district in a marked police car. *Officer Walls was very familiar with this area of his district, which was known for high gang activity. The dominant gang in that area was La Raza, a Norteno gang, the members of which identified with the color red. Officer Walls knew from experience that members of this gang often carried weapons.*

Officer Walls turned south down an alley between North 6th Street and North 7th Street. He saw three to six people *dressed in red clothing* standing around a white, 4-door Lincoln car, which

² A complete copy of the trial court’s Findings of Fact and Conclusions of Law are attached in Appendix A. A complete copy of defense counsel’s Affidavit is attached in Appendix B.

was legally parked at an apartment complex. Officer Walls spotlighted the car. The people ran in different directions when they saw Officer Walls' patrol car. Officer Walls did not activate his light bar, but kept his spotlight and headlights pointed at the white car.

II.

Officer Walls saw two men inside the white car, one in the driver's seat and another sitting directly behind him in the back passenger seat. . . . Officer Walls saw the backseat passenger (later identified as Mr. Olney) move around in his seat and from side to side, and look down as if at something in his hands. He also saw the backseat passenger lean forward to his right toward the front passenger seat as if concealing something, although Walls could not see his hands, and then return to an upright seated position. The backseat passenger's movements, combined with the location, the late hour, *the red clothing worn by the people who had fled, but could still be heard nearby, caused Officer Walls to be concerned for his own personal safety.*

III.

Officer Walls got out of his patrol car, standing behind his door for cover. He drew his firearm, *because in his experience members of the Las Raza gang frequently carried weapons. . . . Officer Walls had recovered stolen cars in that alley before.* The white car's trunk lid was partly open, and Walls suspected that it may have been stolen. He called in the license plate number for checking. Officer Walls approached the car. . . .

(CP 6-7 (Emphasis added.)) The italicized portions of these findings are not supported by the defense counsel's affidavit nor by Officer Kingman's testimony, which was the only evidence

considered by the trial court in deciding this motion. (CP 6; 50-53; 05/05/09 RP 9-12)

First, neither the Officer's testimony nor the affidavit contain any evidence about gang activity in the neighborhood, gang colors, or the prevalence of weapons in particular gangs. Second, neither the testimony nor the affidavit contain any evidence that the people gathered around the car were wearing red clothing. Similarly, there was no evidence that these people could be heard nearby after they ran from the car. And finally, there was no evidence that Officer Walls had recovered stolen cars in that alley in the past. These alleged facts, contained in Findings of Fact 1, 2, and 3, are not supported by the record and should be stricken.

- B. Officer Walls did not have specific and articulable facts sufficient to support a well-founded suspicion of criminal activity justifying a warrantless investigative detention.

These are the remaining facts in the record upon which the trial court relied: that Officer Walls saw people congregated around a car parked in a dark alley; that those people ran when they saw the Officer's patrol car; that the car was legally parked and not reported stolen; and that the passenger, who remained in the car, made movements as if he was placing an item on the floor. (CP 6-

7; 51) These facts do not support the trial court's conclusion that the stop and seizure of Olney was reasonable.

Generally, warrantless seizures are per se unreasonable under the Fourth Amendment of the United States Constitution and Article I, section 7 of the Washington State Constitution. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104, 121 S. Ct. 843, 148 L. Ed. 2d 723 (2001).³ One exception to this requirement is the investigative *Terry* stop, which allows for brief detention when there is a reasonable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Kinzy, 141 Wn.2d at 384-85.

To justify a Terry stop under the Fourth Amendment and Art. I, § 7, a 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; State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). But the stop is permissible only if the officer "has a reasonable suspicion, grounded in specific and articulable facts, that the

³ Art. I, § 7 provides greater protection of a person's right to privacy than the Fourth Amendment, including in *Terry* stop situations. See State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998); State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); State v. Hendrickson, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996); State v. O'Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

person stopped has been or is about to be involved in a crime.” State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). The level of articulable suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

First, it is well established that presence in a high crime area or obvious attempts to avoid an officer will not justify an investigative detention. See State v. Crane, 105 Wn. App. 301, 309, 19 P.3d 1100 (2001); State v. Little, 116 Wn.2d 488, 504, 806 P.2d 749 (1991); State v. Soto-Garcia, 68 Wn. App. 20, 26, 841 P.2d 1271 (1992); State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974). And an individual's proximity to others suspected of criminal activity will not support an investigatory detention. State v. Richardson, 64 Wn. App. 693, 697, 825 P.2d 754 (1992).

For example, in State v. Martinez, police saw the defendant walking at night in an apartment building parking lot open to the public. 135 Wn. App. 174, 177, 143 P.3d 855 (2006). Vehicle prowling had been reported in the past but not on the night Martinez was stopped. 135 Wn. App. at 177. A police officer stopped Martinez and searched him for weapons, but found

methamphetamine. 135 Wn. App. at 178. This Court concluded that the stop was not justified because the officer had no particularized suspicion of any criminal activity and no particularized suspicion that Martinez was involved in any criminal activity. 135 Wn. App. at 181-82.

Similarly, in State v. Larson, officers detained a passenger in a vehicle because it was: parked beside a closed park late at night; in an area which was known to have a high burglary rate; across from an apartment which had recently been burglarized; and the passenger began moving away from the officers when they approached the vehicle. 93 Wn.2d 638, 639, 611 P.2d 771 (1980). The Court suppressed evidence obtained from a passenger, concluding that even though the circumstances looked suspicious, there were no objective facts which could reasonably lead the officers to conclude the passenger was engaged in criminal activity. 93 Wn.2d at 643.

And in State v. Tocki, officers decided to detain and question the defendant because the officers thought he moved while in a parked vehicle, late at night, in a high crime area. 32 Wn. App. 457, 464, 648 P.2d 99 (1982). This court found that the detention was unreasonable, and affirmed the suppression of evidence found

as a result. 32 Wn. App. at 464.

Similarly here, Officer Walls had no particularized suspicion that Olney had been or would be engaged in criminal activity. Olney happened to be in a car legally parked in an alley behind an apartment complex. (CP 6, 51) Other people fled when Officer Walls arrived, but Olney did not. (CP 6-7, 51) And he merely made movements that could be interpreted as an attempt to conceal something. (CP 6-7, 51) These facts are simply insufficient to support a reasonable suspicion of criminal activity, and do not support a seizure at gunpoint. The initial detention of Olney was therefore improper and unconstitutional

If the initial seizure is not based on a reasonable suspicion of criminal activity, the evidence obtained in the course of a subsequent search is inadmissible. Kennedy, 107 Wn.2d at 4. The trial court therefore erred when it denied Olney's motion to suppress.

V. CONCLUSION

Officer Walls detained Olney simply because he was in a sedan parked in a dark alley with people who fled from police, and because he appeared to be trying to conceal something. But it is well established that these facts alone do not provide a sufficient

basis for an investigative detention. Because the detention and seizure of Olney was improper, all evidence discovered as a result should have been suppressed. The trial court's order denying Olney's motion to suppress should be reversed.

DATED: February 8, 2010



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Appellant Marlowe C. Olney, Jr.

CERTIFICATE OF MAILING

I certify that on 02/08/2010, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) David B. Trefry, Attorney at Law, P.O. Box 4846, Spokane, WA 99220-0846; and (2) Marlowe C. Olney, Jr., 813 South 6th Street, Yakima, WA 98901.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX A
Findings of Fact & Conclusions of Law

FILED

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SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY

2009 JUL -1 AM 10:49
STATE OF WASHINGTON,
CLERK
SUPERIOR COURT
YAKIMA, WASHINGTON

Plaintiff,

NO. 09-1-00302-1

vs.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
ON SUPPRESSION
(CrR 3.6) MOTION AND
DISMISSAL MOTION

MARLOWE CLAUDE OLNEY JR.
DOB: 7/21/1986

Defendant.

THIS MATTER came before the court on May 5, 2009, before the Honorable Judge Michael McCarthy, for a suppression hearing under CrR 3.6 and a motion to dismiss under State v. Knapstad. Prosecuting Attorney James P. Hagarty represented the State. Attorney Kenneth W. Raber represented the defendant who was present. The State presented testimony from Yakima Police Officer Claudia Kingman. The court considered the evidence: Officer Kingman's testimony, and defense counsel's supporting affidavit, which recited facts from the police reports and defense interviews of Officers Claudia Kingman and Eric Walls, who testified later at trial. Having also considered the arguments of counsel, the court now sets forth:

FINDINGS OF FACT

I.

On February 6, 2009 at 11:35 p.m. Officer Eric Walls of the Yakima Police Department was on duty in uniform, patrolling his district in a marked police car. Officer Walls was very familiar with this area of his district, which was known for high gang activity. The dominant gang in that area was La Raza, a Norteno gang, the members of which identified with the color red. Officer Walls knew from experience that members of this gang often carried weapons.

Officer Walls turned south down an alley between North 6th Street and North 7th Street. He saw three to six people dressed in red clothing standing around a white, 4-door Lincoln car, which was legally parked at an apartment complex. Officer Walls spotlighted the car. The people ran in different directions when they saw Officer Walls' patrol car. Officer Walls did not activate his light bar but kept his spotlight and headlights pointed at the white car.

ORIGINAL

ii.

Officer Walls saw two men inside the white car, one in the driver's seat and another sitting directly behind him in the back passenger seat. The driver (later identified as Jose Betancourt) looked over his shoulder at Officer Walls but made no movements which concerned Officer Walls for his safety. Officer Walls saw the backseat passenger (later identified as Mr. Olney) move around in his seat and from side to side, and look down as if at something in his hands. He also saw the backseat passenger lean forward to his right toward the front passenger seat as if concealing something, although Walls could not see his hands, and then return to an upright seated position. The backseat passenger's movements, combined with the location, the late hour, the red clothing worn by the people who had fled, but could still be heard nearby, caused Officer Walls to be concerned for his own personal safety.

iii.

Officer Walls got out of his patrol car, standing behind his door for cover. He drew his firearm, because in his experience members of the La Raza gang frequently carried weapons. He reported his location to dispatch and requested backup. Officer Walls had recovered stolen cars in that alley before. The white car's trunk lid was partly open, and Walls suspected that it may have been stolen. He called in the license plate number for checking. Officer Walls approached the white car. When he verbally commanded its occupants to put their hands where he could see them, they complied.

iv.

Officer Claudia Kingman was only two blocks away when she received Officer Walls' request for assistance. Arriving within five minutes, she drove south down the alley and parked her patrol car facing Officer Walls'. Her headlights illuminated the white car, a regular-sized sedan. Getting out of her patrol car, she approached the white car on the driver's side. Officer Walls stood on the white car's passenger side with his flashlight. The driver had his hands on the steering wheel. The backseat passenger had his hands on the roof of the white car. Officer Kingman obtained a Yakima Tribal identification card from the backseat passenger which identified him as Marlowe Claude Olney, Jr. with a birth date of 07/21/86. Relaying this information to dispatch, she requested a warrants check, and waited for a response.

v.

Officer Kingman walked around the back of the white car. Walking up the passenger side, she illuminated the interior with her flashlight, looking for contraband and weapons. She saw a handgun lying on the floorboard behind the passenger seat. Some clothing lay near the

handgun, but nothing covered it. Mr. Olney's feet were not on the handgun. Officer Kingman had a clear view of the handgun. She advised Officer Walls of the handgun.

VI.

The officers removed Mr. Betancourt and Mr. Olney from the white car and placed them in separate patrol cars. During this time, dispatch reported that Mr. Olney was a convicted felon. Officer Walls photographed the white car and its contents to preserve the scene. Officer Ryan Yates, who had arrived about the same time as Officer Kingman, removed the handgun from the white car. The magazine, which was in the handgun, was loaded with ammunition. Officer Kingman later placed the handgun into evidence.

VII.

All facts set forth in these findings are undisputed. There are no disputed facts. Defense counsel's supporting affidavit recited facts from Officer Walls' report and the defense interview of Officer Walls, making testimony from Officer Walls unnecessary. The court considered the issues without testimony from Officer Walls.

CONCLUSIONS OF LAW

I.

The court has jurisdiction over the parties and subject matter herein.

II.

Officer Walls was warranted under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), State v. Little, 116 Wn.2d 488, 495, 808 P.2d 749 (1991) and State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) in conducting an investigatory detention and investigation of the white Lincoln car and Mr. Olney, an occupant. Under the totality of circumstances presented to Officer Walls, he had a well-founded suspicion, based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted this minimal intrusion on Mr. Olney's liberty.

III.

The officers stayed within the proper scope of an investigatory detention at all times. Approaching Mr. Olney at gunpoint, identifying him, removing him from the car after discovery of the handgun and placing him in a patrol car to preserve the status quo, was warranted under the totality of circumstances. The amount of physical intrusion on Mr. Olney's liberty was justified. The duration of Mr. Olney's detention was reasonable.

IV.

Officer Kingman's observation of the firearm on the floorboard under the front passenger seat was permissible under the plain view doctrine.

V.

The seizure of the firearm was permissible under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution.

VI.

The defense motion to suppress the handgun and other evidence found inside the white car is denied.

VII.

The material facts are not genuinely in issue. Substantial evidence supports the elements of the crime of Second Degree Unlawful Possession of a Firearm with which Mr. Olney is charged. The material facts on which the State relies, as a matter of law, establish a prima facie case of Mr. Olney's guilt. The defense motion for pretrial dismissal under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986) is denied.

7-2-09
DATED: June 25, 2009

Duane R. Knittle
DUANE R. KNITTLE
Deputy Prosecuting Attorney
Washington State Bar Number 16538

[Signature]
JUDGE

KENNETH WES RABER
Attorney for Defendant
Washington State Bar Number _____

APPENDIX B

Defense Counsel's Affidavit in Support of Motion to Suppress & Dismiss

1 THIS MOTION is based upon the files and records herein.

2
3 DATED this 17th day of April, 2009.

4 Respectfully submitted,

5
6 
7 KENNETH W. RABER, WSBA #4971
8 Attorney for Defendant

9
10 **AFFIDAVIT**

11 KENNETH W. RABER, under penalty of perjury of the laws of the State of
12 Washington states as follows:

13 I am the attorney of record for the defendant in the above-captioned action and
14 make this affidavit based upon my personal knowledge and in accordance with my
15 information and belief.

16
17 I have been supplied the narrative which supports the filing of the charges
18 herein and defendant's private investigator, Taylor Kindred, has had an
19 opportunity to interview officers for additional information not originally reported
20 in their narratives.

1 The police reports and officer testimony indicates that on or about February 6,
2 2009, at approximately 11:35 p.m., Officer Eric Walls with the Yakima Police
3 Department was on patrol. From East D Street, he turned south into an alley that
4 runs between North 6th Street and North 7th Street. Officer Walls saw three to six
5 people standing around a white car which was legally parked in a parking space of
6 an apartment complex. The people took off running when they saw Officer Walls'
7 patrol vehicle. Officer Walls states he did not activate his light-bar, but he did
8 keep his spotlight and headlights pointed toward and on the white vehicle.
9

10
11 Officer Walls states that he observed two men inside the vehicle. Jose
12 Betancourt was in the driver's seat and the defendant, Marlowe Olney was seated
13 behind the driver in the backseat. While the officer was shining the spotlight on
14 the occupants of the vehicle, Mr. Betancourt looked over his right shoulder and the
15 defendant leaned forward, looked down, the quickly returned to an upright seated
16 position. Officer Walls stated that he assumed that Mr. Olney was looking at
17 something or attempting to conceal something, but he couldn't see Mr. Olney's
18 hands.
19

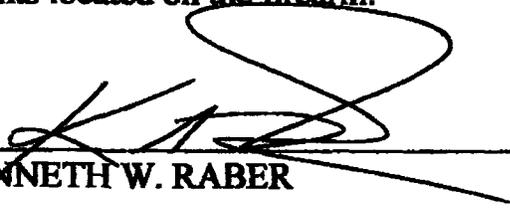
20 Officer Walls then exited his patrol car, standing behind his driver's door for
21 cover. He drew his weapon and scanned the area while reporting his location to
22
23
24

1 dispatch. Officer Walls stated that he believed that the car may have been stolen
2 so he called in the plate number and discovered the vehicle had not been stolen.
3 With his gun drawn, Officer Walls approached the vehicle giving verbal
4 commands to the occupants to put their hands in the air where he could see them,
5 the occupants complied. Officer Yates and Officer Kingman then arrived on scene
6 to assist Officer Walls. Officer Walls then demanded identification from the driver
7 and passenger of the vehicle, again the occupant's complied.
8

9 While standing on the passenger side of the vehicle, Officer Kingman stated
10 that she shined her flashlight into the rear passenger's side floor board and saw
11 what she thought was a gun. Officer Walls then removed the occupants from the
12 vehicle, frisk searched both, handcuffed them and placed them into the back of
13 police vehicles. The officers then proceeded to search the white vehicle and
14 recovered a .38 caliber pistol, a magazine, and seven bullets. Officers also located
15 an open beer bottle on the rear driver's side floorboard where the defendant had
16 been seated.
17
18

19 A records check was conducted and neither occupant had warrants for their
20 arrest however the officer noted the Marlowe Olney was a convicted felon. Jose
21 Betancourt was "free to go" and released at the scene. Marlowe Olney was
22
23
24

1 arrested for felon in possession of a firearm, first and second degree. Later testing
2 would show that there were no fingerprints located on the firearm.

3
4 
5 KENNETH W. RABER

6
7
8
9 SUBSCRIBED AND SWORN to before me this 17 day of April, 2009.



10 
11 NOTARY PUBLIC IN AND FOR THE STATE OF
12 WASHINGTON, RESIDING IN: Yakima County
13 MY COMMISSION EXPIRES: 9/9/09
14 Name as Commissioned: Gina L. Combelic