

No. 287564

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

YASIN AHMED IBRAHIM,

Appellant.

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BRIEF OF RESPONDENT

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Attorney for Respondent

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Did the court err when it denied the appellant's motion to dismiss pursuant to the Second and Fourteenth Amendments?
2. Did the court err when it denied appellants motion to dismiss based on an allegation that RCW 9.41.170 was facially invalid?
3. Did the trial court err when it denied appellants motion to dismiss pursuant to CrR 8.3 or in the alternative was it err to not preclude testimony?
4. Did the trial court err when it denied appellants motion to suppress evidence seized at the time of arrest?

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court correctly denied all of Ibrahim's motions.

## II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

## III. ARGUMENT.

The issues raised by Ibrahim were controlled by clearly settled case law, were of a factual nature or were well within the discretion of the trial court. The actions challenged have been previously addressed by courts in this state.

**THE COURT CORRECTLY DENIED IBRAHIM'S MOTIONS.**

Ibrahim was charged with one count of alien in possession of a firearm under RCW 9.41.170 the date of offense was April 22, 2009. It is undisputed that on that date, the appellant was not a citizen of the United States, did not have a license to carry a handgun, nor did he have a concealed weapons permit.

Ibrahim was a lawful permanent resident at the time of his arrest. He has subsequently lost that status on August 24, 2010 and was ordered deported. The case was filed in Yakima Superior Court on April 27, 2009. The information charged Ibrahim as follows:

On or about April 22, 2009, in the State of Washington, while not a citizen of the United States, you knowingly carried or had in your possession a firearm, a .22 caliber handgun, without having obtained a license from the Department of Licensing. (Emphasis mine.)(CP 45)

Former RCW 9.41.170(1) provides as follows: “(1) It is a class C felony for any person who is not a citizen of the United States to carry or possess any firearm, **without first having obtained an alien firearm license from the director of licensing.**” (Emphasis mine.)

Soon after appellant was found in possession of this handgun House Bill 1052 was adopted and became effective. HB 1052 now codified as RCW 9.41.171 provides, in pertinent part:

It is a class C felony for any person who is not a citizen of the United States to carry or possess any firearm, unless the person: (1) Is a lawful permanent resident; (2) has obtained a valid alien firearm license pursuant to section 3 of this act; or (3) meets the requirements of section 4 of this act.

The State has inherent authority to regulate the possession and use of firearms. As was so simply put by the court in State v.

Masangkay, 121 Wn. App. 904, 914, 91 P.3d 140 (2004) “[w]e also reject Masangkay’s argument based upon the Washington constitution. Regulation of firearms is clearly within the state’s police powers.”

State v. Hernandez-Mercado, 124 Wn.2d 368, 379-80, 879 P.2d 283 (1994) interpreted a very similar version of RCW 9.41.170. The statute at issue in Hernandez-Mercado provided, in pertinent part, as follows: “It shall be unlawful for any person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States, to carry or have in his possession at any time any shotgun, rifle, or other firearm, without first having obtained a license from the director of licensing . . .” The Washington Supreme Court refused to find that this version of the statute was unconstitutional on its face. The statute in effect on the date of this offense, April 22, 2009, was very similar to the statute in Hernandez-Mercado. The subsequent amendments did not significantly alter any of the equal protection

arguments addressed in Hernandez-Mercado. The version of the statute under which Ibrahim was charge is of great similarity. The analysis in Hernandez- Mercado is therefore applicable to this case and similarly there is noting here which would warrant declaring it unconstitutional.

State v. Hernandez-Mercado, 124 Wn.2d 368, 379-80, 879 P.2d 283 (1994);

There is no question that under the United States Constitution there is no absolute right even for citizens to bear arms and that the states may regulate firearms under their police powers.

...

In any constitutional challenge a statute is presumed constitutional unless its unconstitutionality is proved beyond a reasonable doubt. In a facial challenge, we look to the face of the statute to determine whether a conviction under it can be upheld. In this case, petitioner makes only a facial challenge to RCW 9.41.170 and not a challenge as applied to him. ...Petitioner Juan Hernandez-Mercado, whose personal and family story may evoke sympathy, has not convinced this court that RCW 9.41.170 is unconstitutional on its face as a violation of equal protection of the laws.

On the limited record before this court, we are unwilling to declare RCW 9.41.170 unconstitutional as a violation of the equal protection clause of the United States Constitution.

(Footnotes omitted and citations omitted)

The act as recodified does not eliminate the requirement to obtain an alien firearm license, in fact the new statute recodified this section, with more explicate instructions, in RCW 9.41.173. The statute

sets forth one method for an alien to possess a firearm it set forth that the alien “..obtained a valid alien firearm license pursuant to section 3 of this act...” It does set forth a new exempt category which would, if appellant had been arrested with this weapon at a later date, appear to apply to Mr. Ibrahim. The mere fact that a law has established another exempt category does not make that statute facially invalid.

The State will, for the sake of this responsive motion agree with appellant that he has sufficient ties to this “community” to vest him with certain rights, those ties also vest the appellant with certain responsibilities. Those responsibilities were ignored by appellant, which resulted in this legal seizure, arrest and subsequent conviction. It was Ibrahim’s responsibility to comply with this statute. This requirement is not restrictive:

RCW 9.41.170 Alien's license to carry firearms—Exception;

1) It is a class C felony for any person who is not a citizen of the United States to carry or possess any firearm, **without first having obtained an alien firearm license from the director of licensing.** (Emphasis mine.)

It is not specifically set forth in appellant’s brief whether he is challenging the statute in its totality or if the section which is set forth above is the crux of the problem. It would be the assumption of the

State that the section set forth is that which is at issue.

Appellant cites District of Columbia v. Heller, 128 S. Ct. 2783 (2008), for his argument that RCW 9.41.170 violates the Second Amendment of the Constitution. The Second Amendment reads as follows: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” However, in Heller, the Supreme Court explicitly stated that;

“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 128 S.Ct. at 2816-2817. *In a footnote, the court pointed out that the above measures were examples and that their list was not meant to be exhaustive.* Id. at 2817 n. 26.

The federal statute which prohibits the possession of a firearm by a person who is unlawfully in the United States, 18 U.S.C. 922(g)(5) states “It is illegal for an illegal or person unlawfully in the United States to possess a firearm.”. Since Heller, federal courts have upheld challenges to 18 U.S.C. 922(g) and have consistently concluded that Heller “did not disturb or implicate the constitutionality of § 922(g), and was not intended

to open the door to a raft of Second Amendment challenges to § 922(g) convictions.” U.S. v. White, 2008 U.S. Dist. LEXIS 60115, 2008 WL 3211298, at 1 (S.D.Ala. 2008); “Under Heller, individuals still do not have the right to possess machine guns or short-barreled rifles, as Gilbert did, and convicted felons, such as Gilbert, do not have the right to possess any firearms.”; United States v. Robinson, 2008 U.S. Dist. LEXIS 53455, 2008 WL 2937742, at 2 (E.D.Wis. July 23, 2008) (rejecting Heller challenge to constitutionality of § 922(g)(1), and noting that “no court has, even under an individual rights interpretation of the Second Amendment, found 18 U.S.C. § 922(g) constitutionally suspect.

Appellant has not set forth any basis upon which this court could find RCW 9.41.170 facially invalid and or set forth facts which would establish that it violates the Second Amendment. It is clear that numerous federal courts have upheld a similar federal statute. These courts have determined that Heller does not undermine the constitutionality of a similar federal prohibition under 18 U.S.C. § 922(g).

The Washington constitutional provision concerning a citizen’s right to carry firearms in self-defense is unambiguous and the State did not challenge that right at the trial court nor does the State challenge that right in this response:

The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men. Const. art. 1, § 24.

It has long been recognized that the constitutional right to keep and bear arms is subject to reasonable regulation by the State under its police power. See State v. Radan, 98 Wash. App. 652, 656 (1999), reversed on other grounds, 143 Wash.2d 323 (2001); Second Amendment Found. v. Renton, 35 Wash.App. 583, 586 (1983); State v. Krantz, 24 Wash.2d 350, 353 (1945); State v. Gohl, 46 Wash. 408, 410 (1907). The constitutional guaranty of certain rights to the individual citizen does not place such rights entirely beyond the police power of the state. Gohl, 46 Wash. at 410.

Regulations regarding handguns and possession of firearms by convicted felons have been upheld. “(I)t is clear handgun legislation in Washington is designed to prohibit and punish potentially dangerous felons from possessing handguns.” State v. Jeffrey, 77 Wash.App. 222, 226 (1995). “The unlawful possession of a firearm statute reduces the danger or probability of danger that is created when a felon is in possession of a firearm by making it a punishable offense.” State v. Anderson, 94 Wash.App. 151 (1999), reversed on other grounds, 141

Wash.2d 357 (2001). The regulation of guns possessed by non-citizens is similarly a proper exercise of the State's police power.

Regulations enacted by the State in the exercise of its police powers must nevertheless meet the judicial test of reasonableness. To pass constitutional muster, an arms regulation must: (1) be a reasonable limitation, (2) be reasonably necessary to protect public safety or welfare, and (3) be substantially related to the ends sought. Seattle v. Montana, 129 Wash.2d 583, 594 (1996); Homes Unlimited, Inc. v. Seattle, 90 Wash.2d 154, 158 (1978)

This analysis requires balancing the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision. Montana, 129 Wash.2d at 594. The constitution indicates the right to possess and bear firearms is secured not because arms are valued per se, but “[t]he right of the individual citizen to bear arms in defense of himself, or the state only to ensure self-defense or defense of state.” Id.

In Montana, the Supreme Court noted that Courts in Washington have upheld various restrictions and prohibitions on the possession and carrying of firearms and weapons. Id. As early as 1939, the Court upheld the concealed weapons permit requirement and a prohibition preventing those convicted of a violent crime from possessing a pistol. Id. (citing

State v. Tully, 198 Wash. 605 (1939)). The Court also gave significant weight to the fact that at the time art. 1, § 24 in 1889 was adopted the legislative enactments regulated weapons. Id. at 594 n.3.

Recently, the courts have upheld a laws which also place restriction on the possession and use of firearms; “Although possession of a firearm is a right protected to some degree by the Second Amendment, that right has always “been subject to government regulation for safety purposes.” Upholding the ban on possession of firearms by persons convicted of certain crimes, State v. Sweeney, 125 Wn. App. 77, 84, 104 P.3d 46 (2005) “Possession of firearms is subject o reasonable regulation. Prohibiting convicted felons...from possessing firearms is one such reasonable regulation” State v. Krzeszowski, 106 Wn. App. 638, 24 P.3d 485 (2001); upheld a ban on possession of weapons in penal institutions, State v. Barnes, 42 Wash.App. 56 (1985); upheld an ordinance banning firearms in certain places where alcohol is served, Second Amendment Found., 35 Wash.App. at 586-87, supra; and upheld the ancient proscription upon carrying a firearm under circumstances that warrant alarm for the safety of others, State v. Spencer, 75 Wash.App. 118, 124 (1994). In both Second Amendment Foundation and Spencer, the Court concluded the laws were reasonable because they promoted substantial public interests in safety, and minimally affected the right to bear arms in

that they did not proscribe all carrying of a weapon. See Spencer, 75 Wash.App. at 124.

The regulation of guns possessed by non-citizens is no different. A legitimate safety and security purpose is served by regulating guns that are possessed by non-citizens. Moreover, this provision minimally affects the right to bear arms because it does not prohibit the possession of all firearms by all non-citizens. Appellant could have applied for a license through the department of licensing and thereby legally possessed the gun which was seized. He however failed to do so. (It should be noted that he would still have been in violation of the ban on carrying a concealed weapon without a valid permit.) RCW 9.41.170 specifically sets forth all of the requirements that must be met before the issuance of an alien firearm license. Had the Ibrahim applied for and obtained a license, possession of the gun would have been perfectly legal, if carried in a non-concealed manner. In sum, the Ibrahim simply has not met his significant burden of showing that RCW 9.41.190 violates art. 1, § 24 and his claim should be rejected. As noted above one of the methods by which an alien can legally possess a firearm is still by application for and the receipt of an alien firearms license.

RCW 10.01.040 provides a “saving statute” presumptively saving all offenses already committed, and all penalties or forfeitures already

incurred, from being affected by the repeal of a criminal statute. The language of RCW 10.01.040 is clear that this type of criminal action is not affected by the subsequent repeal, change or decriminalization of the RCW 9.41.170

Unless the later statute clearly manifest a different intent, this general saving clause is deemed a part of every repealing statute as if expressly inserted therein, and thereby renders unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute. State v. Hanlen, 193 Wn.494, 497 (1938). In the absence of a contrary expression from the Legislature, all crimes are to be prosecuted under the law existing at the time of their commission. State v. Lorenzy, 59 Wn. 308, 309 (1910).

Through the years, appellate courts have consistently applied the saving statute to preserve prosecutions carried on under a repealed statute where the new statute does not indicate a contrary intent. See, e.g., State v. Hernandez, 20 Wn. App. 225, 226 (1978); State v. Lombardo, 32 Wn. App. 681 (1982).

As expressed in State v. Kane, 101 Wash.App. 607, 617-18, 5 P.3d 741(2000); “The saving statute is a basic principle of construction the Legislature is entitled to rely on when it makes changes to criminal and penal statutes. To ignore the presumption established by the saving

statute is to introduce uncertainty into legislation and intrude into legislative prerogatives.... The saving statute creates an easily administered, bright-line rule. It is not subject to alteration by delays that can occur between trial and sentencing.”

The Kane court went on to point out that, “there is nothing fundamentally unfair in sentencing offenders in accordance with the law they presumably were aware of at the time they committed their offenses.” Id. As applied to this situation, the repeal of RCW 9.41.170 did not affect the prosecution of this case in any way. The repealing act does not express any intent that the law should apply retroactively. In fact, the legislature has expressed the opposite intent by explicitly providing that the law becomes effective on July 26, 2009.

While it may seem “unfair” to prosecute Ibrahim for a crime which would now appear to no longer be a criminal act it must be pointed out in this factual situation that Ibrahim was not merely holding this handgun, he had it concealed within his pocket at the time it was found.

Prosecution of this case in this manner does not violate equal protection nor, the Federal or State constitutions. Under the equal protection clause of the Washington State Constitution, article 1, section 12, and the fourteenth amendment to the United States Constitution, persons similarly situated with respect to the legitimate purpose of the law

must receive like treatment. State v. Schaaf, 109 Wash.2d 1, 17, 743 P.2d 240 (1987). Ibrahim cites State v. McCarthy, 112 Wash.App. 231 (Div. 1 2002) in which the court noted that equal protection is generally not implicated by the prospective application of a new law. The court stated that “in addressing equal protection challenges to new criminal sentencing laws, courts have typically applied a rational basis standard and have had little trouble finding rational bases for applying such laws prospectively only.” Id. at 238. The court noted that the interests of finality and the principles underlying the saving statute provided a rational basis for the prospective application of the challenged amendment.

In Grant County Fire Protection District No. 5 v. City of Moses Lake, 150 Wash.2d 791, 812, 83 P.3d 419 (2004) (Grant County II) the Washington State Supreme Court held that “[f]or a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens.” They also clarified that the term “privileges and immunities” in article I, section 12 pertains only to “those fundamental rights which belong to the citizens of the state by reason of such citizenship.” Id. at 812-13.

Here, Ibrahim has failed to provide any authority that would support his claim that he has a fundamental right to the application of the new law. Indeed, this court has previously held that a defendant’s equal

protection rights are *not* violated “merely because the Legislature changed the standard sentencing range for a crime” or “changed its view of criminal punishment which resulted in offenders being subject to different punishment schemes.” In re Pers. Restraint of Stanphill, 134 Wn.2d 165, 175, 949 P.2d 365 (1998). Thus, Ibrahim’s equal protection claims fail.

This is not a matter of “first impression” the courts have considered matters where acts are now decriminalized. It may be true that this court has never addressed a specific factual pattern wherein a resident alien was found in possession of a firearm and was charged under a valid statute, who then appeals the conviction after the statute has been superseded by a statute which would appear to allow a resident alien to now legally possess a firearm. But the claim that this is a first impression would be true in every case. Each case is factually different, that does not make this a case of “first impression.”

In State v. Lombardo, 32 Wn. App. 681, 649 P.2d 151 (1982) the legislature inadvertently decriminalized a portion of the traffic code. This is very similar to the action the legislature which “decriminalized” possession of a firearm by a resident alien. Lombardo was a case which analyzed the effect what appeared to be an error on the part of the legislature when it “decriminalized” most traffic offenses. The legislature failed to list the felon of “felony flight” as a crime exempt from

decriminalization thus, for a period of several months, making “felony flight” an infraction. Lombardo challenged the ability of the State to prosecute him for his pending felony flight charge “Thus, even if the decriminalization statute effectively repealed the felony flight statute in the case before us, we see no language that even remotely suggests an intention that it apply to a pending charge of a felony flight committed prior to its effective date.” Lombardo states:

The general saving statute, RCW 10.01.040, which denies application of a repeal statute to pending cases absent an express or reasonably implied legislative intent to the contrary, applies in the instant situation. At common law, where a statute is repealed, all pending litigation must be decided according to the state of the law at the time of the decision. Since RCW 10.01.040 is in derogation of the common law, it must be strictly construed. Thus, courts have held that a repealing statute need not state in express terms an intention to affect pending litigation; rather, the statute must reasonably and fairly convey such intention. (Id at 683-84)(Footnote omitted, citations omitted.)

See for example State v. S.M.H., 76 Wn. App. 550, 887 P.2d 903 (1995)

The State did not violate equal protection by charging Ibrahim under the valid statute which was in effect at the time Ibrahim was arrested. Ibrahim can point to no factual situation wherein the State did not adhere to the policy as applied to appellant; if he was an alien, resident

or otherwise, and was found in possession of a firearm without having met the requirements of the statute in effect at the time of this arrest.

This is not a situation were the State had a choice to charge appellant under one statute or another and thereby cause appellant to suffer a criminal record based on that arbitrary action. This is not the same as the issue addressed in State v. Bower, 28 Wn. App. 704, 626 P.2d 39 (1981) where the State did in fact have the ability to charge the defendant under different statutes based on the same conduct. Here the conduct had one proscribed punishment and that is how the State proceeded.

The class of persons to whom the RCW 9.41.170 was applicable is such that the State did not have unfettered discretion to charge. At the time of the offense there were only two possible actions the State could take, charge appellant or ignore the felony which he had committed. The State chose the former. This act does not by itself violate equal protection. In Kennewick v. Fountain, 116 Wn.2d 189, 192-94, 802 P.2d 1371 (1991) the court reasoned as follows:

Prosecutors are given broad discretion in determining what charges to bring and when to file them. However, such discretion does not provide them with the power to predetermine that the sanctions sought will ultimately be imposed. Unfettered discretion in this sense is of little consequence to the actual outcome. ... Thus,

we hold that Fountain suffered no equal protection violation.(Citations omitted.)

**DENIAL OF MOTION TO DISMISS PURSUANT TO CrR 8.3/4.7.**

This matter was first called to trial on January 2, 2010. The amended witness list which was objected to was entered on June 22, 2009. The initial amendment listed "I.C.E. representative" when amended a second time on June 24, 2009 it included the name of the "I.C.E." agent. (CP 179) (I.C.E is the acronym for the United States Immigration and Customs Enforcement Department.)

It is clear that this amendment did not prejudice appellant's ability to present his case. It may have been prejudicial to the outcome of the case but the procedural problems which must be addressed when a witness list is amended or a witness added were clearly not prejudicial to the appellants ability to present a defense. State v. Wilson, 149 Wn. 2d 1, 9, 65 P.3d 657 (2003)

To support CrR 8.3(b) dismissal, a defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting [his or her] right to a fair trial."... First, we must determine whether the prosecutors in these cases committed misconduct when they failed to comply with the trial court's order to produce the witness for interview by the court-imposed deadline. Governmental misconduct " 'need not be of an evil or dishonest nature; simple mismanagement is sufficient.' " Yet Washington courts have clearly maintained that dismissal is an extraordinary remedy to which the court

should resort only in "truly egregious cases of mismanagement or misconduct." (Citations omitted)

The fact that this amendment took place after the date set for the omnibus does not by itself create an action which can be considered "arbitrary" or which could be considered "mismanagement" or "governmental misconduct." The appellant also cites CrR 4.7 indicating that should also be a basis by which the trial court should have and this court can address this alleged wrong. The problem with this allegation is there are no facts before this court which would allow it to make an informed decision that there was a violation of 4.7. This court would have to presume that the State had the I.C.E representatives name and or information within its file at the time of omnibus. It is quite often the case that at omnibus a busy litigator will in fact just be taking the occasion to review this open file. It is as easy to speculate that the name was not contained in the files as it is to presume it was there and therefore a basis to strike the witness.

The period of approximately six months between the time of the amended witness list and the time of trial in and of itself negates the claim that this case should have been dismissed under either CrR 8.3 or 4.7.

## **COURTS DENIAL OF MOTION TO SUPPRESS.**

For sake of this motion the State will discuss the actions of the officer and address the analysis as a situation where appellant was in fact seized.

This is a situation where the officer observed what he believed to be unusual actions on the part of appellant and his companion; the car was parked behind a business which had been closed for years, the registration indicated it was from the Seattle area, the ignition of the vehicle the occupants exited from appeared as if it had been “torn apart” with a screw driver lying on the floor; they exited the car and within seconds of leaving that car they were contacted by Officer Miller at that time both individuals denied knowledge of a vehicle or having been in a vehicle. The officer was alone at the time of this initial encounter. Both appellant and his companion appeared “very nervous.” They would not keep their hands in plain view and soon after the initial contact Officer Miller saw appellants companion throw something away. The officer indicated that he did not believe these two were from the Yakima area. They continued to deny having anything to do with the car the officer positively saw them in. Because the officers were able to identify the object thrown by the companion was a drug pipe, appellant continued noncompliance with the officer’s order to keep his hands in plain sight and general officer safety

Officer Miller asked Officer Sanchez to “frisk him.” The officer explained that part of the reason for the frisk was that he could not “keep my eye on him” (Ibrahim)...so in order to be safe I just asked that he frisk him.” (RP 10-17)

State v. Thierry, 60 Wn. App. 445, 447-48, 803 P.2d 844 (1991);

An investigative stop, although less intrusive than an arrest, is nevertheless a seizure and must therefore be reasonable under the Fourth Amendment to the United States Constitution and under Const. art. 1, SS 7. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). When the initial stop is unlawful, the ensuing search and its results are inadmissible as "fruits of the poisonous tree." Kennedy, 107 Wn.2d at 4 (quoting Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963)).

A stop is justified if the officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." Kennedy, 107 Wn.2d at 5 (quoting Terry v. Ohio, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)); State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (in determining propriety of investigative stop, court first asks whether initial interference with the suspect's freedom was justified at its inception); State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990).

This encounter would pass the test set forth in the recent case State v. Harrington, 167 Wn.2d 656, 663-64, 222 P.3d 92 (2009). The analysis in Harrington is applicable, the facts are distinguishable. In Harrington the officer observed Harrington in a place and at a time which aroused his

suspicious as was the case when Officer Miller saw appellant and his companion parked in the middle of the parking lot behind a closed business. The divergence is what occurred next. In Harrington the officer did not observe or ascertain anything which would indicate the possibility of criminal actions. In this case the officer was able to see that this vehicle which was registered out of Seattle had an ignition which appeared to have been tampered with. Then this solo officer makes contact with the two people whom he was positive had just left this car and they deny knowledge of the car or having ever been in that car. This is followed immediately by the nervous actions of these two and the throwing of an object by one all while in the presence of one officer.

The following frisk was specifically done, according to the testimony of the officer due to safety concerns, this was the police action which resulted in the officer finding and seizing the concealed weapon;

A nonconsensual "protective frisk for weapons" is warranted when 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.'" *State v. Collins*, 121 Wash.2d 168, 173, 847 P.2d 919 (1993) (quoting *Terry*, 392 U.S. at 21-24, 88 S.Ct. 1868). 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. *Id.* In *State v. Belieu*, 112 Wash.2d 587, 773 P.2d 46 (1989), we articulated the principle differently: "[C]ourts are

reluctant to substitute their judgment for that of police officers in the field. ' 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 601-02, 773 P.2d 46, (first emphasis added) (quoting *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir.1966)). A nonconsensual investigative detention is a seizure, albeit a legal intrusion if proper safeguards are met. *See Garvin*, 166 Wash.2d at 250, 207 P.3d 1266. (*Id.* at 667-68)

By the time this frisk had occurred there were several officers present however this does not minimize nor negate the safety concerns based on the information Officer Miller had and the actions of the appellant and his companion. It must be stressed that throughout the majority of this contact Officer Miller was the only officer present with two suspects, one of whom had already thrown an object away while the officer was making his initial contact with them. Appellant couches this as a slightly built nineteen year old Somali refugee on a morning in Yakima, the officer clearly saw two individuals acting in an unusual manner, denying contact with a vehicle which appeared might be stolen, from which the officer saw them exit. They then proceeded to act very nervous and completely failed to follow the requests of the officer.

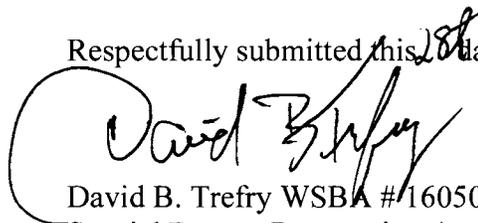
The officer was justified in making the contact and the frisk was legal.

IV. CONCLUSION

The assignments of error raised were factual in nature, well within the trial courts discretion or clearly controlled by settled law and the decision of the court in denying all of the motions was not an abuse of discretion. Appellant has not demonstrated that the statute in question is facially unconstitutional. The State did not mismanage the case not prejudice appellant's defense. The search of appellant was legal.

Therefore the actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this <sup>28<sup>th</sup></sup> day of April 2011



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