

FILED

APR 02 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29895-7-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DARREN R. HOPKINS,

Defendant/Appellant.

RESPONDENT'S BRIEF

GREGORY L. ZEMPEL
Prosecuting Attorney
Kittitas County, Washington

JENNIFER J. MULLIN
Deputy Prosecuting Attorney
Kittitas County, Washington

Office Address:

205 West 5th Avenue, Room 213
Ellensburg, WA 98926

Telephone: (509) 962-7520

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I. COUNTERSTATEMENT OF THE ISSUES

- A. DEPUTY WILLIAMS' CONTACT WITH DARREN HOPKINS ON JANUARY 14, 2011 WAS VALID.
- B. THE OPENING OF THE ALTOIDS CONTAINER WAS NOT A SEARCH.
- C. THE CONCLUSIONS OF LAW ARE UNSUPPORTED BY THE FINDINGS OF FACT AND THE RECORD.
- D. THE JUVENILE COURT'S CONCLUSION OF LAW 3.1 IS NOT CONTRARY TO EXISTING LAW.
- E. THE JUVENILE COURTS CONCLUSION OF LAW 3.6 IS A MISTATEMENT OF LAW AND FACT.

II. STATEMENT OF THE CASE

Reserve Sergeant Mark Williams was on duty in Kittitas County on January 14, 2011. (RP 6, 49.) He was patrolling in the Clearview area at approximately 9:30 p.m. with another reserve deputy, Deputy Garza. (RP 6, 10, 16, 49, 79.) They were patrolling in that area because of previous complaints about people partying and damaging property. (RP 7, 11.) The deputies observed a group of four individuals walking toward the street from some dark fields. (RP 6, 7, 49.) Deputy Williams stopped the patrol vehicle and both deputies got out to contact the group. (RP 6, 7, 11, 50, 55, 56.)

Deputy Williams made contact with the group from about 6 to 10 feet away. (RP 7.) He asked them what they were up to. (RP 8, 50.) Deputy Williams noted that the group appeared to be young, probably

teenagers. (RP 7-8.) They responded that they were just going home. (RP 50, 80.) When the individuals spoke Deputy Williams recognized the odor of intoxicants coming from the group. (RP 8, 50.) Deputy Garza asked if they had been drinking that night. (RP 8, 80.) One individual, later identified as Respondent Darren Hopkins, said, "Not me." (RP 57, 80-81.)

Deputy Williams' attention was drawn to the Respondent because he could smell the odor of intoxicants on his breath when he spoke. (RP 8, 57, 80.) He was also swaying from side to side and had glossy eyes. (RP 8, 50, 51.) Deputy Williams explained to the Respondent that he appeared to have been drinking. (RP 8, 51.) He then admitted to having 2 shots. (RP 8, 52, 81.)

Throughout the contact, Deputy Williams noted that the Respondent kept putting his hands in his pockets. (RP 9, 52.) Because of this action, the dark conditions, and the number of people contacted, Deputy Williams asked if he could frisk the Respondent for weapons. (RP 9, 52, 58.) During the search Deputy Williams found a hard metal object in the Respondent's back pocket. (RP 9, 53.) Deputy Williams asked the Respondent what the container was. (RP 9, 53.) The Respondent stated that it was an Altoids container. (RP 9, 53.) Deputy Williams then asked what was in the container. (RP 9, 53.) The Respondent stated Altoids. (RP

9, 53.) Deputy Williams asked if it was just Altoids. (RP 9.) The Respondent then admitted that it contained marijuana. (RP 53.) The Respondent handed the container to Deputy Williams. (RP 10, 58-59.) Deputy Williams opened the container and observed three buds of marijuana. (RP 53, 60.)

Deputy Williams then placed the Respondent under arrest and he was read his Constitutional rights. (RP 61-62.) Juvenile probation was contacted, and the Respondent was returned to his father's home. (RP 62.)

An Information was filed on January 21, 2011, charging the Respondent with a violation of RCW 66.44.270(2)(a), and RCW 69.50.4014. (CP 2.) The language of the Information included the alternative of "exhibiting the effects of having consumed liquor in a public place." (CP 2.)

A suppression hearing was held on March 24, 2011. (RP 1.) Respondent argued that Deputy Williams' stop of the Respondent was invalid, that the frisk exceeded the scope of the stop, and that all evidence must be suppressed. (CP 6.) After the hearing, the trial court ruled that Deputy Williams' contact with the Respondent was permissible. (RP 36.) The court also ruled that the Respondent's statement of what was in the Altoids container was not admissible. (RP 37, 39.) The container and the contents were admissible because at the time of the frisk the court

determined that the Respondent was functionally under arrest and therefore subject to an inventory search. (RP 37, 39.)

The Respondent filed a motion to reconsider on March 31, 2011. (CP 27.) The court denied the motion on April 5, 2011. (CP 35.) Trial was held on April 21, 2011. (RP 44.) Notice of appeal was file on May 6, 2011. (CP 48.)

III. ARGUMENT

A. DEPUTY WILLIAMS HAD THE AUTHORITY TO STOP DARREN HOPKINS ON JANUARY 14, 2011.

Not every encounter between a citizen and a police officer rises to the stature of a seizure. A police officer does not seize a person by simply striking up a conversation or asking questions. *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed.2d 389, 111 S. Ct. 2382, 2386 (1991); *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). Nor is there a seizure where the conversation between citizen and officer is freely and voluntarily conducted. *Mennegar, supra*.

An encounter between a citizen and the police is consensual or permissive if a reasonable person under the totality of the circumstances would feel free to walk away. *United States v. Mendenhall*, 446 U.S. 544,

554, 100 S. Ct. 1870, 64 L. Ed.2d 497 (1980); *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990).

“When a citizen freely converses with a police officer, the encounter is permissive. It is not a seizure; and therefore the Fourth Amendment is not implicated. *Id.* If a person does freely consent to stop and talk, the officer's merely asking questions or requesting identification does not necessarily elevate a consensual encounter into a seizure. *Id.* Neither does directing the person to remove his hands from his pockets, by itself, convert the encounter into a seizure. *State v. Nettles*, 70 Wn. App. 706, 710 n. 6, 855 P.2d 699 (1993) (citing *Duhart v. United States*, 589 A.2d 895, 898 (D.C. App.1991)), *review denied*, 123 Wn.2d 1010 (1994). A citizen who does not comply, however, is seized when the officer grabs his or her hands. *Nettles*, 70 Wn. App. at 710 n. 6.”
State v. Barnes, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999).

Thus, police do not necessarily effect the seizure of a person because they engage the person in conversation, *Mennegar, supra; Florida v. Royer*, 460 U.S. 491, 75 L.Ed.2d 229, 103 S. Ct. 1319 (1983); *United States v. Mendenhall, supra*, or because they identify themselves as officers. *Royer*, 460 U.S. at 498. *Accord, State v. O'Neill*, 148 Wn.2d 654, 62 P.3d 489 (2003).

Washington courts will review a social contact for evidence that progressive intrusions have converted the contact into a seizure. A contact that a reasonable person may feel free to discontinue at its inception, may mature into a contact that a reasonable person would not feel free to leave. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009), presents an example of a progressive intrusion that culminated in a seizure in violation

of Const. art. I, § 7. The social contact in *Harrington* began with an officer pulling his patrol car into a driveway in a manner that did not block the sidewalk. The officer exited the patrol car, whose lights had not been activated, and moved to the grassy area that was adjacent to the sidewalk, so as to not block the path of anyone who was walking on the sidewalk. The officer then asked an approaching pedestrian "Hey, can I talk to you" or "Mind if I talk to you for a minute?" Upon the pedestrian's affirmative response, the officer, standing five feet from the pedestrian began a conversation that included a question about where the pedestrian was coming from. The subsequent events that converted this lawful social contact into a seizure included:

- The officer asking the pedestrian if he would remove his hands from his pockets.
- The coincidental appearance of a state trooper, who made a u-turn, upon noticing an officer speaking alone with an individual. The state trooper parked his patrol car in the northbound lane of travel, 10 to 30 feet, from the on-going social contact. The trooper exited his marked patrol car, and stood, silently, 7 to 8 feet from the pedestrian.
- The officer, upon the arrival of the trooper, asked if he could pat the pedestrian down for officer safety. The officer, at the time of making this request, told the pedestrian that he was not under arrest.

Id.

However, not all seizures arising from a permissive contact are wrongful. When an officer develops a reasonable, articulable suspicion that criminal activity has occurred or is about to occur, what began as a

permissive encounter develops into a *Terry* detention. The standard applied when determining the legality of a stop is whether there is reasonable suspicion, as initially set forth by *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Pursuant to *Terry*, police may seize and detain a person when they can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999). 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.” *Id.* Probable cause is not necessary for a *Terry* stop because a stop is much less intrusive than an arrest. *Id.*

The court examines the totality of the circumstances to determine whether a *Terry* stop and frisk were justified. *State v. Glover*, 116 W.2d 509, 514, 806 P.2d 760 at 514 (1991). The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. A reasonable suspicion can arise from information that is less reliable than that required to establish probable cause, but reasonable suspicion, like probable cause, is dependent upon both the content of the information possessed by the officer and the degree of reliability of the information. Both factors—quantity and quality—are considered in the totality of the circumstances, i.e., the “whole picture,”

that must be taken into account when evaluating whether the police officer's suspicion of criminal activity is reasonable. *State v. Lee*, 147 Wn. App. 912, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009).

Respondent cites to *State v. Martinez*, 135 Wn.App 174, 133 P.3d 855 (2006), *State v. Ellwood*, 52 Wn.App 70, 756 P.2d 547 (1988), and *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010), to show that the stop of the Respondent was unlawful. However, these cases are distinguishable from the present facts. In both *Martinez* and *Ellwood*, the defendants were stopped and detained while officers ascertained their identity. *Martinez*, at 177-178, *Ellwood* at 71-72. In both cases, the court noted that there were no articulable facts leading to the detention while identity was ascertained. *Martinez*, at 177, *Ellwood*, at 73-74. In *Doughty*, the defendant was observed at a suspected drug house and the officer stopped the defendant for suspected drug activity. *Doughty*, at 60. As in the previous cases, no further information or suspicions were discovered until the defendant's identity was discovered and verified through warrant and driver's check. *Id.*

Here, Deputy Williams observed a group of juvenile males walking behind a home/field area toward the road. He stopped his vehicle and stood in the road. His emergency lights were not on. As the males

approached, he asked where they were going. When he made contact with the group he noted the odor of intoxicants. Once Deputy Williams noted the odor of intoxicants coming from a group of juvenile males, he had a very reasonable suspicion that criminal activity had occurred. As discussed above, merely asking a question of a pedestrian isn't a seizure. The seizure began when Deputy Williams detected the odor of alcohol coming from the juvenile males. The stop that ensued was not an unlawful seizure.

B. THERE WAS NO SEARCH IN VIOLATION OF CONST. ART I, § 7.

1. Deputy Williams' frisk of the Respondent was permissible.

Pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), police officers may make limited searches for the purposes of protecting the officers' safety during an investigative detention. An officer who "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous to stop such person and to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

Terry, at 30-31.

An officer need not be absolutely certain that the detained person the officer is investigating at close range is armed or dangerous; the issue is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. *Terry*, 88 S. Ct. at 1883; *State v. Harvey*, 41 Wn. App. 870, 874-75, 707 P.2d 146 (1985); 3 W. LaFare, *Search and Seizure*, § 9.4(a) (2d ed. 1987). See also, *State v. Harper*, 33 Wn.App 507, 655 P.2d 1199 (1982) (frisk was justified where defendant thrust his hands into coat pockets during questioning).

The Washington Supreme Court phrased the principle thusly:

“[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 [frisk] was not arbitrary or harassing."

(Footnote omitted.) *State v. Collins*, 121 Wn.2d 168, 174, 847 P.2d 919 (1993) (quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989)).

A protective frisk of a person is strictly limited to a pat-down to discover weapons that might be used against the officer. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). This is because “[t]he purpose of the limited pat-down search is not to discover evidence of a crime, but

to allow the officer to pursue his investigation without fear of violence.” *United States v. Garcia*, 459 F.3d 1059, 1063 (10th Cir. 2006) (quotations omitted). An officer exceeds the permissible scope of a frisk by squeezing an item once the officer determines that the item does not contain a weapon. *State v. Garvin*, 166 Wn.2d 242, 207 P.3d 1266 (2009). *Accord*, *United States v. Albert*, 579 F.3d 1188, 1195 (10th Cir. 2009) (“Where, in the context of a limited pat-down, an officer continues to explore a defendant's pocket after concluding it does not contain a weapon, the search ‘amount[s] to the sort of evidentiary search that Terry expressly refused to authorize and that [the Supreme Court] ha[s] condemned in subsequent cases.’ *Minnesota v. Dickerson*, 508 U.S. 366, 378, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) (citation omitted).”).

However, in cases where a pat-down is inconclusive, an officer may reach into a detainee's clothes and may withdraw an object in order to ascertain whether it is a weapon. *See Hudson*, 124 Wn.2d at 112-13. Under this rule, courts have held that it was proper to remove a cigarette pack, a wallet, and a pager. *See State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980); *State v. Horton*, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008); and *State v. Fowler*, 76 Wn. App. 168, 170-72, 883 P.2d 338 (1994), *review denied*, 126 Wn.2d 1009 (1995).

Once a container is removed, an officer may only open the item if it is large enough to contain a small or normal sized weapon. A container that can only accommodate a “miniature weapon” may not be opened. *State v. Horton*, 136 Wn. App. at 38. A razor blade is properly classified as a “miniature weapon”. *Id.* A container the size of a cigarette pack or smaller is deemed only capable of holding a “miniature weapon.” *Id.* An officer may separate the suspect from containers that are only capable of holding miniature weapons until the conclusion of the stop. *Id.*

While the above cases set out the law for an officer initiated search, they are distinguishable from the present case. Unlike *Hudson*, *Horton*, *et. al*, in the present case the Respondent handed the Altoids container to Deputy Williams, after volunteering that it contained marijuana. At no time did Deputy Williams ask or direct the Respondent to give him the container.

2. Deputy Williams’ opening the Altoids container was not a search.

A defendant producing evidence against themselves may be deemed testimonial in nature and require *Miranda* warnings. *State v. Weathered*, 110 Wn.2d 466, 755 P.2d 797 (1988). The requirement for *Miranda* warnings is triggered by custodial interrogation by a state actor. All three conditions (custody, interrogation, and a state actor) must be in

place. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct.1602, 16 L.Ed.2d 694 (1966). See also, *State v. McWatters*, 63 Wn.App 911, 915, 822 P.2d 787, review denied, 119 Wn.2d 1012 (1992) (an officer may question a suspect without *Miranda* even after the officer has probable cause, as long as the suspect's freedom of movement has not been curtailed to the extent associated with formal arrest), *State v. Phu Huynh*, 49 Wn.App 192, 201, 742 P.2d 160 (1987) (a person who is only subjected to a *Terry* routine investigative stop need not be given *Miranda* warnings prior to questioning), *State v. Walton*, 67 Wn.App 127, 834 P.2d 624 (1992) (the fact that a suspect is not "free to leave" during the course of a *Terry* or investigative stop does not make the encounter comparable to a formal arrest for *Miranda*), *State v. Short*, 113 Wn.2d 35, 40-41, 775 P.2d 458 (1989) (a temporary detention does not ripen into a custodial interrogation simply because the officers have probable cause to arrest the defendant.)

Courts have determined that a defendant's action in handing over evidence was testimonial and required *Miranda* when specifically questioned by officers. See *State v. Moreno*, 21 Wn.App 430, 433, 585 P.2d 481 (1978), *Wethered*, 110 Wn.2d at 471. Similarly, in *State v. Dennis*, an officer suggested that the defendant produce the drugs and save the officer the trouble of a search. *State v. Dennis*, 16 Wn.App 417, 419, 558 P.2d 297 (1976). In *State v. Franco*, the supreme court stated: "It has

been consistently held that compulsion which makes an accused the source of real or physical evidence does not violate the privilege. It is only violated when the accused is compelled to make a testimonial communication that is incriminating.” *State v. Franco*, 96 Wn.2d 816, 827, 639 P.2d 1320 (1982). Also, in *Wethered* the court ruled that:

“We reaffirm *Franco*, and now also hold that *Dennis* and *Moreno* correctly state the rule that where a police officer’s questioning or requests induce a suspect to hand over or reveal the location of incriminating evidence, such nonverbal act may be testimonial in nature; the act should be suppressed if done while in custody in the absence of *Miranda* warnings.”

Weathered, at 471.

It is undisputed in the record that the Respondent was not formally placed in custody until after he admitted to possessing marijuana and Deputy Williams verified that the Altoids container did contain suspected marijuana. RP 58, 61-62. It is also undisputed that Deputy Williams was not interrogating the Respondent. Under questioning, Deputy Williams stated he continued to ask questions about the container because he didn’t know what was inside it and was concerned about his safety. RP 9-10. The record shows that the Respondent then handed the container to Deputy Williams. There is absolutely nothing in the record to indicate that Deputy Williams was questioning the Respondent to find contraband or had other impermissible motives.

Respondent has failed to show that he retained any privacy or property interest in the Altoids container when he voluntarily handed it to Deputy Williams. In addition, Respondent has cited no authority for the position asserted, apparently because there is none. A court is entitled to conclude that the failure of counsel to cite authority means that no authority exists supporting counsel's position. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126 (1962). Washington case law has consistently held that a court is not obligated to search out authority to support a party's position. *See*, for example, *State v. Chapman*, 140 Wn.2d 436, 453, 998 P.2d 282, *cert. denied*, 531 U.S. 984, 121 S.Ct.438, 148 L.Ed.2d 444 (2000).

C. THE CONCLUSIONS OF LAW ARE UNSUPPORTED BY THE FINDINGS OF FACT AND THE RECORD.

Appellate review of findings of fact is limited to determining whether the trial court's findings are supported by substantial evidence in the record, and if so, whether the conclusions of law are supported by those findings of fact. *Scott v. Tranns-Sys.*, 148 Wn.2d 701, 707-708, 64 P.3d 1 (2003). Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a

rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 685, 314 P.2d 622 (1957). Review of conclusions of law in an order pertaining to suppression of evidence is de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Respondent calls attention to Finding of Fact 2.9 and 2.12 specifically. Finding of Fact 2.9 indicates that when the Respondent was asked if just Altoids were in the tin he responded with "Altoids and bud." At trial, the court ruled that the Respondent was essentially in custody when he gave the answer that the container held marijuana. (RP 100.) The testimony had been that the Respondent was detained because he was exhibiting the effects of having consumed alcohol. As discussed above, *State v. McWatters*, 63 Wn.App at 915, *State v. Phu Huynh*, 49 Wn.App at 201, *State v. Walton*, 67 Wn.App at 131, and *State v. Short*, 113 Wn.2d at 40-41, all state that statements made before *Miranda* may be admissible as long as the suspect's freedom was not curtailed to the extent of a formal arrest. The record is clear that the Respondent was not formally placed

under arrest until after his admission of having marijuana. (RP 61-62.)

The Finding of Fact does not support the conclusion of law.

Respondent also challenges Finding of Fact 2.12, that the father of the Respondent testified that the Respondent admitted to having been caught by police with marijuana. In trial, Mr. Hopkins testified that he had conversations with his son, the Respondent, since the incident. He stated that the Respondent told him that the police found marijuana on him. (RP 86.) As discussed above, this statement by the Respondent has none of the conditions requiring the giving of *Miranda* warnings.

Conclusion of law 3.5 indicates that the state did not prove that the statement given to the father was voluntary. The Finding of Fact does not support the conclusion of law.

D. THE JUVENILE COURT'S CONCLUSION OF LAW 3.1 IS NOT CONTRARY TO EXISTING LAW.

Respondent assigns error to Finding of Fact 3.1, that the Respondent is guilty of possessing 40 grams or less of marijuana and being a minor in possession or consumption of alcohol. As discussed in sections A and B above, this conclusion is supported by findings of facts, controlling case law, and the record.

E. THE JUVENILE COURTS CONCLUSION OF LAW 3.6 IS A MISTATEMENT OF LAW AND FACT.

Finding of Fact 3.6 states that the search of the defendant where the marijuana was discovered was a valid search incident to arrest. As discussed in section B(2), Deputy Williams' opening the Altoids container was not a search.

IV. CONCLUSION

For the foregoing reasons, the Appellant's appeal should be dismissed and the original Order of Disposition entered by the Juvenile Court on April 25, 2011, should be affirmed pursuant to RAP 18.14(e)(1).

Respectfully submitted this 30th day of March, 2012.

A handwritten signature in black ink, appearing to read 'J. Mullin', with a long horizontal line extending to the right.

JENNIFER J. MULLIN
WSBA No. 35684
Deputy Prosecuting Attorney