30273-3-III

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Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MIGUEL ANGEL CASTANEDA,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction and sentence of the Defendant.

III. ISSUES

1. Was the protective frisk of the Defendant justified for officer safety purposes where there had been several recent reports that his companion was always in possession of a gun including a brandishing report within several hours of the arrest, where the occupants of the car were gang members or affiliates, where the gun was not recovered in the arrest of three of the car's occupants, and where police articulated that gang members commonly hand off weapons to affiliates when they expect to be arrested or searched?
2. Is the finding of ability to pay legal financial obligations supported in the record?

IV. STATEMENT OF THE CASE

The Defendant Miguel Castaneda was convicted of possessing methamphetamine after he stipulated that the facts were sufficient for a finding of guilt. CP 48-49, 52. With no felony history, the Defendant received a thirty day sentence converted to partial confinement (to be served whenever the Defendant was not at work) with credit for the three days already served. CP 54, 58; RP 91-92.

On appeal, the Defendant challenges the protective frisk and the finding of present or future ability to pay legal financial obligations.

THE PROTECTIVE FRISK: On April 18, 2011, Walla Walla County Sheriff's Deputy Kenton Boyd stopped a vehicle for failure to transfer title and a window tinting violation. CP 67. Mr. Castaneda was a passenger. CP 67.

The deputy was familiar with three separate reports which indicated officer safety or weapons concerns related to the particular vehicle. RP 23-25. When beginning his shift that evening, the deputy had been briefed on recent incidents "that have happened ... since we have been off, anything we need to be aware of coming on to shift" – including a recent weapons display incident involving this same car. RP 23-24, 27, 29. Deputy Boyd made the

stop only after Deputy Martin arrived as backup. RP 31-32. The windows of the car were so dark that Deputy Boyd could not see through the back window even with the assistance of a spotlight and had limited ability to see the back seat area from the front passenger door. CP 69; RP 29, 32-34.

Detective Kevin Bayne was dispatched to the scene due to the occupants' gang affiliations. RP 65. He arrived at the same time as Officer Gunner Fulmer and his canine partner -- about ten or twenty minutes after the traffic stop. RP 39, 64-65.

Det. Bayne was aware that the driver Luis Chavez was affiliated with the Florencia 13 gang and that on March 28 Chavez in the company of Miguel Saucedo (a member of the Southside Florencia 13 Los Malos) was alleged to have shot a 9 millimeter handgun into the home of someone who was cooperating in a police investigation of the gang. RP 66, 71. The shooting was intended to intimidate the person into ending contact with police and had its intended effect. RP 66-67. Police arrested Mr. Chavez during this April 18 contact with his vehicle. RP 37.

Det. Bayne was familiar with passengers Cassandra Morreira (Chavez's girlfriend) and Salvador Saucedo (Miguel Saucedo's brother and also with the Southside Florencia 13 Los Malos gang). RP 34, 67, 69. Mr.

Saucedo initially provided a false name, but the detective knew his true name. RP 69-70. Both Saucedo and Morreira had active warrants and were arrested. RP 34-36.

The detective was also familiar with the Defendant, Mr. Castaneda, as the get-away driver in a Southside Florencia 13 Los Malos shooting involving three firearms: a handgun, a sawed off shotgun, and a 7.62 millimeter SKS assault rifle. RP 67, 74-75.

Police had some difficulty confirming the last passenger's identity. RP 39. Joey Crooke also claimed membership in the Southside Florencia 13 Los Malos gang. RP 67.

While police were sorting out the various identities and arrest warrants, Officer Gunner Fulmer applied his canine partner to the car. RP 5. When the canine alerted to the vehicle indicating narcotics, police decided to impound the car while they applied for a search warrant, and they removed the remaining passengers, i.e. Castaneda and Crooke. RP 43, 48, 50.

On arriving, Det. Bayne had advised his fellow officers that "if you pull the people out, make sure you do a pat search for weapons." RP 66. He testified that, based on three different reports, the driver was known to always carry a gun, particularly in the context of narcotics distribution which is what

Deputy Boyd suspected was occurring that night. RP 30, 68. The reports of weapon possession were recent. RP 73. Because no gun was discovered on Chavez's person during his arrest, police were suspicious that he may have handed the weapon off to one of the passengers. RP 68, 69-72. The detective testified that it is a common practice for "a gang member who feels that they are going to be targeted by the police for a search [because of firearm history] ... to either hand it off to a girlfriend, such as Miss Morreira, or to another fellow gang member who they feel is less likely to be contacted or searched." RP 72-73. "So we had a high suspicion, and based on the reports and the affiliation, the gun was in the car, and that as we pulled people out, we didn't know who would have that gun." RP 68.

Deputy Boyd testified that a frisk is a necessary precaution during an arrest and seizure of a vehicle to protect the officers and all others who are present. RP 43-44. And in this particular case, the deputy was aware that only hours earlier the driver of the vehicle had been reported to have been brandishing a weapon. RP 8, 23-24, 29.

When Mr. Castaneda exited the car, Officer Fulmer frisked him for weapons. RP 43. In the course of the frisk, the methamphetamine was discovered. CP 70. Officer Fulmer verified that the bulge in the Defendant's

pocket was a roll of bills and not a weapon by extracting the money "just far enough to see that it was cash." RP 9. In pushing the money back into the pocket, the officer unwittingly caused a baggie of crystal meth to fall from the Defendant's pocket to the ground. RP 9-10. Because the officer's intent was a protective frisk, he finished the pat down, before recovering the drugs. RP 10.

After a hearing, the Honorable Judge Schacht adopted the State's arguments and held that the frisk of the Defendant was justified by officer safety concerns. CP 47, 71.

THE FINDING OF ABILITY TO PAY LFO'S: As part of the sentence, the court imposed legal financial obligations (LFO's) of:

Court costs:	200.00
Sheriff fees:	119.70
Victim assessment:	500.00
Attorney fees:	775.00
City Drug Enf. Fund:	500.00
Crime Lab Fee:	100.00
Biol. Sample Fee:	100.00

for a total of $2,294.70. CP 55-56.

The judgment and sentence states:

> The court has considered the defendant's past, present, and future ability to pay legal financial obligations, including the

> defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

CP 55.

At the time of the sentencing, the trial judge would have been aware of the following record:

- The Defendant was 21 years old. CP 8.
- No competency issue was raised in the record.
- The Defendant does not support an independent household, but resides with his parents. RP 87.
- The Defendant has the ability to purchase or otherwise possess crystal methamphetamine. CP 7.
- The Defendant speaks English. CP 8. See also RP (no use of interpreter).
- The Defendant is an American citizen. RP 93.
- The Defendant is seasonally employed at Davis Orchards in Milton-Freewater during which time he works seven days a week through November. RP 86-87, 91.
- At the time of his arrest, the Defendant was carrying a roll of bills so substantial as to be mistaken for a gun. RP 9.

After speaking with the Defendant, the judge decided to waive the $1000 fine, while imposing the remaining legal financial obligations. RP 87. The court set a payment schedule of $50/mo to begin 90 days after sentencing. CP 56.

V. ARGUMENT

A. THE PROTECTIVE FRISK WAS JUSTIFIED BY OFFICER SAFETY CONCERNS.

While at the trial level the parties discussed many different challenges to the search (Terry stop of the vehicle, pretext stop, canine sniff of the vehicle, frisk of the passengers for officer safety, and the reasonableness of the detention - RP 53-60), only one is renewed on appeal. The Defendant challenges the justification for the protective frisk. CP 9-10.

The State agrees with the Defendant as to the standard of review. In reviewing whether a trial court's determination that a protective frisk was justified, the standard is *de novo*. *State v. Ibrahim*, 164 Wn. App. 503, 508, 269 P.3d 292 (2011), *citing State v. Rankin,* 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

In order to frisk for weapons, an officer must have a reasonable concern for his safety to justify the frisk and the search must be limited to what is necessary to assure the officer's safety. *State v. Ibrahim*, 164 Wn. App. at 508-09, *citing State v. Day,* 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). The State must show:

> (1) the initial stop is legitimate,
> (2) a reasonable safety concern exists to justify a protective frisk for weapons, and

(3) the scope of the frisk was limited to the protective purpose.

Id.

The Defendant does not appear to challenge the legality of the stop or the scope of the frisk. The argument is that police did not articulate "facts to support a reasonable suspicion that Mr. Castaneda or any of the occupants of the vehicle was armed and dangerous." Brief of Appellant at 9.

> ... while *Terry* uses the words armed and presently dangerous, the actual measure appears to be more modest; absolute certainty is not required. *Terry,* 392 U.S. at 21-24, 88 S.Ct. 1868. Our Supreme Court has suggested that courts should be reluctant to substitute their judgment for that of the officer on the scene. *State v. Collins,* 121 Wash.2d 168, 173-74, 847 P.2d 919 (1993). " ' "A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing." ' " *Collins,* 121 Wash.2d at 173-74, 847 P.2d 919 (emphasis omitted) (alteration in original) (quoting *State v. Belieu,* 112 Wash.2d 587, 601-02, 773 P.2d 46 (1989)) (quoting *Wilson v. Porter,* 361 F.2d 412, 415 (9th Cir.1966)); *State v. Miller,* 91 Wash.App. 181, 185-86, 955 P.2d 810, 961 P.2d 973 (1998).

State v. Ibrahim, 164 Wn. App. at 509.

The law enforcement officers articulated that they were concerned that the driver of the car was in possession of a gun that had been used recently in a shooting to intimidate a witness and more recently in brandishing the weapon. RP 29, 66-67. Because three of the five occupants

(including the driver) had already been arrested and the gun had not been uncovered, officers were concerned that the gun had been passed to either of the remaining occupants: Mr. Crooke who was a gang member and Mr. Castaneda who was a gang affiliate. The Defendant Mr. Castaneda was known to have abetted a gang-related shooting by driving a shooter away from the scene, hidden in the bed of his truck. RP 72, 75.

The officers' knowledge of the weapon coupled with the high risk situation of multiple arrests gave rise to a reasonable safety concern. Police were justified in making a protective frisk for weapons.

The Defendant argues that it is significant that the trial judge framed the validity of the pat-down for officer safety as a conclusion of law, rather than a finding of fact. Brief of Appellant at 10. In fact, this information appears under two headings. The trial court made "Findings as to the Facts" that the drugs were discovered "during a valid pat-down search for weapons for officer safety." CP 71. And the trial court explained that its "Reason for Admissibility of Physical Evidence," or conclusion, was that the evidence was admissible because it was discovered "during a lawful traffic stop and a valid police frisk for officer safety." CP 71. In any case, however information is titled, whether as fact or conclusion, it will be treated as what

it actually is and not how it is titled. *Smith v. Breen*, 26 Wash.App. 802, 803, 614 P.2d 671 (1980)("conclusions of law" that are in actuality findings of fact will be treated as findings of fact).

The facts are sufficient to establish a reasonable safety concern justifying a protective frisk.

B. THE FINDING OF LEGAL FINANCIAL OBLIGATIONS IS SUPPORTED IN THE RECORD.

The Defendant has argued that the record does not sufficiently support a finding that he has the current or future ability to pay the legal financial obligations imposed; and the Defendant is asking this Court to strike the finding (2.5 at CP 55), but leave intact the imposition of fines. Brief of Appellant at 12. In fact, the record supports the court's finding quite sufficiently.

The Defendant relies on a recently published case: *State v. Bertrand*, 165 Wn. App. 353, 267 P.3d 511 (2011). In that case, Bertrand was convicted of selling oxycodone, for which she herself had a prescription. *State v. Bertrand*, 165 Wn. App. at 397. She did not object to the imposition of LFO's or assert that, as a disabled person, she lacked the financial ability to pay. *State v. Bertrand*, 165 Wn. App. at 398. The court of appeals found

that there was no record to support the trial court's finding of present or future ability to pay. *State v. Bertrand*, 165 Wn. App. at 404. The court held that until such a future determination could be made, the Department of Corrections could not begin to collect on the LFO's. *State v. Bertrand*, 165 Wn. App. at 405. The court struck the finding, but not the imposition of LFO's. *Id.*

The Defendant here asserts that absent an inquiry into the Defendant's debts and other obligations, the court could not make a finding of ability to pay. Brief of Appellant at 12. This is not the standard.

In determining the standard, *State v. Bertrand* references *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991). There, after a thorough review of the statutes and case law, the court of appeals noted there was no requirement for formal findings, but only a **factual basis** for the finding. *State v. Baldwin*, 63 Wn. App. at 311 ("when the presentence report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied"). That factual basis is met, as set forth *supra* at 7.

RCW 10.01.160 requires the trial court to "take account of the financial resources of the defendant and the nature of the burden that payment

of costs will impose." Here the court took into account the Defendant's financial resources (his employment) and the nature of the burden (where the Defendant resided with his parents). The Defendant had no previous felonies (CP 54), and the prosecutor did not mention any previous misdemeanors[1] (other convictions would suggest other legal financial obligations). In imposing the $50/mo obligation, the court was also aware that the Defendant carried a wad of cash so large as to be mistaken for a gun, could afford to spend his money on crystal methamphetamine, and was not burdened by language, citizenship, or competency barriers.

This record is sufficient to sustain the finding that the Defendant has the present and future ability to pay $50 a month.

[1] There are none.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and sentence.

DATED: May 1, 2012.

Respectfully submitted:

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Susan Marie Gasch <gaschlaw@msn.com> Miguel Angel Castaneda 210 N.E. 14th Avenue Milton-Freewater, OR 97862	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 1, 2012, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**