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In the Court of Appeals of the
State of Washington, D.C.

By _____

NO. 23192-5-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CHARLIE BERNETT DAY,

Defendant/Appellant.

RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

CHARLIE BERNNETT DAY requests the relief designated in Part 2 of this Petition.

B. COURT OF APPEALS DECISION

Mr. Day seeks review of a published opinion of Division III of the Court of Appeals entered on December 8, 2005. (Appendix "A" 1-7)

C. ISSUE PRESENTED FOR REVIEW

1. Does the presence of a gun in a car justify the seizure of the passengers and a warrantless search of that car when a police officer is only investigating a civil infraction?

D. STATEMENT OF THE CASE

On March 29, 2003 Charlie Bernnett Day and his wife Alice were in their car parked at a public access area near the Yakima River outside Benton City, Washington. (03/22/04 RP 13, ll. 18-22; RP 14, ll. 2-3; RP 14, l. 20 to RP 15, l. 8; Ex. 4)

Deputy Hayter contacted Mr. and Mrs. Day. He wanted to find out if they had a permit to park at the public access area. (03/22/04 RP 14, ll. 9-15)

The car was parked next to some trees. It was backed in toward the river. Deputy Hayter walked around the vehicle to see if he could find a permit on it. (Ex. 4)

When the deputy did not see a permit he contacted Mr. Day who was sitting in the driver's seat. The contact occurred at 8:30 a.m. on a Sunday morning. (03/22/04 RP 15, ll. 21-23; RP 16, ll. 8-11)

Deputy Hayter had the video camera in his patrol vehicle operating at the time of the contact. The videotape reflects that the public access area is adjacent to a highway. Traffic can be heard in the background. There are various buildings in the area. (Ex. 4)

When Deputy Hayter walked around the vehicle he saw that the interior of the vehicle was a mess. He noted some lighters, rubber gloves and an empty handgun case. (03/22/04 RP 18, ll. 20-23; RP 19, ll. 1-5)

Deputy Hayter asked Mr. Day if there was a gun in the car. Mr. Day admitted that there was a gun in the car. (03/22/04 RP 19, ll. 20-23)

The deputy asked Mr. Day to step out of the car. He did a pat-down search and handcuffed Mr. Day. (03/22/04 RP 20, ll. 6-18)

The deputy also had Mrs. Day exit the vehicle. She was also handcuffed and detained. (Ex. 4)

Deputy Hayter then began to search the car. He located the gun under the driver's seat. He removed it and contacted dispatch to determine if it was stolen. (03/22/04 RP 21, ll. 3-4)

When the deputy learned that the gun was stolen he arrested Mr. Day. (03/22/04 RP 21, ll. 16-20)

A warrantless search incident to arrest was conducted. Numerous items related to the manufacturing of methamphetamine were located in the car. (Ex. 4)

An Information was filed on April 1, 2003 charging Mr. Day with manufacturing methamphetamine. (CP 64)

A suppression motion was filed on July 24, 2003. (CP 50)

The CrR 3.6 hearing was conducted on March 22, 2004. The trial court denied the motion. It entered findings of fact and conclusions of law on June 11, 2004. (CP 20)

A stipulated facts trial was also conducted on June 11, 2004. The trial court entered its findings of fact and conclusions of law the same date. (CP 18)

The trial court found Mr. Day guilty of manufacturing methamphetamine. Judgment and Sentence was then imposed. (CP 8)

Mr. Day filed his Notice of Appeal on June 29, 2004. (CP 6)

Division III of the Court of Appeals issued its published decision on December 8, 2005. The decision designated a natural resources parking infraction as a traffic infraction. It ruled that a valid *Terry* [*Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)] stop occurred. (Appendix “A” at 6)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Mr. Day contends that the Court of Appeals decision contravenes the Supreme Court decision in *State v. Duncan*, 146 Wn.2d 166, 43 P.3d 513 (2002).

RAP 13.4(b) provides, in part:

A petition for review will be accepted by the Supreme Court only: ... (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court

In *State v. Duncan, supra*, 175 the Court clearly stated:

... [T]he traffic violation exception to the application of the *Terry* stop for criminal violations is distinguishable from the civil infraction before the court. We decline to extend the *Terry* stop exception under the Fourth Amendment and article I, section 7 of the Washington State Constitution to non-traffic civil infractions.

The Court of Appeals ruled that a natural resource parking infraction constitutes a traffic infraction.

The Court of Appeals relied upon former RCW 43.30.310 (recodified as RCW 43.12.065 by LAWS OF 2003, ch. 334, § 128).

RCW 43.12.065(2)(a) states: “Except as otherwise provided in this subsection, a violation of any rule adopted under this section is a misdemeanor.”

RCW 43.12.065(2)(b) then provides:

Except as provided in (c) of this subsection, the department may specify by rule, when not inconsistent with applicable statutes, a violation of such rule is an infraction under chapter 7.84 RCW: PROVIDED, That violation of a rule relating to traffic including parking, standing, stopping and pedestrian offenses is a traffic infraction.

The question is whether or not a parking infraction under the natural resources law is a civil infraction or a traffic infraction.

The Infraction Rules for Court of Limited Jurisdiction recognize a difference between a traffic infraction and a parking infraction.

IRLJ 2.1(a) states:

Traffic infraction cases shall be filed on a form entitled “Notice of Traffic Infraction” prescribed by the Administrator for the Courts; **except that the form used to file cases alleging the commission of a parking, standing or stopping infraction shall be approved by the Administrator for the Courts.**

(Emphasis supplied.)

Moreover, IRLJ 4.1(b) specifically declares that “[t]he court shall not notify the Department of a parking, standing, stopping or pedestrian infraction, except as allowed by RCW 46.20.270(3).”

RCW 46.20.270(3) relates to issuance of an infraction observed by electronic means. It is not applicable to Mr. Day’s case.

On the other hand, WAC 352-20-010 specifically provides that the infraction observed by Deputy Hayter in this case is an infraction under Chapter 7.84 RCW.

RCW 7.84.020 references various RCWs. Title 46 RCW is not included in those references.

Mr. Day contends that the language of the WAC, in its reference to Chapter 7.84 RCW, precludes consideration of the infraction as being “an equivalent administrative regulation” as that term is used in RCW 46.63.020.

Mr. Day’s position gains support from the language of IRLJ 1.1(a). “Infractions are non-criminal violations of law defined by statute.” The WACs are not statutes. Since the WAC provision specifically identifies Chapter 7.84 RCW, it removes this particular infraction from Title 46 RCW.

The Court of Appeals recognized that Chapter 7.84 RCW controls any violation of a rule pertaining to the use of State-owned lands by the public. (*See*: Appendix “A” at 5)

Since RCW 7.84.020 specifically declares that the provisions of Chapter 43.30 RCW (now Chapter 43.12 RCW) are subject to the provisions of Chapter 7.84 RCW, a conflict exists with the provisions in RCW 43.12.065(2)(b).

The WACs are the rules which the Department of Natural Resources adopted to define parking infractions. The rules do not make a parking infraction a traffic infraction. Rather, they make a parking infraction a civil infraction subject to Chapter 7.84 RCW.

WAC 352-20-010 provides, in part:

(1) No operator of any automobile ... shall park such vehicle in any state park area, except where the operator ... possesses a state park nonrecreation permit

...

(5) Except as provided in WAC 352-20-070, any violation of this section is an infraction under Chapter 7.84 RCW.

RCW 7.84.020 states:

Unless the context clearly requires otherwise, the definition in this section applies throughout this chapter.

“Infraction” means an offense which, by the terms of Title 76, 79, or 79A RCW or * Chapter 43.30 RCW and rules adopted under these titles and chapters, is declared not to be a criminal offense and is subject to the provisions of this chapter.

(Emphasis supplied.)

WAC 352-20-070 states:

Any violation designated in this chapter as a civil infraction shall constitute a misdemeanor until the violation is included in a civil infraction monetary schedule adopted by rule by the state supreme court pursuant to chapter 7.84 RCW.

IRLJ 6.2(d)(3) references the monetary penalty for a violation of WAC 352-20-010. The schedule was adopted by the Supreme Court. It became effective September 1, 1992, and was amended on June 25, 1993; May 1, 1994; August 15, 1995; June 5, 1996; December 28, 1999; and July 22, 2001.

Chapter 7.84 RCW has nothing to do with traffic infractions. Chapter 46.63 RCW is the pertinent chapter relating to traffic infractions. RCW 46.63.020 does not cross-reference either Chapter 43.30 RCW or 43.12 RCW. (*See: State v. Hovrud*, 60 Wn. App. 573, 576, 805 P.2d 250 (1991))

Even though RCW 43.12.065 designates a parking infraction as a traffic infraction, it states that the infraction shall be subject to the provisions of Chapter 7.84 RCW.

Also, RCW 7.84.110 specifically declares that any order issued by a court of limited jurisdiction in connection with a natural resources infraction is a civil order.

The only reference in Chapter 43.12 RCW to Chapter 46.63 RCW is to direct that criminal offenses under RCW 46.63.020 remain criminal offenses for purposes of RCW 43.12.065.

There can be no argument that Deputy Hayter's initial investigation was for a civil infraction. The investigation exceeded its scope when he detained and seized Mr. and Mrs. Day.

"... [I]t is elementary that all investigatory detentions constitute a seizure." *State v. Rankin*, 151 Wn.2d 689, 695 (2004).

There can be no dispute that Mr. and Mrs. Day were seized. The seizure calls into play the Fourth Amendment to the United States Constitution and Const. art. 1, § 7.

The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...

Const. art. 1, § 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

No *Gunwall* [*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R. 4th 517 (1986)] is provided since it is well established that Const. art. 1, § 7 provides greater protection to Washington citizens than the Fourth Amendment.

Moreover, as the Court noted in *State v. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999):

... [P]re-existing Washington law indicates a general preference for greater privacy for automobiles and a greater protection for passengers than the Fourth Amendment

Since the *Duncan* case declined to extend the *Terry* exception to non-traffic civil infractions, the only other basis that could possibly justify Deputy Hayter's actions would be an issue of officer safety. (CP 60)

Warrantless searches are *per se* unreasonable. The exceptions to the warrant requirement are "jealously and carefully drawn' exceptions." Officer safety, in and of itself, is not a designated justification for a warrantless search. *See: State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

Deputy Hayter indicated that he had a concern for his safety when he observed the open and empty handgun case in the rear of the car. However, it is apparent that such an observation cannot uphold an invasion of the rights guaranteed under the Fourth Amendment and Const. art. 1, § 7.

In the *Duncan* case, the officer remembered Mr. Duncan from a prior contact. He had recovered a firearm from Mr. Duncan when he was wrestled to the ground. The officer also remembered that Mr. Duncan had a history of violent criminal offenses including murder. Mr. Duncan was wearing a bulky jacket. The officer conducted a pat-down of Mr. Duncan and located a gun in his waistband. *State v. Duncan, supra*, 170.

The *Duncan* Court then proceeded to discuss the issue of officer safety in the context of a non-traffic civil infraction contact. The Court stated at 176:

The policy concerns for police safety are in tension with the constitutional guarantees of personal privacy. The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means. *State v. Putman*, 65 Wn. App. 606, 612, 829 P.2d 787 (1992). In *Rife* [*State v. Rife*, 133 Wn.2d 140, 943 P.2d 266 (1997)], we articulated several policy considerations in support of the exclusionary rule: to protect the privacy interests of individuals against unreasonable government intrusions, to deter law enforcement officers from unlawfully obtaining evidence, and to preserve the dignity of the judiciary by providing a mechanism for the courts to refuse to consider unlawfully obtained evidence. 133 Wn.2d at 148 (citing *State v. Boland*, 115 Wn.2d 571, 581, 8 P.2d 1112 (1990)).

In addition to seeing the open handgun case, Deputy Hayter had also observed Mr. Day moving around in the car. This occurred prior to any face-to-face contact with Mr. Day. Other than those movements, Mr. Day was cooperative and did not take any threatening action toward the deputy.

Mr. Day maintains that the conclusions of law entered by the trial court following the CrR 3.6 hearing do not come within the parameters of any exception to the warrant requirement. In particular, Conclusion of

Law 3, insofar as it pertains to “potentially erratic behavior,” finds no support in the decisional law of this State.

Every contact between a law enforcement officer and a person being investigated has the potential to get out of hand. The videotape clearly indicates that this was not the situation.

F. CONCLUSION

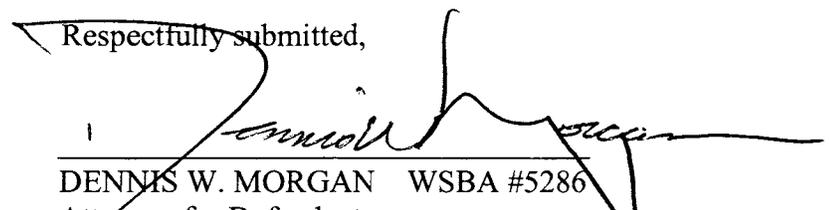
The Court of Appeals miscategorizes the natural resources parking infraction as a traffic infraction. It is a civil infraction.

Mr. Day contends that the Court of Appeals decision should be reversed, the trial court decision reversed, his suppression motion granted, and all evidence suppressed.

If the evidence is suppressed then Mr. Day’s conviction must be reversed and the case dismissed.

DATED this 5th day of January, 2006.

Respectfully submitted,



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APPENDIX "A"

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 23192-5-III
)	
Respondent,)	
)	Division Three
v.)	
)	
CHARLIE BERNNETT DAY,)	
)	PUBLISHED OPINION
Appellant.)	

SCHULTHEIS, J. — Charlie Day and his wife were parked in a Benton County public access area. An officer who investigated to see if they had a proper parking permit observed an open handgun case near Mr. Day’s feet. The officer conducted a limited search of the vehicle to find the handgun, which turned out to be stolen. Mr. Day was arrested and the search of the vehicle incident to the arrest uncovered evidence he was involved in manufacturing methamphetamine.

On appeal from his conviction of manufacturing methamphetamine, former RCW 69.50.401(a)(1) (1998), he contends the trial court erred in denying his motion to suppress evidence discovered during the warrantless search of his vehicle. Because we

conclude that the search was justified for officer safety during the investigation of a traffic infraction, we affirm.

FACTS

In late March 2003, Deputy Jeff Hayter noticed a vehicle backed into shrubbery under a tree in a public access area along the Yakima River. Deputy Hayter knew that migrant workers formerly camped in that area before it was designated public access. He also knew that vehicles parked in that area were required to have a permit tag attached to their rear bumper. The deputy approached the vehicle on foot to determine whether it had a proper permit and whether it was being used as a home for migrant workers.

As Deputy Hayter approached, he saw that the vehicle was occupied with a man in the driver's seat and a woman in the front passenger seat. The vehicle was cluttered with garbage, including cigarette lighters and rubber gloves. While talking with the couple, who identified themselves as Charlie and Alice Day, Deputy Hayter noticed an empty handgun case on the floor of the car near Mr. Day's feet. The deputy asked Mr. Day if there was a gun in the car. When Mr. Day answered yes, Deputy Hayter asked him to step out of the car, patted him down, and handcuffed him. Mr. Day said the gun was under the passenger seat. Consequently, the deputy also asked Ms. Day to step out of the car, patted her down, and handcuffed her. He told the couple they were not under arrest.

By this time, another officer had arrived. Deputy Hayter searched under the passenger seat, but eventually found the handgun—a .45-caliber Glock—under the

driver's seat. Dispatch reported that the handgun was stolen and that Ms. Day had a felony warrant for her arrest. Mr. and Ms. Day were arrested. The subsequent search of the vehicle incident to their arrest uncovered substantial evidence of the manufacture of methamphetamine.

Mr. Day was charged with one count of manufacturing a controlled substance, former RCW 69.50.401(a)(1).¹ His pretrial motion to suppress the evidence obtained during the pre-arrest warrantless search of the vehicle was denied and he was convicted on stipulated facts in a bench trial.

WARRANTLESS SEARCH INCIDENT TO A CIVIL INFRACTION

Mr. Day asserts that, because Deputy Hayter was investigating a civil natural resource infraction rather than a traffic infraction, the deputy was not justified in detaining him and his wife and searching the vehicle for the handgun. He contends the deputy was not authorized to conduct a *Terry* investigation under the circumstances of a nontraffic violation. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Because he assigns error solely to the trial court's conclusions of law in the suppression order, our review is de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Generally, warrantless searches and seizures are unreasonable and violate the Fourth Amendment and article I, section 7 of the Washington State Constitution. *State v.*

¹ An amended information additionally charging possession of a stolen firearm was withdrawn by the State before trial.

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Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Courts recognize a few carefully drawn exceptions to the warrant requirement, including consent, exigent circumstances, inventory searches, plain view searches, searches incident to arrest, and *Terry* investigative stops. *Id.* at 171-72. A *Terry* stop is a brief detention based on an officer's reasonable suspicion of criminal activity. *Terry*, 392 U.S. at 20-27. If the initial stop is justified, the officer may make a limited search for weapons if he or she reasonably believes that his or her safety or the safety of others is endangered. *Duncan*, 146 Wn.2d at 172. To justify the initial stop for *Terry* purposes, the State must show that the officer had a reasonable, articulable suspicion, based on objective facts, that the person stopped had committed or was about to commit a crime. *Terry*, 392 U.S. at 21; *Duncan*, 146 Wn.2d at 172.

Mr. Day was not stopped because he was suspected of committing a crime. As he notes, certain civil infractions, such as the one investigated by Deputy Hayter here, have been decriminalized. *See* RCW 7.84.020 (a natural resource infraction is not a criminal offense); RCW 46.63.020 (a traffic infraction may not be classified as a criminal offense, subject to enumerated exceptions). Although the courts have extended application of the *Terry* stop exception to traffic infractions, *Duncan* declined to extend the exception to include all civil infractions. *Duncan*, 146 Wn.2d at 174. Mr. Day contends parking without a permit in a public access area is a civil infraction that does not justify a *Terry* stop.

With a civil infraction, an officer may briefly detain a person only long enough to check his or her identification and to issue the notice. *Id.* at 174 (citing RCW 7.80.060). Traffic infractions, due in part to the ready mobility of vehicles and safety concerns, justify a broader scope of detention. *Id.* The person may be detained for the reasonable period of time required to identify him or her, check for outstanding warrants, check his or her license, insurance card, and vehicle registration, and complete the notice of the traffic infraction. *Id.* at 174-75 (citing RCW 46.61.021(2)). A nontraffic civil infraction that did not occur in the presence of the officer does not justify a *Terry* investigative detention. *Id.* at 182.

The questions before this court are first, whether this civil parking violation constituted a traffic infraction; and second, whether additional circumstances justified the search for the handgun.

Both parties agree that the authorization for Mr. Day's parking infraction is under chapter 7.84 RCW, which describes the procedure for issuing infraction notices for violations of the natural resource laws. The administrative rule adopted pursuant to this statute provides that no vehicle shall be parked in a state park area without an appropriate permit or purpose. WAC 352-20-010. According to the general statute on natural resources, chapter 43.30 RCW, a violation of a rule pertaining to the use by the public of state-owned lands is an infraction under chapter 7.84 RCW. Former RCW 43.30.310 (1987) (recodified as RCW 43.12.065 by LAWS OF 2003, ch. 334, § 128). Specifically,

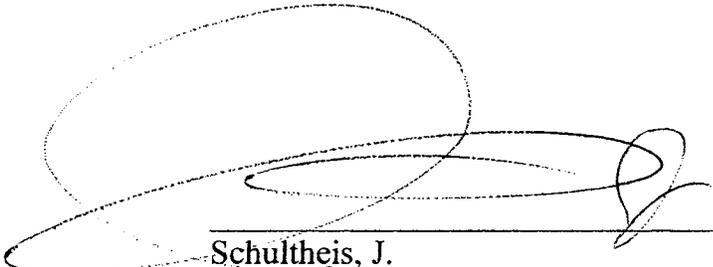
“violation of a rule relating to traffic including parking, standing, stopping, and pedestrian offenses is a traffic infraction.” Former RCW 43.30.310. Under the clear terms of the statutes relating to civil natural resource violations, parking in violation of the rules for use of state-owned land is a traffic infraction.

As noted above, a brief *Terry* investigative stop is justified by a reasonable suspicion of a traffic infraction. *Duncan*, 146 Wn.2d at 174. During such a stop, an officer may make a limited search for weapons if he or she reasonably believes the search is necessary for officer safety. *Id.* at 172. Here, the findings indicate that Mr. Day acted as though he were looking for something as Deputy Hayter approached. The deputy then noticed an open handgun case on the floor at Mr. Day’s feet. When asked, Mr. Day said that there was a gun in the car behind the passenger seat. These facts support the deputy’s reasonable safety concerns. As noted in *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986), the scope of a search during a *Terry* stop based on a traffic infraction should be limited to the extent sufficient to assure the officer’s safety:

This means that the officer may search for weapons within the investigatee’s immediate control. We also recognize that such a limited search applies to any companion in the car because that person presents a similar danger to the approaching officer. The front seat of the car is in the immediate control of a passenger seated next to the driver. Consequently, a search in that area to discover whether the suspect’s furtive gesture hid a weapon under the front seat is similar to a *Terry* frisk where an officer may frisk a suspect to protect himself from danger.

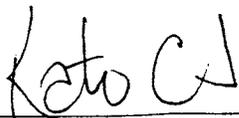
Given Deputy Hayter's objectively reasonable concerns for his safety, his limited search for the handgun under the passenger seat (where Mr. Day said it was), and under the driver's seat was reasonable. "It would be unreasonable to limit an officer's ability to assure his own safety." *Id.* Because the seizure of the handgun was lawful, Mr. Day's arrest for possession of the stolen gun was justified,² as was the search of the vehicle incident to that arrest. The trial court did not err in denying his motion to suppress the evidence of methamphetamine manufacture that was revealed during that search.

Affirmed.



Schultheis, J.

WE CONCUR:



Kato, C.J.



Thompson, J. Pro Tem.

² Apparently Mr. Day admitted that he had possession of the handgun.

