

NO. 23192-5

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

CHARLIE BERNNETT DAY, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

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BRIEF OF RESPONDENT

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### COUNTERSTATEMENT OF FACTS

On March 29, 2003, Deputy Jeff Hayter of the Benton County Sheriff's Office observed the defendant's vehicle backed into the weeds and shrubs in a remote designated wildlife access area along the Yakima River in Benton City. (RP 3/22/04; 14:20-25, 15:1-8). Deputy Hayter was alone on patrol at that time. (RP 3/22/04; 19:17). Through prior law enforcement experience Deputy Hayter knew the area was frequently inhabited by migrant workers. (RP 3/22/04; 14:9). In addition, any vehicles which are parked in the area are required to have an "Access Stewardship" decal pursuant to RCW 77.32.380. (RP 3/22/04; 17:1-20). Failure to do so is an infraction carrying a penalty of \$66.00. RCW 77.32.380.

Deputy Hayter approached the defendant's vehicle to determine if the occupants were migrant workers and/or to locate a permit tag on the vehicle. (RP 3/22/04; 18:12). As

Deputy Hayter approached the vehicle, he observed the defendant making furtive movements in the car, as if he were searching for something. (RP 3/22/04; 27:7). When he reached the vehicle, Deputy Hayter observed a number of lighters, rubber gloves, and an open handgun case, all of which were in plain view. (RP 3/22/04; 19:1). The handgun case was lying on the driver's side floor, next to the defendant. (RP 3/22/04; 19:4).

Due to concerns for his safety, Deputy Hayter asked the defendant to step from the vehicle. (RP 3/22/04; 19:20). The defendant was frisked for weapons, and asked if there were any weapons in the vehicle. (RP 3/22/04: 19:20-25, 20:1-10). The defendant informed Deputy Hayter that there was a pistol behind the front passenger seat. (RP 3/22/04; 19:22). Alice Day, the defendant's wife, was seated in the front passenger seat of the vehicle. (RP 3/22/04; 20:10). Based on her close proximity

to where Deputy Hayter believed the pistol was located, he asked Ms. Day to also exit the vehicle. (RP 3/22/04; 20:12). Both Ms. Day and the defendant were placed in handcuffs for officer safety reasons. (RP 3/22/04; 20:13). Both were informed that they were not under arrest at that time. (RP 3/22/04; 42:24). Deputy Hayter waited until backup arrived, then searched for the pistol. (RP 3/22/04; 21:2-4). Deputy Hayter could not find the gun behind the passenger's seat, but did locate it underneath the driver's seat. (RP 3/22/04; 21:4). Dispatch ran a check on the gun to determine if the defendant had a license for the weapon. (RP 3/22/04; 21:14). Dispatch informed that the pistol had been reported stolen from Pierce County. (RP 3/22/04; 21:16). The defendant was arrested for Possession of a Stolen Firearm. In addition, officers were informed that Ms. Day had a felony warrant for her

arrest, and she was arrested on that warrant.  
(RP 3/22/04; 21:23).

During a search incident to arrest, Deputy Hayter observed components used for manufacturing and distributing methamphetamine. (CP 64-65). Based on evidence obtained during the search, the defendant was convicted at a stipulated facts trial of manufacturing a controlled substance. (RP 4/19/04; 56:24-25, 57:1-2)

#### ARGUMENT

The appellant cites State v. Duncan, 146 Wn. 2d. 166, 43 P.3d 513 (2002), for the proposition that the Terry investigative stop does not extend to non-traffic civil infractions such as possession of an open container in public. In Duncan, the court pointed out that when an officer issues a notice of a civil infraction, he may briefly detain a person long enough to check his or her

identification. Duncan at 174 (citing RCW 7.80.060). RCW 7.80.060 states as follows:

A person who is to receive a notice of civil infraction under RCW 7.80.050 is required to identify himself or herself to the enforcement officer by giving his or her name, address, and date of birth. Upon the request of the officer, the person shall produce reasonable identification, including a driver's license or identicard.

A person who is unable or unwilling to reasonably identify himself or herself to an enforcement officer may be detained for a period of time not longer than is reasonably necessary to identify the person for purposes of issuing a civil infraction.

RCW 7.80.060.

However, Duncan made a distinction between traffic and non-traffic civil infractions. The court noted that "the traffic violation exception to the application of Terry stops for criminal violations is distinguishable from the civil infraction before the court." Duncan at 175. A traffic violation creates a unique set of circumstances that do not exist with other civil infractions. Id. at 174. Specifically,

there is a diminishment of privacy interests "due to the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation." Id. Furthermore, detentions for traffic violations have a broader scope than detentions for other civil infractions. Id. Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction. Id. at 174-5 (citing RCW 46.61.021(2)).

In this case, Deputy Hayter was investigating a civil traffic infraction. RCW 46.63.020 states, in pertinent part, that

. . . failure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction . . .

A violation of WAC 352-20-010 is clearly a traffic infraction as it relates to the parking of a vehicle. WAC 352-20-010 states that "no operation of any automobile . . . shall **park** such vehicle in any state park area, except where the operator . . . possesses a state park nonrecreation permit. (emphasis added).

Here, because both the defendant and co-defendant were in a state access area without a permit, the officer had the right to ask for their identification. The co-defendant, Alice Day, said she did not have identification with her. Deputy Hayter then had a right to detain her to ascertain her identification. He also had the right to conduct a warrants check. The officer conducted a warrant check "as long as

the duration of the check does not unreasonably extend the initially valid contact." See State v. Chelly, 94 Wn. App. 254, 261, 970 P.2d 376 (1999). There is nothing to indicate that the warrant check here unreasonably added to the length of the detention.

Pursuant to Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d. 889, 88 S.Ct. 1868 (1968), Deputy Hayter could also make a limited search for the purpose of protecting his safety and under the Washington Constitution, this includes a protective sweep of the suspect's vehicle when necessary to assure officer safety. State v. Kennedy, 107 Wn.2d 1, 12, 726, P.2d 445 (1986). The protective sweep must be objectively reasonable, State v. Larson, 88 Wn.App. 849, 853-54, 946 P.2d 1212 (1997), and is not limited to "situations in which either the driver or passenger remain in the vehicle." State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002). Rather, the entire

circumstances surrounding the contact are considered when determining if the search was reasonable based on officer safety concerns. Id.

In Larson, the defendant was stopped for a traffic violation and based upon furtive movements that the officer observed, the officer has a reasonable suspicion that there may have been a weapon in the vehicle. Larsen at 851. After the defendant had exited the vehicle, the trooper did a weapons frisk and then placed the defendant out of the reach of the vehicle. Id. The trooper then stuck his head into the vehicle and observed drug paraphernalia and contraband. Id. Based on his observations, the defendant was placed under arrest. The court found that the officer's intrusion into the car was lawful, since "a reasonable concern for officer safety, sufficient to justify the search of an automobile incident to a Terry stop," can arise

even in circumstances where there are no individuals remaining in the vehicle. Id. at 853. "[T]he fact that no passenger remained in the vehicle...was not dispositive on the issue of whether the officer had a reasonable concern for his safety." Id. at 856.

In the present case, Deputy Hayter can point to specific and articulable facts which warranted the protective sweep in this case: 1) the defendant was in violation of RCW 77.32.380, which requires that persons who enters a state access area to display a permit while in that area; 2) the officer saw lighters, rubber gloves, and an empty handgun case; 3) the empty handgun case was lying at the defendant's feet; and 4) the defendant was furtively looking around as if he was searching for something. Given these factors, Deputy Hayter's request that the defendant exit his vehicle did not unjustifiably intrude on the defendant's reasonable expectation of privacy

and the subsequent search was allowed to secure the officer's safety.

When the defendant informed Deputy Hayter that there was a pistol in the vehicle, Deputy Hayter was then entitled to seize the weapon and retain it during the remainder of the contact. See State v. Cotton, 75 Wn.App. 669, 683-84, 879 P.2d 971 (1994). That is precisely what Deputy Hayter did in this case. Subsequently, the officer learned through dispatch that the pistol was stolen and also learned that Ms. Day had a felony warrant for her arrest. Both the defendant and Ms. Day were then lawfully arrested and a lawful search incident to arrest was conducted, during which the deputy found evidence of a methamphetamine lab.

#### CONCLUSION

For the foregoing reasons, Deputy Hayter did not violate the defendant's constitutional

rights in his investigation pursuant to RCW 46.61.021(2) and Terry v. Ohio. As such, the evidence was lawfully admitted at trial and there is no basis to reverse the defendant's conviction.

Respectfully submitted,

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Ofc. Id. 91004