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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. \_\_\_\_\_  
COA No. 24553-5-III

80236-0

FILED

JUN 14 2007

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,  
Respondent

v.

BEE XIONG,  
Petitioner

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2007 JUN -4 PM 4:50

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Jerome J. Leveque

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Bee Xiong, the respondent below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Xiong seeks review of Division Three's published decision in State v. Xiong, \_\_\_ Wn. App. \_\_\_, 154 P.3d 318, No. 24553-5-III, (March 27, 2007), attached as appendix A. The Court of Appeals denied Xiong's motion to reconsider by order dated May 4, 2007. Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Where the officers lacked actual authority of law to arrest Xiong, and where this Court recently affirmed that the Fourth Amendment's "reasonableness" inquiry does not govern police mistakes under the Washington Constitution, should Division Three have affirmed the trial court's order as a matter of state constitutional law?

2. Where the state failed to provide substantial evidence to support a finding that Xiong was the person identified in the warrant, and where the officers lacked reason to believe he was armed and presently dangerous, did the trial court properly find and conclude the officers were required to determine whether Xiong was the subject of the arrest warrant before they searched him?

3. Does the Division Three majority opinion, which declined to address Xiong's second constitutional claim, conflict with this Court's clear decisions in State v. Kindsvogel, State v. Bobic, and McGowan v. State, *infra*?

4. Does the Division Three majority opinion, which declined to address Xiong's constitutional claim, violate Xiong's due process right to be heard under the state and federal constitutions?

D. STATEMENT OF THE CASE<sup>1</sup>

The state charged appellant Bee Xiong with possession of methamphetamine with intent to deliver. CP 1. The charge was based on evidence discovered when five officers seized Xiong and frisked him after finding a "bulge" in his pocket. CP 16-24. The officers arrested Xiong based on a warrant authorizing the arrest of Xiong's brother, Kheng. The state failed to establish reasonable grounds for the officers to believe Xiong was the person identified in the warrant. Brief of Respondent (BOR) at 21-36.

In the trial court, Xiong moved to suppress the evidence under the Fourth Amendment and Article 1, § 7 of the Washington Constitution. He raised two main claims: (1) the officers lacked any

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<sup>1</sup> Citations to the record are set forth in full in the Brief of Appellant, at 4-13.

reasonable or articulable suspicion to justify a belief that Xiong was armed and presently dangerous,<sup>2</sup> and (2) the officers misidentified him and lacked an actual or a reasonable basis to believe Xiong was the intended target of the warrant.<sup>3</sup>

The trial court granted the motion to suppress, agreeing with Xiong's first claim. CP 17-18 ("based upon the Agent's inability to articulate facts, specific and detailed, from which could be reasonably inferred this individual was armed and dangerous, the results of the frisk, which is contraband, should be suppressed."). Because the court granted the motion on those grounds, the court did not fully address Xiong's other claims. To the extent the court did address them, the court found "[t]he stopping and cuffing of Bee Xiong and the detention of him at that time was appropriate." CP 17 (Finding of Fact 4).

The state appealed, arguing the trial court should be reversed. Under one of the state's appellate theories, the officers could mistakenly arrest anyone under the warrant and search that person incident to arrest. Brief of Appellant (BOA) at 5. The state's other theory claimed the officers had a reasonable and articulable basis to

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<sup>2</sup> CP 5-7, 12; RP 33-35.

<sup>3</sup> CP 7, 13; RP 35-37.

believe Xiong was armed and presently dangerous. BOA at 6-8; Amended Reply BOA at 6-9.

Xiong responded on appeal, again raising the same two claims: (1) the officers lacked any reasonable or articulable suspicion to justify a belief that Xiong was armed and presently dangerous,<sup>4</sup> and (2) the officers lacked state or federal authority to arrest him under the warrant, because he was not the person named in the warrant and they lacked a reasonable basis to believe he was that person.<sup>5</sup>

In a divided published opinion, the Division Three majority only addressed the first claim. The majority reasoned the officers had a legitimate reason to frisk Xiong after they had arrested him. Xiong, 154 P.3d at 320. For reasons addressed in argument 2, infra, the majority declined to address Xiong's other constitutional claims challenging the seizure and search. Xiong, 154 P.3d at 319-20 (Brown, J., writing for Kulik, J.).

Xiong moved to reconsider, arguing the majority's avoidance of his claims conflicted with this Court's decision in State v. Kindsvogel. Motion to Reconsider (M2R), at 3-8. Xiong also argued the majority's refusal to address his claims denied him due process and the right to

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<sup>4</sup> Brief of Respondent (BOR), at 13-21.

<sup>5</sup> Brief of Respondent, at 21-36 (raising state and federal constitutional claims).

respond to the state's appeal. M2R at 8. The motion was denied motion without further comment. Appendix B.

This petition timely follows.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE AUTHORITY TO SEARCH SOMEONE INCIDENT TO ARREST – WHEN THE ARREST AUTHORITY IS A WARRANT NAMING SOMEONE ELSE – RAISES SUBSTANTIAL QUESTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

As set forth fully in Xiong's brief, the facts show the officers mistakenly arrested Bee Xiong using a warrant naming his brother, Kheng. Although it might be possible one or more of the officers subjectively believed Xiong was his brother, the state never produced the officer who claimed to have identified Xiong as Kheng. Xiong's brief shows why the officers lacked any reasonable grounds to believe they had arrested the right Xiong under the warrant. BOR at 21-36.

Therefore, under the federal constitution, the evidence seized pursuant to the mistaken arrest was "fruit of the poisonous tree" that should be suppressed. BOR at 21-31 (citing, inter alia, U.S. Const. amend. 4; Const. art. 1, § 7; Hill v. California, 401 U.S. 797, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971), and State v. Smith, 102 Wn.2d 449, 688 P.2d 146 (1984)).

Xiong also raised a separate claim under the state constitution. He properly raised and argued the claim that an arrest warrant

naming a different person did not provide the necessary "authority of law" to justify an arrest and search under the state constitution. BOR at 31-36. Xiong relied heavily on this Court's recent decision in State v. Morse for the proposition that Article 1, Section 7 does not permit officers to simply make mistakes about who they arrest, nor can a warrant give officers "apparent authority" to arrest anyone they mistakenly believe is the person named in the warrant. BOR at 31-36 (citing, inter alia, State v. Morse, 156 Wn.2d 1, 9-15, 123 P.3d 832 (2005)).

There are substantial factual and legal reasons to support the conclusion the officers lacked a reasonable basis to believe Xiong was the person identified in the warrant. Xiong's brief discussed those reasons at length. BOA at 21-31. Because a petition for review has a limited number of pages, Xiong incorporates those arguments here. His case raises a substantial claim under the state and federal constitutions – when can officers arrest and search a person not identified by an arrest warrant, and when can the state use the fruits of a wrongful arrest and search against that person in a Washington court. BOR at 21-31. This Court should grant review. RAP 13.4(b)(3), (4).

Furthermore, because the search lacked authority of law under the Washington Constitution, the Court of Appeals decision conflicts

with this Court's decision in State v. Morse. BOR at 31-36. This Court should grant review. RAP 13.4(b)(1).

Finally, the officers lacked reasonable grounds to believe Xiong was armed and presently dangerous. BOR at 13-19 (setting forth facts and argument related to that claim). As the dissenting judge recognized, Division Three's contrary decision conflicts with Division One's decision in State v. Galbert, 70 Wn. App. 721, 855 P.2d 310 (1993). State v. Xiong, 154 P.3d at 322 (Schultheis, J., dissenting). This Court accordingly should grant review. RAP 13.4(b)(2).

2. THE DIVISION THREE MAJORITY'S AVOIDANCE OF XIONG'S CONSTITUTIONAL CLAIMS CONFLICTS WITH THIS COURT'S CONTROLLING PRECEDENT.

As set forth in Xiong's motion to reconsider, the Division Three majority erred in failing to address Xiong's constitutional claims. M2R at 3-8. Because the failure conflicts with this Court's controlling decisions, review should be granted. RAP 13.4(b)(1).

The facts and law controlling this procedural question are not complicated. The trial court granted Xiong's motion to suppress evidence. CP 16-18. The court then entered an order finding the suppression ruling had the practical effect of terminating the prosecution. CP 23-24. In short, Xiong fully prevailed in the trial court.

The state appealed both orders. CP 25-31. The state contended the trial court erred because the officers either could have arrested Xiong and searched him incident to arrest, despite the officers' factual error (BOA at 4-5), or the officers could have frisked Xiong based on a reasonable suspicion he was armed and presently dangerous. BOA at 6-8.

In response, Xiong argued the trial court correctly rejected both of the state's claims. BOR at 13-21 (citing, inter alia, State v. Collins, 121 Wn.2d 168, 847 P.2d 919 (1993) and State v. Galbert, 70 Wn. App. 721, 855 P.2d 310 (1993)). To the extent the trial court may have erred, however, Xiong also argued the seizure was unconstitutional because the officers lacked reasonable grounds to believe Xiong was the target of the warrant. BOR at 21-36. To support this argument, Xiong: (1) properly assigned error to finding of fact 4, and (2) included separate issue statements fully supporting the argument. BOR at 2-3. Xiong also cited settled authority for the proposition that a trial court order may be affirmed on alternative grounds supported by the record. BOR at 21-22 (citing, inter alia, Ertman v. City of Olympia, 95 Wn.2d 105, 108, 621 P.2d 724 (1980)).

In reply, the state had no difficulty understanding Xiong's claim or replying to it. The state instead asserted Xiong did not raise this argument in the trial court, stating Xiong only argued the frisk was not

justified. Amended Reply BOA, at 1-2. The state was simply wrong about this. Xiong's trial counsel argued several times that the officers had seized the wrong person and the arrest warrant therefore did not give them authority of law to seize or search Xiong. They were obliged to take reasonable efforts to confirm Xiong's identity before searching him. CP 7, 13; RP 35-37; BOR at 21-36.<sup>6</sup>

The Court of Appeals majority did not agree with the state's errant assertion, but unfortunately constructed its own procedural bar to avoid deciding Xiong's properly raised claim. The majority stated Xiong "did not file for cross review as required under RAP 5.1(d)." Slip op. at 3. For this proposition, the majority cited the Division Three decision in State v. Vanderpool, 99 Wn. App. 709, 714, 995 P.2d 104, rev. denied, 141 Wn.2d 1017 (2000).

To the extent Vanderpool is on point, it has been overruled sub silentio by this Court's subsequent decision in State v. Kindsvogel, 149 Wn.2d 477, 69 P.3d 870 (2003). Kindsvogel was convicted of possessing marijuana. He appealed the conviction, arguing the trial court erred in failing to dismiss the marijuana charge because it was not joined at the time he pled guilty to domestic violence charges. On

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<sup>6</sup> Although the state's reply brief was wrong, Xiong lacked any opportunity to correct the state's error before filing his motion to reconsider, because Division Three set the case for consideration without oral argument.

appeal, he claimed the marijuana charge arose from the same incident and therefore was "related" for purposes of the mandatory joinder and speedy trial rules. Kindsvogel, at 479-80.

The state argued the trial court properly rejected the claim because the two charges were not "related" under the speedy trial and mandatory joinder rules. The state also argued the trial court made factual errors and should not have entered certain findings of fact. The state, however, completely failed to assign error to those findings. Kindsvogel, at 481 & n.1.

On appeal, Division Three declined to address the state's factual claim, asserting the state had failed to cross-appeal. State v. Kindsvogel, 110 Wn. App. 750, 753, 43 P.3d 73 (2002), reversed, 149 Wn.2d 477, 69 P.3d 870 (2003). Division Three, briefly citing RAP 5.1(d) and its decision in Vanderpool, held it was "precluded from considering the State's factual allegations." Id.

This Court granted review and reversed Division Three on both procedural and substantive grounds.

This Court first discussed when cross appeals are not necessary under RAP 5.1(d). Citing settled rules, this Court reaffirmed "[t]he prevailing party need not, however, cross-appeal a trial court ruling if it seeks no further affirmative relief. It may argue any ground to support a court's order which is supported by the

record." Kindsvogel, at 481 (citing McGowan v. State, 148 Wn.2d 278, 287-88, 60 P.3d 67 (2002)). Although this court did not overrule Division Three's procedural ruling in Vanderpool, it did reverse Division Three's decision in Kindsvogel.

The Court expressly held, "[b]ecause the State did not seek affirmative relief, it was not required to file a notice of appeal." Kindsvogel, at 481. This rule is well-settled, at least in this Court. See, e.g., State v. Bobic, 140 Wn.2d 250, 257-58, 996 P.2d 610 (2000); McGowan, *supra*. But Division Three continues to cite its contrary decision in Vanderpool. Here it relied on Vanderpool in a published decision despite Xiong's respectful motion to reconsider which cited and analyzed this Court's conflicting decision in Kindsvogel.

Xiong respectfully asserts the appellate rules should not be manipulated to avoid important constitutional questions. The state lost in the trial court and raised limited arguments in the Court of Appeals. Xiong, as is his right, refused to limit his response to the state's chosen playing field. He instead argued alternative grounds to support affirmance of the trial court's order. Division Three nonetheless avoided Xiong's properly raised claim, citing Vanderpool.

The Division Three majority's avoidance of Xiong's claim is wrong. Xiong respectfully moved to reconsider, citing and analyzing

this Court's decision in Kindsvogel. Where Xiong was the prevailing party, he did not need to cross-appeal because he seeks no affirmative relief on appeal. He properly assigned error to the erroneous finding, unlike the state in Kindsvogel. In short, once the Division Three majority rejected Xiong's first claim, it was constitutionally obligated to address his remaining claims. There is no legitimate procedural reason to avoid Xiong's properly raised and meritorious state and federal constitutional claim. See also, RAP 1.2(a) (the "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits").

It is difficult to identify anything else Xiong could have done to raise his claims. Nonetheless, those claims have been relegated to a kind of procedural purgatory by the Division Three majority. The trial suppressed on one ground and did not directly rule on all the remaining grounds, but the record supports affirmance of the trial court on those grounds. Unless this Court grants review, however, the state will likely (and wrongly) argue the "law of the case" doctrine prevents the trial court from suppressing the evidence on those alternative grounds on remand.

This Court therefore should grant review because the majority's decision conflicts with Kindsvogel, Bobic, and McGowan. RAP 13.4(b)(1). The error denied Xiong the right to be heard on

substantial constitutional search questions which he fully argued and briefed. See argument 1, supra. That denial, in turn, deprived Xiong of his right to due process and to respond to the state's appeal. U.S. Const. amend. 14; Const. art. 1, §§ 3, 7, 22; RAP 13.4(b)(3). For the reasons argued in Xiong's brief, and not yet addressed by Division Three, the trial court's suppression order should be affirmed. BOR at 21-36.

This Court also could grant review in a per curiam opinion citing Kindvogel and Bobic, reverse Division Three's failure to address Xiong's constitutional claims, and remand with directions to address those claims. RAP 13.7(b).

F. CONCLUSION

For the reasons set forth above, this Court should grant review.

RAP 13.4(b), 13.6.

DATED this 4th day of June, 2007.

Respectfully submitted,

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# APPENDIX A

Court of Appeals of Washington,  
Division 3.  
STATE of Washington, Appellant,  
v.  
Bee XIONG, Respondent.  
No. 24553-5-III.

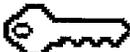
March 27, 2007.

**Background:** Defendant was charged with possession of methamphetamine with intent to deliver. The Spokane Superior Court, Jerome J. Leveque, J., granted defendant's motion to suppress evidence. State appealed.

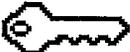
**Holding:** The Court of Appeals, Brown, J., held that police officers were justified in frisking defendant for articulable suspicion of a weapon while awaiting identification of the defendant.  
Reversed.

Schultheis, J., dissented and filed an opinion.

## West Headnotes

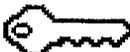
 [1] Arrest 63.5(8)  
35k63.5(8) Most Cited Cases

Police officers who noticed a large bulge in defendant's pocket, after they stopped and handcuffed him pursuant to felony arrest warrant issued for his brother, were justified in frisking defendant for articulable suspicion of a weapon while awaiting identification of the defendant, and thus evidence seized during search was not subject to suppression; defendant was similar in appearance to his brother and he lacked identification, time was necessary to clarify officers' initial identification of defendant, and officers testified that they were concerned that bulge was a weapon and they feared for their safety. U.S.C.A. Const.Amend. 4; West's RCWA Const. Art. 1, § 7.

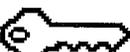
 [2] Criminal Law 1136  
110k1136 Most Cited Cases

On appeal by State from trial court's order granting defendant's motion to suppress, Court of Appeals would decline to review defendant's challenge to trial court's ruling that officers' initial stop and handcuffing of the defendant was appropriate, in trial for possession of methamphetamine with intent to deliver, where defendant failed to file for cross review.

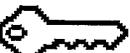
U.S.C.A. Const.Amend. 4; RAP 5.1(d).

 [3] Criminal Law 1158(4)  
110k1158(4) Most Cited Cases

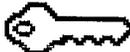
The Court of Appeals reviews suppression orders by independently evaluating the evidence to determine if substantial evidence supports the findings and the findings support the conclusions.

 [4] Criminal Law 1129(1)  
110k1129(1) Most Cited Cases

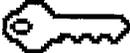
Where findings are unchallenged, they are verities on appeal.

 [5] Criminal Law 1139  
110k1139 Most Cited Cases

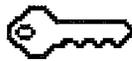
The Court of Appeals reviews suppression conclusions de novo.

 [6] Searches and Seizures 24  
349k24 Most Cited Cases

Warrantless searches are per se unreasonable, but defined exceptions exist. U.S.C.A. Const.Amend. 4.

 [7] Searches and Seizures 192.1  
349k192.1 Most Cited Cases

The State has the burden of showing that a particular search or seizure in question falls within the asserted exception to the rule that warrantless searches are per se unreasonable. U.S.C.A. Const.Amend. 4.



[8] Searches and Seizures 26  
349k26 Most Cited Cases

The Washington Constitution affords greater privacy protection regarding a search for weapons in connection with an investigative stop than the Fourth Amendment; in Washington, the State must show: (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes. U.S.C.A. Const.Amend. 4; West's RCWA Const. Art. 1, § 7.

\*319 Kevin Michael Korsmo, Attorney at Law, Spokane, WA, for Appellant.

Eric J. Nielsen, Eric Broman, Nielsen Broman & Koch PLLC, Seattle, WA, for Respondent.

BROWN, J.

¶ 1 Officers attempting to serve a warrant mistook Bee Xiong for his brother Kheng Xiong. While sorting out the identification, a protective frisk led to a pipe with drug residue. Bee Xiong was arrested. The search incident to Bee Xiong's arrest led to the State's charge for methamphetamine possession with intent to deliver. The trial court suppressed the evidence, and terminated the case. The State appealed. Because the evidence was seized during a proper investigatory stop, we reverse.

FACTS

¶ 2 Task forces assembled to execute felony arrest warrants for persons in the Spokane area, including Kheng Xiong. Using Kheng Xiong's photo, the officers went to his listed home address and found a van parked there. A deputy marshal misidentified the van's passenger, Bee Xiong, Kheng's brother, as Kheng. When approached, Bee Xiong gave his name to a federal agent but he did not have any identification. Bee Xiong explained Kheng Xiong was his older brother.

¶ 3 The agent handcuffed Bee Xiong, noticing a large bulge in his pocket. Concerned the bulge was a weapon, the agent touched the bulge and felt a hard object. Bee Xiong pulled away so the agent could not feel the object any further and said he did not have any weapons, but did not want to be searched. At this point, the agent was still uncertain of identification. Apparently, the photo used by the officers was similar in appearance to Bee Xiong. The officers attempted to obtain a photo of Bee Xiong in

the computer system in an effort to identify their suspect.

¶ 4 During this time, the officers decided to investigate the hard object, suspecting it could be a weapon. Bee Xiong was arrested for possessing a controlled substance when a pipe with drug residue was found. About 10 minutes later, Bee Xiong's mother arrived and identified him. A search incident to Bee Xiong's arrest developed evidence leading to a charge of possession of methamphetamine with intent to deliver.

¶ 5 Bee Xiong moved to suppress the evidence. The court decided the officers should have first identified Bee Xiong, and "that once confirmed he was Bee Xiong, he [should] have been released uncuffed and not patted." Clerk's Papers at 17. The court concluded the officers lacked facts, specific and detailed, that Bee Xiong was armed and dangerous. The court ordered suppression. The State appealed.

ANALYSIS

[1] ¶ 6 The issue is whether, considering investigative stop and frisk principles, the trial court erred in granting Bee Xiong's motion to suppress the evidence seized and dismissing the charge against him. We conclude the court erred.

[2] ¶ 7 Bee Xiong, in his briefing, assigns error to finding of fact 4, regarding the courts ruling that the initial stop and handcuffing \*320 was appropriate. But Bee Xiong did not file for cross review as required under RAP 5.1(d). See State v. Vanderpool, 99 Wash.App. 709, 714, 995 P.2d 104 (2000) (court declined review of allegations raised for the first time in response brief). Therefore, we decline review.

[3][4][5] ¶ 8 We review suppression orders by independently evaluating the evidence to determine if substantial evidence supports the findings and the findings support the conclusions. State v. Hill, 123 Wash.2d 641, 644-45, 870 P.2d 313 (1994). "[W]here the findings are unchallenged, they are verities on appeal." State v. O'Neill, 148 Wash.2d 564, 571, 62 P.3d 489 (2003) (citing Hill, 123 Wash.2d at 644, 870 P.2d 313). We review suppression conclusions de novo. State v. Mendez, 137 Wash.2d 208, 214, 970 P.2d 722 (1999).

[6][7] ¶ 9 Warrantless searches are per se unreasonable but defined exceptions exist. State v. Walker, 136 Wash.2d 678, 682, 965 P.2d 1079 (1998). Our focus is the Terry [FN1] investigative stop exception. State v. Duncan, 146 Wash.2d 166,

171-72, 43 P.3d 513 (2002). The State has the burden of showing the particular search or seizure in question falls within the exception asserted. Id. at 172, 43 P.3d 513.

FN1. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[8] ¶ 10 In Terry, the court held if an initial stop is justified a police officer may make a reasonable search for weapons without violating the Fourth Amendment, regardless of whether he or she has probable cause to arrest the individual, if the circumstances lead the officer to reasonably believe that his or her safety or the safety of others is at risk. See Terry, 392 U.S. at 20-27, 88 S.Ct. 1868. The Washington Constitution affords greater privacy protection than the Fourth Amendment.

¶ 11 In Washington, the State must show "(1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes." Duncan, 146 Wash.2d at 172, 43 P.3d 513 (citing State v. Collins, 121 Wash.2d 168, 173, 847 P.2d 919 (1993)). Here, it is a verity that the stop was appropriate. The sole issue is if a reasonable safety concern exists justifying the frisk. The court apparently determined the officers conducted a general search rather than a frisk for articulable suspicion of a weapon.

¶ 12 Here, agents were trying to make a felony warrant arrest of Kheng Xiong. While Bee Xiong informed the agents he was not Kheng Xiong, he lacked identification. An agent handcuffing Bee Xiong saw a large bulge in Bee Xiong's pocket. Concerned the bulge was a weapon, the officer touched the bulge and felt a hard object. Bee Xiong suspiciously pulled away so the agent could not feel the object any further. At this point, the agent did not know if his suspect was Bee or Kheng Xiong. Agents testified they feared for their safety, and explained that even a handcuffed suspect is a risk if armed. Further, the handcuffs would eventually have to come off, whether he was ultimately arrested or not.

¶ 13 Given the similarity in appearance between Kheng Xiong and Bee Xiong, the time necessary to clarify their initial identification, Bee Xiong's location at Kheng Xiong's home, the bulge in Bee Xiong's pocket, his reaction when an agent tried to touch it, and the officer's stated safety concerns, the agent was justified in frisking Bee Xiong's pocket.

Based on the hardness and shape of the object, the agent was justified in pulling the object out. See State v. Hudson, 124 Wash.2d 107, 113, 874 P.2d 160 (1994) (if a pat-down search is inconclusive and the officer feels an object which might be a weapon, he is entitled to withdraw it for examination).

¶ 14 In sum, given the propriety of the initial stop and the stated need to dispel the agent's safety concerns during the ensuing investigation, the evidence seized incident to Bee Xiong's arrest was incorrectly suppressed under well established principles governing frisks during investigatory stops.

¶ 15 Reversed.

I CONCUR: KULIK, J.

\*321 SCHULTHEIS, A.C.J. (dissenting).

¶ 16 The trial court found that Bureau of Alcohol, Tobacco, and Firearms special agent William Ramsey "wondered if" the bulge in Bee Xiong's pants was a weapon and "assumed" it was. Clerk's Papers at 17. The trial court also found a lack of evidence from which Agent Ramsey could reasonably infer that Mr. Xiong was armed and dangerous. The State does not challenge either finding. The court concluded that these were insufficient articulable facts upon which to base a reasonable belief that Mr. Xiong was armed and dangerous.

¶ 17 The State's appeal is based on a superfluous finding that essentially sets forth the trial court's opinion as to what the officers should have done under the circumstances presented--refrain from searching Mr. Xiong (because the officers were not justified in believing that Mr. Xiong was armed and presently dangerous to the officer or to others), and complete the process of identifying Mr. Xiong, which would have resulted in his release once his identity was confirmed. Because I believe this unnecessary finding is not a legitimate ground for appeal and it has no bearing on the court's ultimate conclusion that there were insufficient articulable facts upon which to base a reasonable belief that Mr. Xiong was armed and dangerous, I must respectfully dissent.

¶ 18 Agent Ramsey never testified that he was fearful or that he believed that Mr. Xiong posed a threat; only that he *justified* the search for officer safety reasons. He stated that, based on his experience, it is possible for *someone* to get a weapon while handcuffed--even when the person is

handcuffed in the back as Mr. Xiong was restrained. But he did not associate that concern to Mr. Xiong under these circumstances. Spokane Police Sergeant David McCabe testified that he was not "immediately concerned" because Mr. Xiong was handcuffed. Report of Proceedings (RP) at 25 (emphasis added). But he told Agent Ramsey to take the object out of Mr. Xiong's pocket if he felt "anything that could have been a weapon" because he knew that eventually Mr. Xiong would be uncuffed and he did not want Mr. Xiong to have access to any weapons in the future. RP at 25. Agent Ramsey's lack of true concern is highlighted by his leisurely response to the bulge in Mr. Xiong's pocket.

¶ 19 Agent Ramsey testified that Mr. Xiong was immediately handcuffed when he could not produce identification to prove that he was not Kheng Xiong. It was later, when Agent Ramsey and four other officers were deciding how to identify Mr. Xiong, that he saw the "fairly large" bulge that made Mr. Xiong's right front pocket "a little bit bulky." RP at 8

Agent Ramsey asked Mr. Xiong what was in his pocket (although he does not recall Mr. Xiong's response); he touched the bulge and noted that it was hard. After Mr. Xiong pulled away to prevent further contact, Agent Ramsey asked Mr. Xiong whether the pocket contained anything that could hurt Agent Ramsey and whether he could reach into Mr. Xiong's pocket. Mr. Xiong responded that he did not have any weapons and he did not want to be searched. Agent Ramsey then again felt the object in Mr. Xiong's pocket, squeezing a bit harder. He noted it was "definitely a hard object" and concluded it was a "potential weapon." RP at 12. He conferred with the other officers and decided to search Mr. Xiong for weapons.

¶ 20 Thus, Agent Ramsey saw the bulkiness, asked about it, felt it, asked if it was a weapon, asked Mr. Xiong if he could search, felt it again, and discussed it with the other officers on the scene before it was determined that Mr. Xiong would be searched. But he never expressed fear. And his attempts to persuade Mr. Xiong to consent to a search and to reveal the contents of his pockets are also indicative of some uncertainty in the officer's justification to proceed with a search.

¶ 21 Further, the record shows that 10 or 15 minutes after the contraband was found, Mr. Xiong's mother arrived and identified him as Bee Xiong, not Kheng Xiong. Agent Ramsey testified that if Mr. Xiong's mother arrived to identify her son at any time prior to

the search, he probably *would not have continued the search* because, in his words, "my concern partially with the weapon is that \*322 he had a *felony warrant*." RP at 20 (emphasis added).

¶ 22 The trial court correctly ruled that Agent Ramsey's generalized suspicion of wondering if Mr. Xiong had a weapon was insufficient to meet the legal test for a limited weapons search. A weapons frisk may be undertaken if the officer can point to particular facts from which he reasonably inferred that the specific individual to be searched was armed and presently dangerous under the circumstances. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Broadnax*, 98 Wash.2d 289, 294-96, 654 P.2d 96, 101 (1982); *State v. Hobart*, 94 Wash.2d 437, 441, 617 P.2d 429, 431 (1980).

¶ 23 In its oral opinion, the trial court relied on *State v. Galbert*, 70 Wash.App. 721, 855 P.2d 310 (1993). In *Galbert*, an officer handcuffed and frisked Mr. Galbert for officer safety reasons while police executed a search warrant. 70 Wash.App. at 722, 855 P.2d 310. Once the officers had the residence secured, the officer returned to frisk Mr. Galbert again. *Id.* at 723, 855 P.2d 310. As in this case, a lump was detected, which the officer testified could have been an "extremely small" gun or some other weapon. *Id.* at 723 n. 1, 855 P.2d 310. Also as in this case, the officer testified that some persons have been able to reach their pockets when handcuffed. *Id.* at 724, 855 P.2d 310.

¶ 24 Division One of this court held that because Mr. Galbert was restrained and there was no indication that he made any gestures or threats, the State could not show that he was presently dangerous. *Id.* at 725, 855 P.2d 310. Significantly the trial court made no finding that Mr. Galbert posed a threat to the officer. *Id.* The same is true here. Since there was no evidence that Mr. Galbert could reach his pocket, or that he made any attempt to do so, any safety concern based on the fear that he would attempt to access a weapon in his pocket lacked an objective basis and was therefore unreasonable. *Id.* at 726, 855 P.2d 310. Moreover, here, even if a safety concern were justifiable, the only evidence dealt with the future, not with present dangerousness.

¶ 25 The trial court's reliance on *Galbert* was proper. The State failed to show that the search fell within an exception to the warrant requirement. I would therefore affirm.

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## APPENDIX B

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STATE OF WASHINGTON

**COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III**

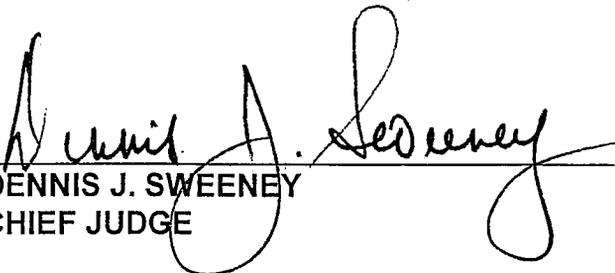
STATE OF WASHINGTON,	)	
	)	No. 24553-5-III
Appellant,	)	
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
BEE XIONG,	)	
	)	
Respondent.	)	

THE COURT has considered respondent's motion for reconsideration of this Court's opinion under date of March 27, 2007, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, respondent's motion for reconsideration is hereby denied.

DATED: May 4, 2007

FOR THE COURT:

  
DENNIS J. SWEENEY  
CHIEF JUDGE

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**No. 24553-5-III**

**Appellant,**

**Division Three**

**v.**

**BEE XIONG,**

**PUBLISHED OPINION**

**Respondent.**

BROWN, J.—Officers attempting to serve a warrant mistook Bee Xiong for his brother Kheng Xiong. While sorting out the identification, a protective frisk led to a pipe with drug residue. Bee Xiong was arrested. The search incident to Bee Xiong's arrest led to the State's charge for methamphetamine possession with intent to deliver. The trial court suppressed the evidence, and terminated the case. The State appealed. Because the evidence was seized during a proper investigatory stop, we reverse.

**FACTS**

Task forces assembled to execute felony arrest warrants for persons in the Spokane area, including Kheng Xiong. Using Kheng Xiong's photo, the officers went to

his listed home address and found a van parked there. A deputy marshal misidentified the van's passenger, Bee Xiong, Kheng's brother, as Kheng. When approached, Bee Xiong gave his name to a federal agent but he did not have any identification. Bee Xiong explained Kheng Xiong was his older brother.

The agent handcuffed Bee Xiong, noticing a large bulge in his pocket. Concerned the bulge was a weapon, the agent touched the bulge and felt a hard object. Bee Xiong pulled away so the agent could not feel the object any further and said he did not have any weapons, but did not want to be searched. At this point, the agent was still uncertain of identification. Apparently, the photo used by the officers was similar in appearance to Bee Xiong. The officers attempted to obtain a photo of Bee Xiong in the computer system in an effort to identify their suspect.

During this time, the officers decided to investigate the hard object, suspecting it could be a weapon. Bee Xiong was arrested for possessing a controlled substance when a pipe with drug residue was found. About 10 minutes later, Bee Xiong's mother arrived and identified him. A search incident to Bee Xiong's arrest developed evidence leading to a charge of possession of methamphetamine with intent to deliver.

Bee Xiong moved to suppress the evidence. The court decided the officers should have first identified Bee Xiong, and "that once confirmed he was Bee Xiong, he [should] have been released uncuffed and not patted." Clerk's Papers at 17. The court concluded the officers lacked facts, specific and detailed, that Bee Xiong was armed

and dangerous. The court ordered suppression. The State appealed.

#### ANALYSIS

The issue is whether, considering investigative stop and frisk principles, the trial court erred in granting Bee Xiong's motion to suppress the evidence seized and dismissing the charge against him. We conclude the court erred.

Bee Xiong, in his briefing, assigns error to finding of fact 4, regarding the courts ruling that the initial stop and handcuffing was appropriate. But Bee Xiong did not file for cross review as required under RAP 5.1(d). See *State v. Vanderpool*, 99 Wn. App. 709, 714, 995 P.2d 104 (2000) (court declined review of allegations raised for the first time in response brief). Therefore, we decline review.

We review suppression orders by independently evaluating the evidence to determine if substantial evidence supports the findings and the findings support the conclusions. *State v. Hill*, 123 Wn.2d 641, 644-45, 870 P.2d 313 (1994). "[W]here the findings are unchallenged, they are verities on appeal." *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003) (citing *Hill*, 123 Wn.2d at 644). We review suppression conclusions de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Warrantless searches are per se unreasonable but defined exceptions exist. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Our focus is the *Terry*<sup>1</sup>

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<sup>1</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

investigative stop exception. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). The State has the burden of showing the particular search or seizure in question falls within the exception asserted. *Id.* at 172.

In *Terry*, the court held if an initial stop is justified a police officer may make a reasonable search for weapons without violating the Fourth Amendment, regardless of whether he or she has probable cause to arrest the individual, if the circumstances lead the officer to reasonably believe that his or her safety or the safety of others is at risk. See *Terry*, 392 U.S. at 20-27. The Washington Constitution affords greater privacy protection than the Fourth Amendment.

In Washington, the State must show “(1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes.” *Duncan*, 146 Wn.2d at 172 (citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). Here, it is a verity that the stop was appropriate. The sole issue is if a reasonable safety concern exists justifying the frisk. The court apparently determined the officers conducted a general search rather than a frisk for articulable suspicion of a weapon.

Here, agents were trying to make a felony warrant arrest of Kheng Xiong. While Bee Xiong informed the agents he was not Kheng Xiong, he lacked identification. An agent handcuffing Bee Xiong saw a large bulge in Bee Xiong’s pocket. Concerned the bulge was a weapon, the officer touched the bulge and felt a hard object. Bee Xiong

suspiciously pulled away so the agent could not feel the object any further. At this point, the agent did not know if his suspect was Bee or Kheng Xiong. Agents testified they feared for their safety, and explained that even a handcuffed suspect is a risk if armed. Further, the handcuffs would eventually have to come off, whether he was ultimately arrested or not.

Given the similarity in appearance between Kheng Xiong and Bee Xiong, the time necessary to clarify their initial identification, Bee Xiong's location at Kheng Xiong's home, the bulge in Bee Xiong's pocket, his reaction when an agent tried to touch it, and the officer's stated safety concerns, the agent was justified in frisking Bee Xiong's pocket. Based on the hardness and shape of the object, the agent was justified in pulling the object out. *See State v. Hudson*, 124 Wn.2d 107, 113, 874 P.2d 160 (1994) (if a pat-down search is inconclusive and the officer feels an object which might be a weapon, he is entitled to withdraw it for examination).

In sum, given the propriety of the initial stop and the stated need to dispel the agent's safety concerns during the ensuing investigation, the evidence seized incident to Bee Xiong's arrest was incorrectly suppressed under well established principles governing frisks during investigatory stops.

Reversed.

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Brown, J.

I CONCUR:

No. 24553-5-III  
*State v. Xiong*

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Kulik, J.

**No. 24553-5-III**

Schultheis, A.C.J. (dissenting) — The trial court found that Bureau of Alcohol, Tobacco, and Firearms special agent William Ramsey “wondered if” the bulge in Bee Xiong’s pants was a weapon and “assumed” it was. Clerk’s Papers at 17. The trial court also found a lack of evidence from which Agent Ramsey could reasonably infer that Mr. Xiong was armed and dangerous. The State does not challenge either finding. The court concluded that these were insufficient articulable facts upon which to base a reasonable belief that Mr. Xiong was armed and dangerous.

The State’s appeal is based on a superfluous finding that essentially sets forth the trial court’s opinion as to what the officers should have done under the circumstances presented—refrain from searching Mr. Xiong (because the officers were not justified in believing that Mr. Xiong was armed and presently dangerous to the officer or to others), and complete the process of identifying Mr. Xiong, which would have resulted in his release once his identity was confirmed. Because I believe this unnecessary finding is not a legitimate ground for appeal and it has no bearing on the court’s ultimate conclusion that there were insufficient articulable facts upon which to base a reasonable belief that

No. 24553-5-III (dissent)  
*State v. Bee Xiong*

Mr. Xiong was armed and dangerous, I must respectfully dissent.

Agent Ramsey never testified that he was fearful or that he believed that Mr. Xiong posed a threat; only that he *justified* the search for officer safety reasons. He stated that, based on his experience, it is possible for *someone* to get a weapon while handcuffed—even when the person is handcuffed in the back as Mr. Xiong was restrained. But he did not associate that concern to Mr. Xiong under these circumstances. Spokane Police Sergeant David McCabe testified that he was *not* “*immediately concerned*” because Mr. Xiong was handcuffed. Report of Proceedings (RP) at 25 (emphasis added). But he told Agent Ramsey to take the object out of Mr. Xiong’s pocket if he felt “anything that could have been a weapon” because he knew that eventually Mr. Xiong would be uncuffed and he did not want Mr. Xiong to have access to any weapons *in the future*. RP at 25. Agent Ramsey’s lack of true concern is highlighted by his leisurely response to the bulge in Mr. Xiong’s pocket.

Agent Ramsey testified that Mr. Xiong was immediately handcuffed when he could not produce identification to prove that he was not Kheng Xiong. It was later, when Agent Ramsey and four other officers were deciding how to identify Mr. Xiong, that he saw the “fairly large” bulge that made Mr. Xiong’s right front pocket “a little bit bulky.” RP at 8.

Agent Ramsey asked Mr. Xiong what was in his pocket (although he does not

No. 24553-5-III (dissent)  
*State v. Bee Xiong*

recall Mr. Xiong's response); he touched the bulge and noted that it was hard. After Mr. Xiong pulled away to prevent further contact, Agent Ramsey asked Mr. Xiong whether the pocket contained anything that could hurt Agent Ramsey and whether he could reach into Mr. Xiong's pocket. Mr. Xiong responded that he did not have any weapons and he did not want to be searched. Agent Ramsey then again felt the object in Mr. Xiong's pocket, squeezing a bit harder. He noted it was "definitely a hard object" and concluded it was a "potential weapon." RP at 12. He conferred with the other officers and decided to search Mr. Xiong for weapons.

Thus, Agent Ramsey saw the bulkiness, asked about it, felt it, asked if it was a weapon, asked Mr. Xiong if he could search, felt it again, and discussed it with the other officers on the scene before it was determined that Mr. Xiong would be searched. But he never expressed fear. And his attempts to persuade Mr. Xiong to consent to a search and to reveal the contents of his pockets are also indicative of some uncertainty in the officer's justification to proceed with a search.

Further, the record shows that 10 or 15 minutes after the contraband was found, Mr. Xiong's mother arrived and identified him as Bee Xiong, not Kheng Xiong. Agent Ramsey testified that if Mr. Xiong's mother arrived to identify her son at any time prior to the search, he probably *would not have continued the search* because, in his words, "my concern partially with the weapon is that he had a *felony warrant*." RP at 20

No. 24553-5-III (dissent)  
*State v. Bee Xiong*

(emphasis added).

The trial court correctly ruled that Agent Ramsey's generalized suspicion of wondering if Mr. Xiong had a weapon was insufficient to meet the legal test for a limited weapons search. A weapons frisk may be undertaken if the officer can point to particular facts from which he reasonably inferred that the specific individual to be searched was armed and presently dangerous under the circumstances. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Broadnax*, 98 Wn.2d 289, 294-96, 654 P.2d 96, 101 (1982); *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429, 431 (1980).

In its oral opinion, the trial court relied on *State v. Galbert*, 70 Wn. App. 721, 855 P.2d 310 (1993). In *Galbert*, an officer handcuffed and frisked Mr. Galbert for officer safety reasons while police executed a search warrant. 70 Wn. App. at 722. Once the officers had the residence secured, the officer returned to frisk Mr. Galbert again. *Id.* at 723. As in this case, a lump was detected, which the officer testified could have been an "extremely small" gun or some other weapon. *Id.* at 723 n.1. Also as in this case, the officer testified that some persons have been able to reach their pockets when handcuffed. *Id.* at 724.

Division One of this court held that because Mr. Galbert was restrained and there was no indication that he made any gestures or threats, the State could not show that he was presently dangerous. *Id.* at 725. Significantly the trial court made no finding that

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Mr. Galbert posed a threat to the officer. *Id.* The same is true here. Since there was no evidence that Mr. Galbert could reach his pocket, or that he made any attempt to do so, any safety concern based on the fear that he would attempt to access a weapon in his pocket lacked an objective basis and was therefore unreasonable. *Id.* at 726. Moreover, here, even if a safety concern were justifiable, the only evidence dealt with the future, not with present dangerousness.

The trial court's reliance on *Galbert* was proper. The State failed to show that the search fell within an exception to the warrant requirement. I would therefore affirm.

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Schultheis, A.C.J.