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Supreme Court No. 89253-9
**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

RECEIVED BY E-MAIL

STATE OF WASHINGTON,
Respondent,
vs.

Tanner Russell
Appellant/Petitioner

Lewis County Superior Court Cause No. 11-1-00627-6
The Honorable Judge Richard Brosey

PETITIONER'S SUPPLEMENTAL BRIEF

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The trial court properly suppressed the evidence because the September warrantless search violated Mr. Russell’s Fourth Amendment right to be free from unreasonable searches and seizures and his right to privacy under Wash. Const. art. I, § 7. 4

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ISSUES PRESENTED

1. A warrantless frisk must rest on specific and articulable facts creating an objectively reasonable belief that the suspect is armed and presently dangerous. Here, Officer Makein frisked Mr. Russell based on Mr. Russell's prior possession of a weapon that had been confiscated by police the previous week. Did the trial judge correctly conclude that Makein lacked an objectively reasonable belief that Mr. Russell was armed and presently dangerous?
2. Wash. Const. art. I, § 7 prohibits the prosecution from using evidence obtained by exploiting a prior illegal search. Here, the prosecution failed to prove the lawfulness of the August warrantless frisk that provided the basis for Officer Makein's belief that Mr. Russell might be armed when he was stopped in September. Should the Supreme Court reinstate the trial court's order suppressing items unlawfully seized?
3. An officer conducting a warrantless frisk may not open a container after realizing that it does not hold a weapon. Here, Officer Makein found a container and determined that it did not contain a small derringer like the one Mr. Russell had previously carried. Did Makein infringe Mr. Russell's rights under the Fourth Amendment and Wash. Const. art. I, §7 by opening the container without obtaining a search warrant?
4. Wash. Const. art. I, § 7 prohibits government intrusion into a person's private affairs without authority of law, and provides broader protection than the Fourth Amendment. Here, Officer Makein opened a small container on the theory that it might possibly have contained a miniature weapon such as a razor blade. Does art. I, § 7 prohibit a warrantless search under these circumstances?
5. To uphold a consent search, a reviewing court must examine the totality of the circumstances and find that consent was freely and voluntarily given. Here, Officer Makein detained Mr. Russell and searched him without advising him of his *Miranda* rights or of his right to refuse consent. Did the state's failure to introduce evidence establishing Mr. Russell's experience, educational level, or intelligence preclude a finding of valid consent under these circumstances?

STATEMENT OF FACTS

Police stopped Tanner Russell as he rode his bike through Centralia at night.¹ The bicycle lacked a working headlight, and Mr. Russell had traveled for a short distance in the wrong lane. CP 72. The stop occurred at 11 pm in the well-lit parking lot of an AM/PM store, located on one of the busier streets in Centralia. CP 72. Mr. Russell seemed nervous, but not unusually so. He was compliant and cooperative. He had no felony history and no history of violence. RP 28-29; CP 73. He made no threatening or suspicious movements. RP 28; CP 73, 76.

The officer who stopped Mr. Russell (Officer Makein) had met him the previous week during a traffic stop.² CP 72-73. Mr. Russell was the passenger in a car containing burglary tools. CP 73. The driver told officers that she and Mr. Russell had planned to commit a vehicle prowl or car theft. CP 73. Mr. Russell did not behave violently or belligerently during the August encounter. CP 73.

At some point during this August stop, another officer (not Makein) frisked Mr. Russell, and found a small two-shot derringer-type .22 caliber handgun. CP 73. Before the gun was discovered in his pocket,

¹ This will be referred to as the September stop.

² This will be referenced as the August stop.

Mr. Russell twice denied having any weapons. CP 73. The August contact resulted in issuance of a misdemeanor citation. CP 73.

During the September encounter, Makein asked Mr. Russell if he'd retrieved the derringer (which had apparently been seized during the earlier incident); Mr. Russell replied that he wanted nothing to do with the gun. CP 73. Makein then frisked Mr. Russell, and discovered in his pant pocket a rectangular object, approximately 6"x4"x1". CP 74. Makein asked what the object was, and Mr. Russell told him it was a box. CP 74.

Makein knew that the box itself was not a weapon, but did not know what might be in the box. CP 74. Makein asked if he could remove the box from the pocket; Mr. Russell acquiesced. CP 74. Mr. Russell had not been read his *Miranda* rights or told that he could refuse consent. CP 75; *See RP generally.*

Once he had possession of the box, Makein asked if he could open it. RP 19. He did not advise Mr. Russell of his *Miranda* rights, or of his right to refuse consent. RP 6-46. The contents of the box weighed only a fraction of what the derringer had weighed. CP 75.

Makein opened the box, which contained a syringe with suspected methamphetamine. CP 75; RP 20-21. Charges followed and Mr. Russell moved to suppress the evidence. CP 1, 4-8.

At the suppression hearing, Officer Makein testified that he'd immediately told Mr. Russell that he was not free to leave. RP 16, 29. He told the court that he knew the box was not a gun, but that it could have held some sort of weapon. RP 18-20. He said at first the box seemed to be about six inches wide, four inches long, and one or two inches deep. RP 18. He later corrected this testimony, making clear that the box was only one inch deep. RP 31.

Makein acknowledged that any potential danger was "gone" once he had possession of the box. RP 39; CP 74.

When asked about whether Mr. Russell consented to removing and opening the box, the officer testified as follows:

Q. So you did ask him for consent to search the box?

A. (Witness nods head.)

Q. Did he appear to have any problem with that?

A. No.

RP 19.

There was no other testimony regarding whether or not Mr. Russell consented to the search. RP 6-46.

The trial court granted the suppression motion, finding both the search and the opening of the box unlawful. CP 71-76. The state appealed and the Court of Appeals reversed the ruling. CP 81-88.

ARGUMENT

THE TRIAL COURT PROPERLY SUPPRESSED THE EVIDENCE BECAUSE THE SEPTEMBER WARRANTLESS SEARCH VIOLATED MR. RUSSELL’S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND HIS RIGHT TO PRIVACY UNDER WASH. CONST. ART. I, § 7.

A. Standard of Review

The Supreme Court reviews *de novo* the validity of a warrantless search. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

B. The state failed to justify the September search as a valid protective frisk.

The state and federal constitutions prohibit warrantless searches and seizures. U.S. Const. Amend. IV; Wash. Const. art. I, § 7.³ This general rule is subject to only a few specifically established and well-delineated exceptions. *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *see also State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008).

The state bears a “heavy burden” to establish one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The state must prove facts supporting an exception by clear and convincing evidence. *Id.*

³ Art. I, §7 provides greater protection than the Fourth Amendment. *State v. Snapp*, 174 Wn.2d 177, 194 n. 9, 275 P.3d 289 (2012). Because this principle is well-established, it

One such exception is a protective frisk for weapons. *State v. Harrington*, 167 Wn.2d 656, 667-68, 222 P.3d 92 (2009). Evidence found during a protective frisk must be suppressed unless the prosecution proves facts establishing the validity of the frisk. *Garvin*, 166 Wn.2d at 250. A frisk must be both justified at its inception and confined in scope. *United States v. I.E.V.*, 705 F.3d 430, 433 (9th Cir. 2012).

The sole justification for a protective frisk is “the protection of the police officer and others nearby.” *Terry v. Ohio*, 392 U.S. 1, 29, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Before a court can uphold a protective frisk, the state must show the officer knew of specific and articulable facts creating an objectively reasonable belief that the suspect was armed and presently dangerous. *Harrington*, 167 Wn.2d at 667-68; *see also State v. Xiong*, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008).

The court must also find that the frisk was “confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” *Terry*, 392 U.S. at 29. A protective frisk for weapons must be “brief and nonintrusive.” *Garvin*, 166 Wn.2d at 254.

is unnecessary to analyze art. I, §7 under *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). *Snapp*, 174 Wn.2d at 194 n. 9.

1. The protective frisk was not justified at its inception: during the September encounter, Officer Makein lacked an objectively reasonable belief, based on specific and articulable facts, that Mr. Russell was armed and presently dangerous.

The state did not meet its burden of establishing a valid protective frisk in this case. *Harrington*, 167 Wn.2d at 667-68. Officer Makein had no reason to believe that Mr. Russell was armed at the time of his search. CP 72-74. Nor did anything in the record suggest he presented any kind of danger. CP 72-76.

Mr. Russell was compliant and cooperative throughout the encounter. RP 28. He had never been convicted of a felony, and had no history of violence. RP 28-29; CP 73. He made no threatening or furtive movements. RP 28; CP 73, 76. Nothing suggested that Mr. Russell had a weapon when Makein spoke with him. RP 6-46.

Furthermore, the encounter took place in a well-lit area adjacent to a busy street, where businesses remained open late at night. RP 26. The locale was not a heavy crime area, and Mr. Russell was alone. CP 76. The interaction did not involve a suspicion of any criminal activity: Makein stopped Mr. Russell solely because of a bicycling infraction. CP 75-76.

Makein's concern rested only on Mr. Russell's prior possession of a .22 caliber derringer during the August encounter. RP 15-17, 32-34, 45.

That gun had been seized by police, and Mr. Russell said he had not retrieved it. RP 39, 42. Makein had no reason to believe that Mr. Russell had the gun or any other weapon with him.

Although Mr. Russell had lied about possessing the weapon during the August encounter, his mendacity on that occasion did not suggest he was armed on this occasion. Instead, it suggested only that Makein would be justified in ignoring Mr. Russell's statements. *See State v. Schultz*, 170 Wn.2d 746, 760-761, 248 P.3d 484 (2011) (homeowner's lie to police does not provide a basis for warrantless entry).

Furthermore, even if Makein suspected Mr. Russell were armed, he had no basis to think him dangerous. Mr. Russell had no felony or violent history, had always been cooperative, and made no threatening or furtive movements. RP 21-22, 28, 30.

These circumstances did not suggest that Mr. Russell carried a weapon or posed a threat. Accordingly, Makein should not have frisked Mr. Russell. *Harrington*, 167 Wn.2d at 667-668. The frisk was not "justified at its inception." *I.E.V.*, 705 F.3d at 433.

2. The scope of the frisk exceeded any justification: Officer Makein should not have opened the closed container he seized during the September warrantless frisk because any perceived danger dissipated after he took control of the container.

If an officer discovers an object during a lawful frisk, the officer can assure himself or herself that it is not a weapon. *Garvin*, 166 Wn.2d at 250-255. However, after establishing that the object is not a weapon, the officer may not continue to search. *Id.* Thus an officer may not search a wallet, even though he initially believed it might have been a weapon. *State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980). Similarly, police may not open a cigarette pack during a protective frisk, even if the pack initially felt like a weapon. *State v. Horton*, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006).

Under Wash. Const. art. I, §7, an officer may not open a small container on the grounds that it might contain a razor blade or other small weapon. *Id.* Permitting such searches would expand the scope of protective frisks beyond their constitutionally permissible scope.⁴ *Id.*

Here, Makein acknowledged that he could tell immediately that the container did not hold the derringer. RP 27. By taking control of the container, Makein removed any danger: “any perceived threat to Officer Makein from the container was eliminated and the search of [its] contents was therefore unreasonable and unjustified.” CP 76.

⁴ This is not necessarily true under the Fourth Amendment. See *United States v. Muhammad*, 604 F.3d 1022, 1027 (8th Cir. 2010).

The fact that Mr. Russell once lied about possessing a weapon does not mean that he possessed a weapon at the time of the September frisk. *Cf.* Opinion, p. 9. Mr. Russell's earlier lie about the derringer did not increase the likelihood that he carried some *other* weapon on this occasion: he was not known to carry razor blades or needles for offensive purposes. At best, Mr. Russell's August falsehood gave Makein a reason to disregard his statements; it did not provide an independent basis to conclude that he carried a weapon on this occasion. *See Schultz*, 170 Wn.2d at 760-761.

Makein did not testify that returning the container at the end of the encounter would pose any risk. Accordingly, the state did not meet its "heavy burden" of proving that officer safety justified a search of the container as a precondition to its return. *Garvin*, 166 Wn.2d at 250.

Even if Makein felt concern that returning the container at the end of the encounter might pose some risk, this would not by itself justify the search. An officer must always return seized items at the end of an encounter, unless the items themselves are contraband or evidence of a crime. The fact that police officers must return closed containers to their owners at the end of an interaction does not, without more, provide a basis to search those containers. *See State v. Glossbrener*, 146 Wn.2d 670, 682, 49 P.3d 128 (2002). In *Glossbrener*, the Supreme Court invalidated a

search conducted at the end of a police encounter. The court noted that “[a]t this point in the investigation, the only thing left was for Glossbrener to leave.” *Id.*

Here, as in *Glossbrener*, the “only thing left” at the end of the encounter would be for Mr. Russell to leave. In light of Mr. Russell’s cooperative attitude and the absence of any threatening movements, Makein had no reason to search the box prior to sending Mr. Russell on his way.

Indeed, even if Makein temporarily took possession of a *firearm* during the encounter, the law would require him to return that firearm at the conclusion of the interaction, given Mr. Russell’s lack of any felony history.⁵ RP 22. Thus “the reality that Makein would be returning the box to Russell after issuing the traffic infraction”⁶ did not justify opening the box, because “[at that] point in the investigation, the only thing left was for [Mr. Russell] to leave.” *Glossbrener*, 146 Wn.2d at 682.

The search of the container cannot be justified. *I.E.V.*, 705 F.3d at 433. Makein exceeded the permissible scope of a protective frisk. *Id.*

⁵ Of course, Mr. Russell would be subject to arrest for UPF if he had been prohibited from possessing a firearm at the time he was detained for the infraction. RCW 9.41.040.

⁶ Opinion, p. 14.

The trial court correctly ordered the evidence suppressed; the court should reinstate its order. *Id.*

C. The state failed to prove the validity of the August warrantless frisk, the fruits of which provided Makein's justification for the September warrantless frisk.⁷

1. Mr. Russell's motion to suppress obligated the prosecution to prove the validity of the August frisk.

An appellate court "may affirm the trial court on any grounds supported by the record." *Francis v. Washington State Dep't of Corr.*, 313 P.3d 457, 467 (Wash. Ct. App. 2013). Mr. Russell's challenge to Makein's warrantless search required the state to prove all facts necessary to sustain the search. *Garvin*, 166 Wn.2d 250. Mr. Russell did not limit the basis for his challenge in any way. As he noted in his motion to suppress, "[i]t is for the State to articulate" an exception to the warrant requirement, and "it is the State's burden to prove to the Court that the search and seizure meets all of the requirements of that exception." CP 5.

Mr. Russell may therefore ask the Supreme Court to affirm the trial court based on the state's failure to prove the validity of the August frisk, even though he did not specifically argue for suppression on that ground. CP 4-8, 28-63, 9-27; RP 47-50, 58. His motion explicitly reminded the

prosecution of its duty to prove whatever exception the state claimed in seeking admission of the evidence. CP 4-8.

2. The court's suppression order should be affirmed based on the state's failure to prove the validity of the August frisk.

When police rely on an invalid search to justify a subsequent search, any evidence discovered must be suppressed as fruit of the poisonous tree.⁸ *Eisfeldt*, 163 Wn.2d at 640. From this rule it follows that the state's burden to establish an exception to the warrant requirement encompasses information obtained from prior warrantless searches. *Id.* Thus, in *Eisfeldt*, the court suppressed evidence obtained pursuant to a search warrant because the warrant rested on information obtained from a prior warrantless search. *Id.*

Here, Makein's decision to frisk Mr. Russell rested on information obtained from the warrantless frisk conducted during the August encounter. CP 73-74; Opinion, p. 12. The state therefore bore the burden of proving the validity of the August frisk. *Eisfeldt*, 163 Wn.2d at 640. This it failed to do.

⁷ The Court of Appeals avoided this issue, asserting that Mr. Russell "fail[ed] to cite supporting authority" for this argument. Opinion, p. 12, n. 6. In fact, Mr. Russell cited six cases in support of his two-page argument. Brief of Respondent, pp. 8-10(citing cases).

⁸ In *Eisfeldt*, police searched one house without a warrant, and used the evidence they gathered to obtain a search warrant for a second home. *Id.* After finding the first search invalid, the Supreme Court suppressed the evidence collected pursuant to the search warrant. *Id.*

Makein’s knowledge—of the gun, its characteristics, the fact that it was loaded, and Mr. Russell’s lie about possessing it—all derived from the August frisk. CP 73-74. Absent proof of the validity of the August frisk, the September frisk cannot be justified. *Eisfeldt*, 163 Wn.2d at 640. The state’s failure to prove the validity of the August frisk means that it also failed to justify the September frisk. *Id.* Accordingly, the evidence seized in September must be suppressed as fruit of the poisonous tree. *Id.*

D. The state failed to prove that Mr. Russell gave valid consent allowing Makein to open the container found during the September frisk.⁹

Consent may justify a warrantless search, but only if the prosecution proves “that the consent was freely and voluntarily given.” *State v. O’Neill*, 148 Wn.2d 564, 588-90, 62 P.3d 489 (2003). Courts evaluate consent by examining the totality of the circumstances. *State v. Ruem*, 313 P.3d 1156, 1163 (Wash. 2013). This requires consideration of the consenting party’s education and intelligence, any restraint imposed by police, and the administration of *Miranda*¹⁰ warnings or advice of the right to refuse consent. *Ruem*, at ____ (addressing art. I, §7); *O’Neill*, 148 Wn.2d at 588 (addressing federal test).

⁹ The trial court suppressed the evidence without reaching the issue of consent. RP 63. The Court of Appeals characterized the evidence of consent as “sketchy,” and likewise did not reach the issue. Opinion, p. 8.

¹⁰ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Consent is not established by “mere acquiescence.” *Schultz*, 170 Wn.2d at 750 (addressing consent to enter home). Where police have ample opportunity to obtain a warrant, the Supreme Court does not look kindly on their failure to do so. *State v. White*, 141 Wn. App. 128, 135, 168 P.3d 459 (2007).

The record here does not support the trial court’s erroneous (and gratuitous) conclusion that Mr. Russell “gave voluntary consent to having the case removed from his pocket and searched.” CP 74.¹¹ First, the state failed to prove that Mr. Russell actually consented. Makein testified that he asked if he could open the box, and that Mr. Russell did not “appear to have any problem with that.” RP 19. At best, this establishes acquiescence, which is insufficient to prove consent. *Schultz*, 170 Wn.2d at 750.

Second, the prosecution failed to show that consent was freely and voluntarily given. Makein had not administered *Miranda* warnings or told Mr. Russell of his right to refuse consent. CP 75. The record does not show Mr. Russell’s intelligence, his experience, or his level of education. *See RP generally*. Makein had restrained Mr. Russell when he asked for consent. RP 16, 29. Under these circumstances, the record does not

¹¹ This conclusion (mislabeled as a finding of fact) is inconsistent with the court’s conclusion that once Makein had the container, “any perceived threat... was eliminated and the search of [its] contents was therefore unreasonable and unjustified.” CP 76.

support a finding that Mr. Russell freely and voluntarily consented to have
Makein open the case and look inside. *O'Neill*, 148 Wn.2d at 588-90.

The prosecution failed to prove valid consent. *Ruem*, at _____. In
the absence of voluntary consent, the container search was invalid under
both the state and federal constitutions. *Id*; *O'Neill*, 148 Wn.2d at 588-90.
The court should reinstate the trial court's order suppressing the evidence,
and dismiss the charge with prejudice. *Ruem*, at _____.

CONCLUSION

The Supreme Court should reverse the Court of Appeals and
reinstate the trial court's order suppressing the evidence. The charge must
be dismissed with prejudice.

Respectfully submitted January 16, 2014.

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CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of the Petition for Review, postage pre-paid, to:

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511 S King Street
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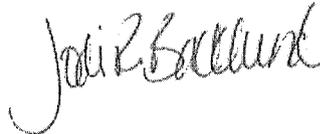
and I sent an electronic copy to

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through the Court's online filing system, with the permission of the recipient(s).

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 16, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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Attached is the Petitioner's Supplemental Brief.
Thank you.

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