89894-4

NO. 43289-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

Z.U.E., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 11-8-01174-4

Brief of Respondent

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied Respondent's motion to suppress where officers had a reasonable suspicion sufficient to justify their investigatory stop of Respondent and did not exceed the permissible scope of that stop.

B. STATEMENT OF THE CASE.

1. Procedure

On October 13, 2011, Z.U.E., date of birth 02/01/1995, hereinafter referred to as the "respondent," was charged by information with unlawful possession of a controlled substance, to wit amphetamine and/or methamphetamine in count I, obstructing a law enforcement officer in count II, and unlawful possession of a controlled substance –forty grams or less of marihuana in count III. CP 1-2.

The respondent filed a motion to suppress, arguing that "[t]he police lacked knowledge of sufficient facts to support a well founded suspicion that [he] or any occupants of the vehicle in which [he] was a passenger were connected to potential or actual criminal activity." CP 9-52. The State filed a response. CP 53-76.

The court conducted a hearing pursuant to Criminal Rule (CrR) 3.6 consolidated with a bench trial, beginning February 14, 2012. RP 111-12,

The State called Officer Donald Rose, RP 7-85, Officer Kristopher Clark, RP 87-99, 113-62, and Officer Jared Williams, RP 162-208. The respondent called Officer Rose, RP 214-42, Kimberly Kay Grassi, RP 243-77, Natosha Macklin, RP 278-318, Curtis K. Escalante, RP 325-33, 339-402, Gabrial Tucker, RP 422-51, and Lynda Escalante. RP 480-90. The respondent also testified. RP 402-18, 451-78.

The parties argued respondent's motion to suppress on February 27, 2012, RP 491-528.

The court issued its decision on March 1, 2012, finding that the officers had reasonable suspicion to stop the respondent and denying the respondent's motion to suppress. RP 533-39; CP 88-102.

The State filed an amended information on the same day, which eliminated count I because the substance underlying the charge in count I was tested and determined not to contain a controlled substance. CP 85-87; RP 210-11.

The parties made their closing arguments, RP 539-59, after which the court found the respondent not guilty of obstructing a law enforcement officer, but guilty of unlawful possession of forty grams or less of marihuana. RP 559-63; CP 103-119.

On April 10, 2012, the court entered findings and conclusions on admissibility of evidence under CrR 3.6, CP 88-102, Appendix A, and

findings of fact and conclusions of law with respect to the bench trial. CP 103-19.

In its disposition, the court ordered the respondent to undergo three months of probation with a drug assessment, and to pay a $75 crime victim penalty assessment. RP 578; CP 120-25.

The respondent filed a timely notice of appeal the same day. CP 134.

2. Facts

On October 2, 2011, Tacoma Police Officers Donald Rose and Kristopher Clark were on patrol in a single vehicle. RP 22-23. Officer Rose testified that, when responding to a call as a two-officer unit, one officer drives while the other monitors the vehicle's computer for updated information regarding the call from dispatch. RP 17-24.

At 4:52 that afternoon, Officers Rose and Clark were dispatched to the area of Oakland Park at 3114 South Madison Street in Tacoma, Washington, to investigate a report of a shirtless man running through the park with a gun. RP 24-31, 88-91. Officer Williams also responded to that call. RP 168, 196.

Officers Rose, Clark, and Williams testified that the area of Oakland Park is a high crime area and that gang activity, including fights and gatherings, is common in the park. RP 25-26, 91, 124, 130-32, 168-69, 184. Gang members tend to be armed with weapons. RP 26, 92.

Officer Rose testified that he was concerned that the man with the gun was involved in gang activity. RP 41. Local business owner Kimberly Grassi also testified that it was very normal to have a lot of police activity in the area, and that she had actually had criminals come over a gate located in front of her store, and cars crash into her store. RP 248, 264, 276.

The 911 caller described the man with the gun as being a black man, 18 to 19 years of age, five foot ten, 145 pounds, with very short dark hair. RP 32-33, 93-93, 95. The 911 caller reported that this man was "hunkering down" and "maybe trying to stay out of sight" as he went through the park. RP 31. The man was reportedly holding the gun by his side in a "ready position," and ducking in and out of houses and cars. RP 33. Officer Rose described a ready position as carrying a firearm in a position in which it could be fired. RP 33.

As officers were responding to the scene, they received additional information that the man carrying the gun was associated with "some subjects in a white car." RP 38. *See* RP 97.

A different 911 caller indicated that a girl had handed the gun to the man who was now carrying it through the park. RP 34, 114-15. That girl was described as a black 17-year-old, who was of medium height, slim, and wearing a black jacket, blue jeans, and shoes that were black with blue trim. RP 34-35, 95, 98, 114-15.

Officers Rose and Clark arrived in the area at approximately 4:56 p.m., and saw two females, one of whom "matched that description to a tee, except that her friend was wearing the black jacket." RP 35, 61, 71, 74, 94, 114-16, 225-26. Officer Rose testified that the girl's age, race, build, attire, and temporal and geographic proximity to the scene all matched the description with which he had been provided. RP 71. The only difference in appearance was the black jacket, and officers "believed that it was possible that she handed off the black jacket [to her friend] in an attempt to alter her appearance." RP 116, 141-43, 226.

However, the officers did not see the man with the gun, RP 33, and considering this as their priority objective, continued to look for him. RP 35, 39-40. As officers continued to search for him, they received updated information that he was associated with a gray car, not a white car. RP 40, 61-62, 68, 97, 140. That vehicle was further described as a two-door compact car. RP 40. At 4:57 p.m., the 911 caller indicated that the man with the gun had gotten into this car, and that the car was now headed in towards Center on Union, which is a few blocks from Oakland Park. RP 40, 81.

Officers Rose and Clark then drove towards this intersection. RP 41. As they were en route, they contacted a witness at an apartment complex adjacent to the park. RP 41, 96. That witness told the officers that there was "a large scale fight in the park, with multiple subjects running

around," and that these people then left in four different vehicles. RP 41-42, 96. *See* RP 287.

The officers then continued to the intersection of Center and Union, where, at about 5:04 p.m., they again saw the two females, one of whom matched the description of the girl who had given the gun to the man in the park. RP 42, 81, 84, 97-98, 114-16. They were in the parking lot of Grassi's Flowers on the southwest corner of the intersection getting into a gray compact Honda sedan. RP 43, 74, 114-16, 245. The vehicle appeared to be heading away from Oakland Park, and also contained two men in its front seats. RP 43-44. Officers were not able to discern how many occupants the car may have contained, and could not see what the occupants visible to them were wearing. RP 73, 156, 227.

Given the information available to them, officers believed that the girl who matched the description provided by the 911 caller was possibly involved in gang activity and may have possessed a weapon. RP 44, 72. *See* RP 189, 215. Officer Rose indicated that if the girl was actually 17 years of age and in possession of a firearm, she would have committed a felony, RP 75. *See* RP 118-19. Officers were concerned that the two male occupants of the car may have been involved in the fight reported to have just occurred in Oakland Park. RP 44, 72. Moreover, they had information that the man seen running through that park with a gun in a ready position had entered a gray car much like that the two females were then entering.

RP 44. Officers felt they were investigating either an unlawful possession of a firearm by a minor or an assault with a deadly weapon. RP 118-19.

Given such information, the officers called for assistance, approached the vehicle with their weapons drawn, and ordered the occupants of the vehicle to put their hands up. RP 45-46; RP 117-22, 215.

Officer Williams and other officers arrived to assist, and officers began having the occupants get out of the vehicle one at a time. RP 46, 172-74. The driver and then the two girls got out of the car, were placed in handcuffs, and detained. RP 47-48, 173-75.

Officer Rose then ordered the respondent, who was the front-seat passenger, to exit the vehicle, walk backwards to him, and stop, which the respondent did. RP 49-50, 176. Officer Rose asked the respondent to get down on his knees, but the respondent did not comply. RP 50, 176-77. So, Officer Rose again ordered him to go to his knees. RP 50, 176-77. The respondent did not comply the second time either. RP 50, 176-77. Instead, he looked back towards the officer. RP 50, 366-67.

Officer Rose testified that, based on his training and experience, people who intend to either assault an officer or flee will first take what's referred to as a "target glance," by which they look backwards to see where the officer is, so that they can better plan an attack or escape. RP 50-51.

Given that the respondent had refused to comply with his commands and appeared to be contemplating an attack or escape, Officer Rose holstered his weapon, grabbed the respondent by his right arm, and escorted him to the ground, where he could be handcuffed more safely. RP 51-52, 177.

As the respondent went to the ground, he brought his left arm into his torso. RP 52. Based on his training and experience, Officer Rose knew that people often have secret weapons in their waistband area, and was concerned that the respondent may be reaching for a firearm. RP 52. So, he ordered the respondent to place his hands behind his back. RP 54. The respondent refused to do so. RP 54. Officer Rose repeated this command several times, but the respondent refused to comply, and kept his left hand tucked between his torso and the ground below. RP 54-55.

Officer Miller, who had responded to assist, then ordered the respondent, "show me your hands," and told him, "stop resisting or you will be tased." RP 179. When the respondent still refused to comply, Officer Miller "deployed his E.C.T.," i.e., Electronic Control Tool or taser, RP 11, and executed a "contact tase" or "drive stun technique," which entails touching the E.C.T. to a person. RP 55, 165, 179-80. This allowed Miller to pull the respondent's left arm out from under him, and officers placed him in handcuffs by about 5:08 p.m. RP 55, 84, 180.

Natosha Mackin, who was one of the two girls who got into the respondent's vehicle, testified that the respondent was in handcuffs before officers pushed him to the ground. RP 293.

Kimberly Grassi testified that, during the approximately thirty seconds she watched, she did not see the officers push the respondent at all. RP 266-67.

Gabrial Tucker, who was watching from across the street, testified that she heard the officers tell the respondent to get on the ground, but that she could not recall if the respondent did so. RP 436. Her boss then told her to get back to work. RP 436, 449. So, she went inside and did not look at the scene for "five to ten minutes." RP 436, 449. When she next looked, this time through a window, she saw "cops... on top of the defendant," i.e., respondent, but had not yet handcuffed him. RP 437-39. Tucker testified that the respondent was not handcuffed until after officers applied the taser. RP 446, 448-49.

Curtis Escalante, the respondent's brother, who was twice previously convicted of attempted second degree burglary, RP 319, 326-27, testified that the respondent went to his knees before the officers had any contact with him and that six officers then "jumped" on the respondent. RP 367-68. Escalante, however, did testify that it would have been possible for the respondent to have hidden a firearm in the waistband of the jeans he was wearing that day. RP 396.

The respondent testified that he had not slept for days before the incident, and that when he does not sleep he becomes "confused" and "unstable." RP 453-53. His mother testified that he suffers from Asperger's syndrome, a sight and hearing deficit, and that he is developmentally delayed. RP 483. The respondent further testified that he was confused when the officers told him to get down on his knees, but that he did so before the officer "slammed" him into "the concrete." RP 414-15, 455. The respondent testified that he was then handcuffed and subsequently tased three times, once on his genitals. RP 415-17. The respondent later testified that the closest taser marks were "a couple of inches, about a foot maybe" away from his genitals. RP 466.

The respondent was arrested for obstructing a law enforcement officer, and searched incident to that arrest. RP 55-56, 181. Officers found a small bag of marihuana and a pill crusher in the respondent's jacket pocket. RP 55-56, 181-82. The respondent stipulated that the substance believed by officers to be marihuana was actually determined to be marihuana by the Washington State Patrol Crime Laboratory. RP 210-11. Officer Williams took custody of those items and booked them into the property room. RP 182.

Officers then had the people who called 911 come to the scene to participate in show-up identifications. RP 68-70. *See* RP 300. One of those callers was Arthur Reed, who provided his telephone number and address to police so that they could pick him up for the show up. RP 75-76.

Another was a woman who identified herself as Dawn and provided her location so that police could contact her. RP 76. Neither caller identified the detained individuals as involved in the fight in the park. RP 68-70. *See* RP 300. Both were "uncertain." RP 126-27. It was not determined if the vehicle in which they were traveling was involved in the incident in Oakland Park. RP 83.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTION TO SUPPRESS BECAUSE OFFICERS HAD A REASONABLE SUSPICION SUFFICIENT TO JUSTIFY THEIR INVESTIGATORY STOP OF RESPONDENT AND DID NOT EXCEED THE PERMISSIBLE SCOPE OF THAT STOP.

"When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." ***State v. Garvin***, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (*citing* ***State v. Hill***, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" *Id.* (*quoting* ***State v. Reid***, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). This Court "do[es] not review credibility determinations on appeal, leaving them to the fact finder," ***State v.***

Gibson, 152 Wn. App. 945, 951, 219 P.3d 964 (2009), and "[u]nchallenged findings of fact are treated as verities on appeal." ***State v. Afana***, 169 Wn.2d 169, 176, 233 P.3d 879 (2010). Appellate courts "review conclusions of law from an order pertaining to the suppression of evidence de novo," *Id.*, ***State v. Louthan***, 158 Wn. App. 732, 740, 242 P.3d 954 (2010), ***State v. Lee***, 147 Wn. App. 912, 916, 199 P.3d 445 (2008)("[w]hether the trial court derived correct legal conclusions from those facts is a question of law that [appellate courts] review de novo"), and "can uphold the trial court on any valid basis." ***Gibson***, 152 Wn. App. at 948, 958.

The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause."

Article I, section 7 of the Washington State Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Illegally obtained evidence is not admissible in court. ***Mapp v. Ohio***, 367 U.S. 643, 82 S. Ct. 23, 7 L. Ed. 72 (1961); ***State v. Afana***, 169 Wn.2d 169, 180, 233 P.3d 879 (2010).

"[A] warrantless search is per se unreasonable, unless if falls within one of the carefully drawn exceptions to the warrant requirement." ***State v. Patton***, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). Similarly, "[t]he 'authority of law' requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions." ***State v. Afana***, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010).

"One such exception is that an officer may briefly detain a vehicle's driver for investigation if the circumstances satisfy the 'reasonable suspicion' standard under ***Terry v. Ohio***, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)." ***State v. Bliss***, 153 Wn. App. 197, 203-04, 222 P.3d 107 (2009).

> To justify a ***Terry*** stop under the state and federal constitutions, there must be some suspicion of a particular crime connected to the particular person, rather than a mere generalized suspicion that the person detained may have been up to no good. ***State v. Martinez***, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006). The officer must have an "articulable suspicion," meaning "a substantial possibility that criminal conduct has occurred or is about to occur."

Bliss, 153 Wn. App. at 204 (*quoting* ***State v. Kennedy***, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)); ***State v. Snapp***, 174 Wn.2d at 198 ("A reasonable, articulable suspicion means that there 'is a substantial possibility that criminal conduct has occurred or is about to occur.'")

Thus, "[a] valid ***Terry*** investigative stop is permissible if the officer can 'point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrants the intrusion.'" ***State v. Snapp***, 174 Wn.2d 177, 197, 275 P.3d 289 (2012).

"[T]he reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop," ***State v. Lee***, 147 Wn. App. 912, 917, 199 P.3d 445 (2008)(*quoting* ***State v. Rowe,*** 63 Wn. App. 750, 753, 822 P.2d 290 (1991)), and "[t]he officer's reasonable suspicion must be based on objective facts." ***State v. Mitchell***, 80 Wn. App. 143, 145, 906 P.2d 1013 (1995).

"[T]he level of articulable suspicion required for a car stop is no greater than required for a pedestrian stop." ***State v. Kennedy***, 107 Wn.2d 1, 6. 726 P.2d 445 (1986).

In the present case, Respondent argues that the stop of the vehicle in which he was riding was unlawful because the officers lacked a reasonable suspicion "that [he] or any occupants of the vehicle in which [he] was a passenger were connected to potential or actual criminal activity." Brief of Appellant, p. 11-27. The record shows otherwise.

Specifically, the trial court, in its findings of undisputed facts, found that

> [a]t 1646 hours on 2 October 2011 Officers ROSE and CLARK were advised by 911 dispatch that a 911 call had been received from an individual who was identified as Arthur Reed.

CP 89. Although, Respondent seems to argue that this finding was not supported by substantial evidence, Brief of Appellant, p. 1, 15-16, the record shows otherwise. Specifically, Officer Rose, who was working with Officer Clark in a two-officer unit on October 2, 2011, RP 22, testified that he was aware that Arthur Reed was one of the 911 callers, RP 75, and officers knew that the "initial call was received at 1646 hours" that day. RP 196, 168. Such testimony is "enough 'to persuade a fair-minded person of the truth of the stated premise'" ***Garvin***, 166 Wn.2d at 249, that "[a]t 1646 hours on 2 October 2011 Officers ROSE and CLARK were advised by 911 dispatch that a 911 call had been received from an individual who was identified as Arthur Reed." Therefore, this finding is supported by substantial evidence.

The court also found that dispatch provided Officers Rose and Clark information that

> [s]omeone was running in the alley between Madison and Gunnison, on the East side of Snake Lake. The subject was a black male with no shirt wearing black pants, creeping around like he was being chased. The subject was armed with a gun that looked like a 9MM [i.e., millimeter]

CP 89. Although Respondent seems to argue that this finding was not supported by substantial evidence, Brief of Appellant, p. 1, the record demonstrates the contrary proposition.

Specifically, Officer Rose testified that a 911 caller had provided information that "a subject was running through [Oakland Park] without a shirt on [with] a gun." RP 31. Oakland Park is located at 3114 South Madison Street. RP 91. The subject was described as "a black male without a shirt" who was wearing black pants and carrying "what appeared to be a 9mm [handgun]." RP 58. This man was described as "hunkering down, maybe trying to stay out of sight as he was moving across the park in the vicinity." RP 31-32. Such testimony is "enough 'to persuade a fair-minded person of the truth of the" court's finding, ***Garvin***, 166 Wn.2d at 249, and thus, that finding is also supported by substantial evidence in the record.

The court also made several additional, relevant findings, which Respondent has not challenged here. These include the following.

First, the court found that

> [a]t 1649 hours the CAD log was updated with further information from REED: The [shirtless] subject appears to be 18-19 years old, 5'10'' tall and 145 pounds, short dark hair, almost bald. The subject was holding a gun down by his side, ducking in and out of houses and cars and, at one point, was seen holding the firearm in the ready position, but no shots were heard.

CP 89.

Second, the court found that officers were aware that Oakland Park "is a known gang hangout" at which there were multiple gang-related incidents in the preceding year. CP 90.

Third, the court found that, as officers were driving to that area, they learned that the shirtless man had gotten into a white car, CP 90, and that four minutes later, the caller corrected this information to indicate "that the car was not white, but grey, and that the car had taken off towards Union on Center Street." CP 90.

Fourth, the court found that

> [w]hile en route dispatch updated the responding officers, indicating that ***another caller had observed a black female handing a gun to the shirtless male. The female was described as being 17 years old***, medium height, slim, wearing a black jacket, blue jeans and shows that were black with blue trim.

CP 90 (emphasis added).

Fifth, the court found that when officers arrived in the area, they saw two females, one of whom "appeared to match the description" of the girl who handed the gun to the shirtless man seen in the park. CP 91. Indeed, Officer Rose testified that the girl "matched that description to a tee, except that her friend was wearing the black jacket" instead of her, RP 35, but officers "believed that it was possible that she handed off the black

jacket [to her friend] in an attempt to alter her appearance." RP 116, 141-43, 226.

Sixth, the court found that, once on scene, the officers themselves located and contacted a witness "who told them about [a] large brawl in [Oakland] park with several subjects with their shirts off," and that "the subjects left in 4 different vehicles." CP 90-91.

Seventh, the court found that

> ROSE and CLARK again saw the two females, who were now at Center Street and Union Ave.... the same area dispatch had just reported the grey vehicle carrying the shirtless man with the gun was headed.

CP 91.

Eighth, the court found that these "two females," one of whom "exactly matched the description of the woman who handed the gun off" except for the lack of a coat, which the other girl was then wearing, "got into the back seat of the grey car, which appeared to have two men in the front seat." CP 91.

Ninth, the court found that the gray car she entered "was similar to the updated description of... the vehicle in which the man carrying the gun was reported to have entered," CP 91.

Tenth, the court found that

> based on the information available to the officers, the officers were investigating a possible Unlawful Possession of a Firearm charge related to the minor seen in possession of the firearm as well as possibly gang-related assault with a deadly weapon

CP 91.

Eleventh, the court found that it was only then that the officers detained the occupants of the car, including the respondent, who was the front-seat passenger. CP 91-92.

Because Respondent did not challenge any of these eleven findings, they must be considered verities here. *See* ***Afana***, 169 Wn.2d at 176.

Such findings demonstrate that the officers could "'point to specific and articulable facts which, taken together with rationale inferences from those facts,'" ***Snapp***, 174, demonstrated "a substantial possibility that criminal conduct has occurred or is about to occur." ***Bliss***, 153 Wn. App. at 204.

Specifically, the officers knew that a girl was reported to have "handed [the] gun to the shirtless male" in Oakland Park, and that this girl "was described as being 17 years old." CP 90.

Contrary to Respondent's assertion that "carrying a gun is not a crime," Brief of Appellant, p. 24, it generally is a crime for a minor.

RCW 9.41.040(2)(a) provides that a person is guilty of unlawful possession of a firearm in the second degree if "the person owns, has in his or her possession, or has in his or her control any firearm:.... (iii) if the person is under eighteen years of age, except as provided in RCW 9.41.042." In fact, "[u]nlawful possession of a firearm in the second degree is a class C felony." RCW 9.41.040(2)(b).

Because none of the exceptions listed in RCW 9.41.042, *see* Appendix B, seemed to apply to the girl identified by the caller, *compare* CP 90-91, a reasonable person in the officers' position could have believed that there was a substantial possibility that this girl had committed second degree unlawful possession of a firearm. *See* RP 118-19.

Moreover, given that this girl was reported to have handed that firearm to a man who was then seen carrying it in a "ready position" through a public park where a large brawl was reported to have been occurring, CP 90-91, she may also have been an accomplice in the commission of second degree assault, RCW 9A.36.021(c), 9A.08.020(c), or at least an accomplice to a violation of RCW 9.41.270.

RCW 9.41.270(1) provides that

> ***[i]t shall be unlawful for any person to carry, exhibit, display, or draw any firearm***, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capabale of producing bodily harm, ***in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.***

(emphasis added). A violation of this statute is a gross misdemeanor. RCW 9.41.270(2).

Likewise, the shirtless man seen carrying the gun in a "ready position" through a public park at which a large brawl had just occurred or was occurring, would also have violated RCW 9.41.270(1) if not committed second degree assault under RCW 9A.36.021(c).

Given that the shirtless man entered a vehicle that appeared to match the description of the vehicle the girl had just entered, and that there were at least two men in that vehicle when officers found it, CP 91, the officers could also "'point to specific and articulable facts which, taken together with rationale inferences from those facts,'" ***Snapp***, 174, demonstrated "a substantial possibility" that one of the two men in that vehicle had committed second degree assault or a violation of RCW 9.41.270(1). ***Bliss***, 153 Wn. App. at 204. They could thus also "'point to

specific and articulable facts that" at least one of those men may still be armed with the firearm the shirtless man was seen carrying in a ready position.

Hence, the officers had a reasonable, articulable suspicion that the girl had committed second degree unlawful possession of a firearm, second degree assault, or a violation of RCW 9.41.270(1), and that one of the men had committed second degree assault or a violation of RCW 9.41.270(1). Thus, they had authority under ***Terry*** to detain the vehicle's occupants for investigation of the circumstances giving rise to those suspicions, ***Terry v. Ohio***, 392 U.S. 1, ***State v. Bliss***, 153 Wn. App. at 203-04. As a result, the trial court properly found that "[t]he ***Terry*** detention that occurred was lawful," CP 101, and properly denied Respondent's motion to suppress.

Although Respondent argues that the information received from the 911 callers could not provide reasonable suspicion to support a ***Terry*** stop because it lacked sufficient indicia of reliability, Brief of Appellant, p. 16-27, the record demonstrates otherwise.

"[I]t is clear that an officer's reasonable suspicion may be based on information supplied by an informant." ***State v. Lee***, 147 Wn. App. 912, 918, 199 P.3d 445 (2008); ***State v. Sieler***, 95 Wn.2d 43, 47, 621 P.2d

1272 (1980); ***State v. Hopkins***, 128 Wn. App. 855, 862, 117 P.3d 377 (2005).

"[T]he legal standard for determining whether police suspicion resulting from an informant's tip is sufficiently reasonable to support a ***Terry*** stop is the 'totality of the circumstances' test announced in ***Illinois v. Gates***, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983), not the two-part reliability inquiry derived from ***Aguilar v. Texas***, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964), and ***Spinelli v. United States,*** 393 U.S. 410, 89 S. Ct. 584 (1969)." ***State v. Marcum***, 149 Wn. App. 894, 903, 205 P.3d 969 (2009).

In contrast to tips provided by paid informants, police officers may presume that citizen-witness reports are credible. ***Lee***, 147 Wn. App. at 919; ***State v. Wakeley***, 29 Wn. App. 238, 241, 628 P.2d 835 (1981). "Under the totality of the circumstances test, an informant's tip provides reasonable suspicion sufficient to justify an investigatory stop if "'it possesses sufficient 'indicia of reliability.'" ***State v. Marcum***, 149 Wn. App. 894, 903-04, 205 P.3d 969 (2009)(*citing* ***State v. Sieler***, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980)(*quoting* ***Adams v. Williams***, 407 U.S. 143, 147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972))).

"[A] reviewing court determines whether an informant's tip possesses the required 'indicia of reliability' by inquiring whether there

exist ''[1]... circumstances suggesting the informant's reliability, or some corroborative observation which suggests either [2] the presence of criminal activity or [3] that the informer's information was obtained in a reliable fashion." ***Marcum***, 149 Wn. App. at 904 (*citing* ***Sieler***, 95 Wn.2d at 47, 621 P.3d 1272 (*quoting* ***State v. Lesnick***, 84 Wn.2d 940, 944, 530 P.2d 243 (1975))). "[T]he so called 'veracity' and 'basis of knowledge' 'prongs' are not distinct under the totality of the circumstances test; rather, these elements are relevant but are 'no longer both essential.'" ***Marcum***, 149 Wn. App. at 904 (*quoting* ***Sate v. Jackson***, 102 Wn.2d 432, 435-36, 688 P.2d 136 (1984)). Rather, an informant's tip, when combined with corroborating observations of police, is sufficiently reliable to justify a ***Terry*** stop. ***Marcum***, 149 Wn. App. at 905.

"The totality of the circumstances test allows the court and police officers to consider several factors when deciding whether a ***Terry*** stop based on an informant's tip is allowable, such as the nature of the crime, the officer's experience, and whether the officer's own observations corroborate information from the informant." *Id.*

"Moreover, 'the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Id.* (*quoting* ***Illinois v. Wardlow***, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L.Ed.2d 570 (2000)). "[A]n officer may 'draw on [his or her] own

experience and specialized training to make inferences from and deductions about cumulative information available to them that 'might well elude an untrained person," and hence, "may form reasonable suspicion based on circumstances that ordinary observers would not necessarily construe as potentially criminal." ***Marcum***, 149 Wn. App. at 908, fn6 (*quoting* ***U.S. v. Arvizu***, 534 U.S. 266, 273, 122 S. Ct. 744 (2002)).

In the present case, there were at least three circumstances that suggested the 911 callers' reliability.

First, there were more than three different and distinct callers who reported largely the same activity. CP 95. Arthur Reed called 911 to report a black, shirtless male with black pants creeping around Oakland Park with a 9 mm pistol in a "ready position." CP 89. "[A]nother [second] caller" reported that a black female handed the gun to a shirtless man. CP 90. Finally, "multiple callers" reported that more individuals were involved, and that these individuals and the shirtless man with the gun got into a 2-door gray car and left the park in the direction of Union on Center Street. CP 90. The fact that more than three callers independently called police to report the same activity suggests the reliability of their reports of such activity.

Second, these callers all called 911, not a police business line or other non-emergency number. CP 89-90. As the Ninth Circuit has held

> the police must take 911 emergency calls seriously and respond with dispatch....
> Police delay while attempting to verify an identity or seek corroboration of a reported emergency may prove costly to public safety and undermine the 911 system's usefulness....
> The touchstone of our search and seizure jurisprudence remains the Fourth Amendment's textual requirement that any search be "reasonable," a determination we make by weighing the competing interests of individual security and privacy with the need to promote legitimate governmental interests. Having weighed those interests, we conclude that it is reasonable to accommodate the public's need for a prompt police response....
>
> ....
>
> [Also], the fact that [a 911 caller] risk[s] any anonymity [s/]he might have enjoyed and exposed [her- or] himself to legal sanction further supports the tip's reliability.... [A 911 caller] jeopardize[s] any anonymity [s/]he might have had by calling 911 and providing [her or] his name to an operator during a recorded call.... Merely calling 911 and having a recorded telephone conversation risks the possibility that the police could trace the call or identify [the caller] by his voice. Moreover, the [trial] court could consider the 911 call reliable because [the caller] risked criminal sanction for any false report to police.

U.S. v. Terry-Crespo, 356 F.3d 1170, 1176 (9th Cir. 2004) (citations omitted).

Finally, Officers Rose and Clark knew that Oakland Park "is a known gang hangout and that there have been multiple gang-related incidents there over the year," CP 90, including fights and gatherings, RP 25-26, 91, 124, 130-32, 168-69, 184.

Thus, the facts (1) that more than three callers independently called (2) 911 to report (3) an activity that officers knew from experience was common in the area in which they reported that activity, all suggest the reliability of the 911 callers' reports of such activity. Hence, the circumstances suggested the 911 callers' reliability, ***Marcum***, 149 Wn. App. at 904, and, as a result, their reports provided reasonable suspicion sufficient to justify the investigatory stop at issue in this case.

Moreover, before initiating the stop in question, Officers Rose and Clark made corroborative observations which suggested the presence of the very criminal activity described by these callers.

First, these officers contacted a woman who was at the scene, who described a "large brawl in the park with several subjects with their shirts off" who had left in four different vehicles. CP 91. This witness thereby corroborated Reed's report of a shirtless man running around the park as though he were being chased or as though he were ready to fire a weapon at someone. CP 89. She also corroborated the "multiple" subsequent callers who reported that there were more individuals involved than just the single shirtless man with the gun and that these people had left in a vehicle. CP 90.

Second, officers were able to make observations which

corroborated almost every element of the report of the 911 caller who stated that "a black female [had] hand[ed] a gun to the shirtless male" and described the female "as being 17 years old, medium height, slim, [and] wearing a black jacket, blue jeans and shoes that were black with blue trim." CP 90.

First, they found a girl in the area described by the caller, who "exactly matched the description of the woman who handed the gun off" except for the lack of a black jacket, which her companion was then wearing. CP 90.

Second, they saw that girl enter a vehicle similar to the one in which the shirtless man was believed to be an occupant at the very intersection to which that man was said to have traveled in that vehicle. CP 91. This observation connected (1) the girl who matched the description of the one who handed off the gun to the shirtless man with (2) the car in which the shirtless man was believed to be located. In other words, officers had visual evidence to believe that there may really be a connection between this girl and that man, as reported by the 911 caller.

Hence, before initiating the stop in question, Officers Rose and Clark made corroborative observations which suggested the presence of the very criminal activity described by the callers. As a result, their reports provided reasonable suspicion sufficient to justify the investigatory stop at

issue in this case.

Therefore, the trial court properly denied Respondent's motion to suppress based on that stop, and its decision to do so should be affirmed.

Although Respondent cites ***State v. Sieler***, 95 Wn.2d 43, 621 P.2d 1272 (1980), and ***State v. Lesnick***, 84 Wn.2d 940, 530 P.2d 243 (1975) for the proposition that "the officers in this case conducted an investigatory stop based on nothing more than an unknown informant's bare conclusion that criminal activity had occurred," Brief of Appellant, p. 17-27, ***Sieler*** and ***Lesnick*** are distinguishable from the present case.

Sieler and ***Lesnick*** both concerned tips made by "by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity." ***Sieler***, 95 Wn.2d at 1274-75 (*quoting* ***Lesnick,*** 84 Wn.2d at 944 (*quoting* ***Lesnick***, 10 Wn .App. at 285)).

In the present case, the 911 callers were not "completely anonymous and unidentifiable." *Id.* Rather the first caller, Arthur Reed, provided his telephone number and address to police so that they could pick him up for the show up identification. RP 75-76; CP 95. Another caller identified herself as Dawn and also provided her location so that police could contact her. RP 76; CP 95. Indeed, "there were at least four individuals who had either called to report information related to this

incident or were contacted by officers in person." CP 95.

More important, unlike the callers at issue in ***Sieler*** and ***Lesnick***, the callers in this case provided "more than a conclusionary assertion that a certain individual is engaged in criminal activity." ***Sieler***, 95 Wn.2d at 1274-75. Indeed, rather than drawing any conclusions or asserting any specific violations of law, they provided precise descriptions of what they observed, *see* CP 89-95, and these descriptions, as shown above, were corroborated by those of other callers and by the observations of Officers Rose and Clark.

As a result, their reports provided reasonable suspicion sufficient to justify the investigatory stop at issue in this case, and the trial court properly denied Respondent's motion to suppress based on that stop. Its decision to do so should therefore be affirmed.

Finally, Respondent argues that "[t]he seizure of [his] vehicle and its occupants exceeded the permissible scope of a ***Terry*** stop because the police ordered those occupants out with their weapons drawn when they "did not have a legitimate fear of danger." Brief of Appellant, p. 27-32. The record demonstrates otherwise.

"While the scope of a permissible ***Terry*** stop will vary with the facts of each case, an investigative detention must last no longer than is necessary to effectuate the stop's purpose." ***State v. Thornton***, 41 Wn.

App. 506, 509-10, 705 P.2d 271 (1985). In other words, "[t]he detention must not exceed the duration and intensity necessary to confirm or dispel the officer's suspicions." ***State v. Mitchell***, 80 Wn. App. 143, 145, 906 P.2d 1013 (1995).

"[A]n investigatory stop is not transformed into an arrest because an officer orders the suspect out of a car," and drawn guns do not necessarily "convert the stop into an arrest requiring probable cause" ***Thornton***, 41 Wn. App. at 512-13. Indeed, "under certain circumstances measures such as handcuffing, secluding, and drawing guns on the suspect may be appropriate to accomplish a ***Terry*** stop." ***Mitchell***, 80 Wn. App. at 145-46. "Such [a] circumstance only exists when the police have a reasonable fear of danger. *Id.* at 146. Specifically, "it is reasonable for an officer to draw a weapon to effect a stop where a suspect is believed to be armed." *Id.* at 146.

In the present case, as described above, officers had reasonable suspicion to believe that one of the girls in the car they stopped had handed off a firearm to another man who they had reasonable suspicion to believe may also have been seated in that car. *See* CP 89-92. They also knew that the area was one of high gang activity, that gang members tend to travel together in vehicles, and that they are typically armed. CP 90; RP 25-26, 91-92, 124, 130-32, 168-69, 184. Under these circumstances,

officers had reason to believe that the suspects in the vehicle were armed.

Therefore, it was reasonable for the officers to use measures such as handcuffing, secluding, and drawing guns on the suspects in this case to accomplish the ***Terry*** stop in question.

As a result, officers did not exceed the scope of their otherwise permissible ***Terry*** stop of the vehicle in which Respondent was a passenger. Hence, the court properly denied Respondent's motion to suppress evidence based on this stop.

Therefore, this Court should affirm the trial court's denial of that motion and Respondent's conviction.

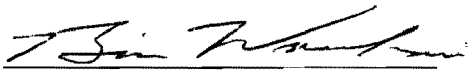
D. CONCLUSION.

The trial court properly denied Respondent's motion to suppress based on the officers' investigative stop of the vehicle in which he was riding because officers had a reasonable suspicion sufficient to justify their investigatory stop of Respondent and did not exceed the permissible scope of that stop.

Therefore, the trial court's denial of that motion and Respondent's subsequent conviction should be affirmed.

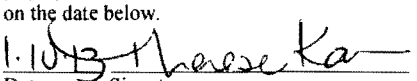
DATED: January 10, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



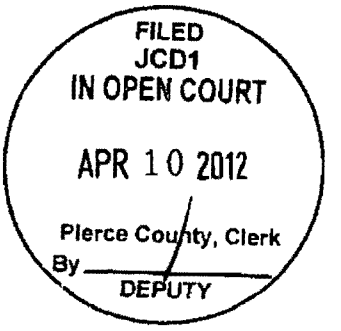
Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ E ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Date Signature

APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON, Plaintiff, vs. ZECHARIAN ULUMEALANI ESCALANTE, DOB: 2/01/1995 JUVIS: 701857-11R040524 Respondent.	CAUSE NO. 11-8-01174-4 FINDINGS AND CONCLUSIONS ON ADMISSIBILITY OF EVIDENCE CrR 3.6

THIS MATTER having come on before the Honorable Kitty-Ann van Doorninck on the 14th day of February, 2012, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

THE UNDISPUTED FACTS

Tacoma Police (TPD) Officers Rose and Clark were working routine patrol as a two-man unit in a fully-marked TPD patrol car. The officers testified that they receive computer-aided dispatch (CAD) over a computer in their patrol car as well as audible information from dispatch and other first-responders over their portable radios. Dispatch informs officers in the field of emergency calls it receives and general information about those calls is transmitted over the computers in the patrol cars. The information is relayed to the officers as it is received, but there is a short delay due to the nature of the CAD system and human data entry. For the most serious

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ORIGINAL

calls, dispatch alerts officers over the radio by way of a special tone. This special tone is intended to garner the officers' immediate attention so that available units may respond on a priority basis. The officers can then access information related to the call as they are en route to the scene. The information on the CAD is updated as necessary with additional or new information that relates to that call. Information from unrelated calls is not included in the CAD log.

At 1646 hours on 2 October 2011 Officers ROSE and CLARK were advised by 911 dispatch that a 911 call had been received from an individual who was identified as Arthur REED. The call was commenced with the special tone, indicating that the information related to a priority call. The officers reviewed the CAD log as additional information was provided while they were en route to the scene of the incident. The CAD in the case at bar provided information from multiple sources, including REED. ROSE and CLARK testified that the CAD provided the following information from REED: Someone was running in the alley between Madison and Gunnison, on the East side of Snake Lake. The subject was a black male with no shirt wearing black pants, creeping around like he was being chased. The subject was armed with a gun that looked like a 9 MM.

At 1649 hours the CAD log was updated with further information from REED: The subject appears to be 18-19 years old, 5'10" tall and 145 pounds, short dark hair, almost bald. The subject was holding a gun down by his side, ducking in and out of houses and cars and, at one point, was seen holding the firearm in the ready position, but no shots were heard. About a minute later, the CAD log indicates that REED now saw two other subjects walking around like they were possibly looking for the subject with the gun. These other subjects were described as follows: They appeared to be possibly two black males, in their 20's, one wearing a white shirt

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and fedora hat. REED was unable to provide more information regarding the description of these two subjects, but indicated that they were also headed towards the alley.

At 1648 hours TPD Officer WILLIAMS, who was also working patrol in the general area, was advised via dispatch that there was possibly a person with a gun running in the area of Oakland Playfield. WILLIAMS responded to the area along with multiple other units. WILLIAMS was aware that Officers ROSE and CLARK had responded to the area first and had contacted a nearby resident who reported that there had been a large fight at Oakland Playfield and numerous subjects had left in 3-4 different vehicles in unknown directions. Officers WILLIAMS, ROSE and CLARK know that Oakland Playfield is a known gang hangout and that there have been multiple gang-related incidents there over the year. Officer WILLIAMS also noted that he knows that gang members often travel together in vehicles, often containing 4 or more occupants at a time.

Meanwhile, at about 1652 hours, dispatch advised there were multiple callers reporting more individuals were involved and that there were approximately 8 of these individuals in a 2-door white car and that the shirtless subject with the gun was with them. As CLARK and ROSE approached the area, they asked dispatch if there was an update regarding the car that was seen by one of the callers. At 1656 hours, dispatch indicated that a caller was reporting that the car was not white, but grey, and that the car had taken off towards Union on Center Street. The CAD also indicates that the shirtless male with the gun got into the grey car.

While en route dispatch updated the responding officers, indicating that another caller had observed a black female handing a gun to the shirtless male. The female was described as being 17 years old, medium height, slim, wearing a black jacket, blue jeans and shoes that were black with blue trim. As CLARK and ROSE arrived in the area, they did not see anyone in the

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park and began to check the area for the listed subjects. As they reached the northeast corner of the park, they saw two females walking eastbound about ½ a block away. Although one of the two females appeared to match the description of the woman who handed the gun off, they continued to check the area for the man with the gun. CLARK and ROSE then contacted a woman who told them about the large brawl in the park with several subjects with their shirts off. She told the officers that the subjects left in 4 different vehicles, but was unable to provide any information on the subjects or their vehicles. The officers updated other units via dispatch.

As they continued their area check for the suspects, ROSE and CLARK again saw the two females, who were now at Center Street and Union Ave. This was in the same area dispatch had just reported the grey vehicle carrying the shirtless man with the gun was headed. The officers saw the women approach a small grey 4-door car, which was similar to the updated description of one of the suspect vehicles, as well as the vehicle in which the man carrying the gun was reported to have entered. CLARK and ROSE now noticed that one of the two females was wearing a blue shirt and blue jeans as well as black shoes with blue trim on them. The other female was wearing a black jacket. ROSE noted that the woman in the blue shirt exactly matched the description of the woman who handed the gun off. The only difference was that she was not wearing the black jacket. The two females then got into the back seat of the grey car, which appeared to have two men in the front seat. The car was already stopped in a parking lot in front of Grassi's Flower shop. CLARK and ROSE stopped their patrol car just south of the grey vehicle and approached it on foot.

At this time, based on the information available to the officers, the officers were investigating a possible Unlawful Possession of a Firearm charge related to the minor seen in possession of the firearm as well as a possibly gang-related assault with a deadly weapon.

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Because of the reports from dispatch indicating a possible gang-related brawl involving a firearm, the reported connection between the women to the gun and the report that the male carrying the gun had entered a grey car that was last seen in the area where the suspect car was located, the officers used a draw-and-direct technique and directed the vehicle's occupants to show their hands. This occurred at roughly 1704 hours. This technique is also referred to as a "felony stop."

All the subjects in the vehicle initially complied. Officer CLARK radioed that they were contacting a vehicle that was possibly involved in the incident and requested more units to assist. Other officers arrived in short order. Once the backup was there, CLARK and ROSE began to order the occupants out of the car, one at a time. The two females were asked to exit the car. They were later identified as MACKLIN and WILLIS. WILLIS was later determined to be a missing person out of Oregon. The driver was ordered out of the car without incident. He would later be identified as Curtis ESCALANTE, the older brother of the respondent. By 1708 hours the officers had the three compliant occupants out of the car.

The respondent, who was sitting in the front passenger seat of the car, was directed to exit the car last. He did as requested, exiting the car without incident. He was ordered to face away from the officer and begin walking back towards the officer. He followed these directions as well. When the respondent was about four feet from the officer, he was directed to stop, which he did. He was then ordered to get on his knees before placing handcuffs on him, which is standard procedure. However, the respondent did not comply; he just stood there. Officer ROSE again asked the respondent to comply. He again did not comply. Rather, he turned his head to ROSE and looked at ROSE. Based on his training and experience, ROSE described this action

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as a "target glance", which is common when suspects are either planning to flee or become assaultive. The purpose of the glance is to determine the location of the officer.

Based on this information, ROSE became concerned that the respondent was going to either flee or attempt to harm him or others. ROSE holstered his firearm and grabbed the respondent's right arm. The CAD Log indicates that the officers were struggling with the respondent at 1709 hours. What occurred from this point forward was contested by the respondent and his witnesses.

THE DISPUTED FACTS

The Officers' Testimony

Officer ROSE performed a "straight arm bar takedown", which is used to gain compliance when a suspect is failing to comply and thereby creating an officer safety concern. ROSE took the respondent to the ground in an attempt to gain the respondent's compliance. As this happened, the respondent tensed up his arms and clenched his fists. The respondent then brought his arms in towards his torso.

ROSE repeatedly ordered the respondent to put his hands behind his back while trying to physically pull the respondent's arm behind the respondent. The respondent continued to tense his muscles and did not comply. Other officers came to ROSE's assistance. ROSE reports that it was still unknown whether the respondent was currently armed, making it necessary to gain compliance as quickly as possible. He knows it is common for suspects to conceal a weapon in his torso and/or waist area, which is where the respondent's hands were. Fearing that the respondent did in fact have a firearm and was trying to access it, ROSE continued to hold onto the respondent's right arm as other officers continued their efforts to gain control over the respondent's left arm.

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Officer WILLIAMS heard ROSE give the respondent multiple verbal commands to "GET ON YOUR KNEES!" The respondent failed to do so, prompting ROSE to attempt to escort the respondent to the ground. WILLIAMS saw ROSE struggling with the respondent and saw that officers MILLER and O'KEEFE rushed to assist ROSE. WILLIAMS said he saw the respondent on his hands and knees in an apparent effort to force his body back up. While WILLIAMS finished clearing the car, he saw that the three officers were still struggling with the respondent. He heard the officers yell "Show us your hands!" and that the respondent's left arm was still under his belly. He heard MILLER repeatedly warn the respondent to "get your left arm out or you will be tased!"

The officers testified that the respondent continued to struggle and continued his noncompliance, prompting Officer MILLER to utilize his Electronic Control Tool (ECT), also known as a taser. Officers testified that MILLER applied the taser on a single occasion. Once the respondent was tased, the officers were able to gain control over him and placed him in handcuffs. The CAD log notes that the respondent was in custody by 1710 hours, less than a minute after the officers began struggling with the respondent. A search incident to the respondent's arrest revealed a small bag containing suspected marijuana. A plastic cylindrical object was also located in the respondent's jacket.

Another officer picked up a witness for the witness to do a field show-up. When she arrived, the witness asked if one of the females had been wearing a black jacket. When informed that she was not wearing such a jacket when contacted, the witness/caller said she did not recognize anyone.

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The respondent was arrested for Obstructing a Law Enforcement Officer and for the drugs in his possession. The other occupants of the vehicle were released, with the exception of the female listed as a missing person.

Mr. REED, one of the first 911 callers, was available for contact and provided a location where he would be for later contact. Another caller/witness, identified as "Dawn", was also identified and provided her location and cellular number for later contact as well. A review of the CAD logs reveals that there were at least four individuals who had either called to report information related to this incident or were contacted by officers in person. One caller was uncooperative and merely reported a fight and a man with a gun. Her cellular number is contained in the CAD information.

Testimony of the Respondent and his Witnesses

The respondent called several witnesses to testify in his defense. These witnesses primarily focused their testimony on what occurred once the first officers responded to the scene. Witness Natosha MACKLIN testified that she was with her friend, Gloria WILLIS. She testified about her schooling, her attire on the day of the incident, her physical build, the weather and her actions on the day in question. MACKLIN said she and WILLIS walked towards the intersection of Center and Union Streets in Tacoma when they saw their friend CURTIS Escalante. MACKLIN said she had not previously met the respondent. She said she accepted an offer for a ride to the Tacoma Mall, although she had previously testified her mom was *en route* from the Mall to pick her up. She said that she and WILLIS had just entered the suspect vehicle through the rear doors. She had closed her door, but WILLIS had not yet closed her door when several police cars arrived and drew their weapons. She said that the officers ordered the occupants of the car (respondent, CURTIS Escalante, WILLIS and her) to put their hands up.

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She testified that the officers ordered them to exit the vehicle one-by-one, starting with CURTIS. She said CURTIS did as ordered. MACKLIN further testified that she was the next one ordered out of the vehicle and that she was placed in a patrol car directly behind the suspect vehicle. MACKLIN said that WILLIS, who was sitting behind the front seat passenger (behind the respondent) was then ordered out of the car. MACKLIN testified that the respondent was the last one out of the car. She said he was pulled out of the car by the officers and that the respondent had his hands above his head. She said the respondent was standing up when the officers placed handcuffs on him. The officers then pushed the respondent to the ground. She said she saw the respondent drop to his knees and then was pushed forward by one of the officers. MACKLIN said she then heard the sound of a taser and heard the respondent screaming and yelling. She said that the respondent was yelling for help when he was on the ground and that she heard officers yelling at him. She said the officers then picked the respondent up and placed him in the back of a patrol car. She testified that, prior to the respondent being placed into a patrol car, an officer slammed the respondent's face into the hood of a patrol car.

During cross examination, MACKLIN admitted that she had previously provided a different story to the respondent's private investigator. She admitted that she told the private investigator that she and WILLIS were still sitting in the back of the suspect vehicle when the respondent was removed from the front passenger seat. She told the investigator that WILLIS and she witnessed the events between the officers and the respondent from the back seat of the suspect car, not from the patrol car as she had testified during direct examination. She also admitted that she told the investigator that the respondent's face was slammed into the trunk of

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the suspect vehicle, not into the hood of a patrol car as she had testified during direct examination. MACKLIN's testimony was NOT credible.

CURTIS Escalante testified next for the respondent. He testified that he was at church with his brother ~~and~~ M the morning of the incident. He said he later ran an errand for a pregnant relative and took the respondent with him. He said that he was in his "champagne pink" car and stopped in the parking lot in front of Grassi's Flower shop. When asked about the color of the car, CURTIS testified it was bright and sunny. When he later testified about his brother's treatment as well as his own, it was raining heavily and there were many puddles in the parking lot. CURTIS testified that he was in the front seat of his car and was its driver. He said the respondent was in the front passenger seat of the car. He testified that MACKLIN and WILLIS approached his car and he offered to give them a ride to the Mall. He said that two officers pulled up to his car and drew their firearms at the occupants of his car, ordering them to put their hands up. CURTIS said this occurred right after the two women got into his car.

Contrary to MACKLIN's testimony, CURTIS testified that WILLIS was the first occupant who was ordered out of the vehicle. She was then handcuffed and placed into a patrol car. CURTIS said that MACKLIN was the next occupant "pulled out" from his car and she too was placed into a patrol car after being handcuffed. CURTIS said he was then ordered out of his car by the officers. CURTIS testified that he was ordered to walk backwards towards the sound of the officer's voice. He said he was then ordered onto his knees in the rain and then was handcuffed and placed into a patrol car. He said he was put into a patrol car that was roughly twenty feet behind his car and off to the left (on the driver's side), away from the building, which was to the right (pass side) of his car. He said he was able to clearly see his brother when his brother was removed from the front seat of the car. The passenger side of the car, however, was on the

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opposite side of his car from where he was sitting while in the patrol car. He said he could clearly see his brother despite the fact that the doors on the driver's side of his car were closed. He testified that his brother has hearing problems and was a special education student. CURTIS said the respondent also is developmentally delayed and has multiple medical conditions.

CURTIS testified that he saw his brother get out of CURTIS' car and had his hands up. He said his brother walked backwards towards the officer who was issuing the respondent commands. He said his brother took roughly five (5) heal-to-toe steps backward before he saw the respondent look back at the officers. CURTIS said the officers then holstered their weapons and forced the respondent to the ground, slamming the respondent's face into the parking lot. He said he was later able to see the indentations in his brother's face from rocks on the ground and could see some rocks embedded in his brother's face after the officers stood the respondent up. CURTIS said that after the officers slammed the respondent's face down, one jumped on his legs while another jumped on the respondent's head. CURTIS said one officer was on top of the respondent while others assisted. He said the officers handcuffed the respondent and that Officer Miller then pointed what appeared to be a gun at the respondent and tased the respondent. CURTIS said he did not see his brother resisting or fighting with the officers. He recalled his brother was on the ground for about 3-4 minutes. When the officers stood the respondent up, CURTIS said he could see blood on the respondent's face and the aforementioned rocks and/or indentations on his face. CURTIS said his brother was handcuffed "right away" and that the cuffs were put on NR prior to the tasing.

During cross examination, CURTIS also admitted that he had provided a different version of events to the private investigator hired by his brother's attorney. CURTIS admitted that he told the investigator that he had been removed from the car first, which was contrary to

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his earlier testimony as well as both versions of the statements/testimony MACKLIN had provided. CURTIS also admitted that he had told the investigator that he did NOT have a clear view of what had happened to his brother. CURTIS's testimony was NOT credible.

The respondent testified next. He testified to some preliminary information prior to a recess. The next day the court reconvened and GABRIAL TUCKER testified prior to the resumption of the respondent's testimony. TUCKER testified as follows: She was working at a business across the street from the flower shop, behind the AM/PM gas station. She estimated she was 100 yards from the scene of the incident. She testified she heard yelling after seeing many patrol cars approach. The cars blocked the intersection and several officers had their firearms drawn. TUCKER said there was a large shrub between the street and the suspect car. The shrub was about five feet wide and roughly as many feet tall. She saw the respondent standing with his hands up. She then looked away for about ten minutes. When she looked again at the incident, she saw the respondent on the ground and said he was tased and then handcuffed.

TUCKER said she had been interviewed by a private investigator who contacted her on behalf of the respondent. She said she spoke with the investigator many times. She admitted that she told the investigator that the respondent was handcuffed before he was tased, contrary to her sworn testimony. She acknowledged that her earlier testimony was accurate. TUCKER's testimony was NOT credible.

The respondent then resumed his testimony. He largely echoed what his brother, CURTIS, had testified to earlier in the trial. The respondent said he was asked to exit the car last and complied with the command. He testified he walked backwards toward the officers while his hands were up. He said he took several steps backwards, covering a greater distance than his

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brother had said. He then turned his head and looked Officer CLARK in the eyes. The respondent said he was asked to get on his knees. He said he got onto his knees and placed his hands on the back of his head with his elbows up. At this point, the respondent testified that CLARK then threw him down to the ground, slamming him into the concrete. The respondent said he heard other officers running towards him and one got onto the back of his legs. He said that Officer MILLER then placed MILLER's knee onto the respondent's head. The respondent said he heard the officers ordering him to get his arm back so he could be handcuffed. He was then handcuffed. He said he did not make efforts to keep his hands under him. He said he was then tased by one of the officers. He testified that the tasing involved multiple applications of the taser that lasted for roughly a minute. He said he was tased up his leg into his groin and that a taser made contact with his private parts at one point. Later, when the respondent testified about some photos alleged to depict the taser marks, he testified the taser went up his leg and stopped about a foot prior to his groin area.

The respondent testified he was confused about what was going on and that he was tired and scared. He said he had not slept for a couple nights before the incident due to a sleeping disorder. He also testified that he believed his responses to the officers' commands were executed too slowly for the officers and that he believed he was trying to comply with their commands. With the exception of this last comment, the respondent's testimony was NOT credible.

The respondent's mother testified regarding the respondent's developmental disability, his medical conditions and his schooling. Her testimony was credible.

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FINDINGS AS TO DISPUTED FACTS

Officers WILLIAMS, ROSE and CLARK each testified credibly. The respondent's witnesses were not credible. The Court adopts the disputed facts as presented by Officers WILLIAMS, CLARK and ROSE. Based on the circumstances known to the officers at the time of the contact with the vehicle in which the respondent was riding, the officers reasonably believed one or more occupant of the suspect vehicle was related to a possible assault with a deadly weapon and/or unlawful possession of a firearm, both of which are felony crimes. They further reasonably believed that one or more of the car's occupants were armed or dangerous. The credible facts support the actions of the officers. While N officers were not certain the occupants were armed or related to the earlier reports regarding an individual with a gun, a reasonably prudent person with the information available to the officers at the time of the contact would believe that one or more of the suspect's occupants were related to the 911 reports and were armed and dangerous. This created a significant officer safety risk + a risk to others.

CONCLUSIONS OF LAW

The Court hereby denies the respondent's Motion to Suppress pursuant to CrR 3.6. The Terry detention that occurred was lawful and based on a reasonable belief that one or more of the suspect vehicle's occupants were armed + had committed one or more felonies involv. FA presenting a potentially life-threatening situation for the officers. The use of drawn firearms by the officers did not amount to an arrest of the subjects in the vehicle. After the contact w/ N R The officers had sufficient probable cause to arrest the respondent for Obstructing a Law Enforcement Officer and Unlawful Possession of a Controlled Substance based on a valid search incident to the lawful arrest of the respondent. Furthermore, the scope of the detention was reasonable in light of all the circumstances.

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DONE IN OPEN COURT this 10th day of ~~March, 2012~~ April 2012.

JUDGE
KITTY ANN VANDOORNINCK

Presented by:

R. BRIAN LEECH
Deputy Prosecuting Attorney
WSB # 24449

FILED
JCD1
IN OPEN COURT
APR 10 2012
Pierce County, Clerk
By DEPUTY

Approved as to Form:

BRYAN HERSHMAN
Attorney for Respondent
WSB # 14780

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APPENDIX B

9.41.042. Children--Permissible firearm possession

RCW 9.41.040(2)(a)(iii) shall not apply to any person under the age of eighteen years who is:

(1) In attendance at a hunter's safety course or a firearms safety course;

(2) Engaging in practice in the use of a firearm or target shooting at an established range authorized by the governing body of the jurisdiction in which such range is located or any other area where the discharge of a firearm is not prohibited;

(3) Engaging in an organized competition involving the use of a firearm, or participating in or practicing for a performance by an organized group that uses firearms as a part of the performance;

(4) Hunting or trapping under a valid license issued to the person under Title 77 RCW;

(5) In an area where the discharge of a firearm is permitted, is not trespassing, and the person either: (a) Is at least fourteen years of age, has been issued a hunter safety certificate, and is using a lawful firearm other than a pistol; or (b) is under the supervision of a parent, guardian, or other adult approved for the purpose by the parent or guardian;

(6) Traveling with any unloaded firearm in the person's possession to or from any activity described in subsection (1), (2), (3), (4), or (5) of this section;

(7) On real property under the control of his or her parent, other relative, or legal guardian and who has the permission of the parent or legal guardian to possess a firearm;

(8) At his or her residence and who, with the permission of his or her parent or legal guardian, possesses a firearm for the purpose of exercising the rights specified in RCW 9A.16.020(3); or

(9) Is a member of the armed forces of the United States, national guard, or organized reserves, when on duty.

PIERCE COUNTY PROSECUTOR

January 10, 2013 - 4:28 PM

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