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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 32233-5-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Appellant,

v.

CODY RAY FLORES,

Defendant/Respondent

RESPONDENT'S BRIEF

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I. INTRODUCTION

Respondent, Cody Ray Flores, asks the Court of Appeals to Affirm the trial court's ruling suppressing evidence in the case and dismissing the charges without prejudice.

II. ASSIGNMENTS OF ERROR

No. 1: The Appellant assigns error to the trial court's ruling suppressing the firearm found on Defendant's person.

No. 2: The Appellant assigns error to conclusion of law 3.6.

No. 3: The Respondent assigns error to findings of fact 2.1 and 2.2 on the CrR 3.6 hearing.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did the law enforcement officers have an articulable suspicion that the defendant was engaged in criminal activity, thereby justifying a *Terry* stop?
2. Was there a reasonable basis for the officer to believe that Cody Flores was armed and dangerous justifying a protective search under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)?
3. Were the officers able to point to specific, articulable facts giving rise to an objectively reasonable belief that the Cody Flores could be armed and dangerous?
4. Does an individual's mere proximity to others independently suspected of criminal activity justify an investigative stop, or must the suspicion be individualized?

5. Does merely associating with a person suspected of criminal activity strip away individual constitutional protections against warrantless searches?
6. Is a brief seizure is justified by mere proximity to criminal activity, or must be there be something more to indicate that the particular person seized may armed or a threat to officer safety?
7. Where police officers do not have articulable suspicion that an individual is armed or dangerous and have nothing to independently connect such person to illegal activity, is the seizure of the person valid under the state constitution?

III. STATEMENT OF THE CASE

a. Substantive Facts

On November 2, 2013, a number of law enforcement officers were dispatched to the area of 1120 Alderwood Drive in Moses Lake, Washington, where they came into contact with Giovanni Powell and Cody Flores. RP 10. RP 31. These included Officer McCain, Officer Ouimette, Officer St. Peter, and Officer Cole of the Moses Lake Police Department. RP 10-11. Officer St. Onge was present as well, and arrived at about the same time as did Officer Ouimette. RP 24. The information provided by dispatch was that Giovanni Powell had pointed a gun at somebody's head; but no information was provided about the person who provided that information. RP 14. RP 66-67. RP 86.

Dispatch reported that the person reporting the incident wanted to remain anonymous and that they had disconnected and that dispatch was unable to get them back on the line. RP 87.

The time officers received the call was approximately 16:35. RP 78. Officer McCain initially estimated that he made contact with Powell and Flores approximately two minutes after receiving the call. RP 79. On cross-examination, McCain stated that it could have been as much a four to five minutes. RP 84.

The officers lacked information from dispatch suggesting how the reporting party knew that Powell had pointed a gun at someone; nor did they have any information that Cody Flores had been involved in criminal conduct of any kind. RP 15. Officer McCain asked dispatch how they knew Powell had a gun, but apparently never got an answer to that question. RP 32. RP 67. McCain was, however, advised that Giovani Powell was a warrant for his arrest. RP 67. Flores had been walking on the sidewalk with Mr. Powell when he was stopped. RP 17. Flores and Powell had been walking shoulder to shoulder. RP 38. The place where Flores and Powell were seen walking was approximately four houses to the north of 1120 Alderwood. RP 44.

Officer McCain was the first officer to arrive at the location. RP 38. RP 72. Officer McCain was also the first to make contact with Powell and Flores. RP 33. He got out of his patrol vehicle and told Powell to stop, and Powell complied. RP 33. At the suppression hearing, McCain testified that he ordered

"them" to stop. RP 70.[1] He drew his gun immediately upon exiting his patrol vehicle. RP 40. RP 70. He called to the two men from across the intersection. RP 38. Flores also stopped, and McCain ordered both subjects to face away from him and to put their hands on their heads. RP 33. McCain testified at the CrR 3.5 hearing that he was not certain whether he specifically instructed Flores to stop, or what his exact words were. RP 39. But McCain testified at the CrR 3.6 hearings that he ordered them both to stop. RP 70. RP 71. But McCain also suggested that his comments were directed primarily at Powell rather than Flores. RP 71-72. McCain then ordered them both down to the knees with hands on their heads. RP 34. RP 72. McCain had both Powell and Flores kneel down onto the sidewalk to put them both at a position of disadvantage. RP 72. The two men complied with Officer McCain's commands. RP 33.

Prior to the arrival of the other officers, while Powell and Flores were on the sidewalk on their knees, they were approximately two feet away from each other and conversing with one another. RP 73. Officer McCain ordered Powell to start taking steps to his right on his knees in order to distance him from Mr. Flores. RP 73. Powell complied with those commands. RP 73. With both suspects now on their knees, and with their hands on their heads, and separated from one another, Officer McCain

[1] "As I got out, I drew my weapon at low ready and ordered, ordered them to stop." RP 70.

waited for the other officers to arrive. RP 73-74. By this time, Powell and Flores were separated from one another by a distance of five to seven feet. RP 77.

The next to arrive at the scene was Officer St. Peter. RP 40. Both Powell and Flores were already on their knees with their hands on their heads when the other officers arrived. RP 73. Once other officers arrived on the scene, McCain and another officer (presumably Officer St. Peter) ordered Mr. Powell back to the officers' location by giving him verbal commands to start walking back toward the sound of the officers' voices while keeping his hands on his head. RP 34. RP 40. RP 75-76. Powell complied with these directives. RP 76. RP 77. Powell did not offer any resistance to McCain's orders. RP 77. Cody Flores also did nothing to obstruct the officers. RP 77-78. At that point in time, Powell was detained and frisked for weapons, and dispatch advised that the warrant for his arrest was confirmed. RP 34. RP 76.

Officer McCain was familiar with Giovanni Powell from several prior dealings, and was familiar with his appearance. RP 43-44. RP 67-68. However, Officer McCain did not immediately recognize Cody Flores. RP 44. RP 70. RP 75.

The next to arrive were Officers Ouimette and Cole. RP 41. Officers Ouimette and Cole arrived from the south of Officer McCain's location while McCain was dealing with Powell. RP 76. Officer Ouimette testified that when he arrived, Officer McCain and Officer St. Peter were already on the scene. RP 87. When

Officer Ouimette arrived, Giovani Powell was being called back to Officer McCain's and Officer St. Peter's location. RP 87. RP 91. Flores was waiting over on the corner with his hands up. RP 87.

Ouimette and Cole began focusing their attention on Mr. Flores. RP 76. Upon contacting the subjects, Officer Quimette drew his gun and held it at the low ready position. RP 15.[2] Prior to this, Officer Ouimette had not observed either of the two subjects holding a gun. RP 93. Mr. Flores was standing with his hands up in what is termed "a common position of disadvantage, and facing away from the officer. RP 18-19. Officer Ouimette was unable to recall whether Flores was still on his knees or standing, but testified that he was already at a position of disadvantage, and facing away from the officers. RP 88-89.

Officer Ouimette then instructed Flores to walk backwards to the sound of his voice. RP 16. Officer Ouimette instructed Flores to keep his hands where Ouimette could see them and to walk backwards to the sound of his voice. RP 87-88. Flores was standing approximately forty to fifty feet away at the time Officer Ouimette addressed him. RP 19. Cody Flores complied with the officer's commands. RP 93. As Officer Ouimette was calling

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[2] Later on, several other officers also arrived on scene. RP 42. The record reflects that ultimately, there were more than five police officers present at the scene and that all of them had their side arms drawn. The parties stipulated that all of the officers who responded had their guns drawn. RP 62.

Flores back to him, Mr. Flores was able to see that the Officer's gun was drawn. RP 16. Officer Ouimette did not yet have any reason to believe that Flores had a gun. RP 17.

After Ouimette had ordered Flores to walk backwards toward the sound of his voice, and when Flores had gotten to a point approximately 20 feet from Ouimette, Flores tried to tell the officer that Giovanni Powell had given him the gun. RP 89. By that point in time, Flores had moved backward approximately ten to fifteen feet from his original location. RP 93. Ouimette instructed Flores to keep facing away from him, and that they would discuss it in a minute. RP 89. Ouimette then asked Flores where the firearm was at that time. *Id.* Flores responded that it was in his pants under his jacket. RP 90. Flores continued to walk backwards as he had been instructed to do. *Id.* Once he got a few feet away from Officer Ouimette, Flores was instructed to go down to his knees, and officers approached him and secured him in handcuffs. *Id.* Officer Ouimette then removed the gun from his waistband. *Id.* Flores was then detained in the back of a patrol vehicle. *Id.*

b. Procedural History

Cody Flores was charged by information with unlawful possession of a firearm in the first degree. CP Sub 1.

A CrR 3.5 hearing was held on December 18, 2013, at which time many of the salient details regarding the stop came to light for the first time. RP 3-55. RP 61-62.

The Defendant filed a motion to suppress evidence on December 19, 2013, arguing that all evidence against him was the product of an unlawful seizure and should be suppressed, citing *State v. Ladson*, 138 Wn.2d 243, 259 (1999). CP Sub 21.

On December 31, 2013, the State filed its response, conceding that both Powell and Flores were seized, and asserting that the seizure of Flores was necessary for the officers to control the scene, and likening the situation to one in which a motor vehicle carrying passengers is pulled over during a traffic stop. CP Sub 31. The State's response did not address the question of whether suppression was the proper remedy. *Id.*

On January 6, 2014, the defense filed its reply brief, challenging the analogy to a traffic stop and pointing out the complete lack of articulable suspicion necessary to justify a detention of the defendant. CP, Sub 32.

On January 7, 2014, the Court of Appeals published its decision in *State v. Z.U.E.*, 178 Wn. App. 769, 792, 315 P.3d 1158, 1170 (2014), *review granted* June, 2014, (holding that under the totality of these circumstances, the court erred in concluding that circumstances supported an investigative stop of ZUE's vehicle).

The same day, Defendant filed additional authority of law, citing the decision in *Z.U.E.*, and analyzing its various holdings as they related to the fact pattern in the case *sub judice*. CP Sub 34.

A suppression hearing was held on January 15, 2014, pursuant to CrR 3.6. RP 56. At the CrR 3.6 hearing, the State

attempted, but failed, to elicit testimony to the effect that Powell was known to law enforcement to be "dangerous." For example, Officer McCain was asked whether he had ever seen pictures of Powell on Facebook. RP 68. McCain responded that he had seen pictures with Powell in them. *Id.* When asked whether Powell was brandishing firearms in those pictures, McCain answered, "I've seen pictures of him holding firearms or friends of his holding firearms." RP 68-69. McCain didn't use the word "brandishing" as the prosecutor had suggested; and he was not even certain that Powell was the person in the photographs who was holding any firearms.

McCain also testified that Powell is in a gang called the Base Block. RP 69.[3] But the witness provided no information about what type of "gang" the Base Block is; what its activities are; or the sorts of people who are members. *Id.* The prosecutor also asked Officer McCain if Mr. Powell was "involved" in a shooting in Spokane. *Id.* McCain responded that Powell had been a material witness and that one of Powell's friends had been killed in Spokane. *Id.* When asked what his knowledge was of the incident, McCain responded, "Just that he was there" for a rap concert. *Id.* A fight broke out in a motel, and one of Powell's best

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[3] "The base" refers to a neighborhood in Moses Lake formerly occupied by an air force base, and is mentioned in passing at RP 69.

friends was shot and killed. RP at 70. This is hardly testimony supporting a conclusion that Powell was dangerous.

McCain offered no testimony that Powell had ever behaved violently toward officers, that he ever resisted arrest, or assaulted anyone, or even that he had any criminal convictions of any kind.

The court also inquired as to the officers' knowledge of Flores. RP 80. The court asked Officer McCain whether he recognized Flores, and the witness responded that he didn't get a good enough look at his face to know who he was. RP 80. Flores did not have any tattoos or distinguishing marks that Officer McCain was able to observe. RP 80-81. Flores was not wearing any clothing that might be considered to be gang-affiliated. RP 81. When asked if the location was considered to be a "high crime area," Officer McCain testified only that there are some residents who live there that "associate with crime." RP 81. McCain also stated that there is a "known gang member" who lived right across the street from where the original incident was alleged to have occurred, but added that this individual was not a part of the situation under investigation. RP 82.

In its opening statement, the State conceded that the anonymous tip alone was insufficient to justify the stop. RP 60. The State's argument focused primarily on the question of whether Officer Ouimette was justified in seizing the Defendant. RP 56-60. RP 95-102. RP 113-120. The State did not address the issue of whether suppression was the appropriate remedy. *Id.*

On January 27, 2014, the trial court entered its decision granting the Defendant's motion to suppress evidence. CP Sub 38. The court also entered an order dismissing the charges without prejudice. CP Sub 40. The State timely filed this appeal.

In its opening brief, the State argues that the officers were justified in treating Flores just like a passenger in a car. Appellant's Opening Brief at 9. The State concludes that the stop of Flores was properly based on Powell's legitimate arrest and the officers' need to secure the scene. *Id.* at 10. The State does not raise the issue of whether suppression is the appropriate remedy.

IV. ARGUMENT

1. STANDARD OF REVIEW

An appellate court reviews disputed findings of fact on a motion to suppress for substantial evidence. *State v. Radka*, 120 Wn. App. 43, 47, 83 P.3d 1038, 1039-40 (2004), *citing State v. Mendez*, 137 Wash.2d 208, 214, 970 P.2d 722 (1999). *See also State v. Dykstra*, 84 Wn. App. 186, 190, 926 P.2d 929, 931 (1996), *citing State v. Hill*, 123 Wash.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence exists where there is sufficient evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Mendez*, 137 Wash.2d at 214.

Conclusions of law in a suppression order are reviewed *de novo*. *Id.* See also *State v. Diluzio*, 162 Wn. App. 585, 590, 254 P.3d 218, 219 (2011), *citing State v. Bailey*, 154 Wash.App. 295, 299, 224 P.3d 852, *review denied*, 169 Wash.2d 1004, 236 P.3d

205 (2010). Furthermore, the question of whether an investigatory stop, or warrantless seizure, is constitutional is a question of law reviewed *de novo*. *Bailey* at 295.

2. THE COURT ERRED IN ENTERING FINDINGS OF FACT 2.1 AND 2.2.

Finding of Fact 2.1 states: "Officer McCain was at the Moses Lake Police Department when he received a dispatch notifying him that Geovanni *(sic)* Powell has pointed a gun at someone's head at 1120 South Alderwood Drive in Moses Lake. The caller stated that she wished to remain anonymous."

There was nothing in the record to support the finding that the caller was a female who stated that she wished to remain anonymous.

The first sentence of the "Statement of the Case" section of Appellant's opening brief, reads as follows: "Officer Kyle McCain was at the Moses Lake Police Department when 911 received a call from a person who initially gave her name, then changed her mind and said she wished to be anonymous." Again, there is nothing in the record to support the claim that the caller was a female who initially gave her name, then changed her name and stated that she wished to remain anonymous.

The trial court held two hearings under CrR 3.5 and 3.6, on December 18, 2013, and January 15, 2014, respectively. VRP 3-55. VRP 56-128. Extensive testimony was taken at these hearings; but at no time did the State elicit testimony to the effect that the

caller was a female, that she initially gave her name, and then changed her mind and said she wished to be anonymous. *Id.* When Officer Oimette was asked, at the CrR 3.5 hearing, what information he had received about the call, the witness answered, "It was information that at 1120 Alderwood, Giovanni Powell had pointed a gun at somebody's head." VRP 14. The witness never stated that the witness had initially provided a name and then changed her mind. *Id.* On the contrary, when asked whether he knew anything about the person who called, Ouimette answered, "I do not know who the person was." *Id.* Also, the witness did not state whether the informant reported the time when the alleged act occurred. *Id.* Ouimette also testified that he did not know how dispatch obtained the information. VRP 14-15.

Officer Kyle McCain also provided testimony at the CrR 3.5 hearing. When asked about the nature of the call, he provided the following testimony:

> Q: Okay. Were you dispatched somewhere?
>
> A: Yes. Dispatch dispatched all Moses Lake patrols to the area of 1120 Alderwood.
>
> Q: Okay. Were you looking for somebody in particular when you were dispatched there?
>
> A: Yes. Dispatch advised that Giovanni Powell had a gun.
>
> Q: Okay. Did they also advise something else about Mr. Powell?

A: I asked dispatch on how they knew Mr. Powell had the gun.

Q: Okay.

A: Whether he was brandishing it, holding it, etcetera, how, you know, how they knew.

Q: And what did they say?

A: They advised us that Giovanni Powell had held a gun to somebody's head.

VRP 31-32. Nowhere in this exchange did Officer McCain testify that the person who called was a female who initially gave her name, and then changed her mind and said that she wished to be anonymous. *Id.*

This subject matter was revisited at the CrR 3.6 hearing, where officer McCain gave the following testimony:

Q: Okay. Where were you dispatched to?

A: To the address of 1120 South Alderwood Drive in Moses Lake.

Q: Okay. What was, what was the information you had that you were dispatched on?

A: Initially we were told that Giovanni was there on scene and had a gun.

Q: Okay. Did you get any information about the caller, the person who told you that information?

A: Information about the caller?

Q: Yes.

A: No, they wanted to remain anonymous.

Q: Okay. Okay. As you responded to that scene, did you learn additional information about Mr. Powell?

A: Yes, I asked questions as far as how this person knew Mr. Powell had a, had a firearm, whether he was brandishing it or they just saw it, and they stated he had it pointed at someone's head, and dispatch also advised that Mr. Powell had a warrant in our Spillman system.

VRP 66-67. Again, this exchange does not support the allegation that the caller provided a name, and then changed her mind, and decided that she wished to remain anonymous. *Id.*

Officer Ouimette testified at the same hearing as follows:

Q: Okay. Where did you respond to?

A: To 1120 South Alderwood Drive.

Q: Okay. What kind of call was it?

A: It was a report of Giovanni Powell holding a gun to another subject's head.

Q: Okay. Was it... Were you the first officer to respond to that call?

A: I was not.

Q: Okay. Did you hear any details about that call or ask any questions about it?

A: I didn't ask any questions, but I heard Officer McCain getting information. The information I heard was basically that he, Giovanni Powell, had a firearm at the

> location, 1120 South Alderwood. Officer McCain asked how they—or what was he doing with the gun, and he explained—or the dispatcher said the he was holding it to somebody's head, according to the reporting party.
>
> Q: Uh-huh. (affirmative).
>
> A: Also dispatch, prior to arrival, dispatch advised that the person reporting it wanted to remain anonymous and they had disconnected and were unable to get them back on the line.

VRP 86-87. In Appellant's opening brief, Appellant does not cite to sworn testimony in support of a number of substantive facts, but cites instead to statements contained in CP 59-61, the written findings prepared by the Prosecuting Attorney's office and entered by the court. *See* Appellant's Brief at 1-2. Respondent assigns error to the court's finding of fact 2.1, as stated herein, to the extent that it is not supported by the testimony presented at either of the two hearings.

The Respondent also assigns error to Finding of Fact 2.2, which is also not entirely consistent with the testimony presented at trial. Finding of Fact 2.2 states: "Officer McCain was familiar with Giovanni Powell. He knew that Powell was in Facebook pictures holding firearms, that he was associated with gang members, and was a material witness in a gang homicide in Spokane." This language is misleading.

Officer McCain did testify that he was familiar with Giovanni Powell from several prior dealings, and was familiar with his appearance. RP 43-44. RP 67-68. Officer McCain was also asked whether he had ever seen pictures of Powell on Facebook. RP 68. McCain responded that he had seen pictures with Powell in them. *Id.* When asked whether Powell was brandishing firearms in those pictures, McCain answered, "I've seen pictures of him holding firearms <u>or</u> friends of his holding firearms." RP 68-69 (emphasis supplied). This testimony does not support the language of Finding 2.2, which states that McCain <u>knew</u> that Powell was in Facebook pictures holding firearms. McCain's testimony actually reflects considerable uncertainty about what McCain actually remembered in that regard; as McCain was not certain that Powell was the person in the photographs who was holding the firearms.

McCain also testified that Powell is in a gang called the Base Block. RP 69. But the witness provided no information about what type of "gang" the Base Block is; what its activities are; or the sorts of people who are members. *Id.* The prosecutor also asked Officer McCain if Mr. Powell was "involved" in a shooting in Spokane. *Id.* McCain responded that Powell had been a material witness and that one of Powell's friends had been killed in Spokane. *Id.* When asked what his knowledge was of the incident, McCain responded, "Just that he [Powell] was there" for a rap concert. *Id.* A fight broke out in a motel, and one of Powell's best friends was shot and killed. RP at 70. This is hardly testimony

supporting a conclusion that Powell was dangerous. McCain offered no testimony that Powell had ever behaved violently toward officers, that he ever resisted arrest, or assaulted anyone, or even that he had any criminal convictions of any kind.

3. BOTH THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT WARRANTLESS SEIZURES UNLESS A NARROW EXCEPTION APPLIES.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures. The due process clause of the Fourteenth Amendment extends this right to protect against intrusions by state governments. *Mapp v. Ohio,* 367 U.S. 643 (1960). The federal constitution, however, only establishes the minimum level of protection for individual rights. *State v. Chrisman*, 100 Wn.2d 814, 817 (1984).

"It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 W.2d 486, 493 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. *See State v. Ladson*, 138 Wn.2d 343 (1999); *State v. Ferrier*, 136 Wn.2d 103, 111 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1 (1996); *State v. Young*, 123 Wn.2d 173, 180 (1994); *State v. Williams*, 102 Wn.2d 733 (1984). Indeed, the scope of the protections offered by article I, section 7 is "not

limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *Parker*, 139 Wn.2d at 494 (quoting *State v. Myrick*, 102 Wn.2d 506, 511 (1984)).

4. WARRANTLESS SEIZURES ARE PRESUMPTIVELY UNREASONABLE.

Warrantless seizures are *per se* unreasonable under both the state and federal constitutions. *State v. Walker*, 136 Wn.2d 678, 682 (1998); *State v. Chrisman*, 100 Wn.2d 814, 818 (1984); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The government bears the heavy burden of establishing an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin,* 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

5. THE DEFENDANT WAS SEIZED.

A person is seized in the constitutional sense when his or her freedom of movement is restrained. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Restraint amounting to a seizure may arise either from the use of physical force or through a show of authority. *State v. Avila-Avina*, 99 Wn. App. 9, 14 (2000); *State v. Young*, 135 Wn.2d 498, 510 (1998)(quoting *State v. Stroud*, 30 Wn. App. 392, 394-95 (1981) *review denied*, 96 Wn.2d 1025 (1982)). The relevant inquiry for the court is whether, in view of all of the circumstances surrounding the incident, "a reasonable person would have felt free to leave or otherwise

decline the officer's requests and terminate the encounter." *State v. Thorn*, 129 Wn.2d 347, 352-53 (1996). The court must look objectively at the totality of circumstances in making its determination. *State v. Coyne*, 99 Wn. App. 566, 571 (2000).

In determining whether a reasonable person in the defendant's position would have felt free to terminate the encounter, the defendant's age is a relevant factor. *J.D.B. v. N. Carolina*, 131 S.Ct. 2394, 2397, 180 L.Ed.2d 310 (2011) (holding *Miranda* custody analysis includes whether defendant is a child because the objective "reasonable person" standard includes relevant circumstances like age); *see also Id.* at 2404 (age is also part of "reasonable person" inquiry in tort law). "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave." *J.D.B.*, 131 S.Ct. at 2398-99. At the the time of this encounter, the Defendant was 18 years of age, according to the Information filed by the State. CP Sub 1, at page 2.

Although a police officer has not necessarily seized an individual merely by approaching him in a public place and asking him questions, an interaction that starts as a "social contact" may escalate into a seizure. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009). Whether an individual was seized turns not on the officer's perceptions of what occurred but on the defendant's reasonable evaluation of the situation. *State v. Barnes*, 96 Wn. App. 217, 223-24 (1999). The officer's subjective beliefs or

intentions in this regard are immaterial unless communicated to the defendant. *Id.* Applying this standard, Washington courts have found that permissive encounters "ripen into seizures when an officer commands the defendant to wait, retains valuable property, or blocks the defendant from leaving." *State v. Coyne*, 99 Wn. App. at 573. *See also State v. Young*, 167 Wn.App. 922, 275 P.3d 1150, 1155 (2012) (two officers seized defendant when "[t]hey stood approximately 5 feet from [her], each at 45–degree angles from her while her back was to a wall, and asked for the last four digits of her social security number"). When an officer takes custody of a citizen's identification or driver's license, for example, the citizen himself is seized within the meaning of the Fourth Amendment. *Coyne*, 99 Wn. App. at 572 (retaining suspects coat and license during warrant check was unlawful seizure); *State v. Thomas*, 91 Wn. App. at 200-201 (seizure occurred when officer retained suspect's license while taking three steps to back of car in order to conduct warrant check via hand-held radio); *State v. Dudas*, 52 Wn. App. 832, 834-35 (1988)(seizure occurred when deputy retained pedestrian's ID for four minutes) *review denied*, 112 Wn.2d 1011 (1989); *State v. Aranguren*, 42 Wn. App. 452, 456-57 (1985)(seizure occurred when deputy retained bicyclists' identification cards during warrant check).

Police need not actually take physical custody of the defendant or his belongings to seize him in the constitutional sense. In *State v. Ellwood* the court found that an officer's request

for the defendant to "wait right here" constituted a seizure. 52 Wn. App. 70, 73 (1988); *see also State v. Barnes*, 96 Wn. App. 217 (1999) (communicating mistaken belief that defendant had outstanding warrant and asking him to "wait" amounted to seizure). Similarly, a seizure occurs when police officers pull up behind a parked vehicle and activate their emergency lights. *State v. Markgraf*, 59 Wn. App. 509, 511 (1990); *State v. DeArman*, 54 Wn. App. 621 (1989); *State v. Stroud*, 30 Wn. App. 392, 396 (1981) *review denied*, 96 Wn.2d 1025 (1982); *State v. Gantt*, 163 Wn.App. 133, 141, 257 P.3d 682, 687 (2011).

Police may seize an individual through commands or requests even if the words used do not explicitly implicate the freedom to walk away. For example, a passenger in an automobile is seized when an officer stops the car in which he is riding, even though the passenger is theoretically free to leave. *Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400; 168 L. Ed. 2d 132 (2007). Furthermore, a passenger in an automobile is seized when an officer asks that person for identification. *State v. Rankin*, 151 Wn.2d 689, 696 (2004). *See also State v. Richardson*, 64 Wn. App. 693, 696 (1992)(police directive to empty pockets and place hands on patrol car transformed encounter into a seizure); *State v. Pressley*, 64 Wn. App. 591, 598 (1992) (implicitly concluding that officer's request to defendant "to remove her hand or to show him what was in it" was a *Terry* stop requiring legal justification); *State v. O'Day*, 91 Wn. App. 244 (1998)(car passenger seized when

ordered out of car, purse placed out of reach, asked about drugs and weapons, and asked for consent to search; *State v. Carney*, 142 Wn. App. 197, 202 (2007) (command that defendant raise hands and provide identification constituted a seizure). A request for consent to search may also transform what would otherwise be a social contact into a seizure. *State v. Soto-Garcia*, 68 Wn. App. 20, 25 (1992). *See also State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009) (Social contact escalated to seizure when second officer arrived but did not participate in interaction, initial officer directed defendant to remove hands from pockets and then asked for consent to frisk). Other factors that suggest a police officer seized a subject are "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92, 95 (2009) (quoting *Young*, 135 Wash.2d at 512, 957 P.2d 681).

6. THE SEIZURE WAS UNLAWFUL.

In *Terry v. Ohio*, the United States Supreme Court recognized a narrow exception to the general rule requiring probable cause before a seizure is permitted. 392 U.S. 1 (1968). Under *Terry*, a police officer may briefly detain and question an individual if the officer has a reasonable and articulable suspicion of criminal activity. The officer must be able to point to "specific and articulable facts which, taken together with rational inferences

from those facts reasonably warrant the intrusion." *Terry*, 392 U.S. at 21; *See also State v. Tocki*, 32 Wn. App. 457, 460 (1982) ("investigative stops are carefully circumscribed--the officer's suspicion must be based on specific, objective facts."). The State bears the burden of establishing a lawful basis for any *Terry* stop. *State v. Alcantara*, 79 Wn. App. 362, 365 (1995).

Under Washington law, the police may not detain a citizen unless there is a substantial possibility that criminal conduct has occurred or is about to occur. *State v. Mendez*, 137 Wn.2d 208, 223 (1999)(quoting *State v. Kennedy*, 107 Wn.2d 1, 6 (1986)); *See also State v. Walker*, 66 Wn. App. 622, 626 (1992).

"[C]ircumstances must be more consistent with criminal than innocent conduct." *State v. Mercer*, 45 Wn. App. 769, 774 (1986). "Innocuous facts" do not justify a stop. *State v. Armenta*, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997). Moreover, the test is an objective one. Because there is no "good faith" exception to the exclusionary rule in Washington, the subjective beliefs of the officer are irrelevant. *State v. White*, 97 Wn.2d 92, 105 (1982); *State v. Sanchez*, 74 Wn. App. 763 (1994), *review denied*, 125 Wn.2d 1022 (1995); *State v. Trenidad*, 23 Wn. App. 418 (1979).

In order to meet the *Terry* standard, an officer's suspicion must be individualized. *State v. Parker*, 139 Wn.2d 486, 497-98 (1999); *State v. Richardson*, 64 Wn. App. 693, 697 (1992). *State v. Thompson*, 93 Wn.2d 838, 841 (1980). Defendant's mere proximity to others independently suspected of criminal activity

does not justify the stop. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525, 527 (1980), citing *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); *State v. Larson*, 93 Wash.2d 638, 611 P.2d 771 (1980). A generalized suspicion based purely on an individual's presence in a particular area likewise cannot justify a *Terry* stop. *Sibron v. New York*, 392 U.S. 40, 62 (1968). Particularized suspicion requires "some suspicion of a particular crime or a particular person, and some connection between the two." *State v. Martinez*, 135 Wn. App. 174, 182 (2006). In *State v. Larson*, the Washington Supreme Court emphasized that an individual's constitutional protections do not evaporate in any particular area merely because of the local crime rate:

> It is beyond dispute that many members of our society live, work, and spend their waking hours in high crime areas, a description that can be applied to parts of many of our cities. That does not automatically make those individuals proper subjects for criminal investigation.

93 Wn.2d 638, 645 (1980). *See also Brown v. Texas*, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct"); *State v. Martinez*, 135 Wn.App. 174 (2006) (presence of unknown individual near parked cars in apartment complex where there had been reported car prowls did not justify seizure, even when individual walked quickly away and told officer he did not live there); *State v. Diluzio*, 162 Wash.App. 585, 593, 254 P.3d

218, 221 (2011) (defendant's having a conversation with a woman who got into the passenger side of his vehicle in area known for prostitution did not justify seizure); *State v. Doughty*, 170 Wash.2d 57, 63, 239 P.3d 573, 575 (2010) ("[p]olice may not seize a person who visits a location—even a suspected drug house—merely because the person was there at 3:20 a.m. for only two minutes").

Similarly, the fact that an individual is in the company of others suspected of crime does not establish the necessary reasonable articulable suspicion. *State v. Lennon*, 94 Wn. App. 573, 580, review denied, 138 Wn.2d 1014 (1999). "Merely associating with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution." *State v. Broadnax*, 98 Wn.2d 289, 296 (1982). In *Sibron v. New York*, a companion case to *Terry*, the Supreme Court stated in no uncertain terms that:

> The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.

392 U.S. 40, 62 (1968).

The Washington Supreme Court affirmed the principle of individualized suspicion in *State v. Larson*, holding that a stop based on an offense committed by one individual in a vehicle cannot be used to detain and question other occupants of that vehicle. 93 Wn.2d at 641-42. Indeed, the *Larson* Court stressed that an offense committed by the driver of a car "does not

reasonably provide an officer with grounds to require identification of individuals in the car other than the driver, unless other circumstances give the police independent cause to question passengers." *Id.* at 642 [emphasis added]. *See also State v. Rankin*, 151 Wn.2d 689, 695 (2004) (officer must have independent cause to ask passenger for identification).

7. THE POLICE EXCEEDED THE PERMISSIBLE SCOPE OF A *TERRY* STOP.

A *Terry* stop must be justified not just at its inception but also in its scope. *State v. Williams*, 102 Wn.2d 733, 739 (1984). To pass constitutional muster, the scope of an investigatory stop must be strictly limited in both duration and focus. It must last only so long as is necessary to confirm or dispel the officer's initial suspicion, and the officer must use the least intrusive means available to do so. *State v. Williams*, 102 Wn.2d at 738 (1984)(citing *Florida v. Royer*, 460 U.S. 491, 500(1983)); S*tate v. Sweet*, 44 Wn. App. 226, 232 (1986). The police failed to use the least intrusive means available in dealing with Cody Flores.

When police conduct a *Terry* stop, the investigation must immediately focus on resolving their initial suspicions. *State v. Williams*, 102 Wn.2d at 738 ("the temporary seizure of the defendant must relate to the purpose of the investigation"). In the case *sub judice*, the seizure of the defendant bore no relationship whatsoever to the purposes at hand, to wit, of arresting Powell.

A citizen's right to be free of governmental interference with his movement means, at a minimum, that when such interference must occur, it be brief and related directly to inquiries concerning the suspect. *Id.* at 741. Where police questioning extends beyond the initial basis for the stop and into an unrelated criminal investigation, the permissible scope of the stop is exceeded and the detention becomes unlawful. *State v. Henry*, 80 Wn. App. 544, 551 (1995). The investigation must be as brief as possible. The United States Supreme Court has made clear that

> ...the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.

United States v. Place, 462 U.S. 696, 709 (1983). In evaluating the length of the detention, the court should consider whether the police diligently pursued the investigation. *Id.*

Police may not use innocuous facts to justify extending the duration of the detention or expanding the scope of the investigation. *State v. Armenta*, 134 Wn.2d 1, 12-14 (possession of large amount of cash is an innocuous fact that cannot justify further investigation); *State v. Tijerina*, 61 Wn. App. 626, 629 (1991)(bars of soap); *State v. Henry*, 80 Wn. App. 544 (nervousness during traffic stop).

An officer may expand the scope of a *Terry* stop only if articulable facts the officer discovers during the stop create a reasonable suspicion of criminal activity. *State v. Veltri*, 136

Wn.App. 818, 822 (2007) (quoting *State v. Armenta*, 134 Wn.2d 1, 15-16 (1997)). There is a three-factor test courts use to decide if an officer has impermissibly extended a *Terry* stop. Those factors are: "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." *State v. Williams*, 102 Wn.2d 733, 740 (1984).

Here, it may be argued that the officers had no justification for detaining Cody Flores for any length of time; for they had no reason to suspect him of criminal activity and no reason to believe that he posed any type of danger to them. But even assuming, *arguendo*, that his detention was somehow justified by the need to arrest Powell, that justification evaporated the moment that Powell, having complied with officers directives that he get down on his knees, continued to follow Officer McCain's orders, first to distance himself from Flores, and then to begin walking backwards to the sound of McCain's voice. At this point in time, the scene was secured, Powell was safely under control, and there was no need to further intrude on Flores' liberty by ordering him to walk backwards to the sound of Officer Ouimette's voice. Instead, Flores should have been told that he was free to leave.

8. THE INFORMANT'S TIP DID NOT PROVIDE ADEQUATE BASIS FOR THE DETENTION OF THE DEFENDANT.

A. The *Aguilar-Spinelli* Test Determines Whether An Informant's Tip Provides an Adequate Basis For a *Terry* Stop.

In some circumstances an informant's tip may create the required reasonable suspicion for a *Terry* stop. *Adams v. Williams*, 407 U.S. 143, 146-47, 32 L.Ed.2d 612, 92 S.Ct. 1921 (1972). This occurs only if the tip exhibits sufficient indicia of reliability. *Alabama v. White*, 496 U.S. 325, 326-27, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990); *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980).

When the State argues a tip provides sufficient indicia of reliability to support reasonable suspicion under article 1, section 7, the State must prove that both (1) the informant is reliable, and (2) the informant's tip is reliable. *State v. Hart*, 66 Wn. App. 1, 8, 830 P.2d 696 (1992) *(citing Sieler*, 95 Wn.2d at 48).

The Washington Supreme Court adopted the two-part standard for the *Terry*-stop context in *Sieler*, 95 Wn.2d at 46-49. The U.S. Supreme Court subsequently abandoned the two-part test for evaluating whether an informant's tip provided probable cause to support a warrant in *Illinois v. Gates*, 462 U.S. 213, 230, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983). However, Washington has declined to follow *Gates*. In *Jackson*, the Washington Supreme Court adhered to *Aguilar-Spinelli*, and held that under article 1, section 7, an informant's tip does not provide probable cause to support a warrant unless the affidavit establishes both (1) the credibility of the informant and (2) the basis of the information. *Jackson*, 102 Wn.2d, 432, 433 (1984). In rejecting the reasoning of *Gates*, the *Jackson* court cited *Sieler* extensively. *See Jackson*,

102 Wn.2d at 439 (*citing Sieler*, 95 Wn.2d at 46-47) and 444-45 (*citing Sieler*, 95 Wn.2d at 48-49). *Sieler* was a *Terry*-stop case.

Therefore, in *Jackson*, the Washington Supreme Court reaffirmed the two-pronged test for evaluating the reliability of an informant's tip for both the probable cause and reasonable suspicion contexts. Division Three of the Court of Appeals has continued to follow *Sieler* and apply the two-pronged test to the *Terry* context. *See Jones*, 85 Wn. App. at 799-800. In *Jones* Division Three ruled:

> "Indicia of reliability" requires: (1) knowledge that the source of the information is reliable, and (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation.

Jones, 85 Wn. App. at 799-800 (*citing Sieler*, 95 Wn.2d at 47-49).

B. The Informant's Tip Did Not Meet the *Aguilar-Spinelli* Standard

To satisfy the *Aguilar-Spinelli* test, police must establish (1) that the informant has a factual basis for his or her allegations ("basis of knowledge" prong), and (2) that the information is reliable and credible ("veracity" prong). *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969).

i. The State Has Failed To Establish The Informant's Basis For Knowledge.

The "basis for knowledge" prong requires that police explain the manner in which the informant acquired his information. An informant's credibility is enhanced when he or she is an eyewitness. *State v. Z.U.E.*, 178 Wn. App. 769, 785, 315 P.3d 1158, 1167 (2014), *citing State v. Lee*, 147 Wash.App.912, 918, 199 P.3d 445 (2008). However, "officers may not presume that informants' tips are eyewitness accounts." *Id.* Establishing a factual basis for the informant's allegations is essential to ensure that the information communicated to police was not based on sheer speculation or provided by an honest informant who simply misconstrued innocent conduct. *State v. Sieler,* 95 Wn.2d 43, 48-49 (1980). To meet the basis of knowledge prong of the *Agular-Spinelli* test, an informant's tip must include objective facts that "involve criminal activity, not merely innocuous information such as an accurate description of the subject or his or her location. *Z.U.E.*, 178 Wn. App.at 785, *citing State Hopkins*, 128 Wash.App. at 862–64, 117 P.3d 377 (2005).

The tip must be "reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.* In *Z.U.E.* an informant called 911 and reported that the caller had observed a young woman hand a gun to a man. The caller said that the young woman was approximately 17-years-old, but the caller did not explain the factual basis for that age estimate. The court held that the tip did not have a sufficient factual basis because possessing a gun would not have been a crime if the woman were an adult:

> If the woman was not a minor, there was no basis for suspecting that her possession of a firearm was unlawful because carrying a gun is not automatically a crime. But the caller did not explain the factual basis for the estimate of the young woman's age. The estimate was a "bare conclusion unsupported by any factual foundation." Sieler, 95 Wash.2d at 49, 621 P.2d 1272. As a result, we hold that the factual basis requirement was not satisfied for the officers' suspicion that the woman was involved in criminal activity.

Z.U.E., 178 Wn. App. at 786, 315 P.3d at 1167 (2014).

ii.The State Has Failed To Establish The Informant's Veracity.

Merely providing a name to police does not itself establish an informant's veracity. *Z.U.E.*,178 Wn.App. at 783. A named but otherwise unknown informant should be treated as an unidentified informant. *State v. Sieler*, 95 Wn.2d 43, 48 (1980). An unidentified informant is not reliable. *State v. Lesnick*, 84 Wash. 2d 940, 530 P.2d 243 (1975). As stated above, the State failed to introduce any evidenence that the informant was ever identified.

iii.The State Has Failed To Show Corroboration.

If the informant's tip fails under either or both of the two prongs of *Aguilar-Spinelli*, probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 438, 688

P.2d 136, 140 (1984). However, police must corroborate more than innocuous details. *Z.U.E.*, 178 Wn.App. at 787 (merely confirming vehicle description and description of suspect without confirming suspect was involved in illegal activity does not satisfy corroboration requirement). "Corroboration of public or innocuous facts only shows that the informer has some familiarity with the suspect's affairs. Such corroboration only justifies an inference that the informer has some knowledge of the suspect and his activities, not that criminal activity is occurring." *State v. Hart*, 66 Wash. App. 1, 9, 830 P.2d 696, 701 (1992) (*citing State v. Jackson*, 102 Wash.2d 432, 438, 688 P.2d 136 (1984)).

Hence, the observation of Powell within a short distance of the location where he was reportedly seen pointing a gun at someone's head only corroborates an innocent detail of the report, to wit, his mere presence in close proximity to the address. Without more, this presence in a geographical location is merely an innocuous fact justifying an inference that the informer has some knowledge of Powell and his activities, but not that criminal activity had occurred.

9.THERE WAS NO ARTICULABLE SUSPICION, BESIDES A WARRANT FOR ARREST, JUSTIFYING THE SEIZURE OF POWELL, AND NO REASON TO BELIEVE THAT HE WAS DANGEROUS

a. The anonymous tip was insufficient.

At the trial court below, the State conceded that the anonymous, uncorroborated tip received by police dispatch was

insufficient, in and of itself, to establish articulable suspicion to detain Giovani Powell. *See* State's Response to Defendant's Motion to Suppress, CP Sub 31. RP 60. That anonymous tip made no mention of an accomplice or companion, and hence, there was no articulable suspicion to detain Mr. Flores either.

Powell's detention was justified solely based on the warrant for his arrest. Information that a person has a warrant for his arrest, supplied to a peace officer after a computer check, supplies probable cause to arrest that person. *State v. Balch*, 114 Wn. App. 55, 64, 55 P.3d 1199, 1203 (2002).

b. Neither Officer McCain nor Officer Ouimette had any credible information that Powell or Flores was armed or dangerous.

The information provided by dispatch was that Giovanni Powell had pointed a gun at somebody's head; but no information was provided about the person who provided that information, and no information was provided indicating that Flores might pose any danger to the officers. RP 14. RP 66-67. RP 86.

Furthermore, as previously mentioned, even if the officers did have credible information providing articulable suspicion to detain Powell, an individual's mere proximity to others independently suspected of criminal activity does not justify an investigative stop; the suspicion must be individualized. *State v. Richardson*, 64 Wn. App. 693, 697, 825 P.2d 754, 757 (1992), *citing State v. Thompson*, 93 Wash.2d 838, 841, 613 P.2d 525 (1980).

Richardson held that an investigative seizure was improper on facts similar to those presented herein. A police officer spotted Richardson walking at approximately 2:50 a.m. with another person whom police believed to be dealing in drugs. 64 Wash.App. at 694–95, 825 P.2d 754. The officer stopped both men. *Id.* The court held the investigative detention to be unlawful. "At the time of the seizure, [the officer] knew only that Mr. Richardson was in a high crime area, late at night, walking near someone the officer suspected of 'running drugs'." *Id.* at 697, 825 P.2d 754. In *Richardson*, then, consorting with a suspected drug dealer late at night in a high-crime area did not justify a *Terry* stop.

A person's presence in a neighborhood known to be high crime area does not, by itself, supply a reasonable suspicion to detain a person. *State v. Ellwood*, 52 Wash.App. 70, 74, 757 P.2d 547 (1988); *accord, State v. Dudas,* 52 Wash.App. 832, 835, 764 P.2d 1012 (1988), *review denied*, 112 Wash.2d 1011 (1989).

The case cited in *Richardson* (*State v. Thompson)*, is even more directly on point, because it involves a situation in which an informant had reported a gun being brandished, which is the very same type of information that the State relies upon here to conjure up the specter of threats to officer safety.

The salient facts of *State v. Thompson*, 93 Wn.2d 838, 839-40, 613 P.2d 525, 526 (1980), are that a Washington State trooper received a report via dispatch alleging that an occupant of a Cadillac was waving a handgun. *Id.* Shortly thereafter, the trooper

saw a car fitting the description leaving a shopping complex. *Id.* The trooper followed the Cadillac and observed it meandering in the parking lot and then coming to a stop beside a green Chrysler, which was parked in a spot that was somewhat isolated from other vehicles in the lot.

The trooper parked his vehicle directly in front of the Cadillac and then ordered the occupants out of the car. At this time Mr. Thompson, who had been driving the Chrysler, exited his car and started to walk "rapidly" toward the shopping mall. *Id.* The trooper ordered him not to leave. *Id.*

Another unit then arrived on scene, and one of the officers from the second unit asked Thompson to identify himself. *Id.* This information was run via dispatch, and the officers were then advised that Thompson was wanted on a $39 traffic warrant. *Id.* Thompson was then placed under arrest and searched incident to arrest. During the search, contraband was found was discovered, which led in turn to the impoundment of Thompson's vehicle, where police discovered more contraband during an inventory search. *Id.*

Thompson was charged with possession of heroin. He moved to suppress the contraband seized during the police investigation. *Id.* His motion was denied, and he was found guilty at trial. *Id.* Thompson appealed on a number of grounds, including a challenge to the lawfulness of the initial detention. *Id.* The Court of Appeals affirmed the conviction in a split decision. *Id.* The

Washington Supreme Court granted review as to this issue. *State v. Thompson*, 93 Wash.2d 1009 (1980).

Of all the various cases cited by the parties in the case at bar, *Thompson* is arguably the most relevant for several reasons. In the first place, the entire investigation in *Thompson* began with a citizen's report of someone brandishing a firearm.[4] Secondly, as the radio report stated, the pistol was brandished solely by the occupants of the Cadillac and not by Thompson. 93 Wn.2d at 841. Thirdly, the State did not contend that the officers suspected Thompson of any specific misconduct, and could point to no other circumstances that might raise a reasonable suspicion of criminal conduct as to Thompson. 93 Wn.2d at 842.

The same is true in the case of Flores. Not one of the State's witnesses could point to any circumstances that might indicate that Flores had been engaged in criminal conduct—only that he was seen in close proximity of another individual independently accused of being armed and of having brandished a firearm. Finally, just as in the case of Mr. Flores, the officer's testimony at the suppression hearing in *Thompson* illustrated that the necessary objective basis for the stop was lacking. 93 Wn.2d 842. The court summarized the officer's testimony as follows:

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[4] *Thompson* is distinguished from *Z.U.E*, insofar as *Thompson* appears to have treated the informant's tip as a given, without any analysis of in informant's reliability or basis of knowledge.

> All that I can say is that I had a suspicious circumstance. Call it instinct or whatever. Something told me that I should keep this gentleman long enough to I.D. him. At that time things happened very quickly. And I'm really not totally sure what went through my mind. It's just that I was I think an instinct is a fair statement.

The lower court found that this "instinct" formed a reasonable ground for the stop and that the lack of a specific reason was not determinative. *Id.* But our Supreme Court reversed, finding that this "inarticulate hunch" was precisely the type of subjective basis for a stop that was constitutionally insufficient, because it created a risk that a person might be detained "solely at the unfettered discretion of officers in the field." *Id., citing Brown*, 443 U.S. at 51, 99 S.Ct. at 2640.

Officer Ouimette (the officer who seized Cody Flores) gave testimony at the suppression hearing that was strikingly similar to the testimony offered by the arresting officer in *Thompson.* Ouimette never stated that he seized Mr. Flores because he thought he might pose any sort of risk to officer safety based on objective facts. *See* RP 88. Instead, Oimette described the very same type of hunch as the arresting officer in *Thomspon:*

> Q: Okay. What made you decide he needed to be called back to you?
>
> A: The -- At the point when I got there, it appeared he was... Based on - - I, I don't know what Officer McCain observed when he got there, but he was at a position of disadvantage. My concern was that there was

a firearm we were responding to. It appeared to me he was involved in that somehow. RP 88.

Just as in *Thompson*, Ouimette could point to no specific information or observation that might have led him to believe that Flores was dangerous or that he had been involved in criminal activity. The only grounds Ouimette could articulate was that fact that Flores has been in close proximity to Powell, who was the person who had been named by the anonymous informant.

When a stop is not grounded in specifically articulated facts, "the risk of arbitrary and abusive police practices exceeds tolerable limits." *State v. Thompson*, 93 Wn.2d 838, 843, 613 P.2d 525, 528 (1980), *citing Brown*, at 52, 99 S.Ct. at 2641. Just as in *Thompson*, the seizure of Cody Flores violated the Fourth Amendment because the officers lacked a reasonable suspicion, based on objective criteria, to believe that Mr. Flores was involved in criminal conduct.

The State never managed to establish that Powell and Flores were present in a high crime area. When the prosecutor attempted to elicit such information, Officer McCain testified only that there are some residents who live there that "associate with crime." RP 81. McCain also stated that there is a "known gang member" who lived right across the street from where the original incident was alleged to have occurred, but added that this individual was not a part of the situation under investigation. RP 82. McCain also never testified as to the nature of the alleged

gang, its activities, or as to any specific reason or reasons why the alleged "gang member" might pose a threat to officer safety in this situation. *Id.* Such testimony is insufficient to establish that this was a high-crime area or that the suspects' presence there posed any kind of danger to the officers. McCain never alleged that there was any sort of affiliation between this person and Giovani Powell. *Id.*

10. THERE WAS NO CREDIBLE INFORMATION THAT POWELL WAS ARMED OR DANGEROUS, OR THAT HE PRESENTED A THREAT TO OFFICER SAFETY.

The State relies on the automobile stop analogy, which is not precisely fitting in the case of two individuals seized by the police while walking town the street together. But even in the context of an automobile stop, it is only where a police officer is able to articulate an objective rationale based specifically on officer safety concerns, that the officer, as a means of controlling the scene, may direct passengers to remain in or exit a vehicle stopped for a traffic infraction. *State v. Horrace*, 144 Wn.2d 386, 399, 28 P.3d 753, 760 (2001) *citing Mendez*, 137 Wash.2d at 220–21, 970 P.2d 722.

At the suppression hearing the State asked Officer McCain a number of questions designed to elicit information to the effect that Powell was perceived as a threat to officer safety. For example, Officer McCain was asked whether he had ever seen pictures of Powell on Facebook. RP 68. McCain responded that he had seen pictures with Powell in them. *Id.* When asked whether Powell was brandishing firearms in those pictures, McCain answered,

holding firearms." RP 68-69. It was obvious from McCain's response that he could not remember specifically ever having seen a photograph of Powell brandishing a firearm. Indeed, there is nothing about this testimony as to suggest that McCain ever regarded Powell as a threat.There was no testimony that Powell was known to be violent. It is not illegal to own or possess a firearm. And McCain's testimony was unclear as to whether any photographs actually depicted Powell with a gun or whether it was someone else in the picture who held a gun. *Id.*

McCain also testified that Powell is in a gang called the Base Block. RP 69. But McCain never provided any kind of details about this gang such as the types of activities the gang is known to be involved in, whether it is a criminal gang or simply an innocuous group of individuals. The prosecutor also asked Officer McCain if Mr. Powell was "involved" in a shooting in Spokane. *Id.* McCain responded that Powell had been a material witness in a case and that one of Powell's friends had been killed in Spokane. *Id.* McCain never stated that Powell was involved in any way in the shooting. When asked what his knowledge was of the incident, McCain responded that Powell had been in Spokane to attend a rap concert, and that during his stay, a fight had broken out in a motel, and one of Powell's best friends was shot and killed. RP at 69-70. This evidence does not show that Powell was dangerous.

11. THE SEIZURE RIPENED INTO AN UNLAWFUL ARREST DUE TO THE OFFICERS' UNJUSTIFIABLE USE OF FORCE AGAINST CODY FLORES.

By drawing weapons and ordering Cody Flores first to get on his knees, and then later to walk backwards to the sound of their voices, even after he was separated from Giovanni Powell, the officers collectively placed the defendant into custody, i.e., arrested him, without justification.

Courts "examine the 'totality of the circumstances' in deciding 'whether an investigative detention has ripened into an arrest,' " focusing "on the perspective of the person seized, rather than the subjective beliefs of the law enforcement officers." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1176 (9th Cir. 2013), *citing United States v. Charley*, 396 F.3d 1074, 1080 (9th Cir.2005) (quoting *Eberle v. City of Anaheim*, 901 F.2d 814, 819 (9th Cir.1990)). "The question is thus whether a reasonable innocent person in [the same] circumstances would not have felt free to leave after brief questioning." *Id.* (internal quotation marks omitted). While this standard suggests that "[u]nder ordinary circumstances, drawing weapons and using handcuffs are not part of a *Terry* stop," *United States v. Miles*, 247 F.3d 1009, 1012 (9th Cir.2001), the courts have recognized some circumstances in which it is appropriate for an officer to use a level of force that would ordinarily bring to mind arrest, i.e.: (1) "where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight;" (2) "where the police have information that the suspect is currently armed;" (3) "where the stop closely follows a violent crime;" and (4) "where the police

have information that a crime that may involve violence is about to occur." *Washington v. Lambert*, 98 F.3d 1181, 1189 (9th Cir.1996); *see United States v. Buffington*, 815 F.2d 1292, 1300 (9th Cir.1987) ("The use of force during a stop does not convert the stop into an arrest if it occurs under circumstances justifying fears for personal safety.").

Examining these factors in turn, it appears that there was no evidence that the suspect was uncooperative; Cody Flores complied with all of the officers' commands.

Turning to the second factor, the officers had no basis for believing that the defendant was then armed or dangerous.

Turning to the third factor, there was no credible evidence that the contact with Flores closely followed a violent crime. The information supplied by the anonymous caller does not qualify for reasons previously discussed *supra* at 17 (no information provided as to *when* the alleged incident had occurred); and at 33-39 (no showing as to the informant's veracity, reliability, credibility, or basis of knowledge, and no corroboration of the information provided).

Finally, the police had no reason to believe that a violent crime was about to occur. For these reasons, the police violated the Defendant's constitutional rights by pointing a gun at him, shouting commands, and forcing him to walk backwards to the sound of their voices, even after he had been separated from his companion, who was in the process of being arrested.

Through the unjustified show of force, Officer McCain and Officer Ouimette collectively transformed a *Terry* stop into a custodial arrest that was unsupported by probable cause. The fruits of such seizure/arrest, including the gun and the defendant's statements, should be suppressed.

12. ALL FRUITS OF THE UNCONSTITUTIONAL SEIZURE OF THE DEFENDANT MUST BE SUPPRESSED.

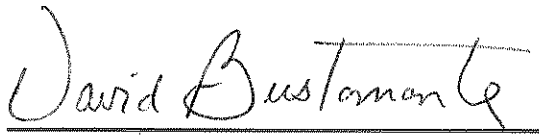
All evidence obtained directly or indirectly through the exploitation of an illegal seizure, including a suspect's post-arrest statements, must be suppressed. *Wong Sun v. U.S.*, 371 U.S. 471 (1963); *State v. Ladson*, 138 Wn.2d 343, 359 (1999); *State v. Avila-Avina*, 99 Wn. App. 9, 13-14 (2000)("When police obtain physical evidence or a defendant's confession as the direct result of an unlawful seizure, the evidence is 'tainted' by the illegality and must be excluded."). Even a voluntary statement must be suppressed if it is the product of illegal police intrusion, inextricably bound up with the illegal conduct. *Florida v. Royer*, 460 U.S. 491, 501, 75 L.Ed. 2d 229, 103 S.Ct. 1319 (1983). A confession is suppressible if it would not have been made but for the impermissible police activity. *State v. White*, 97 Wn.2d 92, 112 (1982).

V. CONCLUSION

The trial court did not abuse its discretion by suppressing the evidence. The order granting the motion to suppress should be confirmed.

DATED this 7th day of August, 2014.

RESPECTFULLY SUBMITTED,



DAVID BUSTAMANTE, WSBA #30668
Attorney for Cody Flores, Respondent

APPENDIX A

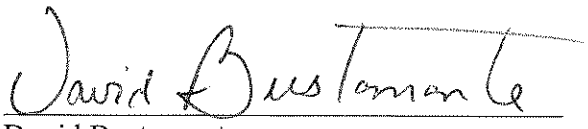
Proof of Service

Certificate of Service

I, David Bustamante, do solemnly affirm and certify that the following facts are true and accurate.

I am over the age of 18 and not a party to this action. On Thursday, August 7, 2014, I served the subjoined Respondent's Brief by hand-delivering a true copy to the offices of the Grant County Prosecuting Attorney in Ephrata, Washington.

SIGNED at Ephrata, Washington, this 7th day of August, 2014.



David Bustamante
Declarant