

66406-9

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No. 66406-9-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

PAUL VILLALON, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether deputies had reasonable and articulable suspicion that Villalon was involved in criminal activity justifying an investigatory stop and eventual protective frisk of Villalon's person when Villalon appeared to be trespassing, was behaving in an agitated manner taking his hands in and out of his pant pockets and where, his pants pockets appeared to have weighted objects in them.
2. Whether Deputy Gervol exceeded the scope of the protective frisk by reaching in and removing a hard, square object from Villalon's pocket where Gervol thought the object could be a weapon and did not immediately recognize the object as a cell phone.
3. Whether the trial court's late entry of findings of fact and conclusions of law warrant reversal where the findings are consistent with the record below.

C. FACTS

1. Substantive facts

On July 30th 2010 Deputies Gervol and Taddonio checked on a property located at 2291 E. Smith Road that had been previously seized and was in the process of being forfeited by the Whatcom County Sherriff. Supp. CP __, FF 1. Deputies Gervol and Taddonio decided to check on the property to insure it had not been vandalized. RP 8. The property was

posted with large reflective no trespassing signs that notified persons the property belonged to the Whatcom County Sherriff and provided a telephone number for anyone wishing access to the property. Id., FF 2. Despite the signs, Deputies Gervol and Taddonio noticed two persons, Joseph Garcia and another who was later identified as Villalon milling about the property working on cars. Id. Joseph Garcia was known to officers as having extensive criminal history involving firearms and drugs. RP 9.

Villalon was contacted by deputies as he walked away from a white Ford automobile. Villalon claimed he had not seen the 'no trespassing' signs, he did not own the white Ford, claimed he had no identification with him and could not explain why he was on the property. Supp. CP ___ FF 3, 12. Nonetheless, Villalon identified himself as Peter John James with a date of birth of May 26th, 1989. Id., RP 10. Deputy Gervol noted, however, that Villalon appeared much old than the 1989 date of birth would make him. Id., FF 5, RP 10. Villalon was wearing baggy clothing and his pockets appeared to be bulging with weighted objects. Id., RP 11. Villalon was observed furtively moving his hands in and out of his pockets and behind him. Id. Deputy Gervol initially asked Villalon to keep his hands where he could see them but nonetheless became increasingly

concerned for his safety based on all of the circumstances and decided the circumstances warranted frisking Villalon. Supp. CP ___, FF 5, 6. Villalon resisted when Gervol initially attempted to conduct a weapons frisk by refusing to put his hands behind his back and pulling away. Id., RP 14. Thereafter, the deputies placed Villalon in handcuffs and proceeded with the weapons frisk. Id. During the frisk, Deputy Gervol detected a hard, square object in Villalon's left front pant pocket. Supp CP ___, FF 7,8, RP 14, 22. Concerned the object was a weapon or could contain a weapon, Gervol removed the object from Villalon's pocket. RP 14-15. Upon removing the object Deputy Gervol observed it was a cell phone and observed an identification card slip out between the spring-loaded folded over phone. Supp. CP ___, FF 8, RP 15. Deputy Gervol could see the card identified "Peter" as Paul Villalon without any manipulation of the phone or the identification card. Id., FF 8,9, RP 15-16. Deputy Taddonio immediately recognized that name as having outstanding warrants because there had been bulletins on Villalon. RP 36. Moreover, the picture in the identification card matched the defendant. Id. Deputies thereafter confirmed Villalon had two warrants out for his arrest. Id., FF 10. In a search of Villalon's person pursuant to his arrest, deputies found a bag

containing methamphetamine. *Id.* Villalon was thereafter charged with unlawful possession of a controlled substance. CP 34-35.

2. Procedural facts

On August 4th 2010, Paul Villalon was charged with one count of Unlawful possession of a controlled substance, methamphetamine, pursuant to RCW 69.50.40113(1). CP 34-35. Prior to trial, Villalon moved unsuccessfully to suppress evidence asserting deputies did not have a legitimate basis to stop and subsequently detain Villalon and that officers thereafter exceeded the scope of a lawful weapons frisk of Villalon's person. Supp. CP 47 (sub nom 17). After hearing testimony and considering argument, the trial court denied Villalon's motion and then, pursuant to a stipulated bench trial, found Villalon guilty as charged. CP 15-24, Supp. CP 46 (sub nom __, findings on stipulated bench trial). Villalon now appeals. CP 4-14.

D. ARGUMENT

1. Deputy Gervol had sufficient articulable basis to justify an investigatory stop, detention and protective frisk of Villalon.

Villalon asserts there was insufficient evidence to justify the investigatory stop, detention and frisk in this case. Specifically, Villalon contends deputies had an insufficient basis to suspect Villalon was

engaged in criminal activity even though Villalon was found trespassing on private property. BOA at 8. Next, Villalon argues deputies had no reasonable basis to believe Villalon was armed and dangerous warranting a weapons frisk even though Villalon gave a name and date of birth that appeared incorrect, was acting nervous and would not take his hands out of his bulky pockets. BOA at 10. Finally, Villalon contends the deputies exceeded the scope of their frisk by removing a hard object, later determined to be a cell phone, out of Villalon's front pant pocket. Based on the totality of the circumstances facing the deputies when they approached the trespassing Villalon, the deputies' actions – the contact and the subsequent frisk – were reasonable. This court should affirm the trial court's decision below denying Villalon's motion to suppress evidence.

a. Standard of Review

The validity of a warrantless search is reviewed on appeal de novo. State v. Kypreos, 110 Wn.App. 612, 616, 39 P.3d 371 (2002). On appellate review findings of fact are reviewed for substantial evidence and conclusions of law are reviewed de novo. State v. Winterstien, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Substantial evidence exists where there is sufficient evidence in the record to persuade a fair-minded, rational

person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Trial court findings are verities on appeal so long as there is substantial evidence in the record to support them. State v. Hill, 123 Wn.2d at 647.

The Fourth Amendment to the United States Constitution prohibits unlawful search and seizures of a person. Similarly, Article 1, §7 of the Washington State Constitution protects persons from unwarranted government intrusions into their private affairs. Pursuant to the state and federal Constitutions, warrantless seizures are per se unreasonable unless the State can demonstrate the seizure was predicated on an exception to the rule. State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010).

b. Deputies lawfully contacted Villalon because he appeared to be trespassing.

A police officer may seize someone for an investigatory Terry stop if they have a reasonable suspicion that the person has committed or is about to commit a crime or, is a safety threat. Terry v. Ohio, 392 U.S. 1, 88 Sect. 1868, 20 L.Ed.2d 889 (1968), State v. Crane, 105 Wn.App. 301, 305-06, 19 P.3d 1100 (2001). A reasonable suspicion exists if an officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry v. Ohio, 392 U.S. at 21, State v. Armenta, 134 Wn.2d 1, 20, 948

P.2d 1280(1997). The scope of an investigatory Terry stop is determined by considering (1) the purpose of the stop, (2) the amount of physical intrusion on the suspect's liberty, and (3) the length of time of the seizure. State v. Laskowski, 88 Wn.App. 858, 950 P.2d 950 (1997), *review denied*, 135 Wn.2d 1002 (1998). When reviewing the reasonableness of an investigatory stop, the trial court must evaluate the totality of the circumstances presented to the investigating officer. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

Villalon contends the deputies had no basis to conduct an investigative Terry stop because it was only three o'clock in the afternoon and there was no indication Villalon was engaged in vandalism or criminal activity when deputies contacted him. BOA at 8-9. Villalon ignores however, the fact that Deputy Gervol legitimately contacted him because he appeared to be trespassing on property belonging to the Whatcom County Sheriff's Office. The property Villalon was observed milling about on was clearly posted with 'no trespass' signs, had been seized by the Sheriff's office and reportedly was unoccupied. Under those circumstances it was reasonable for the deputies to contact any persons, Villalon included, observed to be on the property. Regardless, a brief stop to investigate may be justified based on observed activity that appears to

be criminal even though the same activity is also consistent with innocent behavior. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Because Villalon appeared to be engaged in criminal activity-trespassing, Deputy Gervol's initial contact, even if considered a seizure, was permissible under both the state and federal constitutions.

c. reasonable safety concerns based on Villalon's agitated behavior and the fact that his baggy clothes were bulging with what appeared to be weighted objects justified Deputy Gervol's protective frisk.

An officer may conduct a warrantless, protective frisk of a detained individual without violating the Fourth Amendment if (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the frisk and (3) the scope of the frisk is limited to the protective purpose. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to articulable facts which create an objectively reasonable belief that a suspect is "armed and presently dangerous." State v. Laskowski, 88 Wn.App. 858, 860, 950 P.2d 950 (1997), Terry, 392 U.S. at 21-24.

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous..., he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the

outer clothing of such persons in a attempt to discover weapons which might be used to assault him.

Terry, 392 U.S. at 30. (emphasis added). An officer does not need to be absolutely certain that an individual is armed; the question is whether a reasonably prudent person in the same circumstances would be warranted in the belief that his safety was in danger. State v. Collins, 121 Wn.2d at 173. Courts are reluctant to substitute their judgment for that of police officers in the field. *Id.* A “founded suspicion” is all that is necessary, or some basis from which the court can determine that the frisk was not arbitrary or harassing. *Id.* at 173-174, *citing* State v. Belieu, 112 Wn.2d 587, 601-602, 773 P.2d 46 (1989).

Here, Deputy Gervol legitimately contacted Villalon because he suspected Villalon was trespassing. During this initial contact, Deputy Gervol made several observations which supported his reasonable concern that Villalon was or could be armed and dangerous and that, continuing a conversation with him, without conducting a weapons frisk, was dangerous. First, Deputy Gervol was concerned Villalon had provided a false name because he had provided a date of birth that appeared inconsistent with the visual appearance of his age. Secondly, Villalon appeared agitated while he spoke to Deputy Gervol. Villalon reportedly kept furtively moving his hands in and out of his pockets -pockets that

appeared to be bulging with weighted objects and was not forthcoming in response to basic questions. These objective circumstances, in addition to Gervol's concern that Villalon did not have a reasonable basis to be at the seized property, gave Deputy Gervol a 'founded suspicion' that Villalon was or could be armed and dangerous. Under these circumstances it was reasonable for Gervol to conduct a weapons frisk of Villalon.

d. Deputy Gervol did not exceed the scope the lawful protective frisk by removing a hard, square object to verify that the object did not pose a threat to the deputy's safety.

Finally, Villalon contends Deputy Gervol unlawfully exceeded the scope of the weapons frisk by removing a hard square object, that later turned out to be a cell phone, from Villalon's front pocket. A valid weapons frisk pursuant to a Terry stop is justified if its scope is limited to a pat down search of the outer clothing to discover weapons that might be used to assault the officer. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 46 (1989).

Villalon appears to argue that it was unreasonable for Deputy Gervol to remove his cell phone from his pocket believing that this object could have been a small caliber weapon. BOA at 13. Villalon misconstrues the record. Deputy Gervol testified and the court found that while patting down Villalon's person he detected a hard, square object.

Gervol did *not* immediately recognize the hard object as a cell phone. Instead, he testified and the trial court found, Gervol felt a hard square object and was concerned, based on his training and experience, that the hard object might be a weapon. FF 7, 8. These findings support the trial court's conclusion that the removal of the hard object from Villalon's pocket to verify whether it was a weapon or not was reasonable and within the scope of the lawful weapons frisk.

In State v. Hudson, 124 Wn.2d 107, 110, 874 P.2d 160 (1994), an officer conducted a weapons frisk of a suspect wearing a jacket. During the frisk officers "felt a quite substantial bulge, hard something" which the officer thought might be a weapon. *Id.* When the officer reached into the pocket however, he immediately recognized the objects as a pager, paper work and a baggie containing a "ragged edge chunk" he suspected was rock cocaine. *Id.* The officer then took the baggie and pager out of the pocket confirming his suspicions. The issue before the court was whether the plain touch doctrine justified the removal and admission of the cocaine found in the defendant's pocket. The Supreme Court remanded the matter, determining that the application of the plain touch doctrine may be appropriate if an officer's recognition of the contraband was immediate or

to determine whether the officer improperly continued to search after realizing there was no weapon in the pocket. Id at 199-120.

Hudson is instructive. The issue in this case is whether Gervol's removal of the hard square object – the cell phone – was permissible. If Gervol had immediately recognized the object as a cell phone either while he was frisking the pocket or after he reached in the pocket, Hudson would suggest removal of the phone exceeded the permissive scope of the frisk. Gervol did not however, recognize the hard object in Villalon's pocket as a cell phone. Instead, the trial court found Gervol found a small, hard object, was trained to be concerned that such objects could be or conceal weapons and based on those facts, opted to remove the object to verify whether it was a weapon. Pursuant to Hudson, Gervol did not exceed the scope of the permissible weapons frisk. Where a pat-down is inconclusive, reaching into the clothing is the only reasonable course of action for the police officer to take. State v. Hudson, 124 Wn.2d at 112; State v. Watkins, 76 Wn.App. 726, 730, 887 P.2d 1139 (1980). Here, Gervol could not confirm whether the hard, square object was a weapon or threatened his safety until the object was removed. Pursuant to Hudson, removing the hard object was within the permissible scope of Gervol's weapon frisk. Once the hard object was removed, Villalon's identification

card was visible without further manipulation and deputies lawfully determined Villalon had warrants outstanding for his arrest and lawfully found contraband on Villalon's person pursuant to his arrest. FF 8, 9, 10, Conclusion of law 4. The trial court therefore did not err denying Villalon's motion to suppress below, admitting the evidence found pursuant to his arrest or convicting him on one count of unlawful possession of a controlled substance. *See, State v. Craig*, 115 Wn.App. 191, 104-5, 61 P.3d 340 (2002) (evidence found pursuant to lawful arrest and search of arrestee is admissible).

2. The late entry of the trial court's CrR 3.6 findings of fact and conclusions of law do not warrant reversal.

Villalon also assigns error to the trial court's failure to enter CrR 3.6 findings of fact and conclusions of law. The trial court has now however, entered its findings of fact and conclusions of law. Supp. CP 46, 47 (Sub. Nom. ____). Therefore, the only issue is whether the court's late entry of findings mandates reversal. *State v. Eaton*, 82 Wn.App. 723, 727, 919 P.2d 116 (1996); *State v. Head*, 136 Wn.2d 619, 622-25, 964 P.2d 1187 (1998).

Criminal Rule 3.6 directs the trial court to set forth written findings of fact and conclusions of law following every suppression hearing. *State*

v. Riley, 69 Wn.App. 349, 352, 848 P.2d 1288(1993). Appellate courts rely on the trial court’s findings and conclusions “to ensure efficient and accurate appellate review.” State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). In Cannon, the defendant argued for a reversal where the trial court waited nearly two years before filing its written findings and conclusions. The appellate court refused, noting that, although the practice of submitting late findings and conclusions is disfavored, they may be “submitted and entered even while an appeal is pending” if the defendant is not prejudiced by the belated entry of findings. *Id.* at 329. After examining the record, the court in Cannon concluded that the defendant had not suffered prejudice because “the appeal was not delayed by the late filing” and “the State did not tailor or alter the findings and conclusions to meet issues and arguments raised by [the defendant] in his brief.” Cannon, 130 Wn.2d at 330.

Here, the record does not support an inference that the State tailored its findings to address issues raised in Villalon’s opening brief. First, Deputy Prosecutor Chambers, as reflected in his affidavit, did not read Appellant’s brief before filing the findings of fact and conclusions of law. Supp CP 43 (Sub. Nom. ____). Secondly, the trial court’s findings closely mirror the testimony taken at the CrR 3.6 hearing, argument and

the trial court's general ruling. RP 41-44. Thus, a dismissal is not warranted where appropriate findings, while filed late, accurately reflect record pertaining to Villalon's CrR 3.6 suppression motion.

E. CONCLUSION

Based on the arguments set forth above, the State respectfully requests this court affirm the trial court's decision denying Villalon's motion to suppress and affirm Villalon's conviction for one count of unlawful possession of a controlled substance.

Respectfully submitted this 19 day of August, 2011.



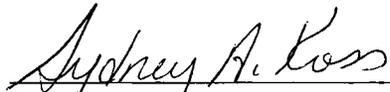
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CERTIFICATE

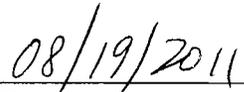
I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the attached document to Appellant's attorney, addressed as follows:

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