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NO. 69149-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL KLEVER,

Appellant.

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

The Honorable Ira Uhrig, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to suppress the evidence as the fruit of an unlawful detention.

2. The court erred in failing to file written findings of fact and conclusions of law from the hearings held under CrR 3.5 and 3.6.

Issues Pertaining to Assignments of Error

1. A brief, investigative detention is a seizure that must be supported by articulable suspicion of criminal wrongdoing associated with the individual detained.

(a) Was appellant unlawfully seized when a uniformed police officer parked a marked patrol car diagonally across the front of the car he was in, partially blocking it from leaving?

(b) Did the officer lack articulable suspicion when 1) he first approached and questioned appellant because appellant was reclined in the passenger seat of a car that was backed into a parking space late at night in an isolated restaurant parking lot, and the officer had prior information the car's owner was involved in drug trafficking; 2) a five minute conversation and a flashlight-view of the interior of the car led to no further suspicion of wrongdoing; and 3) the officer then asked for identification because he did not know who the occupants of the car were and wanted to see if they had been trespassed from the restaurant?

2. CrR 3.5(c) and CrR 3.6(b) require written findings of fact and conclusions of law after hearings on the voluntariness of a defendant's statement and on motions to suppress evidence. After the CrR 3.5 hearing, at which a motion to suppress was also raised, no findings or conclusions were filed in this case. Should this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County prosecutor charged appellant Paul Klever with felony violation of a no-contact order – domestic violence. CP 2-3. Pre-trial, the court denied Klever's motion to suppress the evidence as the fruit of an unlawful seizure. RP 36-37. The jury found Klever guilty, and the Court imposed a standard-range sentence and community custody. CP 33, 37-38, 61. Notice of appeal was timely filed. CP 48.

2. Substantive Facts

Late one night, Klever was in the passenger seat of a car parked in the parking lot of a Jack in the Box restaurant in Bellingham. RP 312. The restaurant's dining area was closed, but the drive-through window was open. RP 21. The car was in was backed into the parking space. RP 55. Behind the car was a field and wooded area. RP 51, 55.

Around midnight, a marked patrol car pulled into the parking lot and stopped at an angle across the front driver's side corner of the car. RP 55, 57. Although the car could still have pulled out of the space, the officer testified his patrol car was parked perpendicular to the front driver's side corner of the car. RP 57. The car could only have gotten out by with a hard turn and some tricky maneuvering. RP 315.

Based on where the car was parked, the officer suspected it might be stolen, so before even approaching, he called in the license number for a check. RP 56-57, 63. At 12:08 a.m., he learned the car was not stolen. RP 63-64.

A few hours earlier, the officer had heard information he described as "confidential" from another officer that the owner of the car was "involved in the delivery of controlled substances." RP 58-59. The officer gave no details about whether the other officer had personally observed this or had simply heard it from a third source such as a confidential informant. RP 58-59. Nor did the officer give any details about whether this was a prior conviction, a suspicion, an allegation or when the conviction, suspicion, or allegation may have occurred. RP 58-59.

After parking his patrol car, the uniformed officer turned on his side alley light and approached the car on foot. RP 22. As he approached, the officer claimed to see what he described as suspicious activity. RP 31. He

testified the passenger appeared to be trying to conceal himself by bending over forward in the car. RP 31. He testified he was concerned for his safety based on these furtive movements. RP 62. Despite this supposed safety concern, he did not ask Klever or his companion to step out of the car or frisk them for weapons. RP 23-25.

The officer shone his flashlight through the window and asked Klever and his companion what they were doing there. RP 23. They said they were napping and talking. RP 23. The officer then requested identification because he did not know who they were and wanted to see if they had been trespassed from the restaurant. RP 23, 25, 67. RP. Klever provided his full name and the last four digits of his social security number. RP 24.

The officer told them he would be right back. RP 123. He then called dispatch with their names and requested a warrant check at 12:15. RP 63. The conversation with Klever and his companion had lasted approximately seven minutes. During this time, the officer saw no other suspicious activity, noticed no signs of alcohol or drug use or weapons. RP 33-34.

From dispatch, the officer learned there was an order prohibiting Klever from having contact with his girlfriend, the driver of the car. RP 26. The officer then arrested Klever for violating the no-contact order. RP 26.

Before trial, Klever argued he was unlawfully seized when the police officer pulled up in front of the car he was in, shone the spotlight on them, and requested identification. RP 36-37, 47, 71-74. Because there was no articulable suspicion of criminal activity, he argued, the detention was an illegal seizure. RP 71-74. The trial court concluded this was a social contact, not an illegal seizure or detention because Klever was free to leave. RP 80. The court also determined Klever's statements to police were voluntary and admissible under CrR 3.5. RP 82.

After the officer testified at trial, Klever moved to reconsider the suppression ruling. RP 141-46. The court ruled it had heard nothing to warrant reconsideration. RP 146. When the State rested, Klever moved to dismiss on the grounds that the State had not proved its case and that the fingerprint cards showing he was arrested five different times were unfairly prejudicial. RP 297. The court denied the motion. RP 298.

At trial, Klever testified he knew he was not supposed to contact his girlfriend, but he loved her. RP 318, 323. He stipulated the no-contact order was valid and he was aware of it. RP 184. They were in the car together talking and sleeping. RP 312-14. Their interaction did not involve drugs, alcohol, fighting, or any other cause for concern. RP 312-14. He admitted he had violated no-contact orders twice before. RP 323.

As of January 11, 2013, no written findings of fact or conclusions of law were filed regarding the hearing under CrR 3.5 or the motion to suppress. At sentencing, Klever requested an exceptional sentence below the standard range because his girlfriend initiated the contact and this was a de minimis violation. RP 374. The court denied this request and imposed a standard range sentence of 26 months. RP 375; CP 37-38. Nearly a month after sentencing, the court entered an order amending the judgment and sentence to add the community custody term required by law. CP 61.

C. ARGUMENT

1. THE EVIDENCE AGAINST KLEVER MUST BE SUPPRESSED BECAUSE IT WAS THE FRUIT OF AN UNLAWFUL SEIZURE.

Under the Fourth Amendment and article 1, section 7 of the Washington Constitution,¹ warrantless searches and seizures are “per se unreasonable.” State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). The State bears the burden of proving one of the jealously and carefully drawn exceptions to the warrant requirement. Id. (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). When a person is unlawfully seized in violation of either the

¹ The Fourth Amendment provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” Article 1, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Fourth Amendment or Article I, Section 7 or both, the evidence obtained as a result of that seizure must be excluded. State v. Gantt, 163 Wn. App. 133, 144, 57 P.3d 682 (2011) rev. denied, 173 Wn.2d 1011 (2012) (citing State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009)).

The evidence against Klever should have been suppressed because it was the result of an unlawful seizure. Klever was seized when the officer parked his patrol car across the front of the parking space, partially blocking the car from leaving. That detention was not justified by general suspicions based on the way the car was parked and vague information that the car's owner might be involved in delivery of a controlled substance. Even if initially justified, the seizure was unlawful because it continued after the officer investigated and found no sign of any wrongdoing. The additional concerns because the officer did not know Klever or his companion and feared they might be trespassing did not rise to the level of articulable suspicion.

- a. Klever Was Seized When the Officer Parked Across the Front Corner of the Parking Space Partially Blocking the Car from Leaving.

A person is seized when, due to physical force or a show of authority, the person's freedom of movement is restrained and a reasonable person would not have believed he or she was free to leave or otherwise decline an officer's request and terminate the encounter. Gantt, 163 Wn.

App. at 139 (citing State v. Beito, 147 Wn. App. 504, 508, 195 P.3d 1023 (2008)). This determination is made based on an objective assessment of the circumstances, not on the officer's subjective intent. Gantt, 163 Wn. App. at 139. Whether an encounter with police is a seizure is a mixed question of law and fact; whether the circumstances constitute a seizure is a legal question reviewed de novo. Id. at 138 (citing State v. Rankin, 151 Wn.2d 689, 709, 92 P.3d 202 (2004)).

Generally, when an officer merely approaches an individual in public, requests to speak with him, and requests identification, no seizure has occurred. State v. O'Neill, 148 Wn.2d 564, 577-80, 62 P.3d 489 (2003) (citing State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998)). But the officer in this case did more. By parking his patrol car to partially block the car from leaving, the officer made a display of authority and restrained the car's movement such that a reasonable person would not have felt free to leave.

Courts have repeatedly found a seizure when police immobilize a person in any way. For example, a seizure occurs when the police retain a person's identification, direct the person to sit on the hood of a car, or instruct the person to wait. Beito, 147 Wn. App. at 509-10.

A seizure occurs when an officer physically blocks a person from leaving. Id. at 510; see also State v. Bennett, 62 Wn. App. 702, 709, 814

P.2d 1171 (1991), rev. denied 118 Wn.2d 1017 (1992) (seizure occurred when officer pulled into parking lot behind vehicle so vehicle could not leave). Beito was a passenger in a car parked in the parking lot of an open store at 3:40 a.m. Beito, 147 Wn. App. at 507. The officer became suspicious and approached to inquire what they were doing there. Id. The officer then asked for identification and called to check for warrants. Id. at 507, 510. The court concluded Beito was seized because the officer stood outside the passenger door, effectively blocking him from leaving. Id.

Like Beito, Klever was effectively blocked from leaving because of the way the officer parked the marked patrol car across the front driver's side corner of the car. RP 57. The car was backed into a parking space at the edge of the lot with a field behind him. RP 55. To drive away, it would have had to make a sharp turn around the patrol car that was largely blocking its path. RP 57, 315. Klever was seized because, with a marked patrol car partially blocking his exit, a reasonable person would not have felt free to drive away.

b. The Officer Did Not Have Reasonable Suspicion of Criminal Activity to Justify the Detention.

Once it is established a seizure has occurred, the burden is on the State to demonstrate the seizure was authorized. Gantt, 163 Wn. App. at 138. To be justified as reasonable under the Fourth Amendment or as

authorized by law under Article I, Section 7, the seizure must be pursuant to either a warrant or a valid exception to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573, 575 (2010). The exceptions are “jealously and carefully drawn.” Id. (quoting State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984))

An investigative detention or Terry stop is an exception to the warrant requirement. Doughty, 170 Wn.2d at 62 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). A Terry stop requires a “well-founded suspicion” of criminal conduct. Doughty, 170 Wn.2d at 61. “A police officer may briefly stop and detain an individual for investigation without a warrant if the officer reasonably suspects the person is engaged or about to be engaged in criminal conduct.” State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (citing State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007)). To justify that intrusion, however, an officer must be able to point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.” Williams, 102 Wn.2d at 739 (quoting Terry, 392 U.S. at 21).

“Specific and articulable facts” means that the circumstances must show “a substantial possibility that criminal conduct has occurred or is about to occur.” Doughty, 170 Wn.2d at 63. In other words, a seizure is

unreasonable unless the officer had “an objectively reasonable suspicion the person was involved in criminal activity.” Gantt, 163 Wn. App. at 144 (citing State v. DeArman, 54 Wn. App. 621, 624, 774 P.2d 1247 (1989)).

The State must show by clear and convincing evidence that the stop was justified. Id. at 62. Whether the facts warrant an investigative detention or Terry stop is a question of law reviewed de novo. Doughty, 170 Wn.2d at 61. Here, the detention was not justified because the State failed to present clear and convincing evidence of objectively reasonable suspicion.

i. The Officer’s General Suspicions About the Way the Car Was Parked Did Not Justify the Seizure.

The officer claimed he suspected drug activity because the car was backed into a space in a remote part of the parking lot. RP 59. When he approached, he saw someone bent down or reclined, and assumed they were trying to hide from him. RP 31, 61. This generalized suspicion based on the position of the car is insufficient to justify detention. See, e.g., Beito, 147 Wn. App. at 507, 510; State v. Stroud, 30 Wn. App. 392, 393, 634 P.2d 316 (1981);

Even in a known high crime area, seizure is not warranted merely because it is unusual, but not unlawful, for a car to be parked there late at

night. Stroud, 30 Wn. App. at 393.² In Stroud, officers saw a car parked in an industrial area of Aberdeen late at night. 30 Wn. App. at 393. The officer testified he was suspicious because it was unusual for someone to be parked there and it was a high crime area. Id. at 394. The officer also stated it was suspicious that the occupants of the car did not appear to notice him as he passed, so he assumed they may have been trying to ignore him. Id. This Court held the seizure was unconstitutional as a matter of law. Id. at 398-99. Here, the officer's vague concerns for drug activity in this case based on the way the car was parked and the occupants' posture are akin to the general concerns for the security of the business rejected in Stroud and were insufficient to justify the detention.

ii. The Officer's Vague Information Linking the Car's Owner to Delivery of a Controlled Substance Was Insufficient to Justify Investigative Detention.

Earlier that evening, the officer claimed he heard from another officer "confidential information" that the car's owner was "involved in the delivery of controlled substances." RP 58. The officer did not explain this information at all. It is unclear from the record whether he was

² See also Beito, 147 Wn. App. at 507, 510 (officer approached a car in a convenience store parking lot late at night; concern for welfare of those in the car and safety of the convenience store was not reasonable suspicion justifying detention); State v. Richardson, 64 Wn. App. 693, 697, 825 P.2d 754 (1992) (presence in a high drug crime area does not, by itself, give rise to reasonable suspicion); State v. Ellwood, 52 Wn. App. 70, 74, 757 P.2d 547 (1988) (presence at a late hour in an area where many crimes have occurred in the past does not justify detention).

speaking of a prior conviction or a tip from a confidential informant. Use of the phrase “confidential information” suggests the latter. RP 58. But regardless of the source, this information does not provide reasonable suspicion to detain the driver of the car, much less Klever, who was only sitting in its passenger seat. First, if this was an informant’s tip, there was no indication the information was reliable or corroborated. See State v. Hart, 66 Wn. App. 1, 6-7, 830 P.2d 696, 699 (1992) (to support Terry stop, informant’s tip must have indicia of reliability). Second, even a prior conviction does not justify warrantless detention. See State v. Hobart, 94 Wn.2d 437, 446-47, 617 P.2d 429 (1980) (prior conviction is not grounds to believe individual is engaged in criminal activity).

An informant’s tip is insufficient to justify detention unless 1) the informant is shown to be reliable and 2) the tip itself is shown to be reliable either because the tip contains enough objective facts to warrant detention or non-innocuous facts from the tip have been corroborated by police. Hart, 66 Wn. App. at 6-7 (citing State v. Sieler, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980)). Both prongs must be met. Id. Here, assuming the information was from a confidential informant, the officer did not give enough detail for a court to determine whether the source was reliable or whether the information was sufficiently detailed or corroborated. RP 58.

This is akin to what occurred in Hart, where police heard from an unnamed source that Hart was selling drugs. 66 Wn. App. at 3. Although the informant was deemed reliable, no other facts or details were provided and the tip was not corroborated. Id. at 3-4, 7, 10. The court reversed the conviction because the Terry stop was unlawful and the evidence should have been suppressed. Id. at 9-10. The same result should accrue here.

Assuming the officer was referring not to an informant's tip, but a prior conviction for delivery of a controlled substance, that information is still insufficient to justify investigative detention. See Hobart, 94 Wn.2d at 446-47. In Hobart, the Washington Supreme Court held that prior arrests for drug and weapons offenses did not constitute probable cause for a search, even in light of arguably suspicious behavior late at night. Id. at 439, 445-46. And the court treated with great skepticism the idea that such prior offenses could even meet the lesser standard of reasonable suspicion for a Terry stop. Hobart, 94 Wn.2d at 446.

Police noticed Hobart as he made a quick turn from Madison Street in Seattle onto a side street. Id. at 439. Hobart drove slowly a few more blocks before entering a parking lot next to an apartment building. Id. He shook the front door knob, looked up at the second floor, and then headed back to the car. Id. On the way, the officer called out to ask Hobart if he were lost. Id. Hobart said he was not, but the officer recognized him as

someone the officer had arrested for a drug offense five years earlier and a weapons offense three years earlier. Id. At that point, the officer detained Hobart and patted him down for weapons. Id. at 439-40.

The court first concluded that a quick, but lawful, turn late at night was insufficient to justify detention. Id. at 444. As were the facts that he drove slowly and unsuccessfully tried to contact someone in the apartment building. Id. at 445. After the officer recognized Hobart and remembered his criminal record, the court assumed, without deciding, the officer had reasonable suspicion of criminal activity. Id. at 445-446. The court did not need to decide this issue because the scope of the search clearly went far beyond a search for weapons and the officer admitted he did not have probable cause. Id.

The court stated the facts known to the officer were arguably insufficient even to show reasonable suspicion of criminal activity. Id. at 446. The reasons why the prior convictions could not establish probable cause applies equally to the lesser suspicion required for a Terry stop:

If a prior conviction, not to mention a prior arrest, should afford grounds for believing that an individual is engaging in criminal activity at any given time thereafter, that person would never be free of harassment, no matter how completely he had reformed. To the best of our knowledge, the law does not countenance such an assumption.

Id. at 446-47. This case is no different. Even assuming the officer's information about the car's owner was as reliable as a prior conviction, that would be insufficient to justify a seizure. A prior conviction is not grounds to suspect a person of criminal activity at any time thereafter, and this Court should not "countenance such an assumption." Id. at 447.

c. No Additional Circumstances Arose to Justify the Continued Detention.

An investigative detention may not continue any longer than necessary to satisfy the purpose of the stop. State v. Bray, 143 Wn. App. 148, 154, 177 P.3d 154 (2008) (citing Williams, 102 Wn.2d at 738). In other words, the scope of the detention must be reasonably related to the initial purpose of the stop. Bray, 143 Wn. App. at 154 (citing Williams, 102 Wn.2d at 739). The detention may be extended only if preliminary investigation confirms the officer's suspicions. Bray, 143 Wn. App. at 154 (citing State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)).

Even if initially warranted, the detention in this case exceeded the scope of what was necessary to satisfy the officer's concerns. The officer's additional concerns that he did not know Klever or his companion and his unsupported concern that they might be trespassing was insufficient to warrant continued detention.

i. The Officer's Initial Investigation Produced No Sign of Criminal Activity.

When an initial suspicion of the need for police intervention is dispelled by subsequent developments, further detention becomes unlawful. See DeArman, 54 Wn. App. at 625; see also State v. Markgraf, 59 Wn. App. 509, 513-14, 798 P.2d 1180 (1990) (officers not justified in requesting identification after occupants responded they were all right even though driver had a “dazed and confused look”). Therefore, Klever’s continued detention was unlawful even if the initial detention was reasonable because the officer’s initial suspicions of drug activity were not subsequently reinforced by any objective observations or facts.

The officer in DeArman saw a car stopped at a stop sign for an unusually long time. Id. at 622. The brake lights were on, but the officer could not tell if the engine was running. Id. Suspecting the car might be disabled, the officer pulled up behind the car and activated his emergency lights. Id. The officer realized the car was not disabled when it responded by continuing through the intersection and then pulling over about 50 feet down the road. Id. at 622-23. Nevertheless, the officer said he was suspicious, so he asked the driver for identification. Id. at 623.

The court held that activating the emergency lights was an unwarranted seizure: “Once it became apparent that DeArman was *not*

disabled, Ross had no reason to proceed with the stop and no right to compel DeArman to produce identification.” Id. at 625. The officer’s generalized suspicion did not justify the subsequent stop and seizure. Id. at 627.

The same is true here. After the officer approached the car and talked to Klever and his girlfriend, no further sign of illegal activity appeared. RP 33-34. His initial concern that the car might be stolen was dispelled even before he approached the car. RP 64. He did not smell alcohol, and saw no sign of weapons or drug activity. RP 33-34. Klever said the two were talking; his companion said she was napping. RP 33. These are not facts that objectively give rise to continuing suspicion of criminal activity. Once the officer was able to see into the car and talk to the occupants and saw nothing to confirm his vague suspicion of drug activity, he had no right to continue to detain Klever and his companion. DeArman, 54 Wn. App. at 627.

- ii. The Officer’s Unsupported Assumption the Occupants of the Car Might Be Trespassing and Desire to Know Who They Were Did Not Justify a Seizure.

Although his investigation showed no sign of crime, the officer remained parked across the front of the car and requested Klever’s identification. He remained parked there while he checked for warrants.

RP 63, 109-11. The officer admitted this continued detention was unrelated to his initial concerns of drug activity. He wanted to identify them, not because he still suspected drug activity, but because he did not know who they were and wanted to determine whether they had been trespassed from the restaurant. RP 35-36, 67. The simple desire to know who they were is not a basis for continued detention. See State v. Cole, 73 Wn. App. 844, 849-50, 871 P.2d 656 (1994) (confirming identity insufficient grounds for continued detention after routine traffic infraction stop). And the officer's concern for trespassing was entirely unsupported by any articulable facts.

The officer had no indication that this car or these people had been told they were unwelcome at the Jack in the Box. RP 66-67. His only reason for suspecting this was that at some unidentified occasions in the past, he had been asked to remove unwanted persons from that restaurant. RP 67. This suspicion was in no way linked to these individuals or this car. Seizure is not permissible based on suspicion that is not reasonably connected to an individual. State v. Martinez, 135 Wn. App. 174, 182, 143 P.3d 855 (2006).

Bray illustrates the individualized suspicion necessary to support an investigative detention related to trespassing in an otherwise public place. 143 Wn. App. at 153-54. In that case, a Terry stop was justified

when Bray was seen in a storage facility. Bray, 143 Wn. App. at 153-54. Although it was night, Bray was driving with his headlights off. Id. There had been recent burglaries in the area, and the officer had seen Bray at the storage facility under unusual circumstances twice before. Id. Also, Bray was wearing gloves and camouflage. Id.

But this case bears little resemblance to Bray. There was no recent history of the type of crime the officer suspected in the parking lot of the Jack in the Box. The officer had not seen Klever or his companion in the area when previous incidents had occurred.

This case is more like Martinez, where the defendant was merely walking at night in an apartment parking lot that was open to the public. 135 Wn. App. at 177. When the officer approached him on foot, he quickly walked away. Martinez, 135 Wn. App. at 177-78. When the officer asked if he lived there, he said he did not. Id. The parking lot was a high crime area; although vehicle prowling in the lot had been reported in the past, nothing was reported that night. Id. The court condemned the stop and search because the officer had no particularized suspicion of any criminal activity at all, let alone any connected to Martinez. Id. at 181-82.

The court specifically rejected an argument that Martinez needed to do something to allay the officer's suspicions. Id. at 181. "The State argues that Mr. Martinez's reaction to the officer's presence aroused

suspicion and the officer observed nothing to suggest any legitimate reason for Mr. Martinez's presence in the shadows late at night. But that is not the test." Id. The court declared, "Martinez was not required to articulate a reason not to stop him." Id. It is the officer who must have articulable grounds to stop a person; "police may not stop and question citizens on the street simply because they are unknown to the police or look suspicious, or because their 'purpose for being abroad is not readily evident.'" Id. (quoting Terry, 392 U.S. at 14 n. 11).

As in Martinez, there was no particularized suspicion of any crime connected to Klever. As in Martinez, the officer here testified that, despite the innocuous nature of everything he observed after contacting Klever, he was still suspicious. RP 35. The mere fact that the officer continued to be suspicious is irrelevant. As in Martinez, that suspicion was not particularized to any crime or to Klever as an individual. Without such facts, the officer's suspicion was not reasonable, and Klever's detention was unlawful. Martinez, 135 Wn. App. at 177, 181-82.

The officer's identification of Klever and his companion's identities and the existence of the no-contact order between them was obtained by exploiting this unlawful detention. Therefore, the evidence against Klever should have been suppressed and his conviction should now be reversed. Gantt, 163 Wn. App. at 144.

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CRR 3.5 AND CRR 3.6

The evidence against Klever was admitted only after the requisite CrR 3.5 hearing to establish whether his statements were the product of police coercion. RP 18-47. The court also addressed Klever's CrR 3.6 motion to suppress the evidence as the fruit of an unlawful seizure. RP 36-80. The court, however, failed to enter written findings or conclusions as required by CrR 3.5 and CrR 3.6. Criminal Rule 3.5 provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Rule 3.6 similarly provides in subsection (b), "If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law." Under the plain language of these rules, written findings of fact and conclusions of law are required. The court below rendered an oral decision following the hearing, but no written findings or conclusions have been entered as of this date. RP 80, 82.

The purpose of written findings is to allow the reviewing court to determine the basis upon which the case was decided and to review the issues raised on appeal. State v. Pena, 65 Wn. App. 711, 715, 829 P.2d 256 (1992), overruled on other grounds, State v. Alvarez, 128 Wn.2d 1, 18-19,

904 P.2d 754 (1995)). Meaningful appellate review requires findings of fact “that show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact . . . with knowledge of the standards applicable to the determination of those facts.” State v. Jones, 34 Wn. App. 848, 851, 664 P.2d 12 (1983). Those findings are absent in this case.

Although the trial court entered oral rulings, the appellate court should not have to comb these rulings to determine if there are appropriate findings, nor should a defendant be required to interpret oral rulings. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). A court’s oral rulings are not an adequate substitute for the written findings and conclusions mandated by CrR 3.5 and 3.6. The oral decision is “no more than a verbal expression of [the court’s] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.” Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court’s decision is not binding “unless it is formally incorporated into findings of fact, conclusions of law, and judgment.” State v. Hescocock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d

494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 (“[T]he State’s obligation is similar under both CrR 3.5 and CrR 3.6”). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. Head, 136 Wn.2d at 624.

Assuming the State ultimately presents the findings and conclusions and the court signs them, reversal will still be required if the delayed entry prejudices Klever. State v. Portomene, 79 Wn. App. 863, 864, 905 P.2d 1234 (1995); see also State v. B.J.S., 72 Wn. App. 368, 371, 864 P.2d 432 (1994). For example, prejudice will result from untimely written findings and conclusions if there is indication the findings have been “tailored” to meet issues raised on appeal. Head, 136 Wn.2d at 624-25; Portomene, 79 Wn. App. at 865. In State v. Litts, this Court held, “[I]f the State fails to file written findings and conclusions until after the appellant has submitted his or her opening brief, and the record reflects that the findings and conclusions were tailored to address the assignments of error raised in appellant’s brief, prejudice may be found.” State v. Litts, 64 Wn. App. 831, 837, 827 P.2d 304 (1992).

This Court should remand Klever’s case for entry of findings and conclusions. Depending on their content, Klever reserves the right to

address the issue of prejudice or tailoring in his reply brief or, if necessary, in a supplemental brief.

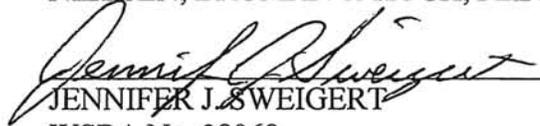
D. CONCLUSION

Because the evidence against him was obtained as a result of an unlawful detention, Klever requests this Court reverse his conviction. Alternatively, at a minimum, this case should be remanded for entry of findings of fact and conclusions of law pertaining to the CrR 3.5 and 3.6 hearings.

DATED this 18th day of January 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69149-0-1
)	
PAUL KLEVER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF JANUARY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 JAN 18 PM 4:36**

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF JANUARY 2013.

x *Patrick Mayovsky*