

NO. 70056-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY BURR,

Appellant.

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On Appeal from the Snohomish County Superior Court  
The Honorable Bruce I. Weiss, Judge

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
Issues Pertaining to Assignments of Error .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. February 2010 incident.....	2
2. March 2010 incident.....	7
C. <u>ARGUMENT</u> .....	10
1. THE TRIAL COURT VIOLATED BURR’S STATE CONSTITUTIONAL RIGHT TO PRIVACY BY DENYING HIS MOTION TO SUPPRESS EVIDENCE BECAUSE THE TRAFFIC STOP WAS PRETEXTUAL. ....	10
2. THE FRISK OF BURR, WHICH LED TO THE FINDING OF A MARIJUANA PIPE, A DOG SNIFF, A SEIZURE OF BURR'S CAR, AND THE DISCOVERY OF A GUN, WAS UNLAWFUL.....	15
D. <u>CONCLUSION</u> .....	19

TABLE OF AUTHORITIES

	<u>Page</u>
<u>WASHINGTON CASES</u>	
<u>State v. Armenta</u> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	18
<u>State v. Arreola</u> , 176 Wn.2d 284, 290 P.3d 983 (2012).....	11, 13, 14
<u>State v. Day</u> , 161 Wn.2d 889, 168 P.3d 1265 (2007).....	7, 15
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	15
<u>State v. Gaines</u> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	11
<u>State v. Galbert</u> , 70 Wn. App. 721, 855 P.2d 310 (1993).....	16
<u>State v. Garvin</u> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....	15
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1993).....	16
<u>State v. Hoang</u> , 101 Wn. App. 732, 6 P.3d 602 (2000), <u>review denied</u> , 142 Wn.2d 1027 (2001).....	12
<u>State v. Hopkins</u> , 128 Wn. App. 855, 117 P.3d 377 (2005).....	18
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	12
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	10, 11, 12, 13, 18

TABLE OF AUTHORITIES (CONT'D)

	<u>Page</u>
<u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Miller</u> , 91 Wn. App. 181, 955 P.2d 810, 961 P.2d 973, <u>review denied</u> , 136 Wn.2d 1016 (1998).....	16
<u>State v. Myers</u> , 117 Wn. App. 93, 69 P.3d 367 (2003), <u>review denied</u> , 150 Wn.2d 1027 (2004).....	13
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	17
<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	16
<u>State v. Terrazas</u> , 71 Wn. App. 873, 863 P.2d 75 (1993), <u>review denied</u> , 123 Wn.2d 1028 (1994).....	16
<u>State v. Walker</u> , 66 Wn. App. 622, 834 P.2d 41 (1992), <u>reversed on other grounds</u> , <u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1993).....	16
<u>RULES, STATUTES AND OTHER</u>	
Const. art. I, § 7.....	10, 12, 16
RCW 9.94A.518 .....	10
RCW 9.94A.533(3)(b) .....	10

A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the motion to suppress methamphetamine found on appellant Anthony Burr's person and the gun found in his car because the traffic stop that preceded the discovery of the evidence was used as an unlawful pretext to investigate whether Burr was driving under the influence.

2. The trial court erred by denying the motion to suppress a gun found in Burr's car because the search flowed from an unlawful frisk for weapons that revealed a marijuana pipe.

Issues Pertaining to Assignments of Error

1. A police officer observed a car traveling very slowly and change lanes without signaling, which caused the officer to suspect the driver might be under the influence. The officer stopped the driver based on what he had seen. Was the stop for the traffic infraction used as a pretext to investigate for driving under the influence?

2. Did the trial court err by concluding the police officer who approached Burr and a friend reasonably believed his safety or that of others was at risk when he frisked the men for weapons?

B. STATEMENT OF THE CASE

1. February 2010 incident

On a February night in 2010, Officer Marcus Dill was on patrol and driving through an apartment complex parking lot when he observed Anthony Burr and Jason Cobbs removing a tire from a parked car. 1RP 7-9; 2RP 5-7.<sup>1</sup> There had been a "significant amount of criminal activity in that area," and Dill found the tire removal suspicious. 2RP 7. Dill was aware of an anonymous tip accusing Cobbs of selling guns to juveniles in the area. 1RP 9; 2RP 8, 23-25, 31-32. He also knew Burr "had been involved in some stolen vehicles and some drug trafficking," and that during a traffic stop had a gun taken from his person. 2RP 8. Dill did not believe either man lived at the complex. 2RP 10.

Dill stepped out of his police car and approached the men. 2RP 7. During the approach, Burr got into the car through the open driver's side door, sat in it briefly, then got back out and closed the door. 2RP 9, 22. Dill asked Burr and Cobbs to remove their hands from their pockets. 2RP 36-37. Dill knew Cobbs from previous contacts and asked him if he had a gun. Cobbs said he did not. 2RP 9-10, 26. Burr also said he was not

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP – 7/12/12; 2RP – 8/2/12; 3RP – 11/29/12; 4RP – 1/31/13; 5RP – 2/4/13; 6RP – 2/19/13; 7RP – 2/22/13; 8RP – 2/26/13.

carrying any guns. 1RP 11. Dill asked them whether they lived at the complex. Burr said they did not and were "just hanging out." 1RP 11. Cobbs said he was visiting someone. 1RP 11; 2RP 11. Meanwhile, Dill detected an odor of burnt marijuana coming from the car. 1RP 11; 2RP 13. Both Burr and Cobbs denied having marijuana. 1RP 11.

Dill frisked both men because of their extensive criminal histories, Cobbs' "significant history of weapons[,]" and Burr's possession of a gun during an earlier traffic stop. 1RP 9; 2RP 11, 37-38. Dill felt what he believed was a marijuana pipe in Burr's pocket and asked Burr what it was. Burr said something like "weed pipe." Dill removed the pipe from the pocket. 2RP 12, 27-28.

By then more officers had arrived. 2RP 12, 32. Dill asked Burr for consent to search the car. Burr declined, so Dill called for a drug-sniffing dog. 1RP 11-12; 2RP 12-13, 30. The dog and its handler arrived and the dog alerted on the front driver's side of Burr's car. 2RP 15, 42. Dill impounded the car because of the suspects' "extensive narcotics history," the dog's alert, and Burr's quick entry into and exit from the car at the outset of the contact. 1RP 12; 2RP 15-16, 31. Dill did not arrest Burr or read him his rights during the contact. 1RP 10-12.

Dill applied for and obtained a warrant to search Burr's car one week after seizing it. 1RP 12; 2RP 16-17. He explained the delay in securing the warrant resulted from the fact he worked the graveyard shift, which made contacting a judge more difficult, was required to perform his regular patrol duties, and did not work Wednesdays through Saturdays. 2RP 17-23, 40. Dill acknowledged he did not have to be the officer who conducted the search merely because he obtained the warrant. 2RP 33-34. He did not consider applying for a telephonic search warrant because he had never done so and the officers would have had to stay on the scene that much longer. 2RP 22-23, 33, 39. He admitted he used a standard template when filling out the warrant affidavit. 2RP 34.

During his search, Dill found a stolen gun in the glove box. 1RP 12; 2RP 18. He knew Burr was a convicted felon who could not have a gun. 2RP 19. He called Burr and asked him if he would be willing to come to the station to discuss the gun. 1RP 12-13. Burr agreed. Dill advised Burr of his constitutional rights, which Burr agreed to waive. 1RP 13-15. Burr explained he had loaned his car to a friend called Steve. 1RP 15-16. He eventually admitted the gun was his, and wrote a statement to that effect. 1RP 17.

The State charged Burr with second degree unlawful firearm possession. 1CP 110.<sup>2</sup> Burr filed a motion to suppress evidence. 1CP 85-106. He contended:

- Dill's frisk was not supported by a reasonable belief that Burr was armed and dangerous at the time of the frisk. 1CP 89; 2RP 42-43;
- The odor of burnt marijuana outside the car did not establish probable cause to believe there was marijuana inside the vehicle. 1CP 89; 2RP 47-51;
- The warrantless seizure of his car was unlawful. 1CP 90; 2RP 52-55;
- Even if the seizure was initially lawful, it became unlawful because Dill waited one week to apply for and obtain the search warrant. 1CP 90; 2RP 55-57;
- The search warrant was facially invalid because it asserted there was probable cause to believe Burr violated RCW 69.50.401, which applies to drug trafficking rather than simple possession. 1CP 90; 2RP 58-64;
- The search warrant should have been limited in scope to the area around the driver's side of the car. CP 90; 2RP 64-65.

The trial court rejected each argument. It found Dill had information sufficient to support the frisk, including hands in pockets, the anonymous tip as to Cobbs, Burr's entry into and exit from the car, and knowledge both men had possessed weapons before. 2RP 46-47.

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<sup>2</sup> 1CP refers to the clerk's papers for the February 2010 case, No. 11-1-00252-1.

The court found there was sufficient evidence, including the odor of burnt marijuana, the dog's alert and Burr's suspicious quick visit into the car, to establish probable cause to believe marijuana was in the car. 2RP 51-52; 3RP 60.

As for the impound, the court found that higher courts have upheld warrantless seizures of property for the time reasonably necessary to obtain and execute a search warrant. 3RP 60-61. Officer Dill's one-week delay in obtaining the warrant was not unreasonable given his days off of work and the performance of his routine patrol duties. 3RP 62.

Next, the court found in the affidavit for search warrant, Dill stated he believed the crime of possession of a controlled substance had been committed. 1CP 97-98 (affidavit); 3RP 62. The warrant, in contrast, cited to the trafficking statute. 1CP 102-03. The court found there was probable cause to believe Burr possessed drugs and that Burr did not show the difference between the affidavit and warrant prejudiced him. 3RP 62. The warrant was therefore not facially invalid. 3RP 62.

Finally, the court found the scope of the search of the car's interior was supported by the dog's alert to the car as described to the magistrate by the handler's report. 1CP 99 (report); 2RP 64-65. The trial court later

entered written findings of fact and conclusions of law as required by CrR

3.6. 1CP 80-82 (attached as Appendix A).

2. March 2010 incident

Officer Bryan Brittingham was on traffic patrol on St. Patrick's Day in 2010 when he pulled behind a car driven by Burr at 10:30 p.m. 3RP 4-6. Burr properly turned left, but proceeded down the four-lane road at about 15 miles per hour below the speed limit. 3RP 6-8, 11-12. Burr then switched from the inside lane to the curb lane without signaling in violation of Washington law. 3RP 8-9. Brittingham pulled Burr over into a business park off the left side of the road. 3RP 8.

Brittingham believed from his driving that Burr may have been intoxicated, although he stopped him for failing to signal. 1RP 47; 3RP 9, 15-16, 20. He knew Burr from previous contacts and Burr was known to carry guns. 1RP 39. Brittingham observed Burr reaching down to his left side, and asked him several times to keep his hands on the steering wheel. 1RP 39-40. At some point, Brittingham summoned a narcotics-sniffing police dog and handler. 1RP 36.

Meanwhile, Dill heard Brittingham's broadcast and arrived at the stop to provide back up. 1RP 28. Dill overheard Brittingham tell Burr to keep his hands on the wheel. 1RP 30. Dill then directed Burr to step out

of the car. 1RP 30, 40, 49-50. When he did, Dill asked Burr if he had any contraband on his person. Burr admitted he had methamphetamine. Dill frisked Burr for weapons and grabbed an object in his pocket. Burr said those were "shards," or bigger chunks of methamphetamine. 1RP 30-31.

Dill handcuffed Burr and advised him of his rights. 1RP 31-32, 42. Brittingham asked Burr how often he sold methamphetamine. Burr said he rarely sold it and usually sold only to the same couple of friends. 1RP 44-45. He explained he was able to buy the amount he was found with because he had sold a car. 1RP 46. Burr displayed no signs of being intoxicated. 1RP 51. Nor was he angry or threatening. 1RP 52.

Burr testified he was driving about 25 miles per hour and accelerating after he made his proper left turn into the inside lane. 3RP 23-24. He never left that lane because he planned to turn left several streets ahead. 3RP 24-25. He saw no speed limit signs before the stop. 3RP 25.

The State charged Burr with possession of methamphetamine with intent to deliver, alleging he committed the crime while armed with a gun, and second degree unlawful possession of a gun. 2CP 145-46.<sup>3</sup> Burr filed

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<sup>3</sup> 2CP refers to the clerk's papers for the March 2010 case, No. 11-1-00248-3.

a motion to suppress the evidence. 2CP 135-42. He argued Brittingham was not legally justified to stop him. 2CP 138-39; 3RP 32-45. He also argued Brittingham stopped Burr to investigate for driving under the influence, for which he lacked a reasonable suspicion, and the illegal lane change never happened. 2CP 139-41; 3RP 45-46, 58. Alternatively, Burr argued even if he failed to signal his lane change, the stop was a pretext to investigate for driving under the influence. 3RP 58.

The trial court denied the motion, concluding Brittingham had a reasonable suspicion to believe Burr committed a traffic infraction. 2CP 18-19, 121-23; 3RP 58-59; 4RP 2-9; Appendix B.

In each of the two cases, Burr waived his right to a jury trial and stipulated to a bench trial on agreed documentary evidence. 1CP 16-79; 2CP 20-106. The documents included the following evidence:

- Brittingham impounded the vehicle after the police dog alerted on it. 2CP 25, 31;
- Burr told Brittingham at booking that he had a pistol in the back seat of the vehicle. 2CP 39;
- Brittingham later obtained a warrant and searched the vehicle. He found a digital scale and small baggies, as well as a stolen gun. 2CP 31, 39;
- A forensic scientist at the Washington State Patrol crime lab tested the substance Burr identified as methamphetamine. The substance weighed 6.79 grams and contained methamphetamine. 2CP 59;

- The guns were test-fired and found to work properly. 1CP 46; 2CP 51;
- Dill answered Burr's ringing telephone during the traffic stop, spoke with a woman who said she wanted to buy a "quarter ounce," arranged for a transaction, went to the agreed location, and met the woman. She said she had been buying methamphetamine regularly from Burr for about six to eight weeks. 2CP 28.

The trial court reviewed the evidence and found Burr guilty as charged. The court also found Burr was armed with a gun when he possessed the methamphetamine. 1CP 13-15; 2CP 14-17. Because of his offender score of six and the court's firearm enhancement, Burr's minimum standard range sentence for the methamphetamine conviction exceeded the 120-month standard range. RCW 9.94A.518, .533(3)(b). The trial court imposed the 120-month term and concurrent 22-month terms for the weapons offenses. 1CP 2-12; 2CP 2-13; 8RP 10-12.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED BURR'S STATE CONSTITUTIONAL RIGHT TO PRIVACY BY DENYING HIS MOTION TO SUPPRESS EVIDENCE BECAUSE THE TRAFFIC STOP WAS PRETEXTUAL.

Article I, section 7 of Washington's constitution prohibits pretextual stops because the reason for the stop is inherently unreasonable. State v. Ladson, 138 Wn.2d 343, 352-53, 979 P.2d 833 (1999). "Pretext is

result without reason.” Ladson, 138 Wn.2d at 351. Although the officer had a valid reason to stop Burr for the improper lane change, the true reason for the stop was to determine whether he was driving under the influence.

Burr does not challenge the evidentiary support for the trial court’s factual findings. Instead, he argues those findings fail to justify the court’s conclusion of law the officer’s contact was “legitimate and the search incident to arrest was valid.” CP 84 (Conclusion of Law 3.3). Burr’s claim thus raises a question of law this Court reviews de novo. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

A court should consider the totality of the circumstances in determining whether a traffic stop was pretextual, including both the subjective intent of the officer and the objective reasonableness of the officer's behavior. Ladson, 138 Wn.2d at 358-59. "In a pretextual traffic stop, a police officer disturbs the private affairs of an automobile's occupants without having first properly determined that a suspected traffic infraction *actually merits police attention*." State v. Arreola, 176 Wn.2d 284, 296, 290 P.3d 983 (2012) (emphasis added).

This Court must therefore determine whether Brittingham first properly determined Burr's suspected unsignaled lane change actually

merited his attention. Brittingham also considered Burr's driving about 15 miles per hour too slowly after having made a proper left turn. 3RP 11-12. But there was no surrounding traffic, and Burr was not weaving or otherwise driving erratically. 3RP 15. Brittingham explained the lane change, like the driving, was "slow," and that intoxicated drivers "don't make any real quick actions." 3RP 9.

Furthermore, the officer did not cite Burr for the traffic infraction. Failing to cite a driver for traffic infractions is a factor to consider when determining the officer's subjective intent for making the stop. State v. Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000), review denied, 142 Wn.2d 1027 (2001).

It is reasonable to infer from the circumstances that Brittingham stopped Burr to investigate for DUI. Brittingham did not first properly determine the improper lane change and slow driving at 10:30 p.m. on a short stretch of empty road actually merited his attention. A traffic stop for investigative purposes is not exempt from the warrant requirement and therefore is without authority of law under article I, section 7. Ladson, 138 Wn.2d at 360. If the initial stop is unconstitutionally pretextual, all fruits of the search are inadmissible. Ladson, 138 Wn.2d at 360 (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

Suppression of the evidence found on Burr's person and his car is therefore warranted. Absent the evidence, Burr's convictions for possession of methamphetamine with intent to deliver and second degree unlawful possession of a firearm cannot stand. Burr therefore requests this Court to reverse the trial court's denial of his motion to suppress evidence, reverse his convictions and remand for dismissal with prejudice. Ladson, 138 Wn.2d at 360; State v. Myers, 117 Wn. App. 93, 98, 69 P.3d 367 (2003), review denied, 150 Wn.2d 1027 (2004).

Having said that, however, the decision in Arreola must be briefly addressed. In that case, the Court created a new type of traffic stop called a "mixed-motive" stop. 176 Wn.2d at 297. The Court defined a mixed-motive traffic stop as a stop based on both legitimate and illegitimate grounds. Id. The Court held the officer's stop of the accused was a mixed-motive stop because the trial court found the driver's exhaust system infraction was an actual reason for the stop. In so holding, the Court observed the trial court found the officer would have stopped the accused for the exhaust infraction even without a previous DUI report. Id. at 298.

The Court held:

[A] traffic stop should not be considered pretextual so long as the officer actually and consciously makes an appropriate and independent determination that addressing the suspected traffic

infraction (or multiple suspected infractions) is reasonably necessary in furtherance of traffic safety and the general welfare.

Arreola, 176 Wn.2d at 297-98.

Arreola is not fatal to Burr's case. In Arreola, the officer testified he often stopped vehicles for exhaust violations. He said he would stop a vehicle for an altered muffler "because, as a member of the community, he appreciates concerns about the excessive noise that such mufflers emit." Arreola, 176 Wn.2d at 289. He also testified "he made a conscious decision to make the traffic stop because of the altered muffler." Id. This testimony therefore supported the trial court's findings.

The trial court in Burr's case found only that Brittingham testified Burr changed lanes without signaling, traveled 15 miles per hour under the speed limit, and that Brittingham "conducted a traffic stop on the car." CP 121-22 (FOFs 2-3).

Brittingham merely testified he stopped Burr "for the failing to use his turn signal." 3RP 9. He said nothing about making a "conscious decision" to stop for that reason. Nor did he state he often stopped vehicles for failing to signal a lane change where there was no other traffic. Not surprisingly, Brittingham did not testify he determined that reacting to the improper lane change was "reasonably necessary in furtherance of traffic safety and the general welfare." For unlike an altered

muffler, which emits "excessive noise" regardless of the time or traffic conditions, changing lanes without signaling poses little or no danger when there is no other traffic.

For these reasons, whether Brittingham's was a mixed motive stop or not, it was still pretextual in violation of article I, section 7. Suppression of evidence found as a result of the unlawful search is required. So is a reversal of Burr's conviction and a remand for dismissal.

2. THE FRISK OF BURR, WHICH LED TO THE FINDING OF A MARIJUANA PIPE, A DOG SNIFF, A SEIZURE OF BURR'S CAR, AND THE DISCOVERY OF A GUN, WAS UNLAWFUL.

A police officer may briefly stop and detain someone for investigation without a warrant if the officer reasonably suspects the person is engaged in or about to be engaged in criminal conduct. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). During the detention, the officer may briefly frisk the individual for weapons if he reasonably believes his safety or that of others is at risk. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The scope of the frisk is limited to its protective purposes. State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). Where an officer has no articulable suspicion that a detainee is armed or dangerous and has nothing to independently connect such person

to illegal conduct, a search of the person is invalid under article I, section 7. State v. Parker, 139 Wn.2d 486, 498, 987 P.2d 73 (1999).

Factors favoring use of a frisk include ignoring an officer's commands, fleeing at the officer's approach, making furtive movements or threats, wearing clothing that conceals the presence of a weapon, being suspected of a crime for which possession of a weapon may be reasonably assumed, being in a high-crime area, and being out late at night. State v. Miller, 91 Wn. App. 181, 185, 955 P.2d 810, 961 P.2d 973, review denied, 136 Wn.2d 1016 (1998); State v. Terrazas, 71 Wn. App. 873, 879, 863 P.2d 75 (1993), review denied, 123 Wn.2d 1028 (1994); State v. Galbert, 70 Wn. App. 721, 726, 855 P.2d 310 (1993); State v. Walker, 66 Wn. App. 622, 631, 834 P.2d 41 (1992), reversed on other grounds, State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1993).

In its unchallenged findings of fact,<sup>4</sup> the trial court found that while patrolling in an apartment complex parking lot, Officer Dill observed Burr and Cobbs standing near a parked car with its door open. There was a tire leaning up against the car. Dill was aware neither Burr nor Cobbs lived at the complex. Earlier that night, Dill had been told an anonymous tipster

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<sup>4</sup> Unchallenged findings of fact are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

reported that Cobbs had been selling guns to juveniles in the area. He knew Burr and Cobbs were convicted felons with a history of possessing guns.

As Dill approached, he observed Burr get into the car, get back out, and close the door that had been open. He also smelled the odor of burnt marijuana. Dill frisked Burr and Cobbs for weapons for his own safety. Dill felt a small, hard object shaped like a marijuana pipe in Burr's pocket. Burr said it was a weed pipe, which Dill then removed. CP 80-81.

Although Burr challenged the frisk, the trial court did not address it in its written conclusions of law. CP 82. In its oral ruling, the trial court found the anonymous tip, knowledge of previous weapons possession, Burr's quick entry into and exit from the car, and time of night, justified the frisk. 2RP 46-47.

Burr disagrees. Neither he nor Cobbs said or did anything threatening to Dill. They were fully cooperative. 2RP 26-27. Dill had a "pretty decent rapport" with Cobbs because of the "extensive contacts" they had. 2RP 9. Both Burr and Cobbs lifted their shirts when asked so Dill could check their waist bands. 2RP 10-11.

As for the above-referenced factors, neither man attempted to flee or ignored Dill's directions. Neither made furtive movements in Dill's

presence. Although Burr and Cobbs had been removing a tire from the car, neither grabbed a tool to use against Dill. It was dark outside and Dill was alone, but Dill did not order the men to move away from the car, did not handcuff them, and did not display his gun before frisking them. Moving Burr and Cobbs away from the car would have alleviated any concern Dill had that Burr hid something when he quickly entered and exited the vehicle. Finally, Dill had not responded to a report of a crime.

For these reasons, the State failed to establish Dill had an articulable suspicion that Burr or Cobbs were armed or dangerous when he frisked them. The frisk was therefore unlawful.

Evidence derived from an unlawful frisk must be suppressed. Ladson, 138 Wn.2d at 359. That means the marijuana pipe and all evidence that flowed from its finding – including the gun found in the car – must be suppressed. Without this evidence, the state cannot prove Burr unlawfully possessed a firearm. This Court should therefore reverse the trial court's denial of Burr's motion to suppress and remand with an order to reverse his conviction and dismiss with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997); State v. Hopkins, 128 Wn. App. 855, 866, 117 P.3d 377 (2005).

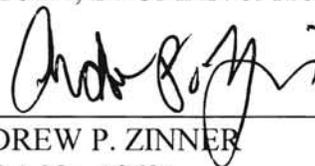
D. CONCLUSION

For the above reasons, this Court should reverse the trial court's denial of Burr's motions to suppress evidence and remand for dismissal with prejudice.

DATED this 29 day of August, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70056-1-1
	)	
ANTHONY BURR,	)	
	)	
Appellant.	)	

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**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 29<sup>TH</sup> DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SUPERIOR COURT  
STATE OF WASHINGTON

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF AUGUST 2013.

X *Patrick Mayovsky*