

70929-1

70929-1

No. 70929-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WYATT H.,

Juvenile Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 JUN 14 1:50

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

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE..... 3

 1. The seizure..... 3

 2. The search..... 4

 3. The trial and Wyatt’s remarkable turnaround..... 5

D. ARGUMENT 7

The trial court erred in denying the motion to suppress because the evidence was obtained as a result of an unconstitutional seizure and search. 7

 1. The *Terry* stop is a narrow exception to the warrant requirement allowing for a warrantless seizure only where the officer has reasonable suspicion that the individual seized is committing a crime..... 8

 2. The seizure occurred when the officers separated Wyatt and Hakala and Officer Brownlee asked Wyatt what he was doing..... 9

 3. The seizure was unconstitutional because, as the officers acknowledged, they merely saw two young men standing close together at Cal Anderson Park on a summer afternoon; they did not witness an exchange, and they thought the two men “may have just been holding hands.”.... 14

 4. Even if the seizure was valid, the search was unconstitutional because the officer lacked reasonable suspicion that Wyatt was armed and dangerous. 19

E. CONCLUSION 22

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	9, 10, 14, 15
<i>State v. Doughty</i> , 170 Wn.2d 57, 239 P.3d 573 (2010)	8, 14, 18
<i>State v. Garvin</i> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....	9
<i>State v. Gatewood</i> , 163 Wn.2d 534, 182 P.3d 426 (2008).....	passim
<i>State v. Harrington</i> , 167 Wn.2d 656, 222 P.3d 92 (2009).....	10, 12
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	17
<i>State v. Setterstrom</i> , 163 Wn.2d 621, 183 P.3d 1075 (2008).....	20, 21

Washington Court of Appeals Decisions

<i>State v. Galbert</i> , 70 Wn. App. 721, 855 P.2d 310 (1993).....	20
<i>State v. Gantt</i> , 163 Wn. App. 133, 257 P.3d 682 (2011).....	11, 12
<i>State v. Lennon</i> , 94 Wn. App. 573, 976 P.2d 121 (1999)	21
<i>State v. Martinez</i> , 135 Wn. App. 174, 143 P.3d 855 (2006).....	8, 9, 14, 15
<i>State v. O’Cain</i> , 108 Wn. App. 542, 31 P.3d 733 (2001)	9, 14
<i>State v. Richardson</i> , 64 Wn. App. 693, 825 P.2d 754 (1992).....	18
<i>State v. Walker</i> , 66 Wn. App. 622, 834 P.2d 41 (1992).....	20, 22

United States Supreme Court Decisions

<i>Brown v. Texas</i> , 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979)	9
<i>J.D.B. v. North Carolina</i> , ___ U.S. ___, 131 S.Ct. 2394, 180L.Ed.2d 310 (2011).....	10
<i>Sibron v. New York</i> , 392 U.S. 40, 88 S.Ct. 1889, 20 L.2d.2d. 917 (1968)	20

Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968) 8, 14

Constitutional Provisions

Const. art. I, § 7..... 8

U.S. Const. amend. IV 8

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Wyatt's motion to suppress the evidence obtained as a result of an unconstitutional seizure and search.

2. In the absence of substantial evidence, and to the extent it is a Finding of Fact rather than a Conclusion of Law, the trial court erred in entering Finding of Fact 14: "At this point, [Wyatt] was free to end their conversation and could have walked away."¹ CP 63.

3. The trial court erred in failing to specify the point at which the alleged "social contact" developed into a seizure. CP 65.

4. The trial court erred in entering Conclusions of Law 1, 4, 5, 6, and 8. CP 65.

5. Wyatt also assigns error to Conclusions of Law 9 and 10 to the extent they depend on Conclusions 1, 4, 5, 6, and 8. CP 65-66.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A person is seized within the meaning of the Fourth Amendment and article I, section 7 when a reasonable person in his position would believe he was not free to terminate an encounter with police officers. Here, 15-year-old Wyatt was hanging out with his friend in a park on a summer afternoon when two police officers rode their

¹ The challenged findings and conclusions are those regarding the CrR 3.6 motion to suppress, at CP 61-66. This document is also attached as an appendix to this brief.

bicycles up to them and separated the two. The officer assigned to Wyatt then asked him what he was doing, asked his name, age, and address, and entered his information into a computer. Did the officers seize Wyatt?

2. Police may not seize an individual without a warrant unless they have a reasonable suspicion that the person is committing a crime. A hunch is not enough; there must be a substantial possibility of criminal activity. Here, officers seized Wyatt and his friend because the two were standing close together on a summer afternoon in a park on Capitol Hill, and, although it looked like the two may have been holding hands, the officers also thought they might have been engaged in a narcotics transaction. Did the officers lack the authority of law to seize Wyatt?

3. Even if a seizure is proper, police may not frisk a person for weapons unless the officer has a reasonable suspicion that the individual is both armed and dangerous. In this case, the officer frisked Wyatt because Wyatt acted nervous and admitted he might have needles on his person; but the officer did not believe Wyatt had a gun, knife, or any other weapon, and Wyatt was polite and complied with the officer's orders. Did the officer lack authority of law to frisk Wyatt?

C. STATEMENT OF THE CASE

1. The seizure.

Fifteen-year-old Wyatt H. was hanging out with his friend Peter Hakala at Cal Anderson Park on a summer afternoon. Uniformed Seattle Police Officers Brownlee and Archer were proactively patrolling the park on their bicycles. The officers saw Wyatt and Hakala standing close together with their hands out in front of them. The officers knew that Capitol Hill has a large population of openly gay men, and thought the two young men may have been holding hands. But they also knew the park was a high-crime area, and thought they “might be seeing a narcotics transaction.” This was so even though the officers did not see anything being exchanged. CP 61-62; RP 55-57.

The officers rode toward the pair, and Peter Hakala’s “eyes widened.” CP 62. Wyatt turned to the left, hiding his hands. Officer Brownlee saw the corner of a plastic sandwich bag in Hakala’s hand, and saw Hakala switch the bag to his other hand while the officers approached. Hakala did not try to hide the sandwich bag when he saw the officers. CP 62; RP 19-20, 24-27, 58-62.

Nevertheless, once the officers reached the young men, they separated them. Officer Archer questioned Hakala, and Officer Brownlee

questioned Wyatt. Officer Brownlee said, "What are you doing?" CP 63; RP 27, 60-62, 122.

Wyatt told Officer Brownlee they were "just hanging out," and that Hakala was "warning him to stay away from tweakers." CP 63. Officer Brownlee asked Wyatt for his name, age, and address, which the officer then entered into a computer. CP 63.

Wyatt was nervous and shifted his weight back and forth. CP 63; RP 34. Officer Brownlee ordered him to stop moving, and he complied. CP 63; RP 34, 64. Wyatt then started fidgeting again, and the officer thought he saw Wyatt's hands start to "creep down towards his centerline and underneath his shirt." CP 63; RP 35. Officer Brownlee ordered Wyatt to stop, and he again complied. RP 35, 64.

2. The search.

After he seized Wyatt by separating him from his friend, asking him what he was doing, entering his information into a computer, and ordering him to stop moving, Officer Brownlee noticed that Wyatt had the word "Peace" and a phone number written in marker on his arm. RP 35. The officer knew that "Peace" was the name of a meth dealer, and asked Wyatt what kinds of drugs he was using. RP 36. Wyatt said he had used heroin that morning. RP 36-37. The officer asked him if he had any

needles on his person, and Wyatt said he was not sure. RP 37-39. The officer then frisked Wyatt. RP 39-40.

3. The trial and Wyatt's remarkable turnaround.

As a result of the above events, Officer Brownlee eventually discovered that Wyatt possessed both crystal meth and heroin. RP 45-52. The King County Prosecutor's Office charged Wyatt with two counts of violating the Uniform Controlled Substances Act. CP 1-2.

Trial did not occur until a year and a half later because Wyatt was participating in intensive drug treatment through the Snohomish County Drug Court. He successfully completed 228 days of inpatient treatment, then successfully completed the aftercare program. RP 140. During treatment, he obtained his G.E.D., and once he returned to the community, he got a job at Ralph Lauren. RP 145-47. Wyatt appreciated his opportunities, and said he had "the best counselor in the whole world" and "the best teacher in the whole world" while he was in treatment. RP 147, 159.

Pre-trial, Wyatt moved to suppress the evidence obtained as a result of the seizure and search described above. CP 7-20; RP 4-118. The court denied the motion. CP 61-66; RP 119-28. The court then found Wyatt guilty on both counts following a stipulated-facts bench trial. RP 130-37; CP 42-47, 67-69.

At sentencing, the probation officer, the prosecutor, and the judge all praised Wyatt profusely for his hard work and success in treatment. RP 139-166. The prosecutor said:

First of all, Officer Brownlee wanted me to convey to the court that looking at [Wyatt] he was very just impressed with his general appearance today compared to when he saw him two years ago. He thought that was really cool.

I think it is really neat as well and I wanted just to say on the record that I congratulate you for doing what you have done the last, you know, six odd months. I think that is awesome. I am proud of you. You should be proud of yourself and – way to go.

RP 144.

The judge said to Wyatt, “I can’t tell you how impressed I am. You have done a fabulous job.” RP 160.

Wyatt’s attorney also praised the way he “completely turned his life around.” RP 145. She said they took the case to trial not because Wyatt declined to take responsibility for his actions but because Wyatt wants to go to college and “these convictions [are] going to prevent him from getting loans and other funding.” RP 145.

The judge asked if she could enter a deferred disposition or in some other way remove these convictions from Wyatt’s record so he could obtain funding for college. RP 154-56. The attorneys stated that Wyatt was not eligible for a deferred disposition and that he could not participate

in drug court in King County because the judge had already found him guilty. RP 154-57. The judge therefore sentenced Wyatt to time served, and the convictions remain on his record. RP 157; CP 36-40.

D. ARGUMENT

The trial court erred in denying the motion to suppress because the evidence was obtained as a result of an unconstitutional seizure and search.

This Court should reverse for two independent reasons: first, because officers seized Wyatt without lawful authority; and second, because Officer Brownlee searched Wyatt without lawful authority. The fact that Wyatt and his friend were standing close together in a park on a summer afternoon does not create a substantial possibility that they were committing a crime, which is required prior to a warrantless seizure. Furthermore, the fact that Wyatt acted nervous while Officer Brownlee interrogated him and admitted he might have needles on his person does not create reasonable suspicion that he was armed and dangerous, as required to justify a warrantless weapons search. This Court should reverse and remand for suppression of the evidence and dismissal of the charges.

1. The Terry stop is a narrow exception to the warrant requirement allowing for a warrantless seizure only where the officer has reasonable suspicion that the individual seized is committing a crime.

Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV.

Under both the federal and state constitutions, warrantless searches and seizures are prohibited unless an exception applies. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). One narrow exception to the warrant requirement is the *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1, 21, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). Under *Terry*, an officer may briefly detain a person if the officer harbors a reasonable suspicion, based on specific articulable facts, that the individual is engaging in criminal activity. *Id.*

As an exception to the warrant requirement, the *Terry* stop must be narrowly construed and “jealously and carefully drawn.” *State v. Martinez*, 135 Wn. App. 174, 179, 143 P.3d 855 (2006). When the “reasonable suspicion” standard is not strictly enforced, the exception swallows the rule and “the risk of arbitrary and abusive police practices

exceeds tolerable limits.” *Brown v. Texas*, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

The *Terry* exception must be limited to those situations in which there is a “substantial possibility” that a crime has been committed and that the individual detained is the offender. *Martinez*, 135 Wn. App. at 180. “[A] hunch does not rise to the level of a reasonable, articulable suspicion.” *State v. O’Cain*, 108 Wn. App. 542, 548, 31 P.3d 733 (2001). “Innocuous facts do not justify a stop.” *Martinez*, 135 Wn. App. at 180; accord *State v. Armenta*, 134 Wn.2d 1, 13, 948 P.2d 1280 (1997).

The *Terry* exception is more narrowly construed under our state constitution than under the Fourth Amendment. See *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The State bears the burden of proving the legality of a warrantless seizure by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). An appellate court reviews the constitutionality of a warrantless seizure de novo. *Martinez*, 135 Wn. App. at 179.

2. The seizure occurred when the officers separated Wyatt and Hakala and asked Wyatt what he was doing.

The trial court concluded that Officer Brownlee had not seized Wyatt even after he separated him from his friend, demanded to know what he was doing, asked him his name, birthdate, and hometown, and

entered the information into a computer. CP 63. The trial court erred, because these events constitute a seizure, not a “social contact.”²

A seizure has occurred when, in view of all the circumstances surrounding the incident, a reasonable person in the individual’s position would have believed that he was not free to leave. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009); *Armenta*, 134 Wn.2d at 10. An encounter that begins as a “social contact” may, through “progressive intrusion,” develop into a seizure for which authority of law is required. *See Harrington*, 167 Wn.2d at 668-69.

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. *Cf. J.D.B. v. North Carolina*, ___ U.S. ___, 131 S.Ct. 2394, 2406, 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);

² As noted in the assignments of error, it is not abundantly clear at what point the trial court concluded Wyatt was seized, but it appears to be at Finding of Fact 15. Finding of Fact 14 states that Wyatt was “free to end their conversation and could have walked away,” even after the officers separated him from his friend, asked him what he was doing, and entered his name, address, and age into the computer. As a legal matter, the question is whether a reasonable person in Wyatt’s position would have believed he was free to leave, regardless of whether he was in fact free to leave. There is no conclusion of law identifying the point at which the ostensible “social contact” developed into a seizure under this test. CP 65.

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.

A reasonable person in Wyatt’s position would not have felt free to leave after police officers separated him from his friend, asked what he was doing, and entered his name, birthdate, and address in a computer. A person engaged in a “social contact” does not separate friends from each other. A person engaged in a “social contact” says “**How** are you doing?” not “**What** are you doing?” And a person engaged in a “social contact” does not check a person’s name, address, and age against a database for warrants. No reasonable person would believe this was a social interaction from which he could walk away – certainly no 15-year-old child would believe he was free to do so.³

This Court’s decision in *State v. Gantt* is instructive. *State v. Gantt*, 163 Wn. App. 133, 257 P.3d 682 (2011). There, the defendant

³ In her oral ruling, the judge appeared to recognize that the officers’ immediate separation of the friends suggested a seizure rather than a social contact, but she believed the question “**How** are you doing?” indicated it was a social contact. RP 121-22. This oral finding is inconsistent with the written findings, which, in line with the officer’s testimony, state that the officer asked “**What** are you doing?” not “How are you doing?” Thus, the erroneous conclusion that Wyatt was not seized at this point may well be based on a misunderstanding of the facts.

parked his van, got out, and walked toward a house. *Id.* at 136. A police officer was suspicious because he had just seen the same van parked in a different place. The officer activated his emergency lights, parked behind the van, and got out of his patrol car. When the man returned to his van, the officer asked him what he was doing. *Id.*

The officer described the interaction up to this point as a “social contact,” and the trial court adopted that characterization. The trial court ruled that the interaction did not evolve into a seizure until the officer later noticed a traffic infraction. *Id.* at 138.

This Court reversed, stating, “[w]e conclude that Mr. Gantt was seized when Officer Valencia activated his emergency lights and asked Mr. Gantt what he was doing.” *Gantt*, 163 Wn. App. at 141. The use of lights and the question constituted a display of authority, not a social contact. *Id.* at 142. Asking a person what he is doing is investigative, but “[a] social contact between a police officer and a citizen ‘does not suggest an investigative component.’” *Id.* (quoting *Harrington*, 167 Wn.2d at 664). A reasonable person in the defendant’s position would not have believed he was free to leave, and therefore the interaction constituted a seizure. *Id.*

The same is true here. In this case, the officers were on bicycles, for which the method of showing authority is not activation of lights. But

the officers engaged in an analogous show of authority when the two of them rode toward Wyatt and Hakala, parked their bikes, and separated the two friends. RP 62. Officer Brownlee then asked Wyatt the same question the officer in *Gantt* asked, namely, “What are you doing?” RP 27, 60. Officer Brownlee further demanded to know Wyatt’s name, age, and address, and entered the information into a computer. RP 28-32. If the events at issue in *Gantt* constituted as seizure, Wyatt was certainly seized by the time the officers had separated him from his companion, demanded to know what he was doing, and entered his information into a computer. The trial court erred in concluding to the contrary.⁴

Because, as explained below, the officers did not have reasonable suspicion to believe Wyatt was committing a crime at the time they seized him, the seizure was unconstitutional and the evidence thereby obtained should have been suppressed.

⁴ Officer Brownlee himself described his initial contact with Wyatt as a *Terry* seizure. RP 89. Although this fact is not determinative because the standard is an objective one, it is worth noting that if the officer thought the encounter was a seizure, a reasonable person subject to the investigation would likely also think it was a seizure.

3. The seizure was unconstitutional because, as the officers acknowledged, they merely saw two young men standing close together at Cal Anderson Park on a summer afternoon; they did not witness an exchange, and they thought the two men “may have just been holding hands.”

As explained above, an officer may briefly seize a person for questioning without a warrant only if the officer has a reasonable suspicion, based on specific articulable facts, that the individual is engaging in criminal activity. *Terry*, 392 U.S. at 21. A person’s presence in a high-crime area does not, by itself, give rise to a reasonable suspicion to detain that person. *Doughty*, 170 Wn.2d at 62. There must be a “substantial possibility” that a crime has been committed; a hunch is insufficient. *Martinez*, 135 Wn. App. at 180; *O’Cain*, 108 Wn. App. at 548. “Innocuous facts” do not justify a stop. *Armenta*, 134 Wn.2d at 13; *Martinez*, 135 Wn. App. at 180.

Here, the facts known to the officers at the time they seized Wyatt and Hakala merely supported a hunch that the two were engaged in criminal activity, and did not rise to the “substantial possibility” required to justify the warrantless intrusion. This is so whether one concludes Wyatt was seized at the moment described above (at the point of Finding of Fact 14), or whether one assumes the trial court correctly concluded

that Wyatt was not seized until the officer twice ordered Wyatt to stop moving (at the point of Finding of Fact 15). *See* CP 63.

The officers saw two young people in a park on a summer afternoon. The two were standing close to each other, and looked like they may have been holding hands. One of them had a sandwich bag. RP 15-20, 55-58; CP 61-62. The officers did not see money, did not see drugs, and did not see an exchange. RP 57. As the trial court found, the officer thought the young men were “looking as though they were either holding hands or participating in a hand-to-hand narcotics exchange.” CP 62 (Finding of Fact 6). The officer “knew that Capitol Hill has a large population of openly gay men, but also thought he and Officer Archer **might** be seeing a narcotics transaction.” CP 62 (Finding of Fact 8) (emphasis added). This type of speculation, based on innocuous facts, is insufficient to justify a seizure. *Armenta*, 134 Wn.2d at 13; *Martinez*, 135 Wn. App. at 180; *O’Cain*, 108 Wn. App. at 548.

Nor does the fact that Hakala’s “eyes widened” as the officers approached, or that Wyatt “turned to the left, hiding his hands,” change the analysis. CP 62 (Finding of Fact 9). The Supreme Court’s decision in *Gatewood* is instructive and controls this case. There, two police officers were patrolling the Rainier Valley area of Seattle after midnight. *Gatewood*, 163 Wn.2d at 537. They drove by a bus shelter where several

people, including the defendant, were sitting. *Id.* When the defendant saw the officers, his “eyes got big,” and he “twist[ed] his whole body to the left, . . . , as though he was trying to hide something.” *Id.* The officers were suspicious, so they circled back. The defendant left the bus shelter and jaywalked across the street. *Id.* at 537-38. The officers then stopped him, and eventually discovered drugs. *Id.* at 538.

The Supreme Court reversed the denial of the suppression motion, holding the combination of the following four facts was insufficient to justify the seizure: (1) Gatewood’s “widened eyes” upon seeing the officers; (2) “his twist to the left like he was trying to hide something;” (3) “his departure from the bus shelter” after seeing the officers; and (4) his jaywalking. *Gatewood*, 163 Wn.2d at 540. The Court noted, “Startled reactions to seeing the police do not amount to reasonable suspicion.” *Id.* Furthermore, “[a]lthough Gatewood twisted to the side, [the officer] did not see what, if anything, Gatewood was hiding.” *Id.* The Court concluded:

Officers seized Gatewood to conduct a speculative criminal investigation. Our constitution protects against such warrantless seizures and requires more for a *Terry* stop.

Id. at 542.

If the facts known to the officers in *Gatewood* at the time of the seizure were insufficient to justify the intrusion, the same is certainly true

here. To begin with, **Wyatt's** eyes did not widen upon seeing the officers, and **Wyatt** was not holding a plastic sandwich bag. He may not be seized based on Hakala's suspicious conduct, because privacy rights are individually held. *State v. Parker*, 139 Wn.2d 486, 497-98, 987 P.2d 73 (1999).

But even if one assumes Hakala's reaction can be taken into account, *Gatewood* makes clear that a person's "widened eyes" upon seeing an officer does not amount to reasonable suspicion of criminal activity – even in combination with other suspicious acts. Similarly, the fact that Officer Brownlee thought that Wyatt's and Hakala's posture **might** indicate an imminent hand-to-hand exchange does not support the intrusion any more than the defendant's "twisting like he was trying to hide something" did in *Gatewood*. Furthermore, in *Gatewood*, the officers actually saw the defendant violate the law by jaywalking, but even that did not tip the scales enough to support the seizure. Here, the officers did not see Wyatt violating any laws. Their observation of him standing close to another young man in a park on a summer afternoon, even in combination with the other man's widened eyes and possession of a sandwich bag, does not rise to the level of creating a substantial possibility of criminal activity. *See Gatewood*, 163 Wn.2d at 540-42.

The Supreme Court’s opinion in *Doughty* and this Court’s opinion in *Richardson* are also instructive. See *Doughty*, 170 Wn.2d 57; *State v. Richardson*, 64 Wn. App. 693, 825 P.2d 754 (1992). In *Richardson*, a police officer was patrolling an area known for high drug activity. *Richardson*, 64 Wn. App. at 694. On three occasions that evening the officer observed a person engage in suspicious activity consistent with delivering drugs: the person would stand on a corner, approach people in cars, and talk with them briefly. After the third suspected drug transaction, the person noticed the officer and quickly walked away. *Id.* Soon thereafter, the officer saw the same person walking with another man, later identified as Richardson. The officer stopped the men, questioned them, and eventually found drugs on Richardson. *Id.* at 695. This Court reversed the trial court’s denial of the suppression motion. It held that although the officer observed the defendant in a high-crime area, late at night, walking with a suspected drug dealer, these facts were insufficient to create reasonable suspicion for the seizure. *Id.* at 697.

The Supreme Court similarly reversed in *Doughty*. There, officers stopped a man after seeing him enter a suspected drug house at around 3:00 in the morning, stay for two minutes, and then leave. *Doughty*, 170 Wn.2d at 62. The Court held these facts created a “mere hunch” of illegal drug activity and did not rise to the level of a “substantial possibility” that

criminal activity occurred. *Id.* at 62-63. “The *Terry*-stop threshold was created to stop police from this very brand of interference with people’s everyday lives.” *Id.* at 63.

As in *Gatewood*, *Richardson*, and *Doughty*, the officers’ observations here created a mere hunch of criminal activity and did not rise to the level of a substantial possibility of criminal activity required to justify the intrusion upon Wyatt’s privacy. The remedy is reversal of the convictions, and remand for suppression of the evidence obtained as a result of the unlawful seizure. *Gatewood*, 163 Wn.2d at 542. The Court need not reach the alternative argument below.

4. Even if the seizure was valid, the search was unconstitutional because the officer lacked reasonable suspicion that Wyatt was armed and dangerous.

Even if the seizure were justified, the subsequent frisk was performed without authority of law, constituting an independent basis for reversal.

Like the *Terry* stop, the *Terry* frisk exception to the warrant requirement must be narrowly construed because a frisk “is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.” *Terry*, 392 U.S. at 17. Thus, even where a *Terry* investigative stop is

lawful, an officer may not frisk a person unless the officer has reasonable grounds to believe the person is both armed and presently dangerous.

State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); *State v. Walker*, 66 Wn. App. 622, 629, 834 P.2d 41 (1992).

A generalized suspicion cannot justify a frisk. *State v. Galbert*, 70 Wn. App. 721, 725, 855 P.2d 310 (1993) (citing *Sibron v. New York*, 392 U.S. 40, 64, 88 S.Ct. 1889, 20 L.2d.2d. 917 (1968)). “[T]he police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. The standard requires both specificity and objectivity, because “[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result [the Supreme] Court has consistently refused to sanction.” *Terry*, 392 U.S. at 22. As in the *Terry* seizure context, Article I, section 7 provides greater protection than the Fourth Amendment against unreasonable weapons frisks. *Setterstrom*, 163 Wn.2d at 626.

Here, the facts known to Officer Brownlee did not rise to the level of reasonable suspicion to believe that Wyatt was armed and dangerous. The officer testified that he frisked Wyatt because (1) Wyatt appeared “nervous” – his “eyes were casting about and he started shuffling back and

forth on his feet,” RP 34; and (2) although the officer did not think Wyatt had a gun, knife, or any other type of weapon, he was concerned because Wyatt was not sure whether he had any needles on his person and in the past the officer had “had drug addicts brandish needles at me as a makeshift weapon.” RP 37-39.

But most people are nervous when interrogated by police officers, so “officers must have some basis beyond nervousness and lying to justify the intrusion of a frisk.” *Setterstrom*, 163 Wn.2d at 627. And the fact that **other** people had brandished needles against the officer does not create reasonable suspicion that **Wyatt** was presently dangerous. *See State v. Lennon*, 94 Wn. App. 573, 580, 976 P.2d 121 (1999) (“The suspicion must be founded, however, on facts specific to the individual suspect”).

Furthermore, the officer testified that (1) both times he ordered Wyatt to stop fidgeting, he complied; (2) Wyatt “was very polite throughout the majority of our contact;” and (3) Wyatt never threatened the officer or made any threatening gestures. RP 64, 78. Thus, as in *Setterstrom* and *Lennon*, the search was improper. *See Setterstrom*, 163 Wn.2d at 627 (reversing where officer frisked suspect who lied and appeared nervous, but made no threatening gestures or words); *Lennon*, 94 Wn. App. at 580-81 (reversing where officer frisked suspect because officers “commonly found weapons on the premises searched for

narcotics,” but individual did not threaten officers, did not ignore their commands, and did not flee). The remedy is reversal and remand for suppression of the evidence. *Walker*, 66 Wn. App. at 631.

E. CONCLUSION

For the reasons set forth above, Wyatt asks this Court to reverse his convictions and remand with instructions to suppress the evidence and dismiss the charges with prejudice.

Respectfully submitted this 22nd day of April, 2014.



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

APPENDIX

Findings of Fact and Conclusions of Law
On CrR 3.6 Motion to Suppress
(CP 61-66)

1 Anderson Park, stating that he has made so many arrests in the park that he cannot even
2 count.

3 4. Between 2008 and 2011, Cal Anderson Park was one of the largest hot spots for narcotics
4 activities in the East Precinct of Seattle. There was a "bad crew" doing a lot of organized
5 residential burglaries, and dumping items in the park during this time period. The area
6 became a "merchandise exchange" for black tar heroin and methamphetamine.

7 5. While the park offers a wading pool, water reservoir and playfields, Brownlee knows that
8 both narcotics use and delivery dominate certain areas of the park. These areas include the
9 park's restrooms, a section with dominos tables, and its northwest section. Officer
10 Brownlee said he patrolled the northwest corner of the park most often because it had the
11 highest use of drug use and delivery. The northwest section is not regularly frequented
12 by the general public.

13 6. As Brownlee and Archer approached the northwest section of the park, Brownlee spotted
14 two males facing each other, standing less than a foot apart. Both males were standing
15 close together and had their hands out in front of them, looking as though they were
16 either holding hands or participating in a hand-to-hand narcotics exchange. One of the
17 males, later identified as Peter Hakala, was holding what appeared to be a Ziploc bag in
18 his left hand. Officer Brownlee could see about an inch of the baggie. *sandwich size*

19 7. This behavior concerned Brownlee because, in addition to the males being in the
20 northwest section of the park (a secluded area that is a hotbed for narcotic activity), (1)
21 the males were alone and were on a downslope, potentially to avoid discovery, (2) dealers
22 often package their narcotics in Ziploc bags, and (3) their actions were consistent with
23 persons trying to use their bodies to block their hands from view. The males' positions
also allowed each male to look out over the other male's shoulder for approaching
pedestrians. Brownlee stated that if you were trying to avoid attention, their location was
a "nice spot."

8. Brownlee knew that Capitol Hill has a large population of openly gay men, but also
thought he and Officer Archer might be seeing a narcotics transaction.

9. As Brownlee and Archer got closer, Brownlee noticed that Hakala looked surprised to see
them. At this point, Brownlee could not see the other male's face (this male was later
identified as the respondent, Wyatt Henderson). Hakala's eyes widened and he got a
"darnit look" in his eyes. He immediately turned away to the right, hiding his hands.
Brownlee said he was concerned that Hakala might be hiding a weapon. Henderson did
the same thing but turned to the left, hiding his hands. He also took a step backwards and
immediately looked down at the ground. Brownlee described both of the males' reactions
as unusual.

10. Both males hid their hands as the officers greeted them. Brownlee said that when
someone immediately hides his hands he pays attention, because based on his training

1 and experience, it means that he is either trying to hide something or is reaching for a
2 weapon.

3 11. Brownlee greeted the males and asked what they were doing. Hakala, an adult, stuttered
4 a bit and moved his hands back in front of him. Brownlee noticed that Hakala now had a
5 cellphone in his left hand and a Ziploc bag in his right (originally, Hakala had had the bag
6 in his left hand).

7 12. Henderson, who appeared to be a juvenile, responded, stating that they were just hanging
8 out and that Hakala was warning him to stay away from "tweakers." Brownlee thought
9 Henderson's "tweakers" comment was "absolutely bizarre" and asked Henderson for his
10 name. Brownlee knew that "tweakers" is a "savvy street drug" reference to
11 methamphetamine addicts.

12 13. Henderson said his name was Tyler Hansen and that he was born on October 16, 1995.
13 When asked, Henderson also told Brownlee that he was 15 years old and that he was
14 from Stanwood, Washington. This also concerned Brownlee because he knew most of
15 the street kids that hung out at the park. Brownlee had never seen Henderson before and
16 he decided to run Henderson's name and date of birth to see if he was a missing child.

17 14. At this point, Henderson was free to end their conversation and could have walked away.

18 *officer Brownlee did not advise Henderson he was*
19 *free to leave.*
20 15. Brownlee stated that he encounters a lot of runaways and missing juveniles while on
21 patrol and given Henderson's age and distance from home, Brownlee told Henderson that
22 he was concerned that he was either a runaway or missing. While Henderson assured
23 Brownlee that he was neither, Brownlee became even more concerned by Henderson's
behavior—as he kept shifting his weight back and forth and looking to his left and right
(which Brownlee knows as both pre-attack and pre-flight indicators). Henderson
complied momentarily when told to stop, but then started to move his hands towards the
center of his beltline, at one point placing his hands underneath his shirt. Brownlee again
asked Henderson to stop.

16 16. While waiting for confirmation of Henderson's identity, Brownlee noticed that
17 Henderson had "Peace" and a phone number written on his left bicep. Because Brownlee
18 knows a male named Peace as both a local burglar and methamphetamine addict, he
19 asked Henderson how he knew Peace. Henderson said they were friends.

20 17. In light of the active meth-burglary group in the park and the fact that Henderson had a
21 known burglar's and methamphetamine addict's name and phone number written on his
22 arm, Brownlee asked Henderson if he had recently used drugs and Henderson stated that
23 he had used heroin at 10:00 am that morning. Concerned for his own safety, Brownlee
asked Henderson if he had any needles on him and Henderson stated that he was not sure.
Henderson started to shift his weight back and forth again and look to his left and right.

- 1 18. Because of Henderson's continued behavior and the fact that suspects have tried to stab
2 Officer Brownlee with crack pipes before and have also brandished needles at him,
Brownlee frisked Henderson for weapons.
- 3 19. Brownlee felt a wallet inside one of Henderson's pockets. Given that he had still not been
4 able to confirm Henderson's identity, he asked Henderson if he could remove his wallet.
5 Henderson said, "Yes." Brownlee removed Henderson's wallet and could clearly see the
6 corner of an identification card sticking out of it. Already knowing the answer, Brownlee
7 asked Henderson if he had any identification in his wallet and Henderson said, "Uh?"
8 Because Brownlee had still not heard back from dispatch regarding Brownlee's identify,
9 Brownlee asked Henderson if he could remove his identification card from his wallet and
Henderson said, "I'd rather you didn't."
- 10 20. Henderson's statement that he would rather Brownlee not remove his identification card
11 indicates that he knew he did not have to give Brownlee permission to remove his wallet
12 or his ID card. Brownlee did not remove Henderson's identification card. At this point,
13 Brownlee had been talking to Henderson for four to seven minutes.
- 14 21. Brownlee then said "You lied to me about your name, didn't you?" Henderson admitted
15 he had lied and that he had two warrants out for his arrest. Because of Henderson's
16 statements regarding his warrants and because Brownlee had not yet completed his
17 weapons frisk, Brownlee placed Henderson into handcuffs.
- 18 22. Henderson then apologized to Brownlee and gave him permission to remove the
19 identification card from his wallet. Brownlee removed the card and ran Henderson's true
20 name. Brownlee contacted both Henderson's mother and Snohomish County's Denny
21 Youth Center and confirmed that Henderson had two outstanding warrants.
- 22 23. Henderson was placed under arrest and read his Miranda rights.
- 23 24. Post-Miranda, Henderson admitted that he had heroin in his backpack.
25. In a search incident to arrest of Henderson at the scene, Brownlee found a pipe in one of
Henderson's pockets. The pipe had methamphetamine residue on it.
26. Henderson was later transported back to the East Precinct and placed into a holding cell.
27. Conducting an inventory search pursuant to SPD's standard procedure, Brownlee
searched Henderson's backpack and discovered several used syringes, a container often
used to cook heroin, and a small amount of heroin.
28. SPD's officers are required to conduct an inventory search before storing an item or
placing it into evidence to protect SPD from claims of theft, to prevent an evidence lab
technician from being stuck by a needle, to dispose of perishable food, and to prevent
against narcotics from being brought into the jail (among other reasons).

CONCLUSIONS OF LAW

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

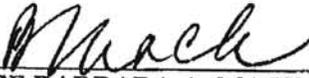
1. Officers Brownlee and Archer first contacted Hakala and Henderson pursuant to a social contact. Not every encounter between a citizen and a police officer rises to the stature of a seizure. A police officer does not seize a person by simply striking up a conversation or asking questions. Nor is there a seizure where the conversation between citizen and officer is freely and voluntarily conducted.
2. Social contacts in the field may include an investigative component. *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009).
3. "Effective law enforcement techniques not only require passive police observation, but also necessitate their interaction with citizens on the streets." *State v. Young*, 135 Wn.2d 498, 511-12, 957 P.2d 681, 688 (1998) (internal quotations omitted).
4. Given Brownlee's concern that Henderson was a juvenile runaway or missing person, Brownlee's request for Henderson's name and date of birth was also a valid request pursuant to a social contact. Brownlee's request did not convert the social contact into an investigative detention.
5. In light of Henderson's initial hiding his hands, his inability to stand still, placing his hands underneath his shirt, having a known burglar and methamphetamine addict's name and phone number written on his arm, his statement that he had recently used heroin and that he was not sure whether he had needles on him, and the fact that suspects had attempted to stab Brownlee with crack pipes before and had brandished needles at him, Brownlee's weapons frisk and concern for his safety was reasonable.
6. Brownlee's removal of Henderson's wallet was also valid, as Henderson gave him permission to do so. Henderson's statement that he would rather Brownlee not remove his identification card indicates he knew he did not have to give Brownlee permission to remove his wallet.
7. Brownlee's initial interaction with Henderson was a social contact which expanded into an investigatory stop because Brownlee's initial suspicions were never dispelled, and Henderson's behavior aroused further suspicions. The scope of Brownlee's contact expanded as his knowledge of Henderson's behavior expanded.
8. In light of all of the factors listed above, Brownlee's initial social contact, later investigative detention, and eventual arrest of Henderson were valid.
9. Brownlee's search incident to arrest of Henderson's person at the scene was valid, as was the inventory search of Henderson's backpack conducted pursuant to SPD's standard procedure.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

- 10. Given the facts of this case, Brownlee's inventory search was reasonable—as it was conducted pursuant to standardized police procedures and served a purpose other than discovering evidence of criminal activity.
- 11. Since all of Brownlee's actions were valid, Henderson's motion to suppress is denied.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 18 day of October, 2013.



 JUDGE BARBARA A. MACK

Presented by:



 ERIC SHELTON, WSBA #44788
 Deputy Prosecuting Assistant Attorney



 KRISTEN GESTAUT, WSBA #39252
 Attorney for Defendant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70929-1-I
v.)	
)	
WYATT H.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF APRIL, 2014, I CAUSED TO BE FILED IN THE COURT OF APPEALS DIVISION ONE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING PARTY IN THE MANNER INDICATED BELOW:

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 22 PM 4:50

- | | | |
|--------------------------------------|-----|---------------|
| [X] KING COUNTY PROSECUTING ATTORNEY | (X) | U.S. MAIL |
| APPELLATE UNIT | () | HAND DELIVERY |
| KING COUNTY COURTHOUSE | () | _____ |
| 516 THIRD AVENUE, W-554 | | |
| SEATTLE, WA 98104 | | |
|
 | | |
| [X] WYATT H. | (X) | U.S. MAIL |
| 4404 192 ND ST NW | () | HAND DELIVERY |
| STANWOOD, WA 98292 | () | _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF APRIL, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710