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October 31, 2016
Court of Appeals
Division I NO. 75255-3-1
State of Washington
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEAN PAUL KIRKPATRICK,

Appellant.

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

The Honorable Laura Inveen, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

When Jean Paul Kirkpatrick ran through a construction zone with limited pedestrian access, three off-duty Seattle Police officers reacted. Officer Smith, responding in part to Kirkpatrick, and in part to his own colleagues barreling toward them, told Kirkpatrick, "Seattle Police, stop." Kirkpatrick stopped.

Without gaining any additional information, Smith then grabbed Kirkpatrick's left arm. Kirkpatrick didn't resist. Within seconds, Officer Reynolds arrived and grabbed Kirkpatrick's right arm. Again, he didn't struggle. Smith told Kirkpatrick to sit on the ground. With an officer attached to each arm, Kirkpatrick complied. A third officer, Grayson, who had been running toward them, also arrived.

All of the officers had very little information. None had observed a crime or communicated with each other prior to seizing Kirkpatrick. Grayson explained that he started running because he saw Reynolds running, and only then looked to see what he was running toward. Similarly, Smith assumed Reynolds had more information than him; there is no evidence in the record that he did.

After speaking to a witness, but without providing Miranda warnings, Smith questioned Kirkpatrick and elicited incriminating

statements.

These actions offend the Fourth Amendment and Article I, section 7 of the federal and State constitutions because officers (1) lacked reasonable suspicion for a Terry stop, and (2) escalated the level of detention beyond the scope allowed under Terry. Officers also violated Kirkpatrick's Fifth Amendment right when they (3) elicited incriminating statements by means of custodial interrogation. The statements and evidence unlawfully obtained must be suppressed.

B. ASSIGNMENTS OF ERROR

Factual Findings

1. The trial court's findings are in error to the extent they suggest Kirkpatrick slowed, but did not stop before Smith grabbed him. [Finding 1.c.]¹

2. The trial court's findings are in error to the extent they suggest Smith ordered Kirkpatrick to sit after he saw the security guard. [Findings 1.b.-c.]

Legal Conclusions

3. The trial court erred in concluding the officers had reasonable articulable suspicion to seize Kirkpatrick without a warrant

¹ The Court's written findings are provided as an appendix to this brief.

for a brief, investigative detention under Terry. [Conclusion 3.a.]

4. The trial court erred in concluding Terry applied and subsequently seized evidence was admissible, where officers had exceeded the permissible scope of a Terry stop, and arrested Kirkpatrick without probable cause. [Conclusions 3.a., d.-f.]

5. The trial court erred in concluding Kirkpatrick was not in custody and his statements were admissible, where officers engaged in custodial interrogation before reading Miranda warnings. [Conclusions 3.c.-d., f.]

Ineffective Assistance of Counsel

6. Kirkpatrick's right to effective assistance of counsel was violated, where trial counsel failed to argue for suppression on the basis that officers had exceeded the scope of a Terry stop.

Issues Pertaining to Assignments of Error

1. An officer observes a man running toward him in a construction zone with limited pedestrian access, hears construction workers honking horns, observes another officer shouting "hey" and waiving his hands, and hears an unidentified person yell, "stop him, he stole a phone." Did the court err in concluding officers had reasonable suspicion of criminal activity?

2. Without learning more than the facts as stated above,

two officers grab the man's arms and while maintaining their hold, order him to sit in the middle of the road. The two officers had no specific facts indicating the man was armed and dangerous, resisting, or attempting to run. Was the scope of a Terry stop exceeded? Did the court err in concluding the Terry exception to the warrant requirement applied to the stop?

3. After the man is commanded to stop, grabbed by two officers, and made to sit on the ground, one of the officers questions him without giving Miranda warnings. Did the court err in concluding he was not "in custody" for purposes of Miranda?

4. Given the above, did the court err in denying suppression of all evidence obtained after the seizure and after the custodial interrogation?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Jean Paul Kirkpatrick with one count of first degree theft, alleging he took a phone from the person of Avdikadir Ali. CP 23. Kirkpatrick moved to suppress evidence, including the phone and his statements, arguing they were the products of an illegal seizure of Kirkpatrick's person. CP 11; RP 152. The State argued the seizure was a lawful Terry stop. RP 146; Supp. CP ____ (sub. no. 29, State's Response to

Defense's Motion to Suppress Pursuant to CrR 3.6, at 2).

The CrR 3.6 hearing on the defense's suppression motion was combined with a CrR 3.5 hearing in which the State sought to establish the admissibility of Kirkpatrick's incriminating statements made to police during his detention. See RP 3, 8, 145. The defense attorney argued any statement made by Kirkpatrick after he was seized and prior to Miranda warnings should not be admitted. RP 147-9.

The hearing established the following. On January 8, 2016, three uniformed, off-duty police officers—Smith, Reynolds, and Grayson—were directing traffic in a construction zone with limited access to pedestrians. RP 25-8, 76, 81. Officer Smith heard shouting. RP 76. He turned to see Grayson waving his hands and shouting at him, and also heard construction horns honking. RP 76-7. He then saw Kirkpatrick running directly toward him. RP 77. He then heard someone, though he did not know who, shout, "stop him, he stole a phone." RP 86. Smith said, "Seattle Police, stop." RP 77. Kirkpatrick slowed and stopped. RP 77, 86.

Smith immediately grabbed Kirkpatrick's left arm. RP 77, 86. Kirkpatrick did not resist. RP 89. Within seconds, Reynolds, who had been running toward them, arrived and grabbed Kirkpatrick's

right arm. RP 88-9. Again, Kirkpatrick did not struggle. RP 34. Smith told Kirkpatrick to sit. RP 88-9. With an officer still attached to each arm, Kirkpatrick complied and sat in the middle of the road. RP 32-4, 88-9. During the entire encounter, Kirkpatrick was “very compliant.” RP 89 (“very compliant”); also 34 (no struggle). Smith never stated any concern that Kirkpatrick was going to assault him, and did not testify to any specific observations which would lead him to believe Kirkpatrick was preparing to run. See RP 89 (not stating any concerns or specific observations); RP 79 (Smith testifying merely that he had Kirkpatrick sit as a precaution against him running).

After Kirkpatrick was sitting, Smith observed Jamaal Cole jogging toward them. RP 78, 86. Unprompted, Kirkpatrick stated, “that guy’s chasing me. He’s got a gun.” RP 78. Smith observed that Cole’s clothing was consistent with the uniform of security guards from the nearby federal building. RP 78. Smith then quickly questioned Cole, learned of an alleged phone theft, and then questioned Kirkpatrick. RP 89-90.

Meanwhile, Officer Grayson was also responding. When Grayson heard Reynolds shouting “hey,” he also “saw that the other officer had begun to run, so [he] thought... there was

probably a good reason for it, so [he] began to do the same.” RP 30. After he began running, Grayson then looked to where he was running toward and saw Kirkpatrick; Smith was already holding his arm. RP 29-30. He also testified that as he was running, he saw Kirkpatrick's right arm raised with a bent elbow, and became concerned Kirkpatrick would strike Smith. RP 31. As noted above, Smith had no such concern. See RP 89 (“very compliant”), c.f. RP 79 (not stating concerns or signs of potential violence). Within seconds, Grayson saw Reynolds arrive, and then arrived himself. RP 31, 33. Grayson observed Cole nearby, and overheard as Smith questioned Kirkpatrick. RP 34.

Smith asked Kirkpatrick whether he had taken a phone and where it was. RP 82, 89-90. Kirkpatrick answered that he had found a phone but that he did not steal it and indicated with his head to a phone in his pocket. RP 82, 89-90,137. Smith never read Kirkpatrick Miranda warnings. RP 82. Shortly after Smith's questioning, Grayson handcuffed Kirkpatrick and read him Miranda warnings. RP 35, 90. Later, a fourth officer arrived who again read Kirkpatrick Miranda warnings and transported him away from the scene. RP 90-1.

The trial court orally found there was reasonable articulable

suspicion for a Terry stop. RP 157. Consistent written findings and conclusions followed. Supp. CP ____ (sub. no. 48, Written Findings of Fact and Conclusion of Law On CrR 3.6 Motion to Suppress Physical, Oral or Identification Evidence (hereinafter "Written Findings")). The court's findings also concluded that Kirkpatrick's pre-Miranda incriminating statements were admissible because he was not yet "in custody." Supp. CP ____ (sub. no. 48, Written Findings, at 5 (Findings 3.c.-d.)).

The evidence presented at trial by the security guard and the officers largely mirrored that from the pretrial hearing. RP 229-300. Kirkpatrick also testified. RP 313-43. In response to the evidence presented by the State at trial, he admitted taking a phone, but stated he did not take it out of anyone's hand. RP 317-18.

Avdikadir Ali, the owner of the phone, also testified. RP 202-20. He stated that his phone was also a wallet which contained, among other things, "mental health business cards." RP 205. He further stated that when Kirkpatrick attempted to grab the phone out of his hand, he did not let go. RP 205, 207. Ali stated that he ran after Kirkpatrick, out of a Starbucks, and through the lobby of the Second and Seneca building. RP 214-15. He claimed that while running through the lobby, three to four feet behind Kirkpatrick, both

he and Kirkpatrick continued to hold the phone. RP 214-15. He also claimed that although Kirkpatrick was running faster than him, and he was trailing behind while clinging to the same six-inch phone, their hands never touched. RP 214-15, 218, 220. He testified that they were clearly linked by the phone while running and anyone in the lobby would be able to see this. RP 220.

Cole's trial testimony did not corroborate these claims. He observed Kirkpatrick run by first, and then saw Ali chasing after him through the lobby. RP 278-79. Cole stated he never saw Kirkpatrick and Ali touch or jointly hold a phone. RP 295-96. In fact, he never saw a phone at all, or anything in Kirkpatrick's hands. RP 295-96.

Ali also testified that after he let go and Kirkpatrick was out of sight, he spoke to a female security guard. RP 210. He testified that aside from shouting that someone was taking his phone, he did not speak to anyone else in the lobby. RP 210-11, 216. He also stated that he did not see Cole until he was later directed to the construction site to identify Kirkpatrick. RP 210-11.

Cole testified to a different version of events. He stated that in addition to shouting that someone had taken his phone, Ali spoke directly with him in the lobby and told him Kirkpatrick had taken his

phone. RP 279.

Ali testified that on some points, his memory was not distinct and “not for certain,” and that he did not recall all events. RP 213, 215-16, 217. He also conceded that the Starbucks was dimly lit. RP 213. However, he stood firm by his claim that Kirkpatrick took the phone directly from his hand. RP 219-20.

The jury was instructed on both first and third degree theft. RP 352-54. Kirkpatrick was found guilty of first degree theft. CP 52. He timely appeals. CP 55-64, 72-82.

C. ARGUMENT

1. THE TRIAL COURT’S FACTUAL FINDINGS ARE IN ERROR.

Where an appellant assigns error, factual findings are reviewed for “substantial evidence.” State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” Id. (internal citations omitted). Here, two of the trial court’s findings are not supported by substantial evidence.

i. Kirkpatrick stopped before Officer Smith grabbed him.

The trial court found Kirkpatrick “slowed, and Smith grabbed

his arm.” Supp. CP ____ (sub. no. 48, Written Findings, at 2 (Finding 1.c.)). This suggests that Kirkpatrick failed to stop before being grabbed. However, there is not substantial evidence in the record to support this.

Smith testified that after he told Kirkpatrick to stop, Kirkpatrick slowed and stopped before Smith grabbed his arm. RP 77. Security guard Cole also testified that he saw Kirkpatrick stop on his own in response to Smith’s command to stop. RP 134. No other testimony in the record contradicts this. Officer Grayson testified only that when he first saw Kirkpatrick, Smith was already holding onto his arm. RP 29-30. Retired Officer Reynolds did not testify at the suppression hearing.

To the extent Finding 1.c. suggests Kirkpatrick had not stopped on his own before Smith grabbed him, the finding is in error.

ii. Officer Smith saw security guard Cole only after Kirkpatrick was seated.

The trial court found, “The defendant slowed, and Smith grabbed his arm. Almost immediately thereafter [Cole] ... came upon the scene.... Smith ordered the defendant to sit down....” Supp. CP ____ (sub. no. 48, Written Findings, at 2 (Finding 1.c.)).

The order of the trial court's findings suggests that Smith observed security guard Cole before he told Kirkpatrick to sit. This is not supported by substantial evidence. The record establishes that Smith saw Cole only after Kirkpatrick was already seated.

The court's finding appears to be gleaned from the order of events as relayed in Smith's initial testimony. Smith's initial testimony relates multiple events, but does not establish a timeline. See RP 77-78 (describing observing Kirkpatrick and grabbing his arm, and Cole and Reynolds running toward him all "about" the same time). However, Smith later explicitly clarified that he saw Cole only after Kirkpatrick was seated. RP 87.

The only other testifying witnesses, Grayson and Cole, relayed observations which are consistent with this reading, and which do not support the court's finding. Cole testified he was thirty feet behind when he saw Kirkpatrick stop in response to police. RP 133. Although Cole "assum[ed]" officers stopped Kirkpatrick "out of curiosity," and assumed they had observed both Kirkpatrick and him chasing Kirkpatrick, Cole did not note any specific indication that Smith had observed him. RP 133. Thus, Cole's testimony about what he actually saw is neutral with respect to the court's finding. Cole's unsupported assumption about what he believed

another person saw should not be relied upon to establish substantial evidence, particularly where that other person testified to the contrary.

Grayson testified that when he first observed Kirkpatrick, he was running toward Kirkpatrick and Smith, and Smith was already holding Kirkpatrick. RP 30-31. Within "seconds," Grayson reached them. RP 31. He observed Smith tell Kirkpatrick to sit down, and Kirkpatrick complied without struggle while Smith and Reynolds maintained control over both of his arms. RP 52-3. Grayson testified that at this point, he noted Cole, who was about fifteen feet away on the sidewalk. RP 34. This suggests Cole was still jogging toward them, which is consistent with a finding that Smith had not seen Cole until Kirkpatrick was seated. Regardless, Grayson's testimony is silent with respect to the precise moment when Smith observed Cole and so does not provide support for the court's finding. See e.g. RP 30-1, 52-3.

To the extent Finding 1.c. suggests Smith saw Cole before Kirkpatrick was stopped and seated, the finding is not supported by substantial evidence and should be found in error.

2. THE STATE SEIZED KIRKPATRICK IN VIOLATION OF THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7.

The officers violated the State and federal constitutions when they seized Kirkpatrick without a warrant and immediately exceeded the proper scope of a brief investigative detention.

- i. The Fourth Amendment and Article I, section 7 protect against unreasonable and unlawful seizures.

The Fourth Amendment of the U.S. Constitution 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, and no warrants shall issue, but upon probable cause” Article I, section 7 of the Washington Constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” It is well established that Art. I, sec. 7 is more protective than the Fourth Amendment. State v. Parker, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

Warrantless seizures are *per se* unreasonable, or unlawful, under both the Fourth Amendment and Article I, section 7. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). Where the State seeks to introduce evidence

obtained via warrantless seizure, the State bears a burden to prove one of the narrowly drawn and jealously guarded exceptions to the warrant requirement applies. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Here, the State argued the stop was justified as a brief investigative detention under the Terry exception. RP 146; Supp. CP ____ (sub. no. 29, State's Response to Defense's Motion to Suppress Pursuant to CrR 3.6., at 4). Defense counsel objected to the application of Terry. CP 7.

Under the Terry exception to the warrant requirement, officers may briefly detain a suspect for investigation where there is a "reasonable suspicion' that the detained person was, or was about to be, involved in a crime." State v. Z.U.E., 183 Wn.2d 610, 617, 352 P.3d 796 (2015) (quoting State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003)); Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). Both the Fourth Amendment and Article I, section 7 require the officer's suspicion to be "grounded in 'specific and articulable facts.'" Z.U.E., 183 Wn.2d at 617 (quoting Terry, 392 U.S. at 21)). Because Article I, section 7 is more protective than the Fourth amendment, it "generally requires a stronger showing by the State." Z.U.E., 183 Wn.2d at 617 (citing Acrey, 148 Wn.2d at 746–47, 64 P.3d 594; Hendrickson, 129

Wn.2d at 69, 917 P.2d 563).

- ii. Kirkpatrick was seized when Officer Smith told him to stop and he complied.

The trial court failed to identify the precise moment when the seizure occurred. The findings suggest that a seizure occurred at least by the time Officer Smith observed security guard Cole. C.f. Supp. CP (sub. no. 48, Written Findings, at 4 (Conclusion 3.a. listing facts which gave rise to reasonable suspicion)). In fact, the seizure occurred much sooner.

The standard of review for determining whether a seizure occurred is a mixed one of fact and law. As discussed above, factual findings are reviewed for “substantial evidence.” Hill, 123 Wn.2d at 647. The legal determination of whether such facts constitute a “seizure” for Fourth Amendment and Art. I, sec. 7 analysis is reviewed *de novo*. State v. Hansen, 99 Wn. App. 575, 577-78, 994 P.2d 855 (2000).

To determine whether a seizure has occurred, courts consider whether “circumstances ... amount to a show of official authority such that ‘a reasonable person would have believed he was not free to leave.’” Florida v. Royer, 460 U.S. 491, 499, 502, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983) (plurality) (quoting

United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497); see also State v. Crespo Aranguren, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing Mendenall, 446 U.S. at 554).

The Washington Supreme Court has held that under Art. I, sec. 7, the following police actions constitute a “nonexclusive list” which “likely result in seizure[:] ... the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.” State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009) (internal quotation marks omitted) (quoting State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting U.S. v. Mendenhall, 446 U.S. at 554-55)).

In particular, commands such as “halt,” “stop, I want to talk to you,” and “wait right here” qualify as seizures. See State v. Whitaker, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028 (1991); State v. Ellwood, 52 Wn. App. 70, 73-74, 757 P.2d 547 (1988); State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986); State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).

Here, Kirkpatrick was seized, under both the Fourth Amendment and Art. I, sec. 7, when Officer Smith made a show of authority and Kirkpatrick complied. Terry, 392 U.S. at 19 n. 16 (noting seizure occurs when officers restrain liberty through force or show of authority). Smith told Kirkpatrick, "Seattle police, stop." Supp. CP ____ (sub. no. 48, Written Findings, at 2 (Finding 1.b.)); RP 77 (Smith's testimony). Given the context, there is no question this was a command and not a request. In response, Kirkpatrick stopped. RP 77 (Officer Smith's testimony that Kirkpatrick stopped); but see Supp. CP ____ (sub. no. 48, Written Findings, at 2 (Finding 1.c., finding Kirkpatrick "slowed")). Meanwhile, two other officers were running toward him. RP 29-30 (testimony of Officer Grayson that he observed Smith holding Kirkpatrick's arm as he and Retired Officer Reynolds ran toward them). A reasonable person would not have felt free to leave. RP 89. Kirkpatrick was seized as of this moment.

iii. Officer Smith lacked reasonable suspicion when he seized Kirkpatrick.

The determination of whether an officer had reasonable articulable suspicion is analyzed based on the facts the officer knew at the moment the seizure occurred. State v. Brown, 154

Wn.2d 787, 798, 117 P.3d 336 (2005) (citing State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)). It is insufficient to suspect a person of general criminal activity; officers must be able to articulate the particular crime in addition to the facts supporting their reasonable suspicions. State v. Martinez, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006).

Here, Smith had very limited information when he seized Kirkpatrick. At that moment, Smith knew only the following. (1) Kirkpatrick was running toward him in a construction zone with limited pedestrian access. Supp. CP ____ (sub. no. 48, Written Findings, at 1-2 (Findings 1.a.-b.)). (2) Construction workers were honking their horns and Retired Officer Reynolds was waiving and yelling. Supp. CP ____ (sub. no. 48, Written Findings, at 2 (Finding 1.b.)). (3) Someone, he did not know who, shouted, “[S]top him, he stole a phone.” Supp. CP ____ (sub. no. 48, Written Findings, at 2 (Finding 1.b.)).

The trial court’s findings are somewhat ambiguous as to the timing of events, but suggest that Smith also observed security guard Cole chasing Kirkpatrick before he initially seized Kirkpatrick. Supp. CP ____ (sub. no. 48, Written Findings, at 2 (Findings 1.b.-c.)). As discussed above, that finding is in error. Smith did not

observe Cole until after Kirkpatrick was seized and seated at his feet.

Given this limited information, and especially that a critical piece of information—“he stole a phone”—was coming from a completely unknown and unverified source, the strength of Smith’s suspicions were insufficient to justify the Terry stop that occurred.

- iv. Kirkpatrick’s seizure was not authorized by Terry because officers immediately exceeded allowable scope.

Even if, based on the limited facts discussed above, the initial stop was justified, the officers’ actions are unlawful where they immediately exceeded the lawful scope of a Terry stop.

Courts have long held that in addition to being lawful at its inception, a Terry stop must also be “carefully tailored to its underlying justification.” Royer, 460 U.S. at 500 (plurality); see also Royer 509 (J. Brennan concurring); Terry, 392 U.S. at 29 (“reasonably related in scope to the justification for [its] initiation”); Kennedy, 102 Wn.2d at 17 (“relate to and further the purpose for which the seizure was originally created”) (citing Williams, 102 Wn.2d at 738).

Scope includes not only the length of the stop, but also the methods of investigation and level of coercive force used. “[I]t is

'clear' that *Terry* requires that ... the investigative methods employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Williams, 102 Wn.2d at 738 (citing Royer, 103 S.Ct. at 1325).

In State v. Williams, the court found that officers had exceeded the proper scope of a Terry stop. Williams, 102 Wn.2d at 741. Officers responded to a residential burglary alarm. Id. at 734. Williams, who was in a car parked outside, was blocked from leaving, told to turn off his car, throw the keys out the window, and put his hands on the roof. Id. at 734-35. Another officer arrived later, at which point, Williams was patted down for weapons, handcuffed, and placed in a patrol car. Id. at 735. The court considered a variety of factors, including that the record did not establish any reason to believe Williams was armed or dangerous. Id. at 740. The court found "the amount of intrusion," including both the duration of the stop and the level of force used to detain Williams, was "significant" especially when weighed against the nature of the crime of residential burglary. Id. at 740.

In Florida v. Royer, officers exceeded the scope of Terry when they obtained Royer's bags and moved him from the airport terminal to a small room with two officers to investigate suspected

drug trafficking. Royer, 460 U.S. at 502-3. Royer was cooperative throughout the interaction, and the State argued that consent sanitized the subsequent search of his bags. Id. at 501-2. However, the Court found the coercion of interrogation by multiple officers in a small room was a level of detention that exceeded the minimum amount necessary to pursue questioning; where the scope of Terry had been exceeded, any later consent was tainted. Id. at 503 (consent had “evaporated”), 507 (Terry scope exceeded). The Court also found it relevant that officers could have used a less intrusive means of detention to pursue their investigation, and that the State offered no evidence to dispute this theory. Id. at 504-06.

In Adams v. Williams, the Court found the officer’s actions did not exceed the scope of Terry. 407 U.S. 143, 148, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). The officer was in a high-crime area at 2:15 A.M. Id. at 144. He was approached by an informant who he personally knew to be reliable. Id. at 144-5. The informant advised that a man was in a car nearby with narcotics and a gun at his waist. Id. at 145. The officer approached the car, tapped on the window and asked Williams to open the door. Id. When Williams rolled down the window instead, the officer reached into the car and grabbed the gun from Williams’ waist. Id.

A distinguishing factor was that the officer in Adams had articulable reasons from a reliable source to believe Williams was armed. Id. at 147-8. His actions in invading Williams' privacy to reach down to his waistband were also narrowly tailored to achieve the objective of maintaining officer safety while pursuing his brief questioning. Id. at 148. He did not escalate the level of intrusion or detention before gaining more information. Once he obtained the gun from the precise location the informant advised, the officer's suspicions had expanded to the point where he had additional authority, i.e. probable cause to arrest Williams of unlawful possession of a firearm. See id. at 149.

These cases show that where an officer's proper and brief investigation yields additional information that increases his suspicion, such as a suspect rolling down the window when asked to open the door, the scope of the Terry stop may expand. However, increases in the use of coercive investigative methods must be justified, in lock step, with the facts known to the officer at the time such actions are taken. Without some indicia of dangerousness, additional invasions into a person's liberty may not be justified, particularly where less intrusive means are available to pursue a brief investigation.

In the case at bar, officers exceeded the scope by employing investigative methods which far exceeded “the least intrusive means reasonably available” to briefly investigate Kirkpatrick. Williams, 102 Wn.2d at 738.

As discussed above, Kirkpatrick was seized when Smith told him to stop and he complied. Moreover, Kirkpatrick was effectively surrounded by multiple officers, with Smith standing in front of him, and Grayson and Reynolds running toward him. All testifying witnesses, including Smith, Grayson, and Cole, confirmed that Kirkpatrick stopped on his own power, was compliant, and did not struggle or resist in any way. RP 77 (Smith’s testimony that Kirkpatrick stopped), 89 (Smith’s testimony that Kirkpatrick was “very compliant”); 34, 53 (Grayson’s testimony that Kirkpatrick was compliant and did not struggle), RP 134 (Cole’s testimony that Kirkpatrick stopped). This establishes that officers had already applied the “least intrusive means reasonably available” to pursue their investigation and maintain the status quo. Williams, 102 Wn.2d at 738.

However, the officers did not stop there. Smith immediately grabbed Kirkpatrick’s left arm. RP 77 (Smith’s testimony); RP 29-30 (Grayson’s testimony). Within seconds, Reynolds grabbed his

right arm. RP 88-9 (Smith's testimony); RP 29-30 (Grayson's testimony). Smith told Kirkpatrick to sit in the middle of the road. RP 79. Again, he complied. RP 79 (Smith's testimony); see also RP 52 (Grayson's testimony). Being told to sit in the road with an officer attached to each arm is much more intrusive than simply being told to stop.

Yet between the initial stop and this escalation of force, the record does not show that officers gained any additional information. Smith clarified that he did not see Cole until after Kirkpatrick was seated at his feet. RP 87. Smith also stated Kirkpatrick was "very compliant" and never testified to any facts suggesting he believed Kirkpatrick was armed and dangerous, or about to flee despite being told to stop. RP 89. Reynolds did not testify at the hearing. See RP 1-157.

The State cannot meet its burden to show that the officers' actions were justified by Terry, i.e. that the level of coercive force applied was the minimal amount necessary. Rather, the record supports that Smith and Reynolds could have pursued their brief investigative detention without applying additional intrusive force. The scope of a Terry stop was exceeded. Thus, the warrantless stop cannot be justified under the Terry exception.

- v. The observations of Grayson and Cole are not relevant to analyze the reasonableness of Smith and Reynolds' actions.

The State may point to additional observations by Grayson and Cole, but those observations are not relevant to the analysis. Grayson testified that he observed Kirkpatrick's right arm raised and cocked, and was concerned that he was preparing to strike Smith. RP 31; Supp. CP ____ (sub. no. 48, Written Findings, at 3 (Finding 1.e.)). Cole testified that he observed Kirkpatrick look around as if considering whether or not to continue running. RP 134; but see generally Supp. CP ____ (sub. no. 48, Written Findings (no related findings)).

The relevant inquiry is what was known to the acting officers at the time they acted. See Brown, 154 Wn.2d at 798 (citing Kennedy, 107 Wn.2d at 6). The State bears the burden to prove Terry applies and that the officer's actions were within scope. Williams, 102 Wn.2d at 736. The record does not support that Grayson or Cole communicated these concerns to Smith or Reynolds prior to Kirkpatrick sitting. See e.g. RP at 84-5 (Smith testifying he had no indication of additional communications between officers, witnesses, or Kirkpatrick prior to the stop).

Here, it was Officers Smith and Reynolds who escalated the

level of detention by grabbing Kirkpatrick and telling him to sit. RP 77, 86, 88-9. Reynolds did not testify, so it is not possible to know what facts he observed at the time. Smith testified explicitly that Kirkpatrick was "very compliant," and did not state any concern that Kirkpatrick was going to strike him. RP 89. Thus, Grayson and Cole's concerns are irrelevant to the analysis of whether Smith and Reynolds acted within scope given the information known to them at the time.

vi. Suppression of all subsequently obtained evidence is required.

Where the State fails to prove that an exception to the warrant requirement applies, all evidence or statements derived directly or indirectly must be suppressed unless sufficiently attenuated from the initial illegality. Wong Sun v. United States, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995); State v. Chapin, 75 Wn. App. 460, 463, 879 P.2d 300 (1994), review denied, 125 Wn.2d 1024 (1995). Courts apply a "but-for analysis." State v. Aranguren, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985).

Here, the stop is illegal for two, independent reasons: officers lacked initial reasonable suspicion and officers immediately

escalated the level of detention beyond the lawful scope. Either requires suppression. But for the illegal stop, there would have been no statements by Kirkpatrick, no seizure of the phone, and no pretrial identification by witnesses Cole or Ali. See State v. Ellwood, 52 Wn. App. 70, 74-75, 757 P.2d 547 (1988) (“coerced continued presence at scene” required suppression of evidence found incident to arrest). Without the seizure, likely there would have been no identification at all, and thus, no criminal charge or conviction.

Even if the case would still have proceeded to trial, the failure to suppress would still have caused prejudice. Although Ali, the owner of the phone, testified at trial, there were serious credibility concerns with his statements. He conceded that the Starbucks was dimly lit and that his memory of events was unclear on several points. RP 213, 215-16, 217. He appears to have mistakenly remembered security officer Jamaal Cole as a woman, and failed to recognize Cole was the same person in the lobby and at the construction site. Compare 210-11, 216 (Ali’s testimony) with 279 (Cole’s testimony). He also made the implausible, and again controverted, claim that he and Kirkpatrick both maintained their hold on the six-inch phone while running for several feet through

the lobby. Compare RP 214-15, 218, 220 (Ali's testimony) with RP 278, 295-96 (Cole's testimony). Ali also testified that he had business cards for mental health professionals in his wallet, which hinted at his mental health instability and memory problems. RP 205. These issues cast serious doubt on Ali's version of events and his trial identification of Kirkpatrick as the person who took his phone.

The phone, incriminating statements, and pre-trial identifications flowed directly from the unlawful seizure. Without this evidence, the State would have been deprived of much of the evidence necessary to its case in chief. It would have had to rely more heavily on the problematic testimony of Ali. Had the State's case been so limited, it is likely Kirkpatrick also would have chosen not to testify. There likely would have been no criminal charge, but at a minimum, no conviction.

3. KIRKPATRICK WAS SUBJECTED TO CUSTODIAL INTERROGATION WITHOUT MIRANDA WARNINGS, IN VIOLATION OF THE FIFTH AMENDMENT.

The trial court concluded that Kirkpatrick was not in custody at the time he made incriminating pre-Miranda statements. Supp. CP ___ (sub. no. 48, Written Findings, at 5 (Conclusion 3.c.)). This

legal conclusion is in error. Kirkpatrick was in custody. Suppression is required under the Fifth Amendment.

i. The Fifth Amendment protects against pre-Miranda custodial interrogation.

The Fifth Amendment to the United States Constitution provides, “No person . . . shall be compelled in any criminal case to be a witness against himself.” This right against self-incrimination protects an accused from being compelled to provide testimonial or communicative evidence to the State. Schmerber v. California, 384 U.S. 757, 761, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

The Fifth Amendment requires that a person interrogated in custody by a state agent must first “be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” Miranda v. Arizona, 383 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); also State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988) (finding Miranda warnings are required to overcome presumption that self-incriminating statements are involuntary when obtained by custodial interrogation). Where Miranda warnings are not provided, statements elicited from custodial interrogation are not admissible

as evidence at trial. Miranda, 383 U.S. at 444, 476-77.

“It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (per curiam)). The question of custody is a mixed question of law and fact. “[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.” Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). Just as in the warrantless stop analysis, findings of fact assigned error by a petitioner are reviewed for “substantial evidence.” Hill, 123 Wn.2d at 644. Conclusions of law are reviewed *de novo*. State v. Neeley, 113 Wn. App. 100, 106, 52 P.3d 539 (2002).

- ii. Kirkpatrick was in custody when Smith interrogated him about the alleged phone theft.

Here, the relevant statements are those made by Kirkpatrick in response to Smith’s questioning and prior to Grayson’s Miranda

warnings.² Even if this Court finds none of the challenged findings are in error, as a matter of law, Kirkpatrick was in custody at the time of questioning and so suppression is required.

The trial court found that Smith told Kirkpatrick, "Seattle police, stop," grabbed his arm, and had him sit down, all before he initiated questioning. Supp. CP ____ (sub. no. 48, Written Findings, at 2-3 (Findings 1.b.-d.)). The court found that Smith then talked to Cole, then he asked Kirkpatrick "if he stole a phone," and then Kirkpatrick responded that "he had found it on the ground, but didn't steal it." Supp. CP ____ (sub. no. 48, Written Findings, at 3 (Finding 1.d.)). According to the trial court's findings, no one had given Kirkpatrick Miranda warnings at this time. Supp. CP ____ (sub. no. 48, Written Findings, at 3 (Finding 1.d.)). The court concluded Kirkpatrick was not "in custody" at the time he responded to Smith's pre-Miranda questioning. Supp. CP ____ (sub. no. 48, Written Findings, at 5 (Finding 3.c.)). This legal conclusion is in error.

At the moment Smith stated, "Seattle Police, stop," Kirkpatrick was in custody. Supp. CP ____ (sub. no. 48, Written

² Kirkpatrick's spontaneous statement was not made in response to questioning and so it is excluded from this Miranda analysis. Supp. CP ____ (sub. no. 48, Written Findings, at 2 (Finding 1.c., finding Kirkpatrick stated "that guy is chasing me, he has a gun"))).

Findings, at 2 (Finding 1.b., quote)). As discussed above in the seizure analysis, a reasonable person would not feel free to walk away when ordered to stop by a uniformed police officer. The court's finding that Smith also grabbed Kirkpatrick's arm and ordered him to sit in the middle of the road reinforces that he was in custody.

Moreover, as discussed above, substantial and uncontroverted testimony in the record establishes that by the time Kirkpatrick was seated and Smith was questioning him, the following had also occurred. Reynolds had arrived and grabbed Kirkpatrick's other arm. RP 31. Smith and Reynolds maintained their hold on each arm while they instructed Kirkpatrick to sit and he complied. RP 33-34. Meanwhile a third officer, Grayson, was running toward them. RP 31. A reasonable person would not feel free to leave with the additional coercive force of an officer attached to each arm, and a third officer running toward him or hovering nearby.

The trial court's finding—that Kirkpatrick was not in custody—is in error. Kirkpatrick's pre-Miranda statements must be suppressed. These statements are incriminating in that Kirkpatrick admitted he had a phone which did not belong to him. As

discussed above, the failure to suppress the statements caused prejudice despite the inconsistent witness testimony later elicited at trial. Had the statements been suppressed, the State would have been forced to rely more heavily on the inconsistent witness testimony. There likely would have been no criminal charge, but at a minimum, no conviction.

- iii. The existence of custodial interrogation is another factor which shows the officers exceeded the scope of *Terry*.

As discussed in the illegal seizure section above, suppression of Kirkpatrick's statements is required under the Fourth Amendment and Art. I, sec. 7, because they are tainted by the illegality of the Terry stop. Moreover, the fact that Smith elicited incriminating statements by means of pre-Miranda custodial interrogation is another factor which shows the officers' actions were beyond scope. "A Terry detention becomes unlawful when no justification exists at its inception or when it becomes a method to procure self-incriminating interrogation in a custodial setting." Kennedy, 102 Wn.2d at 17 (emphasis added). "In that event, a Terry detention is no longer justified as a means of preserving the status quo." Kennedy, 102 Wn.2d at 17-8 (internal quotations omitted). A "detention for custodial interrogation—regardless of its

label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.” Dunaway v. New York, 442 U.S. 200, 216, 99 S.Ct. 2248, 2258, 60 L.Ed.2d 824 (1979). That Smith engaged in pre-Miranda custodial interrogation is another factor weighing against the applicability of Terry.

4. KIRKPATRICK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL LAWYER FAILED TO RAISE THE SUB-ARGUMENT THAT OFFICERS EXCEEDED THE SCOPE OF A TERRY STOP.

Defense counsel objected to the application of Terry. RP 7. The basis for this objection was that officers lacked reasonable suspicion to justify the initial stop. RP 7. Case law suggests that the consideration of whether officers' actions exceeded the scope of a Terry stop is an integral part of whether the Terry exception applies at all. C.f. Royer, 460 U.S. at 500 (plurality finding initial stop justified but Terry did not apply where scope was exceeded), 509 (J. Brennan concurring, but finding court need not reach issue of whether initial stop was justified, where scope is exceeded). However, to the extent that defense counsel should have, but failed to, raise the additional sub-argument—that Terry was inapplicable because the officers had exceeded proper scope—counsel's

assistance was ineffective.

The Sixth Amendment to the U.S. Constitution guarantees “the right to the effective assistance of counsel” in both federal and state criminal proceedings. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)) (internal quotations omitted)). Washington’s Constitution Art. I, sec. 22 also guarantees a right to effective assistance of counsel. State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

Washington has adopted the two-prong Strickland test to determine whether counsel’s assistance was ineffective. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 687)).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing Thomas, 109 Wn.2d at 225-26 (applying Strickland, 466 U.S. at 687)).

“A claim of ineffective assistance of counsel presents a

mixed question of fact and law reviewed de novo.” State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Where trial counsel fails to raise an argument to suppress evidence, the court considers, as part of its analysis whether there are “legitimate strategic or tactical reasons” for counsel’s failure. McFarland, 127 Wn.2d at 336. Where the record below shows legitimate reasons are absent, then the presumption of effective representation is overcome. Id.

Here, defense counsel’s failure to raise the issue was deficient because there was no legitimate trial strategy to support the failure to raise this argument. There was little to lose by raising the objection. Doing so would not have negatively influenced the jury; the CrR 3.6 hearing was held pre-trial. Raising the objection would not have cost substantial additional time or effort. A suppression hearing was already being held, the parties were writing briefs, and the court was considering suppression. No additional witnesses need have been called, as this sub-argument is largely an issue of law that did not need exploration of additional facts. The first prong of Strickland is met.

The second prong of Strickland is met because Kirkpatrick was prejudiced. Had the objection been raised, the analysis above

shows it would likely have prevailed. Had the evidence been suppressed, the State would lack much of the evidence necessary to support its case in chief, would have had to rely much more heavily on inconsistent witness testimony, and the case would have been dismissed or Kirkpatrick acquitted.

Because trial counsel's failure to raise this sub-issue was ineffective, this Court should consider the sub-issue on appeal, and find suppression is required as discussed above.

5. APPEAL COSTS SHOULD NOT BE IMPOSED.

The superior court properly found Kirkpatrick to be indigent, unable to pay the expenses of public review, and entitled to appeal at public expense. CP 70-1. Kirkpatrick was not employed at the time of his conviction. CP 67. His monthly income was \$0.00 and total assets included \$800 in a 401k account. CP 68. His monthly living expenses were \$4800 and he has a dependent daughter under eighteen years old. CP 68; RP 400 (Kirkpatrick's testimony regarding daughter). His testimony at sentencing revealed that he lost his employment and assets to addiction, after being prescribed oxycodone for a job-related injury. RP 400.

Although Kirkpatrick had made strides toward sobriety by the sentencing hearing, his prospects for paying the costs of litigation in

this Court are poor. See RP 400 (defendant's testimony regarding sobriety). Therefore, if he does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (instructing defendants on appeal to make this argument in their opening briefs), review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016).

RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs. The superior court concluded, based on Kirkpatrick's circumstances, that it would not impose on him the burden of discretionary legal financial obligations. RP 403. The result should be the same concerning the discretionary costs associated with this appeal.

D. CONCLUSION

Kirkpatrick was unlawfully seized and officers immediately exceeded the scope permitted by a Terry stop. All evidence obtained during the subsequent search, questioning, and pretrial identifications must be suppressed. Kirkpatrick was in custody when interrogated prior to receiving Miranda warnings. The

incriminating statements elicited and all subsequently obtained evidence must be suppressed for this reason as well. Kirkpatrick is unable to pay the costs of this appeal.

Kirkpatrick respectfully requests that this Court vacate his conviction and remand for suppression and dismissal with prejudice. In the alternative, if the State prevails and seeks costs on appeal, Kirkpatrick respectfully asks this Court to deny the State's request.

DATED this 31st day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "E. Rania Rampersad", is written over a horizontal line. To the right of the signature, the number "# 23289" is handwritten.

E. RANIA RAMPERSAD
WSBA No. 47224

Attorneys for Appellant

APPENDIX

FILED
KING COUNTY, WASHINGTON

JUN 29 2016

SUPERIOR COURT CLERK
BY Janie Smoter
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JEAN PAUL KIRKPATRICK

Defendant,

No. 16-1-00170-6 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on April 26th and 27th, 2016 before the Honorable Judge Laura Inveen. After considering the evidence submitted by the parties and hearing argument, to wit: the testimony of Seattle Police Officers Noah Winningham, Sandlin Grayson, Bretton Smith, Security Officer Jamaal Cole, and the Defendant's and State's pretrial exhibits, the Court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. On January 8, 2016, Seattle Police Officers Bretton Smith and Sandlin Grayson were working an off-duty assignment as traffic control officers in a construction zone in downtown Seattle. This zone required a street to be closed in a several block area. The only vehicles allowed were construction vehicles and vehicles accessing a local business,

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

ORIGINAL

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1 and then only with an escort by police. The area was clearly cordoned off, with yellow
2 tape and stanchions, or "candlesticks". Due to the dangerousness of the area, pedestrians
3 were not allowed access to the street, although there was some access to the sidewalks.
4 Construction vehicles and equipment were in the roadway, and there were large potholes
5 as well.

6 b. Smith was facing southbound away from the zone, when he heard people yelling behind
7 him. Upon turning, he observed a retired officer who was also working the traffic
8 assignment waving his hands at him a block up. He then heard construction horns honk,
9 and at least one person yelling "hey, hey, hey". Almost simultaneously, the defendant
10 ran around the construction vehicles, in what Smith described as a "dead sprint" directly
11 towards Smith. There were traffic cones and tape around Smith. Moments later, Smith
12 heard someone yell "stop him, he stole a phone". At the same time the defendant was
13 running at Smith, Smith said "Seattle Police, stop".

14 c. The defendant slowed, and Smith grabbed his arm. Almost immediately thereafter, an
15 individual, who was chasing the defendant, came upon the scene. Referring to that
16 individual, (who was later identified as Jamaal Cole) the Defendant said "that guy is
17 chasing me, he has a gun". Based upon the individual's dress and the pin on his lapel, the
18 officer thought Cole to be a security officer from the nearby old Federal Building. Cole
19 then identified himself as a security guard. Smith ordered the defendant to sit down in an
20 attempt to sort out what was going on. Because the defendant had been running, Smith
21 felt that by having Kirkpatrick sit down, he would not immediately run away. Cole
22 informed Smith that he was working the front desk of a building with a Starbucks was in
23 a lobby, that the defendant came sprinting out of the Starbucks, with someone chasing
24

1 him, yelling "he stole my phone", that Cole chased Kirkpatrick, telling him to put the
2 phone down, but that he continued to run away.

3 d. After talking to Cole, Smith asked the defendant if he stole a phone. He said he had
4 found it on the ground, but didn't steal it. At that point Miranda rights had not yet been
5 read.

6 e. During this same time, Officer Grayson's attention was drawn to this incident when he
7 heard someone yelling "hey, hey" in an animated, atypical fashion. He was at Spring
8 Street and Western Avenue, facing northbound. He looked behind him (south) where he
9 saw the retired officer (who has since been referenced as Gary) who was stationed south
10 of him, begin to run and yell. He looked to where Gary's attention was drawn, and he saw
11 that the defendant was being held by his left wrist by Officer Smith. He observed the
12 defendant with his arm in a position that he described as "cocked" as if he was getting
13 ready to strike the officer. Grayson ran towards him, and saw the two in the middle of the
14 cordoned off roadway. The security guard was also there, and Grayson was told by
15 Smith of a purported robbery committed by Kirkpatrick. Grayson placed the defendant
16 into handcuffs. At that point, Grayson read him his Miranda rights. No questions were
17 asked by Grayson prior to that.

18 f. Based upon Grayson's training and observations of the way the defendant was acting, and
19 his pupils, Grayson concluded the defendant may have been under the influence of
20 stimulant drugs.

21 g. Subsequently Seattle Police Officer Officer Noah Wunningham was called on the scene.
22 The alleged victim had arrived prior to that time, and identified the defendant as the
23 person who stole his phone. Wunningham asked the defendant what happened. The
24

1 defendant made certain statements in providing an explanation. Winningham then re-
2 advised the defendant of his Miranda rights.

3 h. The defendant never invoked his right to remain silent. He never indicated he did not
4 understand his rights. Although there was an indication that the defendant may have
5 been under the influence of stimulant drugs, that did not appear to affect his cognition.
6 He freely spoke with the officers, and in fact often did not wait for Officer Grayson to
7 conclude his questions before answering. All circumstances support a finding that he
8 knowingly, voluntarily and intelligently waived his rights.

9
10 2. THE DISPUTED FACTS:

11 There are no disputed facts with respect to this motion.

12 3. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
13 SOUGHT TO BE SUPPRESSED:

- 14 a. Based upon the defendant's unusual behavior running at a dead sprint through a cordoned
15 off construction zone while being chased by a man with the appearance of a security
16 guard, honking of construction workers, yelling, and someone yelling to stop the
17 defendant, that he had stolen a phone, the officers had reasonable suspicion that criminal
18 activity was afoot (that he had stolen a cell phone), justifying their ability to briefly detain
19 the defendant for further investigation. Such a detention did not constitute custody status
20 for purpose of invoking Miranda requirements.
- 21 b. The pre-Miranda statement by the defendant that he was being chased by a man with a
22 gun was spontaneous, resulting without interrogation, thus Miranda requirements were
23 not invoked.

- c. The pre-Miranda question to the defendant by Smith as to whether he stole a phone was made when Kirkpatrick was not yet in custody, thus Miranda requirements were not invoked.
- d. All statements made by the defendant are admissible in the state's case in chief.
- e. Once the victim arrived on the scene and identified the defendant as the individual who took his phone, the officers had probable cause to arrest him.
- f. Defendant's Motion to suppress is denied.

In addition to the above written findings and conclusions, the Court incorporates its oral findings and conclusions.

Signed this 29 day of June, 2016.



 JUDGE

Presented by:

 Emily Cox, WSBA #47296
 Deputy Prosecuting Attorney

Notice Received by:

 Micol Sirkin #42891
 Attorney for Defendant