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Supreme Court No. 99076-0
Court of Appeals No. 80078-7-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

JOHN FREDERICK BUDIG II,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

John Budig, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. The trial court ruled that Mr. Budig was unconstitutionally seized by law enforcement and granted his motion to suppress. The Court of Appeals reversed the trial court's order. The Court of Appeals' opinion, along with the order denying Mr. Budig's motion for reconsideration, are attached in the appendix.[1]

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. If reasonable suspicion of criminal activity exists, law enforcement may briefly detain a person to confirm or dispel the presence of criminal activity. Following an extended consensual encounter with a sheriff's deputy, which gave the deputy the opportunity to dispel any suspicion of criminal activity, the deputy decided to frisk Mr. Budig for weapons. Was the seizure of Mr. Budig unlawful when the evidence did not establish that reasonable suspicion of criminal activity existed at the time of the frisk?

2. Rather than simply reverse the trial court's order of suppression, the Court of Appeals reversed and remanded for trial. When the appellate court reverses a denial of a motion to suppress, the remedy is remand with

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[1]The unpublished opinion was issued on August 3, 2020. The order denying Mr. Budig's motion to reconsider was issue on August 31, 2020.

an order to suppress, rather than dismissal. Is the logical corollary to this rule that when an appellate court reverses the grant of a suppression order, the remedy is remand for further consistent proceedings, rather than remand for trial?

C. STATEMENT OF THE CASE

On April 30, 2018, John Budig's car broke down in rural Snohomish County. RP 5, 9. While he waited for a tow truck, he stood at the end of a driveway. RP 6, 9. After a woman pointed to him while she was talking to a sheriff's deputy about half a mile away, Mr. Budig approached the pair. RP 7-8, 17; CP 16 (FF 6-7).

The deputy, Christopher Leyda, was responding to a "traffic hazard" report. RP 5; CP 15 (FF 3). Specifically, a woman believed someone had been shining a blue laser at passing cars. RP 6; CP 16 (FF 4). The deputy met the woman at the scene. RP 6; CP 16 (FF 4). She identified Mr. Budig as that person. RP 6; CP 16 (FF 6). She also told the deputy that she had seen a vehicle pass and stop several times. RP 7.

When Mr. Budig approached, he began a conversation with the deputy. RP 9; CP 16 (FF 9). He explained that his car had broken down

and he was waiting for a tow truck.[2] RP at 9-10. According to the deputy, Mr. Budig said that he had a laser, but that he had not shined it at anyone. RP 9. Mr. Budig spoke with the deputy for some time up to an hour. RP 12; CP 16 (FF 12). Throughout the conversation Mr. Budig was "helpful, affable and cordial." CP 15 (FF 13); accord RP at 18. And although the deputy believed Mr. Budig appeared nervous, Mr. Budig made no threatening movements or gestures towards the deputy, nor did he try to flee or hide anything. RP 21; CP 16 (FF 14).

The deputy told Mr. Budig he was going to frisk him for weapons. RP 11-12; CP 17 (FF 21-22). Mr. Budig complained, but quickly complied once the deputy informed him that he was being detained. RP 12; CP 17 (FF 22). The deputy found a switchblade knife in Mr. Budig's pocket. CP 17 (FF 26); RP 12. The deputy arrested Mr. Budig for carrying a switchblade knife in violation of RCW 9.41.250(1)(a), a gross misdemeanor. RP 11-12; CP 47. In a search incident to arrest, the deputy found drugs. CP 40.

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[2] While the deputy did not testify on whether this proved to be true or not, the deputy's report stated Mr. Budig was in fact waiting for a tow truck for his car. CP 48.

The prosecution charged Mr. Budig with unlawful possession of a controlled substance. CP 51. Mr. Budig moved to suppress the evidence, contending he had been unconstitutionally seized and searched. CP 33.

At the hearing, the deputy's testimony did not establish precisely the length or content of his conversation with Mr. Budig. RP 9, 12. In response to the prosecutor's questioning, the deputy testified that he did not know the length of the conversation and could not give a particular time, other than it was less than an hour:

> Q. How long do you think you and the defendant spoke before you ultimately arrested him?
>
> A. I would be guessing, I don't know.
>
> Q. Under an hour?
>
> A. Certainly under an hour. It wasn't that long, but I couldn't give you a particular time.
>
> Q. Okay.

RP 12 (emphasis added).

The deputy also was unable to remember if there was anyone else with Mr. Budig. RP 10. The prosecution did not elicit whether the woman on the scene who pointed out Mr. Budig, remained at the scene or left during the interaction between the deputy and Mr. Budig. RP 4-16, 21-22; CP 17 (FF 16) ("It is unknown if the reporting party ever left the area during the contact with Mr. Budig.").

Mr. Budig's primary argument was that the frisk for weapons was unlawful because the prosecution failed to prove there was reasonable suspicion that he was armed and presently dangerous. RP 23-29; CP 35-38. Mr. Budig did not concede that the stop was valid. RP 36.

Given the testimony by the deputy, the court asked the parties to address the issue of when the stop of Mr. Budig occurred and whether that stop was lawful. RP 35-43. After hearing from the parties, the court recessed for a week and invited the parties to provide supplemental briefing or additional caselaw. RP 44-45.

When the court reconvened the next week, the court noted it had received additional authority from the defense. 5/10/19 RP 2. Emphasizing that the deputy's testimony was very vague on certain points and that it was the prosecution's burden to prove that the seizure of Mr. Budig was lawful, the court found that Mr. Budig had been seized and that the prosecution had not met its burden to prove the seizure was lawful. 5/10/19 RP 2-7. The court granted the motion to suppress. 5/10/19 RP 7.

The prosecution appealed. The Court of Appeals reversed the order granting Mr. Budig's motion to suppress and remanded for trial. The court denied Mr. Budig's motion to reconsider.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

1. The trial court correctly determined that reasonable suspicion did not exist when the law enforcement officer decided to frisk Mr. Budig for weapons. The Court of Appeals' contrary decision and holding that law enforcement may frisk a person even without reasonable suspicion of criminal activity is contrary to precedent and warrants review.

The Washington Constitution commands: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The United States Constitution also protects people from unreasonable searches and seizures. U.S. Const. amend. IV. Absent an exception, warrantless searches and seizures are per se unreasonable, and violate these provisions. State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). "The State bears a heavy burden to prove by clear and convincing evidence that a warrantless search falls within one of those exceptions." Id. at 867.

A brief investigatory seizure is a limited exception to the warrant requirement. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968); State v. Z.U.E., 183 Wn.2d 610, 617-18, 352 P.3d 796 (2015). To justify a "Terry" stop, a police officer must have reasonable suspicion, based on specific, objective facts, that the person has committed or is about to commit a crime. Z.U.E, 183 Wn.2d at 617.

The purpose of a Terry stop is investigation. "An officer may briefly stop an individual based upon reasonable suspicion of criminal activity if necessary to maintain the status quo while obtaining more information." State v. Duncan, 146 Wn.2d 166, 172, 43 P.2d 513 (2002) (internal quotation omitted). A lawful Terry stop is limited by the investigative purpose of the stop. State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

Distilled into three elements, "An officer may, though, frisk a person for weapons, but only if (1) he justifiably stopped the person before the frisk, (2) he has a reasonable concern of danger, and (3) the frisk's scope is limited to finding weapons." State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008) (emphasis added) (quoting State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)). "The failure of any of these makes the frisk unlawful and the evidence seized inadmissible." Id.

The prosecution failed to prove that Deputy Leyda's frisk of Mr. Budig occurred during a lawful Terry stop. The prosecution did not provide evidence to meet its burden to prove reasonable suspicion of a crime *at the time of the seizure*. Because the seizure was not legitimate, the frisk that followed was impermissible under article I, section 7 of the Washington Constitution.

Here, the deputy was investigating an allegation that Mr. Budig may have been shining a laser into moving vehicles. Mr. Budig and the deputy had an extended conversation, where the deputy had the opportunity confirm or dispel whether Mr. Budig was engaged in criminal activity. Mr. Budig explained he was waiting for a tow truck for his vehicle. The deputy did not testify that he found this account implausible. Rather, the deputy testified Mr. Budig's behavior was "helpful", RP 9 "cooperative," RP 17-18, "cordial," RP 18, and "affable." RP 13. The trial court agreed, entering an unchallenged finding that "Mr. Budig was helpful, affable and cordial during the contact." CP 16 (FF 13).

When the deputy decided to frisk Mr. Budig, he lacked reasonable suspicion that Mr. Budig had committed or was in the process of committing a crime. While Terry holds "that a police officer, under appropriate circumstances, may make a reasonable, limited search for weapons in the interest of his own protection, the rule cannot be invoked where reasonable grounds no longer exist for detaining the suspect." Coleman v. United States, 337 A.2d 767, 772 (D.C. 1975). This follows the general rule that like all exceptions to the warrant requirement, the Terry exception is limited and carefully drawn. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d. 573 (2010). "A lawful *Terry* stop is limited in

scope and duration to fulfilling the investigative purpose of the stop." Acrey, 148 Wn.2d at 747 (emphasis added).

The Court of Appeals reasoned that Deputy Leyda's very vague testimony about his encounter with Mr. Budig, the trial court erred in concluding that the prosecution had failed to meet its burden to prove the stop-and-frisk exception applied. Rather than give deference to the trial court's factual findings on the lack of evidence, the Court of Appeals reasoned that "[d]etermining the exact point at which this encounter became a Terry stop is not critical to our analysis." Slip op. at 5.

The Court of Appeals further disregarded this Court's three-part framework on the stop-and-frisk exception, reasoning that regardless of whether reasonable suspicion of a crime exists, law enforcement can frisk a person if the officer has "legitimate concerns about his safety." Slip op. at 5. In support, the Court cited City of Seattle v. Hall, 60 Wn. App. 645, 651, 806 P.2d 1246 (1991). In Hall, the Court of Appeals reasoned that "[w]hen an individual voluntarily approaches an officer and behaves in a manner that causes the officer a legitimate concern for his or her safety, that officer is entitled to take immediate protective measures." 60 Wn. App. at 651.

Hall has been eclipsed by this Court's precedent. To reiterate, a frisk for weapons is permissible under Terry, but only if the officer

"justifiably stopped the person before the frisk." Setterstrom, 163 Wn.2d at 626. If this requirement is not met, the frisk is not permitted. Id.

The Court of Appeals has recognized this, rejecting the notion that mere concerns of "officer safety" justify a Terry stop and frisk. State v. Carriero, 8 Wn. App. 2d 641, 665, 439 P.3d 679 (2019). "An officer conducting a valid investigatory stop based on reasonable suspicion may take steps to ensure officer safety," but "a valid stop is a precondition." Id. at 665. "In other words, law enforcement officers cannot create reasonable suspicion by claiming officer safety." Id.

Moreover, the scenario in this case is very different than the one in Hall. Here, the deputy responded to a report of a traffic hazard and had information about the possible unlawful discharge of a laser, a relatively minor offense. That the deputy was aware of prior burglaries in the area did not create reasonable suspicion that Mr. Budig was engaged in criminal activity. See State v. Fuentes, 183 Wn.2d 149, 161, 352 P.3d 152 (2015) (visiting apartment of suspected drug dealer late at night in a high crime area does not justify a Terry stop).

While Mr. Budig appeared nervous to the deputy, he did not invade the deputy's personal space or make any threatening movements towards the deputy. RP 8, 21. The trial court found "[t]he Deputy was able

to remember that the encounter did not escalate and he did not yell at the Defendant." CP 17 (FF 18) (unchallenged).

That Mr. Budig's behavior when he approached the deputy was not particularly threatening is underlined by the fact that the deputy did not "take immediate protective measures" as imagined in Hall. 60 Wn. App. at 651. Instead, the deputy had a lengthy conversation with Mr. Budig before deciding to pat him down. The prosecution failed to elicit evidence showing it was a short conversation and that reasonable suspicion existed following the conversation and contemporaneous to the frisk.

In reversing the trial court's order of suppression, the Court of Appeals improperly chided the trial court for its engagement and adherence to the law. The Court of Appeals recounted that Mr. Budig had not initially "challenged the legitimacy of any initial Terry stop." Slip op. at 8. Based on this, the Court reasoned that the "trial court went beyond what was needed to decide Budig's motion" by addressing whether the prosecution had shown reasonable suspicion existed at the time of the Terry frisk. Slip op. at 8.

But a judge is not a robot that outputs a decision after receiving evidence and law from the parties. Rather, a "trial court's obligation to follow the law remains the same regardless of the arguments raised by the

parties before it." State v. Quismundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008).[3]

Here, the trial court was well within its authority to ask the parties about whether the first element necessary for a valid stop-and-frisk had been met. The trial court gave the parties, including the State, an opportunity to respond. The issue was squarely presented following the extremely vague and imprecise testimony from Deputy Leyda about his interaction with Mr. Budig.

And to reiterate, the prosecution failed to prove there was reasonable suspicion at the time of the frisk. After Deputy Leyda engaged in a lengthy conversation with Mr. Budig, Deputy Leyda did *not testify* that he suspected Mr. Budig of unlawfully discharging a laser. Rather, based on Mr. Budig appearing nervous and there having been other crimes in the area, Deputy Leyda testified he thought "that possibly there was a crime occurring." RP 10. But "inarticulate hunches" do not establish reasonable suspicion. See Doughty, 170 Wn.2d at 62-63 (reasonable suspicion not established to stop person who very briefly visited what was a suspected "drug house" late at night). And the duration of any Terry stop

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[3] The Rules of Appellate Procedure recognize this principle. While cases are ordinarily resolved on the arguments of the parties, the Court has discretion to decide the case based on a ground raised by the Court itself. RAP 12.1; see, e.g., State v. Aho, 137 Wn.2d 736, 741, 975 P.2d 512 (1999).

may only last as long as necessary to dispel or confirm whether a violation of the law has occurred or is imminent. See Rodriguez v. United States, 575 U.S. 348, 354, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015) (stop becomes unlawful if it is prolonged beyond the time reasonably required to conduct investigation); United States v. Sharpe, 470 U.S. 675, 685, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) ("Obviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop.").

Admittedly, the trial court's articulation of the law and evidence was not ideal. But on the substance and merits, the court was correct. The prosecution failed to meet *its burden* to prove by clear and convincing evidence that the stop-and-frisk exception applied.

Review is warranted because the Court of Appeals' decision conflicts with precedent. RAP 13.4(b)(1), (2). Review is also warranted to clarify that the Court of Appeals holding in Hall—that the police may frisk of a person for weapons under Terry even if there is no reasonable suspicion of a crime—is not good law. This is a significant constitutional question justifying review. RAP 13.4(b)(3). And whether the police may simply seize and frisk a person based on officer safety concerns is an issue of substantial public interest warranting review. RAP 13.4(b)(4).

2. **Review is also warranted to clarify that when an appellate court reverses a trial court's order of suppression, the remedy is remand for proceedings consistent with the reversal, not remand for trial.**

In reversing, the Court of Appeals "remand[ed] for trial." Slip op. at 1, 8. Because this could be read to preclude another dispositive suppression motion, even on different grounds, Mr. Budig moved for reconsideration. He requested that the Court of Appeals amend its opinion to provide clarity. Without explanation, the Court of Appeals refused.

An appellate court's decision is binding on the trial court on remand. RAP 12.2. Trial courts "must strictly comply with directives from an appellate court which leave no discretion to the lower court." State v. Schwab, 134 Wn. App. 635, 645, 141 P.3d 658 (2006), aff'd, 163 Wn.2d 664, 185 P.3d 1151 (2008).

The language used by the Court of Appeals could be read by the trial court as to preclude an additional motion by Mr. Budig that might result in dismissal rather than trial. This is important because, as noted in Mr. Budig's brief, there is an issue on whether the discovery of the switchblade knife justified Mr. Budig's arrest. Br. of Resp't at 4 n.2. While Mr. Budig did not argue suppression was warranted because his arrest was unlawful, the prohibition on possessing switchblade knifes under RCW 9.41.250(1)(a) likely violates the state and federal

constitutional right to bear arms. Const. art. I, § 24; U.S. Const. amend. II, XIV; McDonald v. City of Chicago, Ill., 561 U.S. 742, 749-50, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). The right to bear arms is not limited to firearms. Caetano v. Massachusetts, __ U.S. __, 136 S. Ct. 1027, 1027, 194 L. Ed. 2d 99 (2016) (stun guns do not fall outside protection of Second Amendment). Unlike a simple tool, like a paring knife, a switchblade knife is an arm entitled to constitutional protection. State v. Delgado, 298 Or. 395, 403, 692 P.2d 610 (1984) (criminalizing the mere possession of a switchblade knife was unconstitutional); City of Seattle v. Evans, 184 Wn.2d 856, 873, 366 P.3d 906 (2015) (paring knife is not an "arm" entitled to constitutional protection). Consequently, arresting Mr. Budig for possessing a switchblade made the arrest illegal, which means the drugs found incident to Mr. Budig's arrest should be suppressed. Mr. Budig should be permitted to raise this theory on remand.

While the language used by the Court of Appeals can be found in other opinions, the more prudent language used when reversing a grant of a motion to suppress is to "reverse and remand for further proceedings consistent with this opinion." State v. Alexander, 5 Wn. App. 2d 154, 168, 425 P.3d 920 (2018) (reversing an erroneous motion to suppress on Terry grounds).

Significantly, this Court has clarified that when this Court reverses *a denial* of a motion to suppress, it is inappropriate for the appellate court to instruct for dismissal:

> When an appellate court vacates a conviction that is obtained with illegally seized evidence, the remedy is remand to the trial court with an order to suppress. This is true regardless of whether the untainted evidence might independently sustain a conviction. We reverse the Court of Appeals and remand to the trial court for further proceedings consistent with the order to suppress evidence seized as a result of the faulty warrant.

State v. McKee, 193 Wn.2d 271, 279, 438 P.3d 528 (2019).

The logical corollary is that when the appellate court reverses the grant of a suppression order, remand for further proceedings consistent with the reversal is the remedy. The remedy is not a trial.

Consistent with McKee, this Court should grant review to clarify that the appropriate remedy when an appellate court reverses a suppression order is remand for further proceedings consistent with the opinion. As in McKee, where this Court granted review solely to determine the appropriate remedy when reversal of a suppression order is granted, this issue is one of substantial public interest meriting review. RAP 13.4(b)(4).

E. CONCLUSION

For the foregoing reasons, Mr. Budig respectfully asks this Court to grant his petition for review.

Respectfully submitted this 30th day of September, 2020.

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Appendix

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Court Administrator/Clerk

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August 3, 2020

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CASE #: 80078-7-I
State of Washington, Appellant v. John Frederick Budig, II, Respondent

Snohomish County, Cause No. 19-1-00063-0

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> “Accordingly, we reverse the trial court’s order granting Budig’s motion to suppress and remand for trial."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Janice Ellis

FILED
8/3/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. JOHN FREDERICK BUDIG II, Respondent.	No. 80078-7-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — The State charged John Budig with one count of possession of heroin. Budig moved to suppress the evidence found during a search incident to his arrest, claiming that a deputy's Terry[1] frisk for weapons was unlawful, and moved to dismiss the case. The trial court granted Budig's motions. On appeal, the State argues that the trial court erred by applying the wrong legal standard to suppress the evidence. We agree, reverse, and remand for trial.

I. BACKGROUND

One spring evening, around 10:30 p.m., a woman called 911 from an "extremely rural" area of Snohomish County and reported "an individual shining some form of blue laser at passing cars." Snohomish County Sheriff's Deputy Christopher Leyda responded.

Deputy Leyda drove to the scene in a fully marked and equipped Snohomish County Sheriff's Office patrol truck. Once there, he found a car

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

parked in the middle of the roadway with its lights flashing. The reporting party was inside the vehicle. It was “dark out that night,” the area had no overhead street lights, and the only source of lighting came from Deputy Leyda’s lights and the headlights from the reporting party’s car.

The reporting party told the deputy that an unknown male had flashed a laser in her eyes while she was driving. She then pointed to a male standing in a driveway about a half-mile north of their location and said “that’s him.” She also reported noticing a silver Volkswagen “drive out from that same driveway,” stop next to the male, and then come and go several times. She felt this behavior was odd and decided to call 911.

During the investigation, while Deputy Leyda was gathering information from the reporting party, the male walked over to them with no prompting and approached the deputy. The male initiated a conversation and identified himself as John Budig. Deputy Leyda did not “know who [Budig] was until” responding to this call.

According to Deputy Leyda, Budig “said his car had broken down and he was waiting for a tow truck.” And Budig, presumably based on the deputy’s investigative questions, “admitted that he did have a laser but he wasn’t shining it at anybody.” While he described Budig as being helpful, affable, and cordial during the encounter, the deputy grew concerned by Budig’s demeanor. He observed that Budig was wearing two jackets, with one of them being “like a North Face jacket.” To the deputy, Budig appeared “very nervous,” fidgety, wide-eyed, “looking around and not at me,” and sweaty “even though it was cold out.”

He was most alarmed by Budig continuing to put his hands in his pockets despite being directed not to do so. Based on these observations, "and the suspicious nature of the call," Deputy Leyda decided to pat down Budig for weapons. The deputy later described his reasons for frisking Budig:

> The fact that I was by myself,[2] it was dark out, it was extremely poorly lit, his demeanor, the fact that he was wearing multiple layers of clothing, and again, the biggest one was the fact that he kept putting his hands in his pockets.

Deputy Leyda informed Budig he would perform a pat down and told Budig to turn around. When the deputy asked if Budig "had any weapons" on him, Budig said "no" and told the deputy "I haven't done anything wrong." Despite his initial objection, Budig quickly complied when the deputy "told him that he was being detained" or "told him he was not free to leave." The deputy found a switchblade knife in Budig's pocket. Deputy Leyda then arrested Budig for possessing a dangerous weapon in violation of RCW 9.41.250(1)(a).

During a search incident to arrest, Deputy Leyda found both heroin and methamphetamine in Budig's pockets. The State later charged Budig with one count of possessing a controlled substance (heroin).

Budig moved under CrR 3.6 to suppress all evidence stemming from the deputy's frisk. He argued that the Terry pat down for weapons was unlawful because the deputy lacked reasonable suspicion that he was armed and presently dangerous. After a hearing, the trial court concluded that "Deputy Leyda had an actual, legitimate concern that Mr. Budig was armed based on his

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[2] It is unknown if the reporting party left the area during Budig's contact with Deputy Leyda.

behavior, the time of night, and the conditions of the area of contact." Then, however, the trial court concluded that Deputy Leyda's encounter with Budig was a social contact that progressed into an unlawful seizure under article I, section 7 of the Washington Constitution and granted the motion to suppress. Because the trial court's ruling on the motion to suppress effectively terminated the State's case, it dismissed the charge against Budig with prejudice.

The State appeals.

II. ANALYSIS

The State contends that the trial court failed to apply the correct test to determine the validity of a Terry weapons frisk. We agree.

We review conclusions of law from a suppression hearing de novo. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

In a Terry stop, a law enforcement officer "may briefly stop and detain an individual for investigation without a warrant," and under proper circumstances, "briefly frisk the individual for weapons." State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). For such a frisk to be lawful, the State must show that "(1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify the protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes." Garvin, 166 Wn.2d at 250 (citing State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)).

Here, Deputy Budig responded to a 911 call to investigate a traffic hazard about a male shining a laser in the eyes of passing drivers.[3] Initially, the deputy did not know the subject of this investigation, "but [it] later turned out to be" Budig. Upon arriving at the scene, the reporting party pointed to Budig and said "that's him." Budig then walked over to the deputy and identified himself. Then, in response to the deputy's presumed questioning, Budig "admitted that he did have a laser but he wasn't shining it at anybody." The deputy also directed Budig keep his hands free during this time, but Budig "wouldn't keep his hands out of his pockets." Determining the exact point at which this encounter became a Terry stop is not critical to our analysis. Considering the totality of the circumstances, it is clear to us that by the time Deputy Leyda frisked Budig this was a Terry encounter.

The fact that Budig approached the deputy does not place the encounter beyond the reach of a Terry analysis. As a practical matter, even absent Budig initiating contact, the fact remains that Budig was the subject of this investigation and Deputy Leyda would have "stopped" him to inquire about the laser activity. Budig cannot avoid a stop simply by approaching the deputy. Moreover, Deputy Leyda had adequate grounds to frisk Budig to the extent the deputy had legitimate concerns about his safety. See City of Seattle v. Hall, 60 Wn. App. 645, 651, 806 P.2d 1246 (1991) ("When an individual voluntarily approaches an officer and behaves in a manner that causes the officer a

[3] Shining a laser into a moving vehicle may violate RCW 9A.84.030(1)(c) (disorderly conduct) and RCW 9A.49.030(1)(a) (second degree unlawful discharge of a laser).

legitimate concern for his or her safety, that officer is entitled to take immediate protective measures.").

Here, Budig's motion to suppress neither challenged the legitimacy of any initial Terry stop, likely because he freely approached the deputy, nor contested the scope of the deputy's frisk. Budig argued only that "there are not specific and articulable facts to support a reasonable belief that [he] was armed and presently dangerous." And the trial court resolved this issue when it concluded the deputy "had an actual, legitimate concern" that "Budig was armed based on his behavior, the time of night, and the conditions of the area of contact."

But the trial court went beyond what was needed to decide Budig's motion. The trial court raised a "social contact"[4] issue that the parties did not present and concluded that the deputy unlawfully seized Budig akin to the situations in State v. Harrington[5] and State v. Johnson,[6] an argument that neither party advanced. Moreover, both Harrington and Johnson are distinguishable because they concern initial social contacts that escalated into unlawful seizures in violation of article I, section 7.

In Harrington, the court concluded that an officer's actions amounted to a progressive intrusion that seized the defendant. 167 Wn.2d at 669-70. There, a police officer made a U-turn, got out of his patrol car, and approached Harrington

[4] A "social contact" merely describes an encounter between law enforcement and an individual that does not amount to a seizure. Johnson, 8 Wn. App. 2d 728, 735, 440 P.3d 1032 (2019). The term rests "someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop)." Harrington, 167 Wn.2d at 664.

[5] 167 Wn.2d 656, 222 P.3d 92 (2009).

[6] 8 Wn. App. 2d 728, 440 P.3d 1032 (2019).

around 11:00 p.m. while he was walking along a sidewalk. The officer questioned Harrington about his activities and travel. A second officer arrived on scene in a patrol car and stood near to Harrington. The first officer requested that Harrington remove his hands from his pockets, and then asked for consent to frisk. The court noted, “[r]equesting to frisk is inconsistent with a mere social contact.” Harrington, 167 Wn.2d at 669. The court held that when the officer requested to frisk Harrington, “the officers’ series of actions matured into a progressive intrusion substantial enough to seize Harrington. A reasonable person would not have felt free to leave due to the officers’ display of authority.” Harrington, 167 Wn.2d at 669-70. The court then suppressed the evidence used to convict Harrington and dismissed the case. Harrington, 167 Wn.2d at 670.

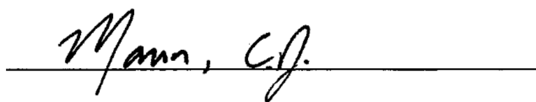
In Johnson, two police officers were engaged in a routine patrol late at night in an area known to have a high rate of criminal activity and became suspicious that the occupants of a parked vehicle were using drugs. 8 Wn. App. 2d at 733. The “two uniformed officers” approached Johnson’s vehicle, shined flashlights in it, and repeatedly questioned the driver, “is this Taylor’s vehicle,” in a “ruse” intended to make Johnson “feel more comfortable, in the hope that he would talk with the officer.” Johnson, 8 Wn. App. 2d at 733-34, 742. The officers then engaged Johnson in conversation and eventually asked for proof of Johnson’s identity. While one officer was attempting to verify Johnson’s identity with dispatch, the second officer noticed a firearm in Johnson’s vehicle and detained him. Johnson, 8 Wn. App. 2d at 734. We held Johnson was seized at the point when officers requested proof of his identity because “a

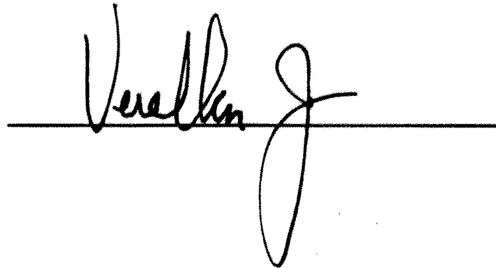
reasonable innocent person in Johnson's position would not have felt free to leave the scene, to disregard the officer's requests, to ignore the officers, or to otherwise terminate the encounter." Johnson, 8 Wn. App. 2d at 745.

Beyond not involving a Terry situation, and unlike Budig's situation, neither defendant in Harrington or Johnson were the "subject of investigation" of a 911 call to which officers responded.

Accordingly, we reverse the trial court's order granting Budig's motion to suppress and remand for trial.[7]

WE CONCUR:





[7] Given our disposition, we need not reach the State's remaining challenges to the trial court's findings of fact and conclusions of law.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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CASE #: 80078-7-I
State of Washington, Appellant v. John Frederick Budig, II, Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

FILED
8/31/2020
Court of Appeals
Division I
State of Washington

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

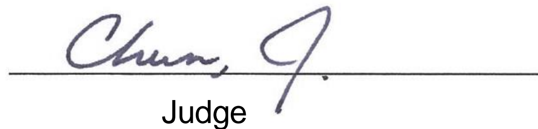
STATE OF WASHINGTON, Appellant, v. JOHN FREDERICK BUDIG II, Respondent.	No. 80078-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondent John Budig filed a motion to reconsider the opinion filed on August 3, 2020. Following consideration of the motion, the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80078-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: September 30, 2020
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

September 30, 2020 - 4:40 PM

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