IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL EDWARD CONNER, Appellant.	)	DIVISION ONE No. 66566-9-I
STATE OF WASHINGTON, Respondent, v. SALLI SUZANNE BOSMA, Appellant.	)	Consolidated with: No. 66604-5-I UNPUBLISHED OPINION FILED: October 1, 2012

Dwyer, J.—In a joint bench trial, Michael Conner and Salli Bosma were convicted of possessing methamphetamine, in violation of RCW 69.50.4013. Conner and Bosma now appeal, contending that they did not validly waive their right to jury trials and that the trial court erred by denying their motions to suppress evidence against them. The trial court ruled correctly on the suppression motions; we affirm that ruling. However, because the record does not demonstrate that either Conner or Bosma knowingly and voluntarily waived

the right to a jury trial, we reverse and remand for further proceedings.

I

On February 26, 2010, at approximately 3:00 p.m., Whatcom County Sheriff's Deputy Michael Taddonio, a seven-year veteran of the department, was driving on Slater Road when he noticed two cars—a white Honda Prelude and a red Honda Accord—parked in a Department of Natural Resources (DNR) parking lot. At that location, Slater Road bisects two DNR parking lots—one to the north and one to the south. Parking in either lot, both of which are used primarily by hikers and fishermen in this rural area, requires a permit. The two vehicles seen by the deputy were the only vehicles in the south lot. The north lot was vacant.

Deputy Taddonio's vehicle was a gray, unmarked police unit with emergency lights in the front grill. He was the only officer in his vehicle and was in full uniform.

The deputy pulled his vehicle into the south lot and parked it about 45 feet from the two vehicles, facing them. His vehicle did not block either of the parked Hondas from leaving, and his emergency lights were not activated.

Upon first noticing the parked vehicles, the deputy had thought that it was odd for cars to be parked there that day, due to intermittent rain. As he pulled into the south lot, he did not see anyone in either vehicle. As his vehicle approached the parked Hondas, he noticed a woman—later identified as Bosma—sit up in the driver's seat of the Prelude. He then saw another

person—later identified as Conner—appear in the front passenger's seat. The Accord was unoccupied. Deputy Taddonio thought that this was unusual, especially because those who park in the DNR lots typically leave the cars unoccupied as they go about their outdoor activities. It is not generally a place where people hang out.

As Deputy Taddonio parked his vehicle, he noted that the ground underneath each vehicle was dry—indicating that the cars had been parked there for a significant period of time, given the intermittent rain. After stepping out of his patrol car, Deputy Taddonio noticed Bosma rolling down the driver's side window of the Prelude. The deputy's perception was that "they were sitting up and rolling down a window to speak to me." As he approached the Prelude, the deputy did not see the required parking permit on either vehicle.

Deputy Taddonio arrived at the Prelude and stood about 18 inches from the driver's window. He began by "inquiring about the permits for the parking lot as it is a permit-only parking area." When questioned at a later hearing, the deputy explained that issuing parking citations "can be" a normal part of his duties but that, with the drivers present, he "probably wouldn't have written any citation," because "it's the education rather than [the] enforcement," that is emphasized. Thus, although he told Bosma and Conner that they needed permits to park in the lot, he at no time told them that they had to leave. When asked later in the hearing why he had not simply done a computer check, determined the names of the Hondas' registered owners, and written citations,

the deputy explained that, as things turned out, neither Bosma nor Conner were registered owners of the illegally parked vehicles and, if he had taken that course of action, innocent people would have needlessly and wrongfully been cited.

After informing Bosma and Conner of the permit requirement, the deputy asked them "what they were doing there," which led to a "general conversation" regarding their presence on the property. Deputy Taddonio found surprising the explanation given: that Bosma and Conner, who were both from Everson (quite a distance from the parking lot), had met in the parking lot to visit with one another, choosing that location because Conner had been at a casino two miles away, and because Bosma's boyfriend did not like her seeing Conner. Deputy Taddonio did not understand "why would they choose this remote area to sit and speak" when they could have "met at the casino and sat in the restaurant." In any event, the deputy noted, both of them spoke to him freely and neither indicated a desire to leave.

At this point, the deputy asked to see Bosma's driver's license, which she provided. Conner also provided his license, although he had not been asked to do so. The deputy described his request of Bosma as taking place "in the midst of the conversation," but no more than three minutes after it began. At this time, "[i]t was an option" to issue citations but the deputy's purpose "more so at this time . . . was to identify who I was speaking with." The deputy remained at the driver's door as he called dispatch on his radio with the information provided.

He held the licenses for 15 to 20 seconds before returning them to Bosma and Conner. The deputy quickly learned that neither Bosma nor Conner had any warrants out for their arrest.

Nevertheless, "as [he] continued to talk to them," Deputy Taddonio's concerns "continued to rise," particularly because of "the misplacement of deciding to have the conversation here as opposed to somewhere else." The deputy then asked if there was any drug paraphernalia in the vehicle, at which time he perceived that Bosma "became quite nervous." Bosma did not immediately answer. Instead, she glanced around the interior of the car and her hand "beg[a]n to move around." Conner and Bosma both then asserted that there was "nothing" in the car. The deputy was unsure whether he asked more than once before receiving an answer.

The deputy was still standing about two feet from Bosma's window, his patrol car 45 feet away. "I guess she could have backed out, absolutely," he stated at the hearing.

In Deputy Taddonio's mind, the circumstances were suspicious: The vehicles' occupants were out of sight when he drove up and could not be seen until they sat up. The vehicles were illegally parked at a remote location. They were the only vehicles in either lot. They had been there for a long time. The reasons given for being there "didn't appear to make sense or what would generally happen." There was immediate nervousness when the subject of drugs was raised. Bosma had not immediately responded but, rather, let Conner

initiate the response when the question about contraband in the car was posed.

The deputy then asked for permission to search the Prelude. Bosma hesitated, looked around the vehicle, then looked at Conner before answering. The deputy found Bosma's behavior unusual. The deputy may have asked twice for permission to search before receiving an answer, but it was not a "long, drawn-out back and forth . . . it was fairly succinct." Both Bosma and Conner consented to the search. Deputy Taddonio, in turn, asked them to get out of the vehicle, "[b]ecause I can't search the vehicle while people are sitting in there."

Deputy Taddonio testified that, during the conversation with Bosma and Conner, he used the same tone of voice that he used while testifying in court. He was not speaking "in a commanding voice" and never accused Bosma or Conner of "doing drugs."

As Bosma got out of the car, she brought her purse, which, the deputy thought, she was "holding . . . fairly tightly to her body." Deputy Taddonio was concerned by this action, explaining, "I don't know what's in the purse there. It might be any weapons, or again, with her nervousness regarding any drugs, whether there's anything illegal in the purse." Thus, "as soon as she exited the vehicle, I asked because it was odd that she made the concerted effort of making sure to retrieve her purse with her, I asked if I could search the purse."

In response, "[s]he opened it and kind of displayed it towards me as if for me to look in and check it with her holding it for me. . . . So I confirmed with her, no, I want to hold your purse and search it. . . . [S]he hesitated briefly and

eventually handed it to me."

At the hearing, Deputy Taddonio further explained the interaction. "[S]he was initially holding it, so I could visually search it, but again that's not something that I'm comfortable doing, so I asked her to provide it to me so it could be searched." Bosma handed him the purse after this "clarifying request." Bosma "hesitated briefly and eventually handed it to me and began to look toward the ground." To the deputy, Bosma "appeared nervous about me searching the purse . . . I gleaned that she was concerned about something in the purse."

The deputy then looked in the purse. "There was a sunglass case essentially on top of all items in the purse which I opened and immediately recognized a glass pipe inside, a methamphetamine pipe with residue." He then arrested Bosma for "possession of narcotics and took her into custody." The methamphetamine in the pipe was the basis for the arrest. At this point, the deputy testified, Conner "was not free to leave."

As Bosma was being led to the deputy's patrol car, after being handcuffed, Conner was pacing back and forth next to the Prelude. Once Bosma was in the patrol car, and the deputy turned back toward Conner, "he began approaching [the deputy] to speak." Conner had a hand in a pants pocket. Deputy Taddonio saw a "fairly large bulge" in Conner's right front pocket that "concerned" the deputy. Worried that "a bulge of that size could be any number of weapons," he "request[ed] permission to pat him down." Conner

consented. After patting down the bulge, the deputy was unsure what it was. When asked, Conner told him that it was a large amount of money, $3,000 cash that he had won at the casino. In response, the deputy "just asked if there was anything else illegal in the pocket, and if I could search his person to verify that there wasn't anything

illegal. . . . He advised I could."

The deputy "peered into" Conner's pocket and saw a plastic bag "sticking out of the center of the money." The deputy retrieved the bag, which, based on his training and experience, he believed contained methamphetamine.

Prior to discovering the plastic bag in Conner's pocket, it had been the deputy's intent to detain Conner and "inquire about his use of the pipe with Ms. Bosma." The deputy, after finding the glass pipe in Bosma's possession, was now investigating the "use of drugs" or "sale of drugs" in that "remote area."

At this point, Deputy Taddonio was still the only officer at the scene, although he had called for another officer to give him assistance after he placed Bosma under arrest. Shortly thereafter, a second officer arrived. While this officer was walking Conner to his patrol car, a pipe containing methamphetamine residue fell out of one of Conner's pant legs. After receiving consent to search both vehicles "from the subjects," the deputy discovered a scale in Conner's vehicle. Conner later admitted that he and Bosma had been smoking methamphetamine in the parking lot prior to Deputy Taddonio's arrival.

Conner and Bosma were each charged with one count of unlawful

possession of a controlled substance—methamphetamine. Both moved to suppress the evidence of the methamphetamine, arguing that it was the product of an unlawful seizure, and a joint CrR 3.6 suppression hearing was held.[1] The trial court denied both suppression motions.

The trial court determined that prior to the discovery of the pipe in Bosma's purse, the interaction between the defendants and Deputy Taddonio was a "consensual citizen encounter." The court ruled that Bosma had voluntarily consented to the search of her purse and, because she "was not at that point in time seized," there were no grounds for suppression of the evidence against Bosma.

With regard to Conner's motion to suppress, the trial court ruled that "once the drugs were found in Ms. Bosma's purse there were reasonable grounds to detain Mr. Conner." The court explained that "just the probable cause to arrest Ms. Bosma allows for there to be a further investigation . . . based upon his proximity to her [and] to the alleged violation that the Deputy found regarding Ms. Bosma." The trial court denied Conner's motion to suppress.

Following the joint suppression hearing, both Conner's counsel and Bosma's counsel told the court that their clients would waive their constitutional right to a jury trial. Following a joint bench trial, the trial court found each

[1] Both Bosma and Deputy Taddonio testified at the CrR 3.6 hearing. The facts set forth herein are those to which Deputy Taddonio testified. Bosma's testimony was in large part consistent with the testimony of the deputy. However, where it conflicted, the trial court determined that Deputy Taddonio's testimony was the more credible.

defendant guilty as charged.

Bosma and Conner appeal. Their appeals were consolidated in this court.

II

Conner and Bosma first contend that the record herein does not demonstrate that either of them knowingly and voluntarily waived the right to a jury trial. The State concedes that "the record evidences [that] the parties and the trial court[] failed to ensure the waiver of their right to a jury trial was placed on the record." Our review of the record confirms this concession. Accordingly, we reverse the convictions and remand for further proceedings.

The question of the propriety of the trial court's ruling on the suppression motions is fully briefed. Judicial economy will be served by our resolution of the issue. Therefore, we do so below.

III

Although the evidence against them was garnered as the result of consensual searches, both Bosma and Conner contend that their consent was vitiated by prior unlawful seizures. As a result, they aver, the searches were unlawful—notwithstanding their consent—and the trial court erred by denying their respective motions to suppress.

To resolve these claims, we must determine both when each defendant was seized and whether the seizure was lawful. "Whether police have seized a person is a mixed question of law and fact." State v. Harrington, 167 Wn.2d

656, 662, 222 P.3d 92 (2009). "The rule in Washington is that challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal." State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

> Under article I, section 7, a person is seized "'only when, by means of physical force or a show of authority,'" his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998) (quoting State v. Stroud, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981) and citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)), or (2) free to otherwise decline an officer's request and terminate the encounter, see Florida v. Bostick, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); [State v.] Thorn, 129 Wn.2d [347,] 352[, 917 P.2d 108 (1996), overruled on other grounds by State v. O'Neill, 148 Wn.2d at 571]. The standard is [] "a purely *objective* one, looking to the actions of the law enforcement officer." Young, 135 Wn.2d at 501 (emphasis added).

O'Neill, 148 Wn.2d at 574. "[T]he 'reasonable person' test presupposes an *innocent* person." Bostick, 501 U.S. at 438.

The defendant "bears the burden of proving a seizure occurred in violation of article I, section 7." Harrington, 167 Wn.2d at 664; accord O'Neill, 148 Wn.2d at 574. As the United States Supreme Court observed:

> Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free "to disregard the police and go about his business," California v. Hodari D., 499 U.S. 621, 628[, 111 S. Ct. 1547, 113 L .Ed. 2d 690] (1991), the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. The Court made precisely this point in Terry v. Ohio, 392 U.S. 1, 19, n. 16[, 88 S. Ct. 1868, 20 L .Ed. 2d 889] (1968): "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of

> persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

Bostick, 501 U.S. at 434.

> Previous Washington cases adopted the Mendenhall test of a seizure to analyze a disturbance of a person's private affairs under article I, section 7:
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> > A person is "seized" within the meaning of the Fourth Amendment only when, by means of physical force or a show of authority, his freedom of movement is restrained. . . . There is a "seizure" when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.
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> State v. Stroud, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981) (footnote omitted) (citing United States Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); accord State v. Thorn, 129 Wn.2d 347, 351-52, 917 P.2d 108 (1996).
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> Washington search and seizure law stemming from Terry and proceeding through Mendenhall is well-established.

Young, 135 Wn.2d at 509-10.

In Young, our Supreme Court confirmed that Mendenhall's approach to Fourth Amendment "seizure" analysis remains applicable to article I, section 7 "seizure" analysis.

> "Examples of circumstance that might indicate a seizure, even where the person did not attempt to leave, would be 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. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person."

Young, 135 Wn.2d at 512 (citations omitted) (quoting Mendenhall, 446 U.S. at 554-55). Our Supreme Court continues to apply the Mendenhall formulation to state constitutional seizure analysis, see, e.g., Harrington, 167 Wn.2d at 664; State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); O'Neill, 148 Wn.2d at 574, as does this court. See, e.g., State v. Mote, 129 Wn. App. 276, 282-83, 120 P.3d 596 (2005).

"'[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification.'" Rankin, 151 Wn.2d at 695 (alteration in original) (quoting Mendenhall, 446 U.S. at 553). Thus, "the police are permitted to engage persons in conversation and ask for identification even in the absence of an articulable suspicion of wrongdoing." Young, 135 Wn.2d at 511. Moreover, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." INS v. Delgado, 466 U.S. 210, 216, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).

Seizure analysis under the federal and state constitutions differs in only one pertinent respect. By way of explanation, we note that, "[i]n Young, Washington adopted the test for Fourth Amendment 'seizure' in United States v. Mendenhall, as the test for seizure analysis under Washington Constitution article I, section 7." Rankin, 151 Wn.2d at 710 (Ireland, J., dissenting) (citations omitted). However, after Mendenhall, the United States Supreme Court held that a seizure for purposes of the Fourth Amendment can occur only where the

subject actually yields to an officer's physical force or show of authority. Hodari D., 499 U.S. at 626-28. Later, our Supreme Court rejected the application of this test to article I, section 7 seizure analysis, instead applying a purely objective standard, Young, 135 Wn.2d at 509-11, which focuses not on whether the subject perceived that he or she was being ordered to restrict his or her movement but, rather, on whether the officer's words and actions would have conveyed that meaning to a reasonable person. Young, 135 Wn.2d at 506. Thus, cases applying the Fourth Amendment seizure analysis continue to be applicable to an article I, section 7 analysis, so long as they do not involve an application of the Hodari D. "subjectivity" test.

There are, of course, a plethora of cases from both the United States Supreme Court and the Washington Supreme Court analyzing claims of unlawful seizures. Unsurprisingly, given the posture and facts of this case, several bear particular mention.

Florida v. Bostick, 501 U.S. 429, the case in which the United States Supreme Court made clear that the "reasonable person" referenced in constitutional seizure analysis is an "innocent person,"[2] 501 U.S. at 438, is one such case. In that case, two uniformed, armed police officers boarded a bus at a scheduled stop. In the admitted absence of articulable suspicion of wrongdoing, one officer asked to see Bostick's ticket and identification. Bostick complied.

[2] Thus making clear that constitutional seizure analysis does not involve an application of a "reasonable criminal" standard. We do not objectively view an officer's words and conduct in an effort to determine whether a "reasonable criminal" would have felt free to leave or decline the officer's request.

The officer then requested permission to search Bostick's luggage for drugs. He consented. Cocaine was found in the search, and Bostick was arrested and charged with trafficking in cocaine. 501 U.S. at 431-32.

Bostick challenged the fruits of the consensual search as being the product of an illegal seizure. In analyzing this claim, Justice O'Connor began her opinion for the Court with this observation:

> We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate.

Bostick, 501 U.S. at 431. Justice O'Connor further explained:

> There is no doubt that if this same encounter had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure. The Court has dealt with similar encounters in airports and has found them to be "the sort of consensual encounter[s] that implicat[e] no Fourth Amendment interest." Florida v. Rodriguez, 469 U.S. 1, 5–6[, 105 S. Ct. 308, 83 L. Ed. 2d 165] (1984). We have stated that even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, see INS v. Delgado, 466 U.S. 210, 216 (1984); Rodriguez, supra, at 5-6; ask to examine the individual's identification, see Delgado, supra, at 216; [Florida v.]Royer, [460 U.S. 491] at 501, [103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)] (plurality opinion); United States v. Mendenhall, 446 U.S. 544, 557-558 (1980); and request consent to search his or her luggage, see Royer, supra, at 501 (plurality opinion)—as long as the police do not convey a message that compliance with their requests is required.

Bostick, 501 U.S. at 434-35.

Notwithstanding the weight of this authority, Bostick argued that he had been illegally seized.

> Bostick maintains that a reasonable bus passenger would not have

> felt free to leave under the circumstances of this case because there is nowhere to go on a bus. Also, the bus was about to depart. Had Bostick disembarked, he would have risked being stranded and losing whatever baggage he had locked away in the luggage compartment.

Bostick, 501 U.S. at 435. The Florida Supreme Court accepted this argument, holding that such encounters on a bus would always constitute a seizure because no reasonable person would feel free to leave the bus in such a situation. Bostick, 501 U.S. at 435.

The United States Supreme Court reversed, holding that the Florida court erred by elevating one fact—presence on a bus—to primacy instead of applying a totality of the circumstances analysis. Bostick, 501 U.S. at 437. The true question, the Court noted, was not merely whether Bostick felt that he was "free to leave"—indeed, as a passenger on a bus scheduled to depart, Bostick would not have felt free to leave the bus even if the police had not been present—but, rather, "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." Bostick, 501 U.S. at 436. In other words,

> the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."

Bostick, 501 U.S. at 437 (quoting Michigan v. Chesternut, 486 U.S. 567, 569, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988).

Bosma and Conner were the occupants of an automobile parked in a public place. A similar situation underlay the State Supreme Court's decision in

State v. Thorn, 129 Wn.2d 347.[3] According to the opinion:

> While on routine patrol in a marked patrol car shortly after midnight, Spokane Police Officer K. Peden observed three people seated in a car that was legally parked in the parking lot of Friendship Park in suburban Spokane. The officer also observed a flicker of light emanate from within the parked car and believed that the light was a flame being used to ignite a drug pipe. . . .
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> Officer Peden stopped, exited the patrol car, and approached the parked car on foot. The officer asked the driver of the parked car, "Where is the pipe?" . . . In response to the question, the driver, James Thorn, removed a pipe from his coat pocket and handed it to Officer Peden.

Thorn, 129 Wn.2d at 349. Psilocybin mushrooms, a controlled substance, were discovered in a subsequent search incident to Thorn's arrest. Thorn, 129 Wn.2d at 349.

On appeal, Thorn claimed that he was illegally seized when the officer asked, "Where is the pipe?" The Supreme Court disagreed, citing Bostick and Mendenhall for the proposition that an officer does not seize a person merely by striking up a conversation or asking questions. Thorn, 129 Wn.2d at 352.

The court noted that the required approach was to analyze the totality of the circumstances. Thorn, 129 Wn.2d at 352-53. It further noted that Thorn's presence in a parked vehicle was not properly a fact to be assigned much significance.

> [A]s the Bostick court pointed out, the focus of the inquiry is not on whether the defendant's movements are confined due to circumstances independent of police action, but on whether the police conduct was coercive. Bostick, 501 U.S. at 436. . . . [T]he

[3] Thorn was decided on Fourth Amendment grounds. It did not, however, involve an application of the Hoderi D. "subjectivity" test and, therefore, retains its validity for purposes of both state and federal constitutional analysis.

> question is not merely whether Thorn felt free to leave, but whether he felt free to terminate the encounter, refuse to answer the officer's question, or otherwise go about his business. Consequently, whether it was more difficult for the defendant to actually leave the scene of the police contact because he was in a parked car is not a significant factor here. See INS v. Delgado, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) (holding that no seizure took place where INS agents interrogated suspected aliens at their workplace despite the fact that the workers may have felt not free to leave because they were at work).

Thorn, 129 Wn.2d at 353. The court concluded that the posing of the question, in the circumstances described, did not "create[] a coercive environment" such that Thorn was seized. Thorn, 129 Wn.2d at 354.

Two years later, in State v. Young, 135 Wn.2d 498, our Supreme Court revisited the arena of seizure analysis, this time deciding the case solely on state constitutional grounds. In that case, a uniformed, armed deputy sheriff was on patrol in a marked police unit on a late August evening. Shortly before 10:00 p.m., the deputy observed Kevin Young standing on a street corner, speaking to a young woman. The deputy observed nothing to arouse his suspicions. Nevertheless, the deputy stopped his patrol car and got out to speak with Young. He asked Young how he was doing and asked his name, which Young truthfully gave him. The deputy returned to his car. Young, 135 Wn.2d at 502.

The deputy drove a half block from the scene and then pulled over, calling in for a criminal history check on Young. The check revealed that Young "had a very extensive background in narcotics sales." Young, 135 Wn.2d at 502.

As the deputy again began to drive, he looked in his rear view mirror and saw Young standing in the middle of the street, on the crest of a hill, and apparently monitoring the deputy's whereabouts. The deputy turned his car around and drove back toward Young. Young, 135 Wn.2d at 502. In response, Young began walking at a fast pace, moving toward a bushy area near an apartment complex. The deputy

> then speeded up. As [the deputy] drove up the hill, he shined the patrol vehicle spotlight on Young when Young was about three or four feet from a tree. He saw Young walk behind the tree, crouch down, and toss something about the size of a small package into the area near the tree. Young continued walking, now away from the tree, and at a very fast pace. . . .
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> [The deputy] drove to the opposite side of the street, stopped his patrol car close to the tree, and exited the vehicle. He asked Young to stop. Then he retrieved the object he saw Young dispose of behind the tree.

Young, 135 Wn.2d at 503. The object was a soda can containing a substance that appeared to be rock cocaine. Young, 135 Wn.2d at 503.

The trial court ruled that Young was seized "at the point the deputy illuminated the defendant with the spotlight," and granted a motion to suppress. Young, 135 Wn.2d at 504. The Supreme Court disagreed.

After discussing the analytical difference between federal and state seizure analysis, as set forth above, the court framed the issue as follows:

> [T]he seizure question becomes, was the illumination by the spotlight such a show of authority that a reasonable person would have believed he or she was not free to leave. That Young actually did leave makes no difference; the test is objective.

Young, 135 Wn.2d at 511. To the Supreme Court, the answer was clear. "The

shining of the spotlight in this case does not rise to the level of intrusiveness discussed in Mendenhall." Young, 135 Wn.2d at 512-13. The court thus held that

> [t]he illumination by the spotlight did not amount to such a show of authority a reasonable person would have believed he or she was not free to leave, not free simply to keep on walking or continue with whatever activity he or she was then engaged in, until some positive command from [the deputy] issued.

Young, 135 Wn.2d at 513-14.

Because there was no seizure, the court ruled, Young's abandonment of the contraband was not the result of unlawful police conduct and the evidence should not have been suppressed.

A similar result obtained in State v. O'Neill, 148 Wn.2d 564, also decided pursuant to article I, section 7. The facts of the case are striking.

> The unchallenged findings in this case establish that on June 7, 1999, Sergeant West was traveling on a road in Bellingham when he saw a car parked in front of a store that had been closed for about an hour. Sergeant West knew that it had been burglarized twice in the previous month. West pulled up behind the car and activated his spotlight in order to see the license plate and run a computer check on the plate. He ran the check, and learned that the vehicle had been impounded within the previous two months due to a drug situation. West noticed that the windows of the parked vehicle were fogged over, and he formed the opinion that someone was in the car. He also believed the car had been there for a period of time sufficient for the windows to fog.
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> Sergeant West approached the driver's side of the car and shined the light from his flashlight in the driver's face. The driver was later identified as O'Neill. West asked Mr. O'Neill to roll the window down, which he did. Sergeant West asked Mr. O'Neill what he was doing there, and O'Neill answered that he had come from Birch Bay and his car had broken down. He said that his car would not start, and that he was waiting for a friend to come with

> jumper cables. West asked Mr. O'Neill to try to start the car. O'Neill tried, but the car would not start.
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> West then asked O'Neill for identification. Mr. O'Neill said that he did not have any on him, and then stated that his driver's license had been revoked. West asked for registration and insurance papers. Mr. O'Neill produced registration that showed that the vehicle was registered to Harold Macomber. There was a handwritten date of birth on the registration. Sergeant West asked O'Neill if he was Macomber, and O'Neill said he was. West asked O'Neill to step from the vehicle and then patted him down for identification.
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> When Mr. O'Neill got out of the car, Sergeant West saw a spoon on the floorboard next to the driver's side. West saw a substance on the spoon that looked granular with a slickness or wet look. Based upon his training and experience, West thought that a narcotic had been cooked on the spoon. When West asked Mr. O'Neill about the spoon, O'Neill said that it was an ice cream spoon.
>
> West then asked O'Neill for consent to search the vehicle. Mr. O'Neill said "no" and said that Sergeant West needed a warrant to search the car. West responded that he did not need a warrant but could simply arrest O'Neill for the drug paraphernalia and search the car incident to that arrest. West asked for consent again. The discussion went back and forth several times, with O'Neill eventually consenting. West got into the car and saw a pipe that he recognized as drug paraphernalia on the driver's seat. He moved the pipe and sat down. From a sitting position, he could see a baggie in the open containing what he believed to be cocaine.
>
> West arrested O'Neill, who was charged with unlawful possession of a controlled substance.

O'Neill, 148 Wn.2d at 571-73.

In resolving the case, the Supreme Court reiterated its view of policing:

> Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens' questions,

> comments, and information citizens may offer.

O'Neill, 148 Wn.2d at 576.

> Accordingly, we reject the premise that under article I, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a Terry stop. Once a seizure is found, however, the reasonableness of the officer's suspicion and the factual basis for it are relevant in deciding the validity of the seizure.

O'Neill, 148 Wn.2d at 577 (footnote omitted). Indeed, the subjective motivation of the officer was not germane; rather "the question of whether a seizure has been effected is an objective determination based upon the actions of the law enforcement officer." O'Neill, 148 Wn.2d at 577 n.1.

The Supreme Court closely analyzed the officer's actions to see if "there was any show of authority on the officer's part," O'Neill, 148 Wn.2d at 577, that would constitute a seizure.

> When Sergeant West pulled into the parking lot he shined his spotlight on O'Neill's car. No seizure occurred at that point. Young, 135 Wn.2d at 510-13. West then approached the car and shined a flashlight into it, illuminating the driver and the passenger compartment. The use of a flashlight to illuminate at night what is plainly visible during the day is not an unconstitutional intrusion into a citizen's privacy interests. Young, 135 Wn.2d at 513 n. 8. As Young notes, this court in State v. Rose, 128 Wn.2d 388, 909 P.2d 280 (1996) reasoned that use of a flashlight is not an intrusive method of viewing what is there to be seen but for the dark of night. Young, 135 Wn.2d at 513 n. 8 (quoting Rose, 128 Wn.2d at 398-99). A flashlight is, instead, an exceedingly common device that can do no more than reveal what would be visible in natural light. This court concluded: "[W]e hold that the fact that a flashlight is used does not transform an observation which would fall within the open view doctrine during daylight into an impermissible search simply because darkness falls." Rose, 128 Wn.2d at 398–99, *quoted in* Young, 135 Wn.2d at 513 n. 8. Thus, in Young, this court

> found no disturbance of private affairs under article I, section 7 where a police officer shined a spotlight on a person in a public street at night, under the same reasoning employed in Rose. Sergeant West's use of a flashlight to see what would be observable in daylight was not an unreasonable intrusion into O'Neill's private affairs.
>
> Sergeant West then asked O'Neill to roll his window down. It is not improper for a law enforcement officer to engage a citizen in conversation in a public place. Young, 135 Wn.2d at 511. O'Neill was parked in a public place. The occupant of a car does not have the same expectation of privacy in a vehicle parked in a public place as he or she might have in a vehicle in a private location—he or she is visible and accessible to anyone approaching. Significantly, this court has concluded that there was no seizure of a person in a vehicle parked at night in the parking lot of a closed public park, where a police officer approached the vehicle after seeing a light in it, and asked, "'Where is the pipe?'" Thorn, 129 Wn.2d at 349. . . . [W]here a vehicle is parked in a public place, the distinction between a pedestrian and the occupant of a vehicle dissipates. . . .
>
> The occupant is free, of course, to refuse an officer's request to open the window, and is under no obligation to engage in conversation with the officer. By the same token, the occupant is just as free to open a window and engage in conversation. The officer's approach and conversation with O'Neill did not, because O'Neill was inside a vehicle, rise to the level of an unconstitutional intrusion into private affairs.
>
> O'Neill next challenges the propriety of Sergeant West's request that he try to start the vehicle. The unchallenged findings do not suggest any show of authority that would lead a reasonable person to believe he was being detained as a result of this request.

O'Neill, 148 Wn.2d at 578-80.

The court next addressed O'Neill's argument that the officer's request for O'Neill's identification constituted a seizure. The court rejected this contention, "adher[ing] to our analysis in Young" that such a request does not elevate an encounter into a detention. O'Neill, 148 Wn.2d at 580 (citing Young, 135 Wn.2d

at 511).

Ultimately, the court concluded that "Sergeant West's actions in their entirety, viewed objectively, do not warrant the conclusion there was a show of authority amounting to a seizure prior to the request that O'Neill exit the car." O'Neill, 148 Wn.2d at 581. By that time, however, O'Neill had already confessed to having driven the vehicle with a revoked driver's license. Thus, the officer had "probable cause to believe that O'Neill was involved in criminal activity: driving while his license was revoked." O'Neill, 148 Wn.2d at 582.

In summary, then, the Supreme Court ruled that the following actions of the officer, considered in their totality, did not constitute a seizure: (1) pulled his patrol car into a closed store's parking lot late at night; (2) pulled up behind a parked vehicle; (3) shined his spotlight on the vehicle; (4) approached the vehicle on foot; (5) shined a flashlight into the sole occupant's face; (6) asked the occupant to roll down the driver's side window; (7) asked the occupant for his purpose in being parked there; (8) in response to being told that the car would not start, asked the driver to attempt to start it; (9) asked the occupant for identification; and (10) asked the occupant for registration and insurance.

The final case bearing mention is also the newest, State v. Harrington, 167 Wn.2d 656. In that case, the Supreme Court held that "the officers' actions, when viewed cumulatively, impermissibly disturbed Harrington's private affairs," 167 Wn.2d at 660, thus constituting a seizure.

The court began its analysis by discussing Rankin, O'Neill, Young, and

Mendenhall, noting that, "[i]n Young, we embraced [Mendenhall's] nonexclusive list of police actions likely resulting in seizure." Harrington, 167 Wn.2d at 664. The court applied that settled law to these facts:

> At roughly 11:00 p.m. on August 13, 2005, Richland Police Officer Scott Reiber was driving his marked patrol car north on Jadwin Avenue in Richland. Reiber noticed Harrington walking south along the sidewalk. Reiber made a U-turn, drove south past Harrington, and pulled into a driveway. The officer did not activate his lights or siren. Reiber exited his patrol car and approached Harrington who was then walking toward the officer. Reiber testified he "contact[ed]" Harrington because "[t]hat area, late at night, a gentleman walking—social contact. See what he was up to, just to talk."
>
> When close enough, Reiber asked, "Hey, can I talk to you" or "Mind if I talk to you for a minute?" Harrington replied either "Yeah" or "Yes." The two men began a conversation, standing approximately five feet apart. Reiber positioned himself off the sidewalk on the grass. Reiber testified Harrington's path was not obstructed by either Reiber or the patrol car. Reiber asked Harrington where he was coming from. Harrington responded he was coming from his sister's house. Asked where his sister lived, Harrington replied he did not know. Reiber considered that lack of knowledge "a little suspicious." Reiber testified Harrington was acting "quite nervous, pretty fidgety" throughout the encounter. Reiber also noticed bulges in Harrington's pockets. Early in the encounter Harrington put his hands into his pockets, prompting Reiber to ask Harrington to remove his hands. Harrington took his hands out when initially asked but repeatedly put his hands back into his pockets before quickly removing them again. Their conversation lasted between two and five minutes.
>
> During that time frame Washington State Patrol Trooper William Bryan coincidentally drove south past the encounter. After noticing an officer speaking alone with an individual, Bryan made a U-turn and parked his marked patrol car in the northbound lane of traffic, approximately 10 to 30 feet from Harrington and Reiber. Bryan exited his car and stood 7 or 8 feet from Harrington. Bryan did not speak to either Harrington or Reiber. When testifying Bryan could not recall whether he activated any pattern of lights when he made the U-turn or when he parked his car in the lane.

> After Bryan appeared Reiber asked if he could pat down Harrington for officer safety. Reiber told Harrington he was not under arrest at that moment. Harrington answered, "Yeah." During the pat down Reiber felt a hard, cylindrical object in Harrington's front right pocket. Reiber asked what it was, to which Harrington responded, "My glass." Asked for clarification, Harrington added, "My meth pipe." Reiber then told Harrington he was under arrest. Incident to arrest the officers searched Harrington and discovered a pipe and baggie. Both contained methamphetamine.

Harrington, 167 Wn.2d at 660-62 (citations to the record omitted).

The court began by noting that Officer Reiber's actions in making a U-turn, pulling into a driveway, leaving his patrol car, approaching Harrington, asking to speak with him, and asking Harrington questions did not "rise to the level of a seizure." Harrington, 167 Wn.2d at 665.

At this point, the court noted, the second officer arrived. A scene with two police officers and a lone citizen meets one of the Mendenhall seizure criteria, the court noted. Harrington, 167 Wn.2d at 666. Observing that "Harrington undoubtedly noted Bryan's presence," the court nevertheless did not find that a seizure had yet occurred. Harrington, 167 Wn.2d at 666.

Moments later, Reiber asked Harrington to remove his hands from his pockets. Reiber conceded that "he asked Harrington to remove his hands from his pockets in order 'to control Mr. Harrington's actions.'" Harrington, 167 Wn.2d at 667 (citation to the record omitted). Nevertheless, the Supreme Court did not hold that Harrington was yet seized at this point in the interaction with the officers.

Reiber then asked Harrington to consent to a frisk—a manual search of

Harrington's person. "When Reiber requested a frisk, 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. Thus, the court ruled that Harrington's consent to the frisk—which resulted in the discovery of contraband—was the product of his illegal seizure, the officers not having a lawful basis to detain him prior to the frisk, and ordered the evidence of the contraband suppressed.

IV

In denying Bosma's motion to suppress, the trial court ruled that she was not seized by the deputy until after he discovered the pipe in her purse. Thus, the court determined, her consent to the search of her purse was valid (in that it was not preceded by an illegal seizure) and the evidence of the methamphetamine, which resulted from the search of her purse, was admissible. On appeal, Bosma takes issue with the court's ruling, arguing that "there was a progressive intrusion, resulting in a seizure—if not by the time Deputy Taddonio asked if there was drug paraphernalia in the car—certainly by the time he asked to search Bosma's car and then her purse."

The trial court's ruling was well-supported by the case law. First, none of the Mendenhall factors were present in this police-citizen interaction. There was not "the threatening presence of several officers"[4] (indeed, in this case, there

[4] Mendenhall, 446 U.S. at 554.

was a single officer dealing with two suspects); there was not a "display of a weapon by an officer;[5] there was not "some physical touching of the person of" Bosma;[6] nor was there "the use of language or tone of voice indicating that compliance

. . . might be compelled."[7] As noted by the United States Supreme Court and our Supreme Court, "'[i]n the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.'" Young, 135 Wn.2d at 512 (quoting Mendenhall, 446 U.S. at 555).

A reasonable, innocent person in Bosma's position would have been reassured, rather than threatened, by the deputy's expressed reason for initially encountering her—a suspected parking violation. The deputy's decision to converse with her and request identification was lawful. Young, 135 Wn.2d at 511. To the extent that the deputy manifested skepticism upon hearing Bosma's explanation for her presence at that remote location, such an expression does not result in a seizure. O'Neill, 148 Wn.2d at 579-80 (upon being told by O'Neill that the vehicle was inoperable, officer asked O'Neill to try to start it). Neither does the mention of the possible presence of drugs, Bostick, 501 U.S. at 431-32, or drug paraphernalia, Thorn, 129 Wn.2d at 349, constitute a seizure.

Similarly, the trial court's ruling that the deputy's request to search

[5] Mendenhall, 446 U.S. at 554.
[6] Mendenhall, 446 U.S. at 554.
[7] Mendenhall, 446 U.S. at 554.

Bosma's vehicle and her purse did not constitute a seizure is supported by Bostick, in which the request of two officers to search a bus passenger's luggage for drugs was not found to constitute a seizure. Moreover, for several reasons, the deputy's request that Bosma step out of her vehicle did not constitute a seizure. First, the request was a direct result of Bosma's consent to the search of her car. A reasonable person would not give such consent and then expect the car to be searched with her and her passenger still sitting inside. Second, as the occupant of a car parked in a public place, Bosma was constitutionally indistinguishable from a pedestrian. Asking her to step out of the car in connection with its search was no different from asking a pedestrian to move a few feet either way to allow a police officer to perform his duties. Finally, O'Neill counsels no differently. In that case, probable cause for arrest existed prior to O'Neill being asked to step out of his car. Whether in his car or out of it, O'Neill was not free to go once he had admitted to committing a crime.

Indeed, Bosma's argument implicitly relies on the assumption that our Supreme Court, in Harrington, created a new test to be applied in seizure analysis—the "progressive intrusion" test. The argument appears to be that when a police officer engages in a "progressive intrusion" a seizure necessarily results. But Harrington established no such rule.

Instead, the Harrington court relied on existing precedent in reaching its decision. Its use of the term "progressive intrusion" simply stands for the unremarkable proposition that, when engaged in a totality of the circumstances

analysis, a tipping point can be reached whereby the cumulative weight of the facts leads from one conclusion (no seizure) to the other (seizure). See Harrington, 167 Wn.2d at 660 ("[T]he officers' actions, when viewed cumulatively, impermissibly disturbed Harrington's private affairs."). Indeed, the Harrington court explicitly mentioned the Mendenhall factors and applied them in its analysis. It did not hold that when a police officer engages in a "progressive intrusion" a seizure necessarily results.

To be sure, the Harrington court determined that the following circumstances (viewed in their totality, or "cumulatively") did *not* constitute a seizure:

1. After seeing Harrington, Officer Reiber made a U-turn, pulling into a driveway;

2. The officer left his patrol car and approached Harrington;

3. The officer asked to speak with Harrington and began asking him questions;

4. A second officer arrived and stood seven or eight feet from Harrington (a Mendenhall factor); and

5. Officer Reiber asked Harrington to remove his hands from his pockets "to control Mr. Harrington's actions" (another Mendenhall factor).

Even though the officer's engagement of Harrington had unquestionably "progressed," the court did not hold that a seizure had yet occurred. 167 Wn.2d at 666-67, 669.

Instead, it was the officer's request to frisk Harrington (a Mendenhall factor: "some physical touching of the person of the citizen") that tipped the scales of the totality analysis.[8] It was only at this point that a "reasonable person would not have felt free to leave due to the officers' display of authority." Harrington, 167 Wn.2d at 669-70.

Such a request is absent from the circumstances herein. The trial court's ruling as to when a seizure occurred is supported by Bostick, Thorn, Young, and O'Neill, and is consistent with Harrington. The trial court did not err in denying Bosma's motion to suppress.

V

In reaching its decision on Bosma's suppression motion, the trial court determined that the evidence did not support a conclusion that Deputy Taddonio's "clarifying request" to physically search Bosma's purse constituted a seizure. This is the closest question presented in this appeal, and we recognize that, with slightly different evidence, a trial court might conclude that such a request could objectively convey a message that compliance with the request is required. However, even if the trial court herein had concluded that Bosma was seized at the time of the "clarifying request," the seizure would nevertheless have been lawful.

It is an axiom that warrantless seizures are prohibited by the Fourth Amendment and article I, section 7 unless falling within certain narrow

[8] The same was true in State v. Soto-Garcia, 68 Wn. App. 20, 841 P.2d 1271 (1992), another case cited by Bosma and discussed in Harrington.

exceptions. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). One such exception is an investigative detention, or "Terry stop," during which a police officer may briefly detain a person for questioning without a warrant and on grounds amounting to less than probable cause. Terry, 392 U.S. 1; Doughty, 170 Wn.2d at 61-62; State v. Kennedy, 107 Wn.2d 1, 4-6, 726 P.2d 445 (1986). The lawfulness of an investigative detention is evaluated by considering the totality of the circumstances known to the officer at the detention's inception. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). An investigative detention is lawful when an officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21; accord State v. Day, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007).

A suspicion is reasonable when it is based upon the "substantial possibility that criminal conduct has occurred or is about to occur." Kennedy, 107 Wn.2d at 6. The analysis is based upon the totality of the circumstances, with officers being allowed to make inferences from known facts, drawing on their experience and specialized training. United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." Ilinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000); accord State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008). The totality

of the circumstances includes the detaining officer's experience and training, the location of the investigatory detention, and the suspect's conduct. Glover, 116 Wn.2d at 514. Although "a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure," Bostick, 501 U.S. at 437, a suspect's behavior while complying with an officer's request is part of the totality of the circumstances.

The state and federal constitutions do not require that innocent persons never be detained; indeed, "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." Arvizu, 534 U.S. at 277; accord Kennedy, 107 Wn.2d at 6 (finding that brief detentions are justified under the Washington Constitution even when based on actions consistent with both criminal and non-criminal conduct). In fact, "Terry accepts the risk that officers may stop innocent people." Wardlow, 528 U.S. at 126. "Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." Arvizu, 534 U.S. at 274 (citations omitted).

Thus, an officer is not required to have spied illegality in order to commence an investigative detention. Indeed, in Terry itself, the officer

> observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was 'perhaps innocent in itself,' we held that, taken together, they 'warranted further investigation. 392 U.S. at 22. See also [United States v.]Sokolow, [490 U.S. 1,] at 9 [109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)] (holding that factors which by themselves were 'quite consistent with innocent travel'

collectively amounted to reasonable suspicion).

Arvizu, 534 U.S. at 274-75.

The Court's decision in Arvizu illustrates these points. In that case, Border Patrol Agent Stoddard was working at a checkpoint along U.S. Highway 191 approximately 30 miles north of Douglas, Arizona, which is situated on the United States-Mexico border. Only two highways lead north from Douglas. Highway 191 leads north to Interstate 10, which passes through Tucson and Phoenix. Highway 80 leads northeast through less populated areas. 534 U.S. at 268.

As the Court elaborated:

> The checkpoint is located at the intersection of 191 and Rucker Canyon Road, an unpaved east-west road that connects 191 and the Coronado National Forest. When the checkpoint is operational, border patrol agents stop the traffic on 191 as part of a coordinated effort to stem the flow of illegal immigration and smuggling across the international border. Agents use roving patrols to apprehend smugglers trying to circumvent the checkpoint by taking the backroads, including those roads through the sparsely populated area between Douglas and the national forest. Magnetic sensors, or "intrusion devices," facilitate agents' efforts in patrolling these areas. Directionally sensitive, the sensors signal the passage of traffic that would be consistent with smuggling activities.
>
> Sensors are located along the only other northbound road from Douglas besides Highways 191 and 80: Leslie Canyon Road. Leslie Canyon Road runs roughly parallel to 191, about halfway between 191 and the border of the Coronado National Forest, and ends when it intersects Rucker Canyon Road. It is unpaved beyond the 10-mile stretch leading out of Douglas and is very rarely traveled except for use by local ranchers and forest service personnel. Smugglers commonly try to avoid the 191 checkpoint by heading west on Rucker Canyon Road from Leslie Canyon Road and thence to Kuykendall Cutoff Road, a primitive dirt road that leads north approximately 12 miles east of 191. From there,

they can gain access to Tucson and Phoenix.

Around 2:15 p.m., Stoddard received a report via Douglas radio that a Leslie Canyon Road sensor had been triggered. This was significant to Stoddard for two reasons. First, it suggested to him that a vehicle might be trying to circumvent the checkpoint. Second, the timing coincided with the point when agents begin heading back to the checkpoint for a shift change, which leaves the area unpatrolled. Stoddard knew that alien smugglers did extensive scouting and seemed to be most active when agents were en route back to the checkpoint. Another border patrol agent told Stoddard that the same sensor had gone off several weeks before and that he had apprehended a minivan using the same route and witnessed the occupants throwing bundles of marijuana out the door.

Stoddard drove eastbound on Rucker Canyon Road to investigate. As he did so, he received another radio report of sensor activity. It indicated that the vehicle that had triggered the first sensor was heading westbound on Rucker Canyon Road. He continued east, passing Kuykendall Cutoff Road. He saw the dust trail of an approaching vehicle about a half mile away. Stoddard had not seen any other vehicles and, based on the timing, believed that this was the one that had tripped the sensors. He pulled off to the side of the road at a slight slant so he could get a good look at the oncoming vehicle as it passed by.

It was a minivan, a type of automobile that Stoddard knew smugglers used. As it approached, it slowed dramatically, from about 50-55 to 25-30 miles per hour. He saw five occupants inside. An adult man was driving, an adult woman sat in the front passenger seat, and three children were in the back. The driver appeared stiff and his posture very rigid. He did not look at Stoddard and seemed to be trying to pretend that Stoddard was not there. Stoddard thought this suspicious because in his experience on patrol most persons look over and see what is going on, and in that area most drivers give border patrol agents a friendly wave. Stoddard noticed that the knees of the two children sitting in the very back seat were unusually high, as if their feet were propped up on some cargo on the floor.

At that point, Stoddard decided to get a closer look, so he began to follow the vehicle as it continued westbound on Rucker Canyon Road toward Kuykendall Cutoff Road. Shortly thereafter, all of the children, though still facing forward, put their hands up at

> the same time and began to wave at Stoddard in an abnormal pattern. It looked to Stoddard as if the children were being instructed. Their odd waving continued on and off for about four to five minutes.
>
> Several hundred feet before the Kuykendall Cutoff Road intersection, the driver signaled that he would turn. At one point, the driver turned the signal off, but just as he approached the intersection he put it back on and abruptly turned north onto Kuykendall. The turn was significant to Stoddard because it was made at the last place that would have allowed the minivan to avoid the checkpoint. Also, Kuykendall, though passable by a sedan or van, is rougher than either Rucker Canyon or Leslie Canyon Roads, and the normal traffic is four-wheel-drive vehicles. Stoddard did not recognize the minivan as part of the local traffic agents encounter on patrol, and he did not think it likely that the minivan was going to or coming from a picnic outing. He was not aware of any picnic grounds on Turkey Creek, which could be reached by following Kuykendall Cutoff all the way up. He knew of picnic grounds and a Boy Scout camp east of the intersection of Rucker Canyon and Leslie Canyon Roads, but the minivan had turned west at that intersection. And he had never seen anyone picnicking or sightseeing near where the first sensor went off.
>
> Stoddard radioed for a registration check and learned that the minivan was registered to an address in Douglas that was four blocks north of the border in an area notorious for alien and narcotics smuggling. After receiving the information, Stoddard decided to make a vehicle stop. He approached the driver and learned that his name was Ralph Arvizu. Stoddard asked if respondent would mind if he looked inside and searched the vehicle. Respondent agreed, and Stoddard discovered marijuana in a black duffel bag under the feet of the two children in the back seat. Another bag containing marijuana was behind the rear seat. In all, the van contained 128.85 pounds of marijuana, worth an estimated $99,080.

Arvizu, 534 U.S. at 268-72 (citations to the record omitted).

As is apparent from the lengthy quotation, Agent Stoddard had witnessed no actual illegality. Each of those things that he observed—to which he assigned significance—could be subject to an innocent explanation.

Nevertheless, based upon his training, experience, and familiarity with the area, he drew adverse inferences about the innocence of that which he was observing.

In ruling on Arvizu's eventual motion to suppress the evidence of the marijuana discovered as a result of the detention commenced by Stoddard, the trial court determined that the stop was lawful. The Court of Appeals for the Ninth Circuit reversed. In turn, the Supreme Court reversed the Court of Appeals, holding that it had improperly engaged in a divide-and-conquer analysis that emphasized the possible benign explanations for the conduct observed by Stoddard but that did not give proper weight and credence to the totality of the circumstances or Stoddard's ability to draw inferences therefrom. Arvizu, 534 U.S. at 274-76. "Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants." Arvizu, 534 U.S. at 276. Thus, although all of the conduct observed by the agent was susceptible to an explanation consistent with innocent conduct, the Supreme Court held that Stoddard's suspicions were nevertheless reasonable and the stop was lawful. Arvizu, 534 U.S. at 277-78.

Arvizu informs the analysis in this case. Here, Deputy Taddonio was suspicious. The vehicles' occupants were out of sight when he drove up and could not be seen until they sat up. The vehicles were illegally parked at a remote location. They were the only vehicles in either lot. They had been there for a long time. The reasons given for being there "didn't appear to make sense

or what would generally happen." There was immediate nervousness when the subject of drugs was raised. Bosma had not immediately responded but, rather, let Conner initiate the response when the question about contraband in the car was posed. Bosma looked at Conner before consenting to the search of the car. Finally, Bosma appeared focused on her purse and appeared nervous about Deputy Taddonio knowing of its contents. Although each of these facts could be susceptible to an innocent explanation, Deputy Taddonio—based on his training, experience, and familiarity with the area—drew inferences to the contrary. Just as in Arvizu, the remote location, suspicious timing, unusual behavior, and absence of a logical and clear innocent purpose for being in that location supported the drawing of adverse inferences by the deputy. As in Arvizu, these facts and the inferences drawn from them by the deputy gave rise to a reasonable suspicion that criminality was afoot. Thus, had the officer commenced a seizure at the time of the "clarifying question," the seizure would have been lawful.

VI

Conner also challenges the trial court's denial of his motion to suppress. In Conner's circumstance, it was his consent to a pat down search, after Bosma's arrest, that resulted in contraband being located on his person. Later, after he was arrested, further contraband fell from inside his pants. As did Bosma, Conner claims that his consent was vitiated by his prior alleged unconstitutional seizure. We disagree.

Initially, we note that Conner was not seized when the deputy approached the Prelude and engaged its occupants in conversation. Neither was *Conner* seized by the deputy's request to search *Bosma*'s car.

Citing to State v. Day, 161 Wn.2d 889, Conner argues that a parking infraction cannot justify a Terry stop. No doubt. But the trial court did not find that Conner was detained by the officer in order to issue a citation and neither do we. The potential citation for a parking infraction had nothing to do with the deputy's ultimate decision to detain Conner, and the questions asked by the deputy at the inception of his encounter with Bosma and Conner did not constitute a seizure.

Next, citing Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007), Conner claims that—as a vehicle passenger—he was seized when the deputy asked him to step out of Bosma's car. He is wrong for five reasons.

1. Brendlin applies to police stops of moving vehicles. Conner was sitting in a parked car when the deputy approached.

2. As the occupant of a vehicle parked in a public place, Conner was constitutionally indistinguishable from a pedestrian. O'Neill, 148 Wn.2d at 579. Thus, the rule in Brendlin does not apply.

3. Conner was asked to step out of the vehicle because of *Bosma*'s consent to the search of *her* vehicle. It was Bosma's action, not the deputy's, that resulted in Conner being asked to step out of the vehicle.

4. Unlike the passenger in a moving vehicle that was stopped by the police alongside a roadway, here, when Conner exited Bosma's vehicle, he was within several feet of his own car. He could have stepped over to his vehicle and driven away. His situation bore no resemblance to the situation Brendlin addressed.

5. Citing O'Neill, Conner claims that he was seized when he was asked to step from the car because the Supreme Court held that O'Neill was seized at that time. This argument misses a major point of the O'Neill analysis: O'Neill was unquestionably seized at this point because he had *admitted to committing a crime* by then. O'Neill was not free to go. Indeed, O'Neill was not a "reasonable person" for the purposes of seizure analysis because he had admitted to being a *guilty* person. Nothing in O'Neill supports Conner's contention that he was seized at this point.

As the trial court correctly ruled, once the pipe with methamphetamine residue was found in Bosma's purse, Conner was seized in that he was, at that point, the subject of an investigative detention. All of the factors that supported a detention of Bosma, coupled with the discovery of the pipe and residue in her purse, justified the detention of Conner.

As the deputy testified, at that point, Conner was not free to go. The deputy intended to investigate whether Conner had either used the pipe to ingest drugs or had sold drugs to Bosma at that remote location. This investigation was lawful.

Conner contends otherwise, asserting that the deputy lacked an individualized suspicion of him. This is not so. While the deputy may not yet have had knowledge sufficient to constitute individualized probable cause sufficient to arrest Conner, see State v. Grande, 164 Wn.2d 135, 187 P.3d 248 (2008), there was plainly sufficient individualized suspicion to *investigate* Conner's connections, if any, to the pipe and methamphetamine residue. Conner was one of only two people in a car parked at a remote location for an extended period of time. A pipe used to ingest methamphetamine had been in the car. Investigating Conner's connection, if any, to the pipe and residue was both logical and lawful.

In any event, this investigation did not take place. Instead, Conner consented to a search of his person. This consent was not preceded by any illegality. The consent was valid and the contraband found in the subsequent search—and later—was properly ruled admissible.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings.

Dwyer, J.

We concur:

Leach, C.J.

Appelwick, J.