# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>TRACY J. GAY,<br><br>Appellant. | No. 38965-7-II<br><br><br><br><br>UNPUBLISHED OPINION |

Quinn-Brintnall, J. — Following a stipulated facts bench trial, the trial court found Tracy J. Gay guilty of unlawful possession of a controlled substance, cocaine. She appeals,[1] challenging the admissibility of evidence seized prior to and after her arrest. We hold that the trial court did not err and affirm.

FACTS

Shortly before midnight on August 23, 2008, Deputy Kevin Schrader of the Grays Harbor County Sheriff's Office observed Gay make two turns without signaling before pulling into a dimly lit parking lot in Aberdeen, Washington. The deputy pulled in behind Gay and asked for her license and registration. Gay did not have those documents with her but gave the officer her

[1] We note a scrivener's error of the appellant's name in the body of the Notice of Appeal. This error does not affect our decision.

name.

Deputy Schrader walked to the rear of the vehicle to contact dispatch and check for a valid license. He saw Gay "make movements towards . . . the center console, which was right beside her in the passenger seat and kind of her waistband area, in the crevice of the seat there." Report of Proceedings (RP) (Nov. 6, 2008) at 8. He could see Gay's hands "go down into that area . . . inside the console and back, kind of in her right side waistband area." RP (Nov. 6, 2008) at 8. He thought that "she was either trying to grab something or stuff something down in there." RP (Nov. 6, 2008) at 8-9. Schrader asked Gay to step out of the vehicle and asked her what she was reaching for. She replied, "Nothing," and he decided to pat her down for weapons. RP (Nov. 6, 2008) at 9. Schrader felt a large square object and a smaller hard object in her front pocket. He removed the items, which turned out to be a cell phone and a lighter.

While removing these items from Gay's front pocket, the deputy felt a small bulge in her coin pocket. He touched the object, without removing it, and asked what it was. Gay said it was drugs. He asked if it was methamphetamine and she said it was cocaine. Deputy Schrader then removed a small plastic container of cocaine from her coin pocket. After arresting and handcuffing Gay, and placing her in the back of his patrol car, he searched her vehicle with the help of a drug dog and discovered more cocaine inside the center console. The State charged Gay with one count of unlawful possession of a controlled substance, cocaine.

Prior to trial, Gay moved to suppress the evidence seized prior to and after her arrest. After a CrR 3.6 hearing, the trial court denied her motion. Gay stipulated to a bench trial on the record, and the trial court found her guilty as charged. Gay appeals.

## ANALYSIS

### Protective Frisk for Weapons

Gay argues that the trial court should have granted her motion to suppress the drugs discovered in her pocket and car. First, she argues that Deputy Schrader's warrantless protective frisk was not based on an objectively reasonable belief that she was armed and presently dangerous. Second, she argues that the frisk exceeded the scope of a permissible weapons frisk. She specifically assigns error to three of the trial court's findings of fact and two conclusions of law.

#### A. Standard of Review

We review challenged findings of fact for substantial supporting evidence and challenged conclusions of law de novo. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the stated premise. *Garvin*, 166 Wn.2d at 249. Deputy Schrader was the only witness at the suppression hearing and the trial court's findings were based on his undisputed testimony. Because the deputy's testimony is sufficient to support the trial court's findings, we consider only whether the findings support the challenged conclusions of law. *See Garvin*, 166 Wn.2d at 249.

#### B. Basis for Protective Frisk

Gay first challenges the trial court's conclusion that Deputy Schrader's protective frisk was justified by a reasonable belief that she might be armed and dangerous. A protective frisk for weapons is one of the "narrowly drawn" exceptions to the warrant requirement under article I, section 7 of our state constitution. *Garvin*, 166 Wn.2d at 249-50. This exception allows an officer to conduct a brief protective frisk for weapons if the officer has a reasonable belief based

on "'specific and articulable facts'" that an individual is armed and presently dangerous. *State v. Horrace*, 144 Wn.2d 386, 394, 28 P.3d 753 (2001) (quoting *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)); *State v. Wilkinson*, 56 Wn. App. 812, 815, 785 P.2d 1139, *review denied*, 114 Wn.2d 1015 (1990). An officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent person in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Horrace*, 144 Wn.2d at 396.

Applying these principles, several Washington courts have upheld a protective frisk or search for weapons under circumstances similar to this case. In *State v. Kennedy*, 107 Wn.2d 1, 3-4, 726 P.2d 445 (1986), an officer signaled a car to pull over and observed the driver lean forward as if to put something under the seat. The *Kennedy* court held that it was reasonable for the officer to conduct a limited search for weapons under the driver's seat because

> [the officer] saw a furtive gesture sufficient to give him an objective suspicion that Kennedy was secreting something under the front seat of the car. From his vantage, in his own car behind Kennedy's, he had no way of knowing what Kennedy was hiding.

107 Wn.2d at 11.

In *Wilkinson*, Division One of our court relied on *Kennedy* to uphold a protective weapons frisk. 56 Wn. App. at 818, In *Wilkinson*, an officer signaled a car to pull over and the driver did not immediately comply. 56 Wn. App. at 813. Before the driver stopped, the officer observed one of the passengers "moving around considerably" so that "it appeared as though he was trying to hide something under the seat." *Wilkinson*, 56 Wn. App. at 814. The officer frisked the passenger once the vehicle stopped. *Wilkinson*, 56 Wn. App. at 814. The *Wilkinson*

court compared the facts to *Kennedy* and reasoned that the *Kennedy* court upheld a protective search for weapons under less compelling circumstances:

> The furtive movement in this case was more prolonged and more pronounced than in *Kennedy*. The stop occurred in the middle of the night, not at midday. The officer testified that he actually felt threatened, whereas in *Kennedy*, it does not appear the officer testified. In *Kennedy*, there was no evidence other than a brief forward lean to support a belief that Kennedy was armed.

56 Wn. App. at 818. The *Wilkinson* court also relied on the fact that the driver disregarded the officer's authority by failing to pull over immediately, and the officer recognized the other two passengers because he had previously arrested them for possession of stolen property. 56 Wn. App. at 818-19.

Finally, in *Horrace*, our Supreme Court upheld a protective weapons frisk where a state trooper pulled over a vehicle for speeding on an isolated stretch of highway at night, observed the driver make movements towards the center console of the vehicle and in the passenger's direction, and frisked the passenger for weapons. 144 Wn.2d at 388-89. The trooper testified that he believed the passenger might be armed and presently dangerous because of the driver's unexplained movements in the passenger's direction, the passenger's proximity to the driver, and the fact that the passenger was wearing a bulky jacket capable of concealing a weapon. *Horrace*, 144 Wn.2d at 395. The *Horrace* court held that these facts, combined with the time of day and relative isolation of the scene, supported a protective weapons frisk. 144 Wn.2d at 400.

In contrast, the Supreme Court held in *State v. Glossbrener*, 146 Wn.2d 670, 673-74, 49 P.3d 128 (2002), that a protective weapons frisk was not justified where the officer signaled a car to pull over, observed the driver "reach down toward the passenger side of the car for several seconds" before coming to a complete stop, and the officer checked for warrants and conducted a

field sobriety test before searching for weapons in the area where the driver had reached. The *Glossbrener* court held "although [the officer] may have had a reasonable belief that [the driver] was armed and dangerous when he first observed the furtive movement, any such belief was no longer objectively reasonable at the time he actually conducted the search." 146 Wn.2d at 681. The *Glossbrener* court distinguished *Horrace* and *Wilkinson*, emphasizing "the searches in those cases were conducted at the first opportunity after the officer observed the furtive movement." 146 Wn.2d at 683.

This case is similar to *Kennedy*, *Wilkinson*, and *Horrace*. Deputy Schrader stopped Gay around midnight, the deputy was alone, and he observed Gay reach into the center console and down toward her waistband area. He thought she was either trying to hide or grab something, and she did not explain her movements when he asked what she was reaching for. Unlike *Glossbrener*, Schrader conducted the frisk immediately after observing the movements that aroused his suspicions. Accordingly, we affirm the trial court's conclusion and hold that Schrader's protective frisk was based on a reasonable belief that Gay was armed and dangerous.

C. Scope of Protective Frisk

Gay next argues that Deputy Schrader exceeded the scope of a permissible protective frisk because he did not clarify when he realized that she did not have a weapon in her pocket. If he realized that the items in her pocket were not weapons after the initial pat down, she contends that he exceeded the scope of a permissible weapons frisk when he reached into her pocket and subsequently questioned her about her coin pocket.

The scope of a valid weapons frisk is strictly limited to a search of the outer clothing for weapons that might be used to assault the officer. *State v. Hudson*, 124 Wn.2d 107, 112, 874

P.2d 160 (1994). If the pat down is inconclusive and the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may reach into the suspect's clothing to identify the object. *Hudson*, 124 Wn.2d at 112. Once the officer concludes that the individual is not carrying a weapon, the protective search is over and any continuing search without probable cause becomes an unreasonable intrusion into the individual's private affairs. *Hudson*, 124 Wn.2d at 113.

Gay did not contest the deputy's authority to remove the items from her pocket at trial; rather, she argued that the deputy's question about the bulge in her coin pocket was improper. While a party may raise an issue for the first time on appeal if it is a manifest error affecting a constitutional right, the error is not "manifest" if the facts necessary to adjudicate the claimed error are not in the record on appeal. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Deputy Schrader did not clarify exactly when he realized the objects in Gay's pocket were not weapons and neither party attempted to elicit further details from the deputy. Thus, the facts necessary to adjudicate the claimed error are not in the record and the alleged error is not manifest.

Additionally, we note that Washington courts have upheld a protective weapons frisk in cases where an officer removed a wallet, cigarette pack, and pager from an individual's pocket. *See State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235 (1980); *State v. Horton*, 136 Wn. App. 29, 38, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008); *State v. Fowler*, 76 Wn. App. 168, 170-71, 883 P.2d 338 (1994), *review denied*, 126 Wn.2d 1009 (1995). Thus, courts have accepted that these items have the "size and density" of a potential weapon and may constitute an "item of questionable identity" during a pat down. *Hudson*, 124 Wn.2d at 113. A cell phone and

lighter are very similar in size and density to these items.

Gay also assigns error to the trial court's conclusion that Deputy Schrader "was entitled to ask [her] what the bulge [in her coin pocket] was without first giving *Miranda*[2] warnings," but provides no argument or authority for this assignment of error. Clerk's Papers at 6. "Without argument or authority to support it, an assignment of error is waived." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). However, a "'very brief, noncoercive, nondeceptive, single question'" during the course of an investigative stop does not amount to custodial interrogation. *Wilkinson*, 56 Wn. App. at 820 (quoting *State v. Hensler*, 109 Wn.2d 357, 363, 745 P.2d 34 (1987)). Schrader asked a single, brief, straightforward question during the course of the protective frisk. Once Schrader was aware of the cocaine, he had a right to seize it to prevent the destruction of evidence. *State v. White*, 129 Wn.2d 105, 112-13, 915 P.2d 1099 (1996). Schrader could not have placed Gay in his patrol car with the cocaine because she might have destroyed it, such as by swallowing it.

We hold that the trial court's conclusions of law support its findings of fact. The trial court did not err in denying Gay's CrR 3.6 motion to suppress and finding the evidence admissible.

Automobile Search Incident to Arrest

Lastly, Gay relies on *Arizona v. Gant*, __ U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), to argue that Deputy Schrader's warrantless search of her car exceeded the scope of the search incident to arrest exception to the warrant requirement. We need not consider this issue because the cocaine found in Gay's pocket is sufficient to support her conviction.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

I concur:

BRIDGEWATER, P.J.

Armstrong, J. (dissenting) — Because these facts are distinguishable from *Kennedy*, *Wilkinson*, and *Horrace*, I respectfully dissent. In *Glossbrener*, our Supreme Court distinguished *Horrace* and *Wilkinson* and recognized that unexplained movements, without more, do not constitute "specific and articulable facts" sufficient to support a protective frisk:

> In [*Horrace* and *Wilkinson*], there was more than one person in the vehicle when it was pulled over. . . . Furthermore, in *Horrace* and *Wilkinson*, the officers articulated reasons in addition to the furtive movements for their suspicion that the passengers might be armed and dangerous. *Horrace*, 144 Wn.2d at 389 (time of day and fact that passenger was wearing bulky jacket); *Wilkinson*, 56 Wn. App. at 814 (driver's failure to pull over right away and officer's prior knowledge of criminal activity on the part of two of the vehicle occupants).

*State v. Glossbrener*, 146 Wn.2d 670, 682-83, 49 P.3d 128 (2002). This case is distinguishable for the same reasons. Unlike *Horrace* and *Wilkinson*, Deputy Schrader did not articulate additional reasons, aside from Gay's unexplained movements, that led him to believe she might be armed and presently dangerous. Unlike *Kennedy*, *Wilkinson*, and *Horrace*, Deputy Schrader approached a car occupied by a single person, not multiple passengers. Unlike *Horrace*, the stop occurred in a lighted, although "dim," parking lot in an urban area, not a dark and isolated highway. Report of Proceedings (RP) (Nov. 6, 2008) at 8. Unlike *Wilkinson*, Gay was cooperative, she did not attempt to disregard the officer's authority, and Deputy Schrader did not recognize her as a known felon.

Exceptions to the warrant requirement must be "narrowly drawn." *State v. Garvin*, 166 Wn.2d 242, 249-50, 207 P.3d 1266 (2009). A protective frisk must be based on "specific and articulable facts" that support a reasonable belief the individual is armed and presently dangerous. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Here, Deputy Schrader observed a traffic infraction, approached a single female driver in a lit parking lot, Gay cooperated

by answering his questions, and he observed her "make movements" towards the center console area. Clerk's Papers at 3-5. Because unexplained movements, without more, do not constitute "specific and articulable facts" sufficient to support a reasonable belief that Gay was armed and presently dangerous, Deputy Schrader did not have authority to frisk Gay for weapons and the trial court should have suppressed the drugs that he found on her person and in her car.

Additionally, I do not agree that the alleged error regarding whether Deputy Schrader exceeded the scope of a valid protective frisk by reaching into Gay's pocket to remove her cell phone and lighter is not "manifest." A protective frisk for weapons is one of the "narrowly drawn" exceptions to the warrant requirement. *Garvin*, 166 Wn.2d at 249. "It is always the State's burden to establish that such an exception applies." *State v. Afana*, 169 Wn.2d 169, 177, 233 P.3d 879 (2010). An officer may not reach into a suspect's clothing during a protective frisk unless he feels an item that he reasonably believes might be a weapon. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). But Deputy Schrader did not clarify when he realized that the items in Gay's pocket were not weapons. Accordingly, the State failed to establish that the search in this case was valid under the protective frisk exception.

Finally, I believe Deputy Schrader lacked authority to ask Gay about the small item in her coin pocket. The deputy testified that he did not believe that it was a weapon; rather, he asked about the item because the coin pocket is "a quite common area for persons to carry narcotics." RP (Nov. 6, 2008) at 14, 17. He testified that when he noticed the bulge in Gay's coin pocket, his focus shifted to include a drug investigation. Thus, his testimony demonstrates that he was no longer searching for weapons when he questioned Gay, but was instead investigating a potential drug violation without probable cause to believe that she had committed a crime. *See State v.*

*Maddox*, 152 Wn.2d 499, 505, 98 P.2d 1199 (2004) ("Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.").

Once the deputy concluded that Gay was not carrying a weapon, his limited authority to conduct a protective frisk was over and any continuing search without probable cause became an unreasonable intrusion into Gay's private affairs. *Hudson*, 124 Wn.2d at 112; *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980). Although the additional detention to investigate her potential possession of drugs was minimal, the issue is not the length of the detention but whether the deputy had the authority to detain Gay for any length of time in order to investigate a crime without probable cause. Nor is the issue whether Gay could have refused to answer the deputy's question. Gay does not bear the burden of asserting her right to be free from further detention and invasion into her privacy, the State bears the burden of establishing the deputy's authority to further detain and question her. *See*, *e.g.*, *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984) ("The burden is on the State to show that the particular search or seizure falls within one of these exceptions [to the warrant requirement]."). For these reasons, I would reverse and remand for the trial court to suppress the evidence seized from Gay's pocket.

Armstrong, J.