IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. MARKEL SCOTT BRIDGMAN, Respondent.	No. 39991-1-II UNPUBLISHED OPINION

Johanson, J. — The State appeals the trial court's decision to suppress evidence found on Markel Bridgman's person and inside his vehicle. The State argues the evidence was found during a lawful search incident to his arrest or, alternatively, during a lawful frisk search. We disagree and affirm the trial court's order suppressing the evidence.

FACTS

On November 4, 2008, Trooper Joshua Winborne was on patrol when he saw a car with expired vehicle license plates. After he confirmed through dispatch that the plates were expired, he pulled the car over. Trooper Winborne advised the driver the reason for the stop and asked for his license. The driver responded that he had a suspended license.

Trooper Winborne confirmed that the driver was Markel Scott Bridgman, who in fact had a suspended license. Trooper Winborne asked Bridgman to step out of his car and told him that he was under arrest for driving with a suspended license. Trooper Winborne immediately

handcuffed Bridgman's hands behind his back, but then told him that how he acted would determine whether he would be released with a citation or would be going to jail. Specifically, the trial court entered a finding of fact, based on Trooper Winborne's trial testimony, that he told Bridgman that whether Bridgman would go to jail or be released with a citation "depended on how [] Bridgman acted while in custody, and Trooper Winborne was not promising [] Bridgman that [he] wasn't going to jail." Clerk's Papers (CP) at 60; *see* Report of Proceedings (RP) (Oct. 1, 2009) at 8.

Trooper Winborne moved Bridgman to the rear of Bridgman's car, where he searched Bridgman's person by patting down his clothing. During this pat down, Trooper Winborne found two pocket knives and a Leatherman tool. Trooper Winborne continued to pat down the outside of Bridgman's clothing and felt a hard rectangular object, approximately 1/2 x 3 x 2 inches in size, in his vest pocket. The object did not feel like a knife or gun. Unsure what the object was, Trooper Winborne reached into the pocket, removed the object, and recognized the object as a scale with what appeared to be methamphetamine residue on its surface. After finding the scale, Trooper Winborne continued to search Bridgman's person and found a baggie that appeared to contain methamphetamine and $431 in cash.

Bridgman cooperated with Trooper Winborne during the entire encounter and did not make any threatening moves. Trooper Winborne testified at trial that he was not concerned for his safety during his encounter with Bridgman.

Trooper Winborne put Bridgman in the back of his patrol car and read him his *Miranda*[1]

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

rights. With Bridgman secured, Trooper Winborne then searched the interior of Bridgman's car and found a binocular case underneath the front passenger seat that contained eight separate small baggies of methamphetamine. He also found three empty baggies in the center console and a blackjack[2] hanging from the gear shift by the steering wheel.

The State charged Bridgman with unlawful possession of methamphetamine with intent to deliver, under RCW 69.50.401(1) and (2)(a), and third degree driving while license suspended, under former RCW 46.20.342(1)(c) (2004). Bridgman moved to suppress the physical evidence that Trooper Winborne obtained from his person and "the fruits thereof." CP at 5. He argued that his initial detention was not a custodial arrest and that the Trooper's search of his person exceeded the scope of a frisk search for officer safety. The trial court agreed with Bridgman and suppressed the evidence.

The State moved for reconsideration, arguing that the search of Bridgman's person was a lawful search incident to a custodial arrest. The trial court rejected the State's motion, noting that Trooper Winborne "was equivacable [sic] with Mr. Bridgman about whether or not he was going to be arrested. . . . [This] equivocation was an issue that showed that he may not go through with a full custodial arrest, [but] was [going to] cite Mr. Bridgman and let him go." RP (Oct. 22, 2009) at 8. The State appeals.

ANALYSIS

I. Custodial Arrest

[2] A "blackjack" is "a small striking weapon typically consisting at the striking end of a leather-enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact." Webster's Third New Int'l Dictionary 226 (2002).

The State does not challenge the trial court's findings of fact, so we treat them as verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The State argues that Trooper Winborne validly searched Bridgman incident to his arrest. Search incident to arrest is an exception to the warrant requirement. *O'Neill*, 148 Wn.2d at 585.

Under article I, section 7 of our state constitution, a lawful custodial arrest is a condition precedent to a search incident to arrest. *O'Neill*, 148 Wn.2d at 587 (quoting *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999)). Probable cause for a custodial arrest is not enough; the officer must make an actual custodial arrest to provide the "'authority of law'" that justifies a warrantless search incident to arrest. *O'Neill*, 148 Wn.2d at 585. We review a trial court's custodial determination de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004); *State v. Gering*, 146 Wn. App. 564, 567, 192 P.3d 935 (2008).

"[T]he determination of custody hinges upon the 'manifestation' of the arresting officer's intent." *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004) (citing *State v. Clausen*, 113 Wn. App. 657, 660-61, 56 P.3d 587 (2002) and *State v. Craig*, 115 Wn. App. 191, 196, 61 P.3d 340 (2002)). "A suspect is in custody if a reasonable person in the suspect's circumstances would believe his movements were restricted to a degree associated with 'formal arrest.'" *Gering*, 146 Wn. App. at 567 (quoting *Lorenz*, 152 Wn.2d at 36-37). "[T]he test is whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest." *Radka*, 120 Wn. App. at 49.

Whether an officer manifests the intent to effectuate a full custodial arrest is a fact specific inquiry. *See Radka*, 120 Wn. App. at 50 (officer did not manifest intent of arrest when he placed

defendant under arrest and put him in the back of patrol car because defendant was not handcuffed and was allowed to talk on a phone while sitting in the back of the patrol car); *State v. McKenna*, 91 Wn. App. 554, 562-63, 958 P.2d 1017 (1998) (officer did not manifest intent of arrest when he cited the defendant for not possessing a valid driver's license and told her that she was "free to go"); *Craig*, 115 Wn. App. at 195-96 (officer manifested intent of arrest when he told defendant that he was under arrest, handcuffed him, and searched defendant's person before securing him in the car for transport).

Typical manifestations of an officer's intent to make a custodial arrest are telling suspects that they are under arrest and placing them in handcuffs. *Craig*, 115 Wn. App. at 196. Single acts, such as placing an non-handcuffed suspect in the back of a police car, that are viewed outside the totality of the circumstances may not necessarily manifest an officer's intent to make a full custodial arrest. *See Radka*, 120 Wn. App. at 50 (court weighed acts surrounding the entire encounter when deciding whether the circumstances manifested the officer's intent to make a custodial arrest). Acts such as handcuffing can also be indicative of a mere investigative detention. *State v. Cunningham*, 116 Wn. App. 219, 229, 65 P.3d 325 (2003); *see State v. Williams*, 102 Wn.2d 733, 740-41, 689 P.2d 1065 (1984).

It is uncontested that Trooper Winborne had probable cause to make a full custodial arrest of Bridgman for driving with a suspended license. RCW 10.31.100(3)(e). Trooper Winborne also had authority to detain Bridgman temporarily while he issued him a citation. *See* RCW 46.64.015; former RCW 46.20.342(1)(c). But a search incident to Bridgman's arrest was lawful only if the arrest was custodial. *Gering*, 146 Wn. App. at 567; *Craig*, 115 Wn. App. at 195.

Here, Trooper Winborne advised Bridgman that he was under arrest for driving with a suspended license and handcuffed him. Trooper Winborne then told Bridgman that "depending on . . . how [Bridgman] acts—it was going to depend on whether I was going to take him to jail or not, but I wasn't going to promise that he wasn't going to jail or not." RP (Oct. 1, 2009) at 8. Trooper Winborne then moved Bridgman to the rear of Bridgman's car, but at this time he did not place Bridgman in the back of the patrol car. Trooper Winborne then frisked Bridgman and Bridgman cooperated throughout the contact.

We hold that Trooper Winborne negated any objective manifestation of his intent to affect a full custodial arrest by stating that, depending on how Bridgman acts, he may or may not go to jail. In reaching our conclusion, we emphasize that a court engages in a fact specific inquiry to determine whether an officer manifested the intent to effectuate a full custodial arrest. We are convinced that, under the specific facts here, Trooper Winborne's objective manifestations were equivocal and that a reasonable person in Bridgman's situation would not think himself under full custodial arrest. Instead, a reasonable person in Bridgman's situation would believe that he was going to be let free with a citation if he cooperated, which he did.

The dissent relies heavily on *Gering*, and states that its facts "mirror" the facts here. We disagree. Unlike here, we do not know if the officer in *Gering* made an equivocal statement about placing Gering under arrest. *Gering*, 146 Wn. App. at 567. Gering's argument at the suppression hearing was that the officer could not have intended a full custodial arrest because the officer "knew" that the jail would not accept Gering. *Gering*, 146 Wn. App. at 566. But this argument questions the officer's *subjective* intent, which is not the test. We are instead concerned

with the *objective* manifestations of the officer's intent. *Gering* does not control here because, as the *Gering* court recognized, the officer there manifested an intent to make a full custodial arrest. In contrast, under the facts here, Trooper Winborne did not manifest an intent to make a full custodial arrest when he equivocated on taking Bridgman to jail for a crime that allowed Bridgman to go free with a citation. RCW 46.64.015; former RCW 46.20.342(1)(c).

II. Frisk Search

The next question is whether Trooper Winborne's search of Bridgman's pockets exceeded the scope of a frisk search allowed in an investigatory detention. The State's position is that finding knives on Bridgman gave Trooper Winborne a reasonable concern for safety. With safety concerns present, the State contends that Trooper Winborne was justified in continuing the search to make sure that Bridgman did not harbor any other weapons. The State maintains that discovering the scale was the inadvertent product of this continued search. We disagree.

Article I, section 7 of our state constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Warrantless searches are per se unreasonable under article I, section 7 unless the State can establish that the search falls under one of the carefully drawn and jealously guarded exceptions to the warrant requirement. *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

One exception to the warrant requirement is a frisk search during an investigatory stop. *State v. Garvin*, 166 Wn.2d 242, 249-50, 207 P.3d 1266 (2009); *see State v. Xiong*, 164 Wn.2d 506, 511-12, 191 P.3d 1278 (2008). "'An officer may frisk a person for weapons if the officer has reasonable grounds to believe the person is armed and dangerous.'" *Xiong*, 164 Wn.2d at

511 (quoting *State v. Galbert*, 70 Wn. App. 721, 725, 855 P.2d 310 (1993)). "'The officer must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.'" *Xiong*, 164 Wn.2d at 511 (quoting *Galbert*, 70 Wn. App. at 725) (internal quotations marks omitted). "The purpose of this limited search is not to discover evidence of a crime, but to allow the officer to pursue his investigation without fear." *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

A protective frisk must be justified at its inception and in its scope. *Hudson*, 124 Wn.2d at 112. The scope of the frisk is limited to a pat down of the outer clothing for weapons that could be used to assault the police officer. *Hudson*, 124 Wn.2d at 112. Once the police officer ascertains that there is no weapon, the State's "limited authority to invade the individual's right to be free of police intrusion is spent." *Hudson*, 124 Wn.2d at 113 (quoting *State v. Allen*, 93 Wn.2d 170, 173, 606 P.2d 1235 (1980)). Any continuing search without probable cause is an unreasonable intrusion into the individual's private affairs. *Hudson*, 124 Wn.2d at 113 (citing *Allen*, 93 Wn.2d at 173).

For a frisk performed during an investigatory stop to pass constitutional muster, the State must show that (1) the officer justifiably stopped the person before the frisk, (2) the officer has a reasonable concern of danger, and (3) the officer limits the scope to finding weapons. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). Because Trooper Winborne was undoubtedly justified in stopping Bridgman, we need only decide whether Trooper Winborne had a reasonable concern for danger and, if so, whether he limited the scope of the frisk to finding weapons.

Our Supreme Court has recently addressed the considerations for whether an officer had a reasonable concern of danger. *Xiong*, 154 Wn.2d 506. In *Xiong*, officers went to a residence to serve Kheng Xiong with an arrest warrant. *Xiong*, 164 Wn.2d at 508. While they were at the residence, a minivan pulled up, and one of the officers thought the passenger was Kheng. *Xiong*, 164 Wn.2d at 508-09. The passenger was actually Bee Xiong. *Xiong*, 164 Wn.2d at 509. The officers immediately handcuffed Bee and frisked him. *Xiong*, 164 Wn.2d at 509. One of the officers noticed a bulge in Bee's front pocket and when the officer touched the bulge, Bee appeared to pull away. *Xiong*, 164 Wn.2d at 509. Believing that there was a potential weapon in Bee's pocket, one of the officers reached into his pocket and pulled out a glass smoking pipe. *Xiong*, 164 Wn.2d at 509. The pipe contained a residue and officers arrested Bee for unlawful possession of methamphetamine. *Xiong*, 164 Wn.2d at 509. They then searched the minivan incident to Bee's arrest and found a scale, some cash, and some methamphetamine. *Xiong*, 164 Wn.2d at 509.

Our Supreme Court held that the officer unlawfully frisked Bee. *Xiong*, 164 Wn.2d at 514. "The scope of the frisk . . . must be limited to protective purposes." *Xiong*, 164 Wn.2d at 514. "If an officer cannot point to specific articulable facts that create an 'objectively' reasonable belief that a suspect is armed and 'presently' dangerous, then no further intrusion is justified." *Xiong*, 164 Wn.2d at 514. The court reasoned that Bee was cooperative and nothing in the record indicated that he posed a danger, e.g., he gave no indication that he could reach into his pants pockets, nor did he attempt to do so. *Xiong*, 164 Wn.2d at 513-14. He was also handcuffed at all times and identified himself from the start. *Xiong*, 164 Wn.2d at 514. Although

the officer may have had some generalized concerns about safety, none was specific to Bee. *Xiong*, 164 Wn.2d at 514.

Trooper Winborne handcuffed Bridgman's hands behind his back immediately upon Bridgman exiting his car. Trooper Winborne patted down Bridgman's outer clothing and found two pocket knives and a Leatherman tool. During the entire encounter, Bridgman was cooperative and did not make any threatening moves that would cause Trooper Winborne to have a concern for his safety. Consistent with these facts, Trooper Winborne testified that at no point was he concerned for his safety. Like the officer in *Xiong*, who could not articulate an objectively reasonable belief that Bee was armed and presently dangerous, Trooper Winborne cannot say that he objectively believed Bridgman was armed and presently dangerous when he continued to search under the circumstances in this case.

Despite the lack of safety concerns, Trooper Winborne kept searching Bridgman until he felt the hard case in Bridgman's vest pocket. The case did not feel like a gun or knife, but Trooper Winborne reached in the pocket and seized the case anyway, which turned out to be a scale with drug residue on its surface. We hold that Trooper Winborne's search of Bridgman exceeded the lawful scope of a frisk search.

III. CONCLUSION

We conclude that when the circumstances here are considered objectively that Trooper Winborne did not manifest an intent to effectuate a full custodial arrest. We hold that Trooper Winborne lacked legal authority to search Bridgman incident to his arrest. We also hold that Trooper Winborne exceeded the scope of a frisk search when he reached inside Bridgman's

pockets while lacking any reasonable suspicion that he was armed and dangerous. Finally, we hold that the subsequent search of Bridgman's vehicle was unlawful because Trooper Winborne's search of Bridgman's vehicle was based on what the Trooper found during the illegal search of Bridgman. Accordingly, the trial court correctly suppressed the evidence in this case. *State v. Schlieker*, 115 Wn. App. 264, 266-67, 62 P.3d 520 (2003) (an unlawful police search requires suppression of evidence that is the fruit of the poisonous tree).

We affirm the trial court's suppression order.

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.

Johanson, J.

Armstrong, P.J.

QUINN-BRINTNALL, J. (dissenting) — Trooper Joshua Winborne stopped a car with expired license plate tags driven by Markel Bridgman. When Winborne asked Bridgman for his driver's license, Bridgman admitted that his license was suspended. When Winborne confirmed that Bridgman's license to drive had been suspended, he asked Bridgman to step out of the car. Winborne told Bridgman that he was under arrest for driving with a suspended license and handcuffed Bridgman's hands behind his back. Although Winborne told Bridgman that he may or may not go to jail depending on his level of cooperation, Winborne clearly told Bridgman that he was under arrest and never told Bridgman that he was free to leave. Winborne then performed a search incident to arrest of Bridgman's person; discovered several pocket knives, a Leatherman tool, and scale with methamphetamine residue on it; read Bridgman his *Miranda*[3] rights and placed him in the back of a patrol car. Winborne then searched Bridgman's vehicle.

The evidence presented in this record, viewed objectively, unquestionably established that Trooper Winborne manifested his intent to effectuate a custodial arrest. The facts of this case mirror those in *State v. Gering*, 146 Wn. App. 564, 192 P.3d 935 (2008). In *Gering*, Division Three of this court reached a decision contrary to the majority's position here. I would follow *Gering* and reverse the trial court's determination that Bridgman was not subject to a custodial arrest at the time of the search of his person as well as its decision suppressing the evidence seized from Bridgman's person in this case.

I agree with the majority's discussion of the legal framework for evaluating the existence of a custodial arrest. We review de novo a trial court's determination of a custodial arrest.

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

Gering, 146 Wn. App. at 567. The determination of custody turns on the manifestation of an arresting officer's intent. *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004) (citing *State v. Clausen*, 113 Wn. App. 657, 660-61, 56 P.3d 587 (2002); *State v. Craig*, 115 Wn. App. 191, 196, 61 P.3d 340 (2002)). We evaluate whether a reasonable person under the detainee's specific circumstances would consider himself under full custodial arrest. *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004); *Radka*, 120 Wn. App. at 49.

I disagree with the majority's analysis of the facts of this case. Division Three's analysis in *Gering* should guide our custody analysis in this case. In *Gering*, a police officer ran a license plate check on car a being driven in the Spokane Valley. 146 Wn. App. at 565. From the check, the officer learned that Gering owned the vehicle and had a suspended driver's license. *Gering*, 146 Wn. App. at 565. The officer also obtained an electronic photo of Gering. *Gering*, 146 Wn. App. at 565-66. When Gering stopped to enter a business, the officer followed him into the store, touched him on the shoulder, asked him to step outside, and arrested him for driving with a suspended license. *Gering*, 146 Wn. App. at 566. The officer handcuffed Gering and then performed a search incident to the arrest. *Gering*, 146 Wn. App. at 566. The officer seized methamphetamine from Gering's pocket during the search. *Gering*, 146 Wn. App. at 566.

Gering challenged the nature of his arrest, and lawfulness of the search, arguing that the officer could not have intended to perform a custodial arrest because the officer knew that the Spokane County Jail was on "emergency status" and, consequently, would not have accepted a booking for a driving with a suspended license charge. *Gering*, 146 Wn. App. at 566. Division Three upheld the challenge to the custodial nature of the arrest and the trial court's denial of a

motion to suppress, reasoning that even though the record did not indicate if the officer told Gering that he was under arrest, the officer had placed Gering in handcuffs and had never told Gering that he was free to go. *Gering*, 146 Wn. App. at 567. In rejecting Gering's argument that handcuffing can be indicative of a "mere investigation detention" instead of a custodial arrest, Division Three affirmed the arrest and search because "as the State correctly point[ed] out, nothing remained to investigate. All the elements of the crime were known and Mr. Gering's identity was confirmed." *Gering*, 146 Wn. App. at 567-68.

As in *Gering*, all of the elements of a driving with a suspended license charge were confirmed at the time of Bridgman's arrest when Trooper Winborne placed him in handcuffs. Here, Winborne confirmed that Bridgman had a suspended driver's license *before* asking Bridgman to step out of his car, placing him under arrest, and handcuffing Bridgman's hands behind his back. And, in contrast to *Gering*, here the record definitively reveals that Winborne told Bridgman that he was under arrest for driving with a suspended license. Moreover, Bridgman confessed to driving with a suspended license when Winborne initially asked for his driver's license. Based on these facts, as guided by the *Gering* court's analysis, a reasonable person in Bridgman's position would believe that he was under arrest and in custody for driving with a suspended license. *See State v. Walls*, 106 Wn. App. 792, 25 P.3d 1052 (2001) (affirming an escape conviction because the defendant attempted to run away after an officer escorted him to a patrol car and began to apply handcuffs); *State v. Solis*, 38 Wn. App. 484, 685 P.2d 672 (1984) (affirming an escape conviction after an officer told the defendant that he was under arrest, the officer grabbed the defendant's arm, and the defendant broke free and attempted to run away); *see*

also, *State v. Patton*, 167 Wn.2d 379, 388, 219 P.3d 651 (2009) (stating that a defendant does not delay the time of arrest when failing to yield to an officer's exercised arrest authority when attempting to flee to avoid physical restraint).

In my opinion, the majority places undue emphasis on Trooper Winborne's statement to Bridgman that depending on how he acted would determine if he would be booked into jail. The majority appears to hold that Winborne's statements negate the manifested intent of a custodial arrest because a reasonable person in Bridgman's position would believe that Winborne was detaining him only to continue his investigation. But there was no further investigation that Winborne needed to perform for the crime of arrest. It is unclear what investigation a reasonable person in Bridgman's position could believe that Winborne would perform for a driving with a suspended license charge that he had already confessed to committing.

Moreover, no case law supports the majority's position that a reasonable person must believe that he will go to jail in order to be under a full custodial arrest. Trooper Winborne's statements to Bridgman stated only that his conduct would influence whether he went to *jail* – not whether he was under arrest. As the trial court stated in its unchallenged findings, Winborne told Bridgman that he had not decided whether Bridgman "would be taken to jail or released with a citation." Clerk's Papers at 60. But the ultimate consequences of committing and being arrested for a crime are irrelevant to the determination of whether a valid custodial arrest has occurred. *See Clausen*, 113 Wn. App. at 660-61 (discussing that the ability of a jail to book a defendant does not impact the authority of an officer to place a defendant under custodial arrest). Whether a detained individual anticipated that he would receive a citation for his offense, be

administratively booked and released, or be booked into jail does not affect whether a reasonable person at the time of the arrest believes that he is under arrest.

Accordingly, I respectfully dissent and I would reverse the trial court's order suppressing the evidence seized from Bridgman's person in the search incident to his lawful arrest.

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QUINN-BRINTNALL, J.