**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>RYAN MICHAEL WARD,<br><br>Appellant. | No. 41202-1-II<br><br><br><br><br>UNPUBLISHED OPINION |

Van Deren, J. — After a bench trial on stipulated facts, the trial court found Ryan Michael Ward guilty of possession of heroin, contrary to RCW 69.50.4013(1). Ward appeals his conviction, asserting that the trial court erred by denying his motion to suppress evidence seized following an illegal detention and search. Because police officers seized evidence following an illegal detention and search of Ward, the trial court erred when it failed to suppress the seized evidence. Accordingly, we reverse Ward's conviction and vacate the order denying suppression of the evidence seized from Ward and remand for further proceedings.

## FACTS

On October 30, 2009, Vancouver police officers executed a search warrant[1] for evidence of possession of a controlled substance with intent to deliver at a Vancouver apartment.[2] The warrant also authorized the search of three apartment occupants: Jesse Hubbell, Kayla Strabeck, and "John Doe." Clerk's Papers (CP) at 30. The search warrant identified "John Doe" as being approximately 18 years old, a white adult male, approximately 5 feet 9 inches tall, weighing approximately 150 pounds, with brown hair, and a tattoo of two feet on his left forearm and a tattooed rose on his right shoulder. Police officers later identified the John Doe described in the search warrant as Joseph Drummond. Before executing the search warrant, the search team of five-to-eight officers saw photographs of Hubbell and Strabeck, and saw or heard a description of John Doe.

As the officers climbed the stairs to the second floor apartment named in the search warrant, Detective Eric Swenson saw an unknown man and an unknown woman standing on the stairs in the hallway outside the target apartment. Moments later, Detective Brian Billingsley saw a third man in the hallway outside the target apartment whom he recognized as Jesse Hubbell, one of the individuals named in the search warrant.

Billingsley detained the unknown female and Swenson ordered the unknown male to the ground, grabbed his arm, took him to the ground, and handcuffed him, while a third officer

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[1] The search warrant is not included in the appellate record.

[2] Cites to the Report of Proceedings refer to the July 30, 2010 suppression hearing.

detained Hubbell. The unknown man complied with Swenson's orders. The remaining members of the search team knocked on the apartment's door and announced that they were police officers serving a search warrant.

As Swenson took the unknown man to the ground, he asked Swenson to be careful not to damage the cell phone in his hands. The man identified himself as Ryan Ward. When Swenson asked if Ward had identification, he stated that he had identification in his wallet. Swenson told Ward that he was going to take the wallet out of his pocket to obtain his identification. Swenson removed Ward's identification, ran a warrant check, and determined that Ward did not have any outstanding warrants.

Swenson then told Ward that he was going to pat him down for weapons and asked Ward if "he had anything dangerous or illegal" in his possession. Report of Proceedings (RP) at 33. Ward told Swenson that he had a pen in his pocket. Swenson conducted a pat down of Ward and felt a "cylindrical object in his pocket." RP at 33.

Around the same time that Swenson conducted his pat down of Ward, officers inside the apartment announced that the apartment was clear of any danger.[3] Swenson removed the cylindrical object from Ward's pocket and saw that it was the outside shell of pen with part of the shell melted down. Swenson also noticed residue on the object and believed that it had been used as a pipe of some sort. Swenson asked Ward if he had used the object to smoke heroin, and Ward replied that he used the pen to smoke "Oxy."[4] RP at 38. Later testing showed that the residue on

[3] The State stipulated at the suppression hearing that Drummond, the John Doe described in the search warrant, was found inside the apartment. Swenson testified that he was not aware that officers had found Drummond in the apartment.

the pen contained heroin.

Swenson continued to pat down Ward and found a scale in his pocket. Swenson checked the scale for drug residue and, after seeing no such residue, asked Ward why he had a scale. Ward told Swenson that "he uses [the scale] to make sure he doesn't get ripped off when he buys weed." RP at 39. Swenson then informed the case officer, Detective Jeremy Free, about the items he had found in Ward's possession. Free advised Ward of his *Miranda*[5] rights, questioned him further about the object found in his pocket, and then arrested him for possession of a controlled substance. The State charged Ward with unlawful possession of a controlled substance and unlawful use of drug paraphernalia.

Ward moved to suppress the evidence seized during Swenson's search. At the suppression hearing, the trial court made an oral ruling that the evidence seized would be admissible at trial. After the suppression hearing, the trial court entered findings of fact and concluded that Swenson lawfully detained and searched Ward, and that the seized evidence was admissible at trial.

Ward waived his right to a jury trial and entered a stipulation to the facts of the crime. The trial court entered findings of fact and conclusions of law, finding Ward guilty of possession of heroin. The trial court dismissed the unlawful use of paraphernalia charge and sentenced Ward to 30 days of incarceration on the unlawful possession of a controlled substance conviction. Ward timely appeals his conviction.

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[4] At the suppression hearing, Swenson testified that "Oxy" refers to either "Oxycontin or "Oxycodone," which are pharmaceutical opiates. RP at 39.

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

## ANALYSIS

Ward contends that the trial court erred by denying his motion to suppress evidence because Swenson detained him and searched his person in violation of the Fourth Amendment of the federal constitution and article I, section 7 of our state constitution. The State counters that the seized evidence was properly admitted at trial because: (1) Swenson seized the evidence after a lawful detention and weapons frisk, and, alternatively, because (2) Swenson seized the evidence after Ward voluntarily told the officer that he had a pen in his pocket.

The material facts here are undisputed. Accordingly, the only issue is whether the trial court properly concluded that Swenson's stop and later frisk of Ward was justified by the circumstances. *State v. Santacruz*, 132 Wn. App. 615, 618-20, 133 P.3d 484 (2006). That is a question of law that we review de novo. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

We hold that law enforcement officers detained and searched Ward in violation of his state and federal constitutional right to be free from unreasonable search and seizures. Accordingly, the trial court erred when it denied Ward's motion to suppress evidence, and we reverse Ward's conviction and vacate the order denying suppression of the evidence and remand for further proceedings.

### I. Authority to Detain Ward

The Fourth Amendment to the United States Constitution and article I, section 7 of our state constitution protect individuals against unreasonable searches and seizures. *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). A warrantless seizure is presumed unreasonable

under the Fourth Amendment. *State v. Houser*, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980).

The presumption of unreasonableness may be rebutted by a showing that one of the "few 'jealously and carefully drawn exceptions' to the warrant requirement'" applies. *Houser*, 95 Wn.2d at 149 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d (1991)). The State bears the burden of showing a warrantless seizure falls within one of these exceptions. *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000).

One exception to the warrant requirement is when an officer has probable cause to believe an individual has committed a crime. *See e.g.*, *Dunaway v. New York*, 442 U.S. 200, 207-209, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *State v. King*, 89 Wn. App. 612, 618, 949 P.2d 856 (1998). A second, narrower exception is an investigative *Terry* stop, based upon less evidence than is needed for probable cause to make an arrest, which permits the police to briefly seize an individual for questioning based on specific and articulable objective facts that give rise to a reasonable suspicion that the individual has been or is about to be involved in a crime. *King*, 89 Wn. App. at 618 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). A third, still narrower exception to the probable cause requirement allows officers executing a search warrant at a residence to briefly detain occupants of that residence to ensure officer safety and an orderly completion of the search. *Michigan v. Summers*, 452 U.S. 692, 702-705, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981).

The State does not contend that probable cause supported Ward's initial detention, a "seizure" within the meaning of the Fourth Amendment. *See Summers*, 452 U.S. at 696 n.5 ("'It

must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.'") (quoting *Terry*, 392 U.S. at 16). The State also concedes that Ward was not specifically named in the search warrant and that he was not an occupant of the residence named in the search warrant. But the State contends that Ward's detention was justified under *Terry* and *Summers* because Swenson had a reasonable suspicion that Ward was connected with the apartment named in the search warrant. We disagree.

The State relies on *State v. Flores-Moreno*, 72 Wn. App. 733, 739, 866 P.2d 648 (1994), to support its position that officers may lawfully "seize persons reasonably identified with the premises to be searched," even when the person is found outside of the premises named in the search warrant. But the State reads *Flores-Moreno* too broadly.

In *Flores-Moreno*, officers executing a search warrant found Flores-Moreno in the driveway of the residence named in the search warrant as he was closing the trunk of his automobile and was approaching the driver's door. 72 Wn. App. at 736. In holding that the officers lawfully detained Flores-Moreno while searching his residence, we noted that Flores-Moreno matched the search warrant's description of the residence's occupant. *Flores-Moreno*, 72 Wn. App. at 736. Accordingly, we held that, under *Terry*, police officers permissibly detained Flores-Moreno because information in the search warrant gave officers an articulable suspicion that a person matching Flores-Moreno's description was involved in criminal activity. *Flores-Moreno*, 72 Wn. App. at 739-40. Additionally, we held that, under *Summers*, officers permissibly detained Flores-Moreno because information in the search warrant gave police adequate reason to believe he was the occupant of the residence for which they had a search warrant. *Flores-*

*Moreno*, 72 Wn. App. at 740.

Here, however, the undisputed facts do not justify Swenson's detention of Ward. Unlike in *Flores-Moreno*, the trial court's findings of fact do not indicate that Ward matched the description of the "John Doe" named in the search warrant.[6] Instead, the trial court's conclusions of law as to Ward's initial detention indicate:

1. The initial detention of [Ward] was lawful. Officers serving a search warrant

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[6] Although Swenson testified at the suppression hearing that he couldn't rule Ward out as the John Doe described in the search warrant, he also did not indicate that he believed Ward matched John Doe's description. The trial court asked Swenson the following:

> [Trial court]: Okay. Why did you—and I'm not going to use the word request. Why did you order them to the ground and not just shoo them away? Did you think he might be this John Doe fellow that we were looking for?
> [Swenson]: Yeah. I mean, it was certainly—it was certainly possible that those people were —
> [Trial court]: So you had that in your mind that this could be that other guy you're looking for?
> [Swenson]: Yes.
> [Trial court]: Because all you have is a vague description?
> [Swenson]: Yes.
> [Trial court]: And that's why you ordered them to the ground as opposed to shooing them away?
> [Swenson]: Yes.
> [Trial Court]: Okay. Once you identified him, what were you concerned with from that point forward if he is already restrained?
> [Swenson]: Once I identified him, I wanted the opportunity for Detective Free, who had a lot more knowledge about the case than I did, and the people who may be involved in who the John Doe may be to come —
> [Trial Court]: So you're still thinking this could be John Doe until the—that moment when he can prove who he is with his ID?
> [Swenson]: Correct.
> [Trial court]: Okay.
> [Swenson]: I wanted an opportunity for Detective Free to come up and speak to him and try to determine through his investigation whether this was the John Doe or if this person was related to the activities of the apartment or —

RP at 34-35.

> have authority to temporarily detain individuals present for sufficient time to determine their identity and the reason for their presence on the premises and whether they are connected to the criminal activity or evidence of it for which the warrant authorizes officers to search. This authority includes persons immediately outside the residence when there is reason to believe they are connected to the residence. . . .
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> 2. It was reasonable for Det. Swenson to detain [Ward] for the purpose of determining his identity and any connection with the apartment, and if connected to the apartment, to assure that [Ward] was not in a position to remove evidence from the scene.
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> 3. Because of uncertainty about other persons inside the apartment, and to assure the safety of officers entering the apartment until the apartment was secured, it was also reasonable for Det. Swenson to place handcuffs on [Ward] temporarily while the entry was being made.

CP at 33-34.

"[W]hile an occupant may be detained during the execution of a residential search warrant, this limited exception to the probable cause requirement does not extend to those merely present on the premises." *State v. Broadnax*, 98 Wn.2d 289, 304, 654 P.2d 96 (1982), *abrogated on other grounds by Minnesota v. Dickerson*, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). The *Broadnax* court explained: "'[M]ere presence' is not enough; there must be 'presence plus' to justify the detention or search of an individual, other than an occupant, at the scene of a valid execution of a search warrant.'" *Broadnax*, 98 Wn.2d at 301. The "plus" consists of independent factors, other than presence at the scene, tying the person to the illegal activities being investigated or raising a reasonable suspicion that the person is armed and dangerous. *Broadnax*, 98 Wn.2d at 296, 300-01. Those independent factors justifying Ward's detention were not present here.

Ward's detention also cannot be justified by his mere presence near an individual named in

the search warrant.

> [A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . This requirement [of probable cause directed at the person to be searched or seized] cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places.

*Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979).

Here, the trial court erroneously concluded that Ward's mere presence near the apartment named in the search warrant and his presence near an individual named in the search warrant gave officers authority to detain Ward while the officers determined whether he had any connection to the alleged criminal activity inside the apartment. This conclusion is not only contrary to our Supreme Court's holding in *Broadnax*, but it seriously undermines or eviscerates *Terry* and *Summers*. The trial court's conclusion would allow law enforcement officers to detain an individual while investigating whether that individual is connected to any criminal activity inside a premises named in a search warrant. But under *Terry*, a reasonable suspicion that an individual is tied to criminal activity must exist *before* officers may lawfully detain that individual. 392 U.S. at 21-22. And under *Summers*, a reasonable belief that an individual is *an occupant* of a residence named in a search warrant must exist *before* detaining *the occupant*. 452 U.S. 703-04.

The trial court's findings do not indicate that Swenson had any reasonable suspicion that Ward was involved in criminal activity, only that he had a reasonable suspicion that Ward was connected to the target apartment based on Ward's proximity to the apartment's door in a common hallway of the apartment building. In fact, at the suppression hearing, Swenson testified

that, apart from Ward's presence near the target apartment, he had no reason to believe that Ward was connected to that target apartment.

The trial court's findings also do not indicate that Ward matched the description of the "John Doe" named in the search warrant, nor do the findings indicate that Swenson had a reasonable belief that Ward was the "John Doe" described in the search warrant. This evidence is insufficient to meet the narrow exception allowing a warrantless seizure. Accordingly, the trial court erred when it denied Ward's motion to suppress the evidence seized as a result of his unlawful detention and we reverse Ward's conviction and vacate the order denying suppression of the evidence and remand for further proceedings.[7]

## II. *Terry* pat down search

Even were we to hold that Swenson properly detained Ward, the later search of his person was unlawful. Thus, the trial court also erred by denying Ward's motion to suppress the evidence seized as a result of the unlawful search of his person.

The United States Supreme Court has clearly established that, before law enforcement officers may search an individual for weapons, there must be a reasonable suspicion that the individual being frisked is armed and presently dangerous. *Ybarra*, 444 U.S. at 92-94. The trial court's findings and conclusions do not indicate that Swenson had any reasonable belief that Ward

[7] Ward's detention also cannot be justified by a concern for officer safety because there was no finding that any officer had an individualized suspicion that Ward posed any danger, which is a prerequisite to a lawful detention based on officer safety. *See State v. Smith*, 145 Wn. App. 208 276-77, 187 P.3d 768 (2008) ("This court has held that when a person comes into the residence in which a search is being conducted, any detention must be justified by specific and articulable facts that create an objective, reasonable belief that the suspect is armed and dangerous and may not be based on a generalized suspicion that people present during narcotic searches are often armed.").

was armed and presently dangerous when he patted him down for weapons. Thus, as in *Ybarra*, the frisk of Ward "was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which [the United States Supreme Court] has invariably held must form the predicate to a pat down of a person for weapons." 444 U.S. at 92-93.

Because there was no evidence presented at the suppression hearing that officers had a reasonable belief that Ward was armed and presently dangerous when Swenson frisked him for weapons, the frisk violated Ward's Fourth Amendment rights. Accordingly, the trial court erred when it denied Ward's motion to suppress the evidence seized as a result of the unlawful search.[8]

## III. *Miranda*

The State contends that even if Ward's detention and search of his person were unlawful, the trial court properly denied his motion to suppress evidence because Swenson seized the evidence following Ward's voluntary statement to him that he had a pen in his pocket. We disagree.

Here, the trial court concluded:

> 4. Although [Ward] was in handcuffs and lawfully detained, he was not under arrest, and not in custody for purposes of [*Miranda*] requirements. Therefore it was not necessary for Det. Swenson to advise [Ward] of [*Miranda*] rights before

[8] The State does not assert in this appeal that there was any evidence presented at the suppression hearing to support a finding that officers had a reasonable belief that Ward was armed and presently dangerous when Swenson frisked him for weapons. Instead, the State asserts, without citation to legal authority, that Ward was not searched. The State also contends, without citation to legal authority, that "Un-secured [sic] individuals associated with premises being searched for evidence of drugs and drug-dealing are universally presumed to be dangerous by police officers." Br. of Appellant at 18. Contrary to the State's contention, constitutional protections are possessed individually, and "[t]he 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion *directed at the person to be frisked*, even though that person happens to be on premises where an authorized narcotics search is taking place." *Ybarra*, 444 U.S. at 94 (emphasis added).

> asking him whether he had identification.
>
> 5. Det. Swenson's seizure of [Ward's] identification was also lawful, since [Ward] was lawfully detained and verifying [Ward's] identity was a permissible basis for the detention.
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> 6. Det. Swenson's question to [Ward] whether he had anything illegal or dangerous on his person also did not have to be preceded by [*Miranda*] rights, and [Ward's] response, indicating he had a pen, was voluntary, not the product of custodial interrogation and not coered [sic]. Det. Swenson reasonably concluded that a pen might be an object which could be used or attempted to be used as a weapon and therefore potentially posed a threat to the officers serving the warrant. His seizure of the pen was therefore lawful, and was not the product of an unlawful search.
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> 7. Det. Swenson's statement to [Ward] that he was going to pat him down for weapons was not a search and did not render [Ward's] statement that he had a pen in his pocket a coerced statement.

CP at 34.

A police officer must give *Miranda* warnings when a suspect is taken into custody and interrogated. *State v. Daniels*, 160 Wn.2d 256, 266, 156 P.3d 905 (2007). A suspect is in "custody" for *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), purposes when the suspect's freedom of action has been curtailed to a degree associated with formal arrest. *Daniels*, 160 Wn.2d at 266. In determining whether an individual is in custody for *Miranda* purposes, the relevant inquiry is whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *State v. Solomon*, 114 Wn. App. 781, 787-88, 60 P.3d 1215 (2002) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)). Interrogation includes "'express questioning"' or "'any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *State v. Sargent*, 111 Wn.2d 641, 650, 762

P.2d 1127 (1988) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1982)).

The facts here are undisputed. Swenson took Ward to the ground, handcuffed him, removed his wallet, told him he would be searched, and, without providing *Miranda* warnings, asked him if he had anything dangerous *or illegal* on his person. Any reasonable person in Ward's position would not have felt that he or she was free to leave after being taken to the ground and handcuffed. And Swenson's question to Ward whether he had anything illegal on his person was likely to elicit an incriminating response. Because Ward's statement concerning the pen was the product of an illegal custodial detention and interrogation absent *Miranda* warnings, the statement was not voluntary and cannot justify Swenson's seizure of the pen.[9] Accordingly, Ward's response that he had a pen in his pocket was the product of a custodial interrogation absent *Miranda* warnings and the trial court erred by concluding otherwise.

We hold that the trial court erred when it denied Ward's motion to suppress the evidence seized as result of this unlawful detention and we reverse and vacate the order denying suppression of the evidence seized from Ward and remand for further proceedings.

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.

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VAN DEREN, J.

[9] The State contends that Ward has waived any objection to a *Miranda* violation by failing to raise an objection at trial. But the record shows that Ward did not waive a *Miranda* challenge and believed that his motion to suppress encompassed the *Miranda* issue.

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QUINN-BRINTNALL, J.

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WORSWICK, A.C.J.