IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27526-4-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JOSHUA ALLAN RIEHLE,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. — Joshua Riehle appeals his Spokane County methamphetamine possession conviction. We reject his contention that the trial court erred in not granting evidence suppression. We accept the State's error concession that Mr. Riehle was convicted in a bench trial without the jury waiver required by CrR 6.1(a). Accordingly, we affirm, vacate Mr. Riehle's conviction, and remand to the trial court.

FACTS

On March 5, 2007, around 4:41 p.m., Deputy Jack Rosenthal stopped a vehicle for failing to signal a turn at the intersection of Government Way and 8th Avenue in Spokane County. The deputy described this area as a high-crime-rate area. He

approached the vehicle and asked the driver, who identified himself as Joshua Riehle, for his driver's license. Mr. Riehle reached into his coat pocket as if he was going to retrieve his license but stopped. Keeping his hand in his pocket, he stated that he did not have his wallet. The deputy asked Mr. Riehle to remove his hand from his pocket, and he did so.

According to Deputy Rosenthal, Mr. Riehle was nervous, sweating heavily, stuttered his words, and seemed anxious. Mr. Riehle's nervousness was not typical for someone who is not involved in criminal conduct. The deputy believed Mr. Riehle was potentially armed and/or lying about having his wallet.

While standing next to Mr. Riehle's vehicle, Deputy Rosenthal checked Mr. Riehle's name through a portable radio. Dispatch advised him that Mr. Riehle was listed as an officer safety contact and that he had previously been armed with a knife on prior contact with law enforcement. The deputy understood this to mean that caution should be used when dealing with such an individual. The deputy related he intended to check Mr. Riehle for weapons but did not feel comfortable doing so alone. Considering all information, he called for back-up.

When back-up arrived, Deputy Rosenthal directed Mr. Riehle out of the vehicle and patted him down for weapons. The deputy testified he felt an object he thought may have been a knife or a shank in Mr. Riehle's right coat pocket where Mr. Riehle had placed his hand. The deputy retrieved the object from Mr. Riehle's coat. The

object was a syringe containing a clear liquid that tested positive for methamphetamine.

Mr. Riehle was arrested for and charged with possessing methamphetamine. Mr. Riehle unsuccessfully sought suppression of the drug evidence found on his person. Mr. Riehle was found guilty as charged in a stipulated facts bench trial, but no oral or written jury waiver is shown in the record. Mr. Riehle appealed.

ANALYSIS

A. Evidence Suppression

The issue is whether the trial court erred in denying Mr. Riehle's CrR 3.6 evidence suppression motion. The sole contention is whether Deputy Rosenthal was justified in conducting a protective pat-down search under these facts.

We review de novo legal conclusions reached after a suppression hearing. *State v. Bee Xiong*, 164 Wn.2d 506, 510, 191 P.3d 1278 (2008). Additionally, "conclusions entered by a trial court following a suppression hearing carry great significance for a reviewing court." *State v. Collins*, 121 Wn.2d 168, 174, 847 P.2d 919 (1993) (citing *State v. Daugherty*, 94 Wn.2d 263, 269, 616 P.2d 649 (1980)).

Generally, the Fourth Amendment and the Washington Constitution protect against unreasonable search and seizures unless supported by probable cause. *State v. Setterstrom*, 163 Wn.2d 621, 625-26, 183 P.3d 1075 (2008). Exceptions to the probable cause requirement are "narrowly drawn and carefully circumscribed." *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994) (citing *Terry v. Ohio*, 392 U.S. 1, 88

S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). One exception is that an officer may frisk a person for weapons without probable cause if the initial stop was legitimate, a reasonable safety concern existed to justify a protective frisk for weapons, and the frisk was limited to protective purposes. *Collins*, 121 Wn.2d at 173 (citing *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

Here, Mr. Riehle solely argues Deputy Rosenthal lacked a reasonable safety concern to search. "A reasonable safety concern exists, and a protective frisk for weapons justified, when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" *Collins*, 121 Wn.2d at 173 (quoting *Terry*, 392 U.S. at 21-24). "Reasonable belief that the suspect is armed and presently dangerous means, 'some basis from which the court can determine that the detention was not arbitrary or harassing.'" *Setterstrom*, 163 Wn.2d at 626 (quoting *State v. Belieu*, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989)). A court should consider the entirety of the circumstances to determine the validity of a protective search pursuant to a traffic stop. *State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128 (2002).

Courts have considered various factors in analyzing the validity of a protective frisk. *See Bee Xiong*, 164 Wn.2d 506 (finding no reasonable basis where defendant made no movements that could be interpreted as an attempt to retrieve a weapon, the defendant was handcuffed and was not uncooperative); *Setterstrom*, 163 Wn.2d at 627

(holding a protective frisk was not justified where a suspect was nervous, fidgety, lied about his name, but did not make threatening gestures or words); *Collins*, 121 Wn.2d at 173 (finding a reasonable frisk where stop occurred in darkness, officer had previously arrested the suspect on an unspecified felony warrant, and where ammunition and a holster were seen in a vehicle associated with the suspect at the time of the prior arrest); *State v. Glover*, 116 Wn.2d 509, 806 P.2d 760 (1991) (finding a reasonable suspicion to stop based on the experience of the officer, the location being one of high crime, and the suspicious conduct of the suspect). Courts are reluctant to substitute their judgment for an officer in the field. *Belieu*, 112 Wn.2d at 601.

Mr. Riehle relies on *Setterstrom* to argue an officer cannot rely exclusively on a suspect's nervous behavior to justify a frisk. Mr. Riehle mistakenly presumes Deputy Rosenthal frisked Mr. Riehle solely because he was nervous, ignoring the entirety of the circumstances. The deputy testified he based his decision to frisk after back-up arrived, because of Mr. Riehle's atypical nervousness, his initial failure to remove his hand from his pocket, and the officer safety problem noted by dispatch. Similarly, Mr. Riehle argues the other facts bearing on the protective search in isolation from one another do not justify a search. He argues the gesture of reaching into one's pocket alone is not sufficient by itself to justify an officer safety concern. And, he dismisses the notification that Mr. Riehle was an "officer safety contact" as insufficient by itself to establish Mr. Riehle was presently armed.

He cites *State v. Hobart*, 94 Wn.2d 437, 617 P.2d 429 (1980) to support his arguments. In *Hobart* the officer frisked the suspect solely because a gun was found on the suspect by the same officer three years earlier. *Id*. at 446. But the *Hobart* court reasoned that the suspect's demeanor and any furtive gestures would be relevant to an officer's decision to conduct a protective frisk. *Id.* at 445. Deputy Rosenthal's testimony established Mr. Riehle's demeanor and gestures contributed to his search decision. Further, although the timing of the stop may be a factor to consider, it is not telling in all cases. *Collins*, 121 Wn.2d at 173. While darkness may increase an officer's safety concerns, the other circumstances present were sufficient for Deputy Rosenthal to form a reasonable concern for his safety.

Given all, we conclude the deputy acted on facts justifying the trial court's conclusion that a reasonable officer safety concern existed. Accordingly, we hold the trial court did not err in denying Mr. Riehle's suppression motion.

B. Jury Waiver

"Cases required to be tried by jury shall be so tried unless the defendant files a written wavier of a jury trial, and has consent of the court." CrR 6.1(a). Because the right to a jury trial is constitutional, the waiver of the right must be "knowingly, intelligently and voluntarily made." *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). Our review is de novo. *Vasquez*, 109 Wn. App. at 319.

Here, no evidence shows Mr. Riehle waived his right to a jury trial, either orally or in writing. Thus, the State aptly concedes error. Because the concession is not erroneous, we accept the State's concession without further analysis. *See State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988) (reviewing court does not have to accept erroneous concession). Accordingly, we vacate Mr. Riehle's conviction.

Affirmed, conviction vacated, remanded for further proceedings.

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

_____
Brown, J.

WE CONCUR:

_____
Schultheis, C.J.

_____
Kulik, J.