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Court of Appeals
Division II
State of Washington
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No. 53432-1-II

Court of Appeals, Div. II, of the State of Washington

State of Washington,

Appellant,

v.

Matthew Perron,

Respondent.

Brief of Respondent

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1. Introduction

The State's appeal is based upon a fundamental misunderstanding of the trial court's decision. Although the trial court expressed some concern about the conflicting descriptions of the vehicle that fled the scene of the shooting, its decision was ultimately based on a conclusion that the officer locating a "small, grey car" was not enough to create reasonable suspicion that the occupants of the car had been engaged in criminal activity. The officer simply did not have enough information to differentiate this "small, grey car" from any other car that may have been on the road at the time.

Because the occupants of a "small, grey car" could just as easily have been innocent, law-abiding citizens, the officer's suspicion was not reasonable under a constitutional standard. The trial court correctly concluded that the traffic stop was improper. The trial court correctly concluded that evidence obtained from the seizure of the vehicle and the resulting search must be suppressed. This Court should affirm the trial court decision.

2. Restatement of Issues

The State makes numerous assignments of error and identifies six issues for this Court's consideration. However, all of these issues and alleged errors boil down to three questions, all of which should be answered affirmatively and the trial court decision affirmed:

1. Do the trial court's findings support the conclusion that locating a "small, grey car" was not enough to create reasonable suspicion that the occupants had been engaged in criminal activity?
2. Were the trial court's findings of fact supported by evidence that was not objected to?
3. Did the trial court correctly suppress the cell phone seized from the car, as fruit of the poisonous tree?

3. Statement of the Case

On January 27, 2019, at 4:10am, Officer Peterson heard through dispatch that a shooting had occurred in Aberdeen and that suspects had left the location heading downhill (south) in a small, grey car. CP 63 (Findings 2.1 and 2.2); RP 64-66. He went looking for the vehicle in case it crossed over into Hoquiam. CP 64 (Finding 2.5); RP 65-66.

Officer Peterson noticed a vehicle with headlights on parked on the opposite side of the road. CP 64 (Finding 2.6); RP 66. The vehicle was within one mile from the location of the shooting. CP 64 (Finding 2.6); RP 74. The vehicle continued to

drive, and Officer Peterson followed. CP 64 (Finding 2.6); RP 67. The vehicle parked in front of Matthew Perron's residence. CP 64 (Finding 2.11); RP 73. Once the vehicle stopped, Officer Peterson activated his overhead emergency lights and conducted a traffic stop. CP 64 (Finding 2.12); RP 70. Perron, the driver of the car, was arrested and eventually charged with robbery, assault, and possession of controlled substances. *See* CP 5:14-19 (Perron was driver), 12-14 (Amended Information).

Officer Peterson based the stop on the car matching the description of a "small, grey car" that had fled the scene of the shooting; the location of the car when he encountered it; and its indirect route of travel after he encountered it. CP 64 (Finding 2.12); 67:4-5 (location), 68:9-12 (description), 69: 3-16 (indirect travel). Officer Peterson did not claim to stop the vehicle based on traffic infractions. CP 64 (Finding 2.13); *see* RP 70.

It is possible that Officer Peterson also had information from a second 911 caller who reported a black car with a loud muffler leaving the scene of the shooting. CP 63 (Findings 2.3 and 2.4), 64 (Finding 2.14); CP 32 (CAD log with information from second caller). Officer Peterson testified that he did not remember receiving that information from dispatch or seeing it in the CAD log, but that dispatch could have reported the information to him. CP 64 (Finding 2.14); RP 75-76. The trial court did not resolve this factual issue, but instead conducted its

analysis "under two distinct scenarios: (a) if the officer had only received the first tip (small, grey vehicle), and (b) if the officer had received both tips." CP 65 (Conclusion 3.3); *see* RP 80-81 (assuming the officer received both tips), 82 (assuming only the first tip), 85:8-14 (first or both), 86:10-12 (only the first).

The trial court concluded that under either scenario, Officer Peterson lacked reasonable suspicion to conduct a traffic stop. CP 65 (Conclusion 3.3); RP 85-86. The trial court reasoned, "The description of a 'small, grey vehicle' by itself is too unspecific and general to lead to reasonable suspicion." CP 65 (Conclusion 3.4).

The trial court was not persuaded by the State's argument regarding exigency of the circumstances and seriousness of the reported crime. CP 65 (Conclusion 3.4). While exigency and seriousness can sometimes allow an officer to rely on information from an unnamed informant, the trial court assumed the information was reliable. RP 86. "One piece of information for sure, small gray car. That alone is not enough reasonable suspicion. It just isn't." RP 86:10-12.

The trial court was not persuaded by the State's arguments about the time of the stop in relation to the initial report and the distance from the shooting. CP 65 (Conclusion 3.4). The trial court concluded that those factors did not weigh in favor of suspicion. CP 65 (Conclusion 3.4). The trial court's

decision was based on the totality of the circumstances. CP 65 (Conclusion 3.2).

The trial court concluded that the traffic stop was unlawful because Officer Peterson did not have reasonable suspicion of criminal activity. CP 65 (Conclusion 3.2). The trial court suppressed "any and all physical evidence found in the vehicle, including backpacks, safe, controlled substances, and cell phones." CP 65 (Conclusion 3.5). The trial court dismissed Counts 4 and 5 of the Amended Information (possession of controlled substances). CP 13-14 (Amended Information), 65 (Conclusion 3.7). The trial court entered findings supporting immediate appeal of the dismissal of Counts 4 and 5. CP 1-2.

4. Argument

The bulk of the State's brief is built upon a fundamental misunderstanding of the trial court's decision. Although the trial court expressed concern over the conflicting description from the second 911 caller, the trial court ultimately concluded that **even if the officer only had information from the first tip**—that the suspects were in a small, grey car—the totality of the circumstances did not rise to the level of a constitutionally reasonable suspicion of criminal activity.

The key question for this Court, then, is whether the trial court correctly concluded that the officer finding a small, grey

car was insufficient to create a constitutionally reasonable suspicion that the occupants had engaged in criminal activity.

The State's arguments regarding the trial court's findings of fact all relate to the information obtained from the second 911 caller. Because the trial court's decision does not depend on these findings, this Court does not need to address these alleged errors. Nevertheless, this brief will also demonstrate that those findings are supported by substantial evidence that was not objected to prior to the trial court's decision.

Finally, the trial court was correct to suppress the cell phone as fruit of the poisonous tree because the phone was seized pursuant to a search warrant for the car, which was issued as a result of the unlawful traffic stop.

Because the officer did not have a reasonable suspicion of criminal activity, the traffic stop was unlawful. All evidence obtained as a result of the stop was correctly suppressed. As a result, the State cannot prove the drug charges, and Counts 4 and 5 were correctly dismissed. This Court should affirm the trial court decision.

4.1 The trial court correctly concluded that Officer Peterson did not have a constitutionally reasonable suspicion of criminal activity.

4.1.1 The trial court's findings of fact are reviewed for substantial evidence, and its legal conclusions are reviewed de novo.

In reviewing a trial court's decision on a motion to suppress, the Court should review the trial court's conclusions of law de novo and its findings of fact for substantial evidence. *State v. Fuentes*, 183 Wn.2d 149, 157, 352 P.3d 152 (2015). "Evidence is substantial if it is sufficient to persuade a fair-minded, rational person that the finding is true." *State v. Jones*, 186 Wn. App. 786, 789, 347 P.3d 483 (2015). Findings 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). The decision should be affirmed if the binding findings support the trial court's conclusions of law. *Jones*, 186 Wn. App. at 789.

4.1.2 The Washington and United States Constitutions prohibit investigative traffic stops that are not based on reasonable, articulable suspicion of criminal activity.

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution prohibit unreasonable seizures. *State v. Kennedy*,

107 Wn.2d 1, 4, 726 P.2d 445 (1986). A traffic stop is a warrantless seizure. *Kennedy*, 107 Wn.2d at 4. Warrantless seizures are per se unreasonable, unless an exception to the warrant requirement applies. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State bears the burden of establishing that an exception to the warrant requirement has been met. *Ladson*, 138 Wn.2d at 350.

One such exception is an investigative stop, including a traffic stop, but only if it is based on an objectively reasonable suspicion that a person is committing a crime or traffic infraction, and only if the stop is reasonable in scope. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012); *see Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The State bears the burden of proving by clear and convincing evidence that the stop was justified. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

When reviewing the lawfulness of an investigative stop, a court must evaluate the reasonableness of the officer's suspicion under the "totality of the circumstances" known to the officer at the time of the stop. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). A reasonable suspicion exists when specific, articulable facts and rational inferences from those facts establish a **substantial possibility** that criminal activity or a

traffic infraction has occurred or is about to occur. *State v. Snapp*, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012).

Although the analysis under the Washington Constitution "generally tracks" the Fourth Amendment analysis, Washington's article I, section 7 "provides for broader privacy protections than the Fourth Amendment [and] requires a stronger showing by the State." *State v. Z.U.E.*, 183 Wn.2d 610, 617-18, 352 P.3d 796 (2015).

"The use of traffic stops must remain limited and must not encroach upon the right to privacy except as is reasonably necessary to promote traffic safety and to protect the general welfare." *Arreola*, 176 Wn.2d at 293. To that end, each investigative stop must be justified at its inception and must be reasonably limited in scope. *Id.* at 294.

The analysis focuses on "the reasonableness of the officer's activities with respect to the privacy rights thereby invaded." *Kennedy*, 107 Wn.2d at 5. Traffic stops are only permitted when reasonably necessary to investigate and detect crime. *Arreola*, 176 Wn.2d at 295. This includes consideration of whether it would be desirable for officers to investigate every time a given set of facts arises, or whether privacy interests should win out. *See Id.* at 294-95. "The misuse of traffic stops … represents an enormous threat to privacy if left unchecked." *Id.* at 296.

When a traffic stop is not based on a reasonable, articulable suspicion, the stop disturbs private affairs without valid justification and is unconstitutional. *Arreola*, 176 Wn.2d at 295-96. In analyzing the constitutional validity of a stop, the Washington Supreme Court has instructed lower courts to consider the totality of the circumstances, "including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." *Id.* at 296.

When a traffic stop is not justified, all evidence uncovered from the stop must be suppressed. *Fuentes*, 183 Wn.2d at 158.

4.1.3 Officer Peterson's stop of Perron was not based on reasonable, articulable suspicion of criminal activity.

Part of the analysis of the totality of the circumstances requires examining each fact identified by the officer as contributing to the officer's suspicion of criminal activity. *Fuentes*, 183 Wn.2d at 159. Where the facts do not establish a substantial possibility of criminal behavior, the stop is unconstitutional. *See Fuentes*, 183 Wn.2d at 159-61.

The available facts must support more than a mere generalized suspicion; they must connect the particular person to the particular crime that the officer seeks to investigate. *Z.U.E.*, 183 Wn.2d at 618. Where an officer bases his suspicion on an informant's tip, the informant's reliability must be

established by the circumstances, by the informant's method of obtaining the information, or by the officer's own observations of criminal activity. *Id.* The officer's observations must corroborate more than just innocuous facts, "such as an individual's appearance or clothing." *Id.* at 618-19.

Here, the trial court found that Officer Peterson's reasons for making the stop were 1) the car matched the description of a "small, grey vehicle"; 2) it was located within one mile of the shooting; and 3) it made an indirect route of travel to its eventual destination in front of Perron's house. CP 64 (Finding 2.12). The State did not assign error to Finding 2.12. As a result, it is a verity on appeal. *See O'Neill*, 148 Wn.2d at 571.

The trial court was understandably not convinced that these circumstances gave rise to a substantial possibility that the occupants of the vehicle were engaged in criminal activity. The only information Officer Peterson had to work with was that multiple suspects left the scene in a "small, grey car." The description in itself is too vague and non-specific to create a reasonable suspicion that any particular "small, grey car" could, with substantial possibility, be the same "small, grey car" that fled the scene of the crime.

A characteristic that is common in the law-abiding public does not reasonably support suspicion of criminal activity. *See, e.g., United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993) (the

universality of a behavior significantly undercuts the rationality of using it as a basis for a traffic stop). *Lyons* dealt with "the universality of drivers' weaving in their lanes," but the same principle holds for physical characteristics. Without more details in the description, it is simply not possible to form a reasonable suspicion that a particular "small, grey car" is, with substantial possibility, the same one that was seen fleeing the scene of the crime.

Officer Peterson did not have a description of the occupants of the "small, grey car." He did not know the make or model, the number of doors, or the license number. The description of "small, grey car" was simply too vague to allow Officer Peterson to form a constitutionally reasonable suspicion that the car he found was the one he was looking for.

Although the location of the car and the indirect path of travel were also factors that could inform the analysis, they are simply not enough to overcome the vague description.

Stopping the vehicle on the basis of this vague description was not justified by exigent circumstances. Just as in *Z.U.E.*, there was no indication here that the suspects or their vehicle posed an ongoing threat to the public. *See Z.U.E.*, 183 Wn.2d at 624. The violent encounter had ended. The names of the suspects were known. They could have been sought and apprehended directly, rather than by stopping a vehicle with a

vague description that just as easily could have had no connection to the crime. *See* RP 85-86.

Because the facts and circumstances known to Officer Peterson were not sufficient to form a constitutionally reasonable suspicion of criminal activity, the trial court was correct in holding that the stop was an unlawful seizure. This Court should affirm the trial court's decision.

4.1.4 The stop cannot be justified on the basis of a traffic infraction.

The State is incorrect in arguing that the stop could be justified on the basis of Officer Peterson observing the car illegally parked. As noted above, an officer's stated reasons for the stop are a part of the constitutional analysis. Officer Peterson never claimed that the stop had anything to do with illegal parking or any other traffic infraction. CP 64 (Finding 2.13). The State has not assigned error to Finding 2.13, making it a verity on appeal. As a factual matter, the stop was not based on a traffic infraction. It cannot be justified after the fact on that basis.

Even if the infraction was a stated reason for the stop, it still would have been unlawful because the infraction would have been merely a pretext for the stop. The real purpose of the stop, as expressed by Officer Peterson, was not to ticket the

driver for an infraction; it was to locate and apprehend the suspects of the shooting. RP 65-66.

> An officer may not use a traffic infraction as a pretext to stop a citizen and search for evidence of criminal wrongdoing that is unrelated to the reason for the stop. The officer's motivation in making the stop must be the traffic infraction, not a desire to arrest the driver and search for evidence. Police officers may enforce the traffic code, so long as they do not use the authority to do so as a pretext to conduct an unrelated criminal investigation.

State v. Snapp, 174 Wn.2d 177, 199, 275 P.3d 289, 300 (2012) (citing *State v. Ladson*, 138 Wn.2d 343, 357–58, 979 P.2d 833 (1999)).

The issue is not that Officer Peterson "waived" the right to stop the vehicle for the infraction. The issue is that Officer Peterson, as a matter of fact, did not stop the vehicle for the infraction. His real reason for the stop was to investigate the shooting—to find and apprehend the suspects. Even if he had claimed that the infraction was a reason for the stop, it would have been an unlawful pretext. The infraction cannot justify the unlawful stop. This Court should affirm the trial court's decision.

4.1.5 The second 911 caller's conflicting description undermined the reliability of either description, supporting the trial court's determination.

In addition to finding the "small, grey car" description too vague to support reasonable suspicion, the trial court also was troubled by the existence of the second 911 caller's conflicting description. The second caller related that the suspects had left the scene in a black car with a loud muffler.

As noted above, when an officer relies on information from an informant to create reasonable suspicion, the reliability of the informant's information is a part of the "totality of the circumstances" analysis. The informant's reliability must be established by the circumstances, by the informant's method of obtaining the information, or by the officer's own observations of criminal activity. *Z.U.E.*, 183 Wn.2d at 618.

In a circumstance where tips from multiple informants conflict with each other, the reliability of all of the information must be questioned. It is unlikely that all of the information is correct. When the reliability of an informant's information is questionable, it cannot be the basis for reasonable suspicion of criminal activity. *See, e.g., State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 (1980) (holding that unreliable information from an informant provided an "insubstantial basis" for investigatory detention).

The State worries that this result "would paralyze the police," but it is the result the Constitution requires. If the information received from informants is unreliable, it cannot be the basis for reasonable suspicion of criminal activity. Unreliable information cannot outweigh a person's constitutional privacy interest. Before interfering in a person's private affairs, the police must be able to verify their information through further investigation. There must be enough, reliable information to form a constitutionally reasonable suspicion of criminal activity. Here there was not.

The trial court was correct in determining that the vague description of "small, grey car" was by itself insufficient to create reasonable suspicion. The trial court's conclusion is all the more correct because the reliability of the description was undermined by the conflicting description of the second 911 caller. The totality of the circumstances, including the unreliability of the description, provided an insufficient basis to outweigh a person's constitutional privacy interest. This Court should affirm the trial court's decision.

4.2 The trial court's findings of fact are supported by evidence that was not objected to before the trial court rendered its decision.

To the extent it is relevant to this last issue of the reliability of the informants' information, the trial court's

findings of fact relating to the 911 calls were supported by substantial evidence that was not objected to before the trial court rendered its decision.

The State's primary objection to the findings related to the 911 calls is that the source of the information was Officer Peterson's report. While the State complains that the report was not formally authenticated or offered and admitted into evidence at the hearing, the State **does not challenge the actual authenticity, reliability, or veracity of the report.** In fact, the State itself relied upon the report to refresh Officer Peterson's memory during direct examination. RP 70. The State's objection is disingenuous and should not be entertained.

The State would have this Court remand for a new hearing for the sole purpose of going through the formalities of authenticating a document to which the State has no substantive objections. The result would be nothing but delay, as the document would be admitted and the trial court's findings would remain unchanged. Even if the findings are technically in error, an erroneous finding that does not materially affect the trial court's conclusions of law is not prejudicial and does not warrant reversal. *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). Any error here is harmless.

The State also failed to preserve this issue for appeal by never objecting to the report or to the trial court's reliance on it.

The report was attached to Perron's written motion to suppress. CP 26-36. Perron's motion relied on the report in making his arguments that the traffic stop was unlawful. CP 18-20. It was clear that Perron relied on the facts in the report. Yet the State's responsive Memorandum of Authorities made no objection to the use of the report or the way in which it was presented as an attachment to Perron's motion. *See* CP 55-62.

Far from objecting to the 911 call information, the State relied upon it in its written response: "In the instant case the testimony will show that multiple calls to 911 reported gunshots and screams. … From that information, Officer Peterson believed that a small gray car was fleeing the shooting." CP 57. The State did not object to the written submission of the report.

Perron cross-examined Officer Peterson regarding the contents of the report. RP 71-72. The State did not object to the reading of the 911 call information. The State did not suggest to the trial court that the information could only be considered for a limited purpose.

The trial court questioned Officer Peterson regarding the 911 call information and whether Officer Peterson had received that information through dispatch. RP 75-76. The State did not object to the judge's line of questioning. The State did not point out to the judge that the report had not been admitted into evidence.

During argument after the presentation of testimony at the hearing, the State began to argue that the second 911 caller's information was irrelevant. RP 79:7-10. The trial court responded that the information from both callers was in play and was material to the analysis. RP 79:11-22 ("So that's where we are, like it or not"). The State argued about the "totality of the circumstances" analysis. RP 79-80. The State did not object to the trial court's reliance on the 911 call information from the report. The State did not argue that the information was not admitted or authenticated. Rather, the State proceeded with argument as though the information was all properly admitted into evidence. *See* RP 79-84.

The trial court announced its oral ruling, relying in part on the 911 call information. RP 85-86. The State sought to clarify the evidence that was being suppressed. RP 88. The State never objected to the trial court's use of the 911 call information from the report. *See* RP 87-90.

One week later, the parties returned to court for presentation of findings and orders. RP, June 3, 2019, at 2. The State raised the issue of RAP 2.2(d) findings to allow immediate appeal. RP, June 3, 2019, at 2-3. The State agreed to sign the proposed findings without raising any objection about the findings' reliance on the 911 call information. RP, June 4, 2019, at 4.

The State failed at every turn to raise any objection to the trial court about the 911 call information or the report. The State cannot now raise an objection for the first time on appeal. *See* RAP 2.5(a). This Court should refuse to review the State's assignments of error to Findings of Fact 2.2, 2.3, 2.4, and 2.14.

This is not a case of judicial notice. Nowhere does the trial court indicate that it is taking judicial notice of anything. Rather, this is a case of evidence that was presented to the trial court and not objected to at any time. In the trial court, the State proceeded as though the evidence was properly admitted. The State cannot now argue that it was not.

The State complains that Finding of Fact 2.14 does not actually find any facts, but the time to make that objection was in the presentation hearing. The State did not object. In any event, the finding is explained by the trial court's written conclusions. The trial court chose not to resolve the factual question of whether Officer Peterson actually received the information from the second 911 caller. Instead, the trial court analyzed the stop under both possible factual scenarios, concluding that under either scenario the officer lacked reasonable suspicion to conduct a traffic stop. CP 65.

The trial court did not "take judicial notice of what the judge believed the police dispatcher would have done." The trial court made a reasonable inference from the evidence. It is

reasonable to infer that the dispatcher would disseminate the information from all of the 911 calls. The inference is further supported by Officer Peterson's testimony that although he did not remember hearing the information, dispatch could have reported it to him. CP 64 (Finding 2.14).[1] As has been noted above, the trial court's analysis does not depend on Officer Peterson actually knowing the second 911 caller's information. Rather, the trial court analyzed both possible factual scenarios, concluding that under either scenario the officer lacked reasonable suspicion to conduct a traffic stop.

All of the trial court's findings of fact are proper because they were based on evidence that was not objected to at any time. The State failed to give the trial court the opportunity to correct any error. Even if there was error, it does not affect the outcome of the trial court's analysis. Even if this Court were inclined to reverse the challenged findings, it would not change the trial court's conclusion that the vague description of "small, grey car" was insufficient to support reasonable suspicion of criminal activity.

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[1] Although the State assigned error to Finding 2.14 because it did not resolve the factual question of whether Officer Peterson actually received the information, the State has not taken issue with the Finding's description of Officer Peterson's testimony, that "dispatch could have reported this to him."

4.3 The trial court was correct to suppress the cell phone as fruit of the poisonous tree.

When a traffic stop is not justified, all evidence uncovered from the stop must be suppressed. *Fuentes*, 183 Wn.2d at 158. This "exclusionary rule" bars the admission at trial of "physical, tangible materials obtained either during or as a direct result of an unlawful invasion." *State v. Garvin*, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009) (quoting *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). When an initial stop is unlawful, "the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree." *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

The items suppressed by the trial court—backpacks, safe, controlled substances, and cell phones—were all found in the car during execution of a search warrant obtained as a result of the unlawful traffic stop. CP 65 (Conclusion 3.5); RP 88. Although no testimony was elicited at the hearing on this point, the parties agreed that this was the case:

> **MR. WALKER [prosecutor]:** So just to clarify, Judge, all of those were seized later pursuant to a search warrant on the vehicle along with the phone; so are you going to include the phone in that?
>
> **THE COURT:** So the phone was located in one of the backpacks. Right?
>
> **MS. NOGUEIRA [defense]:** In the vehicle.

MR. WALKER: No. CJ had it in his hand when they arrested him. It was placed on the speaker box. The trunk was closed. **They moved the car to the Aberdeen Police Department, and they served the search warrant on it later the same day. That's when they got the backpack, the drugs, the safe, and the phone out of it.** There was no search of the vehicle conducted pursuant to the traffic stop. There was the arrest of Mr. Perron, the arrest of Mr. Buhl, and Mr. Karr fled and was arrested later.

MS. NOGUEIRA: Again, Your Honor, **the search warrant was only issued because of the stop and what they saw in the stop.**

MR. WALKER: That's right. Well -- right, yes.

THE COURT: And what are those items?

MS. NOGUEIRA: The safe, the backpacks, the drugs, the cell phone.

RP 88 (emphasis added). As the State agreed at the hearing, the search warrant was a direct result of the traffic stop, and the cell phone was seized during execution of the search warrant. The trial court was correct to suppress the cell phone as fruit of the poisonous tree.

Contrary to the State's arguments, the exclusionary rule does not require Perron to prove any privacy interest in the cell phone. Perron already proved that the stop of his car—in which he has a clear privacy interest—was unlawful. The exclusionary rule requires suppression of all physical evidence obtained as a result of the stop and any search resulting from the stop,

regardless of who owns or has privacy rights in that physical evidence.

The "automatic standing" doctrine is not at play here. The automatic standing doctrine allows a defendant to challenge a search or seizure in cases where possession is an essential element and the defendant was in possession of the contraband at the time of the contested search or seizure, even when defendant would not otherwise have had a privacy interest in the thing seized or the place searched. *State v. Simpson*, 95 Wn.2d 170, 180-81, 622 P.2d 1199 (1980).

But Perron did not challenge the seizure of the phone itself.[2] Perron challenged the traffic stop. There is no question that Perron had standing to challenge the traffic stop. The result of Perron's successful challenge is invocation of the exclusionary rule to suppress all physical evidence seized as a result, including the cell phone. The automatic standing doctrine has no application here.

The trial court correctly suppressed the cell phone as fruit of the poisonous tree because the cell phone was seized pursuant

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[2] Perron did challenge the search of the contents of the phone, but that challenge was denied and is not at issue in this appeal. It is of note that the State originally raised its "automatic standing" arguments in connection with Perron's challenge to the search of the phone's contents, not in connection with suppression of the cell phone itself as fruit of the poisonous tree. This Court could decline to address the argument under RAP 2.5(a).

to a search warrant that was only obtained as a result of the unlawful traffic stop. This Court should affirm the trial court's decision.

5. Conclusion

The trial court correctly concluded that the description of a "small, grey vehicle" was too unspecific and general to lead to reasonable suspicion. The trial court's findings relating to the 911 calls are immaterial to the decision but were nevertheless supported by evidence to which the State never objected. The trial court correctly applied the exclusionary rule to suppress all physical evidence seized during the resulting search of the car, including suppressing the cell phone.

Because the traffic stop was unlawful and the physical evidence correctly suppressed, the State has no evidence with which to prove Counts 4 and 5. Those charges were correctly dismissed. This Court should affirm the trial court's decision.

Respectfully submitted this 8th day of November, 2019.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on November 8, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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