IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. GREGORY ELIJAH CASAD, Respondent.	No. 35333-4-II UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — The State appeals the trial court's order suppressing evidence against Gregory E. Casad. Casad walked down the street in Port Angeles on a Saturday afternoon carrying two rifles partially wrapped in a towel. A woman called 911. Police responded, detained Casad, frisked him, and asked why he carried the weapons. Casad admitted that he was a felon, an admission that lead to his arrest and charges for unlawfully possessing the weapons. The trial court held that the police had no authority to detain Casad for a *Terry*[1] stop and suppressed the evidence as the fruit of an unlawful seizure. We affirm.

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

FACTS

What follows are the undisputed facts which the trial court found.[2] On November 26, 2005, at about 2 p.m. in the afternoon, a woman called 911 to report that she saw a man walking along a public street carrying what appeared to be a rifle wrapped in a purple towel. The caller did not express concern for her safety, but she commented that "it just looked kind of suspicious to me." Ex. 1.

Officers from the Port Angeles Police Department responded. The officers noted the man, whom they did not recognize, wore a backpack and carried what appeared to be a rifle wrapped in a large towel. The officers could see the rifle's barrel sticking out of the towel. Sergeant Roggenbuck[3] waited out of sight for the individual, who was walking toward him. Officers Sean Ryan and David Arand also responded. The three officers approached with their weapons drawn at the "low ready." Clerk's Papers (CP) at 18. At Roggenbuck's command, Casad put down the bundle, revealing two unloaded rifles.

Sergeant Roggenbuck read Casad his *Miranda*[4] rights and explained that they had stopped Casad in response to the 911 call. Casad volunteered that he was a convicted felon but was no longer on probation. The police placed the rifles on a squad car and Casad's backpack on the ground and then frisked Casad for other weapons, finding none. Casad identified himself and Officer Ryan confirmed that he was a felon. Casad said he was carrying the rifles to a pawn shop

[2] These facts are verities on appeal because, as discussed below, the State does not challenge them. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *State v. Balch*, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002).

[3] The record does not contain Sergeant Roggenbuck's first name.

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

and that he felt strange carrying them in the open, but he did not have a vehicle.

The police took Casad to the police station and further investigation revealed that Casad had not had his firearm rights restored after his felony conviction. The police then arrested him for unlawful possession of a firearm. The police also searched his backpack and found a controlled substance and drug paraphernalia.

The State charged Casad with unlawful possession of a controlled substance, contrary to RCW 69.50.4013[5] (Count I), and two counts of second degree unlawful possession of a firearm, contrary to RCW 9.41.040(2)(a)[6] (Counts II and III).[7] Casad challenged the police authority to detain and search him. The trial court ruled that the police did not have authority to detain Casad and, therefore, suppressed the evidence that the police found as a result of the detention.

The State could not obtain a conviction without the suppressed evidence and so it dismissed its case against Casad.

ANALYSIS

The State argues that the police had authority to first detain and then arrest Casad and the

[5] RCW 69.50.4013(1) reads:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

[6] RCW 9.41.040(2)(a) reads in relevant part:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section . . . and the person owns, has in his or her possession, or has in his or her control any firearm:
>
> (i) After having previously been convicted . . . in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section.

[7] The information is not part of our record, but the State asserts these details in its brief.

trial court erred in ruling to the contrary. We disagree.

We review conclusions of law de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). And we review findings of fact related to a motion to suppress for substantial evidence, but unchallenged findings are verities on appeal. *Levy*, 156 Wn.2d at 733. Because the State does not challenge the trial court's findings of fact, those facts are verities not subject to review and we review de novo the trial court's conclusion that the seizure was unlawful. *State v. Balch*, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002) (an appellant must assign error to findings of fact contained in a memorandum opinion or else the reviewing court will treat those facts as verities on appeal).

Direction Rifles Were Pointed

Despite its failure to assign error to facts, the State attempts to argue that the trial court erred because it did not find that Casad held the rifles toward traffic. The trial court did not enter written findings of fact and conclusions of law. But the court's opinion on the matter is clear from its memorandum and oral rulings and we decline the State's request to remand for entry of written findings and conclusions.

Here, the trial court ruled on the rifle's position three times. In its first memorandum opinion, it found that the visible rifle's barrel was "pointing towards the roadway." CP at 18. In its second memorandum opinion, it found that the rifles were "pointing downward" and "pointed at the ground." CP at 7, 8. And in its later oral ruling, it clarified that Casad held the rifles cradled in his arms at approximately a 45 degree angle. In summary, the trial court found that Casad held the rifles with the barrels pointed in the roadway's direction, but at about a 45 degree angle so that they pointed generally down toward the ground.

Substantial evidence supports this finding. Officer Arand testified that Casad carried the rifles "slanted downwards slightly." Report of Proceedings (RP) at 16. Arand agreed during cross examination that he did not believe Casad was aiming or pointing the weapons at anyone.

Officer Ryan's testimony conflicted with Officer Arand's, stating: "[the rifle] was carried, as I remember, parallel to the road with the barrel facing me and I can remember seeing down the barrel as I drove past." RP at 50. But Ryan did not write in his original police report that the rifle pointed toward him. Instead, Ryan supplemented his police report shortly before testifying to "clarify" that Casad pointed the rifle barrel toward his head. CP at 6. Whether Ryan was believable is a credibility determination for the trier of fact that is not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Based on Arand's testimony, the trial court had substantial evidence on which to find that Casad was not pointing the guns at anyone.

Search and Seizure

Next, the State argues that the police had authority to detain and search Casad. Again, we disagree.

A warrantless search or seizure is presumed unreasonable under the Fourth Amendment. *State v. Acrey*, 148 Wn.2d 738, 754, 64 P.3d 594 (2003). The State may rebut this presumption by showing that a specific exception to the warrant requirement applies. *Acrey*, 148 Wn.2d at 754-55. Here, the State invokes the exceptions for community caretaking and *Terry* stops. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The question before this court is whether the police had authority to detain Casad by drawing their weapons and telling him to stop. Casad does not argue here that the police lacked authority to detain and search him after he volunteered the information that he was a convicted

felon. It is a crime for a convicted felon to possess firearms unless his firearm rights have been restored. RCW 9.41.040(2)(a). And the trial court did not rule on whether Casad's statements to the police or the drugs found inside Casad's backpack are admissible in the event that the initial detention was lawful. But if the initial stop was unlawful, any evidence seized as a result of that stop and subsequent search is inadmissible as the fruits of the poisonous tree. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

A. Community Caretaking

The State first claims that the search and seizure were justified under the community caretaking exception to the warrant requirement. We disagree.

The community caretaking exception allows for warrantless searches when police (1) make a routine check on health and safety or (2) respond to an emergency in order to render aid or assistance. *State v. Link*, 136 Wn. App. 685, 696, 150 P.3d 610 (2007) (citing *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004)). But a proper community caretaking function is divorced from a criminal investigation. *Link*, 136 Wn. App. at 696 (citing *State v. Kypreos*, 115 Wn. App. 207, 217, 61 P.3d 352 (2002), *review denied*, 149 Wn.2d 1029 (2003)).

The State argues that the police were engaged in community caretaking by furthering their broad, ongoing duty to serve and protect the public. But it is always the duty of law enforcement to serve and protect; this duty, standing alone, does not justify warrantless searches and seizures. *Link*, 136 Wn. App. at 696. It is clear that the police were neither conducting a routine health or safety check nor responding to an emergency in order to render aid or assistance. Instead, the police were investigating a possible crime of unlawful display of a weapon.[8] The community

caretaking exception to the warrant requirement does not apply here and the trial court did not err in so ruling.

B. *Terry* Stop

Next, the State contends that the police conducted a lawful *Terry* stop of Casad. Again, we disagree.

Under *Terry*, law enforcement officers may stop and question a suspect if they have a reasonable, articulable suspicion that criminal activity has occurred or is about to occur. *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999). Courts do not require probable cause for a *Terry* stop because these stops are significantly less intrusive than an arrest. *Mendez*, 137 Wn.2d at 223. Such a stop is justified under the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution if the officer can specify particular facts and rational inferences that reasonably justify the intrusion. *Mendez*, 137 Wn.2d at 223. No warrant is required. *Mendez*, 137 Wn.2d at 223. Considering the totality of the circumstances known to the officer at the time, a reviewing court asks whether the officer could reasonably surmise that there was a substantial possibility criminal activity was afoot. *Mendez*, 137 Wn.2d at 223. The State must demonstrate that a detention was (1) justified at its inception and (2) reasonably related in scope to the circumstances that justified the interference in the first place. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing *Terry*, 392 U.S. at 20). We focus on the first issue, whether the detention was justified at its inception, because it is dispositive.

---

[8] The unlawful display statute reads in relevant part:

> It shall be unlawful for any person to carry, exhibit, display, or draw any firearm . . . in a manner, under circumstances, and at a time and place that . . . warrants alarm for the safety of other persons.

RCW 9.41.270(1).

The State argued that police could reasonably surmise that there was a substantial possibility that Casad was unlawfully displaying a weapon. The unlawful display statute reads in relevant part:

> It shall be unlawful for any person to carry, exhibit, display, or draw any firearm . . . in a manner, under circumstances, and at a time and place that . . . warrants alarm for the safety of other persons.

RCW 9.41.270(1). Alarm is "warranted" if the circumstances are such that a reasonable person would be alarmed. *State v. Spencer*, 75 Wn. App. 118, 124, 876 P.2d 939 (1994), *review denied*, 125 Wn.2d 1015 (1995). While it is not unlawful for a person to merely possess a firearm in public, the statute at issue does not violate one's right to bear arms because "[i]n the vast majority of situations, a person of common intelligence would be able to ascertain when the carrying of a particular weapon would reasonably warrant alarm in others." *Spencer*, 75 Wn. App. at 123-24. When determining whether the evidence is sufficient to prove unlawful display, the trier of fact considers circumstances such as: (1) the type of neighborhood in which the weapon was carried; (2) the time of day; (3) the urban environment; (4) the manner in which the weapon was carried; (5) the size and type of weapon; and (6) whether the weapon had a visibly attached clip. *Spencer*, 75 Wn. App. at 123 n.4.

The trial court held:

> Here, the Defendant was carrying a rifle only partially concealed and clearly identifiable as a rifle to the citizen who made the call as well as law enforcement officers, with the barrel pointing towards the ground walking on a main thoroughfare in the City of Port Angeles in daylight hours. In fact there were two rifles, which would likely be less alarming than the carrying of one rifle. Nothing indicates that the manner in which the Defendant was carrying the weapons in any way would give reasonable cause for alarm unless the mere fact of carrying a weapon within the city limits in the open in daylight on a major thoroughfare in and of itself would cause such alarm. The statute does not and, under the Constitution, cannot prohibit the mere carrying of a firearm in public. Therefore

> the Court finds that the officers at the time of the initial contact had no reasonable articulable suspicion that any criminal activity was occurring.

CP at 20 (emphasis added).

Under the *Spencer* factors, the facts in this case did not allow the police to detain Casad. First, the neighborhood in which Casad carried the weapon was mixed residential and commercial. He walked over the Eighth Street Bridge, which almost every person traveling across Port Angeles must cross. Nothing about this locale warrants alarm as would, possibly, a park known as a haven for drug dealers or an elementary school during recess. *See, e.g.*, *State v. Mitchell*, 80 Wn. App. 143, 906 P.2d 1013 (1995), *review denied*, 129 Wn.2d 1019 (1996) (upholding validity of *Terry* stop for unlawful display when suspects carried firearms through urban, residential Seattle neighborhood).

Second, Casad carried the rifles at 2 p.m. on a Saturday. Because it was a Saturday afternoon, the area was filled with traffic and pedestrians. These facts contrast with those of *Mitchell*, in which we found that police had authority to make *Terry* stops of suspects for unlawfully displaying a weapon because they walked down an urban, residential street at night carrying a semi-automatic weapon. *Mitchell*, 80 Wn. App. 143. Under this factor, Casad's behavior did not warrant reasonable alarm because he was not smuggling the rifles in the darkness, at a time when the streets were empty and the rare traveler was more vulnerable to criminal behavior, nor was he at a large public event where crowds of people could be gunned down.

There is no evidence in the record relating to the third factor, the urban environment. Port Angeles is a small city and at oral argument the parties each disputed whether the community is

one in which many people own guns and hunt or whether such activities are relatively uncommon. Because the record does not contain evidence to support either perception, we will not consider this factor.

Fourth, the trial court found that Casad did not carry the weapons in a manner that would warrant reasonable alarm. This factor is heavily contested by the parties, primarily based on individuals' reactions to seeing a gun carried on a city street and whether Casad pointed one rifle barrel toward the roadway. We note that, in connection with this case, several individuals have commented that they would find it strange, maybe shocking, to see a man carrying a gun down the street in broad daylight. Casad's appellate counsel conceded that she would personally react with shock, but she emphasized that an individual's lack of comfort with firearms does not equate to reasonable alarm. We agree. It is not unlawful for a person to responsibly walk down the street with a visible firearm, even if this action would shock some people.

And the facts in evidence do not support a reasonable suspicion that Casad carried the weapons in a fashion that would warrant alarm. Casad wrapped a towel around the rifles and he cradled them in both arms, so he could not readily reach the trigger and he did not have the rifles "at the ready." RP at 73. In *Spencer*, this court upheld a conviction for unlawful display partially because the defendant warranted alarm by carrying a rifle while walking briskly with his head down, in "a hostile, assaultive type manner with the weapon ready." 75 Wn. App. at 121. But Casad's demeanor did not warrant alarm; he walked straight down the path with eyes focused forward. He did not wear combat type clothing nor act erratically. In short, other than the fact that he was carrying the guns down the street to a pawn shop, which is typically a lawful activity, Casad did nothing to warrant alarm.

Sixth, nothing about the size and type of weapon would warrant alarm. Unlike in *Spencer* and *Mitchell*, Casad had hunting rifles, not a semi-automatic weapon. *Mitchell*, 80 Wn. App. at 144; *Spencer*, 75 Wn. App. at 120. Last, there was no visible clip attached to Casad's weapons. In short, each of the six factors listed in *Spencer* lead to the ultimate conclusion that the police did not have reasonable suspicion that Casad was violating RCW 9.41.270(1) by carrying the rifles. The police had no other authority to detain Casad. Accordingly, we affirm the trial court's order suppressing the evidence seized as the fruit of this unlawful detention.

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

QUINN-BRINTNALL, J.

We concur:

HOUGHTON, C.J.

PENOYAR, J.