IN SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 78187-7
	)	
v.	)	En Banc
	)	
CHARLIE BERNNETT DAY,	)	
	)	
Petitioner.	)	Filed October 11, 2007
_____	)	

CHAMBERS, J. — Benton County Sheriff's Deputy Jeff Hayter was driving on patrol one Sunday morning. The deputy saw a car backed into shrubbery along the Yakima River in an "improved access facility," where parked vehicles are supposed to display parking permits.[1] RCW 77.32.380. Deputy Hayter testified he approached the car to check whether there was a permit. As Deputy Hayter approached, he saw Charlie Day sitting in the car with his head moving as if he was looking for something. As Deputy Hayter got closer, he started to suspect the car were associated with drug use

[1] The deputy's interest in whether Day had a permit was first raised at the suppression hearing. No suspicion of a missing parking permit is noted in the original police report Deputy Hayter filed. While the permit may have been an afterthought, Charlie Day has made no pretext arguments before this court, and thus we do not consider whether this search should have been suppressed under *State v. Ladson,* 138 Wn.2d 343, 979 P.2d 833 (1999).

because it was cluttered with cigarette lighters and rubber gloves, among other things. Of immediate interest to Deputy Hayter, however, was an empty handgun case on the floor near Day's feet.

Deputy Hayter asked Day if there was a gun in the car. Day said there was. Day was cooperative but Deputy Hayter (he later testified) nonetheless became concerned for his safety and asked Day to step out of the car. Day did. Deputy Hayter frisked Day, handcuffed him, and asked where the gun was. Day said it was behind the passenger seat where his wife was sitting. Deputy Hayter then asked Alice Day[2] to exit the vehicle and frisked her as well, while telling both Days they were not under arrest. After another officer arrived, Deputy Hayter searched the car and found the handgun under the passenger seat.

Dispatch reported the gun was stolen and there was an outstanding arrest warrant for Alice Day. Deputy Hayter arrested the couple, conducted a search incident to arrest, and discovered evidence of methamphetamine manufacturing in the vehicle. Based on that evidence, Day was charged and convicted of manufacturing methamphetamine.

Day argues that the officer exceeded his authority under the Washington State Constitution by stopping and searching him merely on suspicion of a parking infraction and, therefore, that the fruits of that search must be suppressed and his conviction vacated for lack of lawful evidence.

[2] For ease, we refer to the defendant Charlie Day as "Day" and his wife by her full name.

Whether the officer acted with authority of law turns on whether the *Terry*[3] exception to the warrant requirement, which allows an officer to stop and frisk a person without a warrant or probable cause under certain limited circumstances, applies to these circumstances. The Court of Appeals found it did and affirmed Day's conviction. *State v. Day*, 130 Wn. App. 622, 627, 124 P.3d 335 (2005). We granted Day's petition for review, *State v. Day,* 158 Wn.2d 1009, 143 P.3d 830 (2006), and reverse.

ANALYSIS

The trial court denied Day's motion to suppress evidence seized in the search. We review the trial court's conclusions of law de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing *State v. Johnson,* 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

The right to be free from searches by government agents is deeply rooted into our nation's history and law, and it is enshrined in our state and national constitutions. The United States Constitution prohibits unreasonable searches and seizures; our state constitution goes further and requires actual authority of law before the State may disturb the individual's private affairs. U.S. Const. amend. IV; Const. art. I, § 7; *see also State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007); *State v. Boland*, 115 Wn.2d 571, 577-78, 800 P.2d 1112 (1990); *State v. Myrick,* 102 Wn.2d 506, 510, 688 P.2d 151 (1984). Generally, officers of the State must obtain a warrant before

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

intruding into the private affairs of others, and we presume that warrantless searches violate both constitutions. That presumption can be rebutted if the State shows a search fell within certain "narrowly and jealousy drawn exceptions to the warrant requirement." *State v. Stroud,* 106 Wn.2d 144, 147, 720 P.2d 436 (1986); *see also State v. Duncan,* 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002) (citing *State v. Williams,* 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)).

Our state constitution goes beyond the Fourth Amendment's prohibition on "unreasonable" searches and seizures. However, reasonableness does have a role to play in defining the constitutional term "private affairs" in article I, section 7. We do not exclude evidence that was in open or plain view. *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005). Consent and certain exigent circumstances may also justify a warrantless search and seizure. Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 Seattle U. L. Rev. 467, 633, 650 (2005); *see also State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

But we jealously guard these exceptions lest they swallow what our constitution enshrines. *Cf. State v. O'Neill*, 148 Wn.2d 564, 584-85, 62 P.3d 489 (2003) (citing Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest,* 19 Yale L. & Pol'y Rev. 381 (2001) (comparing Washington's narrower search incident to arrest exception to its federal counterpart)). *See also Coolidge v. New Hampshire*, 403 U.S. 443,

454, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (quoting *Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958)). If the evidence was seized without authority of law, it is not admissible in court. We suppress such evidence not to punish the police, who may easily have erred innocently. We suppress unlawfully seized evidence because we do not want to become knowingly complicit in an unconstitutional exercise of power. *See generally Olmstead v. United States,* 277 U.S. 438, 484-85, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting).[4]

The State asks us to extend one of our carefully drawn exceptions to the warrant requirement to parking infractions generally. Officers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct. This exception to the

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[4] As Justice Brandeis put it:

> The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes spoken of as a rule of substantive law. But it extends to matters of procedure as well. A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

*Olmstead v. United State*s, 277 U.S. 438, 484-85, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting) (footnotes omitted).

warrant requirement is often referred to as a "*Terry* stop." *E.g., Mendez,* 137 Wn.2d at 223. While *Terry* does not authorize a search for evidence of a crime, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful *Terry* stop, "a reasonable safety concern exists to justify the protective frisk for weapons" so long as the search goes no further than necessary for protective purposes. *Duncan,* 146 Wn.2d at 172. This brief, nonintrusive search is often referred to as a "*Terry* frisk." *E.g.*, *State v. Glossbrener*, 146 Wn.2d 670, 680, 49 P.3d 128 (2002). If the initial stop is not lawful or if the search exceeds its proper bounds or if the officer's professed belief that the suspect was dangerous was not objectively believable,[5] then the fruits of the search may not be admitted in court. *Id.* at 682, 684-85; *State v. Kennedy,* 107 Wn.2d 1, 9, 726 P.2d 445 (1986).

A *Terry* investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on "specific, objective facts" that the person detained is engaged in criminal activity or a traffic violation. *Duncan*, 146 Wn.2d at 172-74 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The *Terry* investigative stop exception was first adopted under the

[5] The State does not argue that, outside of the relatively relaxed standards of a *Terry* search, Deputy Hayter had objectively reasonable fear for his safety that justified the search. Accordingly, we do not reach whether, given the acknowledged gun, the likely parking infraction, the rubber gloves, the cigarette lighters, and the furtative movement would support a search on that basis. We think it highly unlikely, however, that the lawful possession of a gun could be the basis for a lawful search without burdening rights under article I, section 24 of our constitution.

Fourth Amendment to the United States Constitution, which forbids "unreasonable" searches and seizures, implicitly recognizing the State's police power to conduct "reasonable" ones. *Terry*, 392 U.S. at 20; Johnson, *supra,* at 598. It was later (largely) accepted as an exception under article I, section 7 of the Washington Constitution. *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. Lesnick*, 84 Wn.2d 940, 942-43, 530 P.2d 243 (1975).

Article I, section 7, does not use the words "reasonable" or "unreasonable." Instead, it requires "authority of law" before the State may pry into the private affairs of individuals. Const. art. I, § 7. Washington's adoption of the *Terry* investigative stop exception is grounded upon the expectation of privacy. Our constitution protects legitimate expectations of privacy, "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Myrick*, 102 Wn.2d at 511. Whether the Fourth Amendment or article I, section 7 of the Washington Constitution is in issue, a detaining officer must have "a reasonable, articulable suspicion, based on specific objective facts, that the person seized has committed or is about to commit a *crime*." *Duncan*, 146 Wn.2d at 172 (citing *Terry,* 392 U.S. at 21). Under the Fourth Amendment, whether the officer had grounds for a *Terry* stop and search is tested against an objective standard. *Johnson*, *supra,* at 598. *See also Whren v. United States,* 517 U.S. 806, 813-16, 116 S. Ct. 1769, 135 L. Ed.

2d 89 (1996) (pretextual traffic stops do not violate the Fourth Amendment). By contrast, under article I, section 7, we consider the totality of the circumstances, including the officer's subjective belief. *See State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999); *Kennedy,* 107 Wn.2d at 6. Our constitution does not tolerate pretextual stops. *Ladson,* 138 Wn.2d at 352.

Terry has also been extended to traffic infractions, "due to the law enforcement exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel, as evidenced in the broad regulation of most forms of transportation." *State v. Johnson,* 128 Wn.2d 431, 454, 909 P.2d 293 (1996) (footnote omitted) (citing *United States v. Ross,* 456 U.S. 798, 806-07, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)). However, we see no reason to extend it even further to parking infractions. The reasons underlying extending *Terry* to traffic violations simply lose force in the parking context.

Both parties refer us to various statutes, which they contend shed light on whether parking near the Yakima River in an "improved access facility" without a displayed permit is a civil or a traffic infraction in the eyes of the legislature. In concluding that the offense in question here was a traffic infraction, the Court of Appeals relied upon RCW 43.12.065(2)(b), which states, "violation of a rule relating to traffic including parking, standing, stopping, and pedestrian offenses is a traffic infraction." Former RCW

43.30.310 (1987), *recodified as* RCW 43.12.065 (Laws of 2003, ch. 53, § 229). We do not find a legislative labeling definitive.[6] The issue before us involves the scope of constitutional protections, not statutory interpretation.

This court jealously protects our constitutional rights. If and when probable cause exists to believe that a crime is being committed, the general rule is that government agents must seek a warrant, unless a carefully tailored exception applies. The investigative *Terry* stop is one of those exceptions. Recently, we declined to extend *Terry* to general civil infractions, *Duncan,* 146 Wn.2d at 175, and we refuse to extend it any further today. Like in *Duncan*, at the time of the seizure, the officer, at most, had "a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a" civil infraction. *Id.* at 172 (citing *Terry,* 392 U.S. at 21). That is not sufficient to support a *Terry* stop.[7] Neither legislative labeling nor judicial creativity can change the fact that Deputy Hayter suspected a parking infraction, not a traffic infraction. The Day vehicle was parked, backed into the bushes with its engine off. Deputy Hayter suspected that the vehicle did not have the required permit to park along the Yakima River in an "improved access facility," where vehicles are

[6] Although the legislature may declare an offense a "traffic offense" for certain purposes, such labeling is not binding for constitutional purposes.

[7] We agree with our colleagues that an officer may approach and speak with the occupants of a parked car even when the observed facts do not reach the *Terry* stop threshold. Concurrence at 1; dissent at 4-5; *cf. State v. O'Neill*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003). We stress that the issue before the court is whether we should expand the *Terry* exception to the warrant requirement to include parking infractions, not whether Deputy Hayter acted improperly by approaching the Days' car.

required to display a parking permit. RCW 77.32.380.[8] For constitutional purposes, we find that is a civil infraction, not a traffic infraction.

CONCLUSION

When officers merely suspect a civil infraction has been committed, there is no ground for a *Terry* stop. *Duncan,* 146 Wn.2d at 182. Since there was no ground for a *Terry* stop, there was no ground for a *Terry* frisk. We reverse the trial court's admission of the evidence seized from Days' vehicle, vacate his conviction without prejudice, and remand for further proceedings consistent with this opinion.

[8] The incident was recorded by a camera mounted in Deputy Hayter's patrol car. The Day vehicle was parked so that the back of the vehicle was in the shrubbery. The record reflects that the improved access facility permits are usually affixed to the back of the vehicle. The videotape fails to show that Deputy Hayter ever attempted to look at the back of the vehicle to see if it was properly permitted.

AUTHOR:
Justice Tom Chambers

WE CONCUR:
Chief Justice Gerry L. Alexander

Justice Charles W. Johnson	Justice Susan Owens
Justice Richard B. Sanders	Justice James M. Johnson