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COA No. 69799-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

AMY CAROL TAYLOR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable Thomas J. Wynne

REPLY BRIEF

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A. REPLY ARGUMENT

1. RESPONDENT ERRONEOUSLY CONTENDS THAT MS. TAYLOR WAS NOT SEIZED WHEN THE DEPUTY PULLED UP BEHIND HER PARKED CAR, ACTIVATED HIS STROBE LIGHT, CHALLENGED HER LEGALITY TO DRIVE, AND HELD HER IDENTIFICATION TO RUN IT FOR A WARRANTS CHECK.

The question whether a person has been seized by law enforcement is determined by examining the totality of the circumstances. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Here, the Respondent's contention in arguing that Ms. Taylor was not seized is akin to the error of analysis identified by the United States Supreme Court in Florida v. Bostick, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) -- that of elevating certain isolated facts to primacy rather than examining the facts *in toto*.

Respondent points out that the Deputy did not act to "stop" Ms. Taylor's car by pulling it over while it was immediately driving, characterizing his actions as the same as approaching Taylor on foot, as an officer might amble up to a pedestrian in a public park. BOR, at p. 5. But the cited case of O'Neill stands for the simple proposition that an officer who approaches a car and uses a flashlight to look into it, illuminating what he might readily see during the day if he passed by, does not seize the car or its

occupants by asking questions or requesting identification, "so long as the person involved need not answer." State v. O'Neill, 148 Wn.2d 564, 577-78, 62 P.3d 489 (2003).

That is not similar to what occurred here, where the Deputy pulled up behind Ms. Taylor's car at night and, as Respondent concedes, activated his rear "strobe" lights, as Respondent also concedes. BOR, at p. 2. Respondent next contends that only activation of "emergency" lights can constitute or contribute to facts amounting to a seizure. The case cited for this proposition does not state such a specific or restrictive point of law. State v. Stroud, 30 Wn. App. 392, 396, 634 P.2d 316 (1981), review denied, 96 Wn.2d 1025 (1982). Plainly, either type of light, not being solely headlights, involves a signal to a reasonable person, rather than such lights being necessary to illuminate the subject vehicle in order to see – compare indeed O'Neill, supra. The use of strobe lights by the Deputy after pulling his vehicle behind Ms. Taylor's in this case further contributed to the facts indicating a seizure.

Most crucially, Respondent asserts that there was no demand or request by the officer that Ms. Taylor hand over her identification/driver's license, and argues she 'nevertheless' or spontaneously did so. BOR, at pp. 2, 7. But the operative fact --

which Respondent concedes -- is that Deputy Dusevoir specifically challenged whether Ms. Taylor was legal to drive. BOR, at p. 2. Thus, the Deputy specifically and expressly inquired whether Ms. Taylor was breaking the law. See State v. State v. Soto–Garcia, 68 Wn. App. 20, 22, 25, 841 P.2d 1271 (1992) (officer's inquiry about identification and question if defendant had cocaine contributed to seizure); State v. Smith, 154 Wn. App. 695, 701-02, 226 P.3d 195 (2010) (noting the Court's emphasis in Soto–Garcia that the officer asked a direct question about drug possession); United States v. Richardson, 385 F.3d 625, 629-30 (6th Cir.2004) ("[W]e recognize that words alone may be enough to make a reasonable person feel that he would not be free to leave").

This is an accord with a central determining issue in whether there has been a seizure -- the use of language by the officer that creates an atmosphere of intrusion into private affairs that would make a reasonable person feel she was not free to leave. Officers seize a person when an officer attempts to assert his or her official authority over a citizen, and the citizen does not feel that he or she is at liberty to disregard that authority. See Florida v. Bostick, 501 U.S. at 436; United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); see also State v. Harrington,

167 Wn.2d 656, 668-69, 222 P.3d 92 (2009). If the Respondent is arguing that a person, approached by an officer who then challenges his or her legality to drive a car, would then reasonably feel free to *accelerate and drive away* from that officer, the argument plainly fails. United States v. Williams,[1] 2008 WL 4758683 (S.D. Ohio 2008) (at pp. 2, 4-5) (seizure where Officers Vass and Pappas approached defendant and told him he was trespassing) (citing Richardson, supra, 385 F.3d at 629).

Respondent cites State v. Mote, 129 Wn. App. 276, 279, 292, 120 P.3d 596 (2005), and offers it for an argument that such case involved an officer approaching a parked car and asking the occupant for identification, writing the person's information down, and returning to his vehicle to run it, which the Court found to not be a seizure. BOR, at pp. 5-6. But the circumstances in Mote did not involve a direct challenge inquiring if the occupant was breaking the law, as here, and the circumstances of the case caused the appellate court to conclude that the contact was merely a social one, as part of community caretaking:

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[1] Pursuant to GR 14.1(b) and Fed. R. App. P. 32.1, parties may cite to federal unpublished opinions filed on January 1, 2007 or later. See Washington State Communication Access Project v. Regal Cinemas, Inc., 173 Wn. App. 174, 190 n. 31, 293 P.3d 413 (2013).

> [Officer] Cox testified that he spoke to the occupants politely and respectfully, that the encounter was fairly casual, that he was not being hostile, and that he *did not demand any information*.

Mote, 129 Wn. App. at 280-81. The Mote case is plainly unlike this case. Respondent contends that Ms. Taylor handed her driver's license to the Deputy without a phrased request for that by him. But the challenge to the legality of her driving, combined with the other circumstances of his approach, parking, and use of his strobe lights,[2] only reasonably would make any normal person other than a dedicated scofflaw believe that they should submit to the officer's inquiry and prove their legality as the Deputy demanded she do.

Thus, the Mote case was distinguished in State v. Dorey, 145 Wn. App. 423, 186 P.3d 363 (2008), in which the Court of Appeals noted that Mote involved an approach to a citizen and an inquiry whether the officer could ask questions of them. State v. Dorey, 145 Wn. App. at 428 (but noting that tone of voice can of course indicate that submitting to the inquiry is compelled) (citing cases). The present case, particularly because of the Deputy's

[2] Contrary to Respondent's brief, the Mote Court noted that even if the officer in that case had used an illuminating spotlight to see, this did not contribute to a seizure where the officer did not employ *overhead* lights. See Mote, at 292.

challenge to Ms. Taylor's legality, but also considering the facts in their entirety, cannot reasonably be deemed a social inquiry akin to walking up to a pedestrian. Ms. Taylor was seized, and it is undisputed that Deputy Dusevoir had no reasonable articulable suspicion as required by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

2. THE SEARCH WARRANT LACKED PROBABLE CAUSE BECAUSE IT WAS BASED ON AN ILLEGAL SEIZURE, AN ILLEGAL DOG SNIFF SEARCH, AND ALTERNATIVELY BECAUSE THE K-9 AFFIDAVIT WAS INADEQUATE.

The State contends that the K-9 sniff procedure that the Deputy conducted at Ms. Taylor's car after discovering a warrant and arresting Ms. Taylor was not a search incident to arrest. BOR, at pp. 8-10. Under the recent case of Florida v. Jardines, ___ U.S. ___, 133 S. Ct. 1409, 1415-15, 185 L.Ed.2d 495 (2013), a dog sniff of a home's porch area and surroundings is a Fourth Amendment search, and the dog sniff ordered by the Deputy in this case was in a similar sense used to detect the presence of contraband in a location in which neither the police, nor the dog, was physically present, and which one would not expect anyone to examine or inspect so intrusively without causing alarm and a trespass to a sense of property rights. Jardines, 133 S.Ct. at 1415-16. The Jardines Court agreed that a drug dog is an instrument that

extends the senses of the police beyond what is in plain view. Jardines, 133 S. Ct. at 1424.

Further, the State also notes Ms. Taylor's argument relying on State v. Young. As with the question of whether a seizure has been effected, the question whether a search has been conducted by use of a means that does not physically intrude into the subject property requires an examination of all of the circumstances. State v. Young, 123 Wn.2d 173, 187-88, 867 P.2d 593 (1994). A dog sniff will constitute a search if it, under the circumstances, is police use of a means that amounts to an intrusion into private affairs. See State v. Boyce, 44 Wn. App. 724, 729-30, 723 P.2d 28 (1986); see also State v. DeArman, 92 Wn. App. 630, 635-36, 962 P.2d 850 (1998). The Young Court recognized the possibility that a dog sniff could be a search where the object of the search or the location was entitled to heightened protection, and our state recognizes a privacy interest in automobiles and their contents. Young, 123 Wn.2d at 188; State v. Afana, 169 Wn.2d 169, 176, 233 P.3d 879 (2010).[3]

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[3] Respondent incorrectly states that the appellant has not raised an issue under the U.S. Constitution. BOR, at p. 8. To the contrary, Ms. Taylor argued and continues to argue that the warrant affidavit, supported as it was by an illegal seizure at its commencement, an illegal search, and also unsupported by adequate attestation to show the K-9 dog team's reliability, violated both the state constitution and the Fourth Amendment. Appellant's Opening Brief, at pp. 17-28.

The question then becomes, if the dog sniff's alleged results were relied on for issuance of the warrant, what *was* the dog sniff? An illegal search incident to arrest is an intrusion into private affairs, without authority of law. Wash. Const. art. 1, § 7; State v. Snapp, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). The Fourth Amendment prohibits searches incident to arrest in these circumstances. Arizona v. Gant, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Yet the State does not respond to Ms. Taylor's argument that the Deputy did not lawfully impound her vehicle, and that there was therefore no lawful inventory search. See AOB, at pp. 27-28. Ms. Taylor had been arrested, the State fails to argue that there was a lawful inventory search, and yet the Deputy had a canine unit sniff the vehicle upon arresting her, causing an alert which was the material basis for the later warrant.

Ms. Taylor relies on her argument in her Opening Brief that the present case is not controlled by State v. Hartzell, 156 Wn. App. 918, 928, 237 P.3d 928 (2010), in which a drug dog was used to track from a vehicle to a gun located outside it. AOB, at pp. 21-22. The use of the K-9 in this case was a search incident to arrest, in violation of State v. Valdez, 167 Wn.2d 761, 768, 777, 224 P.3d 751 (2009), as argued.

Further, the search warrant's affidavit material regarding the drug dog's "alert" statistics were, themselves, material to the warrant but inadequate to create probable cause even with the additional information. AOB, at pp. 25-26. Washington law regarding certification of dog and handler together and case law regarding the reliability required for a search warrant affidavit render the affidavit in this case insufficient absent a reliable showing of success rate, which is different than the raw number of alerts or the dog's successful drug indications. See WAC 139-05-915(6)(a); see, e.g., Jennings v. Joshua Independent School Dist., 877 F.2d 313, 317 (5th Cir. 1989); Doe v. Renfrew, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979); see also United States v. Cruz-Roman, 312 F. Supp.2d 1355, 1363 (W.D. Wash. 2004). Ms. Taylor continues to argue that the warrant affidavit as to the K-9 failed to establish the dog team's reliability because the raw number of successful alerts is not an indication of the dog's demonstrated ability to distinguish between when drugs are present, and when drugs are absent. AOB, at pp. 23-24.

Absent a showing of this reliability, there was not probable cause for the warrant that discovered drugs in the car occupied by Ms. Taylor and the person who was allowed to leave the area of

the stop. This materiality and the Fourth Amendment, and the Article 1, section 7 ground of the error, renders the error manifest under RAP 2.5(a). State v. Grimes, 165 Wn. App. 172, 185–86, 267 P .3d 454 (2011). As argued, under the facts in State v. Neth, 165 Wn.2d 177, 181, 184, 196 P.3d 658 (2008), the Supreme Court concluded that no probable cause was made out for a search warrant for controlled substances, where the defendant and his passenger made false statements about their home being in the area, there were empty plastic bags on the defendant's person of the sort "that drug traffickers are known to use for carrying illegal drugs," the defendant had several thousand dollars in cash in the car, the defendant was known to the officers, *and* had an actual prior *conviction* for possession of heroin. Neth, 165 Wn.2d at 184.

The Court ruled that even these facts did not establish probable cause that the defendant was involved in a drug crime. Neth, 165 Wn.2d at 184, 186. The present case involves fewer facts as proffered support for probable cause, and suppression of all evidence seized from the truck Ms. Taylor was driving is required.

3. SUPPRESSION IS REQUIRED.

Evidence will be excluded as fruit of an illegal seizure unless the illegality is not the "but for" cause of the discovery of the evidence, and suppression is required where the challenged evidence is in some sense the product of illegal governmental activity. Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984). Further, where the proffered probable cause statement, supporting a search warrant, relied on illegally obtained evidence, the search pursuant to the warrant is illegal. State v. Schlieker, 115 Wn. App. 264, 266–67, 62 P.3d 520 (2003); U.S. Const. amend. 14. For all of the reasons herein, the drug evidence upon which Ms. Taylor's twin[4] convictions were predicated must be reversed and the charges dismissed.

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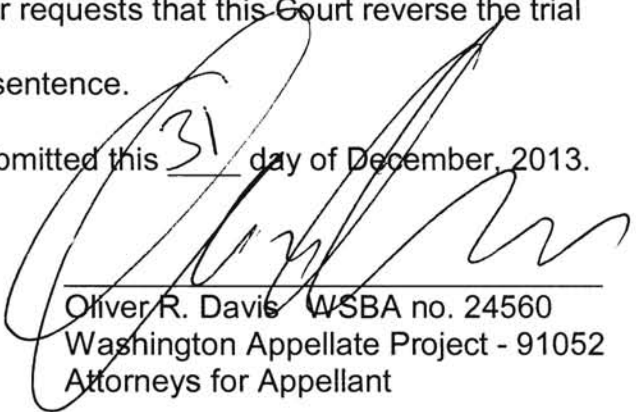
[4] Ms. Taylor acknowledges, and respectfully argues that this Court should find well-taken, the Respondent's concession of Double Jeopardy error where the Washington Courts have concluded that the methamphetamine possession statute creates one unit of prosecution for possession of the same drug in two places, here, Ms. Taylor's vehicle. State v. Chenoweth, 127 Wn. App. 444, 462, 111 P.3d 1217 (2005).

B. CONCLUSION

Based on the foregoing and on her Appellant's Opening Brief, Amy Carol Taylor requests that this Court reverse the trial court's judgment and sentence.

Respectfully submitted this 31 day of December, 2013.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69799-4-I
	)	
	)	
AMY TAYLOR,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF DECEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _______________

SIGNED IN SEATTLE, WASHINGTON, THIS 31ST DAY OF DECEMBER, 2013.

X

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