No. 31756-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOAN P. WITHERRITE, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The court erred by denying Joan P. Witherrite's motion to suppress evidence for failure to give *Ferrier* warnings and consequently finding her guilty as charged.

Issues Pertaining to Assignments of Error

A. Did the court err by determining *Ferrier* warnings were not applicable to vehicle searches? (Assignment of Error 1).

B. Did the court err by finding Ms. Witherrite guilty as charged when the evidence should have been suppressed? (Assignment of Error 1).

II. STATEMENT OF FACTS

Ms. Witherrite was charged by information with one count of possession of methamphetamine, one count of possession of marijuana less than 40 grams, and one count of use of drug paraphernalia. (CP 14). After a CrR 3.6 hearing, the court determined the search of her vehicle was pursuant to a valid consent because *Ferrier* warnings were not required. (CP 104-06; 3/4/13 RP 44). The case was then tried on stipulated facts with the parties believing they were sufficient for finding of guilt on all charges:

1. On March 29, 2012, Walla Walla Sheriff's Office ("WWSO") Dep. Humphreys made a traffic stop of a vehicle driven by Defendant Witherrite. The stop occurred in the SunMart parking lot in Burbank area of Walla Walla County for driving-related violations.

2. When Dep. Humphreys advised Ms. Witherrite of the reasons for the stop, she admitted the violations. During the contact, Dep. Humphreys observed that her speech was somewhat slurred and her eyes extremely droopy, so he asked her to perform field sobriety tests which she agreed to and completed in a marginal manner. However, during her performance, Dep. Humphreys noticed continual hand twitching and facial tics consistent with illegal drug use. Based on Dep. Humphreys' observations of Ms. Witherrite's driving, her slurred speech, droopy eyes, hand twitching, and facial tics, he asked her for consent to search her vehicle.

1. [sic] During a search of Ms. Witherrite's car, Dep. Humphreys found a purse containing a tin snuff container which contained a hard crystal substance and a green leafy substance. Also inside the tin container were razor blades and a snort tube used for processing and ingesting methamphetamine. Ms. Witherrite admitted the purse was hers, but denied ownership of the tin container and its contents.

2. [sic] A state crime lab report concluded that the hard crystal found in the tin container was methamphetamine. Based on the officer's training and experience and observation, he determined the green leafy substance to be marijuana.

THIS STIPULATION is entered into not for the purpose of guilt, but for the purpose of entering a finding of guilt based on a stipulation as to facts sufficient to support such a finding, and with the understanding that the

defendant is doing so to preserve any rights she may have to appeal the decision of the court regarding the suppression of evidence. (CP 99-100).

Thereafter, the court entered findings of fact and conclusions of law for finding of guilt:

FINDING OF FACTS

1. On March 29, 2012, Walla Walla Sheriff's Office ("WWSO") Dep. Humphreys made a traffic stop of a vehicle driven by Defendant Witherrite. The stop occurred in the SunMart parking lot in Burbank area of Walla Walla County for travelling in the oncoming lane of Quincy Road for about 100 feet, and then cutting through the stop line for oncoming traffic at Apple Lane.

2. Upon contact with Ms. Witherrite, Dep. Humphreys advised her of the reasons for the stop with her admitting the violations. During the contact, Dep. Humphreys observed that her speech was somewhat slurred and her eyes extremely droopy, so he asked her to perform field sobriety tests. Ms. Witherrite agreed an completed them in a marginal manner. However, during her performance, Dep. Humphreys noticed continual hand twitching and facial tics consistent with illegal drug use. Ms. Witherrite denied any drug usage. Based on Dep. Humphreys' observations of Ms. Witherrite's driving, her slurred speech and droopy eyes, and her hand twitching and facial tics, he asked her for permission to search her vehicle.

3. During a search of Ms. Witherrite's car, Dep. Humphreys found a purse containing a tin snuff container. The officer found two baggies, one containing a hard crystal substance and the other

containing a green leafy substance. Also inside the tin container was razor blades and a snort tube. Ms. Witherrite admitted the purse was hers, but denied ownership of the tin container and its contents.

4. A state crime lab report concluded that the hard crystal substance was indeed methamphetamine. Based on the officer's training and experience and observation, he determined the green leafy substance to be marijuana.

CONCLUSIONS OF LAW

Defendant [Witherrite] is guilty of the crime of Count 1: VUCSA – Possession of Methamphetamine, based on the hard crystal substance found in her purse, is guilty of the crime of Count 2: VUCSA – Possession of Less than 40 grams of Marijuana, based on the green leafy substance found in her purse, and guilty of the crime of Count 3: VUCSA – Use of Drug Paraphernalia, based on the razor blades and snort tube found in her purse, used for preparing and ingesting methamphetamine. (CP 101-02).

Ms. Witherrite received a standard range sentence. (CP 108). This appeal followed. (CP 125).

III. ARGUMENT

A, The court erred by denying Ms. Witherrite's motion to suppress evidence for failure to give *Ferrier* warnings and consequently finding her guilty as charged.

Wash. Const., article 1, § 7 provides greater protection to an

individual's right of privacy than that guaranteed by the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). Article 1, § 7 provide: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Our provision differs from the Fourth Amendment in that article 1, § 7 "clearly recognize an individual's right to privacy with no express limitations." *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). It protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

Consistent with these principles, the *Ferrier* court was satisfied that public policy supported adoption of a rule that article 1, § 7 is violated whenever the authorities fail to inform home dwellers of their right to refuse consent to a warrantless search:

> While we recognize that a home dweller should be permitted to voluntarily consent to a search of his or her home, the waiver of the right to require production of a warrant must, in the final analysis, be the product of an informed decision. We, therefore, adopt the following rule: that when police officers' conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering

> the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.
>
> . . .
>
> Finally, we have previously held that "[w]ithout immediate application of the exclusionary rule whenever an individual's right to privacy is unreasonably invaded, the protections of the Fourth amendment and Const. art. 1, § 7 are seriously eroded. . . Accordingly, we conclude that the trial court erred in failing to suppress the evidence obtained in the unlawful search of Ferrier's home. 136 Wn.2d at 118.

Here, the court denied the motion to suppress evidence obtained in the vehicle search because it concluded "*Ferrier* warnings were not required for this search." (CP 106).

Ms. Witherrite contends that *Ferrier* warnings should also be applied to warrantless vehicle searches. This issue has apparently not yet been addressed in a published opinion. Right of privacy constitutional considerations for vehicle searches are just as compelling as with home searches and *Ferrier* warnings should be required.

Indeed, in *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73

(1999), the court observed:

> We have long held the right to be free from unreasonable governmental intrusion into one's "private affairs" encompasses automobiles and their contents. . .
>
> More than 75 years ago, in [*State v. Gibbons*, 118 Wash. 171, 187-88, 203 P. 390 (1922)], we explicitly recognized the citizens of this state have a right to the privacy of their vehicles.
>
> We note that the before us does not involve a search . . . in the home of appellant; but manifestly the constitutional guaranty that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law," *protected the person of appellant, and the possession of his automobile and all that was in it*, while upon a public street of Ritzville, against arrest and search without authority of arrest, or a search warrant, as *fully as he would have been so protected had he and his possession been actually inside his own dwelling*, that is, his "*private affairs*" were under the protection of this guaranty of the constitution, whether he was within his dwelling, upon the public highways, or wherever he had the right to be. (cites omitted; emphasis in original). 139 Wn.2d at 493-94.

In *Seattle v. Mesiani*, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988), the court stated that "[f]rom the earliest days of the automobile in this state, this court has acknowledged the privacy interest of

individuals an objects in automobiles" and expressly adopted the United States Supreme Court's reasoning into its article 1, § 7 analysis:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. . ." [*Delaware v. Prouse*, 440 U.S. 648, 662-63, 99 S. Ct. 1391, 59 L. Ed.2d 660 (1979).

In *State v. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999), the court reiterated that "preexisting Washington law indicates a general preference for greater privacy for automobiles . . . than the Fourth Amendment." The *Parker* court, 139 Wn.2d at 496, then underscored "its recognition of a constitutionally protected privacy interest the citizens of this state have held, and should continue to hold, in their automobiles and the contents

therein."

With that backdrop, the decision of the Court of Appeals in *State v. Tagas*, 121 Wn. App. 872, 90 P.3d 1088 (2004), cannot be reconciled with the zealous protection afforded to the privacy interest of Washington citizens in their automobiles and contents. Contrary to the *Tagas* court's reasoning, the *Gunwall* analysis in *Ferrier* is thus applicable to warrantless searches of vehicles as well as to homes as the privacy interests are equally compelling. *Tagas* also noted that the Washington Supreme Court has expressly limited the scope of the *Ferrier* warnings to knock and talk procedures. 121 Wn. App. at 878; s*ee*, *e.g.*, *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004). But the Supreme Court has not been squarely presented with the issue expressly addressing warrantless vehicle searches.

Because of the Supreme Court's continued recognition of a constitutionally protected privacy interest Washington citizens have held, and should continue to hold, in their automobiles and contents, this court should require *Ferrier* warnings here. Because it is undisputed that no such warnings were given by the deputy, this failure vitiated any consent Ms. Witherrite gave thereafter. As

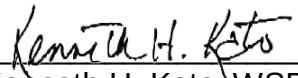
in *Ferrier*, the crux of her argument is that the deputy violated her expectation of privacy in her automobile and avoided the general requirement for a search warrant. *Ferrier*, 136 Wn.2d at 113-14.

The field sobriety tests were akin to the knock and talk in *Ferrier* and the warnings should have been given. As in *Ferrier*, the crux of Ms. Witherrite The exclusionary rule applies. *Ferrier*, 136 Wn.2d at 119. The trial court erred by denying her motion to suppress and the conviction must be reversed. *Id*.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Witherrite respectfully urges this court to reverse her convictions and dismiss the charges.

DATED this 11th day of February, 2014.



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CERTIFICATE OF SERVICE

I certify that on February 10, 2014, I served the brief of appellant by first class mail, postage prepaid, on Joan P. Witherrite at her last known address at PO Box 314, Kennewick, WA 99337; and by email, as agreed by counsel, on Teresa Chen at tchen@wapa-sep.wa.gov.