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April 9, 2014
Court of Appeals
Division III
State of Washington

31756-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOAN P. WITHERRITE,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the conviction of the Appellant.

III. ISSUE

1. Did the deputy's advisement that the Defendant could stop or limit his search at any time sufficiently satisfy the *Ferrier* ruling for an advisement of the right to refuse consent?
2. Should this Court extend the *Ferrier* doctrine to the search of a vehicle traveling on a public roadway in a reckless manner which gave the deputy probable cause to stop and probable cause to arrest?

IV. STATEMENT OF THE CASE

The Defendant Joan Witherrite is convicted of possessing methamphetamine, possessing a misdemeanor amount of marijuana, and using drug paraphernalia. CP 14-16, 108-09. Her conviction follows a

stipulated facts trial. CP 99-103.

Walla Walla deputy sheriff Humphreys stopped the Defendant's Pontiac Sunbird convertible after she crossed into the oncoming traffic lane for a lengthy of one hundred feet while going around a curve in the road. CP 101; RP 17, 29. The deputy observed behavior he recognized from his training as being indicative of drug use. CP 102; RP 17-19. Her speech was slurred. RP 17. Her eyes were droopy and tired looking. RP 17-18. Her hands were twitching, and she had facial tics. RP 18. And her performance in the field sobriety tests was marginal. RP 18. The deputy asked if she would mind if he looked inside the vehicle. RP 19. The Defendant told him to go right ahead. RP 19. He then informed her that she could stop or limit the search at any time. RP 19-20.

The deputy testified that when he is the only officer at the scene, he will seek written permission before a search. RP 27. In this case, he was the second officer to arrive. He asked for verbal permission and then provided the warnings. RP 27. He testified that had the Defendant "shown any kind of hesitation whatsoever, I certainly would have told her she had the right to refuse." RP 27.

The deputy discovered drugs and drug paraphernalia in a snuff tin insider her purse which was on the passenger seat. CP 102; RP 20-22.

On her 45 minute ride to jail, the Defendant made many excuses: she denied the drugs found inside her purse were hers, explained that she was working three jobs while attending school, complained the handcuffs were too tight, and complained of bladder issues. RP 22-23, 26. She did, however, admit that she had a pipe secreted in her bra, and she produced the pipe once in the jail. RP 22.

The court found that the deputy advised the Defendant that she could stop or limit the search of her vehicle, but did not specifically advise her that she could refuse the search. CP 105, FF 1 and 2. The court ruled that *Ferrier* warnings were not required and the search was permitted by the Defendant's valid consent. CP 105-06, FF 3, CL 1.

On appeal, the Defendant asks this Court to extend the *Ferrier* rule to require the warnings be given before obtaining consent for vehicle searches.

V. ARGUMENT

A. THE DEPUTY'S ADVISEMENT SUFFICIENTLY MET THE REQUIREMENTS OF *FERRIER*.

> "[W]hen 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.

State v. Ferrier, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998).

The Defendant argues that the evidence be suppressed on *Ferrier* grounds and the conviction reversed. Before considering whether *Ferrier* should be applied to vehicle searches, the State urges this Court to consider whether the deputy sufficiently complied with *Ferrier* requirements. The essential element of consent is knowledge of the right to refuse. *State v. Khounvichai*, 149 Wn.2d 557, 567, 69 P.3d 862 (2003).

The Defendant's trial counsel observed that police are already giving *Ferrier*-type warnings in vehicle search situations. RP 40. And the trial prosecutor argued that the spirit of the legal principle was met in that the essential elements of the Ferrier warnings were given. RP 38. The deputy asked if the Defendant would mind if he looked inside the vehicle. RP 19. She told him to go right ahead. RP 19. He then informed her that she could stop or limit the search at any time. RP 19-20.

There is no meaningful difference between the rule and what the deputy advised. By explaining that she could stop the search "at any time," the deputy effectively communicated to the Defendant that her ability to refuse consent was continuing. If the Defendant could stop the

search at any time, she could in fact stop the search immediately.

In determining voluntariness, the court looks at the totality of the circumstances. *State v. Bustamante–Davila,* 138 Wn.2d 964, 981–82, 983 P.2d 590 (1999). The factors the court considers include the degree of education and intelligence of the consenting individual, whether or not the individual was advised of her right to refuse consent, and the experience of the individual in the criminal justice system. *Bustamante–Davila,* 138 Wn.2d at 981–82.

Here the Defendant was 39 years old, holding down three jobs, and attending Columbia Basin College full time for three years. RP 2, 6-7, 10, 23. She is a teacher who lives with her four children. RP 5. These facts suggest an intelligent, highly capable person, competent to understand that if she had the right to stop the search at any time, she had the right to stop the search immediately. The number of excuses the Defendant provided also suggest a cleverness and quick-wittedness which again are indicative of the voluntariness of her continuing consent.

This Court should find that the *Ferrier* warnings were sufficiently provided.

B. THIS COURT SHOULD NOT EXTEND *FERRIER* TO VEHICLE SEARCHES.

The Defendant is asking for an extension of the *Ferrier* rule. It is the State's position that *Ferrier* has frequently been narrowly construed to searches of a dwelling and that no extension is warranted.

In *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), the Washington Supreme Court reviewed the "knock and talk" procedure. In this procedure, investigative officers without sufficient probable cause to obtain a warrant approach a home, ask to come in to talk about a complaint, and once inside request the occupant's consent to search. *State v. Ferrier*, 136 Wn.2d at 107.

In the *Ferrier* case, four police officers wearing "raid jackets" arrived at the home, two entering through the front door and two through the back. *State v. Ferrier*, 136 Wn.2d at 107-08. Once inside, they informed Ferrier that they had information that she was growing marijuana and that they wanted to search the home and seize the marijuana. *State v. Ferrier*, 136 Wn.2d at 108. Ferrier signed a consent form, but was not advised that she had a right to refuse. *Id.* Ferrier testified that she did not invite police in, that they entered while saying they wanted to talk about her son, that they told her they were going to take her grandchildren to

CPS, that she was terrified and tearful and believed that by consenting she would be able to keep her grandchildren. *State v. Ferrier*, 136 Wn.2d at 108-09.

The court conducted a *Gunwall* analysis and held that Ferrier had "heightened privacy rights in her home" under article I, section 7 of the Washington Constitution. *State v. Ferrier*, 136 Wn.2d at 106, 111. Therefore, she should have been informed that she could lawfully refuse the search. *State v. Ferrier*, 136 Wn.2d at 118-19. Law enforcement's failure to advise a dwelling's occupant of her right to refuse to consent to a search vitiates her consent and will result in suppression of the evidence obtained there. *Id.*

Ferrier's "principal contention [was] that the 'knock and talk' procedure as employed here violated her right to privacy" under the Washington constitution. *State v. Ferrier*, 136 Wn.2d at 110 (emphasis added). And, therefore, the *Ferrier* holding is **explicitly limited** to the knock and talk procedure. "Central to our holding, is our belief that any knock and talk is inherently coercive to some degree." *State v. Ferrier*, 136 Wn.2d at 115. "It is significant to our analysis, in this regard that it is undisputed that Ferrier was in her home when the police initiated contact with her." *State v. Ferrier*, 136 Wn.2d at 115. Therefore, when the

circumstances are not (1) a knock and talk (2) of a dwelling, the requirement for the advisement of the right to refuse does not apply.

Washington courts recognize the explicit limitations on the *Ferrier* ruling, narrowly construe the rule, and have found ways to distinguish other cases based on this narrow construction. For example, it does not apply when officer have an arrest warrant, good faith to believe they have a warrant, or probable cause to arrest. *State v. Williams,* 142 Wn. 2d 17, 27, 11 P.3d 714 (2000); *State v. Bustamante-Davila*, 138 Wn.2d 964, 984, 983 P.2d 590 (1999); *State v. Johnson*, 104 Wn. App. 489, 17 P.3d 3 (2001).

In *State v. Khounvichai*, 149 Wn.2d 557, 570, 69 P.3d 862 (2003) *quoting Steagald v. United States*, 451 U.S. 204, 214 n.7, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981), the court noted that an arrest warrant authorizes an invasion of one' privacy interest in the home to a limited extent necessary to accomplish the arrest. The *Khounvichai* court also acknowledged that police may enter a home during a routine response, such as investigating a break-in, vandalism, or other crime against the home dweller. *State v. Khounvichai*, 149 Wn.2d at 570. In such cases, the invitation to enter may be explicit or implicit, and *Ferrier* is not implicated. *Id.*

In *State v. Bustamante-Davila*, 138 Wn.2d 964, 968-69, 983 P.2d

590 (1999), police entered the defendant's home in the same way as in *Ferrier*, i.e. after receiving consent they came in via both the front and back doors. They then arrested him under an immigration removal order and instructed him to gather his belongings. *Id.*, 138 Wn.2d at 969. Following him back to his bedroom, police observed a rifle leaning against the living room wall – the basis for the unlawful possession of a firearm conviction. *Id.*

Certainly an arrest can be inherently coercive. Nevertheless, it did not fit the rule. *Id.*, 138 Wn.2d at 976 (holding that *Ferrier* created an explicit rule "for 'knock and talk' procedures employed by law enforcement officers seeking to search a home without a warrant.") The court of appeals distinguished the case from *Ferrier* **because police had not engaged in a true knock and talk procedure**. *Id.*, 138 Wn.2d at 975. The supreme court affirmed on the same basis. *Id.*, 138 Wn.2d at 980 ("This Court limited its holding in *Ferrier* to employment of a "knock and talk" procedure").

In *State v. Williams*, 142 Wn. 2d 17, 20, 11 P.3d 714 (2000), police arrested the defendant at someone else's house after receiving the tenant's consent to enter. Drugs were found in the defendant's pocket in a search incident to arrest. *Id.* The court held that Ferrier warnings were not

required, because the entry was not a knock and talk search. *State v. Williams*, 142 Wn. 2d at 27.

In *State v. Johnson*, 104 Wn. App. 489, 505, 17 P.3d 3 (2001), the issue was "whether *Ferrier* applies, as opposed to whether *Ferrier* was met." There police obtained a search warrant for the defendant's home. The warrant did not cover videotapes. Police did not inform the defendant of the warrant. They knocked on his door and asked if they could speak with him about allegations of child sexual abuse. *State v. Johnson*, 104 Wn. App. at 493-94. The defendant invited them in, was mirandized, and then spoke with police for an hour. *State v. Johnson*, 104 Wn. App. at 494. Police then advised that he would be arrested and asked if he would consent to search "or if he would rather we have a search warrant, that it was totally his choice." *State v. Johnson*, 104 Wn. App. at 495. He told them to "search away." *Id.* The court distinguished *Ferrier*, stating that the officers in Johnson were "not pursuing unverified information from an informant who was not known to be reliable," but had probable cause to arrest. *State v. Johnson*, 104 Wn. App. at 506. The court held that *Ferrier* did not apply under those circumstances. *Id.*

In *State v. Tagas*, 121 Wn.App. 872, 874-75, 90 P.3d 1088 (2004), the officer offered the defendant/passenger a ride after stopping the driver

for impaired driving. The passenger consented to a search of her purse prior to entering the police vehicle, a search performed for officer safety purposes. *State v. Tagas*, 121 Wn.App. at 875. The *Ferrier* challenge was rejected because "Tagas was using a public highway; her expectation of privacy in her home is not at issue." *State v. Tagas*, 121 Wn.App. at 878.

In *State v. Westvang*, 174 Wn. App. 913, 927, 301 P.3d 64 (2013), the court clarified that the goal of a knock and talk was not limited to a search for an object, but could also be a search for a person. Therefore, where officers do not have sufficient basis to believe that the subject of the arrest warrant was on the premises, the *Ferrier* warnings are required. *State v. Westvang*, 174 Wn. App. at 926. *See also State v. Dancer*, 174 Wn. App. 666, 300 P.3d 475 (2013) (upholding a consent search without *Ferrier* warnings where the search for a person was justified by reasonable suspicion).

In this case, police did not stop the Defendant (or knock and talk) with the intention of obtaining consent to search without probable cause. Police stopped her because she had violated the rules of the road in a way which could put other drivers at risk.

The Defendant compares the field sobriety tests (FST's) to a knock and talk. Brief of Appellant at 10. This is inaccurate. First, the FST is

not the first contact with the officer. The first contact is the stop, i.e. being pulled over – for which probable cause is necessary. Second, the coercive nature of a knock and talk is due in significant to part to the surprise a person would feel when police show up unannounced at one's home. The FST is not unannounced. It comes immediately after an officer witnesses behavior which would give him reasonable suspicion of intoxicated driving. The surprise one feels at being pulled over (a common enough occurrence) is not comparable to the surprise one feels when an officer shows up at your door.

Here, the request for consent to search did not come at first contact. It came later – after police had probable cause for DUI or reckless driving or negligent driving. The Defendant appeared under the influence and had exhibited affected driving. *See* RCW 46.61.502(1)(c) or (d). Given the totality of the circumstances, it is highly likely that the Defendant's driving was affected by the use of intoxicating substances. The State did not choose to file every charge for which there was probable cause. RCW 9.94A.411(1) (a prosecuting attorney may decline to prosecute even though technically sufficient evidence to prosecute exists). However, even if she were only sleep deprived, by crossing into the oncoming traffic lane on a curve where visibility is poor, she was driving

recklessly or negligently. *See* RCW 46.61.500(1); RCW 46.61.525.

There is no need to extend *Ferrier* to moving vehicle searches which occur after police have probable cause of a crime, which are the facts here. A police officer cannot knock and talk on a vehicle without first stopping it. And to stop a car, the officer must have probable cause to stop. Therefore, a moving vehicle search is distinguished from a home knock and talk as demonstrated in this state's supreme court case law.

Consider that the *Ferrier* court considered the knock and talk inherently coercive, in part because a home dweller would be "stunned" by the circumstances of police arriving on their doorstep and asking to enter. *Ferrier*, 174 Wn. App. at 115. However, motorists are not stunned to see police on the roadway, and it is the rare motorist who has never been pulled over or otherwise had occasion to interact with police related to travel.

The Defendant notes that many cases have commented on the right to privacy of individuals and their possessions within vehicles. Brief of Appellant at 7-8. The justice system's recognition of this fact is not new. The *Ferrier* court chose to limit the rule. The Washington Supreme Court has not seen fit to extend the rule in the sixteen years since *Ferrier*.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: April 9, 2014.

Respectfully submitted:

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Kenneth H. Kato khkato@comcast.net Joan P. Witherrite 2900 S. Tacoma Pl P.O. Box 314 Kennewick, WA 99337	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 9, 2014, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**