

FILED
SUPREME COURT
STATE OF WASHINGTON
7/22/2021 3:06 PM
BY ERIN L. LENNON
CLERK

No. 99921-0
COA No. 54141-6-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JIM CASTILLA-WHITEHAWK

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese, Judge
Cause No. 18-1-01740-34

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there is a basis under RAP 13.4 to review the Court of Appeals' decision that confidential informant provided a sufficient basis of knowledge to support the search warrant.

2. Whether there is a basis under RAP 13.4 to review the Court of Appeals' decision that Castilla-Whitehawk was properly detained pursuant to a valid investigatory stop, therefore the trial court did not err in denying his motion to suppress his statements.

3. Whether there is a basis under RAP 13.4 to review the Court of Appeals' finding that the trial court did not abuse its discretion ER 403 and ER 404(b) by admitting evidence of a child passenger in the back seat of the car.

4. Whether there is a basis under RAP 13.4 to review the Court of Appeals' finding that the trial court did not abuse its discretion by giving an accomplice jury instruction.

B. STATEMENT OF THE CASE

Sergeant Chris Packard of the Thurston County Sheriff's Office worked with a confidential informant, identified as CS 959, in October of 2018. RP 13-14. Packard had previously worked with this confidential informant during several other investigations. RP 15. CS 959 had provided successful information in past

investigations for Packard and the narcotics task force where search warrants had been issued because of this informant's information. RP 16. Past investigations that CS 959 provided information for led to the issuance of search warrants for Moreno and Castilla-Whitehawk. RP 17.

On October 8, 2019, informant CS 959 contacted Packard about a potential drug transaction between Mr. Castilla-Whitehawk and Mr. Timothy Moreno. RP 16-17. Packard was able to verify the veracity of the information provided by CS 959 in previous investigations. RP 16. Packard testified he had previously been involved with a drug investigation involving a residence that Castilla-Whitehawk had been in and a search warrant uncovered a very large sum of money in Castilla-Whitehawk's vehicle. RP 18. In the residence, authorities had recovered drug paraphernalia and methamphetamine residue where Castilla-Whitehawk had been. RP 18-19. It was at this point that Packard had become aware that Castilla-Whitehawk had been involved in narcotic-related activity. RP 19. Packard testified he had been made aware of Moreno in prior investigations as part of controlled buys of drugs which led to a prior arrest of Moreno. RP 19-20. Because of these two prior incidences, Packard testified he became aware of the possibility

Castilla-Whitehawk and Moreno were involved with drug-trafficking.
RP 20.

CS 959 told Packard both Moreno and Castilla-Whitehawk planned to meet in a Ross Dress for Less parking lot for a drug transaction involving a few ounces of meth or heroin, which CS 959 learned of while driving Moreno to the Ross. RP 20-21. CS 959 also learning the vehicle Castilla-Whitehawk would be in during the transaction which was a Mini Cooper. RP 21. It was understood by Packard that CS 959 had some communication with Moreno that CS 959 would be driving to the location of the transaction and that Castilla-Whitehawk was also on his way to the location. RP 22. Because of his prior knowledge of both individuals being involved in narcotics activity coupled with the information given by CS 959, Packard testified this situation required some sort of immediate action. RP 22-24. Packard and other authorities responded to the situation as CS 959 updated Packard on what was occurring such as identifying the grey Mini Cooper Castilla-Whitehawk was driving. RP 24.

When Packard and authorities arrived, they observed the Mini Cooper and the red Honda CS 959 was driving parked in close proximity to each other. RP 321. The Mini Cooper was driven by

Castilla-Whitehawk's girlfriend who went inside of Ross' to use the restroom. RP 82-83. CS 959 also provided Packard with information that Castilla-Whitehawk and Moreno were both in the Mini Cooper that Packard was also able to observe himself. RP 26, 322. Packard testified that the information given to him from CS 959 was consistent with his own observations of the drug transaction. RP 26-28. After noticing quantities of smoke coming from the Mini Cooper, Packard and another officer, Officer Curtright, approached the vehicle to detain both individuals. RP 29, 323. The clothing law enforcement had on made it very apparent that both worked with the police that included badges and a ballistic vest with an identifier that read "Police". RP 324-25, 538-39. When both authorities began to approach the individuals in the vehicle, Packard testified there was a smell of marijuana coming from the vehicle that corroborated the observation of smoke coming from the vehicle. RP 29, 330. Packard testified the windows of the vehicle were down at a considerable distance. RP 31-32. When the officers approached closer to the vehicle, they could get a better look inside of the vehicle although the windows were a bit tinted. RP 32.

As Packard and Officer Curtright approached the vehicle to detain the individuals, Packard noticed a young child sitting in the

backseat. RP 30-31, 330. The child was identified as the son of Castilla-Whitehawk's girlfriend who was only 8 years old. RP 85-86. Packard testified the marijuana was being smoked at the same time the child was present in the backseat. RP 31. Packard and Curtright detained both individuals based off these observations and CS 959's information. RP 32. They identified themselves as police and ordered both individuals out of the vehicle. RP 540-41. Curtright observed Castilla-Whitehawk move his hands underneath the seat and continue to move around until Curtright gave verbal commands. RP 542.

As both individuals were being detained, Packard observed Moreno reach toward the floorboard of the vehicle to put something down while Curtright recovered a fanny pack from Castilla-Whitehawk. RP 32, 329, 332, 342, 542-43. Curtright observed that the fanny pack was halfway opened and a plastic baggy consistent with packaging material could be seen inside the fanny pack. RP 545. Both individuals were placed in handcuffs, brought to sit in the back of separate vehicles, and were read their Miranda rights. RP 33, 331. Both individuals were ordered to be removed from the vehicle for the prevention of the destruction of any evidence and for the safety of the officers. RP 33. After being read his Miranda

warnings, Castilla-Whitehawk told Sergeant Packard that there was Marijuana and M30s, which Packard identified as Oxycodone 30 milligram pills. RP 34, 99, 333. Packard asked Castilla-Whitehawk if the M30s were a prescription, Castilla-Whitehawk stated they were for personal use and he did not have a prescription. RP 35-36, 333.

Sergeant Packard applied for a search warrant of the vehicle when both individuals were removed. RP 33, 333-34. In the search warrant application, Sergeant Packard detailed the information that he received from CS 959, the observations that had been made at the scene, and the statements made by Castilla-Whitehawk. CP 183-188. The amount of time it took between the individuals being detained and the application for the search warrant was 37 minutes. RP 39.

When the search warrant was executed, controlled substances such as methamphetamine, heroin, suspected oxycodone, and alprazolam pills were uncovered in multiple quantities from containers, packages, and wrappers in the vehicle along with \$1620 in the fanny pack uncovered from Castilla-Whitehawk, all of which were admitted into evidence. RP 40-41, 345, 347-52, 358-75. After the search was complete, Castilla-Whitehawk and Moreno were placed under arrest. RP 357. When

Castilla-Whitehawk was transferred to the jail, Deputy Howard Reynolds, of the Thurston County Sheriff's Office, found a large bag of methamphetamine in the backseat area where Castilla-Whitehawk had been. RP 518, 526. Deputy Reynolds called Castilla-Whitehawk back to him and stated, "Really? I told you I was gonna check my back seat," to which Castilla-Whitehawk apologized and "said he was going to tell [Reynolds] about that but he had fallen asleep and forgot." RP 526-527. The methamphetamine collected from the backseat was also admitted into evidence. RP 528. That portion of methamphetamine was weighed by law enforcement at 29 grams. RP 362.

As a result of the investigation, Castilla-Whitehawk was charged with unlawful possession with intent to deliver heroin, methamphetamine, oxycodone, and alprazolam. CP 5-6. Prior to the start of trial, defense counsel filed a motion to suppress the physical evidence arguing that insufficient facts supported the issuance of the search warrant. CP 10-27. The State responded, CP 28-46, 170-188. The defense then filed a subsequent motion to suppress, arguing that CS 959 did not provide a basis of knowledge for the information that was provided. CP 195. In that motion, the defense stipulated that the facts and case law demonstrated that

CS 959 was credible. CP 195. In addition to the “basis of knowledge argument,” the second motion added a claim that Castilla-Whitehawk was unlawfully arrested and therefore, the statements that he made regarding controlled substances in the vehicle should not have been considered for probable cause to issue the search warrant. CP 200.

Prior to the start of trial, the trial court considered the motion to suppress evidence. Sergeant Packard testified for the State regarding the observations of law enforcement which led to the detention of Moreno and Castilla-Whitehawk and the search warrant. *Generally*, RP 9-105. Castilla-Whitehawk testified during the suppression hearing. According to Castilla-Whitehawk, the reason he met with Moreno was to discuss the sale of cars. RP 92. He also testified he bought the Mini Cooper, but the vehicle was not registered in his name for unknown reasons. RP 92-93. The black fanny pack indeed belonged to Castilla-Whitehawk which included money and M30s wrapped in cellophane wrapper which were not prescribed to Castilla-Whitehawk. RP 94. Castilla-Whitehawk later testified that he indeed was going to meet Moreno in the parking lot to discuss a drug deal and made arrangements for this meeting. RP

95. Castilla-Whitehawk indicated that he felt he was under arrest and had a panic attack when he was detained. RP 88.

The trial court denied the suppression motion. RP 119. The trial court's findings of fact and conclusions of law were later reduced to writing. CP 161-166.

In a motion in limine, Castilla-Whitehawk asked the trial court to "exclude evidence that officers observed a child in the back seat of Mr. Castilla-Whitehawk's vehicle when officers approached," based on "ER 401 and ER 403." Supp CP __; RP 122. The State opposed, indicating that the fact that the other person in the car was a child would make it "unlikely that that person would be in possession of those types of drugs." RP 122. At that point, the trial court stated

I do think the age is relevant because of the reduced likelihood as one gets younger that you are the person who was the person who possessed or brought it into that area. For example, an infant is unlikely to be the person who brought it in. It gets continually less likely to do it, and I think that implicit, if not explicit, in [the prosecutor's] proffer was that no one thinks a child is the one that brought it in.

RP 124. The trial court indicated that the parties could have further discussions on it and that the evidence would be kept "very limited."
RP 124.

After the jury was selected, but prior to witness testimony, defense counsel raised the issue again, arguing that the fact that the child was present was irrelevant and “extremely prejudicial to the defendant.” RP 258. Defense counsel added, “I am happy to stipulate that we aren’t going to blame anyone else in the car for possession of any of these controlled substances other than these two defendants.” RP 259. When the trial court asked for clarification as to whether the defense wanted to stipulate to the element of possession, defense counsel reiterated that the offer was simply not to blame anyone else in the car other than Castilla-Whitehawk and Moreno. RP 259. The prosecutor argued

The State is not seeking to admit that the child was in the car for the purpose of showing that these two individuals are dangerous. The fact of where people were seated and how many people were in the vehicle is a fact of this case, and the defense wants to just exclude it and say, well, we won’t make that argument, but that doesn’t prevent the jury from thinking, well, we know that there was a female - - there’s going to be testimony about the female that was there and that she was in the Ross Dress for Less store and was located after the police got there. So it’s kind of left open that, well, you know, could it have been someone else’s drugs? And to show that there was someone else occupying the back seat I think is necessary for the State to show that that – these drugs and what was occurring was occurring between these two individuals and not someone else.

RP 260-261. The trial court maintained its prior ruling, stating, “I’m going to allow the reference to the fact that there was an eight year old child in the back seat of the car, and I am instructing that the State is not to go on at any more length than is necessary to establish that fact.” RP 262. The trial court further explained:

While there is some prejudice to the defense concerning this evidence, it is the State’s burden to establish possession, and the natural question the jury would ask when hearing about the car is who else was in the car? The State is entitled to present its case to satisfy its sole burden of establishing the guilt beyond a reasonable doubt, and it has to be as to all elements. And so, even if the defense does not raise the argument that there was someone else in the car, their identity as such, that is something that I would expect and in fact hope a jury would be wondering about when determining whether or not the State has met its burden.

RP 262-263. The trial court left open the possibility of a limiting instruction on the issue. RP 263. The trial court decided to give the limiting instruction requested by Castilla-Whitehawk’s counsel after some discussion of the wording. RP 575, CP 99.

Counsel for Moreno then took exception to the proposed jury instructions regarding accomplice liability, specifically arguing that the information did not include accomplice liability. RP 579. The prosecutor then pointed out that case law in Washington State does not require that the State charge accomplice liability in order for an

accomplice liability instruction. RP 580. Castilla-Whitehawk took no exception to the proposed instructions and did not object to the accomplice liability instruction. RP 579.

During closing arguments, the prosecutor discussed the accomplice liability “concept.” RP 605. The prosecutor argued that the evidence supported an inference that Castilla-Whitehawk was a mid-level dealer. RP 605. The prosecutor clarified, “the State’s theory in this case is that they both possessed controlled substances with the intent to deliver, meaning give it, sell it, trade it, barter it away at some point.” RP 606.

The prosecutor also focused on the quantity of drugs that Castilla-Whitehawk had in his possession stating and further argued that the evidence indicated that the drugs were “going further down the line.” RP 624, 626.

Castilla-Whitehawk was convicted of unlawful possession of a controlled substance with intent to deliver heroin, unlawful possession of a controlled substance with intent to deliver methamphetamine, and unlawful possession of a controlled substance with intent to deliver, alprazolam and sentenced to 14 months incarceration. RP 682-683; RP (9/26/19) 24, CP 140-151.

On appeal, Division II of the Court of Appeals held that the trial court did not err in denying the motion to suppress because the search warrant's affidavit established the confidential informant's basis of knowledge, did not err by denying the motion to suppress statements because the informant's information provided a basis for his detention, did not abuse its discretion by allowing testimony that an eight-year-old child was present in the car, and did not err by instructing the jury on accomplice liability. Castilla-Whitehawk now seeks review of each of these issues.

C. ARGUMENT

Under RAP 13.4(b), a petition for review will be accepted by this Court only:

- “(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.”

RAP 13.4(b). Mr. Castilla-Whitehawk's Petition for Review rests primarily on part (3) and (4) of RAP 13.4(b), claiming several significant questions of Constitutional law and substantial public

interest. While search and seizure questions always involve Constitutional law and public interest, the decision of the Court of Appeals rest on settled precedent and there is no reason upon which this Court should accept review.

1. The Court of Appeals correctly found that the search warrant was supported by the information provided by the confidential informant and the knowledge/experience of the officer.

Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of criminal activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The issuing magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. In re Personal Restraint of Yim, 139 Wn.2d 581, 596, 989 P.2d 512 (1999).

The issuing magistrate's determination of probable cause is reviewed for abuse of discretion and is given deference by the reviewing court. State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001). All doubts are resolved in favor of the warrant's validity. State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993). In determining probable cause, the magistrate makes a practical,

commonsense decision, taking into account all of the circumstances set forth in the affidavit and drawing commonsense inferences. Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Probable cause requires a probability of criminal activity, not a prima facie showing of criminal activity. *Id.*; State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). The party challenging a search warrant bears the burden of proof that the information offered in support of the warrant was insufficient. State v. Fisher, 96 Wn.2d 962, 967, 639 P.2d 742, cert. denied. 457 U.S. 1137, 73 L.Ed. 1355, 102 S.Ct. 2967 (1982); State v. Mance, 82 Wn. App. 539, 544, 918 P.2d 527 (1996).

When a search warrant is based on information from an informant, the affidavit in support of the warrant must establish the basis of information and credibility of the informant. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984). A reviewing court will apply an analysis under the Fourth Amendment called the *Aguilar-Spinelli* 2-pronged test in figuring the probable cause from an informant's tips. *Id.*; State v. Chenoweth, 160 Wn.2d 454; Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed 723 (1964); Spinelli v. United States, 393 U.S. 410, 413, 89 S.Ct. 584, 21 L.Ed 2d 637 (1969).

The Court of Appeals acknowledged that this Court seems to have applied two different standards for review in State v. Ollivier, 178 Wn.2d 813, 312 P.3d 1 (2013) (de novo) and State v. Scherf, 192 Wn.2d 350, 363, 429 P.3d 776 (2018)(abuse of discretion); however, the Court of Appeals followed both decisions in finding that “under either standard of review, the trial court did not err in denying Castilla-Whitehawk’s motion to suppress” because “the judge issuing the warrant reasonably could infer that CS 959 had firsthand knowledge.” Unpublished Opinion, at 8-9. The ruling is correct and there is no reason that this Court should accept review.

2. The Court of Appeals correctly found that Castilla-Whitehawk’s initial detention was a valid investigative detention.

A brief investigatory seizure, commonly referred to as a “Terry stop,” is one exception to the warrant requirement. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). An investigative *Terry* stop must be based on “a reasonable and articulable suspicion that the individual [stopped] is involved in criminal activity.” State v. Walker, 66 Wn. App. 622, 626, 834 P.2d 41 (1992). A reviewing court looks at the totality of the circumstances known to the officer at the time of the stop when evaluating the reasonableness of the officer’s suspicion. State v.

Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). When activity is consistent with criminal activity, but also consistent with noncriminal activity, the behavior may still justify a brief detention. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Based on all of the facts and circumstances, including the furtive movements made by Moreno observed by the officers, law enforcement had a reasonable suspicion of criminal activity and were justified in the detention of Moreno and Castilla-Whitehawk for their safety during their investigation. The scope of the intrusion was reasonable in light of the particular facts known to the officers at the time. State v. Williams, 102 Wn.2d 733, 742, 689 P.2d 1065 (1984); State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987).

Here the Court of Appeals correctly upheld the trial court's ruling denying Castilla-Whitehawk's motion to suppress statements he made after his detention. That decision was consistent with the precedent of this Court and there is no basis upon which this Court should accept review. State v. Fuentes, 183 Wn.2d 149, 158, 352 P.3d 152 (2015).

3. The Court of Appeals correctly ruled that the trial court did not abuse its discretion by allowing evidence that an eight-year-old child was present in the vehicle.

The Court of Appeals applied the standards for ER 403 and ER 404(b) that have been set forth by this Court to find that the trial court did not abuse its discretion by admitting evidence that a child was a passenger in the vehicle. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014). Issues of constitutional law regarding ER 403 and ER 404(b) have been well settled by this Court. the prosecutor argued that the evidence that the passenger was a child was part of the facts of the case and necessary to demonstrate that the rear passenger was not in possession of the drugs. RP 122. Such a purpose is proper. Evidence of other acts is admissible to “complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980); State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995).

This Court’s decision in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021) does not change the trial court or the Court of Appeals’ analysis. Whether a passenger in the back seat had possession of the drugs was still highly relevant to the crimes charged. The fact that the passenger was a child was very relevant for the purpose identified by the prosecutor. There is no basis

under RAP 13.4 for this Court to review the decision of the Court of Appeals.

4. The Court of Appeals properly ruled that the evidence supported an accomplice liability instruction.

“Each side in a case may have instructions embodying its theory of the case if there is evidence to support that theory.” State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). A reviewing court considers a trial court’s decision about whether to give a jury instruction by looking at whether there was sufficient evidence to support an instruction viewing the evidence in a light most favorable to the requesting party. State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000).

To give an instruction for accomplice liability, there must be sufficient evidence to support such an instruction. State v. Haack, 88 Wn. App. 423, 428, 958 P.2d 1001 (1997). In this case, the State’s theory of the case was that both Moreno and Castillo-Whitehawk were in possession of controlled substances with the intent of delivering them to other persons. RP 606. The law enforcement officers testified that in their experience, the quantity of drugs located in the vehicle was consistent with dealers who will resell rather than personal use. RP 414-415, 426-429, 491-493.

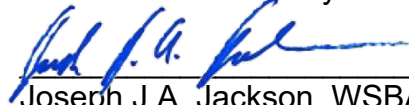
The evidence supported the inference, as the State argued, that Moreno and Castilla-Whitehawk were mid-level dealers who were intending that the drugs in the vehicle be moved along the chain.

The Court of Appeals correctly noted that the facts supported the trial court's decision to give the accomplice liability instruction. There is no reason under RAP 13.4 for this Court to accept review of the issue.

D. CONCLUSION

For the reasons stated herein, the State respectfully request that this Court deny review.

Respectfully submitted this 22nd day of July, 2021.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: July 22 2021

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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Appellate Court Case Title: State of Washington v. Jim Delarosa Castilla Whitehawk
Superior Court Case Number: 18-1-01740-1

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