89763-8

Supreme Court
NO.
Court of Appeals NO. 69335-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent

V.

DERRICK HILLS
Petitioner.

PETITION FOR REVIEW

JENNIFER M. WINKLER
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SUPREME COURT CASE

A. IDENTIY OF PETITIONER
Derrick Hills, Appellant seeks review of the Court of Appeals decision on (1) Statement of Additional Grounds, (2) MOTION For Reconsideration.

B. COURT OF APPEALS DECISION
Mr. Hills appealed KENT County Superior COURT CONVICTION For possessed marijuana and possessed of COcaine.

And COURT OF APPEALS DENIED OF Pro se motion for reconsideration And COURT OF APPEAIS OPinion From DIVISION 1

C. ISSUES PRESENTED FOR REVIEW
COURT OF Appeal opinion On A Brief. I Sub mented A Statement of Additional Grounds AS A Brief. COURT OF APPEAIS Send in OPinion Back State that But how police ultimately Charged Hills is immaterial to whether police had the articulable Suspicion of Criminal activity necessary for a lawful Seizure" The trial Court's unchallenged findings establish that the OFFicer's page(2) NOW page(3) Smell "a strong odor" of marijuana coming directly from Hills Before they Seized him. The odor of marijuana provided an articulable Suspicion of Crimial activity. →

Still on page(3) To the extent Hills contends there was no basis for the subsequent search, the Court's unchallenged finding establish that the officers pat down and subsequent search of Hills person were justified by safety concerns and the authority to conduct a search incident to arrest. Still on page(3) Hills contends the officers violated his Fifth Amendment rights because they not give him Miranda warnings before asking him about the marijuana odor. But the Court's unchallenged findings and conclusions establish that Hills was not in custody when the officers asked him about the odor. Accordingly, Miranda warnings were not required.

D. STATE OF THE CASE

Derrick Hills was Charged with A possessed of uniformed Controlled Substance Act. on Dec 2, 2011 At. 3:16:15 Am officer Daniel Yagi of the Kent Police Department radioed to dispatch that he would be contacting a suspicious vehicle in the Travel Inn Motel parking lot. Officer Yagi parked his vehicle at the north end of the parking lot, just past the Suspicious vehicle, At 3:16:54 am officer Matthew Stansfield of the Kent Police Department radioed to dispatch that he was on scene to assist officer Yagi. Officer parked his vehicle south of the Suspicious vehicle, between the suspicious vehicle, and the front door of the motel. Mr. Hills exited the vehicle from the passenger side and began walking to the front door of the motel. Officer Yagi initiated contact with Mr. Hills by him a question. Mr. Hills stopped walking and turned to address Officer Yagi as Officer Yagi approached him. →

Upon reaching Mr. Hills, Officer Yagi told Mr. Hills that he smelled marijuana, and that he needed to investigate "why." Officer Yagi questioned Mr. Hills about the smell of marijuana, and elicited a statement that Mr. Hills possessed marijuana at that time. At this time, Officer Yagi instructed Mr. Hills that he was not free to leave. At some point Officer Yagi's initial conversation with Mr. Hills Officer Stansfield took position of two arms lengths away from Mr. Hills and acted as a cover officer for Officer Yagi. He heard Officer Yagi comment on an odor of marijuana. Officer Yagi went to vehicle and ran the names of Mr. Hills and Wayne Nahuy, the driver of the vehicle, at 3:19:48 am and 3:20:19 am respectively. While Officer Yagi ran Mr. Hills and Mr. Nahuy's name, Officer Stansfield patted Mr. Hills down. No weapons were discovered on Mr. Hills' person. Officer Stansfield indicated to Mr. Hills that he smelled marijuana and than "began speaking with Hills about the smell [of Marijuana] and 'if he possessed marijuana,'" in response to which Mr. Hills removed two small plastic bags of green leafy substance and put them on the ground. When Officer Yagi returned from his vehicle. Officer Stanfield told Officer Yagi that the two small bags that were lying on the ground had been pulled out of Mr. Hills' sock by Mr. Hills. Officer Yagi pulled Mr. Hills and placed Mr. Hills under arrest. Officer Yagi told Mr. Hills his Miranda warnings from memory. Officer Yagi asked Mr. Hills whether the two plastic bags on the ground were his, and Mr. Hills indicated that they were. Officer Yagi asked whether Mr. Hills possessed any crack cocaine, and Mr. Hills indicated that he Did. Officer Yagi Search Mr. Hills and found a plastic bag containing white rocks, and a metal container with a plastic bag containing white rocks.

Officer Yagi placed Mr. Hills in the patrol vehicle and search Mr. Nahuy's vehicle. Nothing illegal was found in the vehicle. Officer Yagi subsequently released Mr. Hills and that he would receive a court date in the mail.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED.

(1) I File a motion For Reconsideration. To THE COURT OF APPEALS, For REVIEW OF UNCHALLENGED FINDINGS.

(2) BE couse UNCHALLENGED FINDINGS. Was Argument at Trail regarding The Issues Brought. Their Decision on Court of Appeals Brief (pags 2-3)

(1) on court of Appeals Brief page (2) I raises Several additional claims in a pro se statement of additional ground for review.

(1) on my motion for reconsideration. I submeted A Transcrips to The court of Appeals Showing on Transcrips NO. 121 Stateing Here The Trail Judge agress with the Defense in their argument regarding the Search and Seizure by the police in which He states" A police officer may arrest w/o A Warrant Only when the offense is committed in the presence of Officer" RP121 Now following this statement, the Judge and Defense discuss the 10.31.100 statute and how the diffense interpittation of it refect the Case→

And it appears the Defense Does explain Quite Well the Smell of marijuana alone Does not Establish probable Cause" RP, 122. Then the trial Discussion moves to Miranda Issues without Finalizing the probable Cause, Concerning Mr. Hills Search and Seizure. Since this Search Seizure Play a pivotal part in all actions After it. an unJust Search and Seizure, Would nulify the arrest Conviction and Sentence. Mr. Hills Prays the Court of Appeal, will review his reconsider the full aspeect of this trial induced Issue and decide the search and seizure was indeed unJustified and rule accoroingly please refer to the Following Wong sun v Us. 371 U.S. 471 (1963) State V. Ladson 138 Wn.2d 343 359 (1999) State V. AVILA-AVINA 99 Wn. AP. 9 13-14 (2000)

CONCLUSION

AS it Appears the Search and Seizure was Lacking probable Cause, Thus Establishing it as Unlawful... this fact to the arrest and trail and convition.

There for Mr. Hills Conviction should Be Dismissed... OR The Very least Reversed and Remanded for further Proceedings.

as and addition
I have Transcrips that support
TABLE OF AUTHORITIES
(1) STATUTE R.C.W 10.31.100 IS Transcrips NO. 4 (19) (2) State V. mercer, 45 Wn. App. 769, 774, 727 P.2d 676 (1986) Defendant Motion To Suppress brief. State V. France, (2005) Transcrips NO. 12 2 Miranda V. Arizona, 86 S.Ct. 1602 (1966) Defendant's motion To Suppress, (8) missouri v. seibert us. case.

Transcrips No. 127 Miranda V. Arizona, 86 S.Ct. 1602 (1966) on Transcrips 125, 126, 127, 128, Now Looking At Transcrips No 124, Show I was Custody which Court of Appeal Sayed I was not in Custody. and Court of Appeals Brief page (3) see Miranda Warning. State V Hickman 157 Wash. App. 767, on Transcrips No. 129. See Transcrips No. 59 of Officer Stansfield under oath. For not Reading my miranda warnings? I did not. No. See Transcrips No. 19 of Officer Yagi under Oath he sayed he did not Read miranda warnings. I send The Transcrips No 19 to the Court of Appeals, with my reconsideration, or my statement of my Additional Ground to the Court of Appeals. See Transcrips No 115, 116, 117, 118, it For State V Grand For Similar Case See Florida V. Royer, 460 U.S. 491, 501, 75 L.Ed. 2d 229, 103 S. Ct. 1319 (1983)

On this DATE 4 on January 2014

Court of Appeals.
No. 69335-2-1
Respectfully,
DERRICK HILLS
943336 6-B-1
Washington State
1313 North 13th
Avenue
Walla Walla, Wa.
98584

COURT OF APPEALS
DIVISION I

STATE OF WASHINGTON, [illegible] v. DERRICK HILLS, DEFENDANT	[illegible] No. [illegible] COURT OF APPEALS DIV I No. 69335-1-I

MOTION FOR RECONSIDERATION

I DERRICK HILLS' [illegible] REQUEST THE COURT OF APPEALS DIV I [illegible] TAKE THE FOLLOWING ISSUES INTO ACCOUNT [illegible]

I [illegible] ISSUES BROUGHT BY THE C.O.A. IN [illegible] (PAGE 3) AS [illegible] FINDINGS. [illegible] THE TRIAL JUDGE AGREES WITH THE DEFENSE IN [illegible] ARGUMENT REGARDING THE SEARCH [illegible] BY THE POLICE [illegible] ONLY WHEN [illegible]

NOW FOLLOWING THE STATEMENT THE JUDGE [illegible] DEFENSE [illegible] WITH THE [illegible] NOT ESTABLISH PROBABLE CAUSE. [illegible] MOVES TO [illegible] ISSUES [illegible] CONCERNING MR. HILLS [illegible] AND SEIZURE [illegible] 3 & 5. [illegible] WOULD [illegible] THE C.O.A. WILL REVIEW [illegible] ISSUE AND [illegible] 3 & 5 [illegible] ALTERNATELY [illegible] FOLLOWING WONG SUN v. U.S., 371 US 471 (1963); STATE v. [illegible] 342, 351 (1972); STATE v. [illegible] (2000)

Derrick Hills

Derrick Hills

And then after getting closer told him, you know, he found some other information now. But what he smelled first was burnt marijuana. Burnt marijuana doesn't lead to a logical conclusion that that person, at that moment, has marijuana with him. And in the State's brief they refer to, I believe, it's RCW --

JUDGE OISHI: Yeah. The cite is actually wrong.

MS. MCNEIL: I think it's 100 not 200.

JUDGE OISHI: The actually I made that correction. It's the cite in the brief is RCW 10.31.200. It's actually 10.31.100(1).

MS. MCNEIL: Yes. And Your Honor, that statute goes on to say that the officer has probable cause to arrest if they have witnessed it, had personally witnessed, the gross misdemeanor or the misdemeanor. It's not just simply if it has anything to do with marijuana or a controlled substance they are able to stop them. Or that they have probable cause to have arrest them. It discussers the fact that the officer had to have witnessed it.

And in this case, Officer Yagi hadn't witnessed a crime. He witnessed the odor of marijuana. He didn't witness Mr. Hills's in possession of marijuana. And given the fact that the car smelled like marijuana, he had -- there were other innocent explanations for why it was that Mr. Hills would have smelled like marijuana.

So I'm sorry, Your Honor. Do you want me to give you time to --

JUDGE OISHI: No. I'm listening. I also just want to, as I'm listening, just kind of cull through the statute real quick.

MS. MCNEIL: Okay. So in State versus Mercer, which I believe is a case that we referenced in our brief. The Court has to find that what the officer observed was more consistent with criminal conduct than innocent conduct. And there must be, under Washington law, a substantial possibility that a crime has occurred.

Now in this case, the criminal conduct would be possession of marijuana. It wouldn't be smelling like marijuana. It wouldn't be smelling like burnt marijuana. There are innocent explanations and legal explanations for why an individual could smell like burnt marijuana. It could have been in a car with someone who had been smoking marijuana. They could have been, you know, it's not a crime to be in the presence of marijuana. And it's not a crime to smell like marijuana, Your Honor. And so for that reason, I don't believe that marijuana and the smell of marijuana alone can give -- it certainly can't give reasonable suspicion for an -- it certainly can't give probable cause for an arrest.

JUDGE OISHI: Based on the statute?

MS. MCNEIL: Well, based on the statute. Absolutely.

JUDGE OISHI: So, you know, something you said wasn't sitting right with me. And so I was trying to listen and look at the statute at the same time. So I'm looking at 10.31.100. Arrest without warrant. "A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer except as provided in subsections one through ten of this section.

One, any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or a gross misdemeanor" -- and I'm jumping ahead -- "involving the use or possession of cannabis shall have the authority to arrest."

So one through ten actually are exceptions to the actual "I'm a police officer and I see you committing a crime in my presence."

MS. MCNEIL: Yes, Your Honor.

JUDGE OISHI: Which I think you said the statute necessitates that he has to see, you know, for example, he has to see Mr. Hills in his presence holding a joint. I don't think that's the case.

MS. MCNEIL: Well, Your Honor, I may -- now I don't have

the statute in front of me. And I may have misspoken. But I believe that, regardless, looking at that exception, I believe the exception says that they have to have probable cause that an offense had been committed.

JUDGE OISHI: Right.

MS. MCNEIL: And that's the regular -- not the regular standard -- but that is the standard.

JUDGE OISHI: Right. Probable cause standard. Sure.

MS. MCNEIL: Yes. But the smell -- for the reason that outlined before -- the smell of marijuana alone does not establish probable cause. There are innocent explanations. An officer doesn't have to rule out the other innocent explanations. But the criminal explanations must be more consistent with the facts and the circumstances than an innocent explanation.

And Your Honor, that brings me to my -- and talking about that statute, Your Honor, brings me to my the discussion about Miranda warnings and the 3.5 motion. Now, Your Honor, if Your Honor determines that there was probable cause to arrest Mr. Hills, once Officer Yagi smelled the odor of burnt marijuana, in that case, the -- sorry, Your Honor. One moment. In that case, Your Honor, once he smelled the marijuana and he had probable cause to arrest, under State versus France, which is a Court of Appeals case, Division 2, in 2005 and I can hand Your Honor a copy of the case and the

State as well.

(Defense Counsel hands documents to the Judge and State's Counsel.)

Now, and I'm sorry, Your Honor, do you want a moment to look at it or should I go ahead?

JUDGE OISHI: No. Is the argument, basically, if Officer Yagi developed probable cause based on the smell, then Miranda should have been given right away?

MS. MCNEIL: Yes, Your Honor. Precisely. And you know, the facts of State versus France parallel this case in an interesting way. In that case, the Court definitely said they had probable cause and the officer told the defendant that he needed to stop and he needed to clear things up before he could leave.

In this case, the officer -- according to the State's argument -- had probably cause and he said, "I need to investigate why." Now in that case was that the duration of the detention was unlimited because he wasn't told when he could leave and that weighed into the fact that they found that he was in Miranda custody.

Similarly, Mr. Hills wasn't told when he could leave. He was told that, you know, basically this situation needed to be cleared up. Just like in State versus France. And you know, given -- not only that -- but given the circumstances that we talked about before, Mr. Hills was in custody as

soon as the officer -- given these two officers, surrounding him, given the time of day, given the fact that he was told to stop. He was in custody and he needed to be given his Miranda warnings. And his Miranda warnings were not given until after Officer Stansfield had, you know, quote, "talked to Mr. Hills" about the smell and whether he possessed it. It's reasonable to believe that Mr. Stansfield probably questioned Mr. Hills and got Mr. Hills to pull the marijuana out of, you know, off of his person and present it. And this was before he was given his Miranda warnings. So certainly, any statements he made between when he was told, "Stop. I need to figure out why you smell like marijuana." And when he was Mirandized, should all be -- they should be inadmissible. And additionally, I would argue that the action of taking --

JUDGE OISHI: Can you say that one last time. So you're saying from the point that you're saying Officer Yagi said, "Hey. Hold up a minute. I want to talk to you." Until what point?

MS. MCNEIL: Until the point at which he was given his Miranda warnings, which was after Officer Yagi had talked to him --

JUDGE OISHI: Right.

MS. MCNEIL: He went back and Stansfield talked to him some more.

JUDGE OISHI: Okay.

MS. MCNEIL: And I would argue that the actions taking the marijuana out of his sock in response to what I believed to be questions, is an action, in effect, a statement of Mr. Hills that was made without Miranda and I would certainly argue that, you know, the action of him also taking the marijuana out should be suppressed.

JUDGE OISHI: Why should that be suppressed?

MS. MCNEIL: Because, Your Honor, the -- in response to the questioning of Mr. Stansfield or the discussion about whether he possessed it. There's reason to believe that Mr. Hills was asked, "Do you have marijuana on you now? Pull it out."

JUDGE OISHI: But let's say he was. Let's say Officer Stansfield, you know, started to frisk your client and he noted an odor of marijuana coming from him. So he starts to frisk him and he says, "Hey, do you have marijuana on you?" And your client doesn't say anything but just pulls out the marijuana and throws it on the ground.

Why, pursuant to Miranda, should I suppress the baggies?

MS. MCNEIL: Well, Your Honor --

JUDGE OISHI: As opposed to statements?

MS. MCNEIL: Right. Your Honor, I'm not saying specifically the baggies. What I'm saying is, I'm asking that Mr. Hills's statement of pulling the bags out in

response to this question. The action. I'm arguing that the action of him pulling it out in response to the question was a statement. An incriminating statement saying, "Yes. I have marijuana on me. And here it is and I am" -- because then the officers can come into Court and say, "Yes. And the marijuana on the ground, Mr. Hills pulls it out of his sock. And he put it on the ground." I'm arguing that they should not be able to say that.

JUDGE OISHI: Do you have any authority under Miranda or State law that says that his nonverbal physical act of pulling out the baggies should be suppressed?

MS. MCNEIL: Your Honor, I think -- to come up with a -- I can't think of any off the top of my head now, and if Your Honor, you know, if that was an issue, I could certainly go back and look and provide you with a supplemental --

JUDGE OISHI: Well, you're the one making the argument.

MS. MCNEIL: Yes, Your Honor. But to me it's more of a -- this is more of a, kind of, a logical argument. He is making a statement. It's not verbal. But the Miranda is meant to protect individual's making incriminating statements against themselves. And I would argue that -- not incriminating statements against themselves -- but I'm Mirandized, I'm warned, coerced statements against themselves. And much like, you know, in the -- just to draw a parallel in the hearsay

context -- there can be verbal actions. There can be verbal statements.

I would say that, in this case, Mr. Hills was making a statement in response to questioning by pulling that marijuana out.

And moving beyond the marijuana, Your Honor, to the cocaine. The statements regarding the cocaine should also be suppressed because they were statements made when Mr. Hills was not voluntarily making those statements.

And Your Honor, let me back up. So I'm building off of the argument that I made regarding the marijuana. She should have been Mirandized. He made incriminating statements. And then he was Mirandized. Now, we know -- I would argue, Your Honor, that everything before he was Mirandized, all the statements should be out.

Now, in Missouri versus Seibert, which is the United State Supreme Court case, the Supreme Court basically said that officers can't interrogate, question, get a confession, Mirandize, and then get another confession because that basically goes against what the purpose of Miranda is. And the purpose of Miranda is to safeguard against the coercive effect that in-custody interrogations have.

Now, when Mr. Hills made the statements about marijuana, the cat was out of the bag. He had already said something that was incriminating. He had already, you know, Mr. Hills

testified that, you know, he knew, he kind of knew what was going to happen next and the cat was out of the bag as far as those incriminating statements and he figured since he'd already said them, even though he was Mirandized, he was -- the coercive effect was still in play. There's more to voluntariness than simply stating, yes, I understand and appearing to say it voluntarily. But we have to look at the circumstances and determine whether or not a reasonable person would have felt that they really could not answer questions.

Given the fact that the cat was already out of the bag and looking at Missouri versus Seibert, we are -- our client really was not voluntarily making the statements regarding the cocaine. He was still under the coercive effect of the in-custody interrogation that happened before he was Mirandized. And for that reason I'd ask that the statements regarding what the marijuana and the cocaine be excluded.

JUDGE OISHI: Do you have any State court authority that follows that same line of reasoning that you talked about from --

MS. MCNEIL: From Seibert, Your Honor?

JUDGE OISHI: Right.

MS. MCNEIL: Yes, Your Honor.

JUDGE OISHI: Did you cite that in your brief?

MS. MCNEIL: No, Your Honor.

JUDGE OISHI: Or Ms. Murray's brief?

MS. MCNEIL: This was -- no. This was not an issue that was brief. If Your Honor will give me one moment, I do believe that I have a State case that goes to this. Certainly, Your Honor, U.S. Supreme Court cases are the law of the land and they're applicable, but in addition -- and they're controlling -- but in addition, there is the Washington Court of Appeals. It's not a State case. It's a Washington Court of Appeals, State versus Hickman, which is 157 Wash.App. 767. In that case, they talk about the same idea. And that when you're looking at the -- whether the objective evidence would lead someone to believe that they couldn't -- that they really didn't have a choice, you do need to look at objective evidence including timing, setting, completeness of the pre-warning interrogation, the continuity, the overlap in content. It goes to the same idea that, you know, cats out of the bag. And now you've been Mirandized and now you're going to tell the same and other incriminating evidence.

And based on those reasons, Your Honor, we would ask that the statements regarding both the cocaine and the marijuana be suppressed.

JUDGE OISHI: Thank you.

MS. MEYERS: Your Honor, I'm going to keep this really brief because everything is in our motions; that mostly that

I'm going to be referring to with regards to the 3.6 motion. It does all come down to whether this was a seizure or not.

JUDGE OISHI: Absolutely.

MS. MEYERS: I'm not even going to address the social contact issue. There is no disagreement that this was a seizure. Officer Yagi --

JUDGE OISHI: But you need to back up. Because I think you're skipping a step. For law enforcement to make contact with any citizen, right? To intrude in their private affairs. It either has to generally be what the Court's described as a social contact. You're just going up to talk to someone. See what's going on. That's lawful.

Or you could contact someone with the intention of doing a brief detention because you think you have, based on the totality of the circumstances, some reasonable, articulable suspicion that a crime is going on.

So what I want to know is with Officer Yagi's initial contact, is it a social contact or not? If it is a social contact, when does it become essentially a Terry stop.

In the alternative, if it wasn't a social contact, and it was a Terry stop to begin with, what grounds did he have to do that?

MS. MEYERS: And Your Honor, I think where you and I going to disagree on this is that there are only two options. My position, the State's position, would be that his intention

Q. And is that accurate?

A. To my knowledge, yes.

Q. And did you and did Officer Yagi return at some point?

A. Yes. Yes.

Q. And what was your involvement for the rest of the contact?

A. After that, Officer Yagi came back, spoke with the defendant. I can't remember exactly what their course of their conversation was. I can't -- based on my position, I couldn't hear all of it. I was not that close to them at that point. In fact, after I performed the frisk and the defendant produced the two baggies, I backed back to my cover position. So I don't know exactly what Officer Yagi said to him before Officer Yagi and the defendant stepped over by Officer Yagi's car. And I stayed with the other subject whose name escapes me. It's hard to pronounce. I'm not sure.

Q. What else did you do during the course of the stop? Anything?

A. Not that I recall outside of my report. Nothing's sticking out in my mind. Just spoke. Just sat there. Waited for Officer Yagi to be finished speaking with Mr. Hills.

Q. At any point during your contact with Mr. Hills, did you read him his Miranda warnings?

A. I did not. No.

MS. MEYERS: And I don't think I have anything else.

JUDGE OISHI: Thank you, Ms. Meyers. Cross-examination, Ms. McNeil?

MS. MCNEIL: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. MCNEIL:

Q. Officer Stansfield, the evening of this incident, it was dark outside?

A. Yes.

Q. It was 3 o'clock in the morning?

A. Yes.

Q. It was December?

A. Yes.

Q. And I think you said before that it was around freezing?

A. Yes.

Q. And when Officer Yagi called out you decided to go to the scene?

A. Yes.

Q. And that was given the time of day and the darkness?

A. Those are some of the factors. Yes.

Q. Okay. But those are two factors that you pointed?

A. Yes.

Q. Now, when an officer goes on radio to say that they're going to initiate a contact with a suspect, dispatch starts typing into the CAD?

A. Yes.

And now, turning to the smell of marijuana. There was a lot of discussion about the burnt odor of marijuana and the burnt odor of marijuana pouring out of the vehicle. And Officer Yagi said that before he caught up to Mr. Hills he passed by this vehicle. And then when he got to Mr. Hills, he smelled burnt marijuana from Mr. Hills and then he told him, "You smell like marijuana. You have to stop."

Now, he passed by a car that had had two individuals in it. And then he -- one of the individuals and they smelled like marijuana. Officer Yagi testified that if two individuals were in a car and one person was smoking marijuana, people in the car would smell like the burnt marijuana. But there is no evidence, with regards to Mr. Nahuy -- what we talked about was he basically found that this car smelled like marijuana and he tried to then, kind of, bootstrap the, you know, whatever probable cause he would gotten to investigate the vehicle and search the vehicle and tried to bootstrap it through an individual.

Now, Your Honor, the State has cited to a case State versus Grand. And State versus Grand is a case fairly similar to this case. It was a --

JUDGE OISHI: Yeah. I don't know how similar it is. But I'm pretty familiar with Grand. It's a case up north. It was, I think, up near the Skagit Valley. It's a traffic stop. Two people in a car. Odor of marijuana emitting from

the car and essentially what the officer did was the officer arrested everyone from inside the car. And then did a search incident to arrest of all the folks in the car, essentially rooted everyone out, did a search incident to arrest of everyone from the car. Also did, essentially, a search of the vehicle.

MS. MCNEIL: Yes.

JUDGE OISHI: So, factually, a little different.

MS. MCNEIL: Yes, Your Honor. But the connection I'm going to draw is that fact that -- so just as in that case where there are two individuals and there was a car that reeked of marijuana. The smell of burnt marijuana. In this case, we have two individuals who have gotten out of the car. But first the officer smells this odor of marijuana in the car. And in Grand, as your Your Honor stated, the Court determined that that would give -- that would certainly give -- the officer probable cause to search the vehicle.

JUDGE OISHI: Correct.

MS. MCNEIL: And we certainly don't argue here that the officers wouldn't have had probable cause to search the vehicle. But what Grand says is that you cannot, then, make the leap to the individuals in the car.

JUDGE OISHI: Right. You need to have individualized probable cause.

MS. MCNEIL: Absolutely, Your Honor.

JUDGE OISHI: Which was not -- which based on the facts and the timing of when folks were removed from the vehicle and placed under arrest, the Court felt that that particular officer had not developed particular rise, individual PC, for Mr. Grand.

MS. MCNEIL: Yes. The passenger in the car.

JUDGE OISHI: Right. But this fact pattern is a little different. If I find Officer Yagi's testimony to be credible, then what Officer Yagi did, again, putting aside the issue of when the seizure happened.

MS. MCNEIL: Yes, Your Honor.

JUDGE OISHI: What Officer Yagi did was, again, if his testimony is credible, he smelled marijuana specifically on Mr. Hills. Separate and distinct from the vehicle. And if that's the case, then that would likely be individualized probable cause.

MS. MCNEIL: Well, Your Honor, we would argue that it wouldn't be individualized probable cause based on what, in part, on what Officer Yagi said. He said that if two individuals got out of the car where marijuana had been smoked, both individuals would smell like marijuana. And so if Mr. Hills had gotten out of a car that distinctly smelled like burnt marijuana, it's pretty likely that both him and Mr. Nahuy would have smelled like marijuana. And with that understanding, thinking of it as being in the car, and then

moving out, which we know was very close in time, it wasn't individualized.

Rather, what happened was Officer Yagi looked at Mr. Hills and, yes, he did smell this odor of burnt marijuana, but he stopped Mr. Hills without having a reasonable suspicion that a crime had been committed. And Your Honor, that kind of --

JUDGE OISHI: Say that last sentence again?

MS. MCNEIL: So he did not have individualized suspicion as to Mr. Hills that --

JUDGE OISHI: At the time that he told him he was not free to leave?

MS. MCNEIL: Yes. At the time where he came, he smelled the marijuana, and he said, "Stop. I need to investigate why you smell like marijuana." At that point, making that stop, that investigatory stop, he did not have probable cause that a crime had been committed.

JUDGE OISHI: I don't know that that's your strongest argument, frankly.

MS. MCNEIL: Well, it may not be the strongest. I certainly think we have a lot of good arguments. But Your Honor, I do want to turn to -- I do want to talk a little bit about this odor of marijuana. Now, the crime would be possession of marijuana. What Officer Yagi testified to was that he smelled burnt marijuana. He told Mr. Hills to stop.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
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October 28, 2013

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CASE #: 69335-2-I
State of Washington, Respondent v. Derrick Hills, Appellant
King County, Cause No. 12-1-00731-1 KNT

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed in part and remanded for proceedings consistent with this opinion."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived. Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

Enclosure

c: The Honorable Patrick H. Oishi
Derrick Hills

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DERRICK HILLS, Appellant.	)	No. 69335-2-I DIVISION ONE UNPUBLISHED OPINION FILED: October 28, 2013

PER CURIAM — Derrick Hills appeals his conviction and sentence for possession of cocaine. He contends, and the State concedes, that the court erred in imposing a substance abuse evaluation and treatment as a community custody condition without first finding that he has a chemical dependency as required by RCW 9.94A.607(1).[1] We accept the concession and remand for the court to strike the condition unless it determines "that it can presently and lawfully

[1] State v. Warnock, 174 Wn. App. 608, 299 P.3d 1173 (2013) (chemical dependency finding is a statutory prerequisite to ordering chemical dependency evaluation and treatment); cf State v. Jones, 118 Wn. App. 199, 209-10, 76 P.3d 258 (2003) (failure to make statutorily required finding before ordering mental health treatment and counseling was reversible error even though record contained substantial evidence supporting such a finding).

comply" with the statutory requirement for a finding that Hills has a chemical dependency that contributed to his offense.[2]

Because there is no evidence that alcohol contributed to Hills' offense, we also accept the State's concession that the court erred in imposing a community custody condition requiring Hills to refrain from possessing alcohol.[3] This condition must be stricken.

The State also concedes, and we concur, that the judgment and sentence contains a scrivener's error in that section 4.7(a) (imposing community custody for crimes committed before 7-1-2000) is checked instead of section 4.7(c) (imposing community custody for crimes committed after 6-30-2000), which is applicable here. The judgment and sentence must be corrected on remand.

Hills raises several additional claims in a pro se statement of additional grounds for review. He contends the police unlawfully seized him because, while they testified they smelled marijuana, they did not charge him with possessing marijuana. But how police ultimately charged Hills is immaterial to whether police had the articulable suspicion of criminal activity necessary for a lawful seizure.[4] The trial court's unchallenged findings establish that the officers

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[2] See Jones, 118 Wn. App. at 212 n.33.

[3] RCW 9.94A.505(8),.703(3)(f); RCW 9.94B.050(5)(e); State v. McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (condition prohibiting purchase and possession of alcohol was invalid when alcohol did not play a role in the crime).

[4] Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

smelled "a strong odor" of marijuana coming directly from Hills before they seized him. The odor of marijuana provided an articulable suspicion of criminal activity.

To the extent Hills contends there was no basis for the subsequent search, the court's unchallenged findings establish that the officers' pat down and subsequent search of Hills' person were justified by safety concerns and the authority to conduct a search incident to arrest.[5]

Hills contends the officers violated his Fifth Amendment rights because they did not give him Miranda[6] warnings before asking him about the marijuana odor. But the court's unchallenged findings and conclusions establish that Hills was not in custody when the officers asked him about the odor. Accordingly, Miranda warnings were not required.[7]

Last, Hills contends the court violated his right to a speedy trial when, over objection, it granted a two and a half week continuance to August 8, 2012, due to the police witnesses' prescheduled vacations. One officer was on his honeymoon and the other was out of the office until August 7, 2012. The court continued the trial until August 8, 2012. There was no violation of Hills' right to a

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[5] State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (protective frisk); State v. Bonds, 174 Wn. App. 553, 569, 299 P.3d 663 (2013) (search incident to arrest).

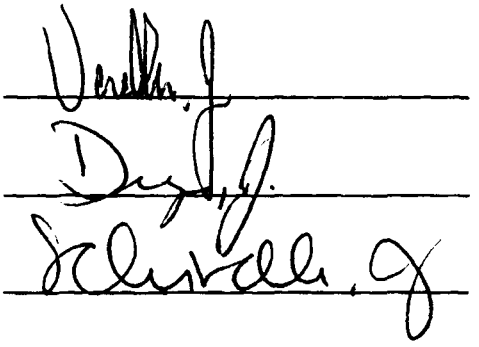
[6] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[7] "Miranda warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent." State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

speedy trial. A preplanned vacation and the unavailability of witnesses constitute valid grounds to continue a trial date under CrR 3.3(f)(2).[8]

Affirmed in part and remanded for proceedings consistent with this opinion.

FOR THE COURT:



[8] See, e.g., State v. Grilley, 67 Wn. App. 795, 799, 840 P.2d 903 (1992); State v. Nguyen, 68 Wn. App. 906, 914, 847 P.2d 936 (1993; see also State v. Brown, 40 Wn. App. 91, 94-95, 697 P.2d 583 (1985); State v. Day, 51 Wn. App. 544, 548-50, 754 P.2d 1021 (1988).

RICHARD D. JOHNSON,
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of the
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December 26, 2013

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CASE #: 69335-2-I
State of Washington, Respondent v. Derrick Hills, Appellant

Counsel:

Enclosed please find a copy of the order entered by this court in the above case today.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

enclosure

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

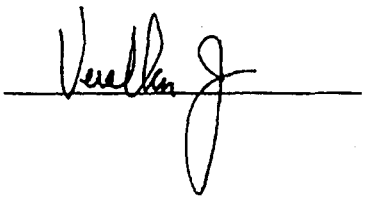
STATE OF WASHINGTON, Respondent, v. DERRICK HILLS, Appellant.	)	No. 69335-2-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's opinion entered October 28, 2013. The panel has considered the motion and determined it should be denied. Now therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Done this 26th day of December, 2013.

FOR THE PANEL:



Certification of mail

THE WASHINGTON STATE OF
SUPreme COURT

I DERRICK Hills COME NOW AS PETITION Appellant Seek review by THE WASHINGTON STATE SUPREME COURT I Submenting a Brief.

On this DATE 4 on January 2014

Signed under penalty to perjury that law of united State that I mail a certification of mail to The WASHINGT ON STATE OF SUPREME COURT.

NO.693335-2-1
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