91202-5

S. Ct. No.
COA No. 31756-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOAN P. WITHERRITE, Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Joan P. Witherrite asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the published decision of the Court of Appeals, filed on December 9, 2014. A copy of the decision is in the Appendix at pages A-1 through A-9, and is presently reported at 2014 Wash. App. LEXIS 2852.

C. ISSUE PRESENTED FOR REVIEW

1. Did the court err by determining *Ferrier* warnings were not applicable to vehicle searches?

D. STATEMENT OF THE CASE

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 findings 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 findings 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). The Court of Appeals affirmed her convictions.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case should be accepted for review under RAP

13.4(b)(3) because it presents a significant question of law under the Constitution of the State of Washington.

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 states: "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 not yet been squarely decided in a published opinion. Yet, it has been addressed in several unpublished Court of Appeal opinions

with conflicting results. But citation to them as authority is prohibited. GR 14.1. In any event, 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 case 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 and 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." The concurring opinion of Judge Lawrence-Berrey in this case further articulates the proposition with respect to vehicle searches.

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 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 specifically addressing warrantless vehicle searches.

Because of this 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. The exclusionary rule applies. *Ferrier*, 136 Wn.2d at 119. This Court should accept review and decide the important constitutional question whether *Ferrier* warnings should be given before warrantless vehicle searches. RAP 13.4(b)(3).

F. CONCLUSION

Based on the foregoing facts and authorities, Ms. Witherrite respectfully urges this Court to accept her petition for review, reverse her convictions, and dismiss the charges.

DATED this 6th day of January, 2015.

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CERTIFICATE OF SERVICE

I certify that on January 6 , 2015, I served a copy of the petition for review 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.

Kenneth H. Kato

APPENDIX

FILED
DEC. 9, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JOAN P. WITHERRITE, Appellant.	)	No. 31756-1-III PUBLISHED OPINION

KORSMO, J. — Joan Witherrite challenges her three convictions for violating the Uniform Controlled Substances Act, chapter 69.50 RCW, arguing that she did not properly consent to the search of her car because an automobile should be treated in the same manner as a home. The trial court concluded that she gave informed consent to the search. As the record supports that determination and our case law does not support her request for stronger consent warnings, we affirm.

FACTS

A deputy sheriff stopped Ms. Witherrite for a traffic violation and had her perform field sobriety tests. The deputy then received permission to search Ms. Witherrite's car after advising her that at any time she could stop or limit the scope of the search. The deputy did not tell her that she had the right to refuse consent.

The vehicle search turned up marijuana, methamphetamine, and drug paraphernalia. The prosecutor ultimately charged the associated crimes for each of those items. She moved to suppress the evidence, arguing that her consent was invalid due to the absence of the warnings required by *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). The trial court disagreed, concluding that *Ferrier* did not extend to vehicles and that Ms. Witherrite had consented to the search.

Ms. Witherrite then submitted to a stipulated facts trial. The court found her guilty as charged and imposed standard range sentence terms. Ms. Witherrite then timely appealed to this court.

ANALYSIS

The sole issue[1] presented by this appeal is Ms. Witherrite's contention that her consent to the search was invalid because it was not the heightened standard required by *Ferrier*. She asks us to extend *Ferrier* to vehicle searches. Since the Washington Supreme Court has expressly declined to extend *Ferrier* outside of the "knock and talk" fact pattern and has distinguished vehicles from homes in prior search cases, and we have rejected that argument in a factually similar circumstance, we decline her invitation.

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[1] Appellant does not present any argument that the trial court erred under the traditional totality of the circumstances test that applies to most consent cases. *E.g.*, *State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975). Under that test, the failure to advise of the right to refuse consent is but one factor taken into consideration in deciding voluntariness. *Id.*

In *Ferrier*, the Washington Supreme Court faced a situation where officers desired to get inside a house to see if they could smell growing marijuana which they suspected was present on the basis of an unsupported tip. 136 Wn.2d at 106-07. The officers did not tell the occupant that she had the ability to refuse consent. *Id.* at 106, 108, 115. After being invited into the home, the officers asked for consent to search the residence. *Id.* at 107-08. A detective explained that this "knock and talk" procedure was used in order to avoid seeking a search warrant. *Id.* at 107. The Washington Supreme Court reversed the conviction, ruling that because the woman had a heightened right of privacy in her home under article I, section 7 of our constitution, officers could not enter a home to seek voluntary consent to search the dwelling without first informing her that she did not need to consent to the entry. *Id.* at 106. The court's analysis repeatedly emphasized the heightened protection given the home under our constitution. *Id.* at 106, 110, 113-16, 118.

The court then adopted the following rule:

> [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.

Id. at 118.

The *Ferrier* court's emphasis on the protection of the home from warrant-evasive tactics was not simply the product of the facts of that case. Since then, the Washington Supreme Court has several times considered whether *Ferrier* governed when officers went to residences for purposes other than gaining entry with intent to obtain consent to search in lieu of obtaining a warrant. In each instance, the court has found that the different purpose in going to the residence took the case outside of the need for *Ferrier* warnings. *See State v. Khounvichai*, 149 Wn.2d 557, 69 P.3d 862 (2003) (*Ferrier* warnings not required where police request entry to a home merely to question or gain information regarding an investigation); *State v. Williams*, 142 Wn.2d 17, 27-28, 11 P.3d 714 (2000) (*Ferrier* warnings not required where police request consent to enter a home to arrest a visitor under a valid warrant); *State v. Bustamante-Davila*, 138 Wn.2d 964, 983 P.2d 590 (1999) (*Ferrier* warnings not required when police and Immigration and Naturalization Service agent gained consensual entry to defendant's home to serve a presumptively valid deportation order).

The Court of Appeals likewise has addressed and resolved *Ferrier* issues by focusing on the purpose for which the officers sought to enter a residence.[2] *E.g.*, *State v. Dodson,* 110 Wn. App. 112, 124, 39 P.3d 324 (*Ferrier* not applicable to officers

[2] This court treated a motel room as the equivalent of a house for *Ferrier* purposes in *State v. Kennedy*, 107 Wn. App. 972, 29 P.3d 746 (2001), *review denied*, 145 Wn.2d 1030 (2002).

looking on rural property for other man suspected in vehicle theft), *review denied*, 147 Wn.2d 1004 (2002); *State v. Johnson*, 104 Wn. App. 489, 505-06, 17 P.3d 3 (2001) (*Ferrier* warnings not necessary when officers went to house with probable cause to arrest suspect); *State v. Leupp*, 96 Wn. App. 324, 333-34, 980 P.2d 765 (1999) (*Ferrier* warnings not applicable when police officers arrived at a residence in response to a 911 call), *review denied*, 139 Wn.2d 1018 (2000).

This history of *Ferrier* application strongly suggests that the case addresses only a segment of house-related searches. It does not suggest that the heightened *Ferrier* warnings are applicable outside of the home.

The Washington Supreme Court has long distinguished houses from vehicles in the search and seizure context. One particularly instructive case is *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2000). There a deputy sheriff stopped a motor home and arrested the driver, Ms. Vrieling. *Id.* at 490-91. A search of the motor home was conducted incident to the arrest. *Id.* at 491. The question before the court was whether the then-existing vehicle search doctrine applied to the search of the house-like vehicle. *Id.* at 492. The court ultimately concluded that when a motor home is used as a vehicle, the vehicle search doctrine applied. *Id.* at 496. Two dissenting justices would have limited the search only to the driver's compartment and protected the living quarters of the motor home. *Id.* at 497 (Johnson, J., dissenting).

While *Vrieling* did not involve a consent search, its distinction between a home and a home-like vehicle for search purposes strongly indicates that the more typical vehicle driven here is not entitled to the protections afforded houses. If a vehicle with living quarters is not treated as a home, a car without those features cannot expect to be treated as home. *Vrieling* thus implies that the heightened search consent standard of *Ferrier* is not applicable to motor vehicles.

In reaching its conclusion, the trial court noted our decision in *State v. Tagas*, 121 Wn. App. 872, 90 P.3d 1088 (2004). That case involved a vehicle stop that led to the occupants needing to be transferred from the scene by the police. *Id.* at 874. The officer would not allow the passenger to carry her purse in the patrol car unless he first searched it. He did not offer her alternatives to the search. She consented to the search and evidence was discovered. *Id.* at 875. On appeal from a conviction, she argued that the *Ferrier* warnings should have been given to her. This court concluded that *Ferrier* did not apply, noting several instances in which the Washington Supreme Court had not required *Ferrier* warnings prior to consent searches at houses. *Id.* at 877-78.

The cited history of *Ferrier* and our court's treatment of the home as most deserving of heightened protection under our constitution leads us to conclude that *Ferrier* warnings need not be given prior to obtaining consent to search a vehicle. While it is undoubtedly best practice to give the full *Ferrier* warnings before any consent search

in order to foreclose arguments such as this one, nothing in our constitution requires those warnings other than in the "knock and talk" situation.

The trial court correctly denied the motion to suppress. The convictions are affirmed.

Korsmo, J.

I CONCUR:

Fearing, J.

LAWRENCE-BERREY, J. (concurring) — Under current law, *Ferrier*[1] warnings are not required for vehicle searches. As an intermediary appellate court, we should be cautious not to grant new rights where our state Supreme Court has not indicated a willingness to expand existing rights. With that said, I am troubled when I see citizens being asked for permission to have their private effects searched where probable cause to search is lacking. Here, the officer knew he lacked probable cause to search the vehicle, he knew that an application for a search warrant would be denied, yet he asked for permission to search. In *Ferrier*, the court noted, "'[w]here the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.'" *State v. Ferrier*, 136 Wn.2d 103, 115, 960 P.2d 927 (1998) (quoting *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989)). I might add, where the police lack authority to obtain a search warrant, we look even less kindly on their searching anyway.

The rights found in our state and federal constitutions must be applied equally to each person. Therefore, if courts are to protect the constitutional rights of *law abiding* citizens, courts must also protect the constitutional rights of *law breaking* citizens. These

[1] *State v. Ferrier*, 136 Wn.2d 103, 115, 960 P.2d 927 (1998).

rights are best protected by courts extending *Ferrier* warnings beyond residential searches. *Ferrier* merely requires law enforcement to advise persons of their rights—the right to refuse, the right to limit, and the right to revoke permission to search. Requiring law enforcement to advise citizens of their rights empowers citizens to knowingly assert their rights instead of unknowingly waive them.

It is consistent with this state's strong emphasis on privacy rights, founded upon article I, section 7 of our state's Constitution, that we extend rather than limit *Ferrier*. Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in *his private affairs, or his home invaded*, without authority of law." (Emphasis added.) I see no basis to limit *Ferrier* to home searches when the constitutional basis for *Ferrier* clearly applies beyond the home.

Lawrence-Berrey, J.

I CONCUR:

Fearing, J.