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NO. 71094-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN STOLTMAN,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

When Fish and Wildlife officer Erik Olson stopped the boat Justin Michael Stoltman was on and suspected that a large pipe valve in the boat had been stolen, he was entitled to ask investigatory questions without providing Miranda[1] warnings. However, when Officer Olson moved Stoltman to the law enforcement vessel, questioned Stoltman twice in isolation, and intended to and did elicit Stoltman's incriminating responses, Officer Olson was required to inform Stoltman of his Miranda rights. His failure to do so requires suppression of Stoltman's incriminating statements.

Officer Olson also lacked probable cause to seize Stoltman's property. Although he suspected that various items in Stoltman's possession were stolen, the items were not immediately apparent as contraband and therefore were not subject to seizure. Mere suspicion of crime is not sufficient; there must be probable cause to seize items in plain view. And, even if Officer Olson had probable cause to seize the items, it was based in part on and thus tainted by Stoltman's unconstitutionally elicited statements. The items seized must be suppressed.

In addition, while Officer Olson's loss of his father during the investigation of this case was tragic and undoubtedly impacted Officer Olson's ability to complete his work, criminal defendants should not face

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

unreasonable and prejudicial preaccusatorial delays based on the health of officers' family members. Due process requires more.

Because the delay in this case prejudiced Stoltman in several ways, and because the trial court should have suppressed Stoltman's statements and items in his possession, this court must reverse Stoltman's convictions and remand with instructions to dismiss this prosecution with prejudice.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting Stoltman's statement that the large pipe valve was already in the boat when he boarded the vessel and that he obtained the seven small red pipe valves for a friend who collected them. These statements were made after Officer Olson exceeded the scope of a Terry[2] stop and after Officer Olson controlled Stoltman's actions such that he was subjected to custodial interrogation that required Miranda warnings.

2. The trial court erred in entering "undisputed fact" (d) on CP 108 and 114 to the extent that it states that Stoltman or co-defendant Hibszki stated they were on a "pleasure cruise" during the early morning hours of July 26, 2010, as the suppression testimony plainly indicated that this statement was made during the early morning hours of July 27, 2010. RP 28.

[2] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

3. The trial court erred in entering "undisputed fact" (o) on CP 110 and 116 to the extent that it states that Stoltman obtained five red metal handles for a friend who collects these handles, as the suppression testimony plainly indicated that Stoltman obtained seven such handles. RP 42.

4. The trial court erred in entering "undisputed fact" (o) on CP 110 and 116 to the extent that it states that Stoltman could not remember the name of this friend, as no such evidence was proffered during the suppression hearing.

5. The trial court erred in entering "undisputed fact" (p) on CP 111 and 117 to the extent that it suggests that Stoltman's entire detention was less than 15 minutes, as the testimony plainly indicated that the detention was approximately 25 minutes in duration. RP 36.

6. The trial court erred in entering conclusion of law on CP 111 that Stoltman's statements were admissible because they were made during the course of a brief Terry stop that did not require Miranda warnings.

7. The trial court erred in entering ¶ 2 on CP 112 admitting the statement that the metal valve was already in the boat when Stoltman boarded the vessel.

8. The trial court erred in entering ¶ 3 on CP 112 determining that Stoltman obtained seven red valve handles for a friend who collects them and that Stoltman could not remember this friend's name.

9. The trial court erred in admitting all physical evidence in this case, as it was not subject to plain view seizure and Officer Olson seized it without probable cause.

10. The trial court erred in entering finding of fact (b) on CP 119-20 that the seizure of the pipe valve and contents of two bags was supported by sufficient probable cause, including the plain view of the valve, conflicting statements by Hibszki and Stoltman concerning where the valve had come from, the observation of the recently cut fittings and pipe and seven red handles, and the confidential informant's statement that Hibszki and Stoltman were out to cut cable to sell it to a scrap metal buyer.

11. The trial court erred in entering conclusion of law (a) on CP 120 that the large metal valve and the contents of the two bags were admissible in the State's case-in-chief.

12. The trial court erred in refusing to dismiss the prosecution against Stoltman based on prejudicial preaccusatorial delay.

13. The trial court erred in entering finding of fact (e) on CP 120 that in balancing the interests of the State against the prejudice to the defendants, the prejudice was insufficient to require dismissal of the charges.

Issues Pertaining to Assignments of Error

1. Does an investigating officer exceed the scope of Terry when he or she physically intrudes on a suspect's liberty for 25 minutes and moves a suspect twice in order to privately question the suspect?

2. May what begins as a permissible Terry stop ripen into a full custodial interrogation when the officer takes actions that render the suspect in custody for practical purposes, and, if so, is the suspect entitled to the full protections prescribed by Miranda?

3. When an investigating officer controls and restricts the physical movement of a suspect and repeatedly questions a suspect to a degree that a reasonable person in the suspect's position would not feel free to leave, has liberty been curtailed to a degree associated with formal arrest and is the suspect in custody?

4. When an investigating officer repeatedly questions a suspect in a manner reasonably likely to elicit incriminating responses, is the suspect subjected to interrogation?

5. When a suspect is in custody and is subjected to interrogation, must officers provide Miranda warnings to protect the suspect's right against self-incrimination?

6. When officers seize items in plain view, must officers have immediately apparent probable cause to believe that the items are evidence of crime?

7. Does mere suspicion that requires further investigation to determine if items seized are evidence of crime constitute immediately apparent knowledge that the seized items are evidence of crime?

8. Even if probable cause exists to seize items, if such probable cause is tainted by unconstitutionally elicited statements, does the tainted probable cause taint the seizure, rendering the seized evidence inadmissible?

9. When an arrest is based on tainted probable cause, must the evidence seized incident to the unlawful arrest be suppressed as fruits of the poisonous tree?

10. When the State cannot prove the offenses charged because all evidence supporting the charges was unconstitutionally obtained and therefore inadmissible, must a defendant's convictions be reversed and must the charges be dismissed with prejudice?

11. When there has been a preaccusatorial delay, must the prosecution be dismissed when the prejudice experienced by the defendant outweighs the State's reasons for the delay?

C. STATEMENT OF THE CASE

1. Charges and motions to suppress

The King County Prosecutor initially charged Stoltman with second degree theft and possession of a controlled substance. CP 1-2. Thereafter, the State amended its charges to include second degree burglary and second degree malicious mischief. CP 29-30. The State amended its information a third time to correct a numbering error in the charged counts. CP 52-53.

Stoltman moved to suppress all of the State's evidence, arguing that his incriminating statements were obtained in violation of Terry and Miranda and that items in his possession were unlawfully seized. CP 38-51. Stoltman also moved for dismissal due to preaccusatorial delay. CP 31-37.

2. Suppression hearing testimony

Officer Olson was the sole witness who testified at the suppression hearing. RP 9-134.

On July 25, 2010 at approximately 9:00 p.m., Officer Olson received a call from a confidential informant, Malcolm Vick, regarding the launch of a vessel under the West Seattle Bridge. RP 14. The two people who launched the vessel stated they were going to drop or retrieve crab pots, in violation of state law. RP 14. Officer Olson arrived at the launch site approximately 40 to 45 minutes after receiving Vick's call and waited. RP 15.

Around 2:30 a.m. on July 26, 2010, Officer Olson noticed a vessel approaching the launch site with two people aboard. RP 15. He noticed that there were no lights or registration affixed to the vessel. RP 15-16. Officer Olson approached the vessel and identified himself as a Fish and Wildlife Officer. RP 17. Officer Olson identified the passengers on the vessel as Stoltman and Tamas Hibszki. RP 16. Officer Olson inquired about Stoltman's and Hibszki's crabbing activities to which they responded that they were not crabbing. RP 18. Hibszki also stated that the vessel belonged to him. RP 19.

Noticing cabling aboard the vessel, Officer Olson also asked Stoltman and Hibszki where they obtained the cable. RP 18. Stoltman and Hibszki stated "they were recycling cabling from abandoned pilings . . . over at Jack Block Park." RP 18. Officer Olson informed Stoltman and Hibszki that they could not recycle cable from pilings because the cable belonged to the Port of Seattle. RP 20, 22. Officer Olson also asked Stoltman and Hibszki to look in their bags containing wire cutters and other tools sticking out, which Stoltman and Hibszki allowed. RP 21. Officer Olson contacted Port of Seattle Police, who arrived in about 15 minutes. RP 22. Port of Seattle Police took the cabling and placed it their patrol car. RP 22. Officer Olson gave Stoltman and Hibszki a warning for not having lights or registration, but released them. RP 22.

The following evening, Officer Olson received another call from Vick stating that the same people were again launching a vessel. RP 23. Vick also stated that Hibszki had offered Vick methamphetamine to watch his car. RP 35, 81. Officer Olson proceeded to call another officer for assistance (Officer Chris Moszeter), obtained a patrol boat, and began patrolling waters near the launch site. RP 24-25. Officer Olson observed pilings near Jack Block Park and noticed that the cabling attached to the pilings did not match the type of cabling seized from Stoltman and Hibszki the night before. RP 24-25.

Around 2:30 a.m. on July 27, 2010, Officer Olson observed faint red lights out on the water following a blip on his radar. RP 25-26, 86. He approached the lights and, after getting closer, saw that it was the same vessel from the previous evening. RP 27. Officer Olson came alongside the vessel and Officer Moszeter made contact, asking Stoltman and Hibszki where they were headed. RP 28. One of the occupants stated that they were "out for a pleasure cruise." RP 28.

Officer Olson immediately observed a large pipe valve sitting in the middle of the boat. RP 29. Officer Moszeter asked to search bags in the possession of Stoltman and Hibszki, which Stoltman and Hibszki permitted. RP 30. The bags contained smaller red valves and brass and copper piping. RP 31. Officer Olson, suspicious because the large pipe valve "looked out

of place," asked Stoltman to board his vessel for questioning. RP 31, 33. Stoltman stated that the pipe valve was on the boat when he and Hibszki launched earlier in the evening. RP 33. During this questioning, Officer Moszeter showed Stoltman the smaller red pipe valves found in the bags and Officer Olson also questioned Stoltman about these smaller valves. RP 34. Stoltman told Officer Olson that he gives those valves to a friend who collects them but could not say where he got them. RP 34-35. Officer Olson returned Stoltman to Hibszki's boat and transferred Hibszki onto the law enforcement vessel. RP 33-34. Hibszki stated that he and Stoltman "had gone up the Duwamish River and picked [the large pipe valve] up from a friend of his, who gave it to him at the First Avenue Bridge." RP 34. Thereafter, Officer Olson returned Hibszki to his vessel and had Stoltman reboard the police vessel. RP 34, 92. Officer Olson informed Stoltman that his statement was inconsistent with Hibszki's, to which Stoltman responded that he did not want to speak to Officer Olson further. RP 34, 93-94.

Following these exchanges, which together took approximately 25 minutes, Officer Olson returned Stoltman to Hibszki's vessel and informed Stoltman and Hibszki that he would be seizing all of the items—the large pipe valve, the smaller valves, and the copper and brass piping—as evidence of theft. RP 36. Officer Olson also issued an infraction for boating safety violations. RP 36. Officer Olson then let Stoltman and Hibszki go. RP 37.

Immediately following his detention of Stoltman and Hibszki, Officer Olson drove his boat up the Duwamish river "looking for a boat that kind of had th[e] coloring or th[e] kind of paint configuration" of the pipe valves. RP 37. No more than 100 yards away, Officer Olson noticed a large freighter with several open hatches that matched the paint. RP 38, 40. Officer Olson proceeded to approach and board the freighter. RP 41.

After looking through the freighter, Officer Olson located a room that was missing a pipe valve that appeared to match the width of the pipe valve he had seized from Stoltman and Hibszki. RP 41. He also located panels and stems from which it appeared the seven smaller valves and piping had been taken. RP 41-42.

Thereafter, Officer Olson left the freighter to retrieve his fingerprint kit from the Elliot Bay Marina. RP 44. He obtained what he believed was a fingerprint that turned out to be a palm print. RP 44. He submitted the palm print to the lab for analysis. RP 44-45.

Some six weeks before trial, the palm print was matched to David Roberts. RP 45. Officer Olson eventually made contact with Roberts, offering him immunity in exchange for being truthful regarding his exchanges with Stoltman and Hibszki. RP 46. Roberts informed Officer Olson that "he had been on that vessel scrapping, as he put it, with . . . Mr.

Hibszki and Mr. Stoltman." RP 46. Roberts later testified at trial. RP 450-90.

On November 23, 2010, Officer Olson located Stoltman. RP 50. Officer Olson placed Stoltman under arrest and found a baggie containing what Stoltman admitted to be heroin on Stoltman's person. RP 50-51.

3. Preaccusatorial delay testimony and argument

Despite the alleged crimes occurring in July 2010 and Stoltman's arrest in November 2010, the State failed to charge Stoltman with any crime until February 2013. CP 1-2. The State's first information only contained charges for theft in the second degree and possession of a controlled substance. CP 1-2. Not until July 12, 2013 was Stoltman informed of the additional charges of burglary in the second degree and malicious mischief in the second degree. CP 29-30.

As with the suppression testimony, Officer Olson was the sole witness to testify regarding the State's delay in bringing charges against Stoltman. Officer Olson testified that his father was diagnosed with terminal brain cancer in June 2010. RP 52. Officer Olson continued to work following the diagnosis until his father suffered a stroke in June 2011. RP 52-53. As a result of his father's stroke, Officer Olson took significant time off work. RP 53. Officer Olson's father eventually died in September 2012. RP 53-54.

Officer Olson testified that as a patrol officer, he was responsible for his own investigations. RP 55. He acknowledged that during the period of his father's illness, his cases went "on the back burner." RP 55. He also indicated that no one else in the Department of Fish and Wildlife could take this case as the Department had 150 officers spread throughout the state and only approximately 12 in King County. RP 56. Officer Olson indicated that all of these officers were "very, very busy." RP 56. In addition, Officer Olson testified that he was unwilling to hand the case over to the Seattle Police Department because he had "had a bad experience with that on one occasion." RP 56. According to Officer Olson, in a previous case he handed to the Seattle Police Department, "they sat on it for a year, so [Officer Olson] took it back and worked it . . . ." RP 56.

During argument on Stoltman's motion to dismiss based on prejudicial preaccusatorial delay, Stoltman identified three specific prejudices suffered as a result of the delay. First, Stoltman indicated that he was unable to accept a misdemeanor plea offer from the State because the statute of limitations on misdemeanors had run by the time of charging. RP 156. Second, Stoltman noted that Vick, Officer Olson's confidential informant, had died, depriving Stoltman of his ability to interview or examine him. RP 156-58. Finally, Stoltman argued that the delay gave the State a technological advantage because, between the arrest and the filing of

charges, the State had upgraded its systems to enable it to perform automated searches of palm prints. RP 156-57.

4. Court's ruling on suppression motions and preaccusatorial delay

The trial court issued written findings of fact and conclusions of law detailing facts that generally conform to the above recitation.[3] CP 108-11, 114-19.

With regard to the CrR 3.5 findings and conclusions, the court concluded that the following statements were admissible: (1) Stoltman's statement that he and Hibszki were on a pleasure cruise; (2) the statement that the metal valve was already in the boat when Stoltman boarded Hibszki's vessel; and (3) the "statement that Stoltman obtained the seven red valve handles for a friend who collects them, but he could not remember the name of this friend." CP 111-12. The court admitted these statements on the basis that they were made during a brief Terry stop during which Miranda warnings were not required. CP 111.

[3] However, as the above Assignments of Error make clear, Stoltman disputes that he or Hibszki stated they were on a "pleasure cruise" during the early morning hours of July 26, 2010. See CP 108, 114. The record is clear that this statement was made during the early morning hours of July 27, 2010, not July 26, 2010. RP 25-26, 28. In addition, the trial court's undisputed facts indicate that Stoltman obtained five red metal handles for a friend but that Stoltman could not remember his friend's name. CP 110, 116. However, the suppression testimony unmistakably indicated there were seven small pipe valve handles, RP 42, and that Stoltman merely "couldn't tell [Officer Olson] where he had gotten them," RP 34-35. Contrary to the court's findings, there was no testimony during the suppression hearing that Stoltman could not remember the name of his friend.

As for the CrR 3.6 findings and conclusions, the trial court determined that the large metal pipe valve recovered from the floor of Hibszki's vessel and the contents of the two bags in Stoltman's and Hibszki's possession were admissible. CP 120. The court deemed this evidence admissible because it found Officer Olson's seizure "supported by sufficient probable cause, including the plain view of the valve on the bottom of Hibszki's boat, the conflicting statements by Hibszki and Stoltman concerning where the valve had come from, and the observation of the freshly-cut fittings and copper pipe and the seven red handles in the bags." RP 119-20. The trial court also determined that probable cause "was further enhanced by the confidential informant who stated that . . . both defendants were going out that night to cut more cable to sell to a scrap metal buyer." CP 120.

With regard to the preaccusatorial delay, the court determined that the "delay in filing charges in this matter caused both defendants prejudice." CP 120. However, the trial court noted that the delay was not caused "deliberately or maliciously by Sgt.[4] Olson." CP 120. Thus, in balancing the "interests of the State against the prejudice to the defendants, the Court concludes that the prejudice suffered by the defendants is not sufficient enough to require a dismissal of these charges." CP 120.

[4] This brief refers to Olson as Officer Olson, as he was not a Department of Fish and Wildlife sergeant at the time of Stoltman's alleged crimes or arrest. RP 23.

5. Conviction and sentence

After trial, the jury returned guilty verdicts on second degree theft, second degree burglary, and unlawful possession of a controlled substance. CP 89, 92, 96; RP 629-31. The jury returned not guilty verdicts on second degree malicious mischief as well as the lesser included charge of third degree malicious mischief. CP 94-95; RP 630.

At sentencing, the trial court declined to impose a first-time offender waiver for which Stoltman was eligible. RP 648-49. The trial court sentenced Stoltman to six months of confinement for the burglary, three months for the theft, and two months for the unlawful possession of a controlled substance, all to be served concurrently. CP 103; RP 649. The court also imposed legal financial obligations totaling $1095.30. CP 102.

Stoltman timely appeals. CP 124.

D. ARGUMENT

1. STOLTMAN WAS INTERROGATED IN POLICE CUSTODY WHICH ENTITLED HIM TO MIRANDA WARNINGS

"[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444. Stoltman was questioned in

police custody when he made incriminating statements to Officer Olson.[5] Officer Olson provided no warnings to protect Stoltman's right against self-incrimination. Accordingly, this court should suppress Stoltman's statements.

The standard of review for the suppression of evidence is mixed. Unchallenged findings are viewed as verities on appeal, "provided there is substantial evidence to support the findings." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Courts "conduct a de novo review of conclusions of law in an order pertaining to a suppression motion." State v. Neeley, 113 Wn. App. 100, 106, 52 P.3d 539 (2002).

a. Officer Olson exceeded the scope of *Terry*

When Officer Olson stopped the boat on which Stoltman was a passenger, it was analogous to an investigatory traffic stop under Terry. Officer Olson, suspicious of seeing Stoltman out on the water for the second night in a row, was entitled to investigate. However, Officer Olson's investigatory stop ripened into full custody when he restricted Stoltman's freedom of movement, moved Stoltman to Officer Olson's vessel, and questioned Stoltman in isolation.

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[5] Stoltman does not challenge the admission of his alleged statement that he was on a "pleasure cruise," as that statement was made before he was in police custody. See RP 28. Stoltman does challenge the admission of Stoltman's statement that the large pipe valve was already on Hibszki's vessel when Stoltman boarded it and the admission of Stoltman's statement that he had the small red valves to give to a friend who collected them but could not say where he got them. See RP 33-35; cf. CP 112.

In Terry, the United States Supreme Court was careful to eschew artificial distinctions between a "stop" and an "arrest" of a person, as such distinctions "seek[] to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen." 392 U.S. at 17. "[A] search [that] is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." Id. at 18. "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" United States v. Brignoni-Ponce, 422 U.S. 873, 881, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975) (quoting Terry, 392 U.S. at 29).

"If, however, the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged." State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003). To detain a person "beyond what the initial stop demands, the officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity." State v. Santacruz, 132 Wn. App. 615, 619, 133 P.3d 484 (2006) (citing State v. Henry, 80 Wn. App. 544, 550, 910 P.2d 1290 (1995); State v. Tijerina, 61 Wn. App. 626, 629, 811 P.2d 241 (1991)). In other words, officers need not ignore even innocuous circumstances that arouse their suspicions. Santacruz, 132 Wn. App. at 619-20.

However, Terry does not permit the police, "based only on articulable suspicion, to take what begins 'as a consensual inquiry in a public place' and escalate it 'into an investigatory procedure in a police interrogation room.'" State v. Lund, 70 Wn. App. 437, 447, 853 P.2d 1379 (1993) (quoting Florida v. Royer, 460 U.S. 491, 503, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)). Indeed, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

The Washington Supreme Court has enunciated three factors to decide whether police intrusion exceeds the permissible scope of Terry: (1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect's liberty; and (3) the length of time the suspect is detained. State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). "Further, the degree of intrusion must also be appropriate to the type of crime under investigation and to the probable dangerousness of the suspect." State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987).

Moreover, in Wheeler, the Washington Supreme Court grappled with whether moving a suspect from the place where the suspect was stopped transforms a Terry stop into a full arrest. 108 Wn.2d at 236. Considering

several authorities that gave conflicting answers to this question, our supreme court opted for the

> middle ground between forbidding any transportation during a Terry stop and allowing it freely: More appealing is the conclusion that because transportation of the suspect even a short distance is more intrusive than a mere stop, it "should be dependent upon knowledge that a crime has been committed" and impermissible when the defendant's conduct was suspicious but "there has not been any report of crime" recently in the vicinity.

Wheeler, 108 Wn.2d at 236-37 (footnotes omitted in original) (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.2, at 26 (Supp. 1986)). Because a burglary had been reported to officers when they stopped Wheeler, the court held that moving Wheeler a short distance did not exceed the scope of Terry. Wheeler, 108 Wn.2d at 237.

In this case, Officer Olson stopped the boat because he recognized it from the previous night and noted that it still operated without the required registration and lights. RP 25-27. Officer Olson also had received another call from his informant that Stoltman and Hibszki launched their boat from the same place to search for more cabling, and this time Hibszki allegedly offered the informant methamphetamine to watch his car. RP 23, 35. Thus, Terry initially permitted Officer Olson to ask Stoltman a moderate number of questions to determine why he was out, why he or Hibszki had not remedied the boating violations, whether or not Stoltman had obtained

additional cable from pilings, and whether there were controlled substances in Stoltman's and Hibszki's possession.

Officer Olson was also permitted to prolong Stoltman's detention beyond this initial scope after the large pipe valve resting in the middle of the boat aroused his suspicions. Given that Officer Olson was aware that Stoltman and Hibszki had been engaged in unlawful activity—removing cable from pilings—the night before, it was not unreasonable for Officer Olson to inquire about or investigate the origin of the pipe valve.

But Officer Olson did more than merely ask Stoltman and Hibszki questions about the pipe valve; he moved them off the vessel and took them to the cabin of the police vessel to be questioned one-on-one. RP 33-34. At this point, Officer Olson exceeded the permissible scope and intensity of a Terry stop.

Analyzing Officer Olson's actions through the three Williams factors, first, the purpose of Officer Olson's Terry stop was to cite Stoltman and Hibszki for boating violations, investigate whether additional cable had been taken off pilings, to ascertain whether Stoltman or Hibszki had methamphetamine, and, based on suspicion at the time of the stop, to inquire about the pipe valve.

Second, the amount of physical intrusion in this case was intense. Officer Olson testified Stoltman was not free to go after the initial stop. RP

92. Officer Olson then proceeded to move Stoltman back and forth between his vessel and the police vessel two times to question Stoltman in isolation. RP 31, 33-34. Furthermore, the degree of Officer Olson's intrusion must be proportionate to the type of crime under investigation and the probable dangerousness of the suspect. Wheeler, 108 Wn.2d at 235. There was no indication that Stoltman presented any danger whatsoever; Officer Olson testified that he was pleasant and cooperative. RP 75. An investigation of potential theft without any perceived threat to officers did not justify the extent of the physical intrusion in this case.

Third, as for the length of Stoltman's detention, Officer Olson indicated it took about 25 minutes.[6] RP 36. While one of the purposes of the stop was to quell Officer Olson's suspicions, spending 25 minutes repeatedly questioning and moving the suspects back and forth between their vessel and the law enforcement vessel was excessive in light of Terry's limited investigative purpose.

Moreover, moving Stoltman to and from the police vessel on two different occasions violated the "middle ground" approach to transportation during a Terry stop that our supreme court adopted in Wheeler, 108 Wn.2d

[6] While the findings of fact indicate that questioning the defendants took less than 15 minutes, CP 111, the length of questioning is not the appropriate measure of the constitutionally acceptable duration of a Terry stop. Rather, it is the length of the detention that counts. See Williams, 102 Wn.2d at 740 (considering "length of time the suspect is detained").

at 236-37. Unlike officers in Wheeler, Officer Olson did not know that a crime had been committed; he was merely suspicious. RP 33 (Officer Olson recounting that the pipe valve "looked out of place," which made him want "to determine whether or not [it] was stolen.") As the Wheeler court indicated, a defendant's suspicious conduct without any report of a crime proscribes moving the suspect from the place of the initial Terry stop. Wheeler, 108 Wn.2d at 237. No crime had been reported to Officer Olson. Moving Stoltman between Hibszki's and the police vessel thus plainly exceeded Terry's parameters. Officer Olson's treatment of Stoltman rendered him in custody for all practical purposes, entitling Stoltman "to the full panoply of protections prescribed by Miranda." Berkemer, 468 U.S. at 440.

b. Officer Olson's questioning of Stoltman constituted custodial interrogation requiring *Miranda* warnings

When Stoltman was removed from Hibszki's vessel and questioned on the police vessel, Stoltman's freedom of action was curtailed to a degree associated with formal arrest. Officer Olson questioned Stoltman in a manner reasonably likely to elicit incriminating responses. Accordingly, Stoltman was subjected to custodial interrogation and entitled to Miranda warnings.

"It is settled that the safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer, 468 U.S. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983) (per curiam)). The question of custody is a mixed question of law and fact: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." Thompson v. Keohane, 516 U.S. 99, 112-13, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). Interrogation "refers . . . to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 110 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (footnotes omitted).

Turning to the factual circumstances surrounding this interrogation, Stoltman was stopped on a vessel late at night by two police officers.[7] RP 25-26, 28. Officers asked to look in Stoltman's and Hibszki's bags. RP 30. Officer Olson transferred Stoltman from the vessel he was on to the law

[7] Officer Olson made clear during testimony that Stoltman and Hibszki were not free to leave. RP 92. It is unclear from the record, however, whether Officer Olson specifically told Stoltman and Hibszki that they were not free to go. In contrast, the previous night, Officer Olson specifically told Stoltman and Hibszki that "they were not free to leave." RP 21.

enforcement vessel. RP 33. Officer Olson questioned Stoltman privately regarding where he had obtained the pipe valve. RP 33. At some point during this questioning, Officer Chris Moszeter joined Officer Olson to present Stoltman with the small red valves, about which Officer Olson questioned Stoltman further. RP 34, 94. After Stoltman answered Officer Olson's questions, he was returned to Hibszki's boat and waited there while Officer Olson questioned Hibszki. RP 33-34. After questioning Hibszki, Officer Olson then returned Hibszki to Hibszki's boat and moved Stoltman back onto the patrol boat. RP 34. Officer Olson then informed Stoltman that his statement was inconsistent with Hibszki's. RP 34, 93. At that point, Stoltman stated that he did not wish to speak to Officer Olson further. RP 34, 93-94. According to Officer Olson, the entire detention took about 25 minutes. RP 36.

A reasonable person in Stoltman's circumstances would not have understood that he could terminate Officer Olson's questioning and leave. Following the initial stop, Officer Olson controlled the entirety of Stoltman's movements and actions. His personal effects were searched. He was bounced back and forth between two vessels in open water on Puget Sound. He was asked questions and was never informed that he could refuse to answer. The officer questioning him had no intention of letting him leave. Under such circumstances, Officer Olson's actions curtailed Stoltman's

freedom of action to a degree associated with formal arrest. Based on the complete control Officer Olson exercised over Stoltman during the period in question, a reasonable person in Stoltman's place surely could not have understood that she or he could refuse to talk to Officer Olson and leave the scene. Stoltman was accordingly entitled to receive Miranda warnings to honor his right against self-incrimination.

In addition, Officer Olson intended to elicit incriminating responses through his questioning. He made clear that he was very suspicious about the pipe valve, prompting him to move Stoltman to the patrol boat for questioning. RP 33. Given his suspicions, Officer Olson hoped to obtain inculpatory responses through the questions he asked. After obtaining an inconsistent story from Hibszki, Officer Olson certainly hoped to again elicit incriminating responses when he questioned Stoltman for a second time. Because Officer Olson knew that his questions were reasonably likely to extract inculpatory responses from Stoltman, his questions plainly qualified as interrogation.

When Stoltman was stopped, moved between boats, and questioned repeatedly, a reasonable person in his position would have understood that he or she could not leave. Stoltman was in police custody. When an officer questioned him with the intention of obtaining incriminating evidence, the questioning amounted to interrogation. Because Officer Olson subjected

Stoltman to custodial interrogation, Officer Olson was required to inform Stoltman of his Miranda rights.

What started as a permissible Terry stop quickly ripened into a full custodial interrogation. Suspects subjected to custodial interrogation must be informed of their Fifth Amendment right against self-incrimination. Because Officer Olson failed to so inform Stoltman as prescribed by Miranda, Stoltman's statements must be suppressed.

2. OFFICER OLSON IMPROPERLY SEIZED ITEMS IN STOLTMAN'S POSSESSION, AS THE ITEMS WERE NOT IMMEDIATELY APPARENT AS CONTRABAND

A plain view seizure requires (1) prior justification for police intrusion by a warrant or a recognized exception to the warrant requirement and (2) immediate knowledge by police that they have evidence before them.[8] Coolidge v. New Hampshire, 403 U.S. 443, 464-71, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). Objects are immediately apparent as evidence of crime when police can reasonably conclude that they have contraband before them on the basis of all surrounding circumstances, including officer experience. Lair, 95

[8] Previously, the plain view doctrine also required inadvertent discovery of the evidence. Coolidge v. New Hampshire, 403 U.S. 443, 469-71, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). However, the United States and Washington Supreme Courts have abandoned the inadvertent discovery prong of the doctrine. Horton v. California, 496 U.S. 128, 130, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); State v. Hudson, 124 Wn.2d 107, 114 n.1, 874 P.2d 160 (1994). In addition, article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution provide equivalent protection in this context. State v. O'Neill, 148 Wn.2d 564, 582, 62 P.3d 489 (2003).

Wn.2d at 716; State v. Higgs, 177 Wn. App. 414, 311 P.3d 1266, 1276 (2013); State v. Cotten, 75 Wn. App. 669, 683, 879 P.2d 971 (1994). "To satisfy the immediate recognition prong of the 'plain view' test, prosecutors must prove the officer had probable cause to believe the item was contraband." State v. Tzintzun-Jimenez, 72 Wn. App. 852, 857, 866 P.2d 667 (1994) (citing Arizona v. Hicks, 480 U.S. 321, 325, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987)). The plain view doctrine "may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." Coolidge, 403 U.S. at 466.

In this case, Officer Olson seized a large pipe valve, several smaller pipe valves, and cut piping from Stoltman and used the seized items to confirm his suspicions by setting off to determine from where the items came. But the items seized were not immediately apparent as contraband. Therefore, the plain view doctrine did not justify Officer Olson's seizure of the items. The evidence must be suppressed.

a. Given the need to conduct further investigation to determine if the items were stolen, the items seized were not immediately apparent as contraband

At the CrR 3.6. hearing, Officer Olson's testimony was clear that he merely suspected that the items he seized were stolen. He acknowledged that he had no immediate knowledge that the items were contraband, stating, "based on the information I had from my informant, and then also the fact

that this giant valve was sitting in the middle of this boat that really looked out of place, based on those two bits of information, I wanted to determine whether or not that was stolen." RP 33. That Officer Olson needed "to determine" whether items were contraband plainly signifies that he could not and did not immediately recognize the items as such. Indeed, Officer Olson testified that the sole reason he interviewed Stoltman and Hibszki was to ascertain whether they stole the pipe valve. RP 33, 92. And, at best, Officer Olson could only say he "probably had probable cause" to seize the pipe valve. RP 95. Officer Olson did not immediately recognize the pipe valve as stolen property. The plain view doctrine cannot justify a seizure in these circumstances.

Officer Olson's actions after seizing the items also belie the application of the plain view doctrine. Rather than arrest Stoltman and Hibszki for theft, Officer Olson "immediately broke away . . . . looking for a boat that kind of had th[e] coloring or th[e] kind of paint configuration" that matched the pipe valves he seized. RP 37. This type of exploratory search to figure out where potentially stolen items came from wholly undermines any claim that Officer Olson immediately recognized the pipe valves as stolen property. Only after Officer Olson saw, boarded, and extensively searched through a freighter with matching paint did Olson gain knowledge that the pipe valves he seized came from the freighter. That Officer Olson

had to take off exploring to confirm his suspicions renders the plain view doctrine entirely inapplicable in this case.

Analogous is our supreme court's decision in State v. Murray, 84 Wn.2d 527, 528, 527 P.2d 1303 (1974), in which officers investigated a theft of a local high school. Officers obtained permission to search an apartment specifically to look for "office and video equipment, such as typewriters, calculators, etc." stolen from the high school. Id. at 529. In the course of their search, one officer tipped a portable television set to obtain the serial number and shortly thereafter learned that the television had been stolen not from the high school but from a pharmacy. Id. The court held that the "television was not . . . subject to seizure under the plain view doctrine since the officers did not have immediate apparent knowledge that they had incriminating evidence before them." Id. at 534. The court reasoned, "the police did not know the television set was incriminating until *after* the serial numbers had been checked with police headquarters." Id. (emphasis added). Moreover, the Murray court rejected as "pure speculation" an officer's testimony that "he thought the television set was more than likely stolen since the defendant was apparently unemployed at the time and could probably not afford a television set." Id. at 534-35.

Similarly, in State v. Keefe, 13 Wn. App. 829, 829, 537 P.2d 795 (1975), officers searched a house for a gun that had been stolen in a burglary.

Prior to arriving at the residence, officers discussed the possibility that Keefe was involved in a forgery ring in which a particular typewriter was used. Id. at 830. During the course of the officers' search, one officer turned on a typewriter in the home and took type samples. Id. Using these samples, officers "concluded that it was [Keefe's typewriter] that had produced the forged documents under investigation" and thereafter obtained a warrant to seize the typewriter. Id. at 830-31. The court began its analysis by recognizing that the officer's "view of the typewriter in no way could have established . . . that it had produced forged documents" and that "[t]he most that can be said for the officer's view of the typewriter . . . is that an item of [p]ossible evidentiary value came within the officer's 'plain view.'" Id. at 832-33. The court held that the plain view doctrine did not apply because the officer "did not have immediate knowledge that he had evidence before him. He could not have such knowledge without the type samples; and without such knowledge he had no legal right to carry the search further." Id. at 833.

As in Keefe and Murray, Officer Olson did not immediately know that the pipe valves in Stoltman's possession were stolen, but merely suspected they were. As Murray and Keefe make clear, actual and immediate knowledge is required under the plain view doctrine. Moreover, the fact that Officer Olson had information that Stoltman had been involved

in past criminal activity is not dispositive. Officers in Keefe had similar information regarding Keefe's involvement in a forgery ring, yet the Keefe court held,

> Since knowledge that it was in fact the machine which produced the forged instruments could not be known until samples of its . . . letters had been taken, the portion of the search which extended to the taking of such samples . . . was entirely unjustified and without legal sanction.

Keefe, 13 Wn. App. at 835.

This court should follow the sound reasoning in Keefe and Murray. Officer Olson did not have knowledge that the pipe valves were contraband at the time he viewed the pipe valves and could not make that determination until *after* he seized them and conducted further investigation. That Officer Olson was especially suspicious because of Stoltman's prior activities is of no moment, as he still was unable to immediately identify the pipe valves as stolen property. The plain view doctrine has no application in this case.

b. Even if probable cause existed, it was based upon unconstitutionally elicited statements

Even if Officer Olson had probable cause to seize the items, the probable cause was based on the inconsistent statements he obtained from interrogating Hibszki and Stoltman. Because, as discussed above, these statements were elicited in violation of Miranda, they tainted any probable cause that existed.

Officer Olson testified that after he interrogated Stoltman for the second time, he put Stoltman back on Hibszki's vessel and "told both the subjects that we were going to be seizing all their, this stuff that was found as evidence of theft." RP 36. Officer Olson then immediately let the defendants go and proceeded to search for the origin of the pipe valves and other items. RP 37. Officer Olson also indicated that he believed that Stoltman and Hibszki had stolen the items, stating, "I didn't know which one was lying really, because I knew there was a lie there, but I didn't know which one was telling, if there was one [of] them telling the truth, I didn't know." RP 95. Before obtaining the conflicting statement from Hibszki, Officer Olson said that he had no reason to doubt that Stoltman was telling the truth. RP 92-93. Thus, when Officer Olson made his decision to seize the items, it was based on the conflicting statements given by Stoltman and Hibszki.

When probable cause depends on information gained from unlawful police activity, the evidence seized is tainted and therefore inadmissible. State v. Ridgway, 57 Wn. App. 915, 920, 790 P.2d 1263 (1990) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). Here, assuming for the sake of argument that Officer Olson had probable cause to seize the items in Stoltman's and Hibszki's possession, that probable cause was entirely dependent on the fact that Stoltman and

Hibszki had given inconsistent statements about where the items came from. These statements were obtained in violation of Miranda. Accordingly, even if Officer Olson had probable cause to seize the items, the evidence seized was tainted and inadmissible.

3. THIS PROSECUTION MUST BE DISMISSED BECAUSE ALL EVIDENCE OBTAINED AGAINST STOLTMAN, INCLUDING HEROIN FOUND AT THE TIME OF HIS ARREST, IS TAINTED AND MUST BE SUPPRESSED

Without the evidence unconstitutionally seized or the statements unconstitutionally elicited, the State cannot prove every element of second degree burglary or second degree theft. Indeed, following the chain of tainted evidence, the unconstitutionally elicited statements led to the unlawful seizure of the items. Officer Olson was able to take the unlawfully seized items and match the paint on the pipe valve to the freighter; without having the paint from the pipe valve in front of him to compare, he would not have been able to determine that the items came from the freighter. See RP 37 (Officer Olson's testimony that the pipe valve was "painted a certain white that was kind of unique" and that he was "looking for a boat that kind of had that coloring or that kind of paint configuration"). Without locating the freighter, Officer Olson would not have been able to determine a crime had been committed at all. In such circumstances, this court must reverse Stoltman's convictions and remand for dismissal of the charges with

prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997) (concluding dismissal appropriate where unlawfully obtained evidence forms the sole basis for the charge).

The heroin seized in Stoltman's possession was also fruit of the poisonous tree and must be suppressed. Tainted items and statements formed the sole basis for probable cause supporting Stoltman's arrest, as the arrest was for theft. RP 50. If probable cause is based on illegally obtained information, courts look to whether otherwise sufficient facts establish probable cause independent of the illegally obtained evidence. Wong Sun, 371 U.S. at 484-85, 487-88; State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990); Ridgway, 57 Wn. App. at 920. Without the statements and the items that Officer Olson seized, Officer Olson would not have had any independent, untainted probable cause to support his arrest of Stoltman for theft. Because Stoltman's arrest was entirely based on illegally obtained evidence and because there were not otherwise sufficient and independently obtained facts to establish probable cause for an arrest for theft, the heroin found from the search of Stoltman incident to arrest must be suppressed as fruit of the poisonous tree. Brown v. Illinois, 422 U.S. 590, 604-05, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). This court must accordingly also reverse Stoltman's conviction for unlawful possession of heroin and remand for dismissal of the prosecution with prejudice. Armenta, 134 Wn.2d at 17-18.

4. THE PREACCUSATORIAL DELAY VIOLATED STOLTMAN'S DUE PROCESS RIGHTS

Despite alleged crimes committed in July 2010 and Stoltman's arrest in November 2010, RP 14-15, 23, 25, 103; CP 1-2, 4-5, 10, the State did not file its initial charges against Stoltman until February 19, 2013, CP 1. The State did not file all of its charges against Stoltman until July 12, 2013. CP 29-30. This 31-month preaccusatorial delay prejudiced Stoltman in very concrete ways that affected plea negotiations, preparation of his defense, and the nature and quantity of evidence admitted against him. The delay violated Stoltman's due process rights.

Preaccusatorial delay can result in a violation of due process rights even before expiration of the statute of limitations. United States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). Washington courts employ a three-pronged test "as an analytical tool to assist the court in answering the . . . question of whether a [preaccusatorial] delay has resulted in a due process violation by violating fundamental conceptions of justice." State v. Oppelt, 172 Wn.2d 285, 295, 257 P.3d 653 (2011). First, "the defendant must show actual prejudice from the delay;" second, "if the defendant shows prejudice, the court must determine the reasons for the delay;" and third, "the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would

be violated by allowing prosecution."[9] Id. "Whether due process rights are violated by a preaccusatorial delay is a question [courts] review de novo." Id. at 290.

a. Stoltman was prejudiced by the delay in filing charges

As the trial court properly determined, Stoltman experienced prejudice as a result of the preaccusatorial delay for three primary reasons. RP 205; CP 119-20.

First, the confidential informant, Malcolm Vick, whose information prompted Officer Olson to investigate Stoltman's and Hibszki's activities, died in late 2011. RP 12-13, CP 11. Because of this witness's death, Stoltman could not interview Vick to investigate the veracity of Vick's statements. A defendant's Sixth Amendment right to compulsory process includes the right to interview witnesses in advance of trial. State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Silva, 107 Wn. App. 605, 624, 27 P.3d 663 (2001). Because Vick died more than a year before the State's first information was filed, Stoltman could not interview Vick to prepare his defense. This unquestionably prejudiced Stoltman.

[9] According to the trial court's written ruling, the trial court "balanc[ed] the *interests of the State* against the prejudice to the defendants." CP 120 (emphasis added). The State's interest was not the proper consideration to be balanced under the preaccusatorial delay inquiry, as Oppelt made quite clear. See 172 Wn.2d at 294-95 & n.7 (commenting that "the State's interest" is imprecise and "problematic because the State's reason for delay is not the same thing as the State's interest in prosecution"). Rather, Oppelt "confirm[ed] that what are meant to be balanced are the *reasons for the delay* and the prejudice to the defendant caused by the delay." Id. at 294 (emphasis added).

Second, in arguments regarding the preaccusatorial delay, defense counsel brought to light that the State was unwilling to continue plea negotiations regarding a possible plea to a misdemeanor because the statute of limitations for a misdemeanor had expired. RP 156; CP 34. That the State was unwilling to negotiate for a plea to a nonfelony offense because its own delay had caused the misdemeanor statute of limitations to run resulted in clear prejudice to Stoltman, who now stands convicted of felonies.

The trial court believed it improper to entertain argument regarding the parties' plea negotiations. RP 173. The trial court nonetheless pointed trial counsel to State v. Zhao, in which the Washington Supreme Court held,

> [A] defendant can plead guilty to amended charges for which there is no factual basis, but *only* if the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole.

157 Wn.2d 188, 200, 137 P.3d 835 (2006). But Zhao does not explicitly permit a plea to a crime whose statute of limitations has run, a point with which the State agreed at trial. See RP 204 ("The problem with Zhao is that it doesn't give us the authority to change the statute of limitations."). Moreover, according to the State, during plea negotiations defense counsel "worked on this issue" and was unable to find "a misdemeanor offense that was not barred by the statute of limitations." RP 204. Thus, even in light of the flexibility Zhao provides to plea negotiations, the State's delay still

prejudiced Stoltman because he was unable to consider a misdemeanor plea in this case.

Third, between the arrest and the charges, the State upgraded its technology, allowing it to perform automated searches for palm print matches. RP 444. Officer Olson had recovered a palm print from the freighter from which the pipe valves were taken, RP 44, but, in 2010, the King County database only allowed automated comparisons of fingerprints, not palm prints, RP 444. After being subpoenaed to testify at trial in 2013, Won Boon Park, a latent fingerprint examiner with the King County Sheriff, contacted the prosecutor to inform him that she had the ability to check palm prints. RP 446. The prosecutor directed Park to search the database for the palm print obtained by Officer Olson, which resulted in a match to David Roberts. RP 447. David Roberts testified at trial that he knew both Stoltman and Hibszki. RP 458. He stated Hibszki had come up with the idea of boarding the vessel to take metal from it. RP 458-59. Roberts also testified that Stoltman took metal from the vessel. RP 462. According to Roberts, the purpose of taking the metal was to sell it to scrap yards. 453-54.

Had the State timely filed charges in this case, it would not have been able to locate Roberts and Roberts never would have testified at trial. The State's delay thus gave it a tactical advantage of locating an adverse witness, which plainly also resulted in prejudice to Stoltman.

b. The State's reasons for delay revolved around Officer Olson's personal life and personal preferences

The State provided two explanations for the preaccusatorial delay in this case. First, Officer Olson testified that his father received a diagnosis of terminal brain cancer in 2010, and suffered a stroke about a year after his diagnosis. RP 52-53. After the stroke, Officer Olson took significant time away from work to spend time with his father. RP 53. Officer Olson's father died in September 2012. RP 53-54. During his father's illness, Officer Olson's "cases went on the back burner." RP 55. Officer Olson testified that he could not have handed the case over to other officers because of heavy workloads of the 150 Department of Fish and Wildlife officers spread throughout the state. RP 55-56. Officer Olson indicated that he did not treat Stoltman's case any differently than his others and that he did not delay to gain any type of advantage. RP 56-57.

Second, Officer Olson indicated that he had "had a bad experience with" handing cases off to the Seattle Police Department. RP 56. He went on to describe a particular case he gave to the Seattle Police Department, which "they sat on . . . for a year," requiring Officer Olson to take the case back. RP 56. Officer Olson's testimony reveals that he could have given the instant case to the Seattle police for processing but chose not to because of prior personal negative experience.

c. Balancing the reasons and the prejudice reveals a violation of fundamental conceptions of justice

In balancing the State's reasons against the prejudice suffered by Stoltman, the severe prejudice outweighs the reasons for the charging delay. While the poor health and eventual death of Officer Olson's father is understandably tragic and made the completion of Officer Olson's work difficult, due process rights should not depend on whether officers' family members are in good or bad health. The delay in this case foreclosed a possible misdemeanor plea and an opportunity to interview and gather information from a material witness. The delay also permitted the State to take advantage of new technology to find an adverse witness. These prejudices cannot be overcome by the fact that a single officer's father was terminally ill.

Moreover, the fact Officer Olson could have transferred this case to the Seattle Police Department severely undermines the validity of the State's reasons for delay. Officer Olson testified that he chose not transfer this case based on his opinion that the Seattle Police Department would do a poor job. One officer's negative opinion of another police department cannot overcome the prejudice caused by the preaccusatorial delay in this case. The fact that Officer Olson could have asked the Seattle Police Department to

take over the investigation and chose not to does not remotely outweigh the prejudice caused by the State's delay.

On balance, the prejudice to Stoltman by having to wait some 31 months before learning of the State's charges heavily outweighs the State's reasons for the preaccusatorial delay. To allow this unacceptably mired prosecution would violate fundamental conceptions of justice. This court must accordingly dismiss this prosecution. See Oppelt, 172 Wn.2d at 295 (framing the question on review as whether or not prosecution should be allowed).

E. CONCLUSION

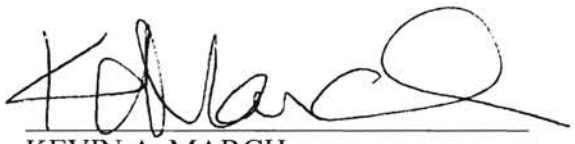
Officer Olson exceeded the scope of Terry when he moved Stoltman aboard the police vessel to be questioned twice in isolation. Officer Olson subjected Stoltman to custodial interrogation yet failed to inform Stoltman of his Miranda rights. In addition, Officer Olson lacked probable cause to seize any items in Stoltman's possession because the items were not immediately apparent as contraband. And even if he had probable cause, it was based on the illegally elicited statements Officer Olson obtained from Stoltman. Stoltman's incriminating statements and items were unconstitutionally obtained and must be suppressed. These constitutional violations tainted the probable cause for Stoltman's arrest and therefore the heroin found as a result of the unlawful arrest must also be suppressed as fruit of the poisonous

tree. Finally, the prejudice caused by the preaccusatorial delay greatly outweighs the State's reasons for the delay. This court must reverse Stoltman's convictions and remand for dismissal of this matter with prejudice.

DATED this 28th day of March, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorney for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71094-0-I
	)	
JUSTIN STOLTMAN,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JUSTIN STOLTMAN
4738 16TH AVE NE #16
SEATTLE, WA 98005

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MARCH 2014.

X Patrick Mayovsky