SUPREME COURT NO. 91257-2

NO. 71094-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN STOLTMAN,

Petitioner.

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

The Honorable Timothy Bradshaw, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Justin Michael Stoltman, the appellant below, asks this court to review the Court of Appeals decision referenced in Section B.

B. COURT OF APPEALS DECISION

Stoltman requests review of the Court of Appeals decision in State v. Stoltman, noted at ___ Wn. App. ___, 2015 WL 82005, No. 71094-0-I (Wash. Ct. App. Jan. 5, 2015).

C. ISSUES PRESENTED FOR REVIEW

1. During a 31-month preaccusatorial delay, a material witness died, the State refused plea negotiations because the misdemeanor statute of limitations had run, and the State's upgraded technology allowed it to find an additional witness. The delay was caused by the terminal illness of a single officer's family member and by this officer's refusal to transfer the case to another police department despite the ability to do so. Does the prejudice caused by the delay outweigh the State's reasons for delay such that the delay violated Stoltman's due process rights?

2a. The Court of Appeals placed the burden on Stoltman to prove his statements were the result of custodial interrogation. Does the State bear the burden of proving the voluntariness of a suspect's statements as a matter of due process?

2b. After an investigating officer initiated a Terry[1] stop, he moved Stoltman from the place of the stop, aboard a police vessel, and twice questioned Stoltman in isolation in the vessel's closed cabin. Did the officer exceed the permissible scope of Terry and render Stoltman in custody, entitling Stoltman to the full protections prescribed by Miranda[2]?

3. An officer seized items in plain view without a warrant based only on suspicion and determined the items were stolen only after additional substantial investigation. Because the seized items were not immediately apparent as contraband, was the plain view doctrine inapplicable, was the seizure unlawful, and must the evidence be suppressed?

4. Is review appropriate under RAP 13.4(b)(1), (2), and (3) because the Court of Appeals decision conflicts with decisions of this court, the United States Supreme Court, and with another Court of Appeals decision as well as because the case involves significant constitutional questions?

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

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

D. STATEMENT OF THE CASE[3]

1. Charges and preaccusatorial delay

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. These charges included second degree theft and possession of a controlled substance. CP 1-2. Not until July 2013 was Stoltman informed of the additional charges of second degree burglary and second degree malicious mischief. CP 29-30.

Department of Fish and Wildlife Officer Erik Olson explained the 31-month delay was caused by time away from work due to his father's cancer diagnosis. RP 52-54. Olson said he could not transfer the case to another officer in his department because they were all "very, very busy." RP 56. Olson testified he could have transferred the case to the Seattle Police Department but refused because he had "had a bad experience with that on one occasion" given that "they sat on [a case] for a year . . . ." RP 56.

Stoltman moved to dismiss, identifying three prejudices he suffered due to the delay: (1) he was unable to accept a misdemeanor plea offer from the State because the statute of limitations had run; (2) Olson's confidential informant died, depriving Stoltman of his ability to interview; and (3)

[3] For a more complete statement of the facts, Stoltman respectfully refers this court to his opening brief. See Br. of Appellant at 7-16.

upgraded technology enabled the State to automate searches for palm prints and locate a witness who testified against Stoltman. CP 31-37; RP 156-58.

The trial court noted the "delay in filing charges in this matter caused [Stoltman] prejudice," but stated that because the delay was not caused "deliberately or maliciously by" Olson, the "prejudice suffered by [Stoltman] is not sufficient enough to require dismissal of these charges." CP 120.

2. Motions to suppress

Stoltman moved to suppress the State's evidence, arguing that his incriminating statements were obtained in violation of Terry and Miranda and that Olson unlawfully seized items in his possession. CP 38-51.

On July 25, 2010, Olson received a report from his informant that Stoltman and codefendant Tamas Hibszki launched Hibszki's vessel to retrieve crab pots after dark. RP 14. Olson investigated, and around 2:30 a.m. on July 26, 2010 noticed a vessel approaching. RP 15-17. Olson noticed cable aboard the vessel. RP 18. Stoltman and Hibszki said "they were recycling cabling from abandoned pilings." RP 18. Olson told them they could not take the cable from pilings, seized the cable, and issued a warning for not having required vessel lights or registration. RP 20-22.

The following evening, the informant reported Stoltman and Hibszki were again launching a vessel and that Hibszki had offered methamphetamine to watch his car. RP 23, 35, 81. Olson called another

officer (Chris Moszeter) for backup and began patrolling nearby waters. RP 24-25.

Around 2:30 a.m. on July 27, 2010, Olson saw Stoltman and Hibszki aboard the same vessel and observed a large pipe valve in the boat. RP 29. Olson asked to search bags aboard the vessel and asked Stoltman to board the police vessel for questioning regarding the large pipe valve and other smaller valves. RP 30-31, 33-34. Stoltman said the large valve was on the vessel when he boarded it and he would give the smaller valves to a friend. RP 33-35. Olson returned Stoltman to Hibszki's vessel and then questioned Hibszki, who stated he and Stoltman had picked the valve up from a friend near the First Avenue Bridge. RP 34. Olson returned Hibszki to his vessel and moved Stoltman back aboard the police vessel. RP 34, 92. Olson told Stoltman his statements did not match Hibszki's and Stoltman then said he did not wish to speak to Olson further. RP 34, 93-94. Olson then seized the large pipe valve, smaller valves, and copper and brass piping as evidence of theft. RP 36. He then let Stoltman and Hibszki go. RP 37.

Immediately following Stoltman's detention, Olson went up the Duwamish River looking for a boat that matched the items he had seized. RP 37. He noticed a large freighter matching the paint and boarded it. RP 38, 40-41. After looking through the freighter, Olson located a room where it appeared the various valves and piping had been. RP 41-42.

Olson retrieved a palm print from the freighter, which was matched to David Roberts six weeks before trial. RP 45. Olson then located Roberts and Roberts testified against Stoltman at trial. RP 46, 450-90.

In November 2010, Olson arrested Stoltman and found a baggie containing heroin on Stoltman's person. RP 50-51.

The trial court admitted Stoltman's various statements, ruling they were made during a Terry stop that did not require Miranda warnings.[4] CP 111. The trial court also admitted the evidence Olson seized under the plain view exception to the warrant requirement. CP 120; RP 119-20.

3. Convictions, sentence, and appeal

The jury found Stoltman guilty of second degree theft, second degree burglary, and unlawful possession of a controlled substance, but acquitted Stoltman of second and third degree malicious mischief. CP 89, 92, 94-96; RP 629-31. The trial court imposed concurrent sentences of six months for the burglary, three months for the theft, and two months for the unlawful possession. CP 103, RP 649. Stoltman appealed. CP 124.

The Court of Appeals ruled the prejudice caused by the preaccusatorial delay did not result in a due process violation because 31-month delays due to family members' illnesses were routine. Stoltman, slip op. at 13-18. The Court of Appeals did not once acknowledge Olson's

[4] Stoltman disputes the content of these alleged statements. Br. of Appellant at 2-3, 14.

refusal to transfer the case to another police department in its analysis. Division One also ruled Olson did not exceed the scope of Terry, Miranda warnings were not required, and all Stoltman's statements were properly admitted. Stoltman, slip op. at 4-9. As for the seizure, the court held Olson had probable cause for a plain view seizure, basing its determination mostly on Stoltman's incriminating statements. Id. at 11-12.

E. ARGUMENT

1. THE PREACCUSATORIAL DELAY VIOLATED STOLTMAN'S DUE PROCESS RIGHTS, CALLING FOR THIS COURT'S REVIEW UNDER RAP 13.4(b)(3)

Under State v. Oppelt, 172 Wn.2d 285, 295, 257 P.3d 653 (2011), this court uses a three-pronged test to examine whether a preaccusatorial delay results in a due process violation: (1) "the defendant must show actual prejudice from the delay;" (2) "if the defendant shows prejudice, the court must determine the reasons for the delay;" and (3) "the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution." On balance, the preaccusatorial delay violated Stoltman's due process rights. This court should review this constitutional question under RAP 13.4(b)(3).

a. Stoltman was severely prejudiced by the delay

The scepter of prosecution hung over Stoltman for 31 months, prejudicing Stoltman in three significant ways.

First, the State's informant died, depriving Stoltman of an opportunity to interview the informant and challenge his veracity. CP 11; RP 12-13. Criminal defendants have a right to compulsory process, including the right to interview witnesses in advance of trial. State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). The Court of Appeals properly acknowledged that the loss of this right prejudiced Stoltman.[5] Stoltman, slip op. at 16.

Second, the State was unwilling to continue negotiations for a misdemeanor plea because the statute of limitations for misdemeanors had run. CP 34; RP 156. The Court of Appeals held this was not prejudicial because defendants "do not have a right to plead guilty to lesser offenses." Stoltman, slip op. at 17. But the record establishes that State appeared very willing to entertain a misdemeanor plea and would have done so but for the statute of limitations. See RP 204 (prosecutor lamenting that counsel did not find a misdemeanor "that was not barred by the statute of limitations").[6] The right to counsel in pretrial proceedings also includes counsel's duty to reach a favorable resolution, which frequently consists of negotiating a plea to a

[5] The Court of Appeals, however, suggested this prejudice was only slight because Stoltman did "not point to any specific information that the witness would have provided to assist in his defense." Stoltman, slip op. at 16. This Catch-22 overlooks that the precise purpose of pretrial investigation is to gather such "specific information."

[6] This occurred before the parties had the benefit of State v. Peltier, 181 Wn.2d 290, 297, 332 P.3d 457 (2014), which clarified that defendants may waive statutes of limitations.

lesser charge. The inability to negotiate for a misdemeanor plea plainly prejudiced Stoltman.

Third, the State put its delay to technological use by obtaining the ability to perform automated searches for palm print matches during the delay period and thereby locating an adverse witness who testified against Stoltman at trial. RP 44, 444, 453-54, 458-59, 462. The Court of Appeals refused to consider this because Stoltman cited no "authority indicating that technological advances during a preaccusatorial delay prejudice the defendant." Stoltman, slip op. at 18. Stoltman is not aware of any rule, and the Court of Appeals cited none, that allows courts to disregard litigants' arguments simply because there is no controlling authority. As a matter of common sense, the State gaining a technological advantage through its delay—allowing it to locate another adverse witness—was prejudicial.

The little authority that exists regarding technological advancement in delay cases supports Stoltman's position. In State v. Walls, 96 Ohio St. 3d 437, 775 N.E.2d 829, 833, 846 (2002), and People v. Nelson, 43 Cal. 4th 1242, 78 Cal. Rptr. 3d 69, 185 P.3d 49, 81 (2008), the Ohio and California Supreme Courts considered 13- and 26-year-old cases where technological advancements made it possible to locate and charge Walls and Nelson. Both courts rejected preaccusatorial delay claims because "upon receiving the new . . . evidence, the state proceeded diligently to initiate proceedings . . . ."

Walls, 775 N.Ed.2d at 846; accord Nelson, 185 P.3d at 81. These cases show the State should be expected to promptly proceed with charging when it takes advantage of technological advancement.

The State did not act promptly here. This case differs from Walls and Nelson because the State had sufficient evidence to proceed against Stoltman at the time of arrest. However, the State upgraded its technology in 2011, and despite being able to test the palm print then, it did not. RP 444, 446. Nor did the State initiate proceedings against Stoltman until two years after the new technology came online. CP 1-2. Thus, under Walls and Nelson, the State's tactical advantage was prejudicial because the State did not promptly proceed against Stoltman after the new technology became available. The State's delay significantly prejudiced Stoltman.

b. The personal life and personal opinions of a single police officer cannot justify a 31-month delay

The State offered two reasons for its delay. First, Olson's "cases went on the back burner" given his father's terminal illness. RP 52-55. Second, Olson refused to transfer the case to the Seattle Police Department because he felt that department took too long to process cases. RP 56.

The Court of Appeals stated "the delay in this case has been characterized as 'normal routine' in the cases," citing one case, State v. Alvin, 109 Wn.2d 602, 606, 746 P.2d 807 (1987). Stoltman, slip op. at 17.

But Alvin involved only one claim of prejudice, which was Alvin's loss of juvenile court jurisdiction due to reaching the age of majority during a five-month delay period. 109 Wn.2d at 603-04. Alvin is readily distinguishable, both in terms of short delay period and the minimal prejudice suffered, and does not control.

In addition, while Alvin stated "sick leave, compensation time, vacations, and training courses are normal routine," id., it did not address lengthy delays due to a family member's prolonged illness. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue."). Having a dying parent is unfortunate, but it is not routine. And it is a far cry from commonplace vacation and sick days to which this court was referring in Alvin. The level of process due criminal defendants should not depend on the health of a single officer's family member, especially when cases might, as here, be subjected to delays spanning years rather than months.

The Court of Appeals drew a distinction between intentional delays and negligent delays, correctly stating, "negligent delay requires greater prejudice to violate due process." Stoltman, slip op. at 14 (citing Oppelt, 172 Wn.2d at 295). The Court of Appeals then treated this case as a negligent delay case. Stoltman, slip op. at 16. But the Court of Appeals failed to

acknowledge that Olson could have transferred this case to another police department but chose not to because, ironically, it had "sat on" one of his previous cases for a year. RP 56; Br. of Appellant at 40-42; Reply Br. at 7-8. While Stoltman does not argue the State's delay was intentional to gain the upper hand, Olson's choice not to transfer the case for timely processing is certainly more than simple negligence. It was at least reckless: Olson knew the delay might cause prejudice and disregarded this possibility based solely on his personal opinion.

On balance, the State's reasons for delay cannot overcome the prejudice Stoltman experienced. The delay foreclosed a misdemeanor plea and the ability to gather information from a material witness. The delay also permitted the State to take advantage of new technology to locate an adverse witness. These significant prejudices cannot be overcome by the fact that a single officer's father was terminally ill. This is especially true when the officer could have transferred the case but did not based on nothing more than a negative personal opinion. The 31-month delay violated Stoltman's due process rights. Pursuant to RAP 13.4(b)(3), Stoltman asks this court to grant review of this significant constitutional question.

2. THE COURT OF APPEALS DECISION THAT OLSON DID NOT EXCEED THE SCOPE OF *TERRY* OR SUBJECT STOLTMAN TO CUSTODIAL INTERROGATION CONFLICTS WITH PRECEDENT OF THIS COURT AND THE UNITED STATES SUPREME COURT, AND ALSO PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION

a. The Court of Appeals misplaced the burden on Stoltman to prove he was not subjected to unlawful custodial interrogation

The Court of Appeals, quoting this court's decision in State v. Post, 118 Wn.2d 596, 607, 826 P.2d 172, 837 P.2d 599 (1992), placed the burden on Stoltman to prove his statements were not given voluntarily: "'The defendant must show some objective facts indicating his or her freedom of movement was restricted.'" Stoltman, slip op. at 5. To the extent this court misplaced the burden of proof and production on criminal defendants at suppression hearings in Post and in State v. Lorenz, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004), these decisions should be overruled because they are incorrect and harmful. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Post and Lorenz are incorrect because they conflict with United States Supreme Court precedent placing the burden of proof on the State to show the voluntariness and admissibility of a criminal defendant's statements. See Lego v. Twomey, 404 U.S. 477, 489, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 12

L. Ed. 2d 908 (1964). Pursuant to RAP 13.4(b)(3), this court should take this opportunity to partially overrule Post and Lorenz and clarify that the burdens of proof and production belong on the State.

This case demonstrates why Post and Lorenz are harmful. The Court of Appeals began its analysis of whether Stoltman was subjected to custodial interrogation with the assumption he was not. Stoltman, slip op. at 4-5. This faulty proposition regarding the burden of proof polluted the Court of Appeals' entire examination of Stoltman's arguments on this issue. Misplacing the burden of proof always distorts the proper analysis.

This court should grant review to overrule Post's, Lorenz's, and the Court of Appeals' unconstitutional burden shifting as a significant question of constitutional law under RAP 13.4(b)(3).

b. The Court of Appeals decision conflicts with this court's decision in *Wheeler*, which prohibits any movement of a suspect during a *Terry* stop unless officers know a crime has been committed

In State v. Wheeler, 108 Wn.2d 230, 236, 737 P.2d 1005 (1987), this court considered whether moving a suspect from the place where the suspect was stopped transforms a Terry stop into a full arrest. This court said yes, adopting a "middle ground" approach:

> 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 (emphasis added) (footnotes omitted in original) (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.2, at 26 (Supp. 1986)).

The State overstepped this middle ground here. Olson stopped the boat Stoltman was on because it still operated without the required registration and lights. RP 25-27. Upon seeing a large pipe valve in the boat as well as receiving another tip from his informant that Stoltman planned to collect more cable off pilings, Olson was suspicious and was entitled to investigate further.[7] RP 23, 33, 35. But Olson did not know a crime had been committed. Nor had any crime been reported in the vicinity. Olson was only suspicious. Thus, under Wheeler, Olson exceeded Terry's scope by moving Stoltman even "only a short distance." Stoltman, slip op. at 8.

The Court of Appeals failed to heed Wheeler's plain holding, stating instead, "we fail to see the analytical significance in the fact that the informant reported that Stoltman intended to commit a crime, rather than reporting a completed crime." Stoltman, slip op. at 9. But Wheeler's language could not be clearer—officers must have actual knowledge a crime

[7] The Court of Appeals stated repeatedly that Stoltman "implicitly concedes" the initial stop was valid. Stoltman, slip op. at 5, 7. Actually, Stoltman explicitly acknowledged Olson's initial stop was valid and argued that Olson exceeded the lawful scope of Terry by moving Stoltman aboard a law enforcement vessel. Br. of Appellant at 20-23.

has been committed before moving a suspect during a Terry stop. The informant's tip that Stoltman might be stealing more cable off pilings did not furnish Olson with knowledge of a crime. Under Wheeler, Olson exceeded the permissible scope of Terry by moving Stoltman twice to Olson's vessel for questioning. The Court of Appeals decision directly conflicts with Wheeler, necessitating this court's review under RAP 13.4(b)(1).

c. The movement of Stoltman to a police vessel twice for questioning would make any reasonable person feel under arrest

To honor the right against self-incrimination, police must inform suspects of their rights to counsel and to remain silent before subjecting them to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Failure to comply with this rule renders a suspect's statements inadmissible at trial. Id. at 444, 476-77. "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 v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (per curiam)).

This case is akin to Florida v. Royer, 460 U.S. 491, 493-94, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), in which officers stopped Royer at an airport for fitting a "drug courier profile" and asked Royer to accompany

them to nearby room. The officers never told Royer he was free to leave. Id. at 501. The Court held Royer was seized for the purposes of the Fourth Amendment and that the circumstances "surely amount[ed] to a show of official authority such that 'a reasonable person would have believed he was not free to leave.'" Id. at 502 (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (plurality opinion)). "As a practical matter, Royer was under arrest." Royer, 460 U.S. at 503.

Here, Stoltman was stopped on a vessel late at night by two police officers, and one of the officers testified Stoltman was not free to leave. RP 25-26, 28, 92. Olson made clear he was suspicious that Stoltman was involved in criminal activity, asking to look through Stoltman's personal effects. RP 30. Olson transferred Stoltman aboard the law enforcement vessel twice for interrogation in a closed room. RP 33-34, 93-94, 239. Stoltman's detention took 25 minutes.[8] RP 36. This was an arrest.

No reasonable person in these circumstances would have understood she or he could terminate Olson's interrogation and leave. Stoltman was moved back and forth between two vessels and into a closed room on Puget

[8] The Court of Appeals disregarded Stoltman's assignment of error to the trial court's factual finding that Stoltman's detention lasted 15 minutes, holding that the finding "is supported by substantial evidence" given that the questioning took "less than 10 minutes." Stoltman, slip op. at 7-8. But 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 Br. of Appellant at 22 n.6 (citing State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984) (considering "length of time the suspect is detained")).

Sound. The officer who questioned him had no intention of letting him leave, and certainly left no impression he could. Under these circumstances, Stoltman's freedom of action was curtailed to a degree associated with formal arrest. He was entitled to receive Miranda warnings. Review of this important constitutional issue is necessary under RAP 13.4(b)(3).

3. THE COURT OF APPEALS' PLAIN VIEW SEIZURE HOLDING CONFLICTS WITH ANOTHER COURT OF APPEALS DECISION AND PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION

A warrantless seizure under the plain view doctrine requires immediate knowledge by police that they have evidence before them. State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). Olson did not have immediate knowledge in this case.

Olson testified a pipe valve in the middle of the boat Stoltman was on looked out of place, and that he "wanted to determine whether or not that was stolen." RP 33. His need to determine whether or not items were stolen can only mean that he did not immediately recognize the items as evidence of crime. And, if Olson truly had probable cause as the Court of Appeals ruled, he would have arrested Stoltman instead of seizing items in Stoltman's possession to search out where they came from. RP 37. The plain view doctrine does not apply. Olson might have been suspicious, but suspicion is not enough to justify a warrantless seizure.

It is telling that neither the State nor the Court of Appeals discussed State v. Keefe, 13 Wn. App. 829, 537 P.2d 795 (1975), despite Stoltman's extensive discussion of the case in his briefing. See Br. of Appellant at 30-32; Reply Br. at 5. In Keefe, officers suspected Keefe was involved in a forgery ring in which a particular typewriter was used but were searching Keefe's house for a gun stolen in a burglary. 13 Wn. App. at 829-30. Officers found a typewriter and took type samples. Id. at 830. The court held the plain view doctrine did not apply because the officer "did not have immediate knowledge 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, Olson did not immediately know items in Stoltman's possession were stolen and had to set off to determine whether they were. RP 37. He did not know he had evidence until *after* he seized items and conducted further extensive investigation.[9] The plain view doctrine thus plainly has no application in this case. This court should grant this petition pursuant to RAP 13.4(b)(2) because the Court of Appeals decision conflicts with Keefe and pursuant to RAP 13.4(b)(3) because the unlawful plain view seizure presents a significant constitutional question.

[9] Moreover, as the Court of Appeals acknowledged, if Officer Olson had probable cause for seizure, it was based on Stoltman's statements. Stoltman, slip op. at 11-12. As discussed, these statements were unlawfully elicited and thus tainted any probable cause that existed.

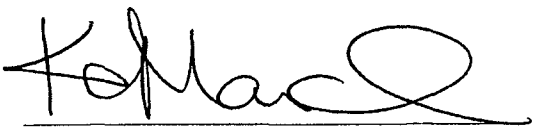
F. CONCLUSION

Based on the preaccusatorial delay that violated his due process rights, the custodial interrogation without Miranda warnings, and the unlawful warrantless seizure of various items in his possession, Stoltman asks this court to grant review, reverse the Court of Appeals, reverse his convictions, and remand for dismissal of this prosecution with prejudice.

DATED this 3d day of February, 2015

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 71094-0-I
	)	
JUSTIN STOLTMAN,	)	
	)	
Petitioner,	)	

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 3RD DAY OF FEBRUARY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** 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 #5
SEATTLE, WA 98005

SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF FEBRUARY 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 03, 2015 - 2:59 PM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 71094-0-I
Respondent,	)	DIVISION ONE
v.	)	
JUSTIN MICHAEL STOLTMAN,	)	UNPUBLISHED
Appellant.	)	FILED: January 5, 2015

Cox, J. — Justin Stoltman appeals his judgment and sentence, claiming that the trial court erred when it denied his motions to suppress. Specifically, he contends that he was subjected to custodial interrogation in violation of Miranda v. Arizona,[1] and that evidence in his case was seized without probable cause. He also argues that the State's 31 month delay in filing charges violated his due process rights. Because none of these arguments are persuasive, we affirm.

In July 2010, an officer with the state Fish and Wildlife agency received information from an informant that two individuals were illegally crabbing at night. These individuals were later identified as Justin Stoltman and Tamas Hibszki, Stoltman's co-defendant.

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

The officer investigated the report, and a few hours later saw Stoltman and Hibszki take a boat into a landing. The officer spoke with Stoltman and Hibszki and saw a large coil of cable in the boat.

The officer asked them where the cable came from, and Hibszki said that they had taken the cable from abandoned pilings to sell as scrap metal. The officer believed that the pilings were property of the Port of Seattle and called Port of Seattle police officers, who came and seized the cable. The officer warned Stoltman and Hibszki that the boat violated state law, and he let them go without then taking further action.

The next night, the same officer received another call from the informant, who had again seen Stoltman and Hibszki. The informant told the officer that Hibszki said that he and Stoltman were going out to get more cable because the officer had seized the cable from them the prior night.

The officer and his partner took a Fish and Wildlife boat and found Stoltman and Hibszki. Stoltman and Hibszki's boat again violated Washington law by failing to have proper lights and a "noise-making system," and by failing to properly display registration. The officer pulled up next to Stoltman and Hibszki and saw a large pipe valve on the floor of their boat.

The officer asked Stoltman to board the Fish and Wildlife vessel, and Stoltman did so. The officer then asked him about the valve. Stoltman told the officer that the large pipe valve had been in the boat when he got on. After this discussion, the officer returned Stoltman to his vessel and asked Hibszki to board

the Fish and Wildlife vessel. After boarding, Hibszki stated that he and Stoltman had picked up the valve from some friends.

The officer then asked Stoltman to re-board the officer's vessel. After Stoltman boarded, the officer confronted Stoltman with the discrepancy in explanations about the pipe valve. Stoltman then stated that he did not want to speak with the officer anymore.

While the officer spoke with Stoltman and Hibszki, his partner obtained permission from them to search their bags and found "freshly cut pieces of copper and brass fittings" and metal handles.

The officer then cited Stoltman and Hibszki for the boating violations and seized their bags and the large valve on the floor of their boat. The officer's subsequent investigation revealed that the items were stolen from a large vessel.

The officer completed his investigation 28 months later. His investigation was delayed because he took time off work to help care for a family member's medical problems. Other members of the Fish and Wildlife division were unable to work on the officer's cases during his absence due to their own caseloads.

In 2013, the State brought charges against Stoltman and Hibszki. This was 31 months after the events giving rise to the charges. Before trial, Stoltman and Hibszki moved under CrR 3.6 to suppress the physical evidence against them, arguing that the officer lacked probable cause when he seized the evidence. Stoltman and Hibszki also moved under CrR 3.5 to suppress their statements made to the officer, arguing that they were obtained in violation of Miranda.

The court denied the motions after a combined CrR 3.5 and CrR 3.6 suppression hearing. A jury found Stoltman and Hibszki guilty.

Stoltman appeals.

MOTIONS TO SUPPRESS

Stoltman argues that the trial court erroneously denied his motion to suppress the statements Stoltman made to the officer and his motion to suppress the physical evidence the officer seized. We hold that the court properly denied these motions.

Trial courts make written findings of fact and conclusions of law when deciding a motion to suppress evidence.[2] Appellate courts review challenged findings of fact for substantial evidence, and determine "whether the findings support the conclusions of law."[3] Conclusions of law are reviewed de novo.[4]

CrR 3.5 Motion

Stoltman argues that the trial court erred when it denied his motion to suppress statements made on board the Fish and Wildlife boat. He contends that the officer obtained these statements in violation of Miranda by interrogating him without informing him of his rights. Specifically, he argues that he was "in custody," because the officer exceeded the scope of an investigatory stop when he questioned Stoltman on board the boat. We disagree.

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[2] CrR 3.5; CrR 3.6.

[3] State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

[4] State v. Ortega, 177 Wn.2d 116, 122, 297 P.3d 57 (2013).

Because Stoltman implicitly concedes that the investigatory stop was proper, the question before us is whether the events that followed gave rise to the warning requirements of Miranda. That, in turn, requires a determination on whether these events elevated the stop to custody.

Miranda prohibits the State from using a defendant's statements resulting from "custodial interrogation" unless the defendant was informed of certain rights.[5] Courts presume that statements made in custody are involuntary and violate the Fifth Amendment unless the defendant received Miranda warnings.[6]

Whether the defendant was in custody is a mixed question of fact and law.[7] "The defendant must show some objective facts indicating his or her freedom of movement was restricted."[8] And the defendant is in custody if "a reasonable person in [the defendant]'s position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest."[9]

When an officer briefly detains a suspect during an investigatory stop, the suspect is not in custody under Miranda.[10] The officer "'may ask a moderate

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[5] Miranda, 384 U.S. at 444.

[6] State v. Heritage, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

[7] See In re Pers. Restraint of Cross, 180 Wn.2d 664, 681 n.7, 327 P.3d 660 (2014).

[8] State v. Post, 118 Wn.2d 596, 607, 826 P.2d 172, amended, 118 Wn.2d 596, 837 P.2d 599 (1992).

[9] Heritage, 152 Wn.2d at 218.

[10] State v. Marcum, 149 Wn. App. 894, 909-10, 205 P.3d 969 (2009).

number of questions . . . to confirm or dispel the officer's suspicions without rendering the suspect "in custody" for the purposes of Miranda.'"[11]

Washington courts analyze the scope of an investigatory stop with three factors in mind: "(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."[12]

In Washington, an investigatory stop may include transporting a suspect a short distance.[13] Although transporting a suspect is "more intrusive than a mere stop," it is permissible as part of an investigatory stop if a crime has been reported.[14]

For example, in State v. Wheeler, a suspect was handcuffed, placed in a police car and transported two blocks for identification following the report of a burglary.[15] The suspect was detained for a total of 5 to 10 minutes.[16] In that case, the supreme court held that the suspect's detention was a part of a permissible investigatory stop rather than the equivalent of a full arrest.[17]

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[11] Id. at 910 (emphasis omitted) (quoting Heritage, 152 Wn.2d at 218).

[12] State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987).

[13] Id. at 236-37.

[14] Id. (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.2, at 26 (Supp. 1986)).

[15] 108 Wn.2d 230, 235, 737 P.2d 1005 (1987).

[16] Id. at 237.

[17] Id. at 236-37.

Here, Stoltman was not in custody under the controlling cases. Stoltman implicitly concedes that the initial stop was a valid investigatory stop. But Stoltman argues that when Stoltman boarded the Fish and Wildlife boat that was adjacent to his boat and was questioned there, the officer exceeded the scope of a valid investigatory stop by placing Stoltman in custody. Thus, the question is whether Stoltman was in custody while on the Fish and Wildlife boat.

As discussed earlier, in an investigatory stop, officers may briefly detain and question a suspect "to confirm or dispel [their] suspicions."[18] Here, that was exactly what the investigating officer did.

The officer stopped Stoltman and Hibszki to investigate the report from the informant that they were going to steal more cable. Based on prior contact with these two individuals, the officer was suspicious about the pipe valve in their possession. The prior night, they had admitted taking property, which the officer believed belonged to the Port of Seattle. Accordingly, the officer decided to question each of them about the valve in their possession. Thus, the stop's investigatory purpose was proper.

Additionally, the stop was brief. The court found that the time spent questioning both Hibszki and Stoltman was less than 15 minutes. Stoltman challenges this finding, but it is supported by substantial evidence. The officer testified that he detained Hibszki and Stoltman for a total of 25 minutes. But he

[18] Marcum, 149 Wn. App. at 910 (emphasis omitted) (quoting Heritage, 152 Wn.2d at 218).

also testified that he spent less than 10 minutes speaking with both Hibszki and Stoltman, and spent some of the 25 minutes writing out a citation.

The fact that the officer questioned Stoltman on the agency boat does not transform the investigatory stop into custody, the equivalent of a full arrest. In this case, the officer twice asked Stoltman if he would speak to him on the agency boat, and both times Stoltman stepped onto the agency boat. There is nothing in this record to support any claim that Stoltman was coerced.

Assuming without deciding that Stoltman's movement to the agency boat was a "physical intrusion upon [his] liberty," it was much less than the intrusion in Wheeler, which the supreme court held was part of an investigatory stop.[19] In that case, the suspect was handcuffed, placed in a police car, and transported two blocks for identification.[20] Here, Stoltman was not handcuffed and boarded the agency boat next to his boat, after he was asked to do so by the officer.

The two boats were next to each other, so Stoltman moved only a short distance for purposes of the questioning, far less than the two blocks under the facts of Wheeler.

Accordingly, this was a valid investigatory stop that never escalated to custody, the equivalent of an arrest. Thus, Miranda warnings were not required. The trial court did not err in admitting Stoltman's statements and denying the motion to suppress them.

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[19] See Wheeler, 108 Wn.2d at 235-37.

[20] Id. at 233.

Stoltman argues that he was in custody because the officer moved him onto the boat, and no crime had been reported. Under Wheeler, transporting a suspect during an investigatory stop is "'impermissible when the defendant's conduct was suspicious but there has not been any report of a crime recently in the vicinity.'"[21]

But the informant had reported that Hibszki and Stoltman intended to commit a crime—taking more cable. Stoltman does not challenge the validity or reliability of the report that the informant made. Thus, we fail to see the analytical significance in the fact that the informant reported that Stoltman intended to commit a crime, rather than reporting a completed crime. Accordingly, this argument is unpersuasive.

CrR 3.6 Motion

Stoltman next argues that the trial court erred by failing to suppress the physical evidence that the officer seized from Stoltman and Hibszki. Specifically, Stoltman argues that the officer lacked probable cause to seize the evidence. He is mistaken.

Courts generally presume that warrantless searches and seizures violate both the federal and state constitutions.[22] But the State may rebut this

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[21] Id. at 237 (internal quotation marks omitted) (quoting 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.2, at 26 (Supp. 1986)).

[22] State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

presumption by showing that a search falls within one of the narrow exceptions to the warrant requirement.[23]

One exception to the warrant requirement is the plain view doctrine. "'A plain view search' occurs when law enforcement officers '(1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize the evidence they see is associated with criminal activity.'"[24]

Courts consider "both the prior information known to police and the surrounding circumstances when evaluating whether items were immediately apparent as evidence."[25] For example, officers properly searched and seized stolen radio equipment when they had already found stolen property on the premises, knew the house belonged to a convicted felon, and the amount of radio equipment was "unusually large."[26]

Under the plain view doctrine, officers do not need to be certain that the item is associated with criminal activity—probable cause that the item is evidence is sufficient.[27]

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[23] State v. Day, 161 Wn.2d 889, 893-94, 168 P.3d 1265 (2007).

[24] State v. Ruem, 179 Wn.2d 195, 200, 313 P.3d 1156 (2013) (quoting State v. Hatchie, 161 Wn.2d 390, 395, 166 P.3d 698 (2007)).

[25] State v. Garcia, 140 Wn. App. 609, 625, 166 P.3d 848 (2007).

[26] State v. Legas, 20 Wn. App. 535, 542, 581 P.2d 172 (1978).

[27] State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994).

Here, the court correctly concluded that the officer had probable cause to seize the pipe valve and the other items found in the bag after the officer obtained permission to search the bag. These circumstances and the officer's knowledge about the prior night's events provided probable cause.

The prior night, the officer had caught Stoltman and Hibszki with stolen cable they intended to sell as scrap metal. Additionally, the officer knew that Stoltman and Hibszki told the informant that they were going out to get more cable. And the officer saw a large pipe valve on the floor of Stoltman and Hibszki's boat, which was where the officer had seen the stolen cabling the prior night. The officer observed that the pipe valve "really looked out of place" and "obviously came from a large ship."[28] And the pieces of copper and brass in Stoltman and Hibszki's bags appeared "freshly cut."[29]

Further, Stoltman and Hibszki gave conflicting statements about how they came into possession of the valve when separately questioned. Stoltman stated that he did not know where the valve came from, and that it had been on the boat when he boarded. Hibszki stated that he and Stoltman had gotten the valve from some friends.

Under these circumstances, the officer had probable cause to believe that the pipe valve and other metal fittings were stolen property.

Stoltman argues that the officer lacked probable cause based on the officer's testimony at the suppression hearing. Specifically, he points to a

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[28] Report of Proceedings (Aug. 29, 2013) at 33, 95.

[29] Clerk's Papers at 116.

statement by the officer that he "wanted to determine whether or not [the pipe valve] was stolen."[30] Stoltman argues if the officer needed "to determine" whether the pipe valve was stolen, it was not immediately apparent as evidence.

But the context of the officer's statement shows that it was made regarding his decision to question Stoltman and Hibszki, not his decision to seize the valve. After Stoltman and Hibszki could not convincingly explain how they acquired the valve, the officer had probable cause to believe it was stolen.

Stoltman also points to the officer's statement that he "probably had probable cause."[31] But the court, not the officer, decides whether probable cause existed. Thus, we reject this argument.

Stoltman also argues that this case is analogous to State v. Murray.[32] But Murray is distinguishable from the present case.

In that case, officers had consent to search an apartment for equipment stolen from a school.[33] During the search, an officer saw a portable television.[34] The officers were not looking for the television, because it was not missing from the school.[35] Although "there was nothing unusual about the location of [the television] as to its utility and usability," the officer seized the television to copy its

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[30] Report of Proceedings (Aug. 29, 2013) at 33.

[31] Id. at 95.

[32] 84 Wn.2d. 527, 527 P.2d 1303 (1974).

[33] Murray, 84 Wn.2d at 528-29.

[34] Id. at 529.

[35] Id. at 536.

serial number.[36] Under those circumstances, the officer did not have "immediate knowledge" that the television was evidence of a crime.[37]

Here, in contrast, the pipe valve appeared out of place, and Stoltman and Hibszki made conflicting statements about how they came into possession of it. Additionally, as described earlier, the officer knew not only that Stoltman and Hibszki had stolen scrap metal the night before, but also that they were planning to steal more that night. Thus, the circumstances in this case are distinguishable from the circumstances in Murray.

Stoltman also assigns error to three of the court's factual findings. He argues that the trial court erroneously found that he told the officer that he and Hibszki were on a "pleasure cruise" on July 26, when he actually made the statement on July 27. Stoltman also challenges the finding that the officer found five metal handles in Stoltman's bag, arguing that he actually had seven. Finally, Stoltman alleges that the court erroneously found that, when Stoltman told the officer he was collecting the metal handles for a friend, Stoltman could not remember the name of his friend. These challenged findings are not material to the questions before us. Accordingly, we do not address them any further.

PREACCUSATORIAL DELAY

Stoltman finally argues that the State's delay in filing charges violated his right to due process. We hold there was no violation of his right to due process.

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[36] Id. at 534-35.

[37] Id. at 535.

The State's delay in filing charges may violate due process, even if the charges are filed within the statute of limitations.[38] Washington courts analyze preaccusatorial delay under a three prong test:

> (1) [T]he defendant must show actual prejudice from the delay;
>
> (2) if the defendant shows prejudice, the court must determine the reasons for the delay;
>
> (3) the court must then weigh the reasons and the prejudice to determine whether fundamental conceptions of justice would be violated by allowing prosecution.[39]

This test allows the court to analyze "the underlying question of whether a delay has resulted in a due process violation by violating fundamental conceptions of justice."[40]

The State's preaccusatorial delay does not need to be intentional in order to violate due process.[41] But negligent delay requires greater prejudice to violate due process.[42] Delays caused by "sick leave, compensation time, vacations, and training courses are normal routine . . . [and] are as much a part of the judicial process as investigatory activities."[43]

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[38] United States v. Lovasco, 431 U.S. 783, 789-90, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977); State v. Oppelt, 172 Wn.2d 285, 288-89, 257 P.3d 653 (2011).

[39] Oppelt, 172 Wn.2d at 295.

[40] Id.

[41] Id. at 291-92.

[42] Id. at 292-93.

[43] State v. Alvin, 109 Wn.2d 602, 606, 746 P.2d 807 (1987).

The loss of witness testimony because of a delay does not necessarily violate due process.[44] In State v. Oppelt, the defendant was charged with child molestation.[45] After the alleged molestation, the victim's great-grandmother gave the victim lotion for her genital area, and took the victim to a medical examination, which revealed redness around the genitals.[46]

The State filed charges after a six-year delay.[47] During the delay, the great-grandmother developed a medical condition affecting her memory and could not remember what type of lotion she gave to the victim.[48] The defendant argued that he had been prejudiced, because he could not discover the type of lotion that had been applied, and thus could not determine if the lotion could have caused the redness.[49] The court rejected this argument, because the defendant could still argue that the lotion might have caused the redness.[50]

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[44] See Oppelt, 172 Wn.2d at 296.

[45] 172 Wn.2d 285, 257 P.3d 653 (2011).

[46] Id. at 287.

[47] Id. at 288.

[48] Id. at 296.

[49] Id.

[50] Id.

This court reviews de novo whether preaccusatorial delay violates due process.[51] The court reviews "the entire record to determine prejudice and to balance the delay against the prejudice."[52]

Here, the State's preaccusatorial delay did not violate due process.

We agree with the trial court determination that Stoltman suffered some prejudice. During the State's delay in filing charges, the informant died. Thus, Stoltman was unable to interview the informant.

The court also found that the State's delay was not intentional. The court found that the officer who investigated the case "put all of his investigations on 'the back burner' so that he could care for his father." The officer testified that other officers in his department could not work on his cases due to their workloads.

Here, balancing the prejudice and the reasons for the delay, there was no violation of due process. Because the State's delay was not intentional, Stoltman must show a higher degree of prejudice.

Although Stoltman lost the ability to interview a potential witness, he does not point to any specific information that the witness would have provided to assist in his defense. Instead, Stoltman argues that he was unable to investigate the informant's statements to the officer. But, just as in Oppelt, Stoltman was still free to make an argument. He could have argued that the court should not trust

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[51] State v. McConnell, 178 Wn. App. 592, 605, 315 P.3d 586 (2013), review denied, 180 Wn.2d 1015 (2014).

[52] Oppelt, 172 Wn.2d at 290.

the informant's statements. And Stoltman was able to extensively cross-examine the investigating officer on the informant's criminal history and reliability, which he does not challenge in this appeal.

Additionally, the delay in this case has been characterized as "normal routine" in the cases. Delays caused by "sick leave, compensation time, vacations, and training courses are ***normal routine*** . . . [and] are as much a part of the judicial process as investigatory activities."[53]

Thus, the prejudice to Stoltman was slight, and the State had valid reasons for the delay. Accordingly, we conclude that the delay did not "violat[e] fundamental conceptions of justice."[54]

Stoltman also argues that he was prejudiced because the delay affected his ability to plea bargain. The State was unwilling to allow Stoltman to plead guilty to lesser misdemeanor charges, as the statute of limitations for misdemeanors had already run. But defendants have a right to plead guilty as charged by the State.[55] They do not have a right to plead guilty to lesser offenses.[56] Accordingly, Stoltman's argument is unpersuasive.

Stoltman also argues that he was prejudiced by the State's delay, because the delay allowed the State to "upgrade[] its technology" to search for palm prints. During his investigation, the Fish and Wildlife officer found a partial

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[53] Alvin, 109 Wn.2d at 606 (emphasis added).

[54] Oppelt, 172 Wn.2d at 295.

[55] State v. Bowerman, 115 Wn.2d 794, 799, 802 P.2d 116 (1990).

[56] See id.

palm print on the vessel from which the valve and pipes were removed. In 2010, King County was unable to search for palm prints in its database. In 2013, the State was able to run the palm print through its database, and locate an additional witness.

But Stoltman does not cite to any authority indicating that technological advances during a preaccusatorial delay prejudice the defendant. Accordingly, we need not address this argument any further, as it is unpersuasive.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Spearman, C.J.

Dwyer, J.