FILED
July 31, 2015
Court of Appeals
Division I
State of Washington

73222-6

NO. 73222-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARK SCHILLING,

Appellant.

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

The Honorable Ellen J. Fair, Judge
The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied a defense motion to suppress evidence obtained from the unlawful and prolonged warrantless seizure of a vehicle appellant was driving.

2. The trial court erred when it entered conclusions of law 3, 6, and 7 in its written ruling denying the defense motion to suppress evidence under CrR 3.6.[1]

Issues Pertaining to Assignments of Error

1. Police officers may lawfully seize a vehicle without a warrant if they have probable cause to believe the vehicle was used in the commission of a felony or contains contraband. Thereafter, however, officers are authorized to hold the vehicle only for a period "reasonably needed" to obtain a search warrant and execute it. Where the State failed to establish officers reasonably needed the 5 ½ days they waited to obtain a warrant, did the trial court err in denying the defense motion to suppress all evidence stemming from issuance of that warrant?

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[1] The court's written findings and conclusions are attached to this brief as an appendix.

2. Are several of the trial court's key conclusions entered in support of its ruling contrary to the facts and controlling law?

B. STATEMENT OF THE CASE

The Snohomish County Prosecutor's Office charged Mark Schilling with Possession of a Controlled Substance based on heroin found pursuant to a warrant authorizing the search of a truck Schilling was driving when pulled over in January 2015. CP 67-68.

Schilling filed a CrR 3.6 motion seeking suppression of the drug evidence, arguing police had waited too long between impound of the vehicle and application for the warrant, resulting in an unreasonable warrantless seizure and a violation of his state and federal constitutional rights. CP 55-62. The State opposed the motion. Supp. CP ___ (sub no. 18, State's Response to Defendant's Motion to Suppress Pursuant to CrR 3.6).

One witness – Arlington Police Officer Rory Bolter – testified at the hearing on the motion. 1RP[2] 3. On the afternoon of Wednesday, January 7, 2015, Officer Bolter and his partner located Schilling driving a vehicle on Smokey Point Boulevard and

[2] This brief refers to the verbatim report of proceedings as follows: 1RP – March 5, 2015; 2RP – March 11, 2015.

initiated a traffic stop. 1RP 6-8. Schilling continued to drive until he reached his residence and pulled into the driveway, where he was arrested at about 8:00 p.m. 1RP 8-10, 14.

From outside the vehicle, Officer Bolter looked inside and saw "a pen tube with a melted tip" on the vehicle's center console and concluded it was a device used to smoke heroin. 1RP 9. Based on this evidence of drug paraphernalia, Schilling's past drug-related police contacts, and information Schilling bought and sold drugs from his home, Officer Bolter decided to seal the vehicle with evidence tape, have it impounded, and seek a search warrant to gain access inside. 1RP 10, 13. The vehicle was then towed to the Arlington Police Department impound lot, where it was placed inside a secure building. 1RP 10.

Officer Bolter believed he already had sufficient evidence to obtain a warrant. 1RP 20. Nonetheless, the following day – Thursday, January 8 – he had a K-9 officer visit the impound lot and "apply his K-9 to the vehicle." 1RP 11, 19. The dog signaled the presence of drugs inside. 1RP 11. Bolter testified that, although use of the K-9 was unnecessary to obtain a warrant, it added to the probable cause and provided training work for the dog. 1RP 20.

Officer Bolter did not seek a warrant on January 8. Nor did he seek a warrant on Friday, January 9, although he was on duty both days. He then had three days off (January 10 – 12). 1RP 11-12, 23. Finally, on Tuesday, January 13, Officer Bolter applied for and received a search warrant authorizing both a seizure and a search of the truck. 1RP 11, 23; CP 43-48.

Officer Bolter testified that he did not apply for a warrant on January 7 (the day of the impound) because it was 9:30 or 10:00 p.m. by the time the car arrived at the lot and he did not want to disturb a judge at that hour. 1RP 17-18. Moreover, prosecutors had indicated that warrants for impounded vehicles can wait until business hours the following day. 1RP 17-18. Bolter did not explain why, however, a warrant was not sought the following day, which was Thursday, January 8. 1RP 12. He also conceded he could have obtained a warrant on Friday, January 9, but added that – depending on calls he could have received that day – "that day might not have been the best day." 1RP 12. And, although Officer Bolter explained that other work sometimes takes priority over obtaining search warrants for impounded vehicles, he did not provide any specific information regarding such work the week of January 7. 1RP 12-13.

Officer Bolter testified that it took him 30 minutes or less to fill out the warrant application in Schilling's case. 1RP 22. Obtaining a judge's signature on a warrant can then require an additional hour to hour and half wait at district court. 1RP 22-23. Bolter could not recall the wait in Schilling's case, however. 1RP 23.

Relying largely on State v. Huff, 64 Wn. App. 641, 826 P.2d 698, review denied, 119 Wn.2d 1007, 833 P.2d 387 (1992), which permits warrantless seizure of a vehicle for a period reasonably necessary to obtain a warrant, Schilling argued that Officer Bolter waited an unreasonably long time to obtain a warrant following seizure of the truck, rendering the seizure unconstitutional and requiring suppression of the fruits of the subsequent search. 1RP 25-28; CP 56-57, 60. The State agreed that Huff controlled, but argued the delay was reasonable under the circumstances. 1RP 26-27.

In her oral ruling, the Honorable Ellen Fair found that the delay in this case occupied "a gray area" in terms of reasonableness. 1RP 31. Judge Fair denied the motion to suppress, but added, "I certainly think this is probably dangerously close to exceeding what the courts might find to be reasonable."

1RP 31-32. Judge Fair then entered written findings of fact and conclusions of law. CP 1-4. The written findings include a finding that Officer Bolter was on duty and could have applied for a warrant on January 8th or January 9th. CP 2 (finding 12). Ultimately, however, Judge Fair concluded that 5 ½ days from impound to warrant – even where the warrant could have been obtained days earlier – was reasonable. CP 3 (conclusions 3 and 6).

Schilling waived his right to trial by jury and proceeded by way of a bench trial based on stipulated evidence. 2RP 2-3; CP 20-54. The Honorable George Bowden reviewed the evidence and found Schilling guilty. 2RP 4. Judge Bowden imposed a standard range 60-day sentence. CP 9. Schilling timely filed his Notice of Appeal. CP 5.

C. ARGUMENT

BECAUSE THE STATE DID NOT ESTABLISH THE DELAY BETWEEN IMPOUND AND WARRANT WAS "REASONABLY NEEDED," SHILLING'S RIGHTS WERE VIOLATED AND THE EVIDENCE AGAINST HIM SHOULD HAVE BEEN SUPPRESSED.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution, a warrantless search or seizure is per se unreasonable unless the State demonstrates by clear and convincing evidence the search or

seizure falls within one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Afana, 169 Wn.2d 169, 176-177, 233 P.3d 879 (2010); State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).

"An impoundment, because it involves the government taking of a vehicle into exclusive custody, is a 'seizure' in the literal sense of that term." State v. Reynoso, 41 Wn. App. 113, 116, 702 P.2d 1222 (1985) (citing State v. Davis, 29 Wn. App. 691, 697, 630 P.2d 938, review denied, 96 Wn.2d 1013 (1981)). Police are authorized to seize an automobile if they have probable cause to believe it was used in commission of a felony or contains contraband. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980); Huff, 64 Wn. App. at 650. No warrant is required for this initial seizure because: (1) the "mobility of vehicles makes rigorous enforcement of the warrant requirement impracticable" and (2) individuals have a lesser expectation of privacy in their vehicles as compared to their homes or offices. Houser, 95 Wn.2d at 149 (citing Arkansas v. Sanders, 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979); South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); Cardwell v. Lewis, 417 U.S.

583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974); Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 2d 543 (1925)).

The authority to impound a vehicle without a search warrant should not, however, be confused with the authority to hold that vehicle indefinitely without obtaining a warrant. In the absence of a search warrant, the seizure eventually ripens into an unconstitutional interference with the defendant's possessory rights. Huff, 64 Wn. App. at 648, 650-653.

As this Court recognized in Huff:

> The United States Supreme Court has upheld the warrantless seizure of various kinds of property for the time reasonably necessary to obtain a warrant, provided that the police have probable cause to search. Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1975)(luggage); United States v. Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970)(packages in the mail); Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)(plurality opinion)(an apartment may be secured from the inside even absence exigent circumstances) . . . .

Huff, 64 Wn. App. at 649-650; see also Illinois v. McArthur, 531 U.S. 326, 332, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001) (warrantless two-hour seizure of premises upheld where "no longer than reasonably necessary for the police, acting with due diligence, to obtain the warrant.").

The United States Supreme Court also has addressed the seizure of cars:

> With specific regard to cars, it has held that when an officer develops probable cause to believe that a car which he or she has lawfully stopped contains contraband, it is reasonable under the Fourth Amendment to seize and hold the car for "whatever period is necessary" in order to obtain a search warrant. *Chambers v. Maroney*, 399 U.S. [42, 53, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Texas v. White*, 423 U.S. 1081, 96 S.Ct. 869, 47 L.Ed.2d 91 (1976) (per curiam); *Michigan v. Thomas*, 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982); *United States v. Kimberlin*, 805 F.2d 210 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023, 107 S.Ct. 3270, 97 L.Ed.2d 768 (1987); *see also Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974).

Id. at 650.

Based on this precedent, and consistent Washington cases involving warrantless seizures, this Court in Huff held that:

> when an officer has probable cause to believe that a car contains contraband or evidence of a crime, he or she may seize and hold the car for the time reasonably needed to obtain a search warrant and conduct the subsequent search. . . .

Id. at 653 (emphasis added). The Huff Court anticipated "only a slightly longer infringement on possessory rights" compared to a warrantless vehicle search at the scene. Id. at 651; see also State v. Flores-Moreno, 72 Wn. App. 733, 737, 741, 866 P.2d 648 (45 minutes between vehicle seizure and issuance of warrant

reasonable), review denied, 124 Wn.2d 1009, 879 P.2d 292 (2004). The rule announced in Huff is the pertinent rule in Schilling's case and the rule Officer Bolter violated.

The reasonableness of any particular seizure depends on the particular facts of the case. Id. at 652. The facts are not in dispute in this case. The legal conclusions, however, are, and this Court reviews Judge Fair's legal conclusions de novo. State v. Campbell, 166 Wn. App. 464, 469, 272 P.3d 859 (2011), review denied, 174 Wn.2d 1006, 278 P.3d 1112 (2012).

While Officer Bolter could lawfully seize the truck Schilling was driving, the State failed to demonstrate the 5 ½ days that passed before a warrant was obtained was "reasonably needed." Officer Bolter did not apply for a warrant on January 7 because he did not want to trouble a judge during the evening hours and had been told by prosecutors that it was perfectly acceptable to wait until business hours the following day. Even assuming the reasonableness of that decision, Officer Bolter could not explain why he did not seek a warrant on Thursday, January 8 or Friday, January 9. Indeed, as Judge Fair correctly found, Officer Bolter was on duty and could have applied for the warrant on either one of these days. CP 2 (finding 12). By failing to do so, he ensured the

truck would remain impounded January 8, January 9, January 10, January 11, January 12, and also a portion of January 13 without a warrant authorizing a lawful search or seizure.

Judge Fair concluded there was no case law that "requires officers to immediately put aside other work to apply for a search warrant of an impounded vehicle." CP 3 (conclusion 4). Schilling does not argue for such a rule. The question is one of "reasonable necessity," and the problem for the State in Schilling's case is a failure of proof establishing the delay was reasonably necessary here. Officer Bolter could not articulate any work-related barrier to obtaining a warrant on January 8th or January 9th. See 1RP 12-13; CP 2 (finding 12: "Officer Bolter doesn't recall what other assignments he had on January 8th and 9th that he did not apply for a search warrant.").

Unusual and challenging circumstances may justify a longer delay between seizure and warrant. See United States v. Leeuwen, 397 U.S. at 253. But there were no such circumstances here. Because the State failed to demonstrate that the prolonged warrantless retention of the truck was "reasonably needed" under the facts of this case, Judge Fair erred when she concluded the 5

½ day delay was reasonable and erred when she denied the defense motion to suppress. See CP 3 (conclusions 6 and 7).

Under the Fourth Amendment and article 1, section 7, "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Judge Fair should have suppressed all evidence of the heroin located in the truck, including statements Schilling made about that heroin. See CP 28, 34, 39, 42, 50; Supp. CP ___ (sub no. 24, Stipulation Concerning Controlled Substance). Without this evidence, Schilling could not have been convicted.

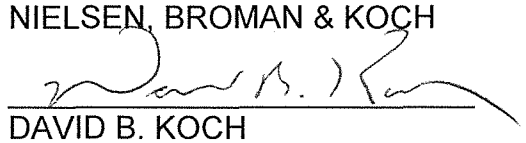
D. CONCLUSION

Because the State failed to justify the delay in obtaining a warrant, Schilling's constitutional rights were violated and the resulting evidence should have been suppressed. His conviction should be reversed.

DATED this 31st day of July, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

APPENDIX

FILED SNOHOMISH COUNTY SUPERIOR COURT

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington, Plaintiff, vs. SCHILLING, MARK DANIEL Defendant.	No. 15-1-00108-1 CERTIFICATE PURSUANT TO CrR 3.6 OF THE CRIMINAL RULES FOR SUPPRESSION HEARING

On March 5, 2015, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. January 7, 2015, Officer Bolter of the Arlington Police department contacted the defendant, Mark Schilling on a traffic stop in Snohomish County, WA.
2. Officer Bolter initiated the traffic stop on Smokey Point Boulevard and the defendant proceeded to his residence after the stop was initiated and parked in his driveway.
3. The defendant was arrested in his driveway on outstanding bench warrants.
4. Officer Rory Bolter observed a pen tube with a melted tip in the center console of the defendant's vehicle.

ORIGINAL

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201-4046
(425) 388-3333 Fax: (425) 388-3572

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5. Based on Officer Bolter's training and experience in investigating controlled substance crimes, the pen tube appeared Officer Bolter to be used to ingest controlled substances into the body.
6. Officer Bolter had information prior to January 7, 2015, that the defendant had a history of using heroin.
7. The vehicle the defendant was driving was impounded based on the melted pen tube and Officer Bolter's knowledge of the defendant's history of use of heroin.
8. The arrest occurred in the evening hours of January 7, 2015.
9. January 8, 2015 a canine officer applied a canine trained to detect and alert to the presence of controlled substances to the vehicle.
10. The canine provided a positive alert to the presence of controlled substances in the defendant's vehicle.
11. Officer Bolter applied for and a judge authorized a search warrant to search the vehicle on January 13, 2015.
12. Officer Bolter was on duty and could have applied for a search warrant on January 8th or 9th, 2015. Officer Bolter doesn't recall what other assignments he had on January 8th and 9th that he did not apply for a search warrant.
13. 5.5 days past between impound of the vehicle and application and execution of the search warrant.
14. The defendant's vehicle was impounded based on probable cause to believe evidence of illegal contraband was in the vehicle. The defendant's vehicle was not impounded based on the impound statute.

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201-4046
(425) 388-3333 Fax: (425) 388-3572

II. CONCLUSIONS OF LAW

1. Based on the officers observations, training, experience and all information available to them at the time of the seizure of the vehicle, they had the constitutional ability to impound the vehicle.
2. The paraphernalia, coupled with the officer's observations and training and experience in this case was sufficient probable cause to believe there was contraband or evidence of a crime in the vehicle. The officers were entitled to seize the vehicle.
3. The Court finds that 5.5 days between impound of the vehicle and application for a search warrant to search the vehicle is reasonable under the case law. There no real guidance as to what is and what is not a reasonable amount of time between impound of the vehicle and application for a search warrant.
4. The court is not aware of any case law that requires officers to immediately put aside other work to apply for a search warrant of an impounded vehicle.
5. Ten (10) days between impound and application ~~would~~ might be unreasonable.
6. In this case 5.5 days is reasonable.
7. The Court denies Defendant's motion to suppress evidence.

DONE IN OPEN COURT THIS 11 day of March, 2015

Judge Ellen J. Fair

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201-4046
(425) 388-3333 Fax: (425) 388-3572

Presented by:

BRIDGET E. CASEY #30459
Deputy Prosecuting Attorney

Copy received this 11 day of March, 2015

NATALIE TARANTINO #24867
Attorney for the Defendant

Snohomish County
Prosecuting Attorney - Criminal Division
3000 Rockefeller Ave., M/S 504
Everett, Washington 98201-4046
(425) 388-3333 Fax: (425) 388-3572

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

STATE OF WASHINGTON/DSHS	)	
Respondent,	)	
v.	)	COA NO. 73222-6-I
MARK SCHILLING,	)	
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 31ST DAY OF JULY, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MARK SCHILLING
4531 195 TH STREET NE
ARLINGTON, WA 98223

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2015.

X Patrick Mayovsky