

FILED
SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
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NO. 97282-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARMEN ROSE LEE,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that the court deny review.

II. STATEMENT OF THE CASE

Carmen Rose Lee was convicted by stipulated bench trial of possession of heroin and methamphetamine with intent to deliver. The Court of Appeals affirmed her conviction. State v. Lee, 7 Wn. App. 2d 692, 435 P.3d 847 (2019). Lee filed a petition for review with this court, attaching the opinion as an appendix (hereinafter Opin). The State was directed to file an answer to the petition for review.

The facts of this case are outlined in the Brief of Respondent filed in the Court of Appeals, and in the Court of Appeals' published decision. The State relies primarily on those two sources for the statement of the case. Most relevant to the narrow issue presented are those facts surrounding Lee's consent to search of the purse she left in a vehicle being searched following a traffic stop.

On July 7, 2015, Lee was the passenger in a car driver by her husband Michael Peterman when it was stopped for a cracked broken windshield and an inoperative brake light. RP 22, 42. A routine check showed Peterman's license was revoked in the first

degree. RP 6, 27. Detective Tilleson arrested Peterman and requested permission to search the vehicle based on it likely being impounded. RP 7, 30, 38-39, 50. After being given Ferrier warnings, Peterman consented to the vehicle search. RP 7, 65.

Tilleson went to the Honda and contacted Lee. Knowing her husband's license was revoked, she had her own license out before Tilleson returned. RP 109-110. Tilleson explained he would be searching the vehicle based on the driver's consent. He asked Lee to step out of the car to facilitate the search and because it was unsafe and impractical for her to sit in the passenger seat as he searched. RP 50-51, 66-67. Lee paced back and forth on the curb, staring back at the Honda. RP 60, 68.

Her information was checked to see if she could drive the vehicle if it was not impounded. RP 44-45, 50. The check showed her license was valid and that she had a prior felony drug conviction. RP 9, 17. Neither Lee nor Peterman was the registered owner of the Honda. RP 26, 111.

When Tilleson began to search the Honda, he asked Lee if anything in the car belonged to her. Lee said the purse on the passenger seat floorboard was hers. RP 68-69. Lee consented to her purse being searched after being advised that she could limit,

refuse, or restrict the search at any time. RP 69, 81. A second officer observed Lee's consent to search and acknowledgement of her right to refuse, limit or restrict the search at any time. Id.

Due to generic safety concerns of being poked by a needle or sharp object, Tilleson asked if there was anything in the purse he need be concerned with. RP 11, 35, 69. Lee first looked worriedly from the purse to Tilleson and back to the purse several times. Id., 32. Lee then stated she had heroin in the purse. RP 12, 69.

Tilleson located 80 grams of heroin and 20 grams of methamphetamine in Lee's purse. RP 12-13. She was advised of her Miranda rights. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct 1602, 16 L.Ed.2d 694 (1966). Lee indicated she understood those rights. RP 13, 14, 71, 89, 92. Lee admitted knowing the drugs were in her purse and described going through them just before the vehicle was stopped. RP 15-16.

Lee moved to suppress the evidence from her purse. She testified that officers physically took her license and retained it until her release from jail. RP 102. She denied consenting to search of her purse and denied saying there were drugs inside it. RP 104-106. Lee conceded using heroin the day of the traffic stop. RP 110. She did not remember if she received Miranda warnings or was

advised she could limit the search of her purse. RP 104-106. Lee said her mental state was “not good” during the search. RP 107.

The trial court determined that Lee voluntarily consented to the search of her purse and that her statements were freely made. After hearing and weighing the testimony of the officers and of Lee, the trial court made a specific finding that Lee’s testimony was “situationally forgetful” and vague on several issues. CP 91.

Following the denial of her suppression motion, Lee chose to proceed to a stipulated bench trial. CP 54-81. The trial court convicted her as charged of possession of a controlled substance with intent to deliver. CP 51-53.

III. ARGUMENT

A. THERE IS NO NEED FOR THIS COURT TO REVIEW THE COURT OF APPEALS DECISION REGARDING LEE’S VOLUNTARY CONSENT TO SEARCH HER PURSE.

1. Review Is Not Warranted Under RAP 13.4(b).

Motions for discretionary review must demonstrate that the case meets one of the grounds set forth in RAP 13.4(b)(1)-(4). Lee asserts this case merits review under RAP 13.4(b) by claiming that the Court of Appeals’ decision affirming her conviction conflicts with prior vehicle passenger cases. Pet. for Rev. 7-17. Lee misreads the Court of Appeals’ decision as involving a departure from

constitutional precedent. The decision here does not conflict with such authority and explicitly cited to a long line of well accepted decisions of this court in determining its result. Opin. at 7.

Lee's petition relies heavily on obfuscating her own consent to search while simultaneously misdirecting from the basis of the Court of Appeals' decision. For example, Lee repeatedly claims officers lacked authority of law to search her purse while leaving out entirely her voluntary consent to that search. Yet the trial court found Lee's validly consented after weighing her testimony against the officers'. CP 91. The trier of fact's credibility determinations are not subject to review. State v. Hill, 123 Wn.2d 641, 646, 870 P.2d 313 (1994).

She also implies the Court of Appeals somehow ambushed the parties with a federal case "sua sponte just before and during oral argument." Pet. at 7-8. This misdirects from the fact the court asked the parties in writing well before argument to be prepared to discuss those specific additional cases as directly relevant to the issues raised. Opin. 7 n.24.

Lee repeats her arguments made below to again obscure her own consent to search. The Court of Appeals thoroughly addressed those arguments when it concluded that her purse was

lawfully searched after she consented. The Court of Appeals decision applied established law to the facts of this case. The State relies on the court's decision and the following argument as the basis for which this court should deny review.

2. Lee Was Not Unlawfully Seized Prior To Giving Consent.

The Court of Appeals noted that Lee conceded the voluntariness of her consent to search and failed to assert any theory of coercion. Opin. 5; Br. of App. 78, 79, 81. Voluntary consent is an exception to the warrant requirement under both the federal and state constitutions. State v. Cantrell, 124 Wn.2d 183, 183, 875 P.2d 1208 (1994). The voluntary consent of one person with common authority to search a vehicle is sufficient to support a search; the independent consent of each occupant present is not required. Id. at 191-192.

Regarding the traffic stop, the Court of Appeals determined, "it is well established that for the duration of a traffic stop...a police officer effectively seizes everyone in the vehicle". Opin. at 6, citing State v. Marcum, 149 Wn. App. 894, 910, 205 P.3d 969 (2009). If the stop is valid then so too is the effective seizure of the vehicle occupants. Id. The stop normally ends when the police no longer need to control the scene and inform the vehicle occupants they

are free to leave. Arizona v. Johnson, 555 U.S. 323, 333, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009); Brendlin v. California, 551 U.S. 249, 255, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968).

The record does not support the assertions of Lee's petition, like claiming the Court of Appeals approved of freely engaging in suspicionless investigations of passengers as long as it doesn't take too long. Pet. 8. Rather, the Court of Appeals decision relied on the long line of Washington authority recognizing Terry stops as an exception to the warrant requirement under Article 1, §7. Opin. 7. These include State v. Mecham, 186 Wn.2d 125, 135-138, 380 P.2d 414 (2016) and State v. Arreola, 176 Wn.2d 284, 292-293, 290 P.3d 983 (2012).

Lee now claims the scope and duration analysis under the state and federal constitutions are different. Pet. 12. Yet at oral argument she acknowledged those Terry standards for scope and duration of a stop were the same whether analyzed under either the state or federal constitutions. Opin. 7-8. The Court of Appeals correctly determined that regarding the validity of a Terry stop, Article 1, §7 generally tracks Fourth Amendment analysis. State v. Z.U.E. 183 Wn.2d 610, 617, 652 P.3d 796 (2015).

The Court Of Appeals direct reliance on this Court's established authority refutes Lee's assertions of a "new" rule conflicting with precedent under RAP 13.4(b). The scope and duration of the stop here evolved from a traffic stop to an arrest of the driver for having a revoked license. The driver consented to search of the vehicle. Lee was told of that consent and asked to exit the car to allow it to be safely searched. Because she indicated the purse or bag inside was hers, her consent was requested before it was searched. These actions were correctly determined to be within the lawful scope and duration of the stop and not to unreasonably extend it. Opin. 8-9.

The Court of Appeals relied on this Court's authority to make these determinations. See State v. Flores, 186 Wn.2d 506, 525, 379 P.3d 104 (2016) (review looks to totality of the circumstances to see if Terry seizure made with authority of law and of reasonable scope and duration); State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (lawful Terry stops are limited in scope and duration to fulfilling investigative purposes of the stop).

Lee here ignores the lawful basis for the stop of the vehicle and valid consent to search given as being lawful authority for the warrantless exception to search her purse. Offices in a traffic stop

are permitted to ask occupants to step away from the vehicle and to leave the vehicle to facilitate a lawful search of it, as occurred here. State v. Rehn, 117 Wn. App. 142, 151, 69 P.3d 379 (2003); Mecham, 186 Wn.2d at 144; Flores 186 Wn.2d at 516. A vehicle stop and arrest in and of itself provides an objective basis for officers to ensure their safety by securing the scene, including ordering passengers in and out of the car as necessary. State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999).

The Court of Appeals decision turned to established state constitutional cases to determine that officers did not exceed the reasonable scope or duration of the expanded traffic stop under the totality of the circumstances here. Opin. 11-12. Despite Lee's attempts to characterize it otherwise, the decision does not conflict with this court's prior decisions but instead applies them correctly.

The Court of Appeals noted that Lee provided no authority supporting her claim that being asked to search her purse rendered her Terry seizure unlawful or exceeded the reasonable scope and duration of the stop. Opin. 11. State authority has suggested that asking a single question unrelated to the stop does not impermissibly prolong the stop. State v. Petit, 160 Wn. App. 716,

720, 251 P.3d 896 (2011); State v. Shuffelen, 150 Wn. App. 244, 257, 208 P.3d 1167 (2009).

The Court of Appeals decision does not conflict with prior constitutional cases and review is not warranted.

3. Because Lee Ignores That Her Consent To Search Was A Valid Exception To The Warrant Requirement, The Cases She Cites Are Distinguishable.

Lee's petition fails to address that consent to search is an exception to the warrant requirement. Her petition fails to state that Lee at trial stipulated to the validity of Peterman's consent to search the vehicle. It further neglects to address her own consent to search her purse having been made after full Ferrier warnings. Only by leaving out the legal context of her consent to search does Lee then compare her case to others analyzing officer interactions with vehicle passengers, none of which involved consent. Pet. 10-12.

Because those cases do not involve consent, they are largely inapposite to the issue raised here. Lee cites Flores, supra to assert that non-arrested companions movement can be directed to control an arrest scene, which is undisputed. Pet. 11. But to engage in further investigative interaction such as a pat down, the individualized Terry standard must be met. Id. Yet Lee here was asked to step out of the car to control the scene of Peterman's

arrest for driving with a revoked license and the accompanying search of the vehicle which he validly consented to. No pat down of Lee or any remotely similar intrusion occurred.

Nor was Lee asked for identification as in cases she now cites like Rankin and Larson. State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004); State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980). Rather, Lee testified that she held out her identification before officers approached her, knowing Peterman's license was revoked and assuming she could drive the car. Her identification was checked solely to see if she could potentially drive the car as an alternative to impound. Contrary to Lee's assertions, the Court of Appeals decision does not conflict in any way with these cases, none of which involved voluntary consent to search a vehicle or an item left behind in the vehicle.

Likewise, Lee's misdirection of the facts and consent here make her reliance on Mendez problematic. State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999). Mendez tried to walk away during a traffic infraction stop and was commanded to stay, with no articulable reason given for the command. Id. at 213. He was physically chased down, arrested, and searched. By contrast here, after driver Peterman was arrested, he gave lawful consent to

search the likely to be impounded vehicle. Passenger Lee was asked to step out solely to facilitate the vehicle search, and not for any investigatory reason. Officers testified to the obvious safety concern of crawling into a vehicle, and trying to search confined spaces prior to impound, with Lee sitting in the passenger seat. RP 50-51, 67. Peterman's consent provided lawful authority to search the vehicle. After Lee left her bag-purse on the floorboard, officer's provided Ferrier warnings and obtained her consent to search that item. No unlawful seizure occurred here, and the factual circumstances are completely different from Mendez.

Similarly, Lee's assertions regarding a Gunwall analysis should be rejected. Pet. 8-9; State v. Gunwall, 106 Wn.2d 54, 729 (1986). The Court of Appeals did not apply a separate federal standard but rather focused on the consent to search which Lee fervently avoids. As previously discussed, the Court of Appeals relied on a long line of Washington cases to analyze the issue of consent and request to search which applied here. Opin. 7. The Court reiterated that at oral argument, Lee acknowledged that the federal and state constitutional standards applied are the same when analyzing Terry scope and duration as here. Id.

Thus the Court's footnote mention of Gunwall simply pointed out that Lee offered no analysis of officers asking a question unrelated to justification for the stop. The Court did not fail to consider Article 1, §7 cases but instead relied on multiple state cases. Lee ignores that at oral argument she acknowledged the state and federal standards under Terry were the same. Opin. 7-8. For these reasons, there was no "new issue" arising pursuant to Article 1, §7 in the context Lee now claims. Pet. 9. The cases Lee relies on are distinguishable for these reasons.

4. The Court Of Appeals Correctly Determined That Spousal Consent To Search A Vehicle Was Not A Manifest Constitutional Error Warranting Review.

Perhaps attempting to deflect her own consent to search of her purse, Lee for the first time on appeal claimed that spousal consent is required before a vehicle may be searched. Appellate review generally precludes matters raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 826, 155 P.3d 125 (2007). Exceptions exist for manifest errors of truly constitutional magnitude which actually prejudiced the defendant. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

Where the record on appeal lacks the facts necessary to decide the claimed error, no actual prejudice is shown and the error

is not manifest. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Such was the case here, where Lee failed to develop any record establishing what authority either party had over the vehicle. Opin. 15. The registered owner was Stacy-Durand-Poe. RP 26, 111. The record was entirely silent as to who was permitted to drive the Honda, or what limitations were placed on the person who presumably borrowed it.

This silence in the record was noted in relation to established authority regarding the existence and scope of the owner's permission as a factor to consider under Article 1, § 7. Opin. 15, citing State v. Vanhollenbeke, 190 Wn.2d 315, 329, 412 P.3d 274 (2017). Contrary to Lee's assertions, the Court of Appeals decision does not conflict with common authority principles, especially with regard to cohabitants of a residence. Pet. at 19, citing State v. Morse, 156 Wn.2d 1, 8, 10-11, 123 P.3d 832 (2005).

Rather, it is Lee's rejection of this Court's decision in Cantrell that conflicts with prior appellate decisions. Cantrell, 124 Wn.2d at 188, citing State v. Leach, 113 Wn.2d 735, 782 P.2d 1035 (1989) (since a person enjoys a lesser expectation of privacy in a vehicle than in an office or home, we decline to extend the Leach rule to vehicle searches.)

Lee stipulated at trial to the validity of Peterman's consent to search the vehicle. RP 114. She cannot now claim actual prejudice stemming from that consent. Lee was present and did not object to the driver's consent at the scene. Her silence implied consent. Cantrell, 124 Wn.2d 191-192, citing U.S. v. Anderson, 859 F.2d 1171, 1176-1177 (3rd Cir. 1988) (driver's consent applied to passenger although neither was owner; passenger's silence inconsistent with later claim of privacy).

Lee cannot show actual prejudice here for these reasons, and because it was her own later consent to search the purse which uncovered the evidence, not the prior consent of Peterman to search the car. Lee's failure to demonstrate manifest constitutional error makes review of the claim that each and every occupant of a vehicle must consent to a search inappropriate for review.

IV. CONCLUSION

For these reasons, the State respectfully requests that this Court deny review.

Respectfully submitted this 17th day of October, 2019.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

CARMEN ROSE LEE,

Petitioner.

No. 97282-6

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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 17th day of October, 2019, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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