

~~1/21/11~~

No. 64899-3-I

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

STATE OF WASHINGTON, Respondent,

vs.

DANIEL SOTO-BOJORQUEZ, Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007
Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

COURT OF APPEALS
DIVISION ONE
2011 DEC -3 PM 1:00:53
E

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

**B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS
OF ERROR..... 1**

C. FACTS 2

1. Procedural facts2

2. Substantive facts.....3

D. ARGUMENT..... 4

**1. There is substantial evidence in the record to support
finding of fact number 7.....5**

**2. The drugs found in Soto-Bojorquez’s car were
admissible pursuant to the impound inventory search
exception to the warrant requirement.8**

E. CONCLUSION 16

TABLE OF AUTHORITIES

Washington State Court of Appeals

State v. Greenway, 15 Wn. App. 216, 547 P.2d 1231, *rev. denied*, 87 Wn.2d 1009 (1976)..... 12, 13

State v. Hardman, 17 Wn. App. 910, 567 P.2d 238 (1977), *rev. denied*, 89 Wn.2d 1020 (1978)..... 13

State v. Hill, 68 Wn. App. 300, 842 P.2d 996, *rev. den.*, 121 Wn.2d 1020 (1993)..... 15

Washington State Supreme Court

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 12

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994)..... 8

State v. Kull, 155 Wn.2d 80, 118 P.3d 307 (2005)..... 12

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)..... 12

State v. Montague, 73 Wn.2d 381, 438 P.2d (1968)..... 12, 13

State v. Peterson, 92 Wn.2d 899, 964 P.2d 1231 (1998)..... 13, 16

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1990)..... 13

State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2010)..... 11

State v. White, 135 Wn.2d 761, 958 P.2d 982 (1998)..... 13

Rules and Statutes

RCW 46.55.113(2)(g)..... 14

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether there was substantial evidence in the record to support the finding of fact that the deputy could not have expected someone to arrive from Everett to retrieve the car for over an hour where the deputy could not find any local contacts or addresses for the defendant, where the defendant and the registered owner who both had the same last name had the same address in Everett, where no one had arrived to retrieve the car in the 45 minutes that had already passed although defendant had a cell phone, and where it was 68-70 miles to Everett from where the car was parked.
2. Whether the impoundment of the car the defendant was driving by himself at 2 a.m. was reasonable and lawful where the defendant was cited for no valid operator's license, as well as other traffic infractions, and released, where the registered owner of the car who had the same last name and address as the defendant lived in Everett, where the defendant was not able to answer the deputy in English when the deputy asked if there was someone else who could move the car, where the car presented a traffic hazard where it was parked, and where the deputy had already spent a considerable amount of time on this call and it was not reasonable for him to wait for someone to arrive from Everett to get the car, even assuming the deputy could have contacted someone and that person could have come at that hour of the morning.

C. FACTS

1. Procedural facts

On December 2nd, 2009 Appellant Daniel Soto-Bojorquez was charged with Unlawful Possession of a Controlled Substance, to wit Cocaine, in violation of RCW 69.50.401(2)(A) for his actions on November 28th, 2009. CP 32-33. He moved for suppression of the drugs found inside the vehicle he was driving, which were found pursuant to an impound inventory search, and other suspected drugs found later on his person at jail. CP 14-29. After the court heard and denied the motion to suppress, Soto-Bojorquez waived his right to a jury trial and proceeded to a bench trial based on stipulated facts. CP 13; 1/20/10 RP 3-6.¹ After reviewing the police reports, the judge found Soto-Bojorquez guilty of Unlawful Possession of a Controlled Substance, cocaine, but did not find the element of intent to deliver because the suspected drugs found on his person at jail had not been tested by the crime lab. 1/20/10 RP 12-13. At sentencing, the judge imposed a standard range sentence of three months. CP 6, 8.

¹ RP refers to the verbatim report of proceedings for the suppression hearing; and 1/20/10 RP to the stipulated trial.

2. Substantive facts

The trial court made the following findings of fact regarding the suppression hearing:

1. Deputy Streubel was parked and working on paperwork around 12:45 am on the morning of November 28, 2009 in the parking lot of the gas station located at Smith and Guide-Meridian. A Lincoln automobile, stopped at the gas pumps, displayed windows tinted to such an extent that the deputy thought they were illegal. He further discovered that the registration for the vehicle had expired one month earlier.
2. Deputy Streubel did not immediately approach the Lincoln and watched it pull out onto Smith Road before he initiated contact at the light at Guide Meridian. The Lincoln drove across the Guide and stopped partially blocking the entrance to Glynn's Shamrock Pub. This establishment was open for business at that time. The Lincoln was parked on the shoulder of Smith Road with its mirrors extending out over the fog line and perhaps portions of its chassis as well. This is a busy intersection with vehicles travelling at high rates of speed and left turn lanes available in all directions.
3. The driver and sole occupant of the Lincoln was defendant Daniel Soto-Bojorquez. He identified himself with a Mexico ID card and returned with no license or identification from Washington State. His driving record indicated that he had previously been stopped for traffic investigations. The Lincoln was registered to a female going by the same surname that listed an address in Everett, Washington. Everett is sixty miles south of Bellingham and it is eight or ten miles from Bellingham to the scene of the stop.
4. Because of the Mexico ID and defendant's difficulty in misunderstanding English, Deputy Streubel contacted Border Patrol to request assistance. It took approximately forty minutes for an agent to arrive. During this time, Deputy Streubel tried various different combinations of defendant's hyphenated last name to find some local information or contacts.

5. The Border Patrol agents spoke with defendant and determined that he was illegally in the United States. The agent stated that since defendant is in a paperwork status, all he could do is arrest and release him. Other deputies arrived during the course of the contact, but served only as backup officers.

6. Defendant was cited for traffic offenses and released. His vehicle remained parked where he left it. At this location, the vehicle was a traffic hazard. Drivers turning left at this corner frequently use that portion of the roadway to merge onto westbound Smith Road and would not expect a car to be parked there. Also, it partially blocked the entrance to an open business establishment.

7. Deputy Streubel could not have expected someone to arrive from Everett to take charge of the vehicle for at least another hour and a half, even if he was lucky enough to contact someone immediately and they could leave momentarily for that entire section of the county. To tie them to this scene watching the car for additional period of time when they had already been there for over an hour is unreasonable.

D. ARGUMENT

Soto-Bojorquez asserts the deputy's decision to impound his car was not reasonable and therefore the inventory search of the car was unlawful and the evidence of the drugs found within the car suppressed. He also asserts that there wasn't substantial evidence in the record to support the court's finding that the deputy could not have expected someone to arrive from Everett for over another hour, essentially asserting that if the deputy had done more to obtain interpreter services, someone might have been able to arrive sooner. There's nothing in the record to show that even if interpreter services had been obtained that someone

would have come to retrieve the car at that time in the morning or would have been able to get there in a short period of time. The evidence that the deputy had tried but been unable to find local contacts or addresses for Soto-Bojorquez, the address the deputy found for Soto-Bojorquez was in Everett, the same address as the registered owner's, and Everett was well over an hour's drive to where the car was parked is substantial evidence to support the court's finding. The deputy impounded the car because the car presented a traffic hazard and under RCW 46.55.113 he had discretion to do so since Soto-Bojorquez did not possess a valid operator's license. The deputy's decision to impound was reasonable because he did ask Soto-Bojorquez if someone could come get the car, although Soto-Bojorquez couldn't or didn't answer him, and no reasonable alternatives existed at that time.

1. There is substantial evidence in the record to support finding of fact number 7.

Soto-Bojorquez asserts on appeal that there is insufficient evidence to support finding of fact 7, wherein the trial court found that the deputy could have expected it to take another hour and a half for someone to retrieve the car if someone could be found, and that it was unreasonable to expect the deputy to wait that long for someone to arrive. Specifically Soto-Bojorquez asserts that the finding "erroneously includes the faulty

understanding that the ‘additional period of time’ that Deputy would have to wait would be the hour or more required for someone to arrive from Everett.” Appellant’s Brief at 13. The only evidence in the record revealed that Soto-Bojorquez and the registered owner of the car with the same last name both lived at the same address in Everett. No local addresses or contacts for Soto-Bojorquez were found from various databases the deputy searched. There is no evidence in the record that someone could have retrieved the car in a short period of time even if the deputy had been able to access interpreter services. Based on the information available to the deputy at the time of his decision, the deputy could not have expected someone to arrive from Everett for well over an hour, even if someone had been willing to retrieve the car at that hour of the morning.

A trial court’s findings of fact and conclusions of law are reviewed on appeal to determine whether substantial evidence supports its findings of fact, and then in turn, whether the findings of fact support the trial court’s conclusions of law. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644. Unchallenged findings of fact are verities for appeal. *Id.*

There is substantial evidence to support the trial court's finding seven. First, the car was registered to a female with the same last name as Soto-Bojorquez who lived in Everett. RP 15, FF No. 3. The deputy ran Soto-Bojorquez's name in the DOL database as well as national and state crime databases. RP 15, FF No. 4. The closest address he could find for Soto-Bojorquez, who had a "built record²," was the same address as the registered owner's in Everett. RP 16, 30, FF No. 3. After being informed by Border Patrol that Soto-Bojorquez was an illegal alien, the deputy also ran his name through a local database and ran his name a couple different ways in order to find a local address for him. FF No. 4, 5. RP 17-18. Soto-Bojorquez did not have any insurance cards or paperwork with a local address on them. RP 18. The deputy was unable to associate him with anybody or any addresses within the county. RP 19-20. When the deputy asked Soto-Bojorquez whether anyone lived close by who could pick up the car or him, he didn't answer the question, although the deputy assumed he didn't understand the question due to the language issue. RP 18. When the deputy decided to impound the car, it had already been 35-40 minutes, it was after 1 a.m., and no one had arrived yet despite the fact that Soto-Bojorquez had a cell phone on him. RP 11, 19, 46. As far as the deputy

² A "built record" means that the driver has been stopped before but doesn't have a valid Washington license or identification card. RP 15.

knew Soto-Bojorquez lived in Everett, and the closest address that anyone would come from was in Everett. RP 45. Everett is 60 miles south of Bellingham and it was another 8-10 miles from Bellingham to the location of the stop. FF No. 3. This evidence is substantial support for the court's finding that the additional time period the deputy *could expect* to wait was over another hour for someone to arrive from Everett. There is nothing in the record to suggest that it would be less than that time period or that someone was available to arrive from anywhere other than Everett.³

Therefore substantial evidence in the record supports finding of fact seven.

2. The drugs found in Soto-Bojorquez's car were admissible pursuant to the impound inventory search exception to the warrant requirement.

Soto-Bojorquez asserts that reasonable alternatives to impounding his car existed and therefore the impound of his car was unlawful, thus requiring suppression of the drugs discovered during the inventory search. Specifically he asserts the deputy's failure to use alleged solutions to the language barrier was tantamount to refusing to communicate with Soto-Bojorquez and constituted a failure to consider reasonable alternatives to

³ On appeal Soto-Bojorquez asserts that the prosecutor gave "short shrift" to undisputed facts regarding available opportunities to locate someone closer to the scene. Appellant's Brief at 14. However, defense counsel never proposed any findings regarding the suppression hearing and merely deferred to the court at the time of entry of the findings. Supp CP __, Sub Nom. 35. Even if the deputy had contacted the Language Line, assuming it was even available at that time of night, there is nothing in the record to show that there was in fact someone within the county who would have been able to come pick up the car that night.

impoundment. The deputy did attempt to find local contacts and addresses for Soto-Bojorquez and did attempt to ask him if there was someone who could come pick the car or him up. At the time the deputy decided to impound the car, the deputy was concerned that Soto-Bojorquez would drive the car again without a valid license, the only contacts and address for Soto-Bojorquez known to the deputy were in Everett, and the car, if left where it was, would have presented a traffic hazard. The deputy had the legal authority under the statute and pursuant to his community-caretaking function to impound the car. The deputy did consider alternatives to impounding the car, but given the passage of time, the lack of any information about local contacts, and the fact that he could not leave the car there for a prolonged period of time, he appropriately exercised his discretion to impound the car. Nothing in the record shows that had the deputy been able to use the language line or Border Patrol to translate that there would have been anyone closer than Everett that Soto-Bojorquez could have contacted to move the vehicle or that those hypothetical person(s) would have agreed to come at 2 a.m. to move the vehicle.

A trial court's conclusions of law on a motion to suppress are reviewed de novo. State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2010). Credibility determinations, however, are left to the trier of fact and are not

subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Article I, §7 of the Washington State Constitution prohibits warrantless searches and seizures. The State has the burden of showing the warrantless search falls within one of the exceptions to the warrant requirement. State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005). Exceptions to the warrant requirement include inventory searches. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

Law enforcement may conduct a warrantless inventory search of a vehicle in preparation for or following lawful impoundment of a vehicle. State v. Greenway, 15 Wn. App. 216, 218, 547 P.2d 1231, *rev. denied*, 87 Wn.2d 1009 (1976). Evidence discovered during an inventory search is admissible when “there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for purposes of finding evidence.” State v. Montague, 73 Wn.2d 381, 385, 438 P.2d (1968).

When...the facts indicate a lawful arrest, followed by an inventory search of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of a crime but is made for the justifiable purpose of finding listing, and securing from loss, during the arrested person’s detention, property belonging to him, then we have

no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

State v. White, 135 Wn.2d 761, 770, 958 P.2d 982 (1998), *quoting* Montague, 73 Wn.2d at 385. Motor vehicles generally may be impounded under the following circumstances: 1) if there is probable cause to believe that the car is evidence of a crime; 2) as part of law enforcement's community caretaking function if the car impedes traffic or poses a threat to public safety, and 3) pursuant to statutorily authorized impoundment. State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1990). Three principle reasons justify an inventory search: 1) to protect the vehicle's owner's property; 2) to protect the police from false claims of theft by the owner; and 3) to protect the police from potential danger. White, 135 Wn.2d at 769-70.

All seizures, including impounds, however must be reasonable in order to satisfy constitutional considerations. State v. Peterson, 92 Wn.2d 899, 902, 964 P.2d 1231 (1998). Whether a particular impound is reasonable is determined under all the facts and circumstances of the case. Greenway, 15 Wn.App. at 219. A police officer need not exhaust every possible alternative before concluding that a vehicle may be impounded. State v. Hardman, 17 Wn. App. 910, 913, 567 P.2d 238 (1977), *rev. denied*, 89 Wn.2d 1020 (1978). The State must show, however, that the

officer considered alternatives, and, if feasible, attempted to get the name of someone locally to move the vehicle, and reasonably concluded that impoundment was appropriate. Id. at 914.

The evidence of the drugs was admissible in this case pursuant to the impound inventory search exception to the warrant requirement. The deputy had the authority to impound the car under his community caretaking function because the car presented a traffic hazard and because Soto-Bojorquez was operating the car without a valid driver's license. RCW 46.55.113(2)(g); Uncontested FF No. 2, 3, 6. The deputy spent a considerable amount of time trying to locate contact and/or address information for Soto-Bojorquez through the DOL, national, state and local databases. At the time the deputy asked Soto-Bojorquez about finding someone local to assist him, the Border Patrol was no longer there, having only stayed a couple minutes, just long enough to confirm that Soto-Bojorquez was illegal and that they weren't going to arrest him. RP 16-17. The only contact/address information the deputy had for Soto-Bojorquez or the registered owner of the car was in Everett. The court specifically found that the deputy did consider alternatives to impound. RP 78. As the judge noted, the caselaw doesn't require that the deputy exhaust *all* possibilities:

He doesn't have to exhaust all possibilities, such as getting an interpreter, getting on the phone with the owner of this, the Defendant's vehicle, or spending a significantly longer period of time out of service, and with the car in a dangerous position.

Those are possibilities that he doesn't have to exhaust if he can articulate his reasons, and I think he's articulated good reasons in this case: The amount of time that had gone by, the amount of time that the deputy had taken up on this matter, which didn't really, wasn't going to involve an arrest, or anything else, until he found this material at the time of the search, would indicate to this Court that he did consider the options. He considered the pros and cons, and didn't have any other choice because of the communication issue, and the fact that one can only assume from what he knew in his mind at the time that if he had to get somebody, it was going to be somebody from Everett, and it was going to take a long, long time to get somebody there.

RP 78-79. Based on the evidence in the record, and not on suppositions about what might have happened if the deputy had spent more time trying to obtain interpreter services, the deputy reasonably concluded there were no other alternatives at that time to impounding the car: there was no one else available to move the car, the car posed a traffic hazard where it was located, and the deputy couldn't spend a significant more amount of time on this call, in which after 45 minutes the defendant had been cited for no valid operator's license and released.

Soto-Bojorquez likens this case to State v. Hill, 68 Wn. App. 300, 842 P.2d 996, *rev. den.*, 121 Wn.2d 1020 (1993), in which the court found that the impoundment of the vehicle was unlawful because the trooper in

that case had not considered alternatives to impoundment. However, in that case, where there was no communication issue, the troopers did not even ask the defendant, the driver of the car, if he could ask someone to come move his car. *Id.* at 307. After arresting the passenger on a felony warrant and determining that the defendant was not legally intoxicated, the troopers asked twice to search the defendant's car. The defendant refused to give consent each time. *Id.* at 303. The troopers then decided to impound the car. *Id.* It's clear from the court's ruling that the court believed that the decision to impound was a pretext to search the car. The court found the impoundment unreasonable because "[t]he trooper decided to impound only after asking twice to search the vehicle and made no inquiries as to the availability of another driver coming to pick up the car." *Id.* at 308. Here, the deputy did attempt to ask Soto-Bojorquez about finding someone to move the car, but Soto-Bojorquez couldn't answer him. The deputy did spend a considerable amount of time trying to find local contacts and/or addresses for Soto-Bojorquez. Due to the car posing a traffic hazard, the deputy could not leave the car where it was and could not move it pursuant to Sheriff's policy. RP 44-45. He also couldn't permit Soto-Bojorquez to drive it again.

This case is more similar to State v. Peterson, 92 Wn. App. at 899, in which the court upheld the impound and subsequent inventory search

under circumstances where no owner of the car was present to authorize someone to move the car or to authorize leaving the car where it was parked. In that case, as here, there was only one person in the car, the driver, it was early in the morning when the car was pulled over and defendant's license was not valid. *Id.* at 901. The defendant there had been pulled over for expired tabs, and couldn't provide the registration or the proof of insurance.⁴ *Id.* at 903. The officer there decided to impound the car rather than arrest the defendant in order to make sure that defendant didn't drive the car again. *Id.* The court found that impoundment lawful and reasonable because defendant was not the owner of the car and the registered owner was not present to authorize anyone else to move the vehicle or authorize leaving the car where it was parked and further found that impoundment was the best way to protect the police and the owner of the car under the circumstances. *Id.*

In this case, given the amount of time that had already passed, the lack of any information that there was someone locally who would have permission to and could move the vehicle at that hour of the morning, the amount of time that it would take for someone to come from Everett, and the traffic hazard the car posed where it was parked, there were no other

⁴ Soto-Bojorquez was also issued citations for expired tabs, and no insurance in addition to the no valid operator's license. RP 17.

reasonable alternatives for the deputy to pursue at that time. He had attempted to find out if there were someone that could come get the car, had released Soto-Bojorquez, and could not remain indefinitely at the scene on a traffic case. At the time the deputy made the decision to impound the car, there was no reason to expect that anyone would have been able to come within a short period of time to retrieve the car. The trial court did not err in concluding that the impoundment was reasonable and lawful. Therefore, there was no basis to suppress the drugs found during the inventory search of the car.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Soto-Bojorquez's conviction for possession of controlled substance; cocaine.

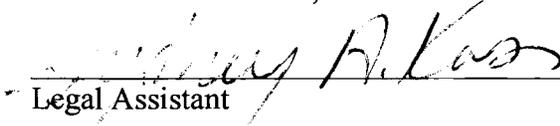
Respectfully submitted this 1st day of December, 2010.


HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to appellant's counsel Oliver Ross Davis, addressed as follows:

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101


Legal Assistant


Date