

NO. 67028-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

ADAM SPRY,

Appellant.

SEP 19 2011

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

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence seized during a search conducted in violation of the Fourth Amendment and article I, section 7 of the Washington Constitution.

2. The trial court erred in entering finding of fact 16 and conclusion of law 8, which state appellant consented to the search. CP 26.

Issue Pertaining to Assignments of Error

Did the trial court err in concluding the warrantless search of a car was consensual when the State failed to prove appellant expressly or implicitly consented to the search, and instead proved only that appellant merely acquiesced?

B. STATEMENT OF THE CASE

The Whatcom County Prosecutor charged appellant Adam Spry with possession of methamphetamine and possession of heroin, which were found during a search of his car conducted after he was arrested for driving with a suspended license.. CP 64-67; RCW 69.50.4013(1). Spry moved to suppress the evidence, arguing the traffic stop was pretextual in violation of article I, section 7 of the Washington Constitution. CP 59-63.

The only evidence presented at the suppression hearing was the testimony of Whatcom County Sheriff's Deputy Courtney Polinder, who stopped and arrested Spry.

Polinder ostensibly stopped Spry because of a defective license plate light. 1RP¹ 9. When asked for his license, Spry explained he thought it might be suspended and that there might be a warrant for his arrest. 1RP 12. Polinder handcuffed Spry, obtained his name and birth date and arrested him after confirming his license was suspended. 1RP 12, 28.

Polinder read Spry his rights, to which Spry replied "yes" when asked if he understood. 1RP 13-14. Polinder recalled that when he asked Spry whether he was willing to waive his rights and answer questions, Spry "nodded his head. But it was clear that he didn't have any objection to it; that he would talk to me." 1RP 14.

After the arrest, Polinder asked Spry if he could search the car. 1RP 18. When asked how Spry responded, Polinder stated:

He didn't have an issue with that. He said he didn't have anything to hide. I advised [him] of the Ferrier² warnings, that he had the right to refuse, revoke or stop the search at any time. I advised him I was going through the

¹ There are three volumes of verbatim report of proceedings referenced as follows: 1RP - two-volume, consecutively paginated set for the dates of March 7, 8 & 9, 2011 (pretrial and trial); and 2RP - April 7, 2011 (sentencing).

² State v. Ferrier, 136 Wn.2d 103, 116, 118, 960 P.2d 927 (1998) (article I, section 7 of the Washington constitution requires police to inform persons from whom they are seeking consent to search that they may refuse, revoke, or limit the scope of consent).

trunk. He didn't have an issue with that.

1RP 19.

Polinder discovered suspected drugs and drug paraphernalia in the car, including a glass pipe, plastic bags, a hypodermic syringe filled with a brownish solution, several hypodermic needles, a scale and a spoon. 1RP 19-20.³

In arguing the motion to suppress should be denied, the prosecutor emphasized that Spry "did not object to the search of the vehicle or the trunk of the vehicle," and never attempted to narrow the scope or otherwise terminate the search. 1RP 39. The trial court agreed, stating the search was "fully consensual" and the scope of the consent was not exceeded. 1RP 46-47. The court later entered written findings of fact and conclusions of law, including:

[Finding of fact] 16. Mr. Spry told Deputy Polinder he could search the vehicle, and stated "he had nothing to hide." At no time did Mr. Spry revoke or limit the consent to search.

...

[Conclusion of Law] 8. The defendant gave consent for the vehicle to be searched.

CP 26.

³ Only the pipe and scale were analyzed for the presence of drugs. 1RP 167. Methamphetamine residue was found on the pipe, and heroin and marijuana residue were found on the scale. 1RP 172.

Spry was ultimately convicted as charged and a standard range sentence was imposed. CP 13-22, 29 1RP 15. Spry appeals. CP 2-12.

C. ARGUMENT

SPRY DID NOT CONSENT TO THE SEARCH AND THEREFORE IT WAS UNLAWFUL AND THE RESULTING EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The trial court concluded Polinder's search of the car was consensual. The State failed, however, to present any evidence of consent, showing instead only that Spry merely acquiesced to the search by not affirmatively objecting. Because mere acquiescence does not constitute consent, this Court should reverse.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Washington Constitution article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Absent a valid warrant, only a few jealously guarded exceptions provide the "authority of law" required by article I, section 7 to conduct a warrantless search. State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Consent is one of these exceptions. Georgia v. Randolph, 547 U.S. 103, 109, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006); State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996).

The State bears the heavy burden of proving an exception applies. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). Where the State fails to prove an exception, any evidence derived from the illegal search must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

To establish a warrantless search is consensual, the State must prove by clear and convincing evidence that (1) the consent was unequivocal and voluntarily given, (2) the person had authority to consent, and (3) the search did not exceed the scope of the consent. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004); State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990); State v. Greco, 52 Wn.2d 265, 267, 324 P.2d 1086 (1958).

Mere acquiescence does not constitute consent. State v. Schultz, 170 Wn.2d 746, 756-59, 248 P.3d 484 (2011); (regarding article I, section 7); Seymour v. Washington State Dept. of Health, Dental Quality Assur. Com'n, 152 Wn. App. 156, 170-71, 216 P.3d 1039 (2009) (regarding Fourth Amendment). Here, the State failed to prove Spry affirmatively consented to the search. When asked how Spry responded to his request for permission to search, Polinder said only that Spry "didn't have a problem with that[.]" "didn't have an issue with that. He said he didn't have anything to hide." IRP 18-19. This shows only that Polinder did not

expressly object to the search. 1RP 19. It does not show an unequivocal, affirmative response to the request, such as verbal approval or an affirmative nod of the head.

It is clear Polinder was able to identify and express when Spry gave unequivocal affirmative responses. For example, Polinder testified Spry said "yes" when asked whether he understood his rights. 1RP 14. Similarly, Spry "nodded his head" affirmatively when asked if he was willing to waive his rights and answer questions without the presence of an attorney. 1RP 14. But when it came to Spry's response to the request for permission to search the car, the best Polinder could say was that "he didn't have a problem with that." This difference in Polinder's certainty is telling, and indicates only that Spry merely acquiesced to the search.⁴ Because mere acquiescence is not enough to excuse an otherwise invalid warrantless search, the trial court should have granted Spry's motion to suppress evidence. Reversal is required. *Schultz*, 170 Wn.2d at 756-59.

The State may claim Spry should be precluded from arguing he did not consent because he did not make that specific argument below. This claim should be rejected. RAP 2.5(a)(3) permits an appellant to raise a

⁴ The prosecutor seemed to acknowledge this fact when, during final argument on the suppression issue she noted, "Mr. Spry appeared cooperative [and] did not object to the search of the vehicle or the trunk of the vehicle[.]" 1RP 39.

manifest constitutional error for the first time on appeal. Erroneous suppression rulings constitute such error when the challenged evidence is the basis for the charged offense. State v. Jones, __ Wn. App. __, __ P.3d __, 2011 WL 3821613 at 2 (slip op. filed August 30, 2011). Here, the drugs sought to be suppressed supported the charges against Spry.

Moreover, to the extent the State may claim the record is insufficient to decide the issue, it would be wrong. See State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) ("If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."). All the necessary facts are in the record; Polinder was specifically asked about Spry's response to the request for consent to search the car, and Polinder said Spry never expressed an "issue" or "problem" with it. Polinder did not claim Spry unequivocally and affirmatively gave permission to search, presumably because that never happened. 1RP 18-19. Nothing more is needed for this Court to determine whether Spry consented to the search.

The lack of consent issue is thus properly before this Court. Because Spry never consented, the search was unlawful and requires reversal. Schultz, 170 Wn.2d at 756-59.

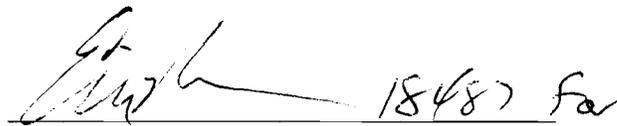
D. CONCLUSION

For the reasons presented, reversal is required.

DATED this 19th day of August 2011.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Gibson", is written over a horizontal line. To the right of the signature, the number "18487" and the letters "for" are handwritten.

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 67028-0-1
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ADAM SPRY,)	
)	
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 19TH DAY OF SEPTEMBER, 2011 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.

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SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF SEPTEMBER, 2011.

x *Patrick Mayovsky*