

69035-3

69035-3

NO. 69035-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSHUA A. LEVINSON,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Was the lower court's findings of fact supported by substantial evidence?

2. Did the lower court's factual findings support its conclusion that defendant voluntarily consented to the search of his motel room?

## **II. STATEMENT OF THE CASE**

### **A. FACTS.**

On September 15, 2011, at approximately 9:40 p.m., Deputy Robinson was looking for a wanted subject at the Far West Motel, Everett, Washington, basically going door to door. Prior to knocking on the door of room 132, Deputy Robinson observed a large glass pipe on the bed in the room through the partially open window blinds. Based on his experience and training, Deputy Robinson recognized the pipe as the type commonly used to smoke methamphetamine. 1RP 4-11, 17-19.

Joshua Adam Levinson, defendant, opened the door when Deputy Robinson knocked. Deputy Robinson asked defendant and a female in the room, Lori Vine, if either knew the subject he was looking for, they replied no. The room was small enough that Deputy Robinson had no reason to think that anyone beside

defendant and Vine were in the room. Deputy Robinson told them that he could clearly see the pipe on the bed and asked for permission to enter the room and retrieve the pipe and any other evidence inside. Defendant asked if he was going to jail. The tone was conversational. Deputy Robinson replied that he could not make any threats or promises, but it was not his intention to book defendant into jail. Defendant was not arrested. Deputy Robinson told defendant that based on seeing the pipe he had enough to write a search warrant. He did not say he had enough to get a search warrant. Deputy Robinson told defendant and Vine that they had the right to refuse the search, the right to limit the scope of the search, and the right to stop the search at any time. Defendant and Vine appeared to understand what they were doing. Both defendant and Vine gave consent for Deputy Robinson to search the room. Deputy Robinson recovered the pipe and located other items of drug paraphernalia and box containing heroin and methamphetamine. Both defendant and Vine were present during the search and neither made any request that the search stop. 1RP 7, 11-17, 20-29, 31, 34-35, 37.

Defendant acknowledged that he knew what "legal consent to search" meant and that no one had threatened to get a search

warrant if he did not consent. Defendant made no contention that he felt coerced by the encounter with police officers or that he did not understand he could withhold consent. Defendant said he could not specifically recall details of his conversation with Deputy Robinson. Defendant claimed that the Deputy Robinson told him that he had authority to do a walk through, but that defendant could stop him at any time. Defendant claimed that Deputy Robinson ignored his request to stop. 1RP 29-34.

## **B. PROCEDURAL.**

Defendant was charged with Possession of a controlled substance—heroin. Defendant filed a motion to suppress evidence under CrR 3.6 and the matter was heard on June 14, 2012. CP 47-60, 63-64.

### **1. Suppression Hearing.**

Two witnesses testified at the suppression hearing, Deputy Robinson and defendant. 1RP 3-39. The lower court found that Deputy Robinson was credible and defendant was not credible. CP 45; 1RP 49-52. The pipe was admitted as evidence at the suppression hearing and residue was clearly visible in the bowl of the pipe. 1RP 18-19, 50.

**a. The Lower Court Found The Following Facts Were Undisputed:**

Deputy Robinson clearly observed a pipe from outside through the motel window. Based on his training and experience the pipe was used to smoke methamphetamine. Defendant basically acknowledged that the meth pipe Deputy Robinson saw through the motel window was in fact a meth pipe. There was residue visible in the pipe when the court made a visual inspection of the pipe at the hearing. CP 43-44; 1RP 49-50.

After confirming that defendant was not familiar with the wanted suspect, Deputy Robinson told defendant that he could see the meth pipe and asked for permission to search the room and gave defendant Ferrier warnings. Defendant's consent was freely, knowingly and voluntarily given after Deputy Robinson gave Ferrier warnings and that defendant did not seek to stop the search at any time prior to Deputy Robinson finding drug paraphernalia, methamphetamine, and heroin. CP 44-45; 1RP 52.

**b. The Lower Court Found The Following Facts Were Disputed:**

The discussion between defendant and Deputy Robinson surrounding permission to search did not go beyond the officer's ability to get a warrant. Defendant's concern was fundamentally

over going to jail. Deputy Robinson had no intention to take defendant to jail and clearly made no promises either way. Any statements made by Deputy Robinson regarding his intention not to arrest defendant were made to dispel any undue influence or coercion. CP 44; 1RP 49-51.

**c. The Lower Court Made The Following Conclusions Of Law:**

Deputy Robinson had probable cause to either arrest defendant and to get a search warrant simply based on his observation of the pipe, given the type of pipe that the deputy recognized it as coupled with his training and experience. CP 45; 1RP 50.

**2. Trial And Sentence.**

The case proceeded to a stipulated bench trial and defendant was found guilty as charged. Defendant was sentenced to 60 days confinement and ordered to pay \$600.00 in fees and assessments. CP 16-42.

**III. ARGUMENT**

**A. FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

**1. Standard Of Review.**

The appellate court reviews a lower court's ruling on a motion to suppress evidence to determine whether substantial

evidence supports the lower court's factual findings and whether the factual findings support the lower court's conclusions of law. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009); State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). “Evidence is substantial when it is enough ‘to persuade a fair-minded person of the truth of the stated premise.’” Garvin, 166 Wn.2d at 249, quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999). Any unchallenged findings of fact are verities on appeal. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009), citing State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005); State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Challenged findings are verities if they are supported by evidence of a sufficient quantity to persuade a fair-minded, rational person of their truth. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The lower court's conclusions of law are reviewed de novo. Garvin, 166 Wn.2d at 249.

## **2. Unchallenged Findings Of Fact.**

The lower court found that Deputy Robinson was credible and defendant was not credible. CP 45; 1RP 49-52. Defendant does not challenge the lower court's findings on credibility. The lower court also found that defendant's consent was freely,

knowingly and voluntarily given after Deputy Robinson gave Ferrier<sup>1</sup> warnings and that defendant did not seek to stop the search at any time prior to Deputy Robinson finding drug paraphernalia, methamphetamine, and heroin. CP 45; 1RP 52. Defendant does not challenge the lower court's findings that defendant's consent was voluntarily given after Ferrier warnings. Unchallenged findings of fact are verities on appeal. Valdez, 167 Wn.2d at 767; O'Neill, 148 Wn.2d at 571.

### **3. Challenged Findings Of Fact.**

Defendant argues that the following findings of facts made by the lower court are not supported by substantial evidence:

- a. The police saw that the pipe observed from outside of a motel room window contained methamphetamine;
- b. Defendant admitted to the police before they searched his room that he possessed a pipe containing methamphetamine;
- c. Defendant spoke with the police before the search only about whether the police would get a search warrant.

Appellant's Brief at 1, 20-22.

#### **a. The Police Saw That The Pipe Observed From Outside Of A Motel Room Window Contained Methamphetamine.**

The lower court found the following facts were undisputed: Deputy Robinson clearly observed a pipe from outside through the

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<sup>1</sup> State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

motel window that based on his training and experience was used to smoke methamphetamine. There was residue visible in the pipe when it was inspected by the court. CP 43-44; 1RP 50.

Deputy Robinson said he could see into defendant's motel room through the partially open window blinds. He observed a large glass pipe on the bed. Based on his experience and training, Deputy Robinson recognized the pipe as the type commonly used to smoke methamphetamine. The pipe was admitted as evidence at the suppression hearing. Residue in the bowl of the pipe was clearly visible. 1RP 6-11, 18-19, 50. Substantial evidence supports the lower court's finding that the pipe Deputy Robinson observed from outside the motel room window was used to smoke methamphetamine.

**b. Defendant Admitted To The Police Before They Searched His Room That He Possessed A Pipe Containing Methamphetamine.**

The lower court found the following facts were undisputed: Defendant basically acknowledged that the meth pipe Deputy Robinson saw through the motel window was in fact a meth pipe and that there was residue visible in the pipe when the court made a visual inspection of the pipe at the hearing. CP 44; 1RP 49-50.

Defendant was asked about the pipe at the hearing:

A Just kind of that he was going to come in, and he had the ability to because he had a probable cause because of seeing the -- whatever evidence you guys had missed.

Q The meth pipe?

A Yeah. Whatever.

Q O.K. And that was, in fact, sitting right on the bed there, wasn't it?

A Yeah. That was.

1RP 34-35. Substantial evidence supports the lower court's finding that defendant basically acknowledge that the pipe Deputy Robinson observed through the window was used for consuming methamphetamine.

**c. Defendant Spoke With The Police Before The Search Only About Whether The Police Would Get A Search Warrant.**

The lower court found the following facts were undisputed: After confirming that defendant was not familiar with the wanted suspect, Deputy Robinson told defendant that he could see the meth pipe and asked for permission to search the room and gave defendant Ferrier warnings. CP 44.

The lower court found the following facts were disputed: The discussion between defendant and Deputy Robinson surrounding permission to search did not go beyond the officer's ability to get a warrant. Defendant's concern was fundamentally over going to jail. Deputy Robinson had no intention to take defendant to jail and

clearly made no promises either way; any statements made by Deputy Robinson regarding his intention not to arrest defendant were made to dispel any undue influence or coercion. CP 44; 1RP 50-51.

Deputy Robinson testified that he told defendant that he could clearly see the pipe on the bed and asked defendant for permission to enter the room and retrieve the pipe and any other evidence inside. Defendant asked Deputy Robinson if he was going to jail. The tone was conversational. Deputy Robinson replied that he could not make any threats or promises, but it was not his intention to book defendant into jail; that based on seeing the pipe he had enough to write a search warrant; and that defendant had the right to refuse the search, the right to limit the scope of the search, and the right to stop the search at any time. 1RP 11-14, 16-17, 20, 22-26, 31, 34, 50-51.

Substantial evidence supports the lower court's finding that Deputy Robinson told defendant that he could see the meth pipe, asked for permission to search the room, and advised defendant of his right to refuse consent, to limit the scope and to stop the search at any time. Additionally, substantial evidence supports the lower court's finding that the discussion between Deputy Robinson and

defendant regarding permission to search did not go beyond Deputy Robinson's ability to get a warrant. Further, that Deputy Robinson's statements regarding his intention not to arrest defendant were made to dispel any undue influence or coercion. The lower court's factual findings were supported by sufficient evidence to persuade a fair-minded rational person of the truth of the stated premise. As such they are verities. Hill, 123 Wn.2d at 644.

#### **4. Challenged Conclusion Of Law.**

The lower court made the following conclusions of law: Deputy Robinson had probable cause to either arrest defendant and to get a search warrant simply based on his observation of the pipe, given the type of pipe that the deputy recognized it as coupled with his training and experience. CP 45; 1RP 50-51. Defendant challenges the lower court's conclusion that Deputy Robinson had probable cause to arrest defendant or obtain a search warrant based on the observations of the pipe inside the motel room. Appellant's Brief at 2.

##### **a. Authority To Seek A Search Warrant.**

Deputy Robinson had authority to seize the meth pipe. RCW 69.50.505 reads in pertinent parts:

(1) The following are subject to seizure and forfeiture and no property right exists in them:

(f) All drug paraphernalia;

(2) ... personal property subject to forfeiture under this chapter may be seized by any ... law enforcement officer of this state upon process issued by any superior court having jurisdiction over the property. ... Seizure of personal property without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant; or

(c) The ... law enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

RCW 69.50.505(1)(f), (2)(a), (c). Probable cause requires the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a person of ordinary caution in the belief that the property was used or intended to be used in violation of the controlled substances act. City of Walla Walla v. \$401,333.44, 164 Wn. App. 236, 245, 262 P.3d 1239 (2011); Valerio v. Lacey Police Dep't, 110 Wn. App. 163, 176–177, 39 P.3d 332 (2002). The facts in the present case support the lower court's finding and conclusion that Deputy Robinson had probable cause to seek a search warrant.

**b. Authority To Arrest.**

In State v. Fisher, 132 Wn. App. 26, 30, 130 P.3d 382 (2006), this court held that possession of a glass pipe with residue

was sufficient to create probable cause for possession with intent to use.<sup>2</sup> The facts in the present case are sufficiently similar the facts in Fisher to support the lower court's finding and conclusion that Deputy Robinson had probable cause to arrest defendant.

## **B. WARRANTLESS SEARCHES ARE REVIEWED DE NOVO.**

### **1. Exceptions To The Warrant Requirement.**

The court reviews the validity of a warrantless search de novo. State v. Parris, 163 Wn. App. 110, 116, 259 P.3d 331 (2011) review denied, 173 Wn.2d 1008, 268 P.3d 942 (2012); State v. Kypreos, 110 Wn. App. 612, 616, 39 P.3d 371 (2002). Unless an exception is present, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. Wash. Const. art. I, § 7; U.S. Const. amend. IV; Gaines, 154 Wn.2d at 716. Generally, the trial court suppresses evidence seized from an illegal search under the exclusionary rule or the fruit of the poisonous tree doctrine. Gaines, 154 Wn.2d at 716–717; Parris, 163 Wn. App. at 117. The State has the burden to show that a warrantless search or seizure falls within one of the exceptions to

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<sup>2</sup> The court additionally held that SCC 10.48.020 did not conflict with nor was it preempted by RCW 69.50.608. State v. Fisher, 132 Wn. App. 26, 31-32, 130 P.3d 382 (2006).

the warrant requirement. State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003); State v. White, 141 Wn. App. 128, 135, 168 P.3d 459 (2007). One such exception to the warrant requirement is consent to a search. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998), citing State v. Leach, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989).

The burden is on the State to show that consent to search was voluntarily given. Walker, 136 Wn.2d at 682; State v. Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975). The State must meet three requirements in order to show that a warrantless but consensual search was valid: (1) the consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) the search must not exceed the scope of the consent. Walker, 136 Wn.2d at 682; State v. Nedergard, 51 Wn. App. 304, 308, 753 P.2d 526, review denied, 111 Wn.2d 1007 (1988). Defendant argues that his consent was not voluntary.

Whether consent is voluntary is a question of fact and depends upon the totality of the circumstances, including (1) whether Miranda<sup>3</sup> warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting

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<sup>3</sup> Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

person, and (3) whether the consenting person was advised of his right not to consent. State v. Reichenbach, 153 Wn.2d 126, 132, 101 P.3d 80 (2004); Shoemaker, 85 Wn.2d at 212. The various relevant factors should be judiciously balanced against each other with no particular factor necessarily being dispositive. Id.; State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003) (knowledge of the right to refuse consent is relevant, however, it is not a prerequisite to finding voluntary consent); State v. Nelson, 47 Wn. App. 157, 163, 734 P.2d 516 (1987) (Miranda warnings are not a prerequisite to a voluntary consent), citing State v. Rodriguez, 20 Wn. App. 876, 880, 582 P.2d 904 (1978). In addition, the court may weigh any express or implied claims of police authority to search, previous illegal actions of the police, the defendant's cooperation, and police deception as to identity or purpose. State v. Flowers, 57 Wn. App. 636, 645, 789 P.2d 333 (1990). In the present case, defendant implies that his consent was not voluntary because the police made express or implied misrepresentations of authority to search. Appellant's Brief at 2, 9-19, 22-23.

## **2. Deputy Robinson Telling Defendant That He Had Probable Cause To Arrest Him Or Write A Search Warrant Did Not Coerce Defendant To Consent To A Search.**

Here, Deputy Robinson informed defendant that he had observed the meth pipe and asked for defendant's consent to search the motel room. 1RP 11-13, 22. Deputy Robinson told defendant that he had probable cause to write a search warrant. 1RP 16-17, 23-24, 30. Defendant asked if he was going to be arrested and Deputy Robinson replied that he could not make any threats or promises, but that he did not intend to arrest defendant or book him into jail. 1RP 13-14, 31. Defendant was not arrested. 1RP 31. By his questions, defendant appears to have adequately understood what he was doing. 1RP 13, 22, 29, 31, 34. After his conversation with Deputy Robinson, defendant consented to a search of the motel room. 1RP 12, 14-15, 22-23.

Deputy Robinson never told defendant that he had a search warrant, nor did he threaten to obtain a search warrant if defendant did not consent to the search. See State v. Smith, 115 Wn.2d 775, 789-790, 801 P.2d 975 (1990); Bumper v. North Carolina, 391 U.S. 543, 548-549, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). At most Deputy Robinson's statements expressed his authority to seek a search warrant. Consent given in response to an officer saying he

would seek a warrant if consent was denied has been held voluntary. Smith, 115 Wn.2d at 790. Nothing in the record supports the allegations that Deputy Robinson threatened to seek a search warrant to coerce defendant into consenting to the search.

Any coercive factors present here must be viewed in light of the totality of the circumstances. Reichenbach, 153 Wn.2d at 132. Defendant took the stand at the suppression hearing and acknowledged that he knew what “legal consent to search” meant and that no one had threatened to get a search warrant if he did not consent. 1RP 29-32. It is evident from defendant's testimony that he is neither of low intelligence nor totally naive in criminal matters.<sup>4</sup> When asked about Deputy Robinson requesting his consent to search defendant replied he could not specifically recall details of the conversation. 1RP 34. Defendant made no contention that he felt coerced by the encounter with police officers or that he did not understand he could withhold consent. Rather, he steadfastly maintained that the Deputy Robinson told him that he had authority do a walk through, that defendant could stop him at any time, and claimed that Deputy Robinson ignored his request to stop. 1RP 29-

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<sup>4</sup> At one point, when being questioned about his conversation with Deputy Robinson regarding consent to search the room, defendant replied, “... I've been in quite a few different situations where I've given consent and then later regretted it.” 1RP 34.

32. Consequently, the trial court's resolution of the consent issue rested heavily on an assessment of the parties' credibility, a factor the lower court resolved in favor of Deputy Robinson. CP45; 1RP 49-52. See Flowers, 57 Wn. App. at 646; Rodriguez, 20 Wn. App. at 879. Nothing in the record supports the allegations that defendant was coerced into consenting to the search.

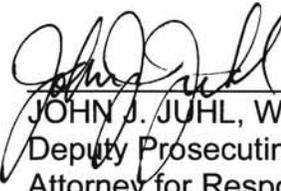
#### **IV. CONCLUSION**

For the reasons stated above, defendant's conviction should be confirmed and the appeal denied.

Respectfully submitted on February 20, 2013.

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Snohomish County Prosecuting Attorney

By:



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IN THE COURT OF APPEALS  
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DIVISION I

THE STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JOSHUA A. LEVINSON,  
  
Appellant.

No. 69035-3-1

AFFIDAVIT OF MAILING

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AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 21<sup>st</sup> day of February, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 21<sup>st</sup> day of February, 2013.

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line. The signature is stylized and extends to the right of the line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit