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COURT OF APPEALS  
STATE OF WASHINGTON  
BY: *AM*

No. 41269-1-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

ROBERT L. OLSON,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE F. MARK McCAULEY, JUDGE  
THE HONORABLE GORDON L. GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## **PLAINTIFF'S COUNTERSTATEMENT OF THE CASE**

The pertinent facts are set forth in the Findings of Fact, Conclusions of Law and Order, Re: Motion to Suppress entered by the court on July 12, 2010. These findings were entered without objection. The defendant has made no claim that these findings are not supported by evidence in the record.

The defendant's motor vehicle was parked in a driveway, which he shared with his neighbor, located at 510 Second Avenue, Aberdeen, Washington. The vehicle was parked in the driveway with rear of the vehicle being within a foot or two of the end of the driveway closest to the sidewalk running down the street. (Findings of Fact 3, Motion to Suppress). Corporal King arrived first and talked to the defendant. The two of them stood in the driveway next to the vehicle. (Findings of Fact 4, Motion to Suppress). Detective Hudson came to the scene and spoke to the defendant while the two of them were standing in the street near the defendant's vehicle. The defendant told Hudson, during the conversation, that the police would need a warrant to search the vehicle. (Finding of Facts 5, Motion to Suppress).

Detective Hudson stood at the rear of the vehicle and looked into the rear window of the vehicle. He saw items that he believed were stolen property taken from the burglary of the automobile dealership. (Findings of Fact 6, Motion to Suppress). The defendant asked if he was being detained. He was told that the police were going to detain the vehicle. The defendant walked away. (Finding of Fact 7, Motion to Suppress). A short time later an employee from the victim business came to the location, looked in the rear of the vehicle and confirmed that the items therein were stolen property taken in the burglary. (Finding of Fact 8, Motion to Suppress).

The vehicle was impounded and a search warrant was obtained. (Exhibit 15). The defendant was located later that day and taken into custody. (Finding of Fact 10, Motion to Suppress). The defendant was interviewed the following morning while still in custody.

### **RESPONSE TO ASSIGNMENTS OF ERROR**

**1. The officers did not intrude upon a reasonable expectation of privacy of the defendant.**

The principle involved herein is well understood. When a law enforcement officer is able to detect something utilizing one or more of his senses while lawfully present at a vantage point where those senses are used, that detection does not constitute a “search” within the meaning of either the Fourth Amendment or Article 1, § 7 of the Washington State Constitution. *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981).

The officers did not intrude in an area where the defendant had a reasonable expectation of privacy. *Seagull*, 95 Wn.2d at 902-903:

The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house in so doing they are free to keep their eyes open... an officer is permitted the same license to intrude as a reasonably respectful citizen... however, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of implied invitation and intrude upon a constitutionally protected expectation of privacy.

The facts at hand are similar to those presented in *State v. Graffius*, 74 Wn.App. 23, 27, 871 P.2d 1115 (1994):

Four uniformed officers arrived at Graffius' home at about 5:30 p.m. while it was light. They were in uniform. They used the driveway commonly used for guests and members of the public who were visiting. They parked the police vehicles in the gravel portion of the driveway by the garage.... Upon arrival, Detectives Holeman, Jeske and Hawkins knocked loudly on Graffius' front door. There was no response. A fourth officer went to the north side of the house by the back fence. Detectives Holeman, Jeske and Hawkins then walked down a concrete walkway and returned to the graveled parking area on the north side of the garage. Officer Jeske knocked on a side door of the garage. There was no response. Meanwhile, Detective Holeman saw two garbage cans

next to the side door to the garage. The lid was ajar on one can, creating an opening 6 to 8 inches wide. Detective Holeman looked in and saw a fist-sized bud of marijuana on top of a few other pieces of household garbage.... Detective Holeman saw the marijuana by natural light; no flashlight was used.

The facts herein are much less intrusive than those in *Graffius*.

The first officer walked up the driveway to the side of the vehicle and spoke to the defendant. The second officer stood at the rear of the vehicle immediately adjacent to the public sidewalk. The driveway was the way one would have expected the officers to gain access to the residence. The car was sitting in the shared driveway next to the public sidewalk.

The court in *Graffius* set forth the factors that the court was to consider, *Graffius, supra*, 74 Wn.2d at 27:

In determining whether an officer exceeded the scope of an "open view", one must consider several factors, including whether the officer (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct access route to the house; (5) attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally.

Corporal King and Detective Hudson were there in daylight. They did not "spy" on the defendant or his vehicle. They did not create an artificial vantage point. They stood at the end of the driveway and looked inside the rear window of the car.

A person has almost no expectation of privacy in an access route to the house. *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996) (It was not a search for officers to walk up to the porch of a residence and observe what they could see from that location.) Likewise, walking up a driveway which is a common access and observing what could be seen through the open garage door is not a search. *State v. Posenjak*, 127 Wn.App. 41, 111 P.3d 1206 (2005).

In the case at hand, the expectation of privacy is even less, given the fact that this was a driveway shared with the house immediately next door. The expectation of privacy in a driveway is determined under the test of reasonableness taking into account the exposure of the driveway to the street and surrounding public areas, the use of the driveway for common access to the house and the nature of the incursion. *State v. Daugherty*, 94 Wn.2d 263, 268, 616 P.2d 649 (1980).

In the case at hand, the observations were made from a point at the end of the driveway closest to the street, within approximately 2 feet of the public sidewalk. This was at a point where the officer or any other person could have used the driveway to either access the defendant's house or the neighbor's house. This is clearly shown in the photos admitted at the hearing on the motion to suppress.

For the reasons set forth, this assignment of error must be rejected.

**2. The out-of-court statements of the defendant were properly admitted.**

A CrR 3.5 hearing was held in conjunction with the motion to suppress. The defendant is not asserting any violation of *Miranda*. Rather, the defendant is asserting that the defendant's confession is a "fruit" of the alleged unlawful arrest of the defendant and the statements were a "fruit" of that unlawful arrest.

By the time the defendant was arrested, the police knew the following. The owner of the dealership had received an anonymous tip from a person he knew, who did not wish to divulge his name to law enforcement, that an individual named "Bob," who was missing a finger, was trying to sell a Rousch Supercharger. A Rousch Supercharger had been stolen in the burglary. The defendant's name was "Bob" and the defendant was missing a finger. (Finding of Fact 2, Motion to Suppress). The Aberdeen police received a second tip that "Robert Olson" was trying to sell merchandise from the burglary and that he had a Rousch Supercharger in his possession. The informant told Aberdeen police that Olson was driving a red Suburban with a particular license number. The defendant was observed driving that vehicle immediately prior to his arrest on the same day the second tip was received. (Finding of Fact 2, 3, Motion to Suppress).

Prior to the defendant's arrest, Colin Gill, a Five Star employee, was brought to the location of the defendant's vehicle. As they were driving to that location Gill saw the defendant and told officers that he had

seen the defendant in the dealership the day before the burglary was discovered. (Finding of Fact 9, Motion to Suppress).

In short, police had probable cause to arrest the defendant even without the observations made by Detective Hudson. Detective Hudson's observations were made from a place where he was entitled to be. The seizure of the vehicle and the subsequent execution of the search warrant were based upon evidence validly obtained. There is no basis to suppress the defendant's out-of-court statements.

### CONCLUSION

For the reasons set forth, this conviction must be affirmed.

Respectfully Submitted,

By:   
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

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STATE OF WASHINGTON  
BY *JM*  
TERRY

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

|                      |                               |
|----------------------|-------------------------------|
| STATE OF WASHINGTON, |                               |
| Respondent,          | No.: 41269-1-II               |
| v.                   | <b>DECLARATION OF MAILING</b> |
| ROBERT L. OLSON,     |                               |
| Appellant.           |                               |

**DECLARATION**

I, *Barbara Chapman* hereby declare as follows:

On the *24<sup>th</sup>* day of May, 2011, I mailed a copy of the Brief of Respondent to:

Peter B. Tiller  
Attorney for Appellant  
P. O. Box 58  
Centralia, WA 98531

by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this *24<sup>th</sup>* day of May, 2011, at Montesano, Washington.

*Barbara Chapman*