

No. 44429-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JEANA LYNN BELL,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 11-1-03178-2  
The Honorable Kathryn Nelson, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied Jeana Bell's CrR 3.6 motion to suppress.
2. The trial court erred when it concluded that Jeana Bell's consent to the warrantless search of her car was knowingly, voluntarily and intelligently given.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court err when it denied Jeana Bell's CrR 3.6 motion to suppress and concluded that Jeana Bell's consent to the warrantless search of her car was knowingly, voluntarily and intelligently given, where the arresting officer exceeded the legitimate scope of the traffic violation detention before he obtained consent to search Jeana Bell's car? (Assignments of Error 1 & 2)

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The State charged Jeana Lynn Bell by Information with one count of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401); one count of unlawful use of drug paraphernalia (RCW 69.50.102, .412); and one count of possessing a dangerous weapon (RCW 9.41.250). (CP 1-2) The trial court

denied Bell's CrR 3.6 motion to suppress and ruled that her post-Miranda<sup>1</sup> warning statements to the arresting officer were admissible. (CP 74-77, 78-81; RP 123-25) Following a bench trial, the court also found Bell guilty as charged. (RP 182; CP 68-73) The court imposed a sentence of 40 months under the special drug offender sentencing alternative. (RP 201-02; CP 51-52) This appeal timely follows. (CP 64)

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.6 Hearing*

Fife Police Officer Jeffrey McNaughton was on routine patrol on the morning of August 7, 2011. (RP 6) As he drove his patrol vehicle eastbound on Pacific Highway, his attention was drawn to a gold Mazda traveling westbound towards him on Pacific Highway. (RP 7, 8, 9) According to Officer McNaughton, the Mazda's exhaust system was making an unusually loud "throaty-sounding" noise, which the Officer could hear even with his patrol vehicle's windows rolled up. (RP 8)

It is a violation of the traffic code to drive a vehicle with a modified or defective exhaust, so Officer McNaughton turned his

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<sup>1</sup> See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

vehicle around and initiated a traffic stop. (RP 8, 10) As he approached the back of the Mazda, Officer McNaughton could see damage to the muffler near the tailpipe. (RP 10) The Mazda turned into a parking lot and stopped in a parking spot. (RP 10)

Officer McNaughton approached the driver, who was alone in the Mazda. (RP 11) The driver identified herself as Jeana Bell, and told the Officer that she had borrowed the car and that her license was suspended. (RP 11, 12) Officer McNaughton's record check confirmed that the driver matched Jeana Bell's physical description, and that Bell's license was suspended in the third degree. (RP13, 14) He also learned that Bell had a felony record consisting of convictions for forgery and controlled substance violations. (RP 14)

Officer McNaughton testified that he often, but does not always, take a person into custody for driving with a suspended license. (RP 14) In this circumstance, however, he decided to ask Bell to exit the vehicle out of a concern for his safety because she seemed unusually jittery and the Mazda was packed full of unknown items within her reach. (RP 14, 15-16) Officer McNaughton asked Bell to stand at the back of the Mazda, and she complied. (RP 16) Officer McNaughton testified that Bell was

fidgety, moved her arms and hands in a “tweaking manner,” and her eyes were red, all signs he believed indicated that she was under the influence of narcotics. (RP 15) She also seemed nervous. (RP 21)

Officer McNaughton decided to continue to investigate, and informed Bell of her Miranda rights. (RP16, 17) Officer McNaughton asked if Bell had been using drugs. (RP 18) Bell said no, and seemed offended by the question. (RP 18-19) Then Officer McNaughton asked Bell if there were any weapons in the car. (RP 19) Bell told him that there was a switchblade knife in her purse in the vehicle. (RP 19) Officer McNaughton asked if there were any other illegal items in the car. (RP 19) Bell told him that there were “rigs” (hypodermic syringes) in the car. (RP 19) Officer McNaughton inquired as to why Bell had the syringes in the car, and Bell became upset. (RP20) She told Officer McNaughton that she had been clean for a long time, but recently “fell off the wagon.” (RP 20)

Bell told Officer McNaughton that she and her boyfriend had a fight and he kicked her out of their home, so she put all her belongings in the car and spent the night gambling and drinking coffee at the Emerald Queen Casino. (RP 20-21) She admitted to

Officer McNaughton that the syringes were for shooting methamphetamine, and that she had used the drug the night before. (RP 22)

At that point, Officer McNaughton asked Bell if he could search the car. (RP 22) Officer McNaughton testified that he told Bell she did not have to consent, and that she could limit or stop the search at any time.<sup>2</sup> (RP 22-23) According to Officer McNaughton, Bell agreed and allowed him to search the car with no limitations. (RP 22, 24)

A second officer, Ryan Pomeroy, arrived and stood with Bell by the back of the car as Officer McNaughton conducted the search. (RP 25, 26, 61) Officer McNaughton found two spring-activated knives in Bell's purse, a box full of small, unused zipper-style plastic baggies, two silver spoons with a white crystalline powder residue on them, \$1,090 in cash, and what appeared to be a significant quantity of methamphetamine. (RP 27-28) McNaughton suspected that Bell was intending to sell the methamphetamine. (RP 29) McNaughton then placed Bell under arrest and placed her in his patrol vehicle. (RP 30)

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

Officer McNaughton acknowledged that he knew he could not automatically conduct a search of the vehicle incident to arrest, and explained that it can be time consuming and expensive to obtain a warrant. (RP 44, 45)

Bell called several witnesses on her own behalf to testify at the CrR 3.6 hearing. Rebecca McDonough testified that she purchased the Mazda shortly before Bell's August 7th arrest, and had loaned the car to her. (RP 66) McDonough testified that there was nothing wrong with the exhaust or muffler before or after Bells' arrest. (RP 66-67, 68) James Matthews testified that he inspected the Mazda on August 9, 2011, when he worked as an exhaust technician at Bucky's repair shop in Fife. (RP 74, 75) He noted nothing unusual about the exhaust or muffler at that time. (RP 77-78) Both McDonough and Matthews testified that the exhaust did not make any unusually loud noises. (RP 68, 78)

Jeana Bell also testified. She claimed that she was stopped at a stop sign, not driving on Pacific Highway, when Officer McNaughton first saw her. (RP 91-92) She testified that the Mazda was not making any loud noises. (RP 93) She also testified that McNaughton informed her that he planned to search the car, and did not tell her she could refuse consent. (RP 95, 96, 98) She

testified she did not consent to the search. (RP 98)

## 2. *Facts from Trial*

Officer McNaughton testified at trial consistent with his testimony at the CrR 3.6 hearing. He also related how he found a scale, unused plastic baggies, spoons, cash, and multiple syringes in the car. These items are commonly associated with the sale and distribution of drugs. (RP 136-37, 151, 152, 161) Several of the syringes also appeared to have been previously used. (RP 161) In addition, Bell told Officer McNaughton that she sells methamphetamine. (RP 167) Bell stipulated that the 85.1 grams of powder found in the car was methamphetamine. (RP 163, 168-69)

## **IV. ARGUMENT & AUTHORITIES**

A warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution. See State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004); Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971). A warrantless search is presumed unlawful unless the State proves that it falls within one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). This is a strict rule, and

the State bears a “heavy burden” of establishing an exception to the warrant requirement by a preponderance of the evidence. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

An automobile search incident to arrest is not allowed unless the arrestee is within reaching distance of the passenger compartment at the time of the search, **and** the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed. State v. Patton, 167 Wn.2d 379, 383, 219 P.3d 651 (2009); State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012). But in this case, the State did not assert that the search was proper under this search incident to arrest exception to the warrant requirement.

Instead, the State argued that the search was valid because Bell gave her consent.<sup>3</sup> (CP 19-22) Bell in turn argued that Officer McNaughton exceeded the legitimate scope of the traffic stop detention before obtaining her consent, and therefore the consent was “vitiating by the illegal detention.” (CP 12-13; 107-12) The trial court agreed with the State and denied Bell’s motion to suppress, concluding that she “knowingly, voluntarily, and intelligently gave

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<sup>3</sup> Consent is also a valid exception to the warrant requirement. See State v. Arreola, 176 Wn.2d 284, 292, 290 P.3d 983 (2012); State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002).

her consent to the officers for them to search her car[.]”<sup>4</sup> (CP 77; RP 124-25)

The use of traffic stops must remain limited and must not encroach upon the right to privacy except as is reasonably necessary to promote traffic safety and to protect the general welfare through the enforcement of traffic regulations and criminal laws. State v. Arreola, 176 Wn.2d 284, 293, 290 P.3d 983 (2012). Although traffic stops are legally authorized for the investigation of traffic infractions or criminal activity, each such investigative stop must be (1) justified at its inception and (2) reasonably limited in scope based on whatever reasonable suspicions legally justified the stop in the first place. Arreola, 176 Wn.2d at 293-94 (citing State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (an officer may not use a traffic infraction as a pretext to stop a citizen and search for evidence of criminal wrongdoing that is unrelated to the reason for the stop)). Thus, even if the initial detention for a traffic violation is valid, when the officer improperly exceeds the legitimate scope of the detention in order to obtain consent for a search, the search itself is also illegitimate.

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<sup>4</sup> When reviewing the denial of a motion to suppress, a trial court’s conclusions of law are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

For example, in State v. Cantrell, 70 Wn. App. 340, 853 P.2d 479 (1993)<sup>5</sup>, a state trooper stopped the defendant for speeding. After issuing a citation, the trooper asked the driver and his passenger if they had any contraband or open containers of alcohol in their vehicle. 70 Wn. App. at 341-42. When they responded that they had some unopened containers of alcohol, the trooper asked if he could search the vehicle. 70 Wn. App. at 342. The passenger, whose father owned the car, consented to the search. The trooper discovered some marijuana and a bag of methamphetamine during his search. 70 Wn. App. at 342. The driver was then charged with possession of a controlled substance and was convicted following the trial court's denial of his motions to suppress. 70 Wn. App. at 342. The Court of Appeals reversed, concluding that “[o]nce the purpose of the stop was fulfilled by issuance of a speeding ticket . . . the trooper had no right to detain the car’s occupants [absent further] articulable facts giving rise to a reasonable suspicion of criminal activity.” 70 Wn. App. at 344.

Similarly, in State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991), a state trooper stopped defendant Tijerina's car after it

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<sup>5</sup> Disaffirmed on other grounds by State v. Cantrell, 124 Wn.2d 183, 875 P.2d 1208 (1994).

weaved over the fog line on Interstate 90 near Spokane. When Tijerina, who was Hispanic, opened his glove box to retrieve his registration, the trooper noticed “several small bars of soap, the kind commonly given out at motels.” 61 Wn. App. at 628. The trooper later testified that he was aware of “dozens of investigations monthly in the motels [in the Spokane area] regarding Hispanics selling controlled substance[s].” 61 Wn. App. at 628. Because Tijerina's license and registration were current, the trooper decided not to issue a citation. Nevertheless, because of his observation of the bars of soap and his knowledge of drug trafficking in Spokane area motels, he asked if he could search the vehicle. Tijerina consented. The search produced several bags of cocaine. Tijerina was arrested and later convicted of possessing a controlled substance. 61 Wn. App. at 629. At trial, the trial court denied Tijerina's motion to suppress evidence of the cocaine. The Court of Appeals reversed Tijerina's conviction, concluding that once the trooper decided not to issue a citation, further detention “had to be based on articulable facts from which the [trooper] could reasonably suspect criminal activity.” 61 Wn. App. at 629.

As Cantrell and Tijerina show, consent obtained after an officer has exceeded the proper scope of the traffic stop does not

legitimize the subsequent warrantless search. And, like the officers in Cantrell and Tijerina, Officer McNaughton exceeded the scope of the legitimate traffic stop when he questioned Bell about criminal behavior and sought to obtain her consent to search the car.

Officer McNaughton learned at the very outset of the stop that Bell was driving with a suspended license. (RP 12, 13) However, instead of issuing a citation and releasing Bell, or taking her into custody as was his usual practice, Officer McNaughton instead began asking Bell whether she had been engaged in other criminal activities and whether she had any sort of weapon or other contraband in the car. (RP 18-19) But this criminal investigation was not “reasonably related in scope to the circumstances which justified the stop in the first place.” Arreola, 176 Wn.2d at 294; Tijerina, 61 Wn. App. at 629.

Officer McNaughton initiated a criminal investigation that was not related to the purpose of the traffic stop, nor did it address the issue of Bell’s suspended driver’s license. Furthermore, even if Officer McNaughton had developed a suspicion that Bell was on drugs because she was nervous and fidgety, he did not take his investigation in that direction. Instead he asked about weapons and contraband.

Officer McNaughton clearly continued the detention in order to investigate unrelated criminal activity and for the sole purpose of gaining consent to conduct what would otherwise have been an unlawful warrantless search. The trial court therefore erred when it rejected Bell's argument that Officer McNaughton exceeded the legitimate scope of the traffic stop, which invalidated Bell's consent.

#### V. CONCLUSION

For the reasons argued above, the trial court erred when it concluded that the search of Bell's car was proper under the consent exception to the warrant requirement. All of the evidence obtained as a result of the search should have been suppressed. Bell's convictions should therefore be reversed.

DATED: June 7, 2013



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#### CERTIFICATE OF MAILING

I certify that on 06/07/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jeana Lynn Bell, DOC# 828950, Washington Corrections Ctr. for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.



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# CUNNINGHAM LAW OFFICE

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