

No. 45225-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kelly Stultz,

Appellant.

Kitsap County Superior Court Cause No. 12-1-01298-7

The Honorable Judge Jennifer Forbes

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Ms. Stultz's motion to suppress.
2. The conviction was based on evidence illegally obtained in violation of Ms. Stultz's right to be free from unreasonable searches and seizures under the Fourth Amendment and her right to privacy under Wash. Const. art. I, § 7.
3. The police violated Ms. Stultz's rights by conducting a warrantless search of her car in the absence of valid consent.
4. The trial court erred by adopting Finding of Fact No. VI.
5. The trial court erred by adopting Finding of Fact No. IX.
6. The trial court erred by adopting Finding of Fact No. X.
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11. The trial court erred by adopting Conclusion of Law No. IX.
12. The trial court erred by adopting Conclusion of Law No. X.
13. The trial court erred by adopting Conclusion of Law No. XI.

ISSUE 1: Absent an exception to the warrant requirement, evidence obtained pursuant to a warrantless search or seizure may not be admitted at a criminal trial. Here, the prosecution failed to establish an exception to the warrant requirement. Did the trial court err by admitting evidence seized in violation of Ms. Stultz's rights under the Fourth and Fourteenth Amendments and art. I, § 7?

ISSUE 2: A warrantless search cannot be justified as consensual unless consent is freely and voluntarily given. Here, Ms. Stultz allegedly "consented" to a search of her car

after being placed in custody by police. Did the prosecution fail to prove valid consent, where police did not administer *Miranda* warnings or advise Ms. Stultz of her right to refuse consent, and where the state presented no evidence as to her age, education, experience, or other factors bearing on the voluntariness of her consent?

14. The trial court erred by admitting evidence seized through exploitation of a prior unlawful seizure.
15. Police unlawfully arrested Ms. Stultz without probable cause.
16. The trial court infringed Ms. Stultz's Fifth Amendment privilege against self-incrimination.
17. The trial court erred by admitting the fruits of Ms. Stultz's unwarned custodial statements.

ISSUE 3: A court may not admit into evidence the fruits of a custodial interrogation conducted without the benefit of *Miranda* warnings. Here, Ms. Stultz's acquiesced to a search of her car during custodial interrogation conducted prior to administration of *Miranda* warnings. Was the evidence admitted in violation of Ms. Stultz's Fifth and Fourteenth Amendment privilege against self-incrimination?

ISSUE 4: Evidence obtained through exploitation of a prior unlawful seizure cannot be admitted into evidence. Here, Ms. Stultz allegedly consented to a search after police had unlawfully seized her without probable cause. Did the trial court err by admitting evidence seized in violation of Ms. Stultz's rights under the Fourth and Fourteenth Amendments and art. I, § 7?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Kelly Stultz was sleeping in her car when two City of Bainbridge police officers knocked on her window. RP¹ 8, 35. The police had received a call from someone concerned because she'd been parked there several hours.² RP 6, 12, 32. They approached and saw her in the driver's seat, with the seat reclined. They could tell she was breathing. RP 8.

When Ms. Stultz woke up, she first noticed the officer on the passenger side of her car. RP 36. She leaned over and opened the passenger door. The officer asked if she had any identification. She responded by handing over her identification. RP 10-11, 36.

As Ms. Stultz leaned over, the officer on the driver's side of her car – Officer Cienega -- saw one inch of a glass object sitting between her legs. RP 37. Most of the object was wrapped in a paper towel and hidden from view. RP 38. He believed the object might be the stem of a drug pipe, and that it had white residue on it. RP 37. He did not include any mention of the residue in his police report.³ RP 52.

¹ All cites to the verbatim report of proceedings refer to the May 7, 2013 suppression hearing.

² The caller indicated that a man was passed out in the driver's seat. RP 6.

³ As a result, neither party addressed the residue in briefing on Ms. Stultz's suppression motion. CP 6-26, 33-36.

Cienega ordered Ms. Stultz to get out of the car. RP 40. He handcuffed her immediately, while she was still in the door well of the car. RP 41, CP 59 (finding VII). After he handcuffed Ms. Stultz, Cienega saw a canvas pouch on the floor of the car. CP 43, 44. The pouch contained baggies of what Cienega believed to be methamphetamine. CP 43.

After handcuffing Ms. Stultz, Cienega told her that he had seen the pipe and the pouch. RP 54. One of the officers asked if she had any more drug paraphernalia in the car. RP 45. Ms. Stultz responded that she did not and that the officers could go ahead and look. RP 45, CP 59-60 (finding X).

Cienega reached into the car and took the pipe and the pouch. He also did a cursory search of the back seat. RP 45, 51. No one advised Ms. Stultz of her *Miranda* rights until after the search. RP 45, CP 60 (finding XII). Neither officer told her she had the right to refuse consent to search the car. RP 3-57.

The state charged Ms. Stultz with possession of methamphetamine. CP 1-2. She moved to suppress the evidence found in her car. RP 6-15.

The trial court found that officers violated Ms. Stultz's *Miranda* rights, and suppressed her statements. CP 61. Initially, the court also excluded the evidence seized from the car, ruling that the *Miranda* violation tainted the search. CP 44 (Findings 6-7). The state filed a

motion for reconsideration and the court changed its ruling. CP 37-41, 61 (Finding XI).

The court found Ms. Stultz guilty at a stipulated facts trial. CP 54-57. This timely appeal follows. CP 73.

ARGUMENT

THE COURT ADMITTED EVIDENCE SEIZED IN VIOLATION OF MS. STULTZ’S RIGHTS UNDER THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS AND ART. I, § 7.

A. Standard of Review.

The validity of a warrantless search is reviewed *de novo*. *State v. Westvang*, 174 Wn. App. 913, 918, 301 P.3d 64 (2013). A trial court’s findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.* In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *Id.* at 916, n. 4.

A *Miranda* claim is an issue of law reviewed *de novo*. *State v. Daniels*, 160 Wn.2d 256, 261, 156 P.3d 905 (2007). Whether a person is in custody for *Miranda* purposes is a mixed question of law and fact also subject to *de novo* review. *United States v. Rogers*, 659 F.3d 74, 77 (1st Cir. 2011).

B. Ms. Stultz did not voluntarily consent to a search of her car.

Both the Fourth Amendment and art. I, § 7 prohibit searches and seizures without a search warrant. *Westvang*, 301 P.3d at 68; U.S. Const Amends. IV; XIV; art. I, § 7. This “blanket prohibition against warrantless searches is subject to a few well guarded exceptions...” *Id.* When police have ample opportunity to obtain a warrant, courts do not look kindly on their failure to do so. *State v. White*, 141 Wn. App. 128, 135, 168 P.3d 459 (2007) (internal citation omitted).

The state bears the heavy burden of showing that a search falls within one of the narrowly drawn exceptions to the warrant requirement. *Westvang*, 301 P.3d at 68. Before evidence seized without a warrant can be admitted at trial, the state must establish an exception to the warrant requirement by clear and convincing evidence. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Unlike the Fourth Amendment, art. I, § 7 focuses on individual rights and the expectation of privacy, not the reasonableness of police conduct. *State v. Monaghan*, 165 Wn. App. 782, 787, 266 P.3d 222 (2012). Thus, a warrantless search presumptively violates the state constitution whether or not the police acted in good faith. *Id.*

In addition, art. I, § 7 specifically confers a privacy interest in vehicles and their contents. *State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d

289 (2012). Absent a warrant, police may not intrude into a vehicle to seize evidence. *Id.*

Consent to search is an exception to the warrant requirement. Consent cannot support a warrantless search unless the prosecution proves “that the consent was freely and voluntarily given.” *State v. O’Neill*, 148 Wn.2d 564, 588-90, 62 P.3d 489 (2003).

Consent must be evaluated under the totality of the circumstances. This requires the court to determine whether or not *Miranda* warnings⁴ were given prior to the alleged consent. *Id.* The totality-of-the-circumstances test also requires the court to evaluate the person’s degree of education and intelligence, whether s/he had been advised of the right to refuse consent, and any restraint imposed. *Id.*

Here, Ms. Stultz did not freely and voluntarily consent to the search of her car. First, police did not administer *Miranda* warnings until after she had given consent. CP 60 (finding XII).

Second, the state presented no testimony regarding her degree of intelligence or education. RP 3-57. The court made no findings on the subject. CP 58-61. This absence of findings must be held against the state. *Westvang*, 174 Wn. App. at 916, n. 4.

⁴*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Third, one officer testified that Ms. Stultz appeared confused at the time of the interaction. RP 10-11, 17, 18. The court did not enter a finding that she understood what she was doing when she gave consent. CP 58-61.

Fourth, the officers did not inform Ms. Stultz of her right to refuse consent. RP 3-57. The court made no finding that she understood her right to refuse. CP 58-61.

Fifth, police had restrained Ms. Stultz in handcuffs, and at least three officers were present when she allegedly consented. RP 6, 49, 54. Each of the factors in *O'Neill* weighs against the voluntariness of Ms. Stultz's acquiescence to the police search of her car. *O'Neill*, 148 Wn.2d at 588-90.

The warrantless seizure cannot be justified under the consent exception to the warrant requirement. *Id.* Her convictions must be reversed and the evidence suppressed on remand. *Id.* at 593.

C. Ms. Stultz's acquiescence to the search of her car was the fruit of her unlawful arrest.

Police may only arrest a person based on probable cause. *State v. Young*, 167 Wn. App. 922, 929, 275 P.3d 1150 (2012). Probable cause exists if the officer has sufficient facts for a reasonable person to conclude that criminal activity is taking place. *Id.*

An encounter that begins as consensual becomes a seizure if the officer “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Young*, 167 Wn. App. at 930 (citing *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)).

Consent to search cannot justify the admission of evidence if the consent is obtained through exploitation of an illegal seizure of a person. *State v. Harrington*, 167 Wn.2d 656, 670, 222 P.3d 92 (2009).

Simple possession of drug paraphernalia is not a crime. RCW 69.50.412.

Ms. Stultz was unlawfully seized before the police had probable cause to believe that a crime was being committed. *Young*, 167 Wn. App. at 929. Cienega ordered Ms. Stultz out of her car upon seeing what he thought *might* be a narcotics pipe in her lap. RP 38-40. Much of the object was obscured by a paper towel. RP 38. The officer testified that he did not yet have probable cause to arrest Ms. Stultz at that point. RP 53, 55. He later went back to confirm his belief that what he’d seen was a drug pipe containing residue. RP 55.

Despite this uncertainty, Cienega immediately placed Ms. Stultz in handcuffs when she exited the car. RP 41; CP 59 (finding VII). He did

not see the pouch on the floorboards until after he had ordered Ms. Stultz out of the car and handcuffed her. RP 43.

Ms. Stultz was arrested without probable cause, in violation of her Fourth Amendment and art. I, § 7 rights. *Young*, 167 Wn. App. at 929. Her subsequent consent was tainted by the illegal arrest. Her consent cannot justify the warrantless search of her car. *Harrington*, 167 Wn.2d at 670. Her conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Id.*

D. The evidence was the fruit of an unwarned custodial interrogation and the state failed to prove that the seizure of evidence was attenuated from the *Miranda* violation.

The Fifth Amendment to the U.S. Constitution provides that “No person shall... be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V.⁵ The privilege against self-incrimination applies in state prosecutions. U.S. Const. Amend. XIV; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

The Fifth Amendment prohibits the admission of evidence that is the fruit custodial interrogation without the benefit of *Miranda* warnings. *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010).

Unwarned statements are presumptively involuntary. *Id.*

⁵ The Washington State Constitution similarly provides that “No person shall be compelled in any case to give evidence against himself...” Wash. Const. art. I, § 9.

A person is “in custody” for *Miranda* purposes if a reasonable person would not have felt free to terminate the interrogation and leave. *J.D.B. v. N. Carolina*, 131 S.Ct. 2394, 2402, 180 L.Ed.2d 310 (2011). Questions reasonably likely to elicit an incriminating response constitute interrogation. *State v. Denney*, 152 Wn. App. 665, 671, 218 P.3d 633 (2009).

The direct or indirect fruits of unlawful police action must be suppressed unless “unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the taint.” *State v. Spotted Elk*, 109 Wn. App. 253, 262, 34 P.3d 906 (2001) (quoting *Wong Sun v. United States*, 371 U.S. 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

Here, the court found that police violated Ms. Stultz’s *Miranda* rights by engaging in custodial interrogation. CP 61. The court should also have suppressed the drugs and paraphernalia. These items were the fruits of the *Miranda* violation.⁶ *Spotted Elk*, 109 Wn. App. at 262. The seizure was not attenuated from the illegality. *Id.* Nothing came between Ms. Stultz’s statement granting permission to search and the seizure of the pipe and pouch. *Spotted Elk*, 109 Wn. App. at 262. The court did not find

⁶ In addition, Ms. Stultz’s response to the officers’ question was akin to a testimonial act. See *Spotted Elk*, 109 Wn. App. at 261.

the seizure of the items attenuated from the illegal custodial interrogation.
CP 58-61.

The evidence must be suppressed. *Id.*

The court violated Ms. Stultz's privilege against self-incrimination. Police violated her *Miranda* rights, and the court erroneously admitted the fruits of that violation. *Id.* Ms. Stultz's conviction must be reversed and the evidence suppressed. *Id.*

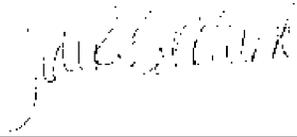
CONCLUSION

Ms. Stultz did not voluntarily consent to the search of her car. Her consent and the evidence were tainted by a *Miranda* violation and by an illegal arrest.

Ms. Stultz's convictions must be reversed. The evidence must be suppressed, and the charge dismissed.

Respectfully submitted on February 11, 2014,

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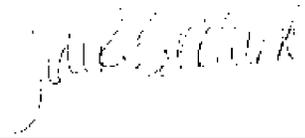
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 11, 2014.



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