

NO. 45225-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KELLY KATHLEEN STULTZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-01298-7

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Jodi R. Backlund
Po Box 6490
Olympia, Wa 98507-6490
Email: backlundmistry@gmail.com

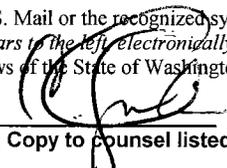
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 16, 2014, Port Orchard, WA 
Original e-filed at the Court of Appeals; Copy to Counsel listed at left.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. COUNTERSTATEMENT OF THE ISSUES.....	1
II. STATEMENT OF THE CASE.....	1
A. PROCEDURAL HISTORY.....	1
B. FACTS	1
III. ARGUMENT	6
THE EVIDENCE WAS PROPERLY SIEZED AFTER STULTZ INVITED THE OFFICERS TO SEARCH HER CAR DURING A VALID <i>TERRY</i> DETENTION; ALTERNATIVELY, EVEN IF THE CONSENT WERE DEEMED INVOLUNTARY, THE ITEMS SEIZED WERE IN STULTZ’S ACTUAL POSSESSION AT OR NEAR THE TIME OF THE ARREST AND WERE PROPERLY SEIZED AS PART OF A SEARCH INCIDENT TO ARREST.....	6
1. Officer Cienega had a reasonable suspicion of criminal activity.....	7
2. Stultz’s consent to search the vehicle was voluntary.....	10
3. The items seized were in Stultz’s actual possession.....	16
IV. CONCLUSION.....	21

TABLE OF AUTHORITIES

CASES

<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).....	17, 18, 19
<i>Hoflin v. City of Ocean Shores</i> , 121 Wn.2d 113, 847 P.2d 428 (1993).....	17
<i>Muehler v. Mena</i> , 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005).....	10
<i>State v. Belieu</i> , 112 Wn.2d 587, 773 P.2d 46 (1989).....	9
<i>State v. Buelna Valdez</i> , 167 Wn.2d 761, 224 P.3d 751 (2009).....	18, 19
<i>State v. Bustamante-Davila</i> , 138 Wn.2d 964, 983 P.2d 590 (1999).....	11
<i>State v. Byrd</i> , 178 Wn.2d 611, 310 P.3d 793 (2013).....	18, 19, 20
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	7
<i>State v. Ellison</i> , 172 Wn. App. 710, 291 P.3d 921 (2013).....	20
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998).....	11, 14
<i>State v. Flowers</i> , 57 Wn. App. 636, 789 P.2d 333 (1990).....	14, 15, 16
<i>State v. Gutierrez</i> , 92 Wn. App. 343, 961 P.2d 974 (1998).....	17
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	7
<i>State v. Johnson</i> , 104 Wn. App. 409, 16 P.3d 680 (2001).....	12
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	8
<i>State v. Khounvichai</i> , 149 Wn.2d 557, 69 P.3d 862 (2003).....	11

<i>State v. Lund</i> , 70 Wn. App. 437 (1993)	8
<i>State v. MacDicken</i> , 179 Wn.2d 936, 319 P.3d 31 (2014)	20
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997)	17
<i>State v. O’Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003)	6, 7, 11
<i>State v. Patton</i> , 167 Wn.2d 379, 219 P.3d 651 (2009)	7, 17
<i>State v. Rodriguez</i> , 20 Wn. App. 876, 582 P.2d 904 (1978)	13, 14, 16
<i>State v. Snapp</i> , 174 Wn.2d 177, 275 P.3d 289 (2012)	18
<i>State v. Tagas</i> , 121 Wn. App. 872, 90 P.3d 1088 (2004)	11
<i>State v. Thierry</i> , 60 Wn. App. 445, 803 P.2d 844 (1991)	8
<i>State v. Villarreal</i> , 97 Wn. App. 636, 984 P.2d 1064 (1999), <i>review denied</i> , , 999 P.2d 1261 (2000)	8
<i>State v. Walker</i> , 136 Wn.2d 678, 965 P.2d 1079 (1998)	11
<i>State v. Watkins</i> , 76 Wn. App. 726, 887 P.2d 492 (1995)	8
<i>State v. Werth</i> , 18 Wn. App. 530, 571 P.2d 941 (1977)	12
<i>State v. Wheeler</i> , 108 Wn.2d 230, 737 P.2d 1005 (1987)	8, 9
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984)	8
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)	7, 8
<i>Thornton v. United States</i> , 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)	18

United States v. Robinson,
414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)..... 19, 20

STATUTORY AUTHORITIES

RCW 69.50.102 9

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was properly seized after Stultz invited the officers to search her car during a valid *Terry* detention; ?

2. Alternatively, whether even if the consent were deemed involuntary, the items seized were in Stultz's actual possession at or near the time of the arrest and were thus properly seized as part of a search incident to arrest?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kelly Kathleen Stultz was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP 1. The evidence consisted of a pipe found in her lap and a baggie of the substance that was in open view in a bag between her legs at the time she was detained and arrested. RP 36-38, 42-43, 48.¹ Stultz moved to suppress the drugs, and the trial court ultimately denied the motion. CP 6, 58.

The matter went to trial on stipulated facts and Stultz was found guilty as charged. CP 54, 57.

B. FACTS

The following facts were adduced at the suppression hearing.

Bainbridge Island Patrol Officer Aimee LaClaire was dispatched

¹ All references to "RP" are to the report of proceedings dated May 7, May 10, and June 5, 2013.

around 10:00 p.m. to an apartment building at 550 Madison Avenue. RP 4-5, 7. Officer Victor Cienega responded as well. RP 5, 33. They were conducting a welfare check in response to a report from the building super who was concerned that someone had been sitting in a parked vehicle for several hours. RP 6, 12, 32..

The car was in the parking lot behind the apartment building. RP 6. The super had stated that the car had been parked there since the 3:00 p.m. RP 12. Several people had been coming and going from Apartment 5 to the car. RP 12. Later, it appeared that a person (subsequently identified as Stultz) had “passed out” in the vehicle, and had been in the driver’s seat for several hours. RP 6, 12.

Cienega had spent two weeks training with WESTNET, the regional narcotics task force a few months before he arrested Stultz. RP 31. Additionally, based on Cienega’s experience with the complex, activity at that time of night was suspicious. RP 32.

The officers located the car upon arrival. RP 7. The license plate matched that reported by the caller. RP 7. The car was not parked in a marked parking spot. RP 7. It was parked along the curb of the parking lot, and would have partially blocked anyone trying to drive out of the lot. RP 8, 34.

LaClaire approached the passenger side and Cienega approached

the driver's side. RP 7-8. Stultz was the only person in the car, and was seated in the driver's seat, which was reclined. RP 8. She had on a hat and had a coat draped over her like a blanket. RP 8. LaClaire could see that Stultz was breathing. RP 8. It was dark out, so LaClaire used her flashlight to check the interior of the car to make sure it was safe. RP 8. She then knocked on the window for about 20 to 30 seconds until Stultz awoke. RP 8. Cienega was also knocking on the driver's side window. RP 9.

The occupant sat up and then reached over and opened the passenger-side door. RP 9. LaClaire identified herself, and asked if she was all right or if she needed help. RP 9. Other than the difficulty rousing her, LaClaire had no prior suspicion that the situation involved anything other than a person sleeping in a car. RP 9. LaClaire was talking to Stultz to clarify whether she needed assistance. RP 22. It was a welfare check. RP 22.

LaClaire requested identification, which Stultz provided. RP 10. She was Kelly Stultz. RP 10. Stultz could not seem to explain what she was doing in the vehicle or how long she had been there, or why she had been there so long. RP 10.

Stultz said that she had come to give a ride to a friend that lived in Apartment 5 and had fallen asleep in the car. RP 11. She could not

explain why she had fallen asleep. RP 11. Stultz stated her friend, Renee, was home. RP 11. Stultz did not explain why if her friend was home, she had not gotten out to get her. RP 11. LaClaire and Cienega was familiar with a person named Renee who lived in that apartment from past calls to that address regarding narcotics activity. RP 11, 48. LaClaire was not familiar with Stultz. RP 11. Nor was Cienega. RP 11.

When Stultz reached over to open the passenger door, her coat had slid up and Cienega could see a glass narcotics pipe between her legs. RP 36-37. The white residue in the pipe was visible, and the bowl was wrapped in a paper towel. RP 37-38.

Cienega then told her loudly, so she could hear him through the window, that he could see her pipe. RP 40. He also told her he needed her to exit the vehicle. RP 40. She responded by covering the pipe with her hands. RP 40. He told her he had already seen it, and she needed to exit. RP 40.

Stultz opened the door and stepped out. RP 41. Stultz did not have any trouble getting out. RP 41. Stultz immediately handcuffed her. RP 41. He cuffed her because he felt uncomfortable and wanted to find out what was going on. RP 42.

When Stultz got out, the pipe rolled down onto the seat. RP 42. As he was handcuffing her, Cienega saw, from where he was standing, a

binocular-type pouch on the floorboard. RP 43. It was slightly under the edge of the seat. RP 20. The flap was open and he could see five one-inch square Ziploc baggies of the type used for drugs. RP 43. He could see what looked like crystal meth, based on his training and experience. RP 43, 48.

As Cienega was handcuffing Stultz, he told her he had seen the pipe and the baggies. RP 44. He asked her if it was methamphetamine. RP 44. She stated that it was. RP 44. He asked her if there were any more narcotics in the vehicle, and she said there were not, and they could search the vehicle. RP 45.

Cienega then seized the baggies – one had crystals in it, the other four were empty – and the pipe and put them on the roof of the vehicle. RP 45. He then told Stultz she was under arrest for possession of paraphernalia and methamphetamine and read Stultz her Miranda rights. RP 45. He then performed a cursory search of the car and found no other evidence. RP 51. Stultz was placed in the police vehicle after the search of the car. RP 17.

No threats were made to induce the consent to search. RP 17. Stultz was not told she had no choice. RP 17. Stultz was compliant, courteous and easygoing. RP 18, 49. The officers also maintained a respectful professional demeanor. RP 18, 48-49.

III. ARGUMENT

THE EVIDENCE WAS PROPERLY SEIZED AFTER STULTZ INVITED THE OFFICERS TO SEARCH HER CAR DURING A VALID *TERRY* DETENTION; ALTERNATIVELY, EVEN IF THE CONSENT WERE DEEMED INVOLUNTARY, THE ITEMS SEIZED WERE IN STULTZ'S ACTUAL POSSESSION AT OR NEAR THE TIME OF THE ARREST AND WERE PROPERLY SEIZED AS PART OF A SEARCH INCIDENT TO ARREST.

Stultz argues that the trial court erred in refusing to suppress the methamphetamine because her consent to search was involuntary, and/or was the fruit of an unlawful arrest and/or interrogation. This claim is without merit because the police saw the drugs in plain sight while conducting a proper welfare check and then *Terry* investigation, which then gave rise to probable cause to arrest. Further, the consent to search was volunteered, the items were not discovered as a result of the consensual search, and in any event, were in Stultz's actual possession and therefore properly seized incident to her valid arrest.

This Court reviews the decision to deny a motion to suppress to determine whether the findings are supported by substantial evidence and whether those findings, in turn, support the conclusions of law. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Where, as here, the findings are not challenged, we treat the findings of fact as verities on appeal and review the conclusions of law de novo. *O'Neill*, 148 Wn.2d at 571.

Article I, section 7 of the Washington Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” An individual’s right to privacy includes automobiles and their contents. *O’Neill*, 148 Wn.2d at 584. Subject to certain exceptions, a warrantless search violates article I, section 7. *State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563 (1996). The Supreme Court has recognized a few exceptions to the warrant requirement, including consent, plain view, search incident to arrest, and an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002); *State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009). The burden is on the State to show that a warrantless search or seizure falls within one of the exceptions. *Hendrickson*, 129 Wn.2d at 70.

1. Officer Cienega had a reasonable suspicion of criminal activity.²

Under *Terry*, police may detain an individual when there exists a reasonable suspicion that criminal activity is afoot. The initial detention must be justified at its inception and reasonable in scope.

The permissible scope of the *Terry* stop is determined by (1) purpose of the stop (2) amount of intrusion, and (3) length of time of

² Stultz does not challenge the propriety of the initial community-caretaking aspect of the officers’ interaction with her. The State therefore assumes that she acknowledges that the police were properly on the scene and checking on her presence in the parking lot and her well-being.

detention. *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987); *State v. Lund*, 70 Wn. App. 437 (1993). Individualized suspicion of criminal conduct, focusing on a specific suspect, is a general requirement for a valid detention or stop. *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986). The scope and degree of detention may be enlarged or prolonged on the basis of information obtained during the detention. *State v. Guzman-Cuellar*, 47 Wn. App. 326, 332, 734 P.2d 966, *review denied*, 108 Wn.2d 1027 (1987).

Furthermore, the officer's experience and knowledge of criminal behavior is a factor to be considered in determining if an investigative stop was reasonable and justified under the circumstances. *State v. Thierry*, 60 Wn. App. 445, 448, 803 P.2d 844 (1991). Thus, in evaluating the reasonableness of a stop, courts consider the totality of the circumstances, including the officer's training and experience, the location of the stop and the conduct of the person detained. *State v. Villarreal*, 97 Wn. App. 636, 984 P.2d 1064 (1999), *review denied*, 140 Wn.2d 1008, 999 P.2d 1261 (2000).

Asking a suspect to exit a vehicle is a seizure, but it does not rise to the level of a custodial arrest. *State v. Watkins*, 76 Wn. App. 726, 729, 887 P.2d 492 (1995). Likewise, placing a suspect in handcuffs is a seizure, but it does not necessarily mean the subject has been arrested.

See generally State v. Belieu, 112 Wn.2d 587, 773 P.2d 46 (1989) (full felony stop procedure which included handcuffing); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987) (police may handcuff a suspect detained pursuant to an investigative stop before transporting him in a police car).

In this case, Cienega had a reasonable suspicion that Stultz was engaged in illegal narcotics activity based on the nature of the 911 call, her current state of being “passed out” in the parking lot, the known history of narcotics activity at the apartment Stultz claimed to be visiting, and his observation of what appeared to him in his experience to be a methamphetamine pipe. The court may take into account Cienega’s training and experience in identifying that pipe and the totality of the situation confronting officers. Cienega testified that he had recently completed two week of training with the regional narcotics task force.

Stultz argues that mere possession of paraphernalia is not a crime. Contrary to Stultz’s contention, possession of paraphernalia is a crime in the City of Bainbridge Island. BIMC³ 9.07.020 provides:

No person shall possess any drug paraphernalia as defined in RCW 69.50.102 with the intent to use or employ the same for manufacturing and/or consuming controlled substances. (Ord. 85-08 § 2, 1985)

BIMC 9.01.050 further provides:

Unless otherwise provided, any person violating any of the

³ See <http://www.codepublishing.com/wa/bainbridgeisland/> (viewed Apr. 24, 2014).

provisions of this title shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine not to exceed \$5,000 or by imprisonment in jail for a term not exceeding one year, or by both such fine and imprisonment. (Ord. 91-34 § 4, 1991: Ord. 85-08 § 2, 1985)

Regardless of whether Cienega had probable cause when he asked Stultz to exit her car, he certainly had a reasonable and articulable suspicion that criminal activity was afoot. That reasonable suspicion was a valid basis to investigate the pipe and Stultz's presence in the apartment's parking lot. Removing her from the vehicle to investigate was permissible in a *Terry* stop. *Muehler v. Mena*, 544 U.S. 93, 99-100, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005).

The moment Stultz stepped out of the car, Cienega was also able to see what immediately and clearly appeared to be a bag of methamphetamine on the floorboard where the Defendant's feet had been. At that moment he certainly had probable cause to arrest her. Instead, the officers continued to speak to her and she volunteered her consent to search the vehicle.

2. Stultz's consent to search the vehicle was voluntary.

Stultz argues that her consent was not voluntary because it was tainted by the earlier allegedly illegal detention. As discussed above, however, her detention was based, at the very least, on a reasonable and articulable suspicion that she was engaged in criminal activity.

For a valid consensual search, the state must show that three factors are met; the consent must be voluntary, the person granting consent must have the authority to consent, and the search must not exceed the scope of the consent. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). In some circumstances, the defendant must also be informed of his *Ferrier* warnings before the defendant can consent to a search of his property. *State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998); *State v. Khounvichai*, 149 Wn.2d 557, 559, 69 P.3d 862 (2003). These warnings are only required when police officers seek entry into a home or residential analogue such as a hotel room to conduct a consensual search for contraband or evidence of a crime. *Id.* *Ferrier* warnings were not required in this case. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981-82, 983 P.2d 590 (1999); *State v. Tagas*, 121 Wn. App. 872, 878, 90 P.3d 1088 (2004).

Outside of the *Ferrier* context, the Court employs a “totality of circumstances” test to determine whether a person consented to a search. *Bustamante-Davila*, 138 Wn.2d at 981-82. No one factor is dispositive. *Id.* Consent will virtually never be found to be voluntary where it is obtained only after an officer has indicated that if consent is not given a warrant will be obtained or that a refusal to consent will result in a search incident to arrest. *See State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489, 503-

04 (2003).

At the time Stultz offered to allow the search of her vehicle, she had not been formally arrested, though probable cause to arrest did exist. Even had she been under arrest, her consent would not be presumed to coerced. *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001) (upholding consent from an individual who was already in custody). One example of a coercive situation is found in *State v. Werth*, 18 Wn. App. 530, 534, 571 P.2d 941 (1977). There, consent was obtained after the defendant had been told that her house was surrounded, she had been ordered out of her home, was told to keep her hands in plain sight, and observed multiple officers, one of whom was armed with a shotgun. The court concluded that she was under arrest and her consent was not voluntary. *Id.* Stultz's case falls far short of the circumstances present in *Werth*.

Though the reading of *Miranda* rights is one factor a court may consider, it is not dispositive. Here, Cienega informed Stultz that he had seen the drugs in her car and asked her if she had anything else in the car. Stultz said no and told the officer could look for himself. These statements were made prior to Stultz being given *Miranda* warnings. The trial court thus excluded Stultz's statements. CP 61.

Nevertheless, the constitutional analysis under the Fifth

Amendment and *Miranda* is quite different than that associated with search and seizure and the fruit of the poisonous tree doctrine, as this Court has explained:

Miranda warnings are not a prerequisite to a voluntary consent; they relate to the compulsory self-incrimination barred by the Fifth Amendment and not to unreasonable searches and seizures proscribed by the Fourth Amendment. The *Miranda* safeguards are designed to prevent a defendant from becoming a witness against himself. The Fourth Amendment protects one's home and possessions. "The essential component of an unreasonable search and seizure is some sort of unreasonableness." The fact that a consent to search might lead to incriminating evidence does not make it testimonial or communicative in the Fifth Amendment sense. However, the request for a consent to search, with no activity required of the suspect, is designed to elicit physical and not testimonial evidence. Even though incriminating evidence is found, the consent need not be regarded as coerced; "(b)owing to events, even if one is not happy with them, is not the same thing as being coerced."

State v. Rodriguez, 20 Wn. App. 876, 880, 582 P.2d 904, 907 (1978) (internal citations removed). In short, for consent to be valid it must be voluntary, which involves a different analysis than whether custodial statements to law enforcement are subject to *Miranda* warnings or follow a voluntary *Miranda* waiver. Consent to search may be voluntary even when the defendant has been arrested and handcuffed, but not advised of *Miranda* or *Ferrier* rights. *Rodriguez*, 20 Wn. App. at 880.

The facts in *Rodriguez* are similar to this case, although the atmosphere was, if anything, less coercive than in *Rodriguez*. The

defendant in that case was arrested in Los Angeles on an arrest warrant for a burglary occurring in Washington. *Rodriguez*, 20 Wn. App. at 879. After placing him under arrest and in handcuffs, officers asked if they could search his bedroom. *Id.* Officers testified he said “he didn’t care because ‘he didn’t have anything in there anyway.’” *Id.* Despite the presence of ten officers at the time of the consent, and the fact the defendant was not given *Miranda* warnings or told he could refuse to give consent, the court found no express or implied coercion. *Rodriguez*, 20 Wn. App. at 881. The court noted no guns were drawn, and the officers did not claim they could search regardless of his permission. *Id.* This Court concluded that *Miranda* warnings were not a prerequisite to valid consent because they related to the Fifth Amendment self-incrimination barrier not to the right to be free from improper searches, even if the search led to incriminating evidence. *Rodriguez*, 20 Wn. App. at 880.

Another example of outwardly coercive circumstances that nevertheless did not invalidate consent is found in *State v. Flowers*, 57 Wn. App. 636, 789 P.2d 333 (1990). The defendant in that case was ordered out of his hotel room at gunpoint by at least four officers. *Flowers*, 57 Wn. App. at 638-39. He was ordered onto his knees with his hands behind his head by one officer, who then put one knee on the defendant’s leg and braced his other knee against the defendant’s spine to

restrain him, while two other officers kept their weapons drawn on him. *Id.* Officers told the defendant they were investigating a robbery and asked for permission to search the hotel room and his car. *Flowers*, 57 Wn. App. at 639. The defendant had not been *Mirandized* or told he could refuse consent. *Id.* He was still on the ground and being held onto by an officer, though the officer no longer restrained the defendant with his knees. *Flowers*, 57 Wn. App. at 644. The defendant answered, “Sure, go ahead.” *Flowers*, 57 Wn. App. at 639.

The Court observed that the circumstances “appear[ed], at first blush, coercive.” *Flowers*, 57 Wn. App. at 645. The court noted that although factors such as failing to give *Miranda* warnings, to tell the suspect he could refuse, custodial restraint, and the display of weapons might not individually preclude finding voluntary consent, the presence of all these factors together were significant indicators of coercion. *Id.* However, the court considered each of those factors in light of the totality of the circumstances and found “no indication that Flowers’ consent was the product of coercion or duress or that his ‘will was overborne.’” *Flowers*, 57 Wn. App. at 646. The court noted that Flowers seemed to have some experience and intelligence dealing with police and he was not threatened to get his consent. *Id.*

Unlike in *Flowers*, Stultz volunteered her consent under non-

hostile circumstances. The contact was by all accounts professional and Stultz was cooperative. No weapons were drawn and the officers did not threaten her or tell her she had no choice but to consent. Indeed, the officers did not even ask for consent; Stultz spontaneously invited the search. Though the trial court found she had been detained but had not been *Mirandized* when she offered her consent, as in *Rodriguez*, her consent remains voluntary and valid. The trial court properly declined to suppress the evidence, which was seen in plain view by Officer Cienega, and seized pursuant to Stultz's voluntary and spontaneous offer for the police to search the vehicle.

3. The items seized were in Stultz's actual possession

Finally, even if the trial court incorrectly found that the consent to search was voluntary, the motion to suppress would have properly been denied. The evidence in question was not found as a result of the consensual search. To the contrary, the officer had identified it as contraband before the search of the car occurred and before consent to search was granted. The question, then, is whether the officer lawfully *seized* it.

Although this point was not raised below, this Court may affirm a trial court's decision on any theory supported by the record and the law. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The

appellate court may therefore affirm on other grounds even after rejecting a trial court's reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), significantly circumscribed an officer's authority under the Fourth Amendment to search a vehicle incident to the arrest of a recent occupant. *See Gant*, 556 U.S. at 351 ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe the vehicle contains evidence of the offense of arrest.") (emphasis supplied). The Washington Supreme Court has applied and further narrowed the federal limits set forth in *Gant* under Article I, section 7 of the Washington Constitution. *E.g. State v. Patton*, 167 Wn.2d 379, 395-96, 219 P.3d 651 (2009) (search incident to arrest exception did not permit search of car where defendant was arrested while standing next to it, but there was no evidence he was a recent occupant of the car or that there would be evidence of the crime of arrest in the car); *State v. Buelna Valdez*, 167 Wn.2d 761, 778, 224 P.3d 751 (2009) (search of vehicle improper after defendant was secured in the back of patrol car and there was no likelihood that there would be evidence of the crime of arrest in the

car); *State v. Snapp*, 174 Wn.2d 177, 197, 275 P.3d 289 (2012) (“*Thornton*⁴ exception,” which permits warrantless search of vehicle for evidence of crime of arrest did not apply under art. I. § 7).

Because it appears that the search of the car occurred after Stultz was in handcuffs and standing at the rear of the car. RP 54. It thus does not appear that the search of the car can be justified under *Buelna Vaddez* or *Snapp*. As noted, however, none of the evidence introduced against Stultz was recovered during the later search of the car. Instead, it was seized before that search occurred.

As the Supreme Court recently explained, there are two types of warrantless searches that may be made incident to a lawful arrest: a search of the arrestee’s person and a search of the area within the arrestee’s immediate control. *State v. Byrd*, 178 Wn.2d 611, 616–17, 310 P.3d 793 (2013). The latter type of search is that addressed in *Gant* and *Buelna Valdez*.

The first type, a search of the arrestee’s person, presumes exigencies and is justified as part of the arrest; therefore it is not necessary to determine whether there are officer safety or evidence preservation concerns in that particular situation. *Byrd*, 178 Wn.2d at 617-18 (*citing United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427

⁴ *Thornton v. United States*, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).

(1973)). Further because it is based on the officer's authority to detain rather the reasonableness of the search, it satisfies both the federal and state constitutions. *Byrd*, 178 Wn.2d at 618.

Thus, whether a search incident to arrest is governed by *Gant* and *Buelna Valdez* or *Robinson* depends on whether the item searched was an article of the arrestee's person. The Court in turn answers that question by "time of arrest" rule. *Byrd*, 178 Wn.2d at 620-21.

That rule, holds that an article that is "immediately associated" with the arrestee's person and can be searched under *Robinson*, if the arrestee has actual possession of it at the time of a lawful custodial arrest. *Byrd*, 178 Wn.2d at 621. The rule recognizes that the same exigencies that justify searching an arrestee prior to placement into custody extends not just to the arrestee's clothes, but to all articles closely associated with the arrestee's person. *Byrd*, 178 Wn.2d at 622.

Although the Court cautioned that the exception was not to be read too broadly, the seizure of the evidence in this case was clearly within *Byrd's* scope:

We caution that the proper scope of the time of arrest rule is narrow, in keeping with this "jealously guarded" exception to the warrant requirement. It does not extend to all articles in an arrestee's constructive possession, but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest. ... Searches of the arrestee's person incident to arrest

extend only to articles “in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person.” Extending *Robinson* to articles within the arrestee’s reach but not actually in his possession exceeds the rule’s rationale and infringes on territory reserved to *Gant* and *Valdez*.

Byrd, 178 Wn.2d at 622 (internal citations omitted); *see also State v. MacDicken*, 179 Wn.2d 936, 941-42, 319 P.3d 31 (2014).

Here, both the pipe and the bag with the drugs in it were within Stultz’s immediate physical possession immediately preceding her arrest: the pipe was in her lap and the bag was directly in front of her seat between her legs. The location of the pipe is indistinguishable from that of the purse in *Byrd*. *Byrd*, 178 Wn.2d at 615. Likewise a bag located between a defendant’s feet is deemed to be in his actual possession for purposes of a search incident to arrest. *State v. Ellison*, 172 Wn. App. 710, 714, 718, 291 P.3d 921 (2013).⁵ Thus even if the consent to search were invalid, the trial court did not err in refusing to suppress the evidence.

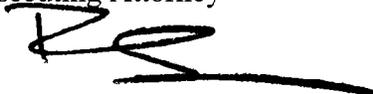
⁵ Even were the bag not deemed to be in Stultz’s possession, and thus suppressible, reversal would not be required. The stipulated facts under which Stultz was convicted established that both the bag and the pipe contained methamphetamine. CP 55.

IV. CONCLUSION

For the foregoing reasons, Stultz's conviction and sentence should be affirmed.

DATED May 16, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'R. Hauge', with a long horizontal stroke extending to the right.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

May 16, 2014 - 1:59 PM

Transmittal Letter

Document Uploaded: 452251-Respondent's Brief.pdf

Case Name: Kelly Stultz

Court of Appeals Case Number: 45225-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Carol L Opalinski - Email: copalins@co.kitsap.wa.us