

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

STATE OF WASHINGTON,

Respondent,

v.

COLLEEN ANN MUIR

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin Hull and Steve Dixon, Judges

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the oral ruling denying suppression of the illegally seized evidence.
2. Appellant assigns error to the trial court's failure to enter written findings following the 3.6 hearing.
3. Appellant was illegally seized and searched in violation of article 1, § 7.
4. Appellant was illegally seized and searched in violation of the Fourth Amendment.
5. Appellant did not consent to a search the truck or the safe.

Issues Presented on Appeal

1. Did the trial court err by orally ruling against the motion to suppress evidence obtained following an illegal detention?
2. Was appellant prejudiced by the trial court's failure to enter written findings following the 3.6 hearing?
3. Was appellant illegally seized and searched in violation of article 1, § 7?
4. Was appellant illegally seized and searched in violation of the Fourth Amendment?

Was appellant's consent to search invalid as the product of an

illegal seizure?

B. STATEMENT OF THE CASE

Following a 3.6 hearing and a stipulated trial, Colleen Muir was convicted of possession of methamphetamine with intent to deliver. CP 39-52. The trial court did not enter written findings following the 3.6 hearing. This timely appeal follows. CP 55.

3.6 Hearing Testimony

Colleen Muir was a passenger in a vehicle driven by James McIntyre who had outstanding arrest warrants. RP 8-10 (May 28, 2013). When McIntyre stopped at a small market, he was arrested and Ms. Muir was detained. RP 9-12). According to officer Elton, he asked Muir to step outside the store to talk to him; he asked Muir to identify herself; he asked if she was buying or selling drugs; he asked her where he could find “H”, meaning heroin; he twice asked permission to search the truck McIntyre was driving; he asked Muir which items in the truck belonged to her; and he asked Muir if he could search a locked safe that was located in the truck. RP 10- 17, 24-26 (May 28, 2013).

Elton testified that Muir was not detained, but she was seated on a curb on her own accord while he searched the safe and truck. Elton testified that Muir had her purse and Muir testified that her purse was out of her

reach. RP 21, 34, 38-39. When Elton asked for the combination to the safe, Muir indicated that she did not know the combination. RP 34. Elton moved the combination until he discovered the combination and opened the safe finding methamphetamine and cash inside. RP 16-17, 28-29,

The statement of probable cause and the police reports largely indicate that officer Elton asked Muir what items in the truck belonged to her. CP 15-31. These documents and the testimony provided that Muir initially indicated that she bought the safe from a person named Sasha and that the boots and black garment bag were not hers. Later, Muir admitted the bag was hers. Muir did not know the combination to the safe and said she did not know its contents. CP 15-31; RP 14.

After the police discovered the safe combination, opened it and found methamphetamine, Muir was given Miranda warnings and arrested. RP 19. While the officers had possession of Muir's safe and while asking Muir questions and trying to open the safe, Muir was seated on the curb. CP 15-31; RP 19, 31. There were four police officers and four police vehicles present during McIntyre's arrest and Muir's detention and Muir she did not feel free to leave. RP 28, 34. Elton wanted to search the truck and its contents to look for contraband. RP 22.

C. ARGUMENTS

1. APPELLANT WAS ILLEGALLY SEARCHED AND SEIZED WITHOUT REASONABLE ARTICULABLE SUSPICION AND WITHOUT REQUIRED MIRANDA WARNINGS

a. Standard of Review Fourth Amendment

A person is ‘seized’ under the Fourth Amendment only if, ‘in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’ *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). ‘Whether a reasonable person would believe he was detained depends on the particular, objective facts surrounding the encounter.’ *State v. Ellwood*, 52 Wn.App. 70, 73, 757 P.2d 547 (1988); *Armenta*, 134 Wn.2d at 10–11.

Whether a seizure occurred is a mixed question of law and fact. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); *State v. Hansen*, 99 Wn. App. 575, 577, 994 P.2d 855, *review denied*, 141 Wn.2d 1022 (2000). When reviewing the denial of a suppression motion, the appellate court must determine whether substantial evidence supports the findings of fact and then determine whether the findings support the conclusions of law. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Although the appellate court gives the trial court’s factual findings

great deference, it must decide ultimately as a question of law whether those facts constitute a seizure. *Hill*, 123 Wn.2d at 647. Thus, review of a suppression issue is de novo. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

Muir was not under suspicion of criminal activity. She and the driver of the vehicle were approached by police inside a store and as her companion was being arrested, Muir was asked to leave the store to talk to the police. RP 30-36 (May 28, 2013). The police asked Muir her name and suggested she take a seat (on the curb). Elton asked if he could search the trunk of the car and the inside of her purse and a safe that belonged to Muir inside the trunk. Muir indicated she could not give consent to search the car because it was not hers. The police repeatedly asked Muir the combination to the safe, which she indicated she could not remember. RP 30-36 (May 28, 2103). The police ultimately opened the safe and discovered methamphetamine. RP 16-17 (May 28, 2013). During this entire interaction, Muir's purse and her safe were out of her reach. RP 36 (May 28, 2013). Elton testified that he just wanted to search the truck driven by Muir's companion and the truck's contents to see if he could find contraband.

If I could get consent to search a vehicle, I can then look and see if there's any illegal items associated to the people that were with it or any other person, if I could determine that.

RP 22 (May 28, 2013).

Generally, without more, police-questioning relating to one's identity or a request for identification by the police is unlikely to result in a seizure. *Armenta*, 134 Wn.2d at 11. For example, if a person freely consents to stop and talk, the officer's questions or request for identification does not necessarily elevate the consensual encounter into a seizure. *State v. Barnes*, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999). "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Mendenhall*, 446 U.S. at 554.

But a police encounter ripens into a seizure when the police retain the person's identification or money or other personal property. *Armenta*, 134 Wn.2d at 6, 12; *State v. Thomas*, 91 Wn. App. 195, 200-01, 955 P.2d 420, *review denied*, 136 Wn.2d 1030, 972 P.2d 467 (1998).

In *Thomas*, a seizure occurred when an officer, while retaining the defendant's identification, took three steps back to conduct a warrants check

on his hand-held radio. *Thomas*, 91 Wn. App. at 200-01. Similarly, in *State v. Dudas*, 52 Wn. App. 832, 834, 764 P.2d 1012 (1988), *review denied*, 112 Wn.2d 1011 (1989), a seizure occurred under the Fourth Amendment when the deputy took the defendants identification card and returned to the patrol car. *Dudas*, 52 Wn. App. at 834.

In *State v. Aranguren*, a seizure occurred when an officer took the defendants' identification documents to his vehicle to write their names down and run warrants checks on them. *State v. Aranguren*, 42 Wn. App. 452, 456, 711 P.2d 1096 (1985). In *State v. Armenta*, a seizure occurred when a police officer placed the defendant's money in his patrol car "for safe keeping." *Armenta*, 134 Wn.2d at 6, 12. In *State v. O'Day*, the court held that a passenger was seized when the officer ordered her out of the car, placed her purse out of reach, asked if she had drugs or weapons, and asked if she would consent to a search. *State v. O'Day*, 91 Wn. App. 244, 252, 955 P.2d 860 (1998). In each of these cases, the officer removed the defendant's identification or property from the defendant's presence, effectively immobilizing the defendant.

In the instant case, as in these cases, once the officer took possession of Muir's safe and the other belongings in the truck, she was detained and the officer was required to provide Miranda warnings before asking permission

to search. Rather than provide Miranda warnings, Elton thrice asked consent to search. The failure to provide Miranda warnings rendered the consent invalid and the search illegal. *Armenta*, 134 Wn.2d at 6, 12; *Thomas*, 91 Wn.App. at 198, 200–01; *O'Day*, 91 Wn. App. at 252; *Dudas*, 52 Wn. App. at 834; *Aranguren*, 42 Wn. App. at 456. Muir was illegally seized when the police took her purse and safe.

b. Article 1, section 7

A person is seized under article I, section 7 of the state constitution only when, by means of physical force or a show of authority, his freedom of movement is restrained when in light of all of the circumstances a reasonable person would not believe he is free to leave or to otherwise decline an officer's request and end the encounter. *State v. Young*, 135 Wn.2d 498, 510–11, 957 P.2d 681 (1998). This is a purely objective standard defined by the actions of the law enforcement officer. *Young*, 135 Wn.2d at 510–11.

Article I, section 7 is more protective than the Fourth Amendment, where warrantless searches are concerned. *State v. Smith*, 177 Wn.2d 533, 303 P.3d 1047 (2013); *State v. Morse*, 156 Wn.2d 1, 9–10, 123 P.3d 832 (2005). Under our state constitution, warrantless searches are per se unreasonable unless one of the narrow exceptions to the warrant requirement applies. *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

Consent is a valid exception to a warrantless seizure provided (1) it is voluntary, (2) the person consenting has the authority to do so, and (3) the search does not exceed the scope of consent. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). The prosecution must show by clear and convincing evidence that a defendant's consent was free and voluntary. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990), *citing*, *State v. Shoemaker*, 85 Wn.2d 207, 210, 533 P.2d 123 (1975); *State v. Nelson*, 47 Wn.App. 157, 163, 734 P.2d 516 (1987)).

Clear and convincing evidence exists when the evidence shows that the ultimate fact in issue is highly probable. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). A court determines if consent is free and voluntary as a question of fact based upon the totality of the circumstances, including (1) if police gave *Miranda* warnings before obtaining consent, (2) the consenting person's degree of education and intelligence, and (3) if the police advised the consenting person of the right to refuse consent. *Smith*, 115 Wn.2d at 789, *citing*, *Shoemaker*, 85 Wn.2d at 212. No one factor is determinative. FN12. *Smith*, 115 Wn.2d at 789.

If an unlawful search precedes a later consent search, the court must determine if the earlier illegality tainted the process of obtaining the derivative evidence, if so, both the Fourth Amendment of the United States

Constitution and article I, section 7 of the Washington Constitution require excluding the evidence seized in the later search. *See Wong Sun v. United States*, 371 U.S. 471, 484–85, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Jensen*, 44 Wn.App. 485, 489 n. 1, 723 P.2d 443 (1986).

This is a factual determination that requires examining the police officers' actions and their motivations for their actions. As part of this inquiry, the court considers if discoveries made in the initial unlawful search motivated the officers conducting the subsequent search. *Murray v. United States*, 487 U.S. 533, 542, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988); *State v. Gaines*, 154 Wn.2d 711, 718–21, 116 P.3d 993 (2005); *State v. Miles*, 159 Wn.App. 282, 291–94, 244 P.3d 1030, *review denied*, 171 Wn.2d 1022 (2011).

In *State v. Soto– Garcia*, 68 Wn.App. 20, 841 P.2d 1271 (1992), abrogated on other grounds in *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996),¹ an officer asked Soto– Garcia if he had cocaine. Soto– Garcia said no, but consented to a search. The officer discovered cocaine in his shirt pocket. *Soto– Garcia*, 68 Wn.App. at 22. This Court held that Soto– Garcia was seized when the officer requested permission to search, reasoning that the “atmosphere created by [the officer's] progressive intrusion into Soto–

¹ *Overruled on other grounds in State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

Garcia's privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter.” *Soto– Garcia*, 68 Wn.App. at 25. Soto-Garcia was illegally detained and the subsequent consent to search rendered invalid. *Soto– Garcia*, 68 Wn.App. at 25.

In *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009), the Washington State Supreme Court recently relied on the reasoning in *Soto– Garcia* to hold that an officer's “progressive intrusion” into a defendant's privacy resulted in a seizure. The Court in *Harrington* described the independent elements referred to in *Soto– Garcia* that amounted to a seizure as: **“[the officer's] inquiry about Soto– Garcia's identification, warrant check, direct question about drug possession, and request to search [Soto– Garcia]—all of which, combined, formed a seizure.”** (Emphasis added). *Harrington*, 167 Wn.2d 656, 668–69, 222 P.3d 92, 97–98.

The Court in *Harrington* compared *Soto– Garcia* to Harrington's case, and held that Harrington was also seized by the officer's progressive intrusion into his privacy which included an officer stopping Harrington on the street at night, asking to talk to Harrington, asking where Harrington had been, noticing Harrington was “nervous”, asking Harrington to take his hands out of his pockets and asking to frisk Harrington for “officer safety”. *Harrington*,

167 Wn.2d at 60-662.

Here as in *Soto-Garcia* and *Harrington*, Muir was seized based on a similar constellation of independent elements” when Elton, without providing Miranda warnings, asked Muir to come outside the store to talk; when he asked Muir to sit on the curb, when Elton asked Muir if she was buying “H”; when Elton asked Muir if she was selling “H”; when Elton asked Muir where to buy “H”, and when Elton thrice asked Muir to consent to search over a 10-15 minute period. RP 30-36 (May 28, 2013). This police behavior created an “atmosphere” of “ progressive intrusion” into Muir’s privacy of such a nature that a reasonable person would not believe that she was free to end the encounter. *Harrington*, 167 Wn.2d at 60-662; *Soto– Garcia*, 68 Wn.App. at 25.

Here just as in *Soto– Garcia* without suspicion of criminal activity, officer Elton asked Muir direct questions about buying and selling drugs and asked to search her personal belongings. And as in *Harrington*, Elton asked Muir not to touch her purse so that he could search it just as the officer in *Harrington* asked Harrington to remove his hands form his pockets “to control Harrington's actions.” *Harrington*, 167 Wn.2d at 668–69. In both of these cases, the progressive intrusion into the defendants' privacy culminated in a request to search. “Requesting to frisk is inconsistent with a mere social

contact” and when “the officer requested a frisk, the officers' series of actions matured into a progressive intrusion substantial enough to seize Harrington.” *Harrington*, 167 Wn.2d at 668–69. Here, once Elton asked or invited Muir to sit down and repeatedly asked to search the truck and the safe, the contact intruded into Muir’s sphere of privacy in violation of Article 1, § 7 of the Washington State Constitution.

Based on the initial illegal detention, Muir’s subsequent consent to search her purse (if any) after her arrest was invalid under both the Fourth Amendment and Article 1, § 7 under *O’Day, supra* and *Harrington, supra*. Suppression is the remedy. *Harrington*, 167 Wn.2d at 670.

2. THE STATE'S OMISSION OF WRITTEN FINDINGS AND CONCLUSIONS FOLLOWING THE 3.6 HEARING PREJUDICED APPELLANT BECAUSE EFFECTIVE APPELLATE REVIEW IS NOT POSSIBLE.

The trial court did enter any written findings following the 3.6 hearing. Generally, unchallenged factual findings, including findings entered following a suppression motion are binding on appeal. *Hill*, 123 Wn.2d at 645. In this case, written findings were only entered following the stipulated trial. CP 39-41. The trial court's failure to enter findings and conclusions after the CrR 3.6 hearing requires reversal when the defendant is prejudiced.

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); *State v. Byrd*, 83 Wn. App. 509, 512, 922 P.2d 168 (1996), *review denied*, 130 Wn.2d 1027, 930 P.2d 1229 (1997)². A defendant is prejudiced by a failure to enter written findings when the record is insufficient to permit appellate review. *State v. Cruz*, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997); *State v. Smith*, 76 Wn. App. 9, 16-17, 882 P.2d 190 (1994), *review denied*, 126 Wn.2d 1003 (1995); *State v. Smith*, 68 Wn. App. 201, 209-10, 842 P.2d 494 (1992).

Prejudice is determined on a case-by-case basis. *Cruz*, 88 Wn. App. at 909. Prejudice can also arise from late entered filings that have been "tailored" to meet issues raised on appeal. *Head*, 136 Wn.2d at 625. Failure to file written findings is only "harmless error if the court's oral opinion and the record of the hearing are 'so clear and comprehensive that written findings would be a mere formality.'" *Smith*, 76 Wn. App. at 13 (citations omitted). In the absence of a showing of prejudice, remand for entry of written findings and conclusions is generally the solution for failure to enter written findings. *Head*, 136 Wn.2d at 623-25.

A trial court's oral statements are "no more than a verbal expression of (its) informal opinion at that time . . . necessarily subject to further study and consideration, and may be altered, modified, or **completely abandoned.**"

(Emphasis added) *State v. Dailey*, 93 Wn.2d 454, 458, 610 P.2d 357 (1980), quoting, *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900, 904 (1963). The written decision of a trial court is considered the court's "ultimate understanding" of the issue presented. *Dailey*, 93 Wn.2d at 459. An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment[]" making it difficult to imagine a scenario when a lack of written findings is not prejudicial. *Head*, 136 Wn2d at 622, quoting, *State v. Mallory*, 69 Wn.2d 5332, 533-534, 419 P.,2d 324 (1996); accord *Dailey*, 93 Wn.2d at 458-59.

In *Smith*, a juvenile case, the Appellate Court determined that Smith was prejudiced by the trial court's opinion following a bench trial because it was not clear enough to permit review. The Court in *Smith*, held that:

Lack of written findings of fact on a material issue in which the State bears the burden simply cannot be harmless unless the oral opinion is so clear and comprehensive that written findings would be a mere formality. The trial court's opinion falls far short of that standard. Accordingly, the conviction cannot stand on the present record.

Smith, 68 Wn. App. at 608 (citations omitted).

In the instant case, the trial court failed to enter any written findings following the 3.6 hearing which determined all of the material and dispositive issues in this case. Because the trial court did not enter written findings it is

impossible to determine if the trial court abandoned its oral ruling or which portions it meant to adopt as its ultimate findings. Prejudice exists in the instant case because the record is insufficient to permit appellate review of a material issue in which the state bears the burden of proof. *Smith*, 68 Wn. App. at 608.

Furthermore, the state is now in a position to "tailor" its findings to meet the issues raised in appellant's opening brief. There is no excuse for the failure to enter written findings and both Divisions One and Two of the Court of Appeals have held in both adult and juvenile settings that neither Court condones the failure to file written findings. *Cruz*, 88 Wn. App. at 211; *Smith*, 68 Wn. App. at 211. Under *Head*; *Cruz*, and *Smith*, 68 Wn. App. at 909, reversal is required because the trial court's oral ruling is insufficiently clear to permit appellate review to determine if the state met its burden of proof.

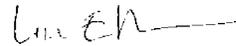
In the alternative and at a minimum, a remand is necessary. *Head*, *supra*.

D. CONCLUSION

Ms. Muir respectfully requests this Court reverse and remand for suppression of the evidence obtained during her illegal detention and hold that her consent if any was not voluntary..

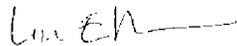
DATED this 2nd^h day of January 2014.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

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