

No. 47563-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JASON SCHWARTZ,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUE1

II. STATEMENT OF THE CASE1

III. ARGUMENT4

 A. THE TRIAL COURT CORRECTLY DENIED
 SCHWARTZ’S MOTION TO SUPPRESS THE
 EVIDENCE4

 1. Standard Of Review.....4

 2. There Was Substantial Evidence Presented To
 Sustain Findings Of Facts 9 And 10, As Well As
 Conclusion Of Law 5.....5

 3. The Fourth Amendment And Article One, Section
 Seven, Protect Citizens From Warrantless
 Searches And Seizures By Police7

 a. Schwartz consented to Trooper Hicks initial
 search of his car for his cell phone.....8

 b. The straw was found in plain view.....10

IV. CONCLUSION.....13

TABLE OF AUTHORITIES

Washington Cases

State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013)7, 8

State v. Campbell, 166 Wn. App. 464, 272 P.3d 859 (2011)4

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).....4

State v. Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999)7

State v. Monaghan, 165 Wn. App. 782, 266 P.3d 222 (2012).....8, 9

State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008)4

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005).....4

State v. Thompson, 151 Wn.2d 793, 92 P.3d 228 (2004).....8

State v. Weller, 185 Wn. App. 913, 344 P.3d 695 (2015)10

Federal Cases

Skinner v. Ry Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989) 7-8

Constitutional Provisions

Washington Constitution, Article I § 77

U.S. Constitution, Amendment IV7

I. ISSUE

- A. Did the trial court err when it denied Schwartz's motion to suppress the evidence recovered from his car after a warrantless search?

II. STATEMENT OF THE CASE

On January 29, 2015, at approximately 5:00 p.m., Trooper Hicks, of the Washington State Patrol, initiated a traffic stop for a defective middle brake light on a vehicle operated by Schwartz. RP¹ 5, 7-8; CP 27. Trooper Hicks was driving a fully marked patrol car equipped with a dash camera. RP 6; CP 27.

Schwartz pulled his car over and parked in an AM/PM gas station parking lot. RP 7; CP 27.

Trooper Hicks approached the vehicle, advised Schwartz the stop was being audibly and visually recorded. CP 27. Trooper Hicks explained to Schwartz the reason for the stop. CP 27.

Trooper Hicks arrested Schwartz after a Department of Licensing Driver's check returned showing his license was suspended. RP 9; CP 28. Trooper Hicks asked Schwartz to step out of the vehicle, placed him in handcuffs, searched him incident

¹ There are two volumes of verbatim report of proceedings. The State will cite to the VRP as Schwartz did in his briefing, the motion hearing on 4/1/15 will be cited as RP and the Bench Trial, 4/22/15, and Sentencing Hearing, 5/6/15, contained within one volume will be cited as RPS.

to arrest and put Schwartz in the back of her patrol car. RP 9; CP 28.

Trooper Hicks read Schwartz his Miranda warnings, which Schwartz indicated he understood. RP 9; CP 28. Trooper Hicks asked Schwartz if he had a licensed driver who could pick up his vehicle in an attempt to find a reasonable alternative to having the car towed from the scene. RP 9. Schwartz requested, from the back of the patrol vehicle, Trooper Hicks retrieve his cell phone out of the front of the vehicle. RP 9; CP 28. Schwartz needed his phone because it had contacts in it for people who may be able to come and pick up his car. RP 9.

Trooper Hicks approached the vehicle and immediately upon looking in the driver's side, Trooper Hicks saw a hard plastic straw, with a white powdery substance on the outside and inside of the straw. RP 10, 13; CP 28. Trooper Hicks immediately recognized the straw as drug paraphernalia and what she believed was methamphetamine based on her training and experience. RP 10, 13; CP 28. Trooper Hicks did pick up the straw, but she recognized the suspected methamphetamine and straw as drug paraphernalia prior to touching the object. RP 13-14; CP 28. Trooper Hicks later obtained a search warrant before continuing the search of the

vehicle and seizing the straw with the white powdery substance. RP 14; CP 28. The substance was tested and found to be methamphetamine. CP 37.

The State charged Schwartz with one count of Possession of a Controlled Substance. CP 1-2. Schwartz filed a motion to suppress the evidence, claiming an unlawful pretextual stop and unlawful search. CP 4-8. At the motion hearing Schwartz conceded that the stop was not pretextual. RP 29. The trial court denied the motion to suppress. RP 32-33; CP 29. Schwartz was convicted after a stipulated facts bench trial. RPS 3-14. CP 34-37. Schwartz timely appeals his conviction and the denial of the motion to suppress. CP 55-67.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY DENIED SCHWARTZ'S MOTION TO SUPPRESS THE EVIDENCE.

Schwartz argues the trial court incorrectly denied his motion to suppress the evidence collected out of his vehicle.² The trial court appropriately ruled that Trooper Hicks saw the straw in plain

² Schwartz breaks his argument into two sections, one challenging the findings and one for the substantive argument regarding the motion to suppress. The State will respond to both in this one section.

view. Further, there was substantial evidence to support each of the findings of fact Schwartz has challenged. This court should find that the motion challenging the search warrant was correctly denied.

1. Standard Of Review.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

2. There Was Substantial Evidence Presented To Sustain Findings Of Facts 9 And 10, As Well As Conclusion Of Law 5.

Schwartz asserts that “a careful review of Trooper Hicks’ testimony from the suppression hearing reveals she did not claim she ‘immediately recognized the straw and powder residue as drug paraphernalia.’” Brief of Appellant 8. Apparently, Schwartz’s argument is that by first illuminating the object with a flashlight prior to seeing it makes this statement false. *Id.* 8-9. Further, Schwartz argues that Trooper Hicks had to inspect the straw before she could see what was inside of it and that she simply suspected or believed the item was drug paraphernalia and residue until she picked it up to confirm this suspicion. *Id.* at 9. The record contains substantial evidence to support each of the challenged findings of the fact.

Finding of Fact 9 states, “Trooper Hicks approached the vehicle and immediately upon looking in the driver’s side, Trooper Hicks saw a hard plastic straw, with a white powdery substance on the outside and inside of the straw.” CP 28.

Finding of Fact 10 states, “Trooper Hicks immediately recognized the straw as drug paraphernalia and what she believed

was methamphetamine based on her training and experience before Trooper Hicks touched the object.” CP 28.

Conclusion of Law 5 states, “Trooper Hicks immediately recognized the straw and white powdery substance as drug paraphernalia and a controlled substance without further manipulation.” CP 29.

Trooper Hicks testified that she went up to Schwartz’s car to retrieve his phone and when she approached his car, “Well, I opened - - or I was in the driver’s side looking in and I noticed a green hard plastic it wasn’t a straw but it was like a straw that had white powdery substance on the driver’s seat.” RP 9-10. Trooper Hicks said the white powdery substance was also inside the straw and she recognized the substance to be methamphetamine. RP 10. When asked if she immediately recognized the straw, Trooper Hicks responded, yes. RP 13. When asked what she recognized the straw to be, Trooper Hicks responded, “As a device used to ingest drugs, methamphetamine.” RP 13.

Trooper Hicks admitted she picked up the straw, but she confirmed that she could see the white powdery substance prior to, and without picking up the straw. RP 13. Trooper Hicks acknowledged she used a flashlight when she looked in Schwartz’s

car. RP 18. Trooper Hicks further testifies that it is her testimony that when she approached with her flashlight she could see the white powdery substance in the green tube. RP 22.

The testimony given by Trooper Hicks at the suppression hearing is sufficient for this court to find substantial evidence supporting Findings of Fact 9 and 10 and in support of the facts contained in Conclusion of Law 5. This Court should find the trial court's findings were supported by substantial evidence.

3. The Fourth Amendment And Article One, Section Seven, Protect Citizens From Warrantless Searches And Seizures By Police.

Citizens have the right to not be disturbed in their private affairs except under authority of the law. U.S. Const. amend IV; Const. art. I, § 7. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

Generally, a search is not reasonable unless it is based on a warrant issued upon probable cause. *Skinner v. Ry Labor*

Executives' Ass'n, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989). “Under article 1, section 7, a warrantless search is per se unreasonable unless the State proves that one of the few carefully drawn and jealously guarded exceptions applies.” *Byrd*, 178 Wn.2d at 616 (internal quotations and citations omitted). The remedy for an unconstitutional search or seizure is exclusion of the evidence that was uncovered and obtained. *State v. Monaghan*, 165 Wn. App. 782, 789, 266 P.3d 222 (2012).

a. Schwartz consented to Trooper Hicks initial search of his car for his cell phone.

One exception to the warrant requirement is consent to search. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). The State will have the burden to establish that a defendant’s consent to search was lawfully obtained. *Thompson*, 151 Wn.2d at 803. “In order to meet this burden, three requirements must be met: (1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of the consent.” *Id.*

Schwartz argues that Trooper Hicks exceeded the scope of his consent to search by using her flashlight to illuminate items she found suspicious because he only consented to allowing her to retrieve his cellphone. Brief of Appellant 12-13. Schwartz equates

Trooper Hicks' action of using a flashlight to illuminate the front seat area of the car with that of the officer in *Monaghan*, who had permission to look in the passenger compartment and trunk of a car for weapons but was found to exceed the scope of the consent when he used a key found in the passenger compartment to open a locked safe found in the trunk. See *Monaghan*, 165 Wn. App. at 789-94.

Schwartz requested Trooper Hicks retrieve his phone from his car so he could have access to his contacts. RP 9. The car was parked with its driver's side door open. Ex. 3 (9:49). Trooper Hicks walks over to the car and illuminates it, while still outside of the vehicle with her flashlight. Ex. 3 (10:19). Trooper Hicks can be seen on the video leaning into Schwartz's car after seeing something that clearly caught her eye, then picking up an item, placing it back down and calling over to Deputy Schlecht. Ex. 3 (10:23-10:31).

Trooper Hicks did not exceed Schwartz's consent to enter his vehicle to retrieve his phone. Trooper Hicks' action of using a flashlight does not exceed the scope and is not analogous to using a key to unlock a locked container. Arguendo, if this court were to find that using the flashlight would have exceeded the scope, Trooper Hicks had not yet entered inside the vehicle when she was

illuminating the inside with the flashlight. She was still outside the vehicle when she saw the straw. Contrary to Schwartz's assertion, the consent to enter the vehicle was not exceeded and the search was lawful.

b. The straw was found in plain view.

Another exception to the warrant requirement is plain view.

The plain view exception to the warrant requirement applies when officers (1) have a valid justification for being in a constitutionally protected area, and (2) are immediately able to realize that an item they can see in plain view is associated with criminal activity.

State v. Weller, 185 Wn. App. 913, 926, 344 P.3d 695 (2015).

"Immediately apparent" does not require certainty by an officer that the item is associated with criminal activity. *Weller*, 185 Wn. App. at 926. Probable cause is sufficient to satisfy "immediately apparent." *Id.* "The test for determining when an item is immediately apparent for purposes of a plain view seizure is whether, considering the surrounding circumstances, the police can reasonably conclude that the item is incriminating evidence." *Id.*

Schwartz argues that the search in this case does not fall within the plain view exception because Trooper Hicks had to manipulate the straw by picking it up and looking inside to confirm her suspicion that it contained methamphetamine. Brief of Appellant

14-15. Therefore, according to Schwartz, it was not immediately apparent that the straw contained methamphetamine because had it, Trooper Hicks would not have had to pick it up. This is not an accurate statement as to what occurred.

Schwartz's argument conveniently ignores Trooper Hicks' own testimony in regards to her actions.

Q. And what happened when you approached the car?

A. Well, I opened - - or I was in the driver's side looking in and I noticed a green hard plastic it wasn't a straw but it was like a straw that had white powdery substance on the driver's side seat.

Q. Did you recognize the straw, for lack of a better word?

A. Yes, and the white powdery substance inside.

Q. What did you recognize it as?

A. I recognized it to be methamphetamine.

RP 9-10. Then later the deputy prosecutor asked,

Q. So Trooper Hicks, did you immediately recognize this straw again, for lack of a better word?

A. Yes.

Q. And what did you recognize it as?

A. As a device used to ingest drugs, methamphetamine.

...

Q. And you could see that without picking the straw up?

A. Yes. It was around the edges.

RP 13. Then again later, Schwartz's trial counsel asks,

Q. So Trooper Hicks, it's your testimony that you can see what's in the green tube at the time when you approached with your flashlight?

A. I can see the white powdery substance in it.

RP 22.

The testimony of Trooper Hicks makes it clear that she immediately recognized the straw as drug paraphernalia and immediately recognized the white powdery substance around the straw as methamphetamine. Trooper Hicks was lawfully in a constitutionally protected area because she had consent to go and retrieve Schwartz's cell phone. The methamphetamine found falls squarely within the plain view exception and the trial court correctly denied Schwartz's motion to suppress the evidence. This Court should affirm the trial court's denial of Schwartz's motion to suppress and affirm his conviction for Possession of a Controlled Substance.

IV. CONCLUSION

The trial court properly denied Schwartz's motion to suppress the methamphetamine located in his car. Schwartz consented to Trooper Hicks entering his car and the straw containing the methamphetamine was in plain view upon entering the vehicle. Further, the trial court's findings of fact are supported by substantial evidence. This Court should affirm the trial court's ruling and Schwartz's conviction.

RESPECTFULLY submitted this 6th day of November, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



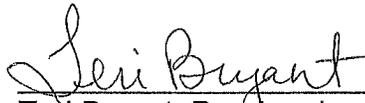
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. JASON SCHWARTZ, Appellant.	No. 47563-4-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On November 6, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to John A. Hays, attorney for appellant, at the following email address: jahayslaw@comcast.net.

DATED this 6th day of November, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

November 06, 2015 - 9:46 AM

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