

No. 49684-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

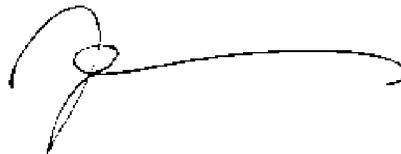
REBECCA L. MCINTIRE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court err when it denied McIntire's motion to suppress?
- B. The State cannot recover appellate costs with the amendment of RAP 14.2, as McIntire has been found indigent.

II. STATEMENT OF THE CASE

On October 1, 2016, Officer Dorff and Sergeant Clary went to the King Oscar Motel in Centralia, Washington. RP¹ 4-5, 17; CP 28. The officers had received a tip that Natalie Sanchez, who had an active arrest warrant, was staying in a particular room at the motel. RP 5, 18; CP 28. A clerk at the motel informed the officers Natalie Sanchez was not a registered guest of the room, but Alicia Sanchez was the registered occupant. RP 18; CP 28. The clerk told the officers she wanted any non-registered occupants to be trespassed from the motel. RP 5-6, 18, 24; CP 28.

The officers were directed to the room and knocked on the door. RP 6, 18; CP 28. Sergeant Clary recognized the woman who answered, Rebecca McIntire. RP 18; CP 28. Sergeant Clary recognized McIntire from prior contacts over several years and knew her by name. RP 18-19.

¹ The State will cite to the transcripts of the 3.6 hearing, bench trial, and sentencing, which are in consecutive paginated volumes, as RP.

The officers asked if Natalie was in the motel room, and McIntire responded she was the only person currently in the room. RP 7, 19; CP 28. The clerk came up to the room, said McIntire was not a registered guest, and said she wanted McIntire trespassed from the property. RP 7-8, 19; CP 28. The officers told McIntire to gather her belongings and leave the room. RP 19; CP 28. Officer Dorff asked McIntire for her driver's license in a normal, non-threatening tone, and McIntire provided her license. RP 8, 20; CP 29. Officer Dorff was in possession of McIntire's license for an unknown length of time, though Officer Dorff estimated he likely held onto the license for approximately 30 seconds, running McIntire's information and returning the license to her. RP 16-17; CP 29.

Officer Dorff provided McIntire's information to dispatch via radio so the Spillman database would show McIntire was trespassed from the motel. RP 8, 14, 20; CP 29. At this time, McIntire was also checked for open warrants. RP 8, 20; CP 29. McIntire's name returned as having an open misdemeanor warrant. RP 8-9, 20; CP 29. The officers arrested McIntire on the warrant and searched her incident to arrest. RP 9-10, 21; CP 29. In the purse McIntire had with her, the officers discovered a baggie containing heroin. RP 10, 22; CP 29-30.

McIntire was charged with Possession of Heroin. CP 1-2. McIntire moved to suppress all evidence obtained, arguing the discovery of a warrant and search incident to arrest arose from an unlawful seizure. CP 6-7, 11-14. At a suppression hearing, the trial court heard testimony from Officer Dorff, Sergeant Clary, and McIntire. RP 4, 17, 29. After considering the testimony and arguments of the parties, the trial court denied the motion to suppress. RP 39; CP 27-30.

The trial court found the officers' contact with McIntire was minimally intrusive. RP 40; CP 30. The trial court found it was lawful for Officer Dorff to possess McIntire's license for a short period of time to provide her information to dispatch for the purposes of trespassing her from the property and running a warrants check. RP 40; CP 30.

McIntire proceeded with a stipulated facts bench trial, with the intent to appeal the trial court's ruling on the motion to suppress. RP 45, 46. The trial court reviewed the stipulated facts and found McIntire guilty of Possession of Heroin. RP 48. This appeal follows. CP 43.

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

III. ARGUMENT

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

McIntire argues the trial court incorrectly denied her motion to suppress the evidence found by the officers upon her arrest on an open warrant. The trial court correctly ruled the officer's contact with McIntire was minimally intrusive and lawful for the purposes of trespassing McIntire from the property. Even if the contact was a seizure, the officers would have had reasonable suspicion McIntire was about to commit a criminal trespass had she remained on the property. Additionally, Sergeant Clary's personal knowledge of McIntire's identity was an independent source for discovering McIntire's open warrant, and the trial court should not have suppressed the evidence on that basis even if it had found an unlawful seizure. This Court should find the motion to suppress the evidence obtained 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). Challenged trial court findings of fact that are not supported by substantial evidence will not be binding on appeal. *Hill*, at 647 (citing *Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4 (1983)).

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).

In the present case McIntire does not assign error to any of the findings of fact, and they are therefore verities on appeal. McIntire also fails to assign error to the conclusions of law. Given McIntire's arguments on appeal, the State will assume this was an oversight.

2. McIntire Was Searched Incident To Arrest – An Exception To The Search Warrant Requirement.

The Washington Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The article I, section 7 provision "recognizes a person's right to privacy with no express

limitations." *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). A warrantless search is per se unreasonable unless it falls within one of the few narrowly drawn exceptions. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). "[T]he search incident to arrest exception to the warrant requirement is narrower" under article I, section 7 than under the Fourth Amendment. *O'Neill*, 148 Wn.2d at 584. Under the Washington Constitution, a lawful custodial arrest is a constitutional prerequisite to any search incident to arrest. *Id.* at 587. If the arrest is invalid, then the search incident to the arrest is invalid as well. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). A warrantless search incident to a custodial arrest may extend to the arrestee's person. *See, e.g., Thornton v. United States*, 541 U.S. 615, 626, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring) ("Authority to search the arrestee's own person is beyond question"); *State v. Whitney*, 156 Wn. App. 405, 232 P.3d 582, *review denied*, 170 Wn.2d 1004 (2010) (*Gant* does not apply to a search of a person, upon the person's arrest). The Washington Supreme Court has determined that the warrantless search of items in an arrestee's actual possession at the time of arrest is lawful even if not performed until after the arrestee is handcuffed. *See, e.g. State v. MacDicken*,

179 Wn. 2d 936, 319 P.3d 31 (2014). RCW 10.31.060 allows for arrest on a warrant by telegraph or teletype if the warrant's existence and information is verified.

Here, Officer Dorff searched McIntire incident to arrest after arresting her on a valid warrant. RP 8-10, 21-22. McIntire does not argue the arrest warrant was invalid, but that Officer Dorff discovered the existence of the warrant through an unlawful seizure and therefore everything following the seizure should be suppressed.

3. Officer Dorff's Brief Retention Of McIntire's License Was Not A Seizure.

Whether or not a seizure has occurred is a mixed question of law and fact. *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996) (*overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)). A trial court's resolution of differing accounts of the circumstances surrounding the encounter are factual findings and are entitled to great deference. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). However, the determination of whether those facts ultimately constitute a seizure is a question of law, reviewed de novo. *Thorn*, at 351 (*citations omitted*).

A seizure occurs when an officer retains a suspect's driver's license and takes it with him to conduct a warrants check. See *State*

v. Dudas, 52 Wn. App. 832, 834, 764 P.2d 1012 (1988), *review denied*, 112 Wn.2d 1011 (1989) (officer took the defendant's identification card and returned to his patrol vehicle); *State v. Thomas*, 91 Wn. App. 195, 955 P.2d 420 (1998) (officer, while retaining the defendant's identification, took three steps back to the rear of the car to conduct a warrants check).

However, a seizure does not occur when the officer retains possession of the identification, while in the presence of the person, for long enough to record a name and date of birth. *State v. Hansen*, 99 Wn. App. 575, 576, 994 P.2d 855, *review denied*, 141 Wn.2d 1022 (2000). Engaging a person in conversation and asking for identification does not by itself turn an encounter into a seizure, particularly where the request was for some purpose other than investigating criminal activity. *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997).

This Court held in *State v. Crane*, 105 Wn. App. 301, 310-11, 19 P.3d 1100 (2001), *overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) a seizure occurred where an officer retained the defendant's identification while running a records check in the defendant's presence. In *Crane*, the officer pulled his patrol vehicle behind the car the defendant had arrived in, the

defendant became aware he had entered an area secured by the police and that the officer was running him for warrants, and the officer retained the license for the duration of the warrants check. *Id.* at 311. This Court found those circumstances “would cause a reasonable person to conclude that he was not free to leave or to terminate contact until the officer completed the warrants check and found the detainee had a clear record.” *Id.*

Here, the record is unclear regarding the quality and duration of Officer Dorff’s possession of McIntire’s license. Finding of Fact 1.16 states “Dorff was in possession of McIntire’s license for an unknown length of time.” CP 29. Conclusions of Law 2.2 and 2.3 state the request for McIntire’s license was necessary to register her for trespass purposes and seizure² of the license was minimally intrusive to accomplish that goal. CP 30.

Officer Dorff testified he believed he took McIntire’s license, ran it, and gave it back to her. RP 17. Officer Dorff testified the process would have taken approximately 30 seconds. RP 16. Sergeant Clary testified he observed Officer Dorff ask for McIntire’s

² McIntire argues characterizing the license as being “seized” in the conclusions of law presupposes McIntire herself was seized. Brief of Appellant 11. However, appellate counsel cites no authority for this proposition.

license, which she produced, and observed Officer Dorff run McIntire's full information via dispatch radio. RP 20. Sergeant Clary could not recall how long Officer Dorff was in possession of McIntire's license. RP 25. Both officers testified this request for identification occurred after the clerk appeared and requested McIntire be trespassed from the motel. RP 7-8, 22. McIntire testified Sergeant Clary asked for her identification almost immediately upon first contacting her, prior to the clerk arriving, and that the officers kept her license throughout the contact. RP 30-32.

The trial court in its ruling lent more credibility to the officers' rendition of the facts. The trial court found the contact to be "a minimal intrusion" and characterized the possession of the license as being "for just a short period of time while that information was passed on through dispatch." RP 40. The trial court stated it would need to assume ulterior motives on the part of the motel clerk in order to believe McIntire's version of events and her argument. RP 40.

Although this Court determines whether the facts ultimately constitute a seizure, the trial court's resolution of differing accounts of the circumstances, e.g., whether the license was possessed for just a short period of time, is entitled to great deference. *Thorn*, at 351; *Hill*, at 647. Here, the trial court found the contact was minimally

intrusive and the license was possessed for the short period of time needed to pass the information through to dispatch. The trial court's characterization of the license possession, though referred to as a seizure in the conclusions of law, is more akin to briefly taking a license to record its information rather than holding onto a license until the warrants check results are received.

This Court should find the possession of McIntire's license under these circumstances does not rise to the level of a seizure. However, even if the contact with McIntire can be characterized as a seizure, the officers had a lawful basis for conducting a brief investigatory stop.

4. If McIntire Was Seized, The Stop Was Lawful Because There Was Reasonable Suspicion McIntire Was About To Commit Criminal Trespass If She Did Not Leave The Motel As Directed.

An investigatory stop of a person is justified if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982); *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The level of articulable suspicion necessary to support an investigatory stop is "a substantial possibility that criminal conduct has occurred or is about

to occur." *Kennedy*, at 6. When reviewing the merits of an investigatory stop, a court must evaluate the totality of circumstances presented to the investigating officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The court takes into account an officer's training and experience when determining the reasonableness of the stop. *Id.* An investigatory stop will not be rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior prior to the stop. *State v. Anderson*, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

A criminal trespass occurs when a person knowingly remains unlawfully, i.e., without license, invitation, or privilege, upon the premises of another. RCW 9A.52.080; RCW 9A.52.010(2). The person's presence on the premises may be unlawful because her privilege to be there has been revoked. *State v. Kutch*, 90 Wn. App. 244, 249, 951 P.2d 1139 (1998) (*citing State v. Collins*, 110 Wn.2d 253, 258, 751 P.2d 837 (1988)). The right to exclude people from the premises extends even if the premises is otherwise open to the public. *Id.* at 247 (citations omitted).

Here, the clerk requested all unregistered occupants be trespassed after the officers made her aware they believed a person with a felony warrant was staying unregistered in the room. RP 24.

Additionally, Officer Dorff and Sergeant Clary were present when the clerk informed McIntire she was not allowed to remain at the motel and could not return. RP 8, 19. In doing this, the clerk was notifying McIntire she did not have license or privilege to be at the motel. Were McIntire to remain or return to the premises, it would be an unlawful criminal trespass. RCW 9A.52.080; RCW 9A.52.010(2). Although the officers had not been investigating a trespass or looking for McIntire, at this point the officers would have information there was a substantial possibility criminal conduct, an unlawful remaining, was about to occur. At this point, the officers would have had reasonable suspicion to conduct a minimally intrusive stop to ensure McIntire left the property and to record her information to make it clear she was not permitted back at the motel.

Because there was a substantial possibility criminal conduct was about to occur, an unlawful remaining, there was reasonable suspicion sufficient to conduct a limited investigatory stop to ensure McIntire did not remain on the property and to enter her information into the Spillman database. If the officers' contact with McIntire was a seizure, it was lawful, and this Court should affirm the trial court's ruling denying the motion to suppress.

5. Even If The Initial Stop Of McIntire Was Unlawful, Sergeant Clary's Preexisting Knowledge Of McIntire's Identity Was An Independent Source For The Discovery Of McIntire's Arrest Warrant.

The Washington Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The article I, section 7 provision "recognizes a person's right to privacy with no express limitations." *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). The Washington State Supreme court has held "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)). When an initial stop is unlawful, "the subsequent search and fruits of that search are inadmissible...." *Id.*

However, evidence obtained from an independent source need not be suppressed under the fruit of the poisonous tree doctrine. *State v. Allen*, 138 Wn. App. 463, 469, 157 P.3d 893 (2007) (citing *State v. Early*, 36 Wn. App. 215, 221-22, 674 P.2d 179 (1983)). Under the independent source exception, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided it ultimately is obtained pursuant to

other lawful means independent of the unlawful action. *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). See also *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968) (identification evidence obtained during an unlawful traffic stop did not defeat the subsequent lawful arrest based on an independent records check revealing a felony warrant); *State v. Dudas*, 52 Wn. App. 832, 835, 764 P.2d 1012 (1988) (identity discovered during initial lawful contact and not from the unlawful detention when the officer had the defendant's identification card and was making the warrant check.)

In *Dudas*, an officer observed Dudas late at night in an area known for recent incidents of vehicle prowling. 52 Wn. App. at 833. The officer drove up to Dudas and asked what he was doing, and Dudas said he was looking for his keys. *Id.* The officer asked Dudas to identify himself, and Dudas provided his identification card. *Id.* The officer took the card back to his patrol car and used it to make a warrant check. *Id.* After four minutes, the officer received a report of no local warrants, and he returned the card to Dudas. After Dudas left, the officer was informed of an out-of-county warrant, and he located and arrested Dudas. *Id.* A search during the booking process revealed cocaine on Dudas's person. *Id.*

The Division I Court of Appeals held that even if an unlawful seizure occurred when the officer took the license back to his vehicle, Dudas's identity, and the subsequent existence of a warrant, was discovered during the initial lawful contact. *Id.* at 835. The Court cited *Rothenberger* for the proposition that having discovered the warrant from an independent source, the officer not only had the right but the duty to pursue and arrest the Dudas. *Id.* at 835-36.

In *Rothenberger*, a vehicle was stopped in Oregon for a routine check to determine if the driver was licensed. 73 Wn.2d at 597. The driver did not have a license, but passenger Rothenberger satisfied the officer that he was the vehicle owner and licensed. After the vehicle left, the officer learned through an identification check that Rothenberger had a felony warrant out of Arizona. *Id.* The officer relayed this information, and Rothenberger was arrested further south in Oregon. *Id.* at 597-98. After Rothenberger was arrested, officers discovered evidence and Rothenberger made statements implicating him in a Seattle burglary. *Id.* at 598. Rothenberger moved to suppress all evidence regarding the burglary, arguing the officer would not have acquired the information as to Rothenberger's identity had he not unlawfully stopped the vehicle. *Id.*

The Washington State Supreme Court presumed the initial stop of Rothenberger was an unlawful arrest, but found that the identity of persons obtained from unlawful arrests may be used to make possible subsequent arrests for other offenses. *Id.* at 599. The Court stated the officer at that point had a duty to pursue Rothenberger and arrest him, if practicable, and it was ridiculous to contend the officer was required to let Rothenberger go despite having an open warrant on the basis the officer initially detained Rothenberger unlawfully. *Id.*

Here, Sergeant Clary's personal familiarity with McIntire provided an independent source for information about her identity. Sergeant Clary recognized McIntire when she answered the door. RP 18. Sergeant Clary was familiar with McIntire, having met her several times over the nine-plus years he had been with the police department. RP 18-19. In fact, Sergeant Clary greeted McIntire by name when she opened the door. RP 12, 30. Sergeant Clary testified he would have run McIntire's name for warrants regardless of the clerk requesting she be trespassed from the motel. RP 20-21. Sergeant Clary testified he would typically run a person's name when dealing with them to check for warrants and, depending on the situation, to see if there are any existing trespass notices. RP 21.

The State maintains the officers' contact with McIntire, if a seizure, was a lawful seizure. However, even if McIntire was unlawfully seized either at the moment Officer Dorff took possession of her license or at the moment she was told to leave the motel room, McIntire's identity was already known through an independent source – Sergeant Clary's personal knowledge from past contacts – and that independent source of information would have led to the discovery of the valid warrant for McIntire's arrest. Because the information leading to the discovery of a warrant, McIntire's arrest, and discovery of evidence was also available from an independent source, the exclusionary rule should not apply, and this Court should affirm the trial court's ruling denying the motion to suppress.

B. MCINTIRE'S ISSUE REGARDING APPELLATE COSTS IS MOOT WITH THE COURT'S AMENDMENT OF RAP 14.2.

McIntire argues this Court should not impose appellate costs if the State prevails. This issue has been mooted by the amendment of RAP 14.2, as McIntire was found indigent for purposes of this appeal, and the State has no evidence that her circumstances have changed. See RAP 14.2; CP 49-50. The State does not know how it will ever meet RAP 14.2's burden to show by a "preponderance of the evidence that the offender's financial circumstances have

significantly improved since the last determination of indigency.” The State has no ability to require an appellant to provide current financial information. RAP 14.2 guarantees there will be no appellate costs imposed upon McIntire in this case if the State is the prevailing party.

IV. CONCLUSION

Officer Dorff possessed McIntire’s license for a short period of time to pass her information through dispatch. This was a minimal intrusion and did not rise to the level of a seizure of McIntire’s person. However, if this Court does find a seizure, the officers possessed information that would form a reasonable articulable suspicion McIntire was about to commit criminal trespass were she to remain on the motel premises. This gave the officers the authority to conduct a brief investigatory stop to record McIntire’s information and ensure she did not remain unlawfully.

Even if the stop were unlawful, it was the knowledge of McIntire’s identity that led to the discovery of a warrant, her arrest, and the discovery of heroin. This knowledge was available from an independent source – Sergeant Clary’s personal familiarity with McIntire. Therefore, the discovery of the heroin should not be subject to suppression under the exclusionary rule. The State will not be seeking appellate costs pursuant to the recently amended RAP 14.2.

This Court should affirm the trial court's conclusions of law from the CrR 3.6 Hearing and McIntire's conviction for Possession of Heroin.

RESPECTFULLY submitted this 7th day of June, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a long, horizontal, slightly wavy line that ends in a small hook.

by: _____
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

June 07, 2017 - 1:57 PM

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