

FILED
Court of Appeals
Division II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

TIMOTHY C. KETCHUM,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00217-7

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. THE TRIAL COURT ERRED BY APPLYING *FROEHLICH* TO THE FACTS OF THE INSTANT CASE AND ERRED IN ITS CONCLUSION OF LAW.

“We review conclusions of law from an order pertaining to the suppression of evidence de novo.” *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); *see also State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

1. **The trial court erred by applying the *Froehlich* Court’s community caretaking analysis in the wrong context contrary to both the *Froehlich* Court’s analysis and the holding under *State v. Peterson*.**

Ketchum claims that the State argues that the Trooper did not need to seek alternatives to impound because he had a statutory authority to impound the vehicle. Br. of Respondent at 10. This is not accurate as the State never suggested that the Trooper did not need to consider reasonable alternatives to impoundment.

The focus of the State’s argument is that the facts of this case fall under *State v. Peterson* where, as pointed out in *Froehlich*, the officer was not obligated to ask the defendant whether he could find someone to move the vehicle. *See State v. Froehlich*, 197 Wn. App. 831, 840, 391 P.3d 559 (2017) (citing *State v. Peterson*, 92 Wn. App. 899, 902–03, 964 P.2d 1231 (1998)) (emphasis added).

Even under the facts of *State v. Peterson*, and the instant case, an officer must consider reasonable alternatives to impound and this is not disputed. See *State v. Tyler*, 177 Wn.2d 690, 698–99, 302 P.3d 165 (2013) (citing *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980); *State v. Hill*, 68 Wn. App. 300, 305, 306, 842 P.2d 996 (1993)). However, “[t]he police officer does not have to exhaust all possible alternatives, but must consider reasonable alternatives.” *State v. Tyler*, 177 Wn.2d 690, 698–99, 302 P.3d 165 (2013) (citing *State v. Coss*, 87 Wn. App. 891, 899, 943 P.2d 1126 (1997)).

“Although an officer is not required to exhaust all possibilities, the officer must at least consider alternatives; attempt, *if feasible*, to obtain a name from the driver of someone *in the vicinity* who could move the vehicle; and then reasonably conclude from this deliberation that impoundment is proper.” *State v. Coss*, 87 Wn. App. 891, 899–900, 943 P.2d 1126 (1997) (citing *State v. Hardman*, 17 Wn. App. 910, 914, 567 P.2d 238 (1977)) (emphasis added).

Nevertheless, the *Peterson* Court, after discussing *Coss*, held the officer’s discretionary decision to impound was reasonable under the facts of *Peterson* although the officer did not inquire with the defendant whether someone was available to retrieve the vehicle. *State v. Peterson*, 92 Wn. App. 899, 903, 964 P.2d 1231 (1998).

Thus, Ketchum incorrectly characterizes the State's argument. The State argued that the Trooper testified that he, under the circumstances, did not have any reasonable alternatives to impoundment. CP 7; RP 29; Br. of Appellant at 15. The State also argued that, under *Peterson*, the Trooper was not required to ask Ketchum if friends or family were available to remove the vehicle under the circumstances present.

The Trooper was, of course, required to consider reasonable alternatives to impoundment. The record shows he did, and he found none under the circumstances he was faced with. CP 7, RP 29. Thus, he was not required to ask Ketchum if he could find someone to remove the vehicle under these facts. *State v. Froehlich*, 197 Wn. App. 831, 840, 391 P.3d 559 (2017) (citing *Peterson*, 92 Wn. App. at 902–03).

Therefore, the State requests this Court to reverse the trial court's decision suppressing the evidence.

- 2. The trial court erred by concluding that, under *Froehlich* and the facts of this case, the trooper did not consider reasonable alternatives to impoundment since he did not ask Ketchum if anyone was available to remove the vehicle.**

The trial court concluded that “the record does not establish that the trooper considered alternatives to impoundment, *since* he did not ask Mr. Ketchum about the availability of anyone he might know who could move the vehicle.” CP 8–9 (emphasis added). The trial court also ruled that “*Froehlich*

establishes that under these circumstances there must at least be some inquiry into whether the driver can make arrangements for someone to remove the vehicle.” CP 9.

This conclusion is erroneous because it wrongly assumes that the facts of *Froehlich* are similar to the facts of the instant case such that failure to inquire with a driver whether the driver knew of anyone that could remove the vehicle is unreasonable. Only with this assumption could it follow, that failure to make this inquiry results in a comprehensive failure to consider reasonable alternatives.

Further, the *Froehlich* Court expressly limited its holding when it stated, “Under the *specific facts of this case*, we hold that Richardson had an obligation to ask Froehlich about other alternatives to impounding the car” *Id.* at 845 (emphasis added). Furthermore, the *Froehlich* Court “acknowledge[d] that there may be situations when an officer has no obligation to ask a driver about reasonable alternatives to impoundment.” *Id.* at 845. In fact, the *Froehlich* Court pointed out that the facts in *Peterson* presented such a case when it distinguished the facts of *Froehlich* from *Peterson*:

Peterson involved an officer's statutory authority to impound a vehicle when the driver had a suspended license and the owner was not at the scene, not the community caretaking function. *Therefore, the State was not required to establish, as here, that the driver's spouse and friends were not available to move the vehicle.*”

Froehlich, at 840 (citing *Peterson*, 92 Wn. App. at 902–03) (emphasis added).

The trial court’s conclusion in this case also ignores the testimony and the court’s own factual findings. Trooper Nelson testified that he did not believe there were any reasonable alternatives to impounding the vehicle because of the road and weather conditions. RP 29. The *trial court* found that “[t]he trooper testified he had no reasonable alternatives to impounding the vehicle, since it would have been unsafe to leave the vehicle where it was due to hazardous road conditions and it would have been unsafe for the officers to attempt to move the vehicle. The trooper testified that it was WSP policy to impound under these circumstances. Further, the trooper did not think Mr. Ketchum lived in the area.” CP 7.

Yet, the trial court concluded that the Trooper did not consider reasonable alternatives because he did not inquire with Ketchum if he was aware of some person that could retrieve the vehicle. This is error because the court’s own factual findings show otherwise as the trooper testified he did not have any reasonable alternatives under the present circumstances.

“The ‘[r]easonableness of an impoundment must be assessed in light of the facts of each case.’” *Froehlich*, at 846 (Melnick, J., dissenting) (quoting *Tyler*, 177 Wn.2d at 699); *see also State v. Coss*, 87 Wn. App. at

899–900.

Here, the trial court went astray from this principle and effectually required that the trooper must have inquired with Ketchum about availability of others to retrieve the vehicle *regardless of the facts* and although the facts of this case were not in alignment with *Froehlich*. This conclusion was erroneous and the State requests this Court to reverse the suppression order.

B. TROOPER NELSON WAS NOT REQUIRED TO CONSIDER ALLOWING THE DEFENDANT TO WAIVE CIVIL CLAIMS FOR A VEHICLE BELONGING TO ANOTHER.

Ketchum argues that even if Trooper Nelson was not required to inquire with Ketchum about whether someone was available to remove the vehicle, that the impound was still unreasonable because Trooper Nelson did not allow Ketchum to waive the vehicle owner's civil liability.

This argument fails because the validity of such a waiver is highly questionable because Ketchum did not own the vehicle and Trooper Nelson had information that Ketchum took it without permission from another. This is not a reasonable alternative under the circumstances. Moreover, a waiver may still be litigated as to its validity and if it was found to be invalid for any reason, the trooper would have been wise to inventory the vehicle.

Ketchum cites to *State v. Sweet*, in support of his argument but fails to recognize that the truck at issue in *Sweet* was Sweet's vehicle and therefore

Sweet was authorized to waive his own rights and would have been in a better position to waive such potential civil liability had the officers been able to arouse Sweet. *See State v. Sweet*, 44 Wn. App. 226, 229, 721 P.2d 560 (1986) (“Meanwhile, Sweet’s truck (the suspicious Dodge pickup) was impounded.”); *see also State v. Sweet*, 36 Wn. App. 377, 380, 675 P.2d 1236 (1984).

Moreover, a waiver of civil liability would not have addressed Trooper Nelson’s concerns regarding public safety in hazardous traffic conditions. Therefore, allowing Ketchum to waive another person’s civil liability was not a reasonable alternative for Trooper Ketchum to consider.

C. THE TRIAL COURT ERRED BY ALLOWING KETCHUM TO BENEFIT FROM THE EXCLUSIONARY RULE FOR THE SEARCH OF A VEHICLE THAT KETCHUM TOOK FROM ANOTHER WITHOUT PERMISSION.

The State argued in response to Ketchum’s Demand for a CrR 3.6 Hearing and Motion to Suppress Evidence that Ketchum could not benefit from the exclusionary rule because he had no rights to assert in regards to the search of Ms. Parker’s vehicle. CP 26–28. *The trial court, by not addressing the issue, failed to use the correct legal standard to resolve this issue.*

Ketchum argues that the State’s argument on appeal fails because the trial court did not make any finding that Ketchum had wrongfully possessed the vehicle. Br. of Respondent at 15.

“We review conclusions of law from an order pertaining to the suppression of evidence de novo.” *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); *see also State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004). “When we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case.” *State v. Corona*, 164 Wn. App. 76, 79, 261 P.3d 680 (2011).

When the record is sufficient for review, a court may look to the facts contained in the record to determine whether the court properly granted or denied a suppression motion even in the absence of a court ruling on the issue. *See State v. Contreras*, 92 Wn. App. 307, 314, 966 P.2d 915 (1998) (“[H]ere the record is sufficiently developed for us to determine whether a motion to suppress clearly would have been granted or denied; thus we can review the suppression issue, even in the absence of a motion and trial court ruling thereon.”); *see also Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007) (citing *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 751 P.2d 329 (1988)) (“[I]f an issue raised for the first time on appeal is ‘arguably related’ to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal.”).

The absence of findings or conclusions of law is more relevant when an issue was *not* raised before the trial court as this would deprive the parties

of the opportunity to develop the record and for the trial court to have “an opportunity to rule correctly upon a matter before it can be presented on appeal.” *See State v. Strine*, 176 Wn.2d 742, 748–49, 293 P.3d 1177 (2013) (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)).

Here, the State raised before the trial court the issue of whether the defendant could benefit from the exclusionary rule under the facts at hand. The parties had an opportunity to develop the record and the trial court had the opportunity to rule on the issue. The State raises the same issue before this Court.

Here, the trial court found that the trooper determined that Ketchum was driving while his license was suspended and that he had five active warrants for charges that included driving with license suspended in the third degree. CP 6. The trial court found that Ketchum said the vehicle was not his but was owned by his girlfriend who lives in Port Orchard. CP 6. The trooper did not think Mr. Ketchum lived in the area. CP 7.

Additionally, Trooper Nelson testified that soon after the inventory search, and before the impound, Sgt. Ryan called him and relayed that the vehicle owner, Ms. Parker, had called and said that Ketchum, her ex-boyfriend or soon to be ex-boyfriend, took the vehicle without her permission but that she did not want to file a theft report. RP 19. Ketchum had claimed

that he borrowed the vehicle from Ms. Parker a few days prior. RP 12.

The State requests that this Court take judicial notice that Port Orchard, WA is approximately 137 miles away from Forks, WA. *See* ER 201; *see also State v. Royal*, 122 Wn.2d 413, 418, 858 P.2d 259 (1993). Also noteworthy is the fact that Ketchum himself claimed that he had loaned the vehicle to *other* individuals just the night before. RP 20–21.

Assuming Ketchum may have had automatic standing to raise the suppression issue, it is the State’s position that Ketchum may not benefit from the exclusionary rule because his rights were not violated by the search of Ms. Parker’s vehicle which Ketchum wrongfully possessed. *See State v. Libero*, 168 Wn. App. 612, 619, 277 P.3d 708 (2012); *see also State v. Hinton*, 179 Wn.2d 862, 880, 319 P.3d 9 (2014) (“These cases . . . teach us that it is the determination of a constitutionally protectable interest, or private affair, that gives rise to the ability to challenge the warrantless search by the government.”).

Trooper Nelson did not intrude into Ketchum’s private affairs by searching Ms. Parker’s vehicle because Ketchum took the vehicle without permission and had no right to be in the vehicle. Therefore, he did not have any private affairs or “privacy interests [in Ms. Parker’s vehicle] that Washington citizens held in the past and are entitled to hold in the future.” *State v. Myrick*, 102 Wn.2d 506, 510–11, 688 P.2d 151 (1984). Additionally,

Ketchum already made clear that he wanted his marijuana secured so he could keep it and the baggie of methamphetamine was found in plain view attached to Ketchum's marijuana. RP 20.

Therefore this Court should reverse the trial court's decision suppressing the evidence.

II. CONCLUSION

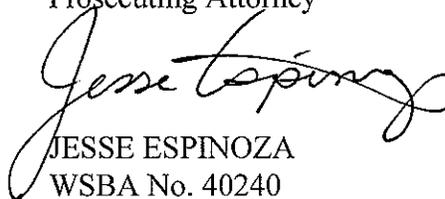
The trial court erred because it erroneously applied the fact specific holding of *State v. Froehlich* to the facts of this case as a basis to suppress the evidence. Additionally, the trial court failed to apply *State v. Peterson* which was on point. Finally, Ketchum had no privacy interest in Ms. Parker's vehicle which he took without permission and therefore the trial court erred by applying the exclusionary rule to suppress the evidence.

For the foregoing reasons, the Court should reverse the trial court's decision suppressing the evidence.

Respectfully submitted this 4th day of May, 2018.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

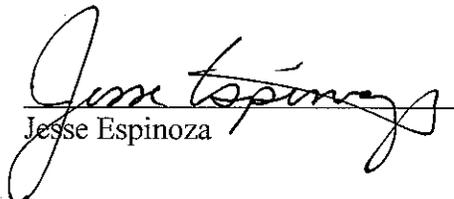


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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to John A. Hays on May 4, 2018.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

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