

FILED
Court of Appeals
Division II
State of Washington
8/6/2018 8:00 AM
NO. 51258-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

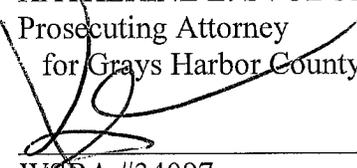
PATRICIA J. LEWIS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The Deputy's initial entry into the vehicle was lawful.**
2. **The Appellant has not preserved issues regarding legal financial obligations for appeal.**
3. **The State concedes to Scrivener's error in sentencing.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Deputy Jeremy Holmes was responding to a burglary call on October 13, 2016, when he saw a car parked oddly of the side of the road. VRP 14. This is an area that Deputy Holmes patrols and is familiar with. The car was parked in a "forestry area" and he had never seen a car there previously. VRP 14. Deputy Holmes noted that the windows were fogged over and he made contact with the vehicle. VRP 15.

Deputy Holmes announced himself and knocked on the windows. VRP 16. Upon receiving no response, Deputy Holmes looked around to determine whether there was anybody nearby. VRP 16. Deputy Holmes was unable to see the interior of the car due to the fogged windows, so to ensure no one inside of the vehicle needed assistance, Deputy Holmes opened the door to the car, which was unlocked. VRP 17.

Deputy Holmes noted there was a black bag matching the description of an item stolen at the nearby burglary. VRP 18.

Deputy Holmes closed the door and called the burglary victim to come identify the item. VRP 20. The victim identified the bag as hers by looking through the window of the vehicle with a flashlight. VRP 25.

At this time, the Appellant came out of the woods with her friend. VRP 49. Deputy Lewis detained the Appellant and her friend on suspicion of burglary. VRP 49. The Appellant declined to allow the deputy to search her car. VRP 49.

The deputy obtained a search warrant. VRP 25. There were narcotics and other drug paraphernalia discovered on the Appellant's person and inside of the vehicle. VRP 25. The Appellant was charged with possessing methamphetamine after a tin found in her pocket was found to contain methamphetamine.

The Appellant was found guilty at a bench trial on stipulated facts and sentenced to ninety days jail time, with thirty of those days being converted to community service and the remaining sixty served through successful completion of inpatient drug treatment. VRP 9.

ARGUMENT

- 1. Was Deputy Holmes's initial entry into the vehicle lawful?**

Yes. This was a proper action under the deputy's community caretaking function.

Standard of review.

The Court must review allegations of constitutional violations de novo. *State v. Siers*, 174 Wash. 2d 269, 273–74, 274 P.3d 358, 360 (2012).

The initial entry of Appellant's car was justified under the community care taking function.

An officer may conduct a search under the community caretaking function if: “(1) The officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.” *State v. Kinzy*, 141 Wash. 2d 373, 386-387, 5 P.3d 668 (2000) (quoting *State v. Menz*, 75 Wash. App. 351, 354, 880 P.2d 48 (1994)).

An officer does not commit a "seizure" by merely contacting a person to inquire about his or her welfare. On the other hand, any action that interferes with a person's freedom of movement is a "seizure," even if carried out pursuant to one of these statutes. The Washington Supreme Court recently placed limits on "seizures" that are carried out pursuant to a community caretaking function. Whether the actions taken during a routine check on safety are reasonable depends on a balancing of the individual's interest in freedom from police interference against the

public's interest in having the police perform a community caretaking function. Police officers may approach citizens and permissively inquire as to whether they will answer questions and whether they need aid.

If police officers make a seizure for community caretaking reasons, they must limit their post-seizure questioning to that strictly relevant to the performance of the community caretaking function. The seizure must end when the reasons for initiating the routine check on safety are fully dispelled, unless the officer has a reasonable articulable suspicion of criminal activity. A citizen's statement that he or she does not require aid from the police will serve to terminate the seizure unless objective evidence exists that contradicts the statement.

Compare *State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000), cert. denied, 121 S. Ct. 843 (2001) (police exceeded the scope of community caretaking when they detained a minor who was standing on a public sidewalk in a high narcotics trafficking area on a school night with several others, including an older person believed by the officers to be associated with narcotics, after the minor demonstrated an unwillingness to speak with the police and there was no evidence of any drug activity at the time the police approached the minor); with *State v. Hutchison*, 56 Wn. App. 863, 867, 785 P.2d 1154 (1990) (police properly searched for the

identification of a man they found passed out in a parking lot); *Gallegos v. City of Colorado Springs*, 114 F.3d 1024, 1029 n.4 (10th Cir. 1997) (police properly stopped a distraught man who was crying, smelled of alcohol, and had his hands over his face as he walked down a street late at night).

In this case, the officer observed a stopped car that appeared out of place. He had no way of knowing whether or not the driver was in need of some kind of aid unless he made contact with that vehicle. His contact did not exceed that allowed by a community caretaking contact. Rather, the contact quickly gave rise to a suspicion that the vehicle contained stolen property.

What appeared to be Wilbur's property was observed in plain view and was not found through a search of the vehicle. The historical elements of a plain view search are that the officer has a prior lawful justification for the intrusion into the constitutionally protected area; that the item(s) seized were immediately recognized as contraband or as having some evidentiary value; and that the discovery of the incriminating evidence must be inadvertent. However, neither article I, section 7, nor the Fourth Amendment still require inadvertent discovery to justify a seizure under the plain view exception. *See Horton v. California*, 496 U.S. 128, 130, 110

S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *State v. Hudson*, 124 Wn.2d 107, 114 n.1, 874 P.2d 160 (1994) (noting the Horton revision to the plain view test). The classic example of a “plain view” occurs where an officer is serving a search warrant for stolen television sets and discovers marijuana plants.

An officer need not have absolute knowledge that the object is related to a crime. It is sufficient that the officer have probable cause to believe that the object is evidence of a crime. *State v. Sistrunk*, 57 Wn. App. 210, 214, 787 P.2d 937 (1990). For example, in *State v. Gonzales*, a clear vial of capsules and pills, “viewed in context” of other items of drug paraphernalia, was properly seized. 46 Wn. App. 388, 400-01, 731 P.2d 1101 (1986). On the other hand, a closed paper bag containing marijuana was improperly seized because the marijuana was clearly not visible. *Id.* at 400, 731 P.2d 1101; see also *Sistrunk*, 57 Wn. App. at 214, 787 P.2d 937 (no probable cause to seize empty beer cans in open view when the condition of cans was consistent with driver’s explanation that they had been picked up for recycling).

The Appellant cites *Tibbles*, where the court ruled “the existence of probable cause, standing alone, does not justify a *warrantless* search. Probable cause is not a recognized exception to the warrant requirement,

but rather the necessary basis for obtaining a warrant.” *State v. Tibbles*, 169 Wash. 2d 364, 369, 236 P.3d 885, 888 (2010). The Appellant claims that the entire search was completed without a warrant. This is untrue. The deputy did not intrude or complete a more extensive search than was necessary to complete the community caretaking function. It was after the victim of the burglary identified the purse that the officers, with probable cause, obtained a search warrant and investigated the car.

The Defendant also cites *Kinzy*, a case in which the Supreme Court ruled that once a youth began to walk away from the police officers, their decision to restrain her stepped outside of the community caretaking exception and violated her constitutional rights. *State v. Kinzy*, 141 Wash.2d at 386-87. *Kinzy* differs from the instant case, as Officer Homes did not conduct further search without a warrant. Upon opening the door to the car and determining there was no one inside, he ceased the search until he had obtained a warrant. The officers in *Kinzy* detained the youth without a warrant, conducting a search of her person without a warrant, leaving all evidence found after the warrantless detainment inadmissible in court. *Id.*

2. Is Appellant entitled to review of imposition of fees?

No. The Appellant failed to preserve this issue for appeal.

Under RAP 2.5, the only issues that a defendant may raise for the first time on appeal are (1) constitutional errors, (2) failure to state a claim upon which relief can be granted, and (3) lack of trial court jurisdiction. The Defendant claims that the trial court failed to make an inquiry into her ability to pay her legal financial obligations. The Defendant failed to object to the imposition of the LFOs on that basis; therefore, she failed to preserve the matter for appellate consideration and the court should reject this argument. RAP 2.5(a).

3. Was there an error in the judgment and sentence?

Yes. The State concedes there was a scrivener's error in regards to community service/treatment.

The remedy for a scrivener's error in a judgment and sentence is to remand to the trial court for correction. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016); CrR 7.8(a). In the instant case, there was an error in the judgement and sentencing. The trial court sentenced the Defendant to 90 days of jail time, 30 of which were converted to community service with the remaining 60 being served through completion of inpatient drug treatment.

CONCLUSION

There was no violation of the Defendant's constitutional rights, and the trial court did not error in denying the motion to suppress evidence.

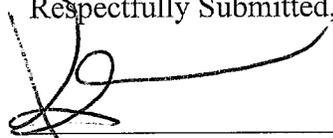
The trial court rendered an appropriate decision in imposing \$650 in attorney's fees.

The State conceded to the Scrivener's errors in sentencing and judgement.

For the reasons stated above, the State respectfully asks that the appeal be denied on the first two grounds and the Court remand the case back to the trial court for correction of the Scrivener's errors.

DATED this 5th day of August, 2018.

Respectfully Submitted,



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GRAYS HARBOR CO PROS OFC

August 05, 2018 - 3:46 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51258-1
Appellate Court Case Title: State of Washington, Respondent v. Patricia Lewis, Appellant
Superior Court Case Number: 16-1-00451-5

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