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Division II
State of Washington
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No. 51886-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN SHELLABARGER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF LEWIS

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY..... 1

1. The officers’ search of the tin located inside the bag that Mr. Shellabarger removed from the truck exceeded the scope of his purported consent to search the truck. 1

 a. Mr. Shellabarger’s consent was involuntary..... 1

 b. The officers’ search of a closed tin inside a bag that Mr. Shellabarger removed from the truck far exceeds the scope of consent to search the truck. 5

2. Mr. Shellabarger was detained beyond the permissible scope of the traffic stop when officers detained him well after the traffic stop was complete for the K-9 to sniff around the truck while police questioned him about his drug use absent reasonable suspicion. 8

 a. The State’s effort to distinguish Mr. Shellabarger’s case from *Rodriguez* fails, because there is no question that the dog sniff took place after the conclusion of the traffic stop. 9

 b. Police lacked reasonable suspicion to detain Mr. Shellabarger. 11

B. CONCLUSION 12

TABLE OF AUTHORITIES

WASHINGTON STATE SUPREME COURT CASES

State v. Doughty, 170 Wn.2d 57, 239 P.3d 573 (2010) 11

State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989)..... 6

State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005)..... 8

State v. Neth, 165 Wn.2d 177, 196 P.3d 658 (2008)..... 2

State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003) 2

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004) 5, 6

State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986) 6

State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) 7

WASHINGTON COURT OF APPEALS DECISIONS

State v. Flowers, 57 Wn. App. 636, 789 P.2d 333(1990) 3

UNITED STATES SUPREME COURT DECISIONS

Illinois v. Caballes, 543 U.S. 405, 125 S. Ct. 834, 160 L. Ed. 2d 842
(2005)..... 9

Rodriguez v. United States, 135 S. Ct. 1609, 191 L. Ed 2d 492 (2015) 8,
10, 11, 12

A. ARGUMENT IN REPLY

1. The officers' search of the tin located inside the bag that Mr. Shellabarger removed from the truck exceeded the scope of his purported consent to search the truck.

a. Mr. Shellabarger's consent was involuntary.

Mr. Shellabarger's ultimate acquiescence to the four police officers' repeated efforts to procure his "consent" to search while also telling him they would search his truck regardless of whether he consented, made Mr. Shellabarger's eventual "consent" to search involuntary.

The State attempts to characterize the various ways the officers threatened to search Mr. Shellabarger's truck with or without his consent as "informative" rather than coercive. Brief of Respondent at 15-16. This claim fails because the officers' conduct revealed that they did not intend to get a warrant to search the vehicle, nor could they have, because by the officer's own admission, the K-9 sniff produced only a "weak alert." Ex. 1; 10:39:55. After the K-9 sniff only produced a "weak alert," the officers immediately sought consent to search a third time from Mr. Shellabarger, this time by telling him they would find a way to search his vehicle with a warrant or some other means. Presumably they again sought Mr. Shellabarger's consent because this "weak alert" did not amount to

probable cause necessary for the officers to have obtained a warrant. *See e.g., State v. Neth*, 165 Wn.2d 177, 181, 196 P.3d 658 (2008) (noting that where the affidavit did not establish reliability of K-9 indication, trial court found dog sniff inadequate basis to issue a warrant). Thus the record does not support the State's claim that the officers' threat to search the vehicle regardless of whether Mr. Shellabarger offered consent was "informative," because their information was not accurate. Brief of Respondent at 18 (describing that the officers' threat to obtain a warrant to search as "truthful information").

Furthermore, *State v. O'Neill* does not support the State's claim that when police "truthfully advise" the defendant about the consequences of refusal, the claim of authority to search makes a threat "informative" rather than "coercive." Brief of Respondent at 15-16 (citing *State v. O'Neill*, 148 Wn.2d 564, 589, 62 P.3d 489 (2003)). In *O'Neill*, police had probable cause to arrest Mr. O'Neill after viewing drug paraphernalia in the vehicle. *Id.* Yet, the Court determined that "for whatever reason West was not inclined to effect arrest prior to searching the vehicle. He thus used the claim that he could search in any event to pressure O'Neill to consent, i.e., to give in because it was futile not to." *O'Neill*, 148 Wn.2d at 591. Thus, in *O'Neill*, even though police may have possessed lawful authority to arrest the driver and search the car, the officer's apparent

disinclination to make the lawful arrest, coupled with the officer telling the driver about the futility of denying consent to search “several times,” made the statement that police would search regardless of consent coercive, not informative. *Id.*

The police conduct here was far more coercive than in *O’Neill*. In Mr. Shellabarger’s case, there were four officers and a K9 drug sniffing dog investigating around his truck. Officers questioned Mr. Shellabarger about his drug activity, and told him in several different ways that refusal to consent was futile. Ex. 1; 10:41:29 (officer says they need to follow through on their suspicion); 10:42:16 (officers not going to walk away; will obtain a search warrant or search by some other means).

The State’s effort to set a factually high bar to establish coercion based on *State v. Flowers* also fails. Brief of Respondent at 14-15 (*citing State v. Flowers*, 57 Wn. App. 636, 645, 789 P.2d 333(1990)). In *Flowers*, the Court of Appeals rightly recognized as “coercive factors,” circumstances in which the defendant was ordered out of his hotel room at gunpoint by several officers, told to kneel on the ground with his hands behind his head, with an officer’s foot between his knees that preceded police obtaining his “consent” to search his apartment and vehicle. *Flowers*, Wn. App. at 646-647. But the *Flowers* court determined that these factors were outweighed by the defendant’s testimony at the

suppression hearing, where he insisted under oath that he understood his legal rights at the time, but that no one had asked him to consent to search, and that officers were lying. Thus the “trial court’s resolution of the consent issue rested heavily on an assessment of the parties’ credibility, a factor resolved in favor of the police officers.” *Flowers*, 57 Wn. App. at 646. The fact that the *Flowers* court did not find the consent to be involuntary despite police coercion is of no import in this case, where unlike in *Flowers*, Mr. Shellabarger contests the voluntariness of any claimed “consent.”

The State tries to impute significance to Mr. Shellabarger’s refusal to grant consent to search in which he asked questions about his rights in response to the officers’ request to search his truck. Brief of Respondent at 17. Regardless of how Mr. Shellabarger’s responses were phrased, the officers correctly interpreted that Mr. Shellabarger twice did not grant their request for consent to search his truck, which is why they had to ask him a third time.

Finally, the State tries to frame Mr. Shellabarger’s 15-year-old VUCSA conviction and his stated concern about taking a lie detector in the past as evidence that Mr. Shellabarger was not “naïve regarding criminal matters,” presumably as evidence that his “education and intelligence” weighed in favor of the voluntariness of consent. Brief of

Respondent at 18, 14 (*citing State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004) (courts may consider education and intelligence of consenting person)). However, Mr. Shellabarger’s bafflement and questions and concerns throughout the protracted interaction with the four officers and the K9 are much stronger evidence that he lacked education and knowledge about his rights than does the over 15-year-old criminal conviction and what he described as his previous confusion about taking a lie detector test. 4/9/18 RP 22, 38.

Where Mr. Shellabarger was surrounded by four officers and a K9 drug sniffing dog, asked three times to consent to search, and provided *Ferrier* warnings that police directly contradicted by telling him that they would search his truck regardless of whether he consented, any purported “consent” was not voluntarily given.

b. The officers’ search of a closed tin inside a bag that Mr. Shellabarger removed from the truck far exceeds the scope of consent to search the truck.

Mr. Shellabarger limited the scope of any purported consent to the search of his truck by removing the bag from the truck.

Despite acknowledging case law that the consent may be expressly or impliedly limited in scope, the State claims that Mr. Shellabarger’s removal of the bag from the truck did not limit the scope of consent to search the truck. Brief of Respondent at 19-20. This claim is contrary to

Washington's very narrow construal of the limits of a police search based on consent. *See e.g. Reichenbach*, 153 Wn.2d at 131.

The State tries to frame this as an issue of whether Mr. Shellabarger had a reasonable expectation of privacy in the bag that he removed from the truck. Brief of Respondent at 19 (*citing State v. Stroud*, 106 Wn.2d 144, 152-53, 720 P.2d 436 (1986); *State v. Fladebo*, 113 Wn.2d 388, 395, 779 P.2d 707 (1989)). However, this analysis is inapplicable in Mr. Shellabarger's case because it concerns the scope of a vehicle search incident to arrest, and Mr. Shellabarger was not under arrest. *Fladebo* relied on *Stroud's* "balancing the exigencies of an arrest against the privacy interest of the individual. *Stroud* presented a bright line rule for determining the scope of a warrantless search of an automobile incident to an arrest: the police can search the contents of the passenger compartment exclusive of locked containers or locked glovebox." *Fladebo*, 113 Wn.2d at 395 (*citing Stroud*, 113 Wn.2d at 152.). *Fladebo* thus reasoned that when a driver is detained for a DUI, police may retrieve and search the driver's purse from her car based on a suspicion that she possessed drugs.¹ *Id.* at 395-397.

¹ *Fladebo* specifically relied on *Stroud* to justify the search of the driver's purse, because like in *Stroud*, it took place "immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car," which meant "officers should be allowed to search the passenger compartment of

Because Mr. Shellabarger was not arrested, his case does not involve, as in *Stroud* and *Fladebo*, the scope of an officer's search of the truck incident to arrest. Rather the State justifies the legality of the warrantless search based on consent, which is a "jealously and carefully drawn exception to the warrant requirement" and may be expressly or impliedly limited in "duration, area or intensity." *Reichenbach*, 153 Wn.2d at 131; *State v. Davis*, 86 Wn. App. 414, 423, 937 P.2d 1110 (1997). The State cites no case law broadly construing a search to include items explicitly removed from the area for which consent was given. To the contrary, Trooper Farkas stated during the CrR 3.6 hearing that based on his training and experience, police do not remove items from the vehicle after consent is given. 4/9/17 RP 51.

Nor does the State cite any legal authority that would permit an officer to seize a bag from a person's hands who is not arrested, under the false pretense of throwing it away, and then search its contents without

a vehicle for weapons or destructible evidence." *Fladebo*, 113 Wn.2d at 357 (citing *Stroud*, 106 Wn.2d at 152). This overly broad interpretation of when an officer can search the vehicle was overruled in *State v. Valdez*, which invalidated the police search of an arrestee who is secured and removed from the automobile when there is no risk of the person obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile. 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

consent or any other applicable exception to the warrant requirement. Brief of Respondent at 18-20. Because the scope of consent did not include the items Mr. Shellabarger removed from the truck, the State cannot meet its burden to establish consent to search the contents of the bag. *See e.g. State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (State has burden to establish “jealously drawn and carefully guarded” exception to warrant requirement).

Because Mr. Shellabarger’s consent to search was involuntary, and police exceeded the scope of any purported consent, the search was illegal and suppression of the methamphetamine contained in the tin inside the bag is required.

2. Mr. Shellabarger was detained beyond the permissible scope of the traffic stop when officers detained him well after the traffic stop was complete for the K-9 to sniff around the truck while police questioned him about his drug use absent reasonable suspicion.

The timing of the K-9 sniff in *Rodriguez v. United States*² and Mr. Shellabarger’s case is nearly identical and firmly establishes that police detained Mr. Shellabarger beyond the allowable scope of the traffic stop to conduct the K-9 sniff, after the officer’s suspicions about DUI were dispelled. *Rodriguez* controls the analysis of Mr. Shellabarger’s unlawful

² 135 S. Ct. 1609, 191 L. Ed 2d 492 (2015).

detention in which the K-9 search plainly exceeded the scope of the traffic stop, requiring suppression of the evidence seized as a result of this unlawful detention.

a. The State's effort to distinguish Mr. Shellabarger's case from *Rodriguez* fails, because there is no question that the dog sniff took place after the conclusion of the traffic stop.

The State's claim that the K9 search in Mr. Shellabarger's case was more like the search in *Illinois v. Caballes*,³ than *Rodriguez*, is entirely without merit. In Mr. Shellabarger's case and *Rodriguez*, the driver was detained beyond the initial traffic stop for police to conduct a K9 sniff. By contrast, in *Caballes*, it was undisputed that the K9 sniff occurred during the course of a lawful traffic stop. *Id.* The question in *Caballes* was whether the dog sniff changed "the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner." *Caballes*, 543 U.S. at 408. Because it was undisputed that the dog sniff occurred *during* the lawful traffic stop in *Caballes*, the State's claim that the facts of Mr. Shellabarger's case are more analogous to *Caballes* than *Rodriguez* is simply wrong, where like in Mr. Shellabarger's case, the K9 sniff prolonged the traffic stop. Brief of Respondent at 12.

³ 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005).

Rodriguez is clear that it is not enough that the K9 sniff technically begins before the end of the traffic stop as in Mr. Shellabarger's case—the question is whether the K9 sniff “prolongs” or adds time to the stop. *Rodriguez*, 135 S. C. at 1616. The State's argument that the K9 sniff did not prolong the stop beyond the time required to investigate a possible DUI and issue a traffic citation is patently unsupported by the record. Brief of Respondent at 12. The State appears to rely on Trooper Farkas' general recollection of events during the suppression hearing, which was controverted by the video of the traffic stop. Brief of Respondent at 12. There is no question that the investigation of the possible DUI was complete and the officer was just finishing up with the ticket when the K9 arrived. Opening Brief of Appellant at 27-28 (video of the stop contradicts Trooper Farkas' testimony that he called the K-9 unit before administering sobriety testing). Mr. Shellabarger was then detained well beyond the end of the traffic stop for the K9 sniff. Ex. 1; 10:33:31-10:46:52 (time between dog arrival and search of the bag). During this time Mr. Shellabarger was questioned about drug use, *not* traffic-related matters, leaving no doubt that the traffic stop was over and Mr. Shellabarger was detained well beyond the initial purpose of the traffic stop in order for police to conduct an unrelated K9 sniff.

Rodriguez is directly on point as to whether police detention of Mr. Shellabarger was prolonged beyond the purpose of the traffic stop. The only difference is that Mr. Shellabarger's detention was more prolonged than in *Rodriguez*. Thus *Rodriguez*, not *Caballes*, controls the analysis of the detention in Mr. Shellabarger's case.

b. Police lacked reasonable suspicion to detain Mr. Shellabarger.

The State does not, and cannot establish "by clear and convincing evidence" that police had reasonable suspicion to detain Mr. Shellabarger beyond the initial traffic stop that was complete by the time of the K9 sniff. *See State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (State must prove by clear and convincing evidence that *Terry* stop was based on a well-founded suspicion that the defendant engaged in criminal conduct); *Rodriguez*, 135 S. Ct. at 1614 (police may not prolong traffic stop absent the reasonable suspicion ordinarily demanded to justify detaining an individual).

The rationale offered by the State to support reasonable suspicion is simply unsupported by the record. The State claims that the police "had a reasonable suspicion of DUI" when the K9 unit "began to investigate." Brief of Respondent at 7. However, it is undisputed that Trooper Farkas' DUI investigation led him to conclude he would not arrest Mr. Shellabarger for DUI by the time he issued his traffic citation and was

discussing it with Mr. Shellabarger. 4/9/19 RP 33; Ex. 1; 10:27:29. Trooper Farkas specifically stated that he was not going to arrest Mr. Shellabarger for DUI prior to the arrival of the K9. Ex.1; 10:27:29; 4/9/18 RP 33. Thus it cannot be claimed that this suspicion of DUI that was entirely dispelled by the time Mr. Shellabarger was detained for the K9 sniff provided the required reasonable suspicion required to detain Mr. Shellabarger while the K9 sniffed around his truck.

Absent reasonable suspicion to detain Mr. Shellabarger beyond the scope of the traffic stop, it was an illegal detention that requires suppression of the evidence seized. *Rodriguez*, 135 S. Ct. at 1617.

B. CONCLUSION

Any claim of “consent” to search the truck fails in light of the coercive police conduct that resulted in Mr. Shellabarger finally acquiescing to the officers’ request to search his truck. The officer exceeded the scope of this purported consent by taking from Mr. Shellabarger the bag he had removed from the truck and searching it without his permission. Nor can the State establish the legality of Mr. Shellabarger’s prolonged detention at the end of the traffic stop while police questioned him about drug activity and conducted a dog sniff absent reasonable suspicion.

Reversal and remand for suppression of the evidence police seized
as a result of this illegal detention and invalid consent is required.

DATED this 12th day of February, 2019.

Respectfully submitted,

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

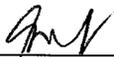
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)	
v.)	NO. 51886-4-II
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