

FILED  
Court of Appeals  
Division II  
State of Washington  
11/7/2019 3:15 PM

No. 53039-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

REANASHA McCORD,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Eric Price, Judge  
The Honorable Carol Murphy, Judge  
Cause No. 17-1-01523-34

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BRIEF OF RESPONDENT

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Joseph J.A. Jackson  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether ER 1101 allows the trial court to consider the declarations filed prior to a CrR 3.6 hearing when drafting findings of fact and conclusions of law, and if so, whether the testimony from Officer Miller and the declaration of the deputy prosecutor adequately supported findings of fact, numbers 4 and 5. as they pertained to the identity of the silver Mercedes involved in this case.

2. Whether the totality of the circumstances supported an individualized reasonable suspicion that McCord was committing or about to commit a narcotics offense.

3. If McCord was unlawfully seized, whether Officer Miller exploited the unlawful seizure to obtain her consent to search the vehicle such that the fruits of the search should be suppressed where Officer Miller properly advised her that she need not consent and could limit the scope of consent and had advised her of her *Miranda* rights prior to her giving consent to search the vehicle.

B. STATEMENT OF THE CASE.

Lacey Police Officer David Miller was dispatched to a narcotics complaint behind the Taco Bell in Lacey. RP 17, 20.<sup>1</sup>

Officer Miller had been with the Lacey Police Department for nearly

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<sup>1</sup> The trial that occurred February 19-20, 2019, will be referenced as RP. All other transcripts will be RP (date of hearing).

24 years and had experience and training related to narcotics investigations. RP 17-18. Officer Miller located the vehicle that had been described by dispatch directly behind the Taco Bell. RP 20. He parked approximately 40 feet from the vehicle and observed a female rear passenger, with the door open, preparing to inject herself with what appeared to be a heroin needle. RP 20.

There were three occupants in the vehicle. RP 21. Officer Miller yelled at the rear passenger, "Police. Show me your hands," and then observed all three occupants stuffing something or moving around, making movements to hide objects. RP 21. The Appellant, Reanasha McCord, was in the driver's seat of the vehicle. RP 21. Officer Miller observed her making furtive movements and made contact with her. RP 21. Officer Miller read McCord her *Miranda* warnings and McCord agreed to speak with him. RP 22.

Officer Miller asked McCord if there were any narcotics in the vehicle and she told him that there would be a "small piece of heroin in tin foil in the driver door kind of pocket." RP 23. McCord stated that she was not a drug dealer, but a drug user. RP 23. McCord further stated that she was about to use the drugs before Officer Miller got there. RP 24. McCord consented to a search of

the vehicle and Officer Miller found the heroin where she indicated it would be. RP 24. Officer Miller continued searching the vehicle and found two packages of methamphetamine, one located between the door and the front passenger seat and another located in the console in between the two seats. RP 26-27. Officer Miller found additional heroin in the back seat. RP 27.

A forensic scientist with the Washington State Patrol confirmed that the items were heroin and methamphetamine. RP 69. The State charged McCord with unlawful possession of methamphetamine and unlawful possession of heroin. CP 1. Before trial, McCord failed to appear for a hearing on January 20, 2018, which resulted in an additional charge of bail jumping. RP 90, CP 9. At trial, the jury convicted McCord of unlawful possession of heroin and bail jumping, but acquitted McCord on the charge of unlawful possession of methamphetamine. CP 99-101. The trial court imposed a first time offender waiver of sentence which included 30 days of confinement, with the option of electronic home monitoring, and 6 months of community custody. CP 136-146; RP (2/27/19) 17-18. This appeal follows the conviction. Additional facts are included in the section below regarding the

pretrial suppression motion and in the argument sections as needed.

1. Pretrial Suppression Motion

Prior to trial, McCord litigated a motion to suppress evidence pursuant to CrR 3.6. Her motion argued that Officer Miller had seized her without individualized suspicion. CP 15-17. The State filed a responsive pleading which included a declaration by the deputy prosecutor indicating the facts that he believed would be presented at hearing or trial. CP 18-24. A hearing on the motion was held on November 5, 2018. *See generally* RP (11/5/18).

The State offered testimony from Officer Miller at the hearing. RP (11/5/18) 6. Officer Miller testified as to his training and experience in law enforcement. RP (11/5/18) 7-8. He also testified as to his knowledge regarding the difference between medical diabetes needle usage and heroin needle usage. RP (11/5/18) 9. Officer Miller testified that a citizen called 911 and reported that there were suspicious people in a vehicle and they looked like they were using heroin behind a Taco Bell. RP (11/5/18) 10. Officer Miller located the car at the location described and parked about 40 feet from the vehicle. RP (11/5/18) 10. He then noticed the passenger seated in the back of the vehicle, with

vehicle, with the door open, preparing to inject herself in the arm with what appeared to be a heroin needle. RP (11/5/18) 11.

At that time, Officer Miller contacted the rear passenger and told her to show him her hands. He testified that he wanted to contact her before she injected the drug. RP (11/5/18) 12. After he made his statement to the rear passenger, Officer Miller observed all three passengers hiding objects in the vehicle, including the driver, who identified as McCord, "stuffing something toward the door compartment." RP (11/5/18) 12, 13. Officer Miller then contacted McCord and read her *Miranda* warnings. RP (11/5/18) 13. McCord made incriminating statements regarding drug usage and heroin in the driver's door. RP (11/5/18) 15. Officer Miller then obtained McCord's consent to search the vehicle and located drugs. RP (11/5/18) 16-17.

The judge, at the suppression hearing, found that based on the totality of the circumstances, the consistency between McCord and the other passenger "stuffing stuff" places, and Officer Miller's extensive training, the stop was a valid *Terry* stop. RP (11/5/18) 39. The trial court followed its oral ruling with written findings of fact and conclusions of law. CP 27-30.

### C. ARGUMENT

1. The trial court's findings of fact and conclusions of law were supported by substantial evidence considered by the trial court during the suppression hearing.

An appellate court reviews the trial court's ruling on a motion to suppress to determine if substantial evidence supports the court's findings of fact. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). The rules of evidence do not apply to questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under ER 104(a). ER 1101(c)(1). In this case, the trial court based its findings of fact and conclusions of law on the testimony provided and the "and the record and file." CP 27.

While Officer Miller did not specifically testify regarding the identity of the vehicle during the suppression hearing, it appears no party asked him about the information that he had regarding the vehicle at the time he arrived at the Taco Bell. RP (11/5/18) 10. His testimony simply stated, "the car was in the back of the parking lot south of Taco Bell." RP (11/5/18). However, the trial court specifically noted that its findings and conclusions were based on the testimony and the record. In the State's response to McCord's motion to suppress, the deputy prosecutor specifically noted he believed that a hearing or trial in the matter would reveal that

Dispatch advised that a citizen reported that the occupants in a silver Mercedes SUV Washington license BCW 1957 appeared to be using heroin. Upon arrival, Officer Miller observed a silver Mercedes SUV with the same license plate (BCW 1957) in a rear parking lot of Taco Bell.

CP 19. The declaration in the State's response was signed by the deputy prosecutor under penalty of perjury. CP 20. When Officer Miller testified at trial, before any evidence of drug possession was introduced, Officer Miller testified regarding the vehicle that he was dispatched to find, the license plate and the fact that he located the vehicle behind the Taco Bell. RP 19-20.

The testimony at the suppression hearing, combined with the factual declaration of the deputy prosecutor filed in advance of the suppression hearing, supported the trial court's findings of fact numbers 4 and 5. CP 27. Officer Miller's testimony at trial confirmed that the deputy prosecutor's declaration was true and correct. RP 19-20.

2. Regardless of whether this Court finds that the trial court's findings of fact number 4 and 5 were supported by substantial evidence, the trial court did not err in denying McCord's motion to suppress evidence because Officer Miller engaged in a valid Terry stop.

Conclusions of law pertaining to suppression of evidence are reviewed de novo. State v. Johnson, 128 Wn.2d 641, 443, 909

P.2d 293 (1996). Under the Fourth Amendment to the United State's Constitution and Article 1, section 7 of the Washington Constitution, an officer generally may not seize a person without a warrant. State v. Weyand, 188 Wn.2d 804, 811, 399 P.3d 530 (2017). On exception to this rule is the *Terry* investigative stop. State v. Fuentes, 183 Wn.2d 149, 158, 352 P.3d 152 (2015); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed 889 (1968).

To conduct a valid *Terry* stop, an officer must have "reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop." Fuentes, 183 Wn.2d at 158. Washington courts look to the totality of the circumstances known to the officer to evaluate the reasonableness of the officer's suspicion. Weyand, 188 Wn.2d at 811. "The totality of the circumstances includes the physical intrusion on the suspects liberty." *Id.* at 812.

Here, Officer Miller had received information from a citizen's 911 call indicating that there were suspicious people in a vehicle behind Taco Bell and it "looked like they were using heroin." RP (11/5/18) 10. After locating a vehicle behind the Taco Bell, Officer Miller took no action until he observed a passenger in the rear of the vehicle engaging in activity that in his training and experience

was consistent with injecting heroin. RP (11/5/18) 10-11. Officer Miller testified, "At that time I told her to show me her hands. I wanted to contact her before she injected the drug." RP (11/5/18) 11 (emphasis added). Immediately after verbally contacting the rear passenger, Officer Miller indicated,

[the rear passenger] dropped the syringe and started stuffing something under the seat. I saw the front passenger, she was stuffing stuff under the seat and between the two front seats, and I also saw the driver stuffing something over towards the door compartment.

RP (11/5/18) 12. After that point, Officer Miller made contact with the driver, later identified as McCord. RP (11/5/18) 13-14, 15-16. The trial court correctly concluded that "at the point [McCord] was seized, the seizure was supported by lawful authority under *Terry v. Ohio*, because the totality of the circumstances supports the seizure of the defendant." CP 29.

During the suppression hearing, the State conceded that McCord was detained the moment Officer Miller stated, "Police, show me your hands." RP (11/5/18) 22. However, looking at Officer Miller's testimony on its own, Officer Miller clearly stated that he was directing his comment at the rear passenger in an effort to contact her before she injected the drugs. RP (11/5/18) 12.

Defense counsel asked Officer Miller if the tone was conversation or a tone “that says everybody in this car do what you — what I’m telling you to do,” and Officer Miller agreed that his tone was the authoritative version. RP (11/5/18) 19. However, the authoritative tone does not change the fact that his statement was directed at the person who was about to inject herself with heroin. This Court is not bound by an erroneous concession at the trial court. State v. Knighten, 109 Wn.2d 896, 901-902, 748 P.2d 1118 (1988). It does not appear that the trial court accepted that concession, as his verbal ruling discussed the furtive movements as justification for Officer Miller’s continued contact with McCord. RP (11/5/18) 39.

An individual is seized “when considering all the circumstances, an individual’s freedom of movement is restrained and the individual would not believe he...is free to leave or declined a request due to an officer’s use of force or display of authority.” State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). An automobile passenger is not seized when a police officer merely stops the vehicle in which the passenger is riding. State v. Mendez, 137 Wn.2d 208, 222, 970 P.2d 722 (1999). Under Article I, section 7, passengers are unconstitutionally detained when an officer requests identification, “unless other circumstances give the

police independent cause to question the passengers.” State v. Larson, 21 Wn.App. 506, 507, 587 P.2d 171 (1978).

The rationale applies by analogy to the facts of this case. The fact that Officer Miller detained the rear passenger did not automatically equate to detention of the other passengers in the vehicle. It was not until Officer Miller specifically contacted McCord and began questioning her that she was also seized. By that point, Officer Miller had observed her making furtive movements in the vehicle indicative of hiding evidence. Prior to her furtive movements, McCord’s liberty was not limited anymore than that of a passenger in a stopped vehicle. Officer Miller’s actions were reasonable in scope and Miller’s actions justified the expanded scope of the interaction.

Even if this Court agrees that McCord was seized at the point of Officer Miller’s initial contact with the rear passenger, at that point, Officer Miller had a reasonable individualized suspicion that all of the occupants in the vehicle were engaged in illegal drug activity. He had received a citizen report that suspicious individuals appeared to be using heroin in a car behind the Lacey Taco Bell, observed several occupants sitting in the location where the vehicle was reported to be, and corroborated the tip by observing the rear

passenger reaching to inject herself with what Officer Miller suspected, based on his training and experience, was a heroin needle. RP (11/5/18) 10-12. Based on a totality of the circumstances, Officer Miller had a reasonable individualized suspicion that all of the occupants of the vehicle were engaged in illegal drug activity. The trial court did not err in denying the motion to suppress.

3. Even if this Court were to find that McCord was unlawfully seized, such a seizure would not vitiate consent to search her vehicle under the facts of this case.

As noted above, the State contends that the *Terry* investigative stop of McCord was lawful. However, if this Court finds that the stop of McCord was unlawful, the record demonstrates that McCord knowingly, voluntarily and intelligently authorized the search of her vehicle.

Evidence obtained as a result of a consensual search, following an illegal seizure, need not be suppressed so long as the search was authorized by a free and voluntary consent “untainted by the illegal search.” State v. Rodriguez, 32 Wn.App. 758, 762, 650 P.2d 225 (1992). Voluntariness of a consent to search is a question of fact to be determined by considering the totality of the circumstances. *Id.* In Rodriguez, this Court noted that it was

erroneous for the trial court not to consider the issue of consent regardless of the finding that the defendant was improperly seized. *Id.* at 763.

In State v. Soto-Garcia, 68 Wn.App. 20, 27, 841 P.2d 1271 (1992), this Court indicated that a court must consider

(1) temporal proximity of the illegality and the subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of *Miranda* warnings.

This Court noted that no one factor is generally dispositive. *Id.* Here, Officer Miller advised McCord of her *Miranda* warnings before speaking with her. RP (11/5/18) 14. He did not learn anything from the seizure that he did not already know. He indicated that he did not use coercive speech. RP (11/5/18) 15. He testified “I just asked if I can search the vehicle, let her know she can consent or deny consent. She can limit the scope and she can stop the search at any time.” RP (11/5/18) 16. She consented and pointed out where Officer Miller could find the drugs. RP (11/5/18) 16-17.

While the consent search was close in time to the seizure, the consent was clearly voluntarily given. Moreover, even if this Court were to find that the seizure of McCord was unlawful, it certainly did not constitute flagrant misconduct. Unlike Soto-

Garcia, there was no progressive intrusion of privacy in this case. See, State v. Harrington, 167 Wn.2d 656, 669, 222 P.3d 92 (2009). The totality of the circumstances in this case should lead this Court to the conclusion that any illegality in the seizure did not lead to “exploitation of that illegality” in order to obtain consent. See, State v. Gonzalez, 46 Wn.App. 388, 398-399, 731 P.2d 1101 (1986). Even if this Court finds that the seizure in this case was unlawful, the trial court properly found that the consent to search was lawful. CP 29-30.

#### D. CONCLUSION.

The totality of the circumstances supported Officer Miller’s investigative *Terry* stop of McCord. This Court should find that Officer Miller’s directions to the passenger of the vehicle did not amount to seizure of McCord and she was seized when Officer Miller specifically asked her questions, after she had made furtive movements to conceal her drugs. Even if this Court finds that Officer Miller’s initial comments to the passenger seized the entire vehicle, Officer Miller had sufficiently corroborated the citizen information that the occupants of the vehicle were engaged in narcotic usage and based on the totality of the circumstances had a reasonable individualized suspicion that each of the vehicle

occupants, including McCord, were engaged in illegal narcotics activity. Finally, McCord voluntarily consented to the search of her vehicle and that consent was not the result of exploitation of officer misconduct. Even if this Court finds that the seizure of McCord was somehow unlawful, the trial court did not err in denying the motion for suppression. The State respectfully requests that this Court affirm McCord's convictions. None of the issues raised affect McCord's conviction for bail jumping. See State v. Council, 170 Wn.2d 704, 710, 245 P.3d 222 (2010).

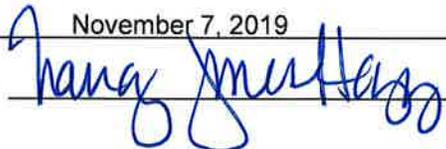
Respectfully submitted this 7<sup>th</sup> day of November 2019.

  
\_\_\_\_\_  
Joseph J.A. Jackson, WSBA# 37306  
Attorney for Respondent

#### DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: November 7, 2019  
Signature: 

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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**Appellate Court Case Title:** State of Washington, Respondent v Reanasha Ann McCord, Appellant  
**Superior Court Case Number:** 17-1-01523-1

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