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No. 53681-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Austin Ciganik,

Appellant.

Kitsap County Superior Court Cause No. 18-1-00639-1

The Honorable Judge Kevin D. Hull

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Ciganik's suppression motion.
2. Officer Keller violated Mr. Ciganik's Fourth and Fourteenth Amendment right to be free from unreasonable searches and seizures.
3. Officer Keller invaded Mr. Ciganik's right to privacy under Wash. Const. art. I, §7.
4. Officer Keller improperly opened the door of Mr. Ciganik's pickup truck and arrested him without authority of law.
5. The trial court erred by adopting Finding of Fact V.
6. The trial court erred by adopting Finding of Fact IX.
7. The trial court erred by adopting Conclusion of Law No. IV.
8. The trial court erred by adopting Conclusion of Law No. V.

ISSUE 1: Police may not disturb a person's private affairs without authority of law. Did Officer Keller improperly intrude on Mr. Ciganik's private affairs by opening the door of his truck and arresting him?

ISSUE 2: Warrantless searches and seizures must be based on probable cause. Did Officer Keller lack probable cause when he opened the door of Mr. Ciganik's truck and arrested him?

INTRODUCTION AND SUMMARY OF ARGUMENT

Austin Ciganik was asleep in his truck when an officer opened the door and arrested him. The officer had neither a warrant nor probable cause. The trial court should have suppressed items seized from Mr. Ciganik's truck.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Austin Ciganik fell asleep in his truck while parked in the parking lot of a Burger King restaurant. CP 59-60, 65. It was around 4:00 a.m. on May 2, 2018. CP 59, 65. Mr. Ciganik left his truck running. CP 59-60, 65.

More than an hour later, he was awakened by a police officer who opened the truck door, told him to get out, and handcuffed him. CP 60, 66. Mr. Ciganik was told that he was under arrest. CP 60, 66.

The officer, Craig Keller, had "responded to a call regarding an individual who had been asleep in a running vehicle." CP 59. When he got to the Burger King parking lot, Keller saw Mr. Ciganik asleep in the driver's seat of the truck. CP 60, 65; RP (5/6/19) 11-12, 29.

Through tinted windows, Keller saw a piece of foil on the passenger seat. CP 60, 66. Keller saw "a small dark substance" on the foil. CP 60. He saw burn marks on the foil but didn't remember seeing a

lighter. RP (5/6/19) 22. He concluded that the foil contained heroin. CP 60, 66.

Keller later admitted that “a brown substance on a foil, it could be a brownie.” RP (5/6/19) 13. He also acknowledged that it could have been another kind of food or “something that’s not drug related.” RP (5/6/19) 13.

Based on his view of the foil through the tinted windows of the truck, Keller decided to arrest Mr. Ciganik. RP (65/6/19) 25. He returned to his patrol car and pulled in behind the truck. CP 60, 66; RP (5/6/19) 13, 18.

He then “knocked on the window and immediately opened the door.” CP 66. He “didn’t really give him a chance to wake up or to respond” after knocking. RP (5/6/19) 19. He told Mr. Ciganik to step out. CP 60, 66. When Mr. Ciganik complied, Keller handcuffed him and told him he was under arrest. CP 60, 66; RP (5/6/19) 20.

Then, with the truck door still open, Keller used his flashlight and “got a better look” at the foil. RP (5/6/19) 30. He later obtained a search warrant.¹ CP 53, 61-62. He found drugs in the truck, and Mr. Ciganik was charged with possession of heroin. CP 1, 62.

¹ The officer who applied for the warrant was not present at the scene. CP 18, 38. According to this officer, Keller’s drug sniff dog alerted to the truck after Mr. Ciganik’s arrest. CP 18, 38. But Keller’s body camera footage did not show the dog alerting to the truck. CP 13, 28.

After a motion to suppress was denied, Mr. Ciganik submitted his case to the court on stipulated facts. CP 59-64, 65. Following conviction, he appealed. CP 69, 70, 82.

ARGUMENT

Mr. Ciganik was sleeping in his truck when Officer Keller opened the door and arrested him. Keller did not have any authority to open the truck door. Nor did he have probable cause to arrest Mr. Ciganik. The trial court should have suppressed the items seized from the truck.

THE POLICE UNLAWFULLY INTRUDED ON MR. CIGANIK’S PRIVATE AFFAIRS WITHOUT AUTHORITY OF LAW, IN VIOLATION OF WASH. CONST. ART. I, §7.

In Washington, “[n]o person shall be disturbed in his private affairs...without authority of law.” Wash. Const. art. I, §7.² Absent a search warrant, the State bears “heavy burden” of proving an exception to the warrant requirement.³ *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); *State v. Afana*, 169 Wn.2d 169, 177, 233 P.3d 879 (2010).

Here, Keller did not have a warrant to enter Mr. Ciganik’s truck and arrest him. No exception to the warrant requirement authorized Keller

² It is “axiomatic” that art. I, §7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

³ The validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

to open the truck door, and he did not have probable cause to arrest Mr. Ciganik. Accordingly, the trial court should have suppressed the evidence.

Id.

- A. Keller did not have the “authority of law” to open the door to Mr. Ciganik’s truck and arrest him.

When Officer Keller opened the door of Mr. Ciganik’s truck, he did not have a search warrant. Nor did any exception to the warrant requirement permit him to open the door and seize Mr. Ciganik. The officer’s entry into the truck and arrest of Mr. Ciganik violated his rights under Wash. Const. art. I, §7 and the Fourth Amendment.

1. The “automobile exception” does not apply under Wash. Const. art. I, §7.

Washington courts applying our state constitution do not recognize an “automobile exception” to the warrant requirement. *State v. Snapp*, 174 Wn.2d 177, 191-192, 275 P.3d 289 (2012). Under federal law, by contrast, the automobile exception “allows for a warrantless search of a mobile vehicle when ‘there is probable cause to believe [the] vehicle contains evidence of criminal activity.’” *Id.*, at 191 (quoting *Arizona v. Gant*, 556 U.S. 332, 347, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)).

The automobile exception is inconsistent with the state constitutional prohibition on searches and seizures conducted without

authority of law. *Id.* Because of this, Keller had no basis to open the door of Mr. Ciganik's truck, even if Keller had probable cause to arrest Mr. Ciganik or believed the truck contained evidence of a crime. *Id.* Instead, Keller was required to either obtain Mr. Ciganik's cooperation or seek a search warrant.⁴ *Id.*

Officer Keller did neither. He "immediately opened the door" after knocking on the window, without giving Mr. Ciganik "a chance to wake up or to respond." CP 66; RP (5/6/19) 19. He did not seek a warrant until after he'd arrested Mr. Ciganik. CP 61-62.

Nor did any "legitimate safety concern" justify Keller's decision to open the door. *See* CP. 60-61. To justify a warrantless seizure based on officer safety, police must be able to point to specific and articulable facts giving rise to an objectively reasonable belief that the person seized "is armed and 'presently' dangerous." *State v. Xiong*, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008). A generalized concern for officer safety is insufficient. *State v. Parker*, 139 Wn.2d 486, 501, 987 P.2d 73 (1999).

Nothing in the record suggests that Mr. Ciganik was "armed and 'presently' dangerous." *Xiong*, 164 Wn.2d at 514. The warrantless entry

⁴ A true emergency would permit an officer to open a vehicle door. No emergency justified Keller's entry into the vehicle here.

into the truck cannot be justified on the basis of officer safety.⁵ *Id.*; *see also State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008).

2. The community caretaking exception cannot justify Keller's warrantless entry into the vehicle.

The State did not attempt to justify the warrantless search under the community caretaking exception to the warrant requirement. *See* CP 20; RP (5/6/19) 32-33, 35. Nor did the trial court make any findings supporting a community caretaking search. CP 59-64.

Keller's actions show that the community caretaking exception does not apply here. *See, e.g., State v. Boisselle*, --- Wn.2d. ---, ___, 448 P.3d 19 (2019). The exception cannot be used as a pretext for conducting an investigatory search. *Id.*

Here, Keller formed the intent to arrest Mr. Ciganik before he opened the door. RP (5/6/19) 25. There is no indication that he was concerned for Mr. Ciganik's welfare. RP (5/6/19) 9-31. He was conducting an investigatory search rather than checking to see if Mr. Ciganik needed medical attention.

⁵ In addition, Finding of Fact IX is not supported by substantial evidence and must be vacated. CP 60-61; *see Garvin*, 166 Wn.2d at 249 (outlining the substantial evidence standard). The court's characterization of the officer's concern as "legitimate" should be analyzed *de novo* as a conclusion of law. *See Guardado v. Guardado*, 200 Wn. App. 237, 245, 402 P.3d 357 (2017) ("This court treats legal conclusions that are incorrectly denominated as findings of fact as conclusions of law, and reviews them *de novo*.")

Even if he'd had a legitimate concern for Mr. Ciganik's well-being, this concern would not have justified Keller's immediate entry into the truck without giving Mr. Ciganik a chance to respond to the knock on the window. CP 66; *see State v. Harris*, --- Wn.App.2d ---, ___, 444 P.3d 1252 (2019).

In *Harris*, the Court of Appeals reversed a conviction stemming from officers' warrantless entry into a car where the occupants, like Mr. Ciganik, "were slumped over in their seats." *Id.*, at ___. The court refused to accept the State's community caretaking argument. *Id.*, at ___. The court noted that "[k]nocking on the window... would not have meaningfully slowed down the officers' response if this had actually been an emergency situation."⁶ *Id.*

Here, Keller did not claim any concern for Mr. Ciganik's well-being. RP (5/6/19) 9-31. He verbalized his intent to arrest him after peering through the tinted window. RP (5/6/19) 25. Instead of trying to rouse Mr. Ciganik, Keller returned to his patrol car and drove to block the truck from leaving. CP 60. When he did finally knock on the window, he

⁶ In *Harris*, no testimony suggested the presence of controlled substances. *Id.*, at ___. Keller's observation of the foil in this case might have provided a basis to distinguish *Harris* if Keller had acted out of concern for Mr. Ciganik's well-being (instead of a desire to arrest him), if he'd immediately knocked on the window instead of returning to his car to block Mr. Ciganik's truck, and if he'd given Mr. Ciganik a chance to respond after knocking on the window instead of immediately opening the truck door and arresting him.

didn't give Mr. Ciganik a chance to respond; instead, he "immediately opened the door." CP 66.

Community caretaking did not justify Keller's entry into the truck. *Boisselle*, --- Wn.2d. at ____.

3. Absent an exception to the warrant requirement, items seized from the truck must be suppressed.

By opening the truck door, Keller intruded on Mr. Ciganik's private affairs. Mr. Ciganik's conviction must be reversed, the evidence suppressed, and the case remanded for dismissal. *Snapp*, 174 Wn.2d at 191-192.

- B. Keller did not have probable cause when he unlawfully opened the door to Mr. Ciganik's truck and arrested him.

A warrantless arrest must be based on probable cause. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). Probable cause exists "when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe that a suspect has committed or is committing a crime." *Afana*, 169 Wn.2d at 182-83. Thus "the validity of an arrest depends upon the objective reasonableness of the arresting officer's belief that probable cause exists." *Id.*

Here, Officer Keller did not have an objectively reasonable belief that Mr. Ciganik had committed a crime. At most, he had a reasonable suspicion, which would have permitted further inquiry. *See* RP (5/6/19) 33; *State v. Carriero*, 8 Wn.App.2d 641, 662-663, 439 P.3d 679 (2019).

The “facts and circumstances” known to Keller before he arrived at Burger King were that Mr. Ciganik was asleep in his truck, that he’d been there for an hour and forty minutes, and that the engine was running. CP 59, 65. The only additional information he learned when he looked through the tinted windows of Mr. Ciganik’s truck was that there was a piece of foil on the passenger seat with “a small dark substance on it” and marks that “were consistent with heroin burns.” CP 60.

Keller admitted that what he saw could have been “a brownie,” other food,⁷ or “something that’s not drug related.” RP (5/6/19) 13. Despite this, he did not wait for Mr. Ciganik to wake up and talk to him before opening the door and arresting him.

Keller did not have probable cause to open the truck door and arrest Mr. Ciganik. The “facts and circumstances” were not “sufficient to cause a reasonable officer to believe” that Mr. Ciganic had committed a crime. *Afana*, 169 Wn.2d at 182–83.

⁷ For example, a piece of foil found near a fast-food restaurant might come from that restaurant.

In Conclusion IV, the trial court indicated that probable cause exists “where an officer observes in plain view a substance, which, given the officer’s training and experience, he or she believes to be a controlled substance.” CP 63. This formulation is incorrect; it does not include the requirement that the officer’s belief be objectively reasonable. *Afana*, 169 Wn.2d at 182-183.

Keller may have subjectively believed he’d seen evidence of a crime when he looked through the tinted window of Mr. Ciganik’s truck, as outlined in Finding of Fact V. CP 60. But Keller’s belief was not objectively reasonable, given his admission that the foil could have contained a brownie, other food, or something wholly unrelated to drugs.⁸ RP (5/6/19) 13.

Because of this, Keller’s warrantless entry into the truck and unlawful seizure of Mr. Ciganik violated both Wash. Const. art. I, §7 and the Fourth Amendment. The trial judge should have suppressed the evidence. *Id.* Mr. Ciganik’s conviction must be reversed, the evidence suppressed, and the case remanded for dismissal with prejudice. *Id.*

⁸ To the extent it suggests Keller’s belief was objectively reasonable, Finding of Fact V is not supported by substantial evidence. CP 60. A “fair-minded person” would not find Keller’s belief objectively reasonable, given his acknowledgment that the foil could have contained a brownie, other food, or something unrelated to drugs. *Garvin*, 166 Wn.2d at 249 (internal quotation marks and citation omitted).

C. Keller's unlawful intrusion into the truck and unconstitutional arrest of Mr. Ciganik tainted the search warrant.

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000), *as corrected* (Aug. 22, 2000). Here, the search warrant was based on information obtained pursuant to the unlawful intrusion into Mr. Ciganik's truck. CP 17-18. The warrant is tainted by the prior illegality. *Id.*

All items seized from the truck must be suppressed. *Id.* Mr. Ciganik's conviction must be reversed and the case remanded for dismissal. *Id.*

CONCLUSION

Austin Ciganik was asleep in his truck when Officer Keller opened the door and arrested him. Keller had no legal authority to open the truck door. He also lacked probable cause to arrest Mr. Ciganik.

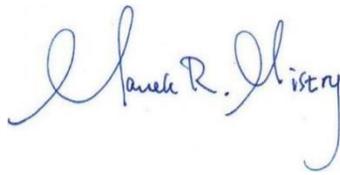
The items seized from the truck must be suppressed. Mr. Ciganik's conviction must be reversed and the case remanded for dismissal.

Respectfully submitted on November 1, 2019,

BACKLUND AND MISTRY

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

A handwritten signature in blue ink that reads "Manek R. Mistry". The signature is written in a cursive style with a large initial "M".

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Austin Ciganik
Id #2019005931
Kitsap County Jail
614 Division St., MS-33
Port Orchard, WA 98366

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
rsutton@co.kitsap.wa.us; kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 1, 2019.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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