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Division II
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NO. 54175-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

K.L.O.,

Appellant.

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

The Honorable Marilyn K. Haan, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
	Issue pertaining to assignments of error	2
B.	STATEMENT OF THE CASE.....	2
C.	ARGUMENT.....	6
	MCGRAW WAS ACTING AS A STATE AGENT WHEN SHE SEARCHED K.L.O.'S BACKPACK, AND EVIDENCE FOUND AS A RESULT OF THE UNLAWFUL SEARCH SHOULD HAVE BEEN SUPPRESSED.....	6
D.	CONCLUSION.....	10

TABLE OF AUTHORITIES

Washington Cases

State v. Clark, 48 Wn. App. 850, 743 P.2d 822, *review denied*, 109 Wn.2d 1015 (1987)..... 7, 8

State v. Krajewski, 104 Wn. App. 377, 16 P.3d 69, *review denied*, 144 Wn.2d 1002 (2001) 6, 7

Federal Cases

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)..... 6

United States v. Reed, 15 F.3d 928 (9th Cir.1994) 6

United States v. Walther, 652 F.2d 788 (9th Cir.1981) 7

Statutes

RCW 69.50.4014 2

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding “Ms. McGraw then grabbed the backpack and without any direction or prompting from Deputy Parker, began to pull things out of the backpack.” Findings of Fact and Conclusions of Law: 3.6 Hearing, filed 4/17/20, at 2 (Finding of Fact 11)¹

2. The court erroneously concluded that the search was not done at the Deputy’s direction or with his assistance but to further the mother’s own ends. 3.6 Findings and Conclusions, at 3 (Conclusion of Law 2).

3. The court erred in concluding the mother searched appellant’s backpack without any prompting from the deputy. 3.6 Findings and Conclusions, at 3 (Conclusion of Law 3).

4. The court erred in concluding that “Deputy Parker did not acquiesce in any way to the conduct of Ms. McGraw. The court would be speculating to conclude otherwise.” 3.6 Findings and Conclusions, at 3 (Conclusion of Law 4).

5. The court erred in concluding the search was lawful.

6. The court erred in denying the motion to suppress.

¹ The written findings of fact and conclusions of law from the CrR 3.6 hearing and the stipulated trial were not entered until after this appeal was filed. They were filed in both the trial court and this court on April 17, 2020. Because of the timing, the findings and conclusions are not included in the clerk’s papers but are instead part of the record as a document filed in the appeal.

Issue pertaining to assignments of error

Appellant was charged with unlawful possession of marijuana discovered when her mother searched her backpack, as the deputy called to the home to arrest appellant stood in the room and watched. Where the mother was acting as an instrument or agent of the state when conducting the search, should evidence found as a result of the unlawful search have been suppressed?

B. STATEMENT OF THE CASE

Appellant K.L.O. (DOB 11/07/02) was charged with possession of 40 grams or less of marijuana while under 21 years of age. CP 1-3; RCW 69.50.4014. She moved to suppress the marijuana, arguing that it was discovered during an unlawful search. CP 4-8. The case proceeded to a CrR 3.6 evidentiary hearing.

K.L.O.'s mother, Stephanie McGraw, testified that she called the police on June 23, 2019, to try to have K.L.O. arrested. RP 4. When Deputy Corey Parker responded, she brought him to K.L.O.'s room, where K.L.O. was sleeping. RP 6. McGraw told Parker that she wanted K.L.O. taken into custody. When Parker explained he had no probable cause to do so, they tried to figure out a way that he could arrest her. RP 6. McGraw

knew K.L.O. had some marijuana and she talked to Parker about looking for it in K.L.O.'s bag, which was on the floor of the room. RP 6.

McGraw picked up the bag and started searching it in K.L.O.'s bedroom while Parker was there. RP 7. She was searching for the marijuana because she and Parker were trying to come up with a reason to arrest K.L.O. RP 7. McGraw found the marijuana she was looking for, but Parker said he still could not arrest K.L.O., and he left after issuing a ticket. RP 7-8.

McGraw testified that she had told the prosecutor that she did not actually remember the exact conversation she had with Parker, but she remembered that she was trying to have K.L.O. arrested. RP 9, 12. She remembered talking to Parker about arresting K.L.O., telling him that K.L.O. had some marijuana, and looking through the bag while Parker was there hoping to find a reason for an arrest. RP 10, 12.

Deputy Parker testified he was dispatched to McGraw's call reporting that K.L.O. was intoxicated. RP 15. He spoke with McGraw about the reason for her call, and then they went up to K.L.O.'s bedroom. RP 17. He believed K.L.O. was pretending to be asleep. RP 17. When she spoke to him her mental state appeared altered, but Parker could not tell whether she was intoxicated. RP 17-18. Parker testified he could not develop probable cause to arrest K.L.O. for intoxication. RP 18. Because

K.L.O. said she had taken a sleeping pill, Parker thought he might have told McGraw to take her to the hospital. RP 19.

McGraw was concerned about K.L.O. running away, so Parker told her she could take away K.L.O.'s cell phone, television, and other items. McGraw pointed out K.L.O.'s backpack, which appeared to be packed, and Parker told her she could take it away. RP 19. Parker did not recall telling McGraw to search the backpack, but he made it clear she could do what she wanted with it since it was in her house. RP 19-20. McGraw grabbed the backpack and started pulling things out of it, including a vial of marijuana. RP 20. Although he had been getting ready to leave, Parker stood at the foot of K.L.O.'s bed during the search, about two to three feet from McGraw and K.L.O. RP 21.

Defense counsel argued at the hearing that while McGraw conducted the search, she was working with Deputy Parker at the time. Parker told her she could take the backpack, and he stood there while McGraw searched it. McGraw was acting as a state agent, seeking justification to have K.L.O. arrested. RP 26-27. Moreover, Parker knew of and acquiesced in the intrusive conduct. RP 28. The search was therefore a law enforcement search without authority of law, and the contents of the backpack should be suppressed. RP 30.

The court found that McGraw lacked credibility because she did not remember details of the conversation with Parker. 3.6 Findings and Conclusions, at 1 (Finding of Fact 1). It found that “McGraw grabbed [K.L.O.’s] backpack and without any direction or prompting from Deputy Parker, began to pull things out of the backpack.” *Id.* at 2 (Finding of Fact 11). Although the court found that Parker was standing in K.L.O.’s bedroom at the time of the search, it concluded that the search was not conducted at the deputy’s direction or assistance, and Parker did not acquiesce to the search in any way. RP 39-40. The court concluded McGraw performed the search to meet her own ends of obtaining help for her daughter, without any prompting from Parker. *Id.* The court concluded the search was lawful and denied the motion to suppress. RP 40.

In light of the court’s ruling, K.L.O. stipulated to the facts in the statement of probable cause and police report. RP 41. The court found K.L.O. guilty and imposed nine months probation. RP 41-43; CP 30-31. K.L.O. filed this timely appeal. CP 52.

C. ARGUMENT

MCGRAW WAS ACTING AS A STATE AGENT WHEN SHE SEARCHED K.L.O.'S BACKPACK, AND EVIDENCE FOUND AS A RESULT OF THE UNLAWFUL SEARCH SHOULD HAVE BEEN SUPPRESSED.

The Fourth Amendment and Article I, section 7 of the Washington constitution protect all individuals against searches by private individuals acting as government instruments or agents. *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Krajeski*, 104 Wn. App. 377, 382-83, 16 P.3d 69, *review denied*, 144 Wn.2d 1002 (2001). A trial court's determination that a search did not violate the appellant's constitutional rights because it was a private search is a legal conclusion reviewed *de novo*. *Krajeski*, 104 Wn. App. at 382 (citing *United States v. Reed*, 15 F.3d 928, 930 (9th Cir.1994)).

In determining whether a private party is acting as a government instrument or agent, the court considers (1) whether the government knew of and acquiesced in the search, and (2) whether the party performing the search intended to assist law enforcement or further his or her own ends. *Krajeski*, 104 Wn. App. at 383; *Reed*, 15 F.3d at 931. If the government is involved directly as a participant or indirectly as an encourager of the search, the private party conducting the search is deemed an agent of the State. *State v. Clark*, 48 Wn. App. 850, 743 P.2d 822, *review denied*, 109

Wn.2d 1015 (1987) (citing *United States v. Walther*, 652 F.2d 788, 791 (9th Cir.1981)).

In *Krajeski*, while the defendant was in jail, his mother and landlord searched his apartment. The landlord had asked the investigating officer if he wanted to do the search, and the officer declined because Krajeski had refused consent. The officer informed the landlord he could not authorize the search, and he did not question the landlord in any way about the search. Both the landlord and the mother called the officer after the search, however, and told him what they had found. Using that information, the officer obtained a search warrant. *Krajeski*, 104 Wn. App. at 381.

On appeal, Krajeski argued that his mother and landlord were acting as state agents when they searched his apartment and reported the findings to police, and fruits of the unlawful search should have been suppressed. This Court disagreed. Since the officer specifically declined to have the parties search on his behalf, told them it would be illegal, and declined to authorize it, the private parties were not acting as state agents, and the officer did not acquiesce in the search. *Id.* at 383-84.

In *Clark*, the co-defendant searched Clark's property and gave a box of items belonging to Clark to his attorney. The attorney eventually turned the box over to police, who opened the box and found evidence

implicating Clark. *Clark*, 48 Wn. App. at 855. Clark argued on appeal that the police encouraged his co-defendant's illegal search by means of immunity agreements and other pre-search contacts. *Id.* at 856. The Court of Appeals concluded that general discussions between the co-defendant and detective about possible evidence did not constitute contacts sufficient to make the search a joint action. *Id.* While the co-defendant might have felt that turning over evidence would help him and aid the police, his unilateral conduct did not make him a state agent. Where there was no indication the detective intended to encourage the co-defendant to take action the police could not take, the co-defendant was acting as a private party when he searched the boxes. *Id.* at 857.

As in *Krajewski* and *Clark*, the court below denied the motion to suppress, finding that the search was done by a private party not acting as a state agent. Specifically, the court found that McGraw searched K.L.O.'s backpack without any direction or prompting by Deputy Parker. Findings of Fact and Conclusions of Law: 3.6 Hearing, filed 4/17/20, at 2 (Finding of Fact 11). This finding is not supported by the record.

Parker testified that he was dispatched to the home because McGraw reported that K.L.O. was intoxicated. RP 15. When he arrived McGraw asked to have K.L.O. arrested, but Parker told her he had no probable cause to do so. RP 18. McGraw persisted, pointing out the

backpack she believed K.L.O. had packed to run away. RP 19. Although Parker testified that he could not recall if he specifically told McGraw she could search the backpack, he testified that he told her she could do whatever she wanted with it, and in response McGraw started searching the backpack. RP 19-20. Thus, contrary to the court's finding, the evidence shows the search was prompted by Parker's conversation with McGraw.

Moreover, the circumstances here are significantly different from those in *Krajewski* and *Clark*. In both those cases, no law enforcement officers were present during the private search, nor was there any evidence that law enforcement encouraged the searches or even knew of them until after they occurred. Here, on the other hand, Deputy Parker knew of and acquiesced in McGraw's search of K.L.O.'s backpack. He stood in the room while McGraw conducted the search, standing no more than two to three feet away. RP 21, 24. He stayed long enough to observe the items that were removed from the backpack and issue K.L.O. a citation for possession of marijuana. RP 20-21, 24.

Although McGraw had a personal reason for wanting her daughter arrested, she conducted the search to assist law enforcement in obtaining probable cause for the arrest. RP 18-20. She was not acting unilaterally.

She searched the backpack as the Deputy stood in the room and watched, with a law enforcement objective in mind. RP 20-21.

Deputy Parker encouraged the search by telling McGraw she could do anything she wanted with the backpack, as she was attempting to assist him in developing probable cause to arrest K.L.O. He acquiesced in the search by remaining in the room while it occurred, staying long enough to see what was removed from the backpack and issue K.L.O. a citation. Under these circumstances, the search of K.L.O.'s backpack was not a private party search. It was a search by a state instrument or agent without a warrant, and evidence found during the search must be suppressed.

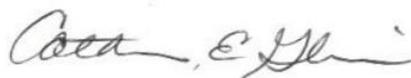
D. CONCLUSION

Evidence found as a result of the unlawful search should be suppressed and the charge against K.L.O. dismissed.

DATED May 4, 2020.

Respectfully submitted,

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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in
State v. K.L.O., Cause No. 54175-1-II as follows:

K.L.O.
135 Bergly Lane
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I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
May 4, 2020

GLINSKI LAW FIRM PLLC

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