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NO. 54175-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

K.L.O.,

Appellant.

RESPONDENT'S BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
MEGHAN E. DUNLAP/WSBA 52619
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST AVE.
KELSO, WA 98626
(360) 577-3080

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Because McGraw exercised her authority as a parent to empty K.L.O.'s backpack, independent of any request from Deputy Parker, she was not a government agent.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

DID MCGRAW ACT AS A GOVERNMENT AGENT WHEN SHE EXERCISED HER AUTHORITY AS A PARENT TO EMPTY K.L.O.'S BACKPACK, INDEPENDENT OF ANY REQUEST FROM DEPUTY PARKER?

III. STATEMENT OF THE CASE

On June 23, 2019, at approximately 9:50 a.m., Deputy Cory Parker was dispatched to the home of Stephanie McGraw. RP 15, CP 33. McGraw reported that the respondent, K.L.O., was intoxicated. RP 15, CP 33. K.L.O. was McGraw's 16-year-old daughter. CP 33. McGraw called law enforcement "to try to get [her] daughter arrested." RP 4, 6. McGraw had made "a lot of calls to the Sherriff's Department," and needed help with K.L.O. RP 9.

When Deputy Parker arrived at the residence, he spoke with McGraw. RP 16. McGraw was familiar with Deputy Parker from "contacting the Sherriff's Department numerous times" regarding K.L.O. RP 11. McGraw led Deputy Parker to K.L.O.'s bedroom, where K.L.O.

was in her bed laying down. CP 33.[1] Deputy Parker asked K.L.O. to wake up, but she told him to leave her alone. RP 17, CP 34. After speaking with K.L.O., Deputy Parker believed she was in an altered mental state, but he was unable to determine whether she was intoxicated by alcohol. RP 18, CP 34. Deputy Parker told McGraw that he could not compel K.L.O. to take a portable breath test ("PBT"). RP 18. K.L.O. told Deputy Parker that she had taken a sleeping pill. RP 18. At that point, the focus of Deputy Parker's visit shifted to K.L.O.'s safety. RP 18. He testified:

> And for the bulk of my conversation, it was mainly with a light on if I needed to have her go to the hospital or not. And I believe I told [McGraw] that she should probably take her to the hospital because of the dangers of mixing a sleeping pill with another depressant.

RP 19.

Deputy Parker was preparing to leave when McGraw pointed to K.L.O.'s cell phone and backpack. CP 34. She told Deputy Parker that K.L.O. had packed the backpack to run away again. RP 21, CP 34. Deputy Parker testified: "I'd spoken to [McGraw] multiple times on this, that she doesn't need to provide [K.L.O.] with any of the niceties of life, the cell phone, the TV in her room, the DVD player and whatnot." RP 19. Deputy Parker told McGraw that she could take away K.L.O.'s cell phone and

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[1] McGraw testified that K.L.O. was asleep. However, Parker believed she was pretending to be asleep. RP 5, 17. The trial court determined that "[i]t was not clear whether she was sleeping." CP 33.

backpack. RP 19, CP 34. He testified that "it's very clearly her house and her belongings, so she can do what she chooses with them." RP 19-20. At some point, he advised McGraw that she can do what she wants with the "things in her house." RP 24. However, Deputy Parker did not tell McGraw to search K.L.O.'s backpack or advise her that she could search it. RP 19-20.

McGraw grabbed K.L.O.'s backpack. CP 20. Without direction or prompting, she began pulling clothes out of the backpack. RP 19-20, CP 34. Underneath the clothes, McGraw discovered a glass jar labeled "TJ's Organics." CP 34. The jar's contents appeared to Deputy Parker to be marijuana. CP 34. After discovering the marijuana, McGraw told Deputy Parker that she wanted her daughter arrested, but he told her K.L.O. did not meet the criteria to go to juvenile detention. CP 34. He did not take K.L.O. into custody. RP 8, CP 34.

After K.L.O. filed a motion to suppress the marijuana, McGraw testified for K.L.O. at a CrR 3.6 hearing. RP 8. She testified that because K.L.O. was not taken into custody, but was charged with an offense, it was a "fail situation." RP 8. McGraw claimed that she and Deputy Parker had been "trying to come up with a reason to arrest [K.L.O.]." RP 6. However, Deputy Parker testified that at the point McGraw asked about the cell phone and backpack "[t]here was no crime . . . and Khloe wasn't really

cooperative, and I'd already given her the warning about the dangers of mixing the intoxicants, so I was kind of on the way out." RP 21.

The State charged K.L.O. with one count of possession of 40 grams or less of marijuana while under 21 years of age. CP 1. K.L.O. brought a motion to suppress the jar of marijuana, arguing that McGraw was acting as a government agent when she looked through her backpack. CP 7-9.

At the suppression hearing, the trial court did not find McGraw's testimony to be credible. CP 35. McGraw did not remember certain details, such as whether the incident occurred during the evening or morning. RP 5, CP 35. McGraw also admitted she did not remember the conversation between her and Deputy Parker prior to emptying K.L.O.'s backpack. RP 12, CP 35.

The trial court found that while Deputy Parker was aware that McGraw was pulling clothes out of her daughter's backpack, as he had not left yet, K.L.O. did not present evidence that he was doing anything other than getting ready to leave. CP 36. Also, the trial court found that the search was to further McGraw's own ends of seeking help for her daughter and to deter her from running away. CP 36. "McGraw decided what she was going to do and searched without further thought from anyone." RP 39, CP 36.

The trial court found that McGraw was a private party searching the backpack of her minor daughter in her own home without any prompting to search by Parker. CP 36. The trial court also found that Parker did not acquiesce to McGraw's conduct. CP 36. The trial court concluded that K.L.O. did not meet her burden of proof, and McGraw did not act as a government agent. CP 36. K.L.O.'s motion to suppress was denied. CP 36.

The parties agreed to a stipulated bench trial based on the police report, and the trial court found K.L.O. guilty. RP 41. She was sentenced to 21 hours of community service, a drug and alcohol evaluation, and nine months of community supervision with the possibility of early termination after completing treatment. CP 17-19.

IV. ARGUMENT

BECAUSE MCGRAW EXCERCISED HER AUTHORITY AS A PARENT TO EMPTY K.L.O.'S BACKPACK INDEPENDENT OF ANY REQUEST FROM DEPUTY PARKER, SHE WAS NOT A GOVERNMENT AGENT.

McGraw emptied K.L.O.'s backpack to further her own ends of seeking help for her daughter. "[N]ormally, the parent has authority over all rooms of the house." *State v. Summers*, 52 Wn. App. 767, 773, 764 P.2d 250 (1988). K.L.O. claims that when McGraw emptied her backpack, it was at the direction of Deputy Parker, making her a government

instrument or agent. However, K.L.O.'s argument fails for two reasons. First, as K.L.O.'s parent, McGraw had authority to search belongings in the rooms of her home. Second, McGraw was a private party who had frequently called law enforcement to further her own ends of seeking help for K.L.O., and Deputy Parker did not acquiesce to the search.

"The critical factors for determining whether a private party is acting as a government instrument or agent are: (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends." *State v. Krajeski*, 104 Wn. App. 377, 383, 16 P.3d 69 (2001) (citing *Clark*, 48 Wn. App. at 856, 743 P.2d 822 *Reed*, 15 F.3d at 931). "If the court answers both queries in the affirmative, then the private citizen was acting as a government agent when he or she conducted the search." *State v. Swenson*, 104 Wn. App. 744, 9 P.3d 933 (2000) (citing *United States v. Reed,* 15 F.3d 928, 931-33 (9th Cir. 1994)). "A defendant has the burden of showing that a search was government action." *Krajeski*, 104 Wn. App. 377 (citing *State v. Clark*, 48 Wn. App. 850, 856, 743 P.2d 822 (1987)).

Krajeski set forth the legal test to determine whether a person is acting as a government instrument or agent. However, *Krajeski* did not involve parental discipline because Krajeski was an adult. Krajeski's

mother entered her adult son's residence twice while he was in jail: once to retrieve his dog and again to safeguard his belongings. *Krajeski*, 104 Wn. App. at 381. Inside Krajeski's apartment, she discovered a bicycle that she knew to be stolen and a handgun she knew he was not allowed to possess. *Id.* She turned both items over to law enforcement. *Id.* Law enforcement did not direct Krajeski's mother to search, nor acquiesce, because the defendant had not consented to a search by law enforcement. *Id.* at 384. Krajeski's mother entered the apartment to further her own ends – to assist her son. *Id.* The Court affirmed that Krajeski's mother was not acting as a government agent.

In this case, Deputy Parker did not request or acquiesce to a search of K.L.O.'s backpack, and McGraw searched to further her own ends. Additionally, as K.L.O.'s parent, McGraw had authority to search her daughter's room, as it was located within her home. McGraw initiated contact with law enforcement by reporting that K.L.O. was intoxicated. When Deputy Parker responded, she invited him into her home hoping that he would arrest her daughter. She wanted Deputy Parker to take K.L.O. to juvenile detention, but she did not want her charged with an offense. Even after Deputy Parker grew concerned and warned McGraw that she should consider taking K.L.O. to the hospital, McGraw's focus remained on her daughter's behavior.

As Deputy Parker was on his way out, McGraw pointed to K.L.O.'s cell phone and backpack, and voiced her concern that her daughter may run away. Deputy Parker told McGraw that as K.L.O.'s parent, she did not have to provide K.L.O. with the cell phone or backpack, and could take both away. Telling a parent that he or she has the authority to take away non-necessity belongings from a minor child is not acquiescence or direction to search the items. McGraw could have chosen to do one of many things with the backpack instead of pulling the clothes out, including storing it away until K.L.O.'s behavior improved.

Although McGraw claims that she and Deputy Parker were "trying to come up with a reason to get K.L.O. arrested," she did not remember the details of the conversation she had with Deputy Parker. After discovering marijuana in the backpack, it was McGraw that asked Parker to arrest K.L.O., and wanted her to go to juvenile detention. Parker had no reason to believe McGraw was looking for anything illegal as she pulled the clothes out of K.L.O.'s backpack. He was merely trying to leave, but McGraw kept him there by bringing up the concern about the cell phone and backpack.

K.L.O. claims that Deputy Parker told McGraw "she could do whatever she wanted with it," referring specifically to the backpack, and that prompted McGraw to search the backpack. *Appellant's Brief 9.*

However, Parker did not testify that McGraw could do "whatever she wanted" with the backpack. He testified that she "can do what she wants with the things in her house." RP 24. He also stated "it's very clearly her house and her belongings, so she can do what she chooses with them." RP 20. Deputy Parker's advice to McGraw cannot be construed as prompting her to search K.L.O.'s backpack. Rather, a law enforcement officer informing a parent of her responsibilities and his.

Although *Krajeski* lays out the government agent test, one difference between the two cases is key. Krajeski was an adult. His mother did not have an obligation to provide him with belongings or to keep him safe. Also, the items were not discovered in his mother's home where she had authority to search. K.L.O. was a minor, fully dependent on her mother, living in her mother's home. McGraw had authority to search the things in her home. It is not uncommon for parents to look through their children's belongings, especially when they suspect the child may be breaking rules. Concerned parents do so to keep their children safe. It makes little sense that because McGraw invited Deputy Parker into her home, she would now be prohibited from searching a belonging she otherwise had authority over.

The government agent test is threefold. The defendant must show (1) knowledge of the search, (2) acquiescence, and (3) that the person

conducting the search was not searching to further his or her own ends. The defendant must show all of these elements. The trial court correctly found that K.L.O. did not meet her burden. McGraw had authority over the belongings in all of the rooms of her home. She exercised her authority as a concerned parent. When Deputy Parker did not acquiesce to McGraw searching K.L.O.'s backpack, the trial court did not err that McGraw searched the backpack as a private party to further her own ends of seeking help for K.L.O. The trial court correctly concluded that K.L.O. did not act as an instrument or agent of the government.

V. CONCLUSION

For the above stated reasons, K.L.O.'s conviction should be affirmed.

Respectfully submitted this 5th day of June, 2020.

Meghan Dunlap, #52619

MEGHAN E. DUNLAP
WSBA #52619
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that the opposing counsel listed below was served RESPONDENTS BRIEF electronically via the Division II portal:

Catherine E. Glinski
Glinski Law Firm PLLC
PO Box 761
Manchester, WA 98353-0761
glinskilaw@wavecable.com

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

Signed at Kelso, Washington on June 5, 2020.

Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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