

No. 28462-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

FILED

JUN 03 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

STATE OF WASHINGTON,

Respondent,

v.

JOSE G. CHAVEZ-ROMERO,

Appellant.

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

The Honorable Cameron Mitchell

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Mr. Chavez-Romero was facing charges in state court and his speedy trial period was almost up. So the State released the defendant on personal recognizance, knowing that there was an ICE hold and the defendant would simply be transferred to federal custody, thereby avoiding speedy trial calculations. This was a ruse of the ICE process and demonstrated a lack of good faith and due diligence on the part of the prosecutor. The matter should be reversed and dismissed with prejudice.

Alternatively, the court erred by failing to enter findings and conclusions following the suppression hearing. Furthermore, officers exceeded the permissible scope of either a community caretaking or *Terry* stop and seized Mr. Chavez-Romero before there was any lawful basis to do so. The court erred by failing to suppress the fruits of Mr. Chavez-Romero's unlawful seizure. Reversal and dismissal is required.

B. ASSIGNMENTS OF ERROR

1. The court erred by denying defendant's motion to dismiss for speedy trial violation.
2. The court erred by failing to enter findings or conclusions following the CrR 3.6 hearing.
3. The court erred by denying defendant's CrR 3.6 motion to suppress.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether a defendant can be released from State custody to federal ICE detention in order to avoid the expiration of speedy trial on the state charges.

Issue 2: Whether the court erred by failing to enter findings of fact and conclusions of law following the CrR 3.6 hearing.

Issue 3: Whether the court erred by denying the defendant's CrR 3.6 motion to suppress because he was unlawfully seized.

(a) Officers exceeded the permissible scope of a community caretaking stop.

(b) The encounter exceeded the permissible scope of a community caretaking or investigative stop and ripened into a full seizure without legal basis to do so.

(c) All evidence obtained as a result of the illegal seizure must be suppressed.

D. STATEMENT OF THE CASE

On February 22, 2009, a 911 hang-up call was placed from the area of the Bonnie Brea apartments and trailer park in Pasco, Washington.

(1RP 14, 15; 2RP 27-28¹) Dispatch called the number back and was told everything was fine, but someone in the background said "drop the bat."

(1RP 4; 2RP 27-28, 47) Officers were dispatched and arrived at the area within a couple minutes. (1RP 21; 2RP 27)

While searching for the source of the 911 hang-up call, Officer Robert Harris noticed a vehicle parked in the back of the park with an

¹ "1RP" refers to the transcript of the 3.6 motion and motion to dismiss for speedy trial violation on June 2, 2009. "2RP" refers to the trial and sentencing transcript held July 22-24, 2009, and September 4, 2009. All other VRP are referred to by date.

occupant in the backseat. (1RP 5-6; 2RP 47) The uniformed officer shined his headlights on the car, approached the driver's-side back door with his flashlight, knocked on the window and opened the back door. (1RP 16-17, 19; 2RP 27-31, 33) Jose Chavez-Romero was sitting in the backseat with a female occupant. (*Id.*) The officer advised them of the 911 call, which they were not aware of, checked Mr. Chavez-Romero's identification, and had dispatch call the number back that had placed the 911 call, at which point no ringing was heard in the vehicle. (*Id.*) The officer then contacted dispatch to determine whether Mr. Chavez-Romero was wanted. (1RP 18)

While waiting a couple minutes for confirmation that Mr. Chavez-Romero was not wanted, Officer Harris had the female M.L. exit the vehicle so she could talk to officers about the nature of her relationship with Mr. Chavez-Romero. (1RP 7, 18, 21; 2RP 27, 39) M.L. told Officer Michelle Goenen that she was 13-years-old, that the 21-year-old defendant was her boyfriend and that they had had sex sometime within the past few months. (1RP 7-9, 12; *see also* 2RP 51, 65, 82, 83, 97-98) Mr. Chavez-Romero spoke with Spanish-speaking Officer Ismael Cano on the telephone, confirming that M.L. was his girlfriend. (1RP 10-11) Mr. Chavez-Romero was transported to jail where he told the same Spanish-

speaking officer that he thought M.L. was 15-years-old based on the girl's statements to that effect. (1RP 11, 24; 2RP 41, 72, 79, 104, 108)

On March 3, 2009, Mr. Chavez-Romero was arraigned on the charge of third-degree rape of a child. (CP 145) He was held on bail of \$25,000. (5/15/2009 RP 3-4) On April 21, 2009, the State moved to continue the CrR 3.6 hearing and trial, and it moved to release the defendant on personal recognizance so speedy trial would not expire. (CP 125; 1RP 31-33) The defendant objected, arguing that the State knew he had an Immigrations and Customs Enforcement (ICE) hold and would thus be unable to attend the next hearing if released, thereby unfairly resulting in a reset of speedy trial based on defendant's failure to appear. (*Id.*; 4/21/09 RP 2-3) The court released Mr. Chavez-Romero over his objection and, as expected, the defendant did not appear for the next hearing on April 28, 2009, because he had been immediately transferred to the Northwest Immigration Center for detention on the ICE hold. (*Id.*; 4/28/09 RP 3-4; CP 155) A bench warrant issued was issued, Mr. Chavez-Romero was served with the warrant on May 14th and brought back to court on May 19, 2009, bail was reset at \$25,000 and trial dates were reset with a fresh speedy trial period. (*Id.*; 5/15/2009 RP 3-4; CP 151-52)

On June 2, 2009, the court denied the defendant's CrR 3.6 motion to suppress and denied defendant's motion to dismiss for the above

alleged speedy trial violation. (CP 5) He was tried on amended charges of second-degree child rape on July 22-24, 2009, after which a jury found him guilty of the lesser-included charge of third-degree rape of a child. (CP 37, 8-26) On September 4, 2009, Mr. Chavez-Romero received a standard-range sentence, and this appeal timely followed. (CP 6)

E. ARGUMENT

Issue 1: Whether a defendant can be released from State custody to federal ICE detention in order to avoid the expiration of speedy trial on the state charges.

The court erred, and the prosecutor failed to exercise good faith and due diligence, by releasing the defendant on his personal recognizance in order to extend speedy trial with the knowledge that, in doing so, the defendant would be immediately transferred to Immigrations and Customs Enforcement (“ICE”) on an ICE hold, thus unfairly resetting his speedy trial timeframe to the date of his next appearance.

Every person accused of a crime in this State has a statutory and constitutional right to a speedy trial. CrR 3.3; Wash. Const. Art. I §22; U.S. Const. Amendments VI and XIV. When the person is “detained in jail,” the State is generally required to bring him to trial within 60 days of his arraignment. CrR 3.3(b)(1). If the person is released from custody pending trial, the speedy trial period extends to 90 days. CrR 3.3(b)(3). Time spent in federal custody generally does not count toward the state

speedy trial calculation. CrR 3.3(e)(6). Also, where a defendant fails to appear for a court hearing, speedy trial starts over at zero and resumes calculation on the date of the defendant's next appearance. CrR 3.3(c)(2)(ii).

This case presents an unprecedented legal issue: whether the defendant could be released from state custody to ICE to effectively toll or reset his speedy trial clock on the state charge. The State likely relied on the language in CrR 3.3(a)(3) and (e)(6), knowing that the defendant's presence in federal ICE custody would be excluded from speedy trial calculations. *See* CrR 3.3(a)(3) (defendant is not "detained in jail" for purposes of speedy trial unless it is "pursuant to the pending charge"); CrR 3.3(e)(6) (defendant's presence in federal jail or prison is excluded from speedy trial calculation). *And see U.S. v. Stolica*, 2010 WL 345968 (S.D. Ill. 2010); *U.S. v. Cepeda-Luna*, 989 F.2d 353, 354-58 (9th Cir. 1993) (speedy trial did not run on federal charges while defendant was in ICE custody).² Or the State relied on CrR 3.3(c)(2)(ii), knowing that the defendant would be in ICE custody and unable to attend the scheduled hearing the following week, thereby resetting his speedy trial calculation

² *See also State v. Sanchez*, 853 N.E.2d 283, 285-91 (Ohio 2006); *State v. Montes-Mata*, 208 P.3d 770, 771-74 (Kansas 2009) (ICE holds while defendants were incarcerated in state jail did not affect speedy trial calculations for the state charges; the jailed defendants had the right to a speedy trial in State court and the calculation was not affected by the concurrent ICE holds).

at zero for his “failure to appear.” But the court erred and the prosecutor failed to exercise due diligence or good faith by its actions in this case.

In *U.S. v. Cepeda-Luna*, the Ninth Circuit held that a defendant detained by immigration and later charged with a federal crime did not have speedy trial timeframe begin on the federal crime so long as he was in ICE custody. 989 F.2d at 354-58. The Speedy Trial Act (CrR 3.3’s federal counterpart) specifically excluded time spent in detention other than on the current charges, so the defendant’s time in ICE custody did not count toward speedy trial calculations on the unrelated federal charges.

Id. However, “this rule is not absolute.” *Id.* at 357. “[T]he Speedy Trial Act can be applied to civil detentions which are mere ruses to detain a defendant for later criminal prosecution.” *Id.* at 357. The Court explained:

“The requirements of the Act would lose all meaning if federal criminal authorities could collude with civil or state officials to have those authorities detain a defendant pending federal criminal charges solely for the purpose of bypassing the requirements of the Speedy Trial Act. If a court found evidence of such collusion, the provisions of the Act could be applied to state or civil detentions... In *United States v. Cordova [infra]*, we indicated speedy trial rights under the Sixth Amendment might be so implicated even in a state arrest, if there was evidence of collusion between state and federal authorities.”

Cepeda-Luna, 989 F.2d at 357 (emphasis added) (citing *United States v. Cordova*, 537 F.2d 1073, 1076 (9th Cir.), *cert. denied*, 429 U.S. 960, 97 S.Ct. 385, 50 L.Ed.2d 327 (1976)).

Washington has decided a similar issue in *State v. Olmos*, 129 Wn. App. 750, 757-59, 120 P.3d (2005). There, the issue involved interstate agreements on detainers (IADs) rather than immigration detainers. *Id.* The question before the Court was whether speedy trial on a Washington State charge would begin to run when the defendant was detained in another State's jurisdiction. *Id.* The Court acknowledged that normally the time a defendant is detained in another jurisdiction is excluded from speedy trial calculation under CrR 3.3(e)(6). *Id.* at 757-58. "But to avail itself of this exception, the State must exercise good faith and due diligence in attempting to return a defendant to Washington." *Id.* at 758. "[G]ood faith and due diligence required the State to inquire whether [the defendant] was available to stand trial in Washington." *Olmos*, 129 Wn. App. at 759. There, the Court found the State had exercised good faith and due diligence. *Id.*

Our State Supreme Court issued a similar decision regarding interstate agreement detainers (IADs) and speedy trial rights in *State v. Welker*, 157 Wn.2d 557, 563-68, 141 P.3d 8 (2006). But in that case, the Court found that the prosecutor did fail to exercise good faith and due diligence by timely filing the detainer request with the foreign state where the defendant was incarcerated, thereby timely bringing the defendant to trial. *Id.* The Court explained, "a prosecutor's mere knowledge of an

incarcerated defendant's whereabouts prompts the good faith and due diligence duty to file a detainer." *Id.* at 566. "The prosecutor's failure to at least file the detainer, regardless of what would have happened had he done so, amounts to a lack of due diligence on his part." *Id.* at 567.³

Our court rules likewise protect a defendant's speedy trial rights from governmental misconduct. First of all, it is the responsibility of the court to ensure a defendant receives a speedy trial. CrR 3.3(a)(1). A defendant has no duty to bring himself to trial. *Barker v. Wingo*, 407 U.S. 514, 527, 33 L.Ed.2d 101, 92 S.Ct. 2182 (1972). The defendant's appearance before the court ultimately depends on the efforts of the prosecutor and law enforcement officials. *State v. Miffitt*, 56 Wn. App. 786, 792-93, 785 P.2d 850, *review denied*, 114 Wn.2d (1990). As such, the State must exercise "'good faith and due diligence' in attempting to bring the defendant before the court." *Id.* (quoting *State v. Peterson*, 90 Wn.2d 423, 428, 585 P.2d 66 (1978)).

Furthermore, a charge may be dismissed pursuant to CrR 8.3 where the government's arbitrary action or misconduct prejudices the defendant. *State v. Michiell*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997) (citing CrR 8.3(b)). "Governmental misconduct...need not be of an evil

³ The Court ultimately affirmed the defendant's conviction because, unlike our State court rules on speedy trial, the IAD's 180-day speedy trial rule did not require reversal where speedy trial was violated. *Welker*, 157 Wn.2d at 567-68.

or dishonest nature; *simple mismanagement is sufficient.*” *Id.* (emphasis in original) (quoting *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). And prejudice is shown by a violation of speedy trial rights. *Id.* at 240.

Here, the court and State were both well aware that Mr. Chavez-Romero had an ICE hold so that if he was released from State custody, he would be held up to an additional 48 hours so he could be immediately transferred to the custody of ICE pursuant to 8 C.F.R. §287.7. After a bench warrant was issued, Mr. Chavez-Romero was brought back to State court. But this unfairly resulted in a reset of his speedy trial dates.

The prosecutor had a duty of good faith and due diligence. This included not using the ICE detainer as a ruse to avoid the speedy trial clock in state court. *See Cepeda-Luna*, 989 F.2d at 357. Had there not been an ICE hold on Mr. Chavez-Romero, the State would have never requested him be released without bail on personal recognizance. Bail was originally set at \$25,000, and after the defendant returned to state custody from ICE to await the state trial, it was reset at \$25,000.

(5/15/2009 RP 3-4) The State merely used the ICE hold as an opportunity to avoid speedy trial implications while maintaining defendant’s presence in a secure facility pending trial. This was a ruse of the ICE process and

demonstrated bad faith and lack of diligence by the prosecutor, constituting reversible error.

Furthermore, the duty of good faith and due diligence required the prosecutor to make reasonable efforts to timely bring Mr. Chavez-Romero to trial and secure his presence. *See Welker*, 157 Wn.2d at 566-67; *Olmos*, 129 Wn. App. at 759; *Michiell*, 132 Wn.2d at 239-40. The prosecutor already had the defendant's presence secured before releasing him to ICE. He should not have moved the court to release the defendant if Mr. Chavez-Romero's presence would have then become more difficult to secure. The prosecutor did not exercise good faith and due diligence by purposefully making the defendant's appearance more unlikely or onerous to secure. Moreover, after Mr. Chavez-Romero was transferred to ICE, the State still had the duty to attempt to secure the defendant's presence at the subsequent court hearings rather than wait until a bench warrant was issued and then pursue custody of the defendant from ICE after the speedy trial clock was reset.

It was ultimately the prosecutor's and law enforcement's duty to secure the defendant's presence, and it was the court's duty to ensure Mr. Chavez-Romero received a speedy trial. Mr. Chavez-Romero did not receive a speedy trial, which is sufficient prejudice in and of itself to have dismissed. He was further prejudiced by the loss of about one month

credit for time served when the State improperly released him from state custody to ICE and then brought him back to state custody the next month. CP 14. The remedy for the speedy trial violation in this case is to reverse and dismiss with prejudice. CrR 3.3(h).

Issue 2: Whether the court erred by failing to enter findings of fact and conclusions of law following the CrR 3.6 hearing.

The court erred by failing to enter written findings of fact and conclusions of law following the suppression hearing.

Trial courts are required to enter written findings of fact and conclusions of law following suppression hearings. CrR 3.6(b). Failure to do so “is harmless error if the court’s oral opinion and the record of the hearing are ‘so clear and comprehensive that written findings would be a mere formality.’” *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994), *review denied*, 126 Wn.2d 1003 (1995) (citing *State v. Smith*, 68 Wn. App. 201, 208, 842 P.2d 494 (1992)). But the Court of Appeals “will reverse for a trial court’s failure to timely enter findings of fact and conclusions of law as required by CrR 3.6 if the appellant can establish that he was prejudiced by the delay...” *State v. White*, 141 Wn. App. 128, 137, 168 P.3d 459 (2007).

Here, the trial court erred by failing to enter written findings of fact and conclusions of law following the suppression hearing. The written order simply stated that the court had reviewed the legal memorandums,

heard testimony and oral argument and “hereby denies the defendant’s motion to dismiss and motion to suppress.” CP 5. The court’s oral ruling stated:

“[G]iven the totality of the circumstances the officer had reasonable suspicion to initially investigate the 911 hang up call. In a very short period of time they discovered alcohol in the vehicle and that the female was underage. I think that follows that they had a right to ask for identification and ages. I will deny the motion to suppress.”

1RP 30.

In this case, the court’s oral ruling was insufficient to excuse the lack of written findings and conclusions. As a result, Mr. Chavez-Romero has been significantly prejudiced in preparing this appeal. The court did not find pertinent findings of fact or related conclusions, such as whether the officer exceeded the scope of a permissible *Terry* stop by opening the vehicle door rather than simply knocking on the window and questioning the vehicle occupants. The court did not enter findings and conclusions as to whether the officers were performing a community caretaking function by contacting the defendant and M.L., and whether the need for the stop ceased after dispatch called the number back that had dialed 911 and no ringing was heard in Mr. Chavez-Romero’s vehicle. A critical factor in the suppression challenge was whether the officers could continue detaining Mr. Chavez-Romero to check for his identification when the defendant and M.L. were obviously not the source of the 911 call that that

any reason for the contact had ceased. Other critical findings include whether any suspected criminal activity involving an *open* container or between Mr. Chavez-Romero and M.L. was actually suspected before or after the scope of the initial investigative stop had already been exceeded.

The above samples of findings and associated conclusions are absent from the oral ruling. Thus, the court's failure to enter the required written findings and conclusions pursuant to CrR 3.6(b) constitutes reversible error. Furthermore, Mr. Chavez-Romero had the right to have these written findings and conclusions so that he could develop the appropriate argument on appeal, particularly as to when the community caretaking stop may have changed to a criminal investigatory stop and whether there was sufficient basis for the stop when the officers began their criminal investigation. Accordingly, because Mr. Chavez-Romero has been prejudiced by the inadequate findings, and because the oral ruling was insufficient to mitigate the error, this case should be reversed and dismissed.

Issue 3: Whether the court erred by denying the defendant's CrR 3.6 motion to suppress because he was unlawfully seized.

If this Court does not reverse for the insufficient CrR 3.6(b) findings and conclusions, Mr. Chavez-Romero argues, to the best of his ability based on the insufficient ruling, that the court erred by denying his motion to suppress. The officers exceeded the scope of a permissible

community caretaking stop and began a criminal investigation before there was sufficient basis to do so.

a. Officers exceeded the permissible scope of a community caretaking stop.

Warrantless searches and seizures are presumed to be unreasonable and a violation of the Fourth Amendment unless an exception applies. *State v. Williams*, 148 Wn. App. 678, 683, 201 P.3d 371 (2009). One exception to the warrant requirement is the community caretaking or emergency aid exception. *Id.* “A proper community caretaking function and the related emergency aid exception are separate from a criminal investigation.” *Id.* (citing *State v. Kinzy*, 141 Wn.2d 373, 386-88, 5 P.3d 668 (2000)). “Where an officer’s primary motivation is to search for evidence or make an arrest, the caretaking function does not create any exception to the search warrant requirement.” *Id.* (citing *State v. Gocken*, 71 Wn. App. 267, 275-77, 857 P.2d 1074 (1993)).

In general, “police may enter a dwelling, vehicle, or other area of privacy if they have a reasonable belief that there is an immediate need for their assistance for the protection of life or property, the search is not primarily motivated by an intent to arrest and seize evidence, and there is probable cause to associate the emergency with the place to be searched.” 12 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and*

Procedure sec. 2734, at 649 (3d ed.2004). In other words, “[t]he emergency exception justifies a warrantless entry when:

“(1) the officer subjectively believes that there is an immediate risk to health or safety, (2) a reasonable person in the same situation would come to the same conclusion, and (3) there is a reasonable basis to associate the emergency situation with the place searched.”

Williams, 148 Wn. App. at 685-86 (citing *Gocken*, 71 Wn. App. at 276-77). For example, although an officer may enter a trailer when someone likely needs assistance for health or safety reasons, he may not enter where he has “no information that someone inside...is injured.” *Williams*, 148 Wn. App. at 686 (quoting *State v. Schlieker*, 115 Wn. App. 264, 271, 62 P.3d 520 (2003) (reversing where officers had no information that someone inside the trailer was injured, such that warrantless entry was unjustified under community caretaking exception).

Here, Officer Harris exceeded the permissible scope of his community caretaking function by entering the vehicle – i.e. opening the door to the vehicle– without reasonable basis to do so. The trial court held that the officer acted appropriately by investigating the 911 hang up call. But the court erred. There was no evidence of any risk to health or safety so that Officer Harris or any other reasonable person in that situation would find it necessary to enter the private vehicle to investigate.

Furthermore, the third prong under the community caretaking exception is likewise absent: there was not sufficient nexus between the

emergency situation and the vehicle entered. A hang-up call was placed to 911 and dispatch heard someone say “put down the bat,” but there was never any link between that call and Mr. Chavez-Romero’s vehicle, which merely happened to be parked in the same trailer park from which the 911 call was placed. And it seems illogical to presume that someone was in danger of a swinging bat in the back of Mr. Chavez-Romero’s vehicle.

Perhaps the officer was justified in approaching the vehicle, knocking on the window and questioning its occupants regarding the 911 call. But the officer exceeded the permissible scope of the community caretaking function by opening the vehicle door rather than simply knocking on the window and waiting to speak with the occupants, who were obviously not in any health or safety risk. *State v. Johnston*, 38 Wn. App. 793, 799, 690 P.2d 591 (1984) (the officer “could have verified or dispelled his suspicion by simply knocking on the door and waiting to see if anyone answered.”)

b. The encounter exceeded the permissible scope of a community caretaking or investigative stop and ripened into a full seizure without legal basis to do so.

In addition to the community caretaking exception, a warrant is also not required when officers conduct an investigative *Terry* stop. “A person may be briefly seized, that is, a police officer may make an

investigative stop, if articulable suspicion exists that the person has committed, is committing, or is about to commit, a crime.”

Johnston, 38 Wn. App. at 798. When determining whether the officer has reasonable suspicion, the court considers the totality of the circumstances known to the officer at the inception of the stop. *State v. Rowell*, 144 Wash.App. 453, 457, 182 P.3d 1011 (2008). “To justify a *Terry* stop under the state and federal constitutions, there must be some suspicion of a particular crime connected to the particular person, rather than a mere generalized suspicion that the person detained may have been up to no good.” *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009). And,

“an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.”

Johnston, 38 Wn. App. at 798 (emphasis added).

A permissible police encounter may ripen into a Fourth Amendment seizure (requiring probable cause to make the arrest)⁴ under certain circumstances. In general, a person is seized when, by means of physical force or a show of authority, his freedom of movement is

⁴ A Fourth Amendment seizure must be supported by probable cause, that is facts and circumstances within the arresting officer’s knowledge at the time the seizure is made that are sufficient to warrant a person of reasonable caution in believing that a crime has been committed and that the person seized committed the crime. *State v. Gluck*, 83 Wn.2d 424, 518 P.2d 703 (1974); *State v. Reyes*, 98 Wn. App. 923, 931, 993 P.2d 921 (2000); *State v. Mendez*, 137 Wn.2d 208, 224, 970 P.2d 722 (1999).

restrained such that he would not believe he is free to leave or otherwise decline the officer's request and end the encounter. *State v. Young*, 135 Wn.2d 498, 510-11, 957 P.2d 681 (1998); *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). For example, “[o]nce an officer retains the suspect’s identification or driver’s license and takes it with him to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred.” *State v. Thomas*, 91 Wn. App. 195, 198, 200-01, 955 P.2d 420 (1998) (citing *State v. Dudas*, 52 Wn. App. 832, 834, 764 P.2d 1012 (1988), *review denied*, 112 Wn.2d 1011 (1989); *State v. Aranguren*, 42 Wn. App. 452, 456-57, 711 P.2d 1096 (1985).

Here, the officers’ actions cannot be justified under the community caretaking or *Terry* stop exceptions. First, Mr. Chavez-Romero was not initially stopped because officers had particularized suspicion of criminal activity. Instead, Officer Harris parked his patrol car behind defendant’s vehicle and approached in full uniform with flashlight for purposes of investigating the 911 hang-up call. But, as established above, the officer exceeded the scope of the community caretaking function by opening the vehicle door rather than simply knocking on the window; there was no evidence of health or safety risk. *C.f. State v. Johnson*, 38 Wn. App. at

799 (explaining, the officer “could have verified or dispelled his suspicion by simply knocking on the door and waiting to see if anyone answered.”)

Next, the circumstances here do not establish a permissible *Terry* stop. At the inception of the stop, there was no suspicion of criminal activity. Furthermore, when the officer opened the door of the vehicle, the encounter actually became a full Fourth Amendment seizure. A reasonable person in Mr. Chavez-Romero’s position would not have believed he was free to terminate the encounter when the officer opened his vehicle door. Yet the officer did not have reasonable suspicion of criminal activity – let alone the requisite probable cause – to justify a full seizure by opening that vehicle door.

The initial illegal intrusion– opening the vehicle door without reasonable basis to suspect a health or safety risk or reasonable suspicion of criminal activity – alone warranted suppression in this case. Nonetheless, the illegality of the encounter continued and further justifies suppression. After officers spoke with the vehicle occupants and had dispatch call the number back that had placed the 911 call, the basis for the encounter ceased to exist. But the trial court held in its oral ruling that, after the initial encounter for the 911 call (which erroneously assumes that the encounter was proper), officers had reasonable basis to continue the encounter because alcohol was noticed in the vehicle. The court erred.

It is true that an open container violation may justify an officer asking a suspect to step out of a vehicle to further investigate the incident. *See e.g. State v. Vriezema*, 62 Wn. App. 437, 441-42, 814 P.2d 248 (1991). In this case, the court noted in its oral ruling that officers discovered alcohol in the vehicle within a very short period of time of contacting the defendant. 1RP 30. But, even if this finding were true, that would not justify an investigative detention. There was no evidence that the alcohol container was open. 1RP 7. Simply having an alcohol container in one's vehicle is not a violation of the law. The evidence does not support that there was an *open* container violation. Thus, the court's oral finding in this regard is superfluous and does not justify the investigative detention in this case. Moreover, it certainly would not support the full seizure that occurred upon opening the vehicle door or, at a minimum, the seizure that occurred when the officer took Mr. Chavez-Romero's identification and had him wait while a warrant check was conducted.

At the time Mr. Chavez-Romero and M.L. were unlawfully seized – i.e., when the officer opened the car door or, at a minimum, when he took the defendant's identification and had him wait a couple minutes for a warrant check – there was not reasonable suspicion of criminal activity or probable cause to make an arrest. Officer Harris testified that he did

not even notice a second occupant in the vehicle before he opened the door. 1RP 16. And he did not notice anything unusual about M.L. at the time he took the defendant's identification and ran the warrant check. 1RP 17-18. This is the only time frame that is pertinent to the suppression issue – the time prior to the warrantless stop and/or seizure. It was not until after Officer Harris was waiting the couple minutes for the warrant check to come back that officers became concerned about M.L. and had her removed from the vehicle to question her age and relationship with the defendant.

In other words, it was not until after the illegal stop and seizure that M.L. told officers her true age and that she had had sex with Mr. Chavez-Romero sometime in the past few months. But subsequent events or discoveries cannot retroactively justify a seizure. *Mendez*, 137 Wn.2d at 224. The defendant was seized before there was probable cause to suspect him of having committed a crime. The court erred to the extent it may have found otherwise in its oral ruling.

c. All evidence obtained as a result of the illegal seizure must be suppressed.

The trial court found that the seizure was lawful. But if this Court agrees that the defendant was unlawfully seized, it should exclude all evidence obtained from M.L. and Mr. Chavez-Romero after that unlawful seizure to deter future police misconduct.

“Evidence that is the product of an unlawful search or seizure is not admissible.” *Thomas* 91 Wn. App. at 201 (citing *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)). Evidence will be excluded as the fruit of the illegality if, but for the illegal seizure, the evidence would not have been obtained. See *id.* This rule has been described as follows:

“The exclusionary rule requires courts to suppress evidence obtained through violation of a defendant's constitutional rights. The purpose of the rule is to deter police from exploiting their illegal conduct and to protect individual rights. Under the ‘fruit of the poisonous tree’ doctrine, the exclusionary rule applies to evidence derived directly and indirectly from the illegal police conduct. Derivative evidence will be excluded unless it was not obtained by exploitation of the initial illegality or by means sufficiently distinguishable to be purged of the primary taint. To prove that the evidence was purged of taint, the State must show either that: (1) intervening circumstances have attenuated the link between the illegality and the evidence; (2) the evidence was discovered through a source independent from the illegality; or (3) the evidence would inevitably have been discovered through legitimate means.”

State v. Le, 103 Wn. App. 354, 360-61, 12 P.3d 653, 657 (2000) (internal citations omitted).

Here, but for the illegal entry into the vehicle and ongoing illegal seizure while waiting on the warrant check, no evidence would have been obtained. Officers were in the Bonnie Brea trailer park and apartment complex to search for the source of the 911 hang-up call. Contrary to their actions, they were not there to pursue a criminal investigation, and there

was no basis for Officer Harris illegally entering the vehicle. Similarly, there was no basis for continuing the unlawful seizure by taking the defendant's identification and running a warrant check. Officer Harris clearly stated that he had no concerns upon first seeing M.L. in the vehicle with the defendant. It was not until the unlawful seizure continued during the time waiting on the warrant check that concerns developed.

But for the illegal seizure, the evidence would not have been legally and independently obtained. Wherefore, the defendant requests that the trial court's decision on suppression be reversed and the case dismissed for lack of admissible evidence.

F. CONCLUSION

The court erred by using the ICE detainer process as a way to secure Mr. Chavez-Romero while at the same time extending speedy trial dates. It further erred by denying defendant's CrR 3.6 motion to suppress and failing to enter the requisite findings and conclusions. Mr. Chavez-Romero respectfully requests that the matter be reversed and dismissed with prejudice for speedy trial violation or a lack of admissible evidence to sustain the conviction.

Respectfully submitted this 3 day of June, 2010.

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