

FILED

AUG 2 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28565-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY S. HARVEY,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 40
Soap Lake, Washington 98851
(509) 237-1744

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the suppression hearing, trial, and conviction of the Appellant.

III. ISSUES

1. Are a fact finder's credibility determinations reviewable?
2. Did the court err in making a factual finding that the Defendant voluntarily consented to a search, when the Defendant was not in custody; when the Defendant was twice advised of his right to refuse consent; when the officer truthfully advised that in the absence of consent he would apply for a search warrant which could result in the seizure of the Defendant's SUV for an unknown length of time; when the Defendant was intelligent, consistently cooperative, and did not appear to be impaired; and when police did not display their weapons, act illegally, or suggest that they were authorized to search?
3. Does the "fruit of the poisonous tree" doctrine have any application merely because police truthfully inform a suspect that in the absence

of consent, they will apply for a search warrant which could result in the seizure of the Defendant's SUV for an unknown length of time?

IV. STATEMENT OF THE CASE

After a stipulated facts trial, the Defendant Harvey Zachary has been convicted as charged of possessing marijuana with intent to deliver. CP 1-3, 48-65.

On June 16, 2008, at about four in the afternoon, Walla Walla police officers Daniel Lackey and Jeremy Pellicer met with Joyce Davidson, the store manager of Northwest Farm Supply in Walla Walla. RP 3-5, 29; CP 21. Both officers were relatively new to their duties. RP 8, 23, 36. Ms. Davidson told police that the Defendant, an employee at the store, had come to work hung over and bragged about dealing drugs in the store parking lot; that she had told him to go home at lunch and get rid of the stuff in his vehicle; but that when he returned to work, she saw the Defendant exchange something for money with an unknown male. CP 42-43, F 1; RP 21-22, 24-26, 47-48. The officers then approached the Defendant as he was watering plants in the loading dock area of the store. RP 5, 29.

Officer Pellicer approached first, asked the Defendant his name, and told him that he heard that the Defendant had been selling marijuana. RP 30.

The Defendant denied selling marijuana. RP 37. The officer asked if he could search the Defendant's vehicle. RP 30. The Defendant asked why. RP 30. And the officer said, if the Defendant had nothing to hide, he had no reason to refuse. RP 31.

Officer Lackey came out to the loading dock at that point. RP 31. He informed the Defendant that there had been a complaint that the Defendant had been selling marijuana out of his vehicle and asked for consent to search the Toyota Forerunner. RP 5, 7, 32. Officer Lackey explained that if the Defendant consented, the police would not arrest him that day. RP 6, 32. If the Defendant did not consent, the "other option was to take the statement that was given to me and go apply for a search warrant." CP 23. After acquiring a search warrant, the police would seize the vehicle temporarily or indefinitely. CP 6; RP 6, 11, 36, 43, 45.

The Defendant said he did not know exactly what was going on. RP 6. After Officer Lackey explained the complaint again, the Defendant gave consent. RP 6. The officer explained that the Defendant "had the right to refuse and the right to restrict the search." RP 6-7.

As it turned out, the police did not enter or search the SUV. RP 6-7. The Defendant walked the police over to his SUV, opened the front passenger door, retrieved a backpack and baggie, and handed the items to

Officer Lackey. RP 7, 32-33. The officer then read the Consent to Search form with *Ferrier* warnings to the Defendant and explained the form. CP 32; RP 7. The Defendant had no questions. RP 7. He signed the consent form before police opened the containers. RP 7, 32-33. The Defendant was then free to leave and, in fact, did leave to return to work. RP 43.

The baggie and six other baggies inside the backpack held marijuana. CP 22, 44, 47, 49; RP 9. There were also two scales in the backpack. CP 22; RP 9. The police seized the items. RP 33.

Officer Lackey took a few minutes to take a digital statement from the store manager inside the store. RP 9, 33.

As the Defendant was walking away, Officer Lackey returned to ask if the Defendant had any money that he earned from his drug deals that day. RP 10, 33, 43. The Defendant responded, "I might as well give it to you now because you guys are going to get it anyways." RP 34. He then opened his wallet and handed Officer Pellicer \$500 in hundred dollar bills. RP 10, 33-34. Officer Lackey asked if the Defendant had any questions. RP 10. He said he did not and he thanked the officers. RP 10. Officer Lackey told the Defendant that the drug unit officers would be contacting him. RP 34-35. The officers then left after seizing the evidence, but without arresting the Defendant. RP 10, 35.

The stipulated facts trial followed a denial of the Defendant's motion to suppress evidence and the Defendant's statements. CP 42-45, 48-50. In his motion to suppress, the Defendant complained that his consent to search his SUV was coerced by the officers' threat to seize and hold the vehicle after acquiring a judge's warrant. CP 6 ("I was told that they would call drug officers and that the officers would show up with a warrant and my vehicle would then be seized for an indefinite period of time."), 8-9. There was no testimony that the officer threatened to arrest the Defendant if he did not consent to the search. RP 6, 11, 36, 43, 45. However, the Defendant testified at the hearing that that he "believed" that if he did not consent that police would return with a warrant and arrest him. RP 45.

The court denied the Defendant's motion. RP 54-58.

In the court's oral ruling, the court found Officer Lackey's testimony to be credible when he said that he was going to apply for a search warrant. RP 56. *See also* CP 44, FF 1. The court noted that the officer's report was prepared within three hours of events without any foreknowledge of the Defendant's motion and that the Defendant's affidavit, by comparison, was made after a passage of time and consultation with legal counsel. RP 56-57.

Counsel immediately requested reconsideration based on the allegation that the officer's statement that a search warrant could result in a

temporary or indefinite seizure of the vehicle was coercive. RP 59.

... I'm not particularly troubled by that because indefinite means not definite. And as Officer Lackey testified earlier, he thought that might have been two hours to two days. How the defendant took those words is certainly beyond Officer Lackey's control, and probably also beyond Officer Lackey's knowledge, because he didn't really know how long the process would take. [...] I'm not particularly troubled about that. I don't see that as a statement that was misleading or made for the purpose of inducing consent based on a misrepresentation. I just don't see it rises to that level.

....

I just don't see it as coercive given the totality of the circumstances here. I don't see it as coercive.

RP 59-60.

After the court's oral ruling, the Defendant filed a written motion for reconsideration. CP 37-39. The court denied the motion, repeating that the officer's inability to specify the duration of seizure was not coercive and that the officer was more credible than the Defendant. CP 40-41.

V. ARGUMENT

A. THE COURT'S CREDIBILITY FINDING IS NOT REVIEWABLE.

The Defendant is correct that, on appeal, normally findings are reviewed for substantial evidence. Brief of Appellant at 15. *See State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006); *State v. Whitney*, --Wn. App. --, 232 P.3d 582, 583 (2010). However, credibility findings are distinct.

The standard for credibility findings is simply deference. *State v. Mennegar*, 114 Wn.2d 304, 309-10, 787 P.2d 1347 (1990). A fact finder's credibility determinations are not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (“Credibility determinations are for the trier of fact and cannot be reviewed on appeal”).

In matters involving a witness's credibility, we defer to the trial court, which had the opportunity to evaluate the witness's demeanor below. *State v. Swan*, 114 Wash.2d 613, 666, 790 P.2d 610 (1990). We review the trial court's inferences and conclusions but not its findings as to credibility or the weight to be given evidence. *Swan*, 114 Wash.2d at 666, 790 P.2d 610.

State v. Pierce, 134 Wn. App. 763, 774, 142 P.3d 610 (2006).

The Defendant complains that the lower court found Officer Lackey more credible than the Defendant. The lower court had the opportunity to hear tone and pauses and to view the demeanor of witnesses. That finding is beyond review.

Moreover, the Defendant appears to misapprehend the court's ruling. The Defendant wants a very specific finding on whether the officer used the word “indefinitely” or “temporarily.” Brief of Appellant at 16-17. There was no such finding. The judge noted that the officer “did not recall the exact words used.” CP 40. And the officer so testified. RP 11-12. However, the

word choice was not dispositive of anything and, in general, the court found the officer was more credible. CP 40, 44; RP 56.

The judge noted that the officer's report was generated within three hours of the occurrence, before he had reason to anticipate defense challenges. RP 57. The Defendant, on the other hand, did not prepare a report immediately, but crafted an affidavit with help from legal counsel many months later. CP 7. "It's just a credibility issue raised there by the passage of time." RP 57. The "gist" of the officer's statement was that there would be a delay because of what acquiring and executing a search warrant entailed. CP 40. The officer's testimony, that he informed the Defendant that he would apply for a search warrant in the absence of consent, was consistent and credible. CP 44; RP 11, 13, 16, 19, 21. The defense argument that police suggested that the warrant was a foregone conclusion (CP 6, 44), rather than something that had to be applied for, was not credible. CP 44, FF 1 ("the officers' testimony was more credible regarding whether they would 'apply' for a search warrant or just get one if Mr. Harvey did not consent to a search"). Whatever word was used, "the officer's version," that a search premised on a warrant would entail a lengthier seizure than a search premised on consent, was "more credible" than the Defendant's version that he was being unlawfully and dishonestly coerced. CP 40.

The Defendant's challenge to the credibility finding is not reviewable.

B. THE COURT DID NOT ERR IN FINDING THAT THE DEFENDANT'S CONSENT TO SEARCH WAS MADE VOLUNTARILY.

The Defendant claims that his consent to search was involuntarily made.

The trial court's finding that a person voluntarily consents to a search is a *question of fact* to be determined from the *totality of circumstances*. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048, 36 L.Ed.2d 854 (1973); *State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975).

Before the police conducted any search, Officer Lackey informed the Defendant that he had the right to refuse, restrict, or withdraw consent at any time. CP 43, F. 3; RP 6-7. As it turned out, the police did not conduct a search of the Defendant's SUV. The Defendant was the only person to enter the vehicle. RP 7. He retrieved the contraband and handed it to the police. RP 7. Therefore, the only search made was of the backpack. RP 23.

Before the officer searched the backpack, he read the Defendant a Consent to Search card and explained it to the Defendant. RP 7-8. The Defendant then signed the consent form with *Ferrier* warnings. CP 32; RP 7. He was cooperative. RP 7. He did not have any questions for the officer.

RP 7. Only then did the police search the backpack. RP 7-9.

The Defendant first complains that he was not mirandized. Brief of Appellant at 25. But, to be clear, the giving of *Miranda* warnings is not a requisite for voluntariness. The *Miranda* warnings regard statements, not physical evidence. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (requiring that statements elicited by a suspect in a custody be preceded by specific warnings). The *Miranda* advisement is not a prerequisite to a voluntary search, because “[t]he request of a consent to search, with no activity required of the suspect, is designed to elicit physical, not testimonial, evidence.” *State v. Rodriguez*, 20 Wn.App. 876, 880, 582 P.2d 904 (1978), citing *People v. James*, 19 Cal.3d 99, 137 Cal. Rptr. 447, 561 P.2d 1135 (1977).

Although the Defendant responded in a testimonial way by retrieving the contraband and thereby demonstrating guilty knowledge of the contraband, this was a spontaneous act on the Defendant’s behalf. The police did not ask the Defendant to produce the contraband, but merely asked that he permit them to search the car. *Cf. State v. Dennis*, 16 Wn. App. 417, 558 P.2d 297 (1976) (holding that police who were executing a search warrant must mirandize before eliciting a testimonial response of guilty knowledge by requesting that the suspect produce contraband and spare the police the

trouble of searching).

The giving of *Miranda* warnings is only a factor, a part of the totality of the circumstances. To quote the Defendant's citation properly, the appellate court "should" consider several factors, but "the various relevant factors are weighed against one another and no one factor is determinative."

State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

Individually, factors such as a failure to give *Miranda* warnings or to advise a suspect of the right to withhold consent, custodial restraint, and the display of weapons by several police officers, do not necessarily preclude a finding of voluntariness. The presence of all of these factors, however, is significant and indicative of coercion.

State v. Flowers, 57 Wn. App. 636, 645, 789 P.2d 333 (1990).

The totality of the circumstances is not limited to an exhaustive list of factors. The court can consider

- whether *Miranda* warnings were given;
- the degree and intelligence of the consenting person;
- whether the consenting person had been advised of his right not to consent;
- whether the person was in police custody;
- whether there were express or implied claims of authority to search;
- whether there had been any prior illegal police action;

- whether the person had been cooperating or refusing before giving consent;
- whether police were deceptive as to identity or purpose;
- whether the person was under the influence of drugs or intoxicants;
- whether officers displayed weapons; and
- whether the person was suffering from any relevant mental or physical impairment.

State v. Shoemaker, 85 Wn.2d at 212; *State v. Sondergaard*, 86 Wn. App. 656, 938 P.2d 351 (1997); *State v. Flowers*, 57 Wn. App. at 645 (1990); *State v. Cole*, 31 Wn. App. 501, 504, 643 P.2d 675 (1982).

Here, police asked to search; they did not ask for or anticipate a testimonial statement. Therefore, the *Miranda* advisement is not particularly relevant. The Defendant was intelligent and a high school graduate. CP 44, FF 1. He did not appear to be under the influence of any drug or intoxicant. RP 11. The Defendant was not in police custody. CP 44, FF1. In fact, one could argue that advising a person of his *Miranda* rights would be suggestive of being in custody. Instead, police explicitly told him that they were going to be seeking a warrant. In other words, they did not claim they had a right to search or even that they had enough evidence at the moment to hold the Defendant. It is implicit that, absent the Defendant's consent, police needed

authority (a warrant) from a court to search.

When they asked for his consent, police explicitly told the Defendant that he had the right to refuse, withdraw, or limit his consent at any time. After the Defendant retrieved his backpack, police again informed of his right to refuse, withdraw, or limit consent. The Defendant signed the written form. Only then, after two advisements, an explanation of the advisement, and a signature, did the police actually search. Nothing the police did was dishonest or illegal. Although the Defendant had been inquisitive (indicative both of his intelligence and the absence of coercion), he never refused consent. He was consistently cooperative, indicating that his consent was not coerced.

The trial court made a factual finding of voluntariness which is amply supported in the record. There is no error.

The Defendant argues that he consented *before* the *Ferrier*-type warnings were given. Brief of Appellant at 27-28. Again, the warning is not a requisite for voluntariness. *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 421, 136 L.Ed.2d 347 (1996) (holding that knowledge of the right to refuse is not the *sine qua non* of an effective consent). Moreover, the alacrity with which the Defendant consented is evidence of spontaneity and

voluntariness.

In any case, the police slowed the Defendant down and advised him twice of his right to refuse. Both advisements came before any search. The second advisement was accompanied with paperwork, allowing the Defendant to take a breath and reconsider. The form is not simply a signature. It would have taken some time for the parties to write down that the Defendant consented to the search of his “Gray/Blue with black straps backpack” and his “white” “Toyota 4-runner” with plate “330PRU” located at the “NW feed supply and Farm Supply on N. 4th Walla Walla.” CP 32. The form contains three signatures, a date, time, two badge numbers, and an incident number. CP 32. There was time for the Defendant to reconsider. At that point, although he had already produced the backpack and a baggie, all that was apparent to police was misdemeanor possession of a small amount of marijuana. The Defendant could have withdrawn his consent and reclaimed his backpack, the contents of which were unknown to police.

The Defendant points to *State v. Erho*, 77 Wn.2d 553, 463 P.2d 779 (1970). Brief of Appellant at 28. This case regards a statement, not a search for physical evidence and falls under *Miranda*, which is a bright-line rule, not a totality of the circumstances rule. There the defendant was not properly mirandized before he gave his initial statement. *State v. Erho*, 77 Wn.2d at

560. Building on this illegally acquired statement, police acquired a second statement. *State v. Erho*, 77 Wn.2d at 561.

In the instant case, there was no illegal police conduct, and, therefore, nothing derivative of illegality. *Erho* has no application here.

The Defendant argues that police made express and implied threats (to arrest him and seize his SUV) to coerce his consent. Brief of Appellant at 30-31. Specifically, he points to Officer Lackey's promise *not* to arrest the Defendant. Brief of Appellant at 31. The Defendant argues that this implies the opposite: that police were threatening to arrest him. Brief of Appellant at 31 ("Consent, and I won't arrest you. Don't consent, and I will arrest you.").

In fact, the officer explained to the Defendant that his other option was not to arrest, but to go apply for a search warrant. CP 23; RP 6. There was no implicit threat, because there was an explicit alternative: the warrant. There was never any threat to arrest. The trial court made a non-reviewable credibility finding that the officer actually said that he would "apply" for a search warrant if the Defendant did not consent to a search. CP 44, FF 1.

The Defendant also points to the officer's statement that a search warrant would result in a seizure of the SUV for an indefinite duration. Brief of Appellant at 32. The Defendant is essentially claiming that the officer told

him that, whether or not the Defendant consented, and in the absence of probable cause or a warrant, the officer had a right to search, seize, or arrest. Such a statement would vitiate consent -- had it been made. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (there can be no consent when it is given “only after the official conducting the search has asserted that he possesses a warrant.”) But, the officer’s testimony and the court’s finding (CP 43, 44) do not support this interpretation. The officer only said that he was going to *apply* for a search warrant. CP 23. Officer Lackey maintained his statement throughout the hearing, and despite repetitive and wearisome cross-examination, which harped on this point over and over. RP 6, 11, 13, 15, 16, 19, 21.

As the officer explained, any search, seizure, or arrest would be conditioned on the issuance of a search warrant and the discovery of evidence sufficient to permit those actions. The officer told the Defendant that he could not make the same promise (not to arrest him) *if* evidence sufficient for arrest came to light after the entrance of the drug unit in order to acquire and execute a search warrant.

The Defendant argues that the officer was threatening to hold the SUV for two days without a warrant and while he applied for a warrant. Brief of Appellant at 32-34. The defense cross-examination conflated

different subjects, in order to attempt to create some confusion on this matter, i.e. the time it would take to get a warrant and the time it would take to conduct a search. However, taking the Defendant at his word, this challenge conflicts with the Defendant's own affidavit. "I was told that they would call drug officers and that the officers would show up with a warrant and my vehicle would *then* be seized for an indefinite period of time." CP 6 (emphasis added). The Defendant understood perfectly well that the seizure would come as a result of a warrant and not before.

If the officer applied for a search warrant, the SUV could be held indefinitely. Whether this seizure was before or after the acquisition of the warrant or both is not clear in the testimony. The officer testified, "I think I did tell him that we would seize his vehicle temporarily if I did have to go apply for a warrant." RP 11. However, when defense counsel tried to tie the officer down to interpreting this to mean that there would be a lengthy detention before the issuance of a warrant, the officer repeatedly rejected this interpretation. RP 15, 19. In fact, the officer said that he would not even have prevented the Defendant from driving away while the officer was gathering information toward the application of a search warrant. RP 42-43.

However, had the officer seized the SUV while waiting for a warrant, it could be justified as a *Terry* detention. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct.

1868, 1879, 20 L.Ed.2d 889 (1968). It is well established that an informant's tip may provide "well-founded suspicion" necessary to support a valid *Terry* detention. *State v. Ortiz*, 52 Wn. App. 523, 526, 762 P.2d 12 (1988). Based on the manager's statement that the Defendant had been told to go home in order to remove the drugs from his vehicle, that he did not argue but complied with the manager's directive, and that when he returned he appeared to be selling suspected drugs on store premises, there was reasonable, articulable suspicion to justify a detention. The detention must be reasonably related in scope to the circumstances, which justify detention. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). Here the detention would be for the purpose of securing possible contraband and preventing its destruction for the short time it took to acquire a telephonic warrant.

The Defendant would like to define the time before acquisition of a search warrant as being as long as two days, by asking the officer, who was new to writing applications for warrants, how long that could take. In fact, the officer never defined "indefinite" in his conversation with the Defendant. Only his manifested expressions, not his private thoughts, would be relevant to a determination of the voluntariness of the Defendant's consent.

In fact, it only took a moment for the officer to make a digital

recording of the manager's statement. RP 33. During that time, the Defendant was not detained, but only continued working at the store. Although the officer did not recall the details of the taped statement during the suppression hearing (RP 26), this does not mean that in those few minutes he did not acquire all the necessary information he would have needed to get a telephonic warrant. As the prosecutor explained, because the witnesses were all store employees, any additional "information [for a search warrant] would be obtained rather quickly." CP 18.

The Defendant argues that the use of the term "indefinitely" is inherently coercive. In essence, he argues that the term should be interpreted out of context to mean an unreasonable and arbitrary length of time. Brief of Appellant at 32, 36; RP 60. As the judge explained, he would give the term its plain and intended meaning: "indefinite means not definite." RP 59. Once a search warrant issued and the drug unit became involved, the officer could no longer guarantee the length of time that other law enforcement officers would require to execute the search warrant. Once a warrant was obtained, the vehicle could be seized for significantly longer. Potentially police could take apart a vehicle to retrieve contraband; depending on department exigencies, they might need to store and inventory the vehicle overnight before a search could be accomplished; and they might even seize

it permanently as the proceeds of drug sales. It was “beyond Officer Lackey’s knowledge, because he didn’t really know how long the process would take.” RP 60. The officer simply could not be more definite.

However, if the Defendant cooperated, the officer would not need to involve other officers in the search and was willing to reciprocate the cooperation by agreeing not to seize the vehicle or arrest the Defendant that day, regardless of what was found. It was a lawful offer. An officer who has probable cause to believe that a person has committed or is committing a felony has the authority to arrest, and the discretion not to. RCW 10.31.100

As the prosecutor previously argued, truthfully advising a person of the consequences of denying consent to search does not render consent involuntary. CP 18, *citing Commonwealth v. Mack*, 796 A.2d 967, 970 (Pa. 2002). If the Defendant realized that, based on the information the police were likely to have, they would probably get a search warrant and be able to seize his contraband and he could end up being immediately arrested and losing his SUV at least temporarily, then he was not coerced, but made a well-informed decision. “Bowling to events, even if one is not happy with them, is not the same thing as being coerced.” *State v. Nelson*, 47 Wn. App. 157, 163, 734 P.2d 516 (1987), *quoting State v. Lyons*, 76 Wn.2d 343, 346-47, 458 P.2d 30 (1969).

The court held: “Under these circumstances, I do not find Officer Lackey’s statements unduly coercive or that such coercion vitiated consent.” CP 41. This finding is tenable and supported in the record.

The Defendant argues that he was not cooperative, but persisted in refusing to give consent. Brief of Appellant at 37-38. That the Defendant did not immediately answer Officer Pellicer’s question can be explained by the interruption of Officer Lackey’s arrival, not refusal. That the Defendant inquired about the purpose of the search can be explained as normal and reasonable curiosity, not reluctance or belligerence. Officer Lackey found the Defendant to be cooperative. RP 7, 10. The finder of fact, for his part, found the officer credible. CP 40, 44; RP 56-57. The officer’s credibility is borne out by the uncontested facts. The Defendant not only consented to a search almost immediately, he performed the search himself. Although the police did not request it, he handed them drugs, scales, and cash. When their contact was over, the Defendant did not flee, but returned to his job duties. He was cooperative throughout. There is no error.

In consideration of all the facts on the record, the trial court’s finding of voluntary consent is substantially and amply supported.

C. THE DEFENDANT'S STATEMENTS WERE NOT COME AT BY THE EXPLOITATION OF ANY ILLEGALITY.

The Defendant challenges the admissibility of his statements as fruit of the poisonous tree. The testimonial statements made by the Defendant were (1) handing the backpack and baggie to police in response to police request for consent to search his SUV; (2) handing the \$500 to police in response to the inquiry whether he had made any money from drug sales that day; and (3) saying police were going to get the money (from the Defendant's drug sales) anyway so they might as well take it now. The Defendant challenges the admissibility of all three statements, arguing that they would not have come to light but for the officer's alleged threat to arrest and seize. Brief of Appellant at 41.

When police have acted illegally, evidence that is come at by exploitation of the illegality and that cannot be sufficiently distinguishable to be purged of the primary taint will be suppressed as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The premise of this doctrine is that there has been some original illegality. As explained above, police did not threaten to arrest the Defendant and did not threaten to seize any property unlawfully. Police

informed the Defendant of their options, namely to “apply for a search warrant.” CP 23; RP 6. To give accurate information of the legal system is not equivalent to making an illegal threat.

Because there was no illegal police behavior, the fruit of the poisonous tree doctrine has no application here.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant’s conviction.

DATED: July 30, 2010.

Respectfully submitted:



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