

No. 290344

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

MICHELE MERLYNN MARTINEZ

Appellant.

REPLY BRIEF OF APPELLANT

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I. IDENTITY OF THE APPELLANT

Michele Martinez is the Appellant.

I. ARGUMENT

1. IN THE STATE'S RESPONSE BRIEF, THEY ERRONEOUSLY USE INTERCHANGEABLY A PHRASE USED IN A CIVIL CONTEXT, "LEGAL OWNER," WITH A PHRASE USED IN A CRIMINAL SEARCH AND SEIZURE CONTEXT "COMMON AUTHORITY".

In the State's Response Brief (SRB), they continuously blurred the distinctions between property law, and an area of criminal law, search and seizure law. The State would like this Court to believe that property law could be applied to Article 1, section 7 cases as well as Fourth Amendment cases. However, in Washington State, "a third party may consent to a search if he or she possesses 'common authority over or other sufficient relationship to the premises or *effects* sought to be inspected.'" State v. White, 141 Wn.App. 128, 136, 168 P.3d 459 (2007)(emphasis added).

Common authority exists when there is "mutual use of the property by persons generally having joint access or control for most purposes." White at 136. Washington Courts have stated that "Access and permission to enter are the hallmarks of common authority." Id. at 136. The Washington State Supreme Court has stated the following:

"We have said that the authority does not rest upon the law of property, with its attendant legal refinements, but rests rather on

mutual use of the property. State v. Leach, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989). We have, thus, justified the common authority rule based upon the theories of “reasonable expectations of privacy” and ‘assumption of risk.’” State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005); Leach, at 739. (emphasis added).

The State throughout the SRB has lost sight of this distinction, the difference between property law, and the criminal law area of search and seizure law. Below are some of the statements made by the State in the SRB that show either an unwillingness to acknowledge, or a lack of understanding of the distinctions between these two areas of the law:

“The only car that was not titled and licensed in her name (Martinez) was the one Ford Escort, the vehicle that is the subject of this appeal.” State’s Response Brief (SRB) p. 2-3;

“There is no dispute that the “legal” owner of this vehicle was Ms. Campos, appellant’s mother.” SRB p. 4;

“The officer merely ran the plate on the car and realized that the mother, Ms. Campos, was the true owner of the car...” SRB p. 4;

“Ms. Campos was the legal owner.” SRB p. 7;

“Ms. Campos said that she was concerned about this car because she would be responsible if anything happened with the car, that she cosigned to purchase the car.” SRB p. 7-8;

“There is no doubt that the question before the court today would be why the officer had not requested consent of the true owner of the car, Martinez’s mother, to enter the car, since the officer knew the name of the true owner; she was at the scene and who by her own words and the testimony of the appellant, would be responsible if anything happened to or with the car.” SRB p. 4-5;

However, with regard to getting consent from the correct person to search the red Ford Escort and to avoid any possible game playing by the defendants, the State had a very simple way to make certain that their search of the vehicle was legally bullet proof: Just get a search warrant.

The Washington State Supreme Court has stated that:

“Where the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.’ Where the police are content to rely upon the consent of a third party to validate a warrantless search, there is an improvident risk of an illegal search and seizure.” State v. Leach, 113 Wn.2d at 744.

The State would love for this Court to believe that being the “legal owner” is the dispositive factor for determining the person that has access and control with regard to the red Ford Escort. However, determining access and control is not an issue of legal ownership as the State would have the Court believe; it is the following: Who had access and permission to enter the red Ford Escort, since both access and permission are hallmarks of common authority. State v. White, 141 Wn.App. at 136. There was overwhelming evidence presented at the Suppression hearing to show that Martinez was the person that had authority with regard to the red Ford Escort, and that Martinez was the person that had access to enter the red Ford Escort, and she was the person that needed to be asked permission for others to use the vehicle.

Campos did not have any authority or common authority with regard to the red Ford Escort. Nor did Medina.

At the Suppression hearing, the following dialogue was between the Defense and Campos:

Defense: “And could you tell, could you tell me the story of how the car was bought or why it was bought?”

Campos: We co-signed for Michele.

Defense: Okay. And could you tell us why?

Campos: She didn’t have no credit for her to get the car out.

Defense: Okay. So since that 2002/2003 period, how often has the red Ford Escort been parked at your house overnight?

Campos: Not very often. Only times when they would need to borrow my car, because it was a bigger car, with their kids to go do something out of town or...

Defense: So, have you ever made payments on that vehicle, red Ford Escort?

Campos: No.

Defense: Have you ever paid any of the maintenance on that vehicle?

Campos: No.

Defense: Do you have control over that vehicle on who gets to use

it and when it's used?

Campos: No.

Defense: Do you have the keys to that vehicle?

Campos: No, I don't." RP 152-153.

Campos stated in very clear terms that she did not have access and control to the red Ford Escort, and that her name on the title was for the purpose of helping Martinez secure credit so that Martinez could buy the vehicle.

The following facts were referenced in the appellant's opening Brief, to show the Court that Martinez was the person that had authority with regard to the red Ford Escort:

"Ms. Martinez is a married woman. She doesn't live with her mother (RP 110, 152): She lives with her husband, Fidel Medina. Martinez's red Ford Escort was regularly kept at Martinez's residence, not her mother, Mary Campos' residence. RP 119, 153. Ms. Martinez stated at the suppression hearing that the red Ford Escort belonged to her alone, not to Fidel Medina or Mary Campos. RP 118. Ms. Martinez is the person that paid for the vehicle, not Medina or Campos. RP 118, 153. Ms. Martinez paid all of the maintenance on the vehicle, not Medina or Campos. RP 119, 153. Ms. Martinez had the keys to the vehicle, not Medina or Campos. RP 119, 153. Ms. Martinez was the primary driver of the vehicle, not Medina or Campos. RP 119, 120, 153. Medina needed to ask Martinez permission to use the red Ford Escort. RP 121. Mary Campos rarely used the red Ford Escort, except for when Martinez needed to borrow Campos' bigger car for longer trips, then they would swap vehicles.

The only association that Mary Campos had with the Ford Escort was that her name was on the registration, even though Martinez had

already finished paying off the red Ford Escort to the finance company. RP 118. Campos didn't pay for the red Ford Escort. RP 153. Martinez had always been in possession of the red Ford Escort from day one of her buying the vehicle. RP 118-119. Mary Campos has never been in possession of the red Ford Escort, nor did she ever have the keys, except for the rare occasion that Martinez and Campos swapped vehicles. RP 121, 153. Campos was not an occupant just prior to the search of the red Ford Escort. RP 70, 154". RP 121. Appellant's Brief, p. 14-16.

If that wasn't enough, below is the exchange between Martinez and her attorney on direct examination going through the paces of showing that Martinez was the person that had authority with regard to the red Ford Escort:

Defense Counsel: Okay. Now, who does the red Ford Escort belong to?

Martinez: That's my car.

Defense Counsel: It's just your car?

Martinez: Just my car.

Defense Counsel: And what about your husband, Fidel?

Martinez: No, it's not his car.

Defense Counsel: What about your mom, Mary Campos?

Martinez: It's not her car, either.

Defense Counsel: Now, who paid for the vehicle?

Martinez: I did.

Defense Counsel: And have you paid off the red Ford Escort?

Martinez: Yes.

Defense Counsel: About how long ago?

Martinez: About two years ago.

Defense Counsel: And who pays the maintenance for your vehicle, like lube jobs, tires, that kind of stuff?

Martinez: I would.

Defense Counsel: Has anybody else ever paid the maintenance?

Martinez: No.

Defense Counsel: And typically who's in charge of the keys to the Ford Escort?

Martinez: Myself.

Defense Counsel: And where do you keep the Ford, the red Ford Escort at night?

Martinez: In my driveway.

Defense Counsel: And who uses -- Who primarily uses the Ford Escort on a daily basis?

Martinez: I do.

Defense Counsel: Does anybody else use it on a daily basis?

Martinez: No.

Defense Counsel: Now, how often does Fidel use your vehicle?

Martinez: Fidel didn't have a license so he wouldn't use the vehicle. It was my responsibility since it was under my mom's name, and so –“ RP 118-119; Appellant's Brief, p. 29-31.

To support the testimony by Martinez about paying for the red Ford Escort, Martinez had three money gram receipts admitted into evidence, showing that Martinez had made the payments for the red Ford Escort. RP 123-125, Exhibits DE E, DE F, DE G. Martinez also had two auto maintenance receipts admitted into evidence, with only her name on the two receipts. RP 125-126, Exhibits DE H, DE I. Martinez testified that there was nobody else's name on the maintenance records. RP 125-126, Exhibits DE H, DE I. Martinez testified that she made other payments as well, for both the payment of the red Ford Escort and its maintenance, but no longer had those receipts. RP 127-128.

Martinez also testified at the suppression hearing that if Medina wanted to use the red Ford Escort, he first had to ask Martinez's permission. RP 120. It was important for Martinez to control the use of the red Ford Escort, because she needed it for transportation to work, school, and running errands. RP 120.

At the suppression hearing, Martinez stated that she owned the red Ford Escort for about five years, and that she finished paying it off about two years ago, which would mean that she owned the red Ford

Escort approximately since January 2005, and paid it off approximately January 2008. RP 118, 126. Fidel Medina was incarcerated for approximately 2-3 years during that period of time when Martinez was paying off the red Ford Escort. Exhibit DE B.

The State offered little to no evidence at the suppression hearing to support their basis of the search of the red Ford Escort: That Fidel Medina had joint ownership or control. The State relied on the fact that Martinez owned the red Ford Escort, and that Martinez let Medina drive it occasionally. RP 18, LN 1-9. However, on cross examination, CCO Martin admitted that he never followed up and asked Martinez how often Martinez let Medina drive the red Ford Escort. RP 32, LN 4-5. Then CCO Martin admitted that to the best of his knowledge, Medina had only driven the red Ford Escort two times. RP 32, LN 6-8.

There was no evidence presented by the State that Medina was one of the owners of the red Ford Escort, nor was there any evidence presented by the State that Medina had any authority with regard to the red Ford Escort that would give him a right to consent to a search of the vehicle, or in this case, would give CCO Martin the right under the Community Custody agreement to search Martinez's red Ford Escort. Thus, under the authority granted by the State for Medina's Community

Custody (Exhibit DE A, Exhibit DE B), and based on the case law cited in the Appellant's Opening Brief, section 4 and 5, the State did not have the legal authority to search Martinez's red Ford Escort.

There was little to no evidence admitted at the suppression to show that either Campos or Medina had authority with regard to the red Ford Escort. The evidence overwhelmingly showed that Martinez had authority with regard to the red Ford Escort, and nobody else.

2. IT IS IRRELEVANT TO THIS CASE HOW MANY CARS MARTINEZ HAD REGISTERED IN HER NAME; THE ONLY ISSUE IS: WHO HAD AUTHORITY, MEANING WHO HAD ACCESS AND PERMISSION WITH REGARD TO THE RED FORD ESCORT?

The State has tried to muddle up the facts of this case by introducing evidence of other vehicles being owned and titled to Martinez other than the red Ford Escort. The State has brought this up in the SRB in the following ways:

“She was the owner of numerous vehicles, vans, a BMW, and other cars which all miraculously were not capable of being used according to her statements. However, they were all licensed and titled in her name.” SRB p. 2;

“This is a community property state. Once again a careful reading of the transcript makes it apparent that Mr. Medina, according to the testimony of the appellant, had full use of all of the cars except this Ford Escort.” SRB p. 13.

While Washington State is a community property state, this is not a family law case; this is a case involving criminal law with regard to article 1, section 7 and the Fourth Amendment. Family Law principles are not the governing laws when deciding a search and seizure case; common authority is the deciding principle.

Martinez had a few cars titled to her; based on her testimony, none of them seemed operable. However, whether the vehicles were operable or not is irrelevant. The existence of these vehicles is also irrelevant. The only vehicle that is relevant in the present case is the red Ford Escort, and the question before the Court is which individuals had authority or common authority with regard to the red Ford Escort. Martinez has stated over and over, and referenced many sections of the suppression hearing transcript that can only lead to one conclusion: Martinez was the only person to have authority with regard to the red Ford Escort. Campos did not have authority with regard to the red Ford Escort; nor did Medina.

3. THE STATE ONCE AGAIN REFERENCED THE FACTS OF AN UNPUBLISHED CASE. WHILE MARTINEZ BELIEVES THAT THIS IS A VIOLATION OF THE RAP, MARTINEZ ASSERTS THAT IT IS IRRELEVANT TO HER CASE.

The respondent wrote the following in his SRB:

“Martinez would have this court turn the bright line rule as forth in cases such as Cantrell into some sort of math problem. The officers would be responsible for the determination of if the car met the new equation. They would now be responsible to determine if the car was off the road and if it was truly a vehicle or now it was an ‘effect.’ This apparently would have to be done on a case by case basis. The law does not make some distinction as to whether a vehicle is a vehicle based on its location. *While not a case which can be cited, this very court recently decided a case where the vehicle which was the basis of a felony conviction had no motor or transmission and was found hidden under a tarp.*” SRB p. 6. (emphasis added).

The unpublished case that the State is “referring” to is State v. Miguel Angel Acevedo, No. 28633-9, Div. III, December 9, 2010. The State was forced to supply the case to the Court and to Martinez when the State initially referenced Acevedo in their Motion on the Merits to Dismiss, and Martinez motioned the Court to force the State to remove the reference to the unpublished case from the

Motion to Dismiss. The State actually used this same paragraph in both the Motion on the Merits and the SRB. This is a case where Acevedo argued that a car without a motor or transmission that was a wreck is just a pile of car parts, and wouldn't come under the definition of vehicle for the purposes of Acevedo being charged with possession of a stolen motor vehicle.

Martinez believes that it is improper for the State to reference an unpublished case and use it as part of their argument in a Response Brief. It is a way to circumvent the RAP, the rule that does not allow the citing of unpublished cases. Martinez made the same argument in her Response to the State's Motion on the Merits, but since the State's Motion was denied, the Court never made a written finding or ruling as to Martinez's motion for the State to be forced to remove the offending paragraph from their motion. So now the State commits the same act in the SRB. Martinez is requesting that the Court draw a big "X" through the offending portion of the SRB, and not allow it to be used.

Martinez believes that the State's argument is irrelevant for the purpose of Martinez's case, because Martinez has never made the argument that her vehicle is not actually a vehicle. Martinez will

better explain it in the next section of this brief, section 4, beginning in the next paragraph.

4. CANTRELL IS NOT A BRIGHT LINE RULE; IT IS LIMITED IN SCOPE AND DOES NOT APPLY TO THE PRESENT CASE, WHERE THE FACTS ARE DISTINGUISHED FROM CANTRELL.

The State argues in the SRB that “Martinez would have this court turn the bright line rule as forth in cases such as Cantrell into some sort of math problem.” SRB p. 5. The State goes on to say that the new test would be to determine if the car was off the road, would it be a vehicle or would it be an effect? SRB p. 6

With regard to Martinez’s case, Cantrell is not a clear case or a bright line rule. In fact, in the 17 years since Cantrell has been published, there has not been one published case that has cited Cantrell. Cantrell has been cited a handful of times for other issues, but never for the issues that have come up in Martinez’s case. That’s because Cantrell is narrow in its scope. The question in Cantrell was the following:

“For a valid consent search of an automobile, must police obtain the consent of all **occupants** who have approximately equal control over the vehicle before police may conduct a search of the automobile without a warrant?” State v. Cantrell, 124 Wn.2d

183, 187, 875 P.2d 1208 (1993) (Emphasis added).” Appellant’s Brief, p. 11.

Cantrell had two important factors occur that did not occur in Martinez’s case: 1) The vehicle that was searched had been driven on a public road, and was then stopped by law enforcement for speeding; 2) there were occupants of the vehicle in Cantrell at the time that the police began their investigation into speeding. Cantrell at 185. In Martinez, the vehicle was parked in a private driveway, with no occupants, with testimony by the officers that they had not seen the red Ford Escort being driven that day. RP 15, 28 -32, 75-76, 101,112.

The State is also arguing that Martinez was making the argument that her red Ford Escort was an effect, not a vehicle, in the SRB, and that Martinez was offering up a

“...new equation. They (the police) would now be responsible to determine if the car was off the road and if it was truly a vehicle or now it was an ‘effect.’” SRB 5-6.

Martinez never made that argument in her opening brief. In Martinez’s appellate brief, Martinez stated the following:

“Martinez is arguing that for the purpose of this appeal, that an automobile that is parked in a private driveway and is unoccupied is an “effect,” and should not be characterized the same way as an automobile that has occupants, and is being driven on a public road.” Appellant’s Brief, p. 18.

Martinez then went on to say in that same brief:

“In the present case, while the “effect” that was searched was the red Ford Escort, it was not a vehicle that was being used like the vehicle in Cantrell. In fact, the red Ford Escort in the present case was not being used at all: It was parked in a private driveway located at Ms. Martinez’s residence (RP 15), with none of the parties involved being an occupant at the time of the search, or just prior to the search of the red Ford Escort. RP 60, 64-65, 70, 154. The characteristics of the red Ford Escort at the time of the search, or just prior to the search, should be viewed as being akin to a piece of property, an effect, as opposed to being a vehicle, because the red Ford Escort was not being driven or occupied, nor was it on public roads. Martinez is not trying to characterize the red Ford Escort as a residence, rather, Martinez believes that it should be viewed in the same category as any other “effect,” since the vehicle was not being driven, occupied by two or more people, or on public roads at the time of the search or just prior to the search.” Appellant’s Brief, P. 21.

It is clear from the two paragraphs above that Martinez is making the following argument: That the facts and circumstances that are associated with the red Ford Escort that was searched by the police in Martinez’s case is distinguished from the facts and circumstances that were associated with the vehicle that was searched by the police in Cantrell, and thus, due to the limited scope of Cantrell, it would not be applicable to Martinez’s case.

The State is making a false argument when the State argues in the SRB that “They would now be responsible to determine if the car was

off the road and if it was truly a vehicle or now it was an 'effect.'" SRB
p. 6. A vehicle is always an "effect," as determined by the United
States Supreme Court which stated that "Automobiles are effects." U.S.
v. Chadwick, 433 U.S. 1, 12, 97 S.Ct. 2476 (1977). The question is
whether the facts surrounding the red Ford Escort are akin to the facts
surrounding the vehicle in Cantrell.

Martinez is not arguing that the red Ford Escort is not a vehicle.
Martinez is arguing that given the facts and circumstances surrounding
the search of the red Ford Escort, that it is more akin to a trunk or some
other moveable but stationary effect that is located on private property,
and has no occupants, than the vehicle in Cantrell. The basis for the
search of the red Ford Escort was unrelated to any illegal driving action
at the time that law enforcement conducted their search of the vehicle,
because it was parked on private property and unoccupied.

In contrast, in Cantrell, the vehicle was being driven on a public
road, with two occupants, and then was stopped and searched by the
police, because of an alleged driving infraction.

5. DUE TO THE POLICE “STOWING” AWAY MARTINEZ IN THE BACK OF A POLICE CAR, HANDCUFFED WITH THE WINDOWS CLOSED, MARTINEZ LOST HER ABILITY TO OBJECT TO THE POLICE SEARCHING THE TRUNK OF HER RED FORD ESCORT.

In the SRB, the State mentions Martinez being locked away in the back of the patrol car. The State said the following:

“She (Martinez) claims in her testimony that she sat locked away in the car she revoked.” SRB 6-7; The State also said:

“Apparently, when the officers were not busy ‘stowing’ away Martinez in the back of a police car ‘with the doors and windows shut’ they were able to divine the fact that there was something illegal in the trunk. The fact is that there was a valid consent from the owner (Campos) of the car therefore there was no tainted fruit in this case.” SRB p. 17

Martinez stated the following in her Appellant’s Opening Brief:

“The Cantrell Court gave the following caveat in its opinion: “Initially it is important ... the Defendant did not object to the search and, therefore, the issue of whether consent by a co-occupant remains valid in the face of another occupant’s *objection* is not before the court.” State v. Cantrell, 124 Wn.2d 183, 187, 875 P.2d 1208 (1993).

The Cantrell Court did not decide the above issue, because it was not raised by either party: Does consent to a search ‘remain valid in the face of another co-occupant’s objection’? “ Appellant’s Brief, p. 23.

Currently, this issue has not been decided by the Washington State Supreme Court, but the Cantrell Court intimated in the above

paragraph that the issue remains valid.

In Cantrell, the defendant stood by and watched as the vehicle was being searched without objection. Cantrell was the driver of the vehicle. The co-occupant's parents were the owners of the vehicle. It could be argued that both Cantrell and the co-occupant had equal authority, based on Cantrell being the driver, and the other co-occupant having the authority of his parents to borrow the vehicle.

In the present case, the following occurred: Martinez was already illegally arrested and handcuffed because of a gun found under the front seat of the red Ford Escort. RP 66-67, 70, 79, 117. Officer Layman asked her to sign a consent to search form that Layman had already written her name onto, in the appropriate space on the form. RP 70. Martinez was not sure if she should sign the form and consent to the search of the trunk. RP 70. Martinez asked Layman what would happen if she didn't consent, and Layman told her "we would have to impound her vehicle to the police department and get a search warrant for it." RP 78. When that didn't seem to work, Officer Layman then placed the arrested and handcuffed Martinez in his patrol vehicle, with both the windows and doors closed. RP 79-80.

Before Martinez could decide whether she would consent to a search of the trunk of her red Ford Escort, Martinez's mother, Mary Campos, arrived. RP 70-71. Campos stated at the suppression hearing that she arrived at the house because she was going to take care of Martinez's children since both of the children's parents were being arrested; Campos did not go to Martinez's house to get the red Ford Escort. RP 154. Layman discovered that the red Ford Escort was registered to Campos, so he crossed out Martinez's name on the consent form, wrote in Campos' name, and secured Campos' signature on the consent form. RP 78-80, Exhibit SE C.

Thus, Martinez was not afforded the same opportunity to object as Cantrell. Cantrell was standing right in front of the vehicle as it was being searched; Martinez was handcuffed, arrested, then locked in a patrol vehicle with the windows and doors closed, thinking that Layman was getting a search warrant because that's what Layman told Martinez he was going to do. Instead, Layman secured consent from Campos, a party with no authority, or at best, less than equal authority, to search the red Ford Escort. Through no choice of her own, and through the authority of law enforcement, Martinez was not allowed to be present for the search of the red Ford Escort, a vehicle that she had equal or greater

control over, due to Officer Layman locking her in the back of his patrol car. Martinez lost her ability to object to the search due to law enforcement's actions.

Martinez believes that she has a right to privacy under article 1 section 7 of the Washington State Constitution and the Fourth Amendment, that would protect her from warrantless searches of a vehicle that she owns, and which she maintains control over which is greater or equal to anyone else, who has given consent to search the vehicle.

III. CONCLUSION

Ms. Martinez respectfully requests the Court to reverse the trial court denial of Martinez's motion to suppress, suppress the evidence from the trunk, and reverse and dismiss the conviction.

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