



29059-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TAMMY J. ALLSTEAD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

Julia A. Dooris
Attorney for Appellant

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INDEX

A. ASSIGNMENTS OF ERROR1

B. ISSUE1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT4

 1. MS. ALLSTEAD’S CONSENT TO
 SEARCH THE BACKPACK AT
 THE SCENE WAS INVOLUNTARY4

E. CONCLUSION.....8

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BUSTAMANTE-DAVILA, 138 Wn.2d 964,
983 P.2d 590 (1999)..... 5

STATE V. GARCIA, 140 Wn. App. 609,
166 P.3d 848 (2007)..... 6

STATE V. HOUSER, 95 Wn.2d 143,
622 P.2d 1218 (1980)..... 5

STATE V. LADSON, 138 Wn.2d 343,
979 P.2d 833 (1999)..... 5

STATE V. O'NEILL, 148 Wn.2d 564,
62 P.3d 489 (2003)..... 6

STATE V. REICHENBACH, 153 Wn.2d 126,
101 P.3d 80 (2004)..... 5, 6

STATE V. WHITE, 135 Wn.2d 761,
958 P.2d 982 (1998)..... 5

SUPREME COURT CASES

ARKANSAS V. SANDERS, 442 U.S. 753,
99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)..... 5

MIRANDA V. ARIZONA, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 1, 3, 4, 6

CONSTITUTIONAL PROVISIONS

ARTICLE I, § 7 5

FOURTH AMENDMENT..... 5

A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Ms. Allstead's motion to suppress the evidence.
2. The trial court erred by entering conclusion of law number 1: "The motion to suppress is denied because the defendant gave permission to Detective Pochert to search her backpack." (CP 34)
3. The trial court erred by entering conclusion of law number 2: "Detective Pochert was not required to provide the defendant with any advisement of rights or warnings because the defendant was free to leave at [sic] she consented to the search." (CP 34)

B. ISSUE

1. Is consent to search a backpack involuntary where a person was released from handcuffs moments earlier, was not advised she could refuse consent, was not given *Miranda*¹ warnings, and the police request to search was unrelated to the reason for the search warrant?

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

C. STATEMENT OF THE CASE

On November 5, 2009, Tammy Allstead was inside her brother's house, checking on his pets, when the Kennewick police department arrived with a search warrant for the home. (RP 3; 19) The police took her to a police car, and Kennewick Police Department Detective Brian Pochert handcuffed her. (RP 4) She was told she "was not under arrest, but she was being detained [while the police searched]." (RP 4) She was in handcuffs for approximately 15 minutes, while several officers looking for tools stolen from construction sites swarmed the house and grounds. (RP 4-5; 11)

While Ms. Allstead was still handcuffed and being "detained," she overheard officers state that they were going to break down a locked door. (RP 5-6) Ms. Allstead volunteered that she had her brother's keys, so breaking it in was not necessary. (RP 6)

An officer retrieved Ms. Allstead's backpack from a car, and Detective Pochert removed the key from a zippered pouch. (RP 6-7) He said he put the backpack down at Ms. Allstead's feet. (RP 7)

Detective Pochert removed Ms. Allstead's handcuffs, and told her she could leave the scene. (RP 5) But he told her she could not drive, because he learned she had a suspended license. (RP 5) A few minutes later, he asked her if she had any stolen credit cards in her backpack. (RP

8; 15) Ms. Allstead responded “no.” She also said that she “did not believe in theft.” (RP 8)

What happened next was disputed. The detective’s story is that he asked if he could search the backpack, and Ms. Allstead agreed to the search. (RP 8) He admitted that he did not tell her that she could refuse to allow the search. (RP 15)

Ms. Allstead said that when the detective took off her handcuffs, he went and retrieved her backpack and handed it to her. (RP 22) But as she was getting ready to walk away, the officer asked her if she had any stolen items in her backpack, and he grabbed it from her and starting looking through it without asking for consent. (RP 22)

When he searched her bag, the detective found drug paraphernalia. (RP 9) At that point, the detective gave Ms. Allstead the *Miranda* warnings and arrested her. (RP 9) The police discovered 0.2 grams of methamphetamine in the bag. (CP 16)

Ms. Allstead was charged with one count of possession of a controlled substance. (CP 1) She moved to suppress the evidence. (CP 3-5) The trial court denied the motion on the basis that Ms. Allstead gave permission to the detective to search her backpack. (RP 28-29; CP 33-34)

The court's findings included "the defendant was not provided with any warnings prior to having her backpack searched. She was not advised that she had the right to refuse permission to search the backpack." (CP 34) The court entered two conclusions:

1. The motion to suppress is denied because the defendant gave permission to Detective Pochert to search her backpack.
2. Detective Pochert was not required to provide the defendant with any advisement of rights or warnings because the defendant was free to leave at [sic] she consented to the search.

(CP 34)

Ms. Allstead entered into a stipulated facts trial. (CP 15-16) The trial court found her guilty. (CP 17) She appeals.

D. ARGUMENT

1. MS. ALLSTEAD'S CONSENT TO SEARCH THE BACKPACK AT THE SCENE WAS INVOLUNTARY.

Ms. Allstead's consent to the search of her backpack was involuntary because she was not informed of her *Miranda* rights at the time, and she was not advised that she could refuse consent.

Article I, § 7 of the Washington State Constitution provides individuals more protection from searches and seizures than the Fourth Amendment to the United States Constitution. *State v. White*,

135 Wn.2d 761, 769, 958 P.2d 982 (1998). Article I, § 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Warrants and certain well established principles of common law provide the “authority of law” necessary to justify a seizure. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). A warrantless seizure of either a person or evidence is *per se* unreasonable, but certain well established exceptions exist. See *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

If a seizure is made without a valid warrant, the State has the heavy burden to show that the seizure falls within one of the limited number of “jealously and carefully drawn’ exceptions” to the warrant requirement. *Houser*, 95 Wn.2d at 149, (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)).

Consent is an exception to the warrant requirement. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). The State bears the burden of proving that consent was voluntary. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). The voluntariness of consent is a question of fact based on the totality of the circumstances. *Reichenbach*, 153 Wn.2d at 132.

In determining if consent was voluntary, the court considers whether *Miranda* warnings were given, the degree of education and

intelligence of the person giving consent, and whether the consenting person was advised of the right to refuse consent. *Id.* This court may also consider the conduct of police as part of the factual analysis. *Id.*

Other factors may also be relevant depending on the totality of the circumstances. *State v. O'Neill*, 148 Wn.2d 564, 588-89, 62 P.3d 489 (2003). While consent may be given when an individual is under arrest, any restraint on an individual is a factor to consider. *Id.* at 589. No single factor is dispositive in the analysis of the voluntariness of consent. *State v. Garcia*, 140 Wn. App. 609, 626, 166 P.3d 848 (2007).

Based on the totality of the circumstances in this case, the State did not meet its burden of proving by clear and convincing evidence that Ms. Allstead's consent was voluntary. Only moments before the detective asked if he could search the backpack, Ms. Allstead had been in handcuffs, obviously restrained. By all accounts, many police officers were present at the scene. Ms. Allstead had not been advised of her *Miranda* rights, nor was she advised that she could refuse to allow the officer to search her backpack.

No evidence was provided related to Ms. Allstead's degree of education and intelligence, but no single factor is dispositive. The court may consider the conduct of the police. In this case, the police were at Ms. Allstead's brother's home to search for tools stolen from a

construction site. Ms. Allstead was at the house to check on the pets. The police apparently did not doubt that explanation, and even released her and told her she could leave. Yet, inexplicably, Detective Pochert admitted that while he handed Ms. Allstead, who was not a suspect, her backpack, he asked her if she had stolen credit cards in her backpack. This request was unrelated to the reason the police were present, and the officer could not articulate any facts that would support a reasonable suspicion that Ms. Allstead had stolen credit cards in her backpack.

Because Ms. Allstead had so recently been restrained – in handcuffs – and was subject to the show of force by the police, it is not reasonable to conclude that her consent was voluntary. Because the State failed to show that Ms. Allstead’s consent was voluntary, and in light of the totality of the circumstances in this case, the trial court erred by finding that Ms. Allstead’s consent was voluntary. The motion to suppress should have been granted.

E. CONCLUSION

Ms. Allstead’s consent was involuntary. She had been released from handcuffs moments before, multiple police officers were present, and in the absence of *Miranda* warnings or information that she had the right to refuse the search, it was unreasonable to conclude she knew she could

refuse consent. Given the totality of the circumstances, the consent was involuntary, and the trial court erred by finding the search was valid based upon consent. The trial court's ruling denying the suppression motion should be reversed.

Dated this 8th day of November, 2010.

GEMBERLING & DOORIS, P.S.

A handwritten signature in black ink, appearing to read "Julia A. Dooris", with a long horizontal flourish extending to the right.

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