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Court of Appeals
Division III
State of Washington

NO. 310001-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

RODOLFO GALVAN, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00669-1

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On March 24, 2011, Washington State Patrol Trooper David Brandt stopped a vehicle with only one working headlight during the hours of darkness. (RP 6). Rodolfo Galvan, the defendant, was driving the vehicle and was the sole occupant of the vehicle. (RP 6). Trooper Brandt contacted the driver and immediately detected an odor of fresh marijuana emitting from the vehicle. (RP 7). Galvan was evasive when questioned. (RP 7). Additionally, his body language and demeanor indicated nervousness. (RP 7). When asked, Galvan stated there was no marijuana in the vehicle. (RP 7). Trooper Brandt placed Galvan under arrest. (RP 7). He placed him in handcuffs and detained him. (RP 7). Trooper Brandt read Galvan his constitutional rights from a department-issued constitutional rights card. (RP 7). The defendant indicated that he understood his constitutional rights and agreed to speak to Trooper Brandt. (RP 8). Trooper Brandt asked when he last smoked marijuana, and Galvan responded that it had been two months ago. (RP 7). However, the defendant's tongue was green and he had raised taste buds. (RP 7). Galvan smelled of burnt marijuana, in contrast to his vehicle, which had smelled of fresh marijuana. (RP 7-8). Trooper Brandt asked the defendant whether he had smoked marijuana recently. At this time the

defendant confirmed that he had smoked marijuana two hours before the stop. (RP 9).

Trooper Brandt then took Galvan into custody for possession of marijuana and searched him incident to arrest. (RP 9). Trooper Brandt found approximately \$400.00 in wadded-up cash in his front pocket. (RP 9). An additional amount of approximately \$700.00 was found in Galvan's wallet. (RP 9). Initially, the defendant claimed the money was for rent, but later he indicated he was going shopping. (RP 9).

Trooper Brandt then asked the defendant who the vehicle belonged to. (RP 10). The defendant stated that it belonged to "Jeanette Morales" and that the vehicle did not belong to him, but that he was the one who drove it. (RP 10). The defendant also told Trooper Brandt that he lost the keys to the vehicle, and it had been sitting in a hotel parking lot for two months. (RP 10). The defendant also stated that the car had been broken into and the stereo was missing. (RP 10). Trooper Brandt did not observe any evidence of forcible entry into the vehicle. (RP 11).

Trooper Brandt then asked for consent to search the vehicle. (RP 11). The defendant stated that he did not want Trooper Brandt to look "anywhere other than the places he could see." (RP 11). The defendant then refused to sign the consent-to-search form. (RP 11). From his position outside the automobile, Trooper Brandt could see a blue gun case

with a padlock on it. (RP 11). When asked, Galvan indicated that the gun case contained a lighter. (RP 11).

Trooper Brandt had Galvan's automobile impounded and taken to the State Patrol office. (RP 11). At that point, Trooper Brandt released the defendant, indicating that he would forward charges of Possession of Marijuana to the Prosecuting Attorney's Office. (RP 12). Trooper Brandt then followed the defendant's vehicle to the State Patrol Office, to maintain the chain of custody on the vehicle. (RP 12).

Once at the State Patrol office, Trooper Brandt requested a search warrant for the automobile. (RP 12). Trooper Brandt requested that he be allowed to search Galvan's vehicle, and Judge Dan Kathryn gave permission to do so. (CP 60-62). Within the Search Warrant, Trooper Brandt specifically lists "all interior compartments, any open, closed, locked or otherwise sealed containers/compartments located inside or outside of the vehicle." (CP 63). Judge Kathryn approved the warrant, and it was executed by Trooper Brandt. (CP 62; RP 13).

During the search of the vehicle, Trooper Brandt observed that the vanity caps were missing on the screws to the center console and the dashboard and the screws appeared to be loose. (RP 14). Trooper Brandt located a digital scale with white powder residue on it in the unlocked center console. (RP 13). Inside the locked glove box, which was opened

with a key, Trooper Brandt found a clear baggy that contained a white powder that later tested positive for methamphetamine, and a .22 caliber handgun that was loaded and contained ten rounds of ammunition. (CP 23; RP 14). Behind the passenger seat was a blue gun case that had a padlock on it. (CP 23-24; RP 14). Inside the gun case was a lighter and a small wooden spoon that had white powder residue on it. (RP 13-14).

The State charged the defendant with one count of Unlawful Possession of a Controlled Substance (Methamphetamine) and one count of Possession of Drug Paraphernalia. (CP 1-2).

The defendant moved to suppress the products of his arrest and the search of his person and his automobile. (CP 4). After a hearing, the court found that there were no grounds to suppress any of the items seized from the defendant. (CP 103-05).

The defendant elected to stipulate to the police reports and proceeded to a bench trial solely on the reports. (CP 76-102). The defendant was convicted of Unlawful Possession of a Controlled Substance (methamphetamine) and Possession of Drug Paraphernalia. (CP 106-117). The defendant now appeals.

I. ARGUMENT

1. THE TRIAL COURT FINDINGS ARE VERITIES ON APPEAL

RAP 10.3 in part, reads:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

RAP 10.3(g).

This is a codification of a long standing rule. “Unfortunately, the plaintiff has assigned no error to the findings of fact. They have become, therefore, the established facts of the case, and the sole question before us is whether these findings support the conclusions of law and judgment.” *Richert v. Handly*, 50 Wn.2d 356, 357, 311 P.2d 417 (1957). Here, the defendant has assigned no error to any of the trial court’s specific findings.

The requirement that an appellant set out the objected finding verbatim is subject to exception, but that exception does not apply. “But the appellate court may excuse a party's failure to assign error where the briefing makes the nature of the challenge clear and the challenged finding is argued in the text of the brief.” *Noble v. Lubrin*, 114 Wn. App. 812, 817, 60 P.3d 1224 (2003). The defendant’s argument claims to be

addressing conclusions of law. The state will thus address the defendant's arguments as such, and treat the findings of the court as verities.

2. THE WARRANTLESS SEARCH OF THE DEFENDANT WAS INCIDENT TO A LAWFUL CUSTODIAL ARREST.

Galvan argues that the search of his person was unlawful. (App. Brief at 6). The argument appears to be that Trooper Brandt never arrested the defendant, and thus the search incident to arrest was invalid. That argument is based upon a grave misunderstanding of the facts. Findings 4, 5, 6, and 7 state:

4. Trooper Brandt had Mr. Galvan exit the vehicle and smelled the odor of marijuana emitting from his person.
5. Trooper Brandt placed Mr. Galvan in handcuffs and told him he was being detained for the investigation of narcotics possession.
6. Trooper Brandt read Mr. Galvan constitutional rights from an issued rights card.
7. Trooper Brandt informed Mr. Galvan that he was under arrest

(CP 103).

The defendant correctly cites much of the case law regarding searches incident to arrest. Searches incident to arrest are a longstanding law enforcement procedure and fulfill a critical role in Fourth Amendment jurisprudence, allowing for the maintenance of officer safety and the securing of evidence so that it cannot be tampered with or destroyed. *State v. Boursaw*, 94 Wn. App. 629, 632, 976 P.2d 130 (1999); *Chimel v.*

California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969);
State v. McKenna, 91 Wn. App. 554, 560-561, 958 P.2d 1017 (1998).

The question of whether an officer has placed an individual under custodial arrest is a complicated one. “A suspect is in custody if a reasonable person in the suspect’s circumstances would believe his movements were restricted to a degree associated with ‘formal arrest.’” *State v. Gering*, 146 Wn. App. 564, 567, 192 P.3d 935 (2008). “When a suspect is handcuffed, placed in a patrol car, and told he or she is under arrest suggests custodial arrest, unless the suspect is told he or she will be free to go after the citation is issued.” *Id.* Indeed, the Court has even found that the lack of a statement to the effect of “you are under arrest” is no bar to a finding of custodial arrest. *Id.*

The defendant makes no argument that Trooper Brandt’s conduct was insufficient to constitute custodial arrest. Instead, he focuses on the rule that states if an officer does not intend to make a custodial arrest, then he cannot search a defendant incident to one. The defendant indicates that Trooper Brandt had no intention of taking the defendant into custody. (App. Brief at 9). That is directly contradicted by the Trooper’s testimony: “I placed him in custody for possession of marijuana based on my observations.” (RP 9). There is no evidence provided indicating that Trooper Brandt *did not* intend to arrest the defendant.

The defendant appears to be under the misapprehension that a custodial arrest must involve transport to a State holding facility. This is not the case. *State v. McKenna*, which the defendant relies upon extensively, makes that clear:

Although an officer may search incident to a lawful custodial arrest, he or she may not search incident to a lawful *non* custodial arrest. It is thought that the officer and arrestee will be in close proximity for only a few minutes, and the arrestee, who is about to be released anyway, will have little motivation to use a weapon or destroy evidence. The officer may pat the arrestee for weapons if he or she reasonably suspects the arrestee is armed.

State v. McKenna, 91 Wn. App at 561.

McKenna does not state that when a defendant is not taken to the jail, that any prior search incident to arrest is invalid. In *McKenna*, the defendant was never informed she was under arrest. *Id.* at 556-57. She was never placed in handcuffs. *Id.* Her freedom of movement was not arrested. *Id.* None of the signs of arrest were present. Indeed, the officer who initially contacted the defendant informed her to “contact the municipal court on her own.” *Id.* at 562. The Court’s issue with the search in *McKenna* was that there was never a custodial arrest.

The facts before the Court here are entirely different. Trooper Brandt handcuffed the defendant, told him that he was under arrest, and intended to place him in the back of his patrol car. (RP 7). Additionally,

the contact was not short. More so, the defendant appears to concede that he was in custody later in his brief, where he asserts that he did not waive his *Miranda*¹ rights. (App. Brief at 14). The defendant's *Miranda* rights only attach when he is subjected to custodial interrogation. *E.g. State v. Sargent*, 111 Wn.2d 641, 657, 762 P.2d 1127 (1988). In the end, there appears to be no real question that the defendant was in custody. The fact that the defendant was released after being subjected to a custodial arrest is of no moment. Therefore, the search of the defendant was lawful.

3. THE SEARCH WARRANT DESCRIBED THE ITEMS TO BE SEARCHED WITH SUFFICIENT PARTICULARITY.

The defendant claims that the warrant in this case was insufficiently particular to meet with the requirements of the Fourth Amendment. (App. Brief at 13). This is a misunderstanding of the particularity requirement. Officers may satisfy the particularity requirement in a number of ways. One of the ways they may do so is by stating the crime they believe that they are investigating. *State v. Askham*, 120 Wn. App. 872, 878, 86 P.3d 1224 (2004). By doing so, officers limit the type of items they may seize.

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

State v. Riley, 121 Wn.2d 22, 846 P.2d 1365 (1993), which the defendant cites, recognizes the distinction between a warrant which affirmatively states the crime to be investigated and a warrant which does not: “A search warrant that fails to specify the crime under investigation without otherwise limiting the items that may be seized violates the particularity requirement of the Fourth Amendment.” *Id.* at 27. Here, Trooper Brandt states that the items he is searching for consist of illegal drugs, based upon his reasonable belief, supported by probable cause, that the defendant was engaged in distribution and transportation of controlled substances. Trooper Brandt requested permission to seize controlled substances, items related to the business of distributing those substances for profit and items establishing dominion and control over the automobile that was seized. All of these items were connected by the necessary “nexus” to the crime under investigation, that of transportation and delivery of controlled substances. *State v. Garcia*, 140 Wn. App. 609, 620-621, 166 P.3d 848 (2007). Trooper Brandt was as particular as he could be in regards to the items he was searching for without unduly restricting himself. That is all the Constitution requires.

The Washington State Court of Appeals Division Three in *State v. Huff*, 33 Wn. App 304, 654 P.2d 1211 (1982) held that a search warrant was proper and contained sufficient particularity to search the trunk of a

car for drugs when the warrant itself described the places to be searched as follows: “[S]earch the premises ... and all property real or personal situated on said described real property, ... and to search the person(s) of *John Doe* ... and to seize ... Marijuana ... together with the conveyances, vehicles or vessels in which they are contained.” *Id.* at 306. When the police in *Huff* searched a vehicle that was on the property in question, they found 107.8 grams of marijuana in the trunk of the defendant’s vehicle. *Id.* Mr. Huff argued on appeal that the affidavit was deficient because it did not contain any information regarding the amount of marijuana being sought, its location within the residence, or how it was packaged or concealed. *Id.* at 307. Also, Mr. Huff argued that the warrant was improper because it did not name Mr. Huff, but instead allowed a search of “John Doe.” *Id.* at 308. Next, Mr. Huff argued that the search of the vehicle was not authorized by the warrant. *Id.* at 309. The Court of Appeals rejected Mr. Huff’s arguments and held that the warrant and search of the vehicle and its trunk were proper because the warrant’s language was sufficiently reliable and it described the areas to be searched with sufficient particularity. Specifically, the Court held that the warrant allowed for the search of the vehicle since the warrant stated the officers were allowed to “search the premises of aforesaid, and all the buildings and out-buildings thereon, and all property real or personal situated on

said described property. *Id.* at 309. The Court of Appeals held that the search of the vehicle was proper since an automobile is “usually considered personal property.” *Id.* at 310.

4. A SEARCH WARRANT AUTHORIZING A SEARCH OF AN AUTOMOBILE AUTHORIZES THE SEARCH OF THE ENTIRE AUTOMOBILE.

The defendant argues that even if the search warrant of the automobile was valid, it did not allow a search of the compartments within the automobile, in particular, the glove compartment where the methamphetamine was located. (App. Brief at 13). Before beginning the analysis, it is important to note under what law the argument should take place. The defendant has not completed an analysis of the six *State v. Gunwall* factors, nor cited any cases which have completed the analysis of *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) in regard to the scope of a search warrant.

It is well settled that a party raising a claim under a state constitutional provision must brief the *Gunwall* factors to the extent required by this court's jurisprudence. Where our precedent establishes that a separate and independent analysis of a state constitutional provision is warranted, further *Gunwall* analysis is unnecessary to establish that point.

Madison v. State, 161 Wn. 2d 85, 93, 163 P.3d 757 (2007).

At first blush, it appears that *State v. Monaghan*, 165 Wn. App. 782, 266 P.3d 222 (2012), a case which the defendant's brief extensively relies upon, might show the prior analysis asked for. However, that would be based on a misunderstanding of *State v. Monaghan*. The difference between the State Constitution and the Fourth Amendment cited in *Monaghan* is in how the State and Federal Constitution treat searches without a warrant. *Id.* at 787. The difference cited is that the Fourth Amendment implicitly allows warrantless, but reasonable searches, while Article 1, Section 7 does not. *Id.* As both sides admit here, there was a lawful warrant issued in this case. The issue is not the limits upon a warrantless search, an area where the jurisprudence of this Court is well established and where the differences between the protections offered by Article 1, Section 7, and the Fourth Amendment are clearly defined. Instead, the issue is the degree to which a warrant must specify what containers are to be searched, before allowing the breaching of a container. The State has found no cases performing a *Gunwall* analysis on this issue. As such, the State will proceed under the understanding that this case is governed by the Fourth Amendment jurisprudence.

The seminal cases on this issue are *Carroll v. U.S.*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), and the subsequent case *U.S. v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). The cases are

better known for establishing the so-called automobile exception to the warrant requirement. However, both cases make quite clear that any search under the automobile exception is subject to the exact same limitations of scope as a search under a warrant would be.

The scope of a warrantless search based on probable cause is no narrower-and no broader-than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize.

U.S. v. Ross, 456 U.S. at 823.

The search in *Carroll* involved removing the upholstery of the seats to find a deliberately concealed compartment containing bottles of alcohol, which were contraband during the prohibition. *Carroll v. U.S.*, 267 U.S. at 132. In *U.S. v. Ross*, the search of the vehicle consisted of opening the glove compartment to find a pistol, and opening the locked trunk to find a brown paper bag containing heroin and a red leather zippered pouch containing \$3,200.00. *U.S. v. Ross*, 456 at 801. Both searches were found to be justified by the generalized ability to search the automobile. “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *Id.* at 825.

Our State Courts, in interpreting Article 1, Section 7 and the Fourth Amendment have never deviated from this principle. In *State v.*

Campbell, 166 Wn. App. 464, 465, 272 P.3d 859 (2011), the Court of Appeals held that the officer had the right to search the defendant's purse that was left in the car after a warrant was obtained to search the vehicle. In that case, the defendant was a passenger in a car that officers developed probable cause to believe was involved in a drug transaction. *Id.* at 466. The officer told her she could not take the purse because they were applying for a search warrant for the entire contents of the car. *Id.* at 467. The trial court held that the warrant itself described the place to be searched as "the vehicle" without any reference to the purse and without any express limitations. *Id.* at 467. The Court of Appeals held that the trial court properly concluded that the officers were not required to return the purse to Ms. Campbell when she asked for it, and they could search it as well because the officers had authority to secure the areas to be searched while the warrant was being obtained and the search was lawfully performed. *Id.* at 475.

This is in keeping with the general rule of searches. Even in searches of the home of a defendant, an area where the Court has stated repeatedly that an individual's expectation of privacy is at its zenith, it is inclusive of containers and locked compartments. *U.S. v. Romero-Bustamente*, 337 F.3d 1104, 1107 (9th Cir. 2003). A search warrant for the home justifies a search of all containers within the home. *State v.*

Simonson, 91 Wn. App. 874, 886-887, 960 P.2d 955 (1998). There is no justification for granting a glove box in an automobile a greater degree of protection than a locked drawer in a defendant's home. There is also no justification for requiring greater specificity in identifying the glove box as a place to be searched.

As the Fourth Amendment is the controlling jurisprudence, it is clear that the search in this instance was appropriate. Case law has established that probable cause to search an automobile entitles an officer to search the entire automobile. The glove box is part of the automobile. It was appropriate for Trooper Brandt to search the glove box because he had requested and received a lawful warrant authorizing a search of the vehicle.

5. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT *STATE V. MONAGHAN* DID NOT LIMIT THE SCOPE OF THE SEARCH.

The defendant attempts to analogize *State v. Monaghan* to the current case. He attempts to show that Trooper Brandt exceeded the lawful authority granted to him when he opened the defendant's glove box. However, the analogy misunderstands the context of *Monaghan*. The search in *Monaghan* was performed without a warrant. The search

here was carried out under the lawful authority of a warrant based on probable cause. The significance of this difference cannot be overstated.

The first words in *Monaghan's* opinion are: "Generally, 'warrantless searches and seizures are per se unreasonable.'" *State v. Monaghan*, 165 Wn. App. at 784. In contrast: "A search warrant is entitled to a presumption of validity." *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). "Consent is among the few 'jealously and carefully drawn exceptions' to the warrant requirement...." *State v. Monaghan*, 165 Wn. App. at 784. "If the officers acted without a valid warrant, the State bears the burden of establishing a search was reasonable. If the officers had a warrant authorizing the search, the defendant bears the burden of establishing the search was unreasonable." [Citation omitted] *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002). The law treats searches under the lawful authority of a warrant very differently than searches without a warrant, such as a consent search.

Indeed, as noted above, the very basis of the opinion in *Monaghan* is a difference in how Washington Courts and Federal Courts deal with warrantless searches. The entire analysis of the case was predicated on the huge difference embodied in Article 1, Section 7 between searches without a warrant and searches with a warrant.

Furthermore, even if *Monaghan* was an appropriate analogy, *Monaghan* was an Article 1, Section 7 case. It dealt exclusively with what the Washington State Constitution stated about a certain type of warrantless search. *Monaghan*, 165 Wn. App. at 787. As indicated above, the defendant has failed to complete the required steps to make an argument based upon Article 1, Section 7. As such, they must assert any privacy rights under the Fourth Amendment, which as *Monaghan* expressly states, offers a different scheme of protection for rights. “Although similar, ‘the protections guaranteed by article I, section 7 of the State Constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.’” *Id.* at 787.

6. THE TRIAL COURT PROPERLY ADMITTED THE DEFENDANT’S STATEMENTS MADE AFTER A KNOWING AND VOLUNTARY WAIVER OF HIS RIGHTS

The State is unclear on the nature of the defendant’s arguments about his waiver. The defendant cites case law regarding the review of conclusions of law. However, their arguments are entirely based on the factual supposition that the defendant did not give a lawful waiver of his rights and that he never verbally agreed to speak with Trooper Brandt. The court explicitly found so in its ruling after listening to the hearing. (CP 104-No. 4; RP 33). In fact the defense goes so far as to cite an

affidavit the defendant authored. (App. Brief at 16). In reality, the affidavit never mentions the reading of rights whatsoever, nor does it mention the defendant's response to the reading of rights. (CP 5-6). The defendant correctly points out that Trooper Brandt's report does not state that the defendant waived his rights. (App Brief at 16). Trooper Brandt's report also does not state that the defendant did *not* waive his rights. (CP 79-80). The defendant's response to the reading of rights, if anything, is not in the report. (CP 79-80). When asked on cross-examination about this specific issue, Trooper Brandt responded that in his practice, he does not note that defendants waive their rights in official reports. (RP 19). He only notes when defendants refuse to answer questions. (RP 19).

The defendant argues that he did not waive his constitutional rights. This argument questions whether the trial court failed to give sufficient weight to both an out-of-court affidavit and testimony provided by Trooper Barandt. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn. 2d 60, 71, 794 P.2d 850 (1990).

The defendant has no legal arguments as to why the trial court was incorrect. Their arguments are all factual matters, which were placed before the trial court and given due consideration. The defendant simply

wishes the Appellate Court to look at the same facts, weigh the evidence again, and rule another way. That is not the role of the Appellate Court.

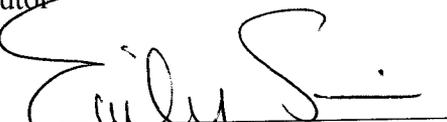
III. CONCLUSION

The defendant has failed to raise any issues which would merit remand. The trial court properly denied the defendant's suppression motion and found him guilty of the crimes of Possession of a Controlled Substance (Methamphetamine) and Possession of Drug Paraphernalia. The State requests that this Court affirm the lower court ruling

RESPECTFULLY SUBMITTED this 26th day of March 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

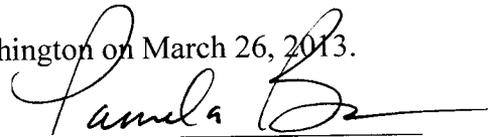
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