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Court of Appeals
Division III
State of Washington

32097-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL R. WILLIAMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting into evidence the contents of Mr. Williams's backpack.

B. ISSUES

1. An officer enlists a bystander in the search for documents needed for an accident investigation. The bystander suggests the documents may be at the scene of the accident or in a backpack belonging to an individual injured in the accident. The officer states he is unable to find the documents at the scene, expecting the bystander to search the backpack for the needed documents. The bystander hands the backpack to the officer. Is the bystander an agent of the state in the seizure of the backpack?
2. Is a backpack a traditional repository of personal belongings protected under the Fourth Amendment?
3. The mother of a person who has been injured in an accident takes possession of the individual's backpack at the scene of the accident in the person's presence. Under the Fourth Amendment and Wash. Const. art. I, sec. 7, does the person

retain a reasonable expectation of privacy in the backpack and its contents?

4. Under Wash. Const. art. I, sec. 7, does a person who has possession of another person's backpack have authority to consent to a police officer's search and seizure of the backpack in the presence of the actual owner of the backpack?
5. After acquiring an individual's backpack, in the presence of the individual but without the individual's consent, a police officer looks into a pocket of the backpack and sees apparent contraband. Is the contraband admissible at trial under the open view exception to the warrant requirement of the Fourth Amendment and Wash. Const. art. I, sec. 7?

C. STATEMENT OF THE CASE

Michael Williams was the driver of a vehicle that was involved in a rollover collision. (CP 144) When Officer Dustin Howe responded to the scene of the collision, Mr. Williams was being treated by medics. (CP 145) Officer Howe spoke with Mr. Williams and attempted to obtain his driver's license, registration and insurance information for use in preparing a report of the collision. (CP 145)

A woman who was standing by Mr. Williams identified herself as his mother, Tamatha Root. (CP 145) Officer Howe asked her if she knew where her son's driver's license, registration and insurance information were and she suggested they were on her son's person, in his vehicle, or in his backpack, which she was holding. (CP 145)

After examining the debris at the accident site, the officer told Ms. Root that he couldn't find the documents. (CP 145) According to Officer Howe, Ms. Root said the items must be in the backpack. (CP 145) The officer expected her to look in the backpack but instead she handed it to him and told him to look in it. (CP 146, 147)

Once Ms. Root handed the backpack to Officer Howe he noticed one of the pockets was unzipped and "he could see several clear plastic baggies with a blue crystalline substance that [he] believed to be methamphetamine." (CP 146)

The State charged Mr. Williams with one count of possession of methamphetamine with intent to deliver, RCW 69.50.401. (CP 1) Defense counsel moved to suppress the evidence found in the backpack, alleging the search was unlawful and Ms. Root lacked authority to consent to the search. (CP 2) At the suppression hearing, Ms. Root testified that Officer Howe asked to see the backpack and took it from her. (RP 53)

The court found Officer Howe’s testimony more credible and concluded the evidence found in the backpack was admissible:

Law enforcement did not initiate or request a search in this case. The officer was given the backpack by Ms. Root and told to look in it. That is not a violation of any constitutional rules. The evidence from the backpack is admissible at trial.

(CP 147)

D. ARGUMENT

Both the state and federal constitutions protect a citizen’s right against unreasonable searches and seizures by police. U.S. Const. amend. IV; Wash. Const. art. I, sec. 7; *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680 (2001). The Fourth Amendment protects people from unlawful government intrusion where there is a “personal and legitimate expectation of privacy in the area searched.” *State v. Jones*, 68 Wn. App. 843, 847, 845 P.2d 1358 (1993).

The state constitution provides even stronger protections. *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980).

Article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). This is because “[u]nlike in the Fourth Amendment, the word ‘reasonable’ does not appear in any form in the text of article I, section 7 of the Washington Constitution.” *State v. Morse*, 156 Wash.2d 1, 9, 123 P.3d 832 (2005). Understanding this

significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

State v. Eisfeldt, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008).

Under article I, section 7 of the Washington State Constitution, warrantless searches are unreasonable. *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citing *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). Exceptions to the warrant requirement are “jealously and carefully drawn.” *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (quoting *Hendrickson*, 129 Wn.2d at 72, 917 P.2d 563). The State bears the burden of showing that a challenged search falls within an exception. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003).

The trial court’s conclusions of law pertaining to suppression of evidence are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

1. IN GIVING THE BACKPACK TO THE OFFICER, MS. ROOT WAS ACTING AS AN AGENT OF THE STATE.

A private individual acts as an agent of the state if the actions of the private citizen were “instigated, encouraged, counseled, directed, or controlled” by the state or its officers. *State v. Agee*, 15 Wn. App. 709, 713-14, 552 P.2d 1084 (1976), *aff’d*, 89 Wn.2d 416, 573 P.2d 355 (1977).

Key considerations when determining whether state agency exists include “whether the government knew of and acquiesced in the intrusive conduct” and whether the private party “intended to assist law enforcement efforts or to further his own ends.” *State v. Clark*, 48 Wn. App. at 856, 743 P.2d 822 (1987).

The court’s findings establish that Officer Howe sought Mr. Williams’s documents for purposes of his investigation, that he solicited Ms. Root’s assistance in locating the documents and that, once he told her he could not find the documents in the accident debris, he expected her to look for them in the backpack. The officer, by instigating and encouraging a search of Mr. Williams’s backpack, obtained possession of it from an individual who failed to perform the expected search. The court’s findings demonstrate that in handing the backpack to Officer Howe Ms. Root acted with intent to assist law enforcement. The court did not find that Ms. Root had any authority to search it or relinquish it to the officer.

2. MR. WILLIAMS RETAINED A REASONABLE EXPECTATION OF PRIVACY IN THE CONTENTS OF HIS BACKPACK.

A legitimate expectation of privacy exists where an individual manifests a subjective expectation of privacy in the area searched, and

society recognizes the individual's expectation of privacy as reasonable. *California v. Ciraolo*, 476 U.S. 207, 211, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986); *State v. Kealey*, 80 Wn. App. 162, 168, 907 P.2d 319 (1995). “Traditional repositories of personal belongings such as purses, briefcases, and luggage are protected under the Fourth Amendment.” *Kealey*, 80 Wn. App. at 170 (citing *Arkansas v. Sanders*, 442 U.S. 753, 762, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)). Such “readily recognizable personal effects are protected from search to the same extent as the person to whom they belong.” *State v. Parker*, 139 Wn.2d 486, 498-99, 987 P.2d 73 (1999) (citing *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994)).

Fourth Amendment protections apply even when the individual is not holding or wearing such a personal item. *State v. Worth*, 37 Wn. App. 889, 892, 683 P.2d 622 (1984). Even a temporary relinquishment of physical possession of an object does not entail ipso facto forgoing one's expectation of privacy in the object. See *State v. Kealey*, 80 Wn. App. at 169 (defendant retained an expectation of privacy in her misplaced purse that a store clerk found and turned over to the police), *review denied*, 129 Wn.2d 1021 (1996). In inferring whether an individual retains a reasonable expectation of privacy in a personal item he has temporarily relinquished, the court considers “words spoken, acts done, and other

objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001).

When Officer Howe arrived at the scene of the accident, Mr. Williams was being treated by the medics. (CP 145) The officer determined that the woman standing nearby was Mr. Williams’s mother, Ms. Root, and that she had possession of her son’s backpack. (CP 145) These circumstances do not support an inference that Mr. Williams had intentionally relinquished his expectation of privacy in the backpack.

3. MS. ROOT LACKED AUTHORITY TO CONSENT TO THE OFFICER’S SEARCH AND SEIZURE OF THE BACKPACK.

The State bears the burden of establishing the validity of a warrantless search based upon consent. *State v. Mathe*, 102 Wn.2d 537, 540, 688 P.2d 859 (1984). The State must meet three requirements to show a warrantless but consensual search was valid: (1) the consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) the search must not exceed the scope of the consent. 102 Wn.2d at 541; *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999); *State v. Nedergard*, 51 Wn. App. 304, 308, 753 P.2d 526 (1988) (citing 3 W. LaFare, *Search and Seizure* § 8.2(m) (2d ed. 1987)).

Voluntariness is a question of fact to be considered under the totality of the circumstances with no one particular factor being dispositive. *State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123 (1975).

“In the context of a search, consent is a form of waiver.” *State v. Morse*, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). In *Morse*, The Washington Supreme Court adopted the common authority rule in search and seizure cases involving cohabitants. 156 Wn.2d at 7. A person who shares authority over spaces with others has a reduced expectation of privacy and reasonably assumes the risk that others with authority will allow outsiders into shared areas. *Id.* “Common authority under article I, section 7 [of the Washington Constitution] is grounded upon the theory that when a person, by his actions, shows that he has willingly relinquished some of his privacy, he may also have impliedly agreed to allow another person to waive his constitutional right to privacy.” *Id.* at 8. But when two individuals hold common authority, the consent of one is not binding on another who holds equal or greater control and is present at the time of the search. *Id.* at 13.

The court concluded that because the individual who physically possessed the backpack gave it to the officer and told him to look in it, no constitutional provisions were violated. The court found, however, that while Ms. Root had physical possession of the backpack it was her son’s

backpack. (CP 145) The State presented no evidence that Mr. Williams's consent was sought or given. The court made no findings as to how Ms. Root came into possession of her son's backpack, and there is no basis for inferring that he willingly relinquished control over his personal property or impliedly allowed his mother to waive his constitutional right to privacy. When the trial court fails to enter findings as to facts directly relevant to an issue before the court, a reviewing court may presume that the party having the burden of proof on the issue has failed to sustain its burden. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *see In re Welfare of A.B.*, 168 Wn.2d 908, 927, 232 P.3d 1104 (2010).

The court's findings are insufficient to support the court's implicit conclusion the seizure and search of the backpack were consensual.

4. THE CONTENTS OF THE BACKPACK ARE NOT ADMISSIBLE UNDER THE OPEN VIEW DOCTRINE.

Under the open view doctrine, contraband that is viewed when an officer is standing at a lawful vantage point is not protected. *State v. Neeley*, 113 Wn. App. 100, 109, 53 P.3d 539 (2002). In short, if an officer is lawfully present at a vantage point and detects something by using one or more of his or her senses, no search has occurred. *Id.* (quoting *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127 (2002)). Until Ms. Root

handed him the backpack, there is no evidence the officer had seen the suspected methamphetamine. He detected it only after he had unlawfully obtained the backpack without Mr. Williams's consent.

The court erred in concluding that no constitutional rules were implicated in the search and that evidence found in the backpack was admissible at trial.

E. CONCLUSION

Mr. Williams was convicted based on evidence obtained by the State in violation of his right to be free of a search and seizure conducted in violation of the Fourth Amendment and Wash. Const. art. I, sec. 7. The conviction should be reversed.

Dated this 26th day of August, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32097-9-III
)	
vs.)	CERTIFICATE
)	OF MAILING
MICHAEL R. WILLIAMS,)	
)	
Appellant.)	

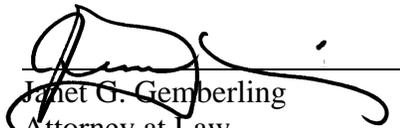
I certify under penalty of perjury under the laws of the State of Washington that on August 26, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on August 26, 2014, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on August 26, 2014.


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