

No. 32146-1-III

FILED
NOVEMBER 17, 2014
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MARSHALL L. STORY, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred by denying the motion to suppress.
2. The State's evidence was insufficient to support the convictions beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

A. Did the court err by determining the property that was searched by law enforcement without a warrant had been abandoned? (Assignment of Error 1).

B. Did the court err by upholding the search warrant that was obtained after the property had already been improperly searched? (Assignment of Error 1).

C. Was the State's evidence insufficient to support the convictions beyond a reasonable doubt? (Assignment of Error 2).

II. STATEMENT OF THE CASE

Marshall L. Story was charged by amended information with count I: first degree unlawful possession of a firearm and count II: possession of a stolen firearm. (CP 165). He moved to suppress evidence, *i.e.*, a thumb drive found in a backpack containing photos of Mr. Story holding a pistol that was initially seized and examined in a warrantless search and further examined pursuant to a search

warrant obtained after the initial search. (CP 258).

No CrR 3.6 evidentiary hearing was held on the motion to suppress. The facts were set forth in the defense attachments to the motion: "Exhibit A: Garfield County Sheriff's Office report of investigation; Exhibit B: Affidavit for Search Warrant; Exhibit C: Report by officer serving search warrant; Exhibit D: examples of photos-images taken prior to receipt of the search warrant and after receipt of the search warrant; Exhibit E: affidavit of probable cause." (CP 259). The court denied the motion to suppress because the property searched had been abandoned:

[T]he photo evidence obtained from the Sharper Image device is admissible. Suppression of evidence based on an unlawful search requires that the defendant enjoy a reasonable expectation of privacy in the item/place which was searched. In this matter, the Defendant did not have a reasonable expectation of privacy in the property retrieved by law enforcement, as his words and conduct were sufficient to hold he abandoned the property. The fact that Law Enforcement obtained a warrant at the point they found an incriminating photograph is to their credit, as no warrant was needed to search through the abandoned property. Furthermore, the initial stop of the vehicle appears to have been proper and sufficient information was included in the affidavit for the search warrant and therefore the search warrant is upheld. (CP 220).

The pertinent facts regarding abandonment came from Deputy Calvin Danserau's affidavit for search warrant:

. . . I had Marshall exit the vehicle and told him he could not drive the vehicle and to get all his personal property out of the vehicle. Marshall stated "the only thing in the vehicle that belongs to me is the box of coloring pens and the coloring book sitting next to the brief case." I noticed a black brief case sitting on the back passenger seat behind where Marshall was sitting. I asked Marshall if the brief case was his and he stated he did not know anything about the brief case. [The driver] was asked if the brief case belongs to her and [she] stated "I don't know anything about the brief case. I again asked Marshall about the brief case and again Marshall stated "the brief case is not mine." I asked Marshall if he wanted the coloring book and the coloring pens. I asked both Marshall and [the driver] if they have anything in the trunk they would like to get out. Both Marshall and [the driver] stated "no". (CP 226-27).

The court further denied suppression of photos obtained pursuant to the search warrant. The report by the officer serving the warrant describes what was found:

On February 14, 2013, I executed the search warrant on the black Sharper Image devise (thumb drive). I plugged the Sharper Image devise (thumb drive/camera) into a computer and three file folders popped up. I opened the "Big Marsh's Photos" and three hundred and fifty three photos opened. A majority of photos are of Marshall Story (they being "self taken"). I viewed numerous photos of Marshall Story holding a Walther P22 firearm, which appears

to be the same firearm recovered from the trunk of the 2013 Chevy Impala. (CP 268).

The case proceeded to jury trial. Viewed in a light most favorable to the prosecution as it must be, much of the State's evidence was summarized in the affidavit of probable cause of Deputy Danserau:

On February 11th 2013 and at approximately 2357 hrs Garfield County Deputy Delp had a traffic stop on a white 2013 Chevy Impala . . . The driver Tracy Lynne Alires DOB 12-08-1964 came back DWLS 3rd also a convicted felon. The male passenger Marshall Lawrence Story DOB 5-25-1961 was also DWLS 3rd and a convicted felon. The driver Tracy was arrested and transported to the Garfield County jail.

I arrived at approximately 0020 hrs to assist Deputy Delp. I had Marshall exit the vehicle and told him he could not drive the vehicle and to get all his personal property out of the vehicle. Marshall stated "the only thing in the vehicle that belongs to me is the box of coloring pens and the coloring books sitting next to the brief case." I noticed a black brief case sitting on the back passenger seat behind where Marshall was sitting. I asked Marshall if the brief case was his and he stated he did not know anything about the brief case. Tracy was asked if the brief case belongs to her and Tracy stated "I don't know anything about the brief case." I again asked Marshall about the brief case and again Marshall stated "the brief case is not mine." I asked Marshall if he wanted the coloring book and the coloring pens. I asked both Marshall and Tracy if they have anything in the trunk they would like to get out. Both Marshall and Tracy stated "no".

During the investigation it was determined that the White 2013 Impala was a rental. We found the vehicle to be rented to Marshall Story the passenger. Efforts were made to contact the rental company. On February 12, 2013 the rental company Avis Budget Group was contacted. Arrangements were made to have the vehicle picked up. Avis Budget sent Agent Steve Kelly and his wife to recover the vehicle. Sheriff Keller, Undersheriff Hyer and I met agent Kelly at the vehicle. Agent Kelly stated that he did not [want] to be responsible for the property left in the vehicle. Agent Kelly was told that he could take the property out of the vehicle and set it on the side of the road. While agent Kelly and his wife were removing the property from the vehicle, Steve's wife went to the trunk of the vehicle and found a Black leather backpack, tire iron, black Mag flashlight and a double-edge sword. The spare tire was removed and a Black Walther P22 was found under the spare tire. I took pictures of the hand gun and removed it to be secured in my patrol vehicle. Once all the property was removed from the vehicle, the property was transported to the Sheriff's Office. Sheriff Keller transported the Walther P22 hand gun to the Sheriff's Office to run the serial number, but was unable to run the serial number because it has been ground off.

I was looking through the black leather backpack to determine who the owner may be. Inside the backpack I found the Sharper Image device (thumb drive), I plugged it into a computer and viewed pictures stored on the device. I found two family pictures with Marshall in them and also by himself. I saw a picture of Marshall's Idaho state identification card and also a picture of Michael Lawrence Provost Washington state Driver's License, front and back. The next picture I viewed was a picture of the Walther P22 hand gun and could see the serial number

ground off. At this point I did not view any further.

On February 12th 2013 Undersheriff Hyer, Deputy Delp and I took Tracy to the booking room to interview her about the property in the vehicle. Deputy Delp read Tracy her Miranda rights from the front of his department Miranda card, Tracy stated "yes, I understand my Miranda rights", and signed the Miranda card. Tracy was asked what she knew about the property that was left in the vehicle. Tracy stated she knew nothing about the property, all she had in the vehicle was her purse. Tracy took her purse with her when she was arrested. Tracy stated that her brother Chase McCubbins asked her to do him a favor. Tracy stated that her brother stated that he needed her to pick up Marshall in Yakima Washington at the Gray Hound Bus Stop located on Yakima Ave. Tracy thought this would be a good opportunity for her to see her grandkids, so she did it. Tracy was asked how her brother knows Marshall. Tracy stated that they were in prison together and her brother said he owes Marshall a favor. . . Tracy was asked if she knew anything about the gun that was found under the spare tire in the trunk. Tracy stated she knew nothing about the gun. . . (CP 270-71)

As it turned out, the evidence at trial was that Ms. Aires and Mr. Story went to the ARCO station in Yakima, not the Greyhound bus station. (12/13/13 RP 338). He did not drive the car at any time from Clarkston to Yakima and back when they got stopped in Garfield County. (*Id.* at 337, 340). She had not met Mr. Story before that day. (*Id.* at 335). Ms. Aires also acknowledged her story at trial was not the same one she gave police. (*Id.* at 338).

She said what really happened was Mr. Story drove to her house in Clarkston and she drove to Yakima. (*Id.* at 343).

Mr. Story testified in his own behalf. He knew Mr. McCubbins from being in prison with him in 2011. (12/13/13 RP 346). On February 11, 2013, Mr. Story was at his home in Rathdrum, Idaho, when a friend from Athol drove him to Yakima to meet someone, who was getting out of prison. (*Id.* at 346). That person did not show up and Mr. Story was stranded in Yakima at the ARCO station, so he called Mr. McCubbins to ask for a ride. (*Id.* at 347). He said he was sending his sister, who would be driving a white Chevy, to pick him up. (*Id.*). When Ms. Alires arrived, they spent about 45 minutes at the station where he got something to eat and they got gas. (*Id.* at 348). Mr. Story had a briefcase and put it on the back seat. (*Id.* 349). They started back. (*Id.* at 349).

Ms. Alires woke Mr. Story up and told him they were getting pulled over. (12/13/13/ RP 349). He said she had gone through his brief case while he was sleeping. (*Id.* at 350). Mr. Story now said the brief case was his. (*Id.*). He did not know a gun was in the trunk of the car. (*Id.* at 353). The gun was Mr. McCubbins' and Mr.

Story had first seen it in Rathdrum, Idaho. Mr. McCubbins was visiting him there and Mr. Story, a little tipsy, had him take pictures for Facebook of his holding the gun. (*Id.* at 353-54). Mr. Story did not think holding the gun was a violation since he was off parole. (*Id.* at 355). Mr. McCubbins put the pictures on Mr. Story's laptop and then put them on a thumb drive. (*Id.* at 354). Mr. McCubbins left Rathdrum with the Walther P22. (*Id.* at 355).

Although Mr. Story purportedly signed the car rental agreement and rented the car, he said he had never rented a car in his life, never had a Washington driver's license in his life, and never had a debit or credit card in his life. (12/13/13 RP 359-62). The rental agent involved was Mr. McCubbins, who did not advise Mr. Story he was going to rent a car in his name. (*Id.* at 362). Mr. Story denied signing the rental agreement. (*Id.*). As for the gun, Mr. McCubbins told him the gun was not stolen. (*Id.* at 366). A Garmin GPS found in the white Chevy was once Mr. Story's, but he gave it to Mr. McCubbins. (*Id.*). Mr. Story knew nothing about the .22 shells, the Sharper Image device, swords, a mag flashlight, a punch, a leatherman, and a lighter. (*Id.* at 368). Nothing in the trunk was his except pictures, but the hats on the backseat and

CDs in a visor holder were his. (*Id.*). Neither the backpack in the trunk nor the thumb drive was his. (*Id.* at 369). He said Mr. McCubbins had access to the information in his laptop. (*Id.* at 371).

The jury returned guilty verdicts to first degree unlawful possession of a firearm and possession of a stolen firearm. (12/13/13 RP 453-54; CP 54-55). The court sentenced Mr. Story to statutorily-mandated consecutive sentences of 92 months for first degree unlawful possession of a firearm and 72 months for possession of a stolen firearm, resulting in total confinement of 164 months. (CP 6). This appeal follows.

III. ARGUMENT

A. The court erred by determining the property searched by law enforcement without a warrant had been abandoned.

Mr. Story told Deputy Danserau the only things belonging to him in the vehicle were the coloring pens and coloring books next to the briefcase in the back seat. (CP 226). The briefcase was not his and he had nothing in the trunk he would like to get out. (CP 226-27). That is the extent of the facts from which the court found the property had been abandoned.

A criminal defendant has automatic standing to challenge

the validity of a search or seizure under Wash. Const. art. 1, § 7 if (1) possession of contraband is an essential element of the charge and (2) the defendant was in possession of the contraband at the time of the contested search or seizure. *State v. Evans*, 159 Wn.2d 402, 406-07, 150 P.3d 105 (2007). This is so “even though he or she could not technically have a privacy interest in such property.” *State v. Simpson*, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980). Mr. Story meets both parts of the automatic standing test because (1) in both charges against him, possession was an essential element of each offense and (2) he was in possession of the contraband at the time of the contested search or seizure.

There is no dispute that the search of the backpack in the trunk and the seizure of the thumb drive were without a warrant. (CP 270-71). Absent an exception to the warrant requirement, a warrantless search is impermissible under Wash. Const. art. 1, § 7 and the Fourth Amendment. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The exceptions are jealously and narrowly drawn and the State has the burden of proving the presence of one. *Id.* at 717. Evidence seized during an illegal search is suppressed under the exclusionary rule. *Id.* at 716-17. Furthermore, evidence

derived from the illegal search is also subject to suppression under the fruit of the poisonous tree doctrine. See *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963)).

An exception to the warrant requirement is for voluntarily abandoned property. *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001). The *Reynolds* court stated:

Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article 1, § 7 of our state constitution.

The issue is whether Mr. Story voluntarily abandoned the backpack and thumb drive found in it during Deputy Danserau's warrantless search.

A defendant's privacy interest in property may be abandoned voluntarily or involuntarily. *Evans*, 159 Wn.2d at 408. Involuntary abandonment occurs when property was abandoned as a result of illegal police behavior. See *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004). But Mr. Story did not involuntarily abandon the property. It must thus be determined whether Mr. Story voluntarily abandoned the backpack and thumb drive.

The *Evans* court drew a road map on voluntary abandonment:

Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. . . . "Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered." . . . The issue is not abandonment in the strict property right sense, but, rather, "whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid."

Mr. Story must show a reasonable expectation of privacy in the backpack and thumb drive and that he did not voluntarily abandon them.

To establish he had a reasonable expectation of privacy in the contents of the backpack, he must show (1) an actual (subjective) expectation of privacy by seeking to preserve something as private and (2) that society recognizes that expectation as reasonable. *Evans*, 159 Wn.2d at 409. Mr. Story meets both requirements. First, the backpack was in the car's trunk and he did not consent to its search. Second, society recognizes a general expectation of privacy in briefcases, purses, luggage, backpacks, and the like. *State v. Kealey*, 80 Wn. App. 162, 170,

907 P.2d 319 (1995).

The *Evans* court noted the status of the area searched is critical in determining whether a privacy interest has been abandoned. 159 Wn.2d at 409. The reason is courts ordinarily do not find abandonment if the defendant has a privacy interest in the searched area. Mr. Story certainly had a privacy interest in the trunk of the car. Indeed, it is well established a warrant is required to search a locked trunk. *Gaines*, 154 Wn.2d at 717. Accordingly, he had a privacy interest in the searched area.

Although Mr. Story disclaimed ownership, the denial of ownership by itself does not amount to abandonment. *Evans*, 159 Wn.2d at 412. The circumstances surrounding the disclaimer of ownership dictate whether a defendant has abandoned his property. *Id.* at 412-13. Mr. Story had an expectation of privacy in the searched area, *i.e.*, the car's trunk; the backpack was an item recognized by society as private; and he did not consent to any search or seizure. There were no acts by Mr. Story showing abandonment. And his denial of ownership, by itself, was insufficient to show any act or intent of abandonment under these circumstances. *Evans*, 159 Wn.2d at 413. The court erred by

finding abandonment.

The warrantless search of the backpack and thumb drive was illegal. *Evans*, 159 Wn.2d at 413. Mr. Story's motion to suppress should have been granted. Moreover, the Walther P22 found in the trunk was derived from the illegal search and thus fruit of the poisonous tree that must be suppressed as well. *O'Bremski*, 70 Wn.2d at 428.

B. The court erred by upholding the search warrant that was obtained after the property had already been illegally searched.

Deputy Dansereau acknowledged he conducted a warrantless search of the backpack, seized the thumb drive, and plugged it into a computer where he saw a picture of Mr. Story's ID card along with photos where he was holding a gun looking like the Walther P22. (CP 270-71). He stopped at that point and later obtained a search warrant based on what he had seen off the thumb drive. (CP 227, 268).

The illegally viewed evidence prompted the search warrant, which cannot be upheld because evidence obtained in violation of the privacy protections of the Fourth Amendment and Wash. Const. art. 1, § 7 must be excluded. *State v. Afana*, 169 Wn.2d 169, 179-

80, 233 P.3d 879 (2010). Washington's exclusionary rule is "nearly categorical." *Id.* at 180. A recognized exception, however, is the independent source rule, under which a search warrant obtained with unlawfully seized evidence may still be valid if the information that remains after excluding the improper information must be genuinely independent of the illegal search. *State v. Ruem*, 179 Wn.2d 195, 209, 313 P.3d 1156 (2013). There is no information independent of the illegal search and Deputy Danserau's affidavit for search warrant acknowledges as much. (CP 228). The improper search warrant based on illegally seized evidence cannot be saved under the independent source doctrine. *See Ruem*, 179 Wn.2d at 210. The court erred by upholding the warrant.

C. The State's evidence was insufficient to support the convictions beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from

it. *State v. Drum*, 168 Wn.2d 23, 25, 225 P.3d 237 (2010).

Because the gun was seized in an illegal warrantless search and the later-obtained search warrant based on that initial search cannot be upheld, the gun must be suppressed. *O'Bremski*, 70 Wn.2d at 428. Without the gun, the State cannot show possession, an essential element of both first degree unlawful possession of a firearm and possession of a stolen firearm. (CP 71, 72, 74, 75). The convictions cannot stand and the charges must be dismissed.

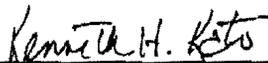
As for the possession of a stolen firearm charge, the State failed to show Mr. Story knew the Walther P22 was stolen. He testified Mr. McCubbins told him his gun was not stolen. The State produced no evidence to the contrary. Questions of credibility are determined by the trier of fact, but the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Even when viewed in a light most favorable to the State, there is no evidence, or reasonable inference from it, that Mr. Story knew, or should have known, the Walther P22 was stolen. The State failed to prove an essential element of the crime beyond a reasonable doubt so the conviction for possession of a stolen firearm must be reversed and the charge

dismissed on this ground as well. *Green, supra.*

IV. CONCLUSION

Mr. Story respectfully asks this court to reverse his convictions and dismiss the charges.

DATED this 17th day of November, 2014.



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CERTIFICATE OF SERVICE

I certify that on November 17, 2014, I served the brief of appellant by first class mail, postage prepaid, on Marshall L. Story, # 836763, 191 Constantine Way, Aberdeen, WA 98520; and by email, as agreed by counsel, on Matt Newberg at mnewberg@co.garfield.wa.us.

