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Court of Appeals
Division III
State of Washington

No. 32146-1-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

MARSHALL L. STORY, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

- a. Was the trial court justified in determining the backpack, and thumb-drive contained therein, had been abandoned?
- b. Was the Walther P22 (firearm) obtained by a legal search?
- c. Was the Search Warrant properly upheld?
- d. Was the State's evidence sufficient to support the convictions?

II. STATEMENT OF THE CASE

On February 11, 2013 just before midnight, Garfield County Deputy Sheriff Delp made a traffic stop on a white 2013 Chevy Impala. (CP 262). During the traffic stop the Deputy learned that the driver, Tracy Aires, was suspended in the third degree. (*Id.*) The only passenger, Marshall Story, was also determined to have a suspended license, therefore the deputy could not turn the vehicle over to the passenger. (CP 262, 264, 270, VRP 218). While “running” Story, the Deputy also learned that he was a felon. (CP 264, 270). After receiving a return on the vehicle registration, the deputies learned the car was a rental vehicle owned by Avis Budget Group. (CP 265, 270).

Garfield County Deputy Sheriff Dansereau arrived to assist with the stop. (CP 264, 270). Dansereau instructed Marshall Story to retrieve his belongings from the vehicle. (*Id.*) Story responded with “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.” (*Id.*) Deputy Dansereau then asked Story if the briefcase belonged to him, to which Story answered he did not know anything about the briefcase. (*Id.*) The driver, Aires, was asked about the briefcase and she told the deputies that she too did not know anything about the briefcase. (*Id.*) The deputy again asked Story

about the briefcase, and he once more replied “the briefcase is not mine.” (CP 264, 270). (At trial, the Defendant testified that the briefcase was his and that he had placed it in the vehicle (VRP 348-349)). The deputy asked both Story and the driver if they had anything in the trunk that they wanted to get out, and both answered “no.” (CP 265, 270). (At trial, the Defendant testified he did not have any belongings in the trunk of the vehicle and the backpack located therein was not his. (VRP 368-369)).

Alires, the driver, was arrested and transported to the Garfield County jail. (CP 262, 264, 270). Alires took her purse with her claiming it was the only property she had in the vehicle. (CP 265, 271). The keys to the vehicle were logged in as her property. (CP 262). Story, along with the items he claimed from the vehicle, was offered a ride to the sheriff’s office so that he could attempt to contact a friend for a ride. (CP 262).

Because the vehicle was a rental car, the deputies contacted Avis Budget to retrieve their car. (CP 265, 270). Agent Steve Kelly and his wife arrived the next day to recover the vehicle. (*Id.*) Upon their arrival, the rental company agents explained that they did not wish to be responsible for any property left in the vehicle. (*Id.*) The Deputies responded that the rental car agents could remove any property they wished and they could leave it on the side of the

road. (CP 265, 270).

The rental company representatives went through the car and removed a number of items. (*Id.*) From the passenger compartment a briefcase, two .22 caliber bullets, CD's, GPS and miscellaneous other items were removed. (VRP 317, 221-231, 234, 236-237). From the trunk, the representatives removed a black leather backpack, tire iron, black Mag flashlight and a double edged sword. (CP 265, 270). From under the spare tire a black Walther P22 (handgun) was removed. (CP 265, 270).

The property was disclaimed and left by the rental agents, and was then recovered by the deputies to be transported to the Sheriff's Office. (CP 265-271). The deputies noted that the firearm's serial number appeared to be ground off, and they could not search for its owner via a trace of that serial number. (*Id.*) In furtherance of their attempt to identify the owner(s) of the items recovered, Deputy Dansereau looked in the backpack and found a Sharper Image device (thumb drive). (*Id.*) The Deputy then plugged the device into a computer and noted a number of pictures were on the device. (*Id.*) The Deputy noted two family pictures that included Marshall Story as well as picture(s) of Story by himself. (*Id.*) The Deputy then noted a picture of Marshall Story's Idaho State Identification card followed by a picture of

Michael Lawrence Provost's Washington State driver's license. (CP 265, 271). The next picture viewed by the Deputy was a picture of the Walther P22 handgun with the serial number ground off. (*Id.*) At this point the Deputy ceased viewing any further pictures. (*Id.*)

With the above information, Deputy Dansereau applied for and received a warrant to search the memory device for evidence of the crime of unlawful possession of a firearm. (CP 263-267, 272). Pursuant to the search warrant, the Deputy located a number of photographs of the recovered handgun, as well as pictures of Marshall Story possessing/handling the handgun. (CP 272).

On February 15, 2013, the State charged Mr. Story with Unlawful Possession of a Firearm (CP 305-306) and later amended the Information to include the additional charge of Possession of a Stolen Firearm (CP 165-166).

The Defense moved to suppress the evidence of the photographs obtained prior to, and after the search warrant, and submitted a number of police reports with pictures as the factual basis of the case. (CP 258-272) The trial court reviewed each party's brief; the exhibits submitted by the defense; as well as argument of the parties; and denied the motion to suppress evidence. (CP 220-221). There were no contested facts at the

hearing. The court found that 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. (CP 220). The court noted further, that the initial stop of the vehicle was proper and sufficient information was included in the affidavit for the search warrant to uphold the search warrant. (*Id.*)

A Jury Trial was held on December 12-13, 2013. (VRP 94-460 generally). Deputy Delp; Deputy Dansereau; Deputy Krouse; the rental car agent, Steve Kelly; the true owner of the firearm, Tina Martinez; and the driver, Tracy Aires; all testified on behalf of the State. (*Id.*) Thirty-five exhibits were introduced into evidence including: the backpack and its contents; the image device; photos which were printed from the image device; the GPS unit; a downloaded report from the GPS unit including the GPS coordinates of that unit; the .22 caliber gun; two .22 caliber bullets; CD's; the briefcase and its contents; and more. (CP 57-58, VRP generally) The Defendant's wife and the Defendant provided testimony on his behalf.(VRP 345-414).

The jury convicted the Defendant on each charge. (CP 54-54, VRP 452-456).

III. ARGUMENT

A. The Trial Court Properly Denied Defendant's Motion to Suppress Evidence Because the Property at Issue Was Abandoned.

Prior to trial, the Defendant moved to suppress all photo evidence obtained by the search of the electronic image device which was found in a backpack, which had been removed from the trunk of the subject vehicle. The Defendant challenges the trial court's refusal to suppress the images located on the image device, arguing that his words alone were not sufficient to find that he had voluntarily abandoned the property. The Defendant does not argue that he involuntarily abandoned the property. Specifically, defense argues abandonment does not occur when the property is located in an area that retains privacy protections, even if the individual denies ownership of the property. *State v. Evans*, 159 Wn. 2d 402, 150 P.3d 105 (2007).

The Court should note that two searches will be reviewed: first, the search of the trunk of the rental car; and second, the search of the backpack and image device. This court will conduct a de novo review of conclusions of law set forth in a suppression order. *State v. Duncan*, 146 Wn. 2d 166, 171, 43 P.3d 513 (2002).

It is clear that the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution both protect an individual's right to privacy from governmental trespass. See, e.g., *State v. Rankin*, 151 Wn. 2d 689, 694–95, 92 P.3d 202 (2004). The Washington Constitution affords greater protection than the Fourth Amendment by requiring a warrant before any search, whereas the Fourth Amendment only protects against unreasonable searches by the State. *Id.* However, the Fourth Amendment and article I, section 7 apply only to searches by state actors, and not those by private individuals. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *Store v. Carter*, 151 Wn. 2d 118, 124, 85 P.3d 887 (2004). The protections afforded by the Fourth Amendment and article I, section 7 can apply to searches by private individuals if they are acting as government agents. *State v. Clark*, 48 Wn.App. 850, 855, 743 P.2d 822 (1987). The burden to establish government involvement in a private search rests on the defendant. *Id.* at 856. The mere fact that there are contacts between the private person and police does not make that person an agent. *Id.*

In the case at hand, the driver of the motor vehicle had been arrested for Driving While License Suspended. (CP 262, 264, 270).

The Defendant (the passenger) was then asked if he had a license to determine if he could take the vehicle. (*Id.*) As he did not have a valid license he was told that he could not drive the vehicle and to get his personal belongings. (*Id.*) The Defendant then stated “*the only thing* in the vehicle that belongs to me is the box of coloring pens and the coloring book setting next to the briefcase.” (CP at 264, 270, emphasis mine). Seeing the briefcase, the Deputy asked if it was the Defendant's. (*Id.*) The Defendant stated he did not know anything about the briefcase. (*Id.*) The Deputy then asked the driver if the briefcase was hers, and she replied that she did not know anything about the briefcase. (*Id.*) The Deputy again asked the Defendant about the briefcase and the Defendant stated “the briefcase is not mine.” (CP at 264, 270) The Deputy then asked both the driver and the passenger if they had anything in the trunk they wanted and each stated “no.” (CP at 264-265, 270). The vehicle was secured at the scene; the driver was transported and booked into jail at the Garfield County Jail; and the Defendant was provided a ride to the Garfield County Sheriff's Office to contact a friend for a ride. (CP at 262, 265, 270).

Because the vehicle was a rental car, the rental company was contacted to retrieve the vehicle. (CP at 265, 270). Agents for the rental company arrived to recover the car. (*Id.*) The agents explained

they did not want to be responsible for the property left in the vehicle, so the deputies informed them that they (the agents) could simply set any disclaimed items on the side of the road. (CP at 265, 270). The rental car agents then removed property from the passenger compartment and trunk area of the vehicle. (*Id.*) After the rental car agents removed the property from the vehicle, it was set on the side of the roadway. (*Id.*) The deputies then gathered the unclaimed items and took them to the Sheriff's Office. (CP at 265, 271).

Based on these facts, it is clear that no government actor entered, searched or seized any items from the vehicle. And, because the Fourth Amendment and article I, section 7 apply only to searches by state actors, and not those by private individuals, the search of the vehicle was not unlawful.

Having determined that the State did not unconstitutionally search the vehicle, we now look at the basis for law enforcement's taking of the disclaimed property from the side of the roadway. RCW 63.21.060 imposes on the police the obligation to attempt to notify the owner of the lost property. *See also* Wayne R. LaFare, 3 *Search and Seizure* § 5.5(d) (2014).

“In addition to their crime prevention and crime detection responsibilities, police are by design or default called upon to render a great variety of other public services. In carrying out

these varied responsibilities, the police sometimes conduct searches for some purpose other than that of finding evidence of criminal activity. Generally, it may be said that the courts have upheld such searches when made reasonably and in good faith, even though evidence of crime is inadvertently discovered as a consequence. This is true as to searches of the person, premises, and vehicles, and also as to searches into personal effects.” *Id.* (footnotes omitted).

“[C]ourts recognize a police obligation to undertake to find the owner of property they find or which a finder turns over to them, and on this basis an examination of contents is permissible...” *Id.* (footnotes omitted).

Searches of misplaced property for identification are an exception to the Fourth Amendment requirement of a search warrant. *State v. Kealey*, 80 Wn.App. 162, 907 P.2d 319 (Div. 2 1996). Additionally, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution. *State v. Reynolds*, 144 Wn. 2d 282, at 287, 27 P.3d 200 (2001).

Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. *Evans*, 159 Wn.2d at 408, *citing* 1 Wayne R. LaFave, *Search and Seizure* § 2.6(b), at 574 (3d ed.1996). “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.” *State v. Dugas*, 109 Wn.App. 592, 595, 36 P.3d 577 (2001). The Defendant

must show a reasonable expectation of privacy in the backpack and that he did not voluntarily abandon it. *Evans*, 159 Wn.2d at 409.

To establish that he had a reasonable expectation of privacy in the contents of the backpack, the Defendant must satisfy a two fold test: (1) Did he “exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?” and (2) “[d]oes society recognize that expectation as reasonable?” *Kealey*, 80 Wn.App. at 168. The Defendant does not satisfy either part of this test.

In *State v. Reynolds*, law enforcement found a coat underneath the passenger side of a stopped (detained) motor vehicle. When the officer asked the passenger about the coat, he denied ownership. *Reynolds*, 144 Wn.2d at 285. The officer then searched the coat finding controlled substances and the passenger was ultimately charged with possession of that controlled substance. *Id.* The court found that the disclaimer of ownership as well as the fact that the coat was not located in place where one would have an expectation of privacy, the officer had the right to search the item as “found property.” *Id.*

In *State v. Kealey*, a patron left a purse behind at a store. A store clerk found the purse and later looked in the purse finding narcotics. Law enforcement was advised of the purse and they too looked in the purse for identification of the owner. The Court upheld

the search of the purse both by the store and law enforcement stating: “[t]he police had a right, if not an obligation, to search the purse for identification for the purpose of returning the purse.” *Kealey*, 80 Wn.App. at 174. The Court referred to RCW 63.21.060 which imposes on the police the obligation to attempt to notify the owner of the lost property. “We hold that searching lost or mislaid property for identification is an exception that makes reasonable a warrantless search. The coexistence of investigatory and administrative motives does not invalidate the lawful search for identification. Thus, the police officers did not lose their right to search the purse for identification when they learned the purse contained drugs. Our holding is supported by the fact that Kealey's reasonable expectation of privacy in her misplaced purse is diminished to the extent that a finder would search for identification.” *Kealey*, 80 Wn.App. at 174-175.

The court will note that the current case is a unique combination of *Reynolds* and *Kealey*. The defendant in *Reynolds* and Mr. Story, both, specifically disclaimed the property. The *Reynolds* court noted that a coat on the side of the road was not in a place where one would have an expectation of privacy. The State argues that the items found in our case, were also not located in a place where the defendant would have an expectation of privacy. First, the Defendant knew that the vehicle was a rental car and that the rental

company would be recovering the vehicle for return to an unknown location to be placed back into service. The Defendant chose to walk away from the belongings that remained in the car, with no protest. After leaving the scene, the items were then disclaimed by the rental car agents and left on the side of the road. As stated in *Reynolds*, a place where one would not have an expectation of privacy. The fact that the Defendant specifically disclaimed the property and then left the items behind, is inapposite to a subjective expectation of privacy.

This court can also note the similarities between the case at hand and that of *Kealey*. The court in *Kealey* found that the owner of the purse did retain her expectation of privacy in the purse because she did not disclaim ownership, but merely misplaced the property. However, the *Kealey* court found that although the item was only temporarily left behind, the owner would have a diminished expectation of privacy. Like *Kealey*, the Defendant could argue that he simply left the backpack behind, or that the rental agents misplaced his property. Even so, the Defendant will still have a diminished expectation of privacy. Unlike *Kealey*, the Defendant specifically disclaimed ownership of all items in the vehicle other than his pens and coloring books, further reducing his expectation of privacy. The burden is on the defendant to establish a subjective expectation of privacy. *Evans*, 159Wn.2d at 409. Based on these

facts, he has failed to meet such a burden.

Here, the Defendant abandoned the property and the rental company specifically requested to disclaim all items in the vehicle. The Sheriff's Office had an obligation to attempt to locate the owner(s) of the property. The Sheriff's Office did then attempt to locate the owner of the property by looking through the backpack and then through an electronic device. Once the deputy recognized there was potentially inculpatory evidence (picture of the defendant along with a picture of the recovered firearm) contained therein, the deputy ceased viewing the pictures further and sought a warrant.

Law enforcement's search of the backpack was legal and there is no basis to suppress the evidence of the photographs.

B. The Walther P22 (firearm) was obtained by a search performed by a non-government actor.

As stated previously, the Fourth Amendment and article I, section 7, apply only to searches by state actors, and not those by private individuals. *Burdeau v. McDowell*, 256 U.S. at 475, and *Store v. Carter*, 151 Wn.2d at 124. The protections afforded by the Fourth Amendment and article I, section 7 can apply to searches by private individuals if they are acting as government agents. *Clark*, 48

Wn.App. at 855. However, the burden to establish government involvement in a private search rests on the defendant. *Id.* at 856. Furthermore, the mere fact that there are contacts between the private person and police does not make that person an agent. *Id.*

The Walther P22 pistol was located by the rental agents in the trunk of the rental car. The pistol was disclaimed by those agents along with all other items that remained in the vehicle. The pistol was taken to the Sheriff's Office along with all of the other property in an attempt to locate its true owner.

For all the reasons stated in the previous section, the Walther P22 was not derived from an illegal search by law enforcement and there is no basis to suppress.

C. The Search Warrant was properly upheld.

The Defendant argues that the Search Warrant was invalid because it was based on an illegal initial search of the image device. The preceding sections of this brief have explained that the deputy's actions were justified. Because the initial search of the image device was not illegal, the court appropriately considered the deputy's observations in upholding the search warrant.

D. The State introduced sufficient evidence to support the convictions.

When reviewing a claim of insufficient evidence, the court must view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn. 2d 311, 336, 150 P.3d 59 (2006). The court will draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Hosier*, 157 Wn. 2d 1, 8, 133 P.3d 936 (2006). The Court does not consider circumstantial evidence to be any less reliable than direct evidence. *State v. Delmarter*, 94 Wn. 2d 634, 638, 618 P.2d 99 (1980). The court must additionally defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn. 2d 821, 874–75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In order to convict the Defendant of Count 1, Unlawful Possession of a Firearm First Degree, the State was required to prove that the defendant knowingly owned or had a firearm in his possession or control after having previously been convicted of a

serious offense. RCW 9A.56.310(1)(a). The only element the Defendant has challenged as to this charge is the introduction of the firearm. Defendant argues that the gun was illegally obtained by law enforcement and therefore cannot be considered by the court. Because the firearm was not illegally obtained (as argued previously) it was not required to be suppressed, consequently there was no error in its introduction to the jury.

In order to convict the Defendant of Count 2, Possession of a Stolen Firearm, the State was required to prove that the Defendant knowingly possessed, carried, or was in control of a stolen firearm. RCW 9A.56.310. The definition of “possessing stolen property” under RCW 9A.56.140 applies to the crime of possessing a stolen firearm. RCW 9A.56.310(4). Under RCW 9A.56.140(1), “[p]ossessing stolen property” means “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” The Defendant specifically challenges the State’s evidence that the Defendant “knew” the firearm was stolen.

Viewing the evidence in the light most favorable to the jury's verdict, there is sufficient evidence to uphold the Defendant's conviction for possession of a stolen firearm. The State did produce

sufficient evidence that the Defendant “knew” the firearm was stolen. A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude that the fact exists. RCW 9A.08.010(1)(b). Circumstantial evidence and direct evidence are equally reliable to establish knowledge. *Delmarter*, 94 Wn. 2d at 638. Knowledge may not be presumed because a reasonable person would have knowledge under similar circumstances, however it may be inferred. *State v. Shipp*, 93 Wn. 2d 510, 516, 610 P.2d 1322 (1980).

Where possession is coupled with “slight corroborative evidence of other inculpatory circumstances” tending to show the defendant's guilt, a conviction will be justified. *State v. Pisauro*, 14 Wn.App. 217, 220, 540 P.2d 447 (1975).

In this case, the most damning evidence that the Defendant knew or should have known the firearm was stolen, was the fact that the serial number of the gun had been obscured. According to the deputies, the serial number could not be discovered initially. Deputy Steve Krouse, who is a gun smith and carries a federal firearms license, stated that federal law requires all firearms to have a serial number on the frame. (VRP 305). Krouse was initially unable to locate a serial number on the frame of the Walther P22. (*Id.*) It was not until the firearm was disassembled that the deputies learned that

somebody had attempted to “scratch out” the serial number and then had filled the number cavity with plastic to hide it. (VRP 305-308). Either the Defendant covered the serial number, or he obtained a gun that appeared to have the serial number removed. This information would lead a reasonable person to conclude that the gun was stolen.

An additional inference can be made from the fact that the defendant is disqualified from purchasing a firearm legally. The defendant had previously been convicted of a “serious offense” and had therefore lost his right to possess a firearm pursuant to RCW 9.41.040(1). This leaves the rhetorical question, how does a disqualified individual obtain a firearm?

Behavior indicating guilty knowledge may also inculcate a defendant. The court in *State v. McPhee*, 156 Wn.App. 44, at 63, 230 P.3d 284 (2010), found that hiding stolen property was evidence of guilty knowledge which could be considered by the jury. In our case, the firearm was hidden under the spare tire in the trunk of the vehicle. The Defendant had taken extraordinary steps to secret the firearm in the motor vehicle. The gun was not just placed in a locked trunk, but had been separated from the other personal belongings and hidden in a place not typically accessed except in an emergency. This “hiding” should be considered “slight corroborating evidence.”

Flight has also been considered a corroborative factor in

determining a defendant's knowledge that an item was stolen. *State v. Medley*, 11 Wn.App. 491, 495, 524 P.2d 466, *review denied*, 84 Wn. 2d 1006 (1974). The Defendant in the matter before us, specifically disclaimed all property in the rental vehicle and chose to leave the scene. These acts of disassociation can be relied upon to infer the defendant's knowledge and guilty conscience.

Arguably, any one of the above factors can be considered slight corroborative evidence of the defendant's knowledge. The State maintains however, that each of the above factors should be taken in conjunction in determining the Defendant knew, or should have known, the firearm was stolen.

Based on all of the evidence, and reasonable inferences therefrom, the jury could have found beyond a reasonable doubt the defendant knew, or should have known, the firearm was stolen.

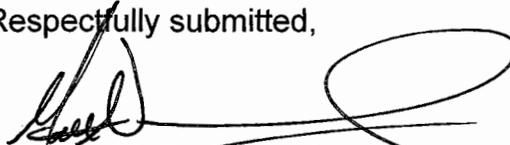
IV. CONCLUSION

In conclusion, the appeal in this matter should be dismissed. The trial court was justified in denying the defendant's motion to suppress. And because no evidence was illegally obtained by law enforcement, it was justifiably considered in the affidavit for search warrant as well as the jury in making its decision to convict. Finally, the evidence produced at trial was more than sufficient to prove all

essential elements of each crime beyond a reasonable doubt. The State respectfully requests this Court enter a decision affirming the Trial Court.

Dated this 17TH day of February, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matt L. Newberg", is written over a horizontal line. The signature is stylized and includes a large, loopy flourish on the right side.

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