

FILED

FEB 16, 2016

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33427-9-III

STATE OF WASHINGTON, Respondent,

v.

JUSTIN DEAN VANHOLLEBEKE, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITEDii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR3

IV. STATEMENT OF THE CASE.....5

V. ARGUMENT.....10

A. Because Vanhollebeke was a legitimate co-occupant of a vehicle when he drove it with the permission of the owner, the State was required to obtain a warrant before entering the vehicle when Vanhollebeke expressly refused consent to search10

B. Detaining Vanhollebeke for over thirty minutes after he had refused consent to search the vehicle was unreasonable15

C. The State failed to show Vanhollebeke’s custodial statements to police were the product of a knowing, intelligent and voluntary waiver when police did not “scrupulously honor” Vanhollebeke’s invocation of his right to silence19

D. The trial court abused its discretion in refusing Vanhollebeke’s missing witness instruction when the State declined to call the owner of the vehicle in which the firearm was found24

E. The trial court’s finding that Vanhollebeke had the ability to pay legal financial obligations is clearly erroneous27

F. Vanhollebeke’s sentence was based upon an offender score that the State failed to prove and is unsupported in the record30

VI. CONCLUSION.....33

CERTIFICATE OF SERVICE34

AUTHORITIES CITED

Federal Cases

<i>Barker v. Wingo</i> , 407 U.S. 514, 92 S. Ct. 2182, 2189, 33 L.Ed.2d 101 (1973).....	21
<i>Florida v. Royer</i> , 460 U.S. 491, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983).....	15
<i>Frazier v. Cupp</i> , 394 U.S. 731, 89 S. Ct. 1420, 22 L.Ed.2d 684 (1969).....	13
<i>Georgia v. Randolph</i> , 547 U.S. 103, 126 S. Ct. 1515, 164 L.Ed.2d 208 (2006).....	11, 12, 13
<i>Johnson v. Zerbst</i> , 304 U.S. 458, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938).....	21
<i>Michigan v. Mosley</i> , 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).....	20, 21
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	19, 20, 22
<i>Rhode Island v. Innis</i> , 446 U.S. 291, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980).....	20
<i>U.S. v. Matlock</i> , 415 U.S. 164, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974).....	11, 12
<i>U.S. v. Morales</i> , 861 F.2d 396 (3rd Cir. 1988).....	13
<i>U.S. v. Place</i> , 462 U.S. 696, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983).....	16

State Cases

<i>In re Pers. Restraint of Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2002).....	30, 31
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 123 P.3d 844 (2005).....	27
<i>State v. Aase</i> , 121 Wn. App. 558, 89 P.3d 721 (2004).....	10
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997).....	16, 17
<i>State v. Aten</i> , 130 Wn.2d 640, 927 P.2d 210 (1996).....	20
<i>State v. Baker</i> , 56 Wn.2d 846, 355 P.2d 806 (1960).....	24
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116 (1991).....	27
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	27
<i>State v. Blair</i> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	24, 25
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	28
<i>State v. Cantrell</i> , 124 Wn.2d 183, 875 P.2d 1208 (1994).....	11

<i>State v. Cheatam</i> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	25
<i>State v. Davis</i> , 73 Wn.2d 271, 438 P.2d 185 (1968).....	21, 22, 24
<i>State v. Emmett</i> , 77 Wn.2d 520, 463 P.2d 609 (1970).....	21
<i>State v. Flora</i> , 160 Wn. App. 549, 249 P.3d 188 (2011).....	25
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	30
<i>State v. Henry</i> , 80 Wn. App. 544, 910 P.2d 1290 (1995).....	16, 17
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	10
<i>State v. Holmes</i> , 108 Wn. App. 511, 31 P.3d 716 (2001).....	13
<i>State v. Hunley</i> , 175 Wn.2d 901, 287 P.3d 584 (2012).....	30, 31, 32
<i>State v. Jeannotte</i> , 133 Wn.2d 847, 947 P.2d 1192 (1997).....	27
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	10
<i>State v. Leach</i> , 113 Wn.2d 735, 782 P.2d 1035 (1989).....	10
<i>State v. Link</i> , 136 Wn. App. 685, 150 P.3d 610 (2007).....	10
<i>State v. Mathe</i> , 102 Wn.2d 537, 688 P.2d 859 (1984).....	11
<i>State v. McGhee</i> , 57 Wn. App. 457, 788 P.2d 603 (1990).....	25
<i>State v. Mendoza</i> , 165 Wn.2d 913, 205 P.3d 113 (2009).....	31
<i>State v. Parker</i> , 132 Wn.2d 182, 937 P.2d 575 (1997).....	30
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	14
<i>State v. Redmond</i> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	25
<i>State v. Reed</i> , 168 Wn. App. 553, 278 P.3d 203 (2012).....	26
<i>State v. Roche</i> , 75 Wn. App. 500, 878 P.2d 497 (1994).....	30
<i>State v. Sweet</i> , 44 Wn. App. 226, 721 P.2d 560 (1986).....	15
<i>State v. Tijerina</i> , 61 Wn. App. 626, 811 P.2d 241 (1991).....	16
<i>State v. Tili</i> , 148 Wn.2d 350, 60 P.3d 1192 (2003).....	30
<i>State v. Tyler</i> , 177 Wn.2d 690, 302 P.3d 165 (2013).....	18

<i>State v. Veltri</i> , 136 Wn. App. 818, 150 P.3d 1178 (2007).....	17
<i>State v. Walker</i> , 129 Wn. App. 258, 118 P.3d 935 (2005).....	20
<i>State v. Weaver</i> , 171 Wn.2d 256, 251 P.3d 876 (2001).....	31
<i>State v. Wheeler</i> , 108 Wn.2d 230, 737 P.2d 1005 (1987).....	17, 20, 21, 23
<i>State v. White</i> , 141 Wn. App. 128, 168 P.3d 459 (2007).....	13
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	15, 16, 17
<i>State v. Wilson</i> , 170 Wn.2d 682, 244 P.3d 950 (2010).....	31
<i>Wright v. Safeway Stores, Inc.</i> , 7 Wn.2d 341, 109 P.2d 542 (1941).....	24

Statutes

RCW 9.94A.530.....	30
RCW 9.94A.535(2).....	32
RCW 10.01.160(3).....	27
RCW 46.55.113(1).....	18
RCW 46.61.021.....	15

Court Rules

CrRLJ 2.1(b).....	18
RAP 2.5(a)(2).....	27

I. INTRODUCTION

Justin Vanhollebeke was stopped for a moving violation in a borrowed car. During the stop, police observed what they believed was drug paraphernalia inside the vehicle and requested consent to search, which Vanhollebeke refused. The officers then detained Vanhollebeke and the vehicle while one of them drove about 18 miles to speak with the owner of the vehicle, and obtained the owner's consent to search the vehicle. Upon returning to the scene more than an hour after the stop, the police searched the vehicle without a warrant and placed Vanhollebeke under arrest as a result of items they found inside.

Following advisement of his rights, Vanhollebeke stated that he did not want to waive his right to silence, then spontaneously declared that the paraphernalia was not in his possession. The officer asked if Vanhollebeke wanted to talk, and Vanhollebeke stated, "Yes." Without re-advising him of his *Miranda* rights, the officer then questioned Vanhollebeke and obtained incriminating statements.

At trial, the State elected not to call all of its law enforcement witnesses and Vanhollebeke requested a missing witness instruction, which the trial court refused to give. The jury convicted Vanhollebeke. At sentencing, the trial court inquired into Vanhollebeke's ability to pay

legal financial obligations and Vanhollebeke stated that he was unemployed and had no funds, had been planning to start a job doing farm work, and could pay \$25 per month if he got a job after his release. Vanhollebeke further objected to the State's calculation of his offender score, arguing that the State failed to present evidence that a previous second degree assault conviction from 2003 did not wash out. The State asserted, but presented no evidence to prove, that Vanhollebeke had intervening convictions that would prevent a wash out and further claimed, erroneously, that violent felonies do not wash out. The trial court imposed a 34 month sentence based on the State's calculated offender score and imposed \$1380 in legal financial obligations, payable at \$25/month. Vanhollebeke now appeals.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Vanhollebeke's motion to suppress when Vanhollebeke refused consent to search the vehicle he was driving.

ASSIGNMENT OF ERROR 2: The trial court erred in denying Vanhollebeke's motion to suppress when the length and scope of the detention was unreasonable.

ASSIGNMENT OF ERROR 3: The trial court erred in finding Vanhollebeke's custodial statements admissible when Vanhollebeke invoked his right to silence and his desire to terminate the interrogation was not scrupulously honored by the police.

ASSIGNMENT OF ERROR 4: The trial court erred in refusing to give Vanhollebeke's proffered missing witness instruction when the State declined to call the owner of the vehicle to testify.

ASSIGNMENT OF ERROR 5: The finding that Vanhollebeke had the ability to pay legal financial obligations is unsupported by substantial evidence.

ASSIGNMENT OF ERROR 6: The trial court erred in including Vanhollebeke's 2003 conviction for assault 2^o in his offender score when Vanhollebeke objected that the State failed to prove the conviction did not wash out.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: When the owner of a vehicle gives possession of the vehicle to another driver, may the police disregard the driver's express refusal and search the vehicle without a warrant if the owner consents to the search?

ISSUE 2: When police initially stop a vehicle for a moving violation and observe suspected drug paraphernalia inside, and the driver refuses consent to search, is it reasonable to detain the driver and the vehicle for over an hour to locate the vehicle's owner and obtain consent to a warrantless search?

ISSUE 3: Did the officer who questioned Vanhollebeke scrupulously honor Vanhollebeke's invocation of his right to silence when, in response to a spontaneous statement to police, the officer pressured Vanhollebeke to make an immediate decision and never obtained an express waiver?

ISSUE 4: Does the State's failure to call the owner of the car in which contraband was found that Vanhollebeke was charged with possessing warrant a jury instruction on the missing witness doctrine?

ISSUE 5: When Vanhollebeke stated at sentencing that he had no assets and was unemployed but preparing to do farm work, and could pay \$25 per month upon release if he got a job, is the finding that Vanhollebeke could afford to pay legal financial obligations clearly erroneous?

ISSUE 6: Is there sufficient evidence to support the offender score of "2" when Vanhollebeke objected to its inclusion on the ground that it washed

out and the State asserted, but did not prove, the existence of any intervening convictions that would prevent the wash out?

IV. STATEMENT OF THE CASE

Othello police sergeant Aaron Garza decided to stop a truck when he saw it facing the wrong way on a one-way street. 2 RP 307, 310-11. The driver got out of the truck and approached him, and Garza ordered the driver back into the truck. 2 RP 312-13. The driver initially got back into the truck but then got back out. 2 RP 314. Garza ordered him back into the truck again, but the driver advised that he had locked himself out. 2 RP 315. The driver did not have a license but identified himself as Justin Vanhollebeke and provided his date of birth. 1 RP 16. Review from dispatch indicated his license was suspended and he appeared to have out-of-county warrants, but they could not be confirmed. 1 RP 18, 20.

Garza did not intend to arrest Vanhollebeke and began writing a citation. 1 RP 21. While he was writing the citation, he was advised that a deputy had seen a meth pipe in the truck and the ignition was punched. 1 RP 22. Vanhollebeke refused to consent to a search of the truck. 1 RP 28.

The car was not reported stolen, and it was identified as belonging to a person named Bill Casteel. 1 RP 54, 2 RP 320. Dispatch could not

reach Casteel by phone, so a deputy volunteered to drive to Casteel's house about 18 miles away to get the keys. 1 RP 30, 71, 107-08. Casteel confirmed that Vanhollebeke had permission to use the truck, gave the deputy consent to search it, and provided a key. 1 RP 110.

The deputy returned to the scene and, approximately one hour and seven minutes after Vanhollebeke's vehicle was stopped, police began to search it. 1 RP 71, 111. The pipe in the dash tested presumptively positive for methamphetamine, and police also located a firearm under the seat. 1 RP 33, 35. Vanhollebeke was arrested for the controlled substances violation and a search incident to his arrest retrieved three bullets from his front pocket. 1 RP 39-40.

After his arrest, Vanhollebeke was advised of his rights under *Miranda* and he stated that he did not want to talk. 1 RP 41-42. However, shortly afterward, he spontaneously stated that the pipe was not in his possession. 1 RP 442. The officer asked Vanhollebeke if he was willing to talk, and Vanhollebeke said yes. 1 RP 43. The officer did not re-advise Vanhollebeke of his *Miranda* rights and did not take any further steps to clarify that he knowingly and voluntarily waived them. Police then continued to question Vanhollebeke and obtained incriminating statements from him. 1 RP 43-45, 46, CP 2.

The State charged Vanhollebeke with first degree unlawful possession of a firearm. CP 3-4. Pretrial, Vanhollebeke moved to suppress the evidence obtained from the search of the vehicle based upon his lack of consent to the search and the unreasonableness of the detention. CP 5-8. The trial court denied the motion and entered findings of fact and conclusions of law supporting its ruling. CP 34-37. The trial court also found that Vanhollebeke's statements to the arresting officers were admissible and entered supporting findings and conclusions. CP 38-40. The statements were later admitted during Vanhollebeke's trial. 3 RP 283, 334, 337-38.

During trial, the State declined to call Casteel and Vanhollebeke requested a missing witness instruction pursuant to WPIC 5.20. 3 RP 415-19. The trial court declined the instruction, and the jury returned a guilty verdict. 3 RP 419, CP 115-131, CP 132.

At sentencing, the State argued that Vanhollebeke's standard range sentence was 26-34 months and requested the high end be imposed. 3 RP 490. However, the range appeared to be based upon a prior felony conviction for second degree assault from 2003 that was introduced at trial and Vanhollebeke argued that the State failed to prove the conviction did not wash out. 3 RP 492, 494. The State asserted, but presented no

evidence, that Vanhollebeke had intervening convictions that would have prevented the assault from washing out, and further informed the court incorrectly that violent felonies do not wash out. 3 RP 494-95. During the sentencing colloquy, the parties appeared to believe the range was based on a score of 1 due to the prior assault. 3 RP 492. However, the judgment and sentence reflected that the score was 2, including a prior conviction for taking a motor vehicle without permission that occurred about two weeks before the prior assault. CP 142-43. The State did not present any evidence of this conviction either.

The State further requested a number of legal financial obligations arising from the additional “financial hardship” arising from the trial. 3 RP 491. The trial court engaged in the following colloquy with Vanhollebeke concerning his ability to pay:

THE COURT: Mr. Vanhollebeke, you're going to have a number of legal financial obligations. How much can you afford to pay a month?

THE DEFENDANT: I'm currently locked up in here for jail, so my funds are at zero right now.

THE COURT: I mean, after you get out, how much can you afford to pay?

THE DEFENDANT: I had job, sir, prior to coming in here.

THE COURT: How much were you making?

THE DEFENDANT: I -- I just barely got it that day -- two days before that, sir.

THE COURT: What were you doing?

THE DEFENDANT: Farm work. I was getting ready to do farm work and I lost that job, I'm pretty sure.

THE COURT: Was that a (inaudible)?

THE DEFENDANT: It would be anything that I could do.

THE COURT: Could you afford \$25 a month?

THE DEFENDANT: At this time?

THE COURT: When you get out.

THE DEFENDANT: When I get out? If I can get a job, yes, sir, if I could (inaudible) myself.

THE COURT: Other than your present predicament, are you healthy and able?

THE DEFENDANT: Yes, sir.

3 RP 495-96. The trial court accepted the State's recommendation and imposed a sentence of 34 months and all of the requested legal financial obligations, except for a crime lab fee, for a total of \$1,380 in LFOs. 3 RP 497, CP 144, 146.

Vanhollebeke now appeals. CP 152.

V. ARGUMENT

A. Because Vanhollebeke was a legitimate co-occupant of a vehicle when he drove it with the permission of the owner, the State was required to obtain a warrant before entering the vehicle when Vanhollebeke expressly refused consent to search.

In reviewing the denial of a defendant's motion to suppress evidence, the Court of Appeals determines whether the factual findings are supported by substantial evidence and reviews de novo the trial court's conclusions of law. *State v. Aase*, 121 Wn. App. 558, 564, 89 P.3d 721 (2004). Unchallenged findings are treated as verities on appeal so long as they are supported by substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Article 1, section 7 of the Washington Constitution and the Fourth Amendment to the US Constitution establish that warrantless searches of property are *per se* unreasonable, unless the State proves that the search falls within an exception to the warrant requirement. *State v. Link*, 136 Wn. App. 685, 695, 150 P.3d 610 (2007). Consent is one of those established exceptions. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). "Consent to a search establishes the validity of that search if the person giving consent has the authority to so consent." *State v. Leach*,

113 Wn.2d 735, 738,782 P.2d 1035 (1989) (quoting *State v. Mathe*, 102 Wn.2d 537, 541, 688 P.2d 859 (1984)).

When multiple people share common authority over property, consent of one of them is valid against an absent, nonconsenting person with shared authority. *U.S. v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L.Ed.2d 242 (1974); *Mathe*, 102 Wn.2d at 543. The Washington Supreme Court has applied the common authority rule to vehicle searches in the context of a non-consenting, but non-objecting, co-occupant. *State v. Cantrell*, 124 Wn.2d 183, 875 P.2d 1208 (1994). The *Cantrell* Court, recognizing that a borrower of a car has authority to consent to a search, held that police are not required to obtain consent from all occupants of a vehicle to conduct a warrantless search. *Id.* at 192. However, the *Cantrell* Court expressly declined to decide whether the consent of one co-occupant would be valid as to another co-occupant who overtly objects to the search. *Id.* This is precisely the circumstance presented here and presents a legal question of first impression.

In the context of a search of a shared residence, the U.S. Supreme Court has held that the consent of one co-occupant to a warrantless entry cannot override the express refusal of another. *Georgia v. Randolph*, 547 U.S. 103, 120, 126 S. Ct. 1515, 164 L.Ed.2d 208 (2006). The *Randolph*

Court, discussing the rights of one with common authority, observed that common authority derives not from technical application of property laws, but from social expectations about how co-inhabitants may affect each others' interests. *Id.* at 110-11. Although shared tenancy may imply a certain assumption of risk that privacy will be invaded, common practices and expectations establish limitations, such as the ability of an occupant child to consent to search of a private area, or entry over the express objection of an occupant. *Id.* at 111-13. "In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders." *Id.* at 114.

Although *Randolph* did not expressly address common authority over personal property, neither did it draw a distinction between the common authority principles governing searches of personal property and searches of residences. The rule permitting a co-occupant's consent to be asserted against an absent co-occupant announced in *Matlock* establishes that "the consent of one who possesses common authority over premises **or effects** is valid as against the absent, nonconsenting person with whom that authority is shared." 415 U.S. at 170 (emphasis added). The *Randolph* Court considered not only the language quoted from *Matlock* but also the prior application of the common authority rule to personal

property in *Frazier v. Cupp*, 394 U.S. 731, 740, 89 S. Ct. 1420, 22 L.Ed.2d 684 (1969) (involving a shared duffel bag). Thus, the express language of *Randolph* does not limit or otherwise indicate that principles of shared authority carry less weight when the shared item is an item of personal property, such as a vehicle or bag, rather than a residence.

Indeed, the cases establishing the driver's authority to consent to a search of a vehicle necessarily imply that the same authority permits the driver to exclude others from the vehicle. A driver's possession and control over a vehicle confers the necessary "joint access and control" that authorizes the driver to consent to a search of the entire vehicle. *See U.S. v. Morales*, 861 F.2d 396, 399 (3rd Cir. 1988) (and authorities cited therein). By giving the driver control over the vehicle, the owner confers the power to consent to searching it. *Id.* The power to consent implies and infers the power to exclude as well; "[a]ccess and permission to enter are the hallmarks of common authority." *State v. White*, 141 Wn. App. 128, 136, 168 P.3d 459 (2007) (quoting *State v. Holmes*, 108 Wn. App. 511, 520, 31 P.3d 716 (2001)). Indeed, as it would be unreasonable for a guest to enter a home over the express objection of an occupant, so it would be unreasonable for a person to enter a car when the driver is plainly refusing permission. *Randolph*, 547 U.S. at 113.

In light of these principles, no reason exists why *Randolph* should not be held to require police to obtain a warrant when a driver in possession expressly refuses consent to enter, even if the owner of the vehicle does not object to the search. Washington courts have long interpreted article 1, section 7 as establishing heightened privacy interests in vehicles than the Fourth Amendment. *See generally State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). Here, Vanhollebeke was entrusted with possession and control of the vehicle by its owner. As discussed in *Randolph*, his authority over the car is not premised on the law of property rights or evaluations of which interests are superior; it is based on the common social expectation that one faced with conflicting instructions will not litigate them on the spot, but will instead defer to the non-consenting occupant. Vanhollebeke's refusal to permit a warrantless search of the vehicle should, accordingly, have controlled, and the police should have seized the vehicle and obtained a warrant to search it. Having failed to do so, the fruits of the warrantless search should have been excluded from his trial.

B. Detaining Vanhollebeke for over thirty minutes after he had refused consent to search the vehicle was unreasonable.

A *Terry* stop must be justified not just at its inception but also in its scope. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). To pass constitutional muster, the scope of an investigatory stop must be strictly limited in both duration and focus. It must last only so long as is necessary to confirm or dispel the officer's initial suspicion, and the officer must use the least intrusive means available to do so. *Id.* at 738 (citing *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983)); *State v. Sweet*, 44 Wn. App. 226, 232, 721 P.2d 560 (1986). Under RCW 46.61.021, the permissible scope of an officer's actions in conducting a traffic stop is to detain the driver "for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction."

When police conduct a *Terry* stop, the investigation must immediately focus on resolving their initial suspicions. *Williams*, 102 Wn.2d at 738 ("the temporary seizure of the defendant must relate to the purpose of the investigation"). A citizen's right to be free of governmental

interference with his movement means, at a minimum, that when such interference must occur, it be brief and related directly to inquiries concerning the suspect. *Id.* at 741. Where police questioning extends beyond the initial basis for the stop and into an unrelated criminal investigation, the permissible scope of the stop is exceeded and the detention becomes unlawful. *State v. Henry*, 80 Wn. App. 544, 551, 910 P.2d 1290 (1995).

The investigation must be as brief as possible. The United States Supreme Court has made clear that “the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.” *U.S. v. Place*, 462 U.S. 696, 709, 103 S. Ct. 2637, 77 L.Ed.2d 110 (1983). In evaluating the length of the detention, the court should consider whether the police diligently pursued the investigation. *Id.*

Police may not use innocuous facts to justify extending the duration of the detention or expanding the scope of the investigation. *State v. Armenta*, 134 Wn.2d 1, 12-14, 948 P.2d 1280 (1997) (possession of large amount of cash is an innocuous fact that cannot justify further investigation); *State v. Tijerina*, 61 Wn. App. 626, 629, 811 P.2d 241

(1991) (bars of hotel soap possessed when officer is aware of drug activity by Hispanic individuals in hotel rooms); *Henry*, 80 Wn. App. 544 (nervousness during traffic stop).

An officer may expand the scope of a *Terry* stop only if articulable facts the officer discovers during the stop create a reasonable suspicion of criminal activity. *State v. Veltri*, 136 Wn. App. 818, 822, 150 P.3d 1178 (2007) (quoting *Armenta*, 134 Wn.2d 1). There is a three factor test courts use to decide if an officer has impermissibly extended a *Terry* stop. Those factors are: "[T]he purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." *Williams*, 102 Wn.2d at 740. Where intrusions are substantial, probable cause for the seizure must be present. *See State v. Wheeler*, 108 Wn.2d 230, 247, 737 P.2d 1005 (1987).

In the present case, the justification for the expansion of the *Terry* stop was the observation of what appeared to be drug paraphernalia in the dash, and a punched ignition. However, police had no information that the vehicle was reported as stolen, and the record reflects no suspicion by police that Vanhollebeke was under the influence of drugs. In investigating the new suspicion, police are still required to proceed

diligently and to use the least intrusive means to address the suspicion.

The detention here fails this standard.

First, police could have simply immediately impounded the vehicle based on Vanhollebeke's suspended license status. Washington law permits summary impoundment of a vehicle when the driver is arrested for driving with a suspended license. RCW 46.55.113(1); *see also State v. Tyler*, 177 Wn.2d 690, 302 P.3d 165 (2013). An arrest does not preclude the officer from issuing a citation and notice to appear in court rather than taking the defendant into custody. CrRLJ 2.1(b). The record reflects that one of the officers was already in the process of writing the citation when another officer looked into the vehicle and became suspicious. 1 RP 22. Had the officer simply completed this process and impounded the vehicle, it would have permitted police to preserve the vehicle and its contents without subjecting Vanhollebeke to the extended detention that occurred here.

Alternatively, the record does not provide any explanation why the deputy who drove to Casteel's house did not contact dispatch or any of the officers remaining at the scene immediately after confirming that the vehicle was not stolen and obtaining Casteel's consent to search. Instead, the detention was delayed while the deputy drove the entire way back to

the scene to deliver the information in person. No justification was shown to explain this failure to diligently address the suspicions giving rise to the detention.

Because the police did not use the least intrusive means available to address their suspicions and because they did not act diligently to bring the detention to a conclusion as soon as they obtained the information they were looking for, the detention was unnecessarily prolonged and fails the requirements of *Terry*. Accordingly, the trial court erred in denying Vanhollebeke's motion to suppress as the result of the unlawful detention.

C. The State failed to show Vanhollebeke's custodial statements to police were the product of a knowing, intelligent and voluntary waiver when police did not "scrupulously honor" Vanhollebeke's invocation of his right to silence.

Under *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), suspects must be warned of their constitutional rights, including their right to remain silent, right to the presence of an attorney, and right to appointed counsel, before they can be subjected to custodial interrogation. Failure to provide proper warnings during custodial

interrogations renders incriminating statements and confessions made by defendants inadmissible at trial. *Id.*

Whether a statement was voluntary depends on the totality of the circumstances. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). While volunteered statements do not implicate the Fifth Amendment, statements that are the product of words or actions on the part of the police that are reasonably likely to elicit an incriminating response are obtained by custodial interrogation, and *Miranda* protections apply. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L.Ed.2d 297 (1980).

When an individual in any manner and at any time invokes his or her right to remain silent, police must cease questioning. *State v. Walker*, 129 Wn. App. 258, 273-74, 118 P.3d 935 (2005) (citing *Miranda*, 384 U.S. at 473-74). Whether statements obtained from an individual after he has invoked his constitutional rights are admissible depends on whether his “right to cut off questioning” was “scrupulously honored.” *Walker*, 129 Wn. App. at 273-73 (citing *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)).

When a defendant has invoked his constitutional rights, he can subsequently waive those rights under certain circumstances. *See*

Wheeler, 108 Wn.2d at 238. Whether a defendant validly waives his previously asserted right depends on: (1) whether the police scrupulously honored the defendant's right to cut off questioning; (2) whether the police continued interrogating the defendant before obtaining the waiver; (3) whether the police coerced the defendant to change his mind; and (4) whether the subsequent waiver was knowing and voluntary. *Id.* Police "scrupulously honor" a defendant's invocation of his rights by immediately ceasing the interrogation, resuming the interrogation only after a significant time has passed, and providing a fresh set of *Miranda* warnings. *Moseley*, 423 U.S. at 104-106.

The State bears a heavy burden of proof to show admissions made by a defendant were the voluntary products of a knowing and intelligent waiver. *State v. Emmett*, 77 Wn.2d 520, 521, 463 P.2d 609 (1970); *State v. Davis*, 73 Wn.2d 271, 285, 438 P.2d 185 (1968), *overruled on other grounds in State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012). A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). There is no presumption in favor of a waiver of a constitutional right; to the contrary, courts are to "indulge every reasonable presumption against waiver." *Barker v. Wingo*, 407 U.S. 514,

525, 92 S. Ct. 2182, 2189, 33 L.Ed.2d 101 (1973); *Davis*, 73 Wn.2d at 285.

Here, the trial court found,

1.7 Sgt. Garza read the defendant his Miranda warnings off his department issued card.

1.8 The defendant acknowledged understanding the warnings and initially stated he did not wish to speak to officers, at which point Sgt. Garza ceased questioning.

1.9 Mere moments later, the defendant initiated conversation with the officers, making comments about the meth pipe that officers had found.

1.10 He was asked if he now wanted to speak with officers and he stated that he did.

CP 39. From these facts, it concluded that all subsequent statements were voluntary. CP 39. This conclusion is incorrect, because the police did not scrupulously honor Vanhollebeke's invocation when they failed to re-advise him of his *Miranda* warnings before asking him if he was willing to speak.

Miranda's requirements arise from the coercive context of the custodial interrogation. 384 U.S. at 445. The interrogation setting exerts psychological pressure on the accused for the purpose of compelling compliance to the questioner. *Id.* at 448, 457. It is because of the coercive nature of the custodial setting that courts do not engage in presumptions in

favor of a waiver of the right to remain silent, particularly when the defendant has expressed a desire not to be questioned.

Here, after a valid invocation, police responded to a voluntary statement by Vanhollebeke by putting pressure on him to decide immediately whether he was going to speak or waive his rights. This does not “scrupulously honor” the invocation; rather, it is a continuation of the coercive pressure that triggers *Miranda* requirements. Moreover, police never obtained an express waiver from Vanhollebeke, and continued questioning without re-advising him of his rights under *Miranda*.

Indulging every presumption against waiver and holding the State to its heavy burden, the State has failed to show a valid waiver under the factors set forth in *Wheeler*, 108 Wn.2d at 238. The police did not scrupulously honor Vanhollebeke’s right to terminate the interrogation because Sgt. Garza continued to exert coercive pressure. Police continued interrogating Vanhollebeke without obtaining an express waiver, after compelling him to make an immediate decision to exercise or waive his rights. As a result of these pressures, the subsequent waiver was not knowing and voluntary.

Because the State failed to meet its burden to show a valid waiver, the trial court erred in concluding that Vanhollebeke’s statements were

admissible. Consequently, the conviction should be reversed and a new trial granted.

D. The trial court abused its discretion in refusing Vanhollebeke's missing witness instruction when the State declined to call the owner of the vehicle in which the firearm was found.

Under the missing witness doctrine, “where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, ... he fails to do so, the jury may draw an inference that it would be unfavorable to him.” *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (quoting *Davis*, 73 Wn.2d at 276). The inference arises when the unexplained failure to call a witness creates a suspicion that competent testimony is being willfully withheld. *State v. Baker*, 56 Wn.2d 846, 859-60, 355 P.2d 806 (1960) (citing *Wright v. Safeway Stores, Inc.*, 7 Wn.2d 341, 109 P.2d 542 (1941)). Under circumstances where a witness is not produced when it would be natural for a party to produce the witness if the facts known by him had been favorable, the inference is appropriate. *Blair*, 117 Wn.2d at 488 (quoting *Davis*, 73 Wn.2d at 280). The standard does not require a showing of deliberate suppression, but merely that under the circumstances, the

prosecutor would not fail to call the witness in question unless the witness's testimony would be damaging. *State v. McGhee*, 57 Wn. App. 457, 463, 788 P.2d 603 (1990).

However, if the witness is unimportant or the testimony would be cumulative, the missing witness doctrine does not apply. *Blair*, 117 Wn.2d at 489. Moreover, if the witness's absence can be satisfactorily explained, the adverse inference does not arise. *Id.* And the witness's presence must be peculiarly available to the party against whom the inference arises. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The "peculiarly available" requirement is not a question of availability or power to compel, but rather whether there is a community of interest between the witness and the party who declined to call the witness. *Id.* at 653.

"Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case." *State v. Flora*, 160 Wn. App. 549, 553, 249 P.3d 188 (2011) (*quoting State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)). Refusing to give a requested missing witness instruction that is supported by the evidence is reviewed for an abuse of discretion, which occurs when the decision is

based upon untenable grounds. *State v. Reed*, 168 Wn. App. 553, 571, 278 P.3d 203 (2012).

In the present case, the State's failure to call Casteel, the owner of the vehicle in which Vanhollebeke was arrested, meets the requirements of the missing witness doctrine. Casteel shared a community of interest with the State because he was in the best position to know whether the contents of the truck were introduced there by Vanhollebeke. Were his testimony that the firearm belonged to Vanhollebeke, the State would have been aided in making its case. Conversely, in declining to call him under the circumstances, the jury could properly question whether his testimony would have tended to show that Vanhollebeke's possession of the firearm was unwitting, or whether he lacked knowledge of its presence such that he was unable to reduce it to his immediate control.

These are precisely the circumstances where a missing witness instruction, when requested, is appropriate. The State did not provide an adequate explanation as to its failure to call him, and his ownership of the truck put him in a unique position to offer material testimony on the merits of the State's case. As such, it was reasonable for the jury to infer that there was some reason the State chose not to call him as a witness, and the trial court's decision to refuse the proffered instruction permitting the jury

to consider the adverse inference against the State was an abuse of discretion. Accordingly, the conviction should be reversed.

E. The trial court's finding that Vanhollebeke had the ability to pay legal financial obligations is clearly erroneous.

Courts may not impose discretionary legal financial obligations (LFOs) on convicted defendants unless the defendant has the present or future ability to pay them. RCW 10.01.160(3). A sentencing court's finding that a defendant has the ability to pay LFOs is reviewable under a "clearly erroneous" standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011); *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991). In applying the clearly erroneous standard, the reviewing court reverses when substantial evidence does not support the finding, meaning that there is an insufficient quantum of evidence to persuade a fair-minded person of the truth of the finding. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997). As such, the finding is reviewable for the first time on appeal even when the defendant does not object at sentencing because it concerns the sufficiency of the evidence supporting the LFO imposition. RAP 2.5(a)(2); *see also Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005).

In the present case, the trial court imposed \$1,380.00 LFOs, payable at \$25 per month, after sentencing Vanhollebeke to a 34 month term of confinement and ascertaining that Vanhollebeke's prospects of employment were in the field of farm labor. 3 RP 495-97. These facts fail to establish sufficiently that Vanhollebeke has the ability to pay discretionary LFOs.

In *State v. Blazina*, 182 Wn.2d 827, 836-37, 344 P.3d 680 (2015), the Washington Supreme Court observed that because LFOs accrue interest at the rate of 12 percent annually, the average defendant ordered to pay \$25 per month toward LFOs will owe more after ten years than at the time of sentencing. As such, ability to pay can, in some cases, be reduced to a question of mathematics. The math in this case indicates that Vanhollebeke will not likely be able to pay the LFOs as the court ordered.

As observed by the *Blazina* Court, the \$1,380 assessment accrues interest at 12 percent per year while Vanhollebeke is incarcerated. Assuming, for the sake of argument, that Vanhollebeke were released after 24 months from the application of good time credits, his LFO balance would balloon to \$1,731 at the time of his release.¹ Further assuming that

¹ See, e.g., http://www.moneychimp.com/calculator/compound_interest_calculator.htm (last visited Feb. 14, 2016).

Vanhollebeke could obtain work immediately upon release and consistently maintain the ability to pay \$25 per month toward it, it would be nearly another ten years before the LFOs would be paid in full.² That the LFOs imposed would burden Vanhollebeke for over a decade under perfect circumstances simply underscores that under more realistic conditions, where farm employment is seasonal and intermittent, where workers become ill, where convicted felons are chronically unemployed,³ and where competing financial obligations often take precedence over the LFO repayment for various lengths of time, the prospect of full repayment is unrealistic.

In summary, the fact that the sentencing court found Vanhollebeke could only afford payments of \$25 per month itself undercuts its finding that he could afford to pay \$1,380 in total LFOs. The fact that a court would have to rely on rosy assumptions to conclude that the obligation could *ever* be repaid indicates that the finding would not be persuasive to a fair-minded, rational person. As such, the finding is clearly erroneous and the imposition of discretionary LFOs should be reversed.

² See, e.g., <http://www.calcxml.com/calculators/pay-off-loan> (last visited Feb. 14, 2016).

³ See Schmidt, Joshua and Kris Warner, *Ex-Offenders and the Labor Market*, Center for Economic and Policy Research (Nov. 2010), available at <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf> (last visited Feb. 14, 2016).

F. Vanhollebeke’s sentence was based upon an offender score that the State failed to prove and is unsupported in the record.

The court of appeals reviews the calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). “In determining any sentence . . . the trial court may rely on no more information that is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530. The miscalculation of an offender score is a sentencing error that may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). When a court imposes a sentence based on a miscalculated offender score, it acts without statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Remand is required when the offender score has been miscalculated. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

In *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), the Washington Supreme Court considered the State’s burden of proof to establish the offender score, stating:

It is well established that the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence. Bare assertions, unsupported by evidence do not

satisfy the State's burden to prove the existence of a prior conviction. While the preponderance of the evidence standard is “not overly difficult to meet,” the State must at least introduce “evidence of some kind to support the alleged criminal history.” Further, unless convicted pursuant to a plea agreement, the defendant has “no obligation to present the court with evidence of his criminal history.” (Internal citations omitted.)

While evidence of prior convictions need not be substantial, there must be some evidence beyond the assertions of the prosecutor, which are not evidence but mere argument. *Hunley*, 175 Wn.2d at 911-12. A defendant’s failure to object to the State’s assertions of criminal history does not constitute an affirmative acknowledgment of the history sufficient to satisfy the State’s burden. *Id.* at 913 (citing *State v. Mendoza*, 165 Wn.2d 913, 925, 205 P.3d 113 (2009); *State v. Weaver*, 171 Wn.2d 256, 260, 251 P.3d 876 (2001)).

“[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” *State v. Wilson*, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (quoting *Goodwin*, 146 Wn.2d at 867-68). The remedy for the error is to vacate the sentence and resentence the defendant using the correct offender score. *Wilson*, 170 Wn.2d at 691.

In the present case, Vanhollebeke objected to the State’s offender score calculation, preserving the issue for review. 3 RP at 492. The State

asserted that violent felonies do not wash out, and further asserted that Vanhollebeke had intervening convictions. 3 RP at 494-95. But the State's bare assertions do not meet its evidentiary burden to prove the convictions that comprise the offender score. *Hunley*, 175 Wn.2d at 910. Moreover, the State's assertion that violent felonies do not wash out is incorrect. Class A felonies and sex offenses do not wash out, but class B felonies wash out after 10 years crime-free in the community. RCW 9.94A.535(2). The prior conviction presented by the State as the basis for the score of "2" was second degree assault, a class B felony. 3 RP 494-95. In the absence of evidence of any other conviction, the conviction should not have been included in the offender score when Vanhollebeke plainly expressed his desire to hold the State to its burden of proof on the score.

The error was not harmless. Vanhollebeke was sentenced to the high end of the range for a score of "2." CP 143-44. The length of confinement imposed cannot be sustained on the record on review. Accordingly, the sentence should be vacated and the case remanded for resentencing with a score of "1." *Hunley*, 175 Wn.2d at 915-16.

VI. CONCLUSION

For the reasons set forth herein, the court should reverse Vanhollebeke's conviction and/or sentence and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 10th day of February, 2016.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16th day of February, 2016 in Walla Walla,
Washington.


Breanna Eng