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Court of Appeals
Division III
State of Washington

33698-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY HARLAN LEONARD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves the search of defendant's person by a private individual, a store security person, who found and retained drugs located on the defendant after his detention for shoplifting. Law enforcement responded to the store to take defendant into custody for an outstanding warrant. At the store, the security person turned over the defendant's contraband to law enforcement. Therefore, no warrantless search was conducted by the state and the private search doctrine was not implicated.

II. APPELLANT'S ASSIGNMENTS OF ERROR

1. Defense counsel failed to provide the trial court with argument and case law concerning the private search doctrine.
2. Defense counsel failed to provide the trial court with argument and case law concerning searches involving small containers.
3. The trial court's Conclusions of Law 2 and 3 dealing with the CrR 8.3(b) motion are erroneous (CP 96; Appendix "A").
4. The stipulated facts concerning security officer Jack Hastings are inconsistent (CP 104; CP 106; CP 110; Appendices "B," "C" and "D").
5. Timothy Leonard was deprived of making an informed decision about entering into the Early Case Resolution Unit (ECR Unit).

III. ISSUES PRESENTED

1. Did the state engage in a warrantless search of the defendant, or was the search of the defendant conducted by a private citizen?
2. Does the exclusionary rule apply to searches conducted solely by private citizens?
3. Did defense counsel provide ineffective assistance of counsel?

IV. STATEMENT OF THE CASE

The defendant was detained for shoplifting on August 26, 2014, at a Rosauer's grocery store in the City and County of Spokane, Washington. CP 93, Suppression Motion Finding of Fact 1 ("FFS" hereinafter). The defendant was detained by Jack Hastings, a security employee of the store. Mr. Hastings did not have a police commission and was not a sworn police officer. CP 93, FFS 2. Mr. Hastings called Crime Check, a crime reporting service, to determine if the defendant had any outstanding warrants before releasing the defendant with a trespass notice. CP 93, FFS 3. After being advised there was a warrant, Mr. Hastings elected to detain the defendant until a patrol car could be dispatched to transport the defendant to jail. The Crime Check operator advised Mr. Hastings that a patrol car would be dispatched. CP 93, FFS 4. While waiting for the patrol car, the defendant

requested to use the restroom. CP 94, FFS 5. Mr. Hastings searched the defendant before allowing him to go to the restroom, and Mr. Hastings located heroin in the defendant's pocket. CP 94, FFS 6. Law enforcement arrived and Mr. Hastings turned over the heroin to the officer. CP 94, FFS 7. The defendant was subsequently charged with possession of a controlled substance. CP 94, FFS 7. The trial court held that Mr. Hastings did not act as an agent of law enforcement. CP 94, Conclusions of Law 1, 2, and 3.

V. ARGUMENT

A. NO STATE WARRANTLESS SEARCH OCCURRED

The defendant conflates the “private search doctrine,” rejected in Washington State, with the still extant rule that allows evidence obtained during a private search to be given to the State without implicating constitutional protections. As explained below, the fact that our State does not recognize the private search doctrine as an exception to the exclusionary rule is not important to the facts of this case. The private search doctrine assumes that state action has occurred in the search of the defendant. Here, no state action occurred; thus, the controlled substance at

issue was not admitted pursuant to that doctrine. The defendant's heroin was turned over to the police when they arrived to arrest the defendant.¹

Under the private search doctrine, a warrantless search conducted by a state actor does not offend the Fourth Amendment where the search by the state actor does not expand the scope of the original or contemporaneous private search. The doctrine was first advanced in *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980). Later, the doctrine was applied in *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 410 (1980), to sanction a warrantless search by state actors. Underlying this doctrine is the rationale that an individual's reasonable expectation of privacy is destroyed when the private actor conducts the search. *Jacobsen*, 466 U.S. at 119, 104 S.Ct. 1652. The State of Washington does not recognize the "private search doctrine" as an exception to the exclusionary rule. *State v. Eisfeldt*, 163 Wn.2d 628, 637-38, 185 P.3d 580 (2008).

However, the very decision announcing Washington State's rejection of the private search doctrine clearly articulated the remaining

¹ CP 94, FFS 7. The appellant assigns no error to the trial court's factual findings on this issue; therefore, these findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

rule - that where evidence is obtained during a private search, and such evidence is given to the State, no constitutional protection is applicable:

The concurrence suggests citizens do not “retain a privacy interest in evidence of a crime obtained by a private actor and delivered to the police.” Concurrence at 588. This is correct where the evidence obtained during a private search is given to the State; constitutional protections do not apply to private actors. *See State v. Walter*, 66 Wn. App. 862, 833 P.2d 440 (1992). But here the evidence obtained during the private search consisted entirely of Piper’s observations. The private search is not at issue here, but instead whether the private search doctrine allows the State to conduct a subsequent warrantless search. As such, the concurrence’s analysis is misplaced insofar as it compares evidence obtained by a private actor to evidence obtained by the State.

Eisfeldt, 163 Wn.2d at 638 fn 9.

In the instant case, as alleged by Appellant, the search of the defendant was conducted by store employee Mr. Hastings, and did not involve the police. Appellant’s Br. at 5. No State action was involved. Even if the court admitted evidence obtained by Mr. Hastings or as a result of Mr. Hasting’s detention of Mr. Leonard, the exclusionary rule does not apply to the acts of private individuals. *State v. Smith*, 110 Wn.2d 658, 666, 756 P.2d 722 (1988) (citing *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985)). While 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 government trespass, they

apply only to searches by state actors. *State v. Carter*, 151 Wn.2d 118, 124, 85 P.3d 887 (2004).

Here, the search of the defendant, and seizure of the heroin was conducted by Mr. Hastings, a private individual. Thereafter, law enforcement responded to the store to arrest the defendant on the outstanding warrant. The State received the heroin from Mr. Hastings, and this receipt of evidence does not invoke the application of the exclusionary rule. *Smith*, 110 Wn.2d at 666.

Even had the police searched Mr. Leonard, or searched his personal effects upon their arrival at the Rosauers Store, such search would have been justified as the defendant had a valid warrant for his arrest, and the officers had additional information that provided probable cause to believe that the defendant possessed heroin.² The search for and seizure of this heroin in defendant's personal effects at the store would be lawful as a search incident to his arrest. A search incident to lawful arrest is an exception to the warrant requirement. *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). This exception is

² Probable cause to arrest exists when an officer knows of circumstances that would lead a reasonably cautious person to believe that the suspect has committed a crime. *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

based on a concern for officer safety and the need to prevent destruction of evidence. *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

There was no state involvement in the search of the defendant. Because there was no warrantless search conducted by state agents, counsel for defendant could not be ineffective for failing to raise an argument on that issue.

B. THE EXCLUSIONARY RULE DOES NOT APPLY TO SEARCHES CONDUCTED BY PRIVATE CITIZENS.

Appellant requests this Court find that the exclusionary rule should apply to a private citizen's *Terry* search of the defendant, because the private search exceeded the scope allowed by *Terry*. Appellant's Br. at 6-10. This Court should disregard this argument as unsupported³ and unsupportable. The exclusionary rule does not apply to the acts of private individuals. *Smith*, 110 Wn.2d 666; *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985); *State v. Ludvik*, 40 Wn. App. 257, 262, 698 P.2d

³ Appellate courts do not consider claims unsupported by argument or citation to legal authority. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Moreover, “[p]arties ... raising constitutional issues must present considered arguments to this court.” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). “[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *Johnson*, 119 Wn.2d at 171, 829 P.2d 1082 (quoting *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

1064 (1985) (citing numerous cases holding exclusionary rule does not apply to acts of private individuals).

C. THE DEFENDANT’S DUE PROCESS RIGHTS AND HIS RIGHT TO RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL WERE NOT VIOLATED BY THE STATE’S WITHDRAWAL OF THE PLEA OFFER SOME THREE TO FOUR MONTHS AFTER HIS ARRAIGNMENT.

The defendant broadly states that he was denied “due process” and effective assistance of counsel by the State’s withdrawal of an unaccepted plea offer. Appellant’s Br. at 11-13. However, he assigns no error to the trial court’s factual findings on this issue; therefore, these findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

The trial court’s findings of fact establish that the defendant was charged with heroin possession on August 29, 2014, and was represented by counsel within a week. CP 95. The case was sent to the prosecutor’s Early Case Resolution Unit (ECR), and an offer was extended to the defendant, consisting of a misdemeanor reduction or entry into the Friendship Diversion Program. CP 95. The defendant continued this case four times while remaining in the ECR Unit. On its own terms, the offer extended by the ECR Unit expired on October 28, 2014. CP 96. Some months after being assigned counsel in the case, on November 12, 2014, a request was made by an investigator of the Public Defender’s Office to

interview a witness. *Id.* The case was transferred out of ECR for regular prosecution. On December 2, 2014, a newly assigned prosecutor asked defense counsel if the defendant had rejected the offer of entering into the Friendship Diversion Program. *Id.* On December 4, 2014, approximately three months after being represented by counsel, the unaccepted offer was withdrawn by the State. *Id.*

From the uncontested findings of fact, the trial court concluded that the defendant did not detrimentally rely on any offer to his prejudice; neither the offer, nor its withdrawal constituted governmental misconduct prejudicing the defendant's right to a fair trial, and the extension of the offer did not create a constitutionally protected entitlement that the defendant could accept at any time. CP 96 (Conclusions of Law). There was no error here.

Due Process and Effective Assistance

After mentioning "due process" in passing, Appellant neither states what process was due nor how the right to "due process" or effective assistance of counsel was violated. Appellant's Br. at 11-13. These issues are controlled by *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003), and *State v. Shelmidine*, 166 Wn. App. 107, 269 P.3d 362 (2012).

In *Moen*, the Court examined and rejected a similar due process claim where the prosecutor's plea offer policy required the defendant to

forego both the disclosure of the confidential informant's identity and an interview with him. That Court found that these conditions

insisted on by the State that require[] a defendant to give up a constitutional right d[o] not, by [themselves], violate due process. "Agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of valid plea agreements." *State v. Lee*, 132 Wn.2d 498, 506, 939 P.2d 1223 (1997); *see State v. Perkins*, 108 Wn.2d 212, 737 P.2d 250 (1987). The theoretical basis for all plea bargaining is that defendants will agree to waive their constitutional rights.

Moën, 150 Wn.2d at 230–31.

Again, absent a guilty plea or some other form of detrimental reliance, the State may revoke any plea proposal. *State v. Wheeler*, 95 Wn.2d 799, 805, 631 P.2d 376 (1981).

In *State v. Shelmidine*, 166 Wn. App. at 115–16, the court concluded that where a plea offer did not preclude defense counsel from reasonably evaluating the State's evidence and each party received some benefit from the plea, a policy to withdraw a plea offer if a defendant seeks the identity of a confidential informant does not infringe on a defendant's right to effective assistance of counsel. Here, the defendant knew the identity of the store security officer, had all of the police reports, and, of course, had access to the defendant to obtain his side of the story. His ineffective assistance claim rests solely on his inability to personally

interview Mr. Hastings, the store security witness. Defendant herein had more information available to make a decision regarding ECR than the court found sufficient in *Shelmindine, supra*. In *Shelmindine*, the State would receive the benefit of protecting a confidential informant. Here, the defendant's counsel had the reports and the defendant's version of the offense to make a rational decision on whether to take the ECR plea offer or to proceed on the regular trial docket. Defendant had three months to review and accept the plea offer. He did not accept it. The whole point of Early Case Resolution is to resolve the case early. That is the benefit to the State - accounting for the State's limited resources. That is why the plea offer was made by the State contingent upon an acceptance date. Defendant did not accept, but, instead, claimed he was hypothetically deprived of information necessary to make a decision.⁴ The trial court held otherwise after the defendant moved for dismissal, under CrR 8.3(b), arguing the withdrawal of an Early Case Resolution offer denied him effective assistance of counsel and constituted governmental misconduct. CP 18-35 (Defendant's Motion to Dismiss).

The defendant has failed to show by a preponderance of the evidence *both* (1) arbitrary action or governmental misconduct, and

⁴ As in *Shelmidine*, the allegation is based upon speculation.

(2) actual prejudice affecting the defendant's right to a fair trial. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). Defendant had a fair trial and does not contend otherwise.

Moreover, dismissal under CrR 8.3(b) is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially prejudice the rights of the accused. *Moen*, 150 Wn.2d at 226; *Wilson*, 149 Wn.2d at 9. No mismanagement can legally occur when a plea negotiation is withdrawn, without a showing of harm to the defendant's right to a fair trial or some form of detrimental reliance. It is lawful for the state to withdraw a plea offer prior to its acceptance. *Wheeler*, 95 Wn.2d at 805 (absent a guilty plea or some other form of detrimental reliance, the State may revoke any plea proposal.)

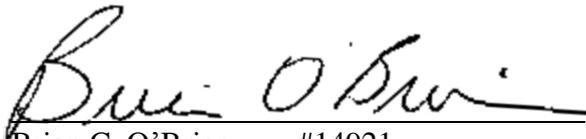
A trial court's decision on a CrR 8.3(b) motion to dismiss is reviewed for manifest abuse of discretion. *Moen*, 150 Wn.2d at 226. Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. *Rohrich*, 149 Wn.2d at 654. The trial court did not abuse its discretion by denying defendant's motion to dismiss.

VI. CONCLUSION

There was no state involvement in the search of the defendant. Because there was no warrantless search conducted by any state agent, counsel for defendant could not be ineffective for failing to raise an argument on that issue. Additionally, the defendant has failed to show by a preponderance of the evidence *both* (1) arbitrary action or governmental misconduct, and (2) actual prejudice affecting the defendant's right to a fair trial. The trial court did not abuse its discretion by denying defendant's CrR 8.3(b) motion to dismiss.

Dated this 19 day of February, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 19, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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