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Court of Appeals
Division III
State of Washington

COA No. 33777-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN PALACIOS-FARIAS,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The court erred by denying Brian Palacios-Farias's CrR 3.5 motion to suppress statements and CrR 3.6 motion to suppress evidence.

Issues Pertaining to Assignment of Error

A. Did the court err by denying Mr. Palacios's CrR 3.5 motion to suppress statements made to police? (Assignment of Error 1).

B. Did the court err by denying Mr. Palacios' CrR 3.6 motion to suppress evidence when it concluded the backpack containing stolen property had been abandoned and could thus be searched without a warrant? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Mr. Palacios was charged by information with one count of residential burglary and one count of second degree theft. (CP 6). He filed a motion to suppress under CrR 3.5 and 3.6. (CP 15). The court denied the motion. (CP 53). These findings of fact and conclusions of law were entered on the motion to suppress:

FINDINGS OF FACT

1. On December 5, 2014, at approximately 10 a.m. Officers Abarca, Rubalcava and Martin of the Grandview Police Department were dispatched

to a trailer park locate at 400 West 5th in Grandview, Washington. Dispatch informed them of suspicious activity at the private trailer park, indicating that the reporting party observed three males wearing black clothing and face masks running through the trailer park. Two of the officers testified that they had been academy trained, were certified, and had experience with burglaries. The third testified he had been a police officer and then detective, serving for fifteen years.

2. Upon entry into the trailer park, Officer Abarca observed a 2000 model silver Ford Mustang parked in the park. At a distance, he observed someone entering the passenger side of the vehicle and the vehicle immediately leaving. The vehicle was located on the road in front of the trailer located to the east of Trailer #15. Officer Abarca and Officer Rubalcava (who was driving the police vehicle) attempted to intercept the Mustang but were unsuccessful.

3. Thereafter, Officer Abarca contacted the reporting party, Anahi Gonzalez, at trailer #56. Ms. Gonzalez corroborated that she had seen three males running northbound in between trailers #40 and #41. She advised only one of the males was wearing a blue mask over his face and that the males were dressed in dark clothes. Officer Abarca walked around the area and between trailers #40 and #41 confirming that it was private property. Officer Abarca asked Officer Martin, who was in a separate marked police vehicle, to locate the silver Mustang and get a license plate. He next spoke to Noe Mejia, the owner of trailer #15 who stated that he had seen two males wearing black walking eastbound past his trailer and shortly after he saw a silver Mustang drive past his trailer driving eastbound.

4. Officer Rubalcava contacted the owner of trailer #41, Joaquin Nunez, because the initial report was

that the three individuals were seen running between trailer #41 and the trailer to the west of it, property #40. Owner of trailer #40 was not contacted by any of the officers. Officer Rubalcava confirmed with Mr. Nunez, owner of #41, that no one had permission to be on his property that day. Officers believed that the majority of the unfenced property between trailers #40 and #41 belonged to trailer #41.

5. In the meantime, Officer Martin located the silver Mustang on the road immediately to the north and west of trailer #40. The vehicle appeared to be unoccupied. Officer Martin ran the California license plate on the vehicle and noted distinctive chrome wheels. He parked his vehicle and stepped away for a few moments at trailer # 41 to observe Officer Rubalcava talk to Mr. Nunez. When he then went back to look at the Mustang, he was surprised because it was gone and did not drive by him as he would have expected. He speculated that when he first observed it, the occupants may have been hiding inside and that it may have backed up the street on the side of #40.

6. Officer Abarca asked Officer Martin to see if he could locate the Mustang and he did shortly locate the vehicle at 405 Nicka Road, at the Vineyard apartments, which is approximately .4 miles to the south of the trailer park. He recognized the vehicle by its distinctive chrome wheels, color and model. He was able to confirm that the California plates were the same. Officer Martin, who was in a marked police vehicle, observed the curtains to A-104 open and close repeatedly as if someone was looking out. It can be inferred that the occupants of A-104 could observe Officer Martin who was in a marked vehicle and in uniform. The Mustang was parked in front of the A building and A-104. Officer Martin had dispatch contact the owner of A-104 to determine if the silver Mustang was associated with the unit. Dispatch contacted the tenant of A-104, Bertha Mora, who

confirmed that her son had a friend who drove the silver Mustang.

7. Officers Abarca and Rubalcava then drove to the Vineyards apartments and contacted Officer Martin. Abarca also recognized the Mustang as the one that was at the trailer park. Once Officer Martin confirmed that the Mustang was associated with apartment A-104, the three officers parked their vehicles and approached A-104.

8. Officers Abarca and Rubalcava approached the front and Officer Martin went to the back of the apartment. As he approached the back of the apartment, Officer Martin heard the back door open, heard something go “thump” or “thud” and observed an individual running from the fence in the back of the property to the open back door of the apartment. The individual, who Officer Martin knew as Brian Palacios, appeared to be startled when he saw Officer Martin and tried to walk away from the officer.

9. At that point, Officer Martin ordered Palacios to the ground. Officer Martin handcuffed Palacios for officer safety, informing Palacios that he was not under arrest at that time but needed to investigate further. Officer Martin did not know at that time whether Palacios was armed, but felt that he might be. He also expressed concern that there might be other suspects present, either outside or in the home.

10. Officers Abarca and Rubalcava then heard Officer Martin yell (or convey by radio) that he had contacted someone in the back of the apartment who did not reside there. Officer Abarca then went to the back of the apartment and instructed Officer Rubalcava to go to the front door. In moving to the back of the residence, Officer Abarca observed a window screen off the window and the rear door open. The window screen was on the east end of the apartment on the ground and he observed a window without a screen. Based upon his experience

investigating burglaries, he believed the officers had interrupted a residential burglary. When asked if he lived at the apartment, Palacios answered "no." At that point, Officer Abarca called out to the occupants of the house through the open rear door, remaining outside the apartment. He identified himself as "police" and asked anyone in the house to come to make themselves known. He received no response despite repeatedly calling out. He then heard Officer Rubalcava announce that he had detained an individual at the front of the house. Officers could hear one another due to the open doors of the apartment.

11. In the meantime, Officer Rubalcava knocked at the front door which was answered by Daniel Mora who was wearing dark clothing. After hearing that the officers in the rear of the apartment had detained a person who was not a resident of the apartment and that there was possible residential burglary occurring, Officer Rubalcava ordered Mora to show his hands. Mora did not ask any questions or offer that he was an occupant of the apartment.

12. Officer Rubalcava then saw another individual exit a back bedroom in the home and Officer Abarca also became aware of that individual. Mora was told then to turn around and show Officer Rubalcava his hands. Officer Rubalcava told the third individual to listen to Officer Abarca's instructions. Officer Abarca verbally commanded that individual, Jose Baron, to exit the home from the rear door where he was then detained and cuffed.

13. Officer Rubalcava verbally commanded Mora to come out of the house and handcuffed Mora for officer safety, concerned that he did not live in the home and may have burglary tools which he could use as weapons. Mora was told he was being detained during the officer's investigation.

14. After exiting the apartment, Baron was asked if he

lived at the apartment, he answered “yes” and was asked what the address was. He gave the wrong address and wrong apartment number. Baron was asked if he knew the occupants of the apartment and he identified Bertha Mora as the occupant. Baron also confirmed that there were other individuals in the home. Officer Martin began to watch Baron as well as Palacios, while Officer Abarca called to Bertha Mora through the back door. Both Palacios and Baron were handcuffed for officer safety and advised that they were not under arrest, but being detained.

15. Eventually Bertha Mora exited the apartment through the back door and Officer Abarca explained what was occurring and she was asked about the three individuals and whether they had permission to be there or not. She stated that Daniel Mora was her son and that he and Baron had permission to be there, but not Palacios. At that time her son was in front with Officer Rubalcava,

16. At that point, Officer Martin jumped over the 6 foot cyclone fence (with security slats) to locate the object that caused the “thud” that he had heard before detaining Palacios. He located a black backpack in the third party’s back yard on the other side of, and near, the fence. He observed that the ground was wet but the backpack was dry as if recently thrown there. Officer Martin retrieved the backpack and brought it back to where the others were. It is reasonable to infer that the backpack was thrown over the fence by Palacios because he knew the police were approaching the apartment.

17. Officer Abarca showed the backpack to Palacios and Baron and asked if the backpack belonged to them. They denied ownership. Ms. Mora was present at that time, but her son, Daniel, was not. After no one claimed ownership of the backpack, Officer Abarca opened the backpack and looked into it and found among other things a school notebook that had Daniel

Mora's name written on it. Also located at that time was a white Mac notebook and charger, a black Xbox 360 Kinect, a black touchscreen cell phone, a white iPhone charger, several school papers bearing Daniel Mora's name and a used roll of grey duct tape. The items were taken out one by one, the notebook being among the first of the items removed. The duct tape was similar to the duct tape which the officers observed on the soles of the shoes of both Palacios and Baron. Officer Abarca was familiar with taping of the soles of shoes with duct tape to keep from leaving shoe prints at the scene of a crime.

18. After this, Bertha Mora was asked if Officer Rubalcava could escort her son through the apartment to the back of the unit. She consented and Officer Rubalcava did so with Mora in handcuffs. Upon his arrival, Mora was asked if the backpack belonged to him. He denied ownership of the backpack. Bertha Mora pointed out to Mora that it was his notebook and to let the officers know it was his backpack. Mora continued to deny ownership.

19. At this point, Officer Abarca advised the juveniles that they were not under arrest, but that he was going to read them their Miranda rights. He then pulled out his Miranda card and gave the three juveniles their Miranda warnings together with the juvenile warnings. Each was asked if they understood their rights and all three responded that they understood their rights and agreed to talk.

20. The boys admitted to being at the trailer park at 400 West 5th. Baron stated that it was his vehicle and that he had been at the trailer park earlier. Palacios stated he was there to visit his friend Caleb. He didn't know Caleb's last name or where he lived and explained that Caleb had tossed the backpack over the fence and fled

prior to Officer Martin's arrival. Then, to determine if others were still in the house, Bertha Mora was asked about this. She said she had been sleeping, but that her daughter was still inside the apartment. The daughter, Christina, came out and indicated that there was no one else in the apartment.

21. The Officers proceeded to ask the juveniles about the contents of the backpack. Palacios was most cooperative and he stated that the items had been stolen from 400 W. 5th and that Caleb had stolen the items and tossed the backpack over the fence. Palacios kept looking at Mora and Baron saying, "tell him, tell him." The boys were told that once the homeowner found out items were missing, the police would find out that they had been stolen and that it would be easier if the boys would just tell them and at that point Palacios stated that the items were stolen. The juveniles may have been detained and handcuffed between five and ten minutes by this point. Then the boys were placed under arrest for possession of stolen property and transported to the Grandview Police Department.

22. During the transport of the juveniles to the police department, Baron and Palacios both agreed to show the officers which trailer had been burglarized. All three agreed on the location of the trailer #34 as the burglarized residence. The officers stopped and observed that the entry had been made through the rear door of trailer #34 where the window had been broken.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact the court makes the following conclusions of law.

1. Officers Abarca, Rubalcava and Martin had a

reasonable and articulable suspicion based upon a totality of the circumstances known to them that there was a substantial possibility that a criminal trespass occurred on 12/5/14 at 400 West 5th in Grandview, Washington at trailer #41 and that individuals in the Vineyard apartment A-104 were involved. This is based on the foregoing facts, and, in particular: that the three suspects wearing dark clothes were seen running between trailers #41 and #40 one wearing a mask; that close in time and proximity, there was parked a 2000 model silver Mustang in the trailer park one space to the east of #15; that the owner of #15 saw two males wearing black walk by his unit to the east and then immediately saw a silver Mustang pulling westbound in front of his trailer; that the owner of #41 did not give anyone permission to be on his property that day; that Officer Abarca saw the same vehicle and an individual getting in the passenger side and the vehicle taking off immediately thereafter; that Officer Martin located the vehicle in the trailer park shortly thereafter and it appeared unoccupied, he noted the distinctive features of the vehicle and ran the plate; that the vehicle within minutes thereafter disappeared without passing the officers and was shortly discovered at the Vineyards apartments; that the vehicle was parked near the entrance of apartment A-104 as belonging to a friend of the tenant's son; that the curtains in one of the windows of A-104 repeatedly opened and closed as if someone was looking out while Officer Martin was in the apartment building parking lot. This suspicion gave the officers a right to approach A-104, both in the front and back of the building and detain for investigative purposes anyone fitting the description of the suspects under Terry v. Ohio, 392 U.S. 1 (1968).

2. When Officer Martin heard the "thud" and saw Palacios running from the fence to the open door

at the rear of the apartment he was entitled to lawfully detain Palacios under Terry as set forth above. Given the screen off the window, open door of the apartment, Palacios' statement that he did not live at the residence and attempt to leave, Officer Martin had an additional reasonable and articulable suspicion based upon the totality of the circumstances that Mr. Palacios could be committing a burglary. This detention was a Terry stop, even though Mr. Palacios was handcuffed. Mr. Palacios was told he was not under arrest, and the officer needed to restrict his freedom for officer safety as it was unknown if he was armed, how many others were in the vicinity, including outside or in the residence at that time. Officer Martin needed to get the situation under control for purposes of his safety and investigation. The detention of Palacios was lawful. . .

5. An officer can handcuff a detainee stopped under Terry for officer safety reasons and to get the immediate situation under control. Given what the officers knew and believed, based upon their observations, training and experience, under a totality of the circumstances, it was reasonable to detain and restrain the freedom of each of the juveniles in the manner they did pending investigation.

6. When Bertha Mora indicated that juveniles Mora and Baron had permission to be at A-104, the reasonable and articulable suspicion for burglary as to them was extinguished, however, there remained a legal Terry stop of the juveniles pertaining to the criminal trespass. A very short period of time passed between this information and when their Miranda Warnings were given and they were ultimately arrested. It wasn't until after the juveniles had been questioned about the content of the backpack that Mora's sister confirmed that Palacios had been in the home with her knowledge.

7. The backpack was in Palacios' control and was

voluntarily abandoned by him before even being encountered by the police thus not abandoned pursuant to illegal police activity. The backpack had been discarded on a third party's property over a fence on the other side of the apartment building's property. Palacios was running away from the fence and discarded backpack at the time he was confronted by Officer Martin. Neither Palacios nor Baron expressed an ownership or privacy interest in the backpack. Each denied that it belonged to them. Mora was not present when the backpack was opened and searched. Officers were conducting the search as a community safety function to determine whether there were drugs or weapons in the backpack. When Mora was then brought to the back of the residence and asked if he was the owner of the backpack, he denied it by words and conduct. He had no reasonable expectation of privacy in the backpack or the property over the fence. Officers had reasonable cause to believe the item was abandoned and were entitled to search the recently discarded backpack as voluntarily abandoned property.

8. Miranda Warnings were not required to be given during the Terry detention of the juveniles. Post-Miranda statements that the property in the backpack was stolen were freely and voluntarily given by Palacios. Those statements gave rise to probable cause to arrest the juveniles for possession of stolen property.

9. It appears that only moments passed between the time of the initial detention and the subsequent arrests. The length, nature and scope of the detentions were not unreasonable given the totality of the circumstances and did not violate the juveniles' constitutional rights.

10. Miranda warnings were properly given pre-arrest. Each of the juveniles knowingly and freely waived their rights and gave information

implicating themselves in the burglary of trailer #34 located at 400 W. 5th. (CP 53-62).

The court denied the motion to suppress statements and evidence. (CP 62).

Thereafter, a stipulated facts trial was held with Mr. Palacios to appeal the denial of the suppression motion. (9/14/15 RP 330). Based on its findings and conclusions, the court found him guilty beyond a reasonable doubt of residential burglary and second degree theft. (CP 83-84). Mr. Palacios received a standard range disposition. (CP 102). He appeals.

III. ARGUMENT

A. The court erred by denying Mr. Palacios' s CrR 3.5 motion to suppress statements made to police.

The court found that Officer Martin approached the back of the apartment when he heard a "thud" and saw Mr. Palacios running from the fence in the back of the property to the open back door of apartment A-104. (FF 8, CP 55). The officer immediately ordered him to the ground and handcuffed him. (FF 9, CP 55). Although advised he was not under arrest, Mr. Palacios was not free to leave as a reasonable person in the same circumstances would have perceived he was in custody for *Miranda* purposes.

State v. Short, 113 Wn.2d 35, 40-41, 775 P.2d 458 (1989); *State v. Watkins*, 53 Wn. App. 264, 274, 766 P.2d 484 (1989). When a suspect's freedom of action has been curtailed to a degree associated with a formal arrest, *Miranda* warnings must be given. *Short*, 113 Wn.2d at 40-41. But as Officer Abarca acknowledged, they were not given until well after Mr. Palacios was questioned about the backpack and made statements in response to questions seeking incriminating responses. (5/8/15 RP 156; FF 17, CP 57). The statements must be suppressed.

The circumstances here show that all other incriminating statements elicited by police from Mr. Palacios flowed from the statements he made regarding the backpack. The Fifth Amendment right against compelled self-incrimination requires police to inform suspects of their *Miranda* rights before a custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966); *State v. Cunningham*, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). Mr. Palacios was not given his *Miranda* rights before the police questioned him to solicit incriminating responses, which were then used to gather even more evidence. Those subsequent statements are fruit of the poisonous tree and must be suppressed as well. *Wong Sun v. United States*, 371 U.S. 471, 83

S. Ct. 407, 9 L. Ed.2d 441 (1963). The convictions must be reversed.

B. The court erred by denying the motion to suppress evidence because Mr. Palacios did not abandon the backpack and a warrant was required before searching it.

The court found Mr. Palacios and Mr. Baron denied ownership of the backpack containing incriminating evidence. (FF 17, CP 57). Based on their denial of ownership, Officer Abarca searched it and found, among other things, a notebook with Mr. Mora's name on it. (*Id.*). But at the time of the warrantless search, Mr. Mora had not disclaimed ownership of the backpack and later denied ownership only when the officer asked him after he had already searched it. (FF 18, CP 58).

A criminal defendant has automatic standing to challenge the validity of a search or seizure under Wash. Const. art. 1, § 7 if (1) possession of contraband is an essential element of the charge and (2) the defendant was in possession of the contraband at the time of the contested search or seizure. *State v. Evans*, 159 Wn.2d 402, 406-07, 150 P.3d 105 (2007). This is so "even though he or she could not technically have a privacy interest in such property." *State v. Simpson*, 95 Wn.2d 170, 175, 622 P.2d 1199 (1980). Mr.

Palacio meets both parts of the automatic standing test because (1) he was arrested on suspicion of a possession of stolen property charge where possession is an essential element and (2) he was in apparent constructive possession of the property in the backpack at the time of the contested search or seizure.

There is no dispute that the search of the backpack was done without a warrant. Absent an exception to the warrant requirement, a warrantless search is impermissible under Wash. Const. art. 1, § 7 and the Fourth Amendment. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The exceptions are jealously and narrowly drawn and the State has the burden of proving the presence of an exception. *Id.* at 717. Evidence seized during an illegal search is suppressed under the exclusionary rule. *Id.* at 716-17. Furthermore, evidence derived from the illegal search is also subject to suppression under the fruit of the poisonous tree doctrine. See *State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, *supra*).

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

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

The question is whether Mr. Palacios voluntarily abandoned the backpack and the stolen property found in it during Officer Abarca's warrantless search.

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

The *Evans* court, at 428, explained voluntary abandonment:

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

To establish he had a reasonable expectation of privacy in the contents of the backpack, Mr. Palacios must show (1) an actual (subjective) expectation of privacy by seeking to preserve something as private and (2) that society recognizes that expectation as reasonable. *Evans*, 159 Wn.2d at 409. He again meets both requirements. First, he did not consent to a search of the backpack. Second, society recognizes a general expectation of privacy in briefcases, purses, luggage, backpacks, and the like. *State v. Kealey*, 80 Wn. App. 162, 170, 907 P.2d 319 (1995), *review denied*, 129 Wn.2d 1021 (1996).

Although Mr. Palacios disclaimed ownership of the backpack, the denial of ownership by itself did not amount to abandonment. *Evans*, 159 W n.2d at 412. The circumstances surrounding the disclaimer of ownership dictate whether a defendant has abandoned property. *Id.* at 412-13. He had an expectation of privacy as the backpack was an item recognized by society as private and he did not consent to any search or seizure. There were no acts by Mr. Palacios showing abandonment. His denial of ownership alone was insufficient to show any act or intent of abandonment under these circumstances. *Evans*, 159 Wn.2d at 413. Under the circumstances, his tossing the backpack over the

fence showed possession and an expectation of privacy rather than abandonment. A warrant was thus required. *Gaines*, 154 Wn.2d at 716-17. The court erred by finding abandonment.

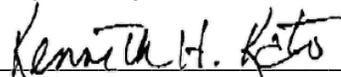
The warrantless search of the backpack and thumb drive was illegal. *Evans*, 159 Wn.2d at 413. Mr. Palacio's motion to suppress should have been granted. Moreover, the belated denial of ownership by Mr. Mora, who at least circumstantially appeared to be the owner of the backpack, did not cure the warrantless search of the backpack. The stolen property was derived from the illegal warrantless search and thus fruit of the poisonous tree that must be suppressed as well. *O'Bremski*, 70 Wn.2d at 428. The court erred by denying the motion to suppress evidence from the backpack.

IV. CONCLUSION

Based on the foregoing, Mr. Palacios respectfully urges this Court to reverse his convictions and dismiss the charges.

DATED this 5th day of July, 2016.

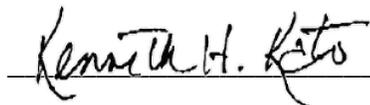
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on July 5, 2016, I served a copy of the Brief of Appellant by USPS on Brian Palacios-Farias at his last known address, 1200 Carriage Ct., Apt. C18, Grandview, WA 98930; and by email, as agreed, on Tamara Hanlon at tamara.hanlon@co.yakima.wa.us.

A handwritten signature in black ink, reading "Kenneth H. Kato", is written over a horizontal line.