

No. 33887-8-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

FILED
APR 14, 2016
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

CORY WAYNE ROBERTS

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PEND OREILLE COUNTY

The Honorable Judge Patrick A. Monasmith

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Cory Roberts was the passenger in a vehicle when it was stopped for speeding. Mr. Roberts immediately informed the deputy the vehicle had been provided to him in exchange for chopping wood. Mr. Roberts also handed his cell phone to the deputy to verify with the registered owner, who was on the phone, that Mr. Roberts had permission to possess the vehicle. The vehicle was not reported stolen. The State conceded that, after citing the driver for driving without a valid operator's license, the deputy did not have articulable suspicion of any criminal activity by the driver or Mr. Roberts. Thus, when the deputy obtained the driver's consent to search the vehicle, the search was unlawful as the consent was vitiated by the illegal ongoing detention.

During the ensuing search, the deputy found a jacket on the floor behind the driver's seat with a pipe containing methamphetamine residue. Upon questioning, Mr. Roberts said the jacket was his. The deputy then read Mr. Roberts his *Miranda* warnings, and Mr. Roberts acknowledged having picked up the pipe while chopping wood.

Mr. Roberts moved to suppress the evidence from the search, which the court denied based on its belief the defendant lacked standing. But the court clearly erred; Mr. Roberts had standing under the Fourth Amendment because he had a reasonable expectation of privacy in the

vehicle and his jacket. Also, Mr. Roberts had standing after being subjected to his own personal violation through the illegal ongoing detainment. Finally, Mr. Roberts had automatic standing since he possessed the pipe, and his offense included an element of possession.

Next, the court erred by admitting Mr. Roberts' statements about owning the jacket and possessing the pipe, since these statements were made prior to or were tainted by the lack of timely *Miranda* warnings.

Finally, as a matter of standard procedure, Mr. Roberts objects to any costs that could be imposed on appeal, even though he strongly believes he will be the prevailing party in this appeal.

Based on the arguments herein, Mr. Roberts respectfully requests that his convictions be reversed and the matter dismissed with prejudice.

B. ASSIGNMENTS OF ERROR

1. The court erred by finding, "At no time did the defendant make any claim to dominion and control over any item in the vehicle." CP 178, FF 1.9. The defendant previously asserted a possessory interest in and control over the vehicle itself (RP 8-9, 79-80), and he claimed the jacket found in the vehicle was his own (RP 10). Consequently, the court erred by concluding "the defendant was not in possession of the jacket at the time Deputy Bowman located the smoking device...", the defendant lacked standing to challenge the search, and the jacket and its contents were admissible at trial. CP 180, CL 2.5.

2. The court erred by finding the defendant's "freedom of movement [was not] restrained in any way" (CP 179, FF 1.11) when the deputy questioned Mr. Roberts about contraband discovered in the vehicle he possessed, Mr. Roberts' license had not yet been returned to him (RP 14), and he was "directed" (CP 178, FF 1.9) to exit the vehicle before an unjustified weapons frisk (RP 8-9, 20-21, 25, 79-80). Consequently, the court erred

by concluding “the defendant’s freedom of movement was not restrained in a manner equivalent to a custodial arrest...” and by admitting the defendant’s statements about ownership of the jacket and possession of the pipe. CP 179-80, CL 2.1-2.2.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred by finding the defendant lacked standing to challenge an admittedly unlawful search where the defendant asserted a possessory or ownership interest over the vehicle and claimed possession of the jacket and contraband, where the defendant was personally subjected to an unlawful detention so as to confer standing, and where the defendant met automatic standing principles.

- a. The State properly conceded and the trial court properly found the ongoing detainment of the driver and Mr. Roberts were not supported by articulable suspicion of criminal activity, thus vitiating the subsequent consent to search the vehicle.
- b. Mr. Roberts had a reasonable expectation of privacy in the place searched and the item(s) seized; he, therefore, had standing to challenge the unlawful search described above.
- c. Mr. Roberts also had standing to challenge the illegal detention and subsequent unlawful search, because he was personally illegally detained.
- d. Mr. Roberts had automatic standing to challenge the unlawful search and seizure based on his possession of the pipe.

Issue 2: Whether the court erred by failing to suppress the defendant’s confessions when the deputy interrogated Mr. Roberts without *Miranda* warnings after locating contraband in the vehicle.

Issue 3: Whether, in the unlikely event Mr. Roberts is unsuccessful in this appeal, this Court should deny any imposition of appellate costs due to Mr. Roberts’ inability to pay.

D. STATEMENT OF THE CASE

On April 11, 2015, Deputy Jordan Bowman stopped a vehicle for allegedly speeding¹ in Pend Oreille County; Lee Broadsword was driving and Cory Roberts rode as the front and only passenger. (RP 7-9, 13, 77) Deputy Bowman requested Mr. Broadsword's license, but was instead given identification and informed Mr. Broadsword did not have a valid license. (*Id.*) The passenger, Mr. Roberts, voluntarily handed his own suspended license to the deputy and explained Mr. Broadsword was learning to drive. (*Id.*) The deputy then asked Mr. Roberts if the vehicle belonged to him. (RP 8-9, 79) Mr. Roberts answered he had received the vehicle as a result of cutting wood for a friend; he was unable to produce a bill of sale for the vehicle. (*Id.*)

The deputy learned from dispatch the vehicle had not been reported stolen. (RP 20) When the deputy returned to the vehicle, Mr. Roberts handed over his cell phone, at which time a woman on the phone informed the deputy she was the registered owner and had given Mr. Roberts permission to have the vehicle. (RP 12, 23, 81-82) The deputy informed the men they would need to have someone else drive the vehicle as neither had a valid license to drive. (RP 8) Mr. Broadsword was cited for driving without a valid operator's license. (RP 8, 13)

¹ No speeding citation was ever issued. (RP 13)

Deputy Bowman was suspicious because the two men were “shaking uncontrollably” and appeared evasive or nervous. (RP 9, 18, 20, 25, 80) The deputy obtained consent to search the vehicle from the driver. (RP 9, 80) The deputy acknowledged he did not have suspicion of a particular crime at this time or evidence the vehicle was stolen, and the State later conceded the deputy did not have authority to have requested this consent to search. (RP 22, 24, 30)

Prior to the vehicle search, Deputy Bowman directed Mr. Broadsword and Mr. Roberts to exit the vehicle and patted them down for weapons. (RP 20-21, 25; CP 178, FF 1.9) The deputy had not yet returned Mr. Roberts’ license to him, and he never told Mr. Roberts he was free to leave during the search. (RP 14) While searching the vehicle, the deputy found a jacket behind the driver’s seat that had a pipe with methamphetamine residue in its pocket. (RP 10, 82, 85, 94-95) Deputy Bowman asked the two men who the jacket belonged to, and Mr. Roberts said the jacket was his. (RP 10, 82-84) The deputy then read Mr. Roberts his *Miranda*² rights, which Mr. Roberts waived, and asked Mr. Roberts about the pipe. (RP 10, 23, 26, 85) Mr. Roberts said he found the pipe while cutting wood and planned to dispose of it. (*Id.*) Mr. Roberts was

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

arrested and charged with possession of a controlled substance (methamphetamine) and use of drug paraphernalia. (CP 1-2)

Mr. Roberts moved to suppress the evidence as the fruit of an unlawful search or seizure. (CP 22-31) The State conceded and the trial court agreed that the “consensual” search was preceded by an unlawful detention lacking articulable suspicion of criminal activity. (RP 30; CP 178, FF 1.8) But the trial court ruled Mr. Roberts did not have standing to challenge the unlawful search and denied his motion to suppress. (CP 180) It held,

2.4 A passenger in a vehicle has standing to challenge a warrantless, consensual search of the vehicle only if (1) the charged crime involves possession of the items seized; and (2) the defendant was in possession of the item at the time of law enforcement contact. *State v. Coss*, 87 Wn. App. 891, 943 P.2d 1126 (1997).

2.5 As the defendant was not in possession of the jacket at the time Deputy Bowman located the smoking device, the defendant lacks standing to challenge the search. Consequently, the jacket and its contents are admissible at trial.

CP 180.

Mr. Roberts also objected to use of his statements as the unlawful fruit of a custodial interrogation made without proper warnings. (CP 32-44) But the court found Mr. Roberts’ freedom of movement was not sufficiently restrained, such that his answer about owning the jacket did

not constitute custodial interrogation that required *Miranda* warnings. (CP 179-80)

A jury found Mr. Roberts guilty as charged, and the court ordered a standard range sentence. (RP 140; CP 162-63, 187-96) Pursuant to *Blazina*,³ the trial court waived all except the victim's assessment and DNA fees, commenting Mr. Roberts was indigent, faced an uphill battle to rehabilitation, and had a history of being unable to maintain minimum wage work. (RP 158; CP 192)

This appeal timely followed. (CP 201)

E. ARGUMENT

Issue 1: Whether the court erred by finding the defendant lacked standing to challenge an admittedly unlawful search where the defendant asserted a possessory or ownership interest over the vehicle and claimed possession of the jacket and contraband, where the defendant was personally subjected to an unlawful detention so as to confer standing, and where the defendant met automatic standing principles.

The trial court properly found the detainment of the driver and Mr. Roberts was not supported by articulable suspicion of criminal activity. But the court then erred in finding Mr. Roberts lacked standing to challenge the subsequent unlawful search. Mr. Roberts had an expectation of privacy in both the place that was searched (the vehicle for which he asserted a possessory interest) and the items that were searched and seized

³ *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

(the jacket, which Mr. Roberts told the deputy belonged to him). Also, Mr. Roberts had standing to challenge the unlawful search as it followed his own illegal detainment. Regardless, Mr. Roberts had automatic standing to challenge the vehicle search, because the crime included a possession element as to an item that was claimed by Mr. Roberts.

- a. The State properly conceded and the trial court properly found the ongoing detainment of the driver and Mr. Roberts were not supported by articulable suspicion of criminal activity, thus vitiating the subsequent consent to search the vehicle.

As a threshold matter, the State properly conceded and the trial court correctly found there was not articulable suspicion of criminal activity to support the ongoing detention of Mr. Roberts and the driver of the vehicle, such that the subsequent “consensual” search of the vehicle was not lawful.

The state and federal constitutions protect against unlawful searches and seizures. Wash. Const. art. I, §7; U.S. Const. amend IV. When law enforcement make a valid traffic stop, an officer may only detain the driver for the time reasonably necessary to verify the driver’s identity; determine the status of his license, insurance and registration; and complete a notice of infraction. *State v. Cole*, 73 Wn. App. 844, 848, 871 P.2d 656 (1994). The officer may not detain the driver longer than is necessary to issue a citation, unless he has reasonable, articulable suspicion of additional criminal activity. *State v. Tijerina*, 61 Wn. App.

626, 629, 811 P.2d 241 (1991); *State v. Henry*, 80 Wn. App. 544, 550-53, 910 P.2d 1290 (1995) (citing *Terry v. Ohio*, 392 U.S. 1, 19-20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *State v. Cantrell*, 70 Wn. App. 340, 344, 853 P.2d 479 (1993), *reversed in part on other grounds*, 124 Wn.2d 183, 875 P.2d 1208 (1994).

A driver's or passenger's nervousness in the presence of the officer, even where a person appears "more nervous than normal," does not constitute articulable suspicion of criminal activity. *Henry*, 80 Wn. App. at 552-53 ("without sufficient justification, police officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches."); *State v. Barwick*, 66 Wn. App. 706, 710, 833 P.2d 421 (1992), *abrogated by State v. Cole*, 73 Wn. App. 844 ("most persons stopped by law enforcement officers display some signs of nervousness.")

When a law enforcement officer extends a traffic stop detention beyond the purpose of the stop without a reasonable, articulable suspicion that criminal activity has or is about to occur, the illegal detention vitiates subsequent consent to search the vehicle unless the consent is sufficiently purged from the taint of the illegal detention. *Tijerina*, 61 Wn. App. at 629-30; *Henry*, 80 Wn.App. at 551-53; *Cantrell*, 70 Wn. App. at 344. To determine whether the consent to search was tainted by a prior illegal detention, courts consider "(1) the temporal proximity of the detention and

subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of *Miranda* warnings.” *Tijerina*, 61 Wn. App. at 630; *see also State v. Armenta*, 134 Wn.2d 1, 17, 948 P.2d 1280 (1997).

In *Tijerina*, the officer could not articulate any criminal activity, other than the infraction of weaving over the fog line, to justify asking permission to search the defendant’s vehicle. 61 Wn. App. at 629. The subsequent consent to search vehicle was, therefore, tainted by the prior illegal detention, and no intervening circumstances were found to otherwise validate the consent. *Id.* at 629-30. In *Cantrell*, the court agreed, “Once the purpose of the stop was fulfilled by issuance of a speeding ticket, . . . the trooper had no right to detain the car’s occupants [absent further] articulable facts giving rise to a reasonable suspicion of criminal activity.” 70 Wn. App. at 344. *Accord Armenta* 134 Wn.2d at 16 (finding ongoing detention of vehicle occupants after traffic stop was unreasonable where officer lacked information regarding suspected criminal activity); *State v. Takesgun*, 89 Wn. App. 608, 609-11, 949 P.2d 845 (1998) (two young men appeared nervous and trooper suspected they were “up to something,” but court found this insufficient to justify the ongoing detention, thereby tainting the driver’s consent to search the vehicle).

Here, the deputy admitted he lacked a reasonable, articulable suspicion that Mr. Broadsword or Mr. Roberts had or were about to be engaged in any particular criminal activity. RP 22, 24, 30. There was not sufficient reason to believe the driver or Mr. Roberts were in possession of stolen vehicle (the vehicle was not reported stolen, and the registered owner informed the deputy via telephone that Mr. Roberts had permission to have the vehicle). RP 20, 24. Also, the driver's and passenger's nervousness (RP 9, 25, 80) did not equate to reasonable suspicion of an articulable crime. *Accord Henry*, 80 Wn. App. at 552-53 *Barwick*, 66 Wn. App. at 710; *Takesgun*, 89 Wn. App. at 609-11. Thus, the State properly conceded (RP 30) and the trial court properly found (CP 178, FF 1.8) the ongoing detention was unlawful.

The driver's consent in this case for the deputy to search the vehicle was not sufficiently purged from the taint of the illegal detention. First, the consent was obtained in close temporal proximity to the illegal ongoing detention without the presence of significant intervening circumstances to otherwise purge the taint. Like in *Armenta, Henry, Cantrell* and *Tijerina, supra*, the driver and defendant in this case were never informed they were free to leave between the issuing of the citation and consenting to the search. RP 14. Also, the purpose of the deputy seeking consent was not to search for evidence of a particular crime, but to

instead explore the deputy's generalized suspicions as to why the driver and Mr. Roberts appeared nervous. *Henry*, 80 Wn. App. at 552-53 (“police officers may not use routine traffic stops as a basis for generalized, investigative detentions or searches.”) Finally, *Miranda* warnings were not given until after the consent was unlawfully obtained and contraband seized. RP 26.

Under these circumstances, the driver's consent to search remained tainted by the illegal, ongoing detention of the driver and Mr. Roberts in order to search for evidence of some unidentified crime. The critical issue in this case, therefore, is whether Mr. Roberts had standing to challenge the admittedly unlawful search. Mr. Roberts did have standing under traditional constitutional expectation of privacy principles and pursuant to Washington's automatic standing doctrine.

- b. Mr. Roberts had a reasonable expectation of privacy in the place searched and the item(s) seized; he, therefore, had standing to challenge the unlawful search described above.

Mr. Roberts had a legitimate privacy interest in both the place searched and the personal items searched and seized. Standing was clearly established in this case pursuant to the Fourth Amendment and article one section seven so Mr. Roberts could challenge the unlawful search.

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

be violated.” U.S. Const. amend IV.⁴ A person may challenge a search under the Fourth Amendment if the person has a legitimate privacy interest. *State v. Jones*, 68 Wn. App. 843, 845 P.2d 1358 (1993). “A defendant who does not personally claim a legitimate expectation of privacy in the area searched or property seized generally has no standing to challenge the search or seizure.” *State v. Foulkes*, 63 Wn. App. 643, 647, 821 P.2d 77 (1991) (internal citations omitted). “An individual has a “‘justifiable,’ ... ‘reasonable,’ or ... ‘legitimate expectation of privacy’” if that individual has manifested an actual, subjective expectation of privacy in the area searched or item seized and society recognizes the individual’s expectation of privacy as reasonable.” *Id.*

“[O]ne need not be the owner of a vehicle in order to have a legitimate expectation of privacy in it.” *Foulkes*, 63 Wn. App. at 648 (citing *United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980)); *State v. Goodman*, 42 Wn. App. 331, 335, 711 P.2d 1057 (1985). On the other hand, a passenger of a vehicle must still assert a possessory or privacy interest in the place searched or the property seized to establish standing under the Fourth Amendment. *Foulkes*, 63 Wn. App. at 647.

In *Portillo, supra*, defendant Portillo was merely a passenger in a vehicle and “asserted neither a property nor a possessory interest in the

⁴ See also Wash. Const. art. I, §7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”)

automobile, nor an interest in the property seized.” 633 F.2d at 1317 (quoting *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)). The Court held the defendant did “not possess an expectation of privacy which the fourth amendment was designed to protect.” *Id.* On the other hand, defendant Montellano had permission to use his friend’s vehicle and could exclude all others, save the owner, from the vehicle. *Id.* This defendant “possesse[d] the requisite legitimate expectation of privacy necessary to challenge the propriety of the search.” *Id.*

In *Foulkes, supra*, the defendant asserted no ownership or possessory interest in the vehicle or its contents; the Court concluded the defendant had “no expectation of privacy in the car or its contents at the time of the search.” 63 Wn. App. at 648. That defendant lacked standing to contest the search and seizure. *Id.* Similarly, in *Jones* the defendant presented no evidence and made no attempt to prove he had an expectation of privacy in the premises that was searched (a friend’s apartment and hallway where the defendant just happened to be present). *Jones*, 68 Wn. App. at 849-50. The court concluded, the defendant “failed to establish a reasonable expectation of privacy in the premises...” to carry his suppression argument under the Fourth Amendment. *Id.* at 852, 854.⁵

⁵ The court also rejected the appellant’s automatic standing argument, stating “there is no authority in Washington binding this court to apply automatic standing as a matter of state constitutional law.” *Jones*, 68 Wn. App. at 854. But subsequent authorities in this

Here, Mr. Roberts could establish standing to challenge the unlawful search pursuant to the Fourth Amendment. Indeed, he had a legitimate expectation of privacy in both the places or thing searched and the items seized. Unlike the defendants above who were mere passengers in vehicles, or who were merely present in a friend's apartment, Mr. Roberts asserted a possessory interest in the vehicle. He informed the deputy he had obtained the vehicle in exchange for cutting wood for a friend. RP 8-9, 79. The vehicle was not reported stolen, and the vehicle's registered owner informed the deputy via telephone Mr. Roberts was indeed in possession of the vehicle with her permission. RP 12, 23, 81-82. Mr. Roberts allowed Mr. Broadsword to drive the vehicle, telling the deputy Mr. Broadsword was learning to drive. Mr. Roberts had a possessory interest in the vehicle, allowing him to exclude others from the vehicle, or to allow others to enter the vehicle as he did with Mr. Broadsword.

Mr. Roberts had a possessory interest in the vehicle, which gave him a reasonable expectation of privacy as to the vehicle itself and its contents. In other words, Mr. Roberts had a reasonable expectation of privacy in the jacket because it was a content of the vehicle he possessed. Furthermore, Mr. Roberts had a reasonable expectation of privacy as to

State have since determined otherwise, holding automatic standing does still exist under Washington state constitutional law (see Issue 1(d) below).

the jacket because he was the only person who claimed ownership of this personal item. *See State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001) (a jacket identified as belonging to the defendant constituted a personal item for which the defendant retained a reasonable expectation of privacy as to its contents, even after the defendant was separated from the jacket and transported to jail).

Here, Mr. Roberts had a legitimate privacy interest in his jacket (RP 10, 82-84), even after he was removed from the vehicle for the deputy to conduct the search. *See Dugas*, 109 Wn. App. at 595. Mr. Roberts undeniably had standing to assert his suppression motion on the basis of the illegal detainment and subsequent unlawful search. He had a legitimate possessory and privacy interest in the vehicle, its contents and, most significantly, his own jacket.

- c. Mr. Roberts also had standing to challenge the illegal detention and subsequent unlawful search, because he was personally illegally detained.

In addition to the possessory interest in the vehicle and jacket, both of which provided standing in this case, Mr. Roberts had standing to challenge the governmental action that infringed upon his own Fourth Amendment rights. That is, Mr. Roberts had standing to challenge his own illegal detention and the fruits of that unlawful seizure.

A mere passenger of a vehicle does not necessarily have standing to challenge the search of a vehicle if he cannot establish a possessory interest in the vehicle or its contents. *Takesgun*, 89 Wn. App. at 610-11 (citing *Rakas*, 439 U.S. at 150-51). However, the passenger does have standing to challenge “his own seizure, regardless whether he has standing to challenge a subsequent search of the vehicle.” *Id.* at 611. As such, if the stop or continued detention of a driver and its passenger is unreasonable (not based on articulable suspicion of criminal activity), the passenger has standing to challenge his own unlawful detention and the fruits of that unlawful detention. *Id.*

In *Takesgun*, an officer stopped a vehicle for failure to dim its bright lights. 89 Wn. App. at 609-10. The driver and passenger (the defendant) appeared nervous and the trooper “suspected the two young men were up to something.” *Id.* at 610. The trooper engaged them in conversation, asked about alcohol in the car, and obtained permission from the driver to search the vehicle, finding cocaine in the trunk. *Id.* The driver and the passenger defendant were arrested, at which time the defendant admitted he had cocaine in his shoe. *Id.*

The trial court found the detention of the driver was illegal, but it refused to suppress evidence as to the passenger, finding the defendant lacked standing to challenge the driver’s detention. *Takesgun*, 89 Wn.

App. at 610. The Court of Appeals agreed with the trial court's decision that the continued detention of the driver after the traffic stop "ripened into an unlawful seizure, which tainted his consent to search the vehicle." *Id.* at 611. But the Court of Appeals reversed as to the ruling on the passenger's standing, emphasizing "the [trial] court's analysis ignores the fact that Mr. Takesgun's detention also became unlawful when the trooper exceeded the scope of the investigatory stop. The fruits of the unreasonable seizure of the car's occupants, i.e., the cocaine in the trunk, both arrests and the cocaine in Mr. Takesgun's shoe, were all inadmissible and should have been suppressed." *Id.*

This case is directly analogous to *Takesgun, supra*. Mr. Roberts, as the passenger of the vehicle, was subject to the same ongoing illegal detainment as the driver of the vehicle, one without articulable suspicion of criminal activity. Like the trooper in *Takesgun*, the deputy here clearly believed the two men in this case were "up to something..." (89 Wn. App. at 610), but this generalized suspicion did not justify the detention of Mr. Broadsword or Mr. Roberts. The deputy questioned the vehicle occupants beyond the time necessary to merely issue a traffic citation; the deputy kept Mr. Roberts' license (RP 14), the deputy directed Mr. Roberts out of vehicle (CP 178, FF 1.9), the deputy patted Mr. Roberts down for weapons (RP 20-21), and the deputy never told the defendant he was free to leave

(RP 14). Like in *Takesgun, supra*, the unreasonable seizure of the car's occupants, including both the driver and Mr. Roberts, results in suppression of all of the evidence obtained as a fruit of the unlawful seizure, including the pipe and Mr. Roberts' subsequent statements about the pipe (RP 10, 23, 85). 89 Wn. App. at 610-11.

Ultimately, Mr. Roberts had standing under the Fourth Amendment to challenge the unlawful search of the car he possessed, his own jacket, and the evidence obtained following his own illegal detention.

- d. Mr. Roberts had automatic standing to challenge the unlawful search and seizure based on his possession of the pipe.

In addition to standing pursuant to the Fourth Amendment and article one section seven, Mr. Roberts had automatic standing pursuant to the Washington constitution to maintain his suppression challenge.

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, §7. A person may challenge a search under article one, section seven, if the person has a legitimate privacy interest. *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). Alternatively, even if the person does not have a legitimate privacy interest in a specific item or place searched, a person may still have “automatic standing” to challenge the unlawful search or seizure in this state. *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980); *State v. Coss*, 87 Wn. App. 891, 895-96, 943 P.2d 1126 (1997), *review*

denied, 87 Wn. App. 891 (1998). “The automatic standing doctrine confers standing on anyone charged with a possessory crime, eliminating the requirement of showing a legitimate expectation of privacy before the defendant can challenge a search or seizure... as long as the person is in possession at the time of the contested search or seizure.” *Id.* at 895, 896 (citing *State v. Michaels*, 60 Wn.2d 638, 644-47, 374 P.2d 9889 (1962); *Simpson*, 95 Wn.2d at 174-81 (plurality opinion)); *State v. Evans*, 159 Wn.2d 402, 407, 412, 150 P.3d 105 (2007) (confirming existence of automatic standing doctrine in this state).

Automatic standing “encompasses the right to assert a violation of a privacy as a result of impermissible police conduct at least in cases where, as here, a defendant is charged with possession of the very item which was seized.” *Simpson*, 95 Wn.2d at 180. The automatic standing doctrine originated to address the “self-incrimination” dilemma. *State v. Jones*, 146 Wn.2d 328, 334, 45 P.3d 1062 (2002). “Without the doctrine, a defendant at a suppression hearing would be discouraged from testifying that he owned or possessed contraband, or the premises in which they were found, because such testimony could be used against him at the subsequent trial to prove possession as an element of the substantive crime.” *Jones*, 68 Wn. App. at 853. The doctrine, though dead under a Fourth Amendment analysis, remains alive today under our state

constitution, article one, section seven. *Evans*, 159 Wn.2d at 407 (recognizing automatic standing and later noting, “article I, section 7 of our state constitution provides a strong privacy interest, exceeding that provided by the federal constitution.”)

A defendant has “automatic standing” if (1) the charged offense involves possession as an essential element; and (2) the defendant was in possession of the subject matter at the time of the contested search or seizure. *Jones*, 146 Wn.2d at 332; *Simpson*, 95 Wn.2d at 181; *Evans*, 159 Wn.2d at 407.

Here, even though Mr. Roberts was riding as a passenger in the vehicle, he had “automatic standing” to challenge the illegal detention and unlawful search because (1) he was charged with a crime that included possession as an element (possession of a controlled substance and drug paraphernalia, RCW 69.50.4013(1), RCW 69.50.412); and (2) the pipe was in Mr. Roberts’ “possession” (the pipe was in Mr. Roberts’ jacket in the vehicle he possessed at the time of the contested search (RP 10)). No argument can be made by the State that Mr. Roberts was not in possession of the pipe at the time of the search, given the jury’s verdict on this essential element of the crime that Mr. Roberts indeed possessed the paraphernalia pipe that had the drug residue. CP 153-54, 162-63.

Like the passenger in *Coss*, Mr. Roberts' status as the passenger in the vehicle rather than the driver does not eliminate his automatic standing to challenge the unlawful search. In *Coss*, the defendant was arrested for possession of a controlled substance after drugs and paraphernalia were found under the passenger seat of a vehicle driven and owned by someone else. *Coss*, 87 Wn. App. at 894. The court held,

[B]ecause she was charged with a possessory offense and was in possession of the contraband under her seat when the police impounded the automobile in which she was riding, Ms. Coss has automatic standing to challenge the seizure and search of [the driver's] vehicle under *Michaels* and *Simpson*.

Coss, 87 Wn. App. at 898. Mr. Roberts too, despite being a passenger in the vehicle, had automatic standing to challenge the search since he was charged with a possessory offense and the contraband was in his possession at the time of the search.

The trial court seemed concerned that the jacket and pipe were no longer in Mr. Roberts' immediate possession at the time of the search, perhaps since he had been removed from the vehicle while the deputy conducted the search. See CP 180, FF 2.4. However, the trial court's ruling is inconsistent with the jury's later finding that Mr. Roberts did indeed possess the pipe. Also, Mr. Roberts did not need to have the jacket or pipe on his person at the time of the search in order to be considered in "possession" of the items at the time of the search. For example, in

Simpson, law enforcement searched a locked truck located outside the defendant's house after the defendant was arrested and taken to jail. 95 Wn.2d at 173, 181. Despite being in jail when the search took place, the Court said Simpson "had the requisite relationship to the seized property at the time when the contested search took place." *Id.* He was, "therefore, entitled to the full protection of the automatic standing doctrine. He has the right to invoke all the privacy interests that an individual properly in possession of the truck could assert." *Id.* at 182. Mr. Roberts is entitled to the same protection of the automatic standing doctrine, as he possessed his jacket containing the pipe at the time of the officer's search.

Similarly, in *Evans*, the defendant was arrested and placed in a patrol vehicle while a "consensual" search of his vehicle ensued. 159 Wn.2d at 404. During the search of the vehicle, officers located and seized a briefcase in the backseat; a search warrant was executed as to the briefcase several days later, revealing materials consistent with the production of methamphetamine. *Id.* at 405-06. Even though the defendant denied ownership of the briefcase and thus could not establish a Fourth Amendment privacy interest in the property, Evans had "automatic standing" under the Washington constitution to challenge the legality of the seizure. *Id.* at 407. That is, "possession" was an essential element of the offense (possession of a controlled substance with intent to deliver),

and Evans was “in possession of the contraband at the time of the contested search or seizure.” *Id.* The Court’s automatic standing analysis did not change simply because the search took place after officers separated the defendant from his property. *See id.* Here, too, Mr. Roberts possessed the pipe at the time of the contested search and had automatic standing to challenge the unlawful search.

The court undeniably erred when it found Mr. Roberts lacked standing to challenge the illegal ongoing detention and unlawful search. He had both traditional standing under the Fourth Amendment and article one section seven of the Washington constitution, and automatic standing under the Washington constitution. The court’s suppression ruling should be reversed, the convictions reversed, and the matter dismissed since all subsequently discovered evidence was the fruit of the poisonous tree. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); *State v. Wisdom*, 187 Wn. App. 652, 678, 349 P.3d 953 (2015) (setting forth this remedy).

Issue 2: Whether the court erred by failing to suppress the defendant’s confessions when the deputy interrogated Mr. Roberts without *Miranda* warnings after locating contraband in the vehicle.

Mr. Roberts believes the court is unlikely to reach this second issue, given the trial court’s clear error identified above, resulting in suppression of all evidence in this case. But, if the Court reaches this

issue involving Mr. Roberts' statements to the deputy, his statements should also be suppressed because they were made during a custodial interrogation tainted by the lack of timely *Miranda* warnings.

Law enforcement officers must advise a suspect of his *Miranda* rights⁶ before conducting a custodial interrogation. *State v. Miller*, 165 Wn. App. 385, 388, 267 P.3d 524 (2011) (citing *Miranda*, 384 U.S. at 444); *State v. Lavaris*, 99 Wn.2d 851, 856, 664 P.2d 1234 (1983). "Any form of custodial interrogation is inherently coercive." *Lavaris*, 99 Wn.2d at 857. "Therefore, any confession obtained in the absence of proper *Miranda* warnings is by definition 'coerced' – regardless of how 'friendly' the actual interrogation." *Id.*

The ultimate "'in custody' determination... [asks] first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995).

"Under *Terry*, a person may be detained briefly for questioning if the officer reasonably suspects a person of criminal activity." *Henry*, 80

⁶ These rights include the "(1) right to remain silent and provide notice that anything said to the police might be used against him, (2) of the right to consult with an attorney prior to answering any questions and have the attorney present for questioning, (3) that counsel will be appointed for him if desired, and (4) that he can end questioning at any time." *Miller*, 165 Wn. App. at 388; *Miranda v. Arizona*, 384 U.S. at 444.

Wn. App. at 551 (internal citations omitted). “Asking a driver to get out of a car does not convert the stop to a custodial arrest.” *Id.* at 552. *Terry* also permits a limited search for weapons ““if the officer has reasonable grounds to believe the person to be armed and presently dangerous.”” *Id.*

However, “the investigative process becomes accusatorial and the need for warnings is triggered at the moment the inquiry ‘focuses’ on an accused in custody and the questioning is intended to elicit incriminating statements.” *State v. Dennis*, 16 Wn. App. 417, 421, 558 P.2d 297 (1976). “[O]nce an investigating officer has probable cause to believe that the person confronted has committed an offense, the officer cannot be expected to permit the suspect to leave his presence. At that point, interrogation becomes custodial, and the suspect must be warned of his rights.” *State v. Creach*, 77 Wn.2d 194, 461 P.2d 329 (1969), *overruled in part on other grounds by State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994).

Here, the interrogation became custodial at least by the time the deputy located the jacket and found the pipe with drug residue and then proceeded with questioning. RP 10, 23. At this moment in time when the contraband was located, the need for warnings was triggered. Upon discovering the drug residue and paraphernalia, the deputy had probable cause to believe Mr. Roberts had committed an offense, and the deputy

would not have permitted Mr. Roberts to leave his presence without answers. Mr. Roberts possessed the vehicle as a result of chopping wood for a friend (RP 8-9), which gave the deputy cause to believe Mr. Roberts possessed the contraband found in that vehicle. A reasonable person in Mr. Roberts' position would not have felt free to leave when the pipe was located and the deputy questioned him about it. The deputy's questioning after finding the pipe in the jacket (asking whose jacket it was, RP 10) was clearly intended to elicit an incriminating response. Thus, this questioning should have been preceded by proper *Miranda* warnings. *Accord Dennis*, 16 Wn. App. 417.

The other circumstances in this case also would not have led a reasonable person to believe he was free to leave and terminate the encounter with the deputy. The deputy retained possession of Mr. Roberts' license throughout the search process and never told Mr. Roberts he was free to leave. RP 14. The deputy "directed" Mr. Roberts from the vehicle (CP 178, FF1.9), which Mr. Roberts had obtained for chopping wood (i.e., Mr. Roberts was directed out of the vehicle for which he had a possessory interest, a possession that a reasonable person would not abandon). And, the deputy conducted a weapons frisk as a matter of standard practice without articulating or having any reasonable grounds to believe Mr. Roberts or Mr. Broadsword was armed and presently

dangerous. *See Henry*, 80 Wn. App. at 55. Even though no unlawful evidence was obtained during the unjustified weapons frisk, a reasonable person would not have felt free to leave where a deputy frisked him without reasonable grounds to do so.

Regardless of these invasive circumstances, there can be no question that the “consensual” encounter crossed into a custodial interrogation that moment when the deputy located the jacket containing the methamphetamine pipe. At the very least, by this time in the encounter, the deputy was required to provide *Miranda* warnings. Yet, he did not do so until after eliciting a response about ownership of the jacket containing the pipe. Mr. Roberts’ statement about owning the jacket should have been suppressed.

After Mr. Roberts admitted the jacket belonged to him, the deputy immediately read Mr. Roberts his *Miranda* warnings. RP 10. But this late reading of warnings cannot cure the earlier involuntary confession, and Mr. Roberts’ subsequent statement about having found the pipe while chopping wood (RP 10, 23, 85) should have also been suppressed as it was tainted by the earlier involuntary confession.

“As a practical matter, *Miranda* warnings are of little use to a person who has already confessed.” *Lavaris*, 99 Wn.2d at 859 (internal quotation omitted). A defendant who “let the cat out of the bag by

confessing” is not “thereafter free of the psychological and practical disadvantages of having confessed.” *Id.*

In *State v. Erho*, a defendant made an oral admission with inadequate *Miranda* warnings. *State v. Erho*, 77 Wn.2d 553, 560-61, 463 P.2d 779 (1970). The defendant then reduced his oral statement to written form with proper *Miranda* warnings. *Id.* The Court held, “by his oral admissions the appellant had ‘let the cat out of the bag by confessing’ and was not ‘thereafter free of the psychological and practical disadvantages of having confessed.’ He could not get the cat back in the bag, for the secret was out... Thus, the voluntariness and admissibility of his written statement was compromised.” *Id.* at 561 (internal quotations omitted).

Here, the first statement by Mr. Roberts that he was the owner of the jacket was made prior to *Miranda* warnings (RP 10, 82-84), and Mr. Roberts’ admission to having picked up the pipe in the woods was tainted by the earlier confession (RP 10, 23, 85). Once Mr. Roberts had confessed to owning the jacket containing the pipe, he could not “get the cat back in the bag.” *Erho*, 77 Wn.2d at 560-61. Thus, the voluntariness of both statements was compromised, and both statements should be suppressed. Again, Mr. Roberts’ convictions should be reversed, and the matter dismissed with prejudice.

Issue 3: Whether, in the unlikely event Mr. Roberts is unsuccessful in this appeal, this Court should deny any imposition of appellate costs due to Mr. Roberts' inability to pay.

Mr. Roberts remains indigent and unable to pay costs that may be considered on appeal. CP 213-16; RP 158. Mr. Roberts preemptively objects to any appellate costs, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, No. 72102-0-I, 2016 WL 393719, at *2-7 (Wash. App. Jan. 27, 2016). The imposition of costs would be inconsistent with those principles enumerated in *State v. Blazina*. See *Blazina*, 182 Wn.2d at 835-37.

The Judgment and Sentence in this case contains boilerplate language, stating the “court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.” CP 189. To the extent the trial court considered this defendant’s ability to pay, it found the defendant indigent and unable to pay costs, waiving all but the mandatory victim’s assessment and DNA fees. CP 192; RP 158. Specifically, the trial court found the defendant had been out of work for even minimum wage jobs, he already had a significant uphill climb to rehabilitate before adding thousands of dollars of additional fines or costs, and imposing

costs on this indigent defendant would be inconsistent with the principles enumerated in *Blazina, supra*. RP 158.

Under these circumstances, the record does not support a finding that Mr. Roberts has the ability to pay costs on appeal. For these reasons, Mr. Roberts respectfully requests no costs on appeal be assigned to him.

F. **CONCLUSION**

Based on the foregoing, Mr. Roberts respectfully requests his convictions be reversed and dismissed with prejudice for lack of admissible evidence.

Respectfully submitted this 14th day of April, 2016.

/s/ Kristina M. Nichols _____
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33887-8-III
vs.) No. 15-1-00073-2
)
CORY WAYNE ROBERTS) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 14, 2016, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Cory Roberts (Appellant)
2117 E. Columbia Avenue
Spokane, WA 99208

Having obtained prior permission, I served a true and correct copy of the attached document on the Respondent at dhunt@pendoreille.org and tshanhholtzer@pendoreille.org using Division III's e-service feature.

Dated this 14th day of April, 2016.

/s/ Kristina M. Nichols
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