No. 33887-8-III

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

FILED

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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

COUNTY OF PEND OREILLE

The Honorable Judge Patrick A. Monasmith

RESPONDENT'S OPENING BRIEF

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I. STATEMENT OF THE CASE

On April 11, 2015, Deputy Jordan Bowman was driving north on State Route 2 in Pend Oreille County when he observed a silver van with two occupants heading toward him. RP 7, 13, 78. His speed measuring radar device indicated that the van was traveling 71 miles per hour in a marked 60 miles per hour zone. RP 7, 13, 78, CP 177, FF 1.2. Deputy Bowman turned his vehicle around, activated his emergency lights and attempted to pull the van over. RP 80. The van continued driving for almost one mile before it eventually stopped. *Id.*

Once stopped, two people were found inside the van. RP 78. Lee Broadsword was contacted as the driver. RP 7, 13, 80. Deputy Bowman noticed that Mr. Broadsword appeared very nervous and would not make eye contact with him. RP 80. Deputy Bowman asked Mr. Broadsword for his license, vehicle registration and proof of insurance. RP 79. Mr. Broadsword responded that he did not have a license. RP 7. At this point the passenger, the Appellant, Cory Wayne Roberts, offered his license to Deputy Bowman without a request and said that Mr. Broadsword was learning to drive. RP 7-8, 79. Deputy Bowman asked Mr. Roberts if he owned the van. RP 79. Mr. Roberts said that he had just received the van

from a friend in exchange for cutting some wood.[1] RP 8, 23, 79. Mr. Roberts was asked if he had any information to prove he owned the van. RP 79. Mr. Roberts indicated he did not and was unable to produce a bill of sale or any other related documents evincing a legal transaction of the van. RP 8, 79, CP 177, FF 1.3. Deputy Bowman recorded that both individuals in the van were "shaking uncontrollably" while he spoke to them. RP 9, 25, 80.

Deputy Bowman returned to his car and ran a record's check. RP 8, 11, 14, 80. The check advised that Mr. Broadsword did not have a valid operator's license and Mr. Roberts was a convicted felon whose driving privilege was suspended.[2] RP 8, CP 177; FF 1.5. The van was reported registered to a "Ms. Fincher." RP 12, 19. The check revealed that at the time of the stop the van was not reported as stolen, but it could not be established that either Mr. Roberts or Mr. Broadsword had permission to possess the van. RP 19-20, 24, CP 178, FF 1.6. Deputy Bowman requested backup during the check because he felt the pair were acting "suspicious." RP 15-19.

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[1] In his Statement of Additional Grounds filed with this Court on June 3, 2016, Mr. Roberts admits that at the time of the stop the van belonged to the party for whom he was cutting wood.

[2] Mr. Broadsword was cited for the infraction of driving without a valid license pursuant to RCW 46.20.015. (RP 13)

After the records check and calling for backup, Deputy Bowman returned to the van where the two men were still seated and found Mr. Roberts on his cell phone speaking with a person he claimed was the registered owner of the van. RP 12, 19, 81. Mr. Roberts asked Deputy Bowman to speak with the person on the phone which he did.[3] RP 12, 19, 81-82. Deputy Bowman could not verify the identity of the party he spoke with on the phone. RP 19-20.

After finishing the conversation and returning the cell phone to Mr. Roberts, Deputy Bowman advised both men that they would need to call someone to come pick them up because neither had authority or legal ability to drive the van. RP 8, 80, CP 178, FF 1.6. Deputy Bowman remained concerned regarding the suspicious behavior of the two men and whether they had permission to possess of the van. RP 20-21, CP 177-178, FF 1.4, FF 1.6, FF 1.7. Based upon these concerns, Deputy Bowman asked the driver, Mr. Broadsword, for permission to search the van. RP 9, 22, 80, 82, CP 178, FF 1.7. Mr. Broadsword read and signed *Ferrier* warnings which advised that he had the right to refuse and/or limit his consent to search the van.[4] RP 9, 81, CP 178, FF 1.7. Mr. Broadsword consented to a search of

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[3] The record does not establish what information was communicated to Deputy Bowman from the person on the cell phone other than that the person said Mr. Roberts had "the right to be in the vehicle." RP 23.

[4] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

the van after reading and signing the warnings. RP 9, 22-23, 80, 82, CP 178, FF 1.7. Mr. Roberts was present for these events and did not object to, or attempt to limit, the search approved and authorized by Mr. Broadsword.[5] *Id.*

After consent for the search was secured, Deputy Bowman had the two men get out of the van. RP 9, 82. Deputy Bowman patted the two men down for weapons as a personal safety precaution prior to beginning the search. RP 9, 82. No weapons were found on either individual. *Id.* After getting out of the van, Mr. Roberts did not attempt to assert or express dominion or control or right to ownership over any item that remained inside the van and did not object to the search. RP 82, CP 178, FF 1.9.

Deputy Bowman began the search and found a jacket behind the driver's side seat. RP 9-10, 82. Inside one of the pockets, he discovered a glass pipe with white residue inside it. RP 10, 82. Deputy Bowman asked the two men who owned the jacket. *Id.* Mr. Roberts said he was the owner. RP 10, 84. Deputy Bowman read Mr. Roberts *Miranda* warnings which Mr. Roberts said he understood and agreed to waive.[6] RP 10-11, 85. Mr.

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[5] The record is unclear if Mr. Roberts consented to a search of the van. The records seems to suggest that Mr. Roberts was not asked if he would consent to a search of the van. See RP 9, 22-23. However, when asked if Mr. Roberts made any comments regarding the search, Deputy Bowman testified that the "defendant stated he was okay with me searching the vehicle." RP 81.

[6] *Miranda v. Arizona*, 384, U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

Roberts told Deputy Bowman that he found the pipe while he was cutting wood and put it in his pocket to throw it away at a later time. RP 10, 85. The residue in the pipe later tested positive for methamphetamine. RP 95.

II. PROCEDRUAL BACKGROUND

Mr. Roberts was arrested and charged with possession of methamphetamine and use of drug paraphernalia. CP 1-2. Prior to trial Mr. Roberts moved to suppress evidence of the glass smoking pipe on the basis that it was obtained pursuant to an illegal search and seizure. CP 22-31. The trial court denied the motion finding that Mr. Roberts lacked standing to challenge the search because he was not in possession of the jacket at the time of the consensual search. CP 180, CL 2.5.

The court also admitted Mr. Roberts' statement that he was the owner of the jacket after finding that *Miranda* warnings were not required at that time because Mr. Roberts was neither restrained nor subject to the equivalent of a custodial arrest when Deputy Bowman asked the two men who owned the jacket. CP 179, CL 2.1. In making this finding, the trial court observed that Mr. Roberts "had not been directed to remain at the scene, nor had he been handcuffed, nor was his freedom of movement restrained in any way" when Deputy Bowman asked who owned the jacket. CP 179, FF 1.11. Because of this, the Court reasoned that Mr. Roberts was not subject to a seizure and was free to leave the scene. CP 179, FF 1.11.

The matter went to trial and Mr. Roberts was found guilty on all charges. RP 140, CP 162-63. This appeal follows. CP 201-212.

III. STATEMENT OF THE ISSUES

A. Whether the trial court correctly found that Mr. Roberts lacked standing to challenge the consensual search of the van.

B. Whether Mr. Roberts had any expectation of privacy over the jacket that was in the van when Mr. Broadsword consented to the search in his presence which would allow him to acquire standing to challenge the search.

C. Whether the trial correctly found that Mr. Roberts was not illegally detained and, thus, lacked standing to challenge the search on the basis that he was illegally detained.

D. Whether the trial court properly admitted the drug pipe into evidence pursuant to the voluntary and consensual search of the van.

E. Whether the consensual search purges any possible taint of an alleged illegal detention.

F. Whether the trial court correctly found that *Miranda* warnings were not required before the deputy asked the two men who owned the jacket.

G. Whether this Court should impose appellate costs if Mr. Roberts is unsuccessful in his appeal.

IV. ARGUMENT

A. The court properly found that Mr. Roberts lacked standing to challenge the consensual search of the van.

In order for automatic standing to apply, a defendant must be in possession of the subject matter at the time of the search or seizure. *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). In this case, the trial

court correctly held that Mr. Roberts did not have automatic standing because he was not in possession of his jacket at the time of the search. CP 180, CL 2.5. This Court conducts de novo review of a trial court's conclusions of law at a suppression hearing. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

Mr. Roberts cannot show he was in actual or constructive possession of the jacket when the van was searched. "Actual possession means that the goods are in the personal custody of the person charged with possession;" and "constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (*citing State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). Dominion and control means that the object may be reduced to actual possession immediately. *State v. Simonson*, 91 Wn. App. 874, 960 P.2d 955 (1998). Mere proximity is not enough to establish possession. *State v. Potts*, 93 Wn. App. 82, 88, 969 P.2d 494 (1998) (citing *State v. Robinson*, 79 Wn. App. 386, 391, 902 P.2d 652 (1995)). A court may consider such factors as whether the defendant could reduce an object to actual possession and whether he or she had the ability to exclude others when assessing dominion and control. *State v. McReynolds*, 117 Wn. App. 309, 341, 71 P.3d 663 (2003).

When the "premises" being searched is a vehicle, additional factors such as whether a party is the owner or driver of a vehicle are considered. *See State v. Turner*, 103 Wn. App. 515, 521-24, 521, 13 P.3d 234 (2000). Courts are reluctant to find sufficient evidence of dominion or control where a passenger alleges constructive possession of an item. *See State v. George*, 146 Wn. App. 906, 923, 193 P.3d 693 (2008) (presence near and knowledge of an illegal item is insufficient to prove dominion and control over the item).

The facts in this case are similar to the facts in *State v. White*, 40 Wn. App. 490, 699 P.2d 239 (1985). Mr. White was a passenger in a vehicle that was stopped for investigation of an armed robbery. *White*, 40 Wn. App. at 492. White and the driver were arrested immediately after being removed from the vehicle. *Id.* While waiting for the vehicle to be impounded, an officer shined a flashlight through a window of the unoccupied vehicle and observed a handgun in the "rear passenger compartment". *White*, 40 Wn. App. at 492, 494-95. The officer opened the vehicle door and seized the handgun, and White admitted he owned the handgun. *White*, 40 Wn. App. at 492. Like the petitioner in this case, at trial, White sought to suppress evidence of the handgun, claiming it was an illegal search. *White*, 40 Wn. App. at 493. The trial court admitted the evidence from the search on the basis that White lacked standing to challenge the search. *Id.* White's status

as a passenger in a vehicle does not demonstrate ownership or control over a gun found in the back passenger compartment of the vehicle. *Id.* Therefore, on appeal, the Court of Appeals, Division II, upheld the trial court's decision finding that White, as a passenger, did not have standing to challenge the search because he did not "possess" the gun at the time it was seized. *White*, 40 Wn. App. at 495.

Also similar to the facts in this case, in *State v. George*, police stopped a vehicle occupied by George and three other passengers and found a water pipe with burnt marijuana next to where George was seated. *George*, 146 Wn. App. at 912-13. The court found that George's proximity to and knowledge of the pipe was insufficient to prove dominion and control over the items. *George*, 146 Wn. App. at 923.

Here, the trial court correctly found that Mr. Roberts did not possess the jacket when Deputy Bowman searched the van. This is so because he left the jacket behind after he was informed that neither he nor Mr. Broadsword would be leaving in the van, and the record establishes that Mr. Roberts never made any attempt to assert dominion and control over the jacket inside the van during the consensual search of the vehicle. The fact that he was not the driver and did not own the van further reduces his ability

to show dominion and control over the jacket.[7] See *State v. Turner*, 103 Wn. App. 521-24. Furthermore, Mr. Roberts' failure to object to Deputy Bowman's request and subsequent search of the van is inconsistent with any claim to dominion or control over any item left inside the van. For all the above reasons, the trial court properly concluded that Mr. Roberts did not possess the jacket at the time of the search, and correctly found that he lacked standing to challenge the consensual search of the van.

B. Mr. Roberts cannot acquire standing to challenge the search based upon a claim that he had a reasonable expectation of privacy in the van.

Mr. Roberts additionally argues that he has standing to challenge the search because he had a reasonable expectation of privacy in the van. He premises this argument on his factually unsupported claim of ownership of the van. This argument must fail because Mr. Roberts cannot show a possessory or privacy interest in the van.

The United States Supreme Court has held that a passenger does not necessarily have an expectation of privacy in all parts of a car stopped by law enforcement. *Rakas v. Illinois*, 439 U.S. 128, 148-49, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978). Passengers lack a possessory interest in a vehicle, and therefore, passengers have no legitimate privacy interest or expectation in

[7] See Statement of Additional Grounds filed with this Court on June 3, 2016.

that vehicle. *State v. Takesgun*, 89 Wn. App. 608, 610, 949 P.2d 845 (1998) (*citing Rakas v. Illinois*, 439 U.S. 128, 131 n.1, 99 S. Ct. 421, 424 n.1, 58 L. Ed. 2d 387 (1978)). In addition, a nonconsenting passenger's silence during a vehicle's search is "inconsistent with his later claim he retained an expectation of privacy." *State v. Cantrell*, 124 Wn.2d 183, 191-92, 875 P.2d 1208 (1994)(citing *United States v. Anderson*, 859 F.2d 1171, 1176-77 (3d Cir. 1988)) (a driver's consent to search an automobile was applicable to passenger even though neither occupant was the owner).

The record in this case clearly shows that Mr. Roberts did not, and could not, produce evidence of an ownership interest in the van. This absence of interest eliminates any privacy expectation Mr. Roberts might have in the van and circumvents his argument that he has standing to challenge the search. Furthermore, Mr. Roberts' silence during the advisement of *Ferrier* warnings and subsequent search of the van establish that hat he had no expectation of privacy in the van. The trial court's decision is a correct application of the law.

C. Mr. Roberts was not illegally detained and, thus, cannot acquire standing to challenge the search on the basis that he was illegally detained.

Mr. Roberts asserts he has standing to challenge the search on the basis that he was illegally detained by Deputy Bowman. This argument fails because Mr. Roberts was not detained by Deputy Bowman and because

the taint of an arguably illegal search is purged by consent as discussed later in this brief.

Article I, § 7 of the Washington State Constitution prohibits law enforcement officers from restricting the movements of passengers in lawfully stopped vehicles absent objective rationale predicated upon safety considerations. *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). However, a passenger is not seized when a police officer merely stops the vehicle in which the passenger is riding, and the passenger may legally get out of the car and walk away. *State v. Mendez*, 137 Wn.2d at 208; *City of Spokane v. Hays*, 99 Wn. App. 653, 658, 995 P.2d 88 (2000). Nor does seizure occur when an officer retains possession of a person's identification long enough to write down the name and date of birth or long enough to call in a background check. *See State v. Hansen*, 99 Wn. App. 575, 576, 994 P.2d 855, *review denied*, 141 Wn.2d 1022 (2000).

As correctly observed by the trial court, up until the time Deputy Bowman discovered the smoking pipe, Mr. Roberts' freedom of movement had not been restrained nor was he subject to any custodial arrest. CP 179, CL 2.1. He was not handcuffed nor directed to remain at the scene. CP 179, FF 1.11. Deputy Bowman did not request or require that Mr. Roberts

produced identification. CP 8. Instead, Mr. Roberts freely and voluntarily presented it to Deputy Bowman without a request. RP 7-8, 14, 79. Once his license was returned, he was told he would have to make arrangements for someone to pick him up evidencing that Mr. Roberts was free to leave the scene. CP 179, FF 1.11. In conclusion, Mr. Roberts was never illegally detained and was free to leave the scene at the time the jacket searched. Therefore, his contention that he was unlawfully detained is completely without merit.

D. The trial court properly admitted the pipe as evidence because the search was legal and conducted with voluntary consent.

The drug pipe was properly admitted into evidence by the trial court because consent for the search was freely and voluntarily given by a party with authority to give consent. Warrantless searches and seizures are permissible as long as it is within the confines of "a few specifically established and well-delineated exceptions" to the warrant requirements of the Fourth Amendment to the United States Constitution and Article I, Section 7 of Washington's Constitution. *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984) (*quoting Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). Consent to search given by one with authority, or by a party that reasonably appears to have authority, over the place or thing to be searched is a well-recognized exception to the warrant

requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973); *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990).

A consensual search is valid if: (1) The consent is found to be voluntary; (2) the person granting consent has authority to consent; and (3) the search does not exceed the scope of the consent given. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004).

1. In this case, consent was voluntarily given.

The record clearly demonstrates that voluntary consent was given to search the van. CP 9, 80-81, FF 1.8. With regard to searches of motor vehicles, the Washington Supreme Court has held that voluntary consent given to search a vehicle by a person with "common authority" over it supports a search and allows evidence found pursuant to the consensual search to be used against a nonconsenting occupant of the vehicle. *Cantrell*, 124 Wn.2d at 187. The Court concluded that an officer is not required to secure the consent of each passenger in a vehicle when he or she obtained consent to search from a party with "common authority" over the vehicle. *Cantrell*, 124 Wn.2d at 190-92. The Court reasoned that requiring an officer to "obtain each occupant's permission before a search of a vehicle can be conducted . . . is both unworkable and goes beyond the requirements of existing federal case law." *Cantrell*, 124 Wn.2d at 190-91.

Prior to Deputy Bowman beginning the search, Mr. Broadsword read, signed and advised of *Ferrier* warnings that he could refuse and/or limit his consent to the search of the van. RP 81, CP 178, FF 1.7. Mr. Broadsword had access to a cell phone if he wished to consult with someone about his decision. RP 19, CP 178, FF 1.6. He also had the opportunity to consult with Mr. Roberts if he had questions regarding whether or not to give Deputy Bowman permission to search the van. There is no evidence of intimidating police conduct or coercion by the sole deputy present who requested permission to search the van. *See State v. Jensen*, 44 Wn. App. 485, 491, 723 P.2d 443 (1986). Lastly, Mr. Roberts raised no objection when Deputy Bowman sought consent to search the van from Mr. Broadsword. His silence also shows that he did not have an expectation of privacy in the van. All of this evidence establishes that consent for the search was voluntarily given. The trial court's finding that the search occurred with consent is supported by substantial evidence.

2. <u>The party granting consent had authority to do so.</u>

Mr. Roberts does not raise any issue regarding Mr. Broadsword's consent or authority to consent in his appeal brief. Issues not raised on appeal are waived. RAP 10.3(a)(4); RAP 10.3(g); *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wn. App. 912, 922, 250 P.3d 121 (2011).

In assessing whether or not Mr. Broadsword had authority to consent to a search of the van, it is important to recall that Deputy Bowman could not determine whether the van had been stolen or even if either man had permission to be in possession of the van. RP 19-20, CP 178, FF 1.6. The men could not produce a vehicle registration for the van or provide documents evincing a transfer of ownership of the van. RP 8, 79, CP 177, FF 1.3. Because of these circumstances, it was reasonable for Deputy Bowman to look to the driver, Mr. Broadsword, as the party to direct his request for consent to search the vehicle. The driver is considered to have "common authority" over the vehicle in contrast to a passenger who could not prove he owned the vehicle.

The courts have employed the common authority rule to determine whether a party had authority to consent to a search. The common authority rule involves a 2-prong analysis: 1) A consenting party must be able to permit the search in his own right and 2) it must be reasonable to find that a defendant assumed the risk that a co-occupant might permit a search." *State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989). Common authority rests on the mutual use of the property by persons generally having joint access or control. *Cantrell*, 124 Wn.2d at 188 (*citing United States v. Matlock*, 415 U.S. 164, 171 n. 7, 39 L.Ed.2d 242, 94 S.Ct. 988 (1974); *State*

v. Hastings, 119 Wn.2d 229, 239-240, 34, 830 P.2d 658 (1992) (Utter, J., concurring).

This case is analogous to *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973). In *Schneckloth*, the defendant was one of five passengers in a car stopped for a burned out headlight and no license plate light. *Schneckloth,* 412 U.S. at 220. One of the passengers said the car belonged to his brother and gave consent for police to search the car. *Id.* An officer found three checks that had previously been stolen from a car wash wadded up under the backseat and arrested one of the passengers for this crime. *Id.* The trial court admitted the checks in the defendant-passenger's trial based upon the consent given by the other passenger. *Schneckloth,* 412 U.S. at 221. The United State Supreme Court upheld the search finding that a co-passenger could validly consent to a search of the vehicle and evidence found pursuant to the search can be used against a non-consenting co-passenger. *Schneckloth,* 412 U.S. at 248-49.

A driver has at least equal, if not more, control than any other party in a vehicle absent the registered owner. *Leach*, 113 Wn.2d at 744. In this case, as the driver, Mr. Broadsword had at least equal, if not more, control over the van than a passenger, such as Mr. Roberts. Because of this level of control, Mr. Broadsword was able to permit a search of the van in his own right. It was also reasonable for Deputy Bowman to seek Mr.

Broadsword's consent for the search because, as the driver, he exhibited greater control than that of Mr. Roberts. Mr. Broadsword had the apparent authority to permit a search of the van as correctly found by the trial court.

It is also reasonable to find that Mr. Roberts assumed the risk that Mr. Broadsword might permit a search of the van. This is so because Mr. Broadsword was either entrusted with, or asserted some authority, in order to be the driver the van. This level of control put Mr. Roberts on notice that Mr. Broadsword might permit a search of the van if asked. Consequently, it is reasonable to find that Mr. Roberts assumed the risk that Mr. Broadsword might permit a search of the van. The fact that Mr. Broadsword was asked for and gave consent to search the van in Mr. Roberts' presence and Mr. Roberts did not attempt to prevent, prohibit or discourage the search further evidences Mr. Broadsword's authority to give consent.

In the end, the trial court correctly determined that the search was consensual because: 1) Mr. Broadsword, as the driver of the van, is a party with "common authority" of the van with the ability to consent to its search; 2) Mr. Broadsword was able to permit the search in his own rights; and, 3) Mr. Roberts assumed the risk that Mr. Broadsword permitted the search and failed to voice any objection. The trial court correctly found

that Mr. Broadsword as the driver had authority to consent to a search of the van.

3. The search did not exceed the consent conferred to search the van.

Petitioner does not raise any issue that the search exceeded the scope of consent. The record is devoid of any evidence of any express or implied limitations by Mr. Broadsword on the scope of Deputy Bowman's search. Mr. Broadsword gave consent to search the "van". RP 9, 22, 80, 82, CP 178, FF 1.7. He never expressly or implicitly withheld consent to search any personal belongings or other items in the van. The record shows that Deputy Bowman found the jacket on the floor of the van behind the driver's seat. CP 178-179, FF 1.10. The jacket was out in the open and not in a locked or closed container. RP 10, 82. Therefore, the jacket was indisputably within the area of consent, and the trial court properly admitted evidence of the pipe found in Mr. Roberts' jacket.

E. The consensual search purges any possible taint of an alleged illegal detention.

As discussed above, Mr. Roberts was not illegally detained. But even if this Court finds that Mr. Roberts was illegally detained, the consensual nature of the search purges the taint of the illegal detention and search.

It is true that when a law enforcement officer makes a valid stop for a traffic infraction, the officer may not detain the driver longer than is necessary to issue a citation, unless the officer has a reasonable, articulable suspicion of additional criminal activity. *State v. Tijerina*, 61 Wn. App. 626, 629, 811 P.2d 241 (1991); see also *State v. Henry*, 80 Wn. App. 544, 550, 910 P.2d 1290 (1995); *Cantrell*, 70 Wn. App. at 344. However, when a law enforcement officer unlawfully extends a detention beyond the purpose of a traffic stop without a reasonable suspicion that criminal activity has or is about to occur, consent to a search may purge the taint of the illegal detention. *Tijerina*, 61 Wn. App. at 629 (*citing State v. Gonzales*, 46 Wn. App. 388, 399, 731 P.2d 1101 (1986)); see also *Henry*, 80 Wn. App. at 551-53; *Cantrell*, 70 Wn. App. at 344. To assess whether consent for a search purges any potential taint following an illegal detention, the court can consider several factors including: (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); *State v. Jensen*, 44 Wn. at 491. Where defendants have been advised of their rights to refuse to consent to a search or to limit the scope of a search, courts have held that the consent

removed and eliminated the taint of the prior illegal detention. *See State v. Gonzales*, 46 Wn. App. at 399; *State v. Jensen*, 44 Wn. App. at 490-91. This Court has found the advisement of a defendant's right to withhold consent for a search to be a "crucial" significant intervening circumstance. *State v. Jensen*, 44 Wn. App. at 490-91.

In assessing these factors here, presumably only a few minutes elapsed between Mr. Broadsword's detention and the time at which he gave consent to search the van. Nevertheless, the amount of time that passes is not solely determinative of the question because events and actions can transpire even during a short timeframe. See *State v. Jensen*, 44 Wn. App. at 490 (two hours elapsed between the detention and the giving of consent). Here, Mr. Broadsword read and signed *Ferrier* warnings between the time of his detention and his consent. Additionally, Mr. Broadsword had access to a phone if he wished to discuss his decision with someone else. He also had access and contact with Mr. Roberts to discuss the request to search the van. Moreover, the record is deficient of any evidence of intimidating police conduct by Deputy Bowman or that he did anything to frighten Mr. Broadsword. There is also no evidence that Mr. Broadsword had "given up" due to a perceived futility in resisting the search or that he lacked the intellectual capacity to appreciate *Ferrier* warnings. Lastly, Deputy Bowman's conduct cannot be interpreted as offensive or flagrant since he

could not verify whether Mr. Roberts or Mr. Broadsword had legal authority to possess or retain the van and he had a duty to ensure he did not release a possibly stolen vehicle.

The reading and signing of *Ferrier* warnings and the presence of substantial intervening factors would sufficiently remove the taint of any alleged prior illegal detention. The court need not address this issue in this case because Mr. Roberts was not illegally detained. The trial court properly admitted the evidence secured pursuant to the consensual search.

F. The trial court correctly found that *Miranda* warnings were not required before the deputy asked the two men who owned of the jacket.

Mr. Roberts argues that the trial court should have suppressed his response to Deputy Bowman's question regarding ownership of the jacket because he had not been given *Miranda* warnings prior to Deputy Bowman asking the question. This argument fails because Mr. Roberts was not "in custody" and not subject to a seizure when Deputy Bowman asked his question and, thus, *Miranda* warnings were not required. This Court reviews de novo the issue of whether an interrogation was custodial. *State v. Lorenz*, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

Police officers are not required to administer *Miranda* warnings to everyone whom they question. See generally *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). The reading of

Miranda rights are only triggered when a suspect is "in custody" and is subjected to "interrogation". *Id.* Not every encounter between an officer and an individual amounts to a custodial arrest or seizure. *State v. Crespo Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985). *Miranda* warnings are not required prior to questioning a person who is only subjected to a routine *Terry* investigative stop. *State v. Huynh*, 49 Wn. App. 192, 201, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988). Even if a suspect is not "free to leave" during the course of a *Terry* or investigative stop, it does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less "police dominated," and does not lend itself to deceptive interrogation tactics. *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003); *Walton*, 67 Wn. App. at 130. An officer may question a suspect without giving *Miranda* warnings even if the officer has probable cause to arrest so long as the suspect's freedom of movement has not been curtailed to the extent associated with formal arrest. See generally *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787, *review denied*, 119 Wn.2d 1012 (1992).

Here, prior to Deputy Bowman's question, both Mr. Roberts and Mr. Broadsword were informed that they would not be leaving in the van in which they were stopped and that they needed to call someone to come pick them up. This demonstrates that the two men were free to leave scene as they had not been directed to remain at the scene, had not been handcuffed, and their freedom of movement had not restricted or limited in any way when Deputy Bowman asked who owned the jacket. The men had a means and opportunity to leave the scene because Mr. Roberts had a cell phone he could use to call someone to come pick him up. As these factors establish that Mr. Roberts' movements had not been restricted and he was free to leave the scene, there was no requirement for *Miranda* warnings be given prior to the deputy's question. Therefore, the trial court properly admitted Mr. Roberts' response to Deputy Bowman's question because Mr. Roberts was not "in custody" when Deputy Bowman asked who owned the jacket.

G. The Court should impose appellate costs if Mr. Roberts is unsuccessful in his appeal.

Pursuant to the Court's General Order dated, June 10, 2016, the Court should deny Mr. Roberts' request to waive appellate costs based on a current inability to pay. The record establishes that Mr. Roberts was working at Outback Steak House at the time of his arrest and earned additional income by logging. RP 150. He also previously quit a job after

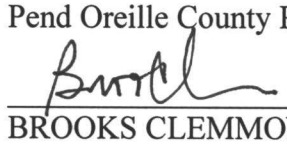
five (5) years of gainful employment to look for other work. RP 153. The trial court ordered that Mr. Roberts' sentence by served on electronic home monitoring in order that he could return to gainful employment. RP 157. The record establishes that Mr. Roberts has an ability to work and pay the costs this may impose and for those reasons this Court should deny Mr. Roberts' request to waive the imposition of appellate costs.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court affirm the holdings of the trial court and convictions of Mr. Roberts. The State further requests, pursuant to RCW 10.73.160(1) and Title 14 of the Rules of Appellate Procedure (RAP), that this Court impose appellate costs against Mr. Roberts if this Court determines the State substantially prevails in this its review of this matter. The State requests that statutory attorney fees and expenses be ordered as allowed under the statute and rules cited above.

Respectfully submitted the 8th day of July, 2016.

DOLLY HUNT
Pend Oreille County Prosecutor



BROOKS CLEMMONS, WSBA # 22896
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Pend Oreille County

Certificate of Mailing

I, do hereby certify and declare under penalty of perjury of the laws of the State of Washington that on this date I deposited in the United States Post Office in the City of Newport, Pend Oreille County, Washington a properly stamped and addressed envelope(s) directed to:

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By: (E-File)

Renee S. Townsley, Clerk
Court of Appeals, Division III
500 North Cedar Street
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Containing a true and correct copy of:

Respondent's Opening Brief

July 11, 2016 @ Newport, WA
Date and Place

Tricia Shanholtzer