

NO. 64873-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID P. FENDICH,

Appellant.

2015 JUN 10 10:11 AM
CLERK OF COURT
T6

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY ROBERTS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS OF CrR 3.6 HEARING.....	2
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT PROPERLY FOUND OFFICER GENDREAU HAD PROBABLE CAUSE TO ARREST FENDICH FOR POSSESSION OF A STOLEN VEHICLE	6
2. THE STATE CONCEDES THAT CONVICTIONS ON COUNTS VII AND VIII VIOLATE DOUBLE JEOPARDY	13
D. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bell v. United States, 349 U.S. 81,
75 S. Ct. 620, 99 L. Ed. 905 (1955)..... 13

Washington State:

In re Orange, 152 Wn.2d 795,
100 P.3d 291 (2004)..... 13

State v. Adel, 136 Wn.2d 629,
965 P.2d 1072 (1998)..... 13

State v. Baxter, 68 Wn.2d 416,
413 P.2d 638 (1966)..... 11

State v. Bellows, 72 Wn.2d 264,
432 P.2d 654 (1967)..... 9

State v. Bullock, 71 Wn.2d 886,
431 P.2d 195 (1967)..... 6

State v. Fisher, 145 Wn.2d 209,
35 P.3d 366 (2001)..... 9

State v. Fore, 56 Wn. App. 339,
783 P.2d 626 (1989), rev. denied,
114 Wn.2d 1011 (1990)..... 12

State v. Gocken, 127 Wn.2d 95,
896 P.2d 1267 (1995)..... 13

State v. Graham, 130 Wn.2d 711,
927 P.2d 227 (1996)..... 7, 11, 12

State v. Huff, 64 Wn. App. 641,
826 P.2d 698, rev. denied,
119 Wn.2d 1007 (1992)..... 11, 12

<u>State v. Jennings</u> , 35 Wn. App. 216, 666 P.2d 381, <u>rev. denied</u> , 100 Wn.2d 1024 (1983).....	7
<u>State v. Johnson</u> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	7
<u>State v. Jones</u> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	8
<u>State v. McReynolds</u> , 117 Wn. App. 309, 71 P.3d 663 (2003).....	14
<u>State v. Murphy</u> , 98 Wn. App. 42, 988 P.2d 1018 (1999), <u>rev. denied</u> , 140 Wn.2d 1018 (2000).....	8
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (2005).....	14
<u>State v. Plank</u> , 46 Wn. App. 728, 731 P.2d 1170 (1987).....	8, 9, 10
<u>State v. Rodriguez</u> , 53 Wn. App. 571, 769 P.2d 309 (1989).....	7
<u>State v. Staley</u> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	8
<u>State v. Terrovona</u> , 105 Wn.2d 632, 716 P.2d 295 (1986).....	7

Constitutional Provisions

Federal:

U.S. Const. amend. V	13
----------------------------	----

Washington State:

Const. art. I, § 9.....	13
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Statutes

Washington State:

RCW 9.94A.589 1

RCW 9A.56.140 7

Rules and Regulations

Washington State:

CrR 3.6..... 2

A. ISSUES PRESENTED

1. Did the trial court correctly find that Police Officer Fred Gendreau had probable cause to arrest the defendant, David Fendich, for being in possession of a recently stolen vehicle?

2. The State concedes that as charged and convicted here, Fendich's convictions on counts VII and VIII--two counts of misdemeanor possession of stolen property, violate double jeopardy--they constitute but a single "unit of prosecution."

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Fendich was charged with five counts of second-degree possession of stolen property (PSP), three counts of third-degree PSP, and one count of possession of burglary tools. CP 8-12. One count of third-degree PSP and the possession of burglary tools count were dismissed for reasons not relevant to this appeal. 1RP 21, 184. A jury convicted Fendich as charged on all the remaining counts. CP 92A-G.

For scoring purposes, the State conceded that all the felony PSP convictions arose out of the same criminal conduct and thus they did not score against each other. 4RP 3; RCW 9.94A.589.

Thus, with one prior felony assault, Fendich's offender score was a 1. See CP 158-73. Fendich received a standard range sentence of 90 days confinement on each felony count--to be served concurrently. CP 141-46. On the two misdemeanor counts, Fendich received a sentence of 90 days on each count--to be served concurrently with each other and concurrently with the 90-day sentence on the felony counts. CP 147-49.

2. SUBSTANTIVE FACTS OF CrR 3.6 HEARING

Prior to trial the court held a hearing pursuant to CrR 3.6 and Fendich's motion to suppress evidence obtained as a result of a search of his person incident to his arrest for possession of a stolen vehicle. Fendich claimed that Police Officer Fred Gendreau did not have probable cause to arrest him and thus all the stolen credit cards and identifications found on his person during the search incident to his arrest for possession of a stolen vehicle should have been suppressed. The following facts are from the CrR 3.6 hearing.

Officer Gendreau has worked in law enforcement for 17 years, ten years as a patrol officer with the City of Des Moines.

1RP¹ 23-24. At approximately 9:00 a.m., on January 8, 2009, while on routine patrol, Officer Gendreau learned via radio that another officer was dispatched to a stolen vehicle call. 1RP 24, 29. Officer Gendreau took note of the license number of the stolen vehicle and a short time later, he located the vehicle parked in a parking lot at the Sea-Tac Value Inn in the 22400 block of Pacific Highway South. 1RP 24-25, 38. It did not appear that the ignition to the stolen car was punched, nor windows broken. 1RP 42, 49.

Officer Gendreau parked his patrol car a distance away from the parking lot, got out on foot, and began observing the parking lot from behind some bushes. 1RP 25-26. He did this because the time frame between the car having been stolen and located was only a few hours and he hoped that the person or persons who stole the car would return to it. 1RP 25. He did not have to wait long.

After only about five minutes, Officer Gendreau observed Fendich, and a female, Kimberly Portra, approach the vehicle together. 1RP 26. When Fendich reached the vehicle, he opened the back passenger-side door and put a black backpack inside.

¹ The verbatim report of proceedings is cited as follows: 1RP--9/10, 9/14 & 9/1509; 2RP--12/10, 12/14 & 12/1509; 3RP--12/16/09; 4RP--1/26/10.

1RP 26. Portra went around to the driver's side, opened the back door and put a black jacket inside. 1RP 26. Portra then opened the driver's side front door. 1RP 26.

Assuming that the two were going to drive away, Officer Gendreau quickly returned to his patrol vehicle. 1RP 27, 44-45. However, in order to get into the lot, Officer Gendreau had to drive past the parking lot in direct view of Fendich and Portra. 1RP 27. Officer Gendreau testified that he believed the two saw him drive by in his patrol car. 1RP 27.

When Officer Gendreau was finally able to get his car turned around and drive into the lot entrance, neither Portra nor Fendich were inside the stolen vehicle. 1RP 28. In fact, Portra was nowhere to be seen and Fendich was now some 50 yards from the stolen vehicle walking away from it. 1RP 28, 46, 51.

Officer Gendreau then exited his fully-marked patrol vehicle and ordered Fendich to the ground. 1RP 28-29. Fendich did not comply. As Officer Gendreau testified, a reasonable person faced with a uniformed patrol officer, armed and with his weapon drawn, ordering you to comply, would comply. 1RP 29, 69. Instead, Fendich began looking around as if he was "looking for an escape route." 1RP 29-30, 53.

Officer Gendreau began walking towards Fendich, still with his weapon drawn, and continued to order Fendich to get down on the ground. 1RP 30. Fendich finally complied. 1RP 30. However, as soon as Officer Gendreau got close to Fendich, he started to get back up. 1RP 30. Officer Gendreau was forced to push him back down onto the ground with his foot. 1RP 30-31.

At the same time as Officer Gendreau was attempting to get Fendich under control, he spotted Portra, who had split off from the defendant, peeking around a corner of the building and then trying to conceal herself. 1RP 30-31, 54. Officer Gendreau ordered Portra to show herself and to get on the ground but she too did not comply. 1RP 31. Shortly thereafter another officer arrived on the scene and apprehended Portra. 1RP 33.

In a search of Fendich's person incident to his arrest for possession of the stolen vehicle, Officer Gendreau found multiple stolen credit cards and driver's licenses in the pocket of the jacket worn by Fendich. 1RP 34-35, 59. In the backpack Fendich placed in the stolen vehicle, officers located multiple car stereos, bolt cutters, a BB gun, a drug scale, mace, and a hat and gloves. 1RP 35-36.

By oral and written ruling, the trial court found that Officer Gendreau had probable cause to arrest Fendich for possession of the stolen vehicle and thus the search of his person was a lawful search incident to arrest and the evidence found on his person was admissible at trial. 1RP 100-02; CP 156-57.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND OFFICER GENDREAU HAD PROBABLE CAUSE TO ARREST FENDICH FOR POSSESSION OF A STOLEN VEHICLE.

Fendich contends that Officer Fred Gendreau did not have probable cause to arrest him for possession of the stolen vehicle and thus all the stolen items recovered during the search of his person incident to his arrest should have been suppressed. Fendich's claim should be rejected. The facts within the knowledge of Officer Gendreau at the time of the arrest were sufficient for a reasonable person to believe Fendich had committed a crime.

Police have the right incident to a lawful arrest to search the person arrested. State v. Bullock, 71 Wn.2d 886, 889, 431 P.2d 195 (1967). A lawful arrest is one based on probable cause.

"Probable cause exists where the facts and circumstances within the knowledge and of which the officer has reasonable trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed."

State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer. State v. Rodriguez, 53 Wn. App. 571, 578, 769 P.2d 309 (1989). The determination involves application of an objective standard, taking into consideration "the fact and circumstances within the officer's knowledge" at the time of arrest. State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996). The trial court's legal conclusions are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Here, the court had to find that it was reasonable for Officer Gendreau to conclude that Fendich had (1) actual or constructive possession of the stolen vehicle and (2) actual or constructive knowledge the vehicle was stolen. RCW 9A.56.140; State v. Jennings, 35 Wn. App. 216, 219, 666 P.2d 381, rev. denied, 100 Wn.2d 1024 (1983). Actual possession occurs when the item is in the actual physical custody of the person charged with

possession. State v. Murphy, 98 Wn. App. 42, 988 P.2d 1018 (1999), rev. denied, 140 Wn.2d 1018 (2000). Constructive possession occurs where there is no actual physical possession but there is dominion and control over the item. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Possession need not be exclusive. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A person has constructive possession of an item if he or she has dominion or control over the item such that the item may be reduced to actual possession immediately. Jones, 146 Wn.2d at 333.

Here, Fendich relies primarily on State v. Plank² to support his claim that Officer Gendreau lacked probable cause to arrest him. Although the case is titled State v. Plank, Plank himself was not part of the appellate case. Rather, the case on appeal involved only Plank's co-defendant at trial, Leslie Killion.

Leslie Killion was the passenger in a stolen car driven by Robert Plank. The car was last seen by the true owner the day prior. The two were travelling from British Columbia to Washington and were questioned while going through customs. Upon

² 46 Wn. App. 728, 731 P.2d 1170 (1987).

questioning, Plank told the custom inspectors, and he later told police officers, that the car had been loaned to him by a friend. Killion confirmed Plank's story but her statement was not introduced at trial. There was no physical evidence showing that the car was stolen. On these facts, Killion was convicted of possession of the stolen vehicle. On appeal, the case was reversed.

The Plank case is not helpful for the defense. First, the court reversed Killion's conviction after Killion raised a sufficiency of the evidence challenge--that the State did not prove the charge against her beyond a reasonable doubt. But a probable cause determination does not require proof "of evidence sufficient to establish guilt beyond a reasonable doubt..., rather, [it requires] reasonable grounds for suspicion coupled with evidence of circumstances to convince a cautious or disinterested person that the accused is guilty." State v. Bellows, 72 Wn.2d 264, 266, 432 P.2d 654 (1967). In short, "probable cause boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed the crime." State v. Fisher, 145 Wn.2d 209, 220 n.47, 35 P.3d 366 (2001) (citations omitted).

Second, the only evidence presented to prove Killion possessed the stolen vehicle and knew that it was stolen, was the fact that she was a passenger in the vehicle. This case does not rely on such limited evidence as Fendich suggests.

Here, the vehicle in question was stolen just hours before. This close proximity in time makes it more likely, and reasonable, that anyone associated with the vehicle knew of, or was involved in, the actual theft of the vehicle. Combined with the fact that the vehicle, Fendich, and his cohort were all discovered in the high-crime Pacific Highway South area, with Fendich and Portra leaving a motel and getting into the stolen vehicle, and there is added reason to believe Fendich both constructively possessed the vehicle and knew it was stolen.

The term "cohort" is used because, unlike the situation in Plank, where the court did not find evidence of a "joint enterprise" between the driver, Plank, and the passenger, Killion, here, Portra and Fendich's actions would lead any reasonable person to believe they were acting in concert. The two approached the vehicle together. There was no indication that either of them did not know which car they were approaching. There is no indication that either of them acted in a manner that suggested they did not already

know that the doors of the vehicle were unlocked when they both put items inside. In other words, they both acted with a familiarity and proprietary manner when they approached the vehicle and put their possessions inside.

In addition, the pair's subsequent actions provided strong evidence of guilty knowledge. After Officer Gendreau observed the two putting items into the stolen car and acting as if they were going to drive away in the vehicle, the officer was forced to drive past the parking lot in open view of the pair in order to get to the entrance of the parking lot. Officer Gendreau believed he had been spotted by the two. Fendich and Portra's reaction? They did not get into the vehicle, nor did they retrieve their possessions. Instead, they split up and quickly distanced themselves from the vehicle--with Portra actually trying to conceal herself and Fendich walking some 50 yards away from the vehicle in the opposite direction.

Courts have been clear, "[f]urtive gestures, evasive behavior, and flight from the police are circumstantial evidence of guilt." Graham, 130 Wn.2d at 725-26 (citing State v. Baxter, 68 Wn.2d 416, 421-22, 413 P.2d 638 (1966) (flight is an element of probable cause); State v. Huff, 64 Wn. App. 641, 647, 826 P.2d 698 (furtive

movements are facts supportive of probable cause), rev. denied, 119 Wn.2d 1007 (1992)).

Fendich and Portra did more than just try to distance themselves from the stolen vehicle. Both refused to comply with Officer Gendreau's commands. Instead of complying, Fendich began looking around in a manner that Officer Gendreau believed showed he was looking at the possibility of fleeing. Even when Officer Gendreau was finally able to get Fendich onto the ground, Fendich did not remain compliant. Instead, Fendich tried to get up and had to be physically forced back down. These are not the actions of innocence, and in any event, an innocent explanation for conduct observed does not negate probable cause. Graham, 130 Wn.2d at 725; see also State v. Fore, 56 Wn. App. 339, 344, 783 P.2d 626 (1989) (a determination of probable cause is not negated by innocent explanations for observed activities), rev. denied, 114 Wn.2d 1011 (1990).

The facts and circumstances within Officer Gendreau's knowledge were sufficient to cause a person of reasonable caution to believe Fendich was in constructive possession of a stolen vehicle and he knew it.

2. THE STATE CONCEDES THAT CONVICTIONS ON COUNTS VII AND VIII VIOLATE DOUBLE JEOPARDY.

The double jeopardy clause of the United States Constitution and the Washington State Constitution guarantee that no person shall be subject for the same offense to twice be put in jeopardy of life or limb. U.S. Const. amend. V; Const. art. I, § 9; State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Generally, where a defendant contends that his single act has been improperly punished twice under separate and distinct criminal statutes, the question is "whether, in light of legislative intent, the charged crimes constitute the same offense." In re Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). However, when a defendant is convicted for violating a single statute multiple times, the proper inquiry is what "unit of prosecution" has the Legislature intended as the punishable act under the specific criminal statute. State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998); Bell v. United States, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955). Here, that question has already been decided.

In State v. McReynolds, 117 Wn. App. 309, 332-37, 71 P.3d 663 (2003), the court held that possession of property stolen from several owners constitutes but a single act where the defendant is in continuous possession of the various pieces of property. McReynolds is directly on point to the situation herein. Thus the State concedes that counts VII and VIII--the two counts of misdemeanor PSP involving the continuous possession of driver's licenses belonging to different persons, violate double jeopardy in that they constitute but a single count or unit of prosecution.³

As a result of the State's concession, one count of misdemeanor PSP must be vacated. This will not result in a change in Fendich's sentence. Thus, this should be accomplished by written order without the need for Fendich to be resentenced.

³ The McReynolds case is not applicable to Fendich's felony counts of PSP. In another case directly on point, State v. Ose, 156 Wn.2d 140, 145-46, 124 P.3d 635 (2005), the Supreme Court distinguished McReynolds and held that the unit of prosecution for possession of a stolen access device is one count for each access device possessed.

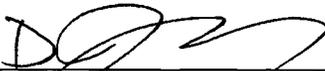
D. **CONCLUSION**

For the reasons cited above, this Court should affirm Fendich's conviction and remand for entry of an order vacating count VIII.

DATED this 30 day of November, 2010.

Respectfully submitted,

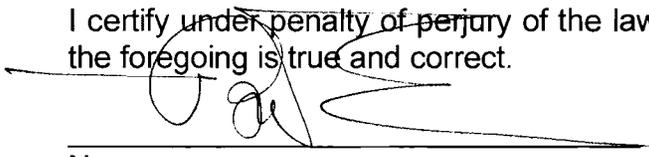
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FENDICH, Cause No. 64873-0-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

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Date

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