

No. 66564-2

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TERESA D. ORT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR SNOHOMISH COUNTY

The Honorable Judge Farris

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 NOV 16 AM 10:35

APPELLANT'S AMENDED REPLY BRIEF

MARK D. MESTEL
Attorney for Appellant
Teresa Ort

MARK D. MESTEL, INC., P.S.
3221 Oakes Avenue
Everett, Washington 98201
(425) 339-2383

TABLE OF CONTENTS

I. ARGUMENT.....1-12

A. Exceptions to Findings

B. Reasonable Expectation of Privacy in the Car

C. Open View

D. Excision

E. Fruit of the Poisonous Tree

II. CONCLUSION.....12

III. CERTIFICATE OF SERVICE.....13

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Bobic</u> , 140 Wash.2d 250, 254, 255, 258-59, 996 P.2d 610 (2000).....	8
<u>State v. Gonzales</u> , 46 Wash.App. 388, 401, 731 P.2d 1101, 1109 (1986).....	12
<u>State v. Lemus</u> , 103 Wash.App. 94, 102-103, 11 P.3d 326, 331 (2001).....	5
<u>State v. Ross</u> , 141 Wash.2d 304, 313, 4 P.3d 130 (1994).....	8

I. ARGUMENT

The issue before this Court is whether the police can walk into someone's backyard to view the underside of the homeowner's car to see if it was involved in a hit and run accident without either consent from the property owner or a search warrant. This is what Detective Baker did in furtherance of his investigation to find the vehicle involved in a hit and run accident. When he observed the vehicle parked behind Ms. Ort's house he elected to walk directly to it, ignoring the entrances of the house, to view the underside of the front driver side wheel well. It is the walking through the backyard to conduct the investigation that Ms. Ort contends violated her reasonable expectation of privacy as guaranteed to her by the State and Federal Constitutions.

A. EXCEPTIONS TO FINDINGS

The State contends that appellant did not take exception to the Findings of Fact entered by the Court. While this is correct, the State's assertion of what is contained in those

Findings is not. The relevant portion of the Findings reads in part:

Baker drove his van along the driveway and stopped at the corner of the defendant's residence where the driveway begins to curve behind the house. He did not stop at the door close to the road. His purpose was to inspect the Vitara. He exited his van and walked about 20 feet to the Vitara. At that time he noticed dents to the hood which Baker recognized as typical of car/pedestrian collisions. He then inspected the driver's side wheel well. He was able to see that it was missing part of its wheel well liner. Baker did not have the plastic piece from the collision scene with him but he was familiar with its distinctive tear pattern. He felt that it would fit into the missing gap of the Vitara's wheel well. Baker did not touch the Vitara nor did he get on the ground to make this observation. It took about a minute.

Findings of Fact at page 2.

The above cited portion taken together with the photographs admitted during the 3.6 hearing clearly establish that the car was not parked on a driveway and that the detective had to leave the driveway in order to inspect the wheel well on the front driver side of the vehicle. **CP 29, Page 64-65**. While the State writes: "Detective Baker remained on or immediately

adjacent to the driveway during the short time he was on the property looking at the Vitara; he did not substantially or unreasonably depart from the area impliedly open to the public....” The photograph of the car in situ clearly belies the State’s contention, as does the Court’s Finding that the Vitara was about twenty feet from the driveway. Furthermore, it is unclear where Detective Baker was located on Ms. Ort’s property when he was able to characterize the damage to the hood of her car as being consistent with a car-pedestrian accident. The best he could say is that he was probably within ten feet of the vehicle. RP3.6 31

In her Opening Brief Ms. Ort discusses the relevant case law that defines curtilage and how it is constitutionally protected. The State has not cited any case which contradicts that assertion that her car was within the curtilage. It does argue that Detective Baker’s observations fall within the Open View doctrine. See State’s Brief at pages 11 - 14. While the State in its Brief writes that the damage to the hood of Ms.

Ort's car was visible from the driveway, the testimony adduced at the 3.6 hearing was that he could not characterize the damage until he was 10 feet from the car; the car apparently was 20 off of the driveway. Although stated earlier, it bears repeating: In its Findings the Court wrote: "He exited his van and walked about 20 feet to the Vitara. At that time he noticed dents to the hood which Baker recognized as typical of car/pedestrian collision." Findings of Fact at page 2 (emphasis added).

The exchange during cross examination with Detective Baker clearly established that the damage he saw to the hood of the car was not sufficient to provide him with probable cause to believe that this car was the car involved in the incident.

Q: And really, whether or not the car had some damage was not as important whether it was missing its piece of plastic, was it?

A: No, because I have seen several Vitaras, and there are damage to them, but I'm looking for specific damage.

RP3.6 25-6.

B. REASONABLE EXPECTATION OF PRIVACY IN THE CAR

The State contends that Ms. Ort did not have a reasonable expectation of privacy in the exterior of her car citing State v. Lemus, 103 Wash.App. 94, 102-103, 11 P.3d 326, 331 (2000).¹ However, the holding in Lemus is inapplicable to the facts of this case. The following excerpt shows that Lemus involved a traffic stop where the officer made his observation from his position on a city street.

Here, Officers Washburn and Kelly stood outside the automobile parked on a city street and conducted a valid, routine traffic stop. Mr. Lemus does not have any expectation of privacy on a city street. In other words, Mr. Lemus cannot claim constitutional privacy protection in the places where these officers stood. See State v. Young, 28 Wash.App. 412, 416–17, 624 P.2d 725 (1981). “There is no expectation of privacy shielding that portion of an automobile which can be viewed from outside by diligent police officers.” Gonzales, 46 Wash.App. at 397, 731 P.2d 1101 (citing Texas v. Brown, 460 U.S. 730, 740, 103

¹ The State raises this argument for the first time on appeal. This court should not consider the argument.

S.Ct. 1535, 75 L.Ed.2d 502 (1983)).

In this case Ms. Ort is not alleging an expectation of privacy in the exterior of her car, per se. Had her car been parked on a public street, she would not assert a constitutional violation. Rather, she is arguing that she has a reasonable expectation of privacy in the curtilage of her home. She parked her car off of the driveway to her house, in her backyard. It was within a relatively close distance to her house and within the area typically considered the curtilage. Detective Baker's only reason to walk into the backyard, directly to the car, was to examine the underside of the car to decide whether the plastic piece recovered at the scene likely originated from this Vitara.

To say that Detective Baker went to the back of the house because it appeared to him to be the primary means of access is disingenuous. Det. Baker testified that his purpose in entering onto the Ort property was to

inspect the Vitara. The Findings drafted by the State admitted that he had no interest in contacting the homeowner before inspecting the car. He did not first go to the rear door to see if anyone was home. He went directly to the Vitara.

Look at the photographs admitted into evidence at the 3.6 hearing. The Vitara's front end is facing the rear of the defendant's residence. Det. Baker could not see the wheel well from the driveway. He had to leave the driveway and walk past the front driver side tire and turn around to look into that wheel well. In so doing he violated Ms. Orts' reasonable expectation of privacy in the curtilage of her home.

C. OPEN VIEW

The State's reliance on the Open View doctrine is misplaced and not supported by the record. "Under the 'open view' doctrine, detection by an officer who is lawfully present at the vantage point and able to detect something by utilization

of one or more of his senses does not constitute a search within the meaning of the Fourth Amendment.” State v. Ross, 141 Wash.2d 304, 313, 4 P.3d 130 (citing Seagull, 95 Wash.2d at 901, 632 P.2d 44; State v. Young, 123 Wash.2d 173, 182, 867 P.2d 593 (1994)). An “open view” observation is not a search at all but may provide probable cause for a constitutionally executed search. See State v. Bobic, 140 Wash.2d 250, 254, 255, 258-59, 996 P.2d 610 (2000).

Ms. Ort asserts that since Det. Baker was at her property to gather information for inclusion in a request for a search warrant, rather than to investigate on going criminal activity, he was not there on legitimate police business as that term has been used in cases involving “open view” and the curtilage of a home. For that reason the State cannot avail itself of the “open view” doctrine. In State v. Ross, 141 Wash.2d at 313-14, 4 P.3d 130, 136 (2000), Deputies had been at the Ross property around 8:30 PM investigating the possibility that marijuana was being grown there. They returned at 12:10 AM to see if

they could smell the odor of marijuana thereby providing probable cause on which to obtain a search warrant. In holding the second entry to be illegal the Court stated:

The affidavit of probable cause states that Deputy Bananola did not detect the smell of marijuana during the 8:30 p.m. entry. In testimony, Deputy Reigle stated that he and Deputy Bananola returned to the Defendant's residence at 12:10 a.m. so that Deputy Bananola could confirm the smell of marijuana for purposes of preparing the affidavit of probable cause. Thus, contrary to the dissent's view that the officers were on legitimate police business investigating criminal activity, the officers' purpose was not to investigate criminal activity but to obtain information to prepare the affidavit in order to obtain a search warrant.

Detective Baker's actions in this case do not constitute legitimate police business.

D. EXCISION

If sufficient facts remain in the affidavit to establish probable cause after excising the illegally obtained facts, the warrant survives attack. On this the parties agree. The State argues that Det. Baker's opinion that the damage he observed to the hood of the Vitara together with Ms. Ort's admissions

establishes probable cause. Ms. Ort argues that Det. Baker's observations, both the damage to the hood of the car and the wheel well, are the product of his illegal presence in the curtilage of her house. She further argues that her admissions must also be excised as the fruit of the initial illegality.

E. FRUIT OF THE POISONOUS TREE

Based on Det. Baker's testimony at the 3.6 hearing it is clear that fact that the Ort vehicle was missing the plastic piece from the wheel well is what caused him to conclude that her car had been involved in the accident. If his inspection of the Vitara showed the wheel well to be intact there would not have been a need to question Ms. Ort. This would have been just another Vitara with damage. Confronting her with the results of the illegal search is what generated the interview and formed the basis for his accusation that her car hit the decedent.

Det. Baker: Okay. Your car is the one that hit him.

Ms. Ort: Okay.

Det. Baker: The one that hit her.

Ms. Ort: How do you know that?

Det. Baker: Because I have those zip ties and I have part of the

car that matched, that probably matches up to your car that was left at the scene.

Ms. Ort: Okay.

Appellant's Opening Brief, Appendix A at page 4.

In State v. Gonzales, 46 Wash.App. 388, 401, 731 P.2d 1101, 1109 (1986) the Court found that Mr. Gonzales had been arrested illegally. Once at the station house the police confronted him with items of potential evidence also obtained illegally. Holding that Mr. Gonzales's subsequent confession must be suppressed the Court stated:

While the consent to search was valid, and not gained by exploitation of the illegal arrest, that cannot be said of the confession. First, Mr. Gonzales confessed only after being confronted with the illegally seized marijuana and the legally seized pills. When confronted with the fruits of an illegal seizure, it is readily apparent that a suspect confessed due to "exploitation of that illegality", whether or not the confession is "voluntary" for Fifth Amendment purposes. *Wong Sun; Byers*, 88 Wash.2d at 9, 559 P.2d 1334; 3 W. LaFave, § 11.4, at 639. The realization that "the cat is out of the bag" certainly played an important role in Mr. Gonzales' decision to confess.

Det. Baker confronted Ms. Ort with the fact that he had recovered at the scene a part of her car. He was able to say this with conviction based on his view of the wheel well of her car. The exploitation of his illegal search caused her admissions and must be suppressed.

II. CONCLUSION

It one excises from the search warrant affidavit the Det. Baker's statements based on his observations of the Vitara and the admission attributed to Ms. Ort, the remainder of the affidavit is insufficient to establish probable cause. Accordingly, this Court should vacate the Judgment and remand this matter to the trial court for further proceedings.

DATED this 14th day of NOVEMBER, 2011.

Respectfully Submitted,



Mark D. Mestel, WSBA #8350
Attorney for Appellant

III. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served upon the following by United States Postal Service, addressed to:

1. Court of Appeals (2 Copies)
Division One
600 University Street
One Union Square
Seattle, WA 98101

2. Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S 504
Everett, WA 98201

3. Teresa Ort
3118 – 172nd Street SW
Lynnwood, WA 98037

2011 NOV 16 AM 10:35
COURT OF APPEALS DIV I
STATE OF WASHINGTON

DATED this 14th day of November, 2011.

Brandy L. Ellis
Brandy L. Ellis, Secretary