

NO. 66604-5-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SALLI BOSMA,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 25 PM 4:24

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Evidence From the CrR 3.6 Hearing</u>	5
C. <u>ARGUMENT</u>	11
1. BOSMA DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HER RIGHT TO TRIAL BY JURY	11
2. THE COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM AN UNLAWFUL SEIZURE.....	14
D. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Bellevue v. Acrey</u> 103 Wn.2d 203, 691 P.2d 957 (1984).....	11, 12
<u>State v. Armenta</u> 134 Wn.2d 1, 948 P.2d 1280 (1997).....	15
<u>State v. Hansen</u> 99 Wn. App. 575, 994 P.2d 855 <u>review denied</u> , 141 Wn.2d 1022 (2000)	15
<u>State v. Harrington</u> 167 Wn.2d 656, 222 P.3d 92 (2009).....	15, 18, 19, 20, 21
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996).....	14
<u>State v. Hos</u> , 154 Wn. App. 238, 225 P.3d 389 <u>review denied</u> , 169 Wn.2d 1008 (2010)	12, 13
<u>State v. O'Neill</u> 148 Wn.2d 564, 62 P.3d 489 (2003).....	14, 15
<u>State v. Ramirez-Dominguez</u> 140 Wn. App. 233, 165 P.3d 391 (2007).....	12
<u>State v. Smith</u> , 154 Wn. App. 695, 702, 226 P.3d 195 <u>review denied</u> , 169 Wn.2d 1013 (2010)	21
<u>State v. Soto-Garcia</u> 68 Wn. App. 20, 841 P.2d 1271 (1992).....	16, 17, 18, 19, 20, 21
<u>State v. Stegall</u> 124 Wn.2d 719, 881 P.2d 979 (1994).....	11
<u>State v. Thorn</u> 129 Wn.2d 347, 917 P.2d 108 (1996).....	14

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Treat</u> 109 Wn. App. 419, 35 P.3d 1192 (2001).....	11
<u>State v. Wicke</u> 91 Wn.2d 638, 591 P.2d 452 (1979).....	11, 12, 13

FEDERAL CASES

<u>Arkansas v. Sanders</u> 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979).....	14
<u>Miranda v. Arizona</u> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	7, 17, 21
<u>Taylor v. Alabama</u> 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982).....	17

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5.....	5
CrR 3.6.....	1, 3, 5, 8, 10, 13
CrR 6.1.....	11
U.S. Const. Amend. IV	14, 15
Wash. Const. art. 1, § 7	14

A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's right to trial by jury when it conducted a bench trial without appellant's personal expression of waiver.

2. The trial court erred when it refused to suppress unlawfully seized evidence.

3. The trial court erred when it entered conclusion of law 1 in its written CrR 3.6 findings and conclusions.¹

Issues Pertaining to Assignments of Error

1. For there to be a knowing, intelligent, and voluntary waiver of the right to trial by jury, the record must contain a personal expression of waiver from the defendant. There is no such expression on this record. Is reversal required?

2. An individual is seized if, under the circumstances, a reasonable person would not feel free to leave or otherwise terminate the encounter with police. In this case, appellant was parked in a parking lot when a uniformed police officer approached and asked her to explain what she was doing in the lot, asked for identification, ran a warrant check, asked if she was in possession

¹ The court's written findings and conclusions are attached to this brief as an appendix.

of any drugs or paraphernalia, and – despite her denial – asked to search her car and her purse. Would a reasonable person have felt free to simply start her car and drive away from the officer during this interaction?

3. Appellant consented to the search of her purse, in which the officer found evidence of methamphetamine possession. In light of the unlawful seizure immediately preceding appellant's consent, must this evidence be suppressed?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County Prosecutor's Office charged Salli Bosma with one count of possession of a controlled substance: methamphetamine. CP 44-45. Co-defendant Michael Conner faced a similar charge, and the two were tried together. RP² 3.

Bosma moved to suppress evidence of the methamphetamine, arguing it was the product of an unlawful seizure. CP 30-41. The motion was denied. RP 120-121; Supp. CP ___ (sub no. 60, Findings of Fact and Conclusions of Law Re: Suppression and Confession).

² "RP" refers to the verbatim report of proceedings for December 7, 2010.

The court did not engage in an oral colloquy with Bosma regarding whether she wished to waive her right to trial by jury. Nor was there a written expression of waiver. Rather, the issue of a bench trial was discussed briefly with trial counsel immediately preceding the CrR 3.6 hearing:

THE COURT: Counsel, my understanding is we're going to do the 3.6 hearing. If the Court suppresses, then the case goes away. Then if the case doesn't go away, are you intending to have a stipulated trial?

Ms. SMITH: Not a stipulated trial, a bench trial.

THE COURT: Is that your understanding, Mr. Chambers?

Mr. CHAMBERS: Yes, Your Honor.

RP 3.

The issue was mentioned briefly again right after the court denied the motion to suppress. In response to the court asking whether the parties wanted a break or preferred to begin the "trial phase" immediately, the following exchange occurred:

Mr. CHAMBERS: Let me see if my witness is outside, Your Honor. I don't want to detain him any longer than possible.

THE COURT: How about the defense? Do you want a few minutes to speak with your clients, or are you ready to go?

Ms. PAIGE: I would be prepared to go forward, and I explained to Mr. Chambers on the lunch recess, on the behalf of Mr. Conner, we would be prepared to proceed to a stipulated bench trial preserving the issues that the Court has just ruled on here, but allowing the state to proceed on whatever is in the evidence that's in the report, so –

Ms. SMITH: And again, as far as Ms. Bosma goes, we have fairly small but significant issues of fact that we would need to address with Deputy Taddonio, and we would like to hear from the other witnesses as well. So we're hoping for the bench trial at this point.

THE COURT: Okay. If we're going to present that evidence, we might as well just present the evidence and the Court can either – and then Ms. Paige and her client can express to the Court whether they want me to make my decision regarding Mr. Conner based on that evidence or just based upon police reports that I can then read.

Are you ready to go at this time with your first witness, Mr. Chambers?

RP 126. Mr. Chambers indicated he was ready and called the first prosecution witness. RP 126-127.

After the State had presented its evidence, and the parties made closing arguments, Judge Snyder found Bosma guilty and later imposed a standard range sentence of one month in jail,

which he converted to community service. CP 2-6, 25-26. Bosma timely filed her Notice of Appeal. CP 7-17.

2. Evidence From the CrR 3.6 Hearing³

Two witnesses testified at the CrR 3.6 hearing: Whatcom County Sheriff's Deputy Michael Taddonio and Bosma. RP 5, 54.

According to Deputy Taddonio, on the afternoon of February 26, 2010, he drove past a Department of Natural Resources parking lot located off Slater Road. Hikers and fisherman use the lot and are required to obtain a parking permit. RP 5-6. There were two cars parked in the lot – a white Honda Prelude and a red Honda Accord. RP 7.

Deputy Taddonio pulled into the lot and parked his car approximately 15 yards from the two Hondas. RP 7-8, 37. He did not block either vehicle. RP 11. It had been raining off and on that day and, although the parking lot was wet, the area under each Honda was dry, which indicated the cars had been parked for a significant period of time. Neither car had a parking permit. RP 10.

There were two people in the Prelude. Bosma was in the driver's seat and Conner was in the front passenger seat. RP 10-

³ The CrR 3.6 hearing was combined with a CrR 3.5 hearing to determine the admissibility of post-arrest statements made by Bosma and Conner. RP 4-5. The court's CrR 3.5 ruling is not at issue in this appeal.

11, 55-57. As Taddonio approached, Bosma rolled down the driver's window. RP 10. Taddonio was in full uniform, with a badge and gun. RP 45. Taddonio spoke to Bosma and Conner about not having permits and asked what they were doing in the car. RP 11-12, 26. They explained that they were friends, both from Everson, and that they had chosen the privacy of the parking lot because Bosma's boyfriend did not like her talking to Conner. Conner had driven over from the nearby casino. RP 12, 41-42. Taddonio found it odd they had chosen to stop and talk in the lot instead of the casino. RP 12.

Deputy Taddonio asked Bosma for identification and both she and Conner provided it. Taddonio remained by the driver's side door while he relayed the information to dispatch and then, 15 to 20 seconds later, handed the IDs back to Bosma and Conner. RP 13-14, 29-30, 42-44. Neither had any warrants. RP 30. Taddonio then asked the two if there was drug paraphernalia in the car. RP 14, 29. In fact, he may have asked twice. RP 29. According to Taddonio, Bosma became nervous and began looking around. Although both denied they had paraphernalia, Taddonio nonetheless asked if he could search the vehicle. Bosma and

Conner indicated he could, although Bosma seemed hesitant. RP 14-15, 29-31, 34, 45-46.

Taddonio asked Bosma and Conner to step out of the car. RP 34. Bosma exited holding her purse tightly. RP 15. Temporarily holding off on his search of the car, Deputy Taddonio asked Bosma whether he could search her purse. Bosma consented, opening the purse and handing it to Taddonio. RP 16, 35. Inside the purse, Taddonio found a sunglass case containing a glass pipe and suspected methamphetamine residue. RP 16-17. The case also contained a baggie with residue. RP 22. Bosma was placed under arrest and provided Miranda⁴ warnings. RP 16-17. Taddonio asked Bosma about the pipe and Bosma denied it was hers. RP 18, 24-25.

Deputy Taddonio placed Bosma in his patrol car, called for an additional police unit, and turned his attention to Mr. Conner, who was still standing by the Hondas. RP 19, 23. Conner had his hand in his right front pocket and Taddonio could see there was a sizeable object in that pocket. Conner said it was \$3,000.00 in

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

cash.⁵ Taddonio asked if he could check and Conner consented. Inside the large wad of money, Taddonio found a plastic bag containing suspected methamphetamine. RP 19-22, 49. After Conner's arrest, and while being escorted to a police vehicle, a pipe fell out of Conner's pants. RP 23-24. After being advised of his rights, Conner said that although he and Bosma were just talking when Taddonio arrived, he admitted the two had been smoking methamphetamine earlier in the car. RP 23-24.

At the CrR 3.6 hearing, Bosma took issue with some of Deputy Taddonio's assertions. She testified Taddonio had been sarcastic. RP 70, 72. He did not simply ask if there was drug paraphernalia in the car; he asked, "So you guys are catching up on old times smoking some meth?" RP 57. She also testified that after Taddonio had asked for and obtained both of their IDs, he said "you guys hold tight" and took the IDs back to his patrol car. RP 58-59. In fact, she never received her ID back. After her arrest, Taddonio told her he had placed it in her purse and she would get it back whenever she was able to reclaim her property. RP 59. She testified that by the time Taddonio asked to search her

⁵ At some point during this encounter, Deputy Taddonio was able to verify that Conner had won this money at the casino. RP 50

car, other officers had already arrived on the scene. RP 61-62. Taddonio never told her she had the right to refuse a search of her purse. RP 71. And she denied there was a plastic baggie in the sunglass case. RP 66-67.

Defense counsel argued that Bosma was unlawfully seized – without reasonable suspicion of criminal activity – because no reasonable person would feel free to simply start the car and leave after a uniformed police officer asks for identification, conducts a warrants check, inquires regarding drug possession, and then seeks to search a car and purse. And because the unlawful seizure vitiated Bosma’s subsequent consent to search her purse, the drug evidence found in that purse must be suppressed. RP 77-86, 101-104.

Judge Snyder found that the encounter was as Deputy Taddonio described, rejecting Bosma’s version of events where inconsistent. RP 108-115. He concluded he was “constrained to find” there had been no seizure prior to Bosma’s arrest. Moreover, her consent to search her purse was voluntary. Therefore, evidence of methamphetamine found inside the eyeglass case was admissible at trial and the defense motion to suppress was denied. RP 120-121, 124. Judge Snyder subsequently entered consistent

written findings and conclusions. Supp. CP ____ (sub no. 60, Findings of Fact and Conclusions of Law Re: Suppression and Confession).

During the "trial phase" immediately following the CrR 3.6 hearing, the State supplemented the record with additional testimony and evidence. Deputy Taddonio testified he did not find the plastic bag inside the eyeglass case until he had left the scene and booked the evidence into the evidence room. RP 148. Whereas the glass pipe had been clearly visible inside the case, the plastic bag was almost entirely obscured by a layer of gray foam that lined the interior of the case. RP 151-152. An analyst from the Washington State Patrol Crime Lab testified that the plastic bag contained methamphetamine. RP 128-130, 142-143. The pipe was never tested. RP 132. Bosma testified that although she knew the pipe was in the eyeglass case, she did not know about the plastic bag under the foam. RP 156.

C. ARGUMENT

1. BOSMA DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HER RIGHT TO TRIAL BY JURY.

Every criminal defendant in Washington has a constitutional right to jury trial,⁶ and a waiver of that right must be knowing, intelligent, and voluntary. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). While the court need not engage the defendant in a colloquy regarding the consequences of waiving this right, there must be “a personal expression of waiver from the defendant.” State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). “The waiver must either be in writing, or done orally on the record.” State v. Treat, 109 Wn. App. 419, 427, 35 P.3d 1192 (2001); see also CrR 6.1(a) (requiring written waiver). Counsel’s waiver on the defendant’s behalf – even in the defendant’s presence – is insufficient. State v. Wicke, 91 Wn.2d 638, 644-645, 591 P.2d 452 (1979).

The State bears the burden of demonstrating a valid jury trial waiver, and courts indulge every reasonable presumption against

⁶ The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” Article I, section 22 of the Washington Constitution provides, “In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury.”

such a waiver. Acrey, 103 Wn.2d at 207; Wicke, 91 Wn.2d at 645. The validity of a waiver is reviewed de novo. State v. Ramirez-Dominguez, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

Bosma's case is indistinguishable from other cases in which there was not a valid waiver. In Wicke, defense counsel waived Wicke's right to jury trial and indicated Wicke would proceed by stipulated trial while Wicke stood beside him in open court. The trial court did not inquire whether Wicke had discussed the matter with his attorney or whether he agreed to the waiver. Wicke, 91 Wn.2d at 641. The Supreme Court rejected the notion that counsel is authorized to waive a client's right to jury trial in this manner and remanded for a new trial. Id. at 644-645.

More recently, in State v. Hos, 154 Wn. App. 238, 225 P.3d 389, review denied, 169 Wn.2d 1008 (2010), at the defendant's trial for methamphetamine possession, defense counsel explained to the trial court – in Hos' presence – that Hos'

intent [was] to ask the Court to review . . . a couple of documents on stipulated facts for a bench trial. It's Ms. Hos' intent to appeal a pre-trial suppression order denying her motion, and that is the most efficient way to get that up on appeal.

Id. at 244. Hos did not sign a jury trial waiver and the trial judge did not inquire whether Hos had discussed the matter with counsel or

whether she agreed with counsel's statement of her intent to waive jury trial. Id. Citing Wicke, Division Two reversed:

here, as in *Wicke*, the record does not contain Hos's personal expression waiving her right to a jury trial. Hos did not sign a written jury trial waiver. Nor did the trial court question Hos on the record to determine whether she knowingly, intelligently, and voluntarily waived her right to a jury trial, or even whether she had discussed the issue with her defense counsel or understood what rights she was waiving. Because the record lacks Hos's personal expression of waiver of her constitutional right to a jury trial, *Wicke* requires that we reverse her conviction and remand for a new trial.

Id. at 251-252.

Similarly, in Bosma's case, there is no written waiver and the trial court failed to determine on the record whether Bosma had discussed the matter with trial counsel or understood what rights she was waiving. See RP 3, 126. There is no personal expression of waiver. And while Bosma was present when defense counsel indicated the defense wished to proceed by way of bench trial following the adverse CrR 3.6 ruling, this is insufficient for the State to prove a valid waiver.

Bosma's conviction must be reversed and the matter remanded for a new trial.

2. THE COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM AN UNLAWFUL SEIZURE.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution,⁷ a warrantless search and seizure is per se unreasonable unless the State demonstrates that it falls within one of the jealously and carefully drawn exceptions to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)).

Whether a person has been seized is a mixed question of law and fact. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds, State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). “The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference,’ but ‘the ultimate determination of whether facts constitute a seizure is one of law

⁷ The Fourth Amendment provides, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” Article 1, § 7 provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

and is reviewed de novo.” State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) (quoting Thorn, 129 Wn.2d at 351).

A person is seized under article 1, section 7 "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." O'Neill, 148 Wn.2d at 574 (internal quotations and citations omitted). Unlike the Fourth Amendment, this is a purely objective standard, focusing on whether a reasonable person would feel he or she is being detained. The defendant bears the burden to demonstrate an unlawful seizure. State v. Harrington, 167 Wn.2d 656, 663-664, 222 P.3d 92 (2009).

Generally, where an officer merely approaches an individual in public, requests to speak with her, and requests identification, no seizure has occurred. O'Neill, 148 Wn.2d at 577-580 (citing State v. Young, 135 Wn.2d 498, 511, 957 P.2d 681 (1998); Armenta, 134 Wn.2d at 11); see also State v. Hansen, 99 Wn. App. 575, 579, 994 P.2d 855 (holding license for no more than 30 seconds to simply record name and birth date is not a seizure), review denied, 141 Wn.2d 1022 (2000). Here, however, the circumstances went

well beyond a mere request for identification. Instead, there was a progressive intrusion, resulting in a seizure – if not by the time Deputy Taddonio asked if there was drug paraphernalia in the car – certainly by the time he asked to search Bosma’s car and then her purse.

The circumstances of the seizure here are indistinguishable in any meaningful way from those in State v. Soto-Garcia, 68 Wn. App. 20, 841 P.2d 1271 (1992). Kelso Police Officer Kevin Tate observed Soto-Garcia walking out of an alley and decided to speak with him, pulling his patrol car to the side of the road. Soto-Garcia voluntarily walked over to Tate, who asked him where he was going. Tate then asked for Soto-Garcia’s name, and Soto-Garcia produced his driver’s license. Tate ran a warrants check in Soto-Garcia’s presence. Id. at 22. Although the check revealed no outstanding warrants, Tate asked Soto-Garcia if he had any cocaine on him. Id. at 22, 25. Soto-Garcia said he did not. Despite this denial, Tate asked if he could conduct a search and Soto-Garcia consented. Tate found cocaine in Soto-Garcia’s shirt pocket. Id. at 22.

Division Two held that “[t]he atmosphere created by Tate’s progressive intrusion into Soto-Garcia’s privacy was of such a

nature that a reasonable person would not believe that he or she was free to end the encounter.” Id. at 25. While the initial contact, questions regarding Soto-Garcia’s intended destination, and request for identification did not qualify as a seizure, a reasonable person would not have felt free to simply walk away once Tate directly asked whether Soto-Garcia had any cocaine on his person. Id.

Having concluded that Soto-Garcia was unlawfully seized without reasonable suspicion of criminal activity, the Soto-Garcia court addressed the impact of his post-seizure voluntary consent to search. Id. at 26. Recognizing that a consent to search is invalid if it is the product of a prior illegality, the court listed several relevant factors in determining whether a search is tainted:

(1) temporal proximity to the illegality and the 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.

Id. at 27 (citing Taylor v. Alabama, 457 U.S. 687, 690, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982)). Noting that Soto-Gonzalez was never told he could withhold consent to search, there was no evidence he had committed a crime prior to the search, and there was no Miranda advisement prior to the search, the court

concluded Soto-Gonzalez's consent was obtained through exploitation of the immediately preceding seizure. Therefore, all resulting evidence had to be suppressed. Id. at 28-29.

Recently, in State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009), the Supreme Court of Washington cited approvingly to Soto-Garcia and its "progressive intrusion" analysis. "[Soto-Garcia] persuades us that a series of police actions may meet constitutional muster when each action is viewed individually, but may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively." Harrington, 167 Wn.2d at 668.

Although the progression of events in Harrington differed from those in Soto-Garcia – i.e., the officer in Harrington did not ask for identification, did not conduct a warrant check, and did not ask Harrington if he was carrying drugs – other events (the presence of a second officer, asking Harrington to remove his hands from his pockets) transformed the interaction from a "social contact" to a seizure by the time the officer asked Harrington for permission to search his person. Id. at 669-670. As in Soto-Garcia, the Supreme Court also concluded that the seizure tainted

the subsequent consent to search and required suppression of the evidence. Id. at 670.

The progression of events in Soto-Garcia is the same as the progression of events in Bosma's case. In both cases, (1) an officer made contact with the defendant, (2) the officer asked the defendant for an explanation of activities, (3) the officer asked for and obtained identification, (4) the officer ran a warrants check in the defendant's presence, which revealed no outstanding warrants, (5) the officer asked the defendant about drugs or paraphernalia, and (6) despite a negative response, the officer asked to conduct a search (in Bosma's case two searches: her car and then her purse). As the Soto-Garcia court recognized, no reasonable person would feel free to end such an encounter.

In finding otherwise, Judge Snyder noted that Soto-Garcia was "fairly old" and decided to compare Bosma's case primarily to Harrington instead, noting the case was more recent and finding that the situation in Bosma's case "doesn't quite come to the level of Harrington[" RP 115, 119-120. Given the Harrington court's explicit approval of Soto-Garcia, and the fact it involves the same sequence of events found in Bosma's case, it is not clear why Judge Snyder chose to compare Bosma's case with Harrington.

The “progressive intrusion” in Harrington does indeed involve different facts than those in Soto-Garcia and this case, but the Harrington court made it clear that the effect and end result were the same:

Similar to Soto-Garcia, Harrington endured a progressive intrusion at the hands of [Officer] Reiber. Tate’s progressive intrusion included an inquiry about Soto-Garcia’s identification, warrant check, direct question about drug possession, and request to search – all of which, combined, formed a seizure. The independent elements of Harrington’s seizure are different, but the effect is the same.

Harrington, 167 Wn.2d at 669.

The only distinguishing feature Judge Snyder mentioned regarding Soto-Garcia was that the officer in that case had no reason to make contact with the defendant whereas Deputy Taddonio was investigating a parking violation. RP 116-117. This is unimportant. Once an officer asks for an explanation of activities, requests identification, runs a warrant check, asks about the possession of narcotics, *and* seeks to conduct a search, whether the initial reason for the contact is a parking infraction or merely officer curiosity is not critical. The critical question is whether a reasonable person would feel free to leave as the encounter progresses.

Once Deputy Taddonio asked Bosma and Conner whether they had any paraphernalia, it was quite apparent this was no longer merely an encounter about a parking infraction. See State v. Smith, 154 Wn. App. 695, 702, 226 P.3d 195 (emphasizing importance of direct question about drug possession in Soto-Garcia), review denied, 169 Wn.2d 1013 (2010). Deputy Taddonio's subsequent request to search Bosma's car, request that she exit her car, and request to search her purse only confirmed this.

Because Judge Snyder found no seizure, he never determined the effect of an unlawful seizure on Bosma's consent to search her purse. Once again, Soto-Garcia controls. The unlawful seizure and consent to search occurred very close in time, there were no significant intervening events (Bosma was never informed she could decline), Deputy Taddonio did not have evidence of criminal activity, and the consent was obtained prior to Miranda rights. As in Soto-Garcia and Harrington, because Bosma's consent to search was obtained through exploitation of the prior illegal seizure, suppression of the resulting evidence is required.

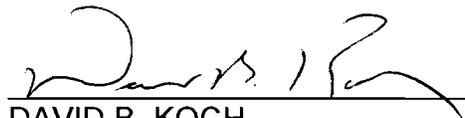
D. CONCLUSION

Bosma did not knowingly, intelligently, and voluntarily waive her right to a jury trial. Her conviction must be reversed and the matter remanded for a new trial. Additionally, Bosma was unlawfully seized. All evidence obtained during the subsequent search of her purse must be suppressed.

DATED this 25th day of July, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

APPENDIX

SCANNED 6

FILED
COUNTY CLERK

2011 APR -4 AM 8:56

WHATCOM COUNTY
WASHINGTON

BY SR

ORIGINAL

1
3
5
7
9
11
13
15
17
19
21
23
25
27
29
31
33
35
37
39
41
43
45
47

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY**

THE STATE OF WASHINGTON,

Plaintiff.

vs.

**SALLI SUZANNE BOSMA,
MICHAEL CONNER**

Defendants.

)
) **No.: 10-1-00275-1** ✓
) **No: 10-1-00274-2**
)
) **FINDINGS OF FACT AND**
) **CONCLUSIONS OF LAW**
) **RE:SUPPRESSION AND CONFESSION**
)
)

This matter having come regularly before the Honorable Charles R. Snyder on the
December 7, 2010 and the court having heard the testimony of Deputy Taddonio and Salli
Bosma and the argument of counsel, makes the following:

I. FINIDINGS OF FACT

1. On the afternoon of February 26, 2010, Deputy Taddonio was on patrol in Slater Road
area of Whatcom County. He observed two vehicles, red and white Hondas, parked in
the Department of Natural Resources parking lot. Parking in this lot is restricted and
requires a permit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:SUPPRESSION

Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
(360) 676-6784
(360) 738-2532 Fax

60

1 2. The deputy parked his marked patrol unit at least fifteen feet from either parked car and
3 did not impede or block either vehicle from backing up and leaving. Neither vehicle
5 displayed the required parking permit. The white Honda was registered in Ms.
7 Bosma's name and the red Prelude was registered to Nancy Conner. The deputy could
9 observe that the ground beneath the vehicles was dry. This indicated to him that they
11 had been parked for a significant time as off and on rain had been falling all afternoon.
13 There were no other vehicles in the parking lot.

15 3. The deputy was wearing his uniform and his holstered gun was visible. As he walked
17 towards the white Honda, Ms. Bosma rolled down the driver's window. Mr. Conner
19 was seated in the passenger's seat. The deputy asked defendants as to why they were
21 in the lot and if they had parking permit. They discussed that Mr. Conner had just left
23 from the Lummi Casino and that Ms. Bosma had driven from Everson to meet Mr.
25 Conner for a conversation. When asked about why they would meet in this location,
27 Ms. Bosma explained that her current boyfriend did not approve of her having contact
29 with Mr. Conner. Following this brief conversation, the deputy asked Ms. Bosma for
31 her identification and Mr. Conner handed his over to the deputy as well. Deputy
33 Taddonio stood by the driver's door and called in warrants checks to dispatch over the
35 radio he was wearing. After contacting dispatch the deputy promptly returned the
37 identification. Neither defendant had a warrant.

41 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

- 1 4. As the explanation given by defendants as to why they would travel such a distance to
3 meet in such an isolated and inhospitable location did not make sense, the deputy
5 asked if there were any drugs or drug paraphernalia in the vehicle. When asked this
7 question, Ms. Bosma began looking nervously around the interior of her car and
9 reached for the center console. Her actions were consistent with someone wondering if
11 some presumably hidden object might be visible. The defendants denied they had any
13 drugs or paraphernalia.
- 15 5. The deputy then asked if he could search the vehicle to verify the absence of any drugs.
17 Ms Bosma stated that the deputy could search the car and exited clutching her purse
19 tightly. The deputy asked if he could search the purse. Ms Bosma stated yes. She then
21 opened and handed the purse to the deputy. Within the purse, Deputy Taddonio
23 located a sunglass case. Inside this case, he immediately observed a glass pipe
25 containing what appeared to the trained and experienced officer to be
27 methamphetamine residue. At this point Deputy Taddonio contacted dispatch and
29 requested a cover officer.
- 31 6. Ms Bosma was placed under arrest and properly advised of her Miranda rights. Ms
33 Bosma chose to waive these rights and make statements and respond to questions. Ms
35 Bosma was handcuffed and placed in the back of the patrol car.
- 37 7. Deputy Taddonio then approached Mr. Conner who was pacing near the Bosma vehicle.
39 He was observed placing his hands in his pants pocket on several occasions. The

41 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:SUPPRESSION

1 deputy noticed a large bulge in his left front pants pocket which Mr. Conner touched
3 several times. The bulge was large enough to be a weapon. Deputy Taddonio asked
5 Mr. Conner if he could pat him down for weapons. Mr. Conner stated yes.

7 8. The deputy determined that the bulge in the pants pocket was fairly firm, but not of the
9 degree associated with a weapon. The deputy inquired into the identity of the object.
11 Mr. Conner stated it was a large amount of currency. This explanation was consistent
13 with the feel of the object from the pat-down. The deputy asked if he could look in the
15 pocket and verify there was only currency inside. Mr. Conner granted permission.

17 9. When the deputy looked further into the pocket he saw a plastic bag commonly used to
19 contain drugs. The deputy saw that the bag contained several small "shards" that he
21 immediately from his training and experience as methamphetamine. Mr. Conner was
23 then arrested and properly advised of his Miranda rights. At this point in time, Officer
25 Johnson of the Ferndale Police Department arrived as a cover officer. After Mr.
27 Conner was being escorted to a patrol car, he called the deputy back to his presence as
29 a methamphetamine pipe fell from his pants leg onto the ground. The pipe had a
31 coating of residue recognized by the officer as methamphetamine.

33
35 10. Mr. Conner then gave a statement that he and Ms. Bosma had smoked methamphetamine
37 in the parking lot earlier that day, but just had been talking at the time the deputy
39 arrived. Ms. Bosma gave multiple statements regarding her possession of the pipe.

1 These were conflicting accounts and she become upset when they were not believed
3 and she was taken to jail.

5 II. DISPUTED FACTS AND RESOLUTIONS THEREOF:

- 7 1. Were multiple officers present when Deputy Taddonio asked Ms. Bosma for
9 permission to search her purse as testified to by Ms. Bosma? The court finds that
11 there were not multiple officers present. The court finds it unlikely that the deputy
13 would have summoned other officers prior to the discovery of the drug pipe as he was
15 until then only involved with a parking investigation.

17 From the foregoing FINDINGS OF FACT the court makes the following:

19 III. CONCLUSIONS OF LAW

- 21 1. Defendants' Motion to Suppress will be denied. Prior to the discovery of the drug
23 pipe in Ms. Bosma's purse the interaction was a consensual citizen encounter. Ms.
25 Bosma's consent to the search of her purse and car was voluntary. In this regard, the
27 court notes the absence of a progressive intrusion into Ms. Bosma's privacy as in the
29 cases she cites as authority for suppression.
- 31 2. Mr. Conner's motion to suppress will be denied as well. The basis just related
33 regarding the denial of the Bosma motion applies equally herein. In addition, once the
35 drugs were found in Ms. Bosma's purse there were reasonable grounds to detain Mr.
37 Conner. He was detained. His furtive movements to his pockets justified the pat down
39 of the bulge in his left front pocket. His further inquiry into verifying the identity of

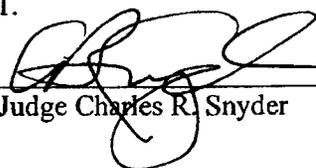
41 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

1 this bulge as currency was voluntary and resulted in the discovery of the drugs. Even
3 if not voluntary, the further examination of the bulge was justified as part of the pat
5 down search previously determined to be permissible.

7 3. There was no pre-textual stop per State v. Ladson as the contact prior to the discovery
9 of the pipe in Ms. Bosma's purse constitutes a consensual officer/citizen encounter.

11 4. The statements of defendants are admissible pursuant to CrR 3.5. Either the
13 statements were made prior to the defendant being placed into custody or after being
15 properly advised of Miranda rights following their arrest.

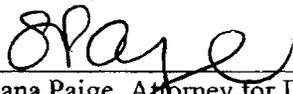
17 DATED this 4 day of ~~March~~^{April}, 2011.

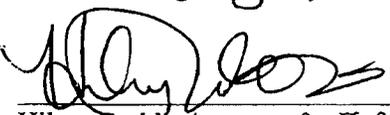
19 
21 Judge Charles R. Snyder

23 Presented by:

25 
27 CRAIG D. CHAMBERS, WSBA #11771
Deputy Prosecuting Attorney

29 Copy Received, Approved as to Form,
31 Notice of Presentation Waived:

33 
35 Shoshana Paige, Attorney for Defendant Conner

37 
39 Hilary Smith, Attorney for Defendant Bosma
WSBA #91001

41 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: SUPPRESSION

43 6

45 Whatcom County Prosecuting Attorney
311 Grand Avenue, Suite #201
Bellingham, WA 98225
47 (360) 676-6784
(360) 738-2532 Fax

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.

1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488

WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT
OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State V. Salli Bosma

No. 66604-5-I

Certificate of Service by Mail

On July 25, 2011, I deposited in the mails of the United States of America,
A properly stamped and addressed envelope directed to:

Craig D. Chambers
Whatcom Co Prosecutor
311 Grand Ave Fl 5
Bellingham WA 98225-4048

Salli Bosma,
7082 Goodwin Road
Everson, WA 98247

Containing a copy of the opening brief, re Salli Bosma
Cause No. 66604-5-I, 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.



John Sloane
Office Manager
Nielsen, Broman & Koch

7-25-11
Date
Done in Seattle, Washington

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 25 PM 4: 24