

08543-1

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NO. 68759-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

CORYELL L. ADAMS,

Appellant.

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 FEB 11 PM 1:55

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I. ISSUES

The defendant was the driver and lone occupant of a vehicle stopped by a State Trooper on I-5 for a lane-travel infraction. The trooper discovered the defendant's license was suspended and arrested him. Because the car could not safely be left on the shoulder and attempts to locate a friend to come drive the vehicle away were unsuccessful, the trooper decided to impound the car. Preparatory to his doing so, he opened the car door to get the mileage and check if the ignition key worked. When he immediately saw contraband, he backed out, closed and secured the car, and obtained a search warrant.

1. Was the brief entry a lawful search, when a fuller inventory search of the passenger compartment would have been justified on these facts?

2. Is the officer's subjective characterization of what he did (that it was not an inventory search) dispositive on de novo review?

3. The trial court concluded the entry was not a search. Respondent agrees with appellant this was error. Can this Court affirm on an alternate basis supported by this record, given that entry, while a search, is a small part of lawful inventory searches to secure property?

II. STATEMENT OF THE CASE

A. INFRACTION STOP AND DISCOVERY OF COCAINE WHILE PREPARING CAR FOR TOW AND IMPOUND.

The defendant was stopped by a Washington State Trooper, Greg Marek, for a lane travel violation. Finding of Fact #1, 1 CP 114-15. As he prepared to issue an infraction to the defendant, the trooper learned the defendant's license was suspended, and arrested the defendant for this offense. . Findings of Fact #2 and 3, 1 CP 114-15. The vehicle was stopped in a tow zone, on a narrow shoulder of I-5. The defendant was the lone occupant of the vehicle. Attempts to contact friends of the defendant to move the car were unsuccessful. Finding of Fact #4, 1 CP 114-15; 11/18/11 Verbatim Record of Proceedings of CrR 3.6 Suppression Hearing (hereafter "3.6 Hrg RP") 5.

Once he realized the car would have to be impounded (because the defendant's license was suspended, and there was no one else to pick up the car) Trooper Marek prepared to fill out the "Uniform Washington State Tow/Impound and Inventory Record." 3.6 Hrg RP 6; Ex. 2. That form includes a box for writing down the mileage. The trooper opened the car door to get it. 3.6 Hrg RP 6-7, 14; Finding of Fact #5, 1 CP 114-15. He also opened

the door because he wanted to ensure the key fit the ignition. Id. Asked why the latter was necessary, the trooper explained that in an ordinary impound – one where the car is not being seized for evidence – sometimes the tow truck driver will need to actually start the car to get it up on the truck. It is quicker and safer that way. 3.6 Hrg RP 14. The trooper's intent was to leave the key in the ignition for the tow truck driver. Id. at 6.

Getting the mileage and inserting the key were routine, simply to facilitate the towing process. Id. at 6, 11-12, 14, 15; Ex. 2.

Counsel on cross-exam noted that the mileage box was not actually filled in on the uniform tow/impound and inventory form [Ex. 2], and asked why. 3.6 Hrg RP 12; Ex. 2. Trooper Marek explained that once he opened the door and saw what appeared to be narcotics in the driver's side door compartment, he immediately backed out and closed the door without doing anything else. 3.6 Hrg RP 7, 12; Finding of Fact #6, 1 CP 114-15.

What the trooper had seen upon opening the door was a baggie with a white crystallized substance in the driver's-side door compartment. He recognized the substance as possibly cocaine or methamphetamine. In fact, it turned out to be 1.14 oz. of cocaine, the size of a golf ball. 3.6 Hrg RP 7, 9.

Once he realized he had possible evidence of a crime, the impound/towing procedure was no longer the trooper's primary concern. *Id.* at 7, 15. He added that noting the mileage on the form was necessary but (obviously) not mandatory, since the car was towed to the State Patrol impound yard without the mileage being noted. *Id.* at 12-13.

Upon seeing evidence of a possible crime, the trooper asked if the defendant would consent to a search. The defendant declined to consent, and said it was not his car. *Id.* at 8. Trooper Marek did not search the car further. Rather, at the impound yard, officers applied a drug dog. The dog alerted on the driver's- and passenger-side doors. Trooper Marek obtained a warrant and the car was searched, and contraband discovered, pursuant thereto. *Id.* at 8-10.

The trooper testified that when he opened the door, it was simply to get the mileage and check the key, not to do an inventory search, nor to conduct a search incident to arrest. *Id.* at 14.

The defendant was charged with possession of a controlled substance (cocaine). 1 CP 125-26. He unsuccessfully challenged the legality of the state trooper's opening the door and finding cocaine in the car. 1 CP 114-16; 3.6 Hrg RP 24-27. Initial trial

resulted in a “hung” jury. 1/20/12 Verbatim Record of Proceedings 12-20. Retrial resulted in conviction as charged. 1 CP 44; 3/26 – 3/27/12 Verbatim Record of Proceedings 156-60. The defendant was sentenced within the standard range. 1 CP 29-43.

B. ARGUMENT AND RULING AT SUPPRESSION HEARING.

The defendant argued below that the trooper’s opening the door was a search for which there was no exception to the warrant requirement, adding that opening the door was analogous to the turning over of stereo equipment to get serial numbers in Arizona v. Hicks, 480 U.S. 321, 324, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987) (manipulating unrelated items to obtain serial numbers exceeded scope of lawful entry into apartment to search for shooter). 1 CP 117-122. He argued that opening the door was not an inventory search, because the trooper had said it was not. 3.6 Hrg RP 16-19. That the officer followed protocols was, he asserted, irrelevant. Id. at 18, 23.

The State argued that opening the car door was lawful to prepare for impound and an inventory search. 2 CP 127-134. The impound was lawful and reasonable, because it was authorized by statute and the officer had determined there were no reasonable alternatives; opening the car door was part of a lawful impound;

and once he saw what appeared to be narcotics, the officer went “by the book,” closed the door, secured the car, and got a search warrant. Id. at 19-22. What the officer had done was merely “the initial steps of preparing the vehicle” to get to an inventory search. Id. at 22.

The trial court denied the motion, issuing the following conclusions of law:

1. There was no pretext involved in the valid traffic stop.
2. Trooper Marek’s actions in opening the driver’s door to get the mileage and prepare for the tow were reasonable, legal, and appropriate. This did not constitute a search.
3. The items observed in the driver’s door panel were in plain view once the door was opened. The evidence was not manipulated in any way.
4. The vehicle was properly towed and impounded to the WSP bullpen.
5. The canine inspection of the vehicle at the WSP bullpen was legally proper.
6. Commission [sic] Moon issued a valid and legal search warrant to have the vehicle searched for suspected narcotics.
7. The search of the vehicle did not violate Constitutional protections and was legally valid.
8. Defendant’s motion to suppress evidence and dismiss is denied.

1 CP 115; see also 3.6 Hrg RP 24-26 (trial court's oral comments).

III. ARGUMENT

A. ONLY THE INITIAL ENTRY INTO THE CAR IS AT ISSUE.

The sole issue in this case is whether the officer conducted an unlawful search when he opened the car door to get a mileage reading and to see if the ignition key fit.

Everything preceding this event – such as the lawfulness of the stop and the arrest – is not at issue. In particular, the lawfulness of the trooper's initial impound decision is not questioned. Nor should it be: There were no reasonable alternatives to impound, nor any indication the impound decision was a pretext to conduct an evidentiary search. See RCW 46.55.113(1) (authorized when driver arrested for DWLS); - (2)(d) (same, when driver arrested generally); State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980) (impound justified if defendant, spouse, or friends unavailable to move vehicle);¹ compare State v. Houser, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980) (State must show any impound and inventory search was

¹ See also State v. Williams, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984) (impound may not be justified if alternatives exist); State v. Sweet, 36 Wn. App. 377, 382-83, 675 P.2d 1236 (1984) (same); State v. Sweet, 44 Wn. App. 226, 236, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986) (same analysis on reconsideration after remand).

conducted “in good faith and not as a pretext for an investigatory search”); State v. Gluck, 83 Wn.2d 424, 428-29, 518 P.2d 703 (1974) (same). And the car had to be moved. 3.6 Hrg RP 5.

The only conduct at issue is the trooper’s opening the door preparatory to towing and impound, which defendant characterizes as a search. Respondent agrees that it was. But it was not unlawful.

B. STANDARD OF REVIEW.

The parties agree on the standard of review. On appeal of a suppression motion, the reviewing court determines whether substantial evidence supports the trial court’s findings of fact; and, if so, whether the findings support the trial court’s conclusions of law. State v. Broadway, 133 Wn.2d 118, 130, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings are viewed as verities on appeal. Hill, 123 Wn.2d at 644. Conclusions of law are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996); Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

C. THE DEFENDANT CANNOT BE HEARD TO CHALLENGE A FACTUAL FINDING WHEN HE AGREED TO ALL THE FACTS BELOW.

At the suppression hearing, defense counsel stated, “I actually think [deputy prosecutor] Mr. Halloran and I agree factually on everything here.” 3.6 Hrg RP 23. He added he was not questioning the officer’s good faith, but simply raising a purely legal issue. Id. He subsequently signed a CrR 3.6 certificate listing findings of fact as “undisputed.” 1 CP 114-15.

Now, however, the defendant assigns error to finding of fact # 5, saying it is not supported by substantial evidence. BOA 1, 16-17. He argues it is “absurd” to find the officer opened the door to ensure the ignition key worked, since it obviously must have worked as the car had just been driven; and that there was no need to insert the key to facilitate a tow, since it appears the car was towed without it. Id. He similarly asserts that getting the odometer was unnecessary, since obviously tow proceeded without it. Id. But he never raised these matters below, and not only signed a 3.6 certificate listing undisputed facts, 1 CP 114-15, but also affirmatively represented that facts were agreed and undisputed. 3.6 Hrg RP 23.

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). Only a “manifest error affecting a constitutional right” can be raised for the first time on appeal. State v. Lynn, 67 Wn. App. 339, 345-46, 835 P.2d 251 (1992); RAP 2.5(a)(3). Arguing, for the first time on appeal, that there was an insufficient factual basis to establish it was necessary to ensure a working ignition key to facilitate a tow does not rise to the level of a “manifest error involving a constitutional right.”

At the very least, to now assign error to a finding of fact after previously stating the parties were in agreement on all factual issues is invited error. The doctrine bars a party from setting up an error at trial and then objecting to it on appeal. State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996); In re Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001) (requires affirmative act by defendant); State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990) (doctrine can bar review even where constitutional rights and issues involved). The doctrine applies in the context presented here. Save-Way Drug, Inc. v. Standard Inv. Co., 5 Wn. App. 726, 727, 490 P.2d 1342 (1971) (on appeal, party cannot dispute factual sufficiency of affidavit when stated in summary judgment hearing there were no disputed facts).

In any case, the defendant is wrong on the merits. The trooper testified that if there is an ignition key, it is quicker and safer to leave it in the ignition for the tow truck driver . 3.6 Hrg RP 6, 14. This enables the tow truck driver to start the car to get it onto the truck. Id. There is nothing in the record to the contrary indicating this is not true. That there may be other ways to tow a car, as defendant argues, BOA 16-18, does not mean the way the officer described, with the key in the ignition, is not the quickest and safest. (Nor does the record reveal how the car was ultimately towed.) The defendant also argues that it was "absurd" for the officer to need to ensure the key fit and worked, since the defendant had obviously been driving the car, and so the key had to work. BOA 16-18. But there is nothing in the record to support this assertion. The officer did not make the impound decision until he had arrested the defendant for driving on a suspended license. 3.6 Hrg RP 5. The defendant as an arrestee no longer had control of the car, and presumably was outside the vehicle. The officer thus had no way of knowing, without checking, whether there was a working key. There are, after all, ways to start and drive a car without an ignition key, and this may be especially true for an older vehicle such as was involved here. See Ex. 2 (vehicle was a 1984

Toyota Tercel); see 3.6 Hrg RP 13-14 (noting age of car with respect to type of odometer).

As for the mileage, the officer testified obtaining an odometer reading was pursuant to protocol. 3.6 Hrg RP 6, 11-12, 14, 15; Ex. 2. There is no evidence to the contrary. He didn't obtain it only because what looked like a routine impound suddenly became a criminal investigation, and he immediately backed out of and secured the car. Id. at 7, 12. That a towing company will tow without the mileage being noted – especially on a criminal impound – does not mean the officer did not enter with the intent to obtain the odometer reading pursuant to protocol.

The finding that the officer opened the car door to get the mileage and ensure he had a working ignition key was supported by substantial evidence. The defendant cannot now be heard to argue to the contrary.

D. A BRIEF ENTRY TO FACILITATE TOWING AND IMPOUND IS PART OF A LAWFUL INVENTORY SEARCH PROVIDED THE IMPOUND WAS LAWFUL.

1. Entry Was A Search.

Although the prosecution did not actually argue this, the trial court found that the officer's entry into the vehicle, to obtain the mileage and ensure there was a working ignition key, was not a

search. 1 CP 116; Finding of Fact #2. On appeal, the defendant asserts that it was. BOA 9-10. Respondent agrees that the entry was a search, albeit a very limited one. See State v. Jones, 163 Wn. App. 354, 361-63, 259 P.3d 351 (2011), review denied, 173 Wn.2d 1009 (2012) (observing pills from outside vehicle was not search, but warrantless entry into vehicle to retrieve them was unlawful search not justified by exigency).

The trial court erred in concluding the entry was not a search. Conclusion of Law # 2, 1 CP 115. But this Court can affirm on any basis supported by the record and the law. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2000); State v. Carter, 74 Wn. App. 320, 324 n. 2, 875 P.2d 1 (1994), aff'd, 127 Wn.2d 836, 904 P.2d 290 (1995). Nor is the State barred from assigning error: The prevailing party need not cross-appeal a trial court's ruling, even if assigning error thereto, if it seeks, as here, no affirmative relief. RAP 2.4(a); State v. Kindsvogel, 149 Wn.2d 477, 481, 69 P.3d 870 (2003). It may argue any ground to support the trial court's order which is supported by the record. Id. In any case, to the extent it may be deemed necessary, respondent has filed a timely cross-appeal in this case. 3 CP ___ (sub 104).

2. Trooper's "Legal Conclusion" And Trial Court's Oral Comments Not Dispositive.

Having correctly characterized Trooper Marek's opening the door to check mileage and check the ignition as a search, the defendant then argues the search was unlawful because it was not covered by any of the recognized exceptions thereto. BOA 14. In particular, he argues that it was not an inventory search. Id. He so argues because the trooper had said it wasn't an inventory search. Id.; see 3.6 Hrg RP 14. He adds that the trial court concluded the same in its oral comments. BOA 14; see 3.6 Hrg RP 25. (The trial court did not, however, state this in its written conclusions of law. Compare 1 CP 115.) It is the core of his argument, on which all else depends.

But an officer's subjective intent is irrelevant to the question of law of whether a search or seizure occurred. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489, 495 (2003) (citing State v. Knox, 86 Wn. App. 831, 839, 939 P.2d 710 (1997)); see also State v. Huff, 64 Wn. App. 641, 826 P.2d 698 (1992) (officer's erroneous subjective belief as to existence of one crime does not nullify arrest based on objective probable cause of another crime). It does not

matter how the officer characterized the legal significance of what he did, or thought he was doing.

A trial court's oral comments or opinion is "no more than a verbal expression of [its] informal opinion at that time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). A trial court's oral decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980) (citations omitted); accord, State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996) (citing State v. Williamson, 72 Wn. App. 619, 623, 866 P.2d 41 (1994)). Even if the trial court's oral comment carries the force of a written conclusion – since it concluded there was no search at all – this Court, as argued above, can affirm on any basis supported by the record, and respondent can assign error to such a finding without having to cross-appeal if not seeking affirmative relief. Avery, 103 Wn. App. at 537 (appeals court can affirm on any basis); Kindsvogel, 149 Wn.2d at 481 (party prevailing below can assign error without cross appeal).

3. Because The Impound Was Lawful, Any “Good Faith” Accompanying Search To Secure The Vehicle Was Lawful As Well, As A Small Part Of An Inventory Search.

Inventory searches are a recognized exception to the overarching warrant requirement. State v. Garvin, 166 Wn.2d 242, 249–50, 207 P.3d 1266 (2009); State v. Duncan, 146 Wn.2d 166, 171–72, 43 P.3d 513 (2002). This is true both under Art. I, § 7 and the Fourth Amendment. State v. White, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998) and Houser, 95 Wn.2d at 154 (Washington Constitution); LaFave, 3 Search & Seizure: A Treatise on the Fourth Amendment § 7.4(a) at 834-64 (5th ed. 2012). To be covered by the exception, an inventory search must be accompanied by a lawful impound. White, 135 Wn.2d at 769-70; Tyler, 166 Wn. App. at 208-09. Determining whether there was reasonable cause for the impound is critical to deciding if evidence discovered in an accompanying search is admissible. State v. Tyler, 166 Wn. App. 202, 209, 269 P.3d 379 (2012),² citing Houser, 95 Wn.2d at 148, and Potter v. Wash. State Patrol, 165 Wn.2d 67, 83, 196 P.3d 691, 694 (2008).

“A vehicle may lawfully be impounded if authorized by statute or ordinance. ‘In the absence of statute or ordinance, there

² Review granted, 174 Wn.2d 1005 (2012).

must be reasonable cause for the impoundment.” State v. Bales, 15 Wn. App. 834, 835, 552 P.2d 688 (1976) (quoting State v. Singleton, 9 Wn. App. 327, 331, 511 P.2d 1396 (1973)), review denied, 89 Wn.2d 1003 (1977). As noted above, RCW 46.55.113(1) expressly authorizes law enforcement “to impound a vehicle when ... the driver is arrested for [driving with license suspended].” Potter, 165 Wn.2d at 73, 196 P.3d 691. Additionally, the statute provides that an officer may “take custody of a vehicle, at his or her discretion” if it is “unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety.” RCW 46.55.113(2)(b).

Here, impound was authorized by statute, because the defendant was driving with his license suspended. RCW 46.55.113(1). Moreover, the car was in a “tow zone” – a narrow shoulder of northbound I-5, 3.6 Hrg RP 5 – so that reasonable grounds for impounding the car existed as well. And even though impound was expressly authorized by statute, the officer also explored reasonable alternatives to impound – trying to reach someone who could drive the vehicle – but his efforts were unsuccessful. See Williams, 102 Wn.2d at 742-43 (impound may not be justified if alternatives exist); Simpson, 95 Wn.2d at 189

(impound justified if defendant, spouse, or friends unavailable to move vehicle). Thus, alternatives were considered as well. *This was a lawful impound.* Appellant has not argued to the contrary.

That being so, “[i]t is well settled that police officers may conduct a ‘good faith’ inventory search following a ‘lawful impoundment’ without first obtaining a search warrant.” Tyler, 166 Wn. App. at 209, citing Bales, 15 Wn. App. at 835 and State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). Any inventory search cannot have been a pretext for an investigatory search. Houser, 95 Wn.2d at 155; Gluck, 83 Wn.2d at 428-29. The trial court found that any entry here was not a pretext, Conclusion of Law #, 1 CP 115, and appellant has not alleged any differently. The search must be made according to “standardized police procedures which do not give excessive discretion to the police officers.” State v. Smith, 76 Wn. App. 9, 14, 882 P.2d 190 (1994), review denied, 126 Wash.2d 1003 (1995). Trooper Marek testified that what he did to prepare the vehicle for impound was routine, and there is no evidence to the contrary. 3.6 Hrg RP 6, 11-12, 14, 15; Ex. 2.

Thus, Trooper Marek could have conducted a full inventory search of the passenger compartment of the vehicle (provided he

did not open the car trunk or any locked containers, Houser, 95 Wn.2d at 155). He did not do this. Instead, as far as he got was opening the car door in preparation for a tow, to obtain a mileage reading and check the ignition key. The defendant asserts this was not an inventory search, and was therefore unlawful. The logical conclusion of his argument is that an officer's doing more is lawful, while his or her doing less is not. This is an absurd result.

The purpose of an inventory search is to perform an administrative or caretaking function. State v. Dugas, 109 Wn. App. 592, 597, 36 P.3d 577 (2001). The principal purposes of an inventory search are: (1) to protect the vehicle owner's property; (2) to protect the police against false claims of theft by the owner; and (3) to protect the public from vandals who might find a firearm or contraband. White, 135 Wn.2d at 769–70; Houser, 95 Wn.2d at 154; South Dakota v. Opperman, 428 U.S. 364, 369, 376 n. 10, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). It is “made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him[.]” Montague, 73 Wn.2d at 385.

Part of any property involved would be the car itself. The testimony was that the vehicle could not be safely left where it was,

on a narrow shoulder on I-5. 3.6 Hrg RP 5. The trooper added that, in entering the vehicle to check the mileage and the key, “[y]ou also need to make sure that there is an observation made that there is nothing dangerous that could harm the driver or the vehicle or anyone else in the area prior to being impounded.” 3.6 Hrg RP 6. All of this is consistent with the underpinnings of a lawful inventory search. That the officer only performed a very small part of such a search does not make what he did unlawful, when he lawfully could have done a great deal more.

On de novo review, it does not matter how the trooper described his entry. And the trial court can be affirmed on any basis supported by the record. Entry into the vehicle preparatory to impound was indeed a search, but it was lawful. The defendant’s argument fails.

IV. CONCLUSION

The judgment and sentence should be *affirmed*.

Respectfully submitted on February 8, 2013.

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