

No. 71111-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WYATT,

Appellant.

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

APPELLANT'S OPENING BRIEF

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RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

People have a constitutional right to privacy in their dwellings and the contents of their effects. Dennis Wyatt, homeless, was living in a tent in a small secluded wooded area. Kent police officers warned Wyatt that his camp was unlawfully on city property and left. About an hour later, the officers saw Wyatt walking on a nearby road away from his camp. The officers returned to Wyatt's camp to snoop around. The officers removed a tarp which was covering items in the camp. Underneath, the officers found a zipped closed bag and a closed cooler. The officers opened the containers. Inside were items the officers suspected were used to manufacture methamphetamine. The officers' conduct unreasonably disturbed Wyatt's private affairs, violating article 1, section 7. The trial court erred in denying Wyatt's motion to suppress. The trial court also erred by not suppressing coerced statements that police extracted from Wyatt in violation of due process. This Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The court erred in denying Wyatt's CrR 3.6 motion to suppress evidence.
2. The court erred in concluding that Wyatt had no legitimate expectation of privacy in items outside Wyatt's tent. CP 75-76.

3. The court erred in concluding that Wyatt was properly arrested for manufacturing methamphetamine. CP 75-76.

4. Lacking substantial evidence, the court erred in finding that no threats were made to Wyatt in exchange for his statements. CP 66 (FF 22).

5. Lacking substantial evidence, the court erred in finding that no promises were made to Wyatt in exchange for his statements. CP 66 (FF 23).

5. The court erred in concluding that all of Wyatt's statements were voluntary. CP 67.

6. The court erred in admitting Wyatt's coerced statements. CP 67.

7. For lack of substantial evidence, the court erred in finding that Wyatt denied knowing there were methamphetamine laboratory items in the camp to Officer Kelso. CP 65 (FF 17); CP 72 (FF 28).

8. Lacking substantial evidence, the court erred in finding that Officer Kelso asked Wyatt how long Wyatt had been addicted to methamphetamine and that Wyatt told him that he had been addicted to methamphetamine for a long time. CP 65 (FF 17); CP 72 (FF 28).

9. Lacking substantial evidence, the court erred in finding that Officer Kelso told Wyatt that it was obvious that the methamphetamine laboratory was Wyatt's. CP 65-66 (FF 17); CP 72 (FF 28).

10. Insufficient evidence supported the jury's determination that the offense happened in a "public park."

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under article 1, section 7, the contents of closed containers within a camp are a private affair. Wyatt, homeless, was camping in a secluded wooded area. He had a tent and kept closed containers in the camp, including a cooler and a zipped bag which were stored under a tarp. Were Wyatt's private affairs unreasonably disturbed when the police opened these closed containers when they knew Wyatt was momentarily away from the camp?

2. When police interrogation overbears a person's will and extracts a confession, the confession is involuntary and its admission violates due process. Deception, threats, and false promises of leniency may overbear a person's will. Upon being awoken in his tent, Wyatt was immediately arrested. Wyatt repeatedly denied the accusation that he made methamphetamine to the interrogating officers. Seeking to obtain a confession, the second interrogating officer lied, telling Wyatt that he had heard that Wyatt was selling methamphetamine to children. Lying further,

the officer threatened Wyatt by telling him that he would have a “real problem” if this were true, but promised he would “understand” if the drugs were just for Wyatt’s personal use. Overborne by the deceptive threat and false promise, Wyatt told the officer what he wanted to hear. Did the trial court err in concluding that Wyatt’s confession was voluntary?

3. Wyatt’s sentence was enhanced by 24 months based on the jury’s determination that the offense occurred in a “public park.” Public park means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government. Wyatt’s camp was near a river in a wooded area abutting an open field. Kent police officers testified that the camp, though not in the field, was within “Riverview Park.” The officers, however, did not have specialized knowledge about park boundaries and did not testify as experts on the subject. And while they testified that “Riverview Park” is geographically in the City of Kent, they did not testify that it was operated by the City. Was this evidence insufficient for the jury to rationally find that the State proved the offense occurred in a public park?

D. STATEMENT OF THE CASE

According to testimony at a combined CrR 3.5 and 3.6 hearing, Officers Kenneth Clay and Andrew Kelso¹ of the Kent Police Department were patrolling on their bicycles in the city near Riverview Park on October 30, 2011. RP 29-30, 88. Homeless people would often camp in this area. RP 29, 47, 114. When they encountered homeless people camping on City property, they would issue warnings to vacate. RP 29-30, 98. According to Officer Clay, they would typically give the person 24 hours to vacate. RP 29-30.

During their patrol, the officers talked to a woman whom the officers had limited contact with in the past. RP 30-31, 48, 112. Neither officer could recall who this woman was and could not say if she had provided reliable information in the past. RP 31, 48, 112. She may have been “occasionally” homeless. RP 129-30. After inquiring about criminal activity, the woman told the officers that a person had been bragging about stealing copper wiring from a railroad. RP 31; 88-89. The officers had heard that wire at a railroad crossing had been removed about two weeks earlier. RP 50-51. The woman also said the same person, named Dennis, was making meth. RP 89-90. The woman told the officers that Dennis

¹ At the time of trial, Kelso was a Sergeant. RP 86.

belongings and leave. RP 44-45. The officers left with Taylor and walked back to where they had left their bikes. CP 70 (FF 11).

The officers waited for a patrol officer to pick up Taylor. CP 70 (FF 11). About 45 minutes later, Clay and Kelso saw Wyatt and Johnson walking northbound. CP 71 (12). Wanting to search the camp while Wyatt and Johnson were not there, the officers returned to the camp. CP 71 (FF 12-13); RP 95, 138.

With no one there to protest, the officers searched the camp. RP 96. They removed the tarp. RP 119. Under the tarp, there was, among other things, a closed blue soft-sided cooler,² and a five-gallon bucket. CP 71 (FF 14-15); RP 60, 69, 120, 156. Inside the bucket was a zipped black bag.³ CP 71 (FF 14); RP 121. The officers opened both the bag and the cooler. CP 71 (FF 14-15); RP 61, 169-70. Inside the bag and cooler, they found items associated with a methamphetamine lab. CP 71 (FF 17). The officers also lifted up the tent and found that there were no leaves under the tent, leading them to speculate that Wyatt and Johnson had been there longer than two days. CP 71 (FF 19).

² See Pretrial Ex. 3, 6, 10 (photos).

³ See Pretrial Ex. 2, 11 (photos).

The officers replaced the tarp and left. CP 71 (FF 20); RP 169. Kelso contacted the Department of Ecology for assistance in processing the scene and spoke with Richard Walker, a responder with the Department. CP 71-72 (FF 20, 24); RP 262. The next day, November 1, 2011, Kelso returned to the area around 10:45 a.m. CP 72 (FF 24). He was accompanied by Sergeant Mike O'Reilly and Walker. CP 72 (FF 24). Leaving Walker behind, Kelso and O'Reilly entered the camp. CP 72 (FF 26); RP 101. They found Wyatt and Johnson asleep in their tent. RP 101. They arrested them and marched back to the road where they interrogated them. RP 101-02, 191.

Wyatt and Johnson both denied accusations of manufacturing methamphetamine. CP 72-73 (FF 28, 29, 30). After Kelso failed to obtain a confession from Wyatt, O'Reilly interrogated Wyatt. CP 72-73 (FF 28, 30). Using a "ruse," O'Reilly got Wyatt to say that he had cooked methamphetamine at the camp for his own use. CP 73 (FF 30). Another officer arrived and took Wyatt and Johnson away. CP 73 (FF 31).

Kelso, O'Reilly, and Walker went to the camp. They processed the items that Kelso had found the other day. See CP 73-74 (FF 33-38). While the items were being processed, O'Reilly entered the tent and found several bags. CP 74 (FF 38). Inside the bags were items that might be used as part of a methamphetamine lab. CP 74 (FF 38, 40).

The State charged Wyatt and Johnson with manufacturing methamphetamine, in violation of RCW 69.550.401(1), (2)(b). CP 1, 25. Wyatt and Johnson both moved to suppress the evidence. After a combined CrR 3.5 and 3.6 hearing, the court partly granted and partly denied their motions.⁴ CP 75-76. The court suppressed the evidence obtained from inside the tent, but admitted evidence obtained under the tarp in closed containers. CP 75-76. The court also admitted Wyatt's inculpatory statements as voluntary. CP 67. Wyatt and Johnson were tried together with Wyatt receiving a jury trial and Johnson receiving a bench trial. See RP 442 (denying motion to sever); RP 456 (accepting Johnson's jury waiver). The jury convicted Wyatt of the charge. RP 1096; CP 48. The court acquitted Johnson. RP 1107-08. The court sentenced Wyatt to a prison based drug offender sentencing alternative (DOSA) with 41.75 months in prison and 41.75 in the community. CP 53. This sentence was enhanced by 24 months based on the jury's finding that the offense had been committed inside a park. CP 49.

⁴ The court's written findings of fact and conclusions of law on the CrR 3.6 hearing is attached as "Appendix A." The court's written findings and conclusions on the CrR 3.5 hearing is attached as "Appendix B."

E. ARGUMENT

1. Wyatt had a valid privacy interest in the contents of a zipped bag and closed cooler within his campsite. The court erred in denying the motion to suppress the evidence obtained from the unlawful search of these containers.

a. The trial court correctly ruled that police unlawfully searched Wyatt's tent, but erred in ruling that the police had lawfully searched nearby closed containers.

The court partly accepted and partly denied Wyatt's CrR 3.6 motion. The court concluded that the officers' search of the items inside the tent was not proper:

The search of the items inside the tent was not proper and therefore those items are inadmissible. The defendant had a reasonable expectation of privacy of the items inside the tent as the items were inside bags inside the tent. No exigency or dangerousness required the immediate retrieval of the items. The officers had ample time to obtain a search warrant and did not do so. The search of the tent was not incident to the defendant's arrest.

CP 76. The court, however, determined that the officers' search of the closed containers outside the tent was permissible, reasoning that Washington appellate courts have held that there is no reasonable expectation of privacy in the area surrounding an illegal camp. CP 75-76; RP 392-393.

This Court reviews conclusions of law de novo. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009).

b. Closed containers within a camp are a private affair and there is a reasonable expectation of privacy in such closed containers.

The Fourth Amendment provides that the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” Const. Amend. IV. Under the Fourth Amendment, a search occurs if the government intrudes upon a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 351–52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Irrespective of the reasonable expectations of privacy test, a search also occurs when “the Government obtains information by physically intruding’ on persons, houses, papers, or effects” Florida v. Jardines, 133 S. Ct. 1409, 1414, 185 L. Ed. 2d 495 (2013) (quoting United States v. Jones, 132 S. Ct. 945, 950–951 n. 3, 181 L. Ed. 2d 911 (2012)). Under this trespass test, the Supreme Court has held that placing a GPS device upon a car, with the purpose of obtaining information, was a search because it physically intruded upon an “effect.” Jones, 132 S. Ct. at 949.

Article 1, section 7 of the Washington Constitution commands that, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. The question of whether the government has intruded on a person’s “private affairs” is broader than the “reasonable expectation of privacy” inquiry. State v.

Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). The relevant inquiry is whether the state unreasonably intruded into the defendant's "private affairs." State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). The focus is on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Id. at 511.

Containers⁵ are "effects" within the meaning of the Fourth Amendment and their contents are among the "private affairs" protected by article 1, section 7. See State v. Boland, 115 Wn.2d 571, 573, 800 P.2d 1112 (1990) (closed trash container left outside home a private affair); State v. Hamilton, 179 Wn. App. 870, 882-83, 320 P.3d 142 (2014) (reasonable expectation of privacy in contents of purse). While the degree of protection varies on the setting, the "Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." United States v. Ross, 456 U.S. 798, 822-23, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). There is no constitutional distinction between "worthy" containers and "unworthy" containers. Id. at 822. "A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." United States v.

⁵ A "container" is "any object capable of holding another object. New York v. Belton, 453 U. S. 454, 460 n. 4, 101 S. Ct. 2860, 9 L. Ed. 2d 768 (1981).

Jacobsen, 466 U.S. 109, 120 n.17, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). Article 1, section 7 also protects containers from unreasonable intrusion. State v. Russell, ___ Wn.2d ___, ___ P.3d ___, No. 89253 slip op at 9 (July 10, 2014) (warrantless search of small container during protective frisk of person violated article 1, section 7, when no reasonable person could believe the container housed a weapon).

This Court presumes a warrantless search violates both the Fourth Amendment and article 1, section 7. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007).

The trial court's ruling that neither the Fourth Amendment nor article 1, section 7 were violated was premised primarily on two opinions involving unlawful encampments: State v. Pentecost, 64 Wn. App. 656, 825 P.2d 365 (1992) and State v. Cleator, 71 Wn. App. 217, 857 P.2d 306 (1993).

In Pentecost, a citizen complained that a man was camping on his property and that he had seen what appeared to be marijuana plants. Pentecost, 64 Wn. App. at 657. Police found Mr. Pentecost sitting in front of a tent. Id. After being asked to identify himself, Pentecost went inside his tent to get his identification. Id. When he opened the tent, an officer saw a shotgun inside. Id. The officer secured the gun. Id. While conducting a cursory search for other weapons in the camp, the officer

saw items linking Pentecost to a marijuana growing operation that police found about three-quarters of a mile away. Id. at 657-58.

Pentecost argued that the officer's entry into his campsite and their viewing of items violated a reasonable expectation of privacy under the Fourth Amendment. Id. 660. This Court rejected his argument. Id. at 660. Relying in part on a Montana decision that has since been overruled,⁶ this Court reasoned that Pentecost had no reasonable expectation of privacy because he was a trespasser with no power to exclude others from the area. Id. 659-60. The Court noted that it was not applying article 1, section 7. Id. at 658 n.1. The Court further noted that a different question would have been presented if the items had been enclosed in a container. Id. at 656, n.3 (citing State v. Mooney, 218 Conn. 85, 97, 588 A.2d 145 (1991)).

In Cleator, police responded to a report of burglary. Cleator, 71 Wn. App. at 218. An officer found a camp with a tent about 150 yards in the woods behind the burglarized house. Id. 218. The officer believed this was City property. Id. When the officer called out, no one responded. Id. The officer lifted open the flap of the tent to see if a person was hiding inside and to check for weapons. Id. Inside, the officer saw in plain view

⁶ State v. Dess, 201 Mont. 456, 655 P.2d 149 (1982) (overruled by State v. Bullock, 272 Mont. 361, 901 P.2d 61 (1995)).

items matching the burglarized items. Id. Police returned the next day and arrested Cleator, who was occupying the tent with others. Id. at 219.

Cleator argued that the police unlawfully searched the tent. Id. at 307. This Court held that Cleator had a limited reasonable expectation of privacy in the tent under the Fourth Amendment, but that this expectation was not violated because police only raised the tent flap, did not disturb Cleator's personal effects, and only saw what was plainly visible. Id. at 22. The Court also held that under article 1, section 7, the officer's "look into the tent and limited entry to retrieve stolen property did not unreasonably intrude into Cleator's private affairs because Cleator's personal effects were not disturbed." Id. at 223. Judge Baker dissented. Id.

Pentecost and Cleator do not address the situation of closed containers within a campsite that served as a de facto home. As this Court recognized, this is a different issue. Pentecost, 64 Wn. App. at 656 n. 3. Under both article 1, section 7 and the Fourth Amendment, a person may have a valid privacy interest in the contents of containers even if the person does not have a recognized privacy interest in the place where the container is located.

The case that best illustrates this point and is most analogous to this case is State v. Mooney, 218 Conn. 85, 588 A.2d 145 (1991). There,

Supreme Court of Connecticut addressed whether the defendant had a reasonable expectation of privacy in closed containers found in the area under a highway bridge abutment where he lived. Mooney, 218 Conn. at 85. The court held that that search of the defendant's duffel bag and cardboard box violated a reasonable expectation of privacy under the Fourth Amendment. Id. at 112. In reaching this conclusion, the court reasoned that (1) closed containers were places where people normally place personal effect; (2) the containers were located in a place that police knew that the defendant regarded as his home; (3) the defendant was unable to assert rights in the containers because he was being held by police; and (4) the purpose of the search was to gather evidence in a criminal investigation. Id. at 111-12.

Similar to Mooney, Wyatt had closed containers, a cooler and a bag, within his camp where he had been living. The clearing for the campsite was not large; it was small and compact, around 15 feet from one side to the other. RP 117, 150. Wyatt was unable to assert his interest in the items when police searched his campsite because the police conducted their search when they knew Wyatt was momentarily away. As the officers readily admitted, the purpose of the search was to look for evidence of crime. RP 54, 95. Under Mooney, Wyatt had a reasonable expectation of privacy in the containers.

Irrespective of whether the reasonable expectations test is satisfied, this was a “classic trespassory search.” Jones, 132 S. Ct. at 953. Wyatt had a possessory interest in the bag and cooler, which were covered by a tarp. The police trespassed upon these “effects” by removing the tarp and then opening the containers. See id. at 949. Because the purpose in removing the tarp and opening the containers was to obtain information, this was a “search.” Id. at 951 n. 5.

The contents of the containers were also a part of Wyatt’s “private affairs.” While Wyatt may not have had permission from the City to camp in the woods, it does not follow that his privacy interest in his possessions vanished by camping there. See Mooney, 218 Conn. at 109-113. Wyatt would not have had the right to exclude the public from the area, but he retained the right to exclude others from his items. See Katz, 389 U.S. at 351 (what a person “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”). That Wyatt was not always in personal possession of the containers does not make their contents public. United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989) (“the law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment.”). Even if a member of the public might have opened the containers, this does not automatically entitle the government to do the

same. See Boland, 115 Wn.2d at 578 (curbside garbage was a private affair). Accordingly, this Court should hold that the State unreasonably intruded into Wyatt's private affairs by opening up the bag and cooler that were under a tarp within his campsite.

One might argue that if police can lawfully open a person's tent to look inside, as was done in Cleator, the police should also be able to open nearby containers at an unlawful campsite. The intrusion into the tent in Cleator, however, was premised on officer safety. The officer was investigating a recent burglary that had occurred nearby and was concerned someone might be hiding in the tent with a weapon. Cleator, 71 Wn. App. at 218. Moreover, the court emphasized that the tent was not Cleator's. Id. at 222. As for Pentecost, the officer only entered the defendant's tent when he saw a firearm inside after the defendant voluntarily went into his tent to retrieve his identification. Pentecost, 64 Wn. App. at 657. Here, there was no comparable safety concern that justified the removal of the tarp and the opening the containers. The trial court recognized as much in suppressing the evidence obtained from inside the tent. CP 76 ("No exigency or dangerousness required the immediate retrieval of the items [inside the tent]."). This Court should hold that the article 1, section 7, and the Fourth Amendment protected the closed containers within Wyatt's camp.

c. Wyatt did not abandon the containers within his camp.

The State argued below that Wyatt abandoned the property. The trial court did not address this issue, instead deciding that Wyatt had no right of privacy in items outside his tent. Because Wyatt did not dispose of the containers, did not deny ownership of them before his arrest, and the containers were within the immediate area where he was living, the State cannot meet its burden to prove abandonment.

Exceptions to the warrant requirement are “jealously and carefully drawn.” State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (internal quotation and citation omitted). The State has the burden to prove that an exception applies. Id. One of the exceptions to the warrant requirement is voluntary abandonment. Id.

“Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent.” Id. at 408. Whether there is abandonment does not turn on property rights. Id. The issue is whether in leaving the property, the defendant relinquished his or her expectation of privacy. Id. In making this assessment, courts typically consider whether there was physical relinquishment of the property or explicit denials of ownership. Id. at 411-412 (recounting other State and federal decisions on abandonment).

The evidence did not show that Wyatt physically relinquished the property. The two containers were kept in close vicinity to Wyatt's tent. Keeping a cooler or a bag near a tent is not unusual. Thus, that Wyatt kept the containers outside his tent is not evidence that Wyatt intended to relinquish his expectation of privacy in the contents of the containers.

There was also no evidence that the containers were moved in between the officers' initial contact with Wyatt and their later opening of the containers. For example, if Wyatt had moved the containers away from the campsite after his first interaction with the police, this would have tended to show abandonment. See State v. Reynolds, 144 Wn.2d 282, 284-85, 27 P.3d 200 (2001) (coat that had been inside stopped car deemed abandoned when officer returned to the same car and found that the passenger in the car had discarded the coat onto the pavement under the car). Because Wyatt did not throw the bag or the cooler away, there was no physical relinquishment. See State v. Dugas, 109 Wn. App. 592, 596, 36 P.3d 577 (2001) (defendant's placement of his jacket on his vehicle was not akin to throwing his jacket away).

Wyatt did, momentarily, leave the camp. This does not show relinquishment. Campers often leave their campsite with the intent of returning. Here, the tent remained behind. Police did not testify that when they saw Wyatt walking north away from the camp, that he had a bundle

of possessions with him. In fact, Wyatt returned to the camp and slept there overnight. Police found him the next morning around 10:45 a.m. CP 72 (FF 24, 26). Wyatt remarked that he was surprised that he had slept in so late. CP 72 (FF 26). Because Wyatt was only briefly away from his camp and he returned to it, he did not relinquish his privacy interest in the containers. See State v. Moore, 29 Wn. App. 354, 359 n.1, 628 P.2d 522 (1981) (rejecting State's argument that luggage on bus was abandoned after defendant missed his bus; insufficient time elapsed).

Wyatt did not disclaim the containers. See CP 70 (FF 8). Only Johnson, the co-defendant, disclaimed ownership of various unspecified items in the campsite when the officers first arrived. See CP 70 (FF 8) ("Johnson stated that the tent was theirs but the remaining items had been there."). But she did not speak for Wyatt. She could not disclaim Wyatt's individual expectation of privacy. See State v. Morse, 156 Wn.2d 1, 15, 123 P.3d 832 (2005) (under article 1, section 7, "[w]hen a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained and the consent of another of equal or lesser authority is ineffective against the nonconsenting cohabitant."). Even if Johnson's statement could be imputed to Wyatt, denial of ownership, by itself, is insufficient to constitute abandonment. Evans, 159 Wn.2d at 412.

As argued earlier, this case is similar to Mooney. The Mooney court also rejected the State's argument that the abandonment doctrine applied. Mooney, 218 Conn. at 106-110.. As that court properly determined, that the containers were found on public property did not show that the defendant intended to relinquish his expectation of privacy. Id. 109. Instead, he tried to shield the contents from the sight of others. Id. Just as that court concluded that the defendant had not abandoned his expectation of privacy in his cardboard box and bag, found under the bridge where he had been living, this Court should also conclude that Wyatt did not abandon his privacy interest in the cooler and bag, found within the camp that was his de facto home.

This Court should conclude that the State cannot meet its burden to show that Wyatt abandoned the bag or the cooler.

c. The unlawful search requires suppression of the evidence and reversal.

If evidence was seized without authority of law, the evidence is not admissible in court. Day, 161 Wn.2d at 894. Further, under the fruit of the poisonous tree doctrine, all evidence that is the product of an illegal search must be suppressed. State v. White, 97 Wn.2d 92, 101, 640 P.2d 1061 (1982). Article 1, section 7 mandates suppression. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Accordingly, the evidence seized from the bag and the cooler should be suppressed. Additionally, Wyatt's inculpatory statements, obtained shortly after his arrest, should also be suppressed because they were a fruit of the illegal search. State v. Wallin, 125 Wn. App. 648, 655, 663, 105 P.3d 1037 (2005) (suppressing statements because they were a fruit of an illegal search). The police used the evidence obtained from the unlawful search in their questioning of Wyatt. CP 72-73 (FF 28-30). While Wyatt agreed to talk, his waiver does not cure the taint from the illegal search. Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

Because the error in admitting the evidence was prejudicial, this Court should reverse the conviction.

2. Because police extracted the statements through lies and a false promise, Wyatt's statements that he made methamphetamine were coerced and violated due process.

a. Involuntary or coerced confessions violate due process and are inadmissible.

Constitutional guarantees of due process and the prohibition against compulsory self-incrimination forbid the admission of involuntary or coerced confessions. Payne v. Arkansas, 356 U.S. 560, 561, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958); State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

Whether a confession is voluntary is viewed under a totality of circumstances standard. Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The question is whether interrogators overcame the defendant's will and obtained a coerced confession. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). Relevant circumstances include whether there was police coercion. Unga, 165 Wn.2d at 101. Coercion can be mental as well as physical. Fulminante, 499 U.S. at 287. Deception, false promises, and threats may constitute coercion sufficient to make a confession involuntary. State v. Braun, 82 Wn.2d 157, 161-62, 509 P.2d 742 (1973); People v. Andersen, 101 Cal.App.3d 563, 575, 161 Cal.Rptr. 707 (1980).

“[T]he ultimate issue of ‘voluntariness’ is a legal question.” Fulminante, 499 U.S. at 287. A trial court's conclusion of law is reviewed de novo. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). Findings of fact are reviewed for substantial evidence. Broadaway, 133 Wn.2d at 131. “Substantial evidence exists where there is a sufficient quantity of evidence in the record 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).

b. Impliedly threatening Wyatt and falsely promising leniency if he confessed, the police extracted a confession from Wyatt.

After the search of Wyatt's camp, Officer Kelso, accompanied by Sergeant Mike O'Reilly, returned to Wyatt's camp the next morning, around 10:45 a.m. CP 65 (FF 14). They found Wyatt and Johnson inside their tent, asleep. CP 65 (FF 14); RP 101. They woke them up and told them to come out. CP 65 (FF 15); RP 109, 178. Wyatt and Johnson complied and were immediately arrested. CP 65 (FF 14, 15). Both were placed in handcuffs. CP 65 (FF 15). They marched Wyatt and Johnson about 150 yards from the camp back to the street. RP 101-02, 191. They separated Wyatt and Johnson. RP 103-04. Wyatt and Johnson agreed to speak to the police. CP 65 (FF 16). The interrogations were not recorded. RP 204-05.

Kelso interrogated Wyatt first. CP 65 (FF 17). Wyatt denied that the items believed to be part of a methamphetamine lab were his. RP 105. He answered that his fingerprints would probably be on the items because he had been cleaning up the area. RP 105-06. During the interrogation, Wyatt may have told Kelso that he needed urinate. RP 107, 202.

Because Officer Kelso did not obtain a confession, Sergeant Mike O'Reilly then interrogated Wyatt. CP 66 (FF 18, 19); RP 181. Wyatt denied knowing there was a methamphetamine lab. RP 181. O'Reilly

then used a “ruse,” or as he later admitted, a calculated lie. CP 66 (FF 19); RP 181, 766. O’Reilly told Wyatt that he had heard that Wyatt was cooking methamphetamine and selling it to children. CP 66 (FF 19); RP 181. O’Reilly said that he would have a “real problem” with that, but that if it was only for Wyatt’s personal use, he would “understand.” CP 66 (FF 19); RP 181, 741. Wyatt then stated he had cooked methamphetamine at the campsite for his personal use; that it was a mess; that he was not good at cooking meth; and that Johnson was angry with him for it. CP 66 (FF 19). O’Reilly admitted that while he did not raise his voice, he may have been a little heated or excited when conducting the “ruse.” RP 211; CP 66 (FF 20).

At the CrR 3.5 hearing, Wyatt argued that given the circumstances and the “ruse,” his statements were involuntary. RP 362-364. The State argued that the statements were voluntary because Wyatt was Mirandized and there was “no affirmative act of fraud or deceit.” RP 329. The court concluded the statements were voluntary. CP 67; RP 399. The court admitted all of Wyatt’s statements, including the inculpatory statements following O’Reilly’s “ruse.” CP 67.

c. Wyatt's "confession" was coerced because it was obtained through lies and a threatening false promise.

Under the totality of the circumstances, the actions of the police overbore Wyatt's will, making his "confession" involuntary.

At what was in effect his home, Wyatt was awoken in the morning by police, ordered out of his tent, and immediately arrested. He was marched about 150 yards to the street where he was subjected to custodial interrogation. While acknowledging he knew of the items, Wyatt repeatedly denied that he had been making methamphetamine. To extract the confession that officer Kelso had been unable to obtain, Sergeant O'Reilly used a "ruse." He told Wyatt that he had heard Wyatt was providing methamphetamine to children and he would have a "real problem" with that. O'Reilly, however, told Wyatt he would not have a problem if Wyatt would just say he had been making methamphetamine for his own use.

While police deception does not necessarily make a confession involuntary, O'Reilly's deception crossed the constitutional line because his lie was combined with an implied promise of leniency if Wyatt confessed and an implied threat if he did not.

Substantial evidence does not support the trial court's finding that Wyatt was not threatened. CP 66 (FF 22). By telling Wyatt that he would

have a “real problem” if Wyatt was making methamphetamine and selling it to children, O’Reilly impliedly threatened Wyatt with further detention and criminal prosecution of a very serious crime. Distribution of methamphetamine to minors is punishable by a term of imprisonment up to twice what is ordinarily authorized. RCW 69.50.406. Wyatt, like most people, would intuitively understand that providing methamphetamine to children is more serious than simply possessing it. This sort of threat strongly supports a conclusion that the confession was coerced. See Fulminante, 499 U.S. at 288 (confession coerced where government agent, a jail informant, offered to protect defendant from threatened violence by inmates in exchange for confession); State v. Miller, 61 Wash. 125, 127, 111 P. 1053 (1910) (confession obtained by duress where prosecuting attorney impliedly threatened the defendant with multiple charges of burglary and told him that sentences for each would be served consecutively).

Substantial evidence also does not support the trial court’s finding that no promises were made to Wyatt. CP 66 (FF 23). O’Reilly followed up his threat with an implied promise of leniency by telling Wyatt that he would “understand” if Wyatt was simply making methamphetamine for his own use. The implication was plain that if Wyatt confessed, the police would let him go. This sort quid pro quo strongly indicates that Wyatt’s

inculpatory statements were coerced. See State v. Pollard, 132 Or. App. 538, 549, 888 P.2d 1054 (1995) (implied promise of treatment instead of prosecution made confession involuntary).

O'Reilly's coercive deception, which incorporated a threat and promise of leniency overbore Wyatt's will. The trial court's findings that no threats or promises were made to Wyatt in exchange for his confession is not supported by substantial evidence. The court erred. This Court should hold the statements were coerced.

d. The error was not harmless.

The admission of a coerced confession is subject to harmless error. Fulminante, 499 U.S. at 296. Prejudice is presumed and the State bears the burden of persuading the appellate court that the error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

"A confession is like no other evidence." Fulminante, 499 U.S. at 296. Here, Wyatt's confession was the evidence relied on by the State to link him to the incriminating items. There was no forensic evidence linking him to the items. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt. This Court should reverse.

e. Correction to the trial court's findings of fact and conclusions of law.

About three months after the trial was completed, the Court entered findings of fact and conclusions of law on the CrR 3.5 and CrR 3.6 hearings. Some of the findings related to Wyatt's interrogation are not supported by substantial evidence.

Both set of findings state that "Kelso asked the defendant how long he had been addicted to meth and the defendant indicated he did not know, but it was a long time." CP 65 (FF 17); CP 72 (FF 28). Both findings also state that Kelso "explained to the defendant that it was obvious that lab was his" CP 65-66 (FF 17); CP 72 (FF 28). Kelso, however, did not so testify during the pretrial hearing. RP 85-174. The findings also erroneously recount that Wyatt denied knowledge of the items associated with the lab to Kelso. CP 65 (FF 17); CP 72 (FF 28). While there was testimony from O'Reilly (who spoke to Wyatt after Kelso) that Wyatt denied knowledge of the items, there was no such testimony at the hearing from Kelso.

3. The State failed to prove beyond a reasonable doubt that the offense occurred in a "public park."

Shortly before trial, the State amended the information to add an allegation that Wyatt committed the offense in a "public park." CP 25; RCW 69.50.435(1)(e). By a special verdict form, the jury found that

Wyatt had manufactured methamphetamine in a public park. CP 49. This finding increased Wyatt's sentence by 24 months. RCW 9.94A.533(6); CP 51; RP 1110, 1141. Because there was insufficient evidence that the offense was committed within a public park, this Court should reverse the sentence.

The State must prove beyond a reasonable doubt every essential element of the allegation which triggers an enhanced penalty. State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). The evidence must be sufficient for a rational trier of fact to find, beyond a reasonable doubt, the facts necessary to support the enhancement. Id.; Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Consistent with the statutory definition, the jury was instructed that “‘Public park’ means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government.” RCW 69.50.435(6)(d); CP 47.

According to the testimony from Kent police officers, “Riverview Park” consists of a large open field and a wooded area that extends to the Green River. RP 630; 733-34. They testified that Wyatt's camp, which was in a wooded area along the Green River, was within “Riverview Park.” RP 581-82, 631-32, 653; Ex. 53.

There was no testimony that “Riverview Park” was a “public” park, i.e., a park that is “operated by state or local government.” There was only testimony that “Riverview Park” is within the City of Kent. See RP 580, 632, 731-32. But not all property within the City of Kent is public property. And that something is called a “park” does not establish that it is operated by the government. Some “parks” are privately owned and operated. For example, Zuccotti Park in New York City, which was synonymous with Occupy Wall Street, is a “privately owned public space.” Lisa W. Foderaro, Privately Owned Park, Open to the Public, May Make Its Own Rules, (2011) http://www.nytimes.com/2011/10/14/nyregion/zuccotti-park-is-privately-owned-but-open-to-the-public.html?_r=0 (last accessed July 15, 2014). Thus, the evidence was insufficient for the jury to find that “Riverview Park” was operated by state or local government.

The evidence was also insufficient to establish that Wyatt’s camp was within “Riverview Park.” While the officers asserted that Wyatt’s camp was within the “park,” and drew boundary lines on a map, the basis for their knowledge was not substantiated. None of the officers testified about having special knowledge about park boundaries or where they had learned about the precise boundaries of Riverview Park. They were never qualified as experts on the subject. See ER 702. While a plat map

delineating the boundaries was not required, more was necessary than the officers' bare assertions for a jury to rationally find that the camp where the offense occurred was in the park. For example, had the jury heard testimony from a city planner or other person with expert knowledge about park boundaries, then this would have likely been sufficient. See State v. Henderson, 64 Wn. App. 339, 342, 824 P.2d 492 (1992) (testimony from a city planner was sufficient to establish that a drug sale that had occurred in a parking lot was within a public a park). Here, the officers were not comparable to a city planner, a person who would have the requisite expert knowledge about park boundaries.

Without evidence that the area in the woods was a park operated by the government, the jury could not rationally conclude beyond a reasonable doubt that the offense had been committed in a "public park." The jury's finding to the contrary should be reversed.

F. CONCLUSION

Homelessness does not deprive people of their right to privacy in their effects. By removing the tarp at Wyatt's camp and opening his stored, closed containers, the police unreasonably intruded upon Wyatt's private affairs. This Court should hold that the government violated article 1, section 7 and the Fourth Amendment, and reverse. This Court should also reverse because Wyatt's inculpatory statements were coerced

in violation of due process. If the case is not reversed, this Court should vacate the sentencing enhancement for lack of sufficient evidence and remand for resentencing.

DATED this 18th day of July, 2014.

Respectfully submitted,



Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorneys for Appellant

Appendix A

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FILED
KING COUNTY, WASHINGTON

DEC 18 2013

SUPERIOR COURT CLERK
BY WENDY VICKERY
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DENNIS M. WYATT,

Defendant,

No. 12-C-05287-1 KNT

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on August 26 and August 27, 2013, before the Honorable Judge Jay White. After considering the evidence submitted by the parties and hearing argument, to wit: the testimony of City of Kent Police Department Officer Kenneth Clay, Sergeant Andrew Kelso, Sergeant Mike O'Reilly, Shawn Bergrud, Richard Walker, and Joann McEwen-Johnston, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

FINDINGS OF FACTS:

1. On October 30, 2011, Kent Police Department Officer Kenneth Clay and Sergeant Andrew Kelso were working routine bicycle patrol in the City of Kent. The officers were wearing their City of Kent Police Department uniforms.
2. During their patrol, the officers made contact with a street source that the officers have had contact with in the past. The source indicated that they overheard a male named "Dennis" brag about being the person who took wire that shut down a railroad traffic signal, causing morning commute traffic to come to a stop for a period of time. The officers recalled this incident, which had happened two weeks prior. The source

* At the time of the hearing the officers could not remember the name of the street source and could not identify prior instances in which the source had provided accurate information.

WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF
LAW - 1

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

ORIGINAL

1 indicated that Dennis lived in a tent camp along the Green River, past LA Fitness.
2 Sergeant Kelso drew a rudimentary map and confirmed the location of the camp located
3 in River View Park; this park is located at 25500 Hawley Road, very near where Sergeant
4 Kelso had contacted Wyatt before. River View Park is owned by the City of Kent. The
5 source also indicated that Dennis digs small holes and cooks meth in the holes.

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3. The source indicated that Dennis was a local homeless subject and gave a description of the subject. Sergeant Kelso is familiar with many of the homeless population in the Kent valley. Sergeant Kelso recalled a male that he had contact with six weeks prior near a dead end of Hawley Road who was with another known male Michael Waller; the male the sergeant recalled matched the description provided by the source and had the name Dennis. Sergeant Kelso located the prior contact report and confirmed the male was Dennis M. Wyatt, the defendant, and confirmed via picture that he was the subject he was thinking of.

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4. *The following day, JW*
On October 31, 2011, Officer Clay and Sergeant Kelso went to the area to find the camp. The officers waited until the next day because the officers hoped the camp would be unoccupied and wanted to go during daylight hours. Using the rudimentary map, the officers located in Riverview Park a well-worn pathway that appeared to be currently used. On the pathway, the officer located a lot of wire sheathing with wire stripped from it. Officer Clay also noticed a large hole dug in the ground. *The hole did not appear recent. JW*

- 15
5. At the end of the pathway, the officers located a camp occupied by the defendant, Jennifer Johnson, and another male.

- 16
6. The camp was in Riverview Park, within the City of Kent.

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7. The male indicated he was visiting the camp; he was later discovered to have outstanding warrants and was arrested on those warrants.

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8. Sergeant Kelso notified and warned the defendant and Johnson that it was illegal to camp in the park. The defendant and Johnson stated they knew and had only been camping there for two days. Johnson stated that the tent was theirs but the remaining items had been there.

- 22
23
9. Sergeant Kelso had sufficient probable cause to arrest the defendant and Johnson for illegal camping at that point, but did not do so.

- 24
10. The officers observed a tent and near the tent several items covered in tarps and laying around. Sergeant Kelso noticed a shovel leaning against bushes nearby, reminding Sergeant Kelso of what the source had indicated about the defendant cooking meth in holes in the ground.

- 25
11. *Taylor, the third person, JW*
The officers took ~~the~~ male into custody for the outstanding warrant and walked him out of the park near their bikes, while they awaited a patrol officer to transport the male to the jail.

1
2 12. Approximately forty five minutes later, the officers were then in the area of L.A. Fitness
3 on Hawley Road when they saw the defendant and Johnson walking northbound.

4 13. The officers returned to the camp. At the camp, the officers took samples of the wire
5 sheathing located away from the tent and samples of unstripped wire located near the
6 tent.

7 14. Under the tarp, Sergeant Kelso located two five gallon propane cylinders and a black
8 zipped up bag ^{the bag was inside} a five gallon bucket. Inside the bucket, ^{zipper bag} Sergeant Kelso located a Coke
9 bottle with a hole drilled in the top with a hose sticking out of the hole. In the bottle was
10 a dark amber colored liquid.

11 15. Sergeant Kelso noticed in a blue soft-sided container the following: tubing, plastic
12 bottles, duct tape, and a small pressurized gas container (potentially butane).

13 16. Both officers have training and experience in recognizing meth labs. Officer Clay used
14 to work as an Enumclaw Fire Department Lieutenant, where he obtained specialized
15 training as a hazardous materials operations level technician; this training included
16 recognizing meth labs. He additionally received training with the police in recognizing
17 meth labs. Sergeant Kelso additionally has had training through the police department on
18 different meth labs and the methods of producing meth. He additionally has observed
19 several meth labs in the field.

20 17. Based on both Sergeant Kelso's and Officer Clay's training and experience, the items
21 seen in the black bag and blue soft-sided container comported with these items being
22 associated with a meth lab.

23 18. Neither Officer Clay nor Sergeant Kelso has any training in handling or disposing of
24 meth lab materials, ~~of~~ which can contain hazardous substances and volatile chemical
25 reactions.

26 19. The officers ^{believed} ~~also noticed~~ that the tent appeared to have been there for longer than two
27 days as it was fall, leaves had been falling for quite some time, and no leaves were under
28 the tent.

29 20. The officers left the scene and Sergeant Kelso contacted the Department of Ecology's on-
30 call spill responder about the lab and the location. It was determined that the lab could be
31 processed in the morning, during the daylight hours, when it would be safer for the
32 officers and spill responder to process the scene. There was no lighting in that area
33 where the camp was located.

34 21. Considerations as to safety concerns of cleaning up a meth lab site during night time
include, but are not limited to, whether there are loose or mixed chemicals, whether there
could be a release of gas, whether the site is close to a public place, whether there is a

1 threat of injury to people, whether the police are capable of handling the lab that night, and
2 whether it would be dangerous or unsafe based on conditions of brush and trees such that
3 the ecologist could not see where he is walking.

4 22. It is safer to process a meth lab during daylight hours *than during dark hours at night.*
5 *OK*

6 23. Typically when illegal camps are located on City of Kent property, the illegal campers
7 are given oral notice, if present when the camp is located, or officers post notice to
8 vacate, if the campers are not present when the camp is located. After notice has been
9 provided, City of Kent Facilities or people serving Work Crew sentences with the local
10 jail are in charge of picking up tents and other items in the area to be disposed of.

11 24. On November 1, 2011, at approximately 10:45 a.m., Sergeants Kelso and O'Reilly
12 returned to Riverview Park with Richard Walker, a Department of Ecology spill
13 responder, to process the meth lab.

14 25. Sergeant Kelso came in on November 1st, his day off, to process the scene. The visit to
15 the Riverview Park to process the meth lab was the first thing Sergeant O'Reilly did on
16 his shift.

17 26. Sergeant Kelso and O'Reilly went to the camp and called out to see if anyone was in the
18 tent. Sergeant O'Reilly heard rustling and moments later the defendant and Johnson
19 exited. Both the defendant and Johnson appeared as if they had just been sleeping and
20 expressed surprise that they slept in so late.

21 27. Both subjects were arrested for Unlawful Camping and investigation of manufacturing
22 meth. Sergeant Kelso read the defendant and Johnson their Miranda Rights and both
23 stated they understood their rights. Both waived their rights and spoke with the officers.
24 *The officers led them away from the tent, across an open field, and toward
the officers' patrol vehicles.*

25 28. Sergeant Kelso spoke with the defendant. The sergeant told the defendant that he
26 observed a meth lab in the camp. The defendant indicated that he had only been in the
27 camp for two days and he was just there to clean up the place. The sergeant told the
28 defendant that he knew that the defendant had been there for longer than two days. The
29 defendant continued on about only being there for two days, but then admitted he had
30 been there for several weeks. The defendant would not give an estimated time, but when
31 the sergeant indicated it was at least three weeks the defendant did not deny that. The
32 defendant denied knowledge of the meth lab in the camp. After a little while, the
33 defendant admitted that he knew it was a meth lab and admitted that his fingerprints
34 would be located on the lab items. The defendant stated that his prints would only be on
the items because he was cleaning the area up. When the sergeant asked the defendant
why all of the lab items were packaged neatly up together, not in a fashion of someone
preparing to dispose of them, the defendant appeared frustrated and reiterated he was
only cleaning up. Sergeant Kelso asked the defendant how long he had been addicted to
meth and the defendant indicated he did not know, but it was several years. The sergeant
explained to the defendant that it was obvious that lab was his and wanted to know if
anything ^{was} unstable and dangerous. The defendant stated that nothing was dangerous. *OK*

- 1
- 2 29. Sergeant O'Reilly spoke with Johnson. Johnson denied any involvement with the meth
- 3 lab. Sergeant O'Reilly asked Johnson how long she has been in a relationship with Wyatt
- 4 and Johnson indicated a year and a half. Sergeant O'Reilly advised Johnson that a full
- 5 forensic analysis would be done of the meth lab items and how Johnson would be able to
- 6 explain her fingerprints and DNA on the suspected meth lab items. Johnson admitted to
- rummaging through all of the property when they first got to the camp. When asked how
- long they had been at the camp for, Johnson stated two weeks. Johnson then became
- angry about getting charged with the lab when she had nothing to do with it.
- 7
- 8 30. Sergeant O'Reilly then went over to Sergeant Kelso and spoke with the defendant.
- 9 Sergeant O'Reilly asked the defendant how long they had been at the campsite and the
- 10 defendant indicated three weeks. Using a ruse, Sergeant O'Reilly told the defendant he
- 11 heard that the defendant was cooking meth and selling it to kids. Sergeant O'Reilly
- 12 indicated that if the defendant was selling to kids, as opposed to using for personal use,
- 13 Sergeant O'Reilly would have a real problem with his actions. The defendant then
- 14 admitted to cooking meth at the campsite for his personal use. The defendant stated that
- 15 it was a mess and he didn't think he did a good job of cooking meth at all. Sergeant
- 16 O'Reilly asked the defendant what Johnson thought about him cooking meth and the
- 17 defendant said Johnson was pretty angry with him.
- 18
- 19 31. Officer Korus arrived and transported the defendant and Johnson to the station where the
- 20 defendants were identified and released.
- 21
- 22 32. Richard Walker assisted in processing the meth lab.
- 23
- 24 33. The officers and Richard Walker returned to the camp. At the camp was the tent and
- items around or near the tent, *some of which were under a tarp. JW*
34. A blue soft-sided container was located six to eight feet from the tent entrance. The
- officers could not recall if this container was covered by the tarp.
35. The officers opened the blue soft-sided container located outside of the defendant's tent.
- Items inside the container include the following: plastic tubing, bottles with tubing
- coming out of the cap (known as acid generators), miscellaneous containers and bottles, a
- pill bottle with partially crushed tablets (appeared to be pseudoephedrine), drain cleaner
- (lye), ammonium sulfate, what appeared to be a partially processed product some of
- which was bound tightly in coffee filters, starting fluid, flammable liquid (suspected
- white gas or kerosene), acid in a Dr. Pepper bottle, a lithium battery, and a gallon jug of
- Muriatic (hydrochloric) acid.
36. A black tarp was loosely covering some items in the encampment. Under the tarp was
- the black bag. The bag was located in a bucket.

1 37. Inside the black bag, the officers located an acid generator, muriatic acid, and another
2 bottle containing liquids. The acid generator and muriatic acid were suspected as being
3 associated with a meth lab. *(a soda bottle with tubing coming out the top)* GW

4 38. While those items were being processed, Sergeant O'Reilly went into the tent which
5 contained several bags with items related to a meth lab.

6 39. Sergeant O'Reilly went into the tent to render the tent safe.

7 40. The tent door was open when Sergeant O'Reilly went into the tent.

8 *Searching the tent and bags as back packs inside the tent, including a blue and black back pack, a yellow and black back pack, and a camouflage bag,*
9 41. Sergeant O'Reilly located items associated with a meth lab, including: containers of drain
10 cleaner (lye), pneumatic bank tube which contained lithium batteries, lithium batteries,
11 IV bag and tubing, pseudoephedrine tablets in a blister pack, acid generators, acetone
12 bottle, and a glass jar containing a granular material (suspected partially processed
13 product) bound in a coffee filter. The sergeant also located an air soft pistol and
14 cartridges, pellets, a wrist rocket, a baggie containing suspected marijuana and three glass
15 smoking-pipes with suspected meth residue.

16 42. Sergeant O'Reilly only took into custody any items in the tent, which were either
17 associated with the meth lab, were illegal contraband, or were weapons

18 43. It would be dangerous to leave meth lab materials in a public park, as a meth lab contains
19 chemicals and hazardous materials.

20 44. The tent and the personal effects in the tent were left for clean-up by the parks
21 department or for a work crew to clean up.

22 45. Joann McEwen-Johnston is homeless and is aware of people being arrested for illegal
23 camping.

24 46. McEwen-Johnston keeps any special items on her back when she leave her campsites
in a "gate wall" space between her tent and the tarp covering it. GW

47. McEwen-Johnston is aware that anyone, either an officer or another camper, could go
into ~~her~~ *her* campsite at any point. GW

48. Walker removed all of the hazardous substances and chemicals from the scene.

49. All of the witnesses' respective testimony was credible.

CONCLUSIONS OF LAW

I.

- 1 a. The defendant was properly arrested as the officers had probable cause to arrest
2 the defendant for both Illegal Camping and Manufacturing Methamphetamine. A
3 law enforcement officer has probable cause to arrest when the totality of the facts
4 and circumstances at the time of the arrest would warrant a reasonably cautious
5 person to believe an offense is being committed. State v. Griffith, 61 Wn. App.
6 35, 39, 808 P.2d 1171 (1991) (citing Watkins v. Dept. of Licensing, 33 Wn. App.
7 853, 856, 658 P.2d 53 (1983)). It is unlawful for "any person to camp in any park
8 or other public place" within the City of Kent. Kent City Code (KCC) 8.09.010.
9 A violation of this offense is a misdemeanor. KCC 8.09.060. It is also unlawful
10 for "any person to manufacture....a controlled substance." RCW 69.50.401(1).
11 Methamphetamine is a controlled substance. RCW 69.50.206(d)(2).
12 Manufacturing is defined as the "production, preparation, propagation,
13 compounding, conversion, or processing of a controlled substance..." RCW
14 69.50.101(p). Furthermore, the arrest of the defendant was not pretextual.
15
16 b. The search of the area outside of the defendant's tent was permissible, as the
17 defendant has no expectation of privacy in those items. The privacy test for an
18 illegal search and seizure involves a two-pronged inquiry into 1) whether an
19 individual by his conduct has exhibited a subjective expectation of privacy in a
20 particular place or object and 2) whether that expectation of privacy is one that
21 society recognizes. State v. Pentecost, 64 Wn. App. 656, 358, 825 P.2d 365
22 (1992), citing Katz v. U.S., 389 U.S. 647 (1967). The defendant seeking
23 suppression of seized evidence has the burden of establishing the requisite privacy
24 interest. See e.g., Alderman v. United States, 394 U.S. 165, 173, 89 S. Ct. 961

1 (1969). Under State v. Pentecost, 64 Wn. App. 656, and State v. Cleator, 71 Wn.
2 App. 217, 222, 857 P.2d 306 (1993), the courts have held that there is no
3 reasonable expectation of privacy in the area surrounding an illegal camp.
4 Therefore the search of items outside of the tent was proper and those items are
5 admissible at trial.
6

7 c. The search of the items inside the tent was not proper and therefore those items
8 are inadmissible. The defendant had a reasonable expectation of privacy of the
9 items inside the tent as the items were inside bags inside the tent. No exigency or
10 dangerousness required the immediate retrieval of the items. ~~Although meth lab~~

11 materials are dangerous, ~~the officers could have obtained a search warrant~~
12 ~~did not do so.~~ ^{had ample time to obtain} ~~The search of the tent was not incident to defendant's~~
13 ~~arrest.~~ ^{arrest.}

14 d. The Court is not relying on the Kent City Code, specifically Kent City Code ^{AW}
15 8.09.020, which makes it illegal to store camp facilities and camp paraphernalia in
16 a park or other public place, in its decision.

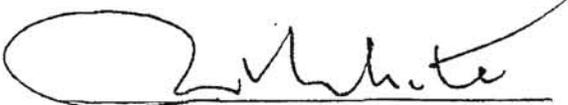
17 II.

18 The officers had probable cause to arrest the defendant for Illegal Camping and Manufacturing
19 Methamphetamine. The arrest was not pretextual. The officers' search of the items outside of
20 the defendant's tent was permissible as the defendant had no expectation of privacy in those
21 items. The officers' search of the items inside the tent was impermissible as the items were
22 located in bags and ^{defendant had} ~~there is~~ a reasonable expectation of privacy in bags ^{in his tent} in an illegal encampment. ^{AW}
23 The defense motion to suppress evidence is denied in part and granted in part.

24 III.

Judgment should be entered in accordance with Conclusion of Law II. In addition to these
written findings and conclusions, the court hereby incorporates its oral findings and conclusions
as reflected in the record.

Signed this 17 day of December, 2013.


JUDGE

JAY V. WHITE

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Presented by:


Kelsey Schirman, WSBA#41684
Deputy Prosecuting Attorney

Catherine Elliot, WSBA#
Attorney for Defendant

WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF
LAW - 9

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

Appendix B

1 After considering the evidence submitted by the parties and hearing argument, to wit: the
2 testimony of City of Kent Police Department Officer Kenneth Clay, Sergeant Andrew Kelso, and
3 Sergeant Mike O'Reilly, the court enters the following findings of fact and conclusions of law as
4 required by CrR 3.5.
5

6 FINDINGS OF FACT:

- 7 1. On October 30, 2011, City of Kent Police Department Officers Kenneth Clay and
8 Sergeant Andrew Kelso went to Riverview Park, located in Kent, Washington. ~~They~~
9 *Wave wearing their City of Kent Police Department uniforms and were working*
10 *routine bicycle patrol in the City of Kent, Washington. **
11 2. The officers went to the Riverview Park based on information they had received from a
12 street source the day prior. The source indicated that they overheard a male named
13 "Dennis" brag about being the person who took wire that shut down a railroad traffic
14 signal, causing morning commute traffic to come to a stop for a period of time. The
15 officers recalled this incident, which had happened two weeks prior. The source
16 indicated that Dennis lived in a tent camp along the Green River, past LA Fitness.
17 Sergeant Kelso drew a rudimentary map and confirmed the location of the camp located
18 in Riverview Park; this park is located at 25500 Hawley Road, very near where Sergeant
19 Kelso had contacted the defendant, Dennis Wyatt, before. The source also indicated that
20 Dennis digs small holes and cooks meth in the holes.
21 *The following day on October 31, 2011,*
22 3. The officers located what they believed to be the encampment, which was occupied by
23 the defendant, Jennifer Johnson, and a male name David Taylor.
24 4. Taylor indicated he was visiting the camp; he was later discovered to have outstanding
warrants and was arrested on those warrants.
5. The defendant and Johnson confirmed that Taylor was just visiting the camp.
6. Sergeant Kelso notified and warned the defendant and Johnson that it was illegal to camp
in the park. The defendant and Johnson stated they knew and had only been camping
there for two days. Johnson stated that the tent was theirs but the remaining items had
been there.
7. At no time during this conversation was the defendant placed in handcuffs or told that he
was under arrest.
8. The officers observed a tent and near the tent several items covered in tarps and laying
around. Sergeant Kelso did notice a shovel leaning against bushes nearby, reminding
Sergeant Kelso of what the source had indicated about Wyatt cooking meth in holes in
the ground.

** During their patrol, the officers made contact with a street source the
officers have had contact with in the past. At the time of the hearing, the
officers could not remember the name of the street source but could not identify
prior instances in which the source had provided accurate
information. JW*

WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF
LAW ON CrR 3.5 MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENT(S) - 2

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

- 1 9. The officers took Taylor into custody for the outstanding warrant and walked him out of
2 the park near their bikes, while they awaited a patrol officer in the vehicle to pick up
3 Taylor and transport him to the jail.
- 4 10. A short while later, the officers returned to the camp when they noticed the defendant and
5 Johnson were walking in the area and no longer at the camp. The officers wanted to
6 return without the defendant and Johnson being present for officer safety reasons.
- 7 11. At the camp, the officers located items which appeared to comport with a
8 methamphetamine lab, based on the officers' training and experience.
- 9 12. The officers also ^{believed} noticed that the tent ^{had} appeared to have been there for longer than two
10 days as it was fall, leaves had been falling for quite some time, and no leaves were under
11 the tent.
- 12 13. That evening, the Department of Ecology on-call spill responder was contacted about the
13 lab and the location. It was determined that the lab could be processed in the morning,
14 during the daylight hours.
- 15 14. On November 1, 2011, at approximately 10:45 a.m., Sergeant Kelso and Sergeant Mike
16 O'Reilly returned to the camp. Sergeant Kelso called out to see if anyone was in the tent.
17 Sergeant O'Reilly heard rustling and moments later the defendant and Johnson exited.
18 Both the defendant and Johnson appeared as if they had been sleeping and expressed
19 surprise that they slept in so late.
- 20 15. Both subjects were immediately arrested for Unlawful Camping and investigation of
21 manufacturing meth. The defendant and Johnson were both placed in handcuffs.
- 22 16. Sergeant Kelso read the defendant and Johnson their Miranda Rights and both stated they
23 understood their rights. Both waived their rights and spoke with the officers.
- 24 17. Sergeant Kelso spoke with the defendant. The sergeant told the defendant that he
observed a meth lab in the camp. The defendant indicated that he had only been in the
camp for two days and he was just there to clean up the place. The sergeant told the
defendant that he knew that the defendant had been there for longer than two days. The
defendant continued on about only being there for two days, but then admitted he had
been there for several weeks. The defendant would not give an estimated time, but when
the sergeant indicated it was at least three weeks the defendant did not deny that. The
defendant denied knowledge of the meth lab in the camp. After a little while, the
defendant admitted that he knew it was a meth lab and admitted that his fingerprints
would be located on the lab items. The defendant stated that his prints would only be on
the items because he was cleaning the area up. When the sergeant asked the defendant
why all of the lab items were packaged neatly up together, not in a fashion of someone
preparing to dispose of them, the defendant appeared frustrated and reiterated he was
only cleaning up. Sergeant Kelso asked the defendant how long he had been addicted to
meth and the defendant indicated he did not know, but it was a long time. The sergeant

1 explained to the defendant that it was obvious that lab was his and wanted to know if
2 anything as unstable and dangerous. The defendant stated that nothing was dangerous.

3 18. Sergeant O'Reilly spoke with Johnson and then went over to speak to the defendant.

4 19. Sergeant O'Reilly asked the defendant how long they had been at the campsite and the
5 defendant indicated three weeks. Using a ruse, Sergeant O'Reilly told the defendant he
6 heard that the defendant was cooking meth and selling it to kids. Sergeant O'Reilly
7 indicated that if the defendant was selling to kids, as opposed to using for personal use,
8 Sergeant O'Reilly would have a real problem with his actions. The defendant then
9 admitted to cooking meth at the campsite for his personal use. The defendant stated that
10 it was a mess and he didn't think he did a good job of cooking meth at all. Sergeant
11 O'Reilly asked the defendant what Johnson thought about him cooking meth and the
12 defendant said Johnson was pretty angry with him.

13 20. During Sergeant O'Reilly's conversation with the defendant, the defendant was not
14 emotional, irate, abrasive. Sergeant O'Reilly's demeanor was monotone, regular tone.
15 At no point did Sergeant O'Reilly raise his voice or yell.

16 21. Officer Korus arrived and transported the defendant and Johnson to the station where the
17 defendants were identified and released.

18 22. No threats were ever made to the defendant in return for his statements.

19 23. No promises were ever made to the defendant in return for his statements.

20 24. The defendant never expressed any confusion as to his Miranda rights.

21 25. The defendant never requested an attorney.

22 26. Officer Clay, Sergeant Kelso, and Sergeant O'Reilly's respective testimony was credible.

23 CONCLUSIONS OF LAW:

24 The following statements of the defendant are admissible in the State's case-in-chief:

- On October 31, 2011, the defendant confirmed that Taylor was just visiting the camp.
- The defendant also stated he knew it was illegal to camp at the park and had only been camping there for two days.
- On November 1, 2011, the defendant expressed surprise that he had slept in so late, when officers arrived on scene.
- After the defendant was read his Miranda Rights, he stated he understood his rights.

- 1 ◦ To Sergeant Kelso, the defendant indicated that he had only been in the
- 2 camp for two days and he was just there to clean up the place.
- 3 ◦ The defendant continued to indicate on about only being there for two
- 4 days, but then admitted he had been there several weeks.
- 5 ◦ The defendant denied knowledge of the meth lab in the camp.
- 6 ◦ Shortly later, the defendant admitted that he knew it was a meth lab and
- 7 admitted that his fingerprints would be located on the lab items.
- 8 ◦ The defendant stated that his prints would only be on the items because he
- 9 was cleaning the area up.
- 10 ◦ When the sergeant asked the defendant why all of the lab items were
- 11 packaged neatly up together, not in a fashion of someone preparing to
- 12 dispose of them, the defendant appeared frustrated and reiterated he was
- 13 only cleaning up.
- 14 ◦ The defendant stated he had been addicted to meth for a long time.
- 15 ◦ The defendant stated that nothing in the meth lab was dangerous.
- 16 ◦ To Sergeant O'Reilly, the defendant indicated they had been there for
- 17 three weeks.
- 18 ◦ When Sergeant O'Reilly told the defendant he heard that the defendant
- 19 was cooking meth and selling it to kids, the defendant admitted to cooking
- 20 meth at the campsite for his personal use.
- 21 ◦ The defendant stated that cooking meth was a mess.
- 22 ◦ The defendant stated he didn't think he did a good job of cooking meth at
- 23 all.
- 24 ◦ The defendant said Johnson was pretty angry with him for cooking meth.

17 The initial statements made to the officers on October 31, 2011, are admissible because
18 Miranda was not applicable as the defendant was ^{Not in custody and} not subject to custodial interrogation. All of
19 those statements were made during either a social contact or during a Terry stop. Under, State v.
20 Templeton, 152 Wn.2d 210, 218, 95 P.3d 345 (2004), and other applicable law, statements made
21 during a Terry stop are not custodial, thus Miranda is not required.

22 The statements made on November 1, 2011, are admissible. The initial statement where
23 the defendant expressed surprise that he had slept so late is admissible as this statement was
24 spontaneously made and thus the defendant was not subject to interrogation, as defined by
25 Miranda. The defendant was then placed into custody and was immediately provided his
26 Miranda warnings. Although Miranda was applicable at this point, as the defendant was then
27 subject to custodial interrogation, the defendant's statements were made after a knowing,
28 intelligent and voluntary waiver of his Miranda rights. The defendant was read his Miranda
29 rights, waived those rights, and continued to speak to the officers.

30 All of the defendant's statements were made voluntarily.

31 In addition to the above written findings and conclusions, the court incorporates by
32 reference its oral findings and conclusions.

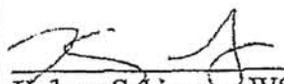
33 Signed this 13 day of December, 2013.

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JUDGE

JAY V. WHITE

Presented by:


Kelsey Schirman, WSBA#41684
Deputy Prosecuting Attorney

Catherine Elliot, WSBA#
Attorney for Defendant

WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF
LAW ON CrR 3.5 MOTION TO SUPPRESS THE
DEFENDANT'S STATEMENT(S) - 6

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429
Phone 206-205-7401 Fax 206-205-7475

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71111-3-I
v.)	
)	
DENNIS WYATT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] DENNIS WYATT 832183 OLYMPIC CORRECTIONS CENTER 11235 HOH MAINLINE FORKS, WA 98331	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF JULY, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710