NO. 96927-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY KETCHUM,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 51062-6-II
Clallam County Superior Court No. 17-1-00217-7

ANSWER TO PETITION FOR REVIEW

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362
(360) 417-2301

SERVICE	Nancy P. Collins Attorney for Petitioner Washington Appellate Project 1511 Third Ave., Suite 610 Seattle, WA 98101 Email: nancy@washapp.org; wapofficemail.@washapp.org	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 15, 2019, Port Angeles, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Clallam County Deputy Prosecuting Attorney Jesse Espinoza.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court to deny review of the Court of Appeals unpublished decision reversing the trial court's suppression order in *State v. Ketchum*, No. 51062-6-II (February 6, 2019), a copy of which is attached to the petition for review.[1]

The Court of Appeals, in conformity with well-established principles held "Barnes has not shown that the interests of justice require re-litigation of the sufficiency of the evidence issue." *Id.* at 9. Additionally, the court held, "Barnes has not met his burden of showing by clear and convincing evidence that he was actually factually innocent of the burglary conviction." *Id*. at 10.

III. COUNTERSTATEMENT OF THE ISSUES

The question presented is whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and

2. The petition fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and

3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

//

[1] *See also State v. Ketchum*, 2019 WL 460355, at *5 (Wn. App. Div. 2, 2019).

IV. STATEMENT OF THE CASE

On March 12, 2016, Ketchum was stopped by the Washington State Patrol (WSP) Trooper Nelson, for speeding on Highway 101, north of Forks, in Clallam County, Washington. CP 12, RP 8. Trooper Nelson determined that Ketchum was driving while his license was suspended and that he had five active warrants for charges that included driving with license suspended in the third degree. CP 12. Ketchum was not the owner of the vehicle as it was owned by Ketchum's girlfriend who lives in Port Orchard, in Kitsap County. RP 12, CP 12. Ketchum told Trooper Nelson that he had been borrowing the car for the past few days. RP 12.

Trooper Allen arrested Ketchum for driving with his license suspended and on his outstanding warrant out of Clallam County District Court for Driving While License Suspended. CP 12; RP 13.

Considerations regarding decision to impound

Trooper Allen testified that it was a "hard rain" at the time of the stop. RP 13. "Hard rain" in Forks means that the rain is bouncing off the pavement such that it comes back up and gets people wet. RP 13. The rain came in intervals and there was a lot of standing water on the roadway. RP 14. Visibility on the highway was poor at times and the sky was overcast. RP 14. It was approximately 4:30 p.m. and, although it was not a rush-hour, Trooper Allen recalled a good number of logging trucks commuting back to Forks on the highway around that time. RP 24, 25.

Trooper Nelson testified that he did not believe there were any reasonable alternatives to impounding the vehicle because of the road and weather conditions. RP 29. Nelson also pointed out that there was no place to push the vehicle to get it off the traveled portion of the road. RP 29. The traveled portions of the road included the shoulders because bicyclists use the shoulder a lot. RP 28–29. Trooper Nelson's safety considerations were based upon his experience patrolling that particular area of Highway 101 in the past 20 years. RP 30.

Trooper Nelson also considered whether there was anybody available to pick the vehicle up. RP 30. Trooper Nelson was aware that the owner of the vehicle resided in Port Orchard as that was what Ketchum told him, and that she was currently in Port Orchard. RP 30, 36. Trooper Nelson also considered the fact that Ketchum was being arrested for driving with his license suspended and that he had a prior conviction for driving with his license suspended. RP 33.

Trooper Nelson did not ask Ketchum what he wanted done with the vehicle and he didn't ask Ketchum whether there was anyone else who could or would come to take the vehicle. RP 35. Trooper Nelson decided to have the vehicle impounded. RP 15.

Miranda Rights

Trooper Nelson advised Ketchum of his *Miranda* rights and Ketchum verbally acknowledged that he understood his rights. RP 16. Trooper Nelson informed Ketchum that he was going to do an inventory search to secure his personal items so that everything could be documented before the vehicle was towed to an impound lot. RP 15. Ketchum told Trooper Nelson about the

marijuana in the vehicle and that it belonged to him and he did not want lose to the marijuana. RP 16. Trooper Nelson told Ketchum that the marijuana would be secured. RP 16

Inventory search

During the inventory search, Trooper Allen found quart size bags of marijuana Ketchum had already mentioned and which he did not want to lose. RP 20. Attached to one of the bags of marijuana, Trooper Allen found a smaller bag containing white crystal substance which he suspected to be methamphetamine. RP 20. Trooper Allen described the package as being stuck to the marijuana package. RP 21.

Ketchum, the sole occupant of the vehicle, stated that the marijuana was his and that he didn't want to lose it but denied that the white crystal substance was his. RP 14, 20. Ketchum said that there were other people that borrowed the vehicle the night before in the Sequim area. RP 14–15, 20–21.

Just prior to the tow truck hooking up the vehicle to take it to impound, WSP Sgt. Ryan contacted Trooper Nelson to inform him that the owner of the vehicle, Ms. Parker, called to inform that the vehicle was taken without her permission by Ketchum. RP 19. Parker stated that she didn't want to file a report for Theft. RP 19. Trooper Nelson did not make any attempt to contact the owner of the vehicle, Ms. Parker. RP 36.

//

V. ARGUMENT

A. THE PETITIONER HAS NOT ESTABLISHED ANY OF THE CONSIDERATIONS GOVERNING ACCEPTANCE OF REVIEW SET FORTH IN RAP 13.4(b).

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only:
>
> If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or
>
> If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals decision reversing the trial court's suppression order and *State v. Peterson* are consistent with Washington appellate decisions *State v. Tyler* and *State v. Froehlich* as explained in *Froehlich*.

Ketchum argues that, under *State v. Tyler*, 177 Wn.2d 690, 698–99, 302 P.3d 165 (2013), the State must prove no reasonable alternatives to impoundment exist before an officer may impound a vehicle. Br. of Petitioner at 8, 12. This would require the State to prove an absolute negative. *Tyler* does not go so far.

The *Tyler* Court specifically pointed out that "[t]he police officer does not have to exhaust all possible alternatives, but must consider reasonable alternatives." *Tyler*, 177 Wn.2d at 699 (citing *State v. Coss*, 87 Wn. App. 891, 899, 943 P.2d 1126 (1997)). "Reasonableness of an impoundment must be

assessed in light of the facts of each case." *Tyler*, 177 Wn.2d at 699 (citing *Coss*, 87 Wn. App. at 898).

In *Tyler*, the Court pointed out that there was both a lawful basis to impound a vehicle under the community caretaking function and because the driver was arrested for driving with a suspended license. *Tyler*, 177 Wn.2d at 700 ("We conclude the trial court correctly determined that the impound was proper. The vehicle threatened public safety if left where it was. In addition, Tyler had been arrested for, among other things, driving with a suspended license. Anglin explored reasonable alternatives to impoundment."). The *Tyler* Court did not hold that failure to ask the driver if someone is available to pick up the vehicle prior to impounding a vehicle because the driver's license is suspended is a failure to consider reasonable alternatives.

As recognized in *State v. Froehlich*, the requirement that, prior to impounding a vehicle, the officer must inquire if the defendant, defendant's spouse or friends are not available to pick up the vehicle is limited to the community caretaking function, not when the impound occurs under statutory authorization. 197 Wn. App. 831, 838, 391 P.3d 559 (2017) (citing *Tyler*, 177 Wn.2d at 698) ("The community caretaking function allows law enforcement to lawfully impound a vehicle when both (1) "the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft;" and (2) "the defendant, the defendant's spouse, or friends are not available to move the vehicle.").

Froehlich, clarifies this distinction by citing to *Peterson* to point out that the statutory authorization for impound does not necessarily require the officer to find out if the driver, driver's spouse or friend is available to pick up the vehicle. "*Peterson* involved an officer's statutory authority to impound a vehicle when the driver had a suspended license and the owner was not at the scene, not the community caretaking function." *Froehlich*, 197 Wn. App. at 840 (citing *State v. Peterson*, 92 Wn. App. 899, 902–03, 964 P.2d 1231 (1998)). "Therefore, the State was not required to establish, as here, that the driver's spouse and friends were not available to move the vehicle." *Froehlich*, 197 Wn. App. at 840.

All three cases, *Tyler*, *Peterson*, and *Froehlich* are consistent and all require that reasonable alternatives to impounding be considered first. Those cases note that there are three different ways a vehicle is lawfully impounded. *Tyler*, 177 Wn.2d at 698 (citing *State v. Williams*, 102 Wn.2d 733, 742–43, 689 P.2d 1065 (1984)) (referencing impoundment as evidence of crime, for community caretaking, and in the course traffic enforcement where authorized by legislature).

The Court of Appeals decision in this case is consistent with all the above because the record shows that Trooper Nelson did consider whether there were reasonable alternatives and determined that there were not any under the circumstances. One of the circumstances of this case is that Ketchum took the vehicle without the permission of the owner and loaned it to individuals he claimed used the vehicle in connection with illicit drugs. RP 20–21. It is highly

probable that asking such a driver to find someone of his choosing to take the vehicle would be poor law enforcement work.

Finally, the Court of Appeals recognized, as in *Peterson*, that the case involved an officer's statutory authority to impound a vehicle because Ketchum's driver's license was suspended and the owner was not at the scene.

Therefore, Ketchum has not established that there is a conflict of case law that needs to be reviewed by this Court.

2. The *Froehlich* Court's interpretation of *Tyler's* second requirement for impoundment on community caretaking grounds has no applicability to the instant case which therefore does not present an issue of substantial public interest.

Ketchum argues that an issue of substantial public interest is raised in this case due to the *Froehlich* Court's comment showing uncertainty in how strictly to apply *Tyler*. Br. of Petitioner at 15. The *Froehlich* Court stated as follows:

> How strictly the second *community caretakin*g requirement stated in Tyler should be applied is *somewhat unclear*. We can conceive of circumstances where it would be reasonable for an officer to impound a vehicle even though he or she may not know the availability of the defendant or the defendant's spouse or friends to remove a vehicle or when removal by those persons would be impractical. However, Tyler suggests that an officer should at least consider whether the defendant can make arrangements for someone to remove the vehicle before impounding it. Otherwise, the *second community caretaking requirement* would be superfluous.

Froehlich, 197 Wn. App. at 839 (emphasis added).

"Law enforcement may lawfully impound a vehicle for three reasons: (1) as evidence of a crime, (2) under the community caretaking function, or (3) when the driver has committed a "traffic offense for which the legislature has expressly

authorized impoundment." *Froehlich*, 197 Wn. App. at 838 (citing *Tyler*, 177 Wn.2d at 698.)

Here, it is clear that the impoundment at issue in this case relates to the third reason, "a traffic offense for which the legislature has expressly authorized impoundment." *Id.* The second community caretaking requirement in *Froehlich* has no application in this case, and therefore, does not raise an issue of substantial public interest.

Review of the Court of Appeals decision is not warranted under RAP 13.4(b)(3).

VI. CONCLUSION

Ketchum has failed to establish either a conflict between the Court of Appeals, Div. 2, decision or decisions of another division or the Supreme Court. Ketchum has also not established that this case raises an issue of substantial public interest that should be decided by this Court.

For the foregoing reasons, the State respectfully requests that the Court deny Ketchum's Petition for Review.

DATED April 15, 2019.

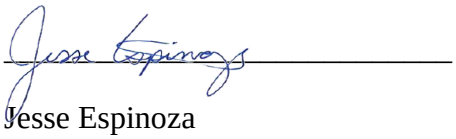
Respectfully submitted,
MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically to Nancy Collins on April 15, 2019.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

April 15, 2019 - 4:48 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96927-2
Appellate Court Case Title:	State of Washington v. Timothy Carsell Ketchum
Superior Court Case Number:	17-1-00217-7

The following documents have been uploaded:

- 969272_Answer_Reply_20190415164740SC294583_1119.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Ketchum - 96927-2 - States Answer to Petition for Review-signed.pdf

A copy of the uploaded files will be sent to:

- nancy@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Jesse Espinoza - Email: jespinoza@co.clallam.wa.us
Address:
223 E 4TH ST STE 11
PORT ANGELES, WA, 98362-3000
Phone: 360-417-2301

Note: The Filing Id is 20190415164740SC294583