

69228-3

69228-3

NO. 69228-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CORBELLA,

Appellant.

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COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. FACTS OF THE CRIME .....	2
3. OTHER RELEVANT FACTS.....	4
C. <u>ARGUMENT</u> .....	5
1. STANDARD OF REVIEW.....	5
2. CORBELLA'S CONSENT WAS VOLUNTARY UNDER THE TOTALITY OF CIRCUMSTANCES.....	6
a. Corbella Voluntarily Consented To Officer Lange's Request To Search The Vehicle.....	7
b. Although The Vehicle Was Not Corbella's, The Registered Owner Had Given Him Permission To Borrow The Vehicle That Evening .....	10
c. The Search Did Not Exceed The Scope Of Consent.....	10
3. CORBELLA HAS FAILED TO ESTABLISH THAT HIS VOLUNTARY CONSENT TO SEARCH WAS TAINTED BY THE PRIOR ILLEGAL SEARCH.....	10
D. <u>CONCLUSION</u> .....	16

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Brown v. Illinois, 422 U.S. 590,  
95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)..... 11

Schneckloth v. Bustamonte, 412 U.S. 218,  
93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)..... 7, 12

Taylor v. Alabama, 457 U.S. 687,  
102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982)..... 11

Wong Sun v. United States, 371 U.S. 471,  
83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)..... 14

Washington State:

Humphrey Industries, Ltd. v. Clay Street Associates LLC,  
170 Wn.2d 495, 242 P.3d 846 (2010)..... 6

In re Dependency of K.S.C., 137 Wn.2d 918,  
976 P.2d 113 (1999)..... 8

State v. Bustamonte-Davila, 138 Wn.2d 964,  
983 P.2d 590 (1999)..... 8

State v. Butler, 53 Wn. App. 214,  
766 P.2d 505 (1989)..... 6

State v. Childress, 35 Wn. App. 314,  
666 P.3d 941 (1983)..... 10, 11

State v. Flowers, 57 Wn. App. 636,  
789 P.2d 333, review denied,  
115 Wn.2d 1009 (1990)..... 8

State v. Hill, 123 Wn.2d 641,  
870 P.2d 313 (1994)..... 5

<u>State v. Hoang</u> , 101 Wn. App. 732, 6 P.3d 602 (2000), <u>review denied</u> , 142 Wn.2d 1027, 21 P.3d 1149 (2001).....	5
<u>State v. Jensen</u> , 44 Wn. App. 485, 723 P.2d 443 (1986).....	11, 12, 13, 14
<u>State v. Johnson</u> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	6
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 .....	6
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	5, 6
<u>State v. Morse</u> , 156 Wn.2d 1, 123 P.3d 832 (2005).....	6, 7
<u>State v. Nelson</u> , 47 Wn. App. 157, 734 P.2d 516 (1987).....	8
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	7
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	6
<u>State v. Smith</u> , 115 Wn.2d 775, 801 P.2d 975 (1990).....	7, 8
<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2004).....	7

Rules and Regulations

Washington State:

CrR 3.5..... 1, 4  
CrR 3.6..... 1, 4

Other Authorities

Maguire, Evidence of Guilt, 221 (1959)..... 14

A. ISSUE PRESENTED

A person must freely and voluntarily give consent to search his property. Consent to search may be invalid if it is obtained through exploitation of a prior illegality. In this case, Corbella was cooperative throughout his contact with law enforcement, he was Mirandized and he was informed of his right to consent after the illegal search. Furthermore, Officer Lange had no knowledge of Lieutenant Tarantino's illegal search prior to asking Corbella to search the vehicle, and therefore did not exploit the prior illegality. Should the court reject the defendant's claim that his consent to search was invalid and affirm his conviction for possession of heroin?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Anthony Corbella was charged with possession of heroin. Clerk's Papers (CP) 1-5. Following CrR 3.5 and 3.6 hearings, the defendant waived his right to a jury trial and proceeded with a stipulated facts trial. Report of Proceedings (RP) 1 161<sup>1</sup>. The defendant was found guilty by the Honorable Judge Michael

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<sup>1</sup> There are two volumes of verbatim Report of Proceedings referenced as follows: 1RP – June 25-26, 2012 and 2RP – July 27, 2012.

Hayden on June 26, 2012. CP 47-50; 1RP 167. The defendant was sentenced July 27, 2012 and ordered to serve six months plus one day in Work/Education Release and pay the \$500 victim penalty assessment and \$100 DNA fee. CP 32-38; 2RP 6-7.

## 2. FACTS OF THE CRIME.

On May 11, 2011, Bellevue Police Lieutenant Mark Tarantino was looking for a vehicle associated with a domestic disturbance. 1RP 66. Lieutenant Tarantino drove into the Newport Hills Park and Ride and observed a parked vehicle that was occupied by a male and female. 1RP 66. Upon seeing the lieutenant, the male and female reacted in a "surprised" manner. 1RP 67. Lieutenant Tarantino approached the vehicle with a flashlight and made contact with the driver, later identified as the defendant, Anthony Corbella. 1RP 71, 72. When the lieutenant approached the driver's side door, he looked around the vehicle and observed Corbella holding a lighter in his hand and tinfoil with burn marks and residue on it near Corbella's left foot on the driver's side floorboard. 1RP 71, 72, 73, 74, 75, 81, 90. Corbella opened his vehicle door without any prompting because the window was not working. 1RP 72. Suspecting that the tinfoil had been used for drug

activity, Lieutenant Tarantino asked Corbella to hand him the tinfoil in an “easygoing” tone of voice. 1RP 73. Corbella handed him the tinfoil and the lieutenant confirmed the tinfoil had black burn marks on it. 1RP 75. Based on his observations, the lieutenant believed the tinfoil indeed looked like it had been used for drug activity. 1RP 75. Lieutenant Tarantino then handed the tinfoil back to Corbella. 1RP 74, 93.

Lieutenant Tarantino asked Corbella to step out of the vehicle and requested backup. 1RP 75. While waiting, Lieutenant Tarantino informed Corbella that he suspected drug activity was occurring and asked Corbella if he used drugs. 1RP 75. Corbella confirmed he used heroin. 1RP 75. The lieutenant then asked Corbella if there were any drugs in the vehicle, and Corbella confirmed that there were drugs in the vehicle. 1RP 75.

Within minutes of the lieutenant’s request for backup, Bellevue Police Officers R.D. Lange and R. Johnson arrived. 1RP 20, 54, 80. Lieutenant Tarantino briefed the officers on what had occurred and asked them to take over the scene. 1RP 81. Officer Lange took the lead point and, as part of his investigation, asked Corbella some questions. 1RP 22. Among other statements, Corbella said that he had stopped to use drugs and that the drugs

were in the side compartment of the passenger door. 1RP 22. Officer Lange confirmed Corbella's identification and ran his name through dispatch. 1RP 21, 22. The check revealed that Corbella had an outstanding warrant for his arrest. 1RP 26. Officer Lange arrested Corbella for the outstanding warrant and for possession of heroin and Mirandized him. 1RP 26, 27, 28. Post-Miranda, Corbella said that the drugs were in the passenger door compartment and he gave Officer Lange permission to search the vehicle to remove the heroin. 1RP 30. In addition to Corbella's verbal consent, Corbella also signed a "Consent to Search" form. 1RP 31. Officer Lange entered the vehicle and found multiple plastic bags containing a "dark sticky substance" and tinfoil that had burn marks on one side and black streaks on the other side. 1RP 32, 34. Officer Lange later field tested the substance and it tested positive for heroin. 1RP 35.

### 3. OTHER RELEVANT FACTS.

At the conclusion of the CrR 3.5 and 3.6 hearings, Corbella advised the Court, via his attorney, that he was waiving his right to a jury trial, stipulating to the facts for purposes of the trial, and had no objection to the evidence the State would be admitting to the

Court. 1RP 161. The Court engaged Corbella in a colloquy to ensure Corbella understood the ramifications of his choice.

1RP 161.

C. ARGUMENT

1. STANDARD OF REVIEW.

Corbella assigns error to the trial court's denial of his motion to suppress the heroin Officer Lange found in the vehicle. CP 51-52. On appeal, this Court must determine whether the trial court derived proper conclusions of law from the factual findings that it made. State v. Hoang, 101 Wn. App. 732, 738, 6 P.3d 602 (2000), review denied, 142 Wn.2d 1027, 21 P.3d 1149 (2001). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard, which requires that the findings be upheld if there is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999); State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). In applying the substantial evidence standard, appellate courts are mindful of the fact that "the trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying."

123 Wn.2d at 646. Conclusions of law are reviewed *de novo*. Mendez, 137 Wn.2d at 214; State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). However, an appellate court may affirm on any basis apparent from the record. State v. Butler, 53 Wn. App. 214, 217, 766 P.2d 505 (1989).

The court's ultimate determination that Officer Lange's discovery of the heroin was not tainted by the prior illegal search, while characterized as a finding, is a mixed question of law and fact. Mixed questions of law and fact are reviewed *de novo*. Humphrey Industries, Ltd. v. Clay Street Associates LLC, 170 Wn.2d 495, 501-02, 242 P.3d 846 (2010).

2. CORBELLA'S CONSENT WAS VOLUNTARY UNDER THE TOTALITY OF CIRCUMSTANCES.

Warrantless searches are per se unreasonable. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833. Exceptions to the warrant requirement must be "jealously and carefully drawn." Morse, 156 Wn.2d at 7 (quoting State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004)). The State bears the burden of proof to show that a warrantless search falls within an exception to the warrant

requirement. Morse, 156 Wn.2d at 7. An exception to the warrant requirement is consent to search, and it is the State's burden to establish consent to search was lawfully given. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

For consent to be valid, a person must consent freely and voluntarily. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). If the free and voluntary character of the consent is challenged, the State must prove that the individual consented freely and voluntarily, not as a result of duress or coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990). In order to establish a valid consent to a search, three requirements must be met: (1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of consent. Thompson, 151 Wn.2d at 804.

a. Corbella Voluntarily Consented To Officer Lange's Request To Search The Vehicle.

Whether consent was voluntarily given is a question of fact to be determined from the totality of the circumstances. O'Neill, 148

Wn.2d at 588 (citing State v. Bustamonte-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)). The prosecution must show the free and voluntary character of the consent by clear and convincing evidence. Smith, 115 Wn.2d at 789 (citing State v. Nelson, 47 Wn. App. 157, 163, 734 P.2d 516 (1987)). Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. In re Dependency of K.S.C., 137 Wn.2d 918, 925, 976 P.2d 113 (1999).

Among the factors considered in a “totality of circumstances” analysis are whether Miranda warnings were given prior to obtaining consent, the degree of education and intelligence of the consenting person, and whether the consenting person had been advised of his right not to consent. Smith, 115 Wn.2d at 789. No one factor is determinative. Id. The court may also consider other factors, such as whether the person had been cooperating or refusing prior to giving consent, State v. Flowers, 57 Wn. App. 636, 645, 789 P.2d 333, review denied, 115 Wn.2d 1009 (1990).

Here, Officer Lange read Corbella his Miranda warnings and Corbella appeared to understand his rights. 1RP 29. Furthermore, Officer Lange informed Corbella of his consent to search rights and Corbella took the time to read the Consent to Search form on his

own. 1RP 28, 30, 31, 32. Corbella consented both verbally and in writing. 1RP 30, 32. Additionally, Corbella was granted an opportunity to witness the search and to terminate the search throughout the search procedure. 1RP 55. Also, Lieutenant Tarantino testified several times that Corbella was cooperative throughout the contact and that his interaction with Corbella was “pleasant.” 1RP 73. Officer Lange described Corbella’s demeanor during his interaction with him as “calm, compliant, not aggressive.” 1RP 38. Finally, both Lieutenant Tarantino and Officer Lange testified that they did not make any promise or threats to entice him to make statements or consent to search. 1RP 30, 73.

Given his “calm, compliant, not aggressive” demeanor during the contact with police, the evidence shows that Corbella’s consent to search was an act of free will and that he was able to make a rational decision to consent to the search. There is clear and convincing evidence, based on the totality of circumstances, from which the trial court found that Corbella freely and voluntarily consented to the search.

- b. Although The Vehicle Was Not Corbella's, The Registered Owner Had Given Him Permission To Borrow The Vehicle That Evening.

Corbella admitted that he stopped in the parking lot to "consume heroin" and had informed Officer Lange where the heroin was located. CP 39-42. Although the vehicle was not Corbella's personal vehicle, the registered owner of the vehicle confirmed that Corbella had permission to borrow it. CP 39-42; 1RP 36, 37. Therefore, he had the ability to consent at that moment.

- c. The Search Did Not Exceed The Scope Of Consent.

Corbella was Mirandized and confirmed verbally and in writing that he consented to a search of the vehicle. CP 39-42; 1RP 28, 30, 31, 32. There was no evidence that Corbella placed any limitations on the search conducted by Officer Lange. The search did not exceed the scope of consent.

3. CORBELLA HAS FAILED TO ESTABLISH THAT HIS VOLUNTARY CONSENT TO SEARCH WAS TAINTED BY THE PRIOR ILLEGAL SEARCH.

Consent to search may be invalid if the consent is obtained through exploitation of a prior illegality. State v. Childress, 35

Wn. App. 314, 666 P.3d 941 (1983). The burden is upon the State to demonstrate sufficient attenuation from an illegal search to dissipate its taint. Id. at 316. The United States Supreme Court has identified several factors useful in determining whether a voluntary consent to search was sufficiently attenuated from a prior illegal search. These factors include: (1) the temporal proximity of the illegal detention and subsequent consent; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the officer's misconduct; and (4) the giving of Miranda warnings. Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982); Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

Corbella relies on several cases, including State v. Jensen, 44 Wn. App. 485, 488-89, 723 P.2d 443 (1986), and Childress, to support his argument that his consent was obtained by the exploitation of a prior illegal search. Corbella's reliance on these cases is misplaced. The Childress court makes clear that not all evidence is suppressible simply because it would not have been discovered but for the illegal actions of the police. Childress, at 316. Here, Lieutenant Tarantino's examination of the tinfoil confirmed his suspicions of what he already knew. 1RP 75. Although the search

was ruled illegal, the tinfoil was observed in open view prior to the illegality. Corbella argues there is no attenuation of the taint of the illegality because his consent occurred in very close temporal proximity to the illegal search. However, time alone is not dispositive. Jensen, 44 Wn. App. at 490. Here, several minutes passed between Lieutenant Tarantino's request for the tinfoil and when Officer Lange arrived, Mirandized Corbella and obtained Corbella's voluntary consent to search the vehicle. 1RP 20, 54, 80.

Examination of the record reveals no evidence that Corbella's "will ha[d] been overborne and his capacity for self-determination critically impaired." Jensen, 44 Wn. App at 488 (quoting Bustamonte, 412 U.S. at 225, 93 S. Ct. at 2046). In Jensen, the court reasoned that the defendant was cooperative; he was legally arrested; he was Mirandized; he orally consented to the search twice before actually signing the consent form; he had prior experience with police; and he was not of low intelligence. Id. at 489. The court also found that the police did not "frighten or intimidate" him. Id. at 491.

Here, the record demonstrates that Corbella was cooperative throughout the contact. 1RP 38, 73. Additionally, the trial court ruled that under Terry, the lieutenant had the right to detain Corbella and ask him questions without Mirandizing him due to his suspicions of Corbella's drug activity. CP 39-42. Therefore, Corbella was legally detained and arrested. Officer Lange Mirandized Corbella and Corbella said he understood his rights prior to Officer Lange requesting his consent to search the vehicle. CP 39-42. Officer Lange read him the Consent to Search form and Corbella was allowed to read through the Consent to Search form on his own. 1RP 31, 32. Corbella then consented to the search both verbally and in writing. 1RP 32. Also, Corbella was not threatened or otherwise persuaded to consent to the search. 1RP 30, 73. Furthermore, Corbella had an outstanding warrant for his arrest, which points to Corbella's prior experience with police. CP 39-42.

Where Jensen and the present case differ is that the Jensen court found that the officer's interest in searching the car arose only after illegally discovering the marijuana. Id. at 490. Here, Lieutenant Tarantino was standing outside the vehicle and observed Corbella

holding a lighter and observed the tinfoil inside the vehicle before he even spoke to Corbella. 1RP 71, 72, 73, 74, 75, 81, 90. His interest was piqued at this point and he suspected drug activity. 1RP 75. His suspicions and interest in searching the car did not arise *after* illegally discovering the tinfoil, as occurred in Jensen, but rather *before* the illegal search. As noted in Jensen,

We need not hold that all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Maguire, *Evidence of Guilt*, 221 (1959).

Id. at 490 (quoting Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). Despite the Jensen court’s finding that the officer’s search was illegal, the court ultimately found that the defendant’s consent was not tainted by the prior illegal search, and affirmed the trial court’s ruling. Jensen, 44 Wn. App. at 493. This court should do the same in the present case.

Here, Officer Lange's search of the vehicle was not the product of Lieutenant Tarantino's initial illegal search, as Corbella argues. Corbella specifically states in his brief that the police "capitalized on this illegality by continuing to find ways to search the interior of the car that ultimately resulted in Mr. Corbella's consent." This is a mischaracterization of what the record reveals. Perhaps most telling to refute this claim is that Officer Lange testified that Lieutenant Tarantino did not inform him of his request for the tinfoil. 1RP 41. Officer Lange did not discover the tinfoil until he was granted permission by Corbella to search the vehicle. 1RP 32. Therefore, Officer Lange did not capitalize on Lieutenant Tarantino's illegal search because he had no knowledge of the prior illegality. Furthermore, Lieutenant Tarantino did not "continue to find ways" to search the vehicle because he immediately handed the tinfoil back to Corbella and called for backup. 1RP 75. He took no part in any subsequent search. Based on what the record reveals, Officer Lange did not exploit the prior illegal search and that search did not taint Corbella's voluntary consent to search the vehicle.

D. CONCLUSION

Corbella has failed to establish that his voluntary consent to search was tainted by the prior illegal search. Accordingly, the State respectfully asks this Court to affirm Corbella's conviction of possession of heroin.

DATED this 23 day of April, 2013.

Respectfully submitted,

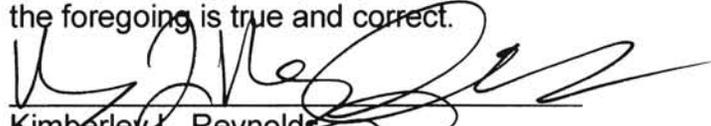
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ANTHONY CORBELLA, Cause No. 69228-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Kimberley L. Reynolds  
Done in Seattle, Washington

4/24/13  
Date