

NO. 70557-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TROXCLAIR, JR.,

Appellant.

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

The Honorable David R. Needy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Robert Troxclair's motion to suppress evidence.¹

2. The trial court violated CrR 6.1(d) by failing to enter written findings of fact and conclusions of law in support of its guilty finding.

Issues Pertaining to Assignments of Error

1. The officer seized Troxclair without a reasonable, articulable suspicion of criminal activity before he learned of Troxclair's outstanding felony warrants, arrested him, and discovered methamphetamine residue in a baggie during a search incident to arrest. Did the trial court err by denying Burkett's motion to suppress evidence?

2. Did the trial court violate CrR 6.1(d) by failing to enter written findings of fact and conclusions of law in support of its guilty finding?

B. STATEMENT OF THE CASE

Officer Deach was on patrol approaching midnight when he came upon a man standing next to a car "parked kind of in an area that it should

¹ The trial court's findings of fact and conclusions of law as required by CrR 3.6 are attached as an appendix.

not have been[.]" RP 23. The car was parked legally, but "not [in] the best neighborhood[.]" RP 33, 38-39. The driver's door was open. RP 27. Deach was "generally suspicious" and was "not quite sure what we've got going on there, could be a stolen vehicle, could be a vehicle prowl[.]" RP 33, 39.

Deach pulled up in his patrol car and asked Franulovich, the man standing outside the car, why he was there. He told Franulovich he was going to park his car so he could speak with Franulovich a bit longer. RP 24. Deach did that, and as he spoke with Franulovich, he radioed for backup. RP 25, 33-34. He then observed Troxclair "kind of propped up" in the back seat with his head "tilted over" either sleeping or passed out. RP 25-27, 40. Deach walked around to the passenger side of the car and knocked on the back window. RP 28. The car's windows were closed. RP 26-27.

At about this time Officer Wright pulled up and engaged Franulovich. RP 9-10. Officer Serrano arrived a short time thereafter. Serrano "most likely" had his flashing lights on so he could arrive faster. RP 17, 19. He stayed in the area monitoring the overall scene. He spoke with neither Franulovich nor Troxclair. RP 19-20. Deach recalled that

Wright arrived before Serrano. He was not sure whether either colleague was present while Troxclair was still in the car. RP 32.

Troxclair woke up when Deach knocked on the window. Deach asked Troxclair if he could speak with him and Troxclair stepped out of the car. RP 28-29, 40-41. Deach asked Troxclair what his name was and Troxclair told him. Deach checked for warrants and after asking why Troxclair was in the area, learned Troxclair had outstanding felony warrants. RP 30-32. Up to that point, Deach did not tell Troxclair he was not free to leave, did not touch him, did not display a weapon and did not remove his handcuffs. RP 30. Deach then handcuffed Troxclair and arrested him on the warrants. RP 31-32. Deach searched Troxclair incident to the arrest and found drug paraphernalia and a baggie with methamphetamine residue. RP 34, CP 18.

The State charged Troxclair with possession of methamphetamine. CP 1. Troxclair filed a motion to suppress evidence. CP 5-19. He contended he was seized, without the required articulable suspicion, from no later than the moment Deach awakened him and asked him if he could speak with him. CP 8-15; RP 52-54. Troxclair testified Deach awakened him by banging a flashlight on the window and shining the light in his face. Deach yelled at him to step out of the car. RP 47-48. Troxclair saw

Franulovich off the front fender on the driver's side. There were three patrol cars at the scene, at least one of which had its lights on. RP 45-47. Troxclair said he believed if he got out of the car and simply walked away, he would have been tackled and arrested. RP 48-49.

The trial court denied the motion. It found Troxclair voluntarily stepped out of the car and concluded he was free to leave up until the moment Deach learned of the warrants. CP 23-24; RP 57-58.

Troxclair waived his right to a jury trial and submitted the case on the record, which consisted of police and lab reports. In exchange, the State promised to recommend an 18-month standard range sentence, which would be stayed pending appeal. CP 25-44; RP 61-62. The trial court reviewed the evidence and found Troxclair guilty as charged. RP 62. The parties agreed to recommend an 18-month sentence, which the court adopted. CP 46-55; RP 64-65. The trial court failed to file written findings of fact and conclusions of law as required by CrR 6.1(d).

C. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING TROXCLAIR'S MOTION TO SUPPRESS EVIDENCE.

A warrantless search is per se unconstitutional under article I, section 7 unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). One exception,

an investigative detention, permits an officer to briefly stop and detain a person he reasonably suspects is engaged in criminal conduct. State v. Day, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007). An investigative detention constitutes a seizure. State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). Officer Deach seized Troxclair before he formed a reasonable suspicion of criminal activity. The methamphetamine residue found on Troxclair's person should be suppressed.

An officer's rationale for requesting a passenger to step out of a vehicle must meet Terry's² standard of reasonable suspicion of criminal activity where the purpose of the contact with the passenger is investigatory. State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999), abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). The purpose of Deach's contact with Troxclair was plainly investigatory. Deach never said he stopped to help Franulovich with a disabled vehicle or to cite him for illegal parking. In fact, the car was legally parked. RP 38-39. Nor did the officer voice concern about Troxclair's unconscious state. Deach said he called for backup because the contact occurred in "not the best neighborhood, possible suspicious activities . . . could be a stolen vehicle,

² Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

could be a vehicle prowl[.]” He stopped because what he saw was “generally suspicious.” RP 39.

Deach seized Troxclair when he requested to speak with him through the closed window of the car. Deach did not ask Troxclair to roll down the window so they could converse. The only way for Troxclair to reasonably honor Deach's request was to do what he did – step out of the car. Given the circumstances, Deach's request was the functional equivalent of a request to step out of the car.

The significance of a request to step out of a vehicle is highlighted by two cases. One is State v. Johnson, 156 Wn. App. 82, 92, 231 P.3d 225 (2010), review granted, cause remanded on other grounds, 172 Wn.2d 1001 (2011). In Johnson, the lone officer parked his patrol car 10 to 15 feet behind a vehicle illegally parked and did not activate his emergency lights or siren. He walked up to the driver and asked why she and her passenger were there and why they parked in the spot. He did not demand identification or ask the driver to step out of the vehicle until after learning she had outstanding warrants. 156 Wn. App. at 87, 92.

The appellate court held that until that point, a seizure had not occurred. Id. at 92. By specifically noting the officer did not ask the driver to step out of the vehicle, the court demonstrates the significance of

such a request when determining whether a seizure occurred.

The second case is State v. O'Neil, 148 Wn.2d 564, 62 P.3d 489 (2003). In O'Neil, the officer pulled up behind a car parked in front of a closed store after dark. He activated his spotlight and determined someone was in the car. He approached the driver's side of the car, shined a flashlight in the driver's face, and asked him to roll the window down, which he did. The officer asked what he was doing there, and the driver explained his car had broken down and would not start.

The officer then asked for identification, registration, and insurance papers. The driver, known by this time as O'Neil to the officer, produced registration that showed the car was registered to another person. When O'Neill said he was the other person, the officer asked him to step out of the car. 148 Wn.2d at 571-72. The Supreme Court held the officer did not seize O'Neil until he requested O'Neill to exit the car. 148 Wn.2d at 581. See also, State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) ("Although the request that Watkins exit the car constituted a seizure, it did not amount to a custodial arrest."). These cases establish Deach seized Troxclair when he asked him, through a closed window, if he could speak with him.

At that point, Deach did not have specific facts to support a reasonable, articulable suspicion that Troxclair was "engaged in criminal activity or a traffic violation" at the time of the seizure. Day, 161 Wn.2d at 896. Deach had not been dispatched to investigate a crime in progress. Nor was he responding to a citizen's complaint. There were no signs of foul play, such as an injury to Troxclair or damage to the car in which he slept. Franulovich's behavior apparently did not cause suspicion. And Troxclair was "kind of propped up" in the back passenger seat and was either sleeping or passed out. RP 26. Deach's investigative seizure was unlawful.

Even if this Court concludes Deach's actions were not for purposes of investigation, he nevertheless lacked the legal authority to request Troxclair to get out of the car. An officer must "be able to articulate an objective rationale predicated specifically on safety concerns" for demanding a passenger to stay in the vehicle or get out of the vehicle. Mendez, 137 Wn.2d at 220.

Deach did not say he feared for his safety and even if he did, such fear would not have been reasonable. Franulovich was outside the car, speaking with Wright, at about the time Deach contacted Troxclair. RP 12-13. Deach did not say Franulovich was agitated or making furtive

movements. Nor did Deach testify he suspected Troxclair was pretending to be asleep. He did not know Troxclair, so he could not know whether Troxclair had a reputation for violence or was known to carry a weapon. Since Troxclair was obviously sleeping and did not wake up until Deach knocked on the window, he posed no threat to Deach, his colleagues, or to citizens in the area.

Furthermore, Deach wondered why the car was parked where it was. Troxclair, who was asleep and obviously not in control of the vehicle, was not the one to question about the reason for being there. Deach thus had no objective rationale for awakening Troxclair and asking to speak with him.

"From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles." City of Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988). Passengers enjoy an independent, constitutionally protected privacy interest that is not reduced "merely upon stepping into an automobile with others." State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

Deach violated Troxclair's privacy as a passenger of a vehicle in Washington without authority of law. This Court should reverse the trial

court's denial of Troxclair's motion to suppress. Without the evidence found during the search, the State cannot prove Troxclair possessed methamphetamine. This Court should remand to the trial court for reversal with prejudice.

2. THE TRIAL COURT ERRED BY FAILING TO FILE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 6.1(d).

"CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial." State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). The written factual findings should address the elements of the crimes separately and state the factual basis for the legal conclusions as to each element. State v. Denison, 78 Wn. App. 566, 570, 897 P.2d 437, review denied, 128 Wn.2d 1006 (1995). The purpose of written findings and conclusions is to ensure efficient and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see Head, 136 Wn.2d at 622 ("A prosecuting attorney required to prepare findings and conclusions will necessarily need to focus attention on the evidence supporting each element of the charged crime, as will the trial court. That focus will simplify and expedite appellate review.").

The court's oral findings are not a suitable substitute for the written findings required by CrR 6.1(d). "A court's oral opinion is not a finding of fact." State v. Hescock, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a trial court's oral opinion is merely an expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Head, 136 Wn. 2d at 622.

Remand for entry of correct written findings and conclusions is the appropriate remedy. Head, 136 Wn.2d at 622-23; State v. Austin, 65 Wn. App. 759, 761, 831 P.2d 747 (1992). This Court should remand Troxclair's case for entry of written findings and conclusions as required by CrR 6.1(d).

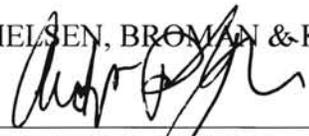
D. CONCLUSION

For the aforesaid reasons, the Court should reverse the trial court's denial of the motion to suppress evidence and remand with an order to dismiss with prejudice. Alternatively, this Court should remand for entry of written findings of fact and conclusions of law as required by CrR 6.1(d).

DATED this 18 day of December, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2013 JUN 12 PM 12:07

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SKAGIT

The State of Washington,

Plaintiff,

vs.

ROBERT TROXCLAIR,
Defendant.

) No.: 12-1-00332-6

) **FINDINGS OF FACT AND**
) **CONCLUSIONS OF LAW RE: 3.6**
) **HEARING**

I. FINDINGS OF FACT RE: 3.6 HEARING

On the 17th day of April, 2013, the Court found the following facts with respect to the CrR 3.5 hearing:

1. On February 16, 2012, shortly before midnight, Officer Deach was on patrol in the area of North Third Street and West Lawrence in Mount Vernon, WA, when he saw a vehicle in the area. Officer Deach was suspicious because he was familiar with this area and had never seen this vehicle before. He was aware of stolen vehicles and prowled vehicles in the area as well.
2. Officer Deach pulled over and approached the individual who was standing outside of the vehicle and asked him some questions.

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3. Officer Deach then looked inside the back seat of the vehicle ^{Deach} and saw the defendant slumped over. *testified the defendant was passed out or asleep. The defendant testified he was asleep.*
4. Officer Deach knocked on the window and asked the defendant if he would talk to him. (M)
TC
5. The defendant voluntarily exited the vehicle and stood next to it.
6. The officer asked the defendant what his name was and the defendant provided his name.
7. The officer ran the defendant's name through dispatch and found that he had a warrant.
8. The officer arrested the defendant, searched him incident to the arrest, and found a baggie of methamphetamine.
9. At some point prior to or concurrent with the defendant's arrest, two other officers arrived at the scene. One of them may have had his flashing lights on. None of the officers had their sirens on.
10. There was no indication that the defendant was not free to leave, up until his arrest on the warrant.

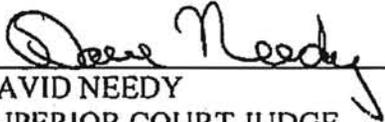
II. CONCLUSIONS OF LAW RE: CrR 3.6 hearing

On the 17th day of April, 2013, the court concluded the following with respect to the CrR 3.6 hearing:

1. The defendant voluntarily exited the vehicle and voluntarily provided his name.
2. The defendant was free to leave up until his arrest on the warrants.

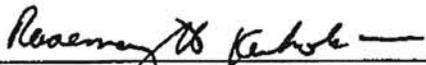
3. The motion to suppress the evidence seized from the defendant's person as a result of the search incident to his arrest on the warrants is denied.

DATED this 12 day of June, 2013.



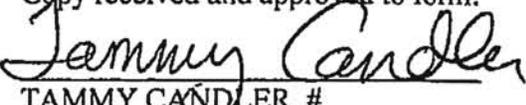
DAVID NEEDY
SUPERIOR COURT JUDGE

Presented by:



ROSEMARY H. KAHOLOKULA, #25026
Deputy Prosecuting Attorney

Copy received and approved to form:



TAMMY CANDLER, #
Attorney for Defendant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70557-1-1
)	
ROBERT TROXCLAIR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF DECEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE
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- [X] ROBERT TROXCLAIR
820 #1
7TH STREET
ANACORTES, WA 98221

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF DECEMBER 2013.

X *Patrick Mayovsky*

RECEIVED
CLERK OF COURT
12/19/13