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NO. 34355-0-II

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

STATE OF WASHINGTON, Respondent

v.

MARC WILSON RAILSBACK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JAMES E. RULLI
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-01472-5

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

In December, 2005, the court held a suppression hearing dealing with four separate defendants that were consolidated into one large suppression hearing. As a result of the hearing, the court entered Findings of Fact and Conclusions of Law Re: Defense Motions to Suppress. (CP 117). A copy of the Findings of Fact and Conclusions of Law Re: Defense Motions to Suppress is attached hereto and by this reference incorporated herein.

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant deals with the suppression hearing that was held in the Superior Court.

The rule in Washington is that challenged Findings of Fact entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d 363 (1997). The Appellate Court reviews the trial court's denial of a motion to suppress by considering whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Substantial

evidence is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d at 647.

In our case, the facts are basically uncontested. The officer felt that he had observed enough unusual behavior on the part of the driver to allow him to freeze the scene for further explanation as to what was going on. The level of articulable suspicion necessary to support an investigative detention under the Federal and State constitutions is a “substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). The suspicion must be individualized. State v. Thompson, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). The Appellate Court examines the reasonableness of the officer’s suspicion under the totality of the circumstances known to the officer at the time of the detention. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

As the trial court notes in the uncontested Findings of Fact (see attached CP 117), the patrol officer for the Vancouver Police Department observed the car driven by the defendant exit a parking lot of an AM/PM market pulling in front of the officer’s vehicle and proceeding northbound in the oncoming lane of traffic before making a left turn into an apartment complex. Because of the defendant’s driving, the officer activated overhead lights and followed the defendant’s car into the parking lot area.

The officer stopped the vehicle and asked the driver for a driver's license, vehicle registration and proof of insurance. The driver produced his driver's license and vehicle registration. The officer further noted that the defendant was acting extremely nervous, his head was moving from right to left, his eyes were darting back and forth to the floorboard of the car and his body was trembling. Based on the defendant's behavior, the fact that the officer was alone, that there was a passenger in the vehicle, time of day was approximately 12:07 a.m., the fact that the defendant did not stop immediately or shortly after the officer turned on his overhead lights, but continued traveling into the parking lot of the apartment complex, the officer asked the defendant to exit the vehicle. (Findings of Fact CP 117 pages 2-3). State v. Little, 116 Wn.2d 488, 806 P.2d 749 (1991).

As case law has indicated, any one of these factors is not of itself proof of any illegal conduct and is quite consistent with innocent travel. But when they are taken together, they amount to reasonable suspicion. Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d, 103 (1983). As noted in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1878, 20 L. Ed. 2d 889 (1968), that case itself involved a series of acts each of which perhaps innocent if viewed separately, but which taken together warranted further investigation.

For example, in Florida v. Royer, the police were aware that Royer was traveling under an assumed name, he paid for his ticket in cash with a number of small bills, he was traveling from Miami to New York, he put only his name and not an address on his checked luggage, and he seemed nervous while walking through the Miami airport. Florida v. Royer, 460 U.S. at 493, n.2, 502 (opinion of White, J.).

The lawful scope of a Terry stop may be enlarged or prolonged as needed to investigate unrelated suspicions that crop up during the stop. State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990); State v. Guzman-Cuellar, 47 Wn. App. 326, 336, 734 P.2d 966 (1987). The officer may maintain the status quo momentarily while obtaining more information. State v. Williams, 102 Wn.2d 733, 737, 689 P.2d 1065 (1984). But, to detain the suspect beyond what the initial stop demands, the officer must be able to articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity. State v. Henry, 80 Wn. App. 544, 550, 910 P.2d 1290 (1995).

When we review our facts, after the officer has the defendant out of the vehicle, and begins to ask him questions, the defendant tells the officer that he is nervous because he is on probation and does not want to get into trouble. As a result of the defendant's behavior, the fact that he was on probation, and not being able to fully watch the passenger in the

car while he was talking to the defendant, the officer, concerned for his safety while controlling the scene, called dispatch for a backup officer. While waiting for the backup officer to arrive, the officer confirmed through dispatch that the defendant was on probation and continued to talk to him. The officer asked the defendant if there was something in the car that might harm him. The defendant at that time told the officer that the passenger in the car had tossed him a bag after they saw the police car and told Railsback to stash the bag. The defendant said he thought the bag might have ecstasy tablets in it. When the backup officers arrived at the scene at approximately 12:19 a.m. (the initial stop was at 12:07 and the officer's backup arrived twelve minutes later), the officer also asked for a Department of Corrections Officer to come to the scene. This was based on the defendant's statements to the officer that he was on probation and there was a possibility that drugs were involved in this incident. (Findings of Fact CP 117 pages 3-4).

Case law is clear that officers have a right to expand the scope of the initial stop to encompass events occurring during the stop. State v. Belieu, 112 Wn.2d 587, 605, 773 P.2d 46 (1989). They are allowed to ask a few questions to determine whether a further short intrusion is necessary to dispel their suspicions. State v. Gonzales, 46 Wn. App. 388, 394-395, 731 P.2d 1101 (1986).

The defense has attempted to analogize our situation to that found in State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991). In Tijerina, an officer stopped the defendant's car after seeing it cross the fog line. When the defendant opened the glove box to get the vehicle registration, the officer noticed several small bars of soap, the kind commonly given out in motels, and decided to search the vehicle. The articulated basis for his suspicion was his knowledge of the local drug trade, specifically the Hispanics frequently sold controlled substances from motels, that the appellant and his companions appeared to be Hispanic. The stop in the Tijerina case was not sanctioned by the Appellate Courts because the officer was basically basing his decisions on ethnicity and motel soap. This is a far cry from the facts as previously articulated in this brief which are the verities on appeal from the Findings of Fact entered by the trial court. The officer in our situation was able to articulate his suspicions and those suspicions were further heightened by the comments made by the defendant concerning drugs and being on probation. This aroused the officer's suspicions and allowed the broadening of the scope of the stop. Guzman-Cuellar, 47 Wn. App. at 332. The State submits that it was a reasonable extension, not an unreasonable intrusion.

The defense in its brief also tries to analogize our case to State v. Henry, 80 Wn. App. 544, 910 P.2d 1290 (1994). Again, the factual

recitations are not similar. The officer in the Henry case stopped the vehicle and was not able to articulate the basis for his actions. In fact, he indicated to the court that his real motivation for the detention was that he was looking for weapons or anything else that the defendant had on him. (State v. Henry, 80 Wn. App. at 553). In a sense this was becoming a pretext stop without any sufficient justification demonstrated in the record. That is exactly the opposite of what we have in our situation.

The defendant also raises as an assignment of error on a small matter where he claims that the sergeant confirmed through dispatch that Railsback was on probation. The claim is that that was not accurate and that that did not support any of the findings. The parties entered into Stipulated Facts on Non-Jury Trial. (CP 139). In those stipulated facts under number 4, it indicates as follows: “Sergeant Graff confirmed through dispatch that defendant Railsback was on probation with the Department of Corrections (DOC), and asked for a DOC officer to respond. DOC Officers Campbell and John Degroat arrived at the scene within ten minutes of the call.”

A copy of the Stipulated Facts on Non-Jury Trial (CP 139) are attached hereto and by this reference incorporated herein. Clearly, the defendant’s argument in its brief is without merit. This matter was agreed to and stipulated between the parties at the time of trial.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 3^d day of November, 2006.

Respectfully submitted:

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APPENDIX "A"

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:
DEFENSE MOTIONS TO SUPPRESS**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

vs.

MARC WILLIAM RAILSBACK,
TINH QUOC TRAN,
JULIETTE MINH NGUYEN,
DUONG QUOC TRAN,
Defendant

Case No.: 05-1-01472-5
05-1-01474-1
05-1-01475-0
05-1-01473-3

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
DEFENSE MOTIONS TO SUPPRESS

This matter having come before the Court on the Defense Motions to Suppress and the Court having heard the testimony of the witnesses and being fully advised in the premises, finds as follows:

On June 30, 2005, Sgt Joe Graaff, a patrol officer for the Vancouver Police Department was traveling northbound on 104th Avenue in Vancouver at

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1 approximately 12:05 a.m. when the car driven by the defendant Marc Railsback
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4 exited the parking lot of a nearby AM-PM market, pulling in front of the officer's
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7 patrol vehicle and proceeded northbound in the oncoming lane of traffic before
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10 making a left turn into the Maple Ridge Apartments on 104th Avenue. Based upon
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13 the Defendant's driving, Sgt. Graaff activated the overhead lights on his vehicle
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16 and followed the defendant's car into an apartment parking lot. The driver
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19 continued driving after entering the parking lot, made a turn, and then pulled into a
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22 parking spot. Sgt Graaff made contact with the driver at his car and asked him for
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25 his driver's license, vehicle registration and proof of insurance. The driver
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27
28 produced his driver's license and vehicle registration.
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33 Sgt. Graaff noticed that the driver, Defendant Railsback was acting
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36 extremely nervous, his head was moving from right to left, his eyes were darting
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39 back and forth to the floorboard of the car and his body was trembling. Based on
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42 Railsback's behavior, the fact that Sgt. Graaff was alone, that there was a
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45 passenger in the vehicle, the time of day which was approximately 12:07 a.m., the
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48 fact that Railsback did not stop immediately or shortly after Sgt. Graaff turned on
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1 his overhead lights, but continued traveling into the parking lot of an apartment
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4 complex, Sgt. Graaff asked Railsback to exit the car.
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8 Where the officer has probable cause to stop a car for a traffic
9 infraction, the officer may, incident to such stop, take whatever
10 steps necessary to control the scene, including ordering the driver
11 to stay in the vehicle or exit it, as circumstances warrant. This is
12 a de minimus intrusion upon the drivers' privacy.
13 state v. Mendez, 137 Wn. 2d 208 (1999)
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19 After ordering Railsback out of his car, Sgt Graaff asked him why he was
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21 acting so nervous. Railsback responded he was on probation and didn't want to get
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23 into trouble. As a result of Railsback's behavior, the fact that he was on probation
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25 and not being able to fully watch the passenger in the car while he was talking to
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27 Railsback, Sgt Graff, concerned for his safety while controlling the scene, called
28
29 dispatch for a back up officer. While waiting for the back up officer to arrive Sgt
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31 Graaff confirmed through dispatch that Railsback was on probation and continued
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33 to talk to him. Sgt Graaf asked Railsback if there was something in the car that
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35 might harm him. Railsback told Sgt Graaff that the passenger in his car tossed him
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37 a bag after they saw the police car and told Railsback to stash the bag. Railsback
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1 said he thought the bag might have Ecstasy tablets in it. The back up officers,
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4 Wilken and Free arrived at the scene while Sgt Graaff was talking to Railsback at
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6
7 approximately 12:19 a.m. according to the computer aided dispatch log (CAD). At
8
9 approximately the same time Wilken and Free arrived Sgt. Graaff called dispatch
10
11 asking for a Department of Corrections officer to come to the scene. This was
12
13 based on Railsback's statements to Sgt. Graaff that he was on probation and there
14
15 was a possibility drugs were involved in this incident. Sgt. Graaff then detained
16
17 Railsback in the back of his patrol vehicle with the door left open. Railsback was
18
19 not handcuffed. Sgt. Graaff and Officer Wilken have the passenger identified as
20
21 Tin Tran exit the car, pat him down for weapons and question him about
22
23 Railsback's statement. While questioning Mr. Tran, DOC officers Campbell and
24
25 DeGroat arrive at approximately 12:28 a.m. After being advised by Sgt. Graaff
26
27 what defendant Railsback said DOC Officer Campbell questions him. Based upon
28
29 Railsback's statement, Campbell concluded that he had violated conditions of his
30
31 probation by committing the traffic infractions and associating with a drug user or
32
33 dealer, Tinh Tran. Campbell then arrests Railsback and places him into custody.
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1 Campbell begins searching the vehicle pursuant to RCW 9.94A.631 and discovers
2 marijuana and Ecstasy during the search.
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7
8 After the reading their constitutional rights to the defendants Railsback and
9
10
11 Tinh Tran, Railsback admitted that he was purchasing the marijuana from Tran and
12
13
14 that he was in possession of the Ecstasy tablets from earlier that day. Tran also
15
16
17 admitted that he was selling the marijuana to Railsback.
18
19

20
21 Based upon the above Findings of Fact this Court concludes that it was
22
23
24 reasonable for Sgt. Graaff to detain defendant Railsback for approximately ten
25
26
27 minutes while the back up officers arrived. In balancing the privacy interest of
28
29
30 defendant Railsback against Sgt Graaff's concern for his safety the ten minute
31
32
33 interval between the traffic stop and the back up officer's arrivals was a "minimal
34
35
36 and insignificant intrusion."
37
38

39
40 The Court further finds that Sgt. Graaff testified that the Defendant
41
42
43 Railsback was sitting in his patrol car when the DOC officers arrived. Defendant
44
45
46 Tinh Tran was being interviewed by officer Wilken and was laying on the ground,
47
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1 after being patted down for weapons, because he was feeling faint and light
2
3
4 headed. This is all occurring simultaneously to the arrival of the DOC officers.
5
6

7 Based upon the above Findings this court concludes that because the DOC
8
9 officer's arrival occurred during the detention of the defendants by the law
10
11 enforcement officers there was no discernible period of time that the Defendants
12
13 were being detained solely for the purpose of awaiting the DOC officers' arrival.
14
15 Thus, following the holding of State v. Mendez above, this court finds that any
16
17 violation of the Defendants freedom from intrusion was "de minimus". Therefore
18
19 the search of Defendant Railsback's car was lawful and the marijuana and Ecstasy
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21 seized as a result of the search is lawful.
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33 The Court further finds that as the officers were concluding the arrests of
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35 Railsback and Tinh Tran, at approximately 2:00 am, a white male, identified as
36
37 Brian Dyche, approached Sgt. Graaff and told him that he occupied the apartment
38
39 nearby and was observing what was going on outside from his upstairs window.
40
41 Mr. Dyche said that he saw the passenger in the front seat of Railsback's car
42
43 holding a cell phone to his ear when the officer was talking to Railsback and about
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1 thirty seconds later he heard noises and movement from the apartment below him.
2
3
4 He also heard the patio door of the apartment below him open and close. He did
5
6
7 not see anyone go outside the apartment. Mr. Dyche's patio door to his apartment
8
9
10 was open at this time. He subsequently looked outside from his patio balcony and
11
12
13 saw a white bag about 8-10 feet away that was lodged between two air
14
15
16 conditioning units which are about two and one-half feet from the defendant
17
18
19 Juliette Nguyen's patio. Brian Dyche, had previously gone out onto his patio
20
21
22 around 3:30 – 4:00 p.m. the previous day and had not seen the bag near the air
23
24
25 conditioning units at that time.
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28
29

30 Prior to talking to the police, Mr. Dyche had smelled the odor of marijuana
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32
33 coming from the apartment below them.
34
35
36

37 Officers Wilken and Landas then searched the area behind Mr. Dyche's and
38
39
40 defendant Juliette Nguyen's apartment building which is one of fourteen buildings
41
42
43 in the Maple Ridge complex at 306 NE 104th in Vancouver. Each building has
44
45
46 eight apartments except for the "D" building where Mr. Dyche and defendant
47
48
49 Nguyen reside, which has 12.
50

1 Tammy Schaffer, the manager of the apartment complex, testified that
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3
4 there's about fifty feet of grass in the areas between the buildings which is open to
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6
7 the guests and occupants of the apartments. She also testified that the occupants
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9 rent their units and patios and others are asked not to go onto an occupant's patio.
10
11 She further testified that the area around the "D" building where the defendant
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Tammy Schaffer, the manager of the apartment complex, testified that there's about fifty feet of grass in the areas between the buildings which is open to the guests and occupants of the apartments. She also testified that the occupants rent their units and patios and others are asked not to go onto an occupant's patio. She further testified that the area around the "D" building where the defendant Nguyen lived is not exclusively for the people who live there. She further testified that there are no walkways which lead from the parking area to the back of building "D" and that the public is not to be walking around in the area behind and between buildings and if someone was back there walking around at 2:00 a.m. he'd be asked to leave. She further testified that the hedges near the back of the defendant Nguyen's apartment are for landscaping purposes, not for privacy and they have no significance as to where a common area begins or ends.

The issue to be determined is whether the area adjacent to an apartment in a multi-unit complex is considered "curtilage" to the extent that there is an expectation of privacy in that area from the tenant who occupies the apartment.

1 Based upon the above findings this Court concludes that Courts have
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3
4 recognized a legitimate expectation of privacy in the curtilage, which is that area
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7
8 'so intimately tied to the home itself that it should be placed under the home's
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10 umbrella' of 4th Amendment protection.
11
12

13
14 Curtilage questions are evaluated with reference to four factors:
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16

17 The proximity of the area claimed as curtilage to the house; (2) whether the
18 area is included in an enclosure surrounding the house; (3) the nature of the
19 uses to which the area is put; (4) the steps taken by the resident to protect
20 the area from passersby.
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23

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27 Reviewing the four factors, this Court finds that the area where the bag was
28
29 seized was approximately 2-3 feet from the defendant Nguyen's patio. The area is
30
31 not included in any kind of enclosure surrounding the apartment; the area has a
32
33 hedge between the common area and the patio; the area is used for the placement
34
35 of two air conditioning units which are located 2-3 feet from the patio and are
36
37 encircled on three sides by the hedge; and there have been no steps taken by
38
39 Defendant to protect the area from passersby. In reviewing the above factors and
40
41 all of the testimony and photos admitted into evidence during this hearing this
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1 court finds Officer Landas had to walk behind the hedge right next to the defendant
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4 Nguyen's apartment wall, reach around the hedge and stoop over and pick up the a
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7 bag from the opposite side of the air conditioner where it was lodged. That this
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10 occurred at a time in the morning (approximately 2:00 a.m.) when no "reasonably
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12
13 respectful citizen" would be allowed to be walking back there.
14
15
16

17 An individual who lives in an apartment unit in a multi-unit complex does
18
19
20 not lose her constitutional protections against unreasonable searches simply
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22
23 because she lives in an apartment complex versus a single unit dwelling. The
24
25
26 curtilage of both the apartment and the home is protected by the Fourth
27
28
29 Amendment. The area in question here was so intimately tied to the occupancy of
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31
32 the apartment that it falls under the umbrella of the Fourth Amendment. The
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34
35 defendant, Juliette Nguyen had a reasonable expectation of privacy in the area near
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37
38 the hedges and air conditioning units located approximately 2-3 feet from the
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41 apartment's patio. The warrantless seizure of the bag is unconstitutional and
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44 suppressed.
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1 The Court further finds as follows that because of the odor of marijuana he
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4 smelled coming from the plastic bag seized behind the apartment, Officer Wilken
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7 advised Sgt. Graaff of what they had discovered.
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10
11 Officer Wilken then speaks to Defendant Tinh Tran, who says that his
12
13
14 cousin (Duong Quoc Tran) and his girlfriend Juliette live in the apartment where
15
16
17 the bag was found.
18
19

20
21 Based upon the arrest of Tinh Tran for possession and/or delivery of
22
23
24 marijuana, the bag of suspected marijuana seized from behind the apartment and
25
26
27 the statement by Tinh Tran that his cousin and girlfriend live in the apartment
28
29
30 Officer Wilken proceeds to contact the occupants of Apartment 27. Officer
31
32
33 Wilken testified that when the defendant, Juliette Nguyen opened the door he
34
35
36 smelled the odor of fresh cut marijuana emitting from inside the apartment.
37
38
39 Officer Wilken asked her if he could come inside and speak to her and asks if John
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41
42 (Duong Quoc Tran) is there. She tells him he isn't there. Officer Wilken tells her
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45 to take a minute to think about it and he'll be back to talk to her. She opens the
46
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48 door a second time and let's Officers Wilken and Landas into the entry way of the
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1 apartment. Officer Wilken tells her about the bag discovered in the back and he
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3
4 knows there's someone else in the apartment. He then reads defendant Nguyen her
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6
7 constitutional rights and tells her he wants to gather everyone in the living room
8
9
10 area to talk. An Asian male, later identified as John (Duong Quoc Tran) goes into
11
12
13 the living room with a baby. There is another Asian male, female and child also in
14
15
16 the living room. Officer Wilken then takes Ms. Nguyen to the bedroom to talk to
17
18
19 her. After concluding his discussion with her, he takes John back to the bedroom
20
21
22 to talk to him. After concluding his conversation with John, Officer Wilken takes
23
24
25 Ms. Nguyen back to the bedroom a second time to talk to her. At this time DOC
26
27
28 officers Campbell and DeGroat enter the apartment. John and Ms. Nguyen
29
30
31 subsequently agree to search of the apartment at Officer Wilken's request. Officer
32
33
34 Wilken goes out to his patrol car and returns to the apartment with Ferrier Consent
35
36
37 to Search forms which John and Ms. Nguyen agree to sign. Officer Landas and
38
39
40 DOC Officers Campbell and DeGroat begin searching the apartment. \$584.00 was
41
42
43 found in a jar in a closet, Ziploc bags, a sharpie pen and multi-colored rubber
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45
46 bands were discovered. \$2400.00 and a car title were found in a dryer. A
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1 notebook which contained names and numbers which defendant Nguyen admitted
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3
4 belonged to her was found. A food saver-heat sealer was found under the kitchen
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6
7 sink. John (Duong Quoc Tran) was arrested and taken into custody. Juliette
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11 Nguyen was also arrested, but allowed to remain out of custody for 24 hours to
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13
14 take care of her baby.
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17 Based upon the above findings this Court concludes that as a general rule,
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20 warrantless searches and seizures are per se unreasonable. Consent is one of the
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22
23 recognized exceptions to the warrant requirement of the Fourth Amendment.
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27 The court in *State v. Ferrier*, 136 Wn2d 103, stated:
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30 When police officers conduct a knock and talk for the
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32 purposes of obtaining consent to search a home, and thereby
33
34 avoid the necessity of obtaining a warrant, they must,
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36 prior to entering the home, inform the person from whom
37
38 the consent is sought that he or she may lawfully refuse to
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40 consent to certain areas of the home. The failure to give these
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42 warnings, prior to entering the home, vitiates any consent
43
44 given thereafter.

45 The Washington State Supreme Court subsequently defined a
46
47 “knock and talk” as:
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50 [A] procedure, [where police officers] not having obtained a

1 search warrant, proceed to premises where they believe
2 contraband will be found. Once there they knock on
3 the door and talk with the resident, asking if they may enter.
4 after being allowed to enter, the officers then explain why
5 they are there, that they have no search warrant, and ask
6 for permission to search the premises. *State v. Bustamante-Davila*,
7 138 Wn2d 964, 977
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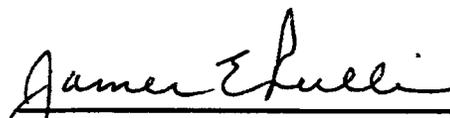
14 The evidence here shows that Officer Wilken had one suspect in custody for
15 possession and/or delivery of marijuana; Officers had discovered a bag of
16 marijuana behind the apartment; and Tinh Tran stated that his cousin and his
17 girlfriend lived in the apartment. When Officer Wilken proceeded to knock on the
18 apartment door and talk to the occupants without a warrant he did so with the
19 intent to further the narcotics investigation, to look for other suspects and to search
20 for contraband. After being allowed to enter the apartment the first time by
21 defendant Nguyen, Officer Wilken had a duty to inform Nguyen of her Ferrier
22 warnings and her right to lawfully refuse any consent to search of the apartment.
23 Officer Wilken not only failed to give Ms. Nguyen her Ferrier warnings the first
24 time he entered the apartment, he failed to do so the second time.
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2 The State's attempt to distinguish receiving consent to enter from consent to
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4 search is not persuasive. As stated by the Court in *State v. Kennedy*, 107 Wn. App
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6
7
8 972 (2001):
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10 . . . the officer's request for permission to enter, is in effect
11
12 a request for permission to "search" for anything in plain view.
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15
16 The entry into the apartment was unlawful and all evidence seized incident
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19 to the unlawful entry is suppressed.
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25 Dated this 5 day of January, 2006
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33 _____
34 JUDGE JAMES E. RULLI
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APPENDIX "B"

STIPULATED FACTS ON NON-JURY TRIAL

3

FILED

JAN 10 2006

JoAnne McBride, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

MARC WILLIAM RAILSBACK,

Defendant.

No. 05-1-01472-5

STIPULATED FACTS ON NON-JURY
TRIAL

COMES NOW Plaintiff, State of Washington appearing by and through Kasey T. Vu, Deputy Prosecuting Attorney for Clark County, and Defendant Marc William Railsback, in person and with his attorney James J. Sowder, Defendant having previously entered a knowing, intelligent, and voluntary written waiver of his right to trial by jury, and of his right to hear and confront witnesses against him and of his right to call witnesses on his own behalf and to compel their attendance, and of his right to testify on his own behalf or to remain silent at trial, and the Defendant and Plaintiff stipulate to the following undisputed facts:

1. On June 30, 2005 at approximately 12:07 AM, SGT Joe Graaff of the Vancouver Police Department (VPD) conducted a traffic stop on the car that Defendant Marc Railsback was driving. The traffic stop occurred in the parking lot of an apartment complex located at 306 NE 104th Avenue in Clark County, Washington.
2. *Sgt Graaff contacted the Defendant Railsback at his car and requested his driver's license, car registration and insurance.* Upon contact with Defendant Railsback, SGT Graaff requested that Defendant Railsback exit his car, and continued their contact at the patrol car, behind Defendant Railsback's car. Inside the car was a male of Asian descent sitting in the front passenger seat. Defendant Railsback was the registered owner of the car.

*JR
KTV
JJA*

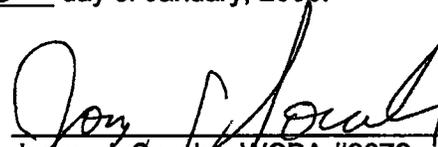
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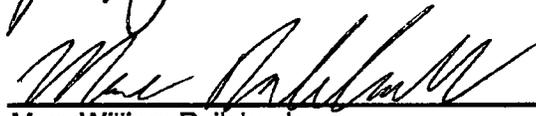
- 1 3. During the contact with Defendant Railsback, SGT Graaff found out that he was on
2 probation, and that there may be contraband inside the car.
- 3 4. SGT Graaff confirmed through Dispatch that Defendant Railsback was on probation with
4 the Department of Corrections (DOC), and asked for DOC Officer ~~Rees Campbell~~^{Campbell} to
5 respond. DOC Officers Campbell and John Degroat arrived at the scene within ten
6 minutes of the call.
- 7 5. The DOC officers confirmed Defendant Railsback's probation status, as well as the
8 conditions of his violation. After talking with Defendant Railsback, DOC Officer
9 Campbell searched his car.
- 10 6. During the search of Defendant Railsback's car, DOC Officer Campbell found a bag
11 behind the driver's seat that contained several plastic packages of green vegetable
12 matter that he suspected to be Marijuana, as well as a plastic bag underneath the
13 driver's seat that contained several pills that he suspected were Ecstasy tablets, based
14 on his training and experience. DOC Officer Campbell turned over the suspected
15 contraband to VPD Officers at the scene.
- 16 7. SGT Graaff processed the contraband found inside Defendant Railsback's car and
17 submitted it into VPD Evidence. The VPD Evidence Custodian sent the suspected
18 Ecstasy tablets to the Washington State Patrol Crime Lab for testing.
- 19 8. Cathy Dunn is a forensic scientist at the Washington State Patrol Crime Lab, who is
20 qualified as an expert in the use of recognized scientific tests to analyze various
21 substances and thereby identify or determine the presence of controlled substances,
22 including 3,4-methylenedioxymethamphetamine (MDMA), a Schedule I controlled
23 substance. MDMA is commonly referred to as Ecstasy. Cathy Dunn received the five
24 tablets from VPD Evidence, and tested one of them. She found that the tablet contained
25 3,4-methylenedioxymethamphetamine (MDMA).
- 26 9. The search of Defendant Railsback's car that yielded the five tablets occurred on June
27 30, 2005, in Clark County, State of Washington.

The Parties further stipulate and agree that this Stipulation and the foregoing facts may be admitted into evidence and considered by the court as evidence in the trial of the above entitled Cause, without the necessity of any further testimony or evidence.

DATED this 10 day of January, 2006.


Kasey T. Vu, WSBA #31528
Deputy Prosecuting Attorney
Attorney for Plaintiff


James J. Sowder, WSBA #9072
Attorney for Defendant


Marc William Railsback
Defendant

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