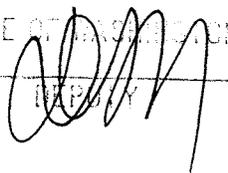


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

NO. 37649-1-II
Cowlitz Co. Cause NO. 07-1-00768-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ZACHARY LOREN BECK,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. CAN A PROBATION OR PAROLE OFFICER SEARCH THE PROBATIONER'S VEHICLE WITHOUT A SEARCH WARRANT WHEN HE OR SHE HAS A REASONABLE WELL FOUNDED SUSPICION THAT THE PROBATIONER HAS VIOLATED HIS OR HER PROBATION?
2. SHOULD A CONVICTION BE AFFIRMED WHEN THE UNTAINTED EVIDENCE UPON WHICH THE TRIAL COURT RELIED WOULD HAVE OVERWHELMINGLY LED TO A GUILTY VERDICT?

II. SHORT ANSWERS

1. **Yes.** A probation or parole officer can search the probationer's vehicle without a search warrant when he or she has a reasonable well-founded suspicion that the probationer has violated his or her probation.
2. **Yes.** A conviction should be affirmed when the untainted evidence upon which the trial court relied would have overwhelmingly led to a guilty verdict.

III. FACTS

On June 19, 2007, the appellant was charged with Violation of the Uniform Controlled Substances Act and Driving While License Suspended or Revoked in the Third Degree. Transcript Volume II, p. 205-206. On April 2, 2008, Judge Stephen Warning of the Cowlitz County Superior Court presided over the appellant's motion to suppress the evidence. Transcript Volume I, p. 1-17. The appellant challenged the

warrant-less search of his vehicle and did not present any evidence or witnesses at the motion hearing. Transcript Volume I, p. 14.

At the motion hearing, Dan Johnson testified to being a Community Corrections Officer and supervising the appellant for a little over a year. Transcript Volume I, p. 1-2. While on supervision, he was required to obey all laws and not use any drugs. Transcript Volume I, p. 3. On June 8th, 2007, Mr. Johnson witnessed the appellant drive his black Chevrolet Silverado truck. Mr. Johnson knew he had a suspended driver's license and followed him to the parking lot of Twin City Shopping Center. He was not in his vehicle and Mr. Johnson waited for him to return to his vehicle. Transcript Volume I, p. 4-5 and 10-11. When the appellant returned to his vehicle, Mr. Johnson noticed his eyes appeared a bit constricted and his arm was bandaged up with a little piece of cotton. Mr. Johnson suspected he had used heroin. The appellant confessed to not having a license and was arrested for driving with a suspended license. Transcript Volume I, p. 5-6 and 9.

Mr. Johnson called the Longview Police Department for assistance and Officer Tim Watson responded to the scene. Transcript Volume I, p. 5-6. Officer Watson advised Mr. Johnson that Officer Angel of the Longview Police Department contacted the appellant the night before for overdosing on heroin at his residence. Based on Officer Watson's

information and the appellant's physical appearance, Mr. Johnson suspected the appellant was using drugs and there were drugs in the vehicle. Transcript Volume I, p. 6-8. Todd Dillmon, a Community Corrections Officer present at the scene, also suspected the appellant might have drugs in the vehicle, searched the vehicle, and found drugs under the driver's seat. Transcript Volume I, p. 11-13.

Judge Warning considered the evidence presented and denied the appellant's motion to suppress the evidence. Transcript Volume I, p. 14-17. Judge Warning held that the proper analysis is under the reasonable suspicion standard attached to a parolee/probationer, that the initial contact and arrest of the appellant was proper, and that there was sufficient evidence, based on the totality of the circumstances, to suspect there were drugs in the appellant's vehicle. Transcript Volume I, p. 14-17.

On April 9, 2008, the appellant moved to represent himself. Judge Warning advised him against representing himself and informed him of the risks in representing himself. He indicated he understood the risks and insisted on representing himself. Judge Warning granted his request and appointed Thad Scudder as his standby counsel. He asserted the defense of unwitting possession. Transcript Volume I, p. 22-34.

On May 7, 2008, the appellant moved to suppress all evidence pertaining to his DOC Negotiated Sanction. The State sought to introduce

his admission to possessing cocaine during his DOC Negotiated Sanction. Judge Warning held that any plea negotiations would be inadmissible, but his admission to possessing cocaine was admissible and he was free to present evidence that his admission was for the purpose of getting a lenient sentence. Transcript Volume IV, p. 2-4. On May 18, 2008, and May 28, 2008, Judge Warning reiterated his ruling with regards to the admissibility of the appellant's admission to possessing cocaine. Transcript Volume I, p. 44-45 and Transcript Volume IV, p. 25-26.

On June 9, 2008, Judge Warning presided over the appellant's jury trial. Transcript Volume I, p. 71-82. The State indicated that a 3.5 hearing was not required because Judge Warning previously held that his admission at the DOC Negotiated Sanction was admissible and the State did not seek to introduce any other statements by the appellant. Transcript Volume I, p. 44-45 and 85 and Transcript Volume IV, p. 2-4 and 25-26. The appellant was tried on charges of Violation of the Uniform Controlled Substance Act, Tampering with a Witness, Bail Jumping, and Driving While License Suspended in the Third Degree. Transcript Volume I, p. 78.

The bail jump charge stemmed from his failure to appear in court on November 27, 2007. At the time, he was charged with Violation of the Uniform Controlled Substances Act, was released on bail with reporting

conditions, and was ordered to appear on that date by Judge James Warne of the Cowlitz County Superior Court. Transcript Volume II, p. 203-208 and 217-219. During the trial, he pled guilty to the Driving Suspended charge and Judge Warning dismissed the Tampering with a Witness charge. Transcript Volume II, p. 154 and 219-222.

At trial, Dan Johnson testified to being a Community Corrections Officer, supervising the appellant for over a year, and being familiar with his handwriting. Transcript Volume I, p. 97-99. Mr. Johnson recognizes his handwriting in Exhibit # 1, Exhibit # 4, and Exhibit # 5. Transcript Volume I, p. 99-101. Frank Hauschildt, a sergeant with the Cowlitz County Jail, also recognizes the appellant's handwriting in Exhibit # 1. Transcript Volume II, p. 278 and 284-285. Exhibit # 1 is a handwritten letter found by jail line officer Joel Treichel. Transcript Volume II, p. 160-163 and 239-243. Exhibit # 4 is the appellant's handwritten motion for order directing service of subpoenas. Exhibit # 5 is his handwritten demand for discloser. All three exhibits are in the appellant's handwriting. Transcript Volume I, p. 99-101.

On June 8, 2007, Mr. Johnson and some other Community Corrections Officers, including Todd Dillmon, conducted some field work and observed the appellant drive a black Chevy Silverado. Mr. Johnson recognized the vehicle as belonging to the appellant and knew it was

registered to his wife. Transcript Volume I, p. 101-103, 121-122, and 132-133. Mr. Johnson knew he did not have a valid driver's license and followed him to the Twin City Shopping Center in the City of Longview, County of Cowlitz, and State of Washington. Mr. Johnson maintained constant visual of his vehicle and noted that he was the lone occupant in the vehicle. When Mr. Johnson arrived at the shopping center, the appellant was not in his vehicle. Mr. Johnson waited at the vehicle and contacted him as he returned to the vehicle fifteen minutes later. He was upset, admitted to not having a license, and arrested for driving without a license. Transcript Volume I, p. 103-107.

Mr. Johnson called the Longview Police Department for assistance. Officer Tim Watson responded to the scene and spoke with Mr. Johnson about the appellant. Subsequently, Mr. Dillmon obtained permission from his supervisor and searched the appellant's vehicle. Mr. Dillmon found a bag with a white powdery substance underneath the driver's seat. The white powdery substance appeared to be cocaine. Transcript Volume I, p. 106-108, 124-129, and 132-135. When the bag was found, the appellant appeared head hung disappointed and hung his head down. Transcript Volume I, p. 139-140. Jason Dunn, a forensic scientist with the Washington State Patrol Crime Laboratory, tested and

confirmed the white powdery substance is cocaine. Transcript Volume II, p. 178-182.

On June 19, 2007, Jessica Johnston, a Community Corrections Officer, was the hearings officer in the appellant's Negotiate Sanction hearing regarding his failure to obey all laws and being in violation of his supervision. Transcript Volume II, p. 184-187. He was in custody at the jail and knowingly and willingly admitted to possessing cocaine on June 8, 2007. Transcript Volume II, p. 187-190.

On May 4, 2008, Joel Treichel, a line officer with the Cowlitz County Jail, conducted a large-scale cell search of the entire A Unit of the jail. Transcript Volume II, p. 156-160. Kevin Robinson was an inmate housed in A Unit. When Mr. Treichel searched Mr. Robinson's cell, he found a two page handwritten letter, Exhibit # 1, by Mr. Robinson's bed and belongings. Transcript Volume II, p. 160-163 and 239-243.

While Exhibit # 1 does not mention the names of Mr. Robinson and the appellant, Transcript Volume II, p. 243-248 and 265-266, Mr. Treichel suspected the letter was from the appellant as it references his charges and tells Mr. Robinson to write a notarized statement on the appellant's behalf. Inmates often use codes or nicknames when writing to each other in the jail because jail policies forbid inmates from writing to each other. At the time, the appellant and Taylor Conley were inmates

housed in B Unit of the jail and B Unit is directly next to A Unit.

Transcript Volume II, p. 162-165 and 171.

The first page of Exhibit # 1 states:

Mr. Clean, Damn it's good to hear from you bro. I miss you brother. I send my love and respect and I need to know your DOC # so I can drop you a line and put \$ on your books. If anyone has your back you know I do brother. Wherever you go I will be sure to send word so you are taken care of. You know how we roll – Ha! Death before dishonor. WhitePower. I'll try to get a pig to send over some coffee and food. If not I will get you a phone card at least I can get that thru the door. Don't sign your plea yet bro. I need to interview you before you go to trial and I need that statement. Put A KITE IN TONIGHT For the Notary. Copy what's on the second page of this letter word for word bro then get it notarized and send it thru the door get a copy and mail it to THAD SCUDDER at po Box 757 Kelso, WA 98626. I love you bro. Hail Victory! WHITE POWERS14AN88S. Exhibit # 1 and Transcript Volume II, p. 239-241.

The second page of Exhibit # 1 states:

Copy and send back thru On June 7 of 07 Lynette Beck lent me her black pickup to move some furniture from my moms to my new place. During one of these trips between my place and my mom's a cop got behind me so I grabbed my coke and stashed it under my seat. I was driving so it would have been under the driver's seat. I was so paranoid about the cop I forgot all about the coke until I heard that Zach Beck was arrested for cocaine that DOC found in his wife's truck. Anyway I returned Lynette's truck to her that night, the same night I borrowed it. I had it for about 4 hours. The coke was in a clear plastic bag but it was only a very small amount. I use it whenever I have things I need to get done but just don't have the energy. I feel horrible for what Zach is being put threw over all of this, because it truly is my fault. Sincerely, Kevin Robinson. Don't copy this part ->[Notarize it bro. My love and respect.]. Exhibit # 1 and Transcript Volume II, pg. 241-243.

The appellant acknowledged the drugs were found in his vehicle, but denied knowing that the drugs were in his vehicle. Transcript Volume II, p. 288 and 294. Mr. Robinson is a very good friend of the appellant and testified on his behalf. Mr. Robinson had difficulty recalling the events in question and could not testify without referencing his written notarized statement, Exhibit # 16. Transcript Volume II, p. 230-234 and 267.

Exhibit # 16 states:

On June 7th of 2007 Lynette Beck lent me her black pick up to move some furniture from my moms to my new place. During one of these trips between my place and my moms a cop got behind me, so I grabbed my coke and stashed it under my seat. I was driving so it would have been under the driver seat. I was so paranoid about the cop I forgot all about the coke until I heard that Zach Beck was arrested for cocaine that D.O.C. found in his wife's truck. Anyway I returned Lynette's truck to her that night, the same night I borrowed it. I had it for about 4 hours. The coke was in a clear plastic bag but it was only a very small amount. I use it whenever I have things I need to get done but just don't have the energy. I feel horrible for what Zach is being put threw over all of this, because it truly is my fault. Sincerely, Kevin Robinson. Exhibit # 16.

Mr. Robinson testified to the contents contained in Exhibit # 16. Transcript Volume II, p. 230-234. Mr. Robinson wrote and notarized Exhibit # 16 on May 6, 2008. Transcript Volume II, p. 238. Mr. Robinson also wrote another notarized statement that is an exact copy of Exhibit # 16, Exhibit # 17. Transcript Volume II, p. 239. Mr. Robinson's

notarized statement is exactly the same as that which is contained on the second page of Exhibit # 1. Transcript Volume II, p. 243.

When confronted with the fact that Exhibit # 1 is in the appellant's handwriting and that Exhibit # 16 is in his own handwriting, Mr. Robinson claimed to have forged the appellant's handwriting and wrote both letters. Mr. Robinson explained that Taylor Conley lent him a handwritten motion by the appellant and he forged the appellant's handwriting and wrote Exhibit # 1 in an attempt to implicate the appellant and get a more lenient plea deal. Mr. Robinson indicated the reason why Exhibit # 1 did not mention his name or that of the appellant was because he did not want to be liable for forgery. Transcript Volume II, p. 243-248 and 265-266.

Prior to writing his notarized statement, Mr. Robinson had contact with the appellant about his case. On October 3, 2007, Mr. Robinson was an inmate at the jail and called the appellant. The call was recorded and played for the jury. The call went as follows:

You have a call from, "Hey, Zach it's me Kevin" an inmate at the Cowlitz County Department of Corrections. You will not be charged for this call. This call is from a correctional institution and is subject to monitoring and recording. If you do not wish to accept this call, please hang up now. To accept the call, press zero. Thank you for using Communix. Go ahead with your call.

Voice: (inaudible), Kevin.

Voice: What's going on? It's --

Voice: I know it's -- whose your attorney?

Voice: Sam Wardle.

Voice: Sam Fucking Wardle. I thought it was -- I really thought it was Thad Scudder.

Voice: No.

Voice: Alright. Well, hey, I'm going to (inaudible) today and I going to use a blank spot and I am going to replace is with Sam Wardle. "Dear Blank spot, I am writing this letter as a statement in the cause of Zach Beck and his possession charge that Cowlitz County charged him with back in June." It happened in June, right?

Voice: Yes. It did.

Voice: "I am a business associated of both Zach Beck and his wife, Lynette Beck. I have (inaudible) both of their automobiles in the past as well for traveling and (inaudible) etc. etc. Back in June of this year when I asked to borrow Zach Beck's 2007 Chevy Silverado, I had some cocaine in a small baggy on my person at that time. (inaudible) to my friend's house and went also to my mother's house at (inaudible) Lane in Kelso. I had the truck for about three hours. And in that time period I lost my bag of cocaine. I thought my girlfriend at that time had stolen it from me but instead it had somehow fallen from my pocket during all the activity of moving my personal property and getting in and out of the truck. It was a few days later when I had heard that Zach Beck had been charged with a bag of cocaine. I did not come forth because I was scared of losing my friendship with both Zach and Lynette Beck and they are against drugs. I would also like to add that if Zach Beck had known I was using drugs he would never have let me use his truck. Both Zach and Lynette are Christians and have done a lot to help me in the past and (inaudible). I couldn't have it on my conscience any more and I can't let Zach pay for a possession that wasn't his. Zach Beck did not know that the dope was in that truck and I am

absolutely positive that that cocaine was mine. (inaudible) in the beginning of June and that's when my cocaine came up missing. I take full responsibility for that possession of cocaine charge as is because the bag of cocaine was actually mine. Kevin (inaudible) under penalty of perjury under the laws of the State of Washington (inaudible) true and correct to the best of my knowledge. Dated Kevin Robinson (inaudible)." And that's it. Transcript Volume II, p. 257-259.

The jury found the appellant guilty of both Violation of the Uniform Controlled Substances Act and Bail Jumping. Transcript Volume III, p. 352-354. On June 11, 2008, Judge Warning sentenced him to 16 months in prison and noted that, "everyone is entitled to a trial. And again that shouldn't be any basis to impose a greater or lesser sentence. What is real clear to me from listening to the testimony and was real clear to the jury based on their verdict however is that you imposed upon something as pathetic as Kevin Robinson to come up with a ludicrous story in order to attempt to avoid responsibility for what you did. And nobody is entitled to suborn perjury to do that. The tampering charge was dismissed because it did not fit the offense. Why you were not charged with soliciting perjury, I don't know." Transcript Volume III, p. 358.

IV. ARGUMENTS

1. **THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM A WARRANT-LESS SEARCH OF HIS VEHICLE BECAUSE HIS COMMUNITY CORRECTIONS OFFICER HAD A REASONABLE WELL FOUNDED**

SUSPICION THAT HE VIOLATED THE TERMS OF HIS SUPERVISION AND THERE WERE DRUGS IN HIS VEHICLE.

Warrant-less searches of constitutionally protected areas are presumed unreasonable absent proof that one of the well-established exceptions applies. Katz v. United States, 389 U.S. 347, 357 (1967); State v. Ladson, 138 Wash.2d 343, 349 (1999). Exceptions to the warrant requirement are to be “jealously and carefully drawn.” State v. Hendrickson, 129 Wash.2d 61, 72 (1996) (quoting State v. Bradley, 105 Wash.2d 898, 902 (1986)). The State bears the burden of establishing an exception to the warrant requirement. State v. Potter, 156 Wash.2d 835 (2006).

Washington recognizes a warrant-less search exception, when reasonable, to search a parolee or probationer and his home or effects. State v. Campbell, 103 Wash.2d 1, 22-23 (1984) (citing Hocker v. Woody, 95 Wash.2d 822, 826 (1981)); See (State v. Coahram, 27 Wash.App. 664, 666-667 (1980)). A probation or parole officer may search the probationer’s vehicle without a warrant so long as the search is based upon a well-founded suspicion that a violation of probation has occurred. Coahran, 27 Wash.App. at 666-667, State v. Patterson, 51 Wash.App. 202, 209 (1988).

A “well-founded suspicion” is analogous to the cause requirement of a Terry stop. Simms, 10 Wash.App. at 87, Terry v. Ohio, 392 U.S. 1, 9 (1968). Reasonable suspicion for a Terry stop must be based upon “specific and articulate facts which, taken together with rational inferences from those facts, reasonably warrant [the search].” Terry, 392 U.S. at 21. A reasonable suspicion requires only sufficient probability, not absolute certainty. New Jersey v. T.L.O., 469 U.S. 325, 346 (1985).

In Coahran, a citizen reported to a police officer that a parolee had threatened him. The police officer notified the parolee’s parole officer and the parole officer ordered the parolee’s arrest and a search of the parolee’s truck. Subsequently, the police spotted the parolee in his truck, stopped the truck, arrested the parolee, and searched the truck. Coahran, 27 Wash.App. at 665-666. The court found the citizen-informant provided the necessary well-founded suspicion and the entire truck was properly subject to search. Id. at 667.

In Campbell, the defendant was on work release, found to be drunk at the work release facility, and suspended on work release for alcohol consumption. A work release supervisor proceeded to do a warrant-less search of the defendant’s vehicle for evidence of alcohol consumption. Campbell, 103 Wash.2d at 11-12. The court held that the warrant-less

search of the defendant's vehicle by the work release supervisor was reasonable to search for evidence of alcohol. Id. at 22-23.

In Patterson, an anonymous caller identified the defendant as a suspect in an armed robbery of a convenience store. The defendant was on parole at the time of the crime and the anonymous tip led to the defendant's photo being tentatively identified as the suspect by the store clerk. Another witness to the robbery reported that the robber was armed with a gun and the police had information that a gun might be in the defendant's car. The court held that there was reasonable suspicion to search the defendant's vehicle without a warrant. Patterson, 51 Wash.App. at 204 and 209.

As in Coahran, in Campbell, and in Patterson, there was sufficient evidence and a reasonable well founded suspicion to search the appellant's vehicle without a warrant. The appellant was being supervised by Community Corrections Officer Dan Johnson and was not to use any drugs. On June 8th, 2007, Mr. Johnson contacted him and noticed that his eyes appeared a bit constricted and his arm was bandaged up with a little piece of cotton. Based on his experience, Mr. Johnson suspected he had used a controlled substance. Transcript, Volume I, p. 1-6. The appellant was arrested for driving with a suspended license and Officer Watson responded to the scene. Officer Watson relayed information that Officer

Angel had contacted the appellant the night before for overdosing on heroin at his residence. Transcript Volume I, p. 5-8. Based upon the totality of the evidence, there is a reasonable well-founded suspicion that the appellant used drugs and there were drugs inside his vehicle.

The appellant's reliance on State v. Fisher, 145 Wash.2d 209 (2001), is unpersuasive because it is distinguishable from the appellant's case. In Fisher, the prosecutor filed an affidavit and sought a bench warrant for the defendant's violation of her release conditions. The affidavit states:

1. I am the assigned deputy prosecuting attorney in the case of State v. Carrie Fisher, Cause Nos. 98-1-00330-5 and 98-1-00371-2.
2. CCO Alice Rogers informed me on January 7, 1999, that a client (probationer) of hers told her that she was present at the January 4, 1999, docket when defendant Fisher pled guilty in the above stated cause numbers, and overheard Ms. Fisher say that there was no way she was going to stick around for sentencing. This client also told CCO Rogers that she could tell that Ms. Fisher was high on drugs at the time of the change of plea hearing, and that she also is acquainted with Ms. Fisher. CCO Rogers stated that the client's information was unsolicited and not the reason for the contact with the client.
3. Your affiant was also informed by the grandmother of Ms. Fisher's child in the last week that she knows Ms. Fisher had been spending considerable time, since posting bail, at a known drug user's home, including spending at least one night there, and using drugs there.
4. Finally, your affiant was informed by WWPD, Det. Castillo, that he had been surveilling a known drug user's home here in Walla Walla, and observed Ms. Fisher present

there on several occasions since being released on bail. Id. at 213.

In Fisher, the court held that the prosecutor's affidavit did not provide specific and articulate facts of a willful violation of any release conditions. The affidavit did not provide any indicia of reliability or specificity that the defendant had violated any conditions of her release. The probationer witness present in court and the defendant's grandmother were unnamed and do not have any indicia of reliability or truthfulness. Detective Castillo's observations do not constitute a violation of any of the defendant's release conditions. Id. at 228-230.

Unlike Fisher, the evidence in the appellant's case does provide an indicia of reliability and specificity with regards to him violating his supervision. All the witnesses are named and had direct contact with the appellant. On June 7, 2007, Officer Angel witnessed the appellant overdosing on heroin at his residence and his knowledge of the appellant is transferable to Officer Watson through the fellow officer rule. On June 8, 2007, Mr. Johnson witnessed the appellant's eyes being a bit constricted and his arm being bandaged up with a little piece of cotton. His physical appearance is consistent with someone using heroin and is consistent with his overdosing on heroin the night before. Transcript Volume I, p. 1-8. Based upon the totality of the evidence, there is a reasonable well-founded

suspicion that he violated his supervision by using and possessing drugs. Therefore, the trial court correctly denied his motion to suppress the evidence that was seized from the warrant-less search of his vehicle. Transcript Volume I, p. 14-17.

2. IT WAS HARMLESS ERROR TO ADMIT THE APPELLANT'S CONFESSION TO JESSICA JOHNTSON BECAUSE THE UNTAINTED EVIDENCE UPON WHICH THE TRIAL COURT RELIED WOULD HAVE OVERWHELMINGLY LED TO A GUILTY FINDING.

The appellant's custodial statements may be admitted as substantive evidence if the State establishes that he was informed of his constitutional rights and he knowingly and voluntarily waived his rights. State v. Brown, 132 Wn.2d 529, 582 (1997) and Miranda v. Arizona, 384 U.S. 436, 475 (1966). Miranda warnings are required when the State's inquiry is (1) custodial, (2) interrogation, and (3) by an agent of the State. Miranda, 384 U.S. at 444. CrR 3.5 was enacted to implement the constitutional requirement that the appellant be afforded a hearing on the voluntariness of his confession prior to its admission at trial. State v. Summers, 52 Wash.App. 767, 774 (1988).

While CrR 3.5 hearings are mandatory where the State seeks to use custodial statements of the appellant, the failure to hold such a hearing does not automatically constitute prejudice and does not automatically entitle the appellant to a new trial. State v. Renfro, 28 Wash.App. 248, 253

(1981); State v. Reuben, 62 Wash.App. 620, 626-627 (1991); Summers, 52 Wash.App. at 773-774; State v. Lopez, 67 Wash.2d 185, 187-188 (1965); and State v. Johnson, 35 Wash.App. 380, 383-386 (1983). “A reviewing court may examine the record to see whether the statements were voluntary and made by the defendant with full knowledge of his constitutional rights.” Renfro, 28 Wash.App. at 253.

Admission of an involuntary confession obtained in violation of Miranda is subject to the harmless error analysis. To find an error affecting a constitutional right harmless, the reviewing court must find it harmless beyond a reasonable doubt. The Washington Supreme Court has adopted the “overwhelming untainted evidence” standard in harmless error analysis; therefore, the reviewing court will look only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty. Reuben, 62 Wash.App. at 626-627.

In Reuben, the defendant drove a vehicle and was involved in a single vehicle accident that caused the death of his passenger. Trooper Klundt contacted the defendant at the hospital and read the defendant his constitutional rights. The defendant told the trooper to “Go f[] yourself,” turned his head away from the trooper, and made no other statements to the trooper. Trooper Klundt left the defendant’s room and advised

Detective Armstrong that the defendant had been advised of his constitutional rights.

Shortly thereafter, Detective Armstrong contacted the defendant, did not advise the defendant of his constitutional rights, and questioned him about the accident. The defendant admitted to being the driver and to driving drunk. The State used the defendant's confession to Detective Armstrong in a bench trial on stipulated facts and convicted him of vehicular homicide. Reuben, 62 Wash.App. at 621-623.

On appeal, the court held that the State failed to prove the defendant waived his rights and his confession to Detective Armstrong, without new Miranda warnings, should have been suppressed. Id. at 626. However, the court upheld the defendant's conviction because admission of his confession to Detective Armstrong was harmless error beyond a reasonable doubt. The untainted evidence upon which the trial court relied would have overwhelming led to a guilty finding. In particular, the court noted the defendant was the owner of the vehicle and was seen lying on the front seat after the accident with his lower body beneath the steering column. Id. at 626-627.

In the appellant's case, Judge Warning held, prior to the trial, that his confession to Jessica Johnston about possessing cocaine on June 8, 2007, was admissible at trial. Therefore, the State did not believe a CrR

3.5 hearing was required and the hearing was not done. Transcript Volume I, p. 44-45 and 85, and Transcript Volume II, p. 184-190, and Transcript Volume IV, p. 2-4 and 25-26. In retrospect, a CrR 3.5 hearing should have been done because Ms. Johnston is an agent of the State and the appellant was interrogated and in custody at the time. Therefore, the State concedes that it was error to admit his confession to Ms. Johnston at trial. However, his conviction should nevertheless be upheld because it was harmless error to admit his confession. As in Reuben, the untainted evidence upon which the trial court relied would have overwhelming led to a guilty finding.

Possession of a controlled substance may be actual or constructive. Constructive possession arises when a person has dominion and control over the premises where the controlled substance is located. State v Staley, 123 Wash.2d 794, 798 (1994); State v Huff, 64 Wash.App. 641, 653 (1992); State v. Bradford, 60 Wash.App. 857, 862 (1991). An automobile may be considered a “premises.” State v. Potts, 1 Wash.App. 614, 617 (1969). More than mere proximity to the controlled substance must be proved; the court must look at the totality of the circumstances to determine whether the jury could reasonably infer dominion and control. State v Robinson, 79 Wash.App. 386, 391 (1995), State v. Partin, 88 Wash.2d 899, 906 (1977).

The totality of the circumstances indicates beyond a reasonable doubt that the appellant unlawfully possessed cocaine on June 8, 2007. On June 8, 2007, Mr. Johnson saw the appellant drive his black Chevy Silverado. Mr. Johnson knew the vehicle belonged to the appellant and was registered to his wife. Mr. Johnson maintained a constant visual of him driving it to the Twin City Shopping Center and the appellant was the lone occupant. Shortly thereafter, he was contacted outside his vehicle and Mr. Dillmon searched the vehicle and found a bag of cocaine under the driver's seat. The appellant appeared head hung disappointed and hung his head down. Transcript Volume I, p. 102-108, 124-129, 132-135, and 139-140 and Transcript Volume II, p. 178-182. Based on the totality of the evidence, the appellant had constructive possession of the cocaine. The appellant owned the vehicle, was in close physical proximity to the bag of cocaine under the driver's seat, and was the only person with access and control of the vehicle at the time of his arrest.

The appellant asserted the defense of unwitting possession and called Mr. Robinson, a very good friend of his, to testify on his behalf. Transcript Volume II, p. 230-234, 267, 288, and 294. Mr. Robison had difficulty recalling the events in question and could not testify without referencing his written notarized statement, Exhibit # 16. Transcript Volume II, p. 230-234 and 267. Mr. Robinson wrote and notarized his

statement two days after Joel Treichel found Exhibit # 1 amongst Mr. Robinson's belongings. Transcript Volume II, p. 160-163 and 238-243. Exhibit # 1 is in the appellant's handwriting, references his charges, and tells Mr. Robinson to write and notarize a statement, Exhibit # 16, on the appellant's behalf. Exhibit # 1, Transcript Volume I, p. 97-101, and Transcript Volume II, p. 164-165, 171, 239-243, 278, and 284-285. Exhibit # 16 has the exact same content as that contained on the second page of Exhibit # 1. Transcript Volume II, p. 243.

When confronted with the fact that Exhibit # 1 and Exhibit # 16 have different handwritings, Mr. Robinson claimed to have forged the appellant's handwriting and wrote both letters in an attempt to get a more lenient plea deal. Mr. Robinson indicated that Exhibit # 1 does not mention his name or that of the appellant because he did not want to be liable for forgery. Transcript Volume II, p. 243-248 and 265-266. Prior to writing his notarized statement, Mr. Robinson spoke to the appellant and offered to write a different statement, from that of Exhibit # 16, on the appellant's behalf. Transcript Volume II, p. 257-259. Mr. Robinson was not a credible witness and it was apparent Mr. Robinson was perjuring himself for the appellant. Transcript Volume III, p. 358.

The totality of the untainted evidence overwhelming shows that the appellant possessed cocaine on June 8, 2007, beyond a reasonable doubt.

On June 8, 2007, he was the lone occupant and driver of his truck, which was registered to his wife. He was the only person with access and control of the vehicle. When a bag of cocaine was found under the driver's seat, he appeared head hung disappointed and hung his head down. The evidence overwhelmingly shows he had constructive possession of the cocaine as he had dominion and control over the vehicle with the drugs.

The appellant's asserted defense of unwitting possession was not persuasive. His evidence of unwitting possession failed to show his lack of knowledge of the drugs in his truck and was further evidence of his guilt as he actively colluded with Mr. Robinson to fabricate Mr. Robinson's testimony. Therefore, the jury correctly found him guilty of possessing cocaine on June 8, 2007. The appellant's conviction for possessing cocaine should be affirmed because the untainted evidence upon which the trial court relied would have overwhelmingly led to the same guilty verdict.

V. CONCLUSION

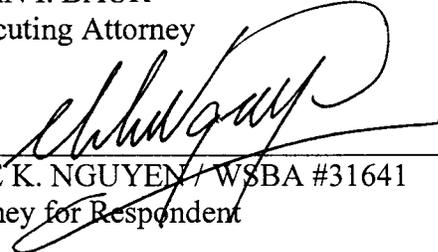
The appellant's appeal should be denied because his community corrections officer had a reasonable well-founded suspicion that he violated his supervision by using and possessing drugs and the untainted

evidence upon which the trial court relied would have overwhelmingly led to a guilty verdict.

Respectfully submitted this 23 day of June 2009.

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Prosecuting Attorney

By:


MIKE K. NGUYEN / WSBA #31641
Attorney for Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 ZACHARY LOREN BECK,)
)
 Appellant.)
 _____)

NO. 37649-1-II
Cowlitz County No.
07-1-00768-4

CERTIFICATE OF
MAILING

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
09 JUN 26 AM 11:25


I, Michelle Sasser, certify and declare:

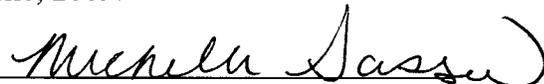
That on the 23rd day of June, 2009, I deposited in the mails of
the United States Postal Service, first class mail, a properly stamped and
address envelope, containing Brief of Respondent addressed to the
following parties;

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

Court of Appeals, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402-4454

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

Dated this 23rd day of June, 2009.


Michelle Sasser