

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

NO. 40634-9-II

STATE OF WASHINGTON

Respondent,

vs.

LARRY D. TYLER

Appellant.

FILED
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JULIANNE M. HARRIS
JUL 21 2010
PORT TOWNSEND, WA
JUL 21 2010

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 09-1-00197-4
The Honorable Craddock Verser

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

State of Washington v. Tyler

STATEMENT OF THE CASE

I Restatement of Issues Presented

- A. The trial court properly denied Mr. Tyler's motion to re-open the case.**
- B. The trial court properly denied Mr. Tyler's motion to suppress evidence.**
- C. The trial court properly denied the defense motion to reconsider suppression of evidence.**
- D. The trial court's Findings of Fact were supported by Substantial evidence.**

II Statement of the case

A. Procedural History

Mr. Tyler was arrested on November 11, 2009. He was charged by Information with possession of a controlled substance – methamphetamine, use of drug paraphernalia, and driving with license suspended- third degree. He was arraigned on November 25, 2009.

Mr. Tyler filed a motion to suppress evidence on December 23, 2009. An evidentiary hearing was held before the Honorable Brooke Taylor on January 8, 2010. The motion to suppress evidence was denied.

Mr. Tyler filed a motion to reconsider on February 3, 2010. The trial court denied this motion in a Memorandum Opinion filed on February 19, 2010.

A bench trial was held starting on April 9, 2010. Mr. Tyler was found guilty of possession of a controlled substance – methamphetamine, and driving with license suspended in the third degree. He was found not guilty of use of drug paraphernalia. He was sentenced to 4 days in jail, 12 months of community custody, and to pay \$2,575 in fees and penalties.

Mr. Tyler filed a notice of appeal on April 19, 2010, and his sentence was stayed pending the outcome of the appeal.

B. Facts

On November 11, 2009, Deputy Brett Anglin was on duty and patrolling highway 104. Deputy Anglin spotted a blue Camaro (license 093XND) with a male driver, which was traveling 65 miles per hour in a 60 mile per hour zone. Deputy Anglin ran a check on the license plate of the Camaro and discovered that the registered owner of the Camaro, Cheryl A. King's, driver's license was suspended in the third degree. As Deputy Anglin followed the

Camaro he realized the driver was a man, therefore he conducted a stop of the vehicle for speeding and not for DWLS 3. RP 10.

The vehicle stopped about one quarter mile from the Hood Canal Bridge at a narrow and very busy part of the road. RP 11.

The driver identified himself as Larry D. Tyler and stated that he did not have a license. RP 11. The passenger, Jeffery N. Bennett, attempted to conceal an alcohol container between his legs. RP 11. Deputy Anglin ran a records check through Jeff-Com who reported that Mr. Tyler's driver's license was suspended and Mr. Bennett's license was suspended and he had several outstanding warrants. RP 12.

Deputy Anglin arrested Mr. Tyler for driving with a suspended license and placed him in his patrol car. RP 12. Deputy Denney and a State Trooper arrived on scene and the State Trooper dealt with Mr. Bennett. RP 13. Deputy Anglin asked Mr. Tyler and Mr. Bennett if they would consent to a search of the vehicle but both refused to consent. RP 13.

Once Mr. Tyler was secured in the patrol car, Deputy Anglin let Mr. Bennett use Mr. Tyler's cell phone to try and find a driver who would move the vehicle, but could not find anyone. RP 14. Deputy Anglin then requested an impound tow of Mr. Tyler's vehicle. Deputy Anglin testified that he requested an impound tow

because the car was in a dangerous location and there was no legal driver available to move it. RP 13-15.

While awaiting the tow truck, Deputy Anglin and Deputy Denney performed an inventory search of the vehicle. Deputy Anglin located a small blue metal container under the driver's seat. Deputy Anglin searched the container to assure that it did not contain any jewelry and he found a substance that he believed to be heroin. Under the same seat he also located a clear baggie containing a white residue when he moved the seat forward to inventory the amplifiers. RP 16. The baggie contents NIK tested positive for methamphetamine.

III. ARGUMENT

A. The trial court properly denied Mr. Tyler's motion to re-open the case.

Mr. Tyler contends that the trial court erred by showing little interest in an email Deputy Anglin sent in April of 2009. This email discussed the impact of the Gant decision on police operations and Mr. Tyler asserted to the trial court that it was evidence of a possible conspiracy to deprive citizens of their right to be free of unconstitutional searches. CP 33-35.

The trial court denied Mr. Tyler's motion for reconsideration .
The court made the following explanation why it denied the motions
to reconsider and to reopen the case:

While the email statement by Deputy Anglin is concerning, to the extent that it could be construed as recommending vehicle impounds in every case where the driver is taken into custody, it is not a basis for reopening the instant case. First, the court has found, and the Defendant admits, that the impound in this case was reasonable, and the finding was supported by the substantial evidence as the court has previously noted, and to do an impound without doing an inventory would be inappropriate, if not foolish. Second, this arrest, impound and inventory took place prior to the publication of the Gant decision, so the ruling in Gant could not have been the motivation for this inventory search. CP 41.

Clearly the trial court's second reason is in error since Gant was published on April 21, 2009, and Mr. Tyler was arrested on November 11, 2009. However this was harmless error since the trial court's first reason, that the impound was reasonable and legal, controls.

This appeal is without merit and should be denied.

B. The trial court properly denied Mr. Tyler's motion to suppress evidence.

Mr. Tyler argues the inventory search was invalid because it was a pretextual evidentiary search.

A warrantless search is unreasonable under both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution, unless the search falls within one or more specific exceptions to the warrant requirement. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The State has the burden of showing that a warrant exception applies. *State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); *State v. Ladson*, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999).

Under *Gant*:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant *or show that another exception to the warrant requirement applies*. *Arizona v. Gant*, 129 S.Ct. 1710, 1723-24 (2009) (emphasis added).

Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative

stops. *State v. Evans*, 159 Wn.2d 402 (2007) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

An inventory search is an exception to the warrant requirement; an exception that has been upheld by the Ninth Circuit Court of Appeals in the post-*Gant* era. *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738 (1987); *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *US v. Ruckes*, 586 F.3d 713 (9th Cir. 2009) (upholding an inventory search performed by the Washington State Patrol)¹. When a vehicle is impounded, law enforcement may conduct an inventory search pursuant to department policy and any evidence that is seized may be used in a criminal prosecution. *Simpson*, 95 Wn.2d at 191-92. Law enforcement officers do not need probable cause for this exception to apply but the search must be made in good faith and can not be a pretext for a generalized evidentiary search. *Id.*; see also *State v. Ladson*, 138 Wn.2d 373 (1999).

According to Black's Law Dictionary a pretext is an "ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive." To determine whether or not a search is a pretext, Washington Courts look to the totality of the

¹ The Ninth Circuit has addressed this issue twice since *Gant* and in both cases the Court upheld the inventory search. The first of these two opinions is unpublished.

circumstances and take into account both the objective reasonableness of the inventory search as well as the deputy's subjective intent in carrying out an impound and subsequent inventory. See *Ladson* 138 Wn.2d at 358. Even though a stop and search may be objectively reasonable, a search is illegal if an officer is subjectively using a warrant exception as a pretext for a generalized search for evidence. See *Id.* at 358-59.

The Court found there was a pretext in *Ladson* as the officer was assigned to the gang unit and admitted that he stopped the car not because the driver had committed a traffic infraction, but because the driver had committed a traffic infraction and the officer believed that the stop provided an opportunity to collect gang intelligence. *Id.* at 346. In that context the court suppressed the evidence even though the driver had actually committed the infraction because the officer's subjective intent was not to write an infraction; it was to search the car and question the passengers. *Id.* at 358-59.

Absent a showing of pretext, a vehicle impound is lawful if it is authorized by statute or ordinance. See *State v. Bales*, 15 Wn.App. 834, 836-37 (1976). Both Washington State Law and the

Jefferson County Sheriff's Policy² authorize impounding vehicles when the driver has been arrested for DWLS. *RCW 46.55.113; RCW 46.20.342; JCSO 19.06.030(7)*.

Once an officer has determined that a vehicle should be impounded, Washington law and Sheriff's Office Policy mandate that an inventory of the vehicle's contents be performed. *RCW 46.55.075; JCSO 19.06.030(9)*.

The trial court found "the impound was reasonable and not a pretext for an exploratory search. The arresting officer had compelling reasons to impound the vehicle, and, having done so, it was incumbent upon him to inventory its content before turning it over to the tow truck driver." CP 25.

This appeal is meritless and should be denied.

C. The trial court properly denied the defense motion to reconsider suppression of evidence.

Mr. Tyler contends he trial court erred by denying his motion for reconsideration of its earlier rejection of his motion to suppress evidence. He argues that while the impoundment was reasonable, the inventory search was not because he did not consent to the search. This argument is refuted in the preceding section.

² There appears to be no county ordinance regarding impoundment.

He also argues that the court's errors in writing the correct dates in its findings improperly affected its logic. Mr. Tyler states:

The trial court abused its discretion because it erroneously determined that the arrest, impoundment and inventory was conducted on February 11, 2009; whereas the actual date of the incident was nine months later on November 12, 2009. CP 2,5. This foundational error most likely affected the trial court's initial ruling denying suppression of the evidence and affected its decision not to reconsider its suppression decision. If the trial court would have reexamined its suppression decision and its memorandum it would have discovered the colossal mistake it made with the important dates of February, April, and November 2009 as they related to this motion. Appellant's Brief 22.

Mr. Tyler's rationale is flawed because he does not cite any authority for his assertion that a mistaken date of occurrence would affect the trial court's decision. Conversely, the trial court's decision is in full accord with case law and statute, given the evidence presented.

This appeal is without merit and should be denied.

D. Sufficient evidence supported the trial court's findings of fact.

Mr. Tyler contends there was not substantial evidence to support the trial court's findings of fact.

1. Wrong Date

The trial court's Memorandum Opinion and Order on Motion to Suppress Evidence mistakenly wrote February 11, 2009, as the date of the arrest. The correct date of Arrest was November 12, 2009. Other than that, all facts in the memorandum correctly matched the police report and testimony, thus the mistake was clearly a scrivener's error.

A trial court's misstatement is subject to harmless error analysis. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *State v. Thacker*, 94 Wn.2d 276, 283, 616 P.2d 655 (1980). A trial court's error "that does not result in prejudice to the defendant is not grounds for reversal." *Bourgeois*, 133 Wn.2d at 403. An error "is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Bourgeois*, 133 Wn.2d at 403 (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

This is clearly harmless error since it did not prejudice Mr. Tyler.

2. Conflicting Testimony

Mr. Foster cites several cases where the trial court's findings reflect Deputy Anglin's testimony and ignore his conflicting testimony: whether he was speeding on Highway 104 just west of the Hood Canal Bridge; his car's distance from the fog line; whether

his passenger made furtive motions and attempted to hide a beer can; and whether his passenger used his cell phone to try and find a driver for the car or just a ride home for himself. Mr. Foster then argues that these differing testimonies show that substantial evidence does not support the court's findings, and therefore they are erroneous.

This issue stems solely from the trial court's determination as to the relative credibility of the conflicting testimony. In matters involving a witness's credibility, the appellate court defers to the trial court, which had the opportunity to evaluate the witness's demeanor below. *State v. Swan*, 114 Wn.2d 613, 666, 790 P.2d 610 (1990). The appellate court reviews the trial court's inferences and conclusions but not its findings as to credibility or the weight to be given evidence. *Swan*, 114 Wn.2d at 666, 790 P.2d 610.

Here, the trial court determined that the Deputy's testimony was more credible than Mr. Tyler's, who had a personal interest in the outcome.

This court should give deference to the trial court's determination as to the weight of the evidence and deny this appeal.

IV. CONCLUSION

The State respectfully requests that this Court affirm the trial court's verdict and sentence and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 21st day of October, 2010,

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Thomas A. Brotherton", written over a horizontal line.

By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

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BY: [Signature]
CLERK

STATE OF WASHINGTON,
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Case No.: 40634-9-II
Superior Court No.: 09-1-00197-4

vs.

LARRY D. TYLER,
Appellant.

DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 5th day of November, 2010, I mailed a copy of the State's BRIEF OF RESPONDENT, to the following:

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Port Angeles, WA 98362

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

Dated this 5th day of November, 2010 at Port Townsend, Washington.

[Signature]
Janice N. Chadbourne
Legal Assistant

DECLARATION OF MAILING
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