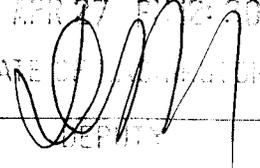


COURT OF APPEALS
DIVISION II

NO. 41269-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LENARD OLSON

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before the Honorable F. Mark McCauley, Judge and
Before the Honorable Gordon L. Godfrey, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's CrR 3.6 motion to suppress evidence. Clerk's Papers (CP) 49-55.

2. The trial court erred in denying appellant's CrR 3.5 motion to suppress statements made to law enforcement. CP 56-59.

3. In denying appellant's motion to suppress evidence pursuant to CrR 3.6, the trial court erred in entering Findings of Facts 1, 2, 5, 6, 8, 9, 10, 11, and 12 as fully set forth herein at pages 3-5.

4. In denying appellant's motion to suppress evidence pursuant to CrR 3.6, the trial court erred in entering Conclusions of Law 2, 3, 4, and 5 as fully set forth herein at pages 5-6.

5. In denying appellant's motion to suppress statements pursuant to CrR 3.5, the trial court erred in entering Findings of Facts 2, 3, 4, 5, and 6, as fully set forth herein at pages 6-7.

6. In denying appellant's motion to suppress statements pursuant to CrR 3.5, the trial court erred in entering Conclusions of Law 2 and 4 as fully set forth herein at pages 7-8.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Acting without a warrant, a law enforcement officer looked through the tinted rear window of a vehicle belonging to appellant Robert Olson while parked on Mr. Olson's driveway. Inside the vehicle the officer

saw two boxes that looked like they contained audio equipment, one of which had a tag that read “\$70 not including tax.” Several pieces of audio equipment had previously been taken in a burglary of a local Ford dealership. Police had received two anonymous tips that an individual fitting Mr. Olson’s description was trying to sell a Roush Supercharger, a type of truck part that was also missing in the Ford dealership burglary. Police used the resulting information regarding the audio equipment boxes viewed inside Mr. Olson’s Chevrolet Suburban to obtain a search warrant of Mr. Olson’s vehicle. Does information gained from an unconstitutional warrantless search that was used as the basis to obtain a search warrant require suppression of the evidence? (Assignments of Error 1, 3, and 4).

2. Whether Mr. Olson had a legitimate expectation of privacy in the vehicle? (Assignments of Error 1, 3, and 4).

3. Whether the officers were conducting legitimate business when they entered the impliedly open area of Mr. Olson’s driveway? (Assignments of Error 1, 3, and 4).

4. Whether the officer exceeded the scope of the open view doctrine by looking inside the vehicle through the tinted rear window? (Assignments of Error 1, 3, and 4).

5. Whether because of the prior illegal search of his vehicle, any evidence, including Mr. Olson’s statements made to law enforcement after he

was advised of his *Miranda* rights, is tainted and therefore inadmissible as fruits of the poisonous tree? (Assignments of Error 2, 5, and 6).

C. STATEMENT OF THE CASE

1. Procedural history:

Appellant Robert Olson was charged by information filed in Grays Harbor County Superior Court with Possession of Stolen Property in the Second Degree, pursuant to Revised Code of Washington (RCW) 9A.56.160. Clerk's Papers (CP) 1-2. Mr. Olson moved pre-trial to exclude illegally obtained evidence under CrR 3.6 and statements made to police under CrR 3.5. CP 4-34; Report of Proceedings (RP) at 5-6.¹

The Honorable F. Mark McCauley primarily denied the suppression motions, but did suppress records obtained from Mr. Olson's cell phone. RP at 123. The court entered the following Findings of Fact and Conclusions of Law pertaining to a search of Mr. Olson's vehicle on March 2, 2010:

FINDINGS OF FACT

1.

On February 10, 2010, there was a burglary of the Five Star Ford dealership in Aberdeen, Washington. Numerous items were stolen, including a Rousch Supercharger, DVDs and audio equipment. The Aberdeen police obtained an inventory of the items stolen.

¹The record of proceedings consists of two volumes and in this brief is designated as follows: RP, pertaining to the July 2, 2010 suppressions hearing; RP(Trial), pertaining to the July 20, 2010 jury trial, and RP(Sentencing), pertaining to the August 23, 2010 sentencing hearing.

2.

On February 23, 2010, the Aberdeen police received information from Mike O'Dell, the general manager at Five Star Ford. He had received a tip the previous day concerning the burglary at Five Star Ford from a person he knew who did not wish to give his name to the police. The information gave a description of a white male missing a finger who was trying to sell a Rousch Supercharger. This included the name "Bob", a cell phone number and the fact that he was missing a finger.

On March 2, 2010, in the afternoon, Aberdeen Police received an anonymous tip that "Robert Olson" was trying to sell merchandise from the Five Star Burglary and currently had the Rousch Supercharger in his possession. The caller stated that Olson was driving a red Suburban, Washington license 223UBA. Police ran a records check and found that this vehicle returned to the defendant as the registered owner with a residence address of 510 Second Avenue, Aberdeen, Washington. Corporal King of the Aberdeen Police Department was assigned to park in the neighborhood and watch the residence.

3.

A short time later, Corporal King of the Aberdeen Police Department observed the defendant driving a red Suburban, Washington license 223 UBA. King observed the vehicle pull into the driveway at 510 Second Avenue, Aberdeen, Washington. This is a shared driveway with a house immediately next door. When the vehicle stopped, the rear of the vehicle was within a foot or two of the end of the driveway closest to the sidewalk along the street.

4.

Corporal King pulled up in his vehicle as the defendant was getting out of the red Suburban. King called out to the defendant. Corporal King got out of his car and walked over to the defendant where they spoke, standing adjacent to the rear driver's corner of the Suburban. Corporal King asked the defendant if he had anything in his vehicle that he should not have. The defendant stated that he did not. When asked if he could look in the vehicle, the defendant told King that he could if he had a search warrant.

5.

Detective Hudson arrived at the scene and spoke briefly with the defendant. They were standing in the street near the red suburban. Hudson asked to see the defendant's hands. Hudson observed that the defendant was missing an index finger from one of his hands. Hudson observed that the

Suburban matched the description given in the most recent tip including the license plate number. The defendant told Hudson that he would need a warrant to search the vehicle.

6.

Hudson walked to the rear of the vehicle and stood 3 to 4 inches from the rear of the vehicle. He looked into the rear window of the vehicle and saw two cardboard boxes, both containing items matching the description of items taken in the burglary of Five Star.

7.

The defendant asked if he was being detained. The defendant was told that he could leave but that the vehicle was being detained. The defendant walked down the driveway toward the residence, alone.

8.

Arrangements were made for an employee of Five Star to come to the location. He looked in the vehicle and observed the items in the vehicle. The information that he provided to the Aberdeen police is as set forth in the search warrant declaration, Exhibit 15. Following this, the car was impounded and taken to the Aberdeen Police Department.

9.

Deputy Chief Timmons of the Aberdeen Police Department contacted Colin Gill and drove him to the location. As they were driving, Gill observed the defendant walking on the street. Gill told police that he recognized the defendant as a person who had been in the dealership the day before the burglary was discovered.

10.

Once Gill made the identification at the scene, Lieutenant Darst informed Corporal King that there was probable cause to arrest the defendant. Corporal King, who had earlier left the scene, located the defendant near a convenience store and placed him under arrest, taking to the Aberdeen Police Department for incarceration.

11.

The following morning Detective Hudson prepared a declaration for search warrant for the red Suburban which by now had been parked at the Aberdeen Police Department. During the course of the preparation of the

declaration for search warrant, Detective Hudson went out and stood by the red Suburban and dialed the phone number given to the Aberdeen Police Department from the tip of February 23, 2010. When he dialed the number he observed a cell phone that was sitting on the seat of the Suburban begin to ring. When he hung up the call the cell phone in the car stopped ringing.

12.

Upon completion of the search warrant declaration, Detective Hudson went to a magistrate and obtained a search warrant to search the Suburban. During the search of the vehicle Detective Hudson seized the cell phone. Based upon the foregoing findings of fact, the court entered the following:

CONCLUSIONS OF LAW

1.

The court has jurisdiction to the parties and subject matter herein.

2.

Upon the receipt of the second tip in the observation of the vehicle driving into the driveway, Aberdeen police had an articulable suspicion that the vehicle contained stolen property taken from the Five Star burglary.

3.

Upon observation of the items in the vehicle by Detective Hudson, the Aberdeen police had probable cause to believe stolen property from the Five Star burglary was contained in the vehicle. This was subsequently confirmed by the observations of employee Colin Gill.

4.

The observation by Detective Hudson was made from the location that was impliedly open to the public. Given the location of the vehicle, at the end of the driveway immediately adjacent to the sidewalk, the officers did not invade any privacy interest of the defendant. The observations made by Detective Hudson were from his "open view."

5.

The search warrant declaration provided to the magistrate set forth probable cause to believe that the Suburban contained stolen property taken

from the Five Star burglary. The arrest of the defendant was supported by probable cause.

ORDER

IT is therefore ordered that the defendant's motion to suppress denied, except that no information gathered from examination of cell phone records may be used.

CP 49-55.

The court also entered the following findings and conclusion regarding the CrR 3.5 motion:

UNDISPUTED FINDINGS

1.

On March 2, 2010, the defendant was arrested by Corporal Darrin King of the Aberdeen Police Department. The facts surrounding the arrest of the defendant are set forth in the findings in regard to the defendant's motion to suppress.

2.

On the morning of March 3, 2010, Detective Hudson of the Aberdeen Police Department made contact with the defendant who remained in custody at the Aberdeen municipal jail. Hudson asked the defendant if he would like to submit a written statement concerning the investigation. The defendant asked if he was being charged with a felony. When told that he was, the defendant stated that he wished to speak to his attorney. Detective Hudson then left.

3.

Approximately five minutes later the defendant contacted Aberdeen Police Department Record Specialist Mindi Stump by way of the intercom. He told Ms. Stump that he wanted Detective Hudson to return and speak with him.

4.

Detective Hudson returned to the defendant's cell. Hudson asked the defendant if he wished to speak with him, to which the defendant stated "yes" and "I need to negotiate." Detective Hudson told the defendant that he would not be negotiating or promising anything to him and that the defendant needed to stop making further comments until Detective Hudson advised him

of his rights.

5.

The defendant stated that he did not need his rights read to him as he just wanted to negotiate. Detective Hudson told the defendant to stop talking and to bear with him as he was required to advise the defendant of his rights. Detective Hudson read the defendant his *Miranda* rights from Aberdeen Police Department rights form, Exhibit _____. The defendant acknowledged that he understood his rights and signed his name to the acknowledgement. The waiver portion of the rights form was read to the defendant who signed it and agreed to speak with Hudson.

6.

Thereafter, the defendant made remarks to Detective Hudson to the effect that he “didn’t do it” but that he knew where the rest of the “stuff” was located. The two of them spoke further. The defendant eventually stated that he did not wish to make a written statement. The interview was terminated.

CONCLUSIONS OF LAW

1.

The court has jurisdiction over the parties and subject matter herein.

2.

All statements made by the defendant were voluntary.

3.

The defendant reinitiated contact with Detective Hudson following his initial request for counsel.

4.

Detective Hudson properly advised the defendant of his *Miranda* warnings and obtained a voluntary waiver of those rights from the defendant.

ORDER

It is therefore ordered that the out-of-court statements of the defendant are admissible for use by the State of Washington in its case-in-chief and the prosecution of this matter subject to admissibility pursuant to the Rules of Evidence.

CP 56-59.

Trial to a jury took place on July 20, 2010, the Honorable Gordon

Godfrey presiding. The jury returned a guilty verdict. CP 115. The matter came on for sentencing on August 23, 2010 and the court imposed a standard range sentence. RP(Sentencing) at 156; CP 133.

Timely notice of appeal was filed September 17, 2010. CP 143-44. This appeal follows.

2. Substantive Facts: CrR 3.5 and 3.6 Hearing

On February 10, 2010, there was a burglary at the Five Star Ford dealership in Aberdeen, Washington. RP at 19. Audio equipment was missing from the business, including CD players and DVD players. The dealership provided a list of missing items to the Aberdeen Police Department. RP at 19.

On February 23, 2010, police received information from Mike O'Dell, the general manager at Five Star Ford. RP at 19, 20. He reported that he got a tip on February 22 from someone he knew but who did not want his name given to police. RP at 20. The anonymous tip gave a description of a man named "Bob," who was missing a finger and who was trying to sell a Rousch Supercharger, which is a automotive part used for F-150 pickup trucks. RP at 21.

On March 2, 2010, police received an anonymous tip that a person named Robert Olson was trying to sell merchandise including a Rousch

Supercharger. RP at 22, 72. The tipster stated that the man identified as Robert Olson was driving a red Suburban, and gave the license plate number of the vehicle. RP at 76, 86. Aberdeen police determined that the vehicle was registered to Robert Olson, and that he lived at 510 Second Avenue, Aberdeen, Washington. RP at 23, 86.

On the afternoon of March 2, 2010, Corporal Darrin King of the Aberdeen Police Department was dispatched to watch Robert Olson's house at that address. RP at 23, 87. At approximately 3 p.m. Corporal King observed Mr. Olson, driving a Suburban, pull into the driveway of the house and park the vehicle RP at 87. Corporal King got out of his car and talked with Mr. Olson while standing behind the Suburban. RP at 88.

Detective Jon Hudson of the Aberdeen Police Department arrived at the scene and spoke with Mr. Olson while standing on the street. RP at 45, 89. Corporal King asked for permission to look inside the Suburban and Mr. Olson said they could but they would have to get a search warrant. RP at 26, 27, 89. Mr. Olson told the officers that they did not have permission to be on his property. RP at 66. Acting without a warrant, Det. Hudson left the street and entered the driveway and looked through the tinted rear window of the Suburban while "a few inches" from the glass. RP at 27, 28, 45, 46, 47, 48.

Det. Hudson saw audio stereo equipment in the back of the vehicle, including one with a tag that stated "\$70 without tax." RP at 27, 28, 47, 61.

Det. Hudson then walked to drivers' side and looked through the rear window, then went back to the rear of the vehicle. RP at 48. Det. Hudson used his hand to block ambient light so he could see inside the vehicle. RP at 48. He also used a flashlight to look inside, but was not able to see anything using that method. RP at 49.

The Suburban was parked on the asphalt driveway, with the rear of the vehicle facing the road. RP at 36, 37, 39. A tow truck driver stated that no portion of the Suburban was on the street or sidewalk, and that the rear of the vehicle was one to two feet from the end of the driveway. RP at 37, 38.

Mr. Olson asked if he was free to leave, and Det. Hudson told him that he could leave, but his vehicle was going to be impounded. RP at 30.

Shortly thereafter police brought Colin Gill, an employee of Five Star Ford, to Mr. Olson's driveway, and he looked through the back window of the Suburban. RP at 54. The police then impounded the Suburban and it was taken to the Aberdeen Police Department. RP at 31.

Police applied for and received a search warrant, and entered the Suburban on March 3, 2010. RP at 31, 33. Exhibits 8 and 14. Appendix B.

In the search warrant affidavit, Det. Hudson affirmed that “Officers could see new merchandise boxes for audio/video car equipment. I noted one box to bear the brand name “Valor” DVD player with a white with black lettering price tag, “\$70 not including tax” . . . I also noted similar merchandise boxes displaying brand name “Planet Audio” amplifier, and a DVD touch screen media player box.” Affidavit for Search Warrant, at 4-5. Appendix B.

On March 3, 2010, Detective Hudson talked with Mr. Olson in a cell at the Aberdeen Municipal Jail. Det. Hudson stated that Mr. Olson said that he wanted to “negotiate” in order to obtain release. RP at 17. The officer testified that after being advised of his constitutional warnings, Mr. Olson said that he did not commit the burglary at Five Star but that he knew where the rest “of the stuff” was located. RP at 18.

The trial court admitted Mr. Olson’s statement to Det. Hudson and the evidence obtained from the search of the vehicle. RP at 123; CP 49-55.

3. Substantive Facts: Trial

Detective Hudson testified consistently with his pre-trial testimony regarding the March 2 search of the Suburban and his custodial statement on March 3, 2010, regarding his knowledge of audio equipment not recovered from the burglary and his inquiry whether he could “negotiate” with the

police for release. RP (Trial) at 90, 98, 114. Mr. Gill stated that the value of the audio equipment was \$1824.95. RP (Trial) at 51.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED WHERE INFORMATION GAINED FROM AN UNCONSTITUTIONAL, WARRANTLESS SEARCH WAS USED AS THE BASIS TO OBTAIN THE SEARCH WARRANT.

a. A search warrant must be supported by probable cause to believe evidence of criminal activity is located within the area for which a warrant is sought.

Robert Olson reasonably expected his vehicle would not be searched by law enforcement. His vehicle was parked on his driveway. Mr. Olson told the officers that they could not search the Suburban without a warrant and that they did not have permission to be on his property. RP at 26, 66. Despite this, Det. Hudson entered the property, leaned within inches of the vehicle and used his hands to shade his eyes from ambient light to see through the Suburban's tinted rear window. RP at 26, 28, 48. His sole purpose for entering onto the property was to gather evidence that Mr. Olson was engaged in criminal activity. Because the police violated Mr. Olson's constitutional right to privacy, the trial court should have granted Mr. Olson's

suppression motions.

Under both art. 1, § 7, of the Washington Constitution and the Fourth Amendment to the United States Constitution, warrantless searches and seizures are per se unreasonable. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999), citing, *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980); *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Article I, § 7 provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

There are only a few carefully drawn and well-delineated exceptions to the warrant requirement. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000); *Ladson*, 138 Wn.2d at 349 (citations omitted). A person's home is a constitutionally-protected area. *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). "The curtilage of a home is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.'" *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990) (quoting *United States v. Dunn*, 480 U.S. 294, 301, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987))." *Ross*, 141 Wn.2d at 312. Exceptions to the warrant requirement include: consent, exigent circumstances, search incident to a valid arrest, inventory search, plain view, and investigative stops. *State*

v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). Under Const. art. I, § 7 and the Fourth Amendment, the State bears the burden of proving that a warrantless search is valid under a recognized exception to the warrant requirement. *State v. Johnson*, 128 Wn.2d 431, 447, 451, 909 P.2d 293 (1996); *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); *Ladson*, 138 Wn.2d at 350.

The federal constitution provides the minimum protection against unreasonable searches. *Young*, 123 Wn.2d at 179-80. "Under the Washington Constitution, it is well established that article I, § 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution." *State v. Surge*, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). Accordingly, a *Gunwall*² analysis is unnecessary to establish that this Court should undertake an independent state constitutional analysis. *Surge*, 160 Wn.2d at 71.

b. Mr. Olson had a reasonable expectation of privacy in his vehicle.

The defendant must demonstrate that he or she has a legitimate expectation of privacy in the area or item searched. *State v. Goucher*, 124

²*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) (setting forth the factors for evaluating whether an issue merits independent state constitutional interpretation).

Wn.2d 778, 787, 881 P.2d 210 (1994); *State v. Jones*, 68 Wn. App. 843, 847, 845 P.2d 1358, review denied, 122 Wn.2d 1018 (1997). A legitimate expectation of privacy exists if the “individual has manifested an actual subjective expectation of privacy in the area searched or item seized and society recognizes the individual’s expectation as reasonable.” *State v. Gocken*, 71 Wn. App. 267, 279, 857 P.2d 1074, review denied, 123 Wn.2d 1024 (1994). The burden is on the defendant to establish the expectation of privacy. *State v. Jones*, 68 Wn. App. at 847.

Here, Mr. Olson had a legitimate expectation of privacy in the residence and surrounding property where the vehicle was parked. The police determined that Mr. Olson resided at 510 Second Avenue. RP at 23, 24, 85. When Det. Hudson spoke with Mr. Olson, he told the detective that the police did not have permission to be on his property. RP at 66. He denied the police permission to search his vehicle. RP at 26. Mr. Olson satisfies his burden of establishing his legitimate expectation of privacy and therefore may challenge the search here at issue.

The trial court ruled Det. Hudson's observation of the interior of Mr. Olson’s vehicle was lawful because it “was made from a location that was impliedly open to the public.” CP 54; Conclusion of Law (COL) 4. This was error.

"Private affairs" protected by article I, § 7 are "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Young*, 123 Wn.2d at 181 (citation omitted). Mr. Olson's vehicle and its contents constituted a "private affair" under article I, § 7. *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990), is part of a line of cases decided under Article I, § 7 that protect information from warrantless government intrusion even though the information is accessible to those who are not government agents. In *Boland*, our Supreme Court held an officer's search and seizure of the contents of a garbage container placed curbside for collection is an unconstitutional intrusion into a person's private affairs under article I, § 7. *Boland*, 115 Wn.2d at 578. The Court expressed the analytical framework for this holding as such: "Given that the fundamental purpose of the state constitution is to govern the relationship between the people and their government rather than to govern the relationship between private parties . . . it also follows that we concern ourselves only with the reasonableness of governmental intrusion into a private individual's garbage and not the reasonableness of such intrusions by private individuals." *Boland*, 115 Wn.2d at 575. The Court reasoned "[w]hile it may be true an expectation that children, scavengers, or

snoops will not sift through one's garbage is unreasonable, average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless governmental intrusion." *Id.* at 578; cf. *California v. Greenwood*, 486 U.S. 35, 37, 40-41, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988) (under Fourth Amendment, no reasonable expectation of privacy exists in garbage left on curbside outside curtilage of home because garbage is exposed to public "snoops" and third-party trash collector).

Just as people reasonably believe police will not rummage through their trash bags to discover their personal effects, people reasonably believe police officers will not trespass into property to spy into their vehicles. Although it would be unreasonable to expect a stranger or passerby neighbor to refrain from looking into one's car parked on a driveway, an average person would be offended to find an officer entering his property, coming within several inches of one's car, using his hands to aid looking into a window tinted specifically to provide privacy, and to otherwise snoop for evidence of crime.

c. **The officer's observation is not justified under the open view doctrine**

The trial court erroneously ruled Det. Hudson's observation of the

interior of Mr. Olson's vehicle was permissible under the "open view" doctrine. CP 54. (COL 4). The basic requirements of the doctrine are not established because Det. Hudson did not make his observations from a lawful vantage point, or if determined by this Court to be lawful, his observations were made from an intrusive vantage point, and what he did observe was not knowingly exposed to the public.

Under the open view doctrine, when a law enforcement officer is able to detect something by using his senses while lawfully present at the place where those senses are used, that detection does not generally constitute a search. *Young*, 123 Wn.2d at 182. However, an officer's visual surveillance constitutes a search if (1) the officer is not at a lawful vantage point; (2) the officer observes an object from a lawful but intrusive vantage point; or (3) the object under observation is not voluntarily exposed to the general public and is private information.

Prior to Det. Hudson's action of walking up to and looking into the Suburban, Mr. Olson said that the police would need to have a warrant to search the vehicle and that they did not have permission to be on his property. RP at 26, 66. The lack of permission means Det. Hudson was not at a lawful vantage point when he looked into the Suburban.

In addition, Det. Hudson's vantage point was unlawful because his actions went beyond what was open and observable to the public. An officer's authority to enter private property is coextensive with that of a "reasonably respectful citizen." *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981); *State v. Hoke*, 72 Wn. App. 869, 877, 866 P.2d 670 (1994). A reasonably respectful citizen would not—as Det. Hudson did—walk onto the property and then lean within inches of a vehicle window, and then use his or her hands to block ambient light in order to see through a tinted window, particularly after having been denied permission to search the vehicle.

Typical "open view" cases involve officers entering the curtilage of a defendant's property and seeing what there is to be seen. That scenario differs factually from this case, where the detective walked onto the driveway, and then used various methods to improve his vantage point to see into the vehicle (coming extremely close to the vehicle, use of his hands to block ambient light, use of a flashlight). There appears to be no Washington case law addressing this precise scenario, but analogous case law shows an officer's vantage point must still be open to the public in order to be lawful. A member of the public, acting as a reasonably respectful citizen, could not lawfully enter the driveway, lean toward the window and use his hands to

look into the vehicle. Det. Hudson's observation of the interior of the vehicle was therefore a warrantless search.

Moreover, the police did not have legitimate business by looking into the vehicle.

It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. expectation of privacy.

State v. Seagull, 95 Wn.2d 898, 902-03, 632 P.2d 44 (1981).

Before addressing *Seagull*, however, the first requirement of the “open view doctrine,” must be satisfied, *i.e.*, whether the officers were conducting legitimate business when they entered the impliedly open areas of the curtilage. *State v. Ross*, 141 Wn.2d at 313. Legitimate police business cannot mean simply investigating the crime the police ultimately discovered or that of which the defendant is suspected. This constitutes a search and would thus allow the warrantless search itself to excuse the police from obtaining a warrant. Where the sole purpose of police entry is to “conduct a search and gain information by trespassing on private property” they cannot be said to be engaged in legitimate police activity. *State v. Johnson*, 75 Wn.App. 692, 705, 879 P.2d 984 (1994), review denied, 126 Wn.2d 1004 (1995). Here, the police were not on “legitimate business.” Corporal King

and Det. Hudson were at Mr. Olson's house solely in response to two anonymous citizen's tips that Mr. Olson had offered to sell a part to a truck, which would not support probable cause for a search warrant. *State v. Ibarra*, 61 Wn. App. 695, 698, 812 P.2d 114 (1991). The officers' purpose was not to investigate criminal activity but to obtain information in order to prepare an affidavit in order to obtain a search warrant, which they did. The officers entered onto Mr. Olson's property for the purpose of searching for evidence that Mr. Olson was selling a truck part or audio equipment in order to obtain a search warrant. The officers were not lawfully on the property conducting legitimate business.

In addition, there was no implied consent to view the interior of the Suburban. The trial court concluded Det. Hudson's observations were made from a vantage point in which Mr. Olson did not have an expectation of privacy. CP 54. COL 4. The open view doctrine is satisfied only when "[t]he object under observation is not subject to any reasonable expectation of privacy." *Seagull*, 95 Wn.2d at 902. The relevant factors to determine if police exceeded the scope of the open view doctrine include whether the police: "(1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct access route to the house; (5)

attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally.” *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991) (citing *State v. Seagull*, 95 Wn.2d at 905).

Det. Hudson’s observation in this case was unlawful under a *Seagull* inquiry. As previously set forth, the officers contacted Mr. Olson for the purpose of gathering evidence to support the issuance of a search warrant. The information they gathered to serve this purpose, including their observations and conversations with Mr. Olson, was not fortuitous, as exemplified by Det. Hudson spying into the vehicle after being denied consent to search therein. Moreover, the detective created an artificial vantage point by coming within inches of the rear of the Suburban and using his hands to shade the tinted window to see inside.

d. Any evidence collected pursuant to the search warrant should be suppressed since the warrant is based on evidence collected illegally.

An affidavit establishes probable cause for a search warrant if it sets forth sufficient facts to permit a reasonable person to conclude there is a probability that the suspect is involved in criminal activity and the evidence of that activity will be found at the place to be searched. *State v. Young*, 123

Wn.2d 173, 195, 867 P.2d 593 (1994).

The *Aguilar-Spinelli* test requires that an affidavit based on information from an informant must (1) set forth the underlying factual circumstances from which the informant makes his conclusions so that a magistrate can independently determine the reliability of the manner in which the informant acquired his information and (2) set forth facts from which the officer can conclude the informant is credible and his information reliable. *State of Washington v. Mickle*, 53 Wn.App. 39, 41, 765 P.2d 331(1989) citing *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v Texas*, 378 U.S. 108, 840S.Ct. 1509, 12 L.Ed.2d 723 (1964). “If the informant’s tip fails under either or both of the two prongs of *Aguilar-Spinelli*, probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test”. *State v. Jackson*, 102 Wn.2d 432, 438, 688 P.2d 136 (1984). An anonymous tip cannot, by itself, establish probable cause. There must be an indicia of reliability in addition to the anonymous tip. *State v. Jackson, supra* at 439. “If the police investigation reveals suspicious activity along the lines of the criminal behavior proposed by the informant, then the corroborating

investigation may satisfy the requirements of *Aguilar-Spinelli*.” *State of Washington v. Duncan*, 81 Wn.App. 70, 77, 912 P.2s 1090 (1996). It is not sufficient if the investigation only corroborates innocuous facts. *State v. Jackson, supra* at 438.

Here, the affidavit for the search warrant in this case [Exhibit 8], when viewed without the information gained from the warrantless search does not establish probable cause, with the result that the warrant should not have been issued, and the trial court erred in not suppressing all evidence seized pursuant thereto, including the officers’ conversations with Mr. Olson and their observations made prior to obtaining the search warrant. *Wong Sun v. United States; State v. Soto-Garcia*, 68 Wn. App. at 27-29.

e. **Mr. Olson’s statements to Det. Hudson on March 3, 2010 should also be suppressed.**

Because of the prior illegal search, any evidence, including Mr. Olson’s statements made to Det. Hudson after he was advised of his *Miranda* rights on March 3, 2010, is tainted and therefore inadmissible as “fruits of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 484-85, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); *State v. Soto-Garcia*, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992); *State v. Gonzales*, 46 Wn. App. 388, 397-98, 731 P.2d

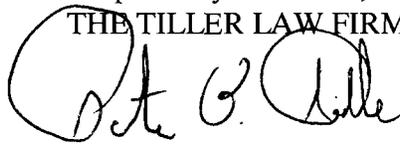
1101 (1986).

E. CONCLUSION

Based on the above, Robert Olson respectfully requests this court to reverse and dismiss his conviction.

DATED: April 25, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", is written over the printed name of the law firm.

PETER B. TILLER-WSBA 20835
Of Attorneys for Robert Olson

ATTACHMENT A

STATUTES

RCW 9A.56.160

Possessing stolen property in the second degree — Other than firearm or motor vehicle.

(1) A person is guilty of possessing stolen property in the second degree if:

(a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value; or

(b) He or she possesses a stolen public record, writing or instrument kept, filed, or deposited according to law; or

(c) He or she possesses a stolen access device.

(2) Possessing stolen property in the second degree is a class C felony.

ATTACHMENT B

EVIDENCE NO: _____

GRAYS HARBOR COUNTY DISTRICT COURT

STATE OF WASHINGTON)
) ss. **AFFIDAVIT FOR SEARCH WARRANT**
 GRAYS HARBOR COUNTY)

COMES NOW Detective Jon J. Hudson, who being first duly sworn, upon oath, complains, deposes and says:

My name is Jon J. Hudson. I have been a Police Officer for over 16 years. I am a graduate of the Washington State Criminal Justice Training Commission Basic Academy. I am currently employed as a Detective with the Aberdeen Police Department. I have conducted numerous criminal investigations; including but not limited to robbery, narcotics, homicide, burglary, stolen property, and forgery investigations as a police officer and detective. I have investigated numerous crimes, leading to the arrest and conviction of a number of perpetrators. I have been closely involved in numerous search and arrest warrant services, which have resulted in the recovery of evidence leading to successful prosecutions.

I have probable cause to believe and in fact do believe that evidence of the crime of burglary, or contraband, the fruits of a crime or things otherwise criminally possessed or other things by means of which a crime has been committed or reasonably appears about to be committed, particularly described as follows:

- a. Indicia of Dominion and control, e.g., misc. receipts, any mail, vehicle registration, and/or vehicle ownership documentation.
- b. Roush Supercharger, Model #401633, black (High performance engine part)
- c. Planet Audio brand amplifiers
- d. Valor, Artis, and Myron brand DVD players

- e. Power Bass and Tsunami brand power capacitors
- f. Panasonic, Pioneer, and Clarion brand in dash DVD
- g. Sony brand Bluetooth CD Player
- h. Motorcraft brand vehicle batteries.

are under the control of, or in the possession of some person or persons and are concealed in or on certain premises, vehicles or persons within Grays Harbor County, Washington, described as follows, to-wit:

1. A motor vehicle bearing WA vehicle license plate # 223UBA, VIN: 1GNFK16R2TJ382943, 1996, Chevrolet, Suburban; registered owner Robert L. Olson, 510 2nd Avenue, Aberdeen, WA 98520.
2. Motor vehicle WA plate #223UBA is parked at the Aberdeen Police Department, with vehicle access doors sealed with evidence tape, located at 210 E. Market Street, Aberdeen, Grays Harbor County, WA

That my belief is based upon the facts and circumstances as set forth in the numbered attachments hereto, which are incorporated herein by this reference.

On 02/10/10 at about 0414 hrs, Aberdeen Police Officers responded to a reported burglary at the Five-Star Ford Dealership located at 711 E. Heron Street, Aberdeen, Washington. The initial investigation at the scene revealed forced entry, glass breakage, to the south showroom door. New Honda brand generators were stolen from the display stand in the showroom, a large number of Audio/Video car

equipment (DVD players, car stereo amplifiers, power capacitors, car stereo CD players) stolen from their storage and display areas from the Audio showroom, and misc vehicle parts, namely a Roush Supercharger stolen from a display wall. A customer's vehicle, WA #B18786A, a gray 2000 Ford Ranger truck, was stored in the service bay awaiting vehicle maintenance but had been stolen from the premise. The customer's truck was used to smash through the service bay metal door, carrying the stolen merchandise.

On 02/12/10 at about 1701 hrs, Aberdeen Police recovered the stolen customer's vehicle in a residential neighborhood in East Aberdeen.

On 02/23/10 at about 1050 hrs, an anonymous tip was provided to Deputy Chief Dave Timmons concerning an individual attempting to sell a Roush Supercharger. The tip had been relayed to Mike O'Dell, the General Manager at Five-Star Ford. I contacted Mike O'Dell at Five-Star. O'Dell related he had received suspect information the previous day (02/22/10) from a person who wished to remain anonymous. The tipster reported to O'Dell that a white stocky male, approximately 5'-7" +, about 250 lbs, middle-aged, short hair, and missing one of his fingers, had approached the tipster wanting to sell a Roush Supercharger. The male knew exactly what the Supercharger who fit, but did not have all the parts for it. The suspect male left his name, "Bob" with a contact cell phone number, "360-591-6557." The tipster reported the associated vehicle the suspect male arrived in was a green or black colored 1990's Honda Civic, bearing Washington license plate number, "907VTQ." O'Dell did not wish to provide the tipster's name due to a promise and tipster's fear of retribution. The suspect vehicle registration (907VTQ) returned to male residing in South Aberdeen; however, the vehicle returns to a red 1997 Dodge Caravan. It was later determined the vehicle plates were not stolen from the Dodge

Caravan. Efforts to locate a "like" vehicle plate to a Honda passenger car was not fruitful.

On 03/02/10 at about 1415 hrs, an anonymous tip was reported to the Aberdeen Police Department. The anonymous tip reported that a "Robert Olson" is trying to sell merchandise from the Five-Star burglary and currently has the Roush Supercharger in his possession. It was related Robert Olson is driving a red Suburban, Washington vehicle plate #223UBA. A records check on the vehicle shows Robert L. Olson (PIC name "OLSONRL302KS") as the registered owner, residing at 510 2nd Avenue, Aberdeen, Washington. The information was directed to police patrols. Cpl Darrin King was assigned to watch Robert Olson's residence, while officers and detectives searched the area for the vehicle. At about 1504 hrs, I heard Cpl King advise radio he was out with the suspect vehicle and Robert Olson at 510 2nd Avenue. I responded to the location and on arrival, Cpl King informed that Robert Olson told him he would not allow the police to search his vehicle without a search warrant. I viewed Robert Olson's maroon colored 1996 Chevrolet Suburban parked in the driveway of his residence at 510 2nd Avenue. I made contact with Robert Olson and informed him that the police had received information he and his vehicle possibly possessed some items he should not have or sell. I asked if this was the case, we would like his cooperation to recover the items for the rightful owner. Robert Olson told me he had nothing to hide but I would need a search warrant if I wanted to search his vehicle. Robert Olson had his hands in his front jeans pocket. I asked Robert Olson to show me his hands. I viewed *Robert Olson to be missing his entire index finger from his left hand.* Captain John Green, Officer Jeff Weiss, and Lt Kevin Darst arrived. In plain view of Washington vehicle plate #223UBA, Robert Olson's 1996 Chevrolet Suburban's rear vehicle window, Officers could see new merchandise boxes for audio/video car equipment. I noted one box to bear the brand name "Valor" DVD player with a white with black lettering price tag, "\$70 not including tax" (produced from an electronic labeler) affixed to the

merchandise box. I also noted similar merchandise boxes displaying brand name "Planet Audio" amplifier, and a DVD touch screen media player box.

Robert Olson asked if he could go inside his residence. Captain Green allowed him to enter his residence (not escorted). Robert Olson was advised his vehicle is being detained for further investigation.

Deputy Chief Dave Timmons located Five-Star Ford employee Colin Gill (parts counterman and audio/video car installer). Colin Gill was transported to 510 2nd Avenue to view through the vehicle window the merchandise boxes contained within Robert Olson's vehicle. While in route to the residence, traveling north on "B" Street, Colin Gill viewed Robert Olson walking southbound under the awning of the Thrift store located in the 300 Blk N B Street. Colin Gill recognized Robert Olson as a customer at Five-Star Ford. Colin Gill also reported he remembered Robert Olson in the audio/video center hours before the burglary that night. On Colin Gill's arrival at the residence, he immediately recognized the merchandise boxes stating those items are sold at Five-Star. He further reported he knows the price labels, as he uses those labels to mark their merchandise (using a Brother's brand electronic labeler). Robert Olson's vehicle was seized for application of a search warrant. No No's Towing impounded the vehicle to the Aberdeen Police Department parking lot where Lt Darst sealed the vehicle's access doors with evidence tape. I later inspected Robert Olson's vehicle for proper seal and observed a cell phone on the center console (face up). I dialed the phone number for "Bob, 360-591-6567", whom had been reported on the 02/23/10 from an anonymous tipster, as person who was attempting to sell the \$5,000 Roush Supercharger engine part. I observed cell phone contained within Robert Olson's vehicle to light up and ring.

I believe that there is probable cause the evidence named on the face of this affidavit will be found at the Aberdeen Police Department, 210 E. Market Street, Aberdeen, Grays Harbor County, WA within motor vehicle Washington State license #223UBA.

SUBSCRIBED AND SWORN: This 3rd day of March, 2010.

[Handwritten Signature] 203 03-10-10

AFFIANT

JUDGE

Issuance of Warrant Approved:

H. STEWARD MENEFEE
Prosecuting Attorney
For Grays Harbor County

BY: Bill Lomas, per telephone

Deputy Prosecuting Attorney
WSBA

Attachments:

COURT OF APPEALS
DIVISION II

11 APR 27 PM 12:30

STATE OF WASHINGTON
BY _____
DEPUTY _____

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT OLSON, Appellant.	COURT OF APPEALS NO. 41269-1-II GRAYS HARBOR COUNTY NO. 10-1-00097-9 CERTIFICATE OF MAILING
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The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to, Robert Olson, Appellant, and Gerald Fuller, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 25, 2011, at the Centralia, Washington post office addressed as follows:

Mr. Gerald Fuller
Deputy Prosecuting Attorney
Grays Harbor Co. Prosecutor's Office
102 W. Broadway Ave., Rm. 102
Montesano, WA 98563

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

CERTIFICATE OF MAILING 1

THE TILLER LAW FIRM
ATTORNEYS AT LAW
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CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828

Robert Olson
510 2nd Avenue
Aberdeen, WA 98520

Dated: April 25, 2011.

THE TILLER LAW FIRM

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
MAILING

2

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