

No. 42330-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MARIO ELLIOTT FALSETTA,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 09-1-00170-9
The Honorable Ronald Culpepper, Judge
The Honorable Beverly Grant, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to enter written findings and conclusions after the CrR 3.5 and CrR 3.6 hearings.
2. The trial court erred when it denied Appellant's CrR 3.6 motion to suppress.
3. The State failed to present sufficient evidence to establish all the elements of the crime of second degree identity theft.
4. The State failed to present sufficient evidence to establish all the elements of the crime of second degree possession of stolen property.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it failed to enter written findings and conclusions after the CrR 3.5 and CrR 3.6 hearings?
(Assignment of Error 1)
2. Did the trial court err when it denied Appellant's CrR 3.6 motion to suppress, where the State failed to present any facts to establish that Appellant's girlfriend had authority to consent to a search, and where the State failed to present any facts to establish that either Appellant or his girlfriend understood that they could refuse to consent to the entry or search of Appellant's home? (Assignment of Error 2)

3. Did the State present any evidence from which a trier of fact could find that Appellant intended to commit a crime with another person's financial information, which is an essential element of the crime of second degree identity theft?
(Assignment of Error 3)
4. Did the State present any evidence from which a trier of fact could find that Appellant knew the credit cards in his room had been stolen, which is an essential element of the crime of second degree possession of stolen property?
(Assignment of Error 4)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Mario Elliott Falsetta by Information with two counts of second degree identity theft (RCW 9.35.020), two counts of second degree possession of stolen property (RCW 9A.56.140, .160), and one count of unlawful use of drug paraphernalia (RCW 69.50.102, .412). (CP 1-2) The State dismissed the paraphernalia charge before the start of trial. (03/22/11 RP 7; CP 48-49)¹

¹ Citations to the transcripts will be to the date of the proceedings followed by the page number.

Falsetta moved to exclude statements he made while in custody, and to suppress evidence found during a search of his residence. (2/17/11 RP 61-69; CP 7-10) The trial court orally denied both motions, and ruled that the statements and evidence were admissible. (2/17/11 RP 73-78) However, the court never entered written findings and conclusions.

After the State rested its case-in-chief, Falsetta moved to dismiss the charges, arguing that the State failed to present evidence to establish the essential elements of the charged crimes. (03/24/11 RP 146-48) The court denied the motion. (03/24/11 RP 150)

The jury convicted Falsetta on both counts of identity theft and both counts of possession of stolen property. (CP 79-82; 03/25/11 RP 247-48) The trial court imposed a standard range sentence totaling 51 months of confinement. (CP 88, 91; 06/03/11 RP 13) This appeal timely follows. (CP 98)

B. SUBSTANTIVE FACTS

1. *Facts from CrR 3.5 and CrR 3.6 Hearing*

Ryan Kowalchuck, a community corrections officer with the Department of Corrections, conducts home visits with drug offenders to monitor compliance with their terms of release.

(02/17/11 RP 20, 22) Among other things, offenders are prohibited from possessing firearms or ammunition, and are required to obey all laws. (02/17/11 RP 29, 42; Exh. 3)

On February 5, 2008, Kowalchuck was assigned to conduct a home visit with Mario Falsetta at his Graham, Washington residence. (02/17/11 RP 22, 23, 26) Kowalchuck testified that he knocked on the front door, and Falsetta's girlfriend answered the door. He told her that he was there to conduct a home visit and, according to Kowalchuck, she let him into the home and led him to Falsetta's bedroom. (02/17/11 RP 27, 28)

Kowalchuck introduced himself to Falsetta, and proceeded to do a cursory visual search of the bedroom. (02/17/11 RP 28) Then Kowalchuck and Falsetta walked back to the living room, where Kowalchuck noticed an ammunition box sitting on a table. (02/17/11 RP 28-29) The box was empty, but Kowalchuck was concerned that there might be ammunition or firearms elsewhere in the home. (02/17/11 RP 29) Kowalchuck also did not believe Falsetta when he said he had found the empty box outside. (02/17/11 RP 45-46)

Kowalchuck believed he had a reasonable suspicion that Falsetta was in violation of the conditions of his release, so he

decided to do a more thorough search of the home. (02/17/11 RP 29, 30) Kowalchuck acknowledged that Falsetta was not free to leave at that point, but he could not remember whether he informed Falsetta of his Miranda rights at that time. (02/17/11 RP33, 34-35, 40)

Kowalchuck returned to Falsetta's bedroom, and noticed a glass pipe and a baggie containing a powder residue sitting on the nightstand. (02/17/11 RP 30-31) Kowalchuck found credit cards, and driver's licenses, and financial documents with the names of Michelle Dequis and Beverly Smith.

Kowalchuck contacted the Pierce County Sheriff's Department and asked for a Deputy to be dispatched to the home. (02/17/11 RP 33) Deputy William Ruder arrived a short time later, and was told by Kowalchuck that Falsetta had already been given his Miranda warnings. (02/17/11 RP 11) Ruder generally advises suspects of their rights when he arrives on the scene, but he could not remember whether he did so in this situation. (02/17/11 RP 11-12) But Kowalchuck noted in his report that Ruder gave Falsetta the standard Miranda warnings. (02/17/11 RP 36)

In orally denying Falsetta's motion to suppress the statements and evidence found in his bedroom, the trial court

stated:

[Kowalchuck's] testimony was that he went to the door and a woman he described as Falsetta's girlfriend met him at the door and invited him in and took him back to a bedroom, apparently, where Mr. Falsetta was living.

. . . And up to this point I don't see any violation on Mr. Falsetta's part. I also don't see any violation of Ferrier. I don't think it applies here.

. . .
So, I think the officer was there legally and found things in plain view. They were subject to seizure. And, again, kind of a step by step, the initial entry into the room was authorized because he had been invited there, found nothing, saw the ammo box, reasonable cause to search further. He finds a drug pipe in violation, continues searching for potential ammunition and guns, finds some other evidence. So I think the evidence was seized legally. I'm going to deny the motion to suppress, 3.6.

With respect to 3.5, it is a little more confusing partly, I think, because of the passage of time. It's now three years since this occurred. . . . I don't find it at all unrealistic the officer wouldn't remember, if he wouldn't have any specific memory of giving Miranda warnings. . . .

Ruder should have put it in his report, no doubt about it, but he didn't. He said his policy generally is if he's not there, he reads the Miranda warnings. Kowalchuck put in his report that Ruder did it, so I find by a preponderance of the evidence that Ruder read the Miranda warnings to Mr. Falsetta, who was already in custody. So, statements made as a result of custodial interrogation after Ruder advised him of his Miranda warnings are admissible.

Other statements made before that, I can't say I am convinced Kowalchuck read him his Miranda warnings, so I don't think he was properly warned, so statements he made in response to interrogation by Kowalchuck would not be admissible. Spontaneous

statements he may have made . . . would be admissible[.]

(02/17/11 RP 73-77; A complete copy of the trial court's oral ruling is attached in the Appendix.)

2. *Facts from Trial*

Michelle Dequis testified that she worked at the Spanaway Walmart in the Fall of 2007. (03/23/11 RP 52, 54-55) She routinely left her purse tucked under the front passenger seat of her car while she worked, because there was no room to store personal belongings inside the Walmart. (03/23/11 RP 52) One night, after she completed her shift, she noticed that her purse was missing. (03/23/11 RP 52, 53) Her wallet, which held her credit cards and driver's license, was inside the purse. (03/23/11 RP 54, 55)

When Dequis called to cancel her credit cards a short time later, she was informed that there had already been multiple charges on the cards at a gas station near the Walmart, and for airtime for a Verizon cellular phone. (03/23/11 RP54)

In December of 2007, Beverly Smith's Yelm home was burglarized. (03/23/11 RP 133-34) The perpetrator took jewelry, her checkbook, an expired driver's license, and financial statements and papers sent to Smith by her bank and investment companies.

(03/23/11 RP 134, 136)

Kowalchuck testified that he found credits cards and a driver's license issued to Michelle Dequis in a drawer or trunk next to Falsetta's bed. (03/22/11 RP 24, 37-38) Falsetta volunteered that he knew the items were there, but he did not know who they belonged to and did not think it was right to throw them away. (03/22/11 RP 35)

Kowalchuck also found a metal tin in Falsetta's room. (03/23/11 RP 67) He found a driver's license, gift cards, and financial documents in the name of Beverly Smith inside the tin. (03/23/11 RP 68-69, 70) Falsetta told Ruder that he had been staying in the bedroom for just two months, and that he knew the documents were in the tin but did not intend to use them. (03/23/11 RP 118)

Neither Kowalchuck nor Ruder could say who took the items from Dequis and Smith, or how the items came to be in Falsetta's room. (03/23/11 RP 81, 123, 127) Nor could they say whether Falsetta ever used Dequis' credit cards or Smith's financial information, or if he ever intended to use them. (03/23/11 RP 81-82, 83, 123)

Falsetta's sister, Brianna Davis, and her friend, Courtney

Brown, testified that they found Dequis' cards in the Walmart bathroom when they stopped there one evening to purchase personal items. (03/24/11 RP 156, 157, 158, 175, 177) Brown testified she put the cards on the table of Davis' house and then forgot about them when she went home the next day. (03/24/11 RP 160)

Davis also testified that Falsetta had only been staying in the bedroom for a short time because he had recently been released from prison. (03/24/11 RP 180-81) Another man of questionable character had been staying in the room before Falsetta moved in. (03/24/11 RP 182-83)

IV. ARGUMENT & AUTHORITIES

- A. THE TRIAL COURT ERRED WHEN IT DENIED FALSETTA'S MOTION TO SUPPRESS BECAUSE THE STATE FAILED TO PROVE A VALID EXCEPTION TO THE WARRANT REQUIREMENT EXISTED AT THE TIME KOWALCHUCK ENTERED AND BEGAN SEARCHING FALSETTA'S HOME

The trial court orally denied Falsetta's request to exclude his custodial statements and to suppress the evidence found in his bedroom. (02/17/11 RP 73-78) But the trial court did not enter any written findings and conclusions formalizing its ruling.

Both CrR 3.5(c) and CrR 3.6(b) require written findings to be entered following a hearing on admissibility of statements or

evidence. As noted by our Supreme Court:

The purpose of . . . written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal.... A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment."

State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)

(citations omitted) (discussing CrR 6.1(d)'s requirement of written findings following a bench trial).

Falsetta is prejudiced by the absence of written findings because he is unable to assign error to the trial court's findings and conclusions, which compromises his ability to adequately challenge the court's rulings and his convictions.

Nevertheless, it is clear that the trial court erred when it denied Falsetta's motion to suppress because the search of his residence was unconstitutional. The trial court concluded that: Kowalchuck was invited into the home by Falsetta's girlfriend; Kowalchuck was legally in a position to see the ammunition box; the ammunition box provided a reasonable suspicion that Falsetta had violated the terms of his release; and the subsequent search was therefore valid. (02/17/11 RP 74-76) The trial court's

conclusions of law are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution protect citizens against warrantless searches and seizures of their person, property or home.² Warrantless searches are per se unreasonable. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Because this is a strict rule, courts limit and narrowly construe exceptions to the warrant requirement. Parker, 139 Wn.2d at 496. When challenged, the State bears the heavy burden of proving that a warrantless search falls within an exception. Parker, 139 Wn.2d at 496.

Probationers and parolees do have a diminished expectation of privacy. Still, a community corrections officer may only conduct a warrantless search of the individual or his property if the search is reasonable and the officer has a well-founded, reasonable suspicion that a violation of the conditions of release has occurred. RCW 9.94A.631(1); State v. Massey, 81 Wn. App. 198, 200-01,

² Article I, section 7 provides greater privacy protections than the Fourth Amendment. State v. Jackson, 150 Wn.2d 251, 260, 76 P.3d 217 (2003); State v. Vrieling, 144 Wn.2d 489, 495, 28 P.3d 762 (2001).

913 P.2d 424 (1996); State v. Lucas, 56 Wn. App. 236, 243-44, 783 P.2d 121 (1989). A suspicion is reasonable when based on specific and articulable facts and the rational inferences drawn from those facts. Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Simms, 10 Wn. App. 75, 87, 516 P.2d 1088 (1973).

Kowalchuck acknowledged that he went to the house to conduct a routine check and did not suspect that Falsetta had violated any conditions of release or engaged in any sort of criminal behavior. (02/17/11 RP 43-44) And in its oral ruling the trial court noted that Kowalchuck “had no particular reason to think Mr. Falsetta was not in compliance.” (02/17/11 RP 73) Accordingly, to support the entry into and search of Falsetta’s home, the State must show that another exception to the warrant requirement existed at the time.

The State argued, and the trial court agreed, that Falsetta’s girlfriend “invited” Kowalchuck into the house; in other words, his girlfriend gave consent to the entry and search. (02/17/11 RP 70, 73) The court apparently also concluded that Falsetta consented to the search as well because Falsetta allowed Kowalchuck to enter his bedroom. (02/17/11 RP 74)

Consent is one exception to the warrant requirement. State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998) (citing State v. Hendrickson, 129 Wn.2d 61, 72, 917 P.2d 563 (1996)). The State has the burden of proving by clear and convincing evidence that the consent to a search was valid. State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990); Ferrier, 136 Wn.2d at 111.

First, the State presented no evidence indicating that Falsetta's girlfriend lived or was staying at the residence, and therefore failed to present any evidence that she had authority to consent to a search in the first place. See State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005) ("the consenting party must be able to permit the search in his own right").

But even if Falsetta's girlfriend did live in the house and did have equal authority to consent to a search, "that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent." Morse, 156 Wn.2d at 13 (citing State v. Leach, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989)). Accordingly, once Kowalchuck contacted Falsetta, he was required to obtain Falsetta's knowing and voluntary consent to remain in and search the home.

To show that consent to a search is valid, the prosecution

must prove that the consent was freely and voluntarily given. See State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003) (citing Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 20 L.Ed.2d 797 (1968); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998)). An essential element of consent to the search of a dwelling is *knowledge of the right to refuse consent*. Ferrier, 136 Wn.2d at 116 (citing State v. Johnson, 68 N.J. 349, 346 A.2d 66, 68 (1975)). “In obtaining that consent, police are required to tell the person from whom they are seeking consent that they may refuse to consent, revoke consent, or limit the scope of consent.” Morse, 156 Wn.2d at 13 (citing Ferrier, 136 Wn.2d at 116).

Kowalchuck testified that Falsetta’s girlfriend opened the front door after he knocked, and that he “probably” told her that he was a community corrections officer with the Department of Corrections, there to conduct a home visit. (02/17/11 RP 27) Kowalchuck testified that the girlfriend “let me into the home and took me back to Mr. Falsetta.” (02/17/11 RP 27) Then Kowalchuck began a cursory search of the home with Falsetta accompanying him. (02/17/11 RP 28)

There is nothing in this record to establish that either Falsetta’s girlfriend or Falsetta understood that, under the

circumstances, Kowalchuck could enter and search the home only with express permission. There is also no evidence that either Falsetta's girlfriend or Falsetta were ever told that they had the right to refuse Kowalchuck's entry into and search of the home. The State therefore failed to establish that the girlfriend's "invitation" to enter, and Falsetta's subsequent acquiescence to a walk-through, were freely and voluntarily given.

The state did not establish that any valid exception to the warrant requirement existed, and therefore did not establish that Kowalchuck's entry into the home was legally permissible.

When an unconstitutional search occurs, all subsequently uncovered evidence, including oral statements, that are "fruit of the poisonous tree" must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (citing State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)); State v. Eserjose, 171 Wn.2d 907, 259 P.3d 172 (2011). Therefore, all of the items discovered in Falsetta's bedroom, as well as any statements made regarding those items, should be suppressed.

B. THE STATE FAILED TO PROVE ALL THE ELEMENTS OF IDENTITY THEFT AND POSSESSION OF STOLEN PROPERTY BECAUSE THE EVIDENCE DID NOT SUPPORT A CONCLUSION THAT FALSETTA INTENDED TO COMMIT A CRIME OR THAT HE KNEW THE CREDIT CARDS WERE STOLEN

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

A person commits the crime of identity theft if they “knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime[.]”

RCW 9.35.020(1).³ Mere possession of another's identification is insufficient; the State must prove that the defendant acted with the intent to commit a crime. State v. Scoby, 117 Wn.2d 55, 61-62, 810 P.2d 1358 (1991); WPIC 131.05, 131.06. The State must provide some corroborating evidence of intent and guilty knowledge. Scoby, 117 Wn.2d at 61-62 (citing State v. Douglas, 71 Wn.2d 303, 428 P.2d 535 (1967); State v. Ladely, 82 Wn.2d 172, 175, 509 P.2d 658 (1973)).

In this case, the State presented no evidence from which a rational trier of fact could infer that Falsetta intended to commit a crime using Dequis' or Smith's financial information. The items were found in Falsetta's room several months after they were taken from Dequis and Smith, and Falsetta acknowledged he knew they were in the room. (03/22/11 RP 35; 03/23/11 RP 118) That is the extent of the State's evidence against Falsetta on these charges.

Dequis testified that her purse was stolen and her credit cards were immediately used sometime in the Fall of 2007. (03/23/11 RP 52, 53, 54, 55) Smith testified that her financial

³ A person commits first degree identity theft if her or she "obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value[.]" and second degree identity theft for any lesser amount. RCW 9.35.020(2), .020(3).

documents were taken from her home in December of 2007, but she did not know who took the items, and apparently nothing had been done with her information in the following months. (03/23/11 RP 134, 135) The State did not present any evidence that Falsetta was the person who took the purse or used Dequis' credit cards, or that he was the person who took Smith's financial documents. In fact, Falsetta had only recently been released from custody. (03/24/11 RP 181, 191-92)

There is simply no evidence from which to infer that Falsetta intended to commit a crime with Dequis' or Smith's financial information. The fact that Falsetta possessed the items cannot, without more, establish that he intended to commit a crime, and cannot establish that he committed the crime of identity theft.

The State also failed to prove all of the elements of the crime of possession of stolen property. Under RCW 9A.56.160(1)(c): "A person is guilty of possessing stolen property in the second degree if. . . [h]e or she possesses a stolen access device." Like the crime of identity theft, proof of mere possession is not sufficient to support a conviction. The State must also prove that a defendant knew the access devices had been stolen. RCW 9A.56.140(1); State v. Mott, 74 Wn.2d 804, 447 P.2d 85 (1968); State v. Rockett, 6 Wn. App.

399, 493 P.2d 321 (1972). An access device is stolen if it is “obtained by theft, fraud, robbery, [or] extortion.” RCW 9A.56.010(17).

The State charged Falsetta with two counts of possession of stolen property for possessing two of Dequis’ credit cards. (CP 48-49) But the State failed to present any evidence to prove that Falsetta knew Dequis’ credit cards had been “obtained by theft, fraud, robbery, [or] extortion.” RCW 9A.56.010(17). Falsetta admitted knowing the cards were in his room (03/22/11 RP 35), but there is simply no evidence that he knew how they came to be in his room, or that he knew they had been stolen from Dequis.

The State failed to present sufficient evidence to support Falsetta’s identity theft and possession of stolen property convictions. These two convictions must be reversed and dismissed. See State v. Smith, 155 Wn.2d 496, 504-05, 120 P.3d 559 (2005); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

V. CONCLUSION

The State did not establish that Kowalchuck had authority or valid consent to enter Falsetta’s home. His subsequent observation of the ammunition box was the result of an unlawful

entry. The credit cards and financial documents later found in Falsetta's room were therefore the fruits of this unlawful entry. The trial court should have granted Falsetta's motion to suppress. Furthermore, the State failed to prove anything beyond mere possession of the credit cards and financial documents, and therefore failed to prove the elements of identity theft and possession of stolen property. Falsetta's convictions should be reversed and dismissed.

DATED: November 21, 2011



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Attorney for Appellant Mario E. Falsetta

CERTIFICATE OF MAILING

I certify that on 11/21/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to Mario E. Falsetta, #822496, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

TRIAL COURT'S ORAL RULING FOLLOWING CRR 3.5 AND CRR 3.6 HEARING

1 here? Yeah. Okay; good-bye.

2 THE COURT: That certainly could have
3 happened.

4 MR. MOSLEY: That's what should have happened
5 under their conditions, requirements.

6 THE COURT: He said he was invited into the
7 house. Is there anything in here saying if somebody
8 invites you in the house, you can't go in? People knock
9 on your door. If you invite them in, they can go in.
10 You don't have to invite them in. I have people knock
11 on my door all the time. I hardly ever invite them in.

12 I'm ready to make a ruling on this. I don't mean
13 to belabor the point. With respect first to the search,
14 my understanding of the testimony from Officer
15 Kowalchuck is he was going out there to make a, quote,
16 routine, unquote, check on Mr. Falsetta, had no
17 particular reason to think Mr. Falsetta was not in
18 compliance. He said as far as he knew, he was, and
19 Mr. Falsetta was polite and cooperative with him.

20 His testimony was that he went to the door and a
21 woman he described as Falsetta's girlfriend met him at
22 the door and invited him in and took him back to a
23 bedroom, apparently, where Mr. Falsetta was living. His
24 testimony was he thought Mr. Falsetta's parents or, at
25 least, his mother and perhaps his sister were there, so

1 there were other people, at least one other adult in the
2 home. And up to this point I don't see any violation on
3 Mr. Falsetta's part. I also don't see any violation of
4 Ferrier. I don't think it applies here.

5 The officer wasn't there to talk about violations
6 of law. He was doing a routine check, had a right to be
7 there, in fact, a duty to be there under the laws
8 pertaining to DOC. His girlfriend takes him back to
9 Mr. Falsetta's bedroom. Mr. Falsetta, I think, probably
10 could have just stepped out of his bedroom and not
11 allowed him in, but apparently he did.

12 The officer did not conduct a search. There
13 apparently was a drug pipe later found. The officer
14 didn't see it. He did kind of a routine view, which
15 he's entitled to do just for officer safety. Again, no
16 problems with that. Mr. Falsetta was cooperative,
17 compliant. The officer hadn't seen anything. But I
18 think he was legally inside the home and then saw an
19 ammunition box.

20 Mr. Falsetta volunteered an explanation for how the
21 box got there that the officer didn't believe,
22 obviously. The ammunition is some concern because it's
23 pretty clear to me that Mr. Falsetta is prohibited from
24 possession of ammunition. I think the officer can then
25 do -- he has reasonable cause to do a search to see if

1 there's any ammunition. He goes back in the bedroom.
2 Before he finds any ammunition he sees a drug pipe, as I
3 understood it, that was on top of a dresser or
4 nightstand, so in plain view. The officer was there
5 legally. That's a violation and that's illegal, grounds
6 for arrest, grounds for a violation.

7 He does a further search looking for ammunition or
8 a gun. Doesn't find a gun, finds soft tip air pistols
9 or Airsoft pistols. Doesn't remember if they have a tip
10 on them or not, which, as we all know, people remove
11 those tips from air guns and use them in armed
12 robberies, so somewhat marginal, but at least a
13 potential cause for concern. Finds a knife, which is in
14 and of itself not a big deal but another potential cause
15 for concern, a 12-inch knife. Continues searching for
16 ammunition and guns, finds the evidence that apparently
17 the State believes is evidence of identity thefts,
18 credit cards belonging to other people, bank statements
19 in other people's names. We didn't get the names, but
20 I'm assuming other than Mr. Falsetta's.

21 So, I think the officer was there legally and found
22 things in plain view. They were subject to seizure.
23 And, again, kind of a step by step, the initial entry
24 into the room was authorized because he had been invited
25 there, found nothing, saw the ammo box, reasonable cause

1 to search further. He finds a drug pipe in violation,
2 continues searching for potential ammunition and guns,
3 finds some other evidence. So I think the evidence was
4 seized legally. I'm going to deny the motion to
5 suppress, 3.6.

6 With respect to 3.5, it is a little more confusing
7 partly, I think, because of the passage of time. It's
8 now three years since this occurred. And as I was
9 arguing more than I should have with Mr. Mosley, I don't
10 find it at all unrealistic the officer wouldn't
11 remember, if he wouldn't have any specific memory of
12 giving Miranda warnings. I don't remember specifically
13 swearing in witnesses. I routinely do. I can think of,
14 at least, one case I forgot to swear in a witness, but I
15 routinely do it. Angie makes a note of it. I don't
16 make a note of it.

17 Ruder should have put it in his report, no doubt
18 about it, but he didn't. He said his policy generally
19 is if he's not there, he reads the Miranda warnings.
20 Kowalchuck put in his report that Ruder did it, so I
21 find by a preponderance of the evidence that Ruder read
22 the Miranda warnings to Mr. Falsetta, who was already in
23 custody. So, statements made as a result of custodial
24 interrogation after Ruder advised him of his Miranda
25 warnings are admissible.

1 Other statements made before that, I can't say I am
2 convinced Kowalchuck read him his Miranda warnings, so I
3 don't think he was properly warned, so statements he
4 made in response to interrogation by Kowalchuck would
5 not be admissible. Spontaneous statements he may have
6 made, the ammo box before he was in custody, for
7 example, would be admissible and if he made other
8 spontaneous statements to Kowalchuck. I don't know what
9 those might have been. So do you have questions?

10 MR. MOSLEY: Just for the record, Your Honor,
11 Deputy Ruder testified that Kowalchuck, in Deputy
12 Ruder's own report, which he documented at the time of
13 the incident, Kowalchuck arrested Falsetta on a
14 probation violation and read him his Miranda warnings.

15 THE COURT: Of course, Ruder wasn't there when
16 that occurred, so that's what he believes Kowalchuck
17 said, and I just found that I'm not convinced Kowalchuck
18 did read him the Miranda warnings. I'm convinced that
19 Ruder read him the Miranda warnings.

20 MR. MOSLEY: Well, Your Honor, it goes on to
21 say that he says he understood and waived. It doesn't
22 say that Kowalchuck told him that. This is saying
23 Kowalchuck arrested Falsetta on a probation violation
24 and read him his Miranda rights, which he said he
25 understood and waived. So he understands his Miranda

1 rights and he's waiving them. It's documented in this
2 report, and this is clearly stating that Kowalchuck did
3 it. Kowalchuck is saying Ruder did.

4 THE COURT: Well, we know or I know from the
5 testimony Ruder wasn't there when that occurred. Ruder
6 is only reporting what Kowalchuck told him, so you're
7 saying I should find that Kowalchuck advised him of his
8 Miranda warnings?

9 MR. MOSLEY: I'm saying I don't know if his
10 Miranda rights were ever provided.

11 THE COURT: I'm convinced by a preponderance
12 of the evidence they were provided by Officer Ruder. He
13 testified that was his policy if he wasn't there.
14 Kowalchuck, in his report, says he was there to witness
15 Ruder read him the Miranda warnings. So I guess
16 Mr. Nelson has got to do some findings and conclusions.

17 MR. NELSON: The only other issue was our
18 trial date as well, so we need to set a new trial date.

19 THE COURT: I hate to do that without a word
20 from CDPJ. Did you talk to CDPJ about dates?

21 MR. NELSON: No. We were sent here without
22 any guidance from CDPJ. They knew that we weren't going
23 to do the trial today.

24 THE COURT: Well, let's set a trial date.
25 Mr. Mosley, you're in a trial in King County?

CUNNINGHAM LAW OFFICE

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Transmittal Letter

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