

FILED
COURT OF APPEALS
DIVISION II

2012 JUN -8 AM 11:56

STATE OF WASHINGTON

BY  DEPUTY

NO. 42751-6-II

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

STATE OF WASHINGTON,
Respondent,

v.

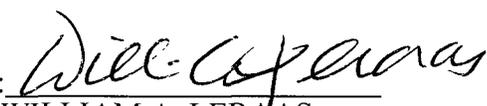
RUSSEL A. FORD,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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BY: 
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COUNTER STATEMENT OF THE CASE

The State would generally agree with appellant's Statement of Facts and Prior Proceedings, except for the following assertion on page three of appellant's brief:

At the hearing, Officer Dayton testified that Alvarado gave consent to a search of the car, which he considered included closed containers within, though that was not listed on the form she signed. RP 12, 21-22; CP 7.

While technically true, the statement is misleading. The consent to search form authorized Dayton to "search and/or seize property from the . . . vehicle listed above as evidenced by my signature on this form." CP 7. Clearly, Ms. Alvarado gave consent to search not only the vehicle, but items in the vehicle.

DISCUSSION

Consent is an exception to the warrant requirement. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). The consent must be voluntary, the person granting consent must have the lawful authority to do so and the search must not exceed the scope of the consent. *Id.*

The State bears the burden of proving that consent was voluntary. *State v. Bustamante-Davila*, 128 Wn.2d 964, 981, 983 P.2d 590 (1999). The voluntariness of the consent is a question of fact based on the totality of the circumstances. *Reichenbach*, at 132. Among the factors to be considered to determine whether or not the consent was voluntary or whether *Miranda* warnings were given, the degree of education and

intelligence of the person giving consent, and whether the consenting person was advised of the right not to consent. *Id.* Courts may also consider whether the individual signed a consent to search form and whether any language was included within the consent form that indicated the right to refuse consent. *State v. Smith*, 115 Wn.2d 775, 790, 801 P.2d 975 (1990).

"The voluntary consent to search a motor vehicle, given by a person with common authority over it, supports a search of the vehicle and evidence so discovered can be used against a non-consenting occupant of the vehicle." *State v. Cantrell*, 124 Wn.2d 183, 187, 875 P.2d 1208 (1994).

In *Cantrell, supra*, the defendant was driving a vehicle owned by his passenger's father (the two were on a "road trip" from California to Washington). During the course of a routine traffic stop in Pacific County, the passenger, the owner's son, gave the officer permission to search the vehicle and evidence was found that was used against Cantrell. In finding that the consent of the passenger was good as against defendant Cantrell, the court cited a long line of federal cases which held that the consent of one with common authority over the vehicle was good as against the other occupants of the vehicle. *Cantrell*, at 191-192. The court also held, or noted, that requiring an officer to obtain each occupant's permission before the search of a vehicle can be conducted was "unworkable." *Cantrell*, at 190-191. The court declined to extend its holding in *State v.*

Leach, 113 Wn.2d 735, 782 P.2d 1035 (1989) (where a co-habitant is present police must also obtain the co-habitant's consent before searching a home or other premises) to vehicles noting that "[t]here is less expectation of privacy in an automobile than in either a home or office." *Cantrell*, at 190.

Furthermore, as Ms. Alvarado did not limit the scope of the search Officer Dayton was entitled to search the backpack and assume that her consent covered the backpack. *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). *Parker* dealt with three consolidated cases which involved searches of the belongings of nonarrested vehicle passengers. In *State v. Parker* and *State v. Hunnel* the arrestee was the male driver of the vehicle and the police searched the purse of the nonarrested female passenger. In *State v. Jines*, Mr. Jines was the passenger in a vehicle in which the driver, Oberst, was arrested. As Jines was not wearing his seatbelt, the police asked him for identification, which he retrieved from his jacket. As the police were going search the vehicle incident to Oberst's arrest, they asked Jines to exit the vehicle and not take anything with him. They searched Jines' jacket and found methamphetamine. In all three of these cases the police knew that the item searched did not belong to the person under arrest. In *Parker* the court adopted a test enunciated by the Wyoming Supreme Court in *Houghton v. State*, 956 P.2d 363 (WYO 1998):

The Wyoming court adopted a straightforward rule allowing police officers

to assume all containers within the vehicle may be validly searched, unless officers know or should know the container is a personal effect of a passenger who is not independently suspected of criminal activity and where there no reason to believe contraband is concealed within the personal effect immediately prior to the search.

Parker, at 503 citing *Houghton*, at 370, 372. (emphasis added). Although searches incident to arrest are no longer allowed under *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 45 (2009), the principle that an officer may assume all containers within the vehicle may validly be searched unless the officer knows, or should know, that the containers are the personal effects of someone other than the person giving consent remains sound where there is a valid consent search such as here. Requiring an officer who is conducting a valid search to stop and ask who owns each piece of evidence would be “unworkable.” *Cantrell* at 190-191.

State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005) and *State v. Rison*, 116 Wn.App. 955, 69 P.3d 362 (2003) both relied upon by appellant are inapplicable because both cases involved searches of residences. As previously noted, the court in *Cantrell* declined to extend its holding in *Leach* (requiring police to obtain permission of co-habitant who is present) to vehicles.

CONCLUSION

Ms. Alvarado's consent to search the vehicle was voluntary. Ms. Alvarado's consent covered not only the vehicle but items within the vehicle. Her consent as the owner of the vehicle was valid as against Mr. Ford. Dayton was entitled to search the backpack because there was no way he could have known, or should have known, that the backpack belonged to Mr. Ford. Mr. Ford neither touched it or reached for it. There is no evidence that it was locked. There was no identification on the outside of the backpack that it belonged to Mr. Ford. There is no evidence that Ms. Alvarado told Dayton not to look in the backpack.

For all the foregoing reasons, appellant's conviction should be affirmed and this appeal dismissed..

DATED this 7 day of June, 2012.

Respectfully Submitted,

By: 
WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA #15489

WAL/lh

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DECLARATION OF MAILING

RUSSEL A. FORD,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 7th day of June, 2012, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry, Backlund & Mistry, P. O. Box 6490, Olympia, WA 98507, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 7th day of June, 2012, at Montesano, Washington.

Barbara Chapman