

NO. 43102-5-II

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

STATE OF WASHINGTON, Respondent

v.

DENNIS WAYNE MILLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01413-4

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE DEFENDANT'S ARREST WAS SUPPORTED BY PROBABLE CAUSE AND THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS

B. STATEMENT OF THE CASE

This Court has three sources of information to inform its decision: The verbatim report of proceedings (RP), the trial court's findings of fact and conclusions of law, and the police report filed by Deputy Yakhour, which Miller submitted to the trial court for its consideration as an attachment to his Motion to Suppress. Miller incorporated the report with his motion, said the motion was based on the records incorporated with the motion as well as the testimony to be adduced at the hearing, and called the report the "facts". See Supp. CP 27, 28. Miller adopted the facts in Deputy Yakhour's police report and placed no restriction on the trial court's consideration of that report. See Supp. CP 27-31.

Deputy Robin Yakhour received information on August 16th or 17th, 2011 (one to two days prior to the arrest) from Deputy Luque that a yellow Honda Accord had been stolen in Orchards, Washington. RP 5-6, CP 1-2, Supp. CP 38. On August 18, 2011, Deputy Yakhour was on patrol driving southbound on NE 147th Avenue when she noticed a yellow

Honda matching the description Deputy Luque had given her. Supp. CP 38, RP 5, CP 2. The car was parked in a residential driveway. Supp. CP 38, CP 2, RP 7. A man was squatted down and sitting partially inside the car, and he appeared to be working on the car in the area of the steering column. Supp. CP 38, RP 6, CP 2. At that point Deputy Yakhour ran a check of the car through NCIC and Washington Department of Licensing (DOL) using her mobile data computer (MDC) and the information came back that the car was reported as stolen. RP 7-8, Supp. CP 38, CP 2. Deputy Yakhour also contacted dispatch which confirmed that the car was reported stolen. RP 8, CP 2, Supp. CP 38. After twice confirming the information she received from Deputy Luque that the car was reported stolen, Deputy Yakhour approached the car, and Miller, on foot and arrested Miller. RP 8, CP 2, Supp. CP 39. During the arrest Miller was found to be in possession of methamphetamine. Supp. CP 39, CP 3, 7, RP 10.

Miller moved to suppress the evidence against him, arguing that Deputy Yakhour lacked probable cause to arrest him for possession of a stolen motor vehicle. Supplemental Clerk's Papers. Following the denial of his motion, the defendant was convicted of possession of methamphetamine after a stipulated facts bench trial. CP 4, 6-8. This timely appeal followed. CP 9-10.

C. ARGUMENT

I. THE DEFENDANT'S ARREST WAS SUPPORTED BY PROBABLE CAUSE AND THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS

An arrest based upon probable cause is an exception to the warrant requirement. *State v. Todd*, 78 Wn.2d 362, 365, 474 P.2d 542 (1970). Probable cause to arrest will be found “where the facts and circumstances within the arresting officer’s knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.” *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). This is not a technical inquiry and the officer need not have evidence proving each element of the crime beyond a reasonable doubt.” *Terrovona* at 643. The totality of the circumstances must point to the probability of criminal activity but a prima facie showing of guilt is not required. *State v. Seagull*, 95 Wn.2d 898, 906-07, 632 P.2d 44 (1981). The trial court’s findings of fact are reviewed for substantial evidence. *State v. Nelson*, 89 Wn.App. 179, 181, 948 P.2d 1314 (1998). This Court reviews the trial court’s finding of probable cause de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); *State v. Hill*, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994).

“The ‘fellow officer’ rule justifies an arrest on the basis of a police bulletin, such as a ‘hot sheet,’ if the police agency issuing the bulletin has sufficient information for probable cause.” *State v. Mance*, 82 Wn.App. 539, 542, 918 P.2d 527 (1996). However, “[i]f the issuing agency lacks probable cause, then the arresting officer will also lack probable cause.” *Mance* at 542. A stolen vehicle report alone “furnishes sufficient information to arrest the driver” under the Fourth Amendment. *Rhodes v. City of Roseburg*, 137 F.3d 1142, 1143, 1998 U.S. App. LEXIS 3672 (1998). The Ninth Circuit stated in *Rhodes*:

When a person operates an automobile, he is effectively in possession of the vehicle and can reasonably be presumed aware of its ownership. It is unlikely that a thief would casually lend a stolen vehicle to others; it is probable that the driver of a stolen car is either the thief himself or is aware that the car had been stolen. If an officer has reliable information, such as a police report, indicating that the vehicle had been stolen, he thus has probable cause to believe the driver has committed the crime of either stealing the car or knowingly operating a stolen vehicle.

Rhodes at 1142.

Relying entirely on *State v. O’Cain*, 108 Wn.App. 542, 31 P.3d 733 (2001), and on a passage from *State v. Sandholm*, 96 Wn.App. 846, 848, 980 P.2d 1292 (1999) that the *O’Cain* Court recognized as dicta (see *O’Cain* at 553), Miller contends that his arrest was not predicated on

probable cause. Miller states that the arrest was unlawful under both the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington Constitution. He does not state, however, how the analysis under Article 1, Section 7 would differ from the Fourth Amendment analysis. He merely states, in a footnote, that it is “‘axiomatic’ that Article 1, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution,” and concludes that no *Gunwall* analysis is required. See Brief of Appellant at page 5. Miller ignores this portion of the holding in *O’Cain*, supra:

O’Cain challenges the validity of the seizure under both the federal and state constitutions. Although our state Supreme Court has held that the first, second, third, fifth and sixth *Gunwall* criteria all lead to the conclusion that article 1, section 7 provides greater protection to privacy than the Fourth Amendment, O’Cain has failed to adequately brief the fourth factor – preexisting state law – as it relates to the issues in this case. Accordingly, we decide this case solely on Fourth Amendment grounds.

O’Cain at 545 (internal citations omitted).

Because Miller fails in this same respect, and makes no argument about how this Court should treat this claim independently of the Fourth

Amendment. this Court should analyze this case under the Fourth Amendment.

For the reasons set forth below, *State v. O’Cain* does not compel suppression of the evidence obtained in this case. In *O’Cain*, officers conducted a *Terry* stop of the driver of a vehicle after one of the officers, having run the plate of a vehicle he found to be suspicious, received notification from dispatch that the vehicle had been reported stolen. *O’Cain* at 546. Acting on the dispatch report alone, several officers conducted a felony-style *Terry* stop of the driver of the car (who spent the first 10 seconds of the apprehension reaching under his seat for a .357 magnum revolver), and subsequently arrested him for unlawful possession of a firearm. *O’Cain* at 547.

The Court held that although the officers are permitted to rely on information held by other law enforcement officers (which includes dispatch), and may act on it “without further inquiry,” the State must nevertheless be able to produce evidence (presumably at a later hearing – see *O’Cain* at 556) “that there was a factual basis for the stop – probable cause in the event of an arrest, and reasonable suspicion in the event of a *Terry* stop.” *O’Cain* at 552-53. To the extent that *O’Cain* was concerned with the fact that the trial court in that case may have relied on confirmatory information learned by the officers *after* the stop (see

O'Cain at 545). such a concern is not presented in this case. The differences between this case and *O'Cain* are plain. In Miller's case, unlike *O'Cain*, Deputy Yakhour possessed more than just a stolen vehicle hit from dispatch following a random license plate check or a hunch. One or two days prior to Deputy Yakhour's contact with Miller she received information from another deputy that a yellow Honda had been stolen out of Orchards. She was given a description of the car. When she saw the car on routine patrol she checked with NCIC and DOL to see if it was currently reported stolen, and it was. Then, she verified that information with dispatch. When she saw Mr. Miller, he was working in the car in the area of the steering column. This is precisely the type of corroboration necessary to support a finding of probable cause to arrest.

Curiously, Miller ignores both *Rhodes* and *Mance*. The *O'Cain* Court discusses *Mance*, but its reliance on *Mance* was curious because the holding in *Mance* addressed the situation where police, relying on the fellow officer rule, fail to recognize that a report of a stolen vehicle had been rescinded *prior* to the arrest or *Terry* stop-which was not the case in *O'Cain*. The *Mance* Court noted that the fellow officer rule must work both ways, and that the police will be held to the knowledge actually held by the other officer or agency upon which it relies. The Court said: "Here, the police who initially placed the car's license plate number on the 'hot

sheet" on March 2 had probable cause to believe that a crime had been committed...Thus, if there had been no attempt to cancel the stolen vehicle report, police would have had probable cause to arrest Mance for possession of stolen property." *Mance* at 542-43. Like *O'Cain*, the holding in *Mance* has limited applicability to this case because there is no suggestion in Miller's case that the stolen vehicle report was canceled prior to his arrest.

The holdings in *Rhodes*, *Mance*, and *O'Cain* each support the trial court's denial of Miller's motion to suppress and compel a finding of probable cause. Deputy Yakhour had three sources of information confirming that the car had been reported stolen. Moreover, when she came upon the car she saw Miller working on what appeared to be the steering column of the car. Substantial evidence supports the trial court's findings of fact, and those findings support the trial court's conclusions of law finding that probable cause supported Miller's arrest. The trial court should be affirmed.

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D. CONCLUSION

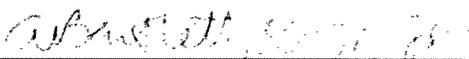
The trial court should be affirmed.

DATED this 13 day of September, 2012.

Respectfully submitted:

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