

NO. 44429-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEANA LYNN BELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 11-1-03178-2

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Stephen Trinen
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied defendant's CrR 3.6 motion to suppress where the traffic stop had expanded to a criminal investigation whereupon Officer McNaughton validly obtained defendant's consent to search her vehicle?

B. STATEMENT OF THE CASE.

1. Procedure

On August 8, 2011, the State charged Jeana Bell, defendant, with one count of unlawful possession of a controlled substance with intent to deliver (RCW 69.50.401(1)(2)(b)), one count of unlawful use of drug paraphernalia (RCW 69.50.102 and RCW 69.50.412(1)), and one count of dangerous weapons (RCW 9.41.250). CP 1–2.

The defendant filed a motion to suppress evidence based on a claim that: (1) the initial stop of defendant was unlawful; (2) the search of defendant's vehicle was incident to arrest and unlawful; (3) any consent was not voluntary because defendant was unlawfully detained. CP 4–15 at 14, 15.

The State's response to the motion argued that Officer McNaughton had a legal basis to stop, contact and arrest defendant, and that defendant voluntarily consented to the search of her vehicle. *See* CP 18, 20. *See* generally CP 16–32.

On September 13, 2012, the Honorable Kathryn J. Nelson presided over a hearing on the defendant's motion to suppress evidence. 1RP.

Defense counsel argued that, once Officer McNaughton learned that defendant was driving with a suspended license, may have been under the influence of intoxicants, and that there were knives in her car that he was done and at that point could only get a warrant. 1 RP 111–12.¹

Defense counsel argued that any consent to the search was invalid because it was coerced by a show of authority, apparently based upon the fact that he was wearing a uniform. 1 RP 112, ln. 1-6. *See* also, 1RP 108, 110.

The State argued that consent remained a valid exception to the warrant requirement and that not only did Officer McNaughton lawfully obtain defendant's consent to search, he advised defendant of her rights under *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998). 1 RP 118–20.

The court denied the motion to suppress the evidence. 1 RP 123–125; CP 74–77.

¹ The State will refer to the verbatim report of proceedings as follows: The three sequentially paginated volumes referred to as 1–3 will be referred to by the volume number followed by RP.

On September 20, 2012, defendant waived her right to a jury trial and at a bench trial the Honorable Judge Nelson found defendant guilty on all counts. 2 RP 131–132, 182.

On October 5, 2012, the court sentenced defendant to a total of 40 months.² 3 RP 202; CP 46–58.

This appeal was timely filed on October 5, 2012. CP 64.

2. Facts

a. Facts at CrR 3.6 Hearing

The following facts and conclusions are transcribed verbatim from the written findings and conclusions entered pursuant to the CrR 3.6 hearing:

FINDINGS OF FACT

1. The Court found Officers McNaughton and Pomeroy to be credible witnesses.
2. On August 7, 2011, Officer McNaughton was on routine patrol in the 5700 block of Pacific Highway East in Fife. He was driving east on Pacific Highway when he noticed defendant's car. Defendant was driving west in a gold Mazda MX3. Officer McNaughton noticed defendant's car because it had a very loud, throaty, worn out exhaust which the officer could hear clearly with all of the windows in his patrol vehicle rolled up.
- 2 [sic]. Officer McNaughton turned his car around and signaled defendant to stop. He could see damage to the muffler while he was driving behind defendant's car.

² Defendant received a DOSA sentence consisting of 20 months confinement and 20 months DOC supervision.

Defendant pulled over and stopped her car in a parking lot adjacent to a smoke shop in the 5500 block of Pacific Highway East.

3. Officer McNaughton contacted defendant and told her the basis for the stop. Defendant said she did not have any form of ID. She said her license was suspended and verbally identified herself. Defendant said the Mazda belonged to her friend but she drives it frequently. She also said she did not have the registration for the Mazda nor did she have proof of insurance. Officer McNaughton [sic] noticed defendant was very nervous and jittery.
4. The officer did a records check and determined defendant's driver's license was suspended in the third degree and she had felony convictions for forgery and UPCSWID. Officer McNaughton asked defendant to step out of her car to speak with him at the rear of the vehicle. The officer did so for officer safety.
5. Officer McNaughton read defendant the Miranda warnings, which defendant acknowledged understanding and waived.
6. Officer McNaughton asked defendant about drug use. Defendant said she had been clean and had not used methamphetamine for over one year. Defendant acted very offended when the officer asked her about drug use. Officer McNaughton asked defendant if she had weapons in her car. Defendant said there was a knife with a spring activated blade in her purse on the front seat. Officer McNaughton asked defendant if there was anything else illegal in her car. Defendant said there were "rigs" or hypodermic syringes. She said she was not diabetic or epileptic. Defendant said the "rig" [sic] were hers and she used them for shooting up methamphetamine because she "fell off the wagon" and used the previous night.

7. Officer McNaughton asked defendant if she would allow a voluntary search of the vehicle, and defendant agreed. Officer McNaughton told defendant that the search was voluntary; that she could limit the scope of the search or where the officer looked; that she could stop the search at any time including after the officer started the search; and that he wished to search her car for drugs, drug paraphernalia, and weapons. Defendant said she understood and again agreed to the search.
8. Officer Pomeroy arrived to assist. He stood with defendant at the rear of her car during Officer McNaughton's search. Defendant had a clear view of the entire search and direct access to both officers to stop or limit search. Defendant did not try to stop or limit search at any time.
9. Defendant also agreed to search of purse and the bags inside the car. In defendant's purse, Officer McNaughton found two knives.
10. Also in defendant's purse, Officer McNaughton [sic] found a 6"x9" unsealed manila envelope which [sic] over \$1000 dollars cash.
11. Officer McNaughton asked Defendant where the 'rigs', or syringes were at in her car. Defendant came over to open driver [sic] door and pointed at a blue duffle bag lying on the rear seat of her car. She said they were in the end pocket of the bag.
12. Officer McNaughton asked Defendant if there was methamphetamine in her car. Defendant told the officer, "It's in the glove compartment." Defendant gave Officer McNaughton permission to search the glove compartment.
13. The Court does not find the testimony of Rebecca McDonough, defendant's witness, to be credible. Ms. McDonough had a poor recollection of events relating to the chain of custody of defendant's car and made

inconsistent statements regarding dates of when she bought the car and received its title.

14. The Court does not find the testimony of James Mathews, defendant's witness, to be credible. Mr. Mathews had a poor recollection of when he inspected defendant's car. He had no record of inspecting defendant's car, admitted that he had no formal training to be an exhaust technician, and admitted that he lied to get his job as an exhaust technician.

CONCLUSIONS OF LAW

1. The officers had a legal basis to stop defendant's car for a traffic violation.
2. Defendant, knowingly, voluntarily, and intelligently gave her consent to the officers for them to search her car after Officer McNaughton advised defendant of the *Ferrier* warnings.
3. The officers' search did not exceed the scope of defendant's consent.
4. Defendant's motion to suppress is DENIED. All evidence which Officer McNaughton found during the search of defendant's car is admissible.

CP 74–77.

b. Facts at trial

The facts at trial are substantially similar to the facts at the suppression hearing and are thus not repeated.

C. ARGUMENT.

The defendant's only claim on appeal is that the lower court erred when it denied defendant's 3.6 motion to suppress the evidence obtained in the search of her vehicle. *See* Brief of Appellant, 1. The defense claims that the search of the car was unlawful because the officer exceeded the scope of the initial traffic stop. Brief of Appellant, 12. More specifically, defendant alleges that the consent to the search of her vehicle was invalid because Officer McNaughton exceeded the "legitimate scope of the traffic stop" by asking questions about criminal behavior and obtaining consent to search the vehicle. Brief of Appellant, 12, 13.

Defendant's claim is without merit where Officer McNaughton's contact did not exceed the scope of a traffic stop because at the time he asked his questions, the stop had properly expanded into a criminal investigation. The traffic stop expanded to a criminal investigation upon contacting the defendant when (1) defendant blurted out that she was driving with a suspended license, and (2) Officer McNaughton simultaneously observed defendant's appearance and behavior, which suggested that she was driving under the influence of drugs.

1. THE TRIAL COURT'S DENIAL OF THE SUPPRESSION MOTION IS REVIEWED BY DETERMINING WHETHER ITS FINDINGS SUPPORT ITS CONCLUSIONS OF LAW.

A trial court's denial of a suppression motion is normally reviewed for (1) whether its findings are supported by substantial evidence; and, (2) whether its findings support its conclusions of law. *State v. Bonds*, 299 P.3d 663, 667 (2013); *see also State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Dancer*, 174 Wn. App. 666, 670, 300 P.3d 475 (2013). Whether a trial court's conclusions of law are properly supported by its findings of fact is reviewed de novo. *State v. Rosas-Miranda*, __ P.3d __, 2013 WL 5297353 (2013).

Unchallenged findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Here defendant does not assign error to any of the trial court's findings. *See* Brief of Appellant, 1. Therefore, the court's findings are verities on appeal. *See Hill*, 123 Wn.2d at 644.

Moreover, because defendant has not assigned error to any of the findings of the CrR 3.6 hearing, this Court does not review such findings for substantial evidence. *See, e.g., State v. Freepons*, 147 Wn. App. 689, 179 P.3d 682 (2008); *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539

(2002) ("[U]nder Washington appellate procedure, the appellate court limits its review of findings of fact entered following a suppression motion solely to 'those facts to which error has been assigned'") quoting in part *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

2. THE PRESENT CASE IS CONTROLLED BY THE COURT'S OPINION IN *STATE V. SANTACRUZ*.

The court's opinion in *State v. Santacruz* involved substantially similar facts, is on point and directly controls this case. *State v. Santacruz*, 132 Wn. App. 615, 133 P.3d 484 (2006).

Santacruz was pulled over for driving with an expired vehicle registration. *Santacruz*, 132 Wn. App. at 617. Defendant admitted that he had no driver's license. *Santacruz*, 132 Wn. App. at 617. The officer observed that defendant's pupils were dilated but did not smell the odor of alcohol. *Santacruz*, 132 Wn. App. at 617. The officer then asked defendant if he had recently taken any type of drugs. *Santacruz*, 132 Wn. App. at 617. The defendant stated that he did not have any drugs, but a consensual search of his person revealed two syringes and a silver spoon with methamphetamine residue. *Id.* at 617-18.

When the trial court in *Santacruz* considered the motion to suppress evidence, it concluded that the officer's question regarding drug use was outside the scope of the traffic stop, and therefore rendered invalid the defendant's admission of his drug use, as well as his consent to

the search of his person *Santacruz*, 132 Wn. App. at 618. The trial court there granted Santacruz's motion to suppress, which ruling the State appealed. *Id.* at 618.

The Court of Appeals reversed the trial court, holding that "the drug investigation [...] was within the expanded scope of the original lawful stop." *Santacruz*, 132 Wn. App. at 622. The court reasoned:

The officer performed a lawful seizure based on an articulable suspicion of a traffic infraction. During that investigation, the officer learned that the driver had no operator's license. [...] [A]n officer investigating vehicle registration irregularities observed that the driver's pupils were unusually dilated. This aroused his suspicion that the driver was under the influence of drugs of some kind. This broadened the scope of the stop. It was a reasonable extension, not an unreasonable intrusion.

Santacruz, 132 Wn. App. at 621.

The facts of *Santacruz* are substantially similar to this case. Here, Officer McNaughton stopped defendant based upon an articulable suspicion of a traffic infraction. Upon contacting the defendant, Officer McNaughton observed that defendant had constricted pupils, pink eyes, and exhibited a "tweaking" behavior. 1 RP 15. Officer McNaughton's observations aroused his suspicion that defendant was under the influence of drugs. 1 RP 15. Despite initially denying possession of drugs, defendant admitted she had used drugs. CP 74–77 (Finding of Fact #6). She then consented to a search of the vehicle. CP 74–77 (Finding of Fact #7). The search yielded methamphetamine. 1 RP 28.

Indeed, the facts here more strongly support admission of the evidence than those in *Santacruz*. While the officer in *Santacruz* only observed dilated pupils, here, Officer McNaughton observed defendant's constricted pupils, pink eyes, and defendant kept moving her hands and arms in a "tweaking manner."³ 1 RP 15. Officer McNaughton further learned from defendant's own spontaneous statement that her license was suspended. 1 RP 39–40.

Here, the scope of the stop expanded, just as it did in *Santacruz*. Accordingly, where the subsequent questioning and consensual search was valid in *Santacruz*, it is even more so here.

3. OFFICER MCNAUGHTON'S CONTACT WITH
DEFENDANT LAWFULLY EXPANDED FROM A
TRAFFIC STOP TO A CRIMINAL INVESTIGATION,
RESULTING IN DEFENDANT'S ARREST.

The scope of the traffic stop properly expanded to a criminal investigation once Officer McNaughton had a reasonable basis to suspect that the defendant was engaged in criminal activity. In this section, the State carefully reviews each step in that process. The defense has not challenged all of the steps in the expansion of the stop from a traffic stop

³ "Tweaker," and "tweaking" are colloquialisms referring to stimulant abuse, most commonly methamphetamine.

to a search of the suspects vehicle, and ultimately the suspects arrest. However, the State reviews each step for the sake of accuracy, and to avoid confusion.

a. The initial traffic stop was proper.

Defendant does not dispute that Officer McNaughton had a legal basis to stop defendant for a traffic violation. Brief of Appellant, 1, 12 (referring to traffic stop as "legitimate").

The legislature has identified certain measures that a police officer may carry out as part of enforcing the traffic code:

Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to identify the person, check for outstanding warrants, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction.

RCW 46.61.021(2).

"A traffic stop is a seizure [...] no matter how brief." *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999); *see also State v. Walker*, 129 Wn. App. 572, 575, 119 P.3d 399 (2005). Traffic stops for investigative purposes are valid only if based upon a reasonable articulable suspicion of either a traffic infraction or criminal activity, and only if reasonably limited in scope. *State v. Arreola*, 176 Wn.2d 284, 292–93, 290 P.3d 983 (2012). Such investigative stops must be justified at their inception and must be "based on whatever reasonable suspicions legally justified the stop in the first place." *Arreola*, 176 Wn.2d at 293–94.

An investigative stop is justified at its inception when the detention is based on "'a well founded suspicion based on objective facts' that the person is violating the law." *State v. Burks*, 114 Wn. App. 109, 112, 56 P.3d 598 (2002) (quoting *State v. Sieler*, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980)).

Washington traffic law requires motor vehicles to be equipped with a muffler in "good working order and in constant operation" to "prevent excessive or unusual noise." RCW 46.37.390(1).

Here, Officer McNaughton properly stopped defendant for driving with a visibly damaged and "very loud, throaty, worn out exhaust." CP 74–77 (Findings #1, 2); *see also* 1 RP 8. The court below held that the traffic stop was lawful. CP 74–77 (Conclusion of Law #1).

Officer McNaughton had a reasonable articulable suspicion that defendant was committing a muffler violation, a traffic infraction. Accordingly, his stop was lawful.

- b. The scope of the traffic stop immediately expanded to a criminal investigation when he contacted defendant where Officer McNaughton had reason to believe two crimes were being committed.

Once a lawful traffic stop has taken place, the scope of the traffic stop may expand where an officer has a reasonable suspicion to believe a crime has been committed. *State v. Chelly*, 94 Wn. App. 254, 260, 970 P.2d 376 (1999); *see also State v. Santacruz*, 132 Wn. App. 615, 133 P.3d

484 (2006) ("[Officers] may expand the scope of the initial stop to encompass events occurring during the stop.").

When Officer McNaughton contacted defendant the stop expanded into a criminal investigation where defendant blurted out that her license was suspended and Officer McNaughton observed evidence of drug use. 1 RP 39–40, 15. It appears from the record that defendant's statement and Officer McNaughton's observations occurred contemporaneously. Defendant told Officer McNaughton that she had a suspended license sometime during their first interaction (before Officer McNaughton had verified her verbal identification back at his police cruiser). 1 RP 39–40. Officer McNaughton observed the pink eyes, constricted pupils, and "tweaking" behavior as he was speaking with defendant. 1 RP 15.

- i. **Officer McNaughton had a reasonable basis to investigate defendant for a suspended license.**

Driving with a suspended license is a crime. RCW 46.20.342.

A driver's admission that he or she is driving with a suspended license creates probable cause that the driver is involved in criminal activity. *State v. O'Neill*, 148 Wn.2d 564, 582, 62 P.3d 489 (2003). A finding of probable cause entails a reasonable basis to act. *Valerio v. Lacey Police Dept.*, 110 Wn. App. 163, 177, 39 P.3d 332 (2002) (quoting *Rozner v. Bellevue*, 56 Wn. App. 525, 531, 784 P.2d 537 (1990), *reversed on other grounds*, 116 Wn.2d 342, 804 P.2d 24 (1991)).

When Officer McNaughton initially contacted defendant, defendant blurted out that her license was suspended. CP 74–77 (Finding of Fact #3); *see also* 1 RP 39–40. Defendant's statement that she was driving with a suspended license provided Officer McNaughton with probable cause that a crime was committed. Officer McNaughton had a reasonable basis to investigate defendant for a suspended license.

ii. **Officer McNaughton had a reasonable basis to investigate defendant for driving under the influence of drug use.**

An officer's observation of a driver's dilated pupils may provide a specific, articulable, reason to investigate for driving under the influence of drugs. *State v. Santacruz*, 132 Wn. App. 615, 133 P.3d 484 (2006). Likewise, an officer's observation of a driver's red eyes is one factor that may be considered in determining the reasonableness of an investigation. *State v. Smith*, 130 Wn.2d 215, 224, 922 P.2d 811 (1996) (*citing Williams v. Department of Licensing*, 46 Wn. App. 453, 455–56, 731 P.2d 531 (1986)).

Upon contacting defendant, Officer McNaughton observed that she had pink eyes, constricted pupils, and could not remain still. 1 RP 15. Officer McNaughton recognized this behavior to be consistent with drug use. 1 RP 15. This led Officer McNaughton to suspect that defendant was driving while under the influence of drugs. 1 RP 15. This suspicion was reasonable. *See Santacruz*, 132 Wn. App. 615 at 620; *Smith*, 130 Wn.2d

215 at 224. Officer McNaughton therefore had a reasonable basis to investigate defendant for driving under the influence of drug use.

- c. Defendant's conduct created safety concerns so that Officer McNaughton properly had defendant step from the vehicle.

During a traffic stop, as circumstances warrant, a police officer can take all necessary steps to control the scene, including ordering the driver to either stay in or get out of the vehicle. *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722 (1999) *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400, (2007). Nor does asking a driver to exit the vehicle convert the stop to a custodial arrest. *State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995).

Whether an objectively reasonable concern for officer safety exists is determined based upon the entire circumstances of the stop. *State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128 (2002). A suspect's furtive moments can be considered in determining whether concerns for officer safety exist. *State v. Glenn*, 140 Wn. App. 627, 634, 166 P.3d 1235 (2007).

Here, defendant "would not sit still"; defendant "kept reaching around"; and defendant's vehicle was "packed with items." 1 RP 15–16, 38. Officer McNaughton therefore asked defendant to step to the rear of the vehicle due to officer safety concerns. CP 74–77 (Finding of Fact #4); *see also* 1 RP 38. Officer McNaughton's safety concern was reasonable in

light of defendant's actions.

- d. Officer McNaughton's questions were proper given the expanded scope of the traffic stop and safety concerns.

The court's opinion in *State v. Santacruz* is instructive as to the questions that may be asked where the scope of a traffic stop expands. *State v. Santacruz*, 132 Wn. App. 615, 133 P.3d 484 (2006).

In *Santacruz*, the Court of Appeals reversed the trial court and held that the officer's further question to the driver in a traffic stop was proper where the officer's observation of defendant's dilated pupils provided a "specific, articulable reason to inquire further" because "the drug investigation [...] was within the expanded scope of the original lawful stop." *Santacruz*, 132 Wn. App. at 620, 622.

Here, once defendant stepped from the vehicle, Officer McNaughton read defendant her *Miranda* warnings and asked defendant a series of questions related to driving under the influence of drugs and to officer safety. CP 74–77 (Findings of Fact #5, #6); *see also* 1 RP 51–52. Like the officer in *Santacruz*, Officer McNaughton's questions were prompted by specific articulable facts suggesting the defendant was engaged in criminal activity.

Officer McNaughton asked defendant about "her behavior related to narcotic use." 1 RP 16. Defendant initially responded that she "no longer uses." 1 RP 18. Officer McNaughton then asked if there were any

weapons in the vehicle. 1 RP 18. Defendant responded that there was a switchblade knife in her purse that was in the vehicle. 1 RP 19. Officer McNaughton then asked if there was anything else illegal in the vehicle, at which point defendant responded that there were "rigs" (syringes) in the vehicle. 1 RP 19. Officer McNaughton then asked about the syringes, and defendant admitted that she had recently "fallen off the wagon" and claimed ownership of the syringes. 1 RP 20. Defendant admitted that she had used methamphetamine the previous night. 1 RP 21.

Defendant's claim that Officer McNaughton exceeded the "legitimate scope of the traffic stop" by *asking questions* about criminal behavior is without merit. Brief of Appellant, 12, 13. The questions were proper where the scope of the traffic stop expanded into a criminal investigation and his questions were related to that investigation and to legitimate officer safety concerns.

4. OFFICER MCNAUGHTON PROPERLY OBTAINED
CONSENT TO SEARCH DEFENDANT'S VEHICLE.

The court considers the following three factors in determining the validity of a consensual search: (1) whether the consent was voluntary; (2) whether the person granting consent had authority to consent; and (3) whether the search exceeded the scope of the consent. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004); *see also State v. Monaghan*, 165 Wn. App. 782, 788, 266 P.3d 222 (2012).

a. Defendant's consent was voluntary.

Whether consent is voluntary is a question of fact and depends upon the totality of the circumstances including (1) whether *Miranda* warnings were given prior to obtaining consent, (2) the degree of education and intelligence of the consenting person, and (3) whether the consenting person was advised of his [or her] right not to consent.

State v. Reichenbach, 153 Wn.2d 126, 132, 101 P.3d 80 (2004).

First, here, *Miranda* warnings were given before Officer McNaughton asked for consent to search the car. CP 74–77 (Finding of Fact #5).

Second, nothing in the record indicates defendant had an intellectual deficiency. She testified at trial and was able to answer questions completely and coherently. Defendant testified that she understood her *Miranda* rights. 1 RP 95.

Third, defendant was expressly advised of her right not to consent to the search. CP 74–77 (Finding of Fact #7).

Indeed, Officer McNaughton gave the defendant *Ferrier* warnings, which provide the highest guarantee of voluntary consent. See *Westvang*, 174 Wn. App. at 921ff. Moreover, he did so even though *Ferrier* warnings were not required precisely because he had a reasonable basis to believe that the defendant was engaged in criminal activity. Review of the two of the court's recent opinions is instructive on the role played by

Ferrier warnings and when they are required. *See State v. Westvang*, 174 Wn. App. 913, 301 P.3d 64 (2013), and *State v. Dancer*, 174 Wn. App. 666, 300 P.3d 475 (2013).

Ferrier warnings arise from the greater privacy protections afforded by article I, section 7 of the Washington Constitution. *See State v. Ferrier*, 136 Wn.2d 103, 114, 960 P.2d 927 (1998). Under the Fourth and Fourteenth Amendments, as well as article I, section 7 of the Washington Constitution, warrantless searches of protected areas are *per se* unreasonable. *See Westvang*, 174 Wn. App. at 918-19. For that reason, warrantless searches are not permitted unless they fall under one of the limited exceptions to the warrant requirement. Consent is one such exception to the warrant requirement. *Dancer*, 174 Wn. App. at 671.

However, the court in *Ferrier* held that under art. I, § 7 when officers engage in a "knock and talk" procedure in order to search a home, additional particular warnings are required before consent to search the home will be considered voluntary. *Dancer*, 174 Wn. App. at 672.

A "knock and talk" procedure is a technique some officers have employed in order to attempt to obtain consent to search a premises for contraband or evidence without a warrant. *See Ferrier*, 136 Wn.2d at 107, 115. *See also, Westvang*, 174 Wn. App. at 919. In a "knock and talk" procedure, officers knock on the door of a residence of interest to them, make contact with an occupant, and ask to enter the residence in order to discuss the officer's investigation. *Ferrier*, 136 Wn.2d at 107; *Westvang*,

174 Wn. App. at 919. Once inside, the officer explains why they are there and asks for permission to search the premises. *Ferrier*, 136 Wn.2d at 107; *Westvang*, 174 Wn. App. at 919.

The court's holding in *Ferrier* was based upon the fact that

"[t]he heightened protection afforded state citizens against unlawful intrusion into private dwellings [that] places an onerous burden upon the government to show a compelling need to act outside our warrant requirement."

Ferrier, 136 Wn.2d at 114 (quoting *Chrisman*, 104 Wn.2d at 822, 676 P.2d 419 (1984)). In rendering its opinion, the court noted, "[i]t is significant to our analysis, in this regard that it is undisputed that Ferrier was in her home when the police initiated contact with her." *Ferrier*, 136 Wn.2d at 115. "Central to our holding, is our belief that any knock and talk is inherently coercive to some degree." *Ferrier*, 136 Wn.2d at 115.

For those reasons, the court held that when officers employ the knock and talk procedure, officers are required to warn home dwellers of their right to refuse consent to a warrantless search. *Ferrier*, 136 Wn.2d at 116. It is also worth noting that imposing the requirement the court emphasized that it was not entirely disapproving of the knock and talk procedure. *Ferrier*, 136 Wn.2d at 116.

Since the court issued its opinion in *Ferrier*, the Supreme Court and Court of Appeals have repeatedly construed it narrowly as limited to the knock and talk procedure. See *Dancer*, 174 Wn. App. at 672; *Westvang*, 174 Wn. App. at 921ff. While slightly expanding the

application of *Ferrier*, the Court of Appeals nonetheless continued to construe it narrowly when it recently held that where officers seek consent for warrantless entry into a home to search for a person. See *Westvang*, 174 Wn. App. 913. *Ferrier* warnings are not required if officers have a reasonable basis to believe that the subject of an arrest warrant is present in the home, but, on the other hand, that *Ferrier* warnings are required if the officers do not have such a reasonable basis to believe the subject is present. See *Westvang*, 174 Wn. App. at 927 (distinguishing *Dancer*, 174 Wn. App. 666).

Here, the officers sought permission to search the defendant's vehicle based upon probable cause to believe that she was engaged in criminal activity, and that she posed a safety concern. The officers did not use a knock and talk procedure to gain admittance to the defendant's home before then asking for permission to search her home.

Here, *Ferrier* warnings were not required. Nonetheless, the officer demonstrated a superabundance of respect for the defendant's rights and provided them anyhow. The officer then went even further by specifically asking the defendant before searching each area of the vehicle, and by employing a second officer to ensure that the defendant was fully able to withdraw consent at any time.

The defendant's consent was voluntary.

b. Defendant had authority to consent.

A driver with common authority over a vehicle has authority to consent to its search. *State v. Cantrell*, 124 Wn.2d 183, 188, 875 P.2d 1208 (1994) (finding defendant had authority to consent to search of his parents' vehicle). See also *State v. White*, 141 Wn. App. 128, 136, 168 P.3d 459 (2007) (third party with "common authority" may consent to search); *State v. Holmes*, 108 Wn. App. 511, 520, 31 P.3d 716 (2001) (access and permission to enter are hallmarks of common authority).

Here, defendant testified at trial that the car in which she was pulled over belonged to a friend, and that she was borrowing it to move some belongings. 1 RP 88–89. The friend who owned the vehicle also testified at trial and confirmed that she had loaned defendant the vehicle. 1 RP 66. At the time of trial, defendant owned the vehicle. 1 RP 88–89.

Defendant's permission to enter and use the vehicle established common authority, which, in turn, permitted defendant (as a third party) to consent to the search of the vehicle. Defendant had authority to consent to the search of the vehicle.

c. Officer McNaughton's search did not exceed the scope of the consent.

"A consensual search may go no further than the limits for which the consent was given." *State v. Reichenbach*, 153 Wn.2d 126 at 133.

Here, Officer McNaughton not only asked for defendant's permission to search the vehicle, but advised defendant of her rights under

Ferrier, and repeatedly offered defendant the opportunity to stop the consensual search of her vehicle. 1 RP 22–23. Defendant stood next to another officer, Officer Pomeroy, at the rear of the vehicle while Officer McNaughton performed the search. 1 RP 25. Officer Pomeroy's presence gave defendant direct access to an officer if she wanted to stop or limit the search. 1 RP 25.

Officer McNaughton proceeded to search defendant's vehicle, pausing several times to ask defendant for permission to search a specific area. 1 RP 26. Defendant repeatedly gave permission for Officer McNaughton to search her vehicle. 1 RP 26. Thus, the record supports that the search did not exceed the scope of defendant's consent.

d. Cases Relied Upon by Defendant are Distinguishable.

Defendant relies upon *State v. Cantrell*, 70 Wn. App. 340, 853 P.2d 479 (1993), and *State v. Tijerina*, 61 Wn. App. 626, 811 P.2d 241 (1991) for the proposition that "consent obtained after an officer has exceeded the proper scope of the traffic stop does not legitimize the subsequent warrantless search." Brief of Appellant, 11–12. However, those cases are inapplicable because in those cases the officers lacked a reasonable suspicion of criminal activity. *Cantrell*, 70 Wn. App. 340 at 348; *Tijerina*, 61 Wn. App. 626 at 629. As a result, unlike here, there were no facts that could justify detention beyond the initial traffic stop. *Cantrell*, 70 Wn. App. 340 at 348; *Tijerina*, 61 Wn. App. 626 at 629.

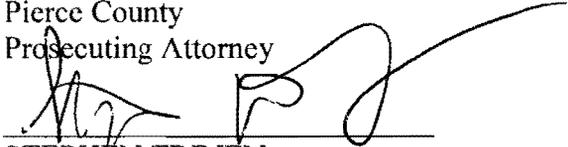
Because Officer McNaughton had a reasonable suspicion that defendant committed two crimes, the traffic stop here did expand into a criminal investigation. The opinions in *Cantrell* and *Tijerina* are inapplicable to this case.

D. CONCLUSION.

Here, Officer McNaughton pulled defendant over for a traffic violation, had a reasonable suspicion to believe two crimes were being committed, and investigated such activity. As part of that investigation the officer obtained defendant's consent to search the vehicle, which she gave freely and voluntarily. Accordingly, the defendant's claim has no merit and should be denied.

DATED: October 8, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



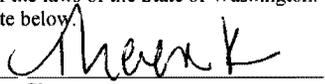
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date

Signature



PIERCE COUNTY PROSECUTOR

October 09, 2013 - 10:24 AM

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