

No. 45225-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kelly Stultz,

Appellant.

Kitsap County Superior Court Cause No. 12-1-01298-7

The Honorable Judge Jennifer Forbes

Appellant's Reply Brief

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ARGUMENT

THE COURT ERRED BY ADMITTING EVIDENCE DISCOVERED PURSUANT TO MS. STULTZ'S UNCONSTITUTIONAL SEIZURE AND INVOLUNTARY CONSENT.

A. Ms. Stultz's consent to search her car was not voluntarily given.

The voluntariness of consent to search is evaluated under the totality of the circumstances. Factors include whether *Miranda* warnings¹ were given prior to the alleged consent, the person's degree of education and intelligence, whether the police advised the accused of the right to refuse consent, and any restraint imposed. *State v. O'Neill*, 148 Wn.2d 564, 588-90, 62 P.3d 489 (2003).

Ms. Stultz's consent to search her car was not voluntary. She had not been Mirandized or told of her right to refuse. She was restrained in handcuffs. The state did not introduce any information about her education or intelligence. RP 3-57; CP 58-61. Indeed, Ms. Stultz appeared confused at the time of the interaction. RP 10-11, 17, 18. The court did not find that Ms. Stultz understood what she was doing when she gave consent. CP 58-61. Even so, the state argues that Ms. Stultz voluntarily consented. Brief of Respondent, pp. 10-16 (*citing State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001); *State v. Rodriguez*, 20

¹*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Wn. App. 876, 880, 582 P.2d 904 (1978); *State v. Flowers*, 57 Wn. App. 636, 789 P.2d 333 (1990)).

Each of the cases upon which the state is readily distinguishable from the facts of Ms. Stultz's case. In *Johnson*, the officers *Mirandized* the accused and informed him of his right to refuse before obtaining consent to search. *Johnson*, 104 Wn. App. 409. The *Rodriguez* court relied, in part, on the accused's admission that he had "considerable experience" talking to and dealing with police officers. *Rodriguez*, 20 Wn. App. at 879. Similarly, in *Flowers*, the court relied on the accused's intelligence and knowledge of the law regarding consent searches. *Flowers*, 57 Wn. App. at 646.

Here, on the other hand, Ms. Stultz was not *Mirandized* or told of her right to refuse consent. She did not have "considerable experience" dealing with the police. The state did not present any evidence of Ms. Stultz's education or intelligence. RP 3-57. Rather, each of the *O'Neill* factors demonstrates that her consent to search the car was not knowing and voluntary. *O'Neill*, 148 Wn.2d at 588-90.

The warrantless seizure of the evidence in Ms. Stultz's car cannot be justified under the consent exception to the warrant requirement. *O'Neill*, 148 Wn.2d at 588-90. Her convictions must be reversed and the evidence suppressed on remand. *Id.* at 593.

B. The officers exceeded the permissible scope of a *Terry* stop, and the unlawful arrest tainted her consent.

Consent to search cannot justify the admission of evidence if the consent is obtained through exploitation of the illegal seizure of a person. *State v. Harrington*, 167 Wn.2d 656, 670, 222 P.3d 92 (2009). The seizure here was illegal because it did not qualify as a legitimate *Terry*² stop. Instead of a limited detention, the seizure was an unlawful arrest.

The scope of a *Terry* stop must be limited to the least intrusive means available to verify or dispel an officer's suspicions. *State v. Williams*, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984) (citing *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). Handcuffs are only permissible during a *Terry* stop when the police have a legitimate fear of danger. *Williams*, 102 Wn.2d at 740 n. 2.

An arrest takes place when “a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person.” *State v. Salinas*, 169 Wn. App. 210, 217-18, 279 P.3d 917 (2012) *review denied*, 176 Wn.2d 1002, 297 P.3d 67 (2013) (quoting *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651 (2009)). Whether an arrest has occurred is evaluated objectively, considering all of the surrounding circumstances. *Id.* at 218. The inquiry looks not to the

² *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

officer's subjective intent, but to an objective understanding of the officer's manifestation of his/her intent. *Id.* Typical manifestations of intent to arrest include handcuffing a person and placing her in a patrol vehicle. *Id.* But a person does not have to be placed in a patrol vehicle to be under arrest. *See e.g. Patton*, 167 Wn.2d at 379 (person was arrested as he stood next to his parked car).

Ms. Stultz was unlawfully arrested before the police had probable cause to believe that she had committed a crime. *State v. Young*, 167 Wn. App. 922, 929, 275 P.3d 1150 (2012). There was an officer on each side of Ms. Stultz's car. RP 8, 36. One officer ordered her out of her car and immediately placed her in handcuffs. RP 38-41; CP 59 (finding VII). He handcuffed her while she was still in the car's door well. RP 40-41, CP 59 (finding VII). The officer asked Ms. Stultz if she had any more drugs in the car. RP 45.

The officer admitted that he did not yet have probable cause to arrest Ms. Stultz when he ordered her out of the car and handcuffed her. RP 53, 55. The state does not argue that the police had probable cause to arrest Ms. Stultz at that point. Brief of Respondent, pp. 7-10. Instead, respondent argues only that she was not under arrest but merely subjected to a *Terry* stop. Brief of Respondent, pp. 7-10.

But ordering Ms. Stultz out of her car and handcuffing her exceeded the permissible scope of a *Terry* stop in this case. *Williams*, 102 Wn.2d at 738. The officers could have confirmed or dispelled their suspicions simply by asking Ms. Stultz what she had in her lap while she remained in the car. *Id.*

Likewise, no officer claimed that he feared for his safety at any point during the interaction with Ms. Stultz. RP 3-57. The officer testified that Ms. Stultz was cooperative throughout the encounter. RP 49. There was no reason to handcuff her and doing so went beyond what was necessary to investigate suspected possession of drug paraphernalia. *Williams*, 102 Wn.2d at 740 n. 2.

A reasonable person in Ms. Stultz's situation would have believed that she was being arrested, not merely detained for investigation. *Salinas*, 169 Wn. App. at 219. Her subsequent consent was tainted by the illegal arrest and cannot justify the warrantless search of her car. *Harrington*, 167 Wn.2d at 670.

Ms. Stultz's conviction must be reversed and the evidence suppressed on remand. *Id.*

- C. The state appears to concede that the court erroneously admitted evidence tainted by a violation of Ms. Stultz's Fifth Amendment rights.

The Fifth Amendment prohibits admission of evidence that is the fruit custodial interrogation without the benefit of *Miranda* warnings. *State v. Hickman*, 157 Wn. App. 767, 772, 238 P.3d 1240 (2010). The direct or indirect fruits of unlawful police action must be suppressed unless "unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the taint." *State v. Spotted Elk*, 109 Wn. App. 253, 262, 34 P.3d 906 (2001) (quoting *Wong Sun v. United States*, 371 U.S. 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

Here, the court found that police violated Ms. Stultz's *Miranda* rights by and suppressed her statements to the officers. CP 61. The court should also have suppressed the drugs and paraphernalia, which were the fruits of the *Miranda* violation and were not attenuated from the illegality in any way. *Spotted Elk*, 109 Wn. App. at 262. The state does not contest that Ms. Stultz's consent to search the car was the direct result of her custodial interrogation without the benefit of *Miranda*. See Brief of Respondent *generally*. The state's failure to argue the issue can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The police violated Ms. Stultz's *Miranda* rights and the court erroneously admitted the fruits of that violation. *Id.* Ms. Stultz's conviction must be reversed and the evidence suppressed on remand. *Id.*

D. The search of Ms. Stultz's car cannot be justified as a search incident to arrest because her arrest was unlawful.

A valid custodial arrest is a prerequisite to a search incident to arrest. *O'Neill*, 148 Wn.2d at 587. As outlined above, Ms. Stultz was unlawfully arrested when she was ordered out of her car and handcuffed without probable cause. Nonetheless, the state argues that the seizure of the evidence in Ms. Stultz's car was a valid search incident to arrest.³

Brief of Respondent, pp. 16-20.

The officer did not confirm his suspicion that Ms. Stultz had a pipe in her lap or see the pouch on the floor until after he ordered her out of the car and handcuffed her. RP 43-45. He did not confirm what was inside the pouch until after he removed it from the car. RP 45. The officer did not have probable cause to justify Ms. Stultz's arrest until after he had seized the evidence in the car. Seizure of that evidence cannot be justified as a search incident to arrest. *O'Neill*, 148 Wn.2d at 587.

³ Notably, the state responds to Ms. Stultz's argument regarding her unlawful arrest by arguing that she was not actually arrested, merely detained under *Terry*. Brief of Respondent, pp. 7-10. If the state is correct that Ms. Stultz was arrested, in order to justify the search of her car incident to arrest, then reversal is still required because it is uncontested that the officers did not have probable cause when she was ordered out of her car and handcuffed. The state cannot have it both ways.

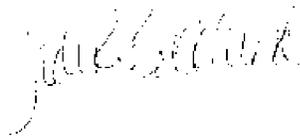
The search of Ms. Stultz's car was not a valid search incident to arrest because her arrest was unlawful. *Id.* Her conviction must be reversed and the evidence suppressed on remand. *Id.*⁴

CONCLUSION

For the reasons outlined above and in Ms. Stultz's Opening Brief, Ms. Stultz's conviction must be reversed. The evidence must be suppressed on remand and the charge dismissed.

Respectfully submitted on June 12, 2014,

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⁴ Respondent argues that, even if the search was not valid, reversal would not be required because the stipulated facts under which Ms. Stultz was convicted established that the bag contained methamphetamine. Brief of Respondent, p. 20, n. 5. But Ms. Stultz stipulated to those facts only after the court erroneously ruled that the evidence was admissible. If the evidence is suppressed on remand, the fact that the bag existed or that it contained drugs would not be admissible. The state's argument misapprehends the posture of this case.



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CERTIFICATE OF SERVICE

I certify that on today's date:

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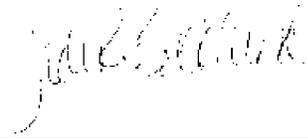
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 12, 2014.



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