

NO. 290590-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

FEB 01 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

TAMMY JEAN ALLSTEAD, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-00131-3

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

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ISSUE

1. WAS THE DEFENDANT'S CONSENT TO THE SEARCH OF HER BACKPACK VALID?

STATEMENT OF THE CASE

I. Nature of the Case

The defendant, Tammy J. Allstead, brought this action to appeal the trial court's denial of her motion to suppress methamphetamine found in a backpack she was carrying. (CP 29-30).

II. Course of the Proceedings

The defendant was charged with Unlawful Possession of a Controlled Substance on February 5, 2010 from an incident that occurred on November 5, 2009. (CP 1-2). The defendant filed a motion to suppress evidence under CrR 3.6. (CP 3-5). The motion was heard on May 6, 2010. (CP 33). The trial court heard testimony from Kennewick Police Detective Brian Pochert and the defendant. (RP 05/06/10, 2, 19). The trial court denied the defendant's motion. (CP 34; RP 28-29, 5/6/10). The defendant was later found guilty at a stipulated facts trial of Unlawful Possession of a Controlled Substance. (CP 16; RP 2, 5/17/10).

III. Counter Statement of the Facts

On November 5, 2009, police officers executed a search warrant for stolen tools and a laptop at 22703 S. Oak Street in Kennewick,

Washington. (CP 15; RP 05/06/10, 11, 17). The property was approximately one-half an acre in size and contained a residence as well as multiple outbuildings. (RP 05/06/10, 4). Detective Brian Pochert contacted the defendant, who was inside the residence. (RP 05/06/10, 3). Detective Pochert advised the defendant she was being detained for safety while officers conducted a protective sweep, but was not under arrest. (CP 15; RP 05/06/10, 3-4). Detective Pochert placed the defendant in handcuffs and stood with her near a patrol vehicle on the property while other officers conducted the protective sweep. (RP 05/06/10, 7). During the course of the protective sweep, officers encountered a locked exterior door leading to the basement of the residence. (RP 6, 5/6/10). The defendant advised officers that she had a key for the door in her backpack, which was inside her truck. (CP 15; RP 05/06/10, 6). The defendant agreed to provide the key to officers so they would not damage the door by breaching it. (RP 05/06/10, 6). Another officer retrieved the backpack from the truck and brought it over to defendant. (RP 05/06/10, 6). The defendant advised Detective Pochert which pocket of the backpack the key was located in and he retrieved it. (RP 05/06/10, 6). The backpack was left with the defendant and Detective Pochert. (RP 05/06/10, 6-7).

Officers completed the protective sweep of the property in less than fifteen minutes. (RP 05/06/10, 4). Detective Pochert then removed the

handcuffs from the defendant and advised her she was free to go. (CP 15; RP 05/06/10, 7). He advised the defendant that she would not be permitted to drive away, as her driver's license was suspended. (CP 15; RP 05/06/10, 5). The defendant advised she was going to contact a friend to pick her up and milled about for several minutes. (RP 05/06/10, 5). She then began gathering her belongings, including her backpack. (RP 05/06/10, 7, 14). Detective Pochert asked the defendant if she had any stolen property in the backpack, and she responded that she did not believe in theft. (CP 34; RP 05/06/10, 8). Detective Pochert asked the defendant if she minded if he searched her backpack and she replied, "Absolutely not, go ahead." (RP 05/06/10, 8). Detective Pochert searched the defendant's backpack and found drug paraphernalia. (RP 05/06/10, 9).

ARGUMENT

1. THE DEFENDANT'S CONSENT TO SEARCH HER BACKPACK WAS VALID

The Washington State Supreme Court has delineated three requirements the State must meet in order to show a person's consent to search is valid: (1) whether the consent was voluntary, (2) whether the person giving consent had authority to do so, and (3) whether the search exceeded the scope of the consent. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). Whether consent is voluntary depends upon the

totality of the circumstances, including whether *Miranda* warnings were given, the degree of education and intelligence of the person consenting, and whether the consenting person was advised of his or her right not to consent. *Id.* at 132. Knowledge of the right to refuse consent is relevant, but not a prerequisite to finding voluntary consent. *Id.* The court may also weigh any express or implied claims of police authority to search, previous illegal actions of the police, and police deception as to identity or purpose. *Id.*

Here, regarding the first requirement of whether consent was voluntary, the defendant was initially advised that she was not under arrest when being handcuffed. (RP 05/06/10, 3-4). She was released from handcuffs after a protective sweep of the house was complete and advised she was free to leave. (RP 05/06/10, 7). The defendant then moved about freely collecting her personal property. It was at this time that Detective Pochert asked her if she minded if he searched her backpack. The defendant replied, "Absolutely not, go ahead." (RP 05/06/10, 8). There is no indication that she expressed any confusion, apprehension, or coercion in her answer. The defendant was not Mirandized because she was not a suspect of any crime and was not under arrest at any point prior to the search of her backpack. Her degree of intelligence or level of education is unknown. While Detective Pochert did not articulate that she had a right

to refuse the search, he had already told her she was free to go and requested her consent to search the backpack. (CP 34). Detective Pochert did not use any deception or trickery in asking the defendant whether she would consent to search, nor did he condition her ability to leave on searching the backpack. Based on the totality of the circumstances, the defendant's consent was voluntary.

Regarding the second requirement, there is no dispute that the backpack belonged to the defendant pursuant to her own testimony at the suppression hearing. (RP 05/06/10, 20-23). The defendant therefore had authority to consent to its search.

Regarding the third requirement, the search did not exceed the scope of the backpack. The defendant's consent to search the backpack is therefore valid and there is no basis to suppress the items found inside it.

Additionally, Detective Pochert was not required to provide *Ferrier* warnings to the defendant when he asked to search her backpack. *State v. Ferrier* requires police officers to inform a person who is consenting to a search of their residence that they may lawfully refuse consent, limit the scope of the search, and revoke consent at any time. *State v. Ferrier*, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998). In *State v. Kennedy*, the reasoning in *Ferrier* was extended to searches of hotel rooms. *State v. Kennedy*, 107 Wn. App. 972, 29 P.3d 746 (2001).

Nothing in either case purports to require police officers to give *Ferrier* warnings in any other circumstance.

CONCLUSION

The defendant's consent to search her backpack was valid and the trial court's ruling regarding the search should therefore be affirmed.

Respectfully submitted this 31st day of January, 2011.

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Ofc *Id.* 91004