94054-1

FILED

JUN 07 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 94054-1

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

NO. 33427-9-III

STATE OF WASHINGTON,
Respondent,

vs.

JUSTIN DEAN VANHOLLEBEKE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 14-1-00143-6

BRIEF OF RESPONDENT

FELICITY A. M. CHAMBERLAIN, WSBA #46155
Deputy Prosecuting Attorney

Adams County Prosecutor's Office
210 West Broadway
Ritzville, WA 99169
509-659-3219

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

RESPONSE TO ASSIGNMENT OF ERROR 1

STATEMENT OF THE CASE 1

ARGUMENT 4

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

1.	*In re Cross*, 180 Wash.2d 664, 687, 327 P.3d 660 (2014).	9
2.	*State v. Acrey*, 148 Wash.2d 738, 746, 64 P.3d 594 (2003).	4
3.	*State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996).	9
4.	*State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 806 (1960).	10
5.	*Blazina, 182 Wash.2d 827, 839, 344 P.3d 680 (2015).*	11
6.	*State v. Cantrell*, 124 Wn.2d 183, 185, 875 P.2d 1208 (1994).	4
7.	*State v. Flora*, 160 Wash.App. 549, 556-57, 249 P.3d 188 (2011).	10
8.	*State v. Hendrickson*, 129 Wash.2d 61, 70, 917 P.2d 563 (1996).	4
9.	*State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989).	5
10.	*State v. Mathers*, 2016 WL 2865576, __ P.3d __ (2016 Div. II).	11
11.	*State v. Montgomery*, 163 Wash.2d 577, 601, 183 P.3d 267 (2008).	10
12.	*State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987).	9
13.	*State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984).	5, 6, 7
14.	*United States v. Donnelly*, 475 F.3d 946 (9th Cir.) cert. denied, 127 S. Ct. 2954 (2007).	7
15.	*Unites States v. White*, 42 F.3d 457 (8th Cir. 1994).	7

OTHER AUTHORITIES

Fourth Amendment of the US Constitution	4
Article 1, Section 7 of the Washington State Constitution	4
RCW 9.94A.537	12, 13
RCW 9.94.530(2)	13

I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The officers were justified in searching the vehicle pursuant to valid consent given by the vehicle's registered owner.
2. The length of time that the appellant was detained pursuant to a valid *Terry* stop was not unreasonable because the officers used due diligence to complete their investigation in a timely manner.
3. Statements Appellant made to Sgt. Garza are admissible because he was properly advised of his right to silence and validly waived that right.
4. It would have been improper for the court to give a missing witness instruction to the jury in this case.
5. The court correctly found the defendant had the ability to pay and imposed Legal Financial Obligations in the amount of $1,380 including discretionary LFOs in the amount of $780.
6. The trial court correctly sentenced Appellant based on an offender score of 2.

II. STATEMENT OF THE CASE

On the night of November 10, 2014, Sergeant Aaron Garza was on patrol in Othello, Washington when he stopped a truck for facing the wrong way on a one-way street. RP 309-10. As

Sergeant Garza was calling in the stop from his patrol vehicle, Mr. Vanhollebeke stepped out of the vehicle. RP 311. Sgt. Garza ordered him to get back in his vehicle, which he did at first, and then stepped out of the vehicle again, closed the door, and, when ordered back into his vehicle again, informed Sgt. Garza that he had locked himself out. RP 311-15.

During the stop one of the officers observed that the ignition of the vehicle had been punched and saw what appeared to be a meth pipe on the dash of the vehicle. RP 22. Mr. Vanhollebeke refused Sgt. Garza's request to search the vehicle. RP 28. The vehicle was registered to Bill Casteel. RP 54. Dispatch was unable to get ahold of Mr. Casteel by phone, so Deputy Barnes drove to his residence to ascertain that he had given Mr. Vanhollebeke permission to use the vehicle and get the keys. 1 RP 30, 71, 107-108. Mr. Casteel confirmed that he had given Mr. Vanhollebeke permission to use the truck, provided Deputy Barnes with the keys to the vehicle and consented to a search of the vehicle. 1 RP 110.

Deputy Barnes immediately returned to the scene with the keys and Sgt. Garza began searching the vehicle. 1 RP 71, 111. The searched recovered the glass pipe, which field tested positive for methamphetamine, and gun under the seat. 1 RP 110. Sgt.

Garza arrested Mr. Vanhollebeke for possession of a controlled substance. 1 RP 39. Sgt. Garza advised him of his *Miranda* rights. 1 RP 41-42. He stated he did not want to talk, but then spontaneously stated the pipe was not in his possession. 1 RP 442. Sgt. Garza then asked him if he wanted to talk and he said yes. 1 RP 43. Sgt. Garza described the length of time between when he advised Mr. Vanhollebeke of his *Miranda* rights and when Mr. Vanhollebeke changed his mind and waived his right to silence as "moments later." 1 RP 76.

The State charged Mr. Vanhollebeke with Unlawful Possession of a Firearm. CP 3-4. The trial court denied Vanhollebeke's motion to suppress the evidence obtained from the search of the vehicle and found his statements admissible. CP 5-8, 38-40.

The State did not call Mr. Casteel, the registered owner of the vehicle, at trial, and Mr. Vanhollebeke requested and was denied a missing witness instruction. 3 RP 415-19. The State calculated Vanhollebeke had an offender score of 2 based on a prior assault conviction and taking a motor vehicle without permission conviction both from 2003. CP 142-43.

Finally, after determining that Vanhollebeke had the ability to pay, the court ordered the defendant pay legal financial obligations in the amount of $1,380 including mandatory LFOs of $500 victim assessment and $100 DNA collection fee. 3 RP 497, CP 144, 146.

III. ARGUMENT

A. The officers were justified in searching the vehicle pursuant to valid consent given by the vehicle's registered owner.

The Fourth Amendment of the US Constitution and Article 1, Section 7 of the Washington State Constitution guarantee people the right to be free from unreasonable searches and seizures. Warrantless searches are per se unreasonable. *State v. Hendrickson*, 129 Wash.2d 61, 70, 917 P.2d 563 (1996). It is the State's burden to show that the warrantless search falls within one of the narrowly drawn exceptions to the warrant requirement. *State v. Acrey*, 148 Wash.2d 738, 746, 64 P.3d 594 (2003).

In *State v. Cantrell*, the police stopped the vehicle while the defendant was driving it. 124 Wn.2d 183, 185, 875 P.2d 1208 (1994). The officer asked for and received consent to search from the passenger, the son of the registered owners, but did not get consent from the driver. *Id.* at 186. The Court held:

> "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 nonconsenting occupant of the vehicle." *Id.* at 187.

The Court's decision did not extend to cases where one occupant of a vehicle consents and another objects, because those facts were not before the Court. Additionally, it specifically declined to extend the holding of *State v. Leach*, to vehicles in this case. *Id.* *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989) (Holding, if two occupants of a *building* are present, both with authority over the premises, the police must obtain consent from both of them in order to lawfully search. *Emphasis added.*).

In this case, consent to search the vehicle, given by registered owner of the vehicle – a person with equal (or arguably superior) interest in the vehicle – is all the officers needed to allow a warrantless search of the vehicle, and the evidence found pursuant to such a search was correctly admitted at trial.

B. <u>The length of time that the appellant was detained pursuant to a valid *Terry* stop was not unreasonable because the officers used due diligence to complete their investigation in a timely manner.</u>

Appellant cites *State v. Williams*, arguing that being detained for over thirty minutes before he was arrested was unreasonable. 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). In *Williams*, the Court concluded, "the police actions so exceeded the proper purpose and

scope of a *Terry* stop as to be justified only if supported by probable cause sufficient to arrest petitioner." *Id.* 741. In *Williams,* the defendant was held at gunpoint, ordered from his car, and secured in the back of a patrol vehicle while the officers waited for the canine unit to arrive. *Id.* at 734-35. Additionally, in *Williams,* the defendant was stopped because the police were responding to a burglary in the area and saw his vehicle leaving the area with the lights off. *Id.* at 741. However, *Williams* is distinguishable from the present case

In this case, Mr. Vanhollebeke locked himself out of the vehicle and Sgt. Garza allowed him to sit in the back of his patrol car to keep warm. He was not under arrest, not handcuffed, and Sgt. Garza even left the door of his patrol vehicle open. Mr. Vanhollebeke was stopped for driving the wrong way on a one way street, locked himself out of the car, was not the registered owner of a vehicle that had a punched ignition, and a meth pipe was visible in the vehicle. The reason he was detained so long was because the officer was waiting for a key to the vehicle. The officers were unable to reach the registered owner by phone to confirm that Vanhollebeke had borrowed the vehicle and so they had to drive to the registered owner's house to confirm this and get a key. Unlike

in the *Williams* case, here, the officers had specific, articulable facts that led to the reasonable suspicion that Mr. Vanhollebeke may have committed one or more crimes.

Lastly, in *Williams,* the Court objected to the length of time the defendant was detained (35 minutes) precisely because it felt he was detained improperly. *Id.* at 741. By contrast, in the case of a proper *Terry* stop and detention, Courts have held that detentions of as long as one hour and forty minutes are reasonable so long as police acted diligently to move the investigation along. (See e.g. *United States v. Donnelly*, 475 F.3d 946 (9th Cir.) cert. denied, 127 S. Ct. 2954 (2007) (90+ minutes can be reasonable while waiting for a K9 unit.) *Unites States v. White*, 42 F.3d 457 (8th Cir. 1994) (one hour and twenty minute detention while awaiting the arrival of a drug dog was reasonable where the officer acted diligently to obtain the dog and the delay was caused by the remote location of the nearest available dog.)

In the case of Mr. Vanhollebeke, he was stopped at 11:23 p.m. by a solo officer. During the next 30 minutes, the officer awaited back-up, verified the his identity, awaited information from dispatch regarding the his driving status (suspended), awaited confirmation of outstanding warrants from Grant County, and began

writing a citation for the suspended license. At this point, the other officers alerted the first officer to the presence of the meth pipe and broken ignition. At 11:55, after trying to telephone the car's owner, Deputy Barnes drove to Hatton to personally contact him. He returned at 12:30 a.m. and the investigation resumed with a search of the vehicle. Clearly, the officers used due diligence in moving the investigation forward and the length of time that the defendant was detained was reasonable in light of all the circumstances.

C. Statements Appellant made to Sgt. Garza are admissible because he was properly advised of his right to silence and validly waived that right.

Appellant argues that he did not properly waive his right to silence and therefore the statements he made to law enforcement should not have been admitted at trial. "In determining the validity of a waiver of a previously asserted right to remain silent, the court may consider as relevant factors: (1) whether the right to cut off questioning was scrupulously honored; (2) whether the police engaged in further words or actions amounting to interrogation before obtaining a waiver; (3) whether the police engaged in tactics tending to coerce the suspect to change his mind; and (4) whether the subsequent waiver was knowing and voluntary." *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987).

> Under *Miranda*, a confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights. To be voluntary for due process purposes, the voluntariness of a confession is determined from a totality of the circumstances under which it was made.
>
> *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996).

One circumstance to consider is whether the defendant initiated further discussion with the officer. *In re Cross*, 180 Wash.2d 664, 687, 327 P.3d 660 (2014). In *Cross*, the defendant stated he did not want to talk, but later made a statement in response to a comment from an officer. The Court held that the defendant did not subsequently waive his right to remain silent. *Id.* at 688. The present case is clearly distinguishable from *Cross*. In this case, Sgt. Garza advised Mr. Vanhollebeke of his rights and Mr. Vanhollebeke said he did not want to speak to the officer, but moments later spontaneously stated the pipe was not in his possession. Sgt. Garza did not make any comments to him at all before this spontaneous statement. Sgt. Garza then asked him if he wanted to talk and he said he did, making further statements that were admitted at trial.

This is not a case where the defendant invoked his right to silence and the police failed to "scrupulously honor" his invocation.

This is a case where the defendant reinitiated the interrogation almost immediately after invoking his right to silence and then knowingly, voluntarily, and intelligently waived that right.

D. <u>It would have been improper for the court to give a missing witness instruction to the jury in this case.</u>

Appellant contends that the State's failure to call Mr. Casteel, the registered owner of the vehicle, should have entitled Mr. Vanhollebeke to a missing witness jury instruction. In cases where the witness is unimportant or the testimony is cumulative, the missing witness instruction does not apply. *State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 806 (1960). "One of the prerequisites for a missing witness instruction is that the witness is either within the control of the adverse party or is "peculiarly" available to that party. *State v. Flora*, 160 Wash.App. 549, 556-57, 249 P.3d 188 (2011) (Citing *State v. Montgomery*, 163 Wash.2d 577, 601, 183 P.3d 267 (2008)).

In this case the court had already ruled the evidence of the search of the vehicle was admissible. The testimony of Mr. Casteel would have been unimportant and could potentially confuse the jury with issues they need not consider to determine the relevant facts of the case. Finally, there is no reason that the appellant could not

have called Mr. Casteel himself. He obviously knew him well enough to borrow a vehicle from him. Hence, the trial court correctly refused to give a missing witness instruction to the jury.

E. <u>The court correctly found the defendant had the ability to pay and imposed Legal Financial Obligations in the amount of $1,380 including discretionary LFOs in the amount of $780.</u>

Appellant contends that the trial court made an erroneous determination that Appellant was able to pay Legal Financial Obligations in the amount of $1380. When imposing discretionary Legal Financial Obligations, the trial judge must make an inquiry on the record on the defendant's ability to pay. *State v. Blazina*, 182 Wash.2d 827, 839, 344 P.3d 680 (2015) and *State v. Mathers*, 2016 WL 2865576, __ P.3d __ (2016 Div. II). The court must consider the defendant's current and future ability to pay, any restitution imposed, and the defendant's other debts. *Blazina* at 839.

In this case, the court inquired whether Mr. Vanhollebeke could pay the legal financial obligations and despite being asked directly what he was earning when he was working, Mr. Vanhollebeke simply did not answer. He admitted that he did have a job before this incident occurred and he was healthy and able to

work. Mr. Vanhollebeke also admitted that he could pay $25 a month minimum payments if he gets a job when he is released.

The discretionary LFOs the court imposed totaled $780. The other LFOs imposed were mandatory. The imposition of the $780 was based on Mr. Vanhollebeke's admission that he is healthy and able to work and the fact that he had been employed doing farm work before the incident occurred. These are not "rosy assumptions" as the appellant argues, but rather reasonable conclusions to make. Therefore, the Court should uphold the imposition of the LFOs, including the $780 discretionary LFOs.

F. <u>The trial court correctly sentenced Appellant based on an offender score of 2.</u>

Appellant argues that the State failed to prove the offender score used to sentence the defendant. The relevant statute regarding sentencing states:

> In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. *Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.* Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise

> specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented. RCW 9.94A.530(2) (Emphasis added).

Contrary to appellant's claim that the prior assault conviction washed and therefore should not have been included in the score, the prior conviction did not wash because the defendant failed to remain crime free in the community for the 10 years required for Class B felonies. When the State asserted that the Appellant had a number of criminal convictions in the past 10 years, ensuring that the assault conviction from 2003 did not wash, the Appellant made no objection to this information thereby acknowledging those convictions. The State concedes that it incorrectly stated that violent felonies do not wash ever; however, the State offered the alternative reason of the defendant failing to remain crime free in the community for 10 years.

The offender score was correctly calculated and should be upheld.

IV. CONCLUSION

For the reasons set forth above, the State requests this Court uphold the appellant's conviction and sentence.

DATED this _____ day of JUNE, 2016.

RANDY J. FLYCKT
Adams County Prosecuting Attorney

By: _____
FELICITY A. M. CHAMBERLAIN, WSBA #46155
Deputy Prosecuting Attorney

DATED this 6* day of JUNE, 2016.

RANDY J. FLYCKT
Adams County Prosecuting Attorney

By: _____
FELICITY A. M. CHAMBERLAIN, WSBA #46155
Deputy Prosecuting Attorney

* I signed and mailed this brief on June 6, 2016
6/21/16.

FILED

JUN 07 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON Respondent, v. JUSTIN DEAN VANHOLLEBEKE, Appellant,	)))))))))	COA NO. 33427-9-III AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
)ss.
County of Adams)

HELEN KENYON, being first duly sworn, on oath deposes and says:

That on this day affiant deposited in the mails of the United States of America a properly stamped and addressed envelope directed to:

1. Ms. Renee Townsley, Clerk/Administrator
   Court of Appeals
   500 N. Cedar St.
   Spokane, WA 99201

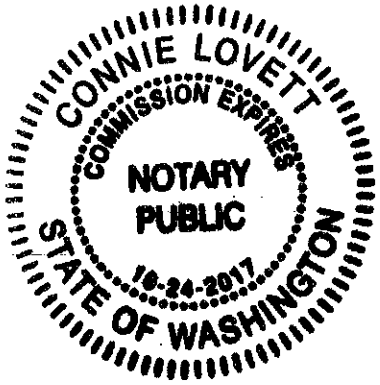
2. Ms. Andrea Burkhart
   Attorney at Law
   Burkhart & Burkhart PLLC
   6 ½ N. 2nd Ave. Ste. 200
   Walla Walla, WA 99362-1855

ADAMS COUNTY
Prosecuting Attorney
210 W Broadway
Ritzville, WA 99169
509-659-3219

3. Justin Dean Vanhollebeke #863700
Washington State Penitentiary
1313 N. 13th Aveune
Walla Walla, WA 99362

containing a copy of the Respondent's Brief.

DATED this 6th day of June, 2016.



Helen Kenyon
HELEN KENYON, Legal Assistant

SUBSCRIBED AND SWORN to before me this 6 day of June, 2016.

NOTARY PUBLIC in and for the State of Washington, residing in Ritzville.
My commission expires: 10-24-2017.

ADAMS COUNTY
Prosecuting Attorney
210 W Broadway
Ritzville, WA 99169
509-659-3219