

COA No. 64899-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL SOTO-BOJORQUEZ,

Appellant.

2010 MAR 23 10:57 AM
CLERK OF COURT
COURT OF APPEALS
DIVISION ONE

ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT
IN THE STATE OF WASHINGTON

The Honorable Charles R. Snyder

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Soto-Bojorquez's CrR 3.6 motion to suppress the cocaine evidence found in his vehicle during an impoundment search conducted by the Whatcom County Sheriff's Office.

2. The trial court erred in entering CrR 3.6 finding of fact 7 in the absence of substantial evidence.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err in denying Mr. Soto-Bojorquez's CrR 3.6 motion to suppress the cocaine evidence found in his vehicle during an impoundment search conducted by the Whatcom County Sheriff's Office, where the defendant could not speak English, and the search was illegal because the Deputy failed to use available translator resources in order to pursue reasonable alternatives to impoundment of the vehicle?

C. STATEMENT OF THE CASE

Daniel Soto-Bojorquez was the driver and sole occupant of a Lincoln automobile that was observed by a Whatcom County Sheriff's Deputy to be stopped at the corner of Smith Road and Guide Meridian in the Bellingham area. The Lincoln was

subjected to an inventory search by Deputy Streubel upon its being prepared for impoundment. Inside the vehicle, the deputy located a plastic baggie containing a gum sized ball of white powder. This substance field-tested positive for the presence of cocaine. In a search of defendant's person incident to arrest, deputies located a fake social security card and over \$700 in currency, mostly in \$50 and \$20 bills. Supp. CP ____, Sub # 37 (bench trial findings, findings 1-2).

When being booked into the jail, the defendant looked at the deputy and said "Muerta," and indicated he meant he was dead. Members of the jail staff discovered eight additional baggies of suspected cocaine under the defendant's testicles. These baggies contained approximately 2 grams of suspected cocaine each. The suspected cocaine was sent to the Washington State Patrol Crime Laboratory in Marysville. The contents of the initial baggie found in the car was chemically analyzed and determined to contain cocaine. However, the eight additional baggies found on defendant's person were not chemically analyzed. Supp. CP ____, Sub # 37 (bench trial findings, findings 2-4).

Following an unsuccessful defense motion to suppress under CrR 3.6, which centered on the propriety of the law enforcement decision to impound the vehicle, and thus the authority to conduct an impound search, Mr. Soto-Bojorquez agreed to a stipulated bench trial. CP 13.

At the stipulated trial, because the eight later-located baggies of suspected cocaine were not analyzed, the Whatcom County Superior Court, the Honorable Charles R. Snyder, properly declined to find that the quantity of cocaine found in the initial baggie, which was analyzed, was sufficient for the court to find that defendant possessed the substance with the intent to deliver. 1/20/10RP at 12. The trial court did find beyond a reasonable doubt that Mr. Soto-Bojorquez was guilty of the lesser crime of Unlawful Possession of Controlled Substance (Cocaine). 1/20/10RP at 13; Supp. CP ____, Sub # 37 (bench trial findings, conclusions as to guilt 1-2).

Mr. Soto-Bojorquez was sentenced to a standard range term of incarceration. CP 5-12. He timely filed a notice of appeal. CP 4.

D. ARGUMENT

THIS COURT SHOULD SUPPRESS THE COCAINE EVIDENCE AS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7, BECAUSE THE DEPUTY ABUSED HIS DISCRETION IN DECIDING TO TOW THE LINCOLN WITHOUT ATTEMPTING TO FIND AN ALTERNATIVE TO IMPOUNDMENT.

The trial court erred in denying Mr. Soto-Bojorquez's CrR 3.6 motion to suppress the cocaine evidence found in his during the impoundment search conducted by the Whatcom County Sheriff's Office.

1. Facts found at CrR 3.6 suppression hearing. Deputy Streubel was parked and working on paperwork around 12:45 am on the morning of November 28, 2009 in the parking lot of the gas station located at Smith and Guide-Meridian. A Lincoln automobile, stopped at the gas pumps, displayed windows tinted to such an extent that the Deputy thought they were illegal. He further discovered that the registration for the vehicle had expired one month earlier. Supp. CP ____, Sub # 36 (CrR 3.6 findings, findings 1-2).

Deputy Streubel did not immediately approach the Lincoln but watched it pull out onto Smith Road before he initiated contact at the light at Guide Meridian. The Lincoln drove across the Guide and stopped, partially blocking the entrance to Glynn's Shamrock Pub. This establishment was open for business at that time. The Lincoln was parked on the shoulder of Smith Road with its mirrors extending out over the fog line and perhaps portions of its chassis as well. This intersection was described as busy, with vehicles traveling at high rates of speed and left turn lanes available in all directions. The driver and sole occupant of the Lincoln was defendant Daniel Soto-Bojorquez. He identified himself with a Mexico identification card and returned as having no license or identification from Washington State. His driving record indicated that he had previously been stopped for traffic investigations. The Lincoln was registered to a woman of the same surname that listed an address in Everett, Washington. Everett is sixty miles south of Bellingham and it is eight or ten miles from Bellingham to the scene of the stop. Supp. CP ____, Sub # 36 (CrR 3.6 findings, findings 2-4); 1/19/10RP at 10-14, 16.

Because of the Mexico identification and the defendant's "difficulty in misunderstanding English," Deputy Streubel contacted the United States Border Patrol to request assistance. It took approximately forty minutes for an agent to arrive. During this time, Deputy Streubel tried various different combinations of defendant's hyphenated last name to find some local information or contacts. The Border Patrol agents spoke with the defendant and determined that he was illegally in the United States. The agent stated that since the defendant was in a paperwork status, all he could do was arrest and release him. Other deputies arrived during the course of the contact, but served only as backup officers. The defendant was cited for traffic offenses and released. However, Mr. Soto-Bojorquez's vehicle remained parked where he left it. At this location, the vehicle was a traffic hazard. Drivers turning left at this corner frequently use that portion of the roadway to merge onto westbound Smith Road and would not expect a car to be parked there. Also, the car partially blocked the entrance to an open business establishment. Supp. CP ____, Sub # 36 (CrR 3.6 findings, findings 4-6); 1/19/10RP at 11-16.

Deputy Streubel could not have expected someone to arrive from Everett to take charge of the vehicle for at least another hour and a half, even if he was lucky enough to contact someone immediately and they could leave momentarily for that entire section of the county. To tie the Deputies to this scene watching the car for additional period of time when they had already been there for over an hour is unreasonable. Supp. CP ____, Sub # 36 (CrR 3.6 findings, finding 7); 1/19/10RP at 74-77.

Based on these findings, the trial court denied the motion to suppress. Supp. CP ____, Sub # 36; 1/19/10RP at 79. The findings do not reflect, but may be supplemented by oral statements of the court, based on non-inconsistent undisputed evidence adduced from the State's witness at the CrR 3.6 hearing. See State v. Holland, 98 Wn.2d 507, 518, 656 P.2d 1056 (1983).

2. The Fourth Amendment and section 7 of Washington's Declaration of Rights protects private affairs from governmental disturbances not sanctioned with the requisite authority of law. Mr. Soto-Bojorquez's right to be left alone is protected by both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State

Constitution. State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002), State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

In part, the Fourth Amendment provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. Const. Amend. IV. In contrast, Article I, Section 7 states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7.

The significant difference in language was an important consideration when the Washington State Supreme Court interpreted the State Constitutional provision as granting greater privacy protection. See generally State v. Gunwall, 106 Wn.2d 54, 720 P.2d 1112 (1986). Accordingly, Washington accords broader privacy protection that is qualitatively different than that afforded by the U.S. Constitution. McKinney, 148 Wn.2d at 25.

Under Article I, Section 7, the test for identifying when the State violates a citizen's right to be left alone requires a two-part examination: (1) the disturbance of a person's "private affairs" and (2) absence of the requisite "authority of law" justifying that

disturbance. State v. McCready, 123 Wn.2d 260, 270, 868 P.2d 134 (1994). When a state actor searches, seizes, or otherwise interferes with a citizen's freedom, his private affairs have been disturbed. State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). Once the disturbance is identified, all that is left for a trial court is to examine the presence or absence of authority of law. McCready, 123 Wn.2d at 270. "Authority of law" means constitutional authority (i.e. a constitutionally valid warrant, an exception to the warrant requirement, or pursuant to a constitutionally valid statute). McCready, 123 Wn.2d at 270.

3. Deputy Streubel lacked authority of law when he decided to impound the Lincoln; therefore, the inventory search was constitutionally infirm and the fruits obtained thereafter were inadmissible as evidence. When law enforcement impounds a vehicle, authority of law must be present because the impoundment constitutes a seizure and a disturbance of the citizen's private affairs. State v. Reynoso, 41 Wn. App. 113, 116, 702 P.2d 1222 (1985). Whether authority of law exists to impound depends on the facts of each case. State v. Greenway,

15 Wn. App. 216, 219, 547 P.2d 1231, review denied, 87 Wn.2d 1009 (1976).

Three circumstances justify impounding a vehicle: (1) when the vehicle itself is evidence of a crime; (2) when the vehicle poses a threat to public safety; and (3) if impoundment is statutorily authorized, as long as the seizure is reasonable. State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980). Specifically:

A vehicle may be impounded if (1) the officer has probable cause to believe that it was stolen or was used in the commission of a felony, (2) as part of the officers' community caretaking function, if no one is available to move the vehicle for the defendant, and (3) if impoundment is statutorily authorized, as long as the seizure is reasonable.

State v. Reynoso, 41 Wn. App. 113, 116-17, 702 P.2d 1222 (1985) (quoting State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980)). There is of course a distinction between the impoundment of a vehicle for the purpose of searching for incriminating items and the impoundment of a vehicle for a purpose unrelated to a search. State v. Davis, 29 Wn. App. 691, 697, 630 P.2d 938 (1981). Police officer may seize a motor vehicle without a warrant only when both probable cause and "exigent circumstances" exist. Davis, at 697-98.

Even if an impoundment were authorized by statute, impoundment of a person's vehicle must nonetheless be reasonable under the circumstances to comport with constitutional guaranties. State v. Hill, 68 Wn. App. 300, 305, 842 P.2d 996 (1993).

In Hill, 68 Wn. App. 300, the impoundment of the vehicle was found unreasonable because no alternative to impoundment was considered. There, a state trooper initiated a traffic stop of a vehicle because it had one headlight out. The driver of the vehicle pulled his car over on the road in front of an automotive parts store. Upon approaching the vehicle, the trooper observed that both the driver and the passenger were not wearing seat belts, that the odor of intoxicants emanating from the vehicle and that there was an open container of alcohol in the vehicle. A warrants check of the passenger revealed three outstanding warrants for the arrest of the passenger regarding drug related matters. A second officer arrived and the passenger was arrested. State v. Hill, 68 Wn. App. at 304, 307.

After the passenger's arrest, and following the denial of the requests to search, the officers decided to impound the vehicle. State v. Hill, 68 Wn. App. at 304, 307.

Prior to impoundment, the officers searched the vehicle. The officers discovered several bindles of suspected narcotics and a sealed cassette tape case. The search halted and the vehicle was sealed. The officers obtained a search warrant and then reinitiated the search of the vehicle. The driver was eventually charged with possession with intent to deliver. Counsel for the driver moved to suppress the evidence discovered by the officers during the inventory search prior to impoundment. The trial court denied the motion, the driver was convicted, and an appeal followed. State v. Hill, 68 Wn. App. at 304, 307.

In reversing, the Court of Appeals specifically rejected several of the State's arguments, which were proffered to justify the intrusion. In particular, the appellate court rejected the State's arguments that the impoundment was justified by the community caretaking function and by statute. The State had relied on RCW 46.32.060 and attempted to argue that the vehicle possessed defective equipment and was subject to towing. The Court also

rejected prosecution-proffered authority from other state jurisdictions and the U.S. Supreme Court. In so doing, the Court of Appeals reiterated that the Washington State Constitution provides greater protection than the Fourth Amendment and "[i]n Washington, impoundment is inappropriate when reasonable alternatives exist." Hill, 68 Wn. App. at 307.

Under Hill's facts, the Court concluded the trooper had made no serious efforts to determine the existence of reasonable alternatives to impoundment. 304, 307. The Court stated:

Trooper Walcker testified he did not ask Mr. Hill if anyone else could drive, suggest a telephone call to someone, or ask if he wanted his car parked and left in the adjacent parking lot. The troopers made no attempt to determine reasonable alternatives.

Hill, 68 Wn. App. at 307. The Court found this infirmity to be unconstitutional and reversed the denial of the suppression motion.

Mr. Soto-Bojorquez argues that the facts of State v. Hill are compellingly analogous to those found below with regard to the absence of the Deputy's inquiry into the viability of reasonable alternatives to impoundment.

Mr. Soto-Bojorquez's appeal turns on this question. In State v. Houser, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980), the

police arrested the defendant and impounded his vehicle even though there were reasonable alternatives. In Reynoso, the impoundment of a vehicle was found to be unreasonable because the owner was available to remove the vehicle from the scene. Reynoso, 41 Wn. App. at 117-18.

The trial court erroneously stated in its oral ruling that the Deputy could not communicate with the defendant about local resources, and suggested that securing an interpreter was unnecessary, but then in turn stated that the Deputy had no choice but to impound the car "because of the communication issue." 1/19/10RP at 72, 78-79.

But Deputy Streubel did not adequately "consider alternatives." The trial court erred in entering CrR 3.6 finding of fact 7, which states: "To tie the Deputies to this scene watching the car for additional period of time when they had already been there for over an hour is unreasonable." CrR 3.6 Finding of Fact 7. But this finding erroneously includes the faulty understanding that the "additional period of time" that Deputy would have to wait would be the hour or more required for someone to arrive from Everett. CrR See 3.6 Finding of Fact 6.

The prosecutor-drafted CrR 3.6 findings give short shrift to undisputed facts regarding the available opportunities, of which the Deputy had actual knowledge but failed to pursue, to locate a person much closer to the scene of the impound.

Deputy Streubel acknowledged in his CrR 3.6 hearing testimony that he immediately realized there was a language barrier after approaching Mr. Soto-Bojorquez. 1/19/10RP at 15, 26. Deputy Streubel also outright admitted that he was aware of but failed to consider utilizing the law enforcement officers Language Line, an easy to use translation service accessed by common cell phone. 1/19/10RP at 48-49.

The Deputy also knew Mr. Soto-Bojorquez was in possession of a cell phone, 1/19/10RP at 46, but apparently no effort was made to tell him in Spanish by some means that he should try and call a nearby relative or friend to come and take custody of the vehicle, because it was about to be impounded.

Indeed, the record is devoid of much evidence as to what the defendant was even told at all about what was happening. The Deputy knew that the Border Parol contingent was a translator, 1/19/10RP at 16, but apparently failed to consider using that

available resource to inform the defendant of impoundment and impoundment alternatives, even though the Border Patrol was perfectly able to communicate with Mr. Soto-Bojorquez on several topics. 1/19/10RP at 17.

Deputy Streubel appeared to decide solely on the basis of his own computer research, rather than even asking the defendant himself, that there was no relative or address of the defendant in the nearby area. 1/19/10RP at 18, 20. When asked if he had "any way" of trying to locate a possible driver for the car, he merely stated he could not "associate" Mr. Soto-Bojorquez with anyone in the area. 1/19/10RP at 20.

These undisputed facts cannot be dismissed as trivial. The reality of the situation is that the Deputy had available solutions to the language barrier and failed to employ such tools, which can be characterized as both intended, or simply critically useful for addressing precisely these situations.

This non-action on the face of availability and feasibility was tantamount to refusing to communicate with the defendant/towee. In the case of State v. Greenway, supra, 15 Wn. App. at 219, it was stated that "the ultimate issue is whether under

all the facts and circumstances of the particular case there were reasonable grounds for an impoundment." The affirmance of reasonableness under that test should not be granted in this case, where Deputy Streubel simply declined to take the easy path of utilizing the Border Patrol agent or the Language Line, or to communicate to the defendant to try and reach a local resident.

Multiple options were presented to the Deputy to quickly solve the language barrier. None were considered. Instead, Deputy Streubel communicated with the defendant by using hand motions and pointing, as if he was a mute. 1/19/10RP at 37-38. But the accused was not a mute. This was unacceptable, given the alternatives available, which would have allowed Mr. Soto-Bojorquez the same chance an English-speaking American would have been given to assist in locating a driver and an alternative to impoundment.

As the rule was set forth most clearly in State v. Coss, 87 Wn. App. 891, 943 P.2d 1126 (1997): "Although an officer is not required to exhaust all possibilities, the officer must at least consider alternatives." (Emphasis added.) State v. Coss, 87 Wn. App. at 899. The Deputy's non-actions in this case violated the

defendant's rights under the afore-cited constitutional provisions. This Court should hold that the impoundment was not reasonable under the circumstances and therefore did not comport with the constitutional protection of privacy. State v. Hill, 68 Wn. App. at 305.

Based on the foregoing, Mr. Soto-Bojorquez asks this Court to reverse the denial of his motion to suppress and reverse his conviction.

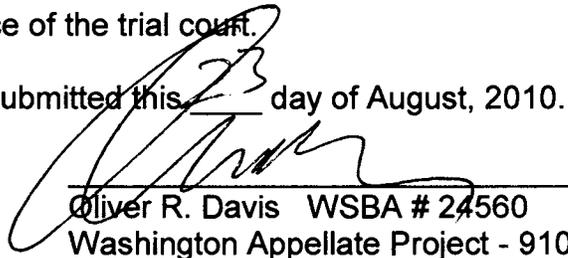
4. Because the search was without authority of law, the resulting evidence must be suppressed. Where there has been a violation of the Fourth Amendment or the state constitution's privacy guarantee, courts must suppress evidence discovered as a direct result of the search, as well as evidence which is derivative of the illegality, the latter being "fruits of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). This rule requires suppression of the cocaine evidence.

4. The suppression of the contraband in a possessory crime requires reversal of Mr. Soto-Bojorquez's VUCSA conviction. Absent the contraband evidence, there was insufficient evidence to support Mr. Soto-Bojorquez's conviction at a bench trial for VUCSA possession of cocaine, and the conviction must therefore be reversed as violative of due process under the Fourteenth Amendment. See RCW 69.50.401 et seq. (possession of drug offenses requiring evidence of contraband); State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000) (contraband is critical element of possession conviction); U.S. Const. amend. 14.

D. CONCLUSION

Based on the foregoing, the appellant Daniel Soto-Bojorquez respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 23 day of August, 2010.



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

STATE OF WASHINGTON,)	
)	
Respondent)	Court of Appeals No. 64899-3
)	
v.)	
)	
DANIEL SOTO-BOJORQUEZ,)	
)	
Petitioner.)	
<i>Appellant</i>)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 23RD DAY OF AUGUST, 2010, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

Craig D. Chambers
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STATE OF WASHINGTON
2010 AUG 23 PM 4:37

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF AUGUST, 2010

x *-Ann Joyce*