

NO. 65615-5-I

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

RECEIVED  
APPELLANT'S BRIEF  
JAN 17 2016  
COURT OF APPEALS  
DIVISION ONE  
STATE OF WASHINGTON

---

---

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS MONAGHAN,

Appellant.

---

---

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

The Honorable Steven J. Mura, Judge

---

---

REPLY BRIEF OF APPELLANT

---

---

JENNIFER M. WINKLER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ISSUES IN REPLY</u> .....	1
B. <u>ARGUMENTS IN REPLY</u> .....	1
1. THE RESPONDENT’S BRIEF MISREPRESENTS THE TRIAL COURT’S FINDINGS OF FACT IN SUPPORT OF THE STATE’S CONSENT ARGUMENT.....	1
2. COLE AND CUZICK CONTROL THE OUTCOME HERE BECAUSE, CONTRARY TO THE STATE’S CLAIM, THE SCOPE OF THE MONAGHAN’S CONSENT WAS NO BROADER THAN IN THOSE CASES.....	3
C. <u>CONCLUSION</u> .....	5

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. Cole

31 Wn. App. 501, 643 P.2d 675 (1982)..... 1, 3

State v. Cuzick

21 Wn. App. 501, 585 P.2d 485 (1978)..... 1, 3, 4, 5

A. ISSUES IN REPLY

1. Does the State's brief misrepresent the trial court's findings of fact in arguing that Mr. Monaghan consented to the police officer's use of his keys to opened the locked container?

2. Where the State has failed to effectively distinguish the facts of State v. Cole<sup>1</sup> and State v. Cuzick,<sup>2</sup> should those cases, which require suppression, control the outcome here?

B. ARGUMENTS IN REPLY

1. THE RESPONDENT'S BRIEF MISREPRESENTS THE TRIAL COURT'S FINDINGS OF FACT IN SUPPORT OF THE STATE'S CONSENT ARGUMENT.

The State argues Monaghan consented to a police search of a locked container in the trunk of his car. In support of this argument, the brief inaccurately recites the superior court's Finding of Fact 7. According to the State, that finding provides that, "*In full view of Monaghan*, Deputy High located the keys from the driver's area of the care and unlocked the container." Brief of Respondent (BOR) at 3. The State appears to be asserting that because Monaghan was aware the deputy was accessing his keys to unlock the safe, he must have consented to the

---

<sup>1</sup> 31 Wn. App. 501, 643 P.2d 675 (1982)

<sup>2</sup> 21 Wn. App. 501, 585 P.2d 485 (1978)

more intrusive search. BOR at 5, 9-11. The court, however, made no such finding.

Instead, Finding 7 states:

7. Deputy Paz located a soft pack in the truck of the vehicle and discovered a desk sized dictionary/safe inside. He obtained the keys from the driver's area of the [Acura] and found a key on the ring that fit the lock on the dictionary/safe.

CP 36-37 (attached as an appendix to Brief of Appellant).

Finding 8 is closer, but still does not establish what the State wishes to assert:

8. [Monaghan] stood at the driver's door of Deputy High's vehicle talking to Ms. Fink-Crider as Deputy Paz searched the trunk and its contents. Parked directly behind the [Acura], the headlights of . . . High's vehicle illuminated the scene. [Monaghan] was within fifteen feet of a the trunk of his car and the search. He did not at any time withdraw his consent to search or limit it in any way.

CP 37.

Contrary the State's claim, moreover, the suppression hearing testimony was as follows:

Deputy Paz testified that while Monaghan was talking to Fink-Crider, he unzipped a soft-sided container and found a locked a dictionary-sized safe inside. RP 36. Paz found Monaghan's key ring on the front seat. RP 36. He opened the safe without asking Monaghan's permission.

RP 36-37, 47, 48. Monaghan, in turn, testified he could not see what Paz was doing in the trunk because he was at High's car speaking to Fink-Crider. RP 54, 64.

This testimony was not contradicted, and the trial court did not find to the contrary. This Court should reject the State's misstatement of the trial court's findings.

2. COLE AND CUZICK CONTROL THE OUTCOME HERE BECAUSE, CONTRARY TO THE STATE'S CLAIM, THE SCOPE OF THE MONAGHAN'S CONSENT WAS NO BROADER THAN IN THOSE CASES.

The State repeatedly asserts that, unlike in the two controlling cases, Monaghan's consent was "general and unqualified." BOR at 1, 2, 5, 8, 11. The State's attempt to distinguish those cases fails.

While both cases are instructive, Monaghan's case is more factually similar to State v. Cuzick, 21 Wn. App. 501, 585 P.2d 485 (1978). There, a police officer was dispatched to a reported home invasion. The officer asked Cuzick, who was standing near his car in front of the residence, if he had guns on his person or in his car. When Cuzick said no, the officer asked if he could look in the car, and Cuzick consented. The officer searched the car and found a suitcase in the back seat. Inside the suitcase was a gun. Id. at 502-03. The State charged

Cuzick with unlawful possession of a firearm, and he moved to suppress the evidence. Id. at 502.

On appeal, this Court held the trial court erred in refusing to suppress the gun, holding that even if Cuzick consented to a *car* search, searching a suitcase exceeded the scope of the consent. Id. at 505. According to the Court, Cuzick's consent to search the car did not "permit the officer to rummage through a suitcase containing [Cuzick's] personal belongings." Id.

While the State repeatedly refers to Monaghan's "general and unqualified consent" and suggests that it was broader than the consent in Cuzick, repeated assertion that something is true does not make it true.

Similar to the facts in Cuzick, Deputy High initially said he wanted to search Monaghan's car for weapons. RP 51, 56; Finding 4. Monaghan consented to a search of the passenger area of his car, not including the glove compartment. RP 11, 25, 51-52, 56. A second officer who arrived later took over the search and began to open the appellant's trunk. After initially protesting, Monaghan consented to the trunk search. RP 14-15, 27-28, 43; Findings 5, 6. While the appellant's attention was elsewhere, the second officer removed a key from the appellant's key ring and opened the safe. RP 36-37, 47, 48; Findings 7, 8.

Thus, despite the State's repeated assertions, there is nothing about Monaghan's consent in this case that distinguishes it from Cuzick. Consent was no broader and no narrower than in that case, which mandates suppression.

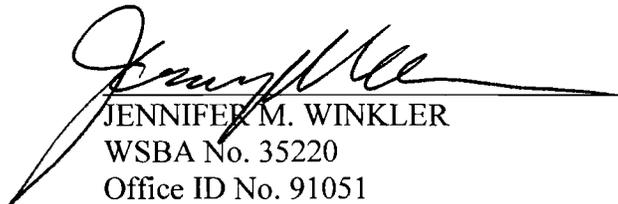
C. CONCLUSION

For the reasons stated above and in the appellant's opening brief, this Court should reverse Monaghan's convictions.

DATED this 17<sup>TH</sup> day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC

  
JENNIFER M. WINKLER  
WSBA No. 35220  
Office ID No. 91051

Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65615-5-1
	)	
NICHOLAS MONAGHAN,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

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

THAT ON THE 17<sup>TH</sup> DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CRAIG CHAMBERS  
WHATCOM COUNTY PROSECUTOR'S OFFICE  
311 GRAND AVENUE  
BELLINGHAM, WA 98225

[X] NICHOLAS MONAGHAN  
5457 MT. BAKER HIGHWAY  
DEMING, WA 98244

**SIGNED** IN SEATTLE WASHINGTON, THIS 17<sup>TH</sup> DAY OF MARCH, 2011.

x *Patrick Mayovsky*