

NO. 66816-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT CHAPMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE SPEARMAN

BRIEF OF RESPONDENT

2011 DEC -5 PM 4:32

COURT OF APPEALS
STATE OF WASHINGTON
THIRD JUDICIAL DISTRICT

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A. ISSUE PRESENTED

1. Evidence discovered following an unlawful search must be suppressed as "fruit of the poisonous tree," unless an exception to the exclusionary rule applies. Under the independent source doctrine, evidence discovered following an unlawful search is admissible, provided it is obtained pursuant to lawful means independent of the unlawful action. Here, Officer Alexander found alcohol during an unlawful search of Chapman's car and subsequently asked Chapman whether he had been drinking. Was Chapman's admission to drinking admissible when Alexander had an independent basis to ask Chapman about drinking?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Robert Chapman was charged by amended information with felony driving while under the influence ("DUI"), driving while license suspended/revoked in the first degree ("DWLS 1"), and driving without an ignition interlock device. CP 7-8. Prior to trial, the court granted the State's motion to dismiss the ignition interlock charge. CP 79.

Following CrR 3.5 and 3.6 hearings, the trial court ruled that Chapman's statements were admissible and denied his motion to suppress evidence.¹ 2RP² 106, 120-22. Trial occurred in February of 2011. The jury found Chapman guilty of both felony DUI and DWLS 1. The trial court imposed a standard range sentence. CP 103-14.

2. SUBSTANTIVE FACTS.

At 7:43 a.m. on April 13, 2009, Clyde Hill Police Officer Di Alexander stopped Robert Chapman after a routine license check revealed that his license was suspended in the first degree and that he had two outstanding warrants. 1RP 11. Records also indicated that Chapman was required to have an ignition interlock device installed in his car. 1RP 12. Alexander's partner, Medina Police Officer James Martin, arrived shortly after her initial contact with

¹ Chapman assigns error to the trial court's failure to file findings of fact and conclusions of law following the CrR 3.6 hearing, but offers no argument regarding this assignment of error. This Court should not address assignments of error not supported by argument or authority. RAP 10.3(a)(6). Regardless, remand is not necessary because trial court entered written findings on September 14, 2011. CP 128-32. Chapman cannot show any prejudice cause by the delay in entering findings, and there is no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).

² The verbatim report of proceedings consists of four volumes: 1RP (2/2/2011), 2RP (2/3/2011), 3RP (2/7/2011 and 2/8/2011), 4RP (2/8/2011 and 3/4/2011).

Chapman. 1RP 14. Alexander removed Chapman from his car, handcuffed him, and told him that he was under arrest for DWLS 1 and the outstanding warrants. 1RP 15. Alexander placed Chapman in her patrol car and advised him of his constitutional rights. Id. She then returned to Chapman's car to see whether there was an ignition interlock device, as she had not seen one during her initial contact with Chapman. 1RP 17.

Chapman's car was cluttered and it was difficult to see the center console, where an ignition interlock device would normally be installed. 1RP 18. Alexander opened the car door and looked around the center console and on the floor. 1RP 17. Although she did not find an interlock device, she found six cans of Sparks, an alcoholic energy drink, on the driver's-side. 1RP 19.

After Alexander finished searching the car, Martin told her that he had smelled the odor of intoxicants on Chapman's breath. Id. Alexander had noticed only the "overwhelming odor of cigarette smoke." 1RP 20. Alexander asked Chapman whether he had been drinking. Id. Chapman admitted that he had been drinking through the night until 4:00 a.m., slept for a couple of hours, woke up at 6:30 a.m. and started drinking again. Id. Chapman also

admitted that he had been drinking on the way to work and that he was an alcoholic. 1RP 21.

Alexander then asked Chapman to do the horizontal gaze nystagmus ("HGN") test, which Chapman agreed to do. 1RP 23. Alexander detected four out of six clues, which indicated impairment.³ 1RP 27. Based on Chapman's admission to drinking, the cans in Chapman's car, the results of the HGN test, and Martin's statement about the odor of intoxicants, Alexander took Chapman for a breath-alcohol test. 1RP 32. The test revealed a blood alcohol content of .188 and .186, at 8:43 a.m. 3RP 42, 149.

When interviewed at the station, Chapman said that he was on his way to work when Alexander stopped him. 3RP 44. Chapman said that he left Clearview, Washington, at 6:00 a.m., and started drinking at 6:30 a.m., while on the road. 3RP 45-46. Chapman had consumed two cans of Sparks since leaving Clearview. 3RP 45.

At the time of his arrest, Chapman had 4 prior DUI-type convictions within 10 years.⁴ 3RP 172.

³ Because the State did not establish the proper foundation, Alexander was not allowed to testify regarding the results of the portable breath test. 1RP 27-32.

⁴ See RCW 46.61.5055(14).

C. ARGUMENT

1. THE STATE CONCEDES THAT THE SEARCH OF CHAPMAN'S CAR WAS UNLAWFUL.

Chapman argues that Officer Alexander unlawfully searched his car. The State concedes that Alexander's search was an unlawful search incident to arrest under Arizona v. Gant.⁵

When reviewing the denial of a motion to suppress, appellate courts review findings of fact for substantial evidence. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). A trial court's conclusions of law are reviewed de novo. Id.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, warrantless seizures are per se unreasonable, unless they fall under one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 62 L. Ed. 2d 235 (1979)). Search incident to a lawful arrest is one exception to the warrant requirement. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). The State must establish the exception to the warrant requirement by clear

⁵ 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

A vehicle may be searched incident to the arrest of a recent occupant, but only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if there is reason to believe that the vehicle contains evidence of the crime of arrest. Gant, 129 S. Ct. at 1719; State v. Wright, 155 Wn. App. 537, 549, 230 P.3d 1063, review granted, 169 Wn.2d 1026, 241 P.3d 413 (2010).

Here, the trial court concluded that Alexander conducted a proper search incident to arrest because she was searching for evidence of the crime of arrest. CP 130. The record does not support the trial court's conclusion that Alexander was searching for the crime of arrest. Although Alexander testified that she searched the car, in part, to determine whether Chapman had an ignition interlock device,⁶ the crime of arrest was only DWLS 1 and outstanding warrants; Chapman was not under arrest for driving without an ignition interlock device. 1RP 17. Alexander had no reason to believe that there was evidence of the crime of arrest--

⁶ Alexander also acknowledged that prior to Gant, she routinely searched vehicles incident to arrest. 2RP 76.

DWLS 1 and outstanding warrants--in the car. Therefore, once Chapman was secured in the patrol car, Alexander had no basis to support a search incident to arrest.

Chapman was arrested eight days before the Supreme Court's decision in Gant. At the time, Alexander had every reason to believe that she could search Chapman's car incident to arrest without any further justification. However, in light of Gant and its progeny, the State concedes that Alexander's search of Chapman's car is no longer a lawful search incident to arrest.

As discussed in more detail below, Chapman's admission that he had been drinking, and subsequent evidence, were not fruit of the unlawful search. On the other hand, the Sparks cans were the direct result of the search and should have been suppressed. Mapp v. Ohio, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Although the cans should have been suppressed, the error was harmless. A constitutional error can be harmless if it is proved to be harmless beyond a reasonable doubt. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). Error is harmless if the court is satisfied beyond a reasonable doubt

that any reasonable jury would have reached the same result without the error. Id. Put another way, such error is harmless if there is "no reasonable probability that the outcome of the trial would have been different had the error not occurred." State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003) (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

Here, Officer Martin noticed the smell of alcohol on Chapman's breath and the HGN test confirmed that he had consumed alcohol. Indeed, Chapman admitted that he had been drinking throughout the prior night and *while driving to work*. Chapman's BAC of .186 and .188 were well over the legal limit of .08. Even without the Sparks cans, the State provided ample evidence to convict Chapman of DUI. There is no reason to believe that the outcome of the trial would have been different without the Sparks cans. See Powell, 126 Wn.2d at 267.

2. CHAPMAN'S ADMISSION TO DRINKING, AND ALL SUBSEQUENTLY-DISCOVERED EVIDENCE, WERE NOT THE FRUIT OF ALEXANDER'S UNLAWFUL SEARCH.

Chapman contends that Alexander asked him whether he had been drinking only as a result of finding the Sparks cans. He

further argues that his statements, the HGN test, and the BAC were fruit of the unlawful search. Because Alexander had independent reasons to ask about drinking, Chapman's statements, and the subsequent evidence, were not fruit of the initial search.

As a general rule, evidence discovered pursuant to an illegal search or seizure must be suppressed as "fruit of the poisonous tree." State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995) (citing Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 1416, 16 L. Ed. 2d 441 (1963)). However, such evidence is not subject to suppression if the relationship between the illegal search and seizure and the evidence obtained is sufficiently attenuated so as to dissipate the taint. State v. Miles, 159 Wn. App. 282, 291, 244 P.3d 1030, review denied, 171 Wn.2d 1022 (2011).

The independent source doctrine is a well-established exception to the exclusionary rule. Id. Under the independent source doctrine, evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to lawful means independent of the unlawful action. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005)

The Washington Supreme Court has repeatedly recognized the independent source doctrine, most often in the context of search warrants. In State v. Coates, the defendant stabbed an off-duty police officer. 107 Wn.2d 882, 883-84, 735 P.2d 64 (1987). Officers arrested Coates, who invoked his right to remain silent. Id. at 884. Later that evening, an officer, unaware that Coates had asserted his right to remain silent, questioned him regarding the location of the knife. Id. Coates stated that it was underneath the front seat of his car. Id. The detective obtained a search warrant for the car the next day. Id. at 885. In the affidavit, the detective set forth details of the assault and disclosed Coates's statement to the deputy. Id. The knife was found during a search of the vehicle. Id. The Supreme Court held that the search warrant was still valid because, after excluding the illegally obtained information, the remaining information independently established probable cause. Id. at 888.

Similarly, in Gaines, the officers saw a weapon during an illegal search of the defendant's trunk. 154 Wn.2d at 714. Later, the police sought a search warrant for the defendant's trunk, which referenced the officer's observation of the weapon, as well as other evidence to establish probable cause. Id. at 714-15. Relying on

the decision in Coates, the Supreme Court held the search warrant was valid because probable cause existed even after excluding the illegally obtained information; thus, the evidence seized as a result of the search warrant was properly admitted. Gaines, at 718-20. The Court further explained that exclusion of only the illegally obtained information was sufficient to respect both the privacy interests of the individual and the State's interest in prosecuting criminal activity. Id. at 720.

Here, the question is whether Officer Alexander would have asked Chapman whether he had been drinking, independent of discovering the Sparks cans. Coates, 107 Wn.2d at 888. Even without the Sparks cans, Alexander knew that her partner had smelled the odor of alcohol coming from Chapman's breath. Combined with the knowledge that Chapman was required to have an ignition interlock device, it was reasonable to ask him whether he had been drinking.⁷ Following Chapman's admission that he had been drinking, it was reasonable for Alexander to investigate

⁷ Ignition interlock devices are designed to prevent someone from driving after consuming alcohol. RCW 46.20.710. The requirement to have an ignition interlock device typically follows conviction for a DUI. RCW 46.20.720.

further.⁸ Therefore, Alexander had an independent basis for asking Chapman whether he had been drinking.

Chapman contends that because Officer Martin did not testify during the suppression hearing, this Court must presume that his testimony would have been harmful. Relying on State v. Davis⁹ and State v. Erho,¹⁰ Chapman argues that the context and timing of Martin's statement was in dispute, and that under the missing witness rule, this Court must infer that his statement about smelling alcohol on Chapman was the fruit of Alexander's unlawful search.

In both Davis and Erho, the defendants disputed that they had been advised of their rights and the State failed to call other officers who were present during the interrogations. Davis, 73 Wn.2d at 274-75; Erho, 77 Wn.2d at 555-56. In both cases, the Court held that where the defendant disputes the giving of Miranda warnings and the State fails, without explanation, to call other

⁸ Chapman does not argue that his admissions provided an insufficient basis to conduct the HGN test, or that at the time she administered the BAC, Alexander lacked reasonable grounds to believe that Chapman had been driving while under the influence. See RCW 46.20.308(1) (when arrested on any offense, a person operating a motor vehicle is deemed to have consented to a breath test, provided the arresting officer has reasonable grounds to believe the person had been driving while under the influence).

⁹ 73 Wn.2d 271, 438 P.2d 185 (1968).

¹⁰ 77 Wn.2d 553, 463 P.2d 779 (1970).

officers who were present during the interrogation to corroborate that the warnings were given, the statement is inadmissible. Davis, at 288; Erho, at 559-60. Davis and Erho were limited to the State's burden of proof regarding waiver constitutional rights and Chapman cites to no authority extending the Davis rule to CrR 3.6 suppression hearings.¹¹

Even if the Davis rule could be extended to CrR 3.6 hearings, it should not apply to Chapman's case. In Davis, the defendant testified and refuted the testimony of the arresting officer, who was the only other witness in the hearing. Recognizing that the recent Miranda¹² decision imposed a "heavy burden" on the State to prove that a waiver was valid, the Court crafted a rule designed to avoid a "swearing contest."¹³ Davis, 73 Wn.2d at

¹¹ On June 30, 2011, the Washington Supreme Court heard argument as to whether the rule announced in Davis and Erho should be overturned. State v. Abdulle, No. 84660-0.

¹² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

¹³ The Davis rule appears to have been based on the Court's mistaken belief that Miranda required the State to prove waiver beyond a reasonable doubt. See Davis, 73 Wn.2d at 285-86. A few years after Davis, the United States Supreme Court clarified that Miranda's "heavy burden" required proof of a lack of coercion only by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 484, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972).

286-88. Here, Chapman did not testify at the suppression hearing. Contrary to Chapman's claim that the timing of Martin's statement was in dispute, the suppression hearing in this case did not involve a swearing contest. There was no evidence to suggest that Martin's statement was made in response to the discovery of the Sparks cans. Alexander did not recall telling Martin that she had found the alcohol in Chapman's car. 2RP 80. All of the arguments focused on whether the search of the car was lawful. CP 9-18. Because the trial court determined that the search of the car was lawful, the timing of Martin's statement was never at issue.

Finally, the missing witness rule does not apply in every case. Rather, "one must establish such circumstances which would indicate, as a matter of reasonable probability, that the prosecution would not knowingly fail to call the witness in question unless the witness's testimony would be damaging." Davis, 73 Wn.2d at 280. Chapman has not established such circumstances. Given the fact that Martin did not stop Chapman, did not search his car, did not question him, and did not have significant contact with him, it was reasonable that the State did not call Martin to testify at the

suppression hearing. Moreover, in order to infer that Martin's testimony would have been damaging, this Court must presume that he would have testified not only that he mentioned Chapman's odor after learning about the Sparks cans, but also that he would not have made his statement absent the discovery of the Sparks cans. It is unreasonable to infer that Martin would need prompting before advising Alexander that he smelled alcohol on Chapman, particularly considering that Chapman's driving status would have triggered a heightened level of suspicion. Because any reasonable officer in Martin's position would have made his statement regardless of the Sparks cans, this Court should not apply the missing witness rule as urged by Chapman.

Martin's statement, combined with Chapman's driving status, provided a sufficient basis for Alexander to ask Chapman whether he had been drinking. Under the independent source doctrine, Chapman's admissions, and all subsequently-discovered evidence, were not fruit of the unlawful search.

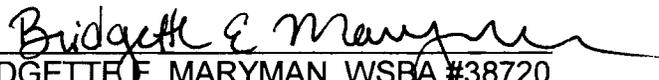
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Chapman's conviction.

DATED this 5 day of December, 2011.

Respectfully submitted,

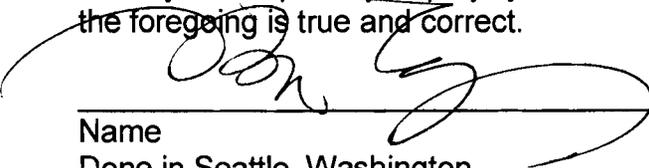
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ROBERT CHAPMAN, Cause No. 66816-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

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