

NO. 71111-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WYATT,

Appellant.

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COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. There is no reasonable expectation of privacy in items in an illegal campsite or that are unlawfully stored on public property, particularly where those items are not personal effects or are voluntarily abandoned. Wyatt was camped illegally on Kent city property and the property at his campsite was stored there illegally. Wyatt and his companion implicitly abandoned this property by disclaiming ownership and then leaving the area without taking, securing, or secreting the property. Did the trial court properly admit evidence of the property that was subsequently discovered outside of Wyatt's tent?

2. Confessions are involuntary and inadmissible when made as a result of overbearing police conduct under the totality of the circumstances. Here, Sergeant O'Reilly used a ruse to suggest he had information that Wyatt was making methamphetamine to sell to children and remarked that he would have "a problem" with that. Did the trial court correctly conclude that this conduct did not overbear Wyatt's will, such that his statements were voluntary and admissible?

3. To prove that Wyatt's offense occurred in a "public park" for purposes of a sentencing enhancement, the State had to

prove that Wyatt produced methamphetamine on land operated as a park by the state or local government. Wyatt admitted making methamphetamine in his camp, and the undisputed testimony of three officers charged with patrolling city parks established that Wyatt's camp was within Kent's Riverview Park. From this evidence and common understanding, the jury could reasonably infer that the land was operated by Kent as a park. Does sufficient evidence support the public park enhancement?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

By amended information, the State charged Dennis Wyatt with one count of Violation of the Uniform Controlled Substances Act for manufacturing methamphetamine. Clerk's Papers (CP) 25. The State further alleged that Wyatt committed the offense in a public park. CP 25. Following a combined CrR 3.5 and 3.6 hearing, the trial court granted the State's motion to admit Wyatt's custodial statements to police. CP 63-68; RP 398-99.¹ The trial court granted Wyatt's motion to suppress evidence obtained in a warrantless search of the tent he was living in, but denied his

¹ The Verbatim Report of Proceedings consists of several consecutively-paginated volumes. The State refers to the record by page number only.

motion to suppress evidence discovered in the search of the area outside of his tent. CP 69-77; RP 387-96. A jury later convicted Wyatt as charged and returned a special verdict finding that the crime occurred in a public park. CP 48-49. The trial court imposed a Drug Offender Sentencing Alternative (DOSA) requiring that Wyatt spend 41.75 months in custody, followed by 41.75 months in community custody. CP 53.

2. SUBSTANTIVE FACTS

During a routine bicycle patrol, uniformed Kent Police Department Officers Kenneth Clay and Andrew Kelso² made contact with a street source with whom they had had contact in the past. RP 29-31, 88; CP 69 (FF 1, 2). The source informed the officers that she had overheard a local homeless man named "Dennis" bragging about a recent theft of wire from a railroad crossing gate. RP 31, 89; CP 69 (FF 2). The source also mentioned that Dennis had been making methamphetamine in small holes he had dug in the ground. RP 31, 89-90; CP 69-70 (FF 2). She stated that Dennis lived in a tent camp along the Green River and indicated the location on a rudimentary map

² By the time of trial, Kelso had become a sergeant.

drawn by Officer Kelso. RP 91. Officer Kelso was familiar with Riverview Park and understood that the indicated location was within it. RP 91; CP 69-60 (FF 2).

Kent bicycle patrol officers spend much of their time “dealing with homeless, checking homeless camps.” RP 29. Through this work, Officer Kelso was familiar with many of the homeless individuals in the Kent valley. CP 70 (FF 3). From the source’s description, Kelso believed he knew who “Dennis” was. RP 32. Kelso confirmed that “Dennis” was Dennis Wyatt by comparing the information provided by the source to a previous contact report. RP 32, 90; CP 70 (FF 3).

The following day, officers Clay and Kelso went to the area of Riverview Park described by the source and found a well-used trail. RP 92; CP 70 (FF 4). They followed the trail, observing a lot of stripped wire sheathing, until they came upon a camp occupied by Wyatt, Jennifer Johnson, and another male. RP 33-34, 92-93; CP 70 (FF 4, 5). The other male, who was only visiting the camp, was later discovered to have outstanding warrants and was arrested. RP 35, 94-95; CP 70 (FF 7).

Kelso notified Wyatt and Johnson that it was illegal to camp there. RP 35, 93; CP 70 (FF 8). Wyatt and Johnson stated that

they knew it was illegal to camp there and claimed that they had been there for only a couple of days. RP 35, 93; CP 70 (FF 8). Johnson stated that "the tent was theirs," but other items in the area, including a tarp-covered pile of things about eight feet away from their tent, had been there when they set up camp and "did not belong to them." RP 94; CP 70 (FF 8). The officers observed a long-handled shovel leaning against the bushes, which reminded Kelso of the source's report that Dennis had been cooking methamphetamine in holes in the ground. RP 94; CP 70 (FF 10).

The officers told Wyatt and Johnson that they could not camp or store property in the park. RP 36. Officer Clay usually tells people who are illegally camping on public property that they have 24 hours to remove their things and move along. RP 44. Officer Kelso did not believe that they gave Wyatt and Johnson any particular timeframe to vacate the camp. RP 93. The officers escorted the third subject out of the park and waited for a patrol officer to transport him to jail. RP 95; CP 70 (FF 11).

About 45 minutes later, the officers returned to the park. RP 36; CP 71 (FF 12). They saw Wyatt and Johnson walking away from the area. RP 36, 96; CP 71 (FF 12). The officers went to the camp, took samples of the wire sheathing and unstripped wire, and

lifted the unsecured tarp to better view the materials that Johnson had said did not belong to her and Wyatt. RP 37-39, 96; CP 71 (FF 13). Under the tarp, the officers found several items consistent with a clandestine methamphetamine lab.³ RP 37, 42, 76, 96-97; CP 71 (FF 14-17). The officers also lifted a corner of the tent and observed that there were no leaves underneath, even though it was fall and leaves had been falling for some time. RP 36-37; CP 71 (FF 19). This led the officers to believe that Wyatt and Johnson had been camping there for more than two days. RP 36; CP 71 (FF 19).

The officers had enough training about methamphetamine labs to know that they could be extremely dangerous, so they did not attempt to remove the lab items from the camp. RP 43, 100. Kelso instead arranged with the Department of Ecology's on-call spill responder to process the material the following day, during daylight hours when it would not be as dangerous. RP 98, 100; CP 71-72 (FF 20-22).

³ Officers Clay and Kelso both testified that one of the items under the tarp was the blue soft-sided container. RP 37, 154. The trial court found that the "officers could not recall if this container was covered by the tarp." CP 73 (FF 34). For the purposes of this appeal, the State assumes the blue container was found under the tarp.

Officer Kelso, Sergeant O'Reilly, and Department of Ecology spill responder Richard Walker returned to the camp at approximately 10:45 a.m. the following day to process the methamphetamine lab. RP 101, 178; CP 72 (FF 24). Wyatt and Johnson were sleeping in the tent. RP 101; CP 72 (FF 26). The officers informed Wyatt and Johnson that they were under arrest for unlawful camping and investigation of manufacturing methamphetamine. RP 101; CP 72 (FF 27). The officers walked Wyatt and Johnson out of the park to the roadway, 120-150 yards away. RP 101; CP 72 (FF 27). The officers informed both suspects of their Miranda⁴ rights; both stated they understood, waived their rights, and agreed to speak with the officers. RP 102-03; CP 72 (FF 27).

Officer Kelso spoke to Wyatt. Wyatt admitted that he and Johnson had been camping in the park for a substantial amount of time and did not deny it when Kelso suggested that they had been there for three weeks. RP 105; CP 72 (FF 28). Wyatt initially denied any knowledge about the methamphetamine lab.⁵ RP 105; Pretrial Ex. 4 at 4; CP 73 (FF 28). He eventually admitted that he

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁵ The record thus belies Wyatt's claim that the trial court's finding that Kelso so testified is unsupported by substantial evidence. See Brief of Appellant at 30.

knew about it and that his fingerprints would be on the lab items, but claimed that was because he was just cleaning it up. RP 105; CP 73 (FF 28). Wyatt became frustrated and could not explain why the items were still neatly packaged, rather than in garbage bags or the like. RP 105; CP 73 (FF 28). Kelso told Wyatt that it was obvious that the lab belonged to Wyatt⁶ and asked whether the items were in danger of exploding; Wyatt said that "there's nothing dangerous right now." RP 106; Pretrial Ex. 4 at 4; CP 73 (FF 28). Kelso also asked Wyatt how long he had been addicted to methamphetamine and Wyatt admitted that he had been addicted for several years.⁷ Pretrial Ex. 4 at 4; CP 72 (FF 28).

Sergeant O'Reilly spoke with Johnson first. RP 179; CP 73 (FF 29). Johnson claimed that she knew nothing about a methamphetamine lab, but admitted that her fingerprints or DNA might be on the lab items from when she had rummaged through the property when they started camping there. RP 180; CP 73 (FF 29). Johnson said they had been camping in that spot for two weeks. RP 180; CP 73 (FF 29).

⁶ The record thus belies Wyatt's claim that the trial court's finding to this effect is unsupported by substantial evidence. See Brief of Appellant at 30.

⁷ The record also belies Wyatt's claim that the trial court's finding to this effect is unsupported by substantial evidence. See Brief of Appellant at 30.

O'Reilly then spoke to Wyatt. RP 180; CP 73 (FF 30). Wyatt told O'Reilly that he and Johnson had been camping there for three weeks. RP 181; CP 73 (FF 29). Using a ruse, O'Reilly told Wyatt that he had heard that Wyatt was making methamphetamine to sell to children. RP 181; CP 73 (FF 29). "I advised him that ... I'd have a problem with that, as would most anybody. And, at that point, he indicated he had been, in fact, cooking methamphetamine at the location, but it was for his own personal use." RP 181; CP 73 (FF 29). Wyatt stated that it was a mess, that he was not very good at cooking methamphetamine, and that Johnson was angry with him for doing it. RP 181; CP 73 (FF 29). Wyatt and Johnson were transported to the station where they were identified and released. RP 182, 187; CP 73 (FF 31).

The officers returned to the camp and assisted Walker in retrieving and processing the methamphetamine lab items. RP 182; CP 73 (FF 33). Sergeant O'Reilly went into the tent to make sure it was safe and found several bags with items related to the labs, as well as an airsoft pistol and cartridges, marijuana, and three glass smoking pipes with suspected methamphetamine residue. RP 182-84; CP 74 (FF 38-42). O'Reilly took the methamphetamine lab materials, illegal contraband, and weapons

into custody, but left the tent and the personal effects within it for clean-up by the parks department or a work crew. RP 185-86, 212; CP 74 (FF 42, 44). Walker removed all of the hazardous materials and chemicals from the scene. CP 74 (FF 48).

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE DISCOVERED OUTSIDE OF WYATT'S TENT BECAUSE THE ITEMS WERE CONTRABAND AND WERE ABANDONED IN AN AREA IN WHICH WYATT LACKED A REASONABLE EXPECTATION OF PRIVACY.

Wyatt contends that the trial court erred in admitting into evidence the contents of two closed containers discovered under a tarp in the area of his illegal campsite.⁸ He relies heavily on a Connecticut Supreme Court opinion that recognized a reasonable expectation of privacy in such items. Because that opinion is inconsistent with Washington authority and expressly limited to circumstances not present in this case, this Court should not rely upon it to invalidate the warrantless search of items that were illegally stored on public property and effectively abandoned by Wyatt and Johnson.

⁸ The trial court excluded evidence discovered inside Wyatt's tent, concluding that Wyatt had a reasonable expectation of privacy in the items he kept in his shelter. CP 76 (CL I.c). The State does not challenge that conclusion.

This Court reviews the denial of a motion to suppress evidence by determining if substantial evidence supports the trial court's findings of fact and if those findings support the trial court's conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Substantial evidence exists if sufficient to persuade a fairminded, rational person of the truth of the matter asserted. State v. Lew, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law are reviewed de novo. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

- a. Wyatt Lacked A Reasonable Expectation Of Privacy In Items Illegally Stored On Public Property.

“As a prerequisite to claiming an unconstitutional search, a defendant must demonstrate that he or she had a reasonable expectation of privacy in the item searched.” State v. Hamilton, 179 Wn. App. 870, 882, 320 P.3d 142 (2014). To make this showing, the defendant must establish that (1) he had an actual (subjective) expectation of privacy by seeking to preserve something as private and (2) society recognizes that expectation as reasonable.

State v. Evans, 159 Wn.2d 402, 409, 150 P.3d 105 (2007). In this case, Wyatt makes neither showing.

The City of Kent prohibits both camping and storing personal property in public places. KCC 8.09.010; 8.09.020. As defense witness Joann McEwen-Johnston testified, homeless people who camp on Kent property expect to be contacted by police frequently and told to move. RP 302, 322-23. They understand that “anyone,” including officers, “could go through your camp when you’re not there.” RP 318-19. Accordingly, if there are items that McEwen-Johnston wishes to keep private, she keeps them on her person. “If you want to keep things really secure, that’s the only place you have.” RP 318. If there are items she wants to secure but cannot carry, she takes the precaution of secreting them in a “false wall” between her tent and tarp. RP 308.

Although Wyatt and Johnson had constructed their camp in a secluded area of Riverview Park, they knew that they were camping illegally on public property. RP 93. They were reminded of that fact and instructed to vacate the area when officers Clay and Kelso first visited the camp on October 31. RP 35. Even after

this warning, they did not take the limited precautions that McEwen-Johnston mentioned to secure the blue cooler and black zippered bag containing Wyatt's methamphetamine lab materials. In these circumstances, this Court should conclude that Wyatt has not established a subjective expectation of privacy.

Further, even if this Court presumes that Wyatt and Johnson possessed such an expectation, it is not one that Washington courts have ever recognized as reasonable. In State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722 (1986), officers investigating a double homicide conducted the warrantless search of possessions that Jeffries had stored under a tarp in the woods. Id. at 413-14. In considering Jeffries' claim that the searches were unlawful, our supreme court relied on United States v. Pruitt, 464 F.2d 494 (9th Cir. 1972).

In Pruitt, smugglers hid boxes of marijuana within a grove of trees and underbrush. 464 F.2d at 495. The Ninth Circuit rejected their claim that a search of these boxes was unconstitutional, despite their subjective expectation of privacy.

“The reasonableness of the search under these circumstances, however, does not depend on the desire of the suspect to attain privacy nor on the knowledge of the officers that such was his desire. Reasonableness is ascertained by application of objective standards in a determination of whether there was a justified expectation of privacy.” Id. at 495-96 (citing Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). Noting that the outdoor area in which the boxes were secreted was not adjacent to a home or occupied as a camp, the court explained that “[a]ny casual passerby would feel perfectly free to ascertain what he had found. The only justified expectation of those who had secreted the marijuana was that the cache would remain secure against intrusion only so long as it remained undiscovered.” Id. at 496.

Relying on Pruitt’s rationale, the Jeffries court held that the search of Jeffries’ tarp-covered possessions in the woods was lawful because he could not reasonably expect to keep anybody who discovered them from examining them. 105 Wn.2d at 414.

The fact that possessions kept outside are associated with an occupied camp has not demanded a different result in Washington. In State v. Cleator, 71 Wn. App. 217, 857 P.2d 306 (1993), this Court considered whether the warrantless seizure of stolen property from inside Cleator's illegal camp was unconstitutional. There, police responding to a call reporting a residential burglary found an occupied campsite in the woods on adjacent public property. Id. at 218. When the officer lifted the unsecured tent flap to ensure that no one was hiding inside with a weapon, he saw items that had been reported missing from the burglarized house. Id. The officer entered the tent and seized the stolen property. Id. Cleator challenged the warrantless seizure as a violation of the Fourth Amendment. Id. at 220.

In considering his claim, this Court noted that “[m]ost courts have rejected an individual’s claim to a right of privacy in the temporary shelter he or she wrongfully occupies on public property.” Id. (citing cases). The Cleator court also quoted Professor LaFave with approval: “Thus, if an individual ‘places his effects upon premises where he has no legitimate expectation of

privacy (for example, in an abandoned shack or as a trespasser upon another's property), then he has no legitimate expectation that they will remain undisturbed upon [those] premises." Id. at 221 (quoting 4 W. LaFave, Search and Seizure §11.3(c), at 305 (1987)). In such circumstances, "the police may enter on a hunch, a fishing expedition for evidence, or for no good reason at all." 71 Wn. App. at 221 (internal citations omitted).

Because Cleator wrongfully occupied public land by living in a tent erected on public property without permission, this Court concluded that "he could not reasonably expect that the tent would remain undisturbed." 71 Wn. App. at 222. Accordingly, "As a wrongful occupant of public land, Cleator had no reasonable expectation of privacy at the campsite because he had no right to remain on the property and could have been ejected at any time." Id. (citing United States v. Ruckman, 806 F.2d 1471 (10th Cir. 1986) (no reasonable expectation of privacy in a cave on federal property from which defendant could be ejected at any time); Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975) (no reasonable expectation of privacy on land that squatters had no

right to occupy)). The Court held that Cleator's legitimate privacy expectations, "to the extent they existed, were limited to his personal belongings." 71 Wn. App. at 222. Because the officer seized only the stolen property and did not disturb Cleator's personal effects, his actions violated neither the Fourth Amendment nor article I, section 7 of the state constitution. Id. at 222-23.

Division Three of this Court addressed a similar scenario in State v. Pentecost, 64 Wn. App. 656, 825 P.2d 365 (1992). There, a citizen complained to police that a trespasser was camped on his property and that there was also marijuana growing on his property. Id. at 657. Officers responded to the site of the encampment and observed fertilizer, pesticide, nails, and boots with a particular tread. Id. When another officer radioed and reported finding similar materials and footprints with the same tread at the nearby marijuana grow site, Pentecost was arrested for manufacturing marijuana. Id. at 657-58. Pentecost argued that the officer's entry into his campsite and observation of items later used to link him to the grow operation constituted an illegal search and seizure. Id. at 658. Division Three rejected the argument that the unenclosed

items left around the campsite were analogous to the curtilage of a residence because unlike a person in his home, Pentecost was a trespasser with no right to exclude others.⁹ Id. at 659.

Pentecost, Cleator, and Jeffries demonstrate that Washington is unwilling to recognize as reasonable any expectation of privacy in items kept unlawfully on public land or without permission on private property, at least as to items that are not

⁹ Wyatt points out that Pentecost relied in part on State v. Dess, 201 Mont. 456 (1982), which has since been overruled by State v. Bullock, 272 Mont. 361 (1995). In Dess, police acting on a burglary complaint went to the defendant's campsite in a public campground and discovered suspected stolen property in plain view at the site. 201 Mont. at 458-59. The officers arrested the defendant for endangering the welfare of the children with him (a charge later dismissed for lack of probable cause) and seized the suspected stolen property, which officers later confirmed as stolen. Id. at 459. On appeal, Dess argued that seizure of the evidence at the campsite was incident to his unlawful arrest. Id. at 460. The court rejected the claim because he had no reasonable expectation of privacy in the public campsite, which it characterized as similar to an "open field," and therefore lacked standing to challenge the seizure of items found there. Id. at 461, 464. In Bullock, the court distanced itself from the Supreme Court's "open fields" doctrine in considering a case where officers entered private property posted with "no trespassing" signs and discovered an illegally-killed elk carcass in an area outside the curtilage of the cabin. 272 Mont. at 365-67. Relying on Montana's state constitution, the court rejected the notion that a person has no reasonable expectation of privacy on private land outside the curtilage of a dwelling, and held that one may have such an expectation "where that expectation is evidenced by fencing, 'No Trespassing,' or similar signs, or 'by some other means [which] indicate[s] unmistakably that entry is not permitted'["] Id. at 384. The court noted that "this requirement does not apply to observations of private land from public property" and stated that "to the extent that our prior decisions in ... Dess ... are inconsistent with this holding, they are overruled." Id. Bullock thus does not undermine Dess or Pentecost where the property searched is on, or viewed from, public property.

"personal effects."¹⁰ Thus, even if Wyatt had an actual, subjective expectation of privacy in his illegal campsite and the items illegally stored there – which has not been established here – that expectation was not objectively reasonable. Accordingly, this Court should conclude that the officers' search of items illegally stored in an illegal camp on Kent city property was not unconstitutional.

b. Mooney Does Not Demand A Different Result.

Both Cleator and Pentecost suggest without deciding that a different result may be necessary when the items searched are in closed containers. Each opinion cites State v. Mooney, 218 Conn. 85 (1991), the Connecticut Supreme Court opinion on which Wyatt principally relies. However, the Mooney court expressly and repeatedly limited its opinion to circumstances not present here. Its holding does not dictate reversal in this case.

In Mooney, the court considered whether the Fourth Amendment applies to closed containers kept by a homeless man

¹⁰ "Personal effects" has nowhere been comprehensively defined, but the Supreme Court has observed that in the Fourth Amendment context, "the term 'effects' is less inclusive than 'property'[" Oliver v. United States, 466 U.S. 170, 177, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). A reasonable interpretation of the phrase would be limited to articles having some intimate association with the owner or devoted to his or her personal use, like identification, luggage, purses, briefcases, wallets, clothing, hygiene items, etc.

in the area under a bridge abutment where he was living. 218 Conn. at 86. The court indicated that “this claim presents a close question” and specifically limited its decision “to the unique factual circumstances of this case, where the closed containers were found by the police in a secluded place that they knew the defendant regarded as his home, *where the defendant’s absence from that place at the time of the search was due to his arrest and custody by the police*, and where the purpose of the search was to obtain evidence of the crimes for which he was in custody.” Id. at 100-01 (emphasis added). The court emphasized these circumstances in distinguishing cases involving abandoned property and cases involving closed containers. See id. at 109 (abandoned property cases are distinguishable because “none of them involved the search of luggage of a homeless defendant living in a secluded area that the police knew he regarded as his home, *where the search took place shortly after the arrest of the defendant*,” and because no intent to relinquish expectation of privacy “can be inferred from the fact that the police arrested him and thus prevented him from returning to his goods and effects that night”) (emphasis added); 111 (third reason for holding that defendant had a reasonable expectation of privacy is “because he was under

arrest and in police custody, [and] could not be at the place he regarded as his home when the search occurred, and thus was rendered unable to assert his fourth amendment right in the luggage”).

In this case, however, the police did not prevent Wyatt from asserting his rights by arresting him and keeping him in custody. Rather, Wyatt and Johnson willingly left the area shortly after police reminded them that it was illegal to camp there, asked them to vacate the area, and left without arresting them. Indeed, far from asserting their rights to the items under the tarp, Johnson told the officers that the property was already at the site when she and Wyatt started camping there and did not belong to them.¹¹ RP 94. Because one of the crucial circumstances underlying the Mooney opinion is not present here, it does not dictate any particular result in this case.

Additionally, Mooney's four-judge majority employed a novel analysis by considering the contents of the containers, rather than where the containers are located, as the “place” searched for

¹¹ Wyatt points out that it was Johnson who disclaimed any interest in the property, not him. But it is undisputed that Wyatt was present when Johnson made the statement, and he did not disagree. Further, it is clear from Officer Clay's testimony that he understood Johnson to be speaking for both of them. RP 94.

Fourth Amendment purposes. 218 Conn. at 102. It does not appear that this aspect of Mooney's analysis has gained much support.¹² The three dissenting judges described the majority's approach as "singularly puzzling" because "the location of the containers was important because it played a major role in determining whether the containers were likely to be disturbed by members of the public, and therefore whether the asserted privacy interest in the contents of the containers was objectively reasonable." Id. at 141-42 (Callahan, J., dissenting). Indeed, even the majority acknowledged that the "nature and circumstances of the location of the container" are not irrelevant, that "even closed containers ... may not carry a reasonable expectation of privacy when placed outside the curtilage for collection," and that "a closed container may, under appropriate circumstances, be regarded as abandoned for fourth amendment purposes." 218 Conn. at 104 n.14.

Wyatt's reliance on Mooney is misplaced, notwithstanding Washington courts' references to that case, because the facts on which the Mooney majority relied are not present here. Moreover,

¹² Notably, Westlaw identifies no cases citing this portion of the opinion, while other parts of the opinion have been cited hundreds of times. The State has found no case that follows this 1991 analysis of the Connecticut court and Wyatt cites none.

the Mooney majority recognized that in some cases, closed containers may be abandoned and therefore unprotected by the Fourth Amendment. As argued next, that is so in this case.

c. The Property Outside Wyatt's Tent Was Abandoned.¹³

One exception to the warrant requirement is for voluntarily abandoned property. Evans, 159 Wn.2d at 407. "Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution." Id. (quoting State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001)). Because Wyatt and Johnson abandoned the property Wyatt contends was illegally searched, his claim fails.

Whether property is voluntarily abandoned depends upon a combination of act and intent. Evans, 159 Wn.2d at 408 (citing 1 W. LaFare, Search and Seizure §2.6(b), at 574 (3d ed. 1996)). "Intent can be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the

¹³ The State argued that the property at issue was abandoned to the trial court. The court declined to reach the issue because it found that the materials were in an area where Wyatt had no reasonable expectation of privacy. RP 396-97.

alleged abandonment should be considered.” Id. at 408 (quoting State v. Dugas, 109 Wn. App. 592, 595, 36 P.3d 577 (2001)).

The question is “whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid.” Id. (internal quotations omitted).

In addition, “[t]he status of the area searched is critical when one engages in an analysis of whether or not a privacy interest has been abandoned. That is so because courts do not ordinarily find abandonment if the defendant had a privacy interest in the searched area.” Evans, 159 Wn.2d at 409. “The opposite generally holds true if the search is conducted in an area where the defendant does not have a privacy interest.” Id. at 409-10. Disclaimer of ownership is not sufficient, by itself, to constitute abandonment. Evans, 159 Wn.2d at 412. “The circumstances surrounding the disclaimer of ownership dictate whether a defendant has abandoned his or her property.” Id. at 412-13.

In Evans, for example, the court found no abandonment where the defendant had a privacy interest in the area searched (the passenger compartment of his truck), the item seized was a locked briefcase, and he objected to its seizure. Id. at 413. Likewise, the defendant’s denial of ownership of a purse did not

constitute abandonment where the evidence established that she had a possessory interest in the purse, which contained her wedding rings, and where she left the purse inside a home in which she had a reasonable expectation of privacy. State v. Hamilton, 179 Wn. App. 870, 883, 320 P.3d 142 (2014). Similarly, while garbage left on unoccupied land “is in effect abandoned,” State v. Hepton, 113 Wn. App. 673, 681, 54 P.3d 233 (2002), garbage placed in the defendant’s personal trash can with a secured lid and put on the curb in front of his home for collection retains protection as a “private affair” under the state constitution. State v. Boland, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990).

In this case, Johnson expressly disclaimed any interest in the property outside of the tent she shared with Wyatt, and Wyatt implicitly agreed. As argued above, this property was located in an area in which Johnson and Wyatt had neither an actual, nor objectively reasonable, expectation of privacy. The bag and cooler were closed but not locked or particularly well-secured underneath the loose tarp. After telling the officers the property was not theirs, and despite the officers’ warning to remove themselves and their things from the public park, Johnson and Wyatt left the park without taking the items or attempting to secret or secure them in any way.

These circumstances demonstrate that Wyatt and Johnson intentionally relinquished any expectation of privacy in the blue cooler, zipped black bag, or any other item outside of their tent. This Court should therefore hold that Wyatt relinquished his expectation of privacy as well as any right to challenge the constitutionality of the subsequent search of those items. See State v. Reynolds, 144 Wn.2d 282, 291, 27 P.3d 200 (2001) (defendant, a passenger in a car stopped for a traffic infraction, voluntarily abandoned his jacket by placing it on the ground underneath the car, such that he had no constitutionally protected privacy interest in the coat's contents).

That the items under the tarp were abandoned also defeats Wyatt's claim that "this was a 'classic trespassory search.'" Brief of Appellant at 17 (citing United States v. Jones, 132 S. Ct. 945, 953, 181 L. Ed. 2d 911 (2012)). In Jones, the government installed a tracking device on Jones's car without consent or a valid warrant, then used that device to monitor the car's movement for four weeks, generating evidence used to convict Jones of conspiracy to distribute cocaine. Id. at 948. The Court held that even though Jones had no reasonable expectation of privacy in the underside of his car or in the locations of his car on public roads, the physical

intrusion on Jones's car – of which he was the exclusive driver – was a trespass upon an “effect” as that term is used in the Fourth Amendment. Id. at 949. Wyatt cites no authority holding that property that is abandoned or illegally stored in a public park are “effects” to which the Fourth Amendment applies.¹⁴ Because the cooler and bag at issue here were abandoned and stored illegally on public property, officers did not trespass upon protected “effects,” and their inspection of these materials was not an unconstitutional search.

d. This Court Cannot Solve The Problem Of Homelessness.

This case highlights but one of the unavoidable inconveniences and indignities endured by citizens who lack shelter in our society. The impulse to establish rights that might ameliorate the unfairness of their untenable situation is compelling. But this Court should not allow “concern for the plight of the homeless to create an empathy that in turn ... create[s] bad fourth amendment law.” Mooney, 218 Conn. at 143-44 (Callahan, J., dissenting). The ability and concomitant obligation to create policy

¹⁴ See footnote 10, *supra*.

to end homelessness and improve the lives of those without shelter lies with the legislature and local governments, not the judiciary.

“Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.” Tobe v. City of Santa Ana, 40 Cal.Rptr.2nd 402, 414 n.12 (1995).

Wyatt urges this Court to recognize a reasonable expectation of privacy in the items within his campsite, which he regards as his “de facto home.” The State does not dispute that people experiencing homelessness might consider any available shelter as “home.” But the State is unaware of any cases holding that an illegal campsite is a “de facto home” in the sense that the privacy protections afforded to a house and curtilage also apply to the areas unlawfully occupied on public property.¹⁵ In State v. Dias, 609 P.2d 637 (Haw. 1980), the Hawaii Supreme Court held that squatters on state property had a reasonable expectation of privacy in their makeshift shelters, but the court relied on “the fact that ‘Squatter’s Row’ on Sand Island has been allowed to exist by sufferance of the State for a considerable period of time.” Id. at

¹⁵ To be sure, determining the how far the curtilage would extend from a tent or similar enclosure on public property would pose a vexing question.

640. “And although no tenancy under property concepts was thereby created, we think that this long acquiescence by the government has given rise to a reasonable expectation of privacy on the part of the defendants. ... This, we think is consistent not only with reason but also with our traditional notions of ‘fair play and justice.’” Id.

The Dias approach, which has been endorsed by more than one commentator,¹⁶ would not benefit Wyatt in this case. The evidence is that Kent actively enforced its prohibitions on camping and storing personal property on the city's public property. There being no evidence of governmental acquiescence to his illegal camp, Wyatt had no reasonable expectation of privacy under Dias.

2. THE TRIAL COURT PROPERLY ADMITTED WYATT'S VOLUNTARY STATEMENTS TO POLICE.

Wyatt next contends that the trial court erred by failing to suppress statements that he argues were coerced. Because Sergeant O'Reilly's conduct did not overbear Wyatt's will, the trial

¹⁶ See, e.g., Nicholas M. May, Fourth Amendment Challenges to “Camping” Ordinances: The Governmental Acquiescence Doctrine as a Legal Strategy to Force Legislative Solutions to Homelessness, 8 Conn. Pub. Int. L.J. 113 (2008); Gregory Townsend, Cardboard Castles: The Fourth Amendment's Protection of the Homeless's Makeshift Shelters in Public Areas, 36 Cal. W.L.Rev. 223 (1999).

court correctly found the confession voluntary. This Court should affirm.

Due process requires that a confession be voluntary and free of police coercion. State v. Reuben, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). Whether a confession is voluntary depends on the totality of the circumstances under which it was made. State v. Aten, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). This examination includes considerations of the location, length, and continuity of the interrogation; the defendant's maturity, education, physical condition, and mental health; and whether the police advised the defendant of his or her Miranda rights. State v. Unga, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). If police tactics manipulated or prevented a defendant from making a rational, independent decision about giving a statement, the statement is inadmissible. Unga, 165 Wn.2d at 102. However, while "[a] police officer's promises or psychological ploys may play a part in a defendant's decision to confess, ... 'so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.'" State v. Rafay, 168 Wn. App. 734, 758, 285 P.3d 83 (2012) (quoting Unga, 165 Wn.2d at 102 (internal citations omitted)). Appellate courts will not disturb

a trial court's determination that statements were voluntary if there is substantial evidence in the record from which the trial court could have found voluntariness by a preponderance of the evidence. State v. Broadaway, 133 Wn.2d 118, 129, 942 P.2d 363 (1997).

Wyatt contends that his will was overborne by Sergeant O'Reilly's deception, implied promise of leniency if Wyatt confessed, and implied threat if he did not. At the suppression hearing, O'Reilly testified that Wyatt initially denied any knowledge of a methamphetamine lab at the site. RP 181. O'Reilly then employed a ruse, in which he told Wyatt that he had "heard that [Wyatt] was cooking methamphetamine in order to sell to children." RP 181. O'Reilly said that he would have "a problem with that, as would most anybody." RP 181. At that point, Wyatt stated that he had been cooking methamphetamine for his personal use. RP 181. Wyatt did not testify at the suppression hearing as to the effect of O'Reilly's ruse.

Wyatt is correct that O'Reilly's statement that he had information that Wyatt was planning to sell methamphetamine to children was deceptive. But "[d]eception alone does not make a statement inadmissible as a matter of law; rather, the inquiry is whether the deception made the waiver of constitutional rights

involuntary.” State v. Burkins, 94 Wn. App. 677, 695, 973 P.2d 15 (1999) (citing State v. Gilchrist, 91 Wn.2d 603, 607, 590 P.2d 809 (1979)). The test for voluntariness is “whether the behavior of the State’s law enforcement officials was such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.” Burkins, 94 Wn. App. at 695 (citing State v. Braun, 82 Wn.2d 157, 161-62, 509 P.2d 742 (1973)). Courts have held confessions to be voluntary when police falsely told a suspect that he had failed a polygraph, that a co-suspect named him as the triggerman, and when police concealed the fact that the victim had died. Id.

O’Reilly’s ruse that he had “heard” that Wyatt intended to sell methamphetamine to children is not inherently coercive, and Wyatt does not argue otherwise. Rather, he contends that his will was overborne because this “lie was combined with an implied promise of leniency if Wyatt confessed and an implied threat if he did not.” Brief of Appellant at 27. Wyatt characterizes O’Reilly’s statement that O’Reilly would have “a problem” with Wyatt selling methamphetamine to children as an implied threat to prosecute Wyatt for distribution of methamphetamine to minors.

Wyatt argues that by stating that he would “understand” if Wyatt was making the drug for his own use, O’Reilly impliedly promised to “let [Wyatt] go” if he confessed to that conduct. Brief of Appellant at 28. But even if the suppression hearing record supported the assertion that O’Reilly told Wyatt he would “understand” if Wyatt was only making methamphetamine for himself,¹⁷ it requires an unreasonable stretch of imagination to interpret this as a promise to let Wyatt go if he confessed.

“[A] defendant’s perception that he is testifying under a grant of immunity does not make the testimony involuntary unless his perception is reasonable.” Unga, 165 Wn.2d at 105. Furthermore, even if a defendant has such a reasonable belief, “it is not true that a defendant’s reasonable perception of immunity alone renders his confession involuntary[.]” Id. Rather, any promise of leniency is only one factor in the totality of the circumstances and must be considered in the context of all of the circumstances. Id.; United States v. Flemmi, 225 F.3d 78 (1st Cir. 2000); Arizona v.

¹⁷ Wyatt cites O’Reilly’s trial testimony that he told Wyatt that he would have a “real problem” with selling methamphetamine to children, but that he would “understand” if Wyatt was making it for his own use. Brief of Appellant at 26 (citing RP 741). At the suppression hearing, O’Reilly did not testify that he told Wyatt he would “understand” making methamphetamine for personal use. RP 181.

Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); Broadaway, 133 Wn.2d at 132.

In Unga, a juvenile suspect confessed to riding in and vandalizing a stolen car after an interrogation by an officer who was evidently a trusted acquaintance of the suspect. 165 Wn.2d at 98-99. The officer elicited the confession after promising Unga that he would not charge him with any offense relating to vandalism of the car. Id. at 109-10. Our supreme court rejected the argument that the confession was coerced because the totality of the circumstances did not demonstrate that his will was overborne: Unga was given Miranda warnings, which he understood and waived. Id. at 108. He was aware that he was being questioned as a suspect in a crime. Id. at 109. The questioning was of a short duration and took place in a small room with an open door. Id. There was no evidence that the officer used a threatening tone, raised his voice, badgered Unga, or attempted to intimidate him. Id. Unga was not subjected to lengthy, prolonged, or repeated questioning, and there was no evidence that he was deprived of any necessities like food, sleep, or bathroom facilities. Id. And despite Unga's friendly relationship with the officer, Unga was well aware that the encounter was not a friendly chat. Id. at 111.

The circumstances in this case are no more indicative of coercion than those in Unga.¹⁸ Wyatt was given Miranda warnings, which he understood and waived. CP 65 (FF 16). He was aware that he was being questioned in relation to the methamphetamine lab discovered in his illegal camp. All indications are that the questioning was of a very short duration and certainly less than an hour. RP 212. Although Wyatt's and Johnson's attorneys repeatedly asked whether Wyatt was denied the opportunity to urinate, there is no evidence to support that suggestion; neither officer recalled Wyatt indicating, by words or demeanor, that he needed to use a restroom, and Wyatt did not testify. RP 107, 202, 212. There is no evidence that O'Reilly used anything but a normal, conversational tone, and no evidence that Wyatt was especially anxious. RP 210-12. Under Unga, Wyatt's statements should be deemed voluntary.

Because there is no indication that Wyatt's will was overborne by promises, threats, or deception, the trial court

¹⁸ This case is also unlike other cases where confessions have been found to be involuntary. See, e.g., Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004) (16-year-old awakened in the middle of the night by armed police officers, handcuffed, driven to the station, taken to a small interrogation room and left there for 30 minutes before enduring a three-hour interrogation that began after midnight and included threats and was not given breaks or food); In re Interest of Jerrell C.J., 283 Wis.2d 145 (2005) (14-year-old with low intelligence handcuffed to wall and left alone for two hours then interrogated for over five hours and denied his request to call his parents).

correctly concluded that his statements were voluntary and admissible. This Court should affirm.

3. THE JURY'S FINDING THAT THE OFFENSE OCCURRED IN A PUBLIC PARK IS SUPPORTED BY SUFFICIENT EVIDENCE.

Wyatt contends that there is insufficient evidence to support the jury's special verdict that his offense occurred in a public park. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Rose, 175 Wn.2d 10, 15, 282 P.3d 1087 (2012).

The jury was instructed that "Public park' means land, including any facilities or improvements on the land, that is operated as a park by the state or a local government." RCW 69.50.435(6)(d); CP 47. By special verdict, the jury found that Wyatt manufactured a controlled substance in a public park.

CP 49. The officers' testimony and reasonable inferences therefrom support that verdict.

Officer Clay testified that his job in the Kent Police Department Bicycle Unit requires him to check all the parks in downtown Kent, including Riverview Park, and deal with homeless people illegally camped there. RP 578, 582. Clay is familiar with Riverview Park, which is located within the City of Kent. RP 580. He identified the park from an aerial photo and indicated on the map "where Riverview Park is specifically." RP 581. Officer Kelso also frequently patrolled Riverview Park while he was in the Bicycle Unit, identified the park on a map, and testified that Wyatt's camp was located within the park. RP 631-34. Kelso testified about the layout and boundaries of the park and described its bike trail, open fields, and wooded areas. RP 699. Kelso pointed out that Riverview Park contains a segment of the Green River Bike Trail and Interurban Trail. RP 630. Sergeant O'Reilly testified that he is familiar with Riverview Park, provided a "rough" address, marked "specifically" where the Park is located on a map, and testified that the Park is within the City of Kent. RP 731.

Wyatt argues that there was no testimony that Riverview Park is "operated" by a local government or is "public" property.

Brief of Appellant at 32. But the jury could reasonably infer that the City “operates” the parks it actively polices within its boundaries. The jury could also reasonably infer that the park is open to the public from both the common understanding of the word “park,”¹⁹ and because it contains segments of the regional Green River Bike and Interurban Trails.

Wyatt also contends that there was insufficient evidence that his camp was within Riverview Park despite repeated, undisputed testimony to that effect because “the basis for [the officers’] knowledge was not substantiated.” Brief of Appellant at 32. But the officers were each part of, or supervised, the Bicycle Unit of the Kent Police Department, and the primary duty of that unit is to patrol the City’s parks. The jury could reasonably infer that the officers learned the boundaries of Riverview Park through their training and experience in the Bicycle Unit.

This Court should affirm the jury’s finding that Wyatt manufactured a controlled substance in a public park because it is supported by the evidence and reasonable inferences therefrom.

¹⁹ Dictionary definitions of “park” incorporate the concept of public use. See Webster’s Third New International Dictionary 1642 (1993) (“a tract of land maintained by a city or town as a place of beauty or of public recreation,” and “a large area often of forested land reserved from settlement and maintained in its natural state for public use”).

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Wyatt's conviction for manufacturing methamphetamine in a public park.

DATED this 16th day of October, 2014.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Richard W. Lechich (richard@washapp.org), the attorney for the appellant, Dennis Wyatt, containing a copy of the Brief of Respondent, in State v. Wyatt, Cause No. 71111-3-1, 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.

W Brame

Name

Done in Seattle, Washington

10/16/14

Date