IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Plaintiff/Respondent, v. ROBERT LENARD OLSON, Defendant/Appellant.	No. 41269-1-II UNPUBLISHED OPINION

Worswick, A.C.J. — Robert Olson appeals his second degree possession of stolen property conviction, claiming that the trial court erred in finding that the police did not unlawfully intrude on his private affairs when observing incriminating evidence from outside his vehicle. We affirm.

Facts

On February 10, 2010, someone burglarized the Five Star Ford dealership in Aberdeen, Washington, stealing a Roush Supercharger and other audio equipment, including power amplifiers, DVD (digital video disc) players, and a capacitor.[1] On February 23, 2010, Mike O'Dell, the dealership's general manager, told the police that a white male missing a finger was trying to sell a Roush Supercharger and his name was "Bob." Clerk's Papers (CP) at 50. O'Dell did not tell the police who told him this information.

[1] Olson assigns error to several findings of fact but he does not argue in his brief that the trial court made factual errors. As such, we regard the findings as the established facts for purposes of reviewing the trial court's rulings on Olson's motions to suppress under CrR 3.5 and CrR 3.6. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

On March 2, 2010, the police received another anonymous tip. This tipster explained that Robert Olson had the Roush Supercharger and was trying to sell it. The tipster explained that Olson was driving a red Suburban with Washington license number 223 UBA.

After a records check confirmed that Olson owned such a vehicle, Corporal Darrin King of the Aberdeen Police Department went to Olson's residence and waited for Olson to return home. After Olson parked in his driveway behind three other vehicles, Corporal King approached, asked Olson if he had anything in his Suburban he should not have, and when Olson responded that he did not, asked Olson if he could search the Suburban. Olson responded that he could if he had a search warrant. The rear of Olson's vehicle was one to two feet up the driveway from the sidewalk.

Detective Jon Hudson arrived, spoke with Olson, and asked to see Olson's hands, one of which was missing a finger. Detective Hudson then walked up to the Suburban, peered into the back windows from three to four inches away, and saw two cardboard boxes, both containing items matching the description of items taken in the Five Star Ford burglary. Detective Hudson then told Olson that he was free to leave.

Aberdeen Police Deputy Chief David Timmons drove Colin Gill, Five Star Ford's audio manager, to Olson's residence where Gill identified the items in the back of the Suburban as things that had been stolen in the Five Star Ford burglary. The police then impounded the

Suburban, located Olson, and arrested him. Relying on this information and a cell phone number from the February 23, 2010 tip,[2] Detective Hudson then obtained a search warrant. [3]

Based on these facts, the trial court denied Olson's motion to suppress the evidence that was first observed and later seized from his vehicle, concluding:

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> Upon the receipt of the second tip and the observation of the vehicle driving into the driveway, Aberdeen police had an articulable suspicion that the vehicle contained stolen property taken from the Five Star burglary.
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> 3.
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> Upon observation of the items in the vehicle by Detective Hudson, the Aberdeen police had probable cause to believe stolen property from the Five Star burglary was contained in the vehicle. This was subsequently confirmed by the observations of employee Colin Gill.
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> 4.
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> The observation by Detective Hudson was made from the location that was impliedly open to the public. Given the location of the vehicle, at the end of the driveway immediately adjacent to the sidewalk, the officers did not invade any privacy interest of the defendant. The observations made by Detective Hudson were from his "open view."
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> 5.
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> The search warrant declaration provided to the magistrate set forth probable cause to believe that the Suburban contained stolen property taken from the Five Star burglary. The arrest of the defendant was supported by probable cause.

CP at 53-54.

The suppression court also found that statements Olson made to Detective Hudson while Olson was in jail were admissible. These statements included that Olson said, "I need to negotiate," and that he did not commit the burglary but that he knew where to find the rest of the

[2] Deputy Hudson called the cell phone number while standing outside the Suburban and saw the cell phone in the Suburban ring. It stopped ringing when Deputy Hudson ended his call.

[3] Police seized $1,824.95 worth of audio equipment. This included three power amplifiers, five DVD players, and a capacitor. The Roush Supercharger is not listed as a seized item.

"stuff." CP at 57; CP at 58. The matter then proceeded to trial where a jury found Olson guilty. The sentencing court imposed a standard range sentence.

ANALYSIS

Olson claims on appeal that the trial court erred in failing to suppress the evidence seized from his vehicle. He claims that because Detective Hudson did not observe the evidence from a lawful vantage point and all the evidence thereafter seized and statements he made followed from this unlawful intrusion, we should reverse and dismiss his conviction.

Under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, generally, a warrantless search is per se unreasonable unless the search falls within a recognized exception to the warrant requirement. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The State bears the burden of establishing the validity of a warrantless search. *Garvin*, 166 Wn.2d at 250.

When a law enforcement officer observes something in open view from a lawful vantage point, the observation is not a "search" triggering the protections of article I, section 7. *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986); *see State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). But the officer's right to seize the items observed must be justified by a warrant or valid exception if the items are in a constitutionally protected area. *Kennedy*, 107 Wn.2d at 9-10; *see State v. Myrick*, 102 Wn.2d 506, 514-15, 688 P.2d 151 (1984) (plain view observation alone not enough to justify warrantless seizure of contraband); *State v. Lemus*, 103 Wn. App. 94, 102, 11 P.3d 326 (2000) (open view observation is not a search but may provide evidence supporting probable cause to constitutionally search under a warrant). Probable cause exists

when the arresting officer is aware of facts and circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been or is being committed. *State v. Greene*, 97 Wn. App. 473, 478, 983 P.2d 1190 (1999).

Olson contends that he had a reasonable expectation of privacy in his vehicle under article 1, section 7 of the state constitution. He also argues that because he told Detective Hudson that the police could not search his vehicle without a search warrant or come onto his property, Detective Hudson was no longer in an area "impliedly open" to the public. Br. of Appellant at 16. Thus, he argues, Detective Hudson was at an intrusive vantage point when he looked into his vehicle.

But this assertion of his privacy right is only one circumstance a court can consider in determining if an officer acted illegally:

> The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. An officer is permitted the same license to intrude as a reasonably respectful citizen. However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

Seagull, 95 Wn.2d at 902-03 (footnote omitted) (citations omitted).

We agree with the State that this case is similar to *State v. Graffius*:

> Four uniformed officers arrived at Graffius' home at about 5:30 p.m. while it was light. They were in uniform. They used the driveway commonly used for guests and members of the public who were visiting. They parked the police vehicles in the gravel portion of the driveway by the garage. . . .
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> Upon arrival, Detectives Holeman, Jeske and Hawkins knocked loudly on Graffius' front door. There was no response. A fourth officer went to the north

> side of the house by the back fence. Detectives Holeman, Jeske and Hawkins then walked down a concrete walkway and returned to the graveled parking area on the north side of the garage. Officer Jeske knocked on a side door of the garage. There was no response. Meanwhile, Detective Holeman saw two garbage cans next to the side door to the garage. The lid was ajar on one can, creating an opening 6 to 8 inches wide. Detective Holeman looked in and saw a fist-sized bud of marijuana on top of a few other pieces of household garbage. . . .
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> Detective Holeman saw the marijuana by natural light; no flashlight was used. He did not move the lid. . . .
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> The discovery of the marijuana bud played a material part in the officers' obtaining a search warrant from the judge shortly thereafter.

74 Wn. App. 23, 24-25, 871 P.2d 1115 (1994).

As did the court in *Graffius*, we apply the following factors:

> In determining whether an officer exceeded the scope of an "open view", one must consider several factors, including whether the officer (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct access route to the house; (5) attempted to talk with the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally.

74 Wn. App. at 27.

Here, it was mid-afternoon and sunny, Detective Hudson stepped one to two feet from the roadway onto the driveway where the Suburban was parked, and he looked into the back tinted windows, where he observed two items matching the description of items stolen in the Five Star Ford burglary. While Olson had told Detective Hudson that he could not search his vehicle without a warrant, Detective Hudson's minor intrusion onto the driveway did not render his observations from outside the vehicle unlawful. We agree with the trial court's conclusion of law 4 that this was an "open view" observation from an area impliedly open to the public. CP at 54. As the *Seagull* court observed:

> "In the 'open view' situation, however, the observation takes place from a non-intrusive vantage point. The government agent is either on the outside looking

> outside or on the outside looking inside to that which is knowingly exposed to the public. The object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution."

95 Wn.2d at 902 (citations omitted) (quoting *State v. Kaaheena*, 59 Hawaii 23, 28-29, 575 P.2d 462, 466-67 (1978)).[4]

Olson argues that he has a greater privacy interest in his vehicle than one does in his garbage can, citing *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). There, our supreme court held that it was an unreasonable intrusion into Boland's private affairs for police officers to remove his garbage from a closed container and take it to the police station for narcotics officers to sift through for evidence of illegal drug transactions. *Boland*, 115 Wn.2d at 578. But *Boland* did not involve an "open view" observation as was present here and in *Seagull*. And while Olson had a privacy interest in his car, Detective Hudson did nothing more than look in through the windows. He did not enter the car in a quest to find evidence. *Boland* simply does not apply here.

Olson argues that because Detective Hudson's observations of the items in his vehicle were unlawful, the fruits of the search based on those observations must be suppressed. He

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[4] Case law supports the trial court's conclusion that this was not an unlawful search. *State v. Gibson*, 152 Wn. App. 945, 219 P.3d 964 (2009) (looking through car windows is not a search); *State v. Posenjak*, 127 Wn. App. 41, 111 P.3d 1206 (2005) (parking in a driveway that is a common access way and there observing what could be seen through the open garage door is not a search); *See State v. Rose*, 128 Wn.2d 388, 390, 392, 909 P.2d 280 (1996) (looking through an unobstructed window while standing on the porch and using a flashlight is not an unreasonable intrusion); *State v. Daugherty*, 94 Wn.2d 263, 268, 616 P.2d 649 (1980) ("The extent of the expectation of privacy in a driveway is determined in any case under a test of reasonableness in light of such characteristics as the exposure of the driveway to the street and surrounding public areas, the use of the driveway for common access to the house, and the nature of the official incursion complained of.").

further argues that because the evidence was illegally seized, his arrest was similarly unlawful and, therefore, the statements he made to Detective Hudson were inadmissible as well. In light of our holding that Detective Hudson observed the audio equipment from a lawful vantage point, these claims fail.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Van Deren, J.

Johanson, J.