IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER ADAM FOSTER, Appellant.	No. 42814-8-II UNPUBLISHED OPINION

Penoyar, J. — After a stipulated facts trial, the court convicted Christopher Foster of unlawfully possessing more than 40 grams of marijuana. He appeals, arguing that the court erred by denying his motion to suppress marijuana seized from his vehicle. We affirm.[1]

FACTS

In denying the motion to suppress, the trial court made the following findings, to which Foster does not assign error:

> 1. On March 10, 2011, at approximately 11:47 p.m., Washington State Patrol Trooper Phil Thoma . . . observed a vehicle travelling in front of him with a burnt out center brake light.
> 2. Trooper Thoma contacted the driver of the vehicle, the Defendant. Also within the vehicle were two passengers. Trooper Thoma explained the basis for the traffic stop. The Defendant appeared confused. Trooper Thoma asked the Defendant to exit the vehicle with the intention of showing the Defendant the burnt out brake light. The Defendant exited the vehicle.
> 3. The Defendant followed Trooper Thoma to the back of his vehicle and was shown the burnt out brake light. While speaking with the Defendant outside of his vehicle, Trooper Thoma noticed the Defendant had his hands in his pockets. Trooper Thoma also observed a size difference between himself and the Defendant.
> 4. Based upon the time of the traffic stop, the presence of two passengers, the lack of a back-up officer, the size difference between himself and the Defendant, and the Defendant placing his hands in his pockets, Trooper Thoma

[1] A commissioner of this court initially considered Foster's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

believed he had an officer safety issue. Trooper Thoma decided to conduct a pat-down frisk of the Defendant.

5. While conducting the pat-down frisk, Trooper Thoma smelled the odor of marijuana coming from the Defendant's person. Trooper Thoma informed the Defendant of his observation and asked the Defendant when he last smoked marijuana. The Defendant admitted he had smoked marijuana a couple of hours prior to the traffic stop. Trooper Thoma asked the Defendant if there was marijuana within his vehicle. The Defendant said there was no marijuana in his vehicle.

6. Trooper Thoma requested permission to search the Defendant's vehicle. The Defendant said he could search the vehicle. Trooper Thoma verbally advised the Defendant of his *Ferrier*[2] rights, which included his right to refuse and/or limit consent to search. The Defendant verbally indicated that he understood his rights and granted Trooper Thoma consent to search.

7. Trooper Thoma had the Defendant stand approximately 20-30 feet away from the front of his vehicle. Prior to conducting the search, a Kelso police officer arrived and stood with the Defendant. Trooper Thoma had the passengers exit the vehicle.

8. Trooper Thoma located a clear plastic baggie between the center console and front passenger seat which contained several other baggies with marijuana residue. Trooper Thoma also located a brown paper bag under the front passenger seat which contained several baggies of marijuana.

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The court then made the following conclusions of law:

1. The test for determining whether an officer safety concern existed is objective. Although the Trooper legitimately acted out of safety concerns, more subjective than objective, there were not enough facts present to justify the pat-down frisk.

2. After concluding the pat-down frisk, the Defendant was informed of his *Ferrier* warnings. The Defendant is articulate and intelligent. The Defendant was not in handcuffs or otherwise restrained. The Defendant understood his right to grant and/or refuse consent.

3. Although the actual pat-down frisk does not rise to the level of *Terry*[3] or its progeny, the fact that the Trooper informed the Defendant of his *Ferrier* warnings and the Defendant granted consent to search, the *Ferrier* warnings have a cleansing effect.

4. Because *Ferrier* warnings were given, understood, and the

[2] *State v. Ferrier*, 136 Wn.2d 103, 115, 960 P.2d 927 (1998).

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

> Defendant consented to search, the Defendant's motion to suppress is denied and the evidence is admissible.

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ANALYSIS

Foster assigns error to conclusions 3 and 4.[4] He argues that the illegal pat-down frisk tainted his consent to search his car, making the consent invalid. Where, as here, a search that exceeds the scope of a traffic stop is improper unless the defendant's "subsequent consent to the search . . . sufficiently purged the taint of the illegal detention." *State v. Tijerina*, 61 Wn. App. 626, 629, 811 P.2d 241 (1991) (citing *State v. Gonzales*, 46 Wn. App. 388, 399, 731 P.2d 1101 (1986)). In determining the effect of the consent, we consider:

> (1) the temporal proximity of the detention and subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official's conduct, and (4) the giving of *Miranda*[5] warnings.

Tijerina, 61 Wn. App. at 630 (citing *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982), and *State v. Jensen*, 44 Wn. App. 485, 490, 723 P.2d 443 (1986)).

Foster relies primarily on *Tijerina* and *State v. Henry*, 80 Wn. App. 544, 910 P.2d 1290 (1995).[6] In both cases, a police officer stopped the defendant on a traffic stop, exceeded the

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[4] He also assigns error to the portion of Conclusion 2 that he was not "otherwise restrained." But that conclusion is not pertinent to Foster's arguments on appeal.

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

[6] Foster also relies on *State v. Sistrunk*, 57 Wn. App. 210, 213, 787 P.2d 937 (1990), in which an officer exceeded the scope of a traffic stop, conducted a search that resulted in the discovery of a used syringe, confronted Sistrunk with the syringe and told her that if she refused to consent to a search of the vehicle, he would have it impounded. There is no evidence that Thoma made a similar threat to impound Foster's vehicle if he did not consent to a search.

legitimate scope of that stop, obtained the defendant's consent to search the vehicle and then located drugs in the vehicle. In concluding that the consent had not purged the taint of the illegal detention, both *Tijerina* and *Henry* observed that: (1) there was close temporal proximity between the detention and the consent; (2) there were no significant intervening circumstances present; (3) the detention was based on an unjustified suspicion; and (4) the officer did not advise the defendants of their constitutional rights. *Tijerina*, 61 Wn. App. at 630; *Henry*, 80 Wn. App. at 551.

But in *Tijerina* and *Henry*, not only were the defendants not advised of their constitutional rights, they were not advised of their rights to refuse to consent to a search. Foster was advised of his right to refuse a search and his right to limit the scope of the search. Thus, a significant intervening circumstance, Thoma's giving of the *Ferrier* warnings, was present. And where defendants have been advised of their rights to refuse to consent to a search or to limit the scope of a search, we have held that that consent was not tainted by the prior illegal detention. *Gonzales*, 46 Wn. App. at 399; *Jensen*, 44 Wn. App. at 490-91. Because Foster was advised of his right to refuse consent to the search, the trial court did not err by concluding that Foster's illegal detention did not taint his consent to search. We affirm the order denying Foster's motion to suppress.[7]

[7] Because we conclude that Foster's consent to the search was valid, we do not address the State's alternate argument that the pat-down frisk was valid.

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.

Penoyar, J.

We concur:

Van Deren, J.

Johanson, A.C.J.