IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28565-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ZACHARY S. HARVEY,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Siddoway, J. — Zachary Harvey was convicted of possessing marijuana with intent to deliver following a stipulated facts trial, and appeals the denial of his motion to suppress the evidence that led to his conviction. We conclude that while conflicting inferences could be drawn from the evidence, there was substantial evidence from which the trial court, having heard the testimony and assessed credibility, could find effective consent by clear and convincing evidence. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In June 2008, a store manager at Northwest Farm Supply in Walla Walla called

police to report her suspicion that Zachary Harvey, an employee, was dealing drugs from the store's parking lot. Walla Walla patrol officers Daniel Lackey and Jeremy Pellicer traveled to the store and interviewed the manager, Joyce Davidson. Officer Pellicer had been an officer for only a couple of months and on the day in question was assigned to observe Officer Lackey. Officer Lackey had been an officer for about three years.

Ms. Davidson told the officers that Mr. Harvey had bragged about dealing drugs in the parking lot; that she had previously told him she "did not want that stuff on the property" and told him earlier that day to go home for lunch and get rid of the stuff in his car; but that on his return from lunch Mr. Zachary had engaged in an exchange of an unknown object for money at the work site, prompting her to call police. Clerk's Papers (CP) at 23. At the suppression hearing Officer Lackey testified that he did not determine in this brief, initial interview of Ms. Davidson whether her information was firsthand or secondhand. Report of Proceedings (RP) at 14-15. The officers wanted to speak with Mr. Harvey without further delay, out of concern that he would learn of their presence, go out to his car, and make any contraband "disappear." RP at 10.

As Officer Lackey wrapped up his conversation with Ms. Davidson, Officer Pellicer walked to the loading dock where Mr. Harvey was watering plants and told him that he heard he was selling marijuana. According to Officer Pellicer, Mr. Harvey's demeanor changed; he seemed worried and started breathing heavier and faster. Officer

Pellicer asked if he could search his car and Mr. Harvey asked "why." RP at 30. Officer Pellicer replied, "[I]f you don't have anything to hide really then there is no reason to refuse consent." *Id.* at 31. Mr. Harvey denied the accusation, saying something to the effect that he was not selling marijuana. *Id.* at 37.

Officer Lackey then joined Officer Pellicer on the loading dock. He asked Mr. Harvey if it would be okay to look in his car, and Mr. Harvey again asked him why he would want to. Officer Lackey stated he believed Mr. Harvey was selling some sort of narcotics out of his car. He told Mr. Harvey that if he gave the officers consent to search, he would not arrest him at that time. He told Mr. Harvey that his other option was to take the statement that had been given to him and apply for a search warrant. At the suppression hearing, Officer Lackey testified he could not be sure of the exact words he used, but he was certain that the gist of his statement was that he would apply for a search warrant, not that one would necessarily issue. Finally, Officer Lackey told Mr. Harvey that he would seize his car indefinitely if he had to apply for a warrant.

In support of his motion to suppress, Mr. Harvey testified that the officers told him that if he did not consent to the search, officers would "show up with a warrant" and arrest him, and that his car would be seized for an indefinite amount of time. CP at 6; RP at 45. Mr. Harvey testified that he would not have consented to a search of his car if the officers had not made these representations. CP at 6; RP at 45.

Mr. Harvey and the officers agree that following this exchange Mr. Harvey gave verbal consent to a search. Officer Lackey then told Mr. Harvey that he had the right to refuse and to withdraw consent at any time. Mr. Harvey apparently did not respond further, but unlocked the passenger door of his car, opened it, and handed Officer Lackey a baggie of green vegetable matter (later confirmed to be marijuana) and his backpack. After being handed the evidence, Officer Lackey completed a consent form, read it to Mr. Harvey, and had him sign it. Officer Lackey did not open the backpack until the consent form had been read to Mr. Harvey and signed. The backpack contained seven more baggies of marijuana and two scales.

Before leaving, the officers obtained a videotaped statement from Ms. Davidson, who provided them with the first names of the two employees (Chris and Nicky) who were the source of her information that Mr. Harvey had bragged about making drug sales and engaged in a suspect dealing in the parking lot. The officers did not speak with the two employees or get their last names.

Finally, and after re-interviewing Ms. Davidson, Officer Lackey returned to ask Mr. Harvey if he had any money earned from his drug deals that day. In response, Mr. Harvey said, "I might as well give it to you now because you guys are going to get it anyways," and handed the officers five $100 bills from his wallet. RP at 34.

Mr. Harvey was charged with one count of possession of a controlled substance

with intent to deliver. He moved to suppress the evidence obtained in the search. Following an evidentiary hearing, the court orally denied a motion to suppress and later denied Mr. Harvey's motion for reconsideration.

Mr. Harvey was convicted following a stipulated facts trial and now appeals. He assigns error to (1) a trial court credibility determination, (2) the court's ultimate conclusion that Mr. Harvey voluntarily consented to the search, (3) the court's conclusions that Mr. Harvey's statement about the $500 turned over to the officers and the evidence seized were both admissible, and (4) the court's refusal to suppress the evidence and statements. Mr. Harvey challenges two findings of the trial court: first, what he characterizes as the trial court's implied finding that Officer Lackey was more credible than Mr. Harvey, and second, the trial court's mixed finding and conclusion that Officer Lackey's statements to Mr. Harvey were not unduly coercive and that coercion did not vitiate consent.

ANALYSIS

I.

The suppression hearing was held on July 20, 2009, and the trial court announced its decision denying the motion to suppress at its conclusion. Presentment of the findings, conclusions, and order was set for September 8. At that time, counsel for Mr. Harvey handed up a motion for reconsideration, which he asked the court to take under

advisement. The trial court accommodated the request and on September 11 wrote a letter to counsel announcing its decision. In entering the findings, conclusions, and order 10 days later, the trial court incorporated its September 11 letter into the findings by a marginal notation.[1]

Mr. Harvey draws our attention to the following portion of the September 11 letter, which he characterizes as an implied finding that Officer Lackey was more credible than Mr. Harvey:

> The Defendant argues that the Court disregarded the fact that Officer Lackey indicated that he would be seizing Mr. Harvey's vehicle for an "indefinite" period of time. It is not clear to me that this term was used. Officer Lackey testified that he told the Defendant that his car would be held "temporarily" although [he] did not recall the exact words used. The gist of the conversation was that Officer Lackey indicated to the Defendant that if he did not consent to the search he would proceed to document probable cause and obtain a warrant and hold the vehicle in the meantime. On cross-examination, he did not recall prior contrary testimony taken in District Court, nor was there a transcript thereof produced at the hearing. Prompted by the defense counsel as to his possible use of the word "indefinitely" at the prior hearing, Officer Lackey testified that he did not know how long he would take to obtain a warrant, but had in mind in speaking to the Defendant that it would take anywhere from "two hours to two days." Months afterwards, and after consultation with his attorney, Mr. Harvey recalls that the officer said that the car would be held "indefinitely." I found the officer's version to be more credible.

[1] At page 4 of the "Findings, Conclusions and Order Regarding 3.5 and 3.6 Hearing" presented by the State, within the section entitled "Court's Reason for Admissibility of Physical Evidence," the trial court wrote and initialed "See letter of Sept. 11 incorporated by reference." CP at 45.

CP at 40. Mr. Harvey then cites us to the report of proceedings, which establishes that the trial court's recollection of the testimony on the temporary/indefinite distinction was mistaken. In fact, and as Mr. Harvey's counsel recalled correctly (and was able to demonstrate, once the record was prepared), the officer had volunteered, "I don't know if I used the word temporarily," later admitting that "indefinitely" was probably the word he had used. RP at 11-12. In the course of the officer's further examination, he never denied having told Mr. Harvey that it would be an "indefinite" seizure. From this, Mr. Harvey argues that we should reject the trial court's assessment of credibility.

We are satisfied from our review of the record that the trial court's letter reflects nothing more than an imperfect recall of the key linguistic dispute between the testimony of Officer Lackey and Mr. Harvey. The key point in dispute was not whether the word "temporary" or "indefinite" was used to describe the period of detention—and the court commented during the hearing that it was not troubled by a description of the expected seizure as "indefinite." RP at 59-60. Indeed, the State's proposed findings, entered by the court, referred only to the "indefinite" characterization. CP at 42-44. Rather, the key dispute between the testimony of Officer Lackey and Mr. Harvey, which the trial court explicitly identified during the suppression hearing, was whether the gist of the officer's statement to Mr. Harvey was that he would *obtain* a search warrant or would *apply* for one. RP at 54 ("[T]hat brings us to the disputed fact . . . . [I]t's clear from Mr. Harvey's

affidavit that he says the officer . . . didn't say he would apply for a warrant. He said he would show up with a warrant . . . . I don't believe there [are] any other disputed facts here."). The court's imperfect recall can be explained by the passage of two months from the time of the hearing. No transcript was available to the trial court.

When it comes to suppression decisions, the trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). We are satisfied from a review of the record that the trial court simply forgot the precise disagreement between Officer Lackey and Mr. Harvey over the language used. We will not disregard its credibility determination.

II.

The closer question is whether, deferring to the trial court's credibility finding, there is sufficient evidence to support its conclusion that Mr. Harvey freely and voluntarily consented to the search of his car. There is.

As a general rule, a warrantless search is per se unreasonable under both the Fourth Amendment and article I, section 7 unless the search falls within one or more specific exceptions to the warrant requirement. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). A consent search is one of those exceptions. *See* Wash. Const. art. I, § 7; *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). For consent to be

valid, a person must consent freely and voluntarily. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003).

If the free and voluntary character of the consent is challenged, the State must prove that the individual consented freely and voluntarily, not as a result of duress or coercion. *Id.*; *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990). Whether consent was voluntary is a question of fact to be determined from the totality of the circumstances. *O'Neill*, 148 Wn.2d at 588 (citing *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)).

The prosecution must show the free and voluntary character of the consent by clear and convincing evidence. *Smith*, 115 Wn.2d at 789 (citing *State v. Nelson*, 47 Wn. App. 157, 163, 734 P.2d 516 (1987)). Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). The court's factual findings must be upheld if supported by substantial evidence from which a rational trier of fact could find the necessary facts by clear, cogent, and convincing evidence. *Id.* (citing *In re Dependency of C.B.*, 61 Wn. App. 280, 286, 810 P.2d 518 (1991)). Findings of fact from the suppression hearing to which error is not assigned are considered verities on appeal. *Bustamante-Davila*, 138 Wn.2d at 976. The court's ultimate determination that the officers' statements were not coercive, while characterized as a finding, is a mixed

question of law and fact. We review mixed questions of law and fact de novo. *Humphrey Indus. Ltd. v. Clay St. Assocs. LLC*, 170 Wn.2d 495, 501-02, 242 P.3d 846 (2010).

Among the factors considered in a "totality of circumstances" analysis are whether *Miranda*[2] warnings were given prior to obtaining consent, the degree of education and intelligence of the consenting person, and whether the consenting person had been advised of his right not to consent. *Smith*, 115 Wn.2d at 789. No one factor is determinative. *Id*. The court may also consider other factors, such as whether the person had been cooperating or refusing prior to giving consent, *State v. Flowers*, 57 Wn. App. 636, 645, 789 P.2d 333, *review denied*, 115 Wn.2d 1009 (1990); whether the defendant was in custody, *O'Neill*, 148 Wn.2d at 589; whether the person was under the influence of drugs or intoxicants, *State v. Sondergaard*, 86 Wn. App. 656, 660-61, 938 P.2d 351 (1997), *review denied*, 133 Wn.2d 1030 (1998); and whether law enforcement had to repeatedly request for consent, *O'Neill*, 148 Wn.2d at 591. Although knowledge of the right to refuse consent is relevant, it is not absolutely necessary to a valid consent. *Nelson*, 47 Wn. App. at 163.

Mr. Harvey does not challenge the trial court's findings that Officer Lackey told Mr. Harvey he would "apply" for a search warrant, that Mr. Harvey was intelligent and a

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

high school graduate, and that Mr. Harvey's statement concerning the $500 was noncustodial and unelicited. Testimony from the officers established that Mr. Harvey was generally cooperative throughout their course of dealings and that he was not under the influence of drugs. While Mr. Harvey was not given a *Miranda* warning, he was not in custody or under arrest, so no warning was required. Although not in custody or under arrest, Mr. Harvey was seized by the officers within the meaning of *Terry*.[3] Any restraint, including a *Terry* stop, is a factor to consider. *O'Neill*, 148 Wn.2d at 589.

Mr. Harvey focuses on what he characterizes as the officers' implied threat to arrest him, their express threat to seize his car for an indefinite period of time if he did not consent, what he terms their "repeated" requests for consent (Br. of Appellant at 37), and their failure to provide *Ferrier*[4]-type warnings until after he had given consent. He argues that these facts collectively prevent a reasonable finding of voluntary consent. We address each of these alleged circumstances in turn.

Implied threat of arrest. In requesting consent, Officer Lackey told Mr. Harvey that if consent was given he would not arrest Mr. Harvey "at this time." CP at 6; RP at 6. Mr. Harvey testified that he interpreted the officer's statement to mean that if he did not consent to a search, the officer would arrest him. CP at 6. But Officer Lackey testified

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

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

that the statement was simply part of explaining to Mr. Harvey the options that he had. On cross-examination, he disputed defense counsel's characterization of his statements and tone, saying, "I wasn't that [']in your face['] like you explained. I explained it more in detail." RP at 19.

Consent that is granted only in submission to a claim of lawful authority is not given voluntarily. *O'Neill*, 148 Wn.2d at 589 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 233, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). However, truthfully advising a person of the consequences of denying consent to search does not render consent involuntary. Br. of Resp't at 20 (citing *Commonwealth v. Mack*, 568 Pa. 329, 796 A.2d 967, 970 (2002), *cited with approval in O'Neill*, 148 Wn.2d at 590). While defense counsel was free to argue that the officer's statement that he would not arrest Mr. Harvey "at this time" was coercive, there was clearly evidence from which the trial court could conclude otherwise, and it concluded that Officer Lackey's testimony was credible. RP at 56.

Threat to seize Mr. Harvey's car "indefinitely." Mr. Harvey contends that the court attached insufficient weight to the officers' express threat to seize his car for an indefinite period of time if he did not consent. As found by the trial court:

> Officer Lackey testified that he told the Defendant that his car would be held "temporarily," although [he] did not recall the exact words used. *The gist of the conversation was that Officer Lackey indicated to the Defendant that if he did not consent to the search he would proceed to document*

probable cause and obtain a warrant and hold the vehicle in the meantime.

CP at 40 (emphasis added). Officer Lackey testified that what he had in mind at the time, based on his relative lack of experience applying for and executing warrants, was anything from two hours to two days. CP at 40; RP at 25.[5] Mr. Harvey argues that this, coupled with Officer Lackey's admission at the suppression hearing that he believed he lacked probable cause at the time he made this statement, amounted to a threat of an unconstitutional detention of the car.

An investigative detention of property is permissible under *Terry* as long as it is justified at its inception and reasonably related in scope to the circumstances that justified the detention. *State v. Williams*, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984). The justification required is not probable cause, but the officer's ability to point to "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" *Id.* (quoting *Terry*, 392 U.S. at 21). At least three factors are relevant in determining whether an intrusion is so substantial that its reasonableness is dependent upon probable cause: the purpose of the detention, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. *Id*. at 740. Officer Lackey's interview of Ms. Davidson gave him reasonable

[5] By the time of trial, and with more experience, he recognized four to five hours as a more realistic time frame. RP at 23.

suspicion to justify a temporary detention of Mr. Harvey and his car. While the officer told Mr. Harvey of his expectation that the drug officers he would contact would seek a warrant, they might just as well have summoned drug dogs to the scene. *See State v. Flores-Moreno*, 72 Wn. App. 733, 740, 866 P.2d 648, *review denied*, 124 Wn.2d 1009 (1994) (upholding a five-minute *Terry* stop of a driver that ripened into probable cause after officers called drug dogs to the scene, who alerted to the presence of drugs in the car). Mr. Harvey does not contest that Officer Lackey had reasonable suspicion, focusing instead on the length of the threatened detention and on cases like *Flores-Moreno* imposing much shorter time limits than the two hours to two days subjectively anticipated by Officer Lackey. While an officer who has probable cause may seize and hold property for the time reasonably necessary to secure a search warrant and conduct the search, *id.* (quoting *State v. Huff*, 64 Wn. App. 641, 653, 826 P.2d 698, *review denied*, 119 Wn.2d 1007 (1992)), Mr. Harvey argues, correctly, that cases do not hold that an officer who has a justification for a *Terry* stop may detain property for whatever time is reasonably required to establish probable cause.

The problem with Mr. Harvey's argument is that the issue of the reasonable duration of a *Terry* detention is germane when there has been an actual detention and therefore an actual amount of time whose reasonableness the parties can debate. Here, though, Mr. Harvey consented to the search, so officers never detained his car. It is not

helpful to debate how much time might have been spent establishing probable cause versus time spent securing and executing a search warrant following the existence of probable cause, because that legal distinction was never considered by either Mr. Harvey or Officer Lackey. Mr. Harvey's testimony suggested that he believed the "indefinite" delay would be post-issuance of the search warrant. CP at 6 (testifying, by affidavit, "I was told that they would call drug officers and that the officers would show up with a warrant and my vehicle would then be seized for an indefinite period of time"). The trial court noted in its oral ruling that it did not find Officer Lackey's using the term "indefinite" as calculated to mislead and thereby induce consent, but only to communicate his good faith uncertainty.[6] RP at 59-60. Mr. Harvey has not shown why the unknowable length of the probable cause determination bears on his decision to consent.

[6] While not affecting our analysis, we note that one case mentioned by the court, *State v. Marcum*, 149 Wn. App. 894, 205 P.3d 969 (2009), involves an inapposite legal standard. In that *Terry* stop case, Division One of this court was undeterred in finding a valid stop by the fact that an officer—who had probable cause—clearly lied to the defendant about why he pulled him over. In connection with its suppression ruling in this case, the trial court commented that it viewed *Marcum* as involving much more egregious police conduct than the conduct of police at issue here. CP at 41; RP at 55-56, 69-70. *Marcum* involved different issues, as the trial court recognized. Most importantly, the false impression intentionally created by the officer in *Marcum* was irrelevant to the basis for the officer's right to search in that case: the existence of probable cause. Where, as here, the basis for the right to search is consent, a false impression even *innocently* created by officers is relevant if it calls into question the free and knowing nature of the consent.

Repeated requests. Mr. Harvey argues that the fact that consent was requested twice was another factor weighing against voluntariness, relying on *O'Neill*, which agreed with authority from other jurisdictions that repeated requests are an indicator that consent is not voluntary. 148 Wn.2d at 591. In *O'Neill*, the defendant affirmatively refused to consent to a search of his car, stating that the officer needed a warrant, which the officer denied; the officer requested consent again and "[t]he discussion went back and forth several times, with O'Neill eventually consenting." *Id.* at 573. Among cases cited with approval in *O'Neill* was *State v. Jackson*, 110 Ohio App. 3d 137, 143, 673 N.E.2d 685 (1996), holding that once an initial request for consent is clearly and definitively denied, an encounter takes on a coercive tone where repeated requests are made. 148 Wn.2d at 591.

Here, by contrast, Officer Pellicer made the first request in Officer Lackey's absence, to which Mr. Harvey responded not with a refusal, but with a question. When Officer Lackey arrived, he requested consent again, but testified at the suppression hearing that he was unaware Officer Pellicer had already asked. Once again, Mr. Harvey did not refuse consent, he questioned why the officers wanted to conduct the search and, following Officer Lackey's explanation, gave verbal consent. RP at 6, 12. The trial court could reasonably have found that unlike the exchange with the officer in *O'Neill*, these two requests did not take on a coercive tone.

Timing of Ferrier-type warnings. Mr. Harvey argues that the trial court should have weighed, in addition to the repetition of the request, the fact that the officers' warnings as to his rights were not provided at the time they requested consent, but only after consent was given. His first verbal warning was given after he gave verbal permission for the search. The Walla Walla Police Department consent to search form, carried by the officers for this purpose, was completed and read to Mr. Harvey only after he had handed officers his backpack and a baggie of marijuana. He argues that because warnings were not given until after the "'cat [was] out of the bag,'" in that he had already consented to the search, "the psychological impact of that consent was such that it rendered the subsequent warnings meaningless." Br. of Appellant at 28-29 (citing *State v. Erho*, 77 Wn.2d 553, 561, 463 P.2d 779 (1970); *State v. Lavaris*, 32 Wn. App. 769, 779-80, 649 P.2d 849 (1982) (Ringold, J., dissenting), *rev'd*, 99 Wn.2d 851, 664 P.2d 1234 (1983)).

The State correctly notes that *Erho* dealt with *Miranda* warnings and a bright line rule, not a totality of the circumstances test. More importantly, the State points out that the fact that the warning followed the search was not the result of any design of the officers; it was because Mr. Harvey unexpectedly took evidence out of his car and handed it to them. As it turned out, the officers never did search Mr. Harvey's car, they only searched his backpack, and before searching the backpack, they read and had Mr. Harvey

sign the department's consent to search form. The trial court was entitled to reject the argument of an intelligent high school graduate that the timing of the verbal and written warnings made them "meaningless" to him.

While some of the facts in this case weigh against effective consent, others weigh in favor. Overall, Mr. Harvey is asking us to reject the credibility determination of the trial court, accept his testimony as credible, and, on that basis, substitute inferences from conflicting evidence that favor Mr. Harvey for the inferences drawn by the trial court. This we will not do. Deferring to the trial court's credibility determination, there was substantial evidence from which the court could find a high probability that Mr. Harvey freely and voluntarily consented to the search.

III.

In light of our conclusion that sufficient evidence supported the trial court's conclusion that Mr. Harvey freely and voluntarily consented to the search, we need not reach his assignment of error to the trial court's admitting his testimonial statements as "fruit of the poisonous tree."

We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Sweeney, J.