# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ZACHARY LOREN BECK,<br><br>Appellant. | No. 37649-1-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Houghton, P.J. — Zachary Beck appeals his conviction for unlawful possession of cocaine. He argues that the trial court erred in denying his motion to suppress evidence and in failing to conduct a CrR 3.5 hearing. We affirm.

FACTS

On June 8, 2007, as Washington State Department of Corrections (DOC) Community Corrections Officer (CCO) Daniel Johnson drove through Longview, he observed Beck driving a black truck, which Johnson had seen Beck driving on several previous occasions. Johnson, Beck's DOC supervisor, knew that Beck did not have a valid driver's license. Johnson, while maintaining visual contact, followed Beck into a parking lot where Beck had parked and left the truck. After Beck's return 15 minutes later, Johnson and fellow CCO Todd Dillmon questioned him. Beck admitted that he did not have a valid license, and Johnson detained him and contacted local authorities.

When Longview Police Officer Tim Watson arrived on scene, Dillmon contacted his supervisor to obtain permission to search Beck's vehicle. Dillmon's search revealed a small plastic bag of cocaine under the driver's seat.

The State charged Beck with unlawful possession of cocaine and third degree driving while license suspended or revoked. He pleaded guilty to driving with a suspended license and moved to suppress the evidence collected during the search of his vehicle.

At the suppression hearing, Johnson testified that as a condition of Beck's probation, Beck was not to violate any laws or use any kind of controlled substance. The State offered into evidence a DOC conditions, requirements, and instructions form signed by Beck that stated Beck was subject to search and seizure of his person or property if the DOC had reasonable cause to believe he had violated any conditions of his probation.

Johnson then explained that he knew Beck was driving without a license on the day of the arrest due to an infraction that occurred two months earlier when Beck drove without his license suspended. Johnson further testified that he observed a bandage and cotton swab over Beck's arm and that Beck's eyes seemed a bit constricted, indicating to Johnson that Beck could be under the influence of a controlled substance. After learning from Watson that another officer had witnessed Beck overdose on heroin the night before, Johnson placed Beck in the back of the patrol car and searched Beck's truck.

Beck moved to suppress the evidence found in the truck. He argued that third-hand information regarding an overdose does not equate to a reasonable suspicion and that although constricted pupils may be enough to search Beck's person, it is not enough to search his vehicle.

The State countered that there is an exception to warrantless searches that allows the supervisor of a parolee or probationer to search his ward when there is a well-founded suspicion that the parolee or probationer is in violation of a condition of his probation. The State argued Johnson had a well-founded suspicion of drug use here.

The trial court found a sufficient basis for the initial contact and for the arrest "under the reasonable suspicion standard attached to a parolee/probationer." I Report of Proceedings (RP) at 16. As for the search of the vehicle, the trial court found "barely" sufficient evidence existed based on Johnson's observation of Beck, information about a recent overdose, and the bandage on Beck's arm. I RP at 17. Viewing the information at a whole and with the knowledge that many drug users keep drugs in their vehicle, the trial court denied Beck's motion to suppress.

At trial, the State entered into evidence a copy of the negotiated sanction agreement signed by Beck at a June 19 hearing. In it, Beck assumed responsibility for two violations: "[failure to obey all laws] by driving while license suspended on/about 06/08/07" and "[failure to obey all laws] by being in possession of a controlled substance, cocaine, on/about 06/08/07." Clerk's Papers at 24.

CCO Jessica Johnston testified that she talked with Beck before he signed the agreement and that she did not recall Beck expressing any reservations. When Beck asked whether a refusal to sign would have likely resulted in a longer sanction, Johnston responded that "it is not uncommon." II RP at 191. Johnson further testified that the State rarely uses negotiated sanction agreements in court.

Beck then testified that he signed the agreement voluntarily and knew what he was

admitting to. But he said that he did so in order to serve the least amount of time in jail.

Beck also called fellow inmate Kevin Robinson to testify. Robinson testified that he borrowed the truck the night prior to Beck's arrest and that he hid a bag of cocaine in the truck. The State questioned the veracity of Robinson's assertions due to his own testimony that he hoped to get a plea bargain.

The jury found Beck guilty of possession of cocaine. He appeals.

## ANALYSIS

### Warrantless Search

Beck first contends that the trial court erred when it denied his motion to suppress the evidence found in his vehicle during a warrantless search. In his statement of additional grounds (SAG),[1] Beck also argues that the conditions of his probation only allowed for the search of a vehicle belonging to him and that the vehicle searched was not his.

The State counters that there was sufficient evidence to support the search of the vehicle due to Johnson's well-founded suspicion that Beck had violated the terms of his probation.

We review de novo a trial court's determination that a warrantless search was valid. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). We review a trial court's determinations on suppression motions de novo as conclusions of law. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

We presume warrantless searches unreasonable. *State v. Hastings*, 119 Wn.2d 229, 234, 830 P.2d 658 (1992); Wash. Const. art. I, § 7. An exception exists for warrantless searches of a

[1] RAP 10.10.

probationer's person, home, car, or effects on a reasonable suspicion that the probationer has violated a condition of release. *State v. Simms*, 10 Wn. App. 75, 85, 516 P.2d 1088 (1973); RCW 9.94A.631. A well-founded suspicion is less than probable cause and is similar to the reasonable suspicion required for a *Terry* stop. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Simms*, 10 Wn. App. at 87. A suspicion is reasonable when based on specific and articulable facts and the rational inferences drawn from those facts. *Terry*, 392 U.S. at 21.

Here, Beck had previously consented to search of his person or property as a condition of his community custody supervision. Specifically, Beck agreed that he was "subject to search and seizure of [his] person, residence, automobile, or other personal property if there is reasonable cause on the part of the Department of Corrections to believe that [he had] violated the conditions/requirements" of his probation. SAG at 3. The conditions of Beck's probation were that he not violate any laws, including the use of a controlled substance. Johnson had reasonable cause to believe Beck violated two probation conditions.

First, Johnson had a well-founded suspicion that Beck was driving with a suspended license. Johnson saw Beck driving this truck on several other occasions and was aware that Beck did not have a valid license. Further, Beck admitted to Johnson that he was driving with a suspended license.

Second, there was evidence to support a well-founded suspicion that Beck was under the influence of a controlled substance. Evidence included Johnson's observation that Beck's pupils seemed a bit constricted, the bandage and cotton swab on Beck's arm, and the information relayed from another officer that Beck had overdosed on heroin the night prior. The information

on which officer Johnson acted went beyond a "causal rumor, general reputation, or a mere whim." *Simms*, 10 Wn. App. at 88. Rather, the information relied on had the required "indicia of reliability" to support the inference that Beck may have been under the influence of a controlled substance. *Simms*, 10 Wn. App. at 88. The trial court properly denied Beck's motion to suppress.

Beck also argues that the search was unlawful because he did not own the vehicle searched,[2] nor was the vehicle in his possession at the time of the arrest. These arguments do not persuade us.

A search under the probationer exception remains valid as long as the CCO relies on specific facts, and inferences drawn there from, that support the property searched belongs to the probationer. *State v. McKague*, 143 Wn. App. 531, 542, 178 P.3d 1035 (2008).

Here, Johnson had specific and articulable facts that led him to believe the vehicle belonged to Beck. Johnson observed Beck driving the vehicle on several previous occasions, Beck was the only person in the vehicle before the stop, and Johnson did not discover until later that the vehicle was registered to Beck's wife. Further, that the vehicle was not in Beck's possession at the time of the arrest does not diminish Johnson's belief that the vehicle was Beck's because Johnson observed Beck driving the truck and maintained visual contact with the vehicle prior to the arrest. These facts sufficiently support Johnson's reasonable belief that the vehicle belonged to Beck and was subject to search and seizure under the terms of Beck's probation.[3]

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[2] The DOC form signed by Beck states: "I am aware that I am subject to search and seizure of my person, residence, automobile, or other personal property." SAG at 3.

[3] Recently, our Supreme Court issued *State v. Winterstein*, No. 80755-8, 2009 WL 4350257

Beck's argument fails.

Custodial Statements

Beck next contends that the trial court violated his right to due process when it failed to conduct a CrR 3.5 hearing prior to Johnston's testimony regarding statements made by Beck while in custody.[4] Beck argues that a CrR 3.5 hearing is mandatory and that he did not waive his right to a hearing. The custodial statements to which Beck refers are his negotiated sanction agreement and his statements to Johnston at the negotiated sanction hearing.

The State concedes that it was error to admit Beck's confession to Johnston without first conducting a CrR 3.5 hearing, but argues that the error was harmless.

We review due process challenges de novo. *State v. Joy*, 128 Wn. App. 160, 163, 114 P.3d 1228 (2005). When the State offers into evidence a statement made by the defendant while in custody, CrR 3.5 requires that the trial court hold an admissibility hearing. *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998). CrR 3.5 applies to confessions, as well as other incriminating statements. *State v. Williams*, 137 Wn.2d 746, 750, 975 P.2d 963 (1999). A trial court's failure to hold a CrR 3.5 hearing does not render a statement inadmissible when the record

(Wash. Dec. 03, 2009). In it, the Court held that we review whether probable cause justified an officer conducting a warrantless search of a probationer's residence. *Winterstein* differs from this case, however. In *Winterstein*, a probation officer searched what he believed to be the probationer's residence, not the probationer's vehicle. *Winterstein*, 2009 WL 4350257, at *10 (Johnson, J. concurring.) The Court limited the application of the probable cause standard to searches of a probationer's residence because of third party privacy interests. *Winterstein*, 2009 WL 4350257, at *9. The same interest in protecting third party privacy is not implicated when searching a vehicle. *Winterstein* does not apply here.

[4] Beck does not specifically identify Johnston as the witness. He further fails to cite the specific testimony he believes should have triggered CrR 3.5.

indicates the statement was voluntary. *State v. Kidd*, 36 Wn. App. 503, 509, 674 P.2d 674 (1983).

A confession is voluntary if made after the police advise the defendant of his rights and the defendant knowingly, voluntarily, and intelligently waives them. *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). We do not disturb a trial court's determination of voluntariness so long as the trial court found by a preponderance of the evidence that the statement was voluntary and substantial evidence in the record supports that conclusion. *State v. L.U.*, 137 Wn. App. 410, 414, 153 P.3d 894 (2007), *aff'd sub nom.*, *State v. Unga*, 165 Wn.2d 95, 196 P.3d 645 (2008).

Here, the trial court did not conduct a CrR 3.5 hearing because the State initially indicated that it did not expect to solicit any statements from Beck. But during Johnston's testimony, the State presented her with a redacted copy of Beck's negotiated sanction agreement and questioned her about the June 19 hearing when Beck admitted to violating his probation. Johnston testified that she did not recall Beck expressing any reservations about admitting to these violations. Last, when the State asked if Beck voluntarily signed the agreement, Johnston read from the agreement, "I, Zachary Beck, knowingly and willingly admit I committed the following violations." II RP at 188.

Beck contends that he signed the form because he would have received a longer sentence had he not. He further indicates that he admitted guilt with the understanding the State would not use the negotiated sanction agreement during trial.

These arguments do not persuade us. Beck could freely contest the charges and receive a shorter sentence were he found not guilty. Further, Johnston did not tell Beck that the State

could not use the negotiated sanction against him during trial, but only that it rarely occurs. Finally, Beck admitted during his testimony that he signed the agreement and knew it included language indicating his voluntariness. Here, Beck voluntarily signed the negotiated sanction agreement and the trial court properly admitted it into evidence.

Nevertheless, even assuming error, it would be harmless. Under the harmless error test, "we look only at the untainted evidence to determine if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt." *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988).

Here, overwhelming evidence shows that Beck possessed cocaine. After observing Beck driving without a license, Johnson detained Beck and noticed his pupils were constricted and he had a bandage on his arm. After learning of a possible overdose the night before, Johnson searched Beck's vehicle and found cocaine. This evidence leads to a finding that Beck possessed cocaine. Further, Robinson's testimony, which Beck offered to prove his innocence, goes to credibility. We leave credibility determinations to the jury and do not review them on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009). Any error in failing to conduct a CrR 3.5 hearing was harmless.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Bridgewater, J.

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Hunt, J.