93998-5

No. 48813-2-II

COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON

vs.

LEE BUNN

PETITION FOR REVIEW

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Cases

A. Identity of Petitioner

Lee Bunn asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition

B Court of Appeals Decision

The Court of Appeals affirmed Mr Bunn's conviction for second degree possession of depictions of a minor engaged in sexually explicit conduct on December 6, 2016 A copy is attached.

C Issues Presented for Review

Is it a significant question of law under article 1, section 7 of the Washington Constitution whether the plain view exception to the warrant requirement requires the discovery of the evidence be inadvertent?

D. Statement of the Case

Lee Bunn was charged by Information with one count of Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree. CP, 1. Prior to trial, he filed a motion to suppress evidence he claimed was illegally seized by the Kitsap County Sheriff's Office CP, 7 The Court held an evidentiary hearing on July 6, 2015 where two officers from that office testified. RP, 1 The Court

denied the motion and entered Findings of Fact and Conclusions of Law. CP, 75. Mr Bunn does not object to the findings as they are all supported by substantial evidence.

On July 27, 2015, Mr. Bunn proceeded to a bench trial on stipulated facts. CP, 58. The trial court found him guilty. CP, 62. Judgment and sentence was entered on August 7, 2015. Mr. Bunn filed a timely notice of appeal seeking direct review in this Court. CP, 79. This Court transferred the case to the Court of Appeals for decision, which affirmed the conviction.

On July 22, 2014, Deputy Duane Dobbins was notified by CenCom (Kitsap County Central Communications) to contact the Best Buy Store in Silverdale, Washington. RP, 12. Employees from Best Buy were reporting they had possible child pornography in their store. RP, 12. Deputy Dobbins responded to the store to see "what they had in reference to child pornography." RP, 30 While there, he did not investigate any crimes other than child pornography. RP, 30.

Arriving at 5:23 p.m., he spoke to a Mr. Everett, who was a supervisor at the "Geek Squad," a group of Best Buy employees who repair computers. RP, 13. Mr Everett took Deputy Dobbins to a back room and pointed to an HP computer tower RP, 13. According to Mr. Everett, the HP computer tower was owned by a customer named Lee

Bunn who had bought a new computer and wanted the data transferred from the old computer to the new computer. RP, 13. When the employees started the data transfer, there was an error message, "Destination path too long," that caused the transfer to stop. RP, 14. The error message contained the file name of the file that had caused the error. RP, 14. The full file name is "Homeclips-Spycam-13 Year Old Sister Masturbation & Orgasm With Panties On. Lesbian dildo vagina sex porn Pamela paris ron Jeremy Hentai anime kiddie incest preteen fuck Item type Movie Clip." When the employees saw the error message, they stopped working and called CenCom. RP, 11. Deputy Dobbins did not see any actual images of child pornography. RP, 33. Deputy Dobbins is aware that file names can be changed. RP, 33.

When Deputy Dobbins saw the error message, he instructed Mr. Everett to take a "screen shot" of the computer, which is a picture that captures whatever is on the computer monitor at the time. RP, 16. He then instructed the Best Buy employees to unplug the computer and it was secured as evidence. RP, 17. Deputy Dobbins then transported the computer to his patrol car. RP, 20.

Prior to leaving Best Buy, Deputy Dobbins instructed the employees that if Mr. Bunn called inquiring about the computer, they were to give "inaccurate information" and say they were still working on the

transfer. RP, 37. (Deputy Dobbins claims it was not "technically" inaccurate information, but was instead a "ruse." RP, 42.) The reason he used this ruse was to allow the sheriff's office more time to process the computer. RP, 37.

At the suppression hearing, Deputy Dobbins testified he considered the need for a warrant and called his sergeant to inquire. RP, 34. He was told a warrant was unnecessary and the detectives unit would handle the investigation from there. RP, 36. No warrant was obtained authorizing the seizure of the computer.

The next day, July, 23, 2014, the case was assigned to Detective Gerald Swayze. RP, 45. Detective Swayze did some follow up investigation and sought a search warrant for the computer on August 1, 2014. RP, 51. Based upon the search warrant, the computer was sent to the crime lab for analysis. CP, 59.

The trial court concluded that the computer was in plain view. CP, 77. The trial court concluded Deputy Dobbins immediately recognized the computer as contraband based upon the file name he observed. CP, 77. The trial court concluded inadvertence is not required by article 1, section 7 of the Washington Constitution. CP, 78. Although the State asked the trial court to make a finding that the evidence was found inadvertently, the trial court specifically declined to make such a finding. The Conclusion of

Law II reads, "[H]e had a prior justification for being where he was when he observed the evidence, and ~~inadvertently~~ discovered it and he immediately recognized it as evidence of a crime." CP, 77 (cross out in original)

E Argument

The computer was not in plain view because law enforcement did not discover it inadvertently, as required by article 1, section 7 of the Washington Constitution.

Mr. Bunn contends, as he did in the Court of Appeals, that inadvertence is required in order to seize evidence under the plain view exception to the warrant requirement A warrantless seizure is per se unreasonable unless it fits within one of the exceptions to the warrant requirement *State v Evans*, 159 Wn.2d 402, 150 P 3d 105 (2007). One of those exceptions is when evidence is in "plain view."

Washington Courts have repeatedly said a plain view search requires three things: (1) prior justification for an intrusion; (2) an inadvertent discovery of incriminating evidence; and (3) immediate knowledge by the police that they had evidence before them. *State v Murray*, 8 Wn App. 944, 509 P 2d 1003 (1973), citing *Coolidge v. New Hampshire*, 403 U.S 443, 91 S.Ct 2022, 29 L Ed 2d 564 (1971); *State v. Dimmer*, 7 Wn App 31, 497 P.2d 613 (1972). The inadvertence

requirement, first set out in Justice Stewart's opinion in the *Coolidge* case, has since been abandoned by the United States Supreme Court. *California v Horton*, 496 U.S. 128, 110 S.Ct. 230, 1110 L.Ed.2d 112 (1990).

In the Court of Appeals, Mr. Bunn engaged in a *Gunwall* analysis of the plain view doctrine, arguing that article 1, section 7 of the Washington Constitution retains the requirement that plain view seizures be inadvertent. *State v Gunwall*, 106 Wn.2d 54, 66, 720 P.2d 808 (1986). *Gunwall* sets out six criteria for determining whether the Washington Constitution is more protective of Washington citizens than the United States Constitution. Those six factors are (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

Despite the fact Mr. Bunn did the required *Gunwall* analysis, the Court of Appeals expressly declined to analyze the issue pursuant to *Gunwall*. See footnote 2. The Court of Appeals held this Court has already ruled the plain view doctrine does not require inadvertence. On this point, the Court of Appeals was in error.

The case cited by the Court of Appeals to avoid the *Gunwall* analysis is *State v O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). There is a brief analysis of the plain view doctrine in *O'Neill* where the Court cites

the first and third elements of the doctrine. Footnote 6 of the opinion also acknowledges the *Horton* decision, saying the United States Supreme Court has eliminated the inadvertence requirement.

Footnote 6 of *O'Neill* should be deemed to be dicta, however, and should not be viewed as the holding of the Court. It is dicta for three reasons. First, appellant O'Neill was not arguing the search was pretextual, so there was no reason for the Court to determine whether the evidence was discovered inadvertently.

Second, the Court itself says it is dicta. The Court said, "The State does not argue for a different analysis under the state constitution than applies under the federal constitution, and accordingly we apply the 'plain view' analysis that applies under the federal constitution." *O'Neill* at 582

Third, this Court has recognized the *O'Neill* analysis as dicta in a subsequent case *State v Kull*, 155 Wn 2d 80, 118 P.3d 307 (2005) *Kull* was written just two years after *O'Neill* and was authored by Justice (now Chief Justice) Madsen, the same Justice who authored *O'Neill*. The *Kull* Court makes clear it is analyzing the plain view doctrine under article 1, section 7 of the Washington Constitution (as opposed to the Fourth Amendment) and specifically lists inadvertence as one of the three requirements for the plain view doctrine. In footnote 4, the Court notes, "The second prong, inadvertent discovery, is no longer a requirement to

establish the plain view exception under the Fourth Amendment. *State v O'Neill* [full cite omitted]" Reading *Kull* on its face, the inadvertence requirement remains an essential part of the plain view doctrine under article 1, section 7

Unlike the appellant in *O'Neill*, Mr. Bunn is arguing the state constitution applies the plain view doctrine differently than the federal constitution. He does so with the required *Gunwall* analysis. No decision of this Court has ever engaged in a *Gunwall* analysis of the plain view doctrine and the Court of Appeals erred by declining to do so. Applying the six elements of *Gunwall*, this Court should determine article 1, section 7 requires plain view searches and seizures be inadvertent.

Turning to the six *Gunwall* factors, the first factor (textual language of article I, section 7), second factor (the differences between it and the Fourth Amendment), the third factor (the constitutional history), fifth factor (the structural differences between state and federal law), and sixth factor (matters of local concern) all have been repeatedly and consistently found to be more protective of the rights of Washington citizens than the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) One of the reasons for the textual and historical differences of article 1, section 7 is that it is intended to provide broader privacy protection for Washington citizens than the Fourth Amendment.

While the exclusionary rule of the Fourth Amendment is designed primarily to deter police misconduct, article 1, section 7 serves three distinct purposes: (1) protect individual privacy against unreasonable governmental intrusion; (2) deter police from acting unlawfully; and (3) preserve the dignity of the judiciary by refusing to consider evidence that has been obtained through illegal means. *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011).

The purpose of the inadvertence requirement was well explained by Justice Stewart in the *Coolidge* decision and by Justice Brennan in his dissent in *Horton*

> As Justice Stewart explained in *Coolidge*, we accept a warrantless seizure when an officer is lawfully in a location and inadvertently sees evidence of a crime because of the inconvenience of procuring a warrant to seize this newly discovered piece of evidence. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the argument that procuring a warrant would be "inconvenient" loses much, if not all, of its force. Barring an exigency, there is no reason why the police officers could not have obtained a warrant to seize this evidence before entering the premises. The rationale behind the inadvertent discovery requirement is simply that we will not excuse officers from the general requirement of a warrant to seize if the officers know the location of evidence, have probable cause to seize it, intend to seize it, and yet do not bother to obtain a warrant particularly describing that evidence. To do so would violate the express constitutional requirement of Warrants particularly describing the things to be seized, and would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

Horton at 144-45 (Justice Brennen, dissenting), citing *Coolidge* at 2040.

The inadvertence requirement furthers the privacy interest of Washington citizens. Failure to limit plain view seizures to items discovered inadvertently has the potential of turning every situation into a pretext for an exploratory search. As the Court of Appeals said in *Dimmer*, "This is not the type of case where police had reason to believe evidence other than what was described in the warrant would be found and, knowing that, simply failed to get a search warrant to cover it." *Dimmer* at 34. The inadvertence requirement serves the same normative values as the particularity requirement for search warrants: prevent general exploratory searches and eliminate the danger of unlimited discretion in the executing officer's determination of what to seize. *State v. Perrone*, 119 Wn. 2d 538, 545, 834 P.2d 611 (1992). Absent exigent circumstances, if the officer expects to find evidence at a particular location, he or she should apply for and secure a warrant prior to the seizure. These concerns become even more acute when one considers the pervasive use of computers to store varied and intimate details of one's life, as with Mr. Bunn. *Riley v. California*, 134 S.Ct. 2473, 189 L.Ed.2d 43082 (2014).

This Court has repeatedly shown a willingness to inquire into a police officer's subjective intent and, upon a finding that the intent was to

avoid a search warrant, declare the search illegal. In *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962) this Court held that pretextual arrests are unlawful. In *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999) this Court extended *Michaels* to all traffic stops. In doing so, this Court rejected the position of the United States Supreme Court, which has held that the officer's subjective intent is irrelevant under the Fourth Amendment. *Whren v. United States*, 517 U.S. 80, 6116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

This Court, in discussing *Steagald v. United States*, 451 U.S. 204, 212, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981), has also provided greater protection than the United States Supreme Court in the context of warrantless entries into third party homes. In *State v. Hatchie*, this Court held an arrest warrant (as opposed to a search warrant) constitutes "authority of law" under article 1, section 7 to search the residence of a third party when (1) the entry is reasonable, (2) the entry is *not a pretext* for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the time of the entry. *State v. Hatchie*, 161 Wn.2d 390, 392-93, 166 P.3d 698 (2007) (Emphasis added).

The discussion in *State v Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) is also worth noting. In *Ferrier*, this Court looked at a common police procedure called the "knock and talk," whose goal is to "gain entry to the home" where insufficient evidence exists to get a search warrant. See *Ferrier* at 407. "The core of [the appellant's] argument is that the police here violated her expectation of privacy in her home because they conducted the knock and talk in order to search her home, thereby avoiding the general requirement that a search warrant be obtained." *Ferrier* at 114. Although this Court did not find the "knock-and-talk" procedure illegal per se, it did find that the procedure was sufficiently coercive to require additional protections and created the now well-known *Ferrier* warnings.

In sum, the privacy interests advanced by article 1, section 7 have caused this Court to inquire repeatedly into the subjective intent of the officer before sanctioning the search. The inadvertence requirement of the plain view doctrine is consistent with this history and should be retained by this Court.

The final *Gunwall* factor to be analyzed is the fourth factor, preexisting case law. The Court of Appeals concluded that all Washington cases requiring inadvertence were decided after *Coolidge* and are, therefore, of little value. Opinion at 9. While it is true that Washington

Courts have been more succinct post-*Coolidge* in articulating the inadvertence requirement, the subjective intent of the officers conducting the search has been a concern since the earliest days of statehood

The first Washington case to recognize the plain view doctrine appears to be *State v. Llewelyn*, 119 Wn. 306, 205 P 394 (1922). In *Llewelyn*, police knocked on the door of a business apparently open to the public and entered when the defendant opened the door. Once inside, they saw evidence of gambling and alcohol consumption and seized the evidence. The defendant argued the search was illegal, citing *State v. Gibbons*, 118 Wn 171, 203 P. 390 (1922) (suppressing evidence pursuant to article 1, section 7 after the police seized evidence without a warrant). This Court disagreed saying, "*Once in the place*, the officers were justified in *taking cognizance* of the fact that a crime was being committed by the defendant The evidence thereof was before their very eyes; it took no search to find it." *Llewelyn* at 310 (emphasis added). Therefore, the officers only became aware of the presence of contraband once they lawfully entered the premises, not before. The discovery of the contraband was inadvertent.

Both *Llewelyn* and *Gibbons* were cited in *State v Basil*, 126 Wn 155, 217 P 720 (1923) where police entered a home without a warrant and seized whiskey in plain view. This time, the Court held the entry was

unlawful, but refused to suppress the evidence because it constituted "nothing more than" a trespass and the police did not have enter with an improper intent. The Court said, "It was not unlawful in the sense that they entered for an unlawful purpose. They had no purpose to search the dwelling for evidences of crime, nor purpose to commit any other wrongful or unlawful act therein." *Basil* at 157-58. Therefore, because the officer's subjective intent was proper, the evidence found in plain view was admissible.

These early cases looking at the officer's subjective intent eventually became the inadvertence requirement after *Coolidge* was decided in 1971. *State v. Murray, supra*; *State v. Dimmer, supra*. With the arguable exception of *O'Neill*, every Washington case since *Coolidge* has required the discovery be inadvertent, including *State v. Kull*, decided two years after *O'Neill*.

In sum, all six prongs of the *Gunwall* test point towards requiring inadvertence as part of the plain view doctrine. This Court has a long, well-established and consistent track record of requiring police officers to get a search warrant any time they have time to do so. When police officers truly come upon evidence inadvertently, they may forgo the "inconvenience" of getting a warrant and may seize the evidence in plain view. But when police engage in behavior as a pretext for a larger search,

they must first seek and obtain a search warrant that describes with particularity the items to be seized and searched.

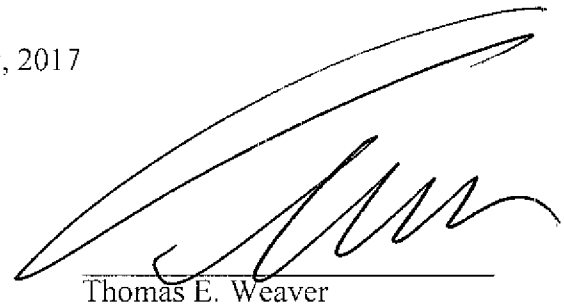
Should this Court should reject the analysis of the *Horton* majority, it would not be alone in doing so. At least three states have refused to follow *Horton* on state constitutional grounds. *Commonwealth of Massachusetts v. Balicki* 762 N.E.2d 290 (2002); *People of New York v. Manganaro*, 561 N.Y.S.2d 379 (1990); *State of Hawaii v. Meyer*, 893 P.2d 159 (1995). The state of New Hampshire has also indicated it might decline to follow it for items not inherently dangerous, such as guns and drugs. *State of New Hampshire v. Nieves*, 999 A.2d 389 (2010). This Court should follow the lead of the Massachusetts, New York and Hawaii courts and reject the *Horton* decision.

In this case, Deputy Dobbins went to Best Buy expecting to find a computer with child porn. When he arrived, he observed an error message that referenced a file with a provocative file name. He considered obtaining a warrant, and even called his sergeant to inquire about the need for one, but ultimately decided to seize the computer without a warrant. The seizure of the computer was not inadvertent and, under article 1, section 7 of the Washington Constitution, was unlawful.

F. CONCLUSION

This Court should reverse the Court of Appeals, hold the warrantless seizure of the computer to be unlawful, and dismiss the case

Dated this 3rd day of January, 2017



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Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEE EARL BUNN, Appellant.	No. 48813-2-II UNPUBLISHED OPINION

LEE, J. — Lee Earl Bunn appeals his conviction for second degree possession of depictions of a minor engaged in sexually explicit conduct. We hold that the plain view exception to the warrant requirement authorized seizure of Bunn's computer because (1) article I, section 7 does not require inadvertent discovery of evidence under the plain view exception to the warrant requirement; and (2) the deputy had probable cause to seize Bunn's computer when he immediately recognized the suggestive file name as evidence of a crime. Accordingly, we affirm.

FACTS

Bunn bought a new computer and contracted with an electronics store to transfer his files from his old computer to his new computer. Bunn signed an agreement with the electronics store that stated he was on notice "that any product containing child pornography [would] be turned over to the authorities." Clerk's Papers (CP) at 24.

When the store employees attempted to execute the file transfer from Bunn's old computer to his new computer, an error message appeared on Bunn's computer screen listing the file name that caused the error. The file name in the error message read, "Homeclips- Spycam-13 Year Old

Sister Masturbation & Orgasm With Panties On Lesbian dildo vagina sex porn Pamela paris ron Jeremy hentai anime kiddie incest preteen fuck Item type Movie Clip " CP at 4. Based on the file name in the error message, the store employees called law enforcement and reported the potential discovery of child pornography.

Deputy Duane Dobbins responded to the call from the store employees reporting the potential discovery of child pornography. Upon arrival, the store employees showed Deputy Dobbins the error message on Bunn's computer.

Deputy Dobbins suspected the presence of child pornography based on words in the file name, including "13-year-old-sister masturbation and orgasm panties on," "Kiddie incest," and "preteen fuck." Verbatim Report of Proceedings (VRP) at 16. Deputy Dobbins did not search Bunn's computer, but he did seize the computer and secure it into evidence for analysis. Deputy Dobbins did not obtain a warrant before seizing the computer.

Detective Gerald Swayze later obtained a search warrant for Bunn's computer. The Washington State Patrol high tech crimes unit then analyzed the computer and found suspected child pornography.

On April 9, 2015, the State charged Bunn with second degree possession of depictions of a minor engaged in sexually explicit conduct. Bunn moved to suppress the evidence seized from his computer. The trial court denied the motion, finding that Deputy Dobbins's seizure of Bunn's computer was permitted under the plain view exception to the warrant requirement because he had probable cause based on his "prior justification for being where he was when he observed the evidence, [and] he discovered it and he immediately recognized it as evidence of a crime." CP at

77. After a bench trial on stipulated facts, the trial court found Bunn guilty of the charged offense. Bunn appeals.

ANALYSIS

A. LEGAL PRINCIPLES

Both the Fourth Amendment of the U.S. Constitution and article I, section 7 of our state constitution prohibit warrantless searches and seizures unless an exception to the warrant requirement applies. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The State must demonstrate that a warrantless search or seizure falls within an exception to the warrant requirement. *Id.* at 250. Under the plain view exception, an officer can seize items in plain view without a warrant if (1) there is a valid justification for the intrusion into a constitutionally protected area, and (2) the item seen is immediately recognized as incriminating evidence associated with criminal activity. *State v. O'Neill*, 148 Wn.2d 564, 582-83, 62 P.3d 489 (2003).

We review a trial court's conclusions of law on the suppression of evidence de novo.[1] *State v. Weller*, 185 Wn. App. 913, 922, 344 P.3d 695, *review denied*, 183 Wn.2d 1010 (2015). And whether an exception to the warrant requirement applies is a question of law that we also review de novo. *Id.*

[1] Bunn does not challenge the trial court's findings. Therefore, the trial court's findings of fact are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

B. PLAIN VIEW EXCEPTION

Bunn argues that the trial court's conclusion that the plain view exception to the warrant requirement justified the warrantless seizure of his computer, without considering inadvertent discovery of the contraband, violated article I, section 7 of our state constitution.[2] We disagree

The parties do not dispute that inadvertent discovery of the contraband in question is no longer required under the Fourth Amendment of the U.S. Constitution. *Horton v. California*, 496 U.S. 128, 139-42, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). But article I, section 7 of the Washington Constitution provides broader privacy protections than the Fourth Amendment. *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Thus, the parties dispute whether inadvertent discovery is a required element under the plain view exception to the warrant requirement under article I, section 7 of the Washington Constitution

Based on our Washington Supreme Court's decisions since 2003 addressing the plain view exception to the warrant requirement, it appears the inadvertent discovery element is no longer required. *See O'Neill*, 148 Wn.2d at 582-83 (applying the federal plain view doctrine analysis and stating that "[t]he doctrine requires that the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence" without any mention of the inadvertent discovery element). The development of case law that has applied the plain view

[2] Bunn argues that a constitutional analysis is required under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), to determine whether article I, section 7 of the Washington Constitution requires plain view seizures to be inadvertent. It is well settled that article I, section 7 provides greater protection of an individual's right to privacy than the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). Furthermore, when "prior cases direct the analysis to be employed in resolving the legal issue, a *Gunwall* analysis is no longer helpful or necessary." *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). Because the development of case law by the U.S. Supreme Court and the Washington Supreme Court on the plain view exception guide our analysis here, a *Gunwall* analysis is not required.

exception to the Fourth Amendment of the U.S. Constitution and to article I, section 7 of our state constitution supports the conclusion that the plain view exception to the warrant requirement under article I, section 7 of our state constitution does not include an inadvertent discovery element.

The inadvertent discovery requirement under the plain view exception to the warrant requirement first appeared in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).[3] In *Coolidge*, the U.S. Supreme Court, in a plurality opinion, considered the application of the plain view exception to the warrant requirement in depth and referenced the inadvertent discovery of evidence:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plan view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

403 U.S. at 466. The Court stated that the plain view exception to the warrant requirement, when applied to the Fourth Amendment, required prior justification for intrusion and inadvertent discovery of incriminating evidence in plain view. *Id.* at 466-69; *see e.g. Texas v. Brown*, 460

[3] The emergence of an inadvertent discovery requirement under the plain view exception to the warrant requirement in this state has mirrored that of the federal courts. The requirement cannot be found in Washington case law prior to *Coolidge*. *See State v. Miller*, 121 Wash. 153, 209 P. 9 (1922); *see also State v. LaPierre*, 71 Wn.2d 385, 428 P.2d 579 (1967). After *Coolidge*, Washington courts began to require inadvertent discovery under the plain view exception to the warrant requirement. *See State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974); *see also State v. Lair*, 95 Wn. 2d 706, 630 P.2d 427 (1981).

U.S. 730, 737, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983) (reviewing the plain view doctrine and noting that "the officer must discover incriminating evidence 'inadvertently'"). In doing so, the Court was mindful of concerns regarding general warrants and noted the importance of inadvertent discovery when applying the plain view exception to the warrant requirement. *Coolidge*, 403 U.S. at 467-71. Justice White dissented in *Coolidge* and strongly disagreed with imposing an inadvertent discovery requirement under the plain view exception to the warrant requirement. *Id.* at 516-17.

The Court, in *Horton v. California*, later revisited the requirements of the plain view exception, and conclusively resolved the issue of "[w]hether the warrantless seizure of evidence of crime in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent." 496 U.S. 128, 130, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

> The "plain-view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy.
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> . . .
>
> It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify the warrantless seizure. First, not only must the item be in plain view; its incriminating character must also be "immediately apparent." . . . Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself. As the United States has suggested, Justice Harlan's vote in *Coolidge* may have rested on the fact that the seizure of the cars was accomplished by means of a warrantless trespass on the defendant's property. In all events, we are satisfied that the absence of inadvertence was not essential to the Court's rejection of the State's "plain-view" argument in *Coolidge*.

Id at 133-35, 136-37 (footnotes and citations omitted). The Court directly addressed the inadvertent discovery element along with the concerns about general warrants and non-inadvertent discovery raised in *Coolidge*:

> First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant. Specification of the additional item could only permit the officer to expand the scope of the search. On the other hand, if he or she has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first
>
> . . .
>
> Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that no warrant issue unless it "particularly describ[es] the place to be searched and the persons or things to be seized," and that a warrantless search be circumscribed by the exigencies which justify its initiation. Scrupulous adherence to these requirements serves the interests in limiting the area and duration of the search that the inadvertence requirement inadequately protects. Once those commands have been satisfied and the officer has a lawful right of access, however, no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent. If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more.

Id. at 138-40 (alteration in original) (footnotes and citations omitted). Thus, the Court found Justice White's dissent in *Coolidge* instructive and held that the inadvertent discovery element added no additional protections. *Id.* at 140. As a result, the Court definitively concluded that

"even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition." *Id.* at 130.

After *Horton*, our courts applied the inadvertent discovery requirement inconsistently. *See, e.g., State v. Myers*, 117 Wn.2d 332, 346-47, 815 P.2d 761 (1991) (including the inadvertent discovery element under the plain view exception to the warrant requirement); *State v. Goodin*, 67 Wn. App. 623, 627-28, 838 P.2d 135 (1992), *review denied*, 121 Wn.2d 1019 (1993) (acknowledging the elimination of the inadvertent discovery element when applied to the Fourth Amendment and noting that the element had never been explicitly required under article I, section 7); *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994) (noting the holding in *Horton* while also stating that if in the course of a search with a valid warrant, officers "happen across some item for which they had not been searching and the incriminating character of the item is immediately recognizable, that item may be seized.")

However, in 2003, the Washington Supreme Court followed the direction of *Horton* and applied its holding for purposes of article I, section 7 in *O'Neill*, 148 Wn.2d at 582-83. The *O'Neill* court expressly acknowledged that the inadvertent discovery requirement had been eliminated by *Horton*, and omitted the inadvertent discovery requirement from its analysis when it applied the plain view exception to the warrant requirement under article I, section 7. *O'Neill*, 148 Wn.2d at 583 n.6, 582-83. Since *O'Neill*, our Washington Supreme Court seems to have omitted the inadvertent discovery requirement from its analysis of the plain view exception to the warrant requirement under article I, section 7.[4]

[4] *See, e.g., State v. Khounvichai*, 149 Wn.2d 557, 565-66, 69 P.3d 862 (2003) (discussing the plain view exception to the warrant requirement when applied to article I, section 7, without referencing inadvertent discovery); *State v. Hatchie*, 161 Wn.2d 390, 395, 166 P.3d 698 (2007) (setting forth

Bunn cites *State v. Murray*, 8 Wn. App. 944, 509 P.2d 1003 (1973) and *State v. Dimmer*, 7 Wn. App. 31, 497 P.2d 613 (1972), and argues that the inadvertent discovery requirement remains under the plain view exception to the warrant requirement. However, as analyzed above, the development of case law regarding the application of the plain view exception to the warrant requirement under article I, section 7, eliminates this murky inquiry into inadvertence. In fact, Bunn only cites to the early cases that included inadvertence as a requirement[5] and does not cite to any recent case law on the issue. Given the progression of the case law in this state after the elimination of the inadvertent discovery requirement under the Fourth Amendment of the U.S. Constitution, we hold that inadvertent discovery is not required for the plain view exception to the warrant requirement under article I, section 7 of the Washington Constitution.

C. IMMEDIATE RECOGNITION AS CONTRABAND

Bunn argues that the trial court erred when it found that the file name seen by Deputy Dobbins was immediately recognizable as contraband. We disagree.

Under the plain view exception to the warrant requirement, the test for determining when an item is immediately recognized as contraband is whether, considering the circumstances, the officer can reasonably conclude the item is incriminating evidence. *Weller*, 185 Wn. App. at 926. Officers do not need to be certain the item is evidence of a crime—"probable cause is sufficient"

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the requirements for a plain view search without mentioning inadvertent discovery); *State v. Ruem*, 179 Wn.2d 195, 200, 313 P.3d 1156 (2013) (defining the plain view exception to the warrant requirement under article I, section 7 and omitting inadvertent discovery); *but see State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005) (including the inadvertent discovery requirement, without analysis, based on *State v. Chrisman*, 94 Wn.2d 711, 715, 619 P.2d 971 (1980), *rev'd and remanded on other grounds*, 455 U.S. 1 (1982), but acknowledging that the inadvertent discovery requirement was eliminated under the Fourth Amendment)

[5] *Murray*, 8 Wn. App. at 948-49; *Dimmer*, 7 Wn. App. at 33.

Id. Probable cause exists when the facts available to the officer would warrant a reasonable person to believe that certain items may be evidence of a crime. *State v Dorsey*, 40 Wn App 459, 468-69, 698 P.2d 1109 (1985); *Brown*, 460 U.S. at 742. Only a nontechnical probability that incriminating evidence is present is required *Dorsey*, 40 Wn. App. at 468-69; *Brown*, 460 U.S. at 742

Here, the trial court properly found that the plain view exception to the warrant requirement authorized the warrantless seizure of Bunn's computer because Deputy Dobbins had probable cause to reasonably conclude that the computer contained evidence of a crime. At the electronics store, employees showed Deputy Dobbins the error message and file name that appeared on Bunn's computer. Based on the file name, Deputy Dobbins immediately suspected that the computer may contain child pornography because the file name contained references to sexual acts, "13-year-old," "preteen," and "Kiddie incest." VRP at 16 While Bunn argues that Deputy Dobbins could not conclude that the suggestive file name was in fact contraband and that Deputy Dobbins did not actually see any child pornography, certainty is not required. *Weller*, 185 Wn App at 926; *Brown*, 460 U.S at 742 Probable cause is sufficient, and, after Deputy Dobbins observed the suggestive file name, probable cause arose because the words in the file name could lead a reasonable person to believe that the computer contained evidence of a crime, child pornography Therefore, we hold that the trial court properly found that the plain view exception to the warrant requirement authorized warrantless seizure of Bunn's computer because Deputy Dobbins immediately recognized the suggestive file name as evidence of a crime. As a result, Deputy Dobbins had probable cause to reasonably conclude that the computer may contain evidence of the crime of child pornography. Bunn's challenge fails.

CONCLUSION

We hold that the plain view exception to the warrant requirement authorized seizure of Bunn's computer because (1) inadvertent discovery is not required for the plain view exception to the warrant requirement under article I, section 7 of the Washington Constitution; and (2) Deputy Dobbins had probable cause to seize Bunn's computer when he immediately recognized the suggestive file name as evidence of a crime. Accordingly, 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.

Lee, J.

We concur:

Worswick, P.J.

Sutton, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Plaintiff/Respondent, vs. LEE BUNN, Defendant/Appellant.	Court of Appeals Case No.: 48813-2-II DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action, and:

On January 3, 2017, I e-filed the original Petition for Review in the above-captioned case with the with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to the Kitsap County Prosecuting Attorney's Office via email to: kcpa@co.kitsap.wa.us through the Court of Appeals transmittal system.

On January 3, 2017, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

Lee Bunn
7684 University Point Circle NE
Bremerton, WA 98311

////

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

DATED: January 3, 2017, at Bremerton, Washington.

Alisha Freeman

The Law Office of Thomas E Weaver
P O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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