

No. 96069-1

THE SUPREME COURT OF WASHINGTON
COURT OF APPEALS, DIVISION THREE, CASE No. 34496-7-III

STATE OF WASHINGTON,

v.

MICHAEL NELSON PECK

(co-defendant CLARK ALLEN TELLVIK No. 34525-4-III)

State's Corrected Petition for Discretionary Review

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I. IDENTITY OF MOVING PARTY.

The State of Washington asks this Court to accept review of the Court of Appeals decisions designated below in Section II.

II. COURT OF APPEALS DECISIONS.

The Court of Appeals decisions at issue are *State of Washington v. Michael Nelson Peck*, No. 34496-7-III, filed May 8, 2018, (unpublished), and *State of Washington v. Clark Allen Tellvik*, No. 34525-4-III, filed June 14, 2018, (unpublished). Motion to Reconsider denied June 12, 2018, for *State v. Peck*¹. (Korsmo, J. dissenting). Holding that the results of the inventory search of the stolen truck of which the two men were found to be in possession should have been suppressed, the Court of Appeals reversed both men's convictions for possession with intent to deliver a controlled substance with the associated firearm enhancement.

¹ Mr. Peck and Mr. Tellvik are co-defendants who were both found guilty on May 13, 2016, of the crimes of Burglary in the First Degree with a Firearm Enhancement, Possession of a Stolen Vehicle with a Firearm Enhancement, Possession of a Controlled Substance with Intent to Deliver with a Firearm Enhancement, and Making or Having Burglary Tools. Mr. Tellvik was also found guilty of Possession of a Stolen Firearm and Unlawful Possession of a Firearm in the Second Degree. The facts regarding the CrR 3.6 motion and the suppression of the methamphetamine located in the stolen truck are the same for each man. While the report of proceedings (RP) for each man is the same in content, their pagination differs. The State will be using the case specific RP references for each of its motions. There are no other differences in the two motions.

III. ISSUE PRESENTED FOR REVIEW.

- A. Whether the Court of Appeals erred in suppressing the contents of a zippered CD case located in a stolen vehicle in the course of an inventory search, when neither defendant asserted any possessory interest in the CD case?

IV. STATEMENT OF THE CASE.

On Friday, January 23, 2016, Michael Peck was the passenger in a stolen Dodge Dakota truck driven by Clark Tellvik. RP 36, 37, 53, 56, 79, 82. Mr. Peck and Mr. Tellvik drove to Ms. Poulter's rural Ellensburg home and broke into at least one outbuilding. RP 35, 38, 39, 164, 228, 312, 503. Ms. Poulter, who had had a surveillance system installed just the prior day, observed the two men on her property when she was demonstrating her phone's surveillance feature to a friend. RP 234-35. Law enforcement was immediately called, and the two men, whose stolen vehicle had become stuck in the snow, were contacted on Ms. Poulter's property and arrested. RP 24, 82, 87, 88, 238.

Ms. Poulter and law enforcement later reviewed the video which had captured some of the men's activity on her property. They were able to observe Mr. Tellvik unsuccessfully attempt entry into Ms. Poulter's shop, then run back to the truck, obtain a pry bar,

jimmy the shop door, and enter. RP 321. A 15" blue pry bar was located outside the driver's door of the stolen truck covered with a thin layer of snow. RP 319, 338, 414, 529.

Ms. Poulter watched the video numerous times and believed that she had also seen Mr. Tellvik drop a gun by the driver's side door and cover it with his foot. Coincidentally, a neighbor had plowed Ms. Poulter's drive the day after the burglary and the removal of the stolen vehicle, and law enforcement was initially unable to locate any gun, believing that what Ms. Poulter had observed was the dropping of the pry bar. RP 274, 276, 322, 323, 543. However, Ms. Poulter was convinced that she had seen Mr. Tellvik drop a gun and re-contacted law enforcement. Kittitas County Sheriff's Office Deputy Vraves went to Ms. Poulter's home on January 25, 2016, with a metal detector, and in an area consistent with where the truck had been located on the video, located a Kel-Tec 9 mm handgun and loaded magazine. RP 543-47, 549, 550, 554, 559.

The truck that the two men had arrived in had been reported stolen the day before the burglary and had a screwdriver in the ignition, as well as a broken rear window. RP 108, 383. Nothing in the record indicates that Mr. Tellvik claimed that any of the items in

the truck were his, but Mr. Peck told law enforcement that a cell phone in the cab, as well as a car battery, and bag of tools in the truck bed were his.² He did not indicate that any other of the items belonged to him. RP 37, 63, 524.

In the course of an inventory search of the vehicle, a black zippered nylon CD case was located under the passenger seat. Located within the black zippered nylon CD case, were multiple individual bags of different sizes containing methamphetamine weighing 74.18 grams including its packaging. RP 423, 431, 483. Also located within the CD case were digital scales and a glass smoking pipe, the latter of which tested positive for methamphetamine. RP 109, 421-22, 486-87.

The Court of Appeals found that although the deputies were involved in a proper inventory search in the course of a lawful impoundment, it was incumbent upon them to obtain a warrant in order to open the black zippered, *i.e.*, closed, nylon CD case.

An inventory search must be restricted to the areas required to fulfill the purpose of the search. *State v. Tyler*, 177 Wn.2d 690, 701, 302 P.3d 165 (2013); *Houser*, 95 Wn.2d at 154. If officers conducting an

² Two cell phones as well as a GPS system were located within the cab of the truck. Law enforcement assumed that the second phone also belonged to one of the two men. It does not appear that either of the two men claimed ownership of the GPS unit. A search warrant was obtained and executed for both the phones and the GPS unit without any evidentiary results. RP 62, 63, 69, 366, 439.

inventory search encounter a locked compartment or closed container, it cannot be opened absent exigent circumstances or the consent of the owner. *Wisdom*, 187 Wn.App. at 675-676; *Houser*, 95 Wn.2d at 158; *State v. White*, 135 Wn.2d 761, 771-72, 958 P.2d 982 (1998). If a locked or closed container is encountered, absent exigency or consent, the officers must inventory the container as a sealed unit. See *Houser*, 95 Wn.2d 158-59. Here, the officers opened a closed container in the absence of any exigency and without consent. Before opening it, they needed a warrant.

State v. Peck, No. 34496-7-III at 9.

Ms. Poulter identified items in the back of the truck as possibly being her own, e.g., tools, and a car battery, however, there is no indication that she identified any item within the truck cab as having possibly been stolen. RP 283. None of the video showed either man placing any items originating from the property into the cab of the truck. A warrant will issue only upon probable cause that a crime has occurred and the item sought to be searched contains evidence of that crime. The State is not aware of any facts that would have satisfied the requisite standard. However, the CD case was found in a stolen vehicle that would have to be impounded, and the Sheriff's Office would thus be responsible for identifying and securing its contents.

The trial court stated in its oral CrR 3.6 ruling:

There was no reason why the officers in this case thought that the CD bag contained any evidence. It was a CD bag and I didn't get the link that Ms. Powers (attorney for Mr. Peck) referenced to the cash that was taken from Mr. Peck. I didn't see that linked up with Deputy McKean, who did the inventory search. But even if he did, like I said, there's no evidence that there were any drugs in that CD case. The officers are required under an inventory search to do the inventory search. They have to look. I mean, you could have a toolbox in the back of the truck. There's no – why would you think there's any crime, evidence of a crime in there? There's no way the judge is going to sign a search warrant for it, but they still need to look to see if there's any tools in there. Otherwise, when the tools come up missing, somebody's going to say there was \$12,000 worth of tools in that toolbox. The tow truck operator, the Sheriff's Office, the individual officers are all going to be liable for that.

Now there's a reason we have these inventory searches and it's for the reasons that Deputy McKean spoke of. And I didn't, I didn't see anything out of the ordinary here that would make me think that he was trying to use the inventory search to try to bypass a warrant requirement. He's just doing his inventory search, so I'm going to deny the motion as well. RP 191-192.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

A. STANDARD FOR ACCEPTANCE OF DISCRETIONARY REVIEW

A party may seek discretionary review if the Court of Appeals

“has committed probable error and the decision of the Court of

Appeals substantially alters the status quo or substantially limits the freedom of a party to act.” RAP 13.5(b)(2).

This Court takes into account the following: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Review is warranted here because the decision below presents a question of substantial public interest and erroneously expands an expectation of privacy in closed items, not locked, located by law enforcement in the course of an inventory search. The decision below also erroneously creates an ownership right of privacy to a defendant who is located in a stolen vehicle, and who claims no ownership interest in the item searched.

B. THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS DECISION WHICH NEGATES THE PURPOSE OF THE INVENTORY SEARCH WARRANT EXCEPTION.

Review is warranted as to the Court of Appeals' decision that although law enforcement was engaged in a valid inventory search of the stolen vehicle that Mr. Peck and Mr. Tellvik were located in, it

was incumbent upon them to either forfeit inventorying an easily accessible and innocuous container or to make a meaningless and useless application for a warrant.

One of the narrow exceptions to the warrant requirement is a valid inventory search which is what occurred here. Inventory searches have long been recognized as a practical necessity. *State v. Gluck*, 83 Wn.2d 424, 428, 518 P.2d 703 (1974) (citing *State v. Montague*, 73 Wn.2d 381, 438 P.2d 571 (1968); *State v. Olsen*, 43 Wn.2d 726, 263 P.2d 824 (1953)). Warrantless inventory searches serve many important non-investigatory purposes, and are permissible because they (1) protect the vehicle owner's (or occupant's) property, (2) protect law enforcement agencies/officer and temporary storage bailees from false claims of theft, and (3) protect police officers and the public from potential danger. *Tyler*, 177 Wn.2d 690, 302 P.3d 165 (2013). An inventory search is permitted only to the extent necessary to achieve its purposes as stated *supra*.

State v. Wisdom, 187 Wn.App. 652, 349 P.3d 953 (2015), relied heavily upon the Court of Appeals in these two matters, can be distinguished from Mr. Peck's and Mr. Tellvik's cases in three significant ways. First, in *Wisdom*, the Court equated a shaving kit

to luggage, noting the more intimate and personal nature of such an item. *Wisdom*, 187 Wn.App. at 675. The Court stated that “a citizen places personal items in luggage in order to transport the items in privacy and with dignity.” *Id.* A CD case has no such aura of intimacy or personal privacy. Second, in *Wisdom*, the defendant identified the shaving bag as his, and the Court noted that while the vehicle the defendant was in was stolen, law enforcement had direct evidence (the statement of Mr. Wisdom), that the shaving kit was not. *Wisdom*, 187 Wn.App. at 677. Third, and most importantly, in *Wisdom*, the deputy acknowledged during the CrR 3.6 hearing that he was on the lookout for controlled substances in the course of his search. *Wisdom* at 661-663. Here, there was no indication at the time of the inventory search that the black zippered nylon CD case belonged to either one. Neither man claimed ownership of the black CD case despite being specifically asked. RP 37, 63, 187, 524, 533, 592. While denial of ownership is not in and of itself sufficient to divest an individual of a privacy interest in an article, the court can consider the status of the area searched to determine whether any privacy interest has been abandoned. *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007). Where a defendant disclaims ownership of an article seized from an area in

which he has a reasonable expectation of privacy, such as his own home or car, courts have declined to consider the disclaimer of ownership an abandonment of privacy interest in the article itself. *Id.* at 409-12. Here, not only was the black CD case not claimed by either man, but it was also within a stolen vehicle to which neither man had an objectively reasonable expectation of privacy. There were no indicators for law enforcement to assume that the case contained anything belonging to either defendant or that it contained contraband. RP 108, 116, 191, 418.

As Judge Korsmo observed in his dissenting opinion, whatever privacy interest a car thief may have in the stolen car must give way to the vehicle owner's interest in protecting his or her property.

It is an open question whether or not a defendant has any privacy interest in a stolen vehicle or its contents. *See State v. Zakei*, 119 Wn.2d 563, 571, 834 P.2d 1046 (1992). I would answer that question "no" because one reason for an inventory search is to protect a vehicle owner's property. *State v. White*, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998). I would hold that a thief has no privacy interest that overrides that of the true owner. *Wisdom*, 187 Wn.App. at 680.

Nor could the officers have obtained a warrant even if one of the defendants had claimed the black CD case. While the men were seen attempting to break into Ms. Poulter's outbuildings, there was

no testimony that either man had been in the interior area of the stolen truck while on her property. Accordingly, there was no probable cause to believe evidence of the burglary would be in the truck cab and no basis for a search warrant.

The purposes of an inventory search, to protect the vehicle owner's property, to protect law enforcement agencies/officers and temporary storage bailees from false claims of theft, and to protect police officers and the public from potential danger are thwarted by the catch-22 of not being allowed to inventory the item while also not being able to obtain a warrant for the item.

In *State v. Tyler*, 177 Wn.2d 690, 302 P.3d 165 (2013), this Court prohibited the opening of "locked containers" as part of an inventory search. The Court did not similarly restrict the opening of *closed containers*. See also *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998).

An earlier Washington Supreme Court case did appear to ban the opening of closed containers. See *State v. Houser*, 95 Wn.2d 143, 156, 622 P.2d 1218 (1980), cited with approval in *Wisdom*, ("the legitimate purposes behind an inventory search could have been effectuated by inventorying as a unit the closed toiletry kit in

which the drugs were found").³ It appears that the rule announced in *Houser* was based upon the Fourth Amendment. This conclusion is based both upon the *Houser* Court's reliance upon federal case law and its statement in footnote 4 that "[f]or the purposes of this Fourth Amendment question, it suffices to say that no such necessity was shown here." *Houser*, 95 Wn.2d at 156 n. 4. Seven years after *Houser* was issued, the United States Supreme Court clarified that the Fourth Amendment is not violated by an inventory of the contents of closed containers found inside an impounded vehicle. See generally *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). As such, the continuing legitimacy and/or expansion of *Houser* is at best doubtful.

VI. CONCLUSION.

Because the decision here erroneously expands the limitations of valid inventory searches, placing law enforcement in a catch-22 in which they can neither inventory an innocuous item within a stolen vehicle, nor obtain a warrant for that same innocuous item,

³ It is worth noting that the closed item in *Houser* was both "a personal item," and located within a locked trunk. While *Houser* found the search of the locked trunk to be impermissible, the court distinguished the case from *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), in which the Court upheld an inventory search of a glovebox, a location commonly thought of as "closed."

and because this case involves an issue of substantial public interest, review should be granted.

Respectfully submitted this 13th day of July, 2018.

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PROOF OF SERVICE

I, Dustin Davison, do hereby certify under penalty of perjury that on July 13th, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Amended Motion for Discretionary Review:

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