NO. 96073-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

CLARK ALLEN TELLVIK,
Respondent.

(Co-Defendant MICHAEL NELSON PECK)

RESPONSE TO STATE'S PETITION FOR DISCRETIONARY REVIEW

TANESHA LA'TRELLE CANZATER
Attorney for Clark Allen Tellvik
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

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United States Supreme Court Decisions

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I. RESPONDENT'S IDENTITY

Clark Allen Tellvik (Mr. Tellvik) is the respondent in this matter. I represented Mr. Tellvik, as the appellant before Division Three Court of Appeals (Division Three), and I represent him here.

II. COURT OF APPEALS' DECISION

The State of Washington (State) petitions this Court to review State v. Clark Allen Tellvik, No. 34525-4–III (Wash. Ct. App. June 14, 2018) (unpublished) https://www.courts.wa.gov/opinions/pdf/345254_unp.pdf and its companion case State v. Peck, No. 34496–7–III (Wash. Ct. App. May 8, 2018) (unpublished). Division Three issued State v. Clark Allen Tellvik on June 14, 2018. In that case, Division Three found the trial court should have granted the defense's motion to suppress the contents of a closed CD case and reversed Mr. Tellvik's conviction for possession with the intent to deliver along with the associated firearm enhancement. I have attached a copy of State v. Tellvik to this response.

III. ISSUE

The overarching issue here is whether an unpublished opinion that falls in line with well-settled privacy laws expands the limits of valid inventory searches to such a degree police can neither inventory a closed CD case found inside a stolen vehicle nor obtain a warrant to search it?

IV. STATEMENT OF THE CASE

We adopt the State's rendition of the facts in its petition.

V. ARGUMENT WHY THIS COURT SHOULD DENY REVIEW

A. THE STATE'S PETITION DOES NOT MEET A REQUISITE CRITERION FOR WHICH THIS COURT COULD ACCEPT REVIEW.

The criteria for which this court will accept review are constrained by the very specific and limited circumstances described in our rule of appellate procedure or RAP 13.4(b). According to RAP 13.4(b), this court will only grant a petitioner's request for review if the court of appeals' decision conflicts with a decision of this court or with another court of appeals' decision; involves a significant question of law under the Constitution of the State of Washington or of the United States; or involves an issue of substantial public interest. RAP 13.4(b)(1)-(4).

Despite the State's insistence State v. Tellvik "…erroneously expands an expectation of privacy in closed items, not locked, located by law enforcement in the course of an inventory search", and "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," Division Three's decision to suppress the contents of a zippered CD case and to attach the doctrine of automatic standing addresses already settled points of our state's privacy law and neither sets new precedent nor expands current law. *See* State's Pet. at 7.

B. STATE V. TELLVIK FALLS IN LINE WITH OTHER WELL-SETTLED CASES THAT INVOLVE PRIVACY AND THE INVENTORY SEARCH WARRANT EXCEPTION.

The purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function. State v. VanNess, 186 Wash. App. 148,162, 344 P.3d 713 (2015). The principal purposes of an inventory search are to protect the owner's property, protect the police against false claims of theft by the owner, and protect the police from potential danger. 186 Wash. App. at 162, 344 P.3d 713. The

scope of an inventory search should be limited to those areas necessary to fulfill its purpose. State v. Wisdom, 187 Wash. App. 652, 674, 349 P.3d 953 (2015) *as amended on reconsideration in part* (Sept. 3, 2015).

Here, the State uses State v. Wisdom, 187 Wash. App. 652, 670, 349 P.3d 953, 961 (2015), as amended on reconsideration in part (Sept. 3, 2015), a published Division Three decision that determined neither the search incident to arrest exception to warrant requirement nor the inventory search exception applied so as to permit an officer's warrantless search inside of a defendant's shaving kit bag found on the seat of a truck, to distinguish Mr. Tellvik's case, in what it deems three significant ways. *See* State's Pet. at 8.

First, the State argues unlike the shaving kit in Wisdom, which Division Three equated to luggage, a "CD case has no such aura of intimacy or personal privacy." See State's Pet. at 9. However, courts treat "luggage and other closed packages, bags, and containers" as unique for purposes of police searches. California v. Acevedo, 500 U.S. 565, 571, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). Washington courts recognize an individual's privacy interest in his closed luggage, whether locked or unlocked, as well as in closed containers. *See* State v. Houser, 95 Wash.2d 143, 157, 622 P.2d 1218 (1980); State v. Dunham, 194 Wash. App. 744, 750, 379 P.3d 958, 962 (2016) (Division One Court of Appeals concluded it was unreasonable for officers to search inside the closed container, and held that "the purposes of an inventory search do not justify opening a closed container located inside a jacket pocket when there is no indication of dangerous contents.") Exposure of a closed container to the public does not permit police to search inside it. United States v. Chadwick, 433 U.S. at 13 n. 8, 97 S.Ct. 2476 (1977);

State v. Wisdom, 187 Wash. App. 652, 670, 349 P.3d 953, 961 (2015), as amended on reconsideration in part (Sept. 3, 2015).

Second, the State argues unlike the defendant in Wisdom, who claimed the shaving kit as his, neither Mr. Tellvik nor his co-defendant claimed the CD case. Therefore, neither man had an objectively reasonable expectation of privacy in whatever the CD case contained and could not challenge the search. *See* State's Pet. at 10. However, as Division Three held here, the doctrine of automatic standing, which allows a defendant to challenge the legality of a seizure "even though he or she could not technically have a privacy interest in such property" applies and confers on Mr. Tellvik the ability to challenge the police search. State v. Evans, 159 Wash.2d 402, 407, 150 P.3d 105 (2007). Because possession was an "'essential' element of the offense," and Mr. Tellvik "was in possession of the contraband at the time of the contested search or seizure," he met both parts of the test for automatic standing. State v. Simpson, 95 Wash.2d 170, 181, 622 P.2d 1199 (1980) (describing two-part test); ;State v. Evans, 159 Wash. 2d 402, 406–07, 150 P.3d 105, 108 (2007).

Third, and what the State says is most important to its analysis, police in Mr. Tellvik's case did not indicate they were looking for drugs, unlike the deputy in Wisdom, who did. *See* State's Pet. at 9. Whether police made such an assertion or not is of little consequence. Because, in order for police to have opened the closed CD case without a warrant, police had to have either consent or some exigent circumstance that manifested a necessity to do so. *See* State v. Tyler, 177 Wash. 2d 690, 708, 302 P.3d 165, 175 (2013); *See also* State v. Ferguson, 131 Wash.App. 694, 703, 128 P.3d 1271 (2006); State v. Houser, 95 Wash.2d 143, 156, 622 P.2d 1218 (1980); State v. Dunham, 194 Wash. App.

744, 749, 379 P.3d 961 (2016). Otherwise, as Division Three found, police should have inventoried the closed CD case as a sealed unit. State v. Wisdom, 187 Wash. App. 652, 671, 675-76, 349 P.3d 953 (2015); State v. Houser, 95 Wash.2d 143, 158, 622 P.2d 1218 (1980).

State v. Tellvik falls in line with at least three other decisions, where courts have suppressed evidence found in closed containers because the officer who found the evidence could have merely listed the container on the inventory rather than opening the container and listing each individual item inside. State v. Wisdom, 187 Wash. App. 652, 675, 349 P.3d 953, 963 (2015), *as amended on reconsideration in part* (Sept. 3, 2015).

In State v. Houser, 95 Wash.2d 143, 622 P.2d 1218 (1980), this Court suppressed evidence of drugs obtained through a warrantless search of a toiletry bag located in the locked trunk of an arrestee's impounded vehicle. This Court held "where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents." Id., *citing* Houser, 95 Wash.2d at 158, 622 P.2d 1218. This Court recognized a citizen places personal items in luggage to transport the items in privacy and with dignity. For that reason, citizens have a significant privacy interest in their personal luggage, as opposed to other containers. Id., *citing* Houser, 95 Wn.2d at 157–58.

In State v. White, 135 Wash.2d 761, 958 P.2d 982 (1998), this Court adopted its Houser ruling and concluded a permissible scope of an inventory search does not include locked containers or trunks "absent a manifest necessity for conducting such a search." Houser, 95 Wash.2d at 156, 622 P.2d 1218; *see* White, 135 Wash.2d at 771, 958 P.2d 982 ("possibility of theft does not rise to the level of manifest necessity"); State v. Tyler, 177

Wash.2d 690, 711–12, 302 P.3d 165, 176 (2013) *citing* State v. White 135 Wash.2d at 771, 958 P.2d 982.

Similarly, in State v. Dugas, 109 Wash.App. 592, 599, 36 P.3d 577 (2001), Division One Court of Appeals concluded it was unreasonable for officers to search inside a closed container and held "the purposes of an inventory search do not justify opening a closed container located inside a jacket pocket when there is no indication of dangerous contents." State v. Dunham, 194 Wash. App. 744, 750, 379 P.3d 958, 962 (2016); Dugas, 109 Wash.App. at 595, 36 P.3d 577.

Houser, White, and Dugas reinforce without either consent, a warrant, or substantial evidence to show there is a manifest necessity to search a closed container, police cannot. Without any of these reasons present in State v. Tellvik, the only other reason officers would have had to search the CD case would have been to collect evidence. Consequently, there was no basis for the trial court to conclude they had a valid and legitimate interest to open the case, therefore, Division Three's decision to reverse should stand.

VI. CONCLUSION

We believe the State has not met a requisite criterion under RAP 13.4(b). Therefore, we respectfully ask this court to deny its petition for review.

Respectfully submitted this 13th day of August, 2018.

s/Tanesha L. Canzater
Tanesha La'Trelle Canzater, WSBA# 34341
Attorney for Clark Allen Tellvik
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362- 2435 (mobile office)
(703) 329-4082 (fax)
Canz2@aol.com

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

STATE OF WASHINGTON, Respondent, v. CLARK ALLEN TELLVIK, Appellant.	)))))))))	No. 34525-4-III UNPUBLISHED OPINION

PENNELL, J. — Clark Allan Tellvik appeals his convictions for first degree burglary, possession of a stolen vehicle, possession with intent to deliver a controlled substance, making or having burglary tools, possession of a stolen firearm, and second degree unlawful possession of a firearm. We reverse Mr. Tellvik's controlled substance conviction, as the evidence in support of that conviction was obtained during an invalid inventory search. The remainder of Mr. Tellvik's convictions are affirmed.

BACKGROUND

The facts of Mr. Tellvik's case are set forth in our decision in the companion case of *State v. Peck*, No. 34496-7-III (Wash. Ct. App. May 8, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/344967_unp.pdf. Those facts need not be recounted in detail here. In summary, a property owner in Ellensburg named Laura Poulter was alerted by video surveillance equipment that a suspicious person was at her residence. A call was placed to 911 and Ms. Poulter, who was visiting friends in Cle Elum, then headed home.

When police arrived at Ms. Poulter's property, they found Mr. Tellvik and Michael Peck in the driveway. The two men were attempting to dislodge a truck that had become stuck in the snow. Further investigation revealed the truck was stolen. Mr. Tellvik and Mr. Peck were arrested and officers performed an inventory search of the truck. The search uncovered a black nylon case that looked like it was designed to hold compact discs (CDs). Officers opened the case and found packaged methamphetamine, an electric scale, and a smoking pipe.

During the days following this incident, Ms. Poulter reviewed the surveillance video of her residence. She came to believe that she saw one of the two men drop a gun in the snow. She believed the gun was still there and called the police to come out and

look. By that time, Ms. Poulter's driveway had been plowed and the area where the truck had been parked was buried in compact snow. Officers responded to Ms. Poulter's residence and looked through the driveway. Their initial search was unfruitful. After Ms. Poulter continued to insist that a gun had been hidden on her property, the police returned with a metal detector and located a handgun.

Mr. Tellvik was charged with first degree burglary, possession of a stolen vehicle, possession with the intent to deliver a controlled substance, third degree theft, making or having burglary tools, possession of a stolen firearm, and second degree unlawful possession of a firearm.

During pretrial proceedings, Mr. Tellvik joined Mr. Peck's motion to suppress the fruits of the inventory search. The trial court denied the motion, but did not enter written findings of fact and conclusions of law until nearly a year later on March 31, 2017.

Also prior to trial, Mr. Tellvik moved for an order prohibiting the State from showing the jury a copy of the surveillance video that had been modified to include captions, noting where the gun was believed to have been dropped. The trial court granted this motion. The court prohibited any "commenting on the evidence." Report of Proceedings (RP) (May 10, 2016) at 210. However, the court specified that witnesses would be able to "describe what it is they think they're seeing" on the video. *Id*. Defense

counsel raised a concern that law enforcement officers, who might be viewed by the jurors as having heightened credibility, should not be able to tell the jurors what is depicted in the video. The court agreed this concern was reasonable. The court ruled that even though witnesses would be allowed to testify as to what they thought they saw in the video, they should not phrase their testimony in terms of what was actually depicted.

At trial, Ms. Poulter was the State's first witness. During questioning about the surveillance video, Ms. Poulter volunteered that what she saw in the video was a gun. She testified, "I saw the gun. . . . [W]ell, I know for sure it was a gun," and "I believe—I know for sure because we still-framed it right on the gun." RP (May 11, 2016) at 330. Ms. Poulter further testified, "it couldn't have been anything but a gun." *Id*. Mr. Tellvik's counsel objected to Ms. Poulter's statements, commenting she "doesn't know for sure what anything was." *Id*. The court overruled the objection. No other witness testified definitively about whether the object in the video was a gun. Mr. Tellvik's attorney did not seek a mistrial.

The jury found Mr. Tellvik guilty of all charges except third degree theft. The court sentenced Mr. Tellvik to 267.5 months' total confinement. Mr. Tellvik appeals.

ANALYSIS

Motion to suppress evidence—inventory search

For the same reasons set forth in our decision in *Peck*, we agree with Mr. Tellvik that the contents of the CD case should have been suppressed as fruits of an illegal inventory search. *Peck*, No. 34496-7-III, slip op. at 7-9. Because the police officers lacked either consent or exigent circumstances, the closed CD case should have been inventoried as a sealed unit. *State v. Wisdom*, 187 Wn. App. 652, 671, 675-76, 349 P.3d 953 (2015); *State v. Houser*, 95 Wn.2d 143, 158, 622 P.2d 1218 (1980). The doctrine of automatic standing applies in this case and confers on Mr. Tellvik the ability to challenge the police search. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007).

The trial court should have granted the motion to suppress the contents of the closed CD case. Mr. Tellvik's conviction for possession of a controlled substance must therefore be reversed. The trial court's failure to enter timely findings of fact and conclusions of law is moot.

Ineffective assistance of counsel

Mr. Tellvik argues his counsel provided ineffective assistance because she failed to move for a mistrial after Ms. Poulter violated the court's in limine ruling by testifying that she knew she saw a gun depicted in the surveillance video. Mr. Tellvik also contends

that had counsel moved for a mistrial, the trial court would have granted the motion. Ineffective assistance of counsel is a manifest error affecting a constitutional right that can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Brown*, 159 Wn. App. 1, 17, 248 P.3d 518 (2010).

To demonstrate ineffective assistance of counsel, Mr. Tellvik must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To show prejudice, Mr. Tellvik must demonstrate there is a probability that, but for counsel's deficient performance, "the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. There is a strong presumption of effective assistance, and Mr. Tellvik bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Failure to move for a mistrial does not constitute ineffective assistance where it is clear that counsel's motion would have been denied. "A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the

defendant will be tried fairly." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). Three factors are necessary to consider when assessing whether an error warrants a new trial: the seriousness of the alleged error, whether erroneously admitted evidence was cumulative, and whether a proper curative instruction was given to the jury. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

Here, we find no error that would have warranted a mistrial. Ms. Poulter's testimony that she saw a gun depicted on the surveillance video did not carry any special weight that could have prejudiced the jury. Ms. Poulter was not a law enforcement officer. She did not purport to have any unique ability to decipher the video or perceive firearms. The video was admitted into evidence free from captions and the jurors were afforded the same opportunity to assess its contents as Ms. Poulter. At the same time, Ms. Poulter's insistence that she believed she saw a gun in the video was relevant to explain why the police twice returned to Ms. Poulter's residence after the night of Mr. Tellvik's arrest in order to search the driveway.

Given that Ms. Poulter's testimony helped explain why law enforcement went to unusual lengths to search the driveway and that Ms. Poulter's testimony was not particularly prejudicial, the trial court acted within its discretion to alter its in limine

ruling and permit Ms. Poulter's testimony. Mr. Tellvik has not, therefore, shown that counsel was ineffective in failing to request a mistrial.

CONCLUSION

We reverse Mr. Tellvik's conviction for possession of a controlled substance with intent to deliver and the associated firearm enhancement, affirm his remaining convictions, and remand for resentencing consistent with the terms of this opinion.

A majority of the panel has determined 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.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.

LAW OFFICES OF TANESHA L. CANZATER

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Address:
PO BOX 29737
BELLINGHAM, WA, 98228-1737
Phone: 877-710-1333

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DECLARATION OF SERVICE

August 13, 2018

Case Name: **State of Washington v. Clark Allen Tellvik**
Supreme Court Case Number: **960739**

I declare under penalty and perjury of Washington State laws that on August 13, 2018, I filed this **RESPONSE TO STATE'S PETITION FOR DISCRETIONARY REVIEW** with this Court and served copies to:

KITTITAS COUNTY PROSECUTING ATTORNEY'S OFFICE
greg.zemple@co.kittitas.wa.us
prosecutor@co.kittitas.wa.us
*The prosecutor's office accepts service via email.

CLARK ALLEN TELLVIK, DOC# 863699
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

s/Tanesha L. Canzater
Tanesha L. Canzater, WSBA # 34341
Post Office Box 29737
Bellingham, Washington 98228
(360) 362-2435 (mobile)
(703) 329-4082 (facsimile)
Canz2@aol.com

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