

FILED
SUPREME COURT
STATE OF WASHINGTON
1/6/2020 4:34 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 97829-8
(Court of Appeals No. 77513-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

HEATHER ALEXANDER,

Respondent.

ANSWER

Jessica Wolfe
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUE PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

E. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) 6

State v. Alexander, ___ Wn. App. ___, 449 P.3d 1070 (2019)..... passim

State v. Armenta, 143 Wn.2d 1, 948 P.2d 1280 (1997) 7

State v. Brock, 184 Wn.2d 148, 355 P.3d 1118 (2015)..... 5, 6, 9

State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013) passim

State v. Castoerna-Gonzalez, 2019 WL 118401, 7 Wn. App. 2d 1006 (Jan. 7, 2019) (unpublished)..... 11

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996)..... 4

State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002)..... 9

State v. MacDicken, 179 Wn.2d 936, 319 P.3d 31 (2014)..... 7, 10

State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999)..... 7

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 9

State v. Villela, ___ Wn. ___, 450 P.3d 170 (2019) 5

States v. Tavolacci, 895 F.2d 1423 (D.C. Cir. 1990)..... 10

Rules

GR 14.1 11

A. INTRODUCTION

When Heather Alexander was arrested, she was sitting on a log next to her friend with a backpack lying behind her, the straps facing down. Although Ms. Alexander acknowledged the backpack belonged to her, the arresting officer did not observe the backpack touching her. Her friend offered to take the backpack as Ms. Alexander was going to jail. However, the officer insisted he would search all of Ms. Alexander's personal property, including the backpack, as a search incident to arrest. The search revealed a small amount of methamphetamine.

The Court of Appeals correctly held this was not a valid search incident to arrest under article I, section 7 of the state constitution. The Court of Appeals properly relied on this Court's decisions in *Byrd*, *MacDicken*, and *Brock* that the item to be searched must be in the arrestee's "actual and exclusive possession." The State now petitions for review, but fails to demonstrate the Court of Appeals' opinion is anything more than a straightforward application of this Court's precedent. Accordingly, Ms. Alexander asks that this Court deny review.

B. ISSUE PRESENTED FOR REVIEW

Under Article I, Section 7, a warrantless search incident to arrest may include personal items immediately associated with the arrestee. The item to be searched must be within the arrestee's actual and exclusive

possession at or immediately preceding the time of arrest. Here, Ms. Alexander was sitting next to a friend with a backpack lying behind her, but not clearly touching her, when she was arrested. Accordingly, she did not have actual and exclusive possession of the backpack. Did the Court of Appeals correctly hold the warrantless search violated article I, section 7 of the state constitution?

C. STATEMENT OF THE CASE

Everett Police Officer Troy Moss responded to a trespassing call involving a vacant lot behind a business. CP 93. Upon arriving, Officer Moss saw Delane Slater and Heather Alexander seated close to each other on a log in the lot. CP 93–94. Officer Moss informed Mr. Slater and Ms. Alexander they were trespassing and checked their names for outstanding warrants. CP 94. During the interaction, Officer Moss noticed a backpack lying on the ground behind Ms. Alexander with the straps facing down. RP 11. Officer Moss couldn't tell if the backpack was touching Ms. Alexander. RP 18. Ms. Alexander acknowledged the backpack belonged to her. CP 94.

Officer Moss discovered Ms. Alexander had an outstanding Department of Corrections warrant and placed her under arrest. CP 94. Officer Moss told Mr. Slater, who did not present any safety concerns, to leave the vacant lot. CP 94, 116; RP 22. Mr. Slater asked Ms. Alexander

if she wanted him to take the backpack since she was going to jail. CP 94, 116. She agreed. CP 94. However, Officer Moss stated he would search all of Ms. Alexander's personal property incident to arrest. CP 94, 116.

Officer Moss handcuffed Ms. Alexander, conducted a "quick safety sweep," and escorted her to the back of the patrol car. RP 12; CP 116. Officer Moss also carried the backpack and placed it on the top of the trunk of the car. RP 13. A search of the backpack revealed a small amount of methamphetamine, and Ms. Alexander was charged with a single count of possessing a controlled substance, committed while on community custody. CP 116, 119.

Prior to trial, Ms. Alexander moved to suppress the methamphetamine, arguing the search of the backpack was not a valid search incident to arrest. CP 106–11. Specifically, she argued she was not in actual possession of the backpack at the time of arrest. CP 109. The trial court denied the motion, ruling that safety concerns permitted the search. CP 95. However, the trial court did not find Ms. Alexander had actual possession of the backpack at any point during the arrest. *See* CP 93–95 Ms. Alexander was convicted after a jury trial. CP 45.

In a published opinion, the Court of Appeals found the search was unconstitutional under article I, section 7 of the state constitution. *See State v. Alexander*, __ Wn. App. __, 449 P.3d 1070, 1072 (2019). The

Court held Officer Moss’ search of the backpack was not a valid search of Ms. Alexander’s person incident to arrest. *See id.* Relying on this Court’s precedent, the Court of Appeals recognized “the arrestee’s person is limited to those items that are within the arrestee’s actual and exclusive possession at or immediately preceding the time of arrest.” *Id.* at 1076 (citing *State v. Byrd*, 178 Wn.2d 611, 623, 310 P.3d 793 (2013)). The Court of Appeals determined Ms. Alexander did not have actual and exclusive possession of the backpack at the time of arrest, as it was “merely sitting behind her” and she was not “holding, wearing, or carrying the backpack at any time during her contact with Officer Moss.” *Id.* at 1075. The Court of Appeals rejected the State’s argument to the contrary, noting “the State cites no authority for the proposition that proximity and ownership alone constitute actual and exclusive possession.” *Id.*

The State now petitions for review.

D. ARGUMENT

“[W]arrantless searches are unreasonable per se” under article I, section 7 of the state constitution. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citations and quotation marks omitted). There are a few “jealously and carefully drawn exceptions to the warrant requirement” where the societal costs of obtaining a warrant—such as danger to law enforcement or the risk of destruction of evidence—

outweigh the reasons for the warrant requirement. *State v. Villela*, ___ Wn. ___, 450 P.3d 170, 174 (2019) (citations and quotation marks omitted); *Hendrickson*, 129 Wn.2d at 70. The State bears the burden of demonstrating that a warrantless search or seizure falls within the scope of one of the narrow exceptions to the rule. *See Villela*, 450 P.2d at 71.

One exception to the warrant requirement is a search incident to arrest. *Byrd*, 178 Wn.2d at 616–17. There are two kinds of searches incident to arrest: “(1) a search of the arrestee’s person (including those personal effects immediately associated with his or her person—such as purses, backpacks, or even luggage) and (2) a search of the area within the arrestee’s immediate control.” *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015).

The “immediate control” search exception applies only when the arrestee is “unsecured and within reaching distance” of the item to be searched, and is intended to protect arresting officers and safeguard evidence the arrestee might conceal or destroy. *See Arizona v. Gant*, 556 U.S. 332, 343–44, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). The “immediate control” search exception does not apply to the case at bar as Ms. Alexander was both handcuffed and beyond the reach of the backpack at the time of the search. RP 12–13.

Thus the only issue presented by this case is whether Officer Moss’s search of the backpack was a proper search of Ms. Alexander’s person and immediately associated personal effects. *See Brock*, 184 Wn.2d at 154. This search exception “does not extend to all articles in an arrestee’s constructive possession, but only those personal articles in the arrestee’s *actual and exclusive possession* at or immediately preceding the time of arrest.” *Byrd*, 178 Wn.2d at 623 (emphasis added).

As the Court of Appeals recognized, the trial court did not find Ms. Alexander had actual and exclusive possession of the backpack at the time of arrest. *See Alexander*, 449 P.3d at 1075; *see also* CP 93–95. In the absence of such a finding, this Court must indulge the presumption the State failed to meet its “heavy burden” on the issue. *See id.* (citing *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999) and *State v. Armenta*, 143 Wn.2d 1, 14, 948 P.2d 1280 (1997)).

The Court of Appeals went further, engaging in a careful analysis of this Court’s precedent applying the “actual and exclusive possession” rule to the facts of this case. *See Alexander*, 449 P.3d at 1073–76. Specifically, the Court of Appeals analyzed three seminal cases decided by this Court in the past decade: *Byrd*, *MacDicken*, and *Brock*. *See id.*

In *Byrd*, the defendant had a purse containing methamphetamine in her lap at the time of arrest. 178 Wn.2d at 615. Based on those facts, this

Court upheld the search, reasoning “Byrd’s purse was unquestionably an article ‘immediately associated’ with her person” because “[t]he purse left Byrd’s hands only after her arrest.” *Id.* at 623–24.

In *State v. MacDicken*, the defendant was arrested in a hotel while carrying a laptop bag and pushing a rolling duffle bag. 179 Wn.2d 936, 939, 319 P.3d 31 (2014). As the handcuffed defendant stood next to a patrol car, an officer searched the bags. *Id.* This Court upheld the search as the bags were in the defendant’s “actual and exclusive possession” at the time of the arrest. *Id.* at 942.

Finally, in *Brock*, the defendant was stopped by an officer while wearing a backpack. 184 Wn.2d at 151. The officer removed the backpack and placed it on his vehicle for safety reasons. *Id.* at 152. After the defendant gave what the officer determined was a false name, the officer arrested the defendant and searched the backpack, finding drugs. *Id.* 151–53. This Court again upheld the search, noting the defendant “wore the backpack at the very moment he was stopped” and “[t]he arrest process began” once the officer informed the defendant he was not free to leave. *Id.* at 159.

As the Court of Appeals recognized below, the justification in each of these three cases was the searched item was an extension of the defendant’s person because they were “holding, wearing, or carrying” the

item. *Alexander*, 449 P.3d at 1075. Here, Ms. Alexander’s backpack “was merely sitting behind her at the time of her arrest.” *See id.* Accordingly, the Court of Appeals concluded “*at most . . . Alexander could immediately have reduced the backpack to her actual possession, i.e., [] Alexander had dominion and control—and thus constructive possession—over the backpack But actual and exclusive possession, not merely constructive possession, is required under the time-of-arrest rule.*” *Id.* at 1075 (citing *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994), *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002), and *Byrd*, 178 Wn.2d at 623) (emphasis in the original).

The Court of Appeals’ opinion is a straightforward application of this Court’s precedent. In contrast, the State’s petition for review urges an unwarranted expansion of a narrow exception, relying on dissimilar and non-binding caselaw.

The State argues the search was valid because the item searched was a backpack, “one of the items specifically listed in *Brock* as a personal effect immediately associated with the arrestee’s person.” Petition for Review at 4. However, the “time-of-arrest” rule does not contemplate all personal items within a specific class are searchable upon arrest. The rule mandates the item be in the arrestee’s “actual and exclusive possession at or immediately preceding the time of arrest.” *Brock*, 184 Wn.2d at 154

(citing *Byrd*, 178 Wn.2d at 623). *Brock* merely listed a backpack as *an example* of the type of item that could be within an arrestee's actual and exclusive possession, along with purses and luggage. *See id.* The State's assertion that *all* backpacks are subject to search incident to arrest would unnecessarily expand an exception intended to be "jealously guarded." *Byrd*, 178 Wn.2d at 623.

The State also asserts Ms. Alexander's ownership of the backpack, coupled with the fact that "no one else had any possession of it," was sufficient to establish "actual and exclusive" possession. Brief of Respondent at 4. However, ownership is irrelevant to the search incident to arrest rule. *See MacDicken*, 179 Wn.2d at 939 (upholding a search of a stolen laptop bag). Further, the rule requires the *arrestee* must have actual and exclusive possession; it is not a rule of default possession because no one else has actual and exclusive possession at the time of arrest. *See Byrd*, 178 Wn.2d at 623.

As it did below, the State insists this case is analogous to *United States v. Tavolacci*, 895 F.2d 1423 (D.C. Cir. 1990), a federal case which received a passing string citation in *Byrd*. *See* 178 Wn.2d at 621. *Tavolacci* involved a search of luggage carried by the arrestee, and *Byrd* cited it as part of an illustrative list cases involving personal items that

could be considered “immediately associated” with an arrestee’s person.

See id.

However, as the Court of Appeals pointed out below, *Tavolacci* is more analogous to *Byrd*, *MacDicken*, and *Brock*, in which the item searched was carried by the arrestee at the time of arrest. *See Alexander*, 449 P.3d at 1076. The Court also noted that, as a federal case interpreting the federal constitution, *Tavolacci* is “not binding in any event.” *See id.* The State’s reliance on an unpublished Court of Appeals decision is similarly not binding and thus does not, as the State suggests, create a split in Division One. *See* Petition for Review at 6 (citing *State v. Castoerna-Gonzalez*, 2019 WL 118401, 7 Wn. App. 2d 1006 (Jan. 7, 2019) (unpublished)); GR 14.1 (“Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court.”).

The Court of Appeals applied this Court’s precedent in correctly holding the search of Ms. Alexander’s backpack exceeded the scope of the time-of-arrest rule. The State’s arguments to the contrary would “erode the distinction between the arrestee’s person and the arrestee’s grab area.” *Alexander*, 449 P.3d at 1075. This Court should deny review.

E. CONCLUSION

For the reasons stated above, this Court should deny the State's
Petition for Review.

DATED this 6th day of January, 2020.

Respectfully submitted,

/s Jessica Wolfe

State Bar Number 52068

Washington Appellate Project (91052)

1511 Third Ave, Suite 610

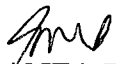
Seattle, WA 98101

Telephone: (206) 587-2711

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 97829-8**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- petitioner Seth Fine
[sfine@snoco.org]
[Diane.Kremenich@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney
- respondent
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 6, 2020

WASHINGTON APPELLATE PROJECT

January 06, 2020 - 4:34 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97829-8
Appellate Court Case Title: State of Washington v. Heather Anne Alexander
Superior Court Case Number: 17-1-01497-9

The following documents have been uploaded:

- 978298_Answer_Reply_20200106163422SC679937_1952.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was washapp.010620-01.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- greg@washapp.org
- sfine@snoco.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Jessica Constance Wolfe - Email: jessica@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200106163422SC679937