No. 43945-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bradley Fulton,

Appellant.

Kitsap County Superior Court Cause No. 12-1-00165-9

The Honorable Judge Sally F. Olsen

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Fulton's motion to suppress.
2. The trial court erred by admitting evidence obtained in violation of Mr. Fulton's right to be free from unreasonable searches and seizures under the Fourth Amendment.
3. The trial court erred by admitting evidence obtained in violation of Mr. Fulton's right to privacy under Wash. Const. art. I, s. 7.
4. The police unlawfully searched Mr. Fulton's satchel after handcuffing Mr. Fulton and locking him in a patrol car.
5. The trial court erred by adopting Finding of Fact No. XII.
6. The trial court erred by adopting Conclusion of Law No. II.
7. The trial court erred by adopting Conclusion of Law No. III.
8. The trial court erred by adopting Conclusion of Law No. IV.
9. The trial court erred by adopting Conclusion of Law No. V.
10. The trial court erred by adopting Conclusion of Law No. VI.
11. The trial court erred by adopting Conclusion of Law No. VII.
12. The trial court erred by adopting Conclusion of Law No. VIII.
13. The trial court erred by adopting Conclusion of Law No. IX.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Evidence seized without a warrant is inadmissible at trial, unless the prosecution establishes an exception to the warrant requirement. In this case, police arrested, handcuffed, and locked Mr. Fulton in the back of a patrol car before searching his satchel. Did the trial court err by admitting illegally seized evidence in violation of Mr. Fulton's rights under the Fourth Amendment and Wash. Const. art. I, s. 7?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While sitting on a bench outside a Safeway, Bradley Fulton was approached by Kitsap County Sheriff's Deputy Greg Rice. Findings of Fact and Conclusions of Law, p. 2, Supp. CP. Deputy Rice told him he was investigating a shoplifting complaint at a nearby auto parts store. RP 9. The complaining party had seen Mr. Fulton in the store, believed he had taken items without paying, and had watched him move something from his pocket to his satchel as he walked away. Findings of Fact and Conclusions of Law, pp. 1-2, Supp. CP.

Almost immediately after making contact, Deputy Rice handcuffed Mr. Fulton. Rice was concerned because Mr. Fulton carried a large knife for protection. The knife handle was protected by metal knuckles, and thus qualified as an illegal dangerous weapon.[1] Rice arrested Mr. Fulton. Findings of Fact and Conclusions of Law, p. 2, Supp. CP.

Mr. Fulton had left his satchel on the bench where he'd been sitting. He asked the deputy to bring it along to the jail, and Rice retrieved the satchel from the bench. Findings of Fact and Conclusions of Law, p. 2, Supp. CP. Deputy Rice later testified that he would have seized the

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[1] See RCW 9.41.250(1).

satchel even if Mr. Fulton hadn't asked him to take it. Findings of Fact and Conclusions of Law, p. 2, Supp. CP.

Mr. Fulton submitted to a search, and sat in the back of the deputy's patrol car. After Mr. Fulton had been secured, Deputy Rice searched the satchel and found methamphetamine. Findings of Fact and Conclusions of Law, p. 3, Supp. CP.

Mr. Fulton was charged with possession, and he moved to suppress the evidence. CP 1; Motion to Suppress, Memorandum of Authorities, Supp. CP. At a hearing on the motion, Deputy Rice testified that the Kitsap County Sheriff's Department policy was to search "all persons and personal property… prior to transporting, entering into evidence, you know, taking to jail." RP 18-19.

The motion to suppress was denied, and the court entered Findings of Fact and Conclusions of Law. Supp. CP. Mr. Fulton waived his right to a jury trial and submitted the case on stipulated facts. Stipulated Trial, Supp. CP. Following conviction and sentencing, he timely appealed. CP 20.

ARGUMENT

THE ADMISSION OF EVIDENCE SEIZED WITHOUT A WARRANT VIOLATED MR. FULTON'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AND HIS RIGHT TO PRIVACY UNDER WASH. CONST. ART. I, S. 7.

A. Standard of Review

The validity of a warrantless search is reviewed de novo. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed de novo. Id. In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); State v. Byrd, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002) (Byrd I).

B. The state and federal constitutions prohibit warrantless searches, absent an exception to the warrant requirement.

Both the Fourth Amendment and Wash. Const. art. I, s. 7 prohibit searches or seizures undertaken without a search warrant. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). This "blanket prohibition against warrantless searches is subject to a few well guarded exceptions…" Id, at 635. Without probable cause and a warrant, an officer is limited in what she or he can do. State v. Setterstrom, 163

Wn.2d 621, 626, 183 P.3d 1075 (2008). Furthermore, where police have ample opportunity to obtain a warrant, courts do not look kindly on their failure to do so. State v. Ferrier, 136 Wn.2d 103, 115, 960 P.2d 927 (1998).

The state bears the heavy burden of showing that a search or seizure falls within one of these narrowly drawn exceptions. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). Before evidence seized without a warrant can be admitted at trial, the state must establish an exception to the warrant requirement by clear and convincing evidence. Id.

In this case, the lower court upheld the warrantless search as "a lawful search incident to the defendant's arrest." Findings of Fact and Conclusions of Law, Supp. CP. In addition, the court concluded that the search was justified by "exigent circumstances," the potential for civil liability if the officer left the bag unattended, and the "safety risk… posed to both the officer and the community," which the court further described as "a legitimate safety concern" and "a real safety risk." Findings of Fact and Conclusions of Law, Supp. CP.

C. The search was not properly incident to Mr. Fulton's arrest.

One exception to the search warrant requirement is where the search is performed incident to arrest. The rationale behind the exception

is that an arrest triggers a concern not only for the officer's safety, but also for the preservation of potentially destructible evidence within the arrestee's control.[2] Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). A search incident to arrest is permitted when it "must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest." State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). The justification vanishes, however, when the search "can be delayed to obtain a warrant without running afoul of those concerns;" under such circumstances, "the warrant must be obtained." Id.

Officers may not search a container that is out of an arrestee's reach at the time of the search. State v. Byrd, 162 Wn. App. 612, 617, 258 P.3d 686, review granted, 173 Wn.2d 1001, 268 P.3d 942 (2011) (Byrd II). In such cases, the justification for the search is absent. Id.

In Byrd, the Court of Appeals analyzed an officer's search of a purse conducted after the arrestee had been secured in a patrol car. Id. The court reversed the conviction and suppressed the evidence:

> Ms. Byrd was secured in a patrol car when her purse was searched. She had no way to access the purse at that time. And the arresting officer was not concerned that she could access a weapon or

[2] The search incident to arrest exception is narrower under Article I, Section 7 than under the Fourth Amendment. State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007).

> destroy evidence. The justifications for the search incident to arrest exception, then, did not exist here. The exception did not apply. And the warrantless search of Ms. Byrd's purse violated the Fourth Amendment.

Id.

Here, as in Byrd, Mr. Fulton had been arrested, handcuffed, and secured in the officer's patrol car at the time of the search. Findings of Fact and Conclusions of Law, Supp. CP. Under these circumstances, the search cannot be justified as incident to arrest. Byrd, at 617. The conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. Id.

D. No exigent circumstances justified the search.

The exigent circumstances exception to the warrant requirement applies when probable cause exists but the delay required to obtain a search warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). The Supreme Court has identified five exigencies that could justify a search under proper circumstances: (1) hot pursuit, (2) fleeing suspect, (3) danger to the arresting officer or the public, (4) the mobility of a vehicle, and (5) the mobility or destruction of evidence. Id. A reviewing court must examine the totality of the circumstances to determine whether or not such exigencies justify a warrantless search. Id.

The prosecution must not only prove the existence of probable cause; it must also show that obtaining a warrant would be impractical. Id, at 371. In Tibbles, for example, the Supreme Court held that exigent circumstances did not justify the warrantless search of a car from which emanated the odor of marijuana:

> To find exigent circumstances based on these bare facts would set the stage for the exigent circumstances exception to swallow the general warrant requirement. It would give the erroneous impression that an exigency may be based on little more than a late-night stop for defective equipment, an officer working alone, and circumstances indicating possible drug possession. This very likely describes any number of encounters between law enforcement and private citizens that occur everyday.

Id.

In this case, even assuming the existence of probable cause, the prosecution failed to prove that it would have been impractical to obtain a search warrant. Mr. Fulton had fully cooperated, and was in custody at the time of the search. Nothing suggested that his satchel contained chemicals, explosives, or anything else that might pose a threat to the public generally. Findings of Fact and Conclusions of Law, Supp. CP. The only "evidence" of danger was that Mr. Fulton carried a knife that qualified as a dangerous weapon. This fact might have raised concern if the satchel had remained within Mr. Fulton's reach; however, with Mr.

Fulton secured at the time of the search, his prior possession of a dangerous weapon did not create any exigency. Tibbles, at 371.

No exigent circumstances justified the warrantless search in this case. Mr. Fulton's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. Tibbles, at 371-372.

E. The search was not a valid inventory search.

The inventory search is a recognized exception to the warrant requirement. State v. White, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998); State v. Smith, 76 Wn. App. 9, 13, 882 P.2d 190 (1994). Such searches "perform an administrative or caretaking function." Smith, at 13. Inventory searches "protect the arrestee's property from unauthorized interference… protect the police from groundless claims that property has not been adequately safeguarded during detention… [and] avert any danger to police or others that may have been posed by the property." Id.

To justify a search under the inventory exception, the prosecution must prove that it was conducted pursuant to "standardized" procedures. United States v. Garreau, 658 F.3d 854, 857 (8th Cir. 2011); Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990); see also State v. Dugas, 109 Wn. App. 592, 597-598, 36 P.3d 577 (2001) ("Inventory searches are regularly upheld when they are conducted according to standardized police procedures which do not give excessive discretion to

the police officers, and when they serve a purpose other than discovering evidence of criminal activity") (emphasis added).

By requiring compliance with standardized procedures, the doctrine removes the inference that police have engaged in a search for evidence. United States v. Taylor, 636 F.3d 461, 464 (8th Cir. 2011), rehearing denied. Under the Fourth Amendment, failure to comply with such standardized procedures can invalidate an inventory search.[3] United States v. Proctor, 489 F.3d 1348, 1354 (D.C. Cir. 2007); see also United States v. Maple, 348 F.3d 260, 265 (D.C. Cir. 2003).

Although the court did not use the phrase "inventory search" in its findings, it did recite factors relating to the inventory search exception. See Conclusions Nos. III-VII, Findings of Fact and Conclusions of Law, Supp. CP. Despite this, the evidence and the court's findings do not justify admission under the inventory search exception.

The prosecution failed to present evidence outlining the Kitsap County Sheriff's Department's actual policies and procedures for inventory searches. See RP generally. Deputy Rice's testimony on the subject was that "our policy and procedure, all persons and personal

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[3] The 8th Circuit will invalidate an inventory search conducted in violation of standard procedure if there is "'[S]omething else'... present to suggest that the police were engaging in their criminal investigatory function, not their caretaking function." Taylor, at 465 (alteration in original) (citation omitted).

property is searched prior to transporting, entering into evidence, you know, taking to jail." RP 18-19.[4]

But a policy to search "all persons and personal property" does not qualify as "standardized criteria" or "established routine." Wells, at 3. Such a policy does not "regulate;" nor is it "designed to produce an inventory," both of which are required under Wells. Id, at 4.

Furthermore, the court did not make any findings on the subject. Findings of Fact and Conclusions of Law, Supp. CP. The lack of findings must be held against the prosecution. Armenta, at 14; Byrd II, at 265. In addition, there is "'[S]omething else'" here: Deputy Rice believed there might have been evidence of shoplifting in the satchel. RP 7; Finding No. IV, Findings of Fact and Conclusions of Law, Supp. CP; cf. Taylor, at 465.

Had Deputy Rice acted in accordance with an established set of policies and procedures, the seizure and inventory of the satchel may have been justified under Wells. See Dugas, at 596 ("A police inventory of an arrestee's possessions 'presents no problem when a person is arrested in some public place while carrying a suitcase or like object…'") (citation

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[4] The trial court's findings erroneously indicate that the policy was to require a search prior to placing property in a patrol car. Findings of Fact and Conclusions of Law, Supp. CP.

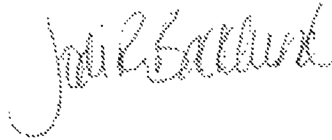
omitted). The prosecution's failure to prove that he did act in compliance with such a policy requires reversal of Mr. Fulton's conviction. The evidence must be suppressed and the case dismissed with prejudice. Wells, at 4.

CONCLUSION

For the foregoing reasons, Mr. Fulton's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on February 13, 2013,

BACKLUND AND MISTRY



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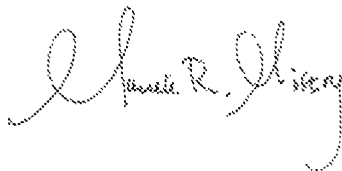

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I certify that on today's date:

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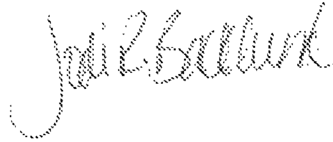

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