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 Reply Brief

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THE SEARCH OF MR. FULTON'S SATCHEL CANNOT BE JUSTIFIED AS A SEARCH INCIDENT TO ARREST.

Where the prosecution seeks to introduce evidence seized without a search warrant, it bears the heavy burden of establishing an exception to the warrant requirement.[1] *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). Here, the trial court erroneously upheld the warrantless intrusion into the satchel as a search incident to Mr. Fulton's arrest. CP 46-50; *see Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

The search incident to arrest exception is narrow. *State v. Patton*, 167 Wn.2d 379, 389, 219 P.3d 651 (2009). The exception is justified by the danger that a suspect will grab a weapon or destroy evidence. *Chimel* 395 U.S. at 763. The justification vanishes when the risk abates. *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). Police are only permitted to search the areas accessible to the suspect *at the time of the search*:

[1] The state must establish the exception by clear and convincing evidence. *Garvin,* 166 Wn.2d at 250. Accordingly, evaluation for "substantial evidence" requires proof that is more substantial than would be sufficient if the burden allowed proof by a preponderance of the evidence. *See In re C.B.*, 61 Wn. App. 280, 285-86, 810 P.2d 518 (1991). Respondent does not mention this heightened standard. Brief of Respondent, p. 6.

> [I]f a possibility exists that an arrestee could reach into the area that officers seek to search, both justifications for the search incident to arrest exception are present. Once officers have obtained exclusive control of an item, such that no danger exists that the arrestee might gain access to the item to seize a weapon or destroy evidence, officers may not conduct a warrantless search of that item incident to the arrest.

State v. MacDicken, 171 Wn. App. 169, 175, 286 P.3d 413 (2012), *review granted* 177 Wn.2d 1004, 300 P.3d 416 (2013).

If, following arrest, a suspect no longer has access to a particular location, the search-incident-to-arrest exception cannot justify a search of that location. In the absence of exigent circumstances, the constitution draws a line "at the point where the property to be searched comes under the exclusive dominion of police authority." *United States v. Chadwick*, 433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) *overruled in part on other grounds by California v. Acevedo*, 500 U.S. 565, 579, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

When police have the option of obtaining a warrant without risk, they *must* do so. *Valdez*, 167 Wn.2d at 777. Thus officers may not search a purse that is out of the 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).[2]

[2] Oral argument in *Byrd* was held on May 15, 2012. A decision in *Byrd* would likely resolve the issues in this case.

This case is controlled by *Byrd.*

Here, as in *Byrd,* Mr. Fulton's satchel was not within reach at the time it was searched: he had been handcuffed and locked in the back of the officer's patrol car. Furthermore, Mr. Fulton cooperated fully with the police. Finally, there was no indication that he had a history of violence, and he was not suspected of a violent crime. CP 46-47.

These factors also distinguish Mr. Fulton's case from *State v. Ellison*, 172 Wn. App. 710, 291 P.3d 921 (2013). In *Ellison,* police responded to a domestic violence call. The suspect had multiple warrants, including one for a domestic violence assault. He was discovered hiding on a patio, and refused to show his hands or follow instructions when contacted. Although he was arrested and handcuffed, he remained on the patio, in close proximity to his backpack when police searched it. *Id.,* at 713-714. The Court of Appeals upheld the search, noting that the circumstances created a heightened concern for officer safety, and that defendant, "although handcuffed at the scene… was not securely placed in the officer's patrol car before the search of his backpack." *Ellison*, 172 Wn. App. at 722.

Contrary to Respondent's argument, the facts here resemble those in *Byrd,* not *Ellison. See* Brief of Respondent, pp. 6, 8-11. Even if all other distinctions are ignored, the critical fact that distinguishes Mr.

Fulton's case from *Ellison* is the location of the suspect at the time of the search. Mr. Fulton was handcuffed and detained in the patrol car when Rice searched the satchel. CP 46-47. This is fatal to any claim that the search was properly incident to arrest. *Byrd*, 162 Wn. App. at 617; *see also MacDicken*, 171 Wn. App. at 175.

There is no general "officer safety" exception to the warrant requirement. In order to justify a search based on officer safety, the prosecution must establish an exception to the warrant clause, in addition to any concern for officer safety. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (limited pat-down search permitted if specific and articulable facts warrant a reasonable belief that suspect is involved in criminal activity, and is presently armed and dangerous); *Maryland v. Buie*, 494 U.S. 325, 337, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) ("The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.")

Where an officer takes custody of a suspect's property, the proper course of action is to search pursuant to a valid inventory protocol.[3] *See* Appellant's Opening Brief, pp. 9-12; *State v. Smith*, 76 Wn. App. 9, 13, 882 P.2d 190 (1994). Among other things, such searches "avert any danger to police or others that may have been posed by the property." *Id.* Inventory searches are thus specifically designed to ensure that property does not contain "anything that can go boom." RP 16. Rice did not have to choose between leaving the bag on the bench or putting it in his car without knowing its contents. Standardized inventory searches are meant to avoid this dilemma.[4] *Id.*

The state did not establish a valid exception to the warrant requirement. The search was neither a proper search incident to arrest nor a proper inventory search. Accordingly, Mr. Fulton's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Byrd*, 162 Wn. App. at 617.

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[3] Of course, if the officer has probable cause, she or he can obtain a search warrant prior to searching. *See Valdez*, 167 Wn.2d at 777.

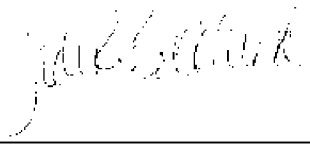
[4] Respondent apparently concedes that the search cannot be justified as an inventory search. *See* Brief of Respondent, p. 7 ([T]he State did not claim. and the trial court did not find that the search of the bag was justified as an inventory search.") This implicit concession is entirely justified, because the state failed to prove facts sufficient to support the exception. *See* Appellant's Opening Brief, pp. 9-12.

CONCLUSION

The search was not properly incident to Mr. Fulton's arrest. Respondent implicitly concedes that the search was not a valid inventory search. The conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on July 1, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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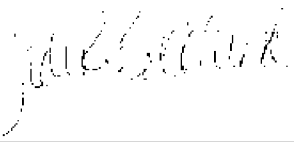
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 1, 2013.



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