NO. 96069-1

Supreme Court of the State of Washington

STATE OF WASHINGTON, Petitioner

v.

MICHAEL NELSON PECK, Respondent

ANSWER TO PETITION FOR REVIEW

COURT OF APPEALS, DIVISION III NO. 34496-7-III
KITTITAS COUNTY SUPERIOR COURT, NO. 16-1-00020-6

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Cases:

A) IDENTITY OF RESPONDENT

Michael Nelson Peck, defendant in *State v. Peck*, Kittitas County Superior Court Case No. 16-1-00020-6, appellant in *State v. Peck*, Court of Appeals Case No. 34496-7-III, seeks the relief described in Part B, below.

B) COURT OF APPEALS DECISION

Mr. Peck requests this Court decline to accept the State's Corrected Petition for Discretionary Review concerning Washington State Court of Appeals, Division III's May 8, 2018 unpublished opinion in *State v. Peck*, Case No. 34496-7-III, which "reverse[d] the controlled substance conviction" in *State v. Peck*, Kittitas County Superior Court Case No. 16-1-00020-6.

C) ISSUE PRESENTED FOR REVIEW

Does the State's Corrected Petition for Discretionary Review involve an issue of substantial public interest that should be determined by the Supreme Court? RAP 13.4(b)(4).

D) STATEMENT OF THE CASE

Kittitas County Sheriff's Office Deputies arrested Clark Tellvik and Michael Peck for, *inter alia*, "possession of a stolen vehicle." RP 30-31, 43, 46, 77, 79, 82, 87-88. The vehicle was impounded. RP 41. Deputy McKean, assisted by Deputy Kivi, searched the vehicle. RP 41, 43, 100-

101. As a result of that search, Deputy McKean found a "black zippered...CD case" in the vehicle. RP 108. Deputy McKean "opened" the CD case. *Id.* Deputy McKean observed a "[s]ubstantial amount of crystalline substance" which "appeared to be crystal methamphetamine", individually packaged" "[a] digital scale," and "[a] glass smoking pipe" inside the CD case. RP 109. Deputy McKean did not seek a search warrant for the vehicle in general, or the CD case in particular.

Mr. Peck was charged with, *inter alia*, Possession with Intent to Deliver a Controlled Substance with a firearm enhancement. CP 212-214.

Before trial, Mr. Peck moved to suppress "all evidence obtained as a result of an unlawful search and seizure, which includes but [is] not limited to drugs found in an automobile occupied by [Mr. Peck] just prior to [his] arrest." CP 19. The written motion focused on the search of the pickup truck in general, and the "black zippered bag in the vehicle" in particular. CP 24. The State responded in writing to that motion. CP 47-53.

The trial court conducted an evidentiary hearing on that motion. RP 20-136, 159-69. The trial court heard argument of the parties. CP 180-90. The trial court issued an oral ruling, denying the motion. CP 190-92. More than ten months later, the trial court entered written findings of fact

and conclusions of law concerning that hearing which modified and expanded on the court's oral ruling. CP 254-58.

After trial, the jury found Mr. Peck guilty of Possession with Intent to Deliver a Controlled Substance, and found Mr. Peck was "armed with a firearm" as to that count. CP 215, 217-23, 228-241.

In an unpublished opinion, the Court of Appeals "reverse[d] Mr. Peck's conviction for possession with intent to deliver a controlled substance and the associated firearm enhancement" and "remand[ed] for resentencing." *State v. Peck*, 34496-7-III, slip op. at 14 (Wash. Ct. App., decided May 8, 2018, reconsid. denied June 12, 2018). The Court of Appeals held the deputies conducting an inventory search should have "inventor[ied any closed] container as a sealed unit." *Id.*, slip op. at 8. Because the deputies instead "opened a closed container in the absence of any exigency and without consent," the deputies exceeded the scope of a valid inventory search, and thus the trial "court erred in denying the motion to suppress." *Id.*, slip op. at 8-9.

The State "ask[ed] this Court to accept review of the Court of Appeals decision[]." State's Corrected Petition for Discretionary Review, filed July 13, 2018.

E) ARGUMENT

1. Petition Does Not Involve Issues of Substantial Public Interest.

"A petition for review will be accepted by the Supreme Court only: (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 a published 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).

Here, the State relies entirely upon RAP 13.4(b)(4) in its argument as to why review should be accepted. State's Corrected Pet. for Discr. Rev. at 7.[1] The State presented two issues it characterized as "of substantial public interest": whether the unpublished Court of Appeals decision (1) "expand[ed] an expectation of privacy in closed items, not locked, located by law enforcement in the course of an inventory search;" and (2) "created 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." State's Corrected Pet. for Discr. Rev. at 7. For the reasons

[1] The State also cites to RAP 13.5(b)(2). However, because the decision of the Court of Appeals at issue is a decision terminating review, not an interlocutory decision, and the State makes no argument based upon that rule, Mr. Peck reads the State's Petition's citation to RAP 13.5 as surplusage.

outlined below, neither of the issues identified by the State are issues of substantial public interest.

The sorts of issues upon which the Supreme Court has explicitly accepted review on the basis of "substantial public interest" in the past are radically different from the sorts of issues presented here.

One example of an issue of substantial public interest is presented by a published Court of Appeals decision adopting a "horizontal stare decisis" rule. *In re Personal Restraint of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091, 1093 (2017); *see also In re Personal Restraint of Arnold*, 198 Wn. App. 842 (2017). The public has a substantial interest in the adoption of such a rule because it "alter[s] the way that the divisions [of the Court of Appeals] treat other division decisions risk[ing] perpetuating incorrect decisions of law, insulating them from this court's review on the basis of divisional conflicts as contemplated by RAP 13.4(b)(2)." *Id.*

Another "prime example of an issue of substantial public interest" is presented by a published Court of Appeals decision that found "a memorandum" "distributed" by "the Pierce County Prosecuting Attorney" "to all Pierce County Superior Court judges, the Department of Assigned Counsel, and the Department of Corrections announcing that, as a general policy, the prosecuting attorney's office would no longer recommend drug offender sentencing alternative (DOSA) sentences" constituted "ex parte

communication." *State v. Watson*, 155 Wn.2d 574, 575-576 (2005); *see also State v. Watson*, 120 Wn. App. 521 (2004). The public has a substantial interest in such a holding because it "has the potential to affect every sentencing proceeding in Pierce County after [the memorandum was distributed] where a DOSA sentence was or is at issue," "invit[ing] unnecessary litigation...and creat[ing] confusion generally," and having "the potential to chill policy actions taken by both attorneys and judges." *Id.* at 577-578.

Another example of an issue of substantial public interest is presented by a published Court of Appeals decision which held a personal restraint petition concerning discretionary legal financial obligations was time barred in part because *State v. Blazina*, 182 Wn.2d 827 (2015) did not constitute a significant change in the law. *In re Personal Restraint of Flippo*, 185 Wn.2d 1031, 380 P.3d 413, 413-414 (2016); *see also In re Personal Restraint of Flippo*, 191 Wn. App. 405 (2015). The public has a substantial interest in such a holding because the decision "ha[d] the potential to affect a number of proceedings in lower courts" and "review will avoid unnecessary litigation and confusion on a common issue," especially given that "there [were] numerous now-pending personal restraint petitions challenging the imposition of LFOs more than one year

after judgments became final and making claims similar to those asserted by Mr. Flippo" in all "divisions of the Court of Appeals." *Id.*

The issues raised in this case, in contrast, do not have any of the hallmarks of "substantial public interest" issues. First, unlike the Court of Appeals decisions in *Arnold*, *Watson*, and *Flippo*, here the Court of Appeals decision is unpublished. "Unpublished opinions of the Court of Appeals have no precedential value and are not binding by any court." GR 14.1(a).

Second, unlike the Court of Appeals decisions in *Arnold* and *Flippo*, the issues here do not concern access to the courts.

Third, unlike the Court of Appeals decisions in *Watson* and *Flippo*, the issues here do not have a serious potential to affect a number of proceedings in lower courts, create confusion on a common issue, or result in unnecessary litigation, in part because the opinion here is unpublished, and in part because, as demonstrated in Section 2 below, the opinion here represents a correct application of long-established legal principles.

Because the State's petition does not involve issues of substantial public interest, this Court should decline to accept review.

2. Court of Appeals Correctly Applied Long-Established Legal Principles.

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art I § 7. "Under the Washington Constitution, the relevant inquiry is whether the State unreasonably intruded into the Defendant's private affairs." *State v. White*, 135 Wn.2d 761, 768 (1998). "The analysis under article I, section 7 focuses, not on a defendant's actual or subjective expectation of privacy, but...on those privacy interests Washington citizens held in the past and are entitled to hold in the future." *Id.*

Moreover, "out constitution's privacy clause, with its specific affirmation of the privacy interests of all citizens, encompasses the right to assert a violation of privacy as a result of impermissible police conduct at least in cases where...a defendant is charged with possession of the very item which was seized." *State v. Simpson*, 95 Wn.2d 170, 180 (1980). "Any other conclusion allows the invasion of a constitutionally protected interest to be insulated from judicial scrutiny by a technical rule of 'standing.'" *id.* "The inability to assert such an interest threatens all of Washington's citizens, since no other means of deterring illegal searches and seizures is readily available." *Id.*

"[A] defendant has 'automatic standing' to challenge a search or seizure if (1) the offense with which he is charged involves possession as an 'essential' element of the offense; and (2) the defendant was in possession of the contraband at the time of the contested search or seizure." *Id.* at 181.

"[T]he automatic standing rule was originally created to effectuate two separate policy judgments: (1) The doctrine was said to ensure that the State will not assume contradictory positions by arguing in the suppression hearing that the defendant did not have possession of the property and therefore lacked any...privacy interests, and then arguing at trial that the defendant was guilty of unlawful possession of the property"; and (2) The principle was established to ensure in addition that a defendant claiming possession in order to acquire standing in the suppression hearing would not have this evidence used against him at trial on the issue of possession." *Id.* at 175-176.

"Any analysis of article I, section 7 in Washington begins with the proposition that warrantless searches are unreasonable per se." *White*, 135 Wn.2d at 769. "Despite this strict rule, there are jealously and carefully drawn exceptions to the warrant requirement." *Id.* (internal quotations omitted). "An inventory search of an automobile" is one such exception to the warrant requirement. *Id.*

"Inventory searches, unlike other searches, are not conducted to discover evidence of crime." *State v. Houser*, 95 Wn.2d 143, 153 (1980). "Accordingly, a routine inventory search does not require a warrant." *Id.* However, to be valid, an inventory search "must be restricted" in "direction and extent" "to effectuating the purposes" of justify an inventory search's exception to the warrant requirement. *Id.* "[A] noninvestigatory inventory search of an automobile is proper when conducted in good faith for the purposes of (1) finding, listing, and securing from loss during detention property belonging to a detained person; [and] (2) protecting police and temporary storage bailees from liability due to dishonest claims of theft." *Id.* at 154. An inventory search is not "conducted in good faith" if it "a pretext for an investigatory search." *Id.* at 155. Furthermore, "the scope of the search should be limited to those areas necessary to fulfill its purpose[s]." *Id.*

"Courts treat luggage and other closed packages, bags and containers as unique for purposes of police searches." *State v. Wisdom*, 187 Wn. App. 652, 670 (2015) (internal citation omitted). "Washington courts recognize an individual's privacy interest in his closed luggage, whether locked or unlocked." *Id.* (citing *Houser*, 95 Wn.2d at 157).

"The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an

inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function." *Id.* at 674. An officer conducting an inventory search can "merely list[a] container on the inventory rather than opening the container and listing each individual item inside." *Id.* at 675. Therefore, the purposes of an inventory search are not furthered by opening a closed container, and searching that closed container is therefore outside the scope of a valid inventory search.

The facts in *Wisdom* are indistinguishable in any relevant respect from the facts here. There, Mr. Wisdom was "arrested...for possession of a stolen vehicle." *Id.* 658. There, a closed container—"a black 'shaving kit type' bag—was observed on the "front seat" of that stolen vehicle. *Id.* The searching officer "removed the bag from the vehicle, opened it, and found methamphetamine, cocaine, ecstasy, heroin, drug paraphernalia, and two thousand seven hundred dollars in case." *Id.* The searching officer "never obtained a warrant for his search, nor did he request [Mr.] Wisdom's consent before opening the black bag." *Id.* at 659. Mr. Wisdom was ultimately charged with, and convicted of, "possession with intent to deliver methamphetamine." *Id.* at 658.

Here, Mr. Peck was arrested for possession of a stolen vehicle. RP 82. In that vehicle, a closed container—a black CD case—was observed "partially wedged under the seat." RP 108. The searching Deputy

"opened" the container and found "[a] lot of drugs" and drug paraphernalia. RP 108-109. The searching Deputy never sought a search warrant or consent from Mr. Peck or Mr. Tellvik. RP 115. And Mr. Peck was ultimately charged with and convicted of unlawful possession with intent to deliver methamphetamine.

The State argues *Wisdom* is distinguishable for three reasons. State's Corrected Pet. for Discr. Rev. at 8-9. First, it argues a "CD case" is less "intimate and personal" than a "shaving kit." *Id.* Second, it argues Mr. Wisdom "identified the shaving kit as his," but Mr. Peck did not "claim ownership of the black CD case." Third, it argues "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."

Regarding the first purported distinction, neither *Wisdom* nor *Houser* turned exclusively on uniquely personal or intimate nature of a shaving kit or personal luggage. Rather, the important issue is "a legitimate inventory search only calls for noting [a closed container] as a sealed unit" absent "reason to believe the container holds instrumentalities which could be dangerous even when sitting idly in the police locker." *Houser*, 95 Wn.2d at 158; *see also State v. Dugas*, 109 Wn. App. 592, 594, 597-599 (2001) (considering "closed key ring pouch" to be a closed container capable of being inventoried as a "sealed unit"). Although a CD

case is not a shaving kit, this distinction is meaningless in the context of analyzing the propriety of an inventory search.

Regarding the second purported distinction, whether there existed any claim of ownership of the container, is also meaningless under the automatic standing rule.

Regarding the third purported distinction, the record here does not actually support such a distinction at all. Corporal Green testified vehicle was searched in part "to see what all was inside" "[f]or the purpose of *looking for evidence* or anything else that was left in the vehicle." RP 41 (emphasis added). Deputy McKean also testified he was, at least in part, "looking for evidence" when he was searching the vehicle. RP 116-17.

Moreover, even if the distinction is valid, that distinction is only relevant regarding whether the inventory search was pretextual, not whether it exceeded its scope. The Court of Appeals here only based its ruling on the scope of the search, not whether the search was pretextual. *See State v. Peck*, No. 34496-7-III, slip op. at 7-9.

Because the Court of Appeals opinion here simply applied the law as articulated in *Houser* and *Wisdom*, and did not extend or modify those cases holdings, the unpublished opinion is unlikely to result in unnecessary litigation, confusion on a common issue, or affect a number of proceedings in lower courts. Therefore, the State's petition does not

involve issues of substantial public interest that should be determined by the Supreme Court.

F) CONCLUSION

Because the Court of Appeals opinion is unpublished, because it does not involve far-reaching access to courts issues, and because the opinion applies, rather than extends or modifies, long-standing legal principles, the State's Corrected Petition for Discretionary Review does not involve any issues of substantial public interest that should be determined by the Supreme Court. Therefore, this Court should decline to accept review.

DATED this 14th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing ANSWER TO PETITION FOR REVIEW was emailed this 14th day of August, 2018 to counsel for the Petitioner, Carole Highland at carole.highland@co.kittitas.wa.us and prosecutor@co.kittitas.wa.us; and was mailed, postage prepaid, on this 14th day August, 2018 to Respondent as follows:

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August 14, 2018 - 4:19 PM

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