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 ANNE ALEXANDER,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington seeks review of the Court of Appeals decision designated in part II. The State was plaintiff in the trial court and respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals reversed the defendant's (respondent's) conviction in an opinion filed October 7, 2019. State v. Alexander, ___ Wn. App. 2d ___, 449 P.3d 1070 (2019). A copy of the opinion is attached as Appendix A.

III. ISSUE

An item can be searched incident to arrest if it is in the "actual and exclusive possession" of the arrestee. Does this cover items that are in the arrestee's immediate possession, if the person is not holding, wearing, or carrying them at the time of arrest?

IV. STATEMENT OF THE CASE

On July 15, 2017, Officer Troy Moss of the Everett Police received a report that people were trespassing in a wooded area behind a building. On arriving there, he saw two people, a man and a woman. There were several "no trespassing" signs in the area. The woman was the defendant, Heather Alexander. 3.5/3.6 hg. RP 5-7. The man later identified himself as "Slater." Id. at 10.

The defendant and the man were sitting three or four feet apart. 3.5/3.6 hg. RP 9. A backpack was laying on a log directly behind the defendant. It appeared to Officer Moss that the backpack was touching her back. Because the defendant was in between the officer and the backpack, he "couldn't tell if it was precisely touching her." Id. at 16-17. Officer Moss asked the defendant if the backpack was hers. She said that it was. Id. at 11-12, 17-18.

Officer Moss told the people why he was there. He asked them for identification. The defendant produced a Washington ID card. On calling dispatch, Officer Moss learned that there was an outstanding warrant for her arrest. 3.5/3.6 hg. RP 9-10.

Officer Moss arrested the defendant and seated her in his patrol vehicle. 3.5/3.6 hg. RP 12-13. The man offered to take the backpack, and the defendant agreed to that offer. Id. at 19. Officer Moss refused that offer and proceeded to search the backpack. In it, he found baggies that appeared to contain a controlled substance. Id. at 13. Later tests confirmed that at least one of the baggies held methamphetamine. 2 RP 174.

The defendant was charged with possession of a controlled substance. CP 119. She moved to suppress the evidence found in

the backpack. CP 106-13. Following a hearing, the court denied the motion. CP 93-95. A jury found the defendant guilty. CP 46.

The Court of Appeals reversed the conviction. It held that the defendant was not in "actual and exclusive possession of her backpack at the time or immediately preceding her arrest." This was because there was "no evidence that [she] was holding, wearing, or carrying the backpack at any time during her contact with Officer Moss." State v. Alexander, ___ Wn. App. 2d ___, 449 P.3d 1070, 1075 ¶ 22. The court therefore held that the evidence resulting from the search should have been suppressed. Id. at 1076 ¶ 24.

V. ARGUMENT

THE COURT OF APPEALS HAS CREATED NEW LIMITATIONS ON SEARCHES INCIDENT TO ARREST, WHICH ARE INCONSISTENT WITH THIS COURT'S DECISIONS AND THE COURT OF APPEALS' OWN PRIOR ANALYSIS.

This case raises an important question about the permissible scope of a search incident to arrest. The limits of such a search were explained by this court in State v. Brock, 184 Wn.2d 148, 355 P.3d 1118 (2015). The search can include "those personal effects immediately associated with [the arrestee's] person—such as purses, backpacks, or even luggage." Id. at 154 ¶ 11. Authority to

search "turns on whether the arrestee had actual and exclusive possession at or immediately preceding the time of arrest." Id. ¶ 12.

In this case, 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. That backpack belonged to the defendant. 3.5/3.6 hg RP 12. At the time of the arrest, it was lying on a log directly behind her. It appeared to the arresting officer that it was touching her. 3.5/3.6 hg RP 11. If it was not, it was only a miniscule distance away. No one else had any possession of it. These circumstances establish that it was in her actual and exclusive possession, so as to justify a search incident to arrest under Brock.

The Court of Appeals held, however, that this is not enough. According to the Court, the search was not justified because the defendant was not "holding, wearing, or carrying the [item] during her contact with [the officer.]" Alexander, 449 P.3d at 1075 ¶ 22. As it happens, this circumstance existed in each of the cases so far reviewed by this court. See Brock, 184 Wn.2d at 151 ¶ 2 (backpack carried by arrestee); State v. MacDicken, 179 Wn.2d 936, 938 ¶ 1, 319 P.3d 31 (2014) (laptop bag carried by arrestee and duffle bag pushed by him); State v. Byrd, 178 Wn.2d 611, 615 ¶ 3, 310 P.3d

793 (2013) (purse in arrestee's lap). Nothing in these cases, however, indicates that this fact was necessary to justify the ensuing search.

Rather, this court's analysis in Byrd indicates a contrary conclusion. The court cited a Federal case as a situation in which "the arrestee [had] actual possession of [an item] at the time of a lawful custodial arrest." Byrd, 178 Wn.2d at 621 ¶ 19, citing United States v. Tavolacci, 895 F.2d 1423, 1428-29 (D.C. Cir. 1990). At the time of the arrest in Tavolacci, the luggage was on a train platform near the defendant. The court upheld this search because "the defendant had control of the suitcase until moments before the search." Tavolacci, 895 F.2d at 1429. There was no requirement that the luggage be carried by the defendant.

In the present case, the Court of Appeals distinguished Tavolacci on the basis that the arrestee "was carrying his suitcase during his interaction with law enforcement." Alexander, 449 P.3d at 1076 ¶ 25. The court failed to note that he did this *at the direction of the arresting officers*. Tavolacci, 895 F.2d at 1424 (officers "directed [Tavolacci] to get off the train with his bag"). Surely this cannot be a meaningful distinction. Is the Court of Appeals suggesting that the

search in the present case would have been lawful if the officer had *ordered* the defendant to pick up her backpack?

Nor has Division One itself adhered to the "holding, wearing, or carrying" requirement. This is clear from an unpublished decision written by the same judge earlier this year: State v. Castoerna Gonzalez, no. 77162-1-I, 2019 WL 2118401, review denied, 193 Wn.2d 1007 (2019). (For the court's convenience, a copy of this decision is attached as Appendix B.) There, police encountered the defendant alone in a small bathroom, with a backpack and other items on the floor. They removed the defendant from the bathroom and piled his belongings outside. They then developed probable cause to arrest him. At the moment of the arrest, the defendant was reaching towards the pile of items to pick them up. The court held that the backpack could properly be searched incident to the arrest. In so holding, the court specifically rejected an argument that "physical contact is required for actual possession." Id. * 4. It is hard to see the difference between the Gonzalez case and the present case.

This court has attempted to draw a "bright line" between search of the arrestee's person and search of property that is not immediately associated with the person. Byrd, 178 Wn.2d at 798 ¶

18. Under the Court of Appeals analysis, however, the line is anything but bright. There is no way for a police officer to understand whether he or she is or is not authorized to search a suspect's personal item pursuant to arrest.

The Court of Appeals also said that searching the backpack was unnecessary because the defendant wanted to have it given to her companion. Alexander, 449 P.3d at 1076 ¶ 23. This occurred *after* the defendant was arrested. This court has held that the right to search is determined by the arrestee's possession "at or immediately preceding the time of arrest." Brock, 184 Wn.2d at 154 ¶ 12. It has never held that a search can be prevented by the arrestee's post-arrest actions. It would create serious safety concerns for a police officer to hand an unsearched item to a suspect's companion. If such a rule exists, police officers need to know so that they can comply with it.

The Court of Appeals has created new restrictions on searches incident to arrest. Those restrictions go well beyond the limitations set out by this court in Brock. Police need clear guidance on what limitations govern searches incident to arrest. The scope of such limitations presents a significant question of constitutional law

and an issue of substantial public interest. Review should be granted under RAP 13.4(b)(1), (3), and (4).

VI. CONCLUSION

This court should grant review, reverse the Court of Appeals, and reinstate the trial court's judgment.

Respectfully submitted on November 4, 2019.

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

THE STATE OF WASHINGTON, Petitioner, v. HEATHER ANNE ALEXANDER, Respondent.	No. 77513-8-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 5th day of November, 2019, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Gregory Charles Link, Washington Appellate Project; greg@washapp.org; wapofficemail@washapp.org

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of November, 2019, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

449 P.3d 1070
Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,
v.
Heather Anne ALEXANDER, Appellant.

No. 77513-8-I
|
FILED: October 7, 2019

Synopsis

Background: Defendant was convicted in the Superior Court, Snohomish County, No. 17-1-01497-9, Joseph P. Wilson, J., of possession of a controlled substance. Defendant appealed.

The Court of Appeals, Siddoway, J., held that defendant did not have actual and exclusive possession of backpack at the time of her arrest or immediately preceding arrest, to support warrantless search incident to arrest.

Reversed.

*1071 Appeal from Snohomish Superior Court, Docket No: 17-1-01497-9, Honorable Joseph P Wilson, Judge.

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PUBLISHED OPINION

Smith, J.

¶ 1 Heather Anne Alexander appeals her conviction for possession of a controlled substance. She argues that the trial court erred by not suppressing evidence found during a warrantless search of a backpack that was sitting behind her at the time of her arrest. Because the State failed to establish that Alexander had actual and exclusive possession of the backpack at or immediately preceding her arrest, we agree and reverse.

FACTS

¶ 2 On July 15, 2017, Officer Troy Moss of the Everett Police Department responded to a trespass report at 901 West Casino Road in Everett. There, he observed a man and a woman, later identified as Delane Slater and Heather Alexander, sitting in an undeveloped field marked with "no trespass" signs. Officer Moss identified himself as law enforcement at some distance and observed Slater and Alexander manipulating some unknown items on the ground. Officer Moss approached Slater and Alexander, who remained seated by a log approximately three or four feet apart from each other.

*1072 ¶ 3 Officer Moss informed Slater and Alexander that they were trespassing and obtained their identification. When Officer Moss conducted a records check on Alexander, he learned that she had an active Department of Corrections (DOC) warrant. A records check on Slater yielded no results.

¶ 4 While interacting with Alexander, Officer Moss observed a pink backpack sitting directly behind Alexander. The backpack was close enough to Alexander that it appeared to be touching her back. When Officer Moss asked Alexander whether the backpack belonged to her, she indicated that it did.

¶ 5 Officer Moss confirmed the DOC warrant and placed Alexander under arrest. At this point, Officer Moss did not believe that he had probable cause for any other offense. Because Alexander was being arrested, Slater offered to take Alexander's backpack with him. Alexander indicated to Officer Moss that it was her desire for Slater to take the backpack. Officer Moss informed Slater that Alexander's personal property would be searched incident to arrest and that it would remain with her at that time. He asked Slater to leave the scene and indicated that "Slater did not do anything to cause [Officer Moss] safety concern." Slater left without incident.

APPENDIX A

¶ 6 Officer Moss took Alexander into custody and walked Alexander and her backpack to his patrol vehicle. Alexander was cooperative throughout this course of action. Officer Moss seated Alexander in his patrol vehicle and placed her backpack on top of the trunk. He then searched the backpack and located items containing what he believed to be a controlled substance. Officer Moss informed Alexander that he was additionally arresting her for possession of a controlled substance and advised her of her Miranda[1] rights.

¶ 7 The State charged Alexander with possession of a controlled substance, committed while on community custody. Prior to trial, Alexander moved to suppress the evidence found during Officer Moss's warrantless search of her backpack, arguing that the search did not fall within any valid exception to the warrant requirement. The trial court denied Alexander's motion and entered findings of fact and conclusions of law. A jury later found Alexander guilty as charged. Alexander appeals.

ANALYSIS

¶ 8 Alexander argues that the warrantless search of her backpack was not a valid search incident to arrest, and thus the trial court erred by not suppressing the fruits of that search. Because the search was not a valid search of Alexander's person incident to arrest and the State does not argue that any other warrant exception applies, we agree.

Standard of Review

¶ 9 When reviewing the denial of a suppression motion, this court ordinarily "determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Garvin, 166 Wash.2d 242, 249, 207 P.3d 1266 (2009). But here, Alexander does not challenge any of the trial court's findings of fact. Accordingly, they are verities on appeal, and the sole issue before this court is whether the trial court's findings support its conclusions of law. State v. Acrey, 148 Wash.2d 738, 745, 64 P.3d 594 (2003); State v. Carneh, 153 Wash.2d 274, 281, 103 P.3d 743 (2004). We review this issue de novo. Carneh, 153 Wash.2d at 281, 103 P.3d 743.

Discussion

¶ 10 The Fourth Amendment of the United States Constitution protects individuals from unreasonable searches and seizures. U.S. CONST. amend. IV. The Washington State Constitution, whose privacy protections are more extensive than those provided under the Fourth Amendment, further narrows the State's authority to search. State v. VanNess, 186 Wash. App. 148, 155, 344 P.3d 713 (2015); State v. Valdez, 167 Wash.2d 761, 771-72, 224 P.3d 751 (2009). Accordingly, when presented with arguments under both the state and federal constitutions, we first examine the state argument. VanNess, 186 Wash. App. at 155, 344 P.3d 713. If a search is invalid under the Washington State Constitution, *1073 any inquiry into its validity ends there. State v. Parker, 139 Wash.2d 486, 492-93, 987 P.2d 73 (1999).

¶ 11 Under our state constitution, "a warrantless search is per se unreasonable unless the State proves that one of the few 'carefully drawn and jealously guarded exceptions' applies." State v. Byrd, 178 Wash.2d 611, 616, 310 P.3d 793 (2013) (quoting State v. Bravo Ortega, 177 Wash.2d 116, 122, 297 P.3d 57 (2013)). The State's burden of proof in this context is a "heavy burden." Parker, 139 Wash.2d at 496, 987 P.2d 73.

¶ 12 Here, the warrant exception at issue is the exception for searches incident to arrest. There are two types 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 Wash.2d 148, 154, 355 P.3d 1118 (2015). A search of the area within the arrestee's immediate control, often referred to as a "grab area" search, "requires justification grounded in either officer safety or evidence preservation—there must be some articulable concern that the arrestee can access the item in order to draw a weapon or destroy evidence." Brock, 184 Wash.2d at 154, 355 P.3d 1118. By contrast, a search of the arrestee's *person* requires no additional justification beyond the validity of the arrest. Byrd, 178 Wash.2d at 617-18, 310 P.3d 793. Here, Alexander does not dispute the validity of the arrest. Meanwhile, the State does not argue that the search of Alexander's backpack was a valid grab area search. Accordingly, the only issue before us is whether the search of the backpack was a valid search of Alexander's *person* incident to arrest. For the reasons discussed below, we conclude that it was not.

¶ 13 In Byrd, our Supreme Court explained that whether an item is part of the arrestee's person is determined by applying the time-of-arrest rule, which turns on whether the arrestee had "actual and exclusive possession at or immediately preceding the time of arrest.' " Byrd, 178 Wash.2d at 621-23, 310 P.3d 793. In Byrd, Lisa Byrd was sitting in the front passenger seat of a car that was stopped after an officer determined that the car bore stolen license plates. Byrd, 178 Wash.2d at 615, 310 P.3d 793. The officer arrested Byrd for possession of stolen property. Byrd, 178 Wash.2d at 615, 310 P.3d 793. At the time of Byrd's arrest, she had a purse in her lap. Byrd, 178 Wash.2d at 615, 310 P.3d 793. Before removing Byrd from the car, the officer seized the purse and set it on the ground nearby. Byrd, 178 Wash.2d at 615, 310 P.3d 793. After securing Byrd in the patrol car, the officer searched Byrd's purse, finding methamphetamine in a sunglasses case therein. Byrd, 178 Wash.2d at 615, 310 P.3d 793.

¶ 14 The trial court concluded at a later suppression hearing that the warrantless search of Byrd's purse was unlawful because Byrd was secured and unable to access the purse when it was searched. Therefore, there was no exigency present to search the purse out of concern for officer safety or evidence preservation. Byrd, 178 Wash.2d at 615, 310 P.3d 793. Division Three of this court affirmed. Byrd, 178 Wash.2d at 616, 310 P.3d 793.

¶ 15 Our Supreme Court reversed, observing that the lower courts erred by evaluating the search as a grab area search rather than as a search of Byrd's *person*. Byrd, 178 Wash.2d at 620, 310 P.3d 793. The court reasoned that "Byrd's purse was unquestionably an article 'immediately associated' with her person" and observed that "[t]he purse left Byrd's hands only after her arrest, when [the officer] momentarily set it aside." Byrd, 178 Wash.2d at 623-24, 310 P.3d 793. The court thus concluded under the time-of-arrest rule that the search of Byrd's purse was valid under both the state and federal constitutions. Byrd, 178 Wash.2d at 625, 310 P.3d 793. But, the court cautioned, "the time of arrest rule is narrow, in keeping with this 'jealously guarded' exception to the warrant requirement. It 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 Wash.2d at 623, 310 P.3d 793 (emphasis added) (quoting Bravo Ortega, 177 Wash.2d at 122, 297 P.3d 57).

*1074 ¶ 16 Fewer than six months after deciding Byrd, our Supreme Court again applied the time-of-arrest rule in State v. MacDicken, 179 Wash.2d 936, 319 P.3d 31 (2014). In MacDicken, officers stopped Abraham MacDicken, a robbery suspect, as he was leaving a hotel. 179 Wash.2d at 938-39, 319 P.3d 31. When MacDicken was stopped, he was carrying a laptop bag and pushing a rolling duffle bag. MacDicken, 179 Wash.2d at 939, 319 P.3d 31. Officers arrested MacDicken, and while he was standing next to a patrol car, handcuffed and speaking with an officer, another officer moved the bags a car's length away and searched them. MacDicken, 179 Wash.2d at 939, 319 P.3d 31. MacDicken later moved to suppress the evidence found during the warrantless search of the bags. MacDicken, 179 Wash.2d at 939, 319 P.3d 31. The trial court upheld the search as a valid search incident to arrest. MacDicken, 179 Wash.2d at 939, 319 P.3d 31. On appeal, we affirmed, analyzing the search as a grab area search and not as a search of MacDicken's person. MacDicken, 179 Wash.2d at 939-40, 319 P.3d 31; see also State v. MacDicken, 171 Wash. App. 169, 171, 176, 286 P.3d 413 (2012), aff'd on other grounds, 179 Wash.2d 936, 319 P.3d 31 (2014). Our Supreme Court also affirmed, but on different grounds. MacDicken, 179 Wash.2d at 943, 319 P.3d 31. Specifically, the court applied the time-of-arrest rule and concluded that the search of MacDicken's bags was a valid search of his *person* because the bags were "in MacDicken's actual and exclusive possession at the time of his arrest." MacDicken, 179 Wash.2d at 942, 319 P.3d 31.

¶ 17 Our Supreme Court again analyzed the scope of the time-of-arrest rule in Brock. 184 Wash.2d at 155-56, 355 P.3d 1118. In Brock, an officer was patrolling Golden Gardens Park after hours when he noticed that the men's restroom door was open and the lights were on. 184 Wash.2d at 151, 355 P.3d 1118. The officer could see a person's legs inside a bathroom stall. Brock, 184 Wash.2d at 151, 355 P.3d 1118. The officer waited about 10 minutes before Antoine Brock emerged carrying a backpack. Brock, 184 Wash.2d at 151, 355 P.3d 1118. The officer identified himself, had Brock remove the backpack, and performed a Terry[2] stop and frisk. Brock, 184 Wash.2d at 151, 355 P.3d 1118. For safety reasons, the officer carried Brock's backpack to his vehicle and placed it on the passenger seat. Brock, 184 Wash.2d at 152, 355 P.3d 1118.

¶ 18 After the officer determined that Brock had falsely identified himself as "Dorien Halley," the officer arrested Brock for providing false information. Brock, 184 Wash.2d at 151-52, 355 P.3d 1118. Because Brock had been cooperative, the officer did not use handcuffs. Instead, he instructed Brock

to remain near the curb while the officer returned to his vehicle to search the backpack for identification. Brock, 184 Wash.2d at 152, 355 P.3d 1118. In the backpack, the officer found a wallet containing what appeared to be marijuana and methamphetamine. Brock, 184 Wash.2d at 152, 355 P.3d 1118. The officer also found a DOC inmate identification card displaying Brock's photograph and identifying him as Antoine L. Brock. Brock, 184 Wash.2d at 152, 355 P.3d 1118. The officer walked back over to Brock, handcuffed him, and put him in the back of his patrol vehicle. Brock, 184 Wash.2d at 152, 355 P.3d 1118.

¶ 19 The officer then ran Brock's actual name through the state database and discovered that Brock had a felony arrest warrant. Brock, 184 Wash.2d at 152, 355 P.3d 1118. After the Washington State Patrol confirmed the warrant, the officer "had no choice" but to take Brock to jail. Brock, 184 Wash.2d at 152, 355 P.3d 1118. Before doing so, the officer emptied the contents of the backpack, discovering numerous checks, credit cards, mail, and more baggies of suspected narcotics. Brock, 184 Wash.2d at 153, 355 P.3d 1118.

¶ 20 Brock moved to suppress the evidence discovered during the search of his backpack. Brock, 184 Wash.2d at 153, 355 P.3d 1118. The trial court denied Brock's motion, concluding that the search was a valid search incident to arrest. Brock, 184 Wash.2d at 153, 355 P.3d 1118. Brock appealed, and the State argued that the search of the backpack was a valid search of Brock's person incident to *1075 arrest. Brock, 184 Wash.2d at 153, 355 P.3d 1118. We disagreed, reasoning that Brock did not have actual, exclusive possession of the backpack " 'immediately preceding' " the arrest. Brock, 184 Wash.2d at 153, 355 P.3d 1118 (quoting State v. Brock, 182 Wash. App. 680, 689, 330 P.3d 236 (2014), rev'd, 184 Wash.2d 148, 355 P.3d 1118 (2015)). Specifically, we observed that the officer separated Brock from his backpack during the initial Terry stop and secured the backpack in his patrol vehicle. Brock, 182 Wash. App. at 689, 330 P.3d 236. And because the officer did not arrest Brock for several minutes thereafter, Brock did not have actual possession of the backpack at the time of or immediately preceding his arrest. Brock, 182 Wash. App. at 689, 330 P.3d 236.

¶ 21 Our Supreme Court reversed, explaining that

> [u]nder these circumstances, the lapse of time had little practical effect on Brock's relationship to his backpack. *Brock wore the backpack at the very moment he was stopped by Officer Olson.* The arrest process began the moment Officer Olson told Brock that although he was not under arrest, he was also not free to leave. *The officer himself removed the backpack from Brock as a part of his investigation.* And, having no other place to safely stow it, Brock would have to bring the backpack along with him into custody. Once the arrest process had begun, the passage of time prior to the arrest did not render it any less a part of Brock's arrested person.

Brock, 184 Wash.2d at 159, 355 P.3d 1118 (emphasis added). The court ultimately held that "when the officer removes the item from the arrestee's person during a lawful Terry stop and the Terry stop ripens into a lawful arrest, the passage of time does not negate the authority of law justifying the search incident to arrest." Brock, 184 Wash.2d at 159, 355 P.3d 1118.

¶ 22 This case is readily distinguishable from Byrd, MacDicken, and Brock. Unlike in Byrd (where the defendant's purse was in her lap at the time of arrest), MacDicken (where the defendant was carrying a laptop bag and pushing a rolling duffle bag when officers saw him), and Brock (where the defendant was wearing his backpack when he was stopped), Alexander's backpack was merely sitting behind her at the time of her arrest. The State points to no evidence that Alexander was holding, wearing, or carrying the backpack at any time during her contact with Officer Moss, and Officer Moss himself testified that no one had reported seeing Alexander carrying the backpack at any earlier time. Indeed, the trial court made no finding that Alexander had actual and exclusive possession of her backpack at the time of or immediately preceding her arrest. The absence of such a finding is not surprising given that the backpack only "appeared" to be touching Alexander, and Slater was seated just a few feet away. Put another way, the trial court's findings establish, *at most,* that Alexander could immediately have reduced the backpack to her actual possession, i.e., that Alexander had dominion and control—and thus *constructive* possession—over the backpack. See State v. Staley, 123 Wash.2d 794, 798, 872 P.2d 502 (1994) (" 'Actual possession means that the goods are in the personal custody of the person charged with possession; whereas,

constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.' ") (quoting State v. Callahan, 77 Wash.2d 27, 29, 459 P.2d 400 (1969)); State v. Jones, 146 Wash.2d 328, 333, 45 P.3d 1062 (2002) ("Dominion and control means that the object may be reduced to actual possession immediately."). But *actual and exclusive possession,* not merely constructive possession, is required under the time-of-arrest rule. See Byrd, 178 Wash.2d at 623, 310 P.3d 793 ("Extending [the arrestee's person] to articles within the arrestee's reach but not *actually in his possession* exceeds the rule's rationale."). And in the absence of a finding that Alexander had actual and exclusive possession of her backpack at the time of or immediately preceding her arrest, we must indulge the presumption that the State, which bore the "heavy burden" of proof on this issue, failed to sustain its burden. Parker, 139 Wash.2d at 496, 987 P.2d 73; State v. Armenta, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997). Indeed, to hold otherwise under these facts would erode the distinction between the arrestee's person and the arrestee's grab area. Cf. *1076 United States v. Knapp, 917 F.3d 1161, 1167 (10th Cir. 2019) (rejecting time-of-arrest rule and observing that although officers would have "clear guidance from a rule allowing them to search any container that an arrestee was or may have been touching around the time of arrest[,]... such a rule risks expanding Robinson's [3] limited exception to grant unqualified authority to search an arrestee's grab area").

¶ 23 Furthermore, as our Supreme Court has explained, the scope of a warrant exception "must track its underlying justification." Brock, 184 Wash.2d at 158, 355 P.3d 1118. To this end, the justification for warrantless searches of an arrestee's *person* (which require no justification beyond the validity of the arrest)—as distinct from grab area searches (which require "some articulable concern that the arrestee can access the item in order to draw a weapon or destroy evidence")—is that "there are presumptive safety and evidence preservation concerns associated with police taking custody of those personal items *immediately associated* with the arrestee, which will *necessarily* travel with the arrestee to jail." Brock, 184 Wash.2d at 155, 355 P.3d 1118 (emphasis added). Here, as discussed, the State failed to establish that Alexander's backpack was in her actual and exclusive possession at or immediately preceding the time of her arrest. Furthermore, Slater, about whom Officer Moss expressed no safety concerns, offered to take the backpack, and Alexander desired that Slater take it. Under these circumstances, Alexander's backpack was not an item immediately associated with her person that would *necessarily* travel to jail with her. Rather, the only reason the backpack traveled to jail with Alexander was because Officer Moss decided that it would. But the scope of the arrestee's person is determined by what must *necessarily* travel with an arrestee to jail, not what an officer *decides* to take to jail.

¶ 24 In short, the State failed to satisfy its "heavy burden" to demonstrate that the search of Alexander's backpack fell within the warrant exception for searches of an arrestee's person incident to arrest. Parker, 139 Wash.2d at 496, 987 P.2d 73. And because the State does not dispute that the evidence found in the backpack was the fruit of that search, the trial court erred by failing to suppress that evidence. See State v. Mayfield, 192 Wash.2d 871, 888-89, 434 P.3d 58 (2019) (exclusionary rule applies to the "fruit of the poisonous tree").

¶ 25 The State argues that this case is analogous to United States v. Tavolacci, 283 U.S. App. D.C. 1, 895 F.2d 1423 (1990), which was cited with approval in Byrd. See Byrd, 178 Wash.2d at 621, 310 P.3d 793. But just as in Byrd, MacDicken, and Brock, the arrestee in Tavolacci was carrying his suitcase during his interaction with law enforcement. United States v. Tavolacci, 704 F. Supp. 246, 253 (D.D.C. 1988), aff'd, 895 F.2d 1423; see also Tavolacci, 895 F.2d 1423, 1428-29 (agreeing with district court's analysis and observing that "defendant had control of the suitcase until moments before the search"). Therefore, the State's reliance on Tavolacci, 895 F.2d 1423, which is not binding in any event, is misplaced.

¶ 26 As a final matter, the trial court's stated justifications for denying Alexander's motion to suppress are unsupported by the law. Specifically, despite not making any finding that Alexander actually and exclusively possessed the backpack at or immediately preceding her arrest, the trial court nonetheless concluded that the warrantless search of Alexander's backpack was justified because (1) Alexander was close to the backpack and stated it belonged to her, (2) Officer Moss was not obligated by law to give the backpack to Slater, and (3) it was reasonable for Officer Moss not to give the backpack to Slater. In short, the trial court expanded the arrestee's person to include any item in proximity to and owned by the arrestee if it is reasonable for the arresting officer to take the item to jail. But as discussed, 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, and the State cites no authority for the proposition that proximity and ownership alone constitute

actual and exclusive possession. The trial court's attempt to expand a "narrow" exception to the warrant requirement—instead of jealously guarding it—was error. See *1077 Byrd, 178 Wash.2d at 623, 310 P.3d 793 ("We caution that the proper scope of the time of arrest rule is narrow, in keeping with this 'jealously guarded' exception to the warrant requirement.") (quoting Bravo Ortega, 177 Wash.2d at 122, 297 P.3d 57).

¶ 27 We reverse.

WE CONCUR:

Andrus, J.

Appelwick, C.J.

All Citations

449 P.3d 1070

Footnotes

1 Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
2 Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
3 United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,

v.

Abraham CASTORENA GONZALEZ, Appellant.

No. 77162-1-I

|

FILED: January 7, 2019

Appeal from Snohomish Superior Court, 17-1-00815-4, Honorable George F. Appel, J.

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UNPUBLISHED OPINION

Smith, J.

*1 Abraham Castorena Gonzalez (Castorena) [1] appeals his conviction for possession of heroin with intent to deliver. He also appeals the trial court's assessment of $1,962 in nonmandatory legal financial obligations (LFOs). Castorena argues that the trial court erred by not suppressing evidence seized from the backpack found during a search incident to his arrest, and that the trial court did not conduct a proper inquiry before ordering him to pay nonmandatory LFOs.

The evidence seized from the backpack was found during a valid search of Castorena's person incident to arrest under article I, section 7 of the Washington State Constitution. But we agree that the trial court's inquiry into Castorena's ability to pay LFOs was insufficient. Because the State conceded as much at oral argument and requested that the disputed LFOs be stricken in lieu of a remand hearing, we affirm and remand to the trial court to enter a revised judgment and sentence that strikes the $1,000 VUCSA (violation of the Uniform Controlled Substances Act) fine and the $962 in court-appointed attorney fees originally assessed.

FACTS

On March 30, 2017, at about 12:30 a.m., Sergeant Tim McAllister of the Everett Police Department responded to a 911 call from the clerk of an Arco AM/PM station on Evergreen Way. The AM/PM clerk reported that a man, later identified as Abraham Castorena Gonzalez, entered the AM/PM store with a backpack. Castorena went into the store bathroom, locked himself inside, and remained there for 30 to 45 minutes, causing a disturbance. On arrival, Sergeant McAllister waited for two other officers to arrive before the officers tried to get Castorena to open the bathroom door.

Castorena eventually opened the door to the bathroom, which was an approximately 10 feet by 10 feet single-occupancy bathroom with a toilet, urinal, and sink. Sergeant McAllister described the bathroom as messy, with toilet paper strewn all over the floor. He saw a backpack and a couple of jackets in the bathroom. Castorena was alone in the bathroom.

After Castorena stepped outside of the bathroom and while the other officers were in the process of identifying Castorena and giving him a formal trespass warning, Sergeant McAllister went into the bathroom to gather the backpack and jackets. Sergeant McAllister placed the backpack and jackets in a pile in "close proximity" to Castorena.

Once they identified Castorena, the officers formally trespassed him and told him that he was free to go. Castorena then approached the pile of items that Sergeant McAllister had placed outside the bathroom and picked up one of the jackets. As he did so, the officers heard the sound of something metal hitting the floor. Sergeant McAllister looked down and observed that a metal spoon with brown residue in it had fallen out of the jacket that Castorena still held in his hand. Sergeant McAllister recognized the spoon as a heroin "cooker." Sergeant McAllister then took the jacket from Castorena's hand and placed him under arrest.

APPENDIX B

*2 The two other officers—Officers Adam Hoffenbacker and Alex Olson—handcuffed Castorena and placed him in the backseat of Officer Hoffenbacker's patrol car. Sergeant McAllister seized the jackets and backpack, followed the other officers and Castorena out to the patrol car, and placed the items on the hood of the car. During Sergeant McAllister's search of the jacket that the spoon had fallen out of, he found a large "baggie" with a brown granular substance in it. He also conducted a preliminary search of the backpack, finding an uncapped syringe with brown liquid in it. Officers Hoffenbacker and Olson later continued with a more extensive search of the backpack and found 13 individually wrapped pieces of suspected heroin and a scale.

The State charged Castorena with possession of a controlled substance with intent to manufacture or deliver. Before trial, Castorena moved to suppress the evidence found in the backpack, arguing that the warrantless search of the backpack was not a valid search incident to arrest. The court denied Castorena's motion. A jury convicted Castorena for possession of heroin with intent to deliver. At sentencing, the court ordered Castorena to pay a $1,000 VUCSA fine and $962 in court-appointed attorney fees. Castorena appeals.

ANALYSIS

Warrantless Search of Backpack

Castorena argues that the warrantless search of the backpack violated his rights under the state and federal constitutions because the search was not a valid search of his person incident to arrest. We disagree.

When reviewing the denial of a suppression motion, this court "determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.' " Garvin, 166 Wn.2d at 249, 207 P.3d 1266 (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). We review de novo the trial court's conclusions of law regarding a motion to suppress. State v. VanNess, 186 Wn. App. 148, 154, 344 P.3d 713 (2015).

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. U.S. CONST. amend. IV. The Washington State Constitution further narrows the State's authority to search. VanNess, 186 Wn. App. at 155, 344 P.3d 713; State v. Valdez, 167 Wn.2d 761, 771-72, 224 P.3d 751 (2009). Where, as here, a party alleges violations of both the federal and Washington State constitutions, "we analyze the Washington State Constitution first because it is more protective of individual privacy." State v. MacDicken, 179 Wn.2d 936, 940, 319 P.3d 31 (2014) (citing State v. Walker, 157 Wn.2d 307, 313, 138 P.3d 113 (2006)). Under the Washington State Constitution, "a warrantless search is per se unreasonable unless the State proves that one of the few 'carefully drawn and jealously guarded exceptions' applies." State v. Byrd, 178 Wn.2d 611, 616, 310 P.3d 793 (2013) (quoting State v. Bravo Ortega, 177 Wn.2d 116, 122, 297 P.3d 57 (2013)).

The exception at issue in this case is the exception for searches incident to arrest. There are two types 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). "A valid search of the latter requires a justification grounded in either officer safety or evidence preservation—there must be some articulable concern that the arrestee can access the item in order to draw a weapon or destroy the evidence." Brock, 184 Wn.2d at 154, 355 P.3d 1118 (citing Byrd, 178 Wn.2d at 617, 310 P.3d 793). By contrast, a search of the arrestee's *person* "presumes exigencies and is justified as part of the arrest." MacDicken, 179 Wn.2d at 941, 319 P.3d 31 (citing Byrd, 178 Wn.2d at 618, 310 P.3d 793). Accordingly, a search of the arrestee's person requires no additional justification beyond the validity of the arrest itself. Byrd, 178 Wn.2d at 617-18, 310 P.3d 793 (citing United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)).

*3 Here, Castorena does not dispute the validity of his arrest. And the State does not argue that the search of the backpack should be validated as a search of the area within Castorena's immediate control. Accordingly, the only issue before us is whether the search of the backpack was a valid search of Castorena's *person* incident to arrest. For the reasons that follow, we conclude that it was.

Whether an item is part of the arrestee's person is determined by applying the time-of-arrest rule, which turns on whether the arrestee had "actual and exclusive possession at or immediately preceding the time of arrest.' " State v. Byrd, 178 Wn.2d at 620-23, 310 P.3d 793. Our Supreme Court recently

analyzed the scope of the time-of-arrest rule in Brock. In Brock, an officer was patrolling Golden Gardens Park after hours when he noticed that the men's restroom door was open and the lights were on. 184 Wn.2d at 151, 355 P.3d 1118. The officer could see a person's legs inside a bathroom stall. Brock, 184 Wn.2d at 151, 355 P.3d 1118. The officer waited about 10 minutes before Antoine Brock emerged, carrying a backpack. Brock, 184 Wn.2d at 151, 355 P.3d 1118. The officer identified himself, had Brock remove the backpack, and performed a Terry[2] stop and frisk. Brock, 184 Wn.2d at 151, 355 P.3d 1118. For safety reasons, the officer carried Brock's backpack to his vehicle and placed it on the passenger seat. Brock, 184 Wn.2d at 152, 355 P.3d 1118.

After the officer determined that Brock had falsely identified himself as "Dorien Halley," the officer arrested Brock for providing false information. Brock, 184 Wn.2d at 151-52, 355 P.3d 1118. Because Brock had been cooperative, the officer did not use handcuffs and instead instructed Brock to remain near the curb while the officer returned to his vehicle to search the backpack for identification. Brock, 184 Wn.2d at 152, 355 P.3d 1118. In the backpack, the officer found a wallet containing what appeared to be marijuana and methamphetamine. Brock, 184 Wn.2d at 152, 355 P.3d 1118. The officer also found a Department of Corrections inmate identification card with Brock's photograph and identifying him as Antoine L. Brock. Brock, 184 Wn.2d at 152, 355 P.3d 1118. The officer then handcuffed Brock and put him in the back of his vehicle. Brock, 184 Wn.2d at 152, 355 P.3d 1118.

The officer ran Brock's actual name through the state database and discovered that Brock had a felony arrest warrant. Brock, 184 Wn.2d at 152, 355 P.3d 1118. After the Washington State Patrol confirmed the warrant, the officer "had no choice" but to take Brock to jail. Brock, 184 Wn.2d at 152, 355 P.3d 1118. Before doing so, the officer emptied the contents of the backpack, discovering numerous checks, credit cards, mail, and more baggies of suspected narcotics. Brock, 184 Wn.2d at 153, 355 P.3d 1118.

Brock moved to suppress the evidence discovered during the search of his backpack. Brock, 184 Wn.2d at 153, 355 P.3d 1118. The trial court denied Brock's motion, concluding that the search was a valid search incident to arrest. Brock, 184 Wn.2d at 153, 355 P.3d 1118. Brock appealed, and this court reversed, reasoning that Brock did not have actual, exclusive possession of the backpack immediately preceding the arrest. Brock, 184 Wn.2d at 153, 355 P.3d 1118. The Washington Supreme Court reversed, explaining:

> Because the search incident to arrest rule recognizes the practicalities of an officer having to secure and transport personal items as part of the arrestee's person, we draw the line of "immediately preceding" with that focus. *The proper inquiry is whether possession so immediately precedes arrest that the item is still functionally a part of the arrestee's person. Put simply, personal items that will go to jail with the arrestee are considered in the arrestee's "possession" and are within the scope of the officer's authority to search.*

*4 Brock, 184 Wn.2d at 158, 355 P.3d 1118 (emphasis added). The court concluded that the search of Brock's backpack was a valid search of his person, observing that there was no place to stow the backpack and that Brock would have to bring the backpack with him into custody. Brock, 184 Wn.2d at 159, 355 P.3d 1118.

Brock controls here. The trial court correctly concluded that under Brock, the search of the backpack was a valid search of Castorena's person. Specifically, the trial court made an unchallenged finding that the officers who responded to the scene "perceived the ... backpack to belong to the defendant and intended to book [it] into jail, or their own property room, incident to the defendant's booking at the jail, as opposed to leaving the items there at the scene." This unchallenged finding is a verity on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Accordingly, the backpack here, like the backpack in Brock, implicates the presumed exigencies underlying the time-of-arrest rule—namely, "safety concerns associated with the officer having to secure those articles of clothing, purses, backpacks, and even luggage, that will travel with the arrestee into custody." Brock, 184 Wn.2d at 156, 355 P.3d 1118. The court did not err by denying Castorena's motion to suppress.

Castorena argues that although the backpack was potentially within his reach during his interaction with officers, he "was not in actual physical possession of the backpack at the time of his initial seizure, such that the backpack was 'functionally a part of' his person." He relies on Byrd for the proposition

that reaching distance proximity is not enough to justify the search of the backpack as a search of his person. Castorena's reliance on Byrd is misplaced. The court in Byrd did caution that the time-of-arrest rule is narrow and does not extend to articles "within the arrestee's reach but not actually in his possession." Byrd, 178 Wn.2d at 623, 310 P.3d 793. And in Byrd, the purse that officers searched had been sitting in the arrestee's lap at the time of her arrest. Byrd, 178 Wn.2d at 615, 310 P.3d 793. But nothing in Byrd suggests, as Castorena does, that physical contact is required for actual possession. Rather, under Brock, whether a personal item is part of the arrestee's person depends on whether that item is "immediately associated" with the arrestee such that it "will necessarily travel with the arrestee to jail." Brock, 184 Wn.2d at 155, 355 P.3d 1118. Here, it is undisputed that Castorena carried the backpack with him into the small bathroom, locked himself in the bathroom, and remained alone with the backpack therein. Additionally, Sergeant McAllister testified that Castorena was "standing over" the backpack as he picked up the jacket with the heroin "cooker" just before the arrest. Sergeant McAllister also testified that Castorena never asked to leave the backpack at the scene and that there was no one else at the scene with whom Castorena could have left the backpack. In short, the backpack was immediately associated with Castorena, such that it would necessarily travel with him to jail, and Castorena's arguments otherwise are unpersuasive. For the same reasons, Castorena's attempt to distinguish Brock on the basis that Castorena was not carrying the backpack at any time during his interaction with officers is also unpersuasive.[3]

*5 Castorena next contends that validating the search in this case would result in an impermissible untethering of the time-of-arrest rule from evidence preservation and officer safety, the two rationales that the United States Supreme Court articulated in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), as justifying the search incident to arrest exception. See Chimel, 395 U.S. at 763, 89 S.Ct. 2034. In other words, Castorena suggests that the search of his backpack is invalid under United States Supreme Court precedent.[4]

But contrary to Castorena's assertions, the time-of-arrest rule, as articulated by our Supreme Court in Brock, is indeed grounded in evidence preservation and officer safety. Specifically, in Brock, the court observed that, "having no other place to safely stow [his backpack], Brock would have to bring the backpack along with him into custody." Brock, 184 Wn.2d at 159, 355 P.3d 1118. The court stated that "there are presumptive safety and evidence preservation concerns associated with police taking custody of those personal items immediately associated with the arrestee." Brock, 184 Wn.2d at 155, 355 P.3d 1118. We are cognizant that "we must draw ... exceptions to the warrant requirement narrowly," and that the exceptions must not be expanded arbitrarily but must track their underlying justifications. Brock, 184 Wn.2d at 158, 355 P.3d 1118. Indeed, this could well be a different case had there been someone on the scene ready to take possession of Castorena's backpack. But instead, as in Brock, Castorena had no other place to stow his backpack and would have had to bring it along with him into custody, thereby implicating the presumptive safety and evidence preservation concerns discussed in Brock. Brock controls.

As a final matter, Castorena assigns error to the trial court's failure to make a finding that the search of the backpack and the jacket occurred "at [a] great distance from the location of the seizure of the items and after [Castorena] was secured." We need not decide whether it was error to omit this finding because even if it were, the error was harmless. Under the time-of-arrest rule, what matters is the relationship between the arrestee and the item at and immediately preceding the time of arrest—not their relationship at the time of the search. See MacDicken, 179 Wn.2d at 941, 319 P.3d 31 (search of bags upheld as a valid search of arrestee's person even though search took place after arrestee was secured and bags had been moved a car's length away).

Assessment of Nonmandatory Legal Financial Obligations

Castorena argues that the trial court erred by ordering him to pay a $1,000 VUCSA fine and $962 in court-appointed attorney fees without conducting an adequate inquiry into his ability to pay. We agree.

*6 "[T]he question of whether the trial court adequately inquired into [a defendant's] ability to pay discretionary LFOs involves both a factual and a legal component." State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714, 718 (2018). We review de novo whether the trial court conducted an adequate inquiry into the defendant's ability to pay. Ramirez, 426 P.3d at 719. We then review under an abuse-of-discretion standard whether the trial court properly "balance[d] the defendant's ability to pay against the burden of his obligation." Ramirez, 426 P.3d at 719. "[D]iscretion is necessarily abused when it is manifestly unreasonable or based on untenable grounds or reasons." Ramirez, 426 P.3d at 719.

At the time Castorena was sentenced, former RCW 10.01.160(3) (2015) provided:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Additionally, RCW 69.50.430(1) states that the $1,000 VUCSA fine may be waived based on indigence.

In State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court held that the trial court must "make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs." Blazina, 182 Wn.2d at 839, 344 P.3d 680. The court also instructed trial courts to look to GR 34 for guidance. Blazina, 182 Wn.2d at 838, 344 P.3d 680. Under GR 34, a person is considered indigent if, among other things, he or she receives certain types of need-based assistance or has income at or below 125 percent of the federal poverty guideline. GR 34. The court noted that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839, 344 P.3d 680. Finally, the court in Blazina held that trial courts must also consider important factors "such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." Blazina, 182 Wn.2d at 838, 344 P.3d 680.

In 2018, after Castorena was sentenced, House Bill 1783 amended RCW 10.01.160(3) "to categorically prohibit the imposition of any discretionary costs on indigent defendants." Ramirez, 426 P.3d at 718 (citing LAWS OF 2018, ch. 269, § 6(3)).[5] Then, during the pendency of this appeal, our Supreme Court decided Ramirez, which held that the amendments to RCW 10.01.160(3) apply prospectively to cases pending on direct review. Ramirez, 426 P.3d at 722. The court also more fully described the nature of the inquiry required of a trial court under Blazina:

> Trial courts must meaningfully inquire into the mandatory factors established by Blazina, such as a defendant's incarceration and other debts, or whether a defendant meets the GR 34 standard for indigency. Trial courts must also consider other "important factors" relating to a defendant's financial circumstances, including employment history, income, assets and other financial resources, monthly living expenses, and other debts. Under this framework, trial courts must conduct an on-the-record inquiry into the mandatory Blazina factors and other "important factors" before imposing discretionary LFOs.

Ramirez, 426 P.3d at 723.

*7 Here, the trial court made the following oral ruling in determining Castorena's LFOs:

> [THE COURT:] ... With regard to monetary assessments, I will assess the $500 victim penalty, $200 filing fee, the $100 DNA fee. Those are the fines and fees that I must impose, regardless of indigency.
>
> I have heard the question raised as to whether you were indigent, and I understand that you have no stable job, nor a place to stay, and I think it may well be, sir, that you have no legitimate, stable job. I don't really know what your job prospects are. I know that based on the evidence in this case, you had sufficient product on you to make a substantial amount of money. I also understand you successfully screened at the Office of Public Defense and were found to be indigent for those purposes, but of course that's all self-reported. They have nothing to go on, other than what is provided by you, sir, and now of course things are different because we had 12 citizens who feel that you were possessing those drugs with the intent to deliver, which is a lucrative business. There's no question about it.
>
> So I don't think I can find that you are indigent. In fact, I think it may well be that you have been earning and could earn considerable money, simply based on the verdict that

the jury has entered. On the other hand, I don't have any credible evidence to the contrary.

[DEFENSE COUNSEL]: May I respond to that, Your Honor?

THE COURT: Respond to my decision?

[DEFENSE COUNSEL]: To the evidence that came out, based on that.

THE COURT: I will let you argue something in the midst of my decision, yes. I don't usually do that, but I will let you.

[DEFENSE COUNSEL]: I apologize for interrupting. You know, it occurred to me that the one piece of testimony that came out during trial was that, you know, somebody may be a runner and that may be why they don't have cash on them and are taking an amount of drugs from one place to another, that I don't think would entail having access to the actual money that requires securing the amount of drugs that they were found with, and I believe that testimony was provided during the trial.

THE COURT: Indeed, it was.

[DEFENSE COUNSEL]: I guess I would just like the Court to consider that, in terms of Your Honor's indigency finding.

THE COURT: I do remember that testimony. I allow, as how that may well be the case. I really don't have any reason to think, and there wasn't any evidence bearing on the subject, that a person employed as a runner doesn't have any form of income. Perhaps it's not much, but on the other hand, perhaps it's a good deal.

Here, after all, we have a case of a person who apparently felt there was sufficient reason to dip into the product himself. I don't really know all the ins-and-outs of this. All I know is what the evidence, what evidence there was. I might speculate that he was a runner, but even then, I don't think I could speculate further, that he didn't make any money as a runner. I simply cannot find that he is indigent. I don't think that there is credible evidence that he is indigent, and I think that there is, on the contrary, credible evidence that he was in a position to be earning significant money tax-free. Most people have to pay taxes on their income, but people who make money illegally don't. At least I find it very difficult to imagine that anybody would report money earned as a runner for a drug dealer on their tax forms. So I don't find that he is indigent.

*8 Now, where was I? I think I had already addressed the fines and fees that are mandatory, regardless of indigency. I have not found any evidence to support a conclusion that he was indigent. I have found evidence to support a conclusion that he is not indigent. And I think a reasonable inference might be that he is perhaps even less indigent than a lot of folks who pay their taxes, so I will impose the $1,000 VUCSA fine and the $962 for his court-appointed attorney which by the way is a deal. If you were going to purchase your attorney's services on the open market, $962 wouldn't begin to cover it. Also, I don't want you to think for an instant, sir, that the fact that you didn't win is a reflection on your attorney's performance. I saw her performance. I've seen her performance in other case, as well. You got a good deal, sir, $962 is a cheap price.

We conclude, and the State conceded at oral argument, that the trial court's inquiry was insufficient under Ramirez with respect to imposition of the VUCSA fine and the assessment of court-appointed attorney fees under RCW 10.01.160(3). The only inquiry that the trial court made was to ask how much cash was discovered on Castorena when he was arrested. The court did not inquire on the record about Castorena's other debts, the GR 34 standards for indigence, or Castorena's employment history, income, assets, financial resources, or living expenses. Instead, the court's decision to impose nonmandatory LFOs appears grounded primarily in (1) the trial court's speculation that as a convicted drug "runner," Castorena must have made a significant amount of money tax-free and (2) the trial court's opinion that $962 for attorney fees was "a good deal." But neither the trial court's unsupported speculation nor its perception of the value of services provided by Castorena's attorney are relevant considerations under Blazina and Ramirez, and the trial court's decision on this basis was manifestly unreasonable. Accordingly, the trial court abused its discretion by imposing nonmandatory LFOs without first conducting a proper inquiry into Castorena's indigence.

CONCLUSION

We affirm Castorena's conviction but hold that the trial court's inquiry into Castorena's ability to pay LFOs was deficient. At the State's request, we remand to the trial court with instructions to enter a revised judgment and sentence that strikes the $1,000 VUCSA fine and the $962 in court-appointed attorney fees originally assessed.

Becker, J.

WE CONCUR:

Schindler, J.

All Citations

Not Reported in Pac. Rptr., 7 Wash.App.2d 1006, 2019 WL 118401

Footnotes

1 We refer to the appellant as "Castorena" for consistency with his opening and reply briefs.

2 Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

3 At oral argument, Castorena attempted for the first time to distinguish Brock by arguing that Brock involved a Terry stop that ripened into an arrest, whereas here, there was no "unbroken chain" of events because Castorena became free to leave after his initial interaction with officers. But Brock is clear that the scope of the arrestee's person is determined through the lens of the underlying justification for the time-of-arrest rule, i.e., the recognition of "the practicalities of an officer having to secure and transport personal items as part of the arrestee's person." Brock, 194 Wn.2d at 158. Accordingly, the fact that Castorena was free to leave just before he approached the pile of his belongings does not negate the fact that the backpack was, as discussed above, immediately associated with Castorena, such that it would need to be transported with him to jail. Castorena's attempt to distinguish Brock on this basis is unpersuasive.

4 At oral argument, Castorena relied for the first time on Riley v. California, —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), to support this argument. In Riley, the United States Supreme Court declined to extend the arrestee's person as far as the data on the arrestee's cell phone. Riley, 134 S.Ct. at 2485. The Riley court did discuss the twin rationales of Chimel. See Riley, 134 S.Ct. at 2483. But the Court also distinguished between data and physical objects, observing that while the categorical rule authorizing searches of a person incident to arrest "strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones." Riley, 134 S.Ct. at 2484. Here, only physical objects are concerned, and therefore Riley does not control.

5 House Bill 1783 also amended the criminal filing fee statute to prohibit courts from imposing the $200 filing fee on indigent defendants. However, Castorena does not challenge the trial court's imposition of the $200 filing fee, so we do not address that fee in this case.

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