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SUPREME COURT NO. 98994-0

NO. 36561-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICO DAVIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Maryann C. Moreno, Judge,
The Honorable John O. Cooney, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Rico Davis, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the unpublished decision of the Court of Appeals in State v. Davis, no. 36561-1-III, entered on August 4, 2020. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Under article I, section 7 of the Washington Constitution and chapter 10.79 RCW, strip searches must be conducted in private and must be based on reasonable suspicion unless the arrest is for a violent offense, burglary, or a drug offense. Did the court err in failing to suppress the evidence found when Davis was strip searched in a bathroom with the door open to the hallway and was arrested on warrants for violating community custody and failing to appear in prior drug and burglary cases?

2. To the extent RCW 10.79.130 (2) authorized the warrantless and suspicionless strip search, is the statute unconstitutional in violation of Davis' privacy rights under article I, section 7 of Washington's constitution?

3. By pre-determining reasonable suspicion upon arrest for certain offenses, is RCW 10.79.130(2) unconstitutional in violation of the separation of powers doctrine?[1]

C. STATEMENT OF THE CASE

1. Arrest

Police received calls that two men were trying to enter a woman's apartment via the sliding door. 1RP[2] 5-6. En route, dispatch advised Officer Mark Zimmerman the two men "had been let inside." 1RP 7. One of the men, Mohammed Jalhoon, was the son of one of the women in the apartment and had an arrest warrant for first-degree robbery. 1RP 8-9. Jalhoon was found standing behind the front door and was arrested immediately. 1RP 9.

One of the women then pointed towards the living room. 1RP 9; Ex. 1. (A language barrier inhibited communication. 1RP 5-6, 10.) In the living room, police found Davis. 1RP 10. He cooperated with police and offered to leave when informed that his presence was unwanted. Ex. 1. Instead of allowing Davis to leave, Zimmerman asked for identification. Ex. 1.

---

[1] Davis asks this Court to exercise its discretion to consider, as it has in the past, this issue, despite its being raised for the first time in this petition for review. E.g., State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983), overruled on other grounds by State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989); Conner v. Universal Utils, 105 Wn.2d 168, 171, 712 P.2d 849 (1986).

[2] There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Aug. 23, 2018; 2RP – Nov. 29, 2018; 3RP – Jan. 14, 2019.

Zimmerman testified he asked about Davis' identity because "at that time we don't know why the female let him in because – I didn't know if she had let them in. I just knew they were inside the residence. With the language barrier, I didn't know if she had asked them to leave, if – what the situation was. And right when we got inside, she was pointing to that gentleman, "Hey, that guy." And she looked scared, so I needed to find out why she might be scared of this guy and who he was and why – what purpose he had being in that residence if he didn't live there." 1RP 14-15.

Davis gave a name that police determined was false. CP 18; Ex. 1 at time stamp 20:49. They handcuffed Davis and detained him "due to not being able to properly identify him." CP 18; Ex. 1 at time stamp 22:18. After police frisked Davis, finding his wallet, Davis admitted his true name. CP 18; Ex. 1. Police then arrested Davis on two outstanding felony warrants, one for a failure to appear in a burglary case and the other from the Department of Corrections for a violation of community custody pursuant to a conviction for possession of a controlled substance. 1RP 14; CP 18, 30. After arresting Davis, Zimmerman informed another officer that the only basis to hold Davis was the warrants. Ex. 1. Zimmerman stated, "as of right now that's all we got cuz mom let him in." Ex. 1.

2. Strip search

Once at the jail, Davis was ordered into a bathroom for a strip search. CP 100-01. The officer left the door open "so that his actions could be monitored by myself." CP 100. The area immediately outside the bathroom was a hallway accessible to all corrections officers. 2RP 17. Davis was asked to spread the cheeks of his buttocks, and the officer saw two small plastic baggies. CP 101.

3. Procedural posture

The Spokane County prosecutor charged Davis charged with possession of the methamphetamine found in the baggies. CP 1-2. Davis moved to suppress the evidence as the result of an unlawful strip search. CP 26-32. He argued the statute allowing suspicionless strip searches when a person is arrested for burglary or drugs offenses does not permit such a search for every subsequent arrest related to those original charges. 2RP 7-8. Davis further argued the statute is unconstitutional under article I, section 7 of the Washington Constitution to the extent it permits strip searches without individualized suspicion. 2RP 7. Finally, he argued the strip search was not lawful under the statute because it was not conducted in private. 2RP 6. This motion was denied. CP 38-39.

Davis agreed to a bench trial on stipulated facts. CP 41-43. The court found him guilty of possession of a controlled substance and imposed a standard range sentence of 12 months and 1 day. CP 49, 70-72.

On appeal, Davis largely continued the arguments made in the suppression hearings.[3] The Court of Appeals held the search at the jail was permissible under the statute and declined to find the statute unconstitutional. App. at 7-11. Davis now seeks this Court's review.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

1. THE STRIP SEARCH VIOLATED ARTICLE I, SECTION 7 BECAUSE IT WAS NOT AUTHORIZED BY LAW.

Washington has set careful statutory limits on the use of strip searches of those detained in jail. The search in this case violated those limits in two ways. First, it was not conducted in private. Second, Davis was not "arrested for" burglary or a drug offense. Thus, the strip search was without the "authority of law" required under article I, section 7. Review is warranted under RAP 13.4(b) because this case raises significant constitutional issues and issues of substantial public interest.

[3] Davis also argued the frisk for weapons was unconstitutional, but the Court of Appeals deemed this issue waived because it was not raised in the trial court.

a. The search violated the statute because it was not conducted in private.

The law requires that a strip search be conducted in private. RCW 10.79.100. Here, Davis was made to disrobe in a bathroom with the door open to the hall where any officer walking by could see. CP 38, 100-01; 2RP 17. The Court of Appeals wrongly concluded that the space was private merely because it was open only to officers and not to the general booking area. App. at 7. This conclusion is inconsistent with the statutory requirements.

A strip search must be conducted "at a location made private from the observation of persons not physically conducting the search." RCW 10.79.100(3). "[N]o person may be present or observe during the search unless the person is necessary to conduct the search or to ensure the safety of those persons conducting the search." RCW 10.79.100(4).

Here, there was no evidence that it was necessary for other officers walking by in the hall to observe the search. RCW 10.79.100(4). The State argued the open door was necessary to prevent inmate lawsuits. 2RP 21. But the law does not provide an exception to prevent lawsuits. The law permits observation of others only to protect the safety of the person conducting the search. RCW 10.79.100(4). The strip search was unlawful because it was not conducted in private.

b. The suspicionless strip search was unlawful because Davis was not under arrest for drug possession or burglary.

Davis was strip searched without reason to believe he, individually, might be bringing contraband into the jail. 2RP 28; CP 38. The statute deems reasonable suspicion automatically exists when the person “has been arrested for” a violent offense, an offense involving escape, burglary, or use of a deadly weapon, or an offense involving possession of a drug or controlled substance. RCW 10.79.130(2). Davis was arrested on outstanding warrants from the Department of Corrections pertaining to community custody violations. 1RP 14. He was on community custody pursuant to a prior drug offense. 1RP 14. He also had a warrant for failure to appear in a burglary case. CP 30. But an arrest for failure to appear is not the equivalent of an arrest for burglary, and an arrest for violating community custody conditions is not the equivalent of an arrest for a drug offense. Therefore, the court erred in finding reasonable suspicion automatically existed. 2RP 28; CP 38.

In general, the law requires at least reasonable suspicion before strip searching an arrestee. RCW 10.79.130. There must be reason to believe a strip search is necessary to discover weapons, evidence, or contraband concealed on the person’s body. RCW 10.79.130(1). Subsection (2) of the statute assumes reasonable suspicion exists when the person is arrested for certain offenses:

> For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:
>
> (a) A violent offense as defined in RCW 9.94A.030 or any successor statute;
>
> (b) An offense involving escape, burglary, or the use of a deadly weapon; or
>
> (c) An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.

RCW 10.79.130(2). The issue in this case is the meaning of the language "has been arrested for."

When interpreting a statute, courts "must ascertain and give effect to the Legislature's intent." Plemmons v. Pierce Cty., 134 Wn. App. 449, 456, 140 P.3d 601 (2006). Statutory construction is a question of law reviewed de novo. Id. For an unambiguous statute the Legislature's intent is derived from the statute's plain language. Id. When a statute is ambiguous, courts look to principles of statutory construction, legislative history, and relevant case law. Id. A statute is ambiguous if it can reasonably be interpreted in more than one way. Id.

The statutory phrase "has been arrested for [the specified offenses]" is ambiguous. It could mean a suspicionless strip search is justified if the arrested person has, ever, been arrested for a listed offense. Or, it could mean the person has, at the time of the strip search, just been arrested on suspicion

of such an offense. The group of persons who have ever been convicted of such offenses is far larger than the group of persons who are, in the instant case, under arrest on those charges.

This Court should clarify that the automatic strip search provision of RCW 10.79.130(2) does not apply to every subsequent arrest pertaining to the listed charges. In enacting the strip search provisions of RCW 10.79, the legislature's intent was to "restrict the practice of strip searching and body cavity searching persons booked into holding, detention, or local correctional facilities to those situations where such searches are necessary." RCW 10.79.060. An expansive reading of the exceptions to the reasonable suspicion requirement is inconsistent with this intent. It would lead to automatic strip searches in cases where it is unnecessary and even absurd, such as an arrest for failure to pay legal financial obligations. Because Davis was not under arrest on suspicion of having committed burglary or a drug offense, but instead on warrants for failure to appear and violating community custody, the automatic strip search provision of RCW 10.79.130(2) did not apply.

c. A warrantless strip search conducted in violation of the statute lacks the "authority of law" required by article I, section 7 of the Washington Constitution.

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without

authority of law." As a general principle, "a search warrant or subpoena must be issued by a neutral magistrate to satisfy the authority of law requirement" under article I, section 7. State v. Miles, 160 Wn.2d 236, 247, 156 P.3d 864 (2007). In the absence of a warrant, the "authority of law" required by article I, section 7 may, in some circumstances, be "granted by a valid (i.e., constitutional) statute." State v. Gunwall, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986). The search in this case violated the state constitution because there was no warrant and the search did not comply with the statute. Id. Because this search led to the only evidence of a crime, this Court should grant review under RAP 13.4(b)(3) and (4) and reverse. State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis for conviction when evidence should have been suppressed).

2. THE STRIP SEARCH STATUTE IS UNCONSTITUTIONAL TO THE EXTENT IT PERMITS SUSPICIONLESS STRIP SEARCHES.

"[W]arrantless strip searches must, at a minimum, be based on individualized, reasonable suspicion that the arrestee is concealing contraband." State v. Audley, 77 Wn. App. 897, 908, 894 P.2d 1359 (1995) (quoting Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984)). No prior Washington case has addressed the constitutionality of subsection (2) of RCW 10.79.130. Davis asks this Court to hold that it violates article I, section 7 of the Washington constitution to permit automatic strip

searches, without individualized suspicion, based solely on the category of the underlying offense. Review is warranted again under RAP 13.4(b)(3) and (4) because this case raises a novel constitutional issue and an issue of substantial public interest. Additionally, review is warranted under RAP 13.4(b)(2) because the Court of Appeals opinion is inconsistent with Audley, 77 Wn. App. 897.

a. Article I, section 7 requires a strip search be supported by at least reasonable, individualized suspicion.

It is well established that article I, section 7 often provides broader protections than the Fourth Amendment. State v. Mayfield, 192 Wn.2d 871, 878, 434 P.3d 58 (2019). The Washington Supreme Court recently reaffirmed that "no Gunwall analysis is needed to justify an independent state law analysis of article I, section 7 in new contexts." Id. Instead, the focus is on "whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result." Id. at 879 (quoting State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007)). Courts examine the text of the constitutional provision, relevant prior case law, and the current implications of recognizing or not recognizing a privacy interest. Id. Examination of these factors demonstrates that, under article I, section 7, strip searches are impermissible without reasonable, individual suspicion.

Washington's constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, sec. 7. "Authority of law" under article I, section 7 means a warrant or a well-established exception to the warrant requirement. State v. Morgan, 193 Wn.2d 365, 369, 440 P.3d 136 (2019). It is well established that this provision guarantees "uniquely heightened privacy protections." Mayfield, 192 Wn.2d at 882.

In the context of strip searches, this Court has previously held that the protection of article I, section 7 is co-extensive with the Fourth Amendment. Audley, 77 Wn. App. at 899. However, given the more recent changes in Fourth Amendment jurisprudence, that aspect of Audley's holding must be rejected.

Contrary to the Court of Appeals opinion, Audley does not decide the issue in this case because the Audley court did not determine the constitutionality of subsection (2) of RCW 10.79.130. No Washington case has yet determined whether subsection (2) is constitutional.

Audley considered the constitutionality of subsection (1) of RCW 10.79.130, permitting warrantless strip searches based on reasonable suspicion, not the following subsection, at issue here, pre-determining that arrest for certain offenses automatically constituted reasonable suspicion. 77 Wn. App. at 908. Therefore, the Court of Appeals erred in relying on Audley

to reject Davis' constitutional challenge to a separate provision of the statute. See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) ("In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."); In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("We do not rely on cases that fail to specifically raise or decide an issue.").

Audley did hold that article I, section 7 should be interpreted identically to the Fourth Amendment in strip search cases. Audley, 77 Wn. App. at 899. But it did so at a time when Fourth Amendment jurisprudence was on all fours with Washington's. That is no longer the case, and that holding is now incorrect and harmful because federal courts have moved away from Washington's stronger protection of privacy rights.

When Audley was decided, the weight of federal authority was that the Fourth Amendment prohibited strip searches without reasonable suspicion. "Blanket policies permitting strip searches of all arrestees booked into detention facilities have uniformly been held unconstitutional by the federal circuit courts." Audley, 77 Wn. App. at 907-08. Federal jurisprudence has since diverged from the principles elucidated in Audley. Since then, the United States Supreme Court has upheld a blanket strip search policy applying to "every detainee who will be admitted to the

general population" as a reasonable. Florence v. Board of Chosen Freeholders of City of Burlington, 566 U.S. 318, 322, 339-40, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012).

In addition to the changed federal landscape, analysis of the only two relevant Gunwall factors also leads to a different result now than at the time of Audley. Before applying the then-existing Fourth Amendment standard, the Audley court analyzed the fourth and sixth factors from Gunwall to determine whether our state's constitution was more protective. Under the sixth Gunwall factor, the court concluded the issue is particularly local in character and national uniformity in jail strip searches is unnecessary. Audley, 77 Wn. App. at 903-04. Both at the time of Audley and now, this sixth Gunwall factor weighs in favor of finding article I, section 7 more protective than the Fourth Amendment. Id.

Under the fourth Gunwall factor, previously established bodies of state law may bear on the distinctiveness of state constitutional rights. Gunwall, 106 Wn.2d at 61. At the time of Audley, there was "no preexisting state law entirely on point." 77 Wn. App. at 904. But that is no longer the case. Audley is now the pre-existing state law that did not then exist. For more than 25 years, Washington precedent has been that strip searches must be justified by reasonable, individualized suspicion. Id. at 907-08.

Pre-existing state law and matters of local concern, the Fourth and Sixth Gunwall factors, weigh in favor of finding article I, section 7 more protective than the Fourth Amendment now that the Fourth Amendment interpretation has changed so dramatically from what it was when Audley was decided. Specifically, that protection requires that such searches be predicated on reasonable suspicion that the arrestee is concealing contraband posing a threat to jail security. Audley, 77 Wn. App. at 908. To the extent it permits strip searches without reasonable suspicion, such as occurred in this case, RCW 10.79.130 (2) is unconstitutional under Audley and article I, section 7.

b. Police had no reason to suspect Davis of concealing contraband.

The strip search was unconstitutional in this case because police had no reason to suspect Davis of concealing contraband. Absent reasonable suspicion, the strip search violated article I, section 7, and the evidence must be suppressed. Because the remaining evidence is insufficient to sustain a conviction, Davis' conviction must be reversed.

Reasonable suspicion to justify a strip search is the same as the "reasonable articulable suspicion" required to justify a Terry[4] stop. State v. Harris, 66 Wn. App. 636, 643, 833 P.2d 402 (1992). This standard requires a "substantial possibility" that the person is concealing

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

contraband. Id. "Reasonable suspicion to conduct a strip search may be based on factors such as the nature of the offense for which a suspect is arrested and his or her conduct." Audley, 77 Wn. App. at 897. The person's prior criminal record and physically violent behavior may also be considered. RCW 10.79.140 (2). For example, in Audley, the court found reasonable suspicion because the defendant was arrested for possession of a controlled substance with intent to deliver and the officer saw him reaching down the front of his pants to retrieve the suspected cocaine. 77 Wn. App. at 908 n. 11.

Here, no one observed any furtive or concealing movements. CP 100-01; Ex. 1; 1RP 4-16. There was no evidence a controlled substance was involved in the potential trespass being investigating when Davis was arrested. 1RP 4-16; Ex. 1. Davis was arrested on warrants, one for violating his community custody. 2RP 16. No evidence showed what condition was violated, whether it involved a controlled substance, or how long ago it occurred. The other warrant was for failure to appear in a burglary case. CP 30.

The state relied on subsection (2)'s automatic strip search provision and on Davis' history of prior convictions for possession of a controlled substance. 2RP 20. But a history of drug offenses does not, standing alone, create reasonable suspicion that Davis was concealing

contraband on his person, requiring a strip search. See United States. v. Powell, 666 F.3d 180, 188 (4th Cir. 2011) (prior criminal record insufficient, standing alone, to support reasonable suspicion) (quoting United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011)); see also United States v. Hammond, 890 F.3d 901, 906 (10th Cir. 2018) ("Standing alone, a criminal record—let alone arrests or suspected gang affiliation—"is not sufficient to create reasonable suspicion of anything.").

The Court of Appeals also erred to the extent it upheld the strip search based on Davis' status as a person on community custody. App. at 11. Review is warranted under RAP 13.4(b)(1) because, under State v. Cornwell, 190 Wn.2d 296, 306, 412 P.3d 1265 (2018), warrantless searches of persons on probation may occur only if there is a nexus between the property searched and the alleged probation violation. The court explained in Cornwell that the individual's privacy interest is diminished only to the extent necessary to monitor compliance with a particular probation condition. Id. at 304. Other property, unrelated to the suspected violation, may not be searched. Id.

The statute purporting to permit automatic strip searches of those arrested on warrants pertaining to certain offenses without reasonable suspicion, must be struck down as violating article I, section 7 of the Washington Constitution. This Court should grant review under RAP

13.4(b) of this constitutional issue that is of significant public interest and reverse. Kinzy, 141 Wn.2d at 393-94.

3. THE AUTOMATIC STRIP SEARCH PROVISION OF RCW 10.79.130(2) VIOLATES THE SEPARATION OF POWERS DOCTRINE.

To the extent this provision is interpreted as merely defining what constitutes reasonable, articulable suspicion, the provision also violates the separation of powers doctrine. The separation of powers doctrine ensures that the fundamental functions of each of the three branches of government remain inviolate and that the actions of one branch do not threaten the independence or integrity or invade the prerogatives of another. State v. Gresham, 173 Wn.2d 405, 428, 269 P.3d 207, 217 (2012) (quoting Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)). The separation of powers doctrine is concerned with whether the legislature has undertaken to exercise a power conferred elsewhere by the nature of an institutional government, such as the judicial power to determine cases or controversies. Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 421 (9th Cir. 1980), aff'd sub nom. I.N.S. v. Chadha, 462 U.S. 919 (1983). It is that fundamental power that is invaded by RCW 10.79.130(2)'s attempt to legislate reasonable suspicion in certain cases.

Interpretation of the constitutional limits on state action is clearly the function of the judiciary. See, e.g., Marbury v. Madison, 5 U.S. (1

Cranch) 137, 176, 2 L.Ed. 60 (1803). The reasonable suspicion standard for searches and seizures is judicial creation and a constitutional standard.[5] Terry, 392 U.S. at 21. While the legislature writes laws, the judiciary to applies them to existing sets of facts. Cornelius v. Washington Dep't of Ecology, 182 Wn.2d 574, 589, 344 P.3d 199 (2015) (citing Lummi Indian Nation v. State, 170 Wn.2d 247, 262, 241 P.3d 1220, 1229 (2010)). The legislature invades the judicial function when it attempts to apply the law to an existing set of facts. Cornelius, 182 Wn.2d at 589 (citing Lummi Indian Nation, 170 Wn.2d at 263).

By declaring that reasonable suspicion automatically exists whenever a person has been convicted for one of the enumerated offenses, the legislature has attempted to apply the constitutional reasonable suspicion standard to a given set of facts. Such a determination also precludes judicial review. Thus, in addition to violating article I, section 7 of Washington's constitution, the statute violates the separation of powers doctrine. This Court should grant review under RAP 13.4(b)(3) and reverse. See Gresham, 173 Wn.2d at 434 (reversing when conviction relied on evidence admitted under to statute that violated separation of powers doctrine).

[5] The reasonable suspicion required for strip searches is identical to the Terry standard. Harris, 66 Wn. App. at 643.

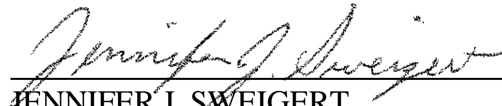
E. CONCLUSION

The Court of Appeals decision presents significant questions of constitutional law and public interest and is inconsistent with the holdings in Audley, 77 Wn. App. at 908, and Cornwell, 190 Wn.2d at 306. Davis, therefore, requests this Court grant review under RAP 13.4 (b) and reverse.

DATED this _3rd_ day of September, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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Appendix

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

STATE OF WASHINGTON,	)	
	)	No. 36561-1-III
Respondent,	)	
	)	
v.	)	
	)	
RICO ODELL DAVIS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

KORSMO, J. — Rico Davis appeals from a conviction for possession of methamphetamine, arguing that he was improperly subjected to a strip search. We affirm.

FACTS

After first lying about his identity, Davis was arrested on both a department of corrections (DOC) warrant from a prior drug possession conviction and an arrest warrant for burglary. At the jail, he was subjected to a strip search due to the DOC warrant. Corrections officers observed and removed two plastic "baggies" from Davis' buttocks. They contained methamphetamine.

Spokane police had come in contact with him after a series of 911 calls reported strangers entering an apartment at 3:30 a.m.; one call reported that the men had been "let inside." The two female occupants, however, who did not speak much English and called

upon family members for help, wanted the two men removed. One man[1] was arrested on an outstanding warrant. The other man, Davis, identified himself as "Karl Davis" and reported that he had a non-extraditable warrant outstanding. When officers reported that his description and the birthdate he had given did not match those of Karl Davis, Rico Davis became agitated. An officer detained Davis because he did "not want to get in a fight" with him. The officer then patted Davis down and noted a wallet. When asked if his correct name could be found there, Davis admitted his true identity. The wallet was seized and he was subsequently arrested on the noted warrants.

Defense counsel filed a motion to suppress, arguing that Mr. Davis had been wrongly detained at the apartment. After conducting a hearing, Judge Maryann Moreno concluded that police were investigating the crime of trespass and properly detained Mr. Davis after he provided a false name. The motion was denied.

Counsel then moved to suppress the methamphetamine, arguing that Mr. Davis had been illegally searched at the jail. A second hearing was held before Judge Julie McKay. Judge McKay concluded that (1) the detention was proper due to the false identification, (2) a body cavity search did not occur, and (3) a strip search was properly conducted at the jail due to the DOC warrant for the earlier controlled substance conviction. The motion was denied.

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[1] He turned out to be the son of the older apartment occupant.

A bench trial on stipulated facts was conducted before the Judge John Cooney. Judge Cooney convicted the defendant as charged and imposed a standard range sentence. Mr. Davis then timely appealed to this court.

A panel considered the case without hearing argument.

ANALYSIS

The appeal presents several issues related to the two suppression rulings, but we condense the challenges into two. We first address the challenges to the apartment detention. We then consider arguments related to the jail search.

Apartment Detention

Mr. Davis argues that the officer had no reason to detain him once they learned he had been "let inside" and that there was no basis for patting him down. The first argument is answered by the findings from the suppression hearings, while the second contention is waived for failure to present it during the course of those two hearings.[2]

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[2] His pursuit of these arguments on appeal is curious since no evidence was discovered during the trespass investigation. The discovery of a person's identity is not a basis for suppressing evidence uncovered following an arrest on an outstanding warrant. *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 184 (1968). Washington excludes evidence that is directly discovered as a result of police violation of art. I, § 7. *Kennedy*, 107 Wn.2d at 9. Washington does not apply a "but for" test of causation that would require the suppression of any and all evidence discovered subsequent to an illegality. *E.g.*, *State v. Mayfield*, 192 Wn.2d 871, 874, 434 P.3d 58 (2019); *State v. Mierz*, 127 Wn.2d 460, 474-475, 901 P.2d 286 (1995); *State v. Bonds*, 98 Wn.2d 1, 10-14, 653 P.2d 1024 (1982); *State v. Vangen*, 72 Wn.2d 548, 554-555, 433 P.2d 691 (1967).

This court typically reviews findings entered following a CrR 3.6 hearing for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review de novo the conclusions derived from the factual findings. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).[3]

Mr. Davis argues that the police had no basis for continuing an investigation or in discovering his identity once he succeeded in entering the apartment. The record does not support that argument.[4] Washington applies the articulable suspicion standard of *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), to investigative stops implicating the protections of article I, section 7 of our state constitution. *State v. Kennedy*, 107 Wn.2d 1, 4-6, 726 P.2d 445 (1986). When an officer can articulate the basis for believing possible criminal activity is afoot, a brief detention to investigate is permissible. *Terry*, 392 U.S. at 21. The test is whether the facts known to the officer show "a substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, 107 Wn.2d at 6. "When the activity is consistent with criminal activity, although also consistent with noncriminal activity, it may justify a brief detention." *Id*.

These standards were satisfied here. The officers knew that there was "a substantial possibility that criminal conduct has occurred." *Id*. Three calls reported that

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[3] Davis also assigns error to related findings of fact, but makes no significant effort to explain whether or not sufficient evidence supports them.

[4] No finding of fact from either CrR 3.6 hearing indicates how the men entered the apartment, let alone suggests that they were permitted or authorized to be there.

strange men were trying to enter an apartment in the middle of the night. The apartment's occupants let the police in and pointed out the unwanted presence of Mr. Davis. That evidence supported the trial court's finding that the "officers were investigating whether Mr. Davis had committed the crime of trespass." Clerk's Papers (CP) at 24. It was reasonable for officers to determine the identity of the strange man in the apartment, particularly after he gave them a false name.[5] The trial court correctly denied the motion to suppress.

Mr. Davis also argues that he was unlawfully patted down. He waived that argument. The failure to raise an issue in the trial court normally precludes a party from raising the issue on appeal. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). One exception to that rule is that a claim of manifest constitutional error can be asserted for the first time on appeal, if the record is adequate to address the issue. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Mr. Davis argues that the record is that the record is sufficient to consider this issue, but it is not. No one asked the officers why a pat down was necessary and the

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[5] The officers also had probable cause to arrest Davis for obstructing a public servant. RCW 9A.76.020. This stands as an independent reason to affirm the suppression ruling. Even if there had been an illegal detention, the false statement provided a basis independent of the initial detention to identify and arrest Davis. A crime committed subsequent to allegedly illegal police actions is not the fruit of the illegality. *State v. Valentine*, 132 Wn.2d 1, 935 P.2d 1294 (1997); *State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995).

court made no findings related to that topic. There was evidence that Mr. Davis was "agitated" and that the officers feared having to fight with him. A properly noted hearing would have provided the answers to these questions. The wallet also appears to have been seized contemporaneously with the arrest on the outstanding warrants. Again, if a hearing had been held, the court could have made findings to identify whether there was any evidence seized, let alone seized illegally.

In addition to the inadequacy of the record, a second reason exists to decline review of this argument. Mr. Davis *twice* brought CrR 3.6 motions to suppress evidence without raising the current version of this claim. The decision not to present a third theory of suppression likely was the result of conscious acknowledgement that the facts of the encounter would not justify it. The issue is waived. *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995).

For all of the reasons noted above, the challenges to the suppression rulings are without merit.

Jail Search

Mr. Davis challenges the strip search, claiming that it was performed improperly and without authorization, and that the statute is unconstitutional. Although these arguments do address evidence that was used at trial, they, too, are without merit.

Strip searches and body cavities searches are governed by RCW 10.79.060-170. The primary distinction is whether a body cavity (stomach, rectum, or vagina) is

involved. RCW 10.79.070(3). Body cavity searches involve touching or probing a body cavity. RCW 10.79.070(2). A body cavity search can only be conducted pursuant to a search warrant. RCW 10.79.080(1). Cavity searches must be conducted by trained health care professionals. RCW 10.79.100(2). A strip search involves the removal or rearrangement of clothing and the display of the genitals, buttocks, anus, female breasts, or undergarments. RCW 10.79.070(1).

Strip searches can only occur when reasonable suspicion exists or when a person has been arrested for specified categories of offenses. RCW 10.79.130. Among those who may be searched is anyone who has been arrested for "an offense involving escape, burglary, or the use of a deadly weapon; or an offense involving possession of a drug or controlled substance." RCW 10.79.130(2)(b), (c). Strip searches shall be conducted in private locations. RCW 10.79.100(3).

Mr. Davis first argues that the search was an improper body cavity search and was not conducted privately. The court's factual findings, all supported by the testimony of a corrections officer, are contrary to those assertions. The search was conducted in a bathroom that was not visible to the public or the general booking area. The door to the room remained open for security purposes. CP at 38. These findings establish that the search was conducted in private in accordance with the requirements of the statute.

The baggies of methamphetamine were observed when Mr. Davis spread his buttocks. The court expressly found, consistent with the testimony of the corrections

officer, that the baggies were removed without probing the rectum. CP at 38. On the basis of these findings, the trial court determined that this constituted a strip search, not a body cavity search. CP at 38.

The ruling was correct. Removing an item protruding from the anus during a strip search is not a body cavity search, even if the protruding item is touching a body cavity. *State v. Jones*, 76 Wn. App. 592, 598, 887 P.2d 461 (1995). An officer does not touch or probe the rectum when retrieving an item that touches the rectum. *Id*.

The trial court properly determined that Mr. Davis was not the subject of a body cavity search.

He next argues that the search was conducted without statutory authorization. We disagree. A strip search is authorized following an arrest for certain named offenses, including "burglary" or "an offense involving possession of a drug or controlled substance." RCW 10.79.130(2)(b), (c). Mr. Davis was arrested due to both the burglary warrant and the DOC warrant from a drug case in which he was on community supervision. CP at 38. Because the statute treats these warrants differently, we, too, will discuss each separately.

The trial court discounted the burglary warrant as a basis for the search, stating that the facts underlying the warrant were not in the record. The court erred in doing so. Nothing in the statute suggests factual inquiry into the nature of the offense is required. Instead, the statute lists categories of offenses for which a strip search is authorized. The

statute authorizes a strip search when a burglary suspect is booked into the jail. The search of Mr. Davis was authorized by the statute.

Anticipating this result, Mr. Davis argues that the categorical approach taken by the legislature in RCW 10.79.130(2), which dictates that reasonable suspicion for a strip search exists when a person is arrested for specific offenses, is unconstitutional. He contends that the individualized suspicion must always be present to satisfy art. I, § 7 of the Washington Constitution.

No published opinion from this court appears to have addressed this argument. *Jones* is the only case that has even addressed a search expressly authorized under subsection 130(2). 76 Wn. App. at 599. In all other instances, our court has addressed searches authorized under subsection 130(1) or has not specified the subsection. *See, e.g., State v. Barron*, 170 Wn. App. 742, 752-754, 285 P.3d 231 (2012) (arrest for assault); *State v. Harris*, 66 Wn. App. 636, 643, 833 P.2d 402 (1992) (arrest on unspecified warrants).

Both parties properly recognize *State v. Audley*, 77 Wn. App. 897, 902, 894 P.2d 1359 (1995), as the most authoritative discussion of the strip search statute. There, the defendant was observed delivering cocaine he had been storing down the front of his pants. *Id*. at 900. Division One of this court upheld the constitutionality of the statute under art. I, § 7 and the Fourteenth Amendment, deciding that the state and federal constitutions provided the same protections in this context. 77 Wn. App. at 903-905.

Consistent with federal authority, *Audley* concluded that individualized suspicion was necessary to perform a strip search at a jail. *Id*. The court recognized that 130(2) deemed reasonable suspicion "automatically present" in the circumstances listed. *Id*. at 906.

Recognizing that federal courts have since retreated from this standard, Davis argues that this court should continue with the individualized suspicion standard and use it to declare 130(2) unconstitutional.[6] *Audley* expressly recognized that the categories of 130(2) themselves provided individualized suspicion. 77 Wn. App. at 902, 908. It would be a significant rewriting of *Audley* to now rule that it was internally inconsistent. He has presented no compelling reason for doing so.[7]

Although *Audley* answers one of the challenges presented here, it does not address the validity of the search based on the DOC warrant relied upon by the trial court. RCW 10.79.120 expressly states that the protections of the strip search statute do not extend to individuals incarcerated "by order of a court" or those "held for post-conviction

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[6] Federal courts now permit strip searches of those destined for the general jail or prison population without requiring individualized suspicion. *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 339-340, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012); *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010).

[7] Before abandoning precedent, a court must find that an established rule is both incorrect and harmful. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 466 P.2d 508 (1970). Mr. Davis has not made that effort here. The statute protects both individual rights and the rights of those working and residing in correctional facilities. *Audley*, 77 Wn. App. at 908-909. There has been no showing that *Audley* wrongly construed either the statute or the demands of art. I, § 7, or that its rule is harmful. We have no basis for abandoning it.

incarceration." The DOC warrant involved a post-conviction matter, taking that arrest outside of the directives of RCW 10.79.130.[8]

Mr. Davis also argues that no one can be strip searched without an arrest warrant, a contention that goes to the heart of the DOC warrant issue. However, his analysis fails because it focuses on the wrong population. A person detained post-conviction is not situated the same as every other citizen, nor even situated the same as an arrestee. Davis primarily relies upon *Audley*, a case dealing with arrestees. It stands for the proposition that RCW 10.79.130's reasonable suspicion standard for strip searches of arrestees satisfies art. I, § 7. It does not stand for the proposition that incarcerated prisoners can only be strip searched when reasonable suspicion exists.

A complete *Gunwall*[9] analysis no longer is needed when determining whether art. I, § 7 provides greater protection than the Fourth Amendment. *State v. Mayfield*, 192 Wn.2d 871, 879, 434 P.3d 58 (2019). Instead, the parties (and reviewing court) may simply consider the merits of the argument for extra protection. *Id*. In that regard, *Audley* does not aid Mr. Davis. Not only does it not address his situation, it also holds that the state and federal constitutions set forth the same protections for strip searches. Now that the United States Supreme Court has confirmed that individualized suspicion is

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[8] *Audley* succinctly summarized the matter: RCW 10.79.130, *et seq.*, applies only to arrestees and does not apply to those committed to jail (presumably to serve sentences) by the court. *Audley,* 77 Wn. App. at 901 n.1.

[9] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

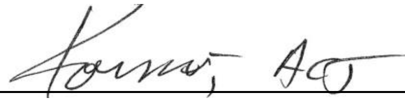
not needed to search prisoners, the *Audley* standard undercuts Mr. Davis's argument. *Florence v. Board of Chosen Freeholders of the County of Burlington*, 566 U.S. 318, 339-340, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012).

More critically, the pre-*Gunwall* case law does not support his argument. Significant here is *State v. Hartzog*, 96 Wn.2d 383, 635 P.2d 694 (1981). There the court upheld a Walla Walla Superior Court policy of having all penitentiary prisoners subjected to strip and body cavity searches before appearing in superior court for any proceedings. *Id*. at 391-397. This is a significant indication that Washington, historically, has not provided extra protection to prisoners in this arena. Similarly, commentators also recognize that Washington prisoner searches are governed by statute and regulation. Charles W. Johnson & Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2019 Update*, 42 Seattle U. L. Rev. 1277, 1447 (2019).

The need of correctional institutions to protect against the introduction of contraband is significant. This case provides a clear example. If Mr. Davis had not been carefully searched, two packages of methamphetamine would have made it into the jail. In the absence of any indication that Washington grants prisoners greater protection against strip searches than the federal constitution, we decline to do so here.

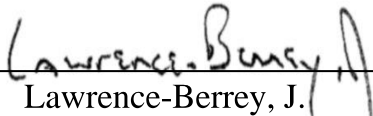
The conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Korsmo, A.C.J.

WE CONCUR:



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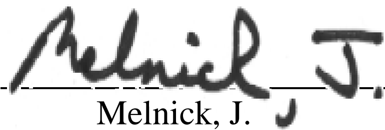

Melnick, J.

NIELSEN KOCH P.L.L.C.

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