

70839-2

70839-2

NO. 70839-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN VANNESS,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JAN 31 PM 4:23

TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
C. <u>STATEMENT OF THE CASE</u>	3
1. <u>Charge and motion to suppress</u>	3
2. <u>Suppression hearing testimony</u>	4
3. <u>Court’s ruling on motion to suppress</u>	6
4. <u>Conviction and sentence</u>	7
D. <u>ARGUMENT</u>	8
THE WARRANTLESS SEARCH OF A LOCKED CONTAINER WITHIN A BACKPACK VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION....	8
1. <u>Overview of article I, section 7</u>	8
2. <u>Search-incident-to-arrest exception</u>	9
a. <u>Byrd does not permit searches of locked containers</u>	11
b. <u>Locked containers should fall outside Byrd’s “time of arrest” rule</u>	12
c. <u>Adopting Stroud’s bright-line rule in all searches incident to arrest makes good policy sense</u>	16
3. <u>Inventory search exception</u>	16

TABLE OF CONTENTS (CONT'D)

	Page
4. <u>No other exception to the warrant requirement applies and the lock box evidence must be suppressed</u>	21
5. <u>Evidence obtained via the search warrant based on the unconstitutional search must be suppressed as fruit of the poisonous tree</u>	22
6. <u>The appropriate remedy is dismissal of this prosecution</u>	23
E. <u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Afana</u> 169 Wn.2d 169, 233 P.3d 879 (2010).....	22
<u>State v. Armenta</u> 134 Wn.2d 1, 948 P.2d 1280 (1997).....	23
<u>State v. Buelna Valdez</u> 167 Wn.2d 761, 224 P.3d 751 (2009).....	8, 10, 12, 13
<u>State v. Byrd</u> 178 Wn.2d 611, 310 P.3d 793 (2013).....	9, 10, 11, 12
<u>State v. Coates</u> 107 Wn.2d 882, 735 P.2d 64 (1987).....	22
<u>State v. Dugas</u> 109 Wn. App. 592, 36 P.3d 577 (2001).....	18, 19
<u>State v. Ferguson</u> 131 Wn. App. 694, 128 P.3d 1271 (2006).....	17
<u>State v. Hall</u> 53 Wn. App. 296, 766 P.2d 512 (1989).....	21
<u>State v. Houser</u> 95 Wn.2d 143, 622 P.2d 1218 (1980).....	17, 19
<u>State v. Ladson</u> 138 Wn.2d 343, 979 P.2d 833 (1999).....	23
<u>State v. Maxwell</u> 114 Wn.2d 761, 791 P.2d 223 (1990).....	22
<u>State v. Ortega</u> 177 Wn.2d 116, 297 P.3d 57 (2013).....	11

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Patton</u> 167 Wn.2d 379, 219 P.3d 651 (2009).....	9
<u>State v. Ruem</u> ___ Wn.2d ___, 313 P.3d 1156 (2013).....	22
<u>State v. Snapp</u> 174 Wn.2d 177, 275 P.3d 289 (2012).....	10, 13
<u>State v. Stroud</u> 106 Wn.2d 144, 720 P.2d 436 (1986).....	12, 13, 14, 15, 16
<u>State v. Tyler</u> 177 Wn.2d 690, 302 P.3d 165 (2013).....	17
<u>State v. White</u> 135 Wn.2d 761, 958 P.2d 761 (1998).....	17
<u>State v. Winterstein</u> 167 Wn.2d 620, 220 P.3d 1226 (2009).....	22
<u>York v. Wahkiakum School District No. 200</u> 163 Wn.2d 297, 178 P.3d 995 (2008).....	8

FEDERAL CASES

<u>Arizona v. Gant</u> 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).....	10, 13
<u>Chimel v. California</u> 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).....	10
<u>Davis v. United States</u> 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).....	16
<u>United States v. Robinson</u> 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).....	10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 3.6.....	2, 18
U.S. Const. Amend. IV	1, 8, 11, 18
Wash. Const. Art. I, § 7	1, 8, 9, 10, 12, 15, 17, 24

A. INTRODUCTION

When officers arrested Stephen Lee VanNess, they searched the backpack VanNess was carrying. In the course of this search, officers found and pried open a locked box. Based on the contents of the locked container, VanNess was convicted of one count of possession of a controlled substance with intent to deliver and one count of simple possession of a controlled substance. The search of the locked container violated VanNess's rights to privacy under article I, section 7 of the Washington Constitution, as no exception to the warrant requirement—neither the search-incident-to-arrest nor inventory search exception—applied. Accordingly, the fruits of this search, including evidence obtained from a subsequent search warrant, must be suppressed. This court should therefore reverse VanNess's conviction and remand for dismissal of this prosecution with prejudice.

B. ASSIGNMENTS OF ERROR

1. The warrantless search of a locked container inside VanNess's backpack violated VanNess's rights under article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. This unconstitutional search tainted a subsequent search warrant pertaining to VanNess's backpack. The trial court should have suppressed the evidence obtained from the warrantless search and the fruits of the search performed pursuant to the tainted warrant.

2. The trial court erred in entering conclusions of law 2(b)(ii), 2(b)(iii), 2(b)(iv), and 2(b)(v), appearing at CP 86¹, insofar as each supported its ruling that the search-incident-to-arrest exception to the warrant requirement justified the search of the locked container.

3. The trial court erred in entering conclusion of law 2(b)(ii), appearing at CP 87, that inventorying the appellant's property justified the search of his bags.

4. The trial court erred in entering conclusion of law 2(b)(iii), appearing at CP 87, insofar as that conclusion of law states that the search of the locked container was authorized incident to the arrest.

5. The trial court erred in entering conclusion of law 2(c) that all evidence from the locked box was admissible.

6. The trial court erred in generally concluding that the contents of the locked box were not suppressed and were properly included in the subsequent application for a search warrant.

Issues Pertaining to Assignments of Error

Washington courts require a search warrant prior to permitting a search of a locked container subject to very few, well delineated exceptions.

¹ The trial court's written CrR 3.6 ruling contains two distinct conclusions of law assigned to paragraph 2(b), one pertaining to the search incident to arrest and the other to the inventory search. For clarity's sake, references made to these separate conclusions of law include the respective CP page numbers on which they appear.

a. Does the search of the locked container fall under the search-incident-to-arrest exception to the warrant requirement?

b. Does the search of the locked container fall under the inventory search exception to the warrant requirement?

c. Does the search of the locked container fall under any other exception to the warrant requirement?

d. Should the trial court have suppressed the evidence obtained from the warrantless search of the locked container?

e. Should the trial court have suppressed the evidence obtained from execution of a search warrant because the search warrant was based solely on illegally obtained evidence from the initial warrantless search of the locked container?

f. Where no other evidence supported the appellant's conviction, must the conviction be reversed and must the charges be dismissed with prejudice?

C. STATEMENT OF THE CASE

1. Charge and motion to suppress

The Snohomish County prosecutor initially charged VanNess with one count of possession of a controlled substance. CP 106. VanNess moved to suppress the evidence seized in the search of a locked container located in

the backpack he was carrying at the time of arrest. CP 90-98. The trial court denied the defense motion to suppress. CP 83-87.

Thereafter, the State amended its information to charge VanNess with one count of possession of a controlled substance with intent to manufacture or deliver (methamphetamine) and one count of possession of a controlled substance with intent to manufacture or deliver (heroin). CP 70. VanNess pleaded not guilty and proceeded to jury trial. 2RP 12.²

2. Suppression hearing testimony

On November 29, 2012, Everett Police dispatched Officer Robert Edmonds to contact VanNess, who had outstanding warrants for his arrest. 1RP 3. VanNess's presence in a particular Everett city block also violated a no contact order. 1RP 3.

Officer Edmonds contacted VanNess and placed him into custody. 1RP 4. At the time of arrest, VanNess was wearing a backpack with both straps over his shoulders. 1RP 4. Officer Edmonds removed the backpack, placed VanNess in handcuffs, and walked VanNess and the backpack to his patrol car. 1RP 5. As Officer Edmonds removed the backpack from VanNess, another officer arrived. 1RP 17. Two more officers arrived in

² This brief refers to the verbatim reports of proceedings as follows: 1RP – June 13, 2013; 2RP – August 5, 2013; 3RP – August 6, 2013; 4RP – August 7, 2013; 5RP – August 27, 2013.

short order. 1RP 17. Officer Edmonds asked VanNess to consent to a search of the backpack. 1RP 7. VanNess did not respond. 1RP 7.

Officer Edmonds proceeded to search VanNess's backpack pursuant to department policy to look for "dangerous" items. 1RP 7 At the time of the search, VanNess was located at the right rear door of Officer Edmonds's patrol car with at least one other responding officer. 1RP 18, 22.

Officer Edmonds found several knives in and outside the backpack. 1RP 7-8. He also located a locked box that was approximately six inches by four inches by two inches. 1RP 8. Over defense counsel's objections, Officer Edmonds testified that he and other officers in his department had previous experience with similar locked boxes containing firearms and incendiary devices. 1RP 10-12. Officer Edmonds went on to explain that his department had recently released additional training guidelines and policies instructing officers to conduct inventory searches of such locked containers for safety purposes. 1RP 12-14.

Officer Edmonds asked VanNess to consent to a search of the locked box and for the combination to the lock. 1RP 14. VanNess remained silent. 1RP 14. Officer Edmonds also asked VanNess whether there was anything dangerous in the box. 1RP 14. VanNess continued to remain silent. 1RP 14. At that time, Officer Edmonds retrieved a flathead screwdriver from his patrol vehicle, inserted it into the corner of the locked box, and pried open

the box approximately one-quarter to one-half inch to look inside. 1RP 14; CP 85. Although Officer Edmonds did not observe any “dangerous items,” he stated he saw contraband. 1RP 15. In his affidavit of probable cause, Officer Edmonds indicated that when he opened VanNess’s locked container, he saw a scale and small plastic baggies, and smelled vinegar, which he associated with heroin. CP 102. After seeing the locked box’s contents, Officer Edmonds returned the box to the backpack, sealed and impounded the backpack, and ceased his search of the backpack. 1RP 26.

Based on what he saw in the locked box, Officer Edmonds applied for a search warrant. 1RP 23. When he executed the search warrant, Officer Edmonds found methamphetamine, heroin, a digital scale, a glass pipe, and several plastic baggies, among other evidence that was not found during the first search. 1RP 26; CP 102. This additional evidence was introduced and admitted against VanNess at trial. 3RP 36-55.

3. Court’s ruling on motion to suppress

The court ruled that the search of the locked container fell within the search-incident-to-arrest exception to the warrant requirement. 1RP 46-47. The court largely framed its ruling around the need for officer safety. 1RP 46-47. The court also approved of the search warrant, “find[ing] that there were valid grounds based on the search incident to arrest to form the basis of probable cause to apply for the warrant.” 1RP 47-48. However, the court

indicated that the inventory search exception alone was not enough to justify this search. 1RP 47.

In its written ruling, attached as an Appendix, the court entered findings of fact (a) through (q) that generally conform with the recitation of facts above. CP 83-85. Based on these facts, the court concluded that the warrantless search of VanNess's locked box was valid as a search incident to VanNess's arrest. CP 86. The court again reasoned that officer safety concerns justified the search incident to arrest because officers had found other weapons in the backpack and that the locked box "could have" contained a "gun or other dangerous weapon or materials, e.g. an incendiary device." CP 86

Consistent the court's oral ruling, the court ruled that while an inventory search of VanNess's bags was valid, "[e]ntry into the locked box was not justified under the inventory search exception." CP 87.

Because the court ruled not to suppress the contents of the locked box, the court concluded that those contents were properly included in the application for a search warrant. CP 87.

4. Conviction and sentence

After a trial, the jury returned two guilty verdicts. With regard to Count I, the jury found VanNess guilty of possession of a controlled substance, methamphetamine, with intent to deliver. CP 33; 4RP 40-43. On

the second count, the jury found VanNess guilty of the lesser included offense of possession of a controlled substance, heroin. CP 30; 4RP 40-43. The court sentenced VanNess, within the standard range, to 78 months of confinement, 12 months of community custody, and \$3,600 in fines and a mandatory victim assessment. CP 16-18. This timely appeal follows. CP 56.

D. ARGUMENT

THE WARRANTLESS SEARCH OF A LOCKED CONTAINER WITHIN A BACKPACK VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

1. Overview of article I, section 7

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.” While the Fourth Amendment precludes only “unreasonable” searches, article I, section 7 prohibits any search “without authority of law.”³ State v. Buelna Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). The courts’ inquiry under article I, section 7 proceeds in two parts: first, courts determine whether the state action was a disturbance of private affairs; second, if private affairs were disturbed, courts ask whether

³ Because the privacy protections of article I, section 7 are more extensive than those provided by the Fourth Amendment, York v. Wahkiakum School District No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008), this brief analyzes the search of the locked container in VanNess’s backpack primarily under the Washington Constitution. VanNess alleges error, however, under both the state and federal provisions.

any authority of law justified the intrusion. Id. at 772. “A trial court’s conclusions on a motion to suppress evidence are reviewed de novo.” Id. at 767.

“Article I, section 7 is a jealous protector of privacy.” Id. at 777. Analysis under article I, section 7 “begins with the presumption that a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement. These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.” State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

In this case, Officer Edmonds’s search of a locked container found in VanNess’s backpack doubtlessly disturbed VanNess’s private affairs. Whether officers had authority of law to conduct the search depends on whether the search fell within one of the narrowly construed exceptions to the warrant requirement. Because no such exception applies here, officers acted without authority of law. The evidence must be suppressed.

2. Search-incident-to-arrest exception

The Washington Supreme Court recently clarified that there are two prongs to the warrant exception for searches incident to a lawful arrest. State v. Byrd, 178 Wn.2d 611, 617-18, 310 P.3d 793 (2013). Under the first prong, searches may be made in the “area from within which [an arrestee]

might gain possession of a weapon or destructible evidence.” Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); see also Byrd, 178 Wn.2d at 617. In the vehicular context, the scope of this type of search incident to arrest has recently been limited to its policy justifications by proscribing automobile searches after an arrestee has been secured in a patrol car and no longer presents any threat to arresting officers or evidence. Arizona v. Gant, 556 U.S. 332, 335, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); State v. Snapp, 174 Wn.2d 177, 188-89, 275 P.3d 289 (2012); Buelna Valdez, 167 Wn.2d at 777.

By contrast, under the second prong of the search-incident-to-arrest exception, “a search may be made of the *person* of the arrestee by virtue of the lawful arrest.” Byrd, 178 Wn.2d at 617 (quoting United States v. Robinson, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)). This is so because, as the Byrd court clarified, searches of the arrestee’s person and personal effects “always implicate Chimel concerns for officer safety and evidence preservation.” Byrd, 178 Wn.2d at 618. Thus, “[t]he authority to search an arrestee’s person and personal effects flows from the authority of a custodial arrest itself,” and therefore such a search “satisfies article I, section 7’s requirement that incursions on a person’s private affairs be supported by ‘authority of law.’” Id.

The Byrd court also defined a “personal effect” of an arrestee, relying on the “time of arrest” rule developed under Fourth Amendment jurisprudence. Id. at 620-21. Under this rule, personal effects are those articles “immediately associated” with the person of the arrestee. Id. at 621. In turn, an “article is ‘immediately associated’ with the arrestee’s person and can be searched . . . if the arrestee has actual possession of it at the time of a lawful custodial arrest.” Id. (collecting cases).

Given that VanNess’s arrest occurred on the street, outside of the vehicular context, the second prong of the search-incident-to-arrest exception identified in Byrd justified a search of VanNess’s backpack because VanNess was actually carrying his backpack on his back at the time of arrest.⁴ However, prior case law and common sense reject the notion that a search of a locked container falls within the proper scope of a search incident to arrest.

a. Byrd does not permit searches of locked containers

While Byrd confirmed that arresting officers had broad authority to search an arrestee’s person and personal effects, it “caution[ed] that the proper scope of the time of arrest rule is narrow, in keeping with the ‘jealously guarded’ exception to the warrant requirement.” 178 Wn.2d at 623 (quoting State v. Ortega, 177 Wn.2d 116, 122, 297 P.3d 57 (2013)).

⁴ VanNess does not dispute the lawfulness of his arrest.

In Byrd, the search in question involved a purse that was on Byrd's lap at the time of arrest. Id. at 615, 623. The court had little trouble concluding that such a search was constitutionally valid because the purse was an article immediately associated with her person—it was touching her person when she was arrested. Id. at 623. Of course, based on the facts in Byrd, the court did not consider whether a search of a locked container within Byrd's purse would have passed constitutional muster. Byrd's cautionary mandate that courts should construe the search-incident-to-arrest exception as narrowly as possible, however, suggests that the court would reject a search of a locked container. This is especially likely given that locked containers have continuously warranted heightened protection against searches incident to arrest under Washington case law for nearly 30 years.

b. Locked containers should fall outside Byrd's "time of arrest" rule

Beginning with State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986) (lead opinion), overruled in part on other grounds by Buelna Valdez, 168 Wn.2d at 777, our supreme court has indicated that locked containers deserve special protection under article I, section 7.⁵ Stroud provided that when searching a vehicle incident to arrest, "if the officers encounter a

⁵ Stroud was a four-justice plurality opinion that, "unlike the concurrence, interpreted the heightened privacy protections under article I, section 7 to exclude an officer from searching any locked containers found in the passenger compartment." Buelna Valdez, 167 Wn.2d at 775. "As this was the narrower ground upon which the majority agreed, this interpretation represents the holding of Stroud." Buelna Valdez, 167 Wn.2d at 775.

locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.” Stroud, 106 Wn.2d at

152. The Stroud court further explained,

The rationale for this is twofold. First, by locking the container, the individual has shown that he or she reasonably expects the contents to remain private. Secondly, the danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual’s access to the contents of the container.

Id. (citation omitted).

Although Stroud has been overruled due to its expansive allowance of a search of the arrestee’s vehicle incident to arrest—contrary to the recent holdings of Gant, Snapp, and Buelna Valdez—Stroud’s holding that locked containers are entitled to greater protection remains Washington law. See Buelna Valdez, 167 Wn.2d at 777 (overruling only “that portion of Stroud’s holding” that gave an “expansive interpretation” of the vehicular search-incident-to-arrest exception). Indeed, Buelna Valdez wholly reaffirmed Stroud’s principles:

This is a *sound limitation* on a search of an automobile incident to arrest Where a container is locked and officers have the opportunity to prevent an individual’s access to the contents of that container so that officer safety or the preservation of evidence of the crime of arrest is not at risk, *there is no justification under the search incident to*

arrest exception to permit a warrantless search of the locked container.

167 Wn.2d at 776-77 (emphasis added).

Given the Washington Supreme Court's recent re-endorsement of Stroud's reasoning and rationale, Stroud's safeguarding of locked containers should certainly also apply to arrests occurring outside the vehicular context. First, by going to the trouble to secure items in a locked container, arrestees demonstrate that they "reasonably expect[] the contents to remain private." Stroud, 106 Wn.2d at 152. This commonsense understanding is equally true whether or not the locked containers appear in the passenger compartment of a vehicle or in a purse, duffle bag, or backpack. Second, when an arrestee stores evidence or a weapon in a locked receptacle, there is a minimal likelihood that the arrestee could destroy such evidence or grab hold of a weapon. Indeed, how would a physically restrained arrestee, even were he or she to get out of handcuffs and make his or her way to the locked container, have time to unlock a container before officers could intervene? As our supreme court has suggested, Stroud's provision of heightened protection for locked containers in searches incident to arrest remains logical and appropriate both in and outside the vehicular context.

Applying Stroud's rationale to the facts of VanNess's case also demonstrates its appropriateness. VanNess's placement of items in a locked

box showed his reasonable expectation that these contents would remain private. When VanNess was arrested, he was placed in handcuffs and otherwise physically restrained by Officer Edmonds, beyond reach of his backpack for the remainder of his time at the scene of arrest. 1RP 16-18. VanNess did not resist arrest or attempt escape, and his personal effects were under the control of officers at the scene of arrest. 1RP 29-30. Even if VanNess could have escaped from his handcuffs, he would have had to physically overcome multiple officers, 1RP 22, would have had to find the locked box in his backpack, and would have had to enter the correct combination with amazing haste in order to access its contents before arresting officers could intervene. Because VanNess's placement of his effects in a locked box demonstrated his reasonable expectation of privacy and because VanNess had no realistic opportunity to gain access to the locked box following his arrest, there was no justification for a search of the locked box incident to VanNess's arrest.

As this case demonstrates, this court should apply Stroud's well reasoned holding to *all* searches of locked containers incident to arrest and require arresting officers to obtain a warrant prior to searching such containers. Anything less would contravene the protections guaranteed by article I, section 7.

c. Adopting Stroud's bright-line rule in all searches incident to arrest makes good policy sense

Aside from the sound logic of Stroud, a blanket prohibition on the warrantless search of locked containers makes sense due to its ease of application. Were this court to adopt such a prohibition, it would have the added benefit of drawing a clear and unmistakable line for Washington's law enforcement officers. The benefits of such a bright-line rule are clear: such a rule "can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." Davis v. United States, 512 U.S. 452, 461, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). For this important policy reason as well, this court should apply Stroud's proscription on searches of locked containers to all searches incident to arrest in Washington.

3. Inventory search exception

The inventory search exception does not apply to locked containers absent a showing of manifest necessity. No such showing was made here. Moreover, any inventory search justified by officer safety is contradicted by the fact that officers failed to conduct a thorough search of other contents in VanNess's backpack after finding the locked container. Accordingly, the search of VanNess's locked container does not fall under the inventory search exception to the warrant requirement.

Under article I, section 7, inventory searches are permitted without a warrant “because they (1) protect the . . . owner’s (or occupants’) property, (2) protect law enforcement agencies/officers and temporary storage bailees from false claims of theft, and (3) protect police officers and the public from potential danger.” State v. Tyler, 177 Wn.2d 690, 701, 302 P.3d 165 (2013). However, at least in the context of inventory searches of vehicles, searches of locked containers are prohibited “because privacy interests exhibited by placement of any property in such containers and in trunks outweigh the need to inventory the contents” Id. at 708. In order to examine a locked trunk or container of an impounded vehicle, there must be a “manifest necessity” for conducting the search. State v. White, 135 Wn.2d 761, 766, 958 P.2d 761 (1998); State v. Houser, 95 Wn.2d 143, 156, 622 P.2d 1218 (1980).

In Houser and White, our supreme court held that there was not manifest necessity that justified a search of car trunks based on a risk of theft for property located in the locked trunks of the defendants’ vehicles. White, 135 Wn.2d at 767-68; Houser, 95 Wn.2d at 156. Therefore, the court suppressed the fruits of the inventory searches in both cases. White, 135 Wn.2d at 772; Houser, 95 Wn.2d at 160.

In contrast, manifest necessity was demonstrated in State v. Ferguson, 131 Wn. App. 694, 128 P.3d 1271 (2006). There, a Washington

State Patrol trooper smelled a strong chemical odor coming from the car he was searching, leading him to believe he had “found a rolling ‘meth’ lab.” Id. at 703. Because the chemical odor prompted the trooper to be concerned “that highly combustible materials were being transported in the trunk that posed a risk to police, the public, and the tow truck driver,” the court held that the trooper’s inventory search of Ferguson’s locked trunk was supported by manifest necessity. Id. at 703-04.

Outside the vehicular context, Division I rejected an inventory search, albeit on Fourth Amendment grounds, involving a search of a closed container in the pocket of the defendant’s jacket. State v. Dugas, 109 Wn. App. 592, 593, 36 P.3d 577 (2001). In Dugas, the defendant removed his jacket and obtained permission to place it on top of the officer’s vehicle. Id. Shortly thereafter, Dugas was arrested and his jacket was left behind. Id. at 593-94. An officer impounded the jacket and searched its pockets, locating and opening a closed container that contained contraband. Id. at 594. The court suppressed this evidence, holding that “the purposes of an inventory search do not justify opening a closed container located inside a jacket pocket when there is no indication of dangerous contents.” Id. at 599.

In this case, no manifest necessity justified prying open the locked container found in VanNess’s backpack. During the CrR 3.6 suppression hearing, Officer Edmonds admitted that there was no evidence that VanNess

had a firearm or an incendiary device that would prompt officers to believe that the locked box presented any danger. 1RP 21-22. Officer Edmonds also testified that the locked box was not ticking and that there was no evidence that the box contained any kind of chemical agent. 1RP 22. Accordingly, there was simply no manifest necessity that justified the inventory search of VanNess's locked container. If a search of a closed container in a jacket pocket falls outside the inventory search exception to the warrant requirement, see Dugas, 109 Wn. App. at 599, a fortiori a locked container inside a backpack falls outside this exception. Because VanNess's locked box presented no manifest danger to arresting officers, the unconstitutional search of the locked box cannot be saved by the inventory search exception to the warrant requirement.

Nor is it any answer to this unconstitutional search that a police department may have a policy of conducting such inventory searches for general safety purposes or that similar locked containers have held dangerous items in the past. See 1RP 7, 9-14 (testimony of Officer Edmonds regarding previous experience with locked boxes containing unsafe materials and departmental training bulletins relating to inventory searches of all such locked containers); CP 101. Indeed, "where a search is improper it cannot be legitimized by conducting it pursuant to standard police procedure." Houser, 95 Wn.2d at 154.

Moreover, any assertion by officers that their safety justified the search of VanNess's locked box is belied by the fact that officers failed to conduct a thorough search of other remaining items in VanNess's backpack. Officer Edmonds testified that after searching the locked box, he put the box back in VanNess's backpack, and then sealed and impounded the backpack. 1RP 25-26. Thereafter, Officer Edmonds applied for a search warrant. 1RP 26. When he conducted a second search of the backpack pursuant to the warrant, he admitted to finding additional items in the backpack that he had not found during his first search. 1RP 26. If VanNess's locked container truly made Officer Edmonds concerned for his safety, he would have exhaustively searched VanNess's backpack for similar "unsafe" items. The fact that he did not do so severely undermines any claim by the State that the inventory search exception justified the search of VanNess's locked container on officer safety grounds.

As the trial court properly ruled, there was no justification under the inventory search exception to search VanNess's locked box. Officers should have obtained a warrant. Their failure to do so violated VanNess's constitutional rights.

4. No other exception to the warrant requirement applies and the lock box evidence must be suppressed

This record discloses no possibility that another exception to the warrant requirement applied. As for consent, the record is plain that VanNess never consented to the search of the locked container in his backpack. IRP 7 (testimony that VanNess did not respond to requests for consent to search); see also CP 101 (“VanNess refused to consent to a search of his backpack.”). Nor was there any indication that any delay in searching the locked container would endanger officers or result in the destruction of evidence to justify a search under the exigent circumstances exception. See State v. Hall, 53 Wn. App. 296, 302, 766 P.2d 512 (1989) (discussing various factors that demonstrate exigency, framed entirely around removal or destruction of evidence and officer safety). On this record, there simply is no indication that any exception to the warrant requirement applied that allowed officers to engage in a warrantless search of the locked box in VanNess’s possession at the time of arrest. Accordingly, the warrantless search of VanNess’s locked box that occurred in this case violated VanNess’s constitutional rights.

When evidence is obtained in violation of a defendant’s constitutional rights, the exclusionary rule applies, and all such evidence must be suppressed. State v. Ruem, ___ Wn.2d ___, 313 P.3d 1156, 1164

(2013). Given Washington's heightened constitutional protections, "Washington's exclusionary rule is "nearly categorical."'" Id. (quoting State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010) (quoting State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009))). Accordingly, this court must reverse the trial court and order suppression of the evidence obtained from the locked box in VanNess's possession at the time of arrest.

5. Evidence obtained via the search warrant based on the unconstitutional search must be suppressed as fruit of the poisonous tree

Generally, a search warrant based on illegally obtained information is not rendered invalid if the affidavit contains otherwise sufficient facts to establish probable cause independent of the evidence that was illegally obtained. State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990); State v. Coates, 107 Wn.2d 882, 888, 735 P.2d 64 (1987).

In this case, the search warrant affidavit is not in the record. However, in the affidavit of probable cause, Officer Edmonds stated that he based his application for a search warrant on the "large quantity of small plastic stamp sized baggies and a digital scale" he saw and the "distinct odor of vinegar" he smelled when he illegally searched VanNess's locked container. CP 102. At the suppression hearing, Officer Edmonds testified that he applied for a search warrant based on what he saw when he pried open a corner of VanNess's locked box. 1RP 23. As Officer Edmonds's

statements show, had the initial unconstitutional search not occurred, officers would have had no indication that VanNess possessed controlled substances at all. The application for a search warrant of the backpack was thus entirely based on illegally obtained evidence of controlled substances and there were not otherwise sufficient facts to establish probable cause. Therefore, the evidence seized pursuant to the search warrant is fruit of the poisonous tree and must be suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

6. The appropriate remedy is dismissal of this prosecution

Without the evidence obtained from the unconstitutional search of the locked box or from the tainted warrant that followed, the State cannot prove every element of possession of a controlled substance, let alone possession with intent to deliver. In such circumstances, this court must reverse VanNess's convictions and remand for dismissal of the charges with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997) (concluding that dismissal appropriate where unlawfully obtained evidence forms sole basis for the charge).

E. CONCLUSION

The warrantless search of the locked container found in VanNess's backpack was a per se violation of VanNess's constitutional rights under article I, section 7. No exception to the warrant requirement justified the search. The fruits of the warrantless search must be suppressed. Because the subsequently obtained warrant was based upon, and therefore tainted by, the evidence obtained from the warrantless search, evidence seized pursuant to the search warrant is fruit of the poisonous tree and must also be suppressed. Because unlawfully obtained evidence formed the sole basis for the charges against Vanness and for his convictions, this court must reverse VanNess's convictions and remand this matter to the trial court for dismissal of the charges with prejudice.

DATED this 31ST day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

APPENDIX

Filed in Open Court

8-2, 2013

SONYA KRASKI
COUNTY CLERK

By *[Signature]*
Deputy Clerk

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26



CL16080905

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,	
	Plaintiff,
vs.	
STEPHEN . VANNESS,	
	Defendant.

12-1-02531-7

FINDINGS AND CONCLUSIONS
PURSUANT TO CrR 3.6 OF THE
CRIMINAL RULES
FOR SUPERIOR COURT

The undersigned Judge of the above court hereby certifies that a hearing has been held in the absence of the jury pursuant to 3.6 of the Criminal Rules for Superior Court and now sets forth:

1. The Undisputed Facts

- a. On 11/29/2012 at approximately 2:18 am, Kay Deleon reported that Stephen Vanness was seated in a green Jeep just outside her residence. Her residence is located at 7826 Timberhill Drive, Everett WA. She described Mr. Vanness as a white male with long brown hair. Stephen L. Vanness has multiple warrants out for his arrest.
- b. Dispatch advised officers of Stephen Vanness's whereabouts as well as his multiple outstanding warrants.

34

ES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- c. Officer Edmonds arrived and saw a white male with long brown hair walking in the 7800 block.
- d. Officer Edmonds contacted the man, who identified himself as Stephen Vanness.
- e. Vanness was wearing a backpack and carrying a black and white burlap bag. In order to place Stephen Vanness under arrest, Officer Edmonds had to remove the backpack from Mr. Vanness' back.
- f. Officer Edmonds read Mr. Vanness Miranda warnings and placed Mr. Vanness in handcuffs. Mr. Vanness exercised his right to remain silent and made no further statements to any officers.
- g. At least two other officers arrived and were present.
- h. Officers confirmed via dispatch that Stephen Vanness was prohibited by a Domestic Violence No Contact Order from being at that location.
- i. Officer Edmonds walked Mr. Vanness over to his patrol vehicle. Mr. Vanness was standing by the back passenger door of the patrol car. At some point Mr. Vanness was seated in the patrol vehicle, with his feet out of the open door. Another officer was standing with Mr. Vanness.
- j. Officer Edmonds asked Mr. Vanness if there was anyone else that could take possession of his belongings, Mr. Vanness did not reply.
- k. Officer Edmonds took the backpack and put it on the trunk of his patrol vehicle. Officer Edmonds performed a cursory search of the backpack. He found three knives strapped to the outside of the backpack. The knives were deemed to be dangerous weapons, and unlawful to carry, due to their length. Inside the backpack, he found another knife and a small locked box. The locked box was 6 inches by 4 inches by 2 inches.
- l. Officer Edmonds asked Mr. Vanness for permission to search the locked box. Mr. Vanness remained silent. Officer Edmonds explained to Mr.

1 Vanness that he needed to know if there was anything dangerous in the
2 box, asked for the combination to the locked box. Mr. Vanness refused to
3 give him the combination to the locked box. Officer Edmonds asked
4 directly if there was anything dangerous in the box, and Mr. Vanness
5 remained silent.

- 6 m. Snohomish County Jail does accept backpacks with inmates. The only
7 available option was to impound the backpack at the Everett Police
8 Department.
- 9 n. It is the Everett Police Department Policy to conduct an inventory search
10 of the contents of bags prior to any impound into the property room which
11 would require Officer Edmonds to transport the items in his patrol car.
- 12 o. In Officer Edmonds' experience, and the collective experience of his
13 department, dangerous items have been found in similar boxes, e.g.
14 firearms of unknown safety status, incendiary devices, chemicals for
15 production of narcotics (esp. methamphetamine), and other explosives.
- 16 p. Officer Edmonds got a flathead screwdriver from his police vehicle and
17 pried up a corner of locked box, approximately one-quarter of an each.
18 Officer Edmonds looked inside of the box and saw a large quantity of
19 small plastic stamp sized baggies and a digital scale. He also could smell
20 the distinct odor of vinegar emanating from the box. From his training and
21 experience he recognized the "vinegar" smell to have the same smell as
22 heroin, the small baggies as items used to package illegal drugs, and the
23 digital scale as an item used in the weighing of illegal drugs.
- 24 q. Officer Edmonds used his observations of the inside of the locked box to
25 obtain search warrant for the rest of the backpack and box. The search
26 warrant was granted. Officer Edmonds re-searched the backpack and box
and found additional items.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

2. Court's Conclusions as the search and the admissibility of the products of the search

a. Warrantless searches are deemed per se unreasonable unless they fall into one of the narrowly tailored exceptions to the warrant requirement. Here, the search was both a search incident to arrest and an inventory search.

b. Search Incident to arrest

- i. Clearly the search of the backpack and the sacks that were in the possession of the defendant were done after he was properly arrested on multiple warrants, and later ripened into other grounds for arrest related to a no-contact order violation and knives in his possession.
- ii. Officers in this case were judicious in doing a cursory search for officer safety, and then seeking a warrant.
- iii. It was reasonable for the officers to be concerned about their safety, as it related to the locked box, especially given the fact that they had found other weapons in the backpack.
- iv. The box was the size in which a gun or other dangerous weapon or materials, e.g. an incendiary device could have been located.
- v. The search was as narrow as possible to ensure the officers' safety – they only opened the box one-quarter of an inch to make sure there was nothing unsafe in there, and stopped the search at that point.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

b. Inventory Search

- i. With regard to the search of the backpack, sack, and box officers were acting to promote officer safety and to protect the property of the defendant.
- ii. Inventorying the Defendant's property justified the search of his bags.
- iii. Entry into the locked box was not justified under the inventory search exception. However, as noted above,

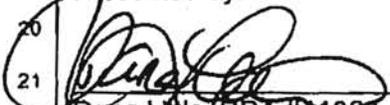
c. All items found are admissible. *The court finds the search WAS authorized incident to the arrest.*

IN CONCLUSION, The contents of the locked box are not suppressed; therefore, they were properly included in the application for a search warrant. The Defense motions to suppress and dismiss are denied

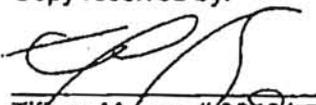
DONE IN OPEN COURT this 2nd day of August 2013.


Judge Judge

Presented by:


Dana Little DPA #41838
Deputy Prosecuting Attorney

Copy received by:


Tiffany Mecca, #39491
Defense Attorney

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 70839-2-1
)	
STEPHEN VANNESS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JANUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

- [X] STEPHEN VANNESS
DOC NO. 780139
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JAN 31 PM 4:23

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JANUARY, 2014.

x *Patrick Mayovsky*