

No. 71111-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WYATT,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The police violated article 1, section 7 and the Fourth Amendment by opening the containers at Wyatt's camp.

Absent a warrant or exception to the warrant requirement, all people in Washington, including the homeless, are entitled to have their closed containers safe from governmental intrusion. While Wyatt was momentarily away from his camp, police officers entered the camp and disturbed Wyatt's private affairs by removing a tarp and searching closed containers. This violated both article 1, section 7 and the Fourth Amendment. Accordingly, the unlawfully obtained evidentiary fruits should have been suppressed.

a. Article 1, section 7 is broader than the Fourth Amendment and an analysis under article 1, section 7 is different than one under the Fourth Amendment.

Wyatt moved to suppress under both article 1, section 7 and the Fourth Amendment. Article 1, section 7 provides greater privacy protection than the Fourth Amendment. State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). The inquiry under article 1, section 7 is not the Katz¹ reasonable expectation of privacy test. State v. Young, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). The focus under article 1, section 7 is on

¹ Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

“those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). This requires a two-part analysis. First, the court determines “whether the state action constitutes a disturbance of one's private affairs.” Valdez, 167 Wn.2d at 772. If there has been a disturbance of one’s private affairs, the court then asks whether authority of law justified the intrusion, which means a valid warrant or exception to the warrant requirement. Valdez, 167 Wn.2d at 772. This Court should reject the State’s selective citations that make it appear that an analysis under article 1, section 7 is really no different than one under the Fourth Amendment. See Br. of Resp’t at 11-12.

b. By opening closed containers within Wyatt’s camp, the police intruded upon Wyatt’s private affairs and violated his reasonable expectation of privacy in his effects.

Using a Fourth Amendment Katz analysis, the State argues that Wyatt lacked a subjective expectation of privacy in the items in his camp. Br. of Resp’t at 11-13. This argument is flawed. The right of privacy under article 1, section 7 is “not confined to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.” Myrick, 102 Wn.2d at 511. Moreover, the

Katz subjective expectation of privacy prong has essentially been subsumed into the objective expectation prong and cases are rarely decided on that prong. Kerr, Orin S., Katz Has Only One Step: The Irrelevance of Subjective Expectations, University of Chicago Law Review, Forthcoming; GWU Law School Public Law Research Paper No. 2014-43; GWU Legal Studies Research Paper No. 2014-43 (June 11, 2014).²

Regardless, Wyatt certainly had a subjective expectation of privacy in his items at his camp. See United States v. Sandoval, 200 F.3d 659, 660 (9th Cir. 2000) (defendant had both a subjective and objective expectation of privacy in his tent on government managed land despite it not being a public campground). As the State concedes, Wyatt's encampment was secluded. Br. of Resp't at 12. The containers in the camp, a bag and a cooler, were closed and covered. CP 71 (FF 14-15). As for Joann McEwen-Johnston's testimony about special precautions she took to secure her property, this does not defeat Wyatt's privacy interest. People who leave the door to their home unlocked surely have the same valid

² Available at <http://ssrn.com/abstract=2448617> (Last accessed November 14, 2014); see also <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/30/the-missing-subjective-expectation-of-privacy-test/> (author's summary) (Last accessed November 14, 2014).

expectation of privacy as people who take the additional precaution of locking their door.

Moreover, when the government trespasses upon an effect with the purpose of learning information, this a “search” under the Fourth Amendment regardless of the Katz test. Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409, 1414, 185 L. Ed. 2d 495 (2013). The Katz test adds protection, it does not diminish it. United States v. Jones, __ U.S. __, 132 S. Ct. 945, 952, 181 L. Ed. 2d 911 (2012) (“the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”). Thus, “Fourth Amendment rights do not rise or fall with the *Katz* formulation.” Jones, 132 S. Ct. at 950.

Continuing its Katz analysis, the State contends that Wyatt did not have a reasonable expectation of privacy in covered, closed containers in his camp. Br. of Resp’t at 13-19. In making its argument, the State relies on inapposite cases, primarily State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722 (1986). In Jeffries, the warrantless search of items under tarps did not occur at a camp where a person had been residing. See Jeffries, 105 Wn.2d at 413-14. Similarly, the Ninth Circuit case cited by the State, Pruitt, is also unhelpful because there “was no indication that the site of the cache was being occupied as a camp.” United States v. Pruitt, 464 F.2d 494, 495-96 (9th Cir. 1972). As for the “Hobo camp” in Jeffries, an

occupant at that camp gave consent to search. Jeffries, 105 Wn.2d at 732.

There was no consent obtained by police in this case.

State v. Pentecost, 64 Wn. App. 656, 825 P.2d 365 (1992) and State v. Cleator, 71 Wn. App. 217, 857 P.2d 306 (1993), while both involving camps, do not address the question in this case: Does a person have a constitutionally protected privacy interest in his or her closed, covered containers in a secluded area of a park where the person has been residing? This Court has recognized that this is a different question. Pentecoste, 64 Wn. App. at 656 n.3; see Cleator, 71 Wn. App. at 222.

While of course not controlling, State v. Mooney, 218 Conn. 85, 588 A.2d 145 (1991) is persuasive authority that the answer to this question is yes. There, the Supreme Court of Connecticut held that the warrantless search of the containers the defendant kept under a bridge abutment where he lived violated the Fourth Amendment. Mooney, 218 Conn. at 85. The Court reasoned that (1) closed containers were places where people normally place their effects; (2) the containers were located in a place that police knew that the defendant regarded as his home; (3) the defendant was unable to assert rights in the containers because he was being held by police; and (4) the purpose of the search was to gather evidence in a criminal investigation. Mooney, 218 Conn. at 111-12.

The State argues Mooney is distinguishable because “the police did not prevent Wyatt from asserting his rights by arresting him and keeping him in custody.” Br. of Resp’t at 21. This is not a material difference. Wyatt was also unable to assert his rights in the containers because he was momentarily away. According to Officer Clay, he and Officer Kelso gave Wyatt and Johnson the typically warning that they had 24 hours to gather their belongings and leave. RP 29-30, 44-45. When they saw Wyatt and Johnson about an hour later walking away from the camp, the officers returned to the camp to search it, knowing that Wyatt and Johnson would not be there to object. CP 71 (FF 12-13); RP 95-96, 138.

Under the State’s argument, article 1, section 7 and the Fourth Amendment provide no protection to the personal belongings or effects of homeless people who reside on the public streets or parks. Following this argument, a government agent may approach a homeless person and, without any justification, search blankets or tarps in the immediate vicinity and open any closed containers the person likely uses to store the few possessions he or she has. Because this is undignified behavior, the officer might instead wait (as was the case here) until the homeless person temporarily departs before violating the person’s privacy.

The Ninth Circuit has indicated that such action violates the Fourth Amendment. In Lavan, the court held that the Fourth Amendment protects homeless persons from government seizure of their unabandoned personal property that was momentarily unattended to. Lavan v. City of Los Angeles, 693 F.3d 1022, 1024 (9th Cir. 2012). There, homeless people in Los Angeles kept personal belongings in mobile containers or mobile shelters on the sidewalk. Lavan, 693 F.3d at 1024-25. Invoking a local ordinance that forbade property being left on the sidewalk, the City had a practice of seizing and destroying the unabandoned personal property of the homeless. Lavan, 693 F.3d at 1025-26. Recounting that, “[v]iolation of a City ordinance does not vitiate the Fourth Amendment’s protection of one’s property,” the Ninth Circuit rejected the City’s argument that the Fourth Amendment did not apply and concluded the practice violated the prohibition on unreasonable seizures. Lavan, 693 F.3d at 1027-31. Though the question was not before it, the court noted that the expectation of privacy of the homeless in their shelters and effects “may well have been reasonable.” Lavan, 693 F.3d at 1028 n.6.

While this case involves homelessness, the issue also implicates the privacy of Washington campers and others who enjoy the outdoors. Under the State’s theory, if a person violates a law regulating camping, such as by mistakenly camping in the wrong area or exceeding a time

limit,³ the government may constitutionally search any containers within the person's camp. See Br. of Resp't at 15-16, 18-19. As the Ninth Circuit explained in Sandoval, a case involving a tent on federal land not designated for camping, this cannot be correct:

[W]e do not believe the reasonableness of Sandoval's expectation of privacy turns on whether he had permission to camp on public land. Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights.

Sandoval, 200 F.3d at 661.

Thus, as Lavan and Sandoval illustrate, the State's reliance on an ordinance forbidding camping or storing items is misplaced. See Br. of Resp't at 27. As the trial court recognized, that Wyatt may have violated such a prohibition is not controlling. RP 402. Similarly, the State's apparent contention that a bag and cooler (both containers) are not "effects" or "private affairs," is incorrect. See Br. of Resp't at 19 n.10. There is no constitutional distinction between "worthy" containers and "unworthy" containers. United States v. Ross, 456 U.S. 798, 822-23, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). Containers are a private affair under

³ See, e.g., WAC 352-32-030(7) (setting time limits on stays by campers in state parks); WAC 232-13-060 (setting duration on camps on lands under authority of the Department of Fish and Wildlife).

article 1, section 7. See State v. Monaghan, 165 Wn. App. 782, 791, 266 P.3d 222 (2012) (search of locked container in car disturbed private affair).

The trial court's error was to reason that because Wyatt did not have a protected privacy interest in the area surrounding his tent, he did not have a privacy interest in containers he kept there with him outside his tent. See RP 392-93. Wyatt retained a right to privacy in his effects, including the bag and cooler. These items were Wyatt's private affairs. Accordingly, under article 1, section 7, and the Fourth Amendment, the government could not intrude upon them by opening them absent a warrant or recognized exception to the warrant requirement.

c. Wyatt did not abandon the containers at his camp.

Alternatively, the State maintains its position that Wyatt voluntarily abandoned the items outside his tent. Br. of Resp't at 23-27. Because abandonment is an exception to the warrant requirement, the State bears the "heavy burden to prove by clear and convincing evidence" that this exception applies. State v. Russell, 180 Wn.2d 860, 867, 330 P.3d 151 (2014). Though the trial court did not reach the abandonment claim by the State, the court orally remarked that, "I think it's probable that it was not abandoned." RP 397. Further, the court impliedly rejected the State's abandonment argument by determining that Wyatt had a reasonable

expectation of privacy in his tent. CP 75-76. Because a determination that Wyatt abandoned the bag and cooler outside his tent would not be supported by clear and convincing evidence on this record, this Court should reject the State's argument.

The bag and cooler were kept in close vicinity to Wyatt's tent. Contrary to the State's argument, Wyatt did not disclaim an interest in the items outside the tent. See CP 70 (FF 8). Wyatt and Johnson were told that they had 24 hours to pack their belongings and leave. RP 29-30, 44-45. About an hour after their encounter with the police, they momentarily left, but returned shortly thereafter and stayed the night. CP 70-71 (FF 11, 12); RP 101.

These facts do not show abandonment. Wyatt did not move the bag or cooler away from the campsite. See State v. Dugas, 109 Wn. App. 592, 596, 36 P.3d 577 (2001) (defendant's placement of his jacket on his vehicle was not akin to throwing his jacket away). They were covered, closed, and in the close vicinity of Wyatt's tent. Wyatt was only momentarily away from his camp. See State v. Moore, 29 Wn. App. 354, 359 n.1, 628 P.2d 522 (1981) (rejecting State's argument that luggage on bus was abandoned after defendant missed his bus; insufficient time elapsed); People v. Schafer, 946 P.2d 938, 944 (Colo. 1997) (one should be free to depart one's campsite without fear of intrusion). As in other

cases, this Court should reject the State's abandonment argument. Mooney, 218 Conn. at 106-110 (rejecting argument that defendant abandoned his containers at his home under a bridge); see Schafer, 946 P.2d at 944 (no basis for the police officers to reasonably believe that tent and personal effects were abandoned).

d. Admission of the tainted evidence was prejudicial.

The State does not contend that the error was harmless. Because the State cannot meet its burden to prove the admission of the tainted evidence harmless beyond a reasonable doubt, this Court should reverse.⁴ Br. of App. at 22-23.

2. The State failed to prove beyond a reasonable doubt that the offense occurred in a "public park."

Wyatt's sentence was increased by 24 months because the jury determined that the offense was committed at a "public park." This required evidence proving beyond a reasonable doubt that the land was "operated as a park by the state or a local government." State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995); RCW 69.50.435(6)(d); CP 47. While there was testimony that the offense occurred at "Riverview Park," there was no evidence that this "park" was

⁴ Concerning the involuntary and inculpatory statements police extracted from Wyatt in violation of due process, Wyatt rests on his arguments presented in the opening brief. Br. of Resp't at 23-29.

operated by the government. Accordingly, if Wyatt's conviction is not reversed, this sentencing enhancement should be vacated for lack of sufficient evidence.

Private parks, not operated by the government, exist. See United Dev. Corp. v. City of Mill Creek, 106 Wn. App. 681, 693, 26 P.3d 943 (2001). The State does not contest Wyatt's argument that there are privately operated public spaces, including "parks."⁵ Br. of App. at 32; Br. of Resp't at 38-39. The State also does not argue that there was testimony stating that "Riverview Park" was operated by a state or local government. Instead, the State contends that the jury could reasonably infer the "park" was operated by the City because the police patrolled there. This is not a reasonable inference. That police patrol somewhere does not establish that a place is operated or maintained by the government. For example, according to its website, the Federal Way Police Department is present at "Wild Waves Theme Park," but this "park" is not operated by a state or local government.⁶

⁵ For example, Seattle has many privately owned public spaces or "POPS." http://www.seattle.gov/council/licata/public_space.htm; (last accessed November 14, 2014).

⁶ <https://www.wildwaves.com/park-policies/> ("Along with our security team, the Federal Way Police Department is onsite during all operating hours.") (last accessed November 14, 2014).

Because the State failed to prove beyond a reasonable doubt that “Riverview Park,” was operated as a park by a state or local government, the sentencing enhancement should be vacated.

3. Officer Kelso’s report was not admitted and cannot be used to support the findings of fact.

The State cites pretrial exhibit 4, Officer Kelso’s report, to support the findings of fact. Br. of Resp’t at 8. This exhibit was not admitted at the hearing. See RP 153. Because it was not admitted, it cannot be used to support the findings. Only the admitted exhibits and the testimony were substantive evidence for purpose of the pretrial hearings.

B. CONCLUSION

People do not lose their constitutional right to be free from unjustified government intrusion into their effects because they are homeless. Because the police intruded upon Wyatt’s private affairs without authority of law in opening closed containers within his camp, this Court should hold article 1, section 7 was violated and reverse Wyatt’s conviction.

DATED this 17th day of November, 2014.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard W. Lechich", written over a horizontal line.

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DENNIS WYATT,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] JENNIFER JOSEPH, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL</p>
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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF NOVEMBER, 2014.

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