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NO. 34561-7-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

GREGORY LAMMAR LEVINGSTON,

Respondent.

BRIEF OF RESPONDENT

MICHELLE BACON ADAMS
WSBA #25200
Attorney for Respondent

CRAWFORD, MCGILLIARD,
PETERSON & YELISH
623 Dwight Street
Port Orchard, WA 98366-4693
(360) 337-7000

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I. COUNTERSTATEMENT OF THE ISSUES

A. UNDER WASHINGTON STATE LAW, A TRIAL COURT CORRECTLY CONCLUDED THAT THE OFFICER'S ABILITY TO PERFORM A SEARCH INCIDENT TO ARREST HAD EXPIRED WHEN THE VEHICLE SOUGHT TO BE SEARCHED HAD BEEN RELINQUISHED TO A THIRD PARTY WHO WAS THE OWNER OF THE VEHICLE.

B. UNDER WASHINGTON STATE LAW, MR. LEVINGSTON HAS STANDING TO CONTEST THE SEARCH OF MS. AALAND'S VEHICLE WHEN HE WAS DRIVING THE VEHICLE AT THE TIME OF THE TRAFFIC STOP AND WAS CHARGED WITH POSSESSORY OFFENSES.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Mr. Levingston was charged with unlawful possession of a firearm in the first degree and possession of a controlled substance by way of an information filed in Kitsap County Superior Court. CP 1. A hearing on the motion to suppress evidence and dismiss filed by Mr. Levingston was heard before the Honorable Judge Hartman on February 1, 2006. CP 5; RP 2/01/06. Judge Hartman

granted the motion to suppress evidence. RP 2/10, 16. The State moved to dismiss the case after Judge Hartman issued his ruling. RP 2/10, 16. Ms. Lewis made the request as follows: "Your honor, at this point we would ask that the court dismiss the case because the State would have no further evidence." RP 2/10, 16; CP 29. The motion to dismiss was granted. CP 38. The State is seeking review of Judge Hartman's ruling on the motion to suppress evidence.

B. FACTS

Mr. Levingston was pulled over by Officer Jensen for a traffic infraction. RP 2/1, 13, 17. Officer Henson was also involved in the traffic stop. RP 2/1, 16. Mr. Levingston was arrested, handcuffed, and placed in a patrol car following the traffic stop. RP 2/1, 14, 19.

Mr. Levingston called Ms. Aaland with his cell phone and informed her that he had been pulled over. RP 2/1, 4. Mr. Levingston was still in the vehicle at the time the call was made. RP 2/1, 4. Mr. Levingston was driving a vehicle belonging to Ms. Aaland. RP 2/1, 4. Ms. Aaland was driving past the scene and pulled over directly across the street from the area of the traffic stop to see what was going on. RP 2/1, 4, 6. Ms. Aaland was concerned

that the vehicle could be impounded due to the cost associated with an impound. RP 2/1, 5.

After Mr. Levingston was handcuffed, Ms. Aaland approached the officers to let them know that the vehicle Mr. Levingston had been driving belonged to her and to request to take the vehicle from the scene. RP 2/1, 6, 14. Ms. Aaland was told by an Officer to stand to the side in front of the vehicle Mr. Levingston had been driving and wait until Mr. Levingston was placed into a patrol car. RP 2/1, 6, 21. The vehicle was registered to Ms. Aaland and she provided the registration and her driver's license. RP 2/1, 16-17. After Mr. Levingston was placed in the patrol car, Ms. Aaland was allowed to contact Mr. Levingston, who was in the back of the patrol car at the time, and say good-bye. RP 2/1, 8.

Ms. Aaland testified that she was told that she could take the car keys off the hood and could take the vehicle before she was allowed to speak with Mr. Levingston. RP 2/1, 9. Officer Jensen confirmed that Ms. Aaland was told that she could take possession of the vehicle when the officers were finished. RP 2/1, 15, 21, 23. Ms. Aaland returned to the vehicle, opened the door, sat inside,

turned off the dome light, headlights, and locked the doors of the car. RP 2/1, 9. Officer Jensen testified that he did not recall seeing Ms. Aaland in the vehicle. RP 2/1, 16. Nor did Officer Jensen recall seeing Ms. Aaland take possession of the keys. RP 2/1, 22. After securing the car, Ms. Aaland then leaned against the car and placed a call on her cell phone to obtain assistance to get the vehicle home. RP 2/1, 10. Ms. Aaland next told the officers that she would be back to the car in about an hour to take it home. RP 2/1, 10. Ms. Aaland testified that while she was on the phone, the Officers requested the keys to the vehicle and grabbed the keys from her hand. RP 2/1, 10, 11. Ms. Aaland was surprised by the request for the keys because it was her belief that the vehicle had previously been released to her. RP 2/1, 11. The vehicle was unlocked and searched by the officers. CP 41. The search uncovered Trazadone in Mr. Levingston's jacket pocket and a handgun was found under the passenger seat. CP 41.

The traffic stop was captured on video. RP 2/1, 24, 25. The Court reviewed the videotape at the request of defense counsel. RP 2/1 26, RP 2/10, 3. Judge Hartman described in detail his observations from the video. RP 2/10, 3-9. The Court found that the

video showed what appeared to be a conversation between Officer Jensen and Ms. Aaland. RP 2/10, 5. During that conversation Officer Jensen gestured to the keys and hat located on the top of the vehicle. RP 2/10, 5. The video also showed that Ms. Aaland took the keys and the hat off the roof of the vehicle right in front of Officer Jensen's face. RP 2/10, 6. Immediately after Ms. Aaland retrieved the hat and keys, Officer Jensen gave the car registration and Ms. Aaland's identification back to her. RP 2/10, 6. The court found that Ms. Aaland had a reasonable expectation and belief that the car was returned to her based on the conduct of the officers at the scene. Finding of Fact No. 17, CP 42. Ms. Aaland is then seen walking towards the police car, presumably to say good-bye to Mr. Levingston. RP 2/10, 6. The video also showed Ms. Aaland's entry into the vehicle and the subsequent phone call outside the vehicle. RP 2/10, 7-8. The vehicle was directly in the line of vision of Officer Jensen from the patrol car. RP 2/10,12. The court found that: "Ms. Aaland's recollection of events more closely tracks the tape than Officer Jensen." RP 2/10, 10. However, the court found that both Ms. Aaland and Officer Jensen were credible and candid in their testimonies. Finding of Fact No. 1, CP 41. The court

concluded that Ms. Aaland had a reasonable belief that the vehicle was returned to her and law enforcement's ability to lawfully search the vehicle expired once the vehicle was returned to Ms. Aaland based on the works and conduct of the Officers. Conclusion of Law No. 3, CP 41. The court also found that Mr. Levingston had automatic standing to contest the search. Conclusion of Law No. 6; CP 41.

III. ARGUMENT

A. UNDER WASHINGTON STATE LAW, A TRIAL COURT CORRECTLY CONCLUDED THAT THE OFFICER'S ABILITY TO PERFORM A SEARCH INCIDENT TO ARREST HAD EXPIRED WHEN THE VEHICLE SOUGHT TO BE SEARCHED HAD BEEN RELINQUISHED TO A THIRD PARTY WHO WAS THE OWNER OF THE VEHICLE.

Appellate review of facts entered by a trial court following an evidentiary hearing is limited to facts to which error has been assigned. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact unchallenged are considered verities on appeal. State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). The party challenging a finding must establish the finding is not

supported by substantial evidence. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Challenged findings of fact that are supported by substantial evidence are binding. State v. Hill, 123 Wn.2d at 647. The appellate courts defer to the trial court on issues determining credibility. State v. Madrigal, 65 Wn.App. 279, 281-282, 827 P.2d 1105 (1992). Substantial evidence exists if sufficient evidence exists to persuade a rational, fair minded person of the truth of the finding. State v. Hill, 123 Wn.2d at 644. Where substantial evidence supports the findings of fact, the reviewing court next determines if the findings support the trial court's conclusions of law. State v. Cole, 122 Wn.App. 319, 323, 93 P.3d 209 (2004). The conclusions made by the trial court are reviewed de novo but should carry a "great significance" for the reviewing court. State v. Floreck, 111 Wn.App. 135, 142, 43 P.3d 1264 (2002), (quoting State v. Ozuna, 80 Wn.App. 684, 691, 911 P.2d 395 (1996)).

In this matter, the State has assigned error to the trial court's finding that Ms. Aaland's testimony was credible and candid. Brief of Appellant Assignment of Error No. 1, page 1. However, the observations of the video tape of the traffic stop, which were

uncontested, and subsequent events as described by the witnesses provide substantial evidence to support the court's finding. RP 2/10 3-9.

1. The trial court correctly concluded that the Officer's ability to lawfully search the vehicle incident to arrest expired because Mr. Livingston was not in immediate control of the vehicle at the time of the search and Ms. Aaland was allowed unobserved access to the vehicle prior to the search.

Warrantless searches are presumed to be unreasonable. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Exceptions to that rule are limited and narrowly drawn. Id. In order to justify a search, the State must prove that a warrantless search falls within an exception to the rule. Id. Vehicle searches incident to an arrest are an exception to the warrant requirement. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996); State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001). The rationale underlying a search incident to arrest is the need to prevent the arrestee from obtaining a weapon or disposing of evidence. Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); State v. Johnson, 128 Wn.2d at 447. On that basis, police

officers are permitted, after a lawful custodial arrest, to search an "arrestee's person and the area 'within his immediate control.'" Chimel v. California, 395 U.S. at 763; see also State v. Johnson, 128 Wn.2d at 451.

Where an arrest is initiated in or near a motor vehicle, however, the permissible scope of a search incident to an arrest is governed by State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986); see also New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). A search incident to arrest may occur in the passenger compartment of a suspect's vehicle if the compartment was within the suspect's immediate control at the time of arrest, or immediately subsequent to arrest. State v. Turner, 114 Wn.App. 653, 657, 59 P.3d 711 (2002). The State must prove both close physical and temporal proximity to establish a valid search incident to arrest. Id.

In State v. Porter, 102 Wn. App 327, 6 P.3d 1245 (2000) the Washington Court of Appeals, Division II, recognized that the cases following Stroud had not fully developed its potential limitations. In examining the scope of a search incident to arrest, the court in Porter held that: "if police initiate an arrest and the passenger

compartment is not within the arrestee's immediate control, Stroud does not apply." State v. Porter, 102 Wn. App at 333.

In the State v. Porter, *supra* case, the court found the arrest of a recent passenger who was arrested 300 feet from the vehicle was beyond the dictates of Stroud, *supra*. In so holding, the court indicated that even though the officer had authority to arrest the passenger while he had been in the automobile just minutes before the arrest, at the time he was actually arrested, the vehicle was no longer in his immediate control. State v. Porter, 102 Wn. App. 327. This case is significant to the analysis required in this matter in determining what is defined as "immediate control". In the Porter case the defendant has been seen in the van immediately prior to the arrest and subsequent search.

Also of note is the Court's reference in the case of State v. Porter, *supra*, to the case of State v. Perea, 85 Wn.App. 339, 345, 932 P.2d 1258 (1997) referring to the holding of that case mandating that law enforcement may not search a locked vehicle incident to the arrest of the driver of the vehicle. A key similarity to Porter case, and this case before the court, is in both cases the vehicle was locked prior to the search incident to the arrest of the

driver. In both cases, the vehicle was not in the immediate control of the defendant immediately prior to the search. In this case Ms. Aaland assumed control of the vehicle after Mr. Levingston's arrest and prior to the search.

In State v. Johnston, 107 Wn. App. 280, 28 P.3d 775 (2001), the court again examined a Stroud issue. In doing so the court stated that: "the key question in applying Belton and Stroud is whether the arrestee had ready access to the passenger compartment at the time of the arrest, if he could suddenly reach or lunge into the compartment for a weapon or evidence the police may search the compartment incident to his arrest. Sometimes this is referred to as having "immediate control" of the compartment." State v. Johnston, 107 Wn. App. at 285-6. In that case the defendant got out of his vehicle and went into a store. The defendant later walked out of the store and walked past the vehicle and apparently walked to a position placing law enforcement between them and the vehicle. State v. Johnston, 107 Wn.App. at 288. The court found that the defendant was arrested "in the immediate vicinity" of the car. Id.

In State v. Turner, 114 Wn. App. 653, 59 P.3d 711 (2002), the court again addressed a Stroud/Belton issue, and in doing so examined how prior courts had ruled on whether an arrestee was in immediate control of the passenger compartment: Courts have upheld vehicle searches where, at the time of arrest, the suspect was (1) standing within the door to the passenger compartment; (2) leaning into the vehicle; or (3) within several feet of the vehicle. See State v. Stroud, 106 Wn.2d at 145, 153 (search valid where one suspect was standing in the "swing of the open passenger door" and the other was only a couple of feet away from the vehicle); State v. Bradley, 105 Wn. App. 30, 33, 18 P.3d 602, 27 P.3d 613 (2001) (search valid where suspect leaned into vehicle, then walked 10 to 12 feet away from car leaving the door "somewhat ajar").

The required physical and temporal proximity have been lacking where (1) the suspect has been removed entirely from the scene; (2) the arrest occurred inside a building some distance away from the vehicle; (3) the suspect lawfully parked and locked the vehicle before the police contact; (4) the suspect was away from the car for an unspecified period and at the time of the arrest the

officers were between the suspect and the closed car; or (5) the suspect had walked a significant distance away from the vehicle. State v. Turner, 114 Wn. App 653, citing State v. Johnston, 107 Wn. App. at 288 (car search invalid where arrest occurred after suspects left car, went into store for unspecified time, when they returned the officers were between closed car and suspects, and proximity was unspecified); State v. Wheless, 103 Wn.App. 749, 14 P.3d 184 (2000) (car search invalid where arrest took place inside tavern); State v. Porter, 102 Wn.App. at 334 (car search invalid when suspect was approximately 300 feet from vehicle when arrested); State v. Perea, 85 Wn.App. 339, 932 P.2d 1258 (1997) (car search invalid where suspect lawfully exited and locked his car before police contact); State v. Boyce, 52 Wn.App. 274, 758 P.2d 1017 (1988) (search not valid where suspect had been entirely removed from the scene).

In the instant case, when law enforcement permitted Ms. Aaland to “search” the vehicle, the purpose of a search of the vehicle incident to arrest expired. The incidents occurring after the arrest and search rendered the search unreasonable. The reasoning behind the line of cases involving vehicle searches

incident to arrest is to prevent the defendant from obtaining a weapon or destroying evidence. Officer safety and the preservation of evidence were clearly undermined when a civilian is given full access to the vehicle and its contents. It is not logical to permit law enforcement to rely on this exception to the warrant requirement when the circumstances show that they have abandoned any concerns for their safety or for the preservation of evidence.

Cases that explore the lawfulness of a search incident to arrest when either the defendant is moved from the location of a vehicle later searched and/or a significant amount of time lapses between the arrest and the search shed some light on the immediate issue before the court. Those cases require that the vehicle be in the exclusive control of either the defendant or law enforcement during the period of time between arrest and the subsequent search. For example in the case of Bennet v. State, (*Okla Crim*) 324 P.2d 873 (1958), the court held that a forty-five minute delay between arrest and search of vehicle was a valid search incident to arrest because the vehicle was retained and under the direct supervision of arresting officers between the time

of arrest and later search. Likewise in the case of State v. McCreary, (SD) 142 NW2d 240 (1966), the court held that a lawful search incident to arrest occurred when a defendant was removed from the scene and the vehicle has been moved to a police station to conduct the search. Once again the search was valid because the vehicle had been under the immediate control and surveillance of the arresting officers from the time of the stop. In the case of Tabb v. State, 154 Tex Crim 613, 229 SW2d 628 (1950) the Court held that a search incident to arrest was lawful because the vehicle was in the control and possession of law enforcement between the arrest and search.

Although the line of cases including State v. Johnston, *supra*; State v. Wheless, *supra*; State v. Porter, *supra*; State v. Perea, *supra*, and State v. Boyce, *supra*, all involve searches occurring after the defendant was removed from the vehicle, they are inciteful for the analysis of the meaning of “immediate control”. The line of cases cited above, and utilized by the trial court, require that a defendant be in immediate control of the vehicle prior to the search. In this matter the vehicle was in Ms. Aaland’s control, not Mr. Levingston’s control immediately prior to the search.

Consequently, the trial court correctly ruled that the Officer's ability to lawfully search the vehicle as incident to arrest had expired.

The fact that many of the cases cited by the court involve individuals outside of vehicles at the time of arrest or individuals removed from the vehicle prior to arrest does not invalidate the trial court's reasoning. The cases were properly utilized to consider if Mr. Levingston was in immediate control of the vehicle at the time of the search. First, common between this case and the cases cited by the trial court is the observation of the defendant in the vehicle prior to the search. A second common fact among the cases is that in all of the cases the defendant was not in immediate control of the vehicle at the time of the search. In each case a break in the chain of events occurred separating the defendant from immediate control of the vehicle. In this case the break occurred when Ms. Aaland was allowed to take possession and gain control over the vehicle prior to search.

The record supports that conclusion that Mr. Levingston was not in immediate control of the vehicle prior to the search. Ms. Aaland was able to enter the vehicle, turn off lights and lock the vehicle unobserved by law enforcement. RP 21, 9, 16.

The State fails to cite any authority supporting the proposition that a search incident to arrest may occur even after the vehicle to be searched has been turned over to another individual by law enforcement. In this matter Mr. Livingston was clearly not in immediate control of the vehicle at the time of the search. The trial court correctly concluded that law enforcement could not lawfully search the vehicle under the incident to arrest exception to the prohibition against warrantless searches.

2. The trial court correctly concluded that the Officer's ability to lawfully search the vehicle incident to arrest expired because Ms. Aaland assumed her significant privacy interest in the vehicle prior to the search.

A search incident to arrest eliminates the warrant requirement as shown in the cases above. However, when the lawful reason for the seizure expires, law enforcement is required to release the person or property. State v. Tijerina, 61 Wn.App. 626, 811 P.2d 241 (1991), citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

When a person is seized, the Fourth Amendment requires two questions to be answered. First, was the initial interference with

the suspect's freedom of movement justified at its inception?

Second, was it reasonably related in scope to the circumstances which justified the interference in the first place? State v. Tijerina, 61 Wn.App at 629.

As previously argued, the search of Ms. Aaland's vehicle was not a search incident to arrest. Therefore, the Court should not consider law enforcement right to search over Ms. Aaland's property rights. However, in the event the Court rejects the argument presented in the prior section of this brief, the search was not lawful because Ms. Aaland's privacy interests precluded a lawful search of the vehicle.

It is well settled that Article I, section 7, of the Washington State Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution. State v. Hendrickson, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996); State v. Stround, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); State v. Williams, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984) Consequently, no Gunwall analysis is necessary to resolve this issue. State v. White, 135 Wn.2d 761, 769 958 P.2d (1998). Article I section 7 of the Washington State Constitution provides as

follows: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision of the Constitution is violated when the State unreasonably intrudes on a person's private affairs. State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984); State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)

In State v. Tijerina, *supra*, the officer validly stopped the driver for crossing the fog line. Mr. Tijerina had a valid license and the officer, having decided not to issue a citation, returned the license. At that time, according to the Court, the purpose of the detention had expired and the officer was required to let him go. Instead the officer requested consent to search the vehicle. The Court said, "[O]nce the sergeant made the decision not to issue a citation and returned the driver's license and registration to Mr. Tijerina, any further detention had to be based on articulable facts from which the sergeant could reasonably suspect criminal activity." State v. Tijerina at 629. See also State v. Soto-Garcia, 68 Wn.App. 20, 841 P.2d 1271 (1992).

As in State v. Tijerina, *supra*, the officer forfeited any right to search the vehicle incident to arrest by effectively releasing the

vehicle to the registered owner, Ms. Aaland, at the scene. Without articulable facts from which the officer could reasonably suspect criminal activity, any further detention, of Ms. Aaland or her vehicle, was invalid.

Ms. Aaland's privacy rights in her vehicle were significant. Ms. Aaland reasonably believed she could leave the scene with her vehicle based on the words and conduct of the officers involved. Officer Jensen told her she would be allowed to take the car. RP 2/1, 9, 15, 21, 23. Officer Jensen gestured to the keys on top of the car and did not object to Ms. Aaland taking the keys off the car. RP 2/10 5,6. Ms. Aaland entered and locked the vehicle in full view of the officers and undisturbed by the officers. RP 2/11 9; RP 2/10 7, 8, 12. Ms Aaland made a phone call directly outside of the vehicle. RP 2/10 12; RP 2/1, 10. Additionally, Ms. Aaland verified ownership of the vehicle. RP 2/10, 6. Ms. Aaland was left to do what she pleased undisturbed. The actions and conduct of the officers indicated a lack of interest in any further action to be taken with the car. No other conclusion can be made from the words and conduct of the officers until an apparent decision to change the course of action was made when the officers requested the key for

the vehicle after Ms. Aaland secured the vehicle and voiced her intent to return to pick it up later. RP 2/1 10-11.

For the reasons previously argued, the officer's actions and comments indicated the vehicle was released to Ms. Aaland broke the connection between Mr. Levingston and the vehicle sought to be searched. Without that connection, law enforcement could not lawfully search the vehicle incident to arrest. Mr. Levingston was arrested and detained, therefore a search of the vehicle he was driving during his contact with law enforcement may appear to be justified as a standard search incident to arrest. However, Ms. Aaland, the registered owner of the vehicle, was an intervening factor that is not considered in the line of cases involving the search of vehicles incident to arrest. After Mr. Levingston was detained and placed in the back of the patrol car, Ms. Aaland was permitted to take the keys and she was given full access to the vehicle. RP 21, 9. At this point, the property (vehicle) was no longer seized in connection with Mr. Levingston's arrest.

Law enforcement permitted Ms. Aaland to enter the vehicle, sit in the driver's seat and look through the vehicle for various items. RP 2/1, 9. Law enforcement stood several feet away from

the vehicle. RP 2/1 9-10. Ms. Aaland secured the vehicle and indicated she would return shortly with another driver. RP2/1, 10. Upon leaving the scene she was called back by one of the officers. RP 2/1, 10-11. Officer Jensen instructed her that she needed to hand over the keys so they could search her vehicle. RP 2/1, 23. Ms. Aaland objected, but the vehicle was searched over her objection. RP 2/1, 23 At this point, Ms. Aaland became the individual that was seized, along with the vehicle; she was not able to leave without abandoning her vehicle. Without any articulable suspicion of criminal activity Ms. Aaland was subject to having her property seized and subsequently searched.

Consequently, Ms. Aaland's privacy rights were not trumped by law enforcement's lawful ability to search the car. The fact that Ms. Aaland was not merely a passenger combined with the fact that Ms. Aaland was allowed unrestricted and unobserved access to the vehicle lead to the appropriate conclusion that law enforcement could not lawfully search the vehicle incident to arrest. The court correctly concluded as such based on the evidence presented.

The fact that Ms. Aaland was the owner of the vehicle searched is a determinative factor. RP 2/14 Law enforcement knew that Ms. Aaland was the owner of the vehicle. RP 2/1 16-17. Law enforcement indicated to Ms. Aaland the vehicle was released to her. Finding of Fact No. 17; CP 41; RP 2/1, 9. The case is distinguishable from cases involving searches of vehicle passengers. First, the case of State v. Cass, 62 Wn.App. 793, 816 P.2d 57 (1991) is factually distinguishable from the case at hand. In that case the defendant was driving a vehicle stopped because law enforcement recognized the passenger had warrants for his arrest. State v. Cass, 62 Wn.App. at 794. The passenger stepped out of the car and was arrested. State v. Cass, 62 Wn.App. at 794. Another officer spoke with the defendant and asked her for a driver's license and vehicle registration. Id. The original officer returned and searched the vehicle. Id.

The case before the court is factually dissimilar for three reasons 1) Ms. Aaland was not a driver or passenger in the vehicle; and 2) the vehicle has been released to Ms. Aaland and she took possession of the vehicle; 3) The vehicle owner (or even passenger) was left alone in the vehicle unobserved. There is no

clear indication in the case of State v. Cass, *supra* that the defendant had been left alone in the car unobserved. In State v. Cass, *supra*, there was no evidence that the license and registration has been returned to the defendant. Therefore, the defendant may have been subject to a seizure (the taking of the license and registration) at the time of the search. In contrast in this matter, Ms. Aaland had been given back her driver's license and registration before the search occurred. RP 2/10, 6. Finally, Ms. Aaland was left to enter the vehicle unobserved which allowed her to have open access to the contents of the vehicle without law enforcement observation. RP 2/1, 16, 22.

The State has cited the case of State v. Chelly, 94 Wn.App. 254, 970 P.2d 376 (1999) to support the assertion that Ms. Aaland's privacy interest in her vehicle should be disregarded. However, the State v. Chelly, *supra*, case did not directly address the privacy issue raised in this matter. In the Chelly case the issue raised by the defendant was whether the detention of the individuals went beyond a permissible scope for a traffic infraction. State v. Chelly, 94 Wn.App. at 257. In that matter the Mr. Chelly was a driver of a vehicle pulled over the a tail light infraction. The

passengers were not wearing seatbelts, appeared to be nervous, and one passenger provided a false name. The facts presented in the case does not indicate whether the passengers had unobserved and free access to the vehicle during the stop. The facts of that case are distinguishable from the case at hand. Additionally, the Chelly case does not address the privacy interests raised in this matter.

The State has asserted the trial court's reliance on the case of State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999) was misplaced. The Respondent disagrees with the State's assertion. A key factor in the Parker case, and the case at hand is that the owner of the possession was not under arrest at the time of the search. "We find the fact the defendants here were not under arrest at the time their possessions were searched determinative." State v. Parker, 139 Wn.2d at 497. The court did not define "personal effects" but did state as follows: "Personal effects need to be worn or held to fall within the scope of protection." State v. Parker, 139 N.2d at 499 (quoting State v. Worth, 37 Wn.App. 889, 892, 683 P.2d 622 (1984))

The holding of State v. Parker, *supra* does not prevent the court from considering Ms. Aaland's vehicle to be a personal effect. The Parker case focused on the issue of whether a person can be subjected to a search when the person they are with is arrested. The court resolved that issue by clearly stating that law enforcement must have an independent suspicion to warrant a search. State v. Parker, 139 Wn.2d at 498-500. Additional important factors to be considered in this analysis is that the vehicle was under Ms. Aaland's control immediately before the search, she sought to keep her vehicle private as evidenced by her resistance to the officer's request to search the vehicle and the vehicle was identified as her property. RP 2/1 8-11. See State v. Parker, 139 Wn.2d at 499, State v. Worth, 37 Wn.App. At 893-894. These factors were common to both Parker and the case at hand.

Mr. Levingston was arrested and detained, therefore a search of the vehicle he was driving during his contact with law enforcement may appear to be justified as a standard search incident to arrest. However, Ms. Aaland, the registered owner of the vehicle, was an intervening factor that is not considered in the above line of cases involving the search of vehicles incident to

arrest. After Mr. Levingston was detained and placed in the back of the patrol car, Ms. Aaland was permitted to take the keys and she was given full access to the vehicle. RP 21, 9. At this point, the property (vehicle) was no longer seized in connection with Mr. Levingston's arrest. The court correctly concluded that the search was not lawful.

Consequently, the trial court correctly concluded that law enforcement could not conduct a lawful search of the vehicle once Ms. Aaland took possession of the vehicle. There is no indication that Ms. Aaland was suspected of any wrong doing. To the contrary, she was allowed to roam the scene unmonitored. If Ms. Aaland had left in the vehicle once she had the keys, law enforcement would not have probable cause to stop the vehicle.

3. Law enforcement's ability to lawfully search the vehicle incident to arrest terminated when Ms. Aaland locked the vehicle.

The State has cited State v. O'Neill, 110 Wn.App. 604, 43 P.3d 522 (2002) for the assertion that Law enforcement could lawfully search the vehicle incident to arrest even after the vehicle was locked. Division Three of the Court of Appeals concluded that a locked car may be searched in the case of State v. O'Neill, 110

Wn.App. 604, 43 P.3d 522 (2002). In that case the defendant was stopped for failing to signal. A check of Mr. O'Neill's driver's license revealed that his license to drive had been suspended. Mr. O'Neill was then told he was under arrest, he stepped out of the truck, and was handcuffed. When the Deputy returned to the vehicle, he discovered that it was locked, the keys were in the ignition, and he observed drug paraphernalia in plain view. State v. O'Neill, 110 Wn.App. at 606. A tow operator arrived at the scene, unlocked the vehicle and a search incident to arrest was conducted. That case is not factually analogous to the facts present in the matter before the court. In this case the car was not locked by Mr. Levingston. Rather, the car was locked by another individual who was given the keys to the car and given permission to assume possession of the vehicle. RP 2/1 9. The case of State v. O'Neill, *supra* is not dispositive for the issues raised in this matter. In this matter, an individual who was not the subject of police investigation locked the car.

The facts in this case are more analogous to State v. Perea, *supra*, and State v. Porter, *supra*, In both the Perea case and the case at hand, the individual responsible for locking the vehicle was

not subject to a seizure at the time vehicle was locked. Specifically in this case Ms. Aaland was given back her identification and told she could take the car. RP 2/1, 8-9. Ms. Aaland was free to leave the scene. She secured the car while she made arrangements to pick up the car by calling another person to assist her. RP 2/1, 9-10. there was no indication in the record that the vehicle was parked illegally, or in a dangerous location. Furthermore, Officer Jensen indicated that he was not going to impound the car. RP 2/1, 15,21,23. Also a common thread in the Perea, Porter and the case at hand, is the cases do not involve exigent circumstances, community caretaking, or seizure of evidence. In these cases, the vehicles searched were legally parked and locked. The searches that occurred in these cases were without probable cause. In the event Ms. Aaland would have driven the car from the scene, the officers would not have any probable cause to conduct a search of the vehicle.

B. UNDER WASHINGTON STATE LAW, MR. LEVINGSTON HAS STANDING TO CONTEST THE SEARCH OF MS. AALAND'S VEHICLE WHEN HE WAS DRIVING THE

**VEHICLE AT THE TIME OF THE TRAFFIC STOP AND WAS
CHARGED WITH POSSESSORY OFFENSES.**

The rule of automatic standing still applies in the State of Washington. State v. Williams, 142 Wn.2d 17, 22, 11 P.3d 714 (2000). As previously stated, it is well settled that Article I, section 7, of the Washington State Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution. State v. Hendrickson, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996); State v. Stround, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); State v. Williams, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984) Consequently, no Gunwall analysis is necessary to resolve this issue. State v. White, 135 Wn.2d 761, 769 958 P.2d (1998). Article I section 7 of the Washington State Constitution provides as follows: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision of the Constitution is violated when the State unreasonably intrudes on a person’s private affairs. State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984); State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)

The case of State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002), holds "a person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be used against him," Jones at 332, citing State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984). There are two factual requirements in asserting automatic standing.

[A] defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure. Jones at 332, citing State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). Possession may be actual or constructive. Jones, at 333, citing State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969).

The first prong of the test is obviously met as Mr. Levingston is charged with possessory offenses. CP 1.

The second prong of the test is satisfied when the defendant is in either actual or constructive possession over the item to support a criminal charge. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969). Actual possession is defined as physical custody of an item. State v. Callahan, 77 Wn.2d at 29. Constructive possession occurs when an individual has dominion and control over an item. Id. Dominion and controlled is defined as the ability to immediately take actual possession of an item. State v. Kypreos,

115 Wn.App. 207, 212-213, 61 P.3d 352 (2002) quoting State v. Jones, 146 Wn.2d at 333, 45 P.3d 1062 (2002)

In this matter Mr. Levingston has automatic standing to challenge the search of Ms. Aaland's vehicle. Possession is an element of the charged offenses. RCW 9.41.040(1)(a) and RCW 69.50.4013. Additionally, Mr. Levingston had constructive possession of the items found in the vehicle, since he had dominion and control over the vehicle at the time of his arrest. At the time of seizure Mr. Levingston was in possession of the vehicle. A Fourth Amendment seizure occurs when a person has a reasonable belief that he is not free to go in light of the circumstances surrounding the encounter with law enforcement . State v. Thornton, 41 Wn.App. 506, 705 P.2d 271 (1985).

The State has asserted that Mr. Levingston must demonstrate that his Fourth and Fifth Amendment rights were in conflict to invoke the doctrine of automatic standing. However, such a requirement is not found in cases subsequent to State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000) In the case of State v. Magneson, 107 Wn.App 221, 26 P.3d 986 (2001) the court determined that a three part test should be utilized in determining if

the doctrine of automatic standing applied. The test did not include any reference to demonstrating and conflict of Fourth and Fifth amendment rights. Automatic standing was found to apply in that case where a defendant was in a home as a guest and methamphetamine was found, and the legitimacy of the search warrant was challenged. Additionally in the case of State v. Kypreos, 110 Wn.App. 612, 39 P.3d 371 (2002) the court did not refer to the necessity of the existence of a conflict between fourth and fifth amendment rights for automatic standing to apply.

However, if the Court finds that a conflict between a defendant's Fourth and Fifth amendment rights must be present before automatic standing applies, such a conflict is present in this case. Mr. Levingston was seen driving Ms. Aaland's vehicle. (RP 2/1, 4) However, Mr. Levingston was not seen in possession of the drugs and firearm which he was charged with. Although the items were in the vehicle Mr. Levingston had been driving, he was not actually seen with the items. Under the theory presented by the State, Mr. Levingston would need to admit that the drugs and firearm belonged to him to obtain standing. The purpose of the automatic standing rule is to prevent that exact scenario. Therefore,

if the Court rejects the argument that Mr. Levingston demonstrate his Fourth and Fifth amendment rights were in conflict, the record shows that the rights were indeed in conflict and therefore Mr. Levingston has standing to assert a violation of the Fourth amendment.

Additionally, the State has asserted that Mr. Levingston has no standing to contest the search under the defense theory that he was not in control of the vehicle at the time of the search.

However, State v. Jones, 146 Wn.2d at 332 requires that the defendant be in possession of the item to be searched at the time search or seizure. In this matter Mr. Levingston was in possession of the vehicle at the time of the seizure. (RP 2/1, 4) Consequently, Mr. Levingston has automatic standing to contest the search under Washington state case law. To hold otherwise would render the search incident to arrest invalid on its face and preclude the State from charging the offenses listed in the information filed in this matter CP 1.

In the event the Court rejects the assertion that the automatic standing rule applies in this case, Mr. Levingston has standing to contest the search. "If a defendant is able to establish a

legitimate expectation of privacy in the area searched, then he has satisfied the standing test under a Fourth Amendment analysis and does not need to rely on automatic standing.” State v. Kypreos, 110 Wn.App. 612, 622, 39 P.3d 371 (2002) quoting United States v. Salvucci, 448 U.S. 83, 93, 95, 100 S.Ct. 2547 (1980) In this matter Mr. Levingston has a reasonable expectation of privacy in the vehicle he was driving immediately before his arrest. A person in possession of a vehicle has a reasonable expectation of privacy in articles within the vehicle which are not visible from outside the vehicle. State v. Stroud, 106 Wn.2d at 152. Mr. Levingston was in a relationship with Ms. Aaland, as evidenced by his call to her at the onset of the traffic stop, and Ms. Aaland’s wish to say good-bye to him before he was taken to jail. (RP 2/1 4,8) Furthermore, the contents of Mr. Levingston’s jacket pockets, and articles under the seats of the car could not be seen from the outside. Consequently, Mr. Levingston had a legitimate expectation of privacy and has standing to contest the search even if the court determines that no automatic standing exists.

Under either theory Mr. Levingston has standing to contest the search and the court correctly concluded as such.

IV. CONCLUSION

For the reasons stated above, the Respondent respectfully requests this court to affirm the trial court's order suppressing the evidence found in the search of Ms. Aaland's car and the dismissal of the charges.

Respectfully submitted this 26 day of October.



MICHELLE BACON ADAMS
WSBA No. 25200
Attorney for Defendant

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Respondent's Brief in the above-captioned case hand-delivered and/or mailed as follows:

Original of Respondent's Brief Hand-Delivered To:

Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

DATED this 26 day of October, 2006, at Port Orchard, Washington.



MICHELLE BACON ADAMS
Attorney for Respondent

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Respondent's Brief in the above-captioned case hand-delivered and/or mailed as follows:

Copy of Respondent's Brief Hand-Delivered To:

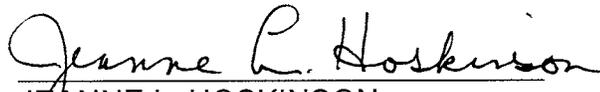
Mr. Randall Sutton
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

Copy of Respondent's Brief Mailed To:

Gregory L. Levingston
3435 East Spruce Place
Bremerton, WA 98310

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DATED this 26th day of October, 2006, at Port Orchard, Washington.


JEANNE L. HOSKINSON
Legal Assistant