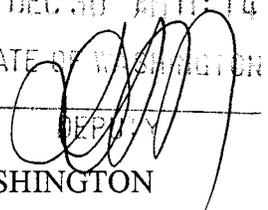


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY 

Nº. 38002-1-II

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

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STATE OF WASHINGTON  
Respondent,

v.

PETER KEVIN WILLIAMS,  
Appellant.

---

OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Kitsap County,  
Cause No. 08-1-00107-3  
The Honorable M. Karlynn Haberly, Presiding Judge

---

Eric Fong  
WSBA No. 26030  
Attorney for Respondent  
569 Division, Ste. A  
Port Orchard, WA 98366  
(360) 876-8205

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A. ASSIGNMENTS OF ERROR

1. The search of Mr. Williams' motorcycle incident to his arrest was unlawful.
2. The State presented insufficient admissible evidence to support convicting Mr. Williams of possession of methamphetamine.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the search of Mr. Williams' motorcycle incident to his arrest lawful under the Washington Constitution where Officer Twomey had no knowledge of facts which would support a reasonable belief that his safety was in danger or that evidence of a crime was located in Mr. Williams' motorcycle? (Assignment of Error No. 1)
2. Did the State present sufficient evidence to support convicting Mr. Williams of unlawful possession of methamphetamine where all evidence relating to Mr. Williams' possession of methamphetamine was discovered pursuant to an unlawful search? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

On January 18, 2008, Kitsap County Sheriff's Deputy Daniel Twomey was driving on patrol when he passed Mr. Williams while Mr. Williams was riding his motorcycle. RP 83-85. Deputy Twomey ran Mr. Williams' license plate and discovered that the DOL records indicated that Mr. Williams' license was suspended. RP 85. Deputy Twomey pulled Mr. Williams over. RP 86.

Mr. Williams was defensive and wanted to know why he had been stopped. RP 87. Deputy Twomey told Mr. Williams he had been stopped because his driver's license was suspended. RP 87. Deputy Twomey noticed that Mr. Williams' speech was slurred and that a strong odor of intoxicants was coming from Mr. Williams' breath and from his person. RP 87.

After initially contacting Mr. Williams, Deputy Twomey returned to his patrol

vehicle to see if a traffic unit was available to assist him in the stop. RP 88. While in his patrol vehicle, Deputy Twomey observed Mr. Williams return to his motorcycle and manipulate a saddlebag. RP 88. Deputy Twomey could not see if Mr. Williams was reaching into the saddlebag, but he was not concerned for his safety. RP 125-126, 145.

No traffic units were available to assist him, so Deputy Twomey recontacted Mr. Williams and asked Mr. Williams if he was willing to perform field sobriety tests. RP 88-89. Mr. Williams agreed to perform the tests. RP 89.

Deputy Twomey administered the hand-gaze nystagmus test, the Romberg balance test, the one-leg stand test, the walk and turn test, and the finger-to-nose test. RP 95-108. Based on Mr. Williams' performance of the tests, Deputy Twomey concluded that Mr. Williams was under the influence of intoxicating liquor. RP 108. Deputy Twomey arrested Mr. Williams for driving under the influence and placed him in the back of his patrol car. RP 109.

Pursuant to Mr. Williams' arrest, Deputy Twomey searched Mr. Williams' motorcycle and discovered a clear baggie containing a substance which later tested positive for methamphetamine. RP 109-110, 142, 166. Deputy Twomey also found a half-bottle of Zinfandel wine in a compartment on the motorcycle. RP 111.

Deputy Twomey showed the baggie to Mr. Williams. RP 111. Mr. Williams was shocked when Deputy Twomey showed him the baggie and told Deputy Twomey that he didn't recognize the baggie and said that Deputy Twomey must have planted it. RP 111-112, 147. Mr. Williams denied knowing anything about the baggie or the substance inside it. RP 153.

Deputy Twomey took Mr. Williams to the Kitsap County Jail where Mr. Williams

refused to give a breath sample. RP 112-114.

On January 18, 2008, the State charged Mr. Williams with: possession of methamphetamine contrary to RCW 69.50.4013 and 69.50.206(d)(2); driving under the influence of alcohol contrary to RCW 46.61.502(1) with a special allegation that Mr. Williams refused to give a breath sample contrary to RCW 46.61.5055; and with driving with a suspended license in the third degree contrary to RCW 46.20.342(1)(c). CP 1-4.

After his arrest, Mr. Williams spoke with his step-son, Mr. Jeffrey Olson, and learned that one of Mr. Olson's friends had placed the methamphetamine in the saddlebag on Mr. Williams' motorcycle. RP 17-18, 28, 173-174. Mr. Olson signed an affidavit in which he indicated that his friend had placed the methamphetamine in Mr. Williams' saddlebag. RP 26, 28.

On June 24, 2008, the State moved to exclude "other suspect" Evidence absent an offer of proof by Mr. Williams establish a proper foundation for introduction of such evidence. CP 14-24. At a pretrial hearing on the motion to exclude "other suspect" evidence, Mr. Olson testified that, if called at trial, he would exercise his Fifth Amendment rights and refuse to testify. RP 14.

Because Mr. Williams' defense to the charge of unlawful possession of methamphetamine was that he possessed the drugs unwittingly and not that someone else possessed the drugs, the trial court analyzed the issue of the admissibility of Mr. Olson's affidavit as an issue of hearsay rather than other suspect evidence. RP 25. The trial court found that Mr. Olson was unavailable for trial due to his refusal to testify (RP 27-28) and found that Mr. Olson's statement that he was smoking methamphetamine with his friends was against his penal interest (RP 28), but ultimately found that Mr. Olson's statement

that his friend had placed the methamphetamine in Mr. Williams' saddlebag was inadmissible under ER 804(b)(3) because it was not trustworthy. RP 28-33. The trial court also found that Mr. Olson's statement that he had smoked methamphetamine was inadmissible since it was irrelevant. RP 31-32.

Mr. Williams pled guilty to the charge of driving with a suspended license in the third degree. RP 41-43.

During closing argument, the trial court allowed counsel for Mr. Williams to argue that Mr. Williams parked the motorcycle at his house where anyone who had access to the motorcycle could have put the drugs in the saddlebag. RP 229-233, 239-240.

The jury found Mr. Williams guilty of possession of methamphetamine, driving under influence, and found that Mr. Williams refused to submit to a breath test. RP 242.

Notice of Appeal was filed on July 11, 2008.

D. ARGUMENT

1. **The search of Mr. Williams' motorcycle incident to his arrest was unconstitutional where Officer Twomey lacked a basis to believe that his safety was threatened or that evidence of a crime was located in Mr. Williams' motorcycle.**

a. *Mr. Williams may challenge the search of his motorcycle for the first time on appeal.*

Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." *See* RAP 2.5(a)(3). Whether RAP 2.5(a)(3) applies is based on a two-part test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). An error is manifest when it had practical and identifiable consequences in the trial at issue. *WWJ Corp.*, 138 Wn.2d at 603, 980 P.2d

1257. *See also State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (An appellate “must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant]’s rights.”).

i. The error complained of is a constitutional error.

As discussed more fully below, Mr. Williams is challenging the search of his motorcycle on the grounds that it violated his Article 1, § 7 rights. This makes the error complained of a constitutional error.

ii. The error was manifest.

Here, all the evidence relating to the possession of methamphetamine was discovered pursuant to the search Mr. Williams is arguing was unlawful. Should this court find that the search was unlawful, then the evidence relating to the possession of methamphetamine would have been inadmissible and the State would therefore have had insufficient admissible evidence to convict Mr. Williams of unlawful possession of methamphetamine. The unlawful search therefore had practical and identifiable consequences in Mr. Williams’ trial in that Mr. Williams was convicted of unlawful possession of methamphetamine.

b. *The search of Mr. Williams’ motorcycle was unconstitutional under Article 1, § 7 of the Washington constitution.*

The Fourth Amendment to the US Constitution provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, § 7 of the Washington Constitution provides “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Absent an exception to the warrant requirement, a warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the fourth amendment to the United States Constitution. *See State v. Johnson*, 128 Wn.2d 431, 446-47, 909 P.2d 293 (1996).

“A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement [.]” *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 8, 145 L.Ed.2d 16 (1999); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992).

“The warrant requirement is especially important under article I, section 7, of the Washington Constitution **as it is the warrant which provides the ‘authority of law’ referenced therein.**” *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (emphasis added) (citing *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

A warrantless search of constitutionally-protected areas is presumed unreasonable absent proof that one of the few well-established exceptions to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Ladson*, 138 Wn.2d at 349, 979 P.2d 833.

A search of a vehicle incident to arrest is a recognized exception to the warrant requirement. *State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001), citing *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986).

- i. The search incident to arrest exception to the warrant requirement was created to protect officers who arrest suspects with weapons secreted on or near their person and to prevent destruction of evidence secreted on or near the person of an arrestee.

In *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the United States Supreme Court held that when an individual was arrested, it was reasonable for the arresting officer to search the person arrested in order to remove any weapons the suspect might later use to resist arrest or escape or otherwise injure the officer. *Chimel*, 395. U.S. at 762-763, 89 S.Ct. 2034, 23 L.Ed.2d 685. The *Chimel* court went on to extend the authority of police officers to search the area into which an arrestee might reach in order to grab a weapon or evidentiary items because, “A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.” *Id.*

Prior to *Chimel*, the most recent U.S. Supreme Court decision discussing the permissible scope of a search incident to an arrest was *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950). The *Chimel* court held that,

*Rabinowitz* has come to stand for the proposition, inter alia, that a warrantless search ‘incident to a lawful arrest’ may generally extend to the area that is considered to be in the ‘possession’ or under the ‘control’ of the person arrested. And it was on the basis of that proposition that the California courts upheld the search of the petitioner’s entire house in this case.

*Chimel*, 395. U.S. at 760, 89 S.Ct. 2034, 23 L.Ed.2d 685. The *Chimel* court then held, “Th[e *Rabinowitz*] doctrine, however, at least in the broad sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis.” *Id.* The *Chimel* court reached this conclusion after taking great pains to emphasize the importance of the warrant requirement:

Mr. Justice Frankfurter wisely pointed out in his *Rabinowitz* dissent that the Amendment's proscription of 'unreasonable searches and seizures' must be read in light of 'the history that gave rise to the words'-a history of 'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution \* \* \*.' The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the [Fourth] Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part. As the Court put it in *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153:

'We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. \* \* \* And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional [sic] requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.' *Id.*, at 455-456, 69 S.Ct., at 193.

*Chimel*, 395. U.S. at 761, 89 S.Ct. 2034, 23 L.Ed.2d 685 (internal citations omitted).

In ruling that searches of a person and the area immediately within that person's control were lawful, the *Chimel* court likened the search incident to arrest to a *Terry* stop and held that searches incident to arrest were permissible for the same reasons as *Terry* stops:

Only last Term in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, we emphasized that 'the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,' *id.*, at 20, 88 S.Ct. at 1879, FN6 and that '(t)he scope of (a) search must be 'strictly tied to and justified by' the circumstances which

rendered its initiation permissible.’ *Id.*, at 19, 88 S.Ct., at 1878. The search undertaken by the officer in that ‘stop and frisk’ case was sustained under that test, because it was no more than a ‘protective \* \* \* search for weapons.’ *Id.*, at 29, 88 S.Ct., at 1884. But in a companion case, *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917, we applied the same standard to another set of facts and reached a contrary result, holding that a policeman’s action in thrusting his hand into a suspect’s pocket had been neither motivated by nor limited to the objective of protection. Rather, the search had been made in order to find narcotics, which were in fact found.

A similar analysis underlies the ‘search incident to arrest’ principle, and marks its proper extent. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

*Chimel*, 395. U.S. at 762-763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (internal citations omitted).

In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the United States Supreme Court held as a “bright-line rule” that when an arrestee is occupying the passenger compartment of a car at the time of arrest, he might grab a weapon or destroy evidence located anywhere within the compartment, therefore the arresting officer may search the entire passenger compartment, including closed containers, incident to the arrest of the occupant. *Belton*, 453 U.S. at 460, 101 S.Ct. 2860, 69 L.Ed.2d 768. The *Belton* court reached this decision in order to provide police officers affecting arrests a “workable rule” as to the permissible scope of a search of a

vehicle incident to the arrest of an occupant. *Belton*, 453 U.S. at 459-460, 101 S.Ct. 2860, 69 L.Ed.2d 768.

In clarifying the permissible scope of a search of a vehicle incident to the arrest of an occupant, the *Belton* court pointed out that “[this] holding...does no more than determine the meaning of *Chimel*’s principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.” *Belton*, 453 U.S. at 460 n. 3, 101 S.Ct. 2860, 69 L.Ed.2d 768.

Thus, the search incident to arrest warrant exception was created in order to protect officers from suspects who may have a weapon on or near their person at the time of arrest and to discover and prevent the destruction of evidence which is on or near the suspect’s person at the time of arrest.

- ii. Washington has adopted the Federal standard and reasoning, except for locked containers.

*State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), *overruled in part by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), was the first post-*Belton* case where the Washington Supreme court addressed the issue of whether or not police could search the passenger area of a vehicle incident to the arrest of an occupant. In *Ringer*, the court ruled that, absent actual exigent circumstances, a warrantless search of a suspect’s vehicle was impermissible. The defendant in *Ringer* was lawfully parked in a rest area when two officers discovered that a felony arrest warrant existed justifying the defendant’s arrest. The officers ordered the defendant out of his van, arrested him, handcuffed him, and placed him in the back of the patrol car. During this arrest process, the officers noticed a strong odor of marijuana emanating from defendant’s van. The officers subsequently

searched the van and discovered closed, unlocked suitcases which contained marijuana, cocaine, and other controlled substances.

The Washington Supreme Court held that the search violated article 1, section 7 because, where police had probable cause to search, warrantless searches were permissible only where emergencies or exigencies existed which do not permit reasonable time and delay for a judicial officer to evaluate and act upon a search warrant application. *Ringer*, 100 Wn.2d at 699-701, 674 P.2d 1240. The *Ringer* court reasoned that “[u]nder the doctrine of exigent circumstances, the totality of circumstances said to justify a warrantless search will be closely scrutinized. The burden is on those seeking the exemption to show that the exigencies of the situation made that course imperative.” *Ringer*, 100 Wn.2d at 701, 674 P.2d 1240 (internal citations omitted). Because *Ringer* had already been arrested, handcuffed, and searched, and because his van was lawfully parked, immobile, and did not impede traffic or threaten public safety, the *Ringer* court held that no exigencies existed and the officers had made no showing that a telephonic warrant could not have been obtained to search the vehicle. *Ringer*, 100 Wn.2d at 703, 674 P.2d 1240.

Thus, post-*Ringer*, the rule under Article 1, § 7 was that, absent actual exigent circumstances, a warrantless search of a suspect’s vehicle was impermissible. However, the law soon changed.

In *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986), the court revisited the question of vehicle searches incident to the arrest of an occupant and rejected the *Ringer* rule. In overruling *Ringer*, the *Stroud* court was concerned with the ability of police officers to decide whether or not a warrantless search was permissible: “The

*Ringer* holding makes it virtually impossible for officers to decide whether or not a warrantless search would be permissible. Weighing the ‘totality of circumstances’ is too much of a burden to put on police officers who must make a decision to search with little more than a moment’s reflection.” *Stroud*, 106 Wn.2d at 148, 720 P.2d 436.

Citing *Belton*, 453 U.S. at 458, 101 S.Ct. 2860, 69 L.Ed.2d 768, the *Stroud* court reasoned

A highly sophisticated set of rules requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.

We agree with the Supreme Court’s decision to draw a clearer line to aid police enforcement, although because of our state’s additional protection of privacy rights we must draw the line differently than did the United States Supreme Court.

*Stroud*, 106 Wn.2d at 151, 720 P.2d 436.

While recognizing that the search incident to arrest exception had been narrowly drawn to address officer safety and prevent the destruction of evidence, the *Stroud* court observed that “because of our heightened privacy protection [under article I, section 7], we do not believe that these exigencies always allow a search.” *Stroud*, 106 Wn.2d at 151, 720 P.2d 436. The *Stroud* court rejected the *Ringer* totality of the circumstances test and followed *Belton* except for locked containers:

During the arrest process...officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.... [T]he 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.

*Stroud*, 106 Wn.2d at 152, 720 P.2d 436.

Thus, post-*Stroud*, under article 1, § 7, where an occupant of a vehicle is arrested, police may search the entire passenger compartment of the vehicle, save for locked containers, in order to prevent the suspect from either obtaining a weapon to harm the officers or from destroying evidence, even if these exigent circumstances do not actually exist.

- iii. The *Stroud* decision is contrary to the contemporary interpretation and application of Article 1, § 7 of the Washington Constitution.

As is discussed below, and examination of Washington law post-*Stroud* reveals that the *Stroud* decision is an aberration in the interpretation of article 1, § 7 and should be abandoned in favor of the *Ringer* standard.<sup>1</sup>

Modern interpretation of Article 1, Section 7 began in the early 1980's when the Washington Supreme Court "indicated that [it] will protect Washington citizens' right to privacy in search and seizure cases more vigorously than they would be protected under the federal constitution." *Stroud*, 106 Wn.2d at 148, 720 P.2d 436 (citing the few previous instances: *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982); *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), *overruled in part by Stroud*; *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984)). *Stroud* itself was a modest example of that greater privacy protection. It generally followed the Fourth Amendment rule which permits a search of the entire passenger compartment incident to the arrest of the driver. *New York v. Belton*, 453 U.S.

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<sup>1</sup> Portions of this briefing have been adapted with permission from the ACLU Amicus Brief authored by Douglas B. Klunder, WSBA #32987 and submitted to the Washington Supreme Court in *State v. Buelna-Valdez*, No. 80091-0. *Buelna-Valdez* was argued before the Supreme Court on June 10, 2008, and an opinion has not yet been rendered.

454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Giving only slightly greater deference to privacy, the rule announced in *Stroud* allows a search of the entire passenger compartment except for locked containers. *Stroud*, 106 Wn.2d at 52, 720 P.2d 436 .

As one of the early Article 1, Section 7 cases, *Stroud* had little previous jurisprudence to draw upon in determining the appropriate scope of Article 1, Section 7's greater privacy protections. In the decades since *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) - a decision announced the same day as *Stroud* - Washington courts have developed a great deal of case law interpreting Article 1, Section 7 and recognized that it is one of the country's strongest constitutional privacy provisions, stronger than the privacy protections afforded by the Fourth Amendment. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) ("It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment"). The *Stroud* rule is incompatible with this subsequent jurisprudence.

Although it has long been recognized that Article I, Section 7 is more protective of privacy than the Fourth Amendment, it is only recently that the overarching philosophy of the difference in interpretive approaches has been formulated. "In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article 1, section 7 we focus on expectations of the people being searched." *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). If this basic approach had been recognized in 1986, it is unlikely *Stroud* would have been decided the same way. The focus there was on determining reasonable guidelines for police actions, rather than on delineating the reasonable expectation of privacy that drivers have in their vehicles. Article 1, Section 7 prohibits the invasion of that privacy without authority of

law; invasion cannot be justified in the absence of exigent circumstances simply because officers act “reasonably.”

An examination of post-*Stroud* caselaw reveals that, in non-arrest situations, courts have returned to the *Ringer* standard of requiring true exigent circumstances in examining the lawfulness of warrantless searches conducted for officer safety or to prevent the destruction of evidence. For example, where police desire to search a home or other protected area, “an officer must be able to articulate reasons supporting a belief that [officer] safety may be compromised if [the officer] does not undertake a protective search and such belief must be objectively reasonable.” *State v. Coutier*, 78 Wn.App. 239, 244, 896 P.2d 747 (1995), *review denied*, 128 Wn.2d 1019, 911 P.2d 1343 (1996).

Similarly, when police conduct a *Terry* stop on a vehicle and search the vehicle for officer safety, the reasonableness of the search is reviewed under the totality of the circumstances. *State v. Glenn*, 140 Wn.App. 627, 633-634, 166 P.3d 1235 (2007), *citing State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128 (2002).

Thus, where an officer *has not* arrested the occupant of a vehicle, the officer must be able to articulate reasons supporting an objectively reasonable belief that his safety will be compromised if he does not search that vehicle in order for the search of the vehicle to be lawful, and the reasonableness of the search is reviewed under the totality of the circumstances. This is the *Ringer* standard that was rejected by *Stroud*.

Similarly, a warrantless search may not be justified if the suspect or evidence is under the control of the police so that they may prevent its destruction. *State v. Hall*, 53 Wn.App. 296, 302-04, 766 P.2d 512, *review denied*, 112 Wn.2d 1016 (1989).

The Washington Supreme Court has held that the search incident to arrest warrant

exception is not a “right” of the State, but is dependent upon the existence of actual exigent circumstances. *See State v. White*, 129 Wn.2d 105, 112-113, 915 P.2d 1099 (1996) (“The validity of a search incident to arrest depends upon the existence of exigent circumstances such as the need to seize weapons which the arrestee may seek to use to resist arrest or escape or the need to prevent the destruction of evidence of the crime”); *see also State v. Rathbun*, 124 Wn.App. 372, 380, 101 P.3d 119 (2004) (“Contrary to the State’s position, the ability to search a vehicle incident to the arrest of a vehicle’s occupant is not a police entitlement justifying a rule that police may search a vehicle incident to arrest regardless of how far a suspect is from the vehicle. If a suspect flees from a vehicle so that the vehicle is no longer within his or her immediate control at the time of arrest, the exigencies supporting a vehicle search incident to arrest no longer exist and there is no justification for the police to search the vehicle without first obtaining a warrant...[B]ecause Rathbun was not in close proximity to his truck when he was arrested, the officers were not justified in conducting a warrantless search of the vehicle.”)

The continued application of the *Ringer* “totality of the circumstances” standard to exigent circumstances searches which do not involve the arrest of the occupant of a vehicle highlights the flawed logic of *Stroud*. The *Stroud* court rejected the *Ringer* standard because it wanted to give officers a bright-line rule applicable by the officer in the field. However, as post-*Stroud* jurisprudence indicates, police officers in the field must still apply the *Ringer* standard to all searches performed due to exigent circumstances *except* where the officer has just arrested the occupant of a vehicle. Further, the successful arrest of a suspect eliminates the exigent circumstances which

supposedly justify the search of a vehicle – the potential destruction of evidence and officer safety – obviating the need for police officers to conduct a search without first obtaining a warrant. Thus, in all exigent circumstances searches except those involving the arrest of a vehicle occupant, police officers are still required to apply the non-bright-line *Ringer* standard, and the arrest of the person eliminates the exigent circumstances which theoretically authorize the warrantless search.

Several other states that have considered the issue in recent years have drawn much different conclusions than *Stroud* under their own state constitutions. Rejecting *Belton* entirely, they allow vehicle searches incident to arrest only when necessary “to ensure police safety or to avoid the destruction of evidence.” *State v. Eckel*, 185 N.J. 523, 539, 888 A.2d 1266 (2006); *see also Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896 (1995); *Camacho v. State*, 119 Nev. 395, 75 P.3d 370 (2003); *State v. Pittman*, 139 N.M. 29, 127 P.3d 1116 (N.M. Ct. App. 2005); *State v. Bauder*, 924 A.2d 38 (Vt. 2007).

*Stroud* was a pragmatic experiment, attempting to create a bright line rule to guide law enforcement and courts, even with some cost to individuals’ privacy. But the *Stroud* rule has failed to provide clarity; the Washington Supreme Court has since dealt with a variety of cases involving searches of vehicles incident to arrest, and the Court of Appeals has dealt with numerous others. *See, e.g., State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (purse is not equivalent of locked container); *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996) (sleeping unit in truck is part of “passenger compartment”); *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) (cannot search passenger’s belongings incident to arrest of driver); *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001) (entire motor home is part of “passenger compartment”); *State v. Jones*,

146 Wn.2d 328, 45 P.3d 1062 (2002) (reaffirming Parker); *see also State v. Lopez*, 142 Wn. App. 930, 176 P.3d 554 (2008); *State v. Patton*, review granted, No. 80518-1, \_Wn.2d\_ (Apr. 1, 2008).

The experience of two decades shows that *Stroud*'s bright line rule has not operated as intended to balance privacy against the needs posed by exigent circumstances. *Stroud*, 106 Wn.2d at 152. Instead, it has allowed searches where there are no exigent circumstances, and has encouraged fishing expeditions and pretextual searches. *Stroud* has created an aberration in the law where a police officer who has arrested the occupant of a vehicle must meet a lower legal standard to search that vehicle for officer safety or to prevent destruction of evidence than the officer would if the occupant had not been arrested. This is simply illogical since the underlying purpose of the search of the vehicle is to prevent the destruction of evidence or obtainment of a weapon by the occupant of the vehicle. If the occupant of the vehicle has been taken into custody, the exigent circumstances allowing the warrantless search no longer exist. The *Stroud* rule is incompatible with continued Article 1, Section 7 jurisprudence, as well as state constitutional interpretations in other jurisdictions.

The Washington State Supreme Court has stated: "The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception." *State v. Ladson*, 138 Wn.2d 343, 357, 979 P.2d 833 (1999).

Once the occupant of a vehicle has been arrested, handcuffed, and removed from his vehicle, it is impossible for that person to destroy evidence in or retrieve a weapon

from his or her vehicle. The arrest of the occupant of a vehicle removes any exigent circumstance relating to officer safety or the destruction of evidence which might provide justification for a warrantless search of the vehicle. *Stroud* is contrary to *Ladson* and to the contemporary understanding of Article 1, § 7, and is therefore no longer good law.

The search of Mr. Williams' motorcycle incident to his arrest was unconstitutional since Officer Twomey did not believe his safety was threatened (RP 125-126, 145) and had no reason to believe that evidence would be destroyed if he did not immediately search Mr. Williams' motorcycle. The search of Mr. Williams' motorcycle incident to his arrest therefore violated Mr. Williams' Article 1, § 7 rights.

**2. The State presented insufficient admissible evidence to convict Mr. Williams of unlawful possession of methamphetamine.**

Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. *See State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. *See State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, ¶ 9, 133 P.3d 936 (2006); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Hosier*, 157 Wn.2d at 8, ¶ 9, 133 P.3d 936; *Salinas*, 119 Wn.2d at 201, 829

P.2d 1068. “A claim of insufficiency admits the truth of the State’s evidence” and all reasonable inferences. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

*Stroud* is contrary to Article 1, § 7 and *Ladson*. Police may not conduct warrantless searches of an arrestee’s vehicle incident to the arrest of an occupant. The search of Mr. Williams’ motorcycle was unconstitutional and all evidence discovered pursuant to that search was therefore inadmissible. If the evidence discovered pursuant to Deputy Twomey’s search of Mr. Williams’ motorcycle is suppressed, the State has no evidence that Mr. Williams possessed methamphetamine. Even viewed in the light most favorable to the State, the evidence which was admissible at trial was insufficient to establish that Mr. Williams possessed methamphetamine. Therefore, the State presented insufficient admissible evidence to establish that Mr. Williams possessed methamphetamine.

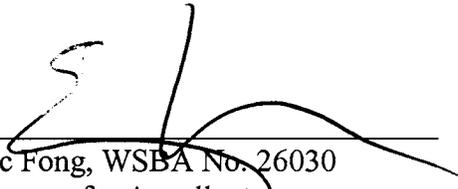
E. CONCLUSION

The search of Mr. Williams’ motorcycle incident to his arrest violated Mr. Williams’ Article 1, § 7 rights. The evidence discovered pursuant to the search was therefore inadmissible. Because all evidence that Mr. Williams possessed methamphetamine was discovered pursuant to the unlawful search of Mr. Williams’ motorcycle, the State had insufficient admissible evidence to convict Mr. Williams’ of possession of methamphetamine.

This court should vacate Mr. Williams' conviction for possession of methamphetamine and dismiss that charge with prejudice.

DATED this 31<sup>st</sup> day of December, 2008.

Respectfully submitted,



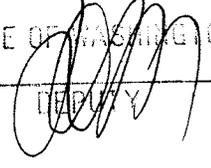
Eric Fong, WSBA No. 26030  
Attorney for Appellant

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IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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| STATE OF WASHINGTON,  | ) |                                 |
|                       | ) | Appeal No. 38002-1-II           |
| Respondent,           | ) | Superior Court No. 08-1-00107-3 |
|                       | ) |                                 |
| vs.                   | ) |                                 |
|                       | ) | <b>DECLARATION OF MAILING</b>   |
| PETER KEVIN WILLIAMS, | ) |                                 |
|                       | ) |                                 |
| Appellant.            | ) |                                 |

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway Street, Suite 300  
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

|                            |                          |
|----------------------------|--------------------------|
| Mr. Randall Sutton         | Mr. Peter Kevin Williams |
| Attorney at Law            | 6565 Olalla Road SE      |
| 614 Division Street, MS-35 | Port Orchard, WA 98367   |
| Port Orchard, WA 98366     |                          |

a true copy of the Brief of Appellant.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 29<sup>th</sup> day of December 2008, at Port Orchard, Washington.

  
ANN BLANKENSHIP

ROVANG FONG & ASSOCIATES  
569 DIVISION, SUITE A  
PORT ORCHARD, WA 98366  
TEL (360) 876-8205  
FAX (360) 876-4745