

**NO. 42324-3-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JONATHAN R. YOUNG,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it entered a finding of fact unsupported by substantial evidence.

2. The trial court erred when it denied the defendant's motion to suppress evidence a police officer obtained in violation of the defendant's rights to privacy under Washington Constitution, Article 1, § 3, and United States Constitution, Fourth Amendment, when he searched a locked container without a warrant.

### ***Issues Pertaining to Assignment of Error***

1. Does a trial court err if it enters a finding of fact unsupported by substantial evidence?

2. Consistent with the privacy protections found under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when a police officer arrests a defendant on a misdemeanor charge and searches that defendant's backpack incident to arrest, may that officer then, without a warrant, open a locked container inside the backpack in order to "inventory" the contents?

## STATEMENT OF THE CASE

A little before 1:00 am on February 19, 2011, Officer Chad Withrow of the Centralia Police Department arrested the defendant Jonathan R. Young on a charge of possession of a dangerous weapon. RP 6/8/11 4-5. At the time, the defendant was on a public walkway by a downtown business and he was carrying a backpack. *Id.* After placing the defendant in handcuffs, the officer searched the backpack incident to the defendant's arrest. RP 6/8/11 5. Inside the backpack, the officer found a locked box. RP 6/8/11 6-7. When he pulled the box out of the backpack, the defendant admitted that the key to the box was in his pocket. RP 6/8/11 7. Without the defendant's permission, and without the aid of a warrant, the officer took the defendant's key, opened the box, and searched it. RP 6/8/11 7-8. Inside, the officer found a small amount of methamphetamine and marijuana. RP 77-82.

The state later charged the defendant with possession of methamphetamine, possession of under 40 grams of marijuana, possession of a dangerous weapon, and resisting arrest based upon Officer Withrow's claims that the defendant had resisted the officer's attempts to better secure the handcuffs on the defendant and put him in a patrol vehicle. CP 1-4. Following arraignment on these charges, the defendant moved to suppress the items from the locked box, claiming that the officer violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United

States Constitution, Fourth Amendment, when he searched the locked container without a warrant. CP 29, 30-43.

At a subsequent suppression motion, the officer testified that he did not open the box because he suspected the presence of any contraband. RP 6/8/11 8. Rather, he stated that he did so in order to “inventory” the box because (1) some Centralia officers followed a custom of inventorying all containers for which they took possession, and (2) the jail would do so when the defendant was booked into custody. RP 6/8/11 6-7. On the first issue, Officer Withrow testified as follows:

Q. Per your policy, are you allowed to put a closed container with unknown contents into your vehicle prior to transporting it to the police department?

A. It is vague in that aspect, but a few people inventory everything prior to transport.

RP 6/8/11 7.

Following argument of counsel, the trial court denied the motion to suppress, and later entered the following findings of fact and conclusions of law in support of its decision.

## **I. FINDINGS OF FACT**

1.1 Both parties stipulated to the admissibility of Officer Chad Withrow’s police report for purposes of the suppression hearing. A copy of that police report is attached.

1.2 The defendant did not consent to the search of the locked box.

1.3 At the time the Defendant's locked container was opened, Officer Chad Withrow was following the Centralia Police Department's department protocols for inventorying personal belongings of arrested individuals.

## **II. CONCLUSIONS OF LAW**

2.1 The locked container found on the Defendant's person after his lawful arrest was lawfully searched as part of a search incident to arrest of the Defendant's personal belongings that he was carrying at the time of his arrest.

2.2 The locked container found on the Defendant's person after his lawful arrest was lawfully searched as part of a valid inventorying of the Defendant's personal belongings that he was carrying at the time of his arrest.

2.3 Officer Withrow did not obtain consent from the defendant to search the locked container in the defendant's backpack

2.4 The search of the locked container was lawful.

2.5 The Defendant's Motion to Suppress Evidence found in the locked container is hereby denied.

CP 70-71.

Following denial of the suppression motion, the defendant stipulated to facts sufficient to convict. CP 77-82. The court then found the defendant guilty on all of the charges, and sentenced him within the standard range on the felonies. CP 83-91. The defendant thereafter filed timely notice of appeal. CP 92.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT ENTERED A FINDING OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, the defendant assigns error to Finding of Fact 1.3, which states the following:

1.3 At the time the Defendant's locked container was opened, Officer Chad Withrow was following the Centralia Police Department's department protocols for inventorying personal belongings of arrested individuals.

CP 71-72.

In fact, the claim that there was a Centralia Police Department protocol requiring officers to inventory personal belongings of individuals arrested, and that the officer in this case was following that protocol when he took the defendant's key and opened the locked box, originated with the prosecutor. Rather, as the following question and answer reveals, the officer disavowed the existence of any such "protocol."

Q. Per your policy, are you allowed to put a closed container with unknown contents into your vehicle prior to transporting it to the police department?

A. It is vague in that aspect, but a few people inventory everything prior to transport.

RP 6/8/11 7.

As this question and answer reveals, there was no protocol on the inventorying of containers prior to transporting a defendant and container. Rather, "a few people" followed this practice. Thus, the trial court erred when it entered Findings of Fact 1.3.

**II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE A POLICE OFFICER OBTAINED IN VIOLATION OF THE DEFENDANT'S RIGHTS TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, WHEN HE SEARCHED A LOCKED CONTAINER WITHOUT A WARRANT.**

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, warrantless searches are *per se* unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment.”). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various “jealously and carefully drawn” exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

In the case at bar, the trial court's ruling revealed that it believed that the officer's search of the defendant's locked box did not violate the defendant's right to privacy under either Washington Constitution, Article 1, § 7, or United States Constitution, Fourth Amendment, because it was an “inventory of property” that the officer was “required” to perform pursuant

to department policy as opposed to a “search for evidence.” In addition, the court found that the officer’s “search” of the locked box was justified as an exception to the warrant requirement as a form of “pre-jail booking” search justified by an anticipated booking into jail. As the following sets out, this ruling was in error.

One recognized exception to the warrant requirement holds that the police may inventory the items in a defendant’s possession at the time of his arrest, including items contained in an impounded automobile in order to protect that property from theft and protect the police from false claims of liability. *State v. Montague*, 73 Wn.2d 381, 438 P.2d 571 (1968). The justification for this exception is that an “inventory of property” is part of a community caretaking function for the police, and not a “search for evidence.” In *Montague*, the court stated this proposition as follows:

When ... the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person’s detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

*State v. Montague*, 73 Wn.2d at 385.

However, in *Montague*, the court recognized the potential for abuse

when the police perform an inventory search as a pretext to find evidence of a crime. In these circumstances, the courts should suppress, even though there was an ostensibly valid reason to inventory. In *Montague*, the court stated as follows on this proposition:

(n)either would this court have any hesitancy in suppressing evidence of crime found during the taking of the inventory, if we found that either the arrest or the impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant.

*State v. Montague*, 73 Wn.2d at 385.

One of the determinative factors the courts consider when judging whether or not the police have used an inventory as a pretext to search is the extent the officers have gone to seek lesser intrusive alternatives to the search which would address the needs underlying the inventory while still preserving the defendant's right to privacy. See *i.e.* *State v. Hill*, *supra* (inventory pursuant to impound absent showing that officer pursued lesser intrusive alternative such as leaving the vehicle or allowing another person to take it violated the defendant's right to privacy); *State v. Hardman*, 17 Wn.App. 910, 914, 567 P.2d 238 (1977) (although police need not exhaust all possible alternatives before impounding a vehicle, they must show they "at least thought about alternatives; attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle, and then reasonably concluded from [their] deliberation that impoundment was

in order.”); *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980) (“It is unreasonable to impound a citizen’s vehicle . . . where a reasonable alternative to impoundment exists.”)

One of the reasonable alternatives that the police should explore is to offer to allow the defendant to sign a waiver of liability releasing the police from any claims arising from a failure to inventory. In *State v. Sweet*, 44 Wn.App. 226, 721 P.2d 560 (1986), another vehicle impound case, the court noted this as a reasonable alternative, unless the defendant is not in a position to execute such a waiver. The court stated as follows on this issue:

Impoundment as part of the police “community caretaking function” is proper if the vehicle is threatened by theft of its contents and neither the defendant nor acquaintances are available to move the vehicle. In the instant case, officers were unable to arouse Sweet either to ***have him sign a waiver of liability*** or to give alternative instructions for disposition of the vehicle. Officers were able to look through the windows of the truck canopy and observe numerous items of potential value, including tools, in the truck bed. Consequently, even if officers had locked the canopy, the potential for theft remained.

*State v. Sweet*, 44 Wn.App. at 236 (citations omitted) (emphasis added).

In addition, inventory searches, even when justified, are not unlimited in scope. *State v. Houser, supra*. Rather, the permitted extent of an inventory search must be restricted to the purposes that justify their exception to the Fourth Amendment and Washington Constitution, Article 1, § 7. *State v. Dugas*, 109 Wn.App. 592, 37 P.3d 577 (2001). The decision in *Houser*

illustrates this limitation.

In *Houser*, the police pulled the Defendant over for a minor traffic violation and eventually arrested him for driving while suspended. After the arrest, the officers decided to impound the vehicle and inventory its contents. As part of the inventory search, one of the officers opened the defendant's trunk and found a shopping bag. Inside that shopping bag, the officer found a shaving kit. Inside the shaving kit, the officer found illegal drugs. The defendant was later convicted of possession of those drugs and appealed, arguing that the trial court had erred when it denied the defendant's motion to suppress that evidence because the search of the grocery bag and the shaving kit exceeded the scope of a valid inventory search. The Washington Supreme Court agreed, stating as follows:

We conclude that where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents. Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit.

*State v. Houser*, 95 Wn.2d 143.

In the same manner that the shopping bag in *Houser* presented no indication of dangerousness, so the locked box the officer took out of the defendant's backpack in the case at bar presented no indication of dangerousness. Thus, in the same manner that the shopping bag in *Houser* should have been inventoried as a single unit and not opened, so the locked

box in the case at bar should have been inventoried as a single unit and not opened. As a result, even if the officer in this case was performing a valid inventory search, his action of looking in the locked box violated the defendant's right to privacy, regardless of the existence or lack of existence of a departmental policy requiring the search. Indeed, it is hard to understand how a "protocol" or "policy" of a police department, even if one existed in this case, could be seen to overrule the Washington Supreme Court's decision in *Houser* requiring the police to inventory locked containers as single units unless there is reason to believe that the contents of the container might be dangerous.

Another of the "jealously and carefully drawn" exceptions to the warrant requirement states that jail personnel may make a warrantless inventory search of a person and his or her belongings prior to booking that person into jail. *State v. Smith*, 56 Wn.App. 145, 783 P.2d 145 (1989), *review denied*, 114 Wn.2d 1019, 790 P.2d 640 (1990). This exception arises from the need to assure safety for jail staff and inmates, and to protect the jail from civil claims. *Id.* The justification for this type of search is identical to the justification behind inventory searches performed by police officers. As such, these searches are under the same limitations that the court set in *Houser*. That is to say, to the extent the jail finds a locked container that gives no indication of dangerous contents, the container must be inventoried

as a whole absent the consent of the defendant. Indeed, it would be an anomaly to allow a jail to search a locked container absent any indication of dangerousness as part of its “inventory” procedures while not allowing a police officer to search a locked container absent any indication of dangerousness. Rather, the point of *Houser* is that even inventory searches are intrusions on the constitutional right to privacy, and that intrusion is no longer reasonable when either the police or the jail encounter a locked container without any indication of dangerousness.

In addition, in the case at bar, the claim that the search can be justified as a “jail inventory” is also erroneous because the defendant was not at the jail at the time the officer opened the locked box. Neither did he make any claim that he was authorized by the jail to perform their duties for them prior to the jail taking custody of the defendant’s person. Thus, in the case at bar, the state failed to meet its burden of proving a valid exception to the warrant requirement. Consequently, the trial court erred when it denied the defendant’s motion to suppress evidence. As a result, this court should reverse the defendant’s convictions for possession of methamphetamine and possession of marijuana, and remand with instructions to grant the defendant’s motion to suppress.

## CONCLUSION

The trial court erred when it denied the defendant's motion to suppress evidence a police officer seized without a warrant in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

DATED this 5<sup>th</sup> day of December, 2011.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTH AMENDMENT**

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 and things to be seized.

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

STATE OF WASHINGTON,  
Respondent,

APPEAL NO: 42324-3-II

vs.

AFFIRMATION OF SERVICE

Jonathan R. Young,  
Appellant.

STATE OF WASHINGTON     )  
  ) vs.  
COUNTY OF LEWIS         )

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On December 5<sup>th</sup>, 2011, I personally placed in the e-filed and/or mailed the following documents

- 1. BRIEF OF APPELLANT
- 2.. AFFIRMATION OF SERVICE

to the following:

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JONATHAN R. YOUNG  
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Dated this 5<sup>TH</sup> day of DECEMBER, 2011 at LONGVIEW, Washington.

/s/

\_\_\_\_\_  
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