

No. 43102-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Dennis Miller,

Appellant.

Clark County Superior Court Cause No. 11-1-01413-4

The Honorable Judges Robert Lewis and John Wulle

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence obtained in violation of Mr. Miller's Fourth Amendment rights.
2. The trial court erred by admitting evidence obtained in violation of Mr. Miller's right to privacy under Wash. Const. Article I, Section 7.
3. The prosecution did not establish that Deputy Yakhour had probable cause to arrest Mr. Miller.
4. The trial judge erred by adopting Finding of Fact No. 4 (CP 2).
5. The trial court erred by adopting Conclusion of Law No. 3 (CP 4).
6. The trial court erred by adopting Conclusion of Law No. 4 (CP 4).
7. The trial court erred by adopting Conclusion of Law No. 5 (CP 4).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence seized without a warrant is inadmissible at trial, unless the prosecution establishes an exception to the warrant requirement. In this case, evidence was seized incident to an unlawful arrest. Was the evidence illegally seized in violation of Mr. Miller's rights under the Fourth Amendment and Article I, Section 7?
2. An arrest must be based on probable cause. In this case, the prosecution failed to establish the underlying facts known to the police at the time of Mr. Miller's arrest. Did the trial court err by denying Mr. Miller's motion to suppress?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While working on a car in his driveway, Dennis Miller was accosted from behind by an armed sheriff's deputy with her taser drawn. RP 8-9; CP 2. He was ordered out of the car, and instructed to lie face down on the ground. RP 8; CP 2. When the deputy told him the car was stolen, he tried to explain that he'd purchased it, and had a bill of sale. RP 20, 32; CP 2.

A second officer arrived, and Mr. Miller was handcuffed, searched, and placed in a patrol car. RP 9; CP 3. Mr. Miller was found to be in possession of a cigarette pack and a metal container; both contained methamphetamine.¹ RP 10-12; CP 3, 7. Mr. Miller was charged with possession, and he moved to suppress the evidence. CP 5; Motion for Suppression, Supp. CP.

At a suppression hearing, Deputy Yakhour testified that "someone had mentioned" to her that a car like the one in Mr. Miller's driveway "had been stolen within the last few days." RP 5. She "ran the plate... and got a stolen hit on the car." RP 5. She identified her informant as Deputy Leukay, and said she'd received the information a day or two

¹ The deputies testified that the items fell out of his clothing. CP 3. Mr. Miller testified that the items were removed from his clothing during the search. CP 3. The court found that the deputy "caused the items to come out of the defendant's pockets." CP 3

earlier. RP 5-6. When asked to describe how she determined the car was stolen, she gave the following explanation:

Basically, I ran the plate through the MDC in my patrol vehicle, in my patrol car. It's a -- we call it an MDC. It basically runs all our plates and all the information through that computer. And, we get all of our Department of Licensing returns through that computer...So, when I got the return, on the bottom of the DOL hit, it tells me, "check NCIC", you know, because the vehicle is listed as stolen.

RP 7.

She explained that the phrase 'check NCIC' is "basically the code that says, 'This is stolen.'" RP 8. She did not reveal what MDC and NCIC stand for. RP 7-8. Yakhour testified that she contacted 'dispatch' with the license plate number "and they also said, 'Yes, this is stolen.'" RP 8.

Deputy Leukay told her "that the gentleman who was the victim of that crime suspected that his daughter and the boyfriend had some involvement." RP 13. Yakhour identified the victim's daughter as Kaitlyn Partlow, and the boyfriend as T.J. Castle. RP 13. She also testified that she was familiar with Castle, and that she could see that Mr. Miller was not Castle, even before he got out of the car. RP 13-15; CP 1-2.

At no point did the prosecution introduce evidence describing how DOL, NCIC, or dispatch obtain information regarding stolen vehicles. RP 4-31. Nor did the state introduce evidence indicating how Deputy Leukay

had obtained his information, or whether he had done any investigation before Mr. Miller's arrest. RP 4-31.

Mr. Miller testified that he'd "told the officer right off the bat I had paid for [the car], that I bought it legally." RP 32. The court later entered a finding to that effect. CP 2.

After hearing all the evidence, the judge denied the motion to suppress, and entered written findings and conclusions. CP 1. Mr. Miller was convicted following a stipulated facts bench trial. RP 50-51; 62; CP 6. This timely appeal followed. CP 9.

ARGUMENT

THE ADMISSION OF EVIDENCE SEIZED WITHOUT A WARRANT VIOLATED MR. MILLER'S RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.

A. Standard of Review

The validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.*

B. The state and federal constitutions generally prohibit searches and seizures conducted without authority of a warrant.

The Fourth Amendment to the federal 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.

U.S. Const. Amend. IV.² Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.³

Under both provisions, searches and seizures conducted without authority of a search warrant “are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a

² The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

³ It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

One exception to the search warrant requirement is where the search is performed incident to arrest. The rationale behind the exception is that an arrest triggers a concern not only for the officer's safety, but also for the preservation of potentially destructible evidence within the arrestee's control. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The search incident to arrest exception to the warrant requirement is narrower under Article I, Section 7 than under the Fourth Amendment. *State v. Moore*, 161 Wash.2d 880, 885, 169 P.3d 469 (2007).

A lawful custodial arrest is a constitutional prerequisite to any search incident to arrest. *Id.*

C. The warrantless arrest was unlawful because the officers lacked probable cause to arrest Mr. Miller.

A warrantless arrest is lawful only if supported by probable cause. *Moore*, at 885. Probable cause exists when the arresting officer has

knowledge of facts sufficient to cause a reasonable person to believe that an offense has been committed. *Id.*

An arrest based on information that the arrestee's vehicle has been reported stolen cannot be upheld unless the prosecution establishes that the police had probable cause at the time of the arrest:

Officers who act on the basis of the dispatch are not required to have personal knowledge of the factual foundation, and are not expected to cross-examine the dispatcher about the foundation for the transmitted information before acting on it. Rather, the collective knowledge of law enforcement agencies giving rise to the police dispatch will be imputed to the officers who act on it. If the resulting seizure is later challenged in court, the State cannot simply rely on the fact that there was such a dispatch, but must prove that the dispatch was based on a sufficient factual foundation to justify the stop at issue.

State v. O'Cain, 108 Wash. App. 542, 544-45, 31 P.3d 733 (2001); *see also State v. Sandholm*, 96 Wash. App. 846, 848, 980 P.2d 1292 (1999) (“[T]he burden is on the State to establish the reliability of the radio report... [H]ere, the record provides no evidence concerning the source of the stolen vehicle report or evidence regarding the procedures followed by WACIC in accepting and broadcasting the information.”)

Here, the prosecution failed to establish probable cause. Deputy Yakhour did not testify to personal knowledge regarding the ownership of the car or its status as a stolen vehicle. RP 4-31. She received information from Deputy Leukay, but did not relay facts establishing how Leukay had

obtained his information. RP 4-31. Nor did the state introduce evidence setting forth the facts known to Deputy Leukay at the time of the arrest, and what, specifically, had led him to conclude the car was stolen. RP 4-31. It is possible that Deputy Leukay had information that would have supplied probable cause; however, that information was not shared at the suppression hearing. RP 4-31. In the absence of evidence of the facts underlying Deputy Leukay's assertions, the prosecution failed to establish probable cause. *See O'Cain, at 544-545.*

Similarly, Deputy Yakhour's computer and radio checks cannot supply probable cause. *Id.* Yakhour checked with "MDC" and with "dispatch" to confirm the car was stolen;⁴ however, no evidence was introduced detailing how MDC and dispatch obtain information regarding stolen vehicles, or what steps they take to confirm the accuracy of their records. RP 4-31.

The evidence introduced at the suppression hearing was insufficient to establish probable cause. *O'Cain, at 544-545.* Accordingly, the arrest was unlawful, and the search violated Mr. Miller's rights under the Fourth Amendment and under Wash. Const. Article I,

⁴ Contrary to the trial court's finding, she did not check the NCIC database. *See* CP 2. Instead, her MDC check returned the code "check NCIC." RP 7-8. There is no indication in the record that she followed through and checked NCIC. RP 4-31.

Section 7. *Id.* The evidence and any statements Mr. Miller made must be suppressed and the case dismissed with prejudice. *Id.*

CONCLUSION

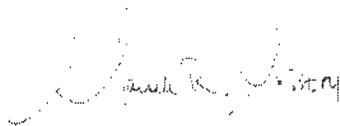
For the foregoing reasons, Mr. Miller's conviction must be reversed and the case dismissed with prejudice.

Respectfully submitted on May 29, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 29, 2012.



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BACKLUND & MISTRY
May 29, 2012 - 8:07 AM

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