

NO. 46169-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

JASON R. DUNHAM,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR LEWIS COUNTY
The Honorable Nelson E. Hunt, Judge
Cause No. 14-1-00076-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. In denying Dunham's motion to suppress, the trial court erred in entering Finding of Fact 27 as fully set forth herein at page 4.
02. In denying Dunham's motion to suppress, the trial court erred in entering the Conclusion of Law that the inventory of Dunham's backpack was lawful as fully set forth herein at page 5.
03. The trial court erred in failing to suppress all evidence seized or obtained through the warrantless search of the locked portion of Dunham's backpack.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the warrantless search of the locked portion of Dunham's backpack was unlawful and the evidence obtained as a result should be suppressed? [Assignments of Error Nos. 1-3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jason R. Dunham was charged by amended information filed in Lewis County Superior Court March 7, 2014, with unlawful possession of methamphetamine, count I, and theft in the third degree, count II, contrary to RCWs 69.50.4013(1), 9A.56.050(1) and 9A.56.020, respectively. [CP 21].

The court denied Dunham's pretrial motion to suppress evidence under CrR 3.6 and entered the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

- (1.) Sgt. Carrell was employed by the Chehalis Police Department on January 29, 2014.
- (2.) On that day, Sgt. Carrell responded to the K-Mart on a report of a shoplifting that had occurred shortly before her arrival.
- (3.) Sgt. Carrell responded to the K-Mart within minutes of being dispatched, due to her location in the area of the call.
- (4.) Upon arriving at the K-Mart, Sgt. Carrell met with loss prevention officers, who advised her of the facts of the shoplifting, and the events of their detention of the suspect in the parking lot.
- (5.) Sgt. Carrell contacted loss prevention and the suspect in the back office of the K-Mart.
- (6.) Loss Prevention indicated to Sgt. Carrell they had observed the suspect steal multiple boxes of candy and a stylus pen. Loss prevention stated they had only been able to recover the candy from the suspect.
- (7.) The suspect was identified as Jason Ray Dunham.
- (8.) Sgt. Carrell was advised by loss prevention that Dunham had multiple knives in his backpack.
- (9.) Loss prevention indicated that because of the knives they found, they removed the backpack from Dunham's reach. The backpack was on the other side of the room and

not within Dunham's reach when Sgt. Carrell arrived in the office.

(10.) Dunham was placed in handcuffs for officer safety and searched for any weapons.

(11.) Sgt. Carrell located two more knives on Dunham's person, and a stylus in the lining of his jacket, which was the stylus that he had stolen from K-Mart.

(12.) After finding the stylus, all known items associated with the theft had been recovered.

(13.) Dunham was advised of his Miranda warnings, and acknowledged them, stating he wanted to remain silent.

(14.) Sgt. Carrell arrested Dunham for theft.

(15.) Sgt. Carrell determined that she was going to book Dunham into jail given his deceptive answers to loss prevention about his name, and also the fact that he had run from the store.

(16.) Sgt. Carrell will sometimes cite and release Theft offenders and has done so in the past, but believed that Dunham needed to be booked because of his behavior.

(17.) Sgt. Carrell searched the backpack that loss prevention had removed from Dunham for the items to be logged into temporary storage.

(18.) The backpack was made of a cloth-like material.

(19.) It is the Chehalis Police Department policy to inventory items that are going to be held in their storage facility for any dangerous items. This policy had been in place for several years, and Sgt. Carrell was aware of the policy prior to and at the time of her inventory of Dunham's backpack. As part of this policy, knives were to be kept in secure containers, preventing them from puncturing anything.

(20.) The policy came about when a person in the evidence storage facility was cut by a sharp object piercing the item it was contained in, which cut the evidence custodian. Because of this cut, the custodian had to undergo many medical treatments to ensure they did not become infected with anything harmful.

(21.) Sgt. Carrell has a personal practice to also inspect all items that are placed in her car for her own safety. Sgt. Carrell does not want any unknown items placed in her car that could pose a potential danger (sic) her or others.

(22.) Sgt. Carrell located the two knives in the unlocked portion of the backpack that loss prevention had mentioned, only one of which was sheathed.

(23.) The front pocket to the backpack had a luggage lock on zippers to the front pocket, which prevented the zippers from fully opening.

(24.) Sgt. Carrell felt a hard object that resembled one of the knives she had already found inside the backpack, so she examined further by lightly touching the outside of the pocket the object was located in.

(25.) Sgt. Carrell noted that the object tapered at one end, and believed that the object was a knife.

(26.) Sgt. Carrell felt another hard object inside the locked pocket of the backpack

(27.) Sgt. Carrell was afraid of being stabbed by the object inside the backpack, given the number of knives she had already found with Dunham.

(28.) Sgt. Carrell used Dunham's keys, which had been removed from inside the backpack, to unlock the zippers. Dunham did not consent to having the lock opened.

(29.) Sgt. Carrell opened the pocket, she observed items such as a flashlight, butane torch, and a glass pipe,

suspected to be used for smoking methamphetamine base on the residue that was in the pipe.

(30.) Sgt. Carrell testified that what she thought may have been a knife was actually a butane torch, which was wide at one end, and tapered to a point at the other end.

(31.) Sgt. Carrell tested the residue in the pipe, which returned positive results for methamphetamine.

CONCLUSIONS OF LAW

The inventory of Dunham's backpack was lawful because Dunham had been placed under arrest for theft, and the backpack had to go somewhere. The backpack and items therefrom could not remain at K-Mart, and the backpack and items could not be returned to Dunham due to the safety risk posed by doing so. An inventory of items associated with an arrestee is a common practice and is to be expected. Inventorying items in this case was valid because it was done pursuant to policies and procedures that were put in place by the Chehalis Police Department, and was conducted after an arrest for Theft.

[CP 33-37].

Following the denial of his motion to suppress, Dunham waived his right to a jury trial and proceeded by way of stipulated trial.¹ [CP 32, 38-45]. The court found him guilty on both counts, sentenced him within his standard range, and timely notice of this appeal followed. [CP 45-56].

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¹ Given this and the fact that the sole issue on appeal presents a question of law relating to the CrR 3.6 hearing, there is no need to set forth in detail the facts of the underlying crimes, which are fully presented in the court's findings and conclusions at CP 39-45.

02. Substantive Facts: CrR 3.6 Hearing

In the early afternoon of January 29, 2014, Sergeant Gwen Carrell of the Chehalis Police Department responded to the report of a shoplifting at a local K-Mart. [RP 04/02/14 4; CP 14]. Upon arrival, she was informed that Dunham had been detained by store personnel after he had been observed exiting the store with some candy and a stylus he had not paid for, and that he had several knives in his backpack. [RP 04/02/14 5].

Sgt. Carrell placed Dunham in handcuffs and searched him, uncovering the stolen stylus and several knives. [RP 04/02/14 5, 15]. After Dunham was arrested for shoplifting and invoked his right to remain silent, Sgt. Carrell searched the open portion of his backpack and found numerous miscellaneous items and several more knives. [RP 04/02/14 6-7]. The front pocket of the backpack was locked. [RP 04/02/14 8, 14]. Sgt. Carrell “pat[ted] the area that was locked, and ... could feel long cylindrical type objects with a different shape towards the end of it in that backpack.” [RP 04/02/14 8-9]. She believed it might be another knife. [RP 04/02/14 9]. Using a key she had taken from Dunham’s property during his arrest [RP 04/02/14 9], Sgt. Carrell opened the locked compartment to find a butane torch, a flashlight and a glass pipe with residue that

subsequently tested positive for methamphetamine. [RP 04/02/14 9; CP 45].

In justifying the search of the locked portion of the backpack, Sgt. Carrell explained that she was acting in compliance with a recently implemented agency policy that all knives be put “into secure knife containers.” [RP 04/02/14 7].

If I take any property, I have to go through it, make sure everything is safe for the evidence person that’s going to receive it on the other side.

....

Every single case. It’s our policy. We have to.

[RP 04/02/14 8].

D. ARGUMENT

THE WARRANTLESS SEARCH OF
THE LOCKED PORTION OF
DUNHAM’S BACKPACK WAS
UNLAWFUL AND THE EVIDENCE
OBTAINED AS A RESULT SHOULD
BE SUPPRESSED.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and art. I, § 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996).

Such exceptions are narrowly drawn and jealously guarded. Parker, 139 Wn.2d at 496; Hendrickson, 129 Wn.2d at 71. The State has the burden to show by clear and convincing evidence that an exception applies. State v. Garvin, 166 Wn.2d 242, 259, 207 P.3d 1266 (2009).

The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigative stops.

Hendrickson, 129 Wn.2d at 71.

The State argued below “[t]hat the protection of police from potential danger is the principal reason justifying the search of the backpack in this case.” [CP 27]. While an appropriate reason for conducting an inventory is the protection of the police from such danger, State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998) (citing State v. Houser, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980)), authority for warrantless searches incident to arrest and inventory searches does not extend to locked containers. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2000); State v. White, 135 Wn.2d at 771. This is so because a locked container expresses a higher expectation of privacy and would be more difficult to access to destroy evidence or reach a weapon. State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), overruled on other grounds, State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009). The only

exception is where a manifest necessity exists. Id. at 772; see, e.g., State v. Ferguson, 131 Wn. App. 694, 703-04, 128 P.3d 1271 (2006) (odor of chemical fumes indicated likelihood that highly combustible materials were being transported in the vehicle's trunk and presented manifest necessity for search). Absent such exigent circumstances, a legitimate inventory search only calls for noting the locked container as a sealed unit. State v. Houser, 95 Wn.2d at 159.

Here, Sgt. Carrell unlocked a portion of Dunham's backpack without his consent and conducted an inventory search because it was her agency's policy to do so in "[e]very single case." [RP 04/02/14 8]. No manifest necessity existed, for there is no logical equivalence between Sgt. Carrell's concern that a knife may have been in the locked pocket she had patted down and the exigent circumstances found compelling in Ferguson, where the justification for the warrantless search was the fear of the transportation of highly combustible materials. There was no ticking bomb and no scent of dangerous chemicals or some other type of self-activated means of destruction.

Without citing to authority, the State advanced a perplexing argument below in an attempt to distinguish between searches within and without a vehicle: "inventory searches of items within automobiles are distinguishable because their reliance on the item searched being within

the impounded vehicle(,)” adding that “ [o]bjects that are inventoried that are not inside an automobile receive different scrutiny.” [CP 27]. Of note, the United States Supreme Court, in Arkansas v. Sanders, 442 U.S. 753, 763-64, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), has disfavored a similar distinction, holding “there is no greater need for warrantless searches of luggage taken from automobiles than luggage taken from other places.” The scrutiny does not shift, no matter the location, and opening a locked container outside an automobile is indistinguishable from opening the same container within a vehicle, and a locked pocket on a backpack secured outside a vehicle is not so different from a locked glove compartment within a vehicle: lacking a manifest necessity, each requires a warrant to inventory its contents.

The contents of the pocket on Dunham’s backpack were securely locked and did not, as previously noted, give any indication of anything amounting to a manifest necessity. Under Houser, a legitimate inventory search could have been fully accomplished by noting the backpack as a sealed unit. There was nothing preventing Sgt. Carrell from applying for a telephonic warrant, nor was there a reasonable danger in transporting the backpack to police headquarters, where its contents could have been searched and inventoried following issuance of a warrant.

The trial court concluded that that the inventory of the items in the locked portion of Dunham’s backpack “was valid because it was done pursuant to policies and procedures that were put in place by the Chehalis Police Department, and was conducted after an arrest for Theft.” [CP 33-37]. Police policy, however, does not trump constitutional protections: “Unconstitutional searches cannot be constitutionalized by standardizing them as a part of a normal practice.” White, 135 Wn. 2d at 771 n. 10 (quoting State v. Jewell, 338 So.2d 633, 640 (La. 1976)). In other words, an unconstitutional search cannot be legitimized by conducting it pursuant to standard police procedure, as happened in this case.

On this record, the State did not meet its burden of showing a valid inventory search as an exception to the warrant requirement, and there is almost no limitation on the logic of the trial court’s ruling. Any police agency statewide could adopt a similar policy requiring that all locked items that are seized—cars, glove compartments, suitcases, briefcases, backpacks—must be inventoried, as here, in “[e]very single case,” thus eliminating the need for a warrant in all cases involving a locked container. If the trial court’s ruling is affirmed, those cases will come.

When “an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833

(1999). The warrantless search of the locked portion of Dunham's backpack was unlawful under either art. I, § 7 of the Washington Constitution or the Fourth Amendment to the United States Constitution and all evidence seized as a result must be suppressed. Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992).

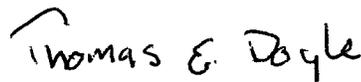
Dunham's conviction for unlawful possession of methamphetamine should be reversed and dismissed with prejudice.

E. CONCLUSION

Based on the above, Dunham respectfully requests this court to reverse and dismiss his conviction for unlawful possession of methamphetamine.

DATED this 27th day of September 2014.

Respectfully submitted,



THOMAS E. DOYLE
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CERTIFICATE

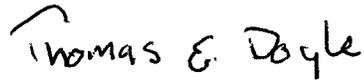
I certify that I served a copy of the above brief on this date as follows:

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Jason R. Dunham
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DATED this 29th day of September 2014.

Handwritten signature of Thomas E. Doyle in black ink.

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DOYLE LAW OFFICE

September 29, 2014 - 4:30 PM

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