

**No. 481189**

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

DARIAN LIVINGSTON, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY  
THE HONORABLE HELEN WHITENER

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REPLY BRIEF OF APPELLANT

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## I. Statement of Facts in Reply<sup>1</sup>

Mr. Livingston incorporates the statement of facts from appellant's opening brief and adds the following.

While washing a vehicle at a car wash facility, officers arrested Mr. Livingston on an outstanding warrant for failure to report while on community custody. (RP 53;58; 228-229). At the time he was arrested there was no articulable suspicion of any other parole violation or crime. (RP 108-109).

Officer Grabiski testified that within ten minutes of making contact with Mr. Livingston, he and Officer Boyd made a "systematic" search of the car looking for "further violations of probation." (RP 60-61;72). They searched the interior of the vehicle, the car trunk, and a packback found inside of the trunk. (RP 60-62;124). Inside the vehicle they found drugs and inside of the backpack a firearm and ammunition. (RP 96).

Officers testified they intended to wait for Mr. Livingston's girlfriend to retrieve the vehicle so they did not have to impound it. (RP 93). Officer Young testified that while they were searching the

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<sup>1</sup> Mr. Livingston incorporates the assignments of error and issues related to assignments of error provided in the appellant's opening brief.

vehicle Mr. Livingston's sister arrived with keys to take the car. (RP 95; 107-108; 119). She was directed to wait across the street while they finished their search. (RP 107-108). Officers did not ask Mr. Livingston for consent to search the car, trunk or backpack. (RP 73;106).

## II. Argument

A. Under The Protections Of The Fourth Amendment And Washington Constitution Article I, § 7, The Search Authorized By RCW 9.94A.631(1) Must Relate To The Violation Which Community Corrections Officers Believe Has Occurred.

Mr. Livingston incorporates by reference the arguments in his opening brief and adds the following in reply.

1. *Parris* is distinguishable from *Jardinez*, and the ruling is inapplicable to the facts in Mr. Livingston's case.

In its response brief, the State encourages this Court to follow the holding in *Parris*, rather than the holding in *Jardinez*. *State v. Parris*, 163 Wn.App. 110, 259 P.3d 331 (2011); *State v. Jardinez*, 184 Wn.App. 518, 338 P.3d 292 (2014). (Br. of Resp. at 13). To do so would be error for two reasons. First, the legal reasoning in *Parris* is identical to the reasoning in *Jardinez* : the

*Parris* Court did not open the door to wholesale unfettered searches of probationers. Rather, the Court articulated the required nexus between the searched property and the alleged crime necessary to justify a warrantless search of a probationer. Second, the facts, which supported the warrantless search in *Parris* are absent in both *Jardinez* and this case.

In *Parris*, the defendant was a convicted sex offender. He was prohibited from having contact with minors, possessing sexually explicit materials, possessing or using drugs or alcohol, required to comply with a 10pm to 5 am curfew, be involved in drug and alcohol treatment, and maintain employment. *Parris*, 163 Wn.App. at 113-114. His CCO was aware he violated several of his probationary requirements: failing a drug test, failing to participate in treatment, and failing to provide proof of employment. Approximately a month after the initial violations, *Parris* was arrested for driving with a suspended license, after curfew, with an underage female in the car. His mother reported concerns about his drug use and out of control behavior, and his threat to get a gun to avoid arrest. The CCO believed *Parris* to be at risk to harm himself or others. After consultation with her supervisor, she

decided to arrest him and search the residence he shared with his mother. *Parris*, 163 Wn.App. at 114.

Officers found him and an underage female hiding in his bedroom. They found a large quantity of women's clothing belonging to the minor female, as well as syringes, an empty Vodka bottle, pornographic magazines, DVDs, and videos. *Id.* They also found USB drives and memory cards, one of which had the minor female's name written on it. When the officer later viewed the memory cards, it included incriminating evidence of the defendant with guns, and a video of his sexual activity with the minor. *Id.* at 115-116. *Parris* was convicted and on appeal, addressed only the search of the memory cards containing the incriminating pictures. *Id.* at 119.

On review, the Court acknowledged both the constitutional right to be free from warrantless searches, and the diminished expectation of privacy of probationers, stating: "Nevertheless, this diminished expectation of privacy is constitutionally permissible *only to the extent* 'necessitated by the legitimate demands of the operation of the parole process.'" *Id.* at 117. (emphasis added).

The authorization of a warrant exception for a probation search requires the officer to have a well-founded suspicion; an

articulable suspicion of a substantial possibility that criminal conduct has occurred or is about to occur. *Id.* at 119. The fact of multiple known violations in *Parris* provided a well-founded and reasonable suspicion of criminal activity, that was reasonably related to the place to be searched.

By contrast, the facts in this case do not provide a well-founded and reasonable suspicion of criminal activity that would justify an exception to the warrant requirement. Mr. Livingston's violation was a failure to report. His vehicle was searched based on a belief by officers that there might be evidence of *some other type* of criminal activity. Such a belief is too attenuated to justify a warrantless search. There was no reasonable, articulable well-founded suspicion that evidence of the violation of failure to report was likely to be found in Mr. Livingston's vehicle. The warrantless search of probationers is not unlimited in scope, but rather, must be limited to a search for evidence of the violation which the officer believes the person has committed or is about to commit. *Jardinez*, 184 Wn.App. at 523-530.

In this context, a warrantless search not based on a well-founded, reasonable, articulable suspicion that results in the seizure of potentially incriminating evidence is an illegal search and

seizure. Evidence seized during an illegal search is suppressed under the exclusionary rule. *Jardinez*, 184 Wn.App. at 523. The trial court erred when it did not suppress the evidence. Mr. Livingston respectfully asks this Court to reverse the trial court's denial of the motion to suppress and dismiss the charges against him with prejudice.

2. This Court should not affirm the trial court's ruling on the basis of an inventory search.

For the first time, in its response brief, the State raised an alternate, albeit insufficient basis to affirm the trial court's ruling. (Br. of Resp. at 14-15)<sup>2</sup>. This Court should not affirm on the basis of an inventory search because the state never raised that as the basis for the search, and neither the facts in this case or the case law support or justify the search on that basis.

Warrantless searches of cars are per se unreasonable, with a few narrowly drawn exceptions. *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013). One exception is a valid inventory search of a lawfully impounded car. *Id.* The State bears the

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<sup>2</sup> The State misrepresents the record at Br. of Resp. page 15. The officer testified they talked about impounding the car but wanted to wait for someone to arrive so they would not have to impound it. (RP 92-93).

burden of establishing the exception applies under the given facts.

*Id.*

Here, the search cannot be justified as an inventory search for three reasons. First, the officers did not impound the vehicle and did not intend to impound it and there was no basis for impounding it. An inventory search cannot occur where there is no lawful basis for impounding a vehicle<sup>3</sup>. *Tyler*, 177 Wn.2d at 707-08. "It is unreasonable to impound a car following the driver's arrest when there is no probable cause to seize the car and a reasonable alternative to impoundment exists. *State v. Houser*, 95 Wn.2d 143,153, 622 P.2d 1218 (1980).

Here, there was no probable cause to seize the car. The officers testified they considered they might have to impound the vehicle because Mr. Livingston was being arrested. However, they waited for his girlfriend to arrive to retrieve it, and Mr. Livingston's sister arrived very shortly with the key to take the car. (RP 107-

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<sup>3</sup> A vehicle may be lawfully impounded if officers have probable cause to believe it has been stolen or used in the commission of a felony offense; under the community caretaking function if the car must be moved because it has been abandoned, impedes traffic, or there is a threat to the vehicle itself and its contents of vandalism or theft *and* the defendant, defendant's spouse, or friends are not able to move the vehicle; or impoundment is statutorily authorized for a traffic offense. *State v. Williams*, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984)(internal citation omitted).

108;1119). Officers directed her to wait across the street while they finished their search. (RP 108). There was an available reasonable alternative to impounding the vehicle, officers knew of the alternative and utilized it. They did not intend to impound it.

Second, the officers specifically testified they searched the vehicle specifically because they were looking for evidence of criminal activity. This purpose stands in stark contrast to an inventory search. The principal purposes of an inventory search are to protect the car owner's property, protect police against false claims of theft, and to protect police from potential danger. *Houser*, 95 Wn.2d at 154. An inventory search is a limited search for a limited purpose that must be conducted in good faith. *Id.*

The good faith limitation precludes conducting an inventory search as a pretext for an investigatory search. *Tyler*, 177 Wn.2d. at 707. The officer's purpose must be "unrelated to discovering contraband or evidence of criminal activity. Rather, the officer is concerned with securing the vehicle and property within the vehicle." *Id.*

Here, three officers systematically searched the vehicle to look for incriminating evidence. (RP 120). The search they conducted cannot be categorized as an inventory search, either at

the time of its inception or after the fact, as the State suggests. Their intent was to find incriminating evidence, and the search far exceeded the bounds of a justified inventory search.

Third, a search of locked trunks and locked containers is prohibited under the vehicle inventory exception. *Tyler*, 177 Wn.2d at 708. Under Article I, § 7 of the Washington constitution, absent manifest necessity, an officer must obtain consent to open a locked trunk or container. *Houser*, 95 Wn.2d at 156. Here, officers stated they searched the interior of the car, they searched the trunk, and they opened and searched the backpack. They specifically testified they did not ask Mr. Livingston's consent to search the trunk and backpack. (RP 73;106).

For these reasons, this Court should not affirm the unauthorized, illegal search on the basis of an inventory search.

### III. Conclusion

Based on the facts and authorities presented in Mr. Livingston's opening brief and the reply brief, he respectfully asks this Court to reverse the trial court's holding denying the suppression of evidence and remand with instructions to suppress

all items recovered from the unauthorized search and dismiss the charges with prejudice.

Respectfully submitted this 5<sup>th</sup> day of July 2016.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on July 5, 2016, I mailed by USPS, first class, postage prepaid, or served by electronic service by prior agreement between the parties, a true and correct copy of the Reply Brief of Appellant to the following:

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**July 05, 2016 - 8:19 AM**

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