

NO. 49490-6

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

TINA BERVEN and WILLIAM WITKOWSKI, RESPONDENTS

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 15-1-04393-7 and 15-1-04375-9

AMENDED SUPPLEMENTAL BRIEF OF APPELLANT
(amended as to title page only)

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court decline to engage in a *Gunwall*¹ analysis when it is unnecessary and well settled, and when the search in this case was done with lawful authority?
2. Even though the Washington Constitution provides greater protection, is there any support for the assertion that the lawfully issued search warrant need to explicitly authorize locked or closed containers in a home that is being searched?

B. STATEMENT OF THE CASE.

The statement of the case has been set forth in the previous briefing. This court has directed a supplemental brief on (1) whether a *Gunwall* analysis is required and (2) if article 1, section 7 of the Washington Constitution provides greater protection than the Fourth Amendment for locked containers being searched in a home following a lawfully issued search warrant.

¹ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

C. ARGUMENT.

1. THIS COURT SHOULD DECLINE TO ENGAGE IN A **GUNWALL** ANALYSIS AND CONCLUDE THAT THE SEARCH WARRANT ISSUED IN THIS CASE WAS CONSTITUTIONALLY SUFFICIENT IN PARTICULARITY AND SCOPE TO AUTHORIZE THE SEARCH OF LOCKED CONTAINERS INSIDE A RESIDENCE FOR WHICH A LAWFUL SEARCH WARRANT WAS ISSUED.

Article I, section 7 of the Washington Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Under article 1, section 7, the language “authority of law” has been interpreted to mean that a search warrant is generally required. *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005), citing *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Article 1, section 7 is explicitly broader than the Fourth Amendment of the United States Constitution in that the Washington Constitution recognizes an individual’s right to privacy with no express limitations. *Ladson*, 138 Wn.2d 343, 348-349. The State agrees that article I, section 7 generally provides greater protection than the Fourth Amendment. *State v. Eisfeldt*, 163 Wn.2d 628, 636, 185 P.3d 580 (2008). While the Fourth Amendment protects against unreasonable searches, Washington requires actual authority of law. *State v. Monaghan*, 165 Wn. App. 782, 788, 266 P.3d 222 (2012); *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007).

“According to the plain text of article I, section 7, a search or seizure is improper only if it is executed without ‘authority of law.’ But a lawfully issued search warrant provides such authority.” *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005), *citing State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

Const. art. 1, §7 analysis encompasses those legitimate privacy expectations protected by the Fourth Amendment, but is not confined to the subjecting privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives. Rather, it focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.

State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990), *citing State v. Myrick*, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984) (internal citations omitted).

The State agrees with defendant Berven that an independent *Gunwall* analysis is not necessary as it relates to article I, section 7, as it has already been determined that article I, section 7 should be given independent effect. BOR, page 16, fn. 7. Rather, this court should examine what constitutional protection is provided in the particular context of executing a lawful search warrant of a residence. *See State v. Athan*, 160 Wn.2d 354, 365, 158 Wn.2d 27 (2007).

However, if this court elects to engage in a *Gunwall* analysis, the State asserts none of the *Gunwall* factors suggest the need to extend even greater privacy to locked containers inside a residence than that granted by a lawfully issued search warrant for the residence itself. There is no evidence presented by the defendant Berven to support an assertion of greater protection in light of the six *Gunwall* factors: (1) textual language of the State constitution, (2) significant differences in the texts of parallel provisions of the federal and state constitutions, (3) the state constitutional and common law history, (4) preexisting state law, (5) differences in structure between the federal and state constitutions, and (6) matters of particular state interest or local concern. The analysis of this court should not be whether there is a privacy interest in locked containers within a residence that is recognized by the Washington Constitution that is not recognized by federal law, but rather whether the search warrant was drafted in a way that contemplated or logically implied the search of a locked safe within the residence. The issue is one of scope and particularity, not one of greater constitutional protection.

In this case, the police acted with actual authority of law. They had a valid search warrant. The warrant here was adequate in terms of particularity and scope. Both the Fourth Amendment and Article I, Section 7 require that warrants describe with particularity the items or

evidence to be seized. *State v. Martines*, 184 Wn.2d 83, 92-93, 355 P.3d 1111 (2015), quoting *State v. Riley*, 121 Wn.2d 22, 28, 846 P.3d 1365 (1993); *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The particularity requirement “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” *Perrone*, 119 Wn.2d at 546. The purpose of such requirement includes preventing exploratory searches, protecting against items seized under the mistaken belief that they fall within the scope of the warrant, and ensuring that probable cause exists. *Id.* at 545. There is no case cited by defendant Berven to support the position that Article I, Section 7 requires a heightened particularity in the seizure of physical evidence. Rather, as cited above, Article I, Section 7 and the Fourth Amendment have been treated identically regarding the particularity requirement.

In *State v. Martines, supra*, the State sought and obtained a warrant for the collection of a blood sample because there was probable cause to believe that *Martines* was driving under the influence of intoxicants. *Martines*, 184 Wn.2d 83 at 93. The warrant did not include any express reference to the testing of the blood sample, but only authorized a blood sample collection. *Id.* at 88. In examining both the Fourth Amendment and Article I, Section 7, the court held:

The purpose of the warrant was to draw a sample of blood from Martines to obtain evidence of DUI. It is not sensible to read the warrant in a way that stops short of obtaining that evidence. A warrant authorizing a blood draw necessarily authorizes blood testing, consistent with and confined to the finding of probable cause.

Id. at 93.

The reasoning of *Martines* applies to the case at bar. In the current case, the police sought evidence of guns and narcotics. Just as it was not sensible to read the warrant in *Martines* as stopping short of obtaining the desired evidence, it is similarly not sensible to read the warrant in this case as limiting the search for guns and narcotics to items seen in plain sight. To hold otherwise would require this court to overrule all existing caselaw holding that all doubts be resolved in favor of the warrant's validity. Following the court's ruling in *Martines*, it is not reasonable to hold that a search warrant for guns does not authorize a search of a gun safe, locked or otherwise. Guns are often in locked safes, locked drawers, or locked cabinets. A sensible reading of this warrant encompasses locked containers and to hold otherwise would render the warrant virtually meaningless.

Washington courts have endorsed the concept that search warrants are to be tested and interpreted in a common sense, practical manner.

State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992), *citing United*

States v. Turner, 770 F.2d 1508, 1510 (9th Cir. 1985), *cert. denied*, 475 U.S. 1026, 106 S. Ct. 1224, 89 L. Ed. 2d 334 (1986). In this case, the defendants are asking this court to impose a hypertechnical reading of the warrant.

The rule set forth in *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994), does not run afoul of Article I, Section 7. Rather, the premise that personal effects of the owner of a residence for which there is a lawful search warrant may be searched provided that the personal effects are “plausible repositories” for the items being sought by the warrant. *Id.* at 643, *citing State v. Worth*, 37 Wn. App. 889, 892, 683 P.2d 622 (1984). In this case, the officers were searching a residence for guns and narcotics. They searched a gun safe for those items, as a gun safe is a plausible repository for guns. The defendants assert that their argument would not require law enforcement to speculate as to what locked containers are in a residence, but rather the standard boilerplate language should include authority to search locked containers. BOR, page 17. Such specificity is not only not constitutionally required, would be the exact hypertechnical interpretation that was disapproved in *Perrone, supra*.

While the Washington Supreme Court has held that article I, section 7 affords greater protection than the Fourth Amendment in the context of residences, it has always been addressing warrantless searches

of residences, not searches pursuant to a lawfully issued search warrant. Defendant Berven attempts to analogize this case to *State v. Monaghan*, 165 Wn. App. 782, 266 P.3d 222 (2012). BOR, page 17. *Monaghan*, however, is not applicable to the facts of the case in two key ways. First, *Monaghan* involved a locked safe recovered from a *vehicle*. *Id.* at 784. Second, *Monaghan* involved a warrantless search. *Id.* at 784.

Washington law has long held that the context of vehicle searches are treated differently. Article I, section 7 has been held to prohibit warrantless searches of *locked trucks of vehicles*. *State v. White*, 135 Wn.2d 761, 764, 958 P.2d 982 (1998). Locked containers or glove compartments are outside the scope of a search incident to arrest in Washington. *State v. Johnson*, 104 Wn. App. 409, 416-17, 16 P.3d 680 (2001), *citing State v. Stroud*, 106 Wn.2d 155, 152, 53, 720 P.2d 436 (1986), *overruled on other grounds by State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009). Under Article I, section 7, a person in possession of a vehicle has a legitimate expectation of privacy in a vehicle. *Stroud*, 106 Wn.2d 155 at 152. The court held that the privacy interest extends to vehicle identification numbers not visible from the outside of the vehicle, and therefore by extension, that privacy interest also extends to items within the vehicle not visible from the outside, such as things in suitcases or glove compartments. *Id.* The court has also held that the act of locking

a car “manifests a subjective expectation of privacy which is objectively justifiable.” *Id.*, citing *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). Second, the danger of an arrestee being able to access a locked container during an arrest and destroying or concealing the evidence is minimal. *Id.* Because of this increased expectation of privacy in locked containers inside vehicles, courts have required a warrant for such searches to occur. *Id.* Analysis comparing both warrantless and warrant-authorized searches of vehicles is inapplicable to the present case.

While warrantless searches of vehicles is permissible in certain situations (i.e. incident to arrest, inventory searches), police may search a residence without a warrant only in very narrow and carefully drawn circumstances, such as exigent circumstances, emergencies, or community caretaking. *State v. Smith*, 165 Wn.2d 511, 519, 199 P.3d 386 (2009). In this case, none of those exceptions apply because a warrant was obtained. In *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992), the court held that a search warrant authorizing police to search the defendant’s apartment for narcotics, paraphernalia, currency and firearms extended to a locked footlocker in a storage closet outside of the apartment. *Id.* at 450. The warrant, which did not specify a search of locked containers, was upheld by the court, which found that it was reasonable for the police to

assume that the footlocker belonged to the defendant. *Id.* at 453.² Similarly, in *State v. Walker*, 178 Wn. App. 478, 315 P.3d 562 (2013)³, this court held that because the search warrant in that case involved items that could have fit inside a safe, police lawfully searched the safe in the execution of the search warrant. *Id.* at *73.

Defendant Berven also relies upon *State v. Schenck*, 197 Wn. App. 1075 (2017)⁴. In *Schenck*, the language of the warrant included authorization to search locked containers within the residence. *Id.* at *4. The fact that additional language regarding locked containers was contained in the search warrant, however, was not the dispositive factor in the court's analysis. The court held that "opening a locked container was a warranted search. The magistrate issued a warrant that authorized a search of the residence." *Id.* at *4. Moverover, *Schenck* involved a challenge that the warrant authorized only the seizure, not the search, of locked containers. The court disagreed, relying on *Martines, supra*, and

² The court in *State v. Llamas-Villa* was specifically asked to consider the defendant's constitutional claim and declined to do so. *Llamas-Villa*, 67 Wn. App. 448, fn. 2.

³ As the State indicated in its reply brief, the relevant portion of *Walker* is unpublished. While it has no precedential value and is not binding on this court, it is cited for persuasive value as this court deems appropriate. *See*, GR 14.1. *Crosswhite v. DSHS*, 197 Wn. App. 539, 389 P.3d 731 (2017). *Walker* was also relied upon in part by Commissioner Bearse in the ruling granting discretionary review.

⁴ *State v. Schenck* is unpublished but raised as persuasive authority by the defendant. This decision has no precedential value, is not binding on the court, and is cited for persuasive value as this court deems appropriate. *See*, GR 14.1. *Crosswhite v. DSHS*, 197 Wn. App. 539, 389 P.3d 731 (2017).

held that a warrant authorizing the seizure of an item implicitly also authorizes the search of that item. Similar logic applies to the case at bar. The court authorized the seizure of items—guns and drugs—and also therefore implicitly authorized the search for guns and drugs. The defendant’s reliance on *Schenck* is misplaced.

In the case at bar, a lawful warrant was obtained for a residence. While the State acknowledges that Article I, section 7 of the Washington Constitution provides greater protection than the Fourth Amendment, the greater protection is ensured by the issuance of a search warrant. To require even more—that the warrant include authorization for every locked container, locked door, or locked cabinet—would take the warrant requirement to an illogical place. The warrant in this particular case authorized that the residence be searched for items easily concealed within a gun safe—guns and narcotics. The warrant properly described the place to be searched and the items sought. To require more would go well beyond anything this court has held as constitutionally required. Moreover, as Commissioner Bearse reasoned in her opinion, the warrant addendum in this case listed the alleged crimes, identified the premises to

be searched, and specified the items the officers were to search for in the residence.⁵

The locked gun safe was located in an area of the residence that was identified in the warrant addendum and the safe could reasonably be expected to contain the items sought—guns and narcotics. It was reasonable and logical for guns to be located in a gun safe, and was reasonable to believe it was included in the warrant. The lawfully issued search warrant satisfies the constitutional protections of the Washington Constitution.

Finally, defendant Berven asserts that the warrant in this case lacked particularity because the warrant authorized a search for containers for surveillance equipment, but not for containers for narcotics, computer equipment, or drugs. BOR, page 11. As Commissioner Bearse held:

This court cannot conclude that but for surveillance equipment, the omission of other types of containers meant that the officers were barred from looking in containers in the home that could store the other listed types of evidence absent obtaining another warrant addendum.

Ruling Granting Review, page 9. There are legitimate reasons for including containers for surveillance but not containers for anything else listed. For example, police may have wanted to search for concealed or

⁵ Ruling Granting Motions of Discretionary Review and Consolidating Cases, page 11.

hidden surveillance contained in something not readily identifiable as a container. Regardless of the motivation, to engage in speculation as to why containers were specified for one type of item only is irrelevant. What is relevant is whether the warrant in this case had sufficient particularity and scope to search a gun safe for guns. When the warrant is examined in the correct context, this court should conclude that the warrant is constitutionally valid.

D. CONCLUSION.

For all of the above stated reasons, as well as the reasons set forth in the State's opening brief and reply brief, the State respectfully requests that this court reverse the trial court's ruling below and find that the search of the locked safes inside the defendants' residence was lawful.

DATED: August 2, 2017

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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