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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
RESPONDENT,

VS.

CHARLES CARROLL HARTZELL IV
APPELLANT.

JEFFERSON COUNTY SUPERIOR COURT CAUSE No. 17-1-00028-6
THE HONORABLE JUDGE KEITH HARPER

STATEMENT OF ADDITIONAL GROUNDS-RAP 10.10

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INTRODUCTION

This statement of additional grounds, done Pursuant to RAP 10.10, idresses only the impound and tow inventory issue. For economy of time respectfully incorporate, by reference, the Statement of Facts as presented the Brief of Appellant, and note that all references to the record are n the State's Findings of Fact and conclusions of Law from the 3.6 hearing, held on July. 6TH. 2017 and filed August. 1ST. 2018.

The heart of this issue is whether the initial impound of the icle was lawful despite the state's admission and finding that impounding deputy (Peterson) never considered ANY alternatives mpound. And whether the subsequent search of the vehicle was ful despite the State's admission and finding that the searching ities did not follow Policies and Procedures while conducting the ntory search" and failed to ever produce an itemized-detailed ntory as required Per established inventory Policy. And finally was initial reasonableness of the search vitiated by the searching ys admission and State's finding that the backpack in which rcotics were found in was "set aside to be searched for something of and was Probably manipulated by the searching deputy's Knees

just prior to the narcotics becoming into 'Plain View', when established entory Policy requires the backpack be inventoried as a whole and en both State and federal law prohibit searching or manipulating backpack as part of an inventory search when done in order "determine if it contained anything of value", that would n ostensibly be inventoried.

Restated, does the State have the burden of Proving that an ounding deputy excercised discretion prior to impound, does inventory have to be conducted Pursuant to established time and WSP approved procedures to be valid, and is an cer allowed to set a backpack aside because it may contain ething of value inside, which "may need to be documented" ite Policy which requires items such as a purse or Shaving be inventoried as a whole?

STANDARD OF REVIEW

A trial court's findings of fact are reviewed for substantial vidence; conclusions of law are reviewed de novo. State v. Gatewood, 3 Wn.2d 534, 539, 182 P.3d 426 (2008). Unchallenged findings are verities n appeal. Mueller v. Wells, 185 Wn.2d 1, 367 P.3d 580 (2016).

In the absence of a finding on a factual issue, an appellate urt presumes that the party with the burden of proof failed to sustain burden on the issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997)

The State has alleged that the search of Hartzell's vehicle was done ursuant to the "vehicle impound/tow inventory" exception to the warrant uirment and therefore bears the heavy burden of establishing [redacted] the cts that will justify the warrantless search, by clear and convincing idence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

The impoundment of Hartzell's vehicle was unlawful because the state failed to prove that no reasonable alternatives to impoundment existed.

Hartzell's vehicle was impounded and towed after a brief high speed ursuit, and collision with a tree on private property. Hartzell fled the ene on foot immediately after the collision. (CP, Findings of fact CrR 3.6 s 1-17) The state never offered a specific reason or justification for the impound.

he impounding deputies had multiple reasons to impound the vehicle but ver considered any alternatives to impound. (CP - Finding of Fact CrR 3.6 # 22)

Even if an impound is justified by statutory authorization or community etaking function, the State must prove that no reasonable alternatives impoundment existed. State v. Tyler. 177 wn.2d at 698 (2012) And since State had this burden of proof, but specifically found that alternatives mpound were never considered, it cannot be fairly argued that the te met this burden.

n argument can be anticipated that the specific facts of Hartzell's case nstrate that no reasonable alternatives to impoundment could have ed. Hartzell had collided with a tree, he fled the scene on foot, it was at night, the vehicle was unoperable, etc. (CP - Findings of fact CrR 3.6 #'s 9, 12, respectively). But the state made no specific finding that no reasonable native to impound existed, and the deputy on the scene who was in est position to determine alternatives never considered them.

n accepting these aforementioned many premises concerning the circumces on the night of the crash, the reviewing court is encouraged to inue to note that the state has alleged the impound was lawful and tate bears the heavy burden of justifying the impound procedure

Certainly a reasonable person can anticipate some set of circumstances
nich would allow for no reasonable alternative to impound. Here, however,
ere was no testimony on behalf of the state as to Deputy Peterson's
ploration of reasonable alternatives, or why he ultimately determined to
round the vehicle. Neither did the state present its own analysis proving
at impoundment/tow was the only reasonable option. It may ask the
iewing court to infer this fact from the circumstances, but the state
glected to specifically prove this fact.

Absent any express justification by the state, in the record concerning
impoundment, and in light of the fact that the impounding deputy
ifically did not consider any alternative prior to the tow, the procedure
s creating the suspicion that it was a pretext to then conduct an
rantless "inventory search" of Hartzell's vehicle.

qually troubling is the fact that Deputy Peterson failed to exercise his
retion to weigh reasonable alternatives prior to impound/tow. Law
rcement can only impound a vehicle when no reasonable alternatives
t. State v. Tyler 177 wn.2d 690, 698. 302 P.3d 165 (2013); State v. Houser
Jn.2d 143 (1980); State v. Bales 15 wn. App. 834, 552 P.2d 688 (1976);
e v. Hardman 17 wn. App. 910, 913, 567 P.2d 238 (1977) It is axiomatic
+ deputy Peterson must at least consider alternatives before he could
rmine that the weren't any, and that tow/impound was proper. By
ng to exercise his discretion, Deputy Peterson impounded Hartzell's vehicle
out lawful authority, and seized the vehicle without due process of law.

.e seizure of Hartzell's vehicle was conducted outside of the judicial
s without prior sanction by a magistrate, the State therefore had the
of justifying this seizure under an exception to the warrant requirment.

Nothing which occurred the night of the crash relieved the deputy f his affirmative duty to at least consider (and then properly dismiss i appropriate) alternatives to tow/impound Hartzell's vehicle. This xercise of discretion of considering alternatives is a necessary tep in conducting a lawful impound/tow.

In conclusion the fact that the State specifically found that t deputy Peterson never considered alternatives to impound, not just sonable or unreasonable, but ANY alternatives, means the State led to meet its burden of proof. Division II's finding in the 2017 case State v. Froehlich 197 Wn. App 831 (2017) is directly on point and should particularly helpful in this case:

"We hold that impoundment was not lawful and therefore the search was unlawful because under the community caretaking exception the State did not prove that the impounding officer considered whether Froehlich had a spouse or friend available [to move the car], and even though the State had statutory authority to impound, the State failed to prove the officer considered all reasonable alternatives" (Emphasis added)

In Washington, our constitution forbids officers from impounding vehicles thout first considering alternatives. The officer must show that he at least ought about alternatives, and then after deliberating, he may finally decide t impound is in order. State v. Hardman, 17 Wn. App 910, 914, 567 P.2d 236 (1977)

The "inventory" search performed on Hartzell's vehicle was unlawful because it was not done according to standardized criteria and established routine and was not done in order to create an itemized inventory

Nothing that happened the night of the collision and impound excused ne deputies from executing the "inventory" search according to WSP - niform Impound Procedures, RCW 46.55.075, or the WSP approved (JCSO) fferson County Sheriff's office impound / inventory Policy & Procedure.

Deputies Anderson and Peterson admitted under oath that JCSO Policies . Procedures were not followed with respect to inventory searches. (CP- ings of fact 3.6 # 37)

n Itemized-detailed inventory was never created during the "inventory" ifter the vehicle was re-searched Pursuant to a search warrant. Findings of Fact CrR 3.6 # 38)

he State admitted several specific violations of both policy and Procedure le performing the "inventory" search including failing to list the items found he vehicle as required by State law (RCW 46.55.075) (CP - Findings of Fact 3.6)

To justify a search under the inventory exception, the prosecution prove that it was conducted pursuant to "standardized criteria... or shed routine." Florida v. Wells, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990)

Both having and following standardized procedures are constitutionally equired. Florida v. Wells supra Officers have to follow the standard rocedures for an inventory search. US v. Palacios, 957 F.Supp 5D (SDNY 1997) equiring compliance with standardized procedures removes the inference hat police have engaged in a search for evidence. (US. v. Taylor 636, F.3d 461 (8th cir. 2011)

Law enforcement's failure to record property illustrates the inventory s pretextual. US v. Rowland 341 F.3d 774 (2003) (8th cir.)

An incomplete inventory shows a pretextual search. State v. Harper 2014 Ohio-347, 2014 Ohio. App Lexis 346 (9th District. Feb 3 (2014))

Even if the reviewing court finds the impoundment and initial entory search weve reasonable, that reasonableness may be vitiated the manner in which law enforcement officials conducted the search n if the conduct did not rise to the level of a due process violation. sh. Prac. Vol 12 § 2705

It is a verity in this case that the deputies did not follow standardized eria nor established routine. (CP-Findings crR 3.6 #'s 36, 37, 38)

it is a verity in this case that deputies did not create an itemized inventory uired by state law and JCSO policy (CP Finding crR 3.6 #38 RCW 46.55.075)

ne state attempts to excuse these "irregularities" in completion of the d form/inventory because "it is not realistic to think that in the early ning hours ~~it~~ an officer is going to pick through a car item for item write it out on the form" (CP Findings crR 3.6 #35)

Finding of fact #35 from the CrR 3.6 hearing is both contrary to the aw and not properly a finding of fact. Neither Article I section 7 of he Wash. state constitution, nor the 4TH Amendment of the U.S. onstitution provides certain hours of the day in which law enforce- ay violate citizens rights without sanction.

"Both having and following standardized procedures are nstitutionally required." Florida v. Wells. 495 U.S. 1, 4, 110 S.Ct. 1632. 109 L.Ed 1 (1990)

As the States finding of fact #35 is contrary to clearly established state federal law and not supported by evidence elicited from testimony at CrR 3.6 hearing Hartzell respectfully objects to this finding in it's iety and to its implications.

In sum, no inventory search was performed here that either complied established policy or which created an actual inventory. As such t did occur cannot fairly be characterized as an inventory search must remain a warrantless intrusion and search specifically ibited by Wash const. Article 1 § 7 and U.S. constitution 4TH Amend. all evidence thus gained should be suppressed.

The manner in which the backpack was handled and manipulated vitiated any initial reasonableness of the inventory search and the illegal narcotics came into "plain view" only after the searching deputy violated JCSO policies and state law in respect to manipulating the backpack

While conducting a brief 'inventory search' Deputy Anderson "picked up backpack from the passenger area of the vehicle and put it to the side on driver's seat". (CP Findings of Fact 3.6 # 27 ln 14-15.)

State law requires the backpack be inventoried as a whole in his inventory he cor. State v. Wisdom, 187 Wn. App. 652, 673-678, 349 P.3d 953 (2015), amended (2015); v. White, 135 Wn.2d 761, 958 P.2d 982 (1998); State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980); v. Driggs, 109 Wn. App. 592, 36 P.3d 577 (2001)

espite this prohibition against searching the backpack the state found that is reasonable to move a backpack when doing an inventory search because night contain something of value - such as a wallet - that needs to be mented" (CP - Finding of Fact CrR 3.6 # 27 Ln. 19-21)

he searching deputy had no way of knowing if the backpack had anything ke within it prior to the evidence coming into "plain view", and the graciously admits that the deputy set it to the side, kneeled upon it y, and that kneeling on it would have manipulated it and that it

was reasonable to move a backpack because "it might contain something of value."

Moving the backpack to the side with the intention of looking inside of it for something of value unequivocally demonstrates the searching officer's intent to search the backpack, something explicitly prohibited by policy, procedure, case precedent, and both Article 1 § 7 of state law and the 4TH Amendment of the U.S. constitution.

The fact that another deputy happened to see what appeared to be narcotics inside of the backpack <u>after</u> the searching deputy moved it and isolated it for individual examination and <u>after</u> it had likely been relied upon and manipulated does not render this discovery lawful.

And insofar as findings #27 & 34 disagree with this conclusion that the search of the backpack was unlawful, Hartzell objects to these findings as contrary to the law and not supported by substantial evidence in the record.

The backpack was picked up, isolated, and set to the side in order to see if it contained anything of value. The backpack was probably kneeled on and manipulated immediately prior to narcotics being discovered inside of it. These circumstances vitiate any initial reasonableness.

CONCLUSION

The vehicle impound/inventory exception to the warrant requirement is narrowly drawn and jealously guarded. Standardized policies & procedures must regulate both the initial impoundment of the vehicle and the law enforcement officials' behavior while she/he conducts the non-investigatory search, in order to render this otherwise unlawful intrusion into a citizen's private affairs, reasonable.

That did not happen here. By the State's own admissions the impounding officer did not excercise his discretion before he impounded the vehicle; the deputies did not create an itemized inventory; the deputies did not follow established procedures while conducting what they later labeled an "impound inventory".

Law enforcement was required to consider reasonable alternatives to impound but did not, and they had WSP standardized policies in place for inventories [redacted] but grossly deviated from them. The "inventory search" lasted only as long as it took officers to discover incriminating evidence and then they abandoned the "inventory" search permanently.

State law requires the exercise of individual discretion in re impound seizure of vehicles: RCW 46.55.113 ; In re impoundment : Chevrolet Truck, 148 Wn.2d 145, 60 P.3d 53 (2002)

State and Federal law require law enforcement to follow their tandardized criteria and procedures while conducting impound-nventory searches: State v. Tyler, 177 Wn.2d (2012) ; Florida v. Wells, 95 U.S. 1, 4, 5 110 S.ct 1632 (1990)

Neither the facts leading up to and surrounding the impound, r the time of day that law enforcement choose to conduct "inventory search" relieve the officers of the constitutional uirments that regulate this behavior. Accordingly the evidence ulting from this unlawful search must be suppressed.

Respectfully submitted,
August-25TH-2018
CHARLES CARROLL HARTZELL, IV
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