

FILED
Court of Appeals
Division II
State of Washington
1/2/2020 4:41 PM

No. 52809-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH BONOMO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

REPLY BRIEF OF APPELLANT

Jessica Wolfe
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES III

A. ARGUMENT 1

 1. The search of the trunk exceeded the scope of the community
 custody warrant exception and was thus unconstitutional..... 1

 2. Following the resolution of *State v. A.M.*, whether simple
 possession requires an element of knowledge is still a live
 issue..... 9

B. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

<i>City of Seattle v. Mesiani</i> , 110 Wn.2d 454, 755 P.2d 775 (1988).....	5
<i>Morisette v. United States</i> , 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).....	11
<i>Quinn v. Cherry Lane Auto Plaza, Inc.</i> , 153 Wn. App. 710, 225 P.3d 266 (2009).....	9
<i>State v. A.M.</i> , 194 Wn.2d 33, 448 P.3d 35 (2019)	10, 11
<i>State v. Adkins</i> , 96 So. 3d 412 (Fla. 2012).....	11
<i>State v. Belanger</i> , 2019 WL 4187740 (Sept. 4, 2019)	7, 8
<i>State v. Bradshaw</i> , 152 Wn.2d 528, 98 P.3d 1190 (2004).....	11
<i>State v. Carriero</i> , 8 Wn. App. 2d 641, 439 P.3d 679 (2019).....	9
<i>State v. Cleppe</i> , 96 Wn.2d 373, 635 P.2d 435 (1981).....	11
<i>State v. Conover</i> , 154 Wn.2d 596, 115 P.3d 281 (2005)	4
<i>State v. Cornwell</i> , 190 Wn.2d 296, 412 P.3d 1265 (2018).....	1, 8
<i>State v. Gaines</i> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	6
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	4
<i>State v. Jardinez</i> , 184 Wn. App. 518, 338 P.3d 292 (2014)	6, 8
<i>State v. Martinez</i> , 135 Wn. App. 174, 143 P.3d 855 (2006).....	6, 8, 9
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	5
<i>State v. Peck</i> , 194 Wn.2d 148, 154–55, 449 P.3d 235 (2019)	2
<i>State v. Richardson</i> , 64 Wn. App. 693, 925 P.2d 754 (1992).....	9
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005)	4

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980)..... 2
State v. White, 135 Wn.2d 761, 958 P.2d 982 (1998)..... 6
State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009)..... 3, 5

Statutes

RCW 9.94A.631..... 1, 2, 3, 4

Rules

GR 14.1 7

A. ARGUMENT

1. The search of the trunk exceeded the scope of the community custody warrant exception and was thus unconstitutional.

“If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of *the offender’s* person, residence, automobile, or other personal property” without first obtaining a warrant. RCW 9.94A.631(1) (emphasis added). However, there must be “a nexus between the property searched and the alleged probation violation” to pass constitutional muster. *State v. Cornwell*, 190 Wn.2d 296, 306, 412 P.3d 1265 (2018). Here, community custody officers searched a car that did not belong to Mr. Bonomo. Accordingly, the search did not satisfy the statutory warrant exception. Further, the officers did not have reasonable cause to believe Mr. Bonomo violated a condition of his community custody requiring a search of the trunk of the car. This Court should reverse the firearm convictions and remand with instructions to grant the motion to suppress. The State’s arguments to the contrary are unavailing.

The State first argues that the search of the vehicle fell within the community custody statutory exception because “possession of a car, rather than its ownership, is the relevant fact.” Brief of Respondent at 9.

The State is unable to support this assertion with relevant legal authority. The sole case the State relies on for this proposition, *State v. Peck*, concerned defendants’ automatic standing to challenge the search of a stolen car. 194 Wn.2d 148, 154–55, 449 P.3d 235 (2019). The doctrine of automatic standing was created in order to deter illegal searches and searches by removing technical standing rules, thus protecting the private affairs of all Washington citizens. See *State v. Simpson*, 95 Wn.2d 170, 180, 622 P.2d 1199 (1980) (plurality opinion). The State’s reliance on *Peck* is misplaced. Automatic standing is a judicial doctrine expanding review of invasions of privacy; it is not a statutory interpretation of the community custody warrant exception under RCW 9.94A.631. Accordingly, *Peck* provides no support for the State’s argument that Mr. Bonomo’s control of the car alone justified the search.

Second, the State argues that it proved Mr. Bonomo “co-owned” the car with Ms. Winget *at trial*. See Brief of Respondent at 9. However, in determining probable cause, only the facts and information “available to the officer *at the time of the search*” are relevant. See *State v. Winterstein*, 167 Wn.2d 620, 630, 220 P.3d 1226 (2009) (emphasis added)). At the time of the search here, the officers knew that the car was registered *only* to Ms. Winget. See 12/5/18 RP at 70–72. Additionally, Ms. Winget confirmed the car belonged to her, not Mr. Bonomo, and there was no

evidence she gave consent for officers to conduct a search. *See* 12/5/18 RP at 35, 72.

State v. Winterstein controls, and its holding is clear: the statute means what it says. 167 Wn.2d at 628–29. In codifying the community custody warrant exception, the legislature only contemplated a reduced expectation of privacy in “the *offender’s* person, residence, automobile, or other personal property.” *See id.* (quoting RCW 9.94A.631) (emphasis in the original). As *Winterstein* recognized, while probationers “have a lessened expectation of privacy, third parties not under the control of [the Department of Corrections] do not.” *Id.* at 630.

The State seems to imply that *Winterstein’s* reasoning only applies to private residences, not cars. *See* Brief of Respondent at 10. The State argues that the third-party interests here are “not the same” as in *Winterstein*, because Mr. Bonomo “was driving on a public street in plain view.” *See id.* However, *Winterstein’s* holding was an interpretation of RCW 9.94A.631, which references *both* residences and automobiles. *See* 167 Wn.2d at 628–29.

Again, the statute is clear on its face, providing a warrant exception *only* for the offender’s person, residence, automobile, or “other personal property.” *See* RCW 9.94A.631; *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (internal citation and quotation marks

omitted) (courts must give effect to the plain meaning of a statute as an expression of legislative intent), *superseded by statute on other grounds as stated in State v. Conover*, 154 Wn.2d 596, 115 P.3d 281 (2005). In addition to the use of a possessive noun – “offender’s” – the statute also references “*other personal* property,” indicating a search is only permissible for those residences and automobiles *personal* to the offender. *See State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (“A single word in a statute should not be read in isolation . . . the meaning of words may be indicated or controlled by those in which they are associated.”) (citations and quotation marks omitted). There is no other viable interpretation of the statute, and the State does not attempt to provide one.

Additionally, although there is generally less of a privacy interest in a vehicle when compared to a home, cars are still protected from government intrusion. *See State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). “From the earliest days of the automobile in this state, [the supreme court] has acknowledged the privacy interest of individuals and objects in automobiles.” *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456–57, 755 P.2d 775 (1988). Although *Winterstein* concerned a private residence, its underlying reasoning concerning third-party privacy interests naturally extends to automobiles. *See* 167 Wn.2d at 629 (recognizing the

importance of “safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.”) (citations and internal quotation marks omitted).

It is worth noting that the trunk of the car itself was not in “plain view.” *See* Brief of Respondent at 10. Locked trunks are entitled to a heightened privacy interest as compared to the passenger compartment. *See State v. White*, 135 Wn.2d 761, 772, 958 P.2d 982 (1998).

Accordingly, “[i]t is well established that a warrant is required to search a locked trunk.” *State v. Gaines*, 154 Wn.2d 711, 717, 116 P.3d 993 (2005). Accordingly, while Ms. Winget’s car as a whole was not subject to the community custody warrant exception, her privacy interest in the trunk was even greater. *See id.*

The State next argues the small amount of heroin found on Mr. Bonomo justified the search of the car, relying solely on the officers’ “extensive experience finding larger stashes of drugs in a car after discovering a small amount on a probationer.” Brief of Respondent 10–11. However, reasonable cause must be supported by “*specific and articulable* facts and rational inferences” related to “the *particular person*” suspected of committing a crime. *See State v. Jardinez*, 184 Wn. App. 518, 524, 338 P.3d 292 (2014) (internal citations and quotation marks omitted); *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006)

(emphases added). Here, the officers' experience finding drugs in the vehicles of other probationers alone was not enough to support reasonable cause that Mr. Bonomo was concealing large amounts of drugs in his car.

This Court's recent unpublished decision in *State v. Belanger*, 2019 WL 4187740 (Sept. 4, 2019)¹ is instructive. There, the defendant was also on community custody and was arrested for failure to report. *Id.* at *1. During his arrest, the defendant attempted to escape apprehension, reached towards the floorboards of his car during arrest, and actively resisted the officers. *Id.* at *2. He also attempted to distance himself from the vehicle. *Id.* Officers searched the defendant, finding various types of drugs, drug paraphernalia, and a large sum of cash on his person. *See id.* at *1. Based on *both* the defendant's behavior and the items found during the search of his person, officers suspected there were narcotics or firearms in the vehicle. *See id.* at *3. A search confirmed their suspicions. *See id.* This Court upheld the search based on the defendant's behavior coupled with the officers' experience that an individual with drugs on their person may have additional drugs in their car. *See id.* at *6.

Conversely, here, the trial court did not make any factual findings specific to Mr. Bonomo that would have supported reasonable cause to

¹ Mr. Bonomo cites to *Belanger* as persuasive authority pursuant to GR 14.1.

search the vehicle. *See* CP 57–58. The court did not find Mr. Bonomo exhibited particular behavior consistent with drug dealing or with an attempt to distance himself from the car.² *See id.* Instead, the court relied solely on the officers’ training and experience interacting with other probationers in finding the search constitutional. *See id.* (Finding of Fact 3); *id.* at 58–59 (Conclusions of Law); *cf. Belanger*, 2019 WL at *6. This was insufficient to support reasonable cause. *See Jardinez*, 184 Wn. App. 524; *Martinez*, 135 Wn. App. at 180.

The State argues there was a nexus between a suspected violation and the search of the trunk of the car because Mr. Bonomo was visiting a “high crime area” and thus “the trunk was the most secure spot to hide [drugs].” Brief of Respondent at 11; *see also State v. Cornwell*, 190 Wn.2d 296, 301–302, 412 P.3d 1265 (2018) (requiring a nexus between a suspected violation and a community custody search). As a threshold matter, the trial court did not find nor rely on this factual circumstance in concluding the search was constitutional. *See* CP 57–59; *see also Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (appellate courts must defer to the factual findings of the trial

² Although the trial court did find that Mr. Bonomo had a knife, “made furtive movements,” and did not comply with instructions to exit the car, it did not rely on these facts to find that a search of the car was justified. *Compare* CP 57 (Finding of Fact 1) with CP 57–58 (Finding of Fact 3) and CP 58–59 (Conclusions of Law).

court). Additionally, presence in a high crime area is not sufficient to support reasonable cause or even a nexus; an officer must observe circumstances that a “*particular person* has committed a specific crime or is about to do so.” *Martinez*, 135 Wn. App. at 180 (emphasis added); *see also State v. Carriero*, 8 Wn. App. 2d 641, 663, 439 P.3d 679 (2019); *State v. Richardson*, 64 Wn. App. 693, 925 P.2d 754 (1992) (“[M]ere proximity to others independently suspected of criminal activity” does not support reasonable suspicion; “the suspicion must be individualized.”). The officers here were merely engaged in a “fishing expedition” of a probationer already found to be in violation of his community custody—the exact type of government intrusion prohibited by *Cornwell*. *See* 190 Wn.2d at 306–307.

The community custody officers who searched Ms. Winget’s car did not have the authority to evade the warrant requirement. Nor was there reasonable cause to believe Mr. Bonomo possessed a large amount of drugs or a nexus justifying a search of the trunk. This Court should reverse the firearm counts and remand with instructions to grant the motion to suppress.

2. Following the resolution of *State v. A.M.*, whether simple possession requires an element of knowledge is still a live issue.

At the time of the filing of Mr. Bonomo’s opening brief, the Supreme Court was considering the issue of whether the possession statute must be interpreted to have a knowledge element to be deemed constitutional. *See* Brief of Appellant at 18–20. The court ultimately declined to address that issue by ruling in the petitioner’s favor on other grounds. *See State v. A.M.*, 194 Wn.2d 33, 448 P.3d 35 (2019). However, two concurring justices urged the Court to address this “pressing issue,” noting that the current case law criminalizes “innocent conduct in Washington’s war on drugs.” *A.M.*, 194 Wn.2d at 44 (Gordon McCloud, J., concurring). The concurring justices acknowledged that imposing strict liability for drug possession violates due process, and labeled the Supreme Court’s previous decisions to the contrary “grievously wrong.” *Id.* at 44, 49–53 (citing *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) and *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004)).

Washington appears to be the only state in the nation that permits conviction for drug possession on the basis of strict liability. *See State v. Adkins*, 96 So. 3d 412, 423 & n.1 (Fla. 2012) (Pariente, J., concurring).³ Under current Washington law, “[a] person might pick up the wrong bag

³ Florida requires knowledge of possession, but not knowledge of the illicit substance possessed. *See id.* at 415–16.

at the airport, the wrong jacket at the concert, or even the wrong briefcase at the courthouse” and be guilty of the crime of possession. *A.M.*, 194 Wn.2d at 64 (Gordon McCloud, J., concurring). As argued in the opening brief and in the concurring opinion in *A.M.*, this application of the law is unconstitutional in violation of due process. *See also Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952) (“[W]rongdoing must be conscious to be criminal.”) Because the trial court did not make a finding that Mr. Bonomo knowingly possessed the heroin, this Court should reverse the conviction. *See CP 49–52.*

B. CONCLUSION

For the reasons stated above, this Court should reverse the firearm convictions and remand with instructions to grant the motion to suppress. This Court should also reverse the possession of a controlled substance conviction for insufficient evidence. In the alternative, this Court should accept the State's concession that \$300 in legal financial obligations and the interest provision should be stricken from the judgment and sentence.

DATED this 2nd day of January, 2020.

Respectfully submitted,

/s Jessica Wolfe

State Bar Number 52068

Washington Appellate Project (91052)

1511 Third Ave, Suite 610

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-2711

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 52809-6-II
)	
JOSEPH BONOMO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF JANUARY, 2020, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] PHILIP BURI [philip@burifunston.com] BURI FUNSTON MUMFORD & FURLONG, PLLC(X) 1601 F ST BELLINGHAM, WA 98225	() () (X) () ()	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] JOSEPH BONOMO (ADDRESS OF RECORD) ON FILE WITH OUR OFFICE)	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF JANUARY, 2020.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

January 02, 2020 - 4:41 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52809-6
Appellate Court Case Title: State of Washington, Respondent v Joseph Anthony Bonomo, Appellant
Superior Court Case Number: 18-1-01418-4

The following documents have been uploaded:

- 528096_Briefs_20200102164030D2493648_3252.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.010220-06.pdf

A copy of the uploaded files will be sent to:

- philip@burifunston.com

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Jessica Constance Wolfe - Email: jessica@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200102164030D2493648