

FILED
Court of Appeals
Division II
State of Washington
6/4/2019 3:27 PM
No. 52994-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

CHERYL ANN HEATH

REPLY BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

A. Argument in Reply.....	1
B. Conclusion.....	2

TABLE OF AUTHORITIES

Cases

<i>State v. Boland</i> , 115 Wn.2d 571 800 P.2d 1112 (1990).....	1
<i>State v. Brock</i> , 184 Wash.2d 148 355 P.3d (2015)	3
<i>State v. Brock</i> , 184 Wn.2d 148, 159, 355 P.3d (2015).....	1, 2, 4
<i>State v. Byrd</i> , 178 Wn.2d 611, 310 P.3d 793 (2013)	1, 2, 3, 4
<i>State v. Callahan</i> , 77 Wn.2d 27 459 P.2d 400 (1969)	2
<i>State v. Lohr</i> , 164 Wn.App. 414, 263 P.3d 1287 (2011)	3
<i>State v. MacDicken</i> , 179 Wn.2d 936, 319 P.3d 31 (2014).....	4
<i>United States v. Perdoma</i> , 621 F.3d 745 (8 th Cir. 2010).....	4

A. Argument in Reply

It turns out search and seizure law, like football, is a game of inches. People are allowed to dispose of their property in any way they wish prior to being detained by a police officer. *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990) (warrantless search of trash can unconstitutional). But once a police officer has detained the person to the point where they are not free to go, any personal effects in their actual possession are subject to search incident to arrest. *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013). But *Byrd* is equally clear that the personal effects must be in the arrestee's actual possession, not constructive possession, at the time of detention. *State v. Brock*, 184 Wn.2d 148, 159, 355 P.3d (2015) clarifies that the time of detention includes lawful *Terry* stops that ripen into a lawful arrest.

According to Ms. Heath's unrebutted testimony, at the time the police officer activated her emergency lights, thereby detaining Ms. Heath, Ms. Heath had already pulled over her motorcycle, removed her backpack from her back, taken out the cigarettes that were in the backpack, placed the backpack on the ground, and lit a cigarette. While Ms. Heath was certainly in actual possession of the backpack while wearing it, once she placed the backpack on the ground, she was no longer in actual

possession. *State v. Callahan*, 77 Wn.2d 27 459 P.2d 400 (1969) (close proximity to drugs does not constitute actual possession).

The State's brief does not contest Ms. Heath's factual recitation. Nor could it. The State forfeited its right to contest the facts when it chose not to subpoena the arresting officer to testify. And the trial court compounded the problem by failing to resolve the disputed facts. This Court should adopt Ms. Heath's recitation of the facts. Because she was not in actual possession of the backpack at the time she was detained, the search incident to arrest was unlawful and the trial court should be reversed.

The State criticizes Ms. Heath's argument because she relies on "cases that address searches of the passenger compartments of cars" and motorcycles have "no passenger compartment that is subject to search." Brief of Respondent, 4. This argument is meritless. The two primary cases relied upon by Ms. Heath are *Byrd* and *Brock*. In *Byrd*, the issue was the legality of the search of the defendant's purse. Although the defendant was driving a motor vehicle at the time of the stop, the purse was sitting in her lap. The search was, therefore, not a search of a passenger compartment but the search of the defendant's personal effects found in her actual possession at the time of the arrest. In *Brock*, there was no motor vehicle at all. The defendant was detained as he exited a

public restroom stall carrying a backpack. The State's argument that Ms. Heath is relying on passenger compartment searches is, therefore, completely incorrect.

The other cases cited by the State are inapposite. In *State v. Lohr*, 164 Wn.App. 414, 263 P.3d 1287 (2011), during the execution of a search warrant of a residence police searched a purse seven to eight feet away from a woman that was easily recognized as her personal effect. The woman was not identified in the warrant, she was not under arrest at the time of the search, and there was not probable cause to arrest her. The only ground claimed by the State as justification for the search was the existence of the warrant. The Court of Appeals disagreed and found the search illegal.

The *Lohr* case has no applicability to Ms. Heath, whose was searched incident to arrest and not pursuant to a warrant. Ms. Heath agrees her backpack was easily identified as her personal effect at the time of her arrest. She also agrees she was in constructive possession of the backpack at the time the officer activated her emergency lights, thereby detaining her. But at the moment she placed the backpack on the ground and lit her cigarette, she ceased to be in actual possession. The officer's emergency lights were activated after she placed the backpack on the ground, not before. Pursuant to *State v. Byrd*, law enforcement may not

search personal possessions incident to arrest unless the arrestee is in actual possession, not constructive possession, of the item at the time of detention. Any search incident to arrest of the backpack was, therefore, illegal.

The State next cites *United States v. Perdoma*, 621 F.3d 745 (8th Cir. 2010). In *Perdoma*, the defendant was lawfully detained and arrested after a short chase in a bus terminal. During the handcuffing process, he was separated from the bag he was holding. The bag was searched incident to arrest shortly thereafter even though the bag was “beyond his reach” at the time of the search. The Court of Appeals sustained the search because it occurred in close proximity to the arrest, both temporally and geographically. This conclusion is consistent with *Byrd* and *Brock*: he was in actual possession of the bag at the time of his arrest.

Likewise, in *State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014), the defendant was in actual possession of a laptop bag and rolling duffle bag at the time of his arrest. Citing *Byrd*, the Court held that the bags were legally searched incident to arrest.

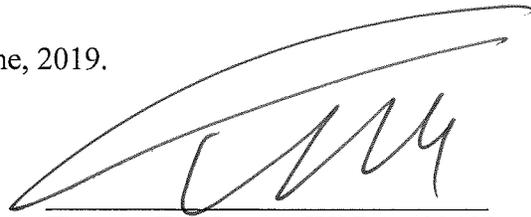
The State fails to cite a single case where a bag or personal item in constructive possession (as opposed to actual possession) of an arrestee was searched incident to arrest. Because Ms. Heath was not in actual possession of the backpack at the time the officer activated her emergency

lights, the search incident to arrest was unlawful. This Court should reverse.

B. Conclusion

The order of the trial court denying Ms. Heath's motion to suppress should be reversed and the case dismissed.

DATED this 4th day of June, 2019.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

THE LAW OFFICE OF THOMAS E. WEAVER

June 04, 2019 - 3:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52994-7
Appellate Court Case Title: State of Washington, Respondent v. Cheryl Ann Heath, Appellant
Superior Court Case Number: 18-1-01343-5

The following documents have been uploaded:

- 529947_Affidavit_Declaration_20190604152645D2201723_2207.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Heath Decl of Service.pdf
- 529947_Briefs_20190604152645D2201723_3345.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Heath Reply Brief.pdf

A copy of the uploaded files will be sent to:

- jcross@co.kitsap.wa.us
- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

Filing on Behalf of: Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email:)

Address:
PO Box 1056
Bremerton, WA, 98337
Phone: (360) 792-9345

Note: The Filing Id is 20190604152645D2201723

FILED
Court of Appeals
Division II
State of Washington
6/4/2019 3:27 PM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

STATE OF WASHINGTON,) Court of Appeals No.: 52994-7-II
)
Plaintiff/Respondent,) DECLARATION OF SERVICE OF
) REPLY BRIEF OF APPELLANT
vs.)
)
CHERYL HEATH,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On June 4, 2019, I e-filed the Reply Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated said document to be emailed to Randall Sutton (rsutton@co.kitsap.wa.us) at the Kitsap County Prosecutor's Office through the Court of Appeals transmittal system.

On June 4, 2019, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Reply Brief of Appellant to the defendant:

Cheryl Heath
4246 Arsenal Way W
Bremerton, WA 98312

////

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct.

3 DATED: June 4, 2019, at Bremerton, Washington.

4 

5 _____
6 Alisha Freeman

THE LAW OFFICE OF THOMAS E. WEAVER

June 04, 2019 - 3:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52994-7
Appellate Court Case Title: State of Washington, Respondent v. Cheryl Ann Heath, Appellant
Superior Court Case Number: 18-1-01343-5

The following documents have been uploaded:

- 529947_Affidavit_Declaration_20190604152645D2201723_2207.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Heath Decl of Service.pdf
- 529947_Briefs_20190604152645D2201723_3345.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Heath Reply Brief.pdf

A copy of the uploaded files will be sent to:

- jcross@co.kitsap.wa.us
- kcpa@co.kitsap.wa.us
- rsutton@co.kitsap.wa.us

Comments:

Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

Filing on Behalf of: Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email:)

Address:
PO Box 1056
Bremerton, WA, 98337
Phone: (360) 792-9345

Note: The Filing Id is 20190604152645D2201723