

FILED

APR 13 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 28802-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

RANDY JAMES JERRED,

Defendant/Appellant.

REPLY BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES	ii
OTHER AUTHORITIES	ii
ARGUMENT	1

TABLE OF AUTHORITIES

CASES

State v. Adams, 144 Wn. App. 100, 181 P. 3d 37 (2008).....1

State v. Gammon, 61 Wn. App. 858, 812 P. 2d 885 (1991).....2

State v. Gatewood, 163 Wn. 2d 534, 182 P. 3d 426 (2008).....2

State v. Horton, 136 Wn App. 29, 146 P. 3d 1227 (2006)..... 2

State v. Kjorsvik, 117 Wn. 2d 93, 812 P. 2d 86 (1991).....3

State v. Rison, 116 Wn. App. 955, 69 P. 3d 362 (2003).....2

State v. Thomas, 150 Wn. 2d 821, 83 P. 3d 970 (2004).....3

OTHER AUTHORITIES

YMC 6.48.010.....1

ARGUMENT

The State, in its brief, initially addresses the constitutionality of YMC 6.48.010. Mr. Jerred is not challenging the constitutionality of the ordinance. Mr. Jerred is challenging the lawfulness of his arrest based upon the lack of individualized suspicion.

...[A]ssociation with a person suspected of criminal activity “does not strip away the protections of the fourth amendment to the United States Constitution.” *State v. Broadnax*, 98 Wn. 2d 289, 296, 654 P. 2d 96 (1982), *overruled on other grounds by Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed. 2d 334 (1993)... [E]ven a brief seizure is not justified by mere proximity to criminal activity.” (Citations omitted) Rather, there must be something more to indicate that the particular person seized may be armed or a threat to safety. [Citation omitted.]

State v. Adams, 144 Wn. App. 100, 106, 181 P. 3d 37 (2008).

A factual dispute exists concerning whether or not Mr. Jerred was a threat to officer safety. The trial court did not enter any finding of fact concerning this particular issue. Rather, the trial court’s findings pertain to the training and experience of the arresting officer in conjunction with shoplifting incidents.

If, indeed, the initial search of Mr. Jerred is unlawful, then any items seized from his person must be suppressed. *See: State v. Gatewood*, 163 Wn. 2d 534, 542, 182 P. 3d 426 (2008).

Next, the State relies upon *State v. Gammon*, 61 Wn. App. 858, 812 P. 2d 885 (1991) to counter Mr. Jerred's argument concerning the unlawful search of the cigarette package. The *Gammon* case predates *State v. Horton*, 136 Wn App. 29, 38, 146 P. 3d 1227 (2006) which specifically addresses the ability of a law enforcement officer to search items which cannot contain a weapon.

Additionally, the case of *State v. Rison*, 116 Wn. App. 955, 69 P. 3d 362 (2003) provides further support for Mr. Jerred's position. The *Rison* case involved the search of a closed eyeglass case belonging to the guest of the tenant where an apartment was being searched. The Court held at 959-60:

“A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant.” *United States v. Jacobson*, 466 U.S. 109, 120 n. 17, 104 S.Ct. 1652, 80 L.Ed. 2d 85 (1984) (citing *United States v. Ross*, 456 U.S. 798, 809-12, 102 S.Ct. 2157, 72 L.Ed. 2d 572 (1982)).

The *Gammon* case dealt with a closed cosmetics case. The opinion does not address the size of the case. Even so, Mr. Jerred asserts that *Gammon* would be decided differently based upon *Rison*. The *Rison* Court noted at 960-61:

...”[P]urses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.” *State v. Kealey*, 80 Wn. App. 162, 170, 907 P. 2d 319 (1995)(citing *Arkansas v. Sanders*, 442 U.S. 753, 762, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979)). A closed eyeglass case is similar. The case serves “as a repository for a person’s private effects, when one wishes to carry them. *Sanders*, 442 U.S. at 762, n. 9. The eyeglass case here is, then, associated with an expectation of privacy and is protected by the Fourth Amendment. ...*See*: fn.3 at 960.

The State also claims that Mr. Jerred’s failure to challenge the sufficiency of the Information at trial precludes his raising that issue on appeal. The State makes its claim under the invited error doctrine. However, the State fails to establish that Mr. Jerred did anything to “invite error”

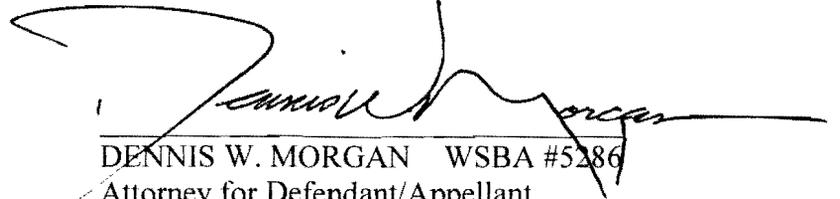
“The State bears the burden of proof on invited error.” *State v. Thomas*, 150 Wn. 2d 821, 844, 83 P. 3d 970 (2004).

The law is clear that a criminal defendant can challenge the sufficiency of the charging document post-trial. *See: State v. Kjorsvik*, 117 Wn. 2d 93, 105, 812 P. 2d 86 (1991).

Mr. Jerred otherwise relies upon the argument contained in his initial brief.

DATED this 12th day of April, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis W. Morgan", is written over a horizontal line. The signature is stylized and extends to the right of the line.

DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600