

No. 31832-0-III

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

FILED  
JAN 29, 2014  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

HEATH T. WISDOM

Appellant.

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

The Honorable Judge Robert Lawrence-Berry

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APPELLANT'S OPENING BRIEF

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### **A. SUMMARY OF ARGUMENT**

Law enforcement arrested Heath Wisdom for possession of a stolen vehicle. They then searched the vehicle, deputies said, “for inventory purposes.” But a lawful inventory search was exceeded when deputies searched a closed bag that they knew belonged to the defendant and was likely to contain drug items. This investigatory search under the guise of an inventory search does not pass legal muster. The search could not be justified as a lawful search incident to arrest, police were required to inventory the bag as a sealed unit until a warrant could be obtained, Mr. Wisdom never consented to any such search, and no other exception to the warrant requirement justified the search. Prior to intruding into Mr. Wisdom’s private belongings, deputies were required to obtain a search warrant. There was no risk to obtaining a warrant prior to the search, such as destruction of evidence or any safety concern. The warrantless search was unlawful and should have resulted in the evidence being suppressed. Mr. Wisdom’s convictions should now be reversed and dismissed with prejudice.

### **B. ASSIGNMENTS OF ERROR**

1. The court erred by denying defendant’s motion to suppress after a warrantless search of a closed container within the vehicle that defendant was driving prior to his arrest.

2. The court erred by characterizing the deputy's search as an inventory search (FF 4), though the court appears to have properly concluded that the scope of any permissible inventory search was exceeded (CL 1).
3. The court erred by admitting the evidence obtained without a warrant based on the defendant's admission about drugs located in the vehicle.
4. The court erred by convicting the defendant of four drug charges based on unlawfully-obtained evidence.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the drug evidence within the closed shaving kit bag should have been suppressed because it was discovered by law enforcement during a warrantless search, not lawfully incident to arrest and exceeding the scope of any lawful inventory search.

- a. The search of the vehicle and shaving kit bag as a "search incident to arrest" would clearly violate *Arizona v. Gant*.<sup>1</sup>
- b. The search of the shaving kit bag exceeded any permissible inventory search; the bag should not have been opened without a warrant and should have instead been inventoried as a sealed unit.

Issue 2: Whether Mr. Wisdom maintained a reasonable expectation of privacy in the black bag even after he admitted having drugs there, at least until a telephonic warrant could be obtained.

- a. Mr. Wisdom did not consent for deputies to search the vehicle or the shaving kit bag.
- b. The trial court confused the probable cause test for issuing a search warrant with legal justification for a warrantless search.

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<sup>1</sup> *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

#### **D. STATEMENT OF THE CASE**

On October 6, 2010, Heath Wisdom was driving a pickup truck near Moxee, Washington, with an ATV in the back of the truck; both vehicles had been reported stolen. (RP 4) Deputy Boyer pulled Mr. Wisdom over and arrested him for possession of a stolen vehicle. (RP 5) Mr. Wisdom was handcuffed, taken to the patrol vehicle and searched, at which time the deputy located a pipe that Mr. Wisdom admitted he used for smoking methamphetamine. (RP 5)

Deputy Boyer read Mr. Wisdom his rights, which the defendant waived. (RP 5) The deputy asked if there were drugs in the truck, and Mr. Wisdom said there were “quite a bit” of drugs on the front seat. (RP 5, 8) The only thing on the front seat that could contain the drugs in question was a black shaving kit bag. (RP 12-13, 17) The bag was closed, but deputies could see large amounts of money through the mesh of the bag. (RP 5, 8) After photographing the truck, Deputy Boyer removed the bag from the vehicle, opened it, and found large amounts of money, methamphetamine, cocaine, ecstasy, heroin, and drug paraphernalia inside. (RP 7-10) No warrant was ever obtained for this search; deputies indicated they were merely doing an inventory search to protect against potential liability claims. (RP 9, 12, 15, 17, 19-21) The truck was towed for impound since its legal owner could not be located. (RP 9; CP 24-25)

Mr. Wisdom moved to suppress the drug evidence as the product of an unlawful and warrantless search. But the trial court denied the motion, concluding without reference to any legal authority: “When a person tells law enforcement that drugs are in a specific area, it is unreasonable for that person to have any expectation of privacy in that limited area.” (CP 39)

Mr. Wisdom was convicted following a stipulated facts trial of possession of methamphetamine with intent to deliver and three other counts of unlawful possession of controlled substances. He was given a standard range sentence to run concurrent to that of his longer federal conviction and sentence, which has a projected release date in 2025. (CP 41, 58-59) Mr. Wisdom timely appealed his State drug convictions. (CP 66)

#### **E. ARGUMENT**

**Issue 1: Whether the drug evidence within the closed shaving kit bag should have been suppressed because it was discovered by law enforcement during a warrantless search, not lawfully incident to arrest, and exceeding the scope of any lawful inventory search.**

The court erred by failing to suppress the evidence discovered during the warrantless search of a closed shaving kit bag within the vehicle Mr. Wisdom was driving prior to his arrest. The search of the bag was not conducted with authority of law (i.e., a warrant), and none of the narrow and carefully drawn exceptions to the warrant requirement existed

to otherwise justify the warrantless search. Indeed, the search of the bag could not be justified as a search incident to arrest since Mr. Wisdom had already been removed from the vehicle, the bag was not associated with his person, and there was no cause to believe that it contained destructible evidence of the crime of his arrest for possession of a stolen vehicle. Next, any permissible inventory search was exceeded, because deputies were required to inventory the shaving kit bag as a sealed unit rather than opening it before obtaining a warrant. Finally, no “manifest necessity” existed for opening the bag during the inventory search, such as a safety risk or potential destruction of evidence.

As a threshold matter, this Court reviews a trial court’s findings of fact following a motion to suppress for substantial evidence and its conclusions of law de novo. *State v. Green*, \_\_ Wn. App. \_\_, 312 P.3d 669 (2013) (internal citations omitted).

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” U.S. CONST. amend. IV. Traditionally providing greater protections than its federal counterpart, our State Constitution guarantees that “[n]o personal shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST. art. I, §7. “[I]t is the warrant which provides the ‘authority of law’ referenced

therein.” *State v. Ladson*, 138 Wn.2d 343, 350, 79 P.2d 833 (1999) (internal cites omitted). “[A] warrantless search is per se unreasonable unless the State proves that one of the few ‘carefully drawn and jealously guarded exceptions’ [to the warrant requirement] applies.” *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013).

“Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops.” *Ladson*, 138 Wn.2d at 349-50. “The burden is always on the state to prove one of these narrow exceptions...” by “clear, cogent and convincing evidence.” *Id.*; *Green*, 312 P.3d at 672.

**a. The search of the vehicle and shaving kit bag as a “search incident to arrest” would clearly violate *Arizona v. Gant*.<sup>2</sup>**

In *Arizona v. Gant*, the U.S. Supreme Court held, “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.” *Gant*, 129 S.Ct. at 1718-19 (emphasis added).

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<sup>2</sup> *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

Applying our Washington State Constitution, this State's Supreme Court has further held, "the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search." *State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009) (emphasis added). Importantly, "when a search can be delayed to obtain a warrant without running afoul of [these] concerns..., the warrant must be obtained." *State v. Valdez*, 167 Wn.2d 761, 777, 779, 224 P.3d 751 (2009) ("There was no showing that a delay to obtain a warrant would have endangered officers or resulted in evidence related to the crime of arrest being concealed or destroyed.")

Here, Mr. Wisdom had already been handcuffed and taken away from the vehicle to the patrol car. Law enforcement acknowledged there was no risk of the defendant getting to the contents of the vehicle when it was searched. (RP 18) There was no evidence that anything contained in the vehicle, and particularly the shaving kit bag, posed a safety risk that might otherwise require officers to perform a warrantless search and seizure. Nothing suggested that officers might need to find and seize any items in the shaving kit bag with haste to prevent concealment or destruction of evidence. Also, deputies did not purport to search the

vehicle for evidence of the crime of Mr. Wisdom's arrest (possession of a stolen vehicle). Instead, as the trial court correctly acknowledged, law enforcement officials knew that their search of the bag would likely reveal evidence of a drug-related crime, different from the crime of arrest. But such knowledge could at best justify a warrant, not a warrantless search incident to Mr. Wisdom's arrest for possession of a stolen vehicle.

Finally, the shaving kit bag was left in the vehicle when Mr. Wisdom was led to the patrol car; it was not immediately associated with Mr. Wisdom's person or within his immediate control at the time of his arrest, so it was clearly outside the scope of a permissible search incident to arrest. *C.f., Byrd*, 178 Wn.2d at 616-25 (court upheld search of purse on arrestee's lap, explaining that search of arrestee and items within his or her immediate control is permissible if the arrestee has actual possession of it at the time of a lawful custodial arrest, but warning that this narrowly drawn exception does not extend to articles in an arrestee's constructive possession or possession immediately preceding arrest).

The search of the vehicle and the shaving kit bag could not be justified as incident to Mr. Wisdom's arrest without running afoul of *Arizona v. Gant*, *supra* and its progeny. The evidence should have been suppressed.

**b. The search of the shaving kit bag exceeded any permissible inventory search; the bag should not have been opened without a warrant and should have instead been inventoried as a sealed unit.**

Another exception to the warrant requirement is an inventory search accompanying a lawful vehicle impound.<sup>3</sup> *Green*, 312 P.3d at 673 (citing *Ladson*, 138 Wn.2d at 349; *State v. White*, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998)). The “purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function.” *State v. Dugas*, 109 Wn. App. 592, 36 P.3d 577 (2001). “The principle purposes of an inventory search are to (1) protect the vehicle owner’s property; (2) protect the police against false claims of theft by the owner; and (3) protect the police from potential danger.” *Id.* (citing *State v. Houser*, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980)).

“An inventory search is permitted only to the extent necessary to achieve its purposes.” *Tyler*, 177 Wn.2d at 708. “Not every inventory taken in compliance with police department regulations is lawful and where a search is improper it cannot be legitimized by conducting it pursuant to standard police procedure.” *Houser*, 95 Wn.2d at 154; *White*, 135 Wn.2d at 771) (quoting *State v. Jewell*, 338 So.2d 633, 640 (1976)

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<sup>3</sup> Mr. Wisdom acknowledges that deputies could lawfully impound the vehicle he was driving since it was reported stolen and its rightful owner could not be located at the time of Mr. Wisdom’s arrest. *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013); 12 Wash. Prac. §2805; RCW 46.55.113(2)(e); *State v. Davis*, 29 Wn. App. 691, 698, 630 P.2d 938 (1981).

(“Unconstitutional searches cannot be constitutionalized by standardizing them as a part of normal police practice.”)

Because of the possibility for abuse under the guise of inventory searches, the State is required to “show that the search was conducted in good faith and not as a pretext<sup>4</sup> for an investigatory search.” *Houser*, 95 Wn.2d at 155. “The direction and scope of an inventory search ‘must be limited to the purpose justifying the exception: finding, listing and securing from loss during detention the property of the person detained, and protection of police and bailees from liability due to dishonest claims of theft.’” *Green*, 312 P.3d at 673 (quoting *Ladson*, 138 Wn.2d at 372). “When conditions justify a reasonable inventory search, in good faith and without pretext, the officer’s purpose is unrelated to discovering contraband or evidence of criminal activity.” *Tyler*, 177 Wn.2d at 707. “[C]ontraband or incriminating evidence found during a true inventory is discovered through inadvertence.” *Davis*, 29 Wn. App. at 697.

A proper inventory search should not be “enlarged on the basis of remote risks.” *Houser*, 95 Wn.2d at 155. During an inventory search of a vehicle in *State v. Green*, an officer looked inside a bag and seized receipts, admittedly not for inventory purposes but as possible evidence of a crime. 312 P.3d at 674. The court held that the seizure of the receipts

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<sup>4</sup> “Pretext is, by definition, a false reason used to disguise a real motive...,” taking into account an officer’s subjective and objective motives for a search. *Ladson*, 138 Wn.2d at 359.

exceeded the lawful scope of the inventory search and became an investigatory search unsupported by any exception to the warrant requirement. *Id.* The receipts were suppressed. *Id.*

Here, too, deputies exceeded the scope of a permissible inventory search and expanded their search for investigative purposes when they opened the shaving kit bag. Deputies knew that the bag very likely contained drugs, and they opened it to search for evidence of a drug crime. The deputies subjectively knew or objectively should have known that drugs would be discovered in the shaving kit bag. They did not discover the drugs and paraphernalia by mere inadvertence during their inventory search. It is not permissible to expand a standard inventory search to justify what was truly a warrantless investigatory search of the bag in this case.

The critical question herein is whether an inventory search of a vehicle that is to be impounded automatically extends to searching sealed containers within that vehicle in order to protect law enforcement from false claims. The settled answer to this question is “no.” “[A]n inventory search may not be unlimited in scope... [It] must be restricted to effectuating the purposes that justify [the inventory search] exception...” *Dugas*, 109 Wn. App. at 597-98. “During the course of a proper inventory search, personal luggage, whether locked or not...may not be examined

absent a reasonable belief that its contents could be dangerous when stored.” 12 Wash. Prac. §2805. “Searches of locked trunks and locked containers is prohibited under the vehicle inventory exception because privacy interests exhibited by placement of any property in such containers and in trunks outweigh the need to inventory the contents to protect the property or protect against false claims of theft.” *Tyler*, 177 Wn.2d at 708 (citing *White*, 135 Wn.2d at 766-67). “[W]here a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents. Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit.” *Dugas*, 109 Wn. App. at 597-98 (citing *Houser*, 95 Wn.2d at 158) (emphasis added).

In *State v. Dugas* and *State v. Houser*, both courts held that a permissible inventory search did not extend to searching closed containers. In *Dugas*, the defendant had abandoned his jacket on his vehicle prior to his arrest. The court held that officers could inventory the jacket for safekeeping, but they could not open containers within that jacket under the guise of an inventory search. *Dugas*, 109 Wn. App. at 597.

Similarly, in *State v. Houser*, the court held that officers exceeded the bounds of a permissible inventory search when they searched and

found drugs in a toiletry kit within a locked trunk. *Houser*, 95 Wn.2d at 156. The court explained, “We must inquire whether it was necessary for the police to examine the contents of a closed toiletry bag within a locked trunk in order to effectuate the valid purposes of an inventory search.” *Id.* The court did not believe such a search was necessary and that the defendant’s privacy interests outweighed the need for such an inventory search. *Id.* at 156-57.<sup>5</sup>

In the cases above, the courts held that the purposes of an inventory search were better satisfied, including protecting law enforcement from false claims, by inventorying the containers as sealed units. *Dugas*, 109 Wn. App. at 599; *Houser*, 95 Wn.2d at 156. In fact, opening the containers, the courts believed, was neither necessary nor reasonable to guard against a false property loss claim. *Dugas*, 109 Wn. App. at 599. “Balancing the legitimate needs of the police against the right to be free of warrantless intrusions into ones personal effects..., it was unreasonable to search inside the closed container.” *Id. Accord*, *Houser*, 95 Wn.2d at 156 (“the legitimate purposes behind an inventory

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<sup>5</sup> The *Houser* court relied on *People v. Counterman*, 556 P.2d 481, 485 (Col. 1976). There, the court held that police exceeded the proper scope of an inventory search by opening and searching the contents of a knapsack when the contents were securely sealed and gave no indication of danger. The court noted that police should have inventoried the knapsack as a sealed unit so that it is “locked up as a whole in police headquarters, has never been opened and its contents have never been removed, reshuffled and replaced... this would minimize the possibility of loss and the possibility of false claims against police by the owner.” *Houser*, 95 Wn.2d at 159.

search could have been effectuated by inventorying as a unit the closed toiletry kit in which the drugs were found.”)

The only exception that permits searching a locked trunk or container during an inventory search is where “manifest necessity exists.” *Tyler*, 177 Wn.2d at 708, 711 (citing *White*, 135 Wn.2d at 772 (“possibility of theft does not rise to the level of manifest necessity”)); *Houser*, 95 Wn.2d at 156, 158-59; *c.f. State v. Ferguson*, 131 Wn. App. 694, 703-04, 128 P.3d 1271 (2006) (chemical fumes indicated likelihood of highly combustible materials involving a mobile methamphetamine lab and presented manifest necessity for search). “Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit...[unless] police have reason to believe a container ‘holds instrumentalities which could be dangerous even when sitting idly in the police locker...’” *Houser*, 95 Wn.2d at 158 (internal quotations omitted).

Here, there was no indication that the closed shaving kit bag contained anything hazardous or dangerous. There was no indication that any destructible evidence was located within that bag that precluded officers from storing the bag as a sealed unit in a police locker and then obtaining a warrant to search the bag. The supposed risk of theft of the contents of the bag was so remote that it cannot be considered a “manifest

necessity.” *Tyler*, 177 Wn.2d at 708, 711 (remote or hypothetical possibility of theft does not alone rise to the level of manifest necessity); *accord*, *White*, 135 Wn.2d at 771 (“simply stated, the possibility of theft does not rise to the level of manifest necessity.”) Police would be better protected by inventorying the bag as a sealed unit. There was no manifest necessity in this case to justify the warrantless search of the shaving kit bag. The bag should have remained closed and been inventoried as a sealed unit until a warrant could be properly obtained.

**Issue 2: Whether Mr. Wisdom maintained a reasonable expectation of privacy in the black bag even after he admitted having drugs there, at least until a warrant could be obtained.**

To the extent the trial court may have relied on a consent theory to justify the warrantless search in this case, it erred. The State agreed below and Mr. Wisdom maintains that he did not legally consent for the deputies to search the vehicle or shaving kit bag, so the consent exception cannot justify the warrantless intrusion. To the extent that the court sua sponte crafted a new exception to the warrant requirement – that the defendant had no expectation of privacy in a place where he admitted drugs were located – the court’s decision is not supported by law. While the court’s theory may have justified issuance of a search warrant, it did not justify the warrantless search. The trial court’s premise does not fit within any narrowly or carefully drawn exception to the warrant requirement.

**a. Mr. Wisdom did not consent for deputies to search the vehicle or the shaving kit bag.**

Consent to search is an established exception to the warrant requirement. 12 Wash. Prac. §2710; *State v. Hastings*, 119 Wn.2d 229, 234, 830 P.2d 658 (1992). “[W]here a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents.” *Houser*, 95 Wn.2d at 158. In order to obtain valid consent, police “must advise the suspect that (1) consent need not be given, (2) consent may be revoked at any time, and (3) consent may be limited.” 12 Wash. Prac. §2711; Wash. Const., art. I, §7; *State v. Ferrier*, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998).

Consent must be voluntarily given – that is, it must be the product of an informed decision – , and the ensuing search cannot exceed the scope of the consent. *Hastings*, 119 Wn.2d at 234; *Ferrier*, 136 Wn.2d at 118; *State v. Cole*, 31 Wn. App. 501, 505, 643 P.2d 675 (1982) (defendant consented to search of vehicle, but not for search of luggage found within, so court suppressed the evidence). “Whether consent was freely given is to be determined by the totality of the circumstances.” *Cole*, 31 Wn. App. at 504 (internal citations omitted). “Absent a warrant, the burden is on the State to prove by clear and convincing evidence consent was truly voluntary and fully informed.” *Id.*

Here, the State did not prove by clear and convincing evidence that Mr. Wisdom consented for deputies to search the vehicle and the shaving kit bag. In fact, the deputy acknowledged that he did not ask for or receive consent to search from the defendant (RP 12), and the State conceded that no consent existed to justify the search (CP 33-34). And yet, the trial court was concerned that Mr. Wisdom had essentially “consented” to the search by telling officers where drugs were located. (See RP 26, 28, 47; CP 39)

Although it is somewhat ambiguous from the court’s colloquy, memorandum decision and written findings, to the extent that the trial court found consent in order to justify the warrantless search, its decision was not supported by law or the circumstances of this particular case. Mr. Wisdom did not expressly or voluntarily agree for officers to search; there was no consent that was the product of an informed decision with the requisite consent warnings; and Mr. Wisdom certainly never consented for officers to search beyond the vehicle into the shaving kit bag. The consent exception does not justify the warrantless search in this case.

**b. The trial court erroneously interjected the probable cause test for issuing a search warrant in place of legal justification for a warrantless search.**

Courts have “long expressed a strong preference for the use of a search warrant... because it imposes an orderly procedure whereby a

neutral and detached judicial officers can make an impartial determination of probable cause before a deprivation of one's rights occurs." 12 Wash. Prac. §2502. Police must "obtain a search warrant before conducting a probable cause search on unlocked personal luggage found in an automobile..." *Houser*, 95 Wn.2d at 157-58. This requirement recognizes a "citizens privacy interest in personal luggage, albeit unlocked, to be significant." *Id.*

A "search warrant may issue only upon a showing that there is probable cause for the search..." which exists where an officer possesses sufficient reliable basic articulable facts to support a reasonable inference that more probably than not an offense has been committed and that particular evidence of that offense is located in a particular place." 12 Wash. Prac. §2502; *Ferguson*, 131 Wn. App. at 704.

Where a person admits that drugs are in a certain location, a warrant may be issued to search and seize those drugs. *See e.g., In re Brennan*, 117 Wn. App. 797, 800, 72 P.3d 182 (2003). But just because drugs are located in a certain location, such as luggage in a vehicle, does not mean that that place is subject to a lower degree of constitutional protection prior to a warrant being obtained. *See e.g., Cole*, 31 Wn. App. at 505-06 (searching luggage within a vehicle requires a warrant or one of the narrowly drawn exceptions to the warrant requirement). And, "absent

a valid exception to a search warrant, ...luggage and containers exhibiting a reasonable expectation of privacy are deserving of the full protection of the Fourth Amendment.” *Cole*, 31 Wn. App. at 506.

As set forth above, the exceptions to the warrant requirement are carefully and narrowly drawn to include: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops.” *Ladson*, 138 Wn.2d at 349-50. None of these exceptions applied in this case, so the trial court appears to have crafted a new exception of admission. There is no legal support for this theory. Where a defendant admits that drugs are in a certain location, absent one of the aforementioned exceptions, police must obtain a warrant to perform their investigatory search.

Mr. Wisdom maintained an expectation of privacy in his bag, regardless of his statements to police, at least until a warrant to search that bag could be obtained. Suppressing in this case furthers the overall goal of ensuring that neutral and detached magistrates make decisions that allow privacy intrusions. There was no reason to search the shaving kit bag without first obtaining a warrant. The evidence searched for was not destructible or a safety concern, and none of the other exceptions above were established. The trial court erred by allowing the warrantless search

rather than requiring officers to present the same pre-search facts to a neutral and detached magistrate for a lawful warrant.

Since the discovery of the drugs and paraphernalia in the shaving kit bag stemmed from an excessive and illegal search, the evidence seized must be suppressed. *State v. Larson*, 93 Wn.2d 638, 645-46, 611 P.2d 771 (1980); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Without this evidence, Mr. Wisdom's conviction cannot stand and must be reversed and dismissed with prejudice.

F. **CONCLUSION**

The trial court erred by denying Mr. Wisdom's motion to suppress. Mr. Wisdom's conviction should be reversed and the charge dismissed with prejudice.

Respectfully submitted this 29<sup>th</sup> day of January, 2014.

/s/ Kristina M. Nichols

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 31832-0-III  
vs. )  
HEATH WISDOM ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on January 29, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Heath T. Wisdom, Register No. 13870-085  
FCI Herlong  
Federal Correctional Institution  
P.O. BOX 800  
Herlong, CA 96113

Having obtained prior permission, I also served David Trefry at David.Trefry@co.yakima.wa.us and appeals@co.yakima.wa.us.

Dated this 29<sup>th</sup> day of January, 2014.

/s/ Kristina M. Nichols  
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