

FILED  
August 2, 2016  
Court of Appeals  
Division III  
State of Washington  
NO. 33874-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent

v.

JOEL GROVES,

Appellant.

---

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

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APPELLANT'S REPLY BRIEF

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## A. ARGUMENT IN REPLY

The suspicion Joel Groves had committed a crime arose almost immediately after he was stopped by Trooper Paul Carroll. Even though Mr. Groves provided the trooper with reasonable alternatives to seizing his motorcycle, the motorcycle was seized pursuant to a mandatory policy which requires impoundment for all motorcycles where the driver does not possess a motorcycle endorsement.

The trooper continued to search the motorcycle for evidence of true ownership, despite having no evidence the motorcycle was stolen. When the trooper opened closed containers to investigate whether Mr. Groves had committed a crime, the trooper exceeded the lawful authority of an inventory search. The State failed to establish the search was conducted according to established policies and the evidence should have been suppressed.

Mr. Groves also asks for dismissal because the Court failed to issue written findings of fact and the oral findings are not clear and comprehensive. Further, the State failed to present sufficient evidence of an intent to deliver a controlled substance or an essential element of possession of a legend drug. The State did introduce evidence of prior

acts, with no apparent purpose. For all of these reasons, Mr. Grove asks this Court for relief.

**1. WITHOUT CLEAR AND COMPREHENSIVE FINDINGS OF FACT, DISMISSAL IS REQUIRED.**

The State argues remand for findings of fact is the appropriate remedy for the failure of the court to enter findings. State's response at 20. This is only an appropriate remedy where the trial courts oral findings are clear and comprehensive. *State v. Smith*, 68 Wn.App. 201, 209, 842 P.2d 494 (1992); *see also* CrR 3.6.

As is apparent from both the State's response and Mr. Grove's opening brief, both parties are attempting to surmise what the trial court intended from the very brief comments the court made before it decided not to suppress the evidence seized from Mr. Groves. The State guesses that the trial court intended to address *Arizona v. Gant* but also argues the search should be sustained as a lawful inventory search. State's response at 20, 23. Neither of these rules are cited by the court in the oral ruling it made. Rather, the court focused upon the two different versions of what it perceived had occurred. 1 RP 116. For the court, the question it was asked to judge appears to regard a credibility determination and whether Mr. Groves was in possession of the required documents to establish ownership. 1 RP 116.

The findings are not sufficient to understand the trial court's theory for why the violation of Mr. Grove's right to be free from unlawful searches should be upheld. The appropriate remedy for this violation is dismissal. CrR 3.6.

**2. THE STATE FAILED TO SUSTAIN ITS BURDEN OF DEMONSTRATING THE SEARCH AND SEIZURE OF THE MOTORCYCLE WAS CONSTITUTIONAL.**

*a. Law enforcement did not consider reasonable alternatives before impounding the motorcycle.*

The State argues the warrantless search of Mr. Grove's motorcycle should be sustained as a legal inventory stop. State's response at 21. While the State notes the police had allowed Mr. Groves to leave before they began to search the motorcycle, thereby establishing that the search was only an inventory search, this is not the standard courts require to sustain an inventory stop.

Instead, in order to impound a vehicle, the State must first establish law enforcement considered reasonable alternatives to impoundment before impounding the vehicle. *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013); (citing *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980)). Impounding a vehicle when reasonable alternatives exist is unreasonable and unconstitutional. *Tyler*, 177 Wn.2d at 699, *see also* U.S. Const. amends. 4, 14, and Const. art. I, §7.

No such consideration was made here. 1 RP 76. According to Trooper Carroll, the State Patrol's policy was to impound any motorcycle where the rider does not have a motorcycle endorsement. 1 RP 75. Because Mr. Groves had no endorsement, the trooper impounded the motorcycle pursuant to their policy and did not consider other alternatives. 1 RP 75-76, 80, 93. He did not attempt to make alternative arrangements, such as allowing a licensed driver to drive it away, having it parked safely, or having the motorcycle towed at Mr. Groves' expense. 1 RP 76, 80-81.

The evidence at the hearing established there were reasonable alternatives. Mr. Groves offered to have a friend come and drive the motorcycle away. 1 RP 103-04. The trooper declined the invitation and did not provide any other alternatives to Mr. Groves other than impoundment which, according to him, happened in every case where a driver lacks a motorcycle endorsement. 1 RP 75-76. Because the State failed to establish it had considered reasonable alternatives to impoundment, suppression is required.

*b. The lack of discretionary authority to seize the motorcycle requires suppression.*

While the State addresses whether reasonable alternatives were available to impoundment, it does not address whether the officer had

the discretionary authority not to impound the motorcycle, which is improper when it exceeds statutory authority.

The policy requiring impoundment for all drivers who lacked the motorcycle endorsement removed discretionary authority from individual law enforcement officers, transforming a discretionary authority to impound into a mandatory impoundment. Impounding a vehicle under a mandatory policy that exceeds statutory authority is improper. *See In re Impoundment of Chevrolet Truck, WA License No.A00125A ex rel. Registered/Legal Owner*, 148 Wn.2d 145, 162, 60 P.3d 53 (2002). Because Trooper Carroll impounded the motorcycle pursuant to the State Patrol's policy and failed to consider reasonable alternatives to impoundment, impounding the motorcycle was an unreasonable, unconstitutional seizure.

*c. The search of the motorcycle exceeded exceed the scope of a proper inventory search.*

The State asks this court to affirm the search because the search was done to determine ownership of the vehicle. State's response at 24. This Court should find law enforcement exceeded its authority. The State failed to prove the search fell within one of the "carefully drawn and jealously guarded" exceptions to the rule against warrantless

searches. *State v. VanNess*, 186 Wn.App. 148, 155, 344 P.3d 713 (2015).

An inventory search is not an excuse to search for evidence of a crime. Evidence found in the course of an inventory search should be suppressed if the purpose of the search was a warrantless, exploratory search of the vehicle. *Houser*, 95 Wn.2d at 148. The State must show that the search was conducted in good faith and not as a pretext for an investigatory search. *Id.* at 155.

Trooper Carrol was suspicious “until the very end” that the motorcycle he had seized from Mr. Groves was stolen. 1 RP 77. The trooper testified he removed the seat of the motorbike to try and find ownership documents. 1 RP 93. His purpose in opening the two closed cases was to continue to investigate whether the motorcycle was stolen. 1RP 94-95. Continued investigation of whether a crime has occurred is outside the scope of a valid inventory search and any evidence found in the course of that investigation must be suppressed. *Houser*, 95 Wn.2d at 155.

d. *The State concedes the purpose for opening the zippered containers was “to investigate the true and actual owner of the motorcycle,” a purpose outside the scope of a lawful inventory search.*

The State argues the purpose of the officer looking into the two zippered pouches was “to investigate the true and actual owner of the motorcycle.” State’s response at 25. This would appear to be a concession that the true purpose of conducting the warrantless search was not to safeguard the seized property, but to investigate whether Mr. Groves could be prosecuted for a crime. Should this Court accept this apparent concession, the only remedy for what the State describes as an investigatory stop is to suppress. *Houser*, 95 Wn.2d at 148.

Even without the concession, the State had no lawful authority to search inside the closed containers. This Court has held that where a closed container in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of that container in an inventory search. *Wisdom*, 187 Wn.App. at 674 (citing *Houser*, 95 Wn.2d at 158); accord *VanNess*, 186 Wn.App. at 163-64, *State v. Dugas*, 109 Wn.App. 592, 597, 36 P.3d 577 (2001) (closed container in a seized jacket should have been inventoried as a unit).

*e. The failure to establish the search was conducted pursuant to standardized procedures requires reversal.*

The State's brief does not appear to address law enforcement's failure to establish standardized procedures for the inventory search of the motorcycle, although the State does recognize standardized procedures are required. State's response at 23 (citing *Tyler*, 177 Wn.2d 690).

Inventory searches must in fact be conducted according to standard criteria. *Colorado v. Bertine*, 479 U.S. 367, 374 n. 6, 375, 107 S.Ct. 738, 743, 93 L.Ed.2d 739 (1987). Where there is no policy governing whether or not an officer should open a container, evidence found in a closed container should be suppressed. *Florida v. Wells*, 495 U.S. 1, 5, 100 S.Ct. 1632, 109 L.Ed.2d 1 (1990).

The State did not present any evidence at the suppression hearing that standard policy or procedure were followed by the trooper, as is required of a valid inventory search. *Bertine*, 479 U.S. at 375. Because the State failed to prove a standard policy governed Trooper Carroll's search, the search is invalid and the evidence found should be suppressed. *Id.* at 375; *Wells*, 495 U.S. at 5.

### **3. THERE WAS INSUFFICIENT EVIDENCE OF AN INTENT TO DELIVER.**

The State argues there was ample evidence of an intent to deliver. State's response at 27. Without "substantial evidence as to the possessor's intent", courts are wary of turning a simple possession case into a possession with intent to deliver. *State v. Brown*, 68 Wn.App. 480, 483, 843 P.2d 1098 (1993) (citing *State v. Harris*, 14 Wn.App. 414, 418, 542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976)). This is true even if the amount of the controlled substance is greater than what is consistent with personal use, or if the substance is separated into individual baggies. *State v. Campos*, 100 Wn.App. 218, 222, 998 P.2d 893 (2000).

The only evidence seized from Mr. Groves was a zipped container with two bags of methamphetamine, along with smaller bags. 2B RP 268. The weight of the drugs was under three quarters of an ounce. 2B RP 272. A pipe commonly used to smoke methamphetamine was found with the drugs. 2B RP 268. In a container separate from the drugs, the trooper found a digital scale. 2B RP 269.

There was no evidence Mr. Groves was involved in any kind of delivery. He was not the subject of an investigation. He did not have a large quantity of money. There were no ledger books. 2B RP 280.

There was no evidence Mr. Groves intended to sell the methamphetamine recovered from the motorcycle.

There was insufficient evidence to establish an intent to deliver. While the trooper testified the drugs seized had a value of \$1,900, this is not necessarily a large amount. As more affluent communities become involved in drug use, the amount purchased increases. There are many reasons why a user with income is likely to possess a larger amount, including the reduction in the number of transactions the user has with the seller and the reduced likelihood of getting caught. *See, e.g., State v. Kovac*, 50 Wn.App. 117, 120, 747 P.2d 484 (1987). Further, a police officer's opinion that a person possessed more drugs than normal for personal use is also insufficient to establish intent to deliver. *State v. Lopez*, 79 Wn.App. 755, 768, 904 P.2d 1179 (1995).

For the same reasons, a scale should no longer be thought of as a hallmark of intent. A person who is purchasing a large quantity of drugs is likely to make sure they are getting what they paid for. Possession of a scale does not establish the person intended to deliver the drugs they were found to possess.

**4. THE STATE DID NOT ESTABLISH AN ESSENTIAL ELEMENT OF POSSESSION OF A LEGEND DRUG.**

While the State cites WPIC 55.01 in its response brief as an appropriate instruction for possession of a legend drug, it does not address whether the evidence presented to the jury established the essential elements of this crime. State's response at 29. This Court should find the State failed to prove an essential element of this crime.

It is unlawful to possess a legend drug, except upon the order or prescription of a physician. RCW 69.41.030. An essential element of this crime is that the possession occurred without "the order or prescription of a physician." *Id.* Mr. Groves does not contest that the WPIC cited in the State's response is an accurate statement of the law.

The State did not, however, introduce any evidence to show Mr. Groves was not entitled to possess the oxycodone and does not contest this in its response. The State was obligated to prove this charge beyond a reasonable doubt. *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725, 728 (2006), *as amended* (May 26, 2006). Failure to prove this essential element requires reversal.

**5. THE RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE STATE IMPROPERLY RELIED UPON PRIOR ACT EVIDENCE.**

The State argues the reason why the jury heard evidence of other acts was to put the investigation into context. State's response at 30-31. This is an improper basis for the use of prior act evidence. Because the prejudicial effect of the prior act evidence outweighed its probative value, the evidence should have been excluded. The use of this evidence violated Mr. Groves' right to a fair trial.

Prior to admitting evidence of prior acts, a trial court must find by a preponderance of the evidence the prior act, identify the purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 173, 163 P.3d 786 (2007). The evidence must also be relevant to be admissible. *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009); ER 402.

Exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes and accusations. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). Courts must be wary of the potential risk prior act evidence has in prejudicing an

accused and be aware of situations “where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986).

The evidence of the motorcycle being stolen should never have been put before the jury. Not only was the evidence irrelevant and highly prejudicial, but the State could not even prove the motorcycle was actually stolen. 2B RP 281. To the contrary, the evidence suggested the motorcycle was not stolen. This was a motorcycle which needed extensive repairs and had probably been salvaged. 2B RP 257 (motorcycle had dented fuel tank, had been repainted and some of the equipment on it was not original). No witness came forward declaring the motorcycle had been stolen from them. Mr. Groves was never charged with possession of stolen property.

Additionally, the question of whether the motorcycle was stolen bears no relevancy as to whether Mr. Groves committed the crimes charged, all of which deal with whether he possessed controlled substances. *See* ER 403. Instead, the apparent sole purpose of letting the jury know about the investigation of the motorcycle appears to have been to persuade the jury to convict Mr. Groves of the crimes charged.

The use of the evidence by the State violated ER 404(b) and deprived Mr. Groves of his right to a fair trial.

## B. CONCLUSION

Because the findings of the court were not clear and compelling, CrR 3.6 requires dismissal.

Should this Court reach the issue of whether the warrantless search of the motorcycle was lawful, this Court should find the State failed to meet its burden of demonstrating the lawfulness of the search. Law enforcement had reasonable alternatives to impounding the motorcycle and exceeded the scope of an inventory search. The State's concession it was searching for evidence of the true ownership of the motorcycle fails to justify the search of the zipped containers. The failure to demonstrate the search was conducted according to standardized procedures also makes this search unlawful.

The State also failed to present sufficient evidence of an intent to deliver and failed to prove an essential element of the possession of a legend drug.

Finally, Mr. Groves' right to a fair trial was denied when the State relied upon prior act evidence without establishing a proper basis for the introduction of such evidence.

Mr. Groves respectfully requests this Court grant him the relief argued for above.

DATED this 1st day of August 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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

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RESPONDENT,	)	
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v.	)	NO. 33874-6-III
	)	
JOEL GROVES,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF AUGUST, 2016.

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