

NO. 80113-4

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IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DENNIS RAY KIRWIN,

Petitioner.

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COURT OF APPEALS No. 33642-1-II

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
CAUSE NO. 05-1-00165-1

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HONORABLE GARY R. TABOR, Judge

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SUPPLEMENTAL BRIEF OF RESPONDENT - STATE OF  
WASHINGTON

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A. STATEMENT OF THE ISSUES

1. Whether state law has preempted the field of litter control or whether Olympia Municipal Code 9.40.110 is in conflict with state anti-littering laws such as to render that ordinance unconstitutional under Article XI, section 11 of the Washington State Constitution.

2. Should this court find that OMC 9.40.110 is unconstitutional, given that it had not been ruled invalid at the time of the arrest in this case, whether it was not so grossly or flagrantly unconstitutional that a person of reasonable prudence would recognize its flaws, and therefore the arrest in this case pursuant to OMC 9.40.110, made with probable cause for a misdemeanor offense committed in the presence of the arresting officer, was valid.

B. STATEMENT OF THE CASE

On January 22, 2005, at about 2 a.m., Olympia Police Officer Korey Pearce was on patrol duty. RP 8, 11. While operating his patrol vehicle within the city of Olympia, he observed a pickup being driven ahead of him. Two persons could be seen in the truck. Pearce then observed a beer can being thrown out the passenger window of the truck. The can hit the sidewalk and the contents spilled out. RP 8.

Pearce initiated a stop of the truck and contacted the occupants. Before the truck came to

a stop, Pearce observed the passenger reach down and slightly to his left as if trying to conceal something. RP 12. The defendant, Dennis Kirwin, was the driver. The male passenger, Casey Irwin, admitted he had thrown the beer can out in order to avoid being caught with an open container in a vehicle. RP 9. Pearce placed Irwin under arrest for littering in violation of the Olympia Municipal Code.

The driver, Kirwin, was asked to exit the vehicle. Given the early morning hour of this stop and the other circumstances, including the bulky, baggy outer clothing worn by Kirwin, Pearce frisked the driver, noting a pack of Marlboro cigarettes and a large roll of money in a front, breast pocket. RP 11.

Pearce then conducted a search of the vehicle in the area where Irwin had been seated. He found a black bag with several small baggies inside, which appeared to contain a controlled substance. RP 13. Pearce noted that the center console of the vehicle was locked.

Pearce asked Kirwin for consent to use a key to open the console. RP 13-14. Pearce explained that Kirwin had the right to refuse consent. RP 38. Kirwin initially responded that it was his boss's truck. Pearce indicated that the choice of consent was Kirwin's, since Kirwin was in possession of the truck. Kirwin then gave his consent to the search. RP 14. Inside the console, Pearce found an envelope containing \$2,800 and a Marlboro cigarette pack with a baggie of suspected methamphetamine inside. RP 15, 57. Pearce seized these items and placed Kirwin under arrest for possession of a controlled substance. RP 16, 57.

Pearce initially advised Kirwin of his right to an attorney and that the money found in the console was being seized along with the methamphetamine. Kirwin made a spontaneous comment that the money was from a settlement. RP 57. Pearce then informed the defendant of his full Miranda rights which Kirwin then waived. Kirwin acknowledged that the methamphetamine and

the money were his. RP 57.

On January 25, 2005, the defendant was charged by Information in Thurston County Superior Court with one count of unlawful possession of a controlled substance, to wit: methamphetamine. CP 2. Thereafter, no CrR 3.5 or CrR 3.6 hearing was requested by the defendant. A jury trial was held on this charge on July 27, 2005, before the Honorable Judge Gary Tabor.

At trial, testimony was received from Officer Pearce and Olympia Police evidence custodian Chester Mackaben. The substance found in the center console was admitted into evidence, as was a report from Washington State Patrol Crime Laboratory forensic scientist Jane Boysen which concluded after testing that the substance was methamphetamine. RP 16, 28-30. The defendant did not choose to testify. The jury returned a verdict of guilty as charged.

On appeal, in Appellant's Brief, the defendant raised for the first time the argument that evidence of the initial search of the vehicle

should have been suppressed, claiming the search was pursuant to an unlawful arrest, and therefore the results of the consent search that followed, including the methamphetamine that was the basis for this charge, should have been suppressed as well. The defendant argued that littering was a civil infraction under state law, specifically RCW 70.93.060(2)(a) and RCW 7.80.120(1)(c), and not a crime. However, in Appellant's Brief, the defendant failed to note that littering was a crime, a misdemeanor, under the Olympia Municipal Code, OMC 9.40.110 and OMC 9.64.010. The defendant also claimed ineffective assistance of counsel because a suppression motion had not been made pretrial.

In Respondent's Brief, the State challenged the defendant's attempt to raise this search and seizure issue for the first time on appeal. The State also argued that the arrest was for the misdemeanor violation of the city code which had occurred in the officer's presence, and so the search pursuant to that arrest was lawful.

No reply brief was filed by the defendant. Nor did the defendant seek permission from the court, pursuant to RAP 12.1(b), to present additional written briefing to the court, with an opportunity for the State to respond, on a new issue prior to oral argument. Instead, at oral argument, Appellant's counsel attempted to argue for the first time that Olympia's designation of littering as a crime was unconstitutional because it was in conflict with state law, and attempted to cite case law in support of that argument which had never been cited in any briefing to the court. The State objected to a legal issue being raised for the first time in oral argument.

In its decision of this case, the Court of Appeals ruled that it was unfair to consider this claim of unconstitutionality, since it was being raised for the first time during oral argument without notice allowing the State to prepare a response, citing State v. Olson, 126 Wn.2d 315, 319-320, 893 P.2d 629 (1995), and State v. Johnson, 119 Wn.2d 167, 170-171, 829 P.2d 1082

(1992). State v. Kirwin, 137 Wn. App. 387, 394-395, 153 P.2d 883 (2007). The court also determined that the defendant's argument would have been without merit even if it had been properly raised. Kirwin, 137 Wn. App. at 395.

Further, the Court of Appeals noted that the defendant had the burden to show that the challenged search was prejudicial, and therefore manifest error, since the claim was being made for the first time on appeal pursuant to RAP 2.5(a)(3). Since the defendant had not properly challenged the Olympia ordinance which was the basis for the arrest, the required showing of prejudice had not been made. Kirwin, 137 Wn. App. at 393. The defendant's conviction was affirmed.

In the defendant's petition for review to the Washington Supreme Court, the defendant's challenge to the decision of the Court of Appeals claimed that the State had failed to carry its burden on the issue of the constitutionality of the Olympia ordinance on which the arrest in this case was based. The defendant failed to

acknowledge in the petition that the Court of Appeals, in fact, ruled that the issue of the constitutionality of that ordinance had been improperly raised by the defendant for the first time at oral argument, and that the defendant had failed in his burden to show manifest error in challenging the search in this case.

#### C. ARGUMENT

1. State law has not preempted the field of litter control nor is Olympia Municipal Code 9.40.110 in conflict with state anti-littering laws, and therefore OMC 9.40.110 is constitutional and provided valid legal authority for the arrest of the passenger in this case, leading to the search incident to arrest and the subsequent consent search during which methamphetamine was located.

Clearly, the actions of the defendant before the Court of Appeals were prejudicial to the State. By never challenging the constitutionality of the Olympia ordinance in any briefing, and then failing to move under RAP 12.1(b) to reopen briefing to address a new issue, the attempt to raise this issue for the first time during oral argument left the State with no notice or chance

to prepare a response. State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). Thus, the Court of Appeals acted properly in refusing to consider this issue. State v. Johnson, 119 Wn.2d 167, 170-171, 829 P.2d 1082 (1992). At the same time, the State does not dispute the ability of this court to consider that issue in regard to the search in this case, since the State presently has the ability to address the arguments raised.

Both RCW 70.93.060(1) and Olympia Municipal Code (OMC) 9.40.110 prohibit littering using substantially the same language. RCW 70.93.060(1) states that:

. . . no person shall throw, drop, deposit discard, or otherwise dispose of litter upon any public property in the state or upon private property in this state not owned by him or her or in the waters of this state whether from a vehicle or otherwise including but not limited to any public highway, public park, beach, campground, forest land, recreational area, trailer park, highway, road, street, or alley except:

(a) When the property is designated by the state or its agencies or political subdivisions for the disposal of garbage and refuse, and the person is authorized to use such property for that purpose;

(b) Into a litter receptacle in a manner that

will prevent litter from being carried away or deposited by the elements upon any part of the private or public property or waters; . .

OMC 9.40.110 states as follows:

No person shall throw, drop, deposit, discard, or otherwise dispose of litter, as that term is defined in RCW 70.93.030(4), upon any public property within the city or upon private property within the city not owned by him or in the waters of the city whether from a vehicle or otherwise, including but not limited to any sidewalk, street, alley, highway or park, except:

A. When such property is designated by the city for the disposal of garbage and refuse, and such person is authorized to use such property for such purpose;

B. Into a litter receptacle in such a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of such private or public property or waters.

Under the state statute, littering in an amount less than or equal to one cubic foot is a class 3 civil infraction as provided in RCW 7.80.120. RCW 70.93.060(2)(a). Under RCW 7.80.120(1)(c), the maximum penalty for a class 3 infraction is fifty dollars. If the litter is greater than one cubic foot but less than one cubic yard, littering is a misdemeanor under the state statute. It is then a gross misdemeanor if

the litter is one cubic yard or more. RCW 70.93.060(2)(b) and (c).

Under OMC 9.40.110(C), any amount of littering is a misdemeanor, with a maximum penalty of 90 days in jail or a \$1,000 fine or both. OMC 9.64.010(A). Thus, a violation of the city ordinance prohibiting littering may cause an offender to face a potential maximum penalty that is less, equal to, or more than that person would face under the state statute, depending on the amount of litter.

The evidence in this case, without refutation, showed that the passenger Irwin violated OMC 9.40.110, a misdemeanor, by throwing the beer can onto the sidewalk, and that he did so in the presence of Officer Pearce. Therefore, pursuant to RCW 10.31.100, Pearce was legally authorized to arrest Irwin, thereby justifying a search of the area in the vehicle within the reach of Irwin. State v. Cass, 62 Wn. App. 793, 797, 816 P.2d 57 (1991); See State v. Stroud, 106 Wn.2d 144, 152-153, 720 P.2d 436 (1986).

Nevertheless, the defendant argues that OMC 9.40.110 did not provide valid legal authority for the arrest of Irwin, claiming that the Olympia ordinance is in conflict with the state statute on littering. Article XI, section 11, of the Washington State Constitution empowers a city to make and enforce within its limits such local police, sanitary and other regulations as are not in conflict with the laws of the state. Thus, the defendant challenges the constitutional validity of OMC 9.40.110 pursuant to Article XI, section 11. A heavy burden rests upon the defendant in challenging the constitutionality of OMC 9.40.110, and every presumption must be made in favor of the constitutional validity of that ordinance. HJS Development Inc. v. Pierce County, 148 Wn.2d 451, 477, 61 P.3d 1141 (2003).

The defendant seeks to satisfy that burden by arguing that Chaney v. Fetterly, 100 Wn. App. 140, 995 P.2d 1284 (2000) constitutes controlling precedent and requires a finding that OMC 9.40.110 is in conflict with the state littering statute.

That claim is certainly not accurate. In Chaney, there was a challenge to a property encroachment suit in Superior Court for an injunction and damages based on an argument that the plaintiffs had failed to exhaust administrative remedies under the Pierce County Code. The appellate court ruled that such exhaustion of administrative remedies was not required because the Superior Court had concurrent jurisdiction over the matter under state law, and that law would trump any local ordinance holding otherwise. Chaney, 100 Wn. App. at 149-150. In the present case, there is no claim that the City of Olympia had exclusive authority over restrictions on litter, and therefore Chaney is of little assistance here.

A local ordinance will be found unconstitutional only if a state enactment was intended to preempt the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the ordinance and a state statute which cannot be harmonized. Rabon v. City of Seattle, 135 Wn.2d 278, 287, 957 P.2d 621 (1998). Litter

is obviously a matter of local concern. Nothing in Chapter 70.93 RCW indicates any state intent to preempt local efforts to control littering. In fact, evidence of a contrary intent can be found in RCW 70.93.020.

. . . The intent of this chapter is to add to and to coordinate existing recycling and litter control and removal efforts and not terminate or supplant such efforts.

RCW 70.93.020. Thus, there is no basis to argue that state law has preempted the field of litter control.

A local ordinance is in conflict with a state statute if the ordinance permits that which the state statute forbids or forbids that which the state statute permits. The conflict must be direct and irreconcilable, and the ordinance is required to yield to the state statute only if the two cannot be harmonized. Tacoma v. Luvene, 118 Wn.2d 826, 834-835, 827 P.2d 1374 (1992). Certainly, in this regard, OMC 9.40.110 does not conflict with RCW 70.93.060. The ordinance does not permit anything which RCW 70.93.060 forbids, nor does it forbid anything permitted by the state

statute.

Thus, the issue becomes whether the greater penalty imposed by the ordinance for certain littering violations is alone sufficient to create a conflict invalidating the ordinance where the ordinance otherwise is fully in harmony with the state statute. In City of Spokane v. White, 102 Wn. App. 955, 10 P.3d 1095 (2000), the Court of Appeals considered a Spokane ordinance that extended criminal penalties to willful or knowing assaults whereas the state statute imposed such penalties only for intentional assaults. The appellate court found that the two provisions were not in conflict because one did not permit what the other forbade or vice versa. The two provisions merely differed in the scope of the prohibition imposed, and that was not enough to cause the ordinance to be unconstitutional. White, 102 Wn. App. at 962-963. Here, the ordinance merely extends the application of a criminal penalty to that which is forbidden by both, and so should not invalidate the ordinance.

Finally, there is language in the state statutory scheme indicating the intent that cities have the latitude to choose whether or not to make a local ordinance on littering uniform with state statutes on all points. Under RCW 70.93.200, the Washington Department of Ecology is given the responsibility to administer the state's anti-littering programs. Among its other duties, the department is required to:

*Recommend* to the governing bodies of all local governments that they adopt ordinances *similar* to the provisions of this chapter.

RCW 70.93.200(3) (emphasis added). The word "recommend" clearly shows an intent to rely upon persuasion, rather than a legal mandate, to bring local ordinances more in line with the state scheme. Moreover, the goal is phrased as causing local ordinances to become "similar" to state provisions, not necessarily identical. As shown above, Olympia's ordinance on littering is similar to RCW 70.93.060. The differences that remain do not create a conflict with state law. Therefore, OMC 9.40.110 is constitutionally permissible under

Article XI, section 11 of the state constitution.

2. Even if there was a conflict between OMC 9.40.110 and state law sufficient to render that ordinance unconstitutional, the ordinance was valid at the time of the arrest in this case and it was certainly not so grossly or flagrantly unconstitutional that a person of reasonable prudence would recognize its flaws, and therefore the arrest in this case made upon probable cause for an offense committed in the officer's presence would still be valid despite a later determination regarding the unconstitutionality of the Olympia ordinance.

In the above section, the State has argued why OMC 9.40.110 is a valid exercise of the police powers of the city of Olympia as provided for in Article XI, section 11 of the Washington State Constitution, and that it has not been preempted by state law nor is it in conflict with state statutes on littering, and therefore is constitutional and was a valid legal basis for the arrest of the passenger in this case. Consequently, the search incident to that arrest, and the consent search that followed, were also valid.

Should this court disagree with the analysis of the constitutionality of OMC 9.40.110 set forth

above, and find that the ordinance is in direct conflict with state littering statutes, the arrest in this case should still be held to have been valid. The general rule is that an arrest under legal authority valid at the time of the arrest and made properly with probable cause remains valid even if the legal authority for the arrest is later held to be unconstitutional. State v. Potter, 156 Wn.2d 835, 842-843, 132 P.3d 1089 (2006). See also Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979). A narrow exception to this rule exists when the legal authority for the arrest was so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to perceive its flaws. Potter, 156 Wn.2d at 843.

Here, at the time of the arrest, the state had not preempted the field with regard to anti-littering provisions. No local littering ordinance had been found unconstitutional on the basis of being in conflict with state laws on littering. As discussed above, general rules

governing when such a conflict exists provided considerable support for the legitimacy of the ordinance in this case. Language in state anti-littering statutes was also supportive. Thus, even should this court ultimately decide that the ordinance is unconstitutional, it cannot be said that the ordinance is so grossly and flagrantly unconstitutional such that this would have been apparent to a reasonable person at the time of the arrest of the passenger in this case.

Officer Pearce saw the beer can thrown from the passenger side of the vehicle. Thus, it happened in his presence. Irwin was the passenger in the vehicle. Irwin admitted he was the one who threw the can onto the sidewalk. Thus, Pearce had probable cause for this arrest.

A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer . . .

RCW 10.31.100. OMC 9.40.110 provided legal authority for the misdemeanor offense which had occurred in the presence of Pearce and so the

arrest of Irwin was valid.

That arrest provided the basis for the search of the vehicle in the area where Irwin had been sitting. Finding the center console locked, consent was obtained from Kirwin to search there as well. Therefore, there would not have been any basis for suppression of the methamphetamine found in the center console even if a CrR 3.6 hearing had been requested prior to the trial in this case.

D. CONCLUSION

Based on the arguments set forth above, the State respectfully requests that this court affirm the defendant's conviction for unlawful possession of a controlled substance.

DATED this 19th day of February, 2008.

Respectfully submitted,

  
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