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NO. 57568-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICAH TIBBLES,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY,

The Honorable Vicki I. Churchill

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that the search of Mr. Tibbles' vehicle did not violate Washington Constitution article 1, § 7.

2. The trial court erred in concluding that the search of Mr. Tibbles' vehicle was permitted under State v. O'Neill, 148 Wn.2d 564, 62 P.2d 489 (2003).

3. The trial court erred in entering the "Conclusion of Law Preface" concluding that the search of Mr. Tibbles' vehicle was permitted as an "exigent circumstances/probable cause" exception to the search warrant requirement and was not a search incident to arrest.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. O'Neill states that article 1, § 7, Washington Constitution, forbids prearrest searches incident to arrest. Does the Superior Court's decision affirming the prearrest search of Mr. Tibbles' vehicle conflict with this Washington State Supreme Court decision? (Assignment of Error 2)

2. When Mr. Tibbles was stopped for a defective taillight, he was courteous and calm. He remained calm throughout the officer's questioning regarding marijuana use and the subsequent searches of his person and vehicle. The officer never expressed suspicion about weapons and no weapons were located. Did the trial court err in deciding that

exigent circumstances provided authority of law under article 1, § 7 to search Mr. Tibbles' vehicle before arrest? (Assignment of Error 3)

3. In the context of an automobile stop, a prearrest warrantless search conducted pursuant to the exigent circumstances exception to the warrant requirement must be justified by specific facts pointing to an urgent need to search immediately, or by an objective suspicion that the person may be armed or dangerous. Where the trial court found no danger to the officer and made no finding of urgency, did the court err in concluding that the officer's suspicion that marijuana may be in the vehicle justified the prearrest search under the "probable cause/exigency" exception to the search warrant requirement? (Assignments of Error 1-3)

C. STATEMENT OF THE CASE

On an October evening in 2004, Micah Tibbles was driving a vehicle in Island County. CP 44 (Memorandum Decision of Island County District Court, attached as Appendix A). Trooper Larsen observed that Mr. Tibbles' vehicle had a defective left taillight and stopped him. *Id.* Trooper Larsen contacted Mr. Tibbles at the driver's side of the vehicle and requested his driver's license, vehicle registration, and proof of insurance. *Id.* Mr. Tibbles produced a license but was unable to produce registration or proof of insurance. *Id.*

While speaking with Mr. Tibbles, Trooper Larsen smelled the odor of marijuana coming from the vehicle. *Id.* Trooper Larsen then asked Mr. Tibbles to step out of the vehicle. *Id.* He did not arrest Mr. Tibbles at this time. *Id.* When Trooper Larsen relayed his observation regarding the odor to Mr. Tibbles, Mr. Tibbles denied possessing any marijuana. *Id.* Trooper Larsen then searched Mr. Tibbles, finding no marijuana. *Id.* After asking Mr. Tibbles whether he had smoked any marijuana that day and being told that he had not, Trooper Larsen searched the interior of Mr. Tibbles' vehicle. *Id.* The search revealed a glass pipe and a substance that appeared to be marijuana under the front passenger seat. *Id.* Mr. Tibbles told Trooper Larsen that the substance was not his. *Id.* Trooper Larsen then arrested Mr. Tibbles for possession of marijuana and paraphernalia. *Id.*

Before trial, Mr. Tibbles moved unsuccessfully for suppression, arguing that under *State v. O'Neill*, 148 Wn.2d 564, 62 P.2d 489 (2003), the prearrest search of Mr. Tibbles' vehicle violated article 1, § 7, Washington Constitution. *Id.* In the trial court's March 31, 2005 Memorandum Decision, the court noted that of the seven possible exceptions to the warrant requirement,¹ "[t]he only exception that could

¹ The court listed the seven exceptions as (1) Consent, (2) Stop and frisk, (3) Search incident to lawful arrest, (4) Probable cause/exigent circumstances, (5) Hot pursuit, (6) Plain view, and (7) Inventory. Memorandum Decision at 2.

apply in this case is (4) Probable cause/exigent circumstances.” CP 44 (Appendix A at 2.) Beginning its decision by noting that probable cause to arrest and search the occupants of a car for possession of a controlled substance exists when a trained, experienced officer detects the odor of a controlled substance emanating from an automobile, citing *State v. Hammond*, 24 Wn. App. 596, 600 (1979), the trial court concluded based on federal law that “[i]f a car is readily mobile and probable cause exists to believe that it contains contraband, it may be searched without a separate exigency requirement. (citing *Pennsylvania v. Labson*, 115 L.Ed.2d 1031 (1996). CP 45 (Appendix A at 3.)

Despite its conclusion that the plain view doctrine did not apply here, the district court analogized the smell of marijuana in Mr. Tibbles’ vehicle to the officer in *O’Neill* seeing a suspected coke spoon in plain view in the vehicle (citing *State v. O’Neill*, 148 Wn.2d 564, 62 P.2d 489 (2003). CP 45 (Appendix A at 3.) The court termed this an “exigent circumstance.” CP 45-46 (Appendix A at 3-4.) The trial court explained that this exception requires proof of probable cause to believe that a crime has been committed; that items of evidentiary value relating to that crime will be found in the premises to be searched; and that exigent circumstances exist which do not permit a reasonable time and delay for a judicial officer to evaluate and act upon probable cause applications for

warrants by police officers. CP 46 (Appendix A at 4.) According to the trial court, the factors that govern a finding of exigent circumstances are (1) the degree of urgency and the amount of time necessary to obtain a warrant; (2) a reasonable belief that contraband was about to be removed; (3) the possibility of danger to police officers guarding the area while the warrant was obtained; (4) indications that the possessor of contraband was aware of police activity directed at them; and (5) the ready destructibility of the contraband, and the officer's knowledge that disposal efforts are characteristic behavior of persons engaged in a particular line of criminal activity. *Id.* The trial court's factors did not include seriousness of the offense. *Id.*

The district court determined that exigent circumstances existed here because (1) Trooper Larsen believed that evidence relating to the use or possession of marijuana was present in a vehicle which was under the control of a defendant he intended to cite and release; (2) Trooper Larsen had informed the defendant of his suspicions concerning the marijuana, and had physically searched the defendant; and (3) evidence of controlled substances crime is readily destroyed. CP 46-47 (Appendix A at 4-5.) The trial court did not make any finding that either Trooper Larsen or the public were in any danger, nor did the court make a finding that there was

any urgency or that there was insufficient time to obtain a warrant. *Id.*

Mr. Tibbles timely appealed to Superior Court.

The Superior Court, noting that the facts are undisputed, affirmed the District Court, deciding that exigent circumstances provided authority of law to search Mr. Tibbles' car because (1) the officer was alone, (2) it was late at night, (3) the officer had alerted Mr. Tibbles to the officer's suspicion that marijuana might be in the car, (4) there was probable cause to arrest, (5) the vehicle was mobile, and (6) the contraband might be destroyed if no search occurred. 2 RP 6²; CP 13. Mr. Tibbles sought discretionary review of the RALJ decision entered by the Island County Superior Court. Review was granted and this brief timely follows.

D. ARGUMENT

THE TRIAL AND SUPERIOR COURT'S DECISIONS
DO NOT COMPORT WITH THE PROTECTIONS OF
WASHINGTON CONSTITUTION ARTICLE 1, § 7 AND
CONTRAVENTE THE SUPREME COURT'S DECISION IN
State v. O'Neill

1. Washington Constitution, Article I, § 7 provides greater privacy protection than does the Fourth Amendment of the United States Constitution. Article I, § 7 provides: "No person shall be disturbed in his

² The Verbatim Report of Proceedings consists of two volumes, from December 7, 2005 consisting of 16 pages and from December 15, 2005 consisting of 9 pages. These volumes are not sequentially paginated. Hereafter, counsel shall refer to the December 7 hearing as "1 RP" and the December 15 hearing as "2 RP", followed in each case by a page designation.

private affairs, or his home invaded, without authority of law." This provision differs from the Fourth Amendment in that article I, § 7 "clearly recognizes an individual's right to privacy with no express limitations." *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Accordingly, while article I, § 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy but, more broadly, protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999); *State v. Johnson*, 128 Wn.2d 431, 446, 909 P.2d 293 (1996); *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990).

It is by now axiomatic that article I, § 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69, n.1, 917 P.2d 563 (1996); "Any analysis of article I, § 7 in Washington begins with the proposition that warrantless searches are unreasonable per se." *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). This is a strict rule. *White*, 135 Wn.2d at 769. Exceptions to the warrant requirement are limited and narrowly drawn. *Id.*; *Hendrickson*, 129 Wn.2d at 70-71. The State, therefore, bears

a heavy burden to prove the warrantless searches at issue fall within the exception it argues for. See *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

When assessing police intrusions into individuals' privacy, courts engage in a delicate balancing of interests, weighing safety and evidentiary concerns against the basic notion that the people of this state enjoy a measure of privacy that is, and will forever be, unassailable. See *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (Washington Constitution protects those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass and does not depend on subjective expectations of privacy).

2. The greater protections of Article 1, § 7, extend to the context of automobile searches. Our Supreme Court has long held that the right to be free from unreasonable governmental intrusion into one's "private affairs" encompasses automobiles and their contents. See, e.g., *State v. Mendez*, 137 Wn.2d 208, 217, 219, 970 P.2d 722 (1999); *Hendrickson*, 129 Wn.2d at 69, n.1 (citing cases). "[P]reexisting Washington law indicates a general preference for greater privacy for automobiles and a greater protection for passengers than the Fourth Amendment" *Mendez*, 137 Wn.2d at 219.

Washington law indicates a general preference for greater privacy for automobiles than does the Fourth Amendment. *Mendez*, 137 Wn.2d at 219; *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004). Our Supreme Court has explicitly recognized that “[c]itizens of this state do not expect to surrender their article I, § 7, privacy guaranty when they step into an automobile with others, for as E.B. White put it, ‘Everything in life is somewhere else, and you get there in a car.’” *State v. Horrace*, 144 Wn.2d 386, 399, 28 P.3d 753 (2001). For over 80 years, our Supreme Court has closely analogized the privacy rights implicated in automobile searches to those implicated in searches of one’s home. *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999) (citing *State v. Gibbons*, 118 Wn.2d 171, 187-88, 203 P.390 (1922)).

3. Washington applies the exigent circumstances exception to the warrant requirement very narrowly. Our Supreme Court has adopted the factors used in federal cases to determine whether exigency justifies a warrantless intrusion into any private area: (1) a grave offense, particularly a crime of violence; (2) a suspect who is reasonably believed to be armed; (3) trustworthy information that the suspect is guilty; (4) strong reason to believe that the suspect is on the premises; (5) likelihood of escape if the suspect is not swiftly apprehended; and (6) entry can be made peaceably. *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 205 (1986). These six

elements supplement the five different exigent circumstances: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or the public; (4) mobility of a vehicle; and (5) mobility or destruction of the evidence. *State v. Ramirez*, 49 Wn. App. 814, 824, 819, n.4, 746 P.2d 344 (1987).

Our Supreme Court has carefully restricted automobile searches to balance an individual's privacy interest against a real state and societal need to search. The mere fact that a car is potentially mobile is not sufficient to support a warrantless search based on exigency; mere convenience is simply not enough. *State v. Patterson*, 112 Wn.2d 731, 734-35, 774 P.2d 10 (1989); *State v. Parker*, 139 Wn.2d 486, 501-02, 987 P.2d 73 (1999).

This reasoning comports with the general principle that warrantless searches of vehicles are related to the "hot pursuit" doctrine. *Patterson*, 112 Wn.2d 731. In both *McCary* and *Robinson*, the courts focused on the gravity of the offense (bank robberies); the immediacy of the investigation (cars found within 1 to 2 hours); the belief that the suspects were armed; the likelihood that the suspects, who were at large, would escape; and peaceable entry. *McCary v. Commonwealth*, 228 Va. 219, 228, 321 S.E.2d 637, 642 (1984) (listing decisions); *United States v. Robinson*, 533 F.2d 578, 583 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 956, 47 L.Ed.2d 32,

96 S.Ct. 1432 (1976). These decisions all demonstrate that the exigent circumstances exception is narrowly applied.

4. Mr. Tibbles' situation does not present exigent circumstances.

Washington courts in particular have been reluctant to apply the exigent circumstances exception to misdemeanor marijuana offenses. "The offenses for which the officers here had probable cause to arrest (use or possession of marijuana) were misdemeanors. Thus, using the *Welsh* analysis, we find the State's interest in preventing these crimes, though important, is not of sufficient magnitude to justify this warrantless entry and arrest under the Fourth Amendment. . . . Likewise, given the stricter protection afforded by Const. art. 1, § 7, that provision mandates the same conclusion." *Ramirez*, at 49 Wn. App. at 821.

In Washington, "the exigent circumstances doctrine is applicable only within the narrow range of circumstances that present a real danger to the police or the public or a real danger that evidence . . . might be lost." *State v. Counts*, 99 Wn.2d 54, 63, 659 P.2d 1087 (1983). *State v. McIntyre*, 39 Wn. App. 1, 5, 691 P.2d 587 (1984) presents the classic vehicle/exigency search situation. There, after a police officer had stopped McIntyre for a traffic violation, McIntyre fought with the officer, took his gun and threatened to kill him with it. The police traced McIntyre to his house and there arrested him without a warrant. Citing *Counts*, the Court

of Appeals held that the danger McIntyre presented demonstrated exigent circumstances justifying a warrantless search and seizure. *McIntyre*, at 5.

In *Counts*, the court found an exigency did not exist where the crime at issue was burglary of the clubhouse at a golf course. 99 Wn.2d at 59. After quickly locating a suspect near the clubhouse, the suspect named Mr. Counts as an accomplice. *Id.* Following the scent, a canine unit led police to Mr. Counts' home. Counts' father refused the police permission to enter the home to arrest his son. *Id.* An hour or more of bitter argument ensued during which Counts' father demanded that the police secure a warrant. *Id.* The officer in charge decided, however, to proceed with an immediate arrest and ultimately entered the home without a warrant and without consent. On appeal, Counts conceded the police had probable cause for arrest. *Id.* at 61. The Supreme Court held these circumstances did not amount to exigent circumstances since there was no "hot pursuit" and "[t]he police easily could have maintained surveillance while waiting for a warrant." *Id.* at 60-61. The only fact supporting a finding of exigency is mobility of the vehicle.

The leading Washington case regarding marijuana odor during traffic stops is *State v. Hammond*. In *Hammond*, the Court of Appeals held that an officer who is trained to detect the odor of marijuana can arrest and search a person at a traffic stop when the odor is present. *Id.* at

600. " If the marijuana odor constitutes probable cause to arrest the vehicle's occupants, police may of course search them incident to the arrest." *Id.* The *Hammond* court carefully distinguished the federal approach embodied in *People v. Chestnut*, 43 App. Div. 2d 260, 351 N.Y.S.2d 26 (1974), noting that it relied on a "different rationale." *Id.*

In *Chestnut*, the court sanctioned the search of the car's occupants in the absence of any arrest. The court agreed that the odor would constitute probable cause and felt a warrantless search was justified by the exigent circumstances of a vehicle stopped along the highway whose occupants are alerted to the officer's suspicions.

Id. Rather than adopt the federal *Chestnut* approach, the Court of Appeals declined to adopt the exigent circumstances/probable cause basis for such a search:

We do not reach the question, however, of whether the search warrant exception based on probable cause and exigent circumstances would apply to a search of an individual in these circumstances. We find that the officers in the instant case had probable cause to arrest Hammond for marijuana possession based on the marijuana odor in the vehicle, and to search him incident to that arrest.

Id. In the intervening years between *Hammond* and *O'Neill*, article 1, § 7 jurisprudence has developed considerably. As mentioned above, one of the areas in which heightened state constitutional privacy protections have been recognized is the area of automobile searches. In 1979, the *Hammond* court did not see fit to sanction an automobile search based on

the broad federal “probable cause/exigency” warrant exception when the odor of marijuana is present. Now, after over a quarter century of acknowledging heightened state privacy protections for Washington’s citizens, there is even less reason for this court to adopt the less protective federal approach to such searches. This court should adhere to the *Hammond* approach that such searches are properly analyzed as searches incident to arrest.

Finally, the plain language of *Hammond* shows that the last step of its analysis -- that an officer who detects marijuana odor in a vehicle may search the individual incident to arrest before actually arresting the individual – requires refinement in light of *O’Neill*. “As long as probable cause to arrest exists at the time of the search, however, the search can occur before the officers place the subject under formal arrest if the search and arrest constitute a unified and reasonable undertaking.” *Id.* at 600. While *O’Neill* certainly does not undermine the central holding of *Hammond*, *O’Neill* serves to refine *Hammond*’s approach. The *Hammond/O’Neill* approach to automobile searches based on the odor of marijuana is therefore that such searches may only occur after and incident to an actual arrest.

The appropriateness of the *Hammond/O’Neill* approach is well demonstrated in Mr. Tibbles’ case. Mr. Tibbles’ situation completely

lacks the urgency, danger, and seriousness that characterize searches justified by exigent circumstances; it is much more like *Counts* than *McIntyre*. Unlike *McIntyre*, there was no firearm and no threat to kill or harm anyone. The suspected offense, possession of a small amount of marijuana, is even less consequential than the burglary of a golf course clubhouse in *Counts*. Moreover, Washington courts have found that the State's interest in preventing and arresting for possession of marijuana is generally not of sufficient magnitude to justify warrantless searches. *State v. Ramirez*, 49 Wn.2d 814, 821, 746 P.2d 344 (1987); *State v. Chrisman*, 100 Wn.2d 814, 821-22, 676 P.2d 419 (1984). Indeed, there is a substantial body of federal law limiting use of the exigent circumstances exception to the warrant requirement strictly to felony arrests. *See Ramirez*, 49 Wn. App. at 819. *Hammond's* unwillingness to allow broadly-based "probable cause/exigency" searches for small amounts of marijuana reflects Washington's antipathy to this rationale. Given article 1, § 7's greater protections, and Washington's previous refusal to apply the broad "probable cause/exigency" rationale in this situation, it would be inconsistent with article 1, § 7 jurisprudence for this court to reverse course and recognize less privacy protection for Washington citizens in this situation than that offered by many federal courts.

Indeed, the Superior Court's stated rationale directly contradicts the Supreme Court's decision in *Chrisman*. *Chrisman* specifically disapproved warrantless searches of the home in pursuit of a misdemeanor amount of marijuana. 100 Wn.2d 821-22. Yet the Superior Court's RALJ decision stated,

. . . even analyzing this under article 1, section 6 of the Washington – Section 6 or 7, I'm sorry, of the Washington Constitution would find that this search was reasonable and here's some basis of that opinion: Washington courts have long held that an officer's reasonable belief that contraband is about to be destroyed constitutes exigent circumstances allowing an officer to enter a private residence to seize the contraband and since there is a greater protection of privacy interest in one's home than in one's automobile, it is reasonable that under both the Fourth Amendment and Article 1, Section 6 of the Washington constitution that an officer who has a reasonable belief that contraband is about to be destroyed may enter the vehicle and seize the contraband. I am denying the appeal . . .

2 RP 8. Contrary to the Superior Court's belief, article 1, § 7 does not permit warrantless searches of a residence in pursuit of under 40 grams of marijuana. *Chrisman*, 100 Wn.2d 821-22; *Ramirez*, 49 Wn. App. at 821. Accordingly, the Superior Court's conclusion that article 1, § 7 must therefore also permit a warrantless search of a vehicle in pursuit of a small amount of marijuana is incorrect.

Viewed with common sense, Mr. Tibbles' case simply does not support a finding of exigency. While vehicles are mobile, the officer

never feared that Mr. Tibbles might be armed or dangerous or that he might present a danger to himself or to the public. Although there was a possibility that Mr. Tibbles might be guilty of possessing a small amount of marijuana, there was no evidence showing that the officer had the training or ability to accurately identify the odor of marijuana. Lacking such evidence, the trial court erred in finding there was a strong possibility that Mr. Tibbles was guilty of a crime. CP 46. At most, any crime Mr. Tibbles might have committed would merely be a misdemeanor, a fact militating against invasion of his privacy without a warrant. *See Chrisman*, 100 Wn.2d at 821-22; *State v. Kull*, 155 Wn.2d 80, 86-87, 118 P.3d 307 (2005). While Mr. Tibbles was certainly present, the record is devoid of any information that he was more likely than any other automobile driver to escape if not swiftly apprehended. But even if he did escape, he was hardly a threat to the health, safety, or welfare of the citizens of Island County. Entry into Mr. Tibbles' vehicle could be made peaceably since he was cooperative during the entire process. Accordingly, there was no "hot pursuit."

In turn, the Superior Court's findings of "exigency" are no more than boilerplate findings that could be used to justify a prearrest search of any vehicle stopped at night that smelled of marijuana, or any vehicle stopped at night that might contain destructible contraband. They

completely fail to explain why exigent circumstances demanded that Mr. Tibbles be searched before he be arrested.

The Superior Court's first factor, that the officer was alone, does not contribute to exigency since the officer was armed, was not outnumbered, and Mr. Tibbles was calm and cooperative. The Superior Court's second factor, that it was late at night, carries very little weight given the rest of the circumstances. The Superior Court's third factor, that Mr. Tibbles had been alerted to the officer's suspicion that marijuana was likely in the vehicle, was entirely of the officer's creation. The officer could have arrested Mr. Tibbles without alerting him to anything, thus avoiding that factor. The Superior Court's fourth factor, probable cause to arrest, merely points to what should have been done before searching: arrest. It does not establish a circumstance authorizing the officer to search before arrest. The Superior Court's fifth factor, that the vehicle was mobile, is in itself insufficient to find exigent circumstances, and in combination with the minimal nature of the crime, carries little or no weight. It is of no use whatsoever in determining that there was an exigency that necessitated the officer search the vehicle before arresting Mr. Tibbles. The Superior Court's sixth factor, that there was a potential that contraband would be destroyed if there was no search, works strongly against finding exigency since in our state as well as many federal

jurisdictions, the use of exigent circumstances to authorize searches for small personal-use amounts of marijuana is disapproved.

Other reasonable options were available to the officer. He could have arrested Mr. Tibbles and searched him incident to arrest as contemplated by *Hammond/O'Neill*, or he could have obtained a telephonic search warrant. See *City of Seattle v. Altschuler*, 53 Wn. App. 317, 321, 766 P.2d 518 (1989) (holding police could have watched defendant's home while obtaining "the usual warrant or a telephonic warrant" rather than entering the defendant's home when defendant committed only a minor offense). Paradoxically, while finding the search was justified by exigent circumstances, the district trial court noted in its Order ". . . nor was any evidence offered as to the exigent circumstances justifying a warrantless search." CP 46 ("Further Observations.") Instead, the trial court

conditioned the admissibility of the evidence on the showing at trial that the officer had the training and experience to identify the smell of marijuana sufficient to establish probable cause to search and on a further adequate showing of sufficient exigent circumstance to justify dispensing with a judicially approved warrant.

Appendix B at 2. The district trial court reasoned that if the petitioner had chosen a bench or jury trial, the court "might well have suppressed the evidence," but that bringing a pretrial

suppression motion was not sufficient to trigger suppression since after the suppression motion was denied, the petitioner chose to proceed by way of stipulated trial. CP 46. By bringing a properly noted and briefed pretrial suppression motion, however, Mr. Tibbles fulfilled the procedural requirements necessary for receiving a suppression ruling.

As a result the district trial court, while admitting that there was no evidence of exigency and no reason to believe the officer knew the smell of marijuana, nonetheless admitted the evidence. The Superior Court rubberstamped this error. But the bottom line here is that there was no exigency, no warrant, and no pre-search arrest. As a result, the search violated article 1, § 7, Washington Constitution.

5. The pre-arrest search cannot be justified as taking place incident to arrest. The basic thrust of the trial court's ruling is that since the officer possessed probable cause to arrest Mr. Tibbles, the search was justified. Because the search here was admittedly pre-arrest, however, it cannot be justified by that doctrine. *State v. O'Neill*, 148 Wn.2d 564, 585, 591, 62 P.3d 489 (2003).

Our Supreme Court has held that when officers conduct a search incident to arrest, the arrest must precede the search, since authority of law

for the search derives from the arrest itself. *State v. O'Neill*, 148 Wn.2d 564, 585, 591, 62 P.3d 489 (2003). In *O'Neill*, the state claimed that the search incident to arrest of O'Neill's car was proper even though the officer did not arrest O'Neill before conducting the search. *Id.* at 583-84. The state argued that search incident to arrest can take place before actual custodial arrest as long as probable cause to arrest exists at the time of the search. *Id.* The Supreme Court disagreed: "Under Const. Art. 1, sec. 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest." *Id.* at 585.

The trial court's reliance upon probable cause to arrest as established in *Hammond* is misplaced since this rationale was rejected in *O'Neill*. Probable cause alone cannot justify a pre-arrest search. Adopting the trial court's rationale would effectively abolish the warrant requirement for automobile searches, since they are all potentially mobile. All that would be needed for an automobile search would be probable cause that any crime had been committed; no warrant or arrest or plain view would be needed. This interpretation violates the meaning of article 1, § 7. Accordingly, the trial court erred in failing to suppress the items found as a result of the illegal search of Mr. Tibbles' vehicle. *O'Neill*, 148 Wn.2d at 585; *Kull*, 155 Wn.2d 86-87.

E. CONCLUSION

The lower court's interpretation of *O'Neill* and of the exigent circumstances doctrine contravenes article 1, § 7. This court should reverse.

DATED this 25th day of September, 2006.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Blackford", written over a horizontal line.

Sharon J. Blackford, WSBA #25331
Law Office of Sharon J. Blackford
Attorney for Appellant Micah Tibbles

ISLAND COUNTY DISTRICT COURT
OAK HARBOR MUNICIPAL COURT
COUPEVILLE MUNICIPAL COURT
LANGLEY MUNICIPAL COURT
800 SE 8TH AVENUE
OAK HARBOR, WA 98277-3741

P. H. STROW
JUDGE

PHONE 360-675-5988
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LINDA B. KIPLING
COMMISSIONER

March 31, 2005

Chris Desmond
Platt & Arndt
PO Box 727
Coupeville WA 98239

Anne Lundwall
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PO Box 5000
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Memorandum Decision
C560932

Counsel:

The defense moved to suppress the items seized by Trooper Larsen during his search of the vehicle on October 28, 2004, as the products of an illegal, warrantless search. The defense specifically objected to the search because it could not be justified as a search incident to arrest (no arrest having been made) or as the result of inevitable discovery. The State replied asserting that the officer's observation (smell of marijuana) justified an immediate warrantless search of the vehicle.

On February 14, 2005, Trooper Larsen testified at a hearing held pursuant to CrRLJ 3.6, and I denied the motion to suppress finding that the otherwise unexplained smell of marijuana emanating from a vehicle driven by a sole occupant could provide probable cause for a search of the vehicle under the exigent circumstances exception to the general rule prohibiting warrantless searches. I will set out my findings of fact and conclusions of law below.

Findings of Fact

- 1) On October 28, 2004 at 2355 Trooper Norman Larsen stopped a vehicle driven by the defendant for a defective left taillight.
- 2) During the encounter Trooper Larson noticed the strong odor of marijuana coming from the vehicle.
- 3) The driver provided a license identifying himself as Micah N. Tibbles, but could not find the registration.
- 4) Trooper Larsen asked Mr. Tibbles to step out of the vehicle, and Mr. Tibbles complied
- 5) Trooper Larsen advised Mr. Tibbles that he could smell the odor of marijuana coming from the vehicle, and Mr. Tibbles stated that he did not have any marijuana
- 6) Trooper Larsen searched Mr. Tibbles and did not find any marijuana or paraphernalia on his person
- 7) Trooper Larsen asked Mr. Tibbles if he had smoked any marijuana that day, and Mr. Tibbles said that he had not.
- 8) Trooper Larsen then searched the interior of the vehicle and found a glass pipe, a glass container with suspected marijuana inside, a knife, and two lighters in a brown paper bag under the front passenger seat.
- 9) Trooper Larsen asked defendant about the marijuana, and Mr. Tibbles denied that it was his.
- 10) Defendant was not arrested but was cited and released at the scene, and the evidence was transported to the Oak Harbor Washington State Patrol evidence locker and assigned agency case number 04-13446.
- 11) The evidence was analyzed by Scott Legler, a leaf technician for the Washington State Patrol and found to contain 6.6 grams of marijuana.

Conclusions of Law

Preface

This was a warrantless search and not incident to arrest. As a general rule warrantless arrests are prohibited unless they fall within seven carefully defined exceptions:

- 1) Consent
- 2) Stop and frisk
- 3) Search incident to lawful arrest
- 4) Probable cause/exigent circumstances
- 5) Hot pursuit
- 6) Plain view
- 7) Inventory

The only exception that could apply in this case is (4) Probable cause/exigent circumstances.

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Washington courts have long held that probable cause to arrest and search the occupants of a car for possession of a controlled substance exists when a trained, experienced officer detects the odor of a controlled substance emanating from an automobile: *State v Hammond*, 24 Wn. App. 596, 600 (1979); irrespective of whether the smell comes from the person or the car. If a car is readily mobile and probable cause exists to believe that it contains contraband, it may be searched without a separate exigency requirement, *Pennsylvania v. Labson*, 15 L.Ed. 2nd 1031 (1996).

State v. O'Neill, 148 Wn. 2nd 564, 62 P.2d 489 (2003) has recently addressed searches of automobiles in similar circumstances holding that the search incident to arrest exception may not be used to justify a warrantless search of a motor vehicle when the custodial arrest follows the search. As *O'Neill* correctly points out, it is the fact of custodial arrest that provides the legal basis for the search, and consequently the actual fact of arrest must precede the search. *O'Neill* also holds that inevitable discovery cannot validate the arrest even where the search and arrest are close in time.

What *O'Neill* does not address is the probable cause/exigent circumstances exception to the warrant requirements. In *O'Neill*, the officer approached a vehicle, asked the occupant to step out to pat him down for identification, saw a suspected coke spoon on the floor, seized the spoon and then searched the entire vehicle finding controlled substances that were not otherwise in plain view. The court said that seizing the spoon without a warrant was justified by the plain view exception to the warrant requirement but held that the other items were seized during an illegal warrantless search. In *O'Neill*, the state had argued that under the existing case law that the search incident to arrest could precede the custodial arrest so long as the two were close in time. The state, in *O'Neill*, did not urge probable cause/exigent circumstances as an alternate basis for admitting the evidence, and were probably correct in not doing so, since there was no probable cause to believe any other evidence of controlled substance would be found as there was no indication by smell or other sense that such substance were present.

In our present case, the officer smelled marijuana, and could not find any on the defendant. Moreover the defendant denied consuming any that day. The officer then had probable cause to believe that marijuana either was in or had recently been in the defendant's automobile. His smell of the marijuana was essentially an equivalent to the *O'Neill* officer's visual observation of the coke spoon justifying the quick entry and seizure of any small amount of marijuana or paraphernalia the might be found. In *O'Neill*, once the spoon was found there was no probable cause to believe that other items were present. In our case, probable cause to search existed until something capable of producing the smell was found.

As I indicated at the suppression hearing, however, admission of the items seized would require prior proof that the officer was properly qualified to identify the smell of marijuana, as well as proof of exigent circumstances justifying forgoing the normal warrant requirement.

CERTIFICATION OF SERVICE

I, Sharon J. Blackford, certify that on the 25th day of September, 2006, I caused a true and correct copy of OPENING BRIEF OF APPELLANT to be served on:

Ann Lundwall
ISLAND COUNTY PROSECUTING ATTORNEY
P.O. Box 5000
Coupeville, WA 98239

VIA FIRST CLASS MAIL, POSTAGE PREPAID.

SIGNED in Seattle, Washington, this 25th day of September, 2006.


Sharon J. Blackford

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