

NO. 80308-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICAH NEWMAN TIBBLES,

Petitioner.

Superior Court Cause No. 05-1-00072-5
Court of Appeals No. 57568-6-1

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STATE OF WASHINGTON

SUPPLEMENTAL BRIEF IN RESPONSE TO PETITION FOR
REVIEW

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I. IDENTITY OF PARTY

The State of Washington, represented by the Island County Prosecuting Attorney, and his deputy, Colleen S. Kenimond, is the respondent to Petitioner's Petition for Discretionary Review.

II. RELIEF REQUESTED

The State requests the Court to affirm the Court of Appeals.

III. SUMMARY OF ARGUMENT

The District Court ruling does not conflict with *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003), because the court did not uphold the search as a search incident to arrest. The trial court instead found the search was justified by exigent circumstances. The Superior Court and the Court of Appeals made the same findings.

The exigent circumstances consisted of the lateness of the hour, the movable nature of the Petitioner's vehicle, and that the Petitioner was aware of the law enforcement officer's suspicions that marijuana was in his vehicle. Such circumstances presented a real possibility that evidence would be lost if the law enforcement officer had attempted to obtain a search warrant.

IV. ISSUES PRESENTED FOR REVIEW

Petitioner indicates one issue presented for appeal, but there are in fact two separate issues:

- A. Whether, The Odor Of Marijuana, Smelled By A Trooper During A Routine Vehicle Equipment Violation Stop, Justifies A Warrantless Search, Not Incident To Arrest, Where The Trooper Is Alone In A Rural Area, The Defendant Knows Of The Trooper's Suspicion Of Contraband In The Automobile, And It Is Late At Night?**

- B. Whether Such A Warrantless Search Conflicts With *State v. O'Neill*, 148 Wn. 2d 564, 62 P.3d 489 (2003).**

V. STATEMENT OF THE CASE

Respondent's statement of the case is based upon the written decision of the Court of Appeals (Attached as Appendix A) in this case.

A. Factual Statement Of The Case.

On October 28, 2004, at 2355 hours, Trooper Norman Larsen stopped a vehicle driven by the Petitioner for a defective left taillight. Appendix A at 2. The Petitioner was the only one present inside the vehicle and Trooper Larsen smelled a strong odor of marijuana coming from the vehicle. *Id.* Trooper Larsen asked the Petitioner to step out of the vehicle and advised him that he could smell the odor of marijuana emitting from the vehicle. *Id.* The Petitioner denied having any

marijuana. *Id.* The Petitioner got out of the car. Trooper Larsen then searched the Petitioner but did not find any marijuana or paraphernalia. *Id.* Trooper Larsen asked the Petitioner if he had smoked any marijuana that day and the Petitioner denied it. *Id.* Trooper Larsen then searched the Petitioner's vehicle and recovered a brown paper bag containing a glass pipe and a glass container with suspected marijuana inside from under the front passenger seat. *Id.* The Petitioner was cited and released at the scene.

B. Procedural Statement Of The Case.

The Petitioner moved to suppress the evidence seized by the Trooper. *Id.* The trial court denied the motion to suppress. The trial court found the Petitioner guilty of unlawful possession of marijuana and possession of drug paraphernalia following a trial on stipulated facts. *Id.*

The Petitioner appealed the trial court's ruling to Superior Court. The superior court found that out of the five circumstances identified by the courts as being exigent and justifying a warrantless search, mobility of the vehicle and mobility or destruction of the evidence applied to the current case. *Id.* The superior court affirmed the trial court's decision and found that the State proved exigent circumstances and the reasonableness of the warrantless search. *Id.* at 2-3.

The Petitioner moved for discretionary appeal to the Court of Appeals, which was granted. *Id.* The Court of Appeals concluded that exigent circumstances justified the warrantless search of Petitioner's automobile, and that the Superior Court's decision did not conflict with *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) because the search was not based on search incident to arrest. *Id.* at 1-2.

VI. ARGUMENT

A. Trial Court's Findings Are Unchallenged.

As the Court of Appeals correctly pointed out, "exigent circumstances were established based upon the stipulated facts." Appendix A at 5. Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

B. The Trial Court Correctly Ruled That The Warrantless Search Was Justified By Exigent Circumstances.

The Petitioner's two issues presented for review are based on the same issue: whether the search of the Petitioner's vehicle was justified by exigent circumstances. The Petitioner first argues that Petitioner's situation does not present exigent circumstances. Petitioner's Petition for Review at 10. The correct justification for a search of a motor vehicle

under exigent circumstances is set forth in *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, ___ L.Ed. ___ (1970).

Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search . . . [A] search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible. *Id.* at 1981.

As the Petitioner concedes, the leading Washington state case concerning marijuana odor detected during a traffic stop is *State v. Hammond*, 24 Wn.App. 596, 603 P.2d 377 (1979). Petition for Review at 12. In *Hammond*, the Court found probable cause for police to arrest and search an individual based on the odor of marijuana emitting from his automobile. The Court briefly discussed the different rationale applied in *People v. Chestnut*, 43 A.D.2d 260, 351 N.Y.S.2D 26 (1974), in which the New York Court allowed a search of a vehicle without an arrest based on exigent circumstances from the smell of marijuana and the fact that the vehicle's occupants had been alerted to the officer's suspicions. But the Washington Court indicated it would not examine whether exigent circumstances would apply because the officers already had arrested the Petitioner and searched him incident to that arrest. *Hammond* at 600.

In *State v. Huff*, 33 Wn.App. 304, 654 P.2d 1211 (1982), the court followed identical reasoning and determined, that based on exigent circumstances, "a warrantless search is constitutionally permissible if there is probable cause to search the automobile which is stopped, the car is movable, the occupants are alerted and contents of the car may never be found again if a warrant must be obtained first." *Id.* at 310.

In the present case, Trooper Larsen contacted the defendant at a vehicle stop just before midnight. He smelled marijuana and confronted the defendant with his suspicions. The defendant denied possession of any marijuana and denied consuming any marijuana that day. Appendix A at 2. Trooper Larsen then had probable cause to believe marijuana was in the defendant's vehicle. The superior court found that the combined factors of the movable nature of the defendant's vehicle and potential that the evidence would be destroyed justified a warrantless search. *Id.* At 2-3. Substantial evidence supported both the trial court's and superior court's findings that sufficient exigent circumstances existed to justify the warrantless search.

Petitioner relies on *State v. Counts*, 99 Wn.2d 54, 63, 659 P.2d 1087 (1983) for his proposition that exigent circumstances were not present at the search of his automobile. *Counts* was this Court's first impression of the retroactive application of the rule announced by the

United States Supreme Court in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). That rule, plainly stated, is that “in the absence of exigent circumstances, police may not make a warrantless, nonconsensual entry into a suspect’s *home* to make a routine felony arrest.” *Counts*, 99 Wn.2d at 54. (Emphasis added.)

Counts is inapposite to Petitioner’s situation because the search in Petitioner’s case is of an automobile, which had been stopped late at night by a trooper who was alone and who recognized the smell of contraband. In *Counts*, the search was of the defendant’s home for defendant, where the police could have maintained surveillance of the residence while obtaining a warrant. *Id.* at 60. The exigent circumstance argued by the state in that case was “hot pursuit,” which the Court found inapplicable. *Id.*

Petitioner also cites to *State v. McIntyre*, 39 Wn.App. 1, 691 P.2d 587 (1984) for the same proposition. *McIntyre* is equally inapplicable. That case involved the warrantless entry into a home inside which officers actually saw the suspect for whom they were searching. *Id.* at 3. That suspect was sought for assaulting an officer and taking the officer’s service pistol. *Id.* The court found that the suspect presented as “highly dangerous to the police or the public,” and that “[s]uch danger has been

recognized as demonstrating exigent circumstances justifying a warrantless search and arrest.” *Id.* at 5.

The exigent circumstances at issue in Petitioner’s case involve mobility of the automobile and potential for destruction of the evidence, which circumstances have been acknowledged as “exigent” by this Court in a long line of cases, as set forth in *State v. Patterson*, 112 Wn.2d 731, 774 P.2d 10 (1989).

C. The Superior Court Decision Does Not Conflict With Washington Decisional Law.

The Petitioner argues that the decision of the Superior Court is in conflict with this Court’s decision *State v. O’Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). Pet. at 13.

In *O’Neill*, it was determined that a warrantless search incident to arrest must be preceded by a valid arrest. *Id.* at 501. Petitioner relies on *O’Neill* for the proposition that the search was illegal because it preceded a custodial arrest. However, in the present case, the District and Superior courts recognized that this case did not present a search incident to arrest. The trial court correctly recognized that the legal basis for the search was provided by exigent circumstances. Appendix A at 2. The Court of Appeals specifically addressed the holding in *O’Neill* and determined that although the search could not be justified as a search incident to arrest,

sufficient exigent circumstances existed to justify the warrantless search and that *O'Neill* did not apply. *Id.* At 7.

There is no violation of *O'Neill* because in that case, this Court analyzed that situation under search incident to arrest law. In *O'Neill*, this Court did not alter the rule for warrantless searches of automobiles in *State v. Patterson*: “If exigencies in addition to potential mobility exist, they will justify a warrantless search.” *Patterson*, 112 Wn.2d 731, 774 P.2d 10 (1989). The “exigencies in addition to potential mobility” in this case are that the stop occurred late at night in a rural area, the officer was alone, and the Petitioner had been alerted to the officer’s suspicion that evidence of a crime was within the automobile.

The gravamen of Petitioner’s argument is that this Court should eliminate the exigent circumstances exception to the requirement of a warrant to search a vehicle. Appendix A at 7. The argument could be restated to require the “magic words,” “You are under arrest” in order to search a vehicle where the officer has probable cause to believe a crime is being committed in his presence and exigent circumstances exist that relate directly to mobility of the vehicle and the real possibility of destruction of the evidence if time to obtain a warrant would be taken. In this case, the Trooper recognized the exigencies of the situation, and chose

the less intrusive option, that is, not further restricting Petitioner's liberty by placing him under formal arrest.

VII. CONCLUSION

For the reasons discussed herein, this Court should uphold the lower court's decision.

Respectfully submitted this 27 day of June, 2008.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

COLLEEN S. KENIMOND
DEPUTY PROSECUTING ATTORNEY
WSBA # 24562

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 57568-6-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
MICAH TIBBLES,)	Unpublished Opinion
)	
Appellant.)	FILED: May 21, 2007

COLEMAN, J. — The principal issue in this case is whether the smell of marijuana, detected by a trooper making a routine traffic stop, justifies a warrantless search of a vehicle under the exigent circumstances exception to the warrant requirement where the vehicle was mobile, the trooper alerted the defendant that he smelled marijuana and could not find its source, the trooper was alone in a rural area, and it was late at night. A secondary issue is whether the superior court's decision upholding the search conflicts with State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003), which held that "a valid custodial arrest is a condition precedent to a search incident to arrest[.]" O'Neill, 148 Wn.2d at 587. We conclude that exigent circumstances justified

the warrantless search of the vehicle and that the superior court's decision does not conflict with O'Neill because this case does not involve a search incident to arrest.

FACTS

On October 28, 2004, near midnight, Trooper Norman Larsen, working alone in Island County, stopped Micah Tibbles for a defective taillight. The propriety of the stop is not challenged. Tibbles was alone in the vehicle. Trooper Larsen noticed a strong odor of marijuana coming from the vehicle. Tibbles provided Trooper Larsen with his drivers license but could not find any registration or proof of insurance. Trooper Larsen asked Tibbles to step out of the vehicle and advised him that he smelled marijuana. Tibbles denied possessing any marijuana. Trooper Larsen searched him and found no marijuana. He asked Tibbles if he had smoked marijuana that day, and Tibbles said no. Trooper Larsen then searched the interior of the vehicle and under the front seat found a glass pipe and marijuana, which Tibbles denied belonged to him. Trooper Larsen did not formally arrest Tibbles, but instead issued him a citation and allowed him to drive away.

Before trial, Tibbles moved to suppress the evidence seized by Trooper Larsen. The district court denied the motion, finding that "the prosecutor might be able to establish that the warrantless search was reasonable in this instance under the probable cause/exigent circumstances exception." In a trial on stipulated facts, the court found Tibbles guilty of unlawful possession of marijuana and possession of drug paraphernalia.

Tibbles appealed to the superior court. The superior court affirmed, concluding that the mobility of the vehicle and the potential for the destruction of the evidence

constituted exigent circumstances justifying a warrantless search. Tibbles sought discretionary review of the RALJ decision, which was granted.

ANALYSIS

Tibbles argues that exigent circumstances did not justify Trooper Larsen's warrantless search of the vehicle. We conclude that there were exigent circumstances justifying Trooper Larsen's warrantless search: the mobility of the vehicle, the risk that Tibbles would destroy evidence because he was alerted to Trooper Larsen's suspicion that he had marijuana, the time of night, the rural location of the traffic stop, and the fact that Trooper Larsen was alone.

Absent an exception, a warrantless search is impermissible under article 1, section 7 of the Washington Constitution.¹ State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The exceptions are carefully circumscribed and provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for recourse to a magistrate. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

Washington has identified five circumstances that qualify as being exigent: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983). The State bears the burden of showing that an exception applies. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001).

¹ Article 1, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Tibbles only argues that his state constitutional rights were violated and does not make an argument under the federal constitution.

In State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979), the court 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.² The court declined to decide whether the search was justified based on probable cause and exigent circumstances. Instead, the court held that the search was valid as a search incident to arrest. In State v. Huff, 33 Wn. App. 304, 654 P.2d 1211 (1982), police had a warrant to search all real and personal property at a certain residence. The police searched a vehicle parked at the residence and found marijuana. The defendant argued that the search was not authorized by the warrant and that no exception to the warrant requirement justified the search. The court held that the vehicle was included in the warrant and then stated,

[A]ssuming arguendo the warrant did not authorize a search of Mr. Huff's automobile, a warrantless search of an automobile is constitutionally permissible if there is probable cause to search the automobile which is stopped, the car is movable, the occupants are alerted, and contents of the car may never be found again if a warrant must first be obtained.

Huff, 33 Wn. App. at 310.

The warrantless search here was justified because of exigent circumstances. Trooper Larsen told Tibbles that he smelled marijuana. Tibbles denied possessing marijuana or consuming any marijuana that day. Trooper Larsen searched Tibbles, but did not find any marijuana. Trooper Larsen then had probable cause to believe marijuana was in the vehicle because he had not discovered the source of the marijuana smell. A warrantless search was necessary because of the mobility of the vehicle and the likelihood that the evidence would be removed or destroyed.

² Tibbles stated in the superior court that he was not disputing that Trooper Larsen had probable cause to arrest based on the odor of marijuana. Verbatim Report of Proceedings (Dec. 7, 2005) at 7.

Additionally, it was late at night in a rural area and Trooper Larsen was alone, making it difficult to obtain a warrant.

Tibbles argues that exigent circumstances did not justify the search because the district court stated in its entry of judgment that there was no “evidence offered as to the exigent circumstances justifying a warrantless search.” Tibbles stipulated to all of the exigent circumstances discussed above—mobility of the vehicle, Tibbles being told by Trooper Larsen that he suspected marijuana was in the vehicle, time of night, and other factors relied on by the court. Therefore, exigent circumstances were established based upon the stipulated facts.

Tibbles contends that the possession of a misdemeanor amount of marijuana is not serious enough to overcome the privacy protections of the Washington Constitution, relying on State v. Ramirez, 49 Wn. App. 814, 746 P.2d 344 (1987). In Ramirez, police entered a hotel room without a warrant after detecting a strong odor of marijuana emanating from the doorway. The State argued that the entry was permissible based on the probable cause and exigent circumstances exception to the warrant requirement. The court agreed that the officers had probable cause but held that exigent circumstances did not exist to justify the officers' warrantless entry into the hotel room. The court explained that hotel rooms enjoy the same constitutional protection as homes. Ramirez, 49 Wn. App. at 817. The court also noted that the use or possession of marijuana is a misdemeanor. The court then held that under the federal and state constitutions, “the State’s interest in preventing these crimes, though important, is not of sufficient magnitude to justify this warrantless entry and arrest” in an area entitled to the same protection as a home. Ramirez, 49 Wn. App. at 821.

Ramirez is distinguishable because it involved exigent circumstances in the context of a hotel room, not a vehicle. Article 1, section 7 protects vehicles, but historically, vehicles enjoy less protection than homes because “[o]ne does not expect the same degree of privacy in an automobile as in one's home.” State v. Stroud, 106 Wn.2d 144, 167, 720 P.2d 436 (1986) (Durham, J., concurring).

In Ramirez, there was no risk of the defendants suddenly fleeing in a vehicle or purposefully destroying the evidence because they had not been alerted to the fact that police officers suspected drug activity. Here, there were such risks because Trooper Larsen alerted Tibbles that he smelled marijuana and the vehicle Tibbles was driving was mobile. And though this case involves misdemeanors, Tibbles cites no authority stating that in misdemeanor cases, police officers are prohibited from searching a vehicle under the exigent circumstances exception of the warrant requirement. The fact that the crimes at issue here are misdemeanors is not sufficient to overcome the exigent circumstances faced by the officer. Moreover, based on the smell alone, the officer could not know there was only a misdemeanor amount of marijuana in the vehicle.³

Tibbles also argues that the superior court's decision conflicts with State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). In O'Neill, the court held that “a valid

³ Tibbles also relies on State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984) for his argument that the possession of a misdemeanor amount of marijuana is not serious enough to overcome the privacy protections of the Washington Constitution. Like Ramirez, however, Chrisman is distinguishable because it involved a dorm room, which the court treated as a home. See Chrisman, 100 Wn.2d at 822 (“The heightened protection afforded state citizens against unlawful intrusion into private dwellings places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement.”). And unlike this case, the Chrisman court found that there was no danger of the evidence being destroyed. Chrisman 100 Wn.2d at 821 (“Neither the officer nor the evidence was threatened.”).

custodial arrest is a condition precedent to a search incident to arrest [.]” O’Neill, 148 Wn.2d at 587. O’Neill is not relevant to this case because it did not concern vehicle searches based on exigent circumstances. The parties agree that the district court and superior court concluded that the search in this case was constitutional because of exigent circumstances—not as a search incident to arrest.

Tibbles essentially argues that O’Neill eliminated the exigent circumstances exception to the warrant requirement in the context of vehicle searches and, therefore, because Trooper Larsen had probable cause, he should have obtained a search warrant or made an arrest and searched the vehicle incident to the arrest. O’Neill concerned a parked vehicle and did not discuss exigent circumstances. It did not eliminate the exigent circumstances exception to the warrant requirement in the context of vehicle searches. We are reluctant to require police officers to make full custodial arrests in order to perform warrantless searches of vehicles. Therefore, we reject Tibbles’ proposed rule that officers must search incident to an arrest in order to search a vehicle without a warrant.

For the foregoing reasons, we affirm.

Columan, J.

WE CONCUR:

Appelwick, J.

Becker, J.