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NO. 59750-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

83742-2

IN RE THE PERSONAL RESTRAINT OF:

GLENN G. NICHOLS

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES PRESENTED

1. Whether State v. Jordan, 160 Wn.2d 121, 156 P.3d 893 (2007), requires suppression of evidence obtained as a result of a motel registry search conducted with neither a warrant nor a valid exception to the warrant requirement?

2. Whether the above issue may be raised for the first time in a personal restraint petition ("PRP"), where the petitioner has shown he was actually prejudiced by the constitutional error?

B. STATEMENT OF THE CASE

In February of 2004, the Seattle Police Department executed a series of four controlled buys of cocaine from Toreka Ativalu. App. D at 1.¹ The department sent a confidential informant, Charles Ream, into Ms. Ativalu's house in order to acquire evidence to support a search warrant. Based on Mr. Ream's purchases and observations, the department succeeded in obtaining a warrant for the home.

During the fourth controlled buy, on February 26, Ms. Ativalu took Mr. Ream with her to the nearby Travel Lodge Motel because she had to buy more cocaine from her supplier in order to sell it to

¹ Mr. Nichols will reference the appendices attached to the State's response to his PRP. Appendix D is the trial court's findings of fact and conclusions of law following the CrR 3.6 suppression hearing.

Mr. Ream. App. D at 2. Mr. Ream and another man waited in Ms. Ativalu's van while she went to purchase the drugs. Ms. Ativalu soon shouted back to the other man in the van and asked him to call "O.G." to find out which room he was in. After making a call, the man yelled back that O.G. was in room 56.

Approximately five minutes later, Ms. Ativalu returned to the van and gave Mr. Ream several pieces of cocaine. App. D at 2. Mr. Ream returned to Seattle Police Detective Rudy Gonzalez's car as planned, and told him what happened. App. D at 3.

Later that same day, the department executed the search warrant at Ms. Ativalu's home. Detective Gonzalez relayed the information obtained from Mr. Ream regarding Ms. Ativalu's apparent purchase of cocaine in room 56 at the Travel Lodge to two other officers, Sergeant Caylor and Officer Nelson. App. D at 3.

Two hours later, Sergeant Caylor and Officer Nelson went to the Travel Lodge and asked the desk clerk for information about the registered guest in room 56. The clerk gave them the name of the registered guest, Glenn Nichols, a photocopy of his identification card, and his registration form. App. D at 3; 1/4/05 RP 30-31. The

officers entered Mr. Nichols's name into their computer, and learned that his driver's license was suspended.

Shortly thereafter, the officers saw Mr. Nichols drive into the motel parking lot. They recognized him from the copy of the identification card the desk clerk had just shown them. App. D at 3. They arrested Mr. Nichols for the driving violation, and found cocaine and marijuana during their search incident to arrest. App. D at 4. Mr. Nichols was charged with possession of cocaine with intent to deliver, and possession of less than 40 grams of marijuana. App. A at 1; App. B at 1.

Before trial, Mr. Nichols's attorney moved to suppress the evidence against him, on grounds different than those presented in this PRP. App. D at 4-5; 1/5/05 RP 7-9. That motion was denied, and Mr. Nichols was convicted as charged. App. A at 1; App. B at 1; App. D at 5.

On direct appeal, Mr. Nichols's attorney did not challenge the search, instead arguing only that Mr. Nichols's rights were violated when the court ordered him to provide a biological sample for DNA identification. App. C at 1. A commissioner of this Court granted a motion on the merits to affirm on August 7, 2007. App. C.

In the meantime, Mr. Nichols filed a PRP pro se, alleging, inter alia, that (1) his right to be free from unreasonable searches and seizures was violated when the police officers viewed his private motel room registration information without a warrant or exigent circumstances, and (2) both trial counsel and appellate counsel were ineffective for failing to raise this issue. PRP at 8-19, 27-33.

On April 26, 2007, the Washington Supreme Court held in Jorden that information contained in a motel guest registry is a “private affair” protected by article 1, section 7 of our state constitution. Jorden, 160 Wn.2d at 130. As such, a police officer’s viewing of such information constitutes a search, which can only be performed pursuant to a warrant or a valid exception to the warrant requirement. Id.

On April 10, 2008, the State filed a response to Mr. Nichols’s PRP, in which it agreed that Mr. Nichols should be granted relief because he “has established that the warrantless search of the motel registry violated his right to privacy under the state constitution.” Response at 1. This Court appointed counsel for Mr. Nichols and requested briefing on (1) whether the holding in Jorden applies to any situation where police obtain a defendant’s name

from a motel registry without a warrant, regardless of whether or not the search was random, and (2) whether this type of suppression issue can be raised for the first time in a PRP. After Mr. Nichols objected to the appointment of the same counsel he had had for his direct appeal, that office was permitted to withdraw, and undersigned counsel was appointed.

C. ARGUMENT

1. *JORDEN* REQUIRES SUPPRESSION OF THE EVIDENCE OBTAINED AS A RESULT OF THE MOTEL REGISTRY SEARCH BECAUSE IT WAS CONDUCTED WITHOUT A WARRANT AND NO EXCEPTION TO THE WARRANT REQUIREMENT APPLIED.

a. *Jorden* held that the information in a motel guest registry constitutes a private affair, and therefore police officers may not view it absent authority of law. 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.” Const. art. 1, § 7. Private affairs are those “interests which citizens of this state have held, and should be entitled to hold, safe from government trespass.” *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). “[T]he information contained in a motel registry – including one’s whereabouts at the motel – is a private affair under

our state constitution, and a government trespass into such information is a search.” Jorden, 160 Wn.2d at 130.

b. “Authority of law” means a warrant or an established exception to the warrant requirement. A warrantless search is per se unreasonable unless it falls under one of Washington’s recognized exceptions. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). The exceptions are consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry² investigative stops. Id. at 71. Exceptions to the warrant requirement “must be jealously and carefully drawn, and must be confined to situations involving special circumstances.” State v. Boyce, 52 Wn. App. 274, 279, 758 P.2d 1017 (1988).

c. The officers did not have authority of law to view Mr. Nichols’s registration information. The officers here did not have a warrant to search the registry information for room 56, and none of the narrowly drawn exceptions to the warrant requirement applies.

Mr. Nichols did not consent to the search, and the desk clerk lacked the authority to consent to a search of Mr. Nichols’s information. State v. Mathe, 102 Wn.2d 537, 544, 688 P.2d 859

² Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

(1984); State v. Davis, 86 Wn. App. 414, 419, 937 P.2d 1110 (1997). The officers conducted the search prior to arresting Mr. Nichols (indeed, the information discovered during the search provided the basis for the arrest), so it did not constitute a search incident to arrest. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). It was obviously not an inventory search. The information was not in plain view, and instead was obtained from the desk clerk. App. D.

No exigent circumstances justified the warrantless search. Our supreme court has recognized five circumstances that could be termed 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). Here, the search of the motel registry did not involve a vehicle, hot pursuit, a fleeing suspect, or prevention of danger. Nor were the officers concerned about the mobility or destruction of the evidence. If they had been, they would have performed the search immediately after Charles Ream returned and reported his observations, instead of over two hours later. App. D at 3; contrast State v. Carter, 127 Wn.2d 836, 851, 904 P.2d 290 (1995) (exigent circumstances supported warrantless

entry and search of motel room *immediately following* controlled buy in the room *where occupants were alerted to police presence and therefore likely to flee with evidence*). Instead of performing a warrantless search, the officers should have maintained surveillance while waiting for a warrant. Counts, 99 Wn.2d at 60.

The Terry exception does not apply, either. An officer's viewing of private motel registry information constitutes a search, not a stop or seizure. Jorden, 160 Wn.2d at 130. While the officers had enough information under Terry to support a brief stop for questioning of anyone emerging from room 56, that is not what occurred here. App. D. Terry also would have allowed for a patdown search of such a person if the officer reasonably suspected the individual of being armed and dangerous, but that is the only kind of search allowed under this exception. State v. Walker, 66 Wn. App. 622, 629-30, 834 P.2d 41 (1992). An evidentiary search requires a warrant or one of the other narrowly drawn exceptions discussed above. Terry, 392 U.S. at 29; State v. Broadnax, 98 Wn.2d 289, 303, 654 P.2d 96 (1982).

In sum, the officers lacked authority of law to search Mr. Nichols's private motel registration information, because they did

not have a warrant and none of the exceptions to the warrant requirement applies.

d. The evidence must be suppressed. The remedy for a violation of article 1, section 7 is suppression of the fruits of the improper search or seizure. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). “[T]he right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. . . . [W]henver the right is unreasonably violated, the remedy must follow.” Id.

Thus, evidence obtained as a result of a motel registry search conducted with neither a warrant nor a valid exception to the warrant requirement must be suppressed. The State properly concluded that the evidence in this case should have been suppressed because “Mr. Nichols’ detention flowed directly from the warrantless search of the motel registry.” Response at 4. Mr. Nichols therefore asks this Court to vacate his convictions and remand with instructions to suppress the evidence.

2. THIS ISSUE MAY BE RAISED FOR THE FIRST TIME IN A PERSONAL RESTRAINT PETITION.

a. The failure to raise a constitutional issue on direct appeal is not a basis for automatic rejection of a personal restraint petition; rather, the Court must evaluate whether the petitioner has shown he was actually prejudiced by the error. An appellate court will grant relief to an individual who has filed a personal restraint petition if the petitioner is under "restraint" and the restraint is unlawful.

RAP 16.4(a). A petitioner is under restraint if, like Mr. Nichols, he is incarcerated. RAP 16.4(b). The restraint is unlawful, if, inter alia:

The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.

RAP 16.4(c)(2).

Although the illegality of the motel registry search in this case could have been raised at an earlier stage, "the failure to raise a constitutional issue for the first time on appeal is no longer a reason for automatic rejection of a Personal Restraint Petition." In re Personal Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983).³ Rather, a court reviewing a PRP "must proceed to

³ Even in the context of *nonconstitutional* error, there is no automatic bar to raising the issue in a PRP "merely because the argument was not advanced

determine whether [the petitioner] has shown actual prejudice stemming from constitutional error.”⁴ Id. Then:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the cause for further hearing.

Id. at 88.

b. Mr. Nichols’s petition must be granted because he has shown actual prejudice resulting from the officers’ unconstitutional search of his motel registry information. The determination of whether a constitutional error results in actual prejudice

earlier.” In re Personal Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

⁴ Although there would also be no per se bar to raising the issue if he *had* raised it on direct appeal, the supreme court appears to disfavor such redundant PRP’s more than those like Mr. Nichols’s, which raise new issues:

We take seriously the view that a collateral attack by PRP on a criminal conviction and sentence should not simply be reiteration of issues finally resolved at trial and direct review, but rather should raise new points of and law that were not or could not have been raised in the principal action, to the prejudice of the defendant.

In re Personal Restraint of Gentry, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999).

“necessarily requires an examination of the merits of a petition.” In re Personal Restraint of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). As discussed in section C(1) above, Mr. Nichols’s argument is correct on the merits. Accordingly, the State properly concluded that the petition should be granted. Response at 5; see In re Personal Restraint of Brown, 154 Wn.2d 787, 790, 117 P.3d 336 (2005) (PRP granted where petitioner showed his seizure violated article 1, section 7). This Court should grant Mr. Nichols’s petition and vacate the convictions on both counts. Brown, 154 Wn.2d at 799.

c. In the alternative, Mr. Nichols’s petition must be granted because he has established that he was denied the effective assistance of counsel. If this Court disagrees that Mr. Nichols may raise the Jorden issue directly, it should nevertheless grant the petition because Mr. Nichols has alleged and shown ineffective assistance of counsel. PRP at 27-33.

Both the federal and state constitutions guarantee a defendant the effective assistance of counsel. The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” Article 1, section 22 of the Washington

Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel’s performance was deficient, and (2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The denial of the effective assistance of counsel constitutes reversible error. Chapman v. California, 386 U.S. 18, 23 n.8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). A personal restraint petitioner may be granted relief on the basis of ineffective assistance of counsel. See In re Personal Restraint of Vazquez, 108 Wn. App. 307, 31 P.3d 16 (2001) (petitioner argued in his second PRP that both his trial and appellate attorneys were ineffective for failing to challenge the sufficiency of a search warrant; this Court remanded for a determination of whether the petitioner had good cause for failing to raise the issue in his first PRP).

The failure to raise a violation of article 1, section 7 or the Fourth Amendment constitutes ineffective assistance of counsel. See State v. Reichenbach, 153 Wn.2d 126, 137, 101 P.3d 80 (2004) (Defendant received ineffective assistance of counsel where

his attorney failed to move to suppress the baggie of drugs the defendant had dropped in response to a police officer's unlawful seizure of him). Even if trial counsel moves to suppress evidence, the failure to make the right arguments or elicit the necessary evidence at the CrR 3.6 hearing constitutes ineffective assistance of counsel if it appears the motion would likely have been successful otherwise. State v. Meckelson, 133 Wn. App. 431, 436-37, 135 P.3d 991 (2006).

Here, although trial counsel properly brought the CrR 3.6 motion, he did not argue that the search of the motel registry violated article 1, section 7, even though Division Two of this Court had not yet decided Jorden adversely to defendants. And appellate counsel did not challenge the search and seizure at all, even though by that time the supreme court had granted review and heard argument in Jorden. These deficiencies plainly prejudiced Mr. Nichols, because Jorden was decided before his convictions were affirmed on direct appeal, and would have dictated the outcome had the issue been preserved. Accordingly, even if this Court holds that Mr. Nichols may not now raise the Jorden violation directly, it should grant his petition because he was denied the effective assistance of counsel.

D. CONCLUSION

For the reasons set forth above, Mr. Nichols respectfully requests that this Court grant his personal restraint petition and vacate his convictions.

DATED this 10th day of October, 2008.

Respectfully submitted,


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