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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LISA ANN BYRD,

Respondent.

**AMICUS BRIEF OF WASHINGTON ASSOCIATION
OF PROSECUTING ATTORNEYS
(WAPA)**

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ORIGINAL

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A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that may establish constitutional contours of the searches and seizures.

B. ISSUES

Does a search of an arrestee's person and personal effects incident to arrest comport with Article I, § 7 of the Washington Constitution?

C. FACTS

The Court of Appeals and the parties set forth the salient facts; WAPA will simply refer to those facts in the body of its brief.

D. SEARCHES OF ARRESTEES AND THEIR PERSONAL EFFECTS ARE ALLOWED UNDER ARTICLE I, § 7.

The common law, this Court, and the Supreme Court have long permitted searches of the person and personal effects of an arrestee. A purse or bag held in the hands of an arrestee at the time of arrest is a personal effect in her possession. Even if a safety or destruction of

evidence standard is applied, if the bag is to be placed in police custody, a search of that bag is required by safety and preservation of evidence concerns. Thus, its search does not violate either the state or federal constitutions.

In State v. Snapp, this Court held that "a warrantless search incident to arrest is authorized when the arrestee would be able to obtain a weapon from the vehicle or reach evidence of the crime of arrest to conceal or destroy it." State v. Snapp, No. 84223-0, slip op. at 11-12 (Wash.S.Ct. April 6, 2012). This Court reasoned that, as it held in State v. Ringer, interpretation of the search incident to arrest exception under the state and federal constitutions had strayed from its original narrow purpose, and it was necessary "to return to the protections of our own constitution and to interpret them consistent with their common law beginnings." Snapp, slip op. at 16, citing State v. Ringer, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983) *overruled in part by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). With the Snapp decision, this Court has broken the conceptual link, established in State v. Hughlett, 124 Wash. 366, 214 P. 841 (1923), between personal effects and vehicles. Vehicles may no longer be searched as if they were an extension of the arrestee's person.

The holding in Snapp does not, however, require this Court to abandon the search incident to arrest rule that existed since the drafting of Article I, § 7. That rule is based on the age-old search incident to arrest doctrine from the common law.

In the first search and seizure cases decided by this Court following adoption of the State constitution, this Court followed the rule that articles, personal effects, or money taken from the person of a defendant lawfully arrested, may be used in evidence against him. In State v. Nordstrom, 7 Wash. 506, 35 P. 382 (1893), this Court held that boots, socks, a cap, and a memo book were properly taken from defendant upon arrest without a warrant and properly admitted into evidence. This Court in Nordstrom cited State v. Graham, 74 N.C. 646, 648 (1876), which held that "an officer who arrests a prisoner has a right to take any property which he has about him, which is connected with the crime charged, or which may be required as evidence. Roscoe Cr. Ev. 211; R. v. O'Donnell, 7 C. & B. 138 (32 E. C. L. R.)." Nordstrom, 7 Wash. at 510.

In State ex rel. Murphy v. Brown, 83 Wash. 100, 145 P. 69 (1914), this Court emphasized the common law roots of the rule it had recognized.

[t]he general rule is that, where a person is legally arrested, the arresting officer has a right to search such person, and take from his possession money or goods which the officer reasonably believes to be connected with the supposed

crime, and discoveries made in this lawful search may be shown at the trial in evidence.

State v. Brown, 83 Wash. at 105-06. In discussing this authority, this court in Brown cited Weeks v. United States, 232 U.S. 383, 34 S. Ct 341 (1914), which recognized the common law rule to be

the right on the part of the government always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop. Crim. Proc. § 211; Wharton, Crim. Pl. & Pr. 8th ed. § 60; Dillon v. O'Brien, 16 Cox, C. C. 245, I. R. L. R. 20 C. L. 300, 7 Am. Crim. Rep. 66.

Brown, 83 Wash. at 106 (citing Weeks, 232 U. S. at 392) (emphasis added). See also Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925). Thus, the common law rule upon which our constitution was based was quite broad; it was not based simply on the twin goals of disarming a suspect and preserving evidence, although it certainly included those goals.

Many other Washington cases reached similar results as to various items of property on or near the defendant at the time of arrest. In State v. Burns, 19 Wash. 52, 52 P. 316 (1898), this Court held that boots were properly seized from an arrestee to compare with boot imprints in mud. In Olympia v. Culp, 136 Wash. 374, 377-78, 240 P.360 (1925), this Court

held that a bottle of intoxicating liquor was properly seized from arrestee who attempted to flee police raid on house.

These holdings are consistent with the common law origins of the search incident to arrest exception. They recognize that whenever officers arrest they take with them items belonging to the arrestee. In neither Ringer nor Snapp has there been identified a basis to repudiate these early cases or their common law origins.

The preconditions for searches incident to arrest have fluctuated since that era. Under early state and federal cases like those described above, there was relatively broad authority to search. Under the federal constitution, however, the scope was narrowed by new limits imposed in Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), where the Court held that although the arrest of defendant in his house authorized a search of his person, it did not authorize a broader search of the house.

Several years later, in United States v. Robinson, 414 U.S. 218, 234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Supreme Court affirmed a search of a container taken from an arrestee's pocket. Just as this Court held in 1914 in State v. Brown, *supra*, the Robinson court recognized that the common law permitted searches of the person and personal effects of an arrestee. Robinson distinguished between searches of the person and

searches of the area around the person, and held that the former was always permissible whereas the latter was not.

In New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), the Supreme Court extended Chimel to include searches of automobiles recently occupied by an arrestee, upholding as valid a warrantless search of the pocket of a jacket in a car which had minutes before been occupied by the four arrestees.

Belton was revisited in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), where the Court held that an arrestee's car could not be searched unless the officer had safety concerns, evidence could be destroyed, or there was probable cause to search for evidence of the crime of arrest. Although the Court disapproved of an expansive interpretation of Belton, the Court in Gant cited Robinson in passing and gave no hint that its rule was undermined by the Gant decision. 556 U.S. at 338.

Under the state constitution, the authority to search incident to arrest recognized from the 1930's forward was narrowed in Ringer, broadened two years later in Stroud, narrowed by State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009) and State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) (post-Gant), and then narrowed further by this Court in Snapp.

Although, Snapp did not address whether an arrestee's person could be searched, Byrd correctly concedes that a search of the arrestee's person is always permissible. Supp. Br. of Respondent at 11 n.4. However, she argues that a search of personal effects is different from a search of the person.

Two modern decisions of this Court have held that searches of containers in the arrestee's actual possession are proper under the state and federal constitutions. In State v. Smith, 119 Wn.2d 675, 835 P.3d 1025 (1992), this Court held that a search of a "waist purse" contemporaneous with arrest was permissible. In State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989), this Court upheld a search of a woman's purse immediately after her arrest. Although these decisions relied heavily on Belton, they are also consistent with the rule followed by this Court in Nordstrom, Brown, Burns and Culp a mere twenty years after ratification of the state constitution. They are also consistent with Fourth Amendment principles under Robinson.

Personal items are distinct from vehicles, so even if Gant and Snapp have invalidated searches of vehicles incident to arrest, they are consistent with Robinson and Nordstrom, meaning that searches of the arrestee and her personal effects are allowed. A vehicle may be secured and left at the scene of an arrest, or towed. Personal items and containers

cannot simply be left sitting at the scene of an arrest and, thus, must accompany the arrestee. United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977). For these reasons, this Court should hold that searches of the person of an arrestee may include personal effects in his or her actual possession, regardless of safety or evidence destruction concerns.

Even if this Court were to limit such searches to safety and destruction of evidence concerns, however, it should recognize that there are inherent dangers in gathering unexamined containers, and it should hold that such inherent dangers permit officers to search to ensure that any hazards have been neutralized. As the Supreme Court observed in Robinson, this risk is *routinely* present, so a case-by-case analysis was never required at common law, and the right to search the person and his effects was presumed. Similarly, this Court recognized in a different search context that "we have always been careful to balance an individual's privacy concerns with the safety concerns and law enforcement duties of police officers." State v. Grande, 164 Wn.2d 135, 146, 187 P.3d 248 (2008). Arrestees have a diminished expectation of privacy that justifies intrusions on their person and personal effects that would be impermissible as to other citizens. State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999).

The clearest example of risk is, of course, the danger of firearms. Handguns are commonplace in modern society and many are surprisingly compact and light and can be concealed in very small containers, bags, garments, packs, purses and the like, in a manner that is not easily detected. When an officer takes such a container into his custody, he incurs a risk that the arrestee or anyone else might gain access to the weapon. Firearms can also be unstable, such that mishandling a backpack with a loaded gun can cause the gun to accidentally discharge.¹ Similarly, ammunition is small and light and can reside in a container, garment, purse, pack, or bag with little chance of detection. If mishandled, ammunition can discharge and cause injury. An officer taking into his custody a bag or other container of an arrestee must be allowed the right to search that bag for weapons.

Moreover, a purse, container, or backpack might contain a hazardous substance such as methamphetamine precursors, acids, ricin, anthrax, or hazardous items like syringes, or razor blades, and there will be no obvious indication that the hazard exists. Although less common in the general population, within the subpopulation of arrestees, such

¹ See, e.g., Girl shot at Bremerton school stabilizing after 5th surgery, Tacoma News Tribune, 2/29/12, available at <http://www.thenewstribune.com/2012-02/29/2046066/bremerton-girl-8-who-was-shot.html> (last accessed 4/12/12).

substances pose a significant enough risk as to cause reasonable concern for police officers.

Similar concerns underlie the common law rule that permitted officers to search incident to arrest and those principles have always been incorporated into Article I, § 7. These concerns are not simply matters of "pragmatism and convenience." Snapp, slip op. at 18. They are matters of safety and evidence handling, considerations that shaped the common law rule and Article I, § 7. Grande, 164 Wn.2d at 146.

There is no constitutionally-based reason to roll back such protections in the modern world. Officers should be permitted to check containers for hazardous substances to ensure their safety and the safety of police department employees who will come into contact with the container.

The question arises, however, as to when an item should be considered a personal effect. If the item is in the arrestee's direct possession, it should be considered a personal effect and subject to search. If it is in a car or other place where it may safely be left behind after arrest, it will not be a personal effect and subject to search incident to arrest.

Here, the purse was initially in Byrd's lap and removed from her possession only upon arrest. Finding of Fact (FOF) VII. She apparently did not leave it in the car or ask that it be left behind. Thus, the officer had

a duty (or at least a right) to secure it and, once secured, it was subject to a search. Byrd was going to jail. FOF XI. Although the trial court found that, in hindsight the purse did not pose any danger to the officers, FOF XIII (interlineated), that fact should not be controlling. A search of the person of an arrestee may not reveal weapons, but a search is allowed because arrestees are sometimes armed and officers should not have to roll the dice.

There are countless scenarios in which officer safety might be in jeopardy after arrest and the State respectfully asks this Court to consider those possibilities in crafting an opinion. Although an officer has placed a defendant in custody by, for example, holding the defendant at gunpoint, a lone officer may believe that it is safer to search a bag the defendant had possessed than to attempt to handcuff an unruly defendant before the arrival of a backup officer. Or, an officer may reasonably fear the container holds a weapon that could be accessed by someone before the container is secured at the stationhouse. The officer might reasonably fear that the container holds hazardous materials. If the arresting officer(s) is outnumbered by the arrestees, and a duffel bag is present at the scene of the arrest, the officer(s) may need to search the bag to ensure it does not contain weapons or evidence. If an arrestee is detained and later released, search of a person or backpack would be appropriate before returning the

container to the arrestee because, if the container holds a weapon, the weapon could readily be used against an officer by an arrestee angry that he or she was detained for hours and that his or her car was towed.

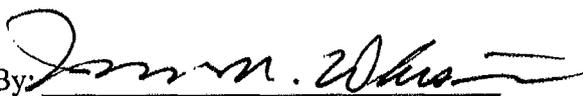
E. CONCLUSION

For these reasons, WAPA respectfully asks this Court to hold that the search of Ms. Byrd's purse incident to arrest was a valid because it was the search of a personal effect in her actual possession at the time of arrest. The authority to search personal effects in an arrestee's possession existed at common law and is incorporated into Article I, § 7.

DATED this 13th day of April, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

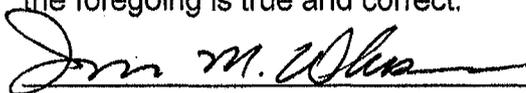
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the respondent, Susan Gasch @ gaschlaw@msn.com, and to Kevin Eilmes, Yakima County Prosecutor @ kevin.eilmes@co.yakima.wa.us, containing a copy of the Amicus Brief of Washington Association of Prosecuting Attorneys, in STATE V. LISA ANN BYRD, Cause No. 86399-7, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

Done in Seattle, Washington



Date 4/13/12