

67334-3

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NO. 67334-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTOINE BROCK,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Susan Craighead, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

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A. SUPPLEMENTAL ARGUMENT¹

UNDER BYRD, THE SEARCH OF THE BACKPACK WAS UNLAWFUL BECAUSE IT WAS NOT PART OF BROCK'S "PERSON" AT THE TIME OF OR IMMEDIATELY PRECEDING HIS ARREST.

In Byrd, the Washington Supreme Court clarified the permissible scope of a search incident to arrest. The Court began by noting there are two types of searches incident to arrest: (1) "a search . . . of the area within the control of the arrestee" and (2) "a search . . . of the person of the arrestee by virtue of the lawful arrest." Byrd, 2013 WL 5570220 at 2-3 (quoting United States v. Robinson, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)). The first type of search "must be justified by concerns that the arrestee might otherwise access the article to obtain a weapon or destroy evidence." Byrd, 2013 WL 5570220 at 2 (citing Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). The second type of search "require[s] 'no additional justification' beyond the validity of the custodial arrest. Byrd 2013 WL 5570220 at 2 (quoting Robinson, 414 U.S. at 235).

The type of search conducted is determined by applying the "Time of Arrest" rule. Byrd, 2013 WL 5570220 at 4-6. Under the rule, a search may be conducted of an arrestee's personal possessions, such as a purse or

¹ This Court directed the parties to file supplemental briefs discussing the impact of the Washington Supreme Court's decision in State v. Byrd, __ Wn.2d __, __ P.3d __, 2013 WL 5570220 (Slip Op. filed October 10, 2013).

backpack, without further justification if it was in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest. Id. at 6. The Court emphasized "that the proper scope of the time of arrest rule is narrow, in keeping with this 'jealously guarded' exception to the warrant requirement." Id. As such, it does not apply to items that are simply within the arrestee's reach, or merely constructively possessed. Id.

Applying the "time of arrest" rule to the facts here, it is clear the backpack was not part of Brock's person at the time of or immediately preceding his arrest. Nor is there any basis to find the search was justified for purposes of officer safety or preservation of evidence. Therefore Officer Olson violated Brock's privacy rights under the Fourth Amendment and Wash. Const. article 1, section 7, by searching the backpack without a warrant.

As discussed in the opening brief, prior to his arrest Brock was asked to set the backpack aside so Officer Olson could conduct a frisk for weapons. Following the frisk, which produced no weapons, Olson asked Brock for identification information and then took the backpack and secured it in his patrol car while he checked the accuracy of the information Brock had provided. 1RP 25-30, 57. Unable to validate the identification information, Olson arrested Brock for providing false information, but did not immediately handcuff him. 1RP 33, 35-36, 38.

At that point Olson returned to his patrol car and conducted a preliminary search of the backpack to try to determine Brock's true identity. In the process Olson discovered a small bag of marijuana, a small bag of methamphetamine, and a "green inmate DOC badge" with Brock's picture and name on it. 1RP 40-43. Olson handcuffed Brock and secured him in the back of his patrol car. 1RP 44, 58. Olson then conducted a more thorough search of the backpack and discovered the evidence leading to the identify theft and forgery charges and more suspected drugs and drug paraphernalia. 1RP 48-50.

Officer Olson candidly admitted that when he placed him under custodial arrest, Brock did not have possession of the backpack, nor had it been in his possession immediately preceding the arrest as Olson had seized it very early in the encounter. The record supports Olson's admission. Likewise, the record provides no basis to conclude Officer Olson searched the backpack out of fear that it contained a weapon Brock could access or evidence Brock might try to destroy. To the contrary, Olson admitted that once he seized it, Brock had no access to the backpack whatsoever. 1RP 57.

Under Byrd, Olson lacked lawful authority to conduct a warrantless search of the backpack. Therefore the fruits of the unlawful search should have been suppressed. State v. Boland, 115 Wn.2d 571,

582, 800 P.2d 1112 (1990); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

B CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse Brock's judgment and sentence.

DATED this 23rd day of October 2013

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67334-3-1
)	
ANTOINE BROCK,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCTOBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KING COUNTY PROS/APPELLATE UNIT
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2013.

X *Patrick Mayovsky*