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Division I
State of Washington

SUPREME COURT NO. _____
COURT OF APPEALS NO. 67334-3-I

90751-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTOINE LAMONT BROCK,

Appellant.

FILED
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STATE OF WASHINGTON
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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

The State of Washington, Petitioner here and Respondent below, respectfully requests that this Court review two issues from the Court of Appeals' published decision.

B. ISSUES PRESENTED FOR REVIEW

1. An officer may search "personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." Over a period of time that lasted 10 to 12 minutes, Officer Olson detained Brock for criminal trespass, separated him from the backpack he had been carrying, tried to determine his true identity, placed him under formal arrest for providing false information, then searched his backpack and discovered a plethora of evidence of other crimes. Was the backpack in Brock's possession "immediately preceding the time of arrest" for purposes of the search incident to arrest rule?

2. Officers may, without a warrant, inventory and search personal items before booking a defendant into jail. Brock was arrested and booked into jail. Was the search of his backpack a proper inventory search even if it was not justified as a search incident to arrest?

C. STATEMENT OF THE CASE

At approximately 3:00 a.m. on May 21, 2008, Washington Department of Fish and Wildlife Officer Eric Olson was patrolling Golden Gardens Park in Seattle. 1RP 6, 11.¹ The park closes at 11:30 p.m. 1RP 12. Signs at the park's entrances provide notice of the park's hours and that violators are subject to prosecution for trespass. 1RP 12-13. Olson parked his patrol car close to the restrooms and noticed that the men's restroom door was propped open. 1RP 20-21. Olson saw two legs facing the toilet and he waited outside for about ten minutes before the occupant—Brock—emerged. 1RP 21-23, 26. Brock wore very baggy clothing and carried a backpack. 1RP 23-24. Olson told Brock that he was not permitted in the park and Brock replied that he did not know the park was closed. 1RP 24-25.

Olson asked Brock to place his backpack on the ground. 1RP 25. He patted down Brock for weapons because he was patrolling alone, he did not know Brock, Brock was wearing baggy clothing and Brock's behavior in the bathroom had been suspicious - during the long wait, Olson never heard Brock urinate. 1RP 26, 61. Olson told Brock that he was not under arrest then asked Brock for identification because he needed to know who he was investigating. 1RP 28. Brock replied that he only

¹ The verbatim report of proceedings will be cited as follows: 1RP - 6/13/11; 2RP - 6/14/11; 3RP - 6/28/11 (sentencing).

had a library card and started to retrieve it from his backpack, but he then stopped and said, "Actually, I don't have any identification on me."

1RP 27. Olson asked Brock for his name, birth date and social security number. 1RP 27. Brock identified himself as "Dorien Halley," with a birth date of "7/19/67," and a social security number of "560-32-4581."

1RP 27. Olson repeated the information back to Brock, who confirmed its accuracy. 1RP 27-28.

Olson asked Brock to stand by his patrol car while he continued his investigation. 1RP 30. Olson carried Brock's backpack to his vehicle because because it was very full and had a lot of pockets, and he did not know if it contained a weapon. 1RP 30, 47. Olson did not know whether Brock was assaultive. 1RP 30.

As Olson returned to his patrol car, Brock told him that his driver's license had been issued in California, not Washington. 1RP 33-34. Neither state had a record of the information Brock had provided. 1RP 35. Olson then told Brock that he was under arrest for providing false information.² He told Brock that he would not necessarily be taken to jail. 1RP 36, 39. Olson did not handcuff Brock. 1RP 39.

² RCW 9A.76.175 provides:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Olson returned to his patrol car. He knew from his pat-down that Brock did not have a wallet in his pockets. 1RP 40. Olson opened the main backpack pocket to try to find valid identification. As he did so, he kept an eye on Brock, who stood 12 to 15 feet away. 1RP 41, 45. Olson saw a purse or wallet. He opened it because he thought it was a good place for identification. 1RP 41-42. In the wallet, Olson saw two baggies (one containing suspected marijuana and one with suspected methamphetamine), a Department of Corrections (DOC) identification badge³ with a photograph of Brock and his true name and birth date, and lots of checks and gift cards in various names. 1RP 41-42, 49-50. Olson then handcuffed Brock, searched him, and placed him in his patrol car. 1RP 43.

Olson returned to his car to run a computer check using Brock's true name and he discovered that Brock had an outstanding felony arrest warrant. 1RP 44. As Olson waited for the Washington State Patrol to confirm the warrant, he did field tests on the suspected marijuana and methamphetamine, which came back positive. 1RP 44-47. Once he confirmed the warrant, Olson had no discretion; he had to transport Brock to jail and book him. 1RP 50.

³ Olson knew that the badge was authentic because he had previously worked as a DOC community corrections officer. 1RP 6-7.

Olson then more thoroughly searched the backpack. 1RP 48. Olson knew that the jail would not permit him to book Brock with the backpack unless he had searched the bag for contraband, such as weapons, drugs, or explosives. 1RP 51, 70-71. Olson said that the jail required such a search because otherwise, "I could bring a bomb there." 1RP 51. And Olson could not leave the backpack at the park, because it would expose the Department of Fish and Wildlife to tort liability. 1RP 52.

During this second search, Olson found lots of checks, mail, and credit and debit cards in various names, more baggies with possible drugs, and a small electronic scale, and a glass pipe with residue. 1RP 48-49. Before Olson booked Brock on the felony warrant and for possession of methamphetamine, he inventoried the backpack's items, but he did not create a detailed evidence spreadsheet until a later time.⁴ 1RP 50-51.

Brock was subsequently charged with ten counts of second degree identity theft, three counts of forgery, and one count of possession of methamphetamine. CP 35-41. He moved, pursuant to Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), to suppress all of the evidence seized. CP 23-34. On June 13, 2011, after a CrR 3.6 hearing, the trial court ruled that the search was lawful as incident to a valid arrest and declined to suppress the evidence. CP 63.

⁴ The inventory search is discussed more fully in section D.2 of the petition, infra.

Brock waived his right to a jury trial and proceeded with a bench trial on stipulated facts. CP 42-45; 2RP 12-15. Later that same day, Brock filed a motion for reconsideration of the court's denial of his suppression motion. CP 79-82. Brock argued that the reasoning of Gant applied not just to vehicles, but to all searches incident to arrest, including searches of personal effects. CP 79-82; 2RP 18-20. The trial court denied the motion. 2RP at 18-20. The court found Brock guilty of all charges, except one count of identity theft (count 10). CP 96-101; 2RP 30-33.

Brock appealed his convictions and challenged the trial court's denial of his motion to suppress evidence, claiming that because there was no officer safety or preservation of evidence basis for the search of his backpack, Olson's warrantless search violated his right to privacy under article I, section 7 of the Washington Constitution. Brock did not challenge the legality of his arrest at the trial level or on appeal. The State argued that the search incident to arrest was proper.

The Court of Appeals reversed, holding that Brock did not have actual and exclusive possession of his backpack at or immediately preceding the time of his arrest. State v. Brock, No. 67334-3-I, slip op. at 10 (filed Aug. 4, 2014). The Court of Appeals did not address whether the inventory search was valid. Judge Becker filed an opinion in dissent arguing that the backpack was in Brock's possession immediately before

his arrest, that “the officer’s way of dealing with the situation was thoroughly professional,” and pointing out that the majority’s decision “would create an undesirable incentive for hasty arrests.” Slip op. at 3 (Becker, J., dissenting).

D. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

RAP 13.4(b) permits review by this Court where a decision by the Court of Appeals is in conflict with another decision of the Court of Appeals or the Supreme Court, raises a question of law under the Washington State or United States Constitutions, or deals with an issue of substantial public interest. These criteria are met in this case.

Under this Court’s recent decisions in State v. Byrd⁵ and State v. MacDicken,⁶ a search of a personal article is justified as incident to arrest if an article was “immediately associated” with the arrestee’s person at the time of the initial police contact, even if some short period of time passes between arrest and search. Brock conflicts with that rule by creating a distinction between cases where a suspect is immediately arrested and searched upon police contact, and those cases where an officer briefly separates a defendant from his property during further investigation, and

⁵ 178 Wn.2d 611, 310 P.3d 793 (2013).

⁶ 179 Wn.2d 936, 319 P.3d 31 (2014).

then makes a formal arrest. Such a distinction ignores the rationale for the search incident to arrest exception, and is not required by the constitution. Items directly associated with an arrestee will necessarily be taken into custody with the arrestee and may be searched for that reason. This new component to the search-incident-to-arrest rule will likely encourage officers to immediately arrest and search people where there is probable cause to believe that they have committed a crime, instead of permitting officers to exercise their discretion to not escalate a citizen contact beyond what is necessary to ensure public safety and lawful behavior.

1. REVIEW IS NEEDED BECAUSE THE COURT OF APPEALS DECISION ERRONEOUSLY RESTRICTS SEARCHES INCIDENT TO ARREST IN A MANNER THAT WILL ENCOURAGE UNNECESSARY CUSTODIAL ARRESTS.

This Court recently held that the long-standing search-incident-to-arrest exception to the warrant requirement encompasses two distinct rationales: 1) a search of the arrestee's immediate area is justified only by concerns for officer safety or evidence preservation, and 2) a search of the arrestee's person and articles of his or her person is justified by the authority of a lawful arrest. State v. Byrd, 178 Wn.2d 611, 625, 310 P.3d 793, 800 (2013). Byrd was arrested in a car, and an officer confiscated and searched a purse that was sitting in Byrd's lap at the time of arrest.

This Court applied the second rationale for searches incident to arrest and reiterated that searches of an arrestee's person extend to the person's personal effects, such as clothing and all articles closely associated with the arrestee. Id. at 621-22.

In determining whether an article falls within the search of the arrestee's person, this Court reaffirmed the "time of arrest" rule. Id. at 621. Under this rule, the Court defined articles subject to search as "personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." Id. at 623-24. The Court cautioned that such a search does not include "articles within the arrestee's reach but not actually in his possession." Id. In other words, the articles must be in such immediate physical relation to the one arrested "as to be in a fair sense a projection of his person." Id. The Court also observed that a delay—like one of more than an hour— between the arrest and the search could render the search unreasonable. Id. at 623-24 (citing United States v. Chadwick, 433 U.S. 1, 15, 97 S. Ct. 2476, 2486, 53 L. Ed. 2d 538 (1977)).

This holding was reaffirmed a year later in State v. MacDicken, 179 Wn.2d 936, 319 P.3d 31 (2014). MacDicken was arrested for armed robbery. At the time of arrest, he was carrying a laptop bag and pushing a rolling duffle bag. MacDicken was handcuffed and separated from the

bags by one officer while another officer searched the bags a car's length away. MacDicken, 179 Wn.2d at 939. This Court held that the search was proper because it extended "only to articles in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person." Id. at 941 (quoting United States v. Rabinowitz, 339 U.S. 56, 78, 70 S. Ct. 430, 94 L. Ed. 2d 653 (1950)).

Here, the Court of Appeals concluded that neither the length of time the officer had control of the backpack, the physical distance between Brock and the backpack, nor the fact that the backpack was secured at the patrol vehicle rendered the search invalid or unreasonable. Brock, slip op. at 7-8. Nonetheless, the Court of Appeals held that the search of Brock's backpack was not a search incident to arrest because Olson, rather than Brock, was in actual and exclusive possession of the backpack at or immediately preceding the moment of his arrest. Id. at 10.

The relevant sequence of events in Brock may be described as follows: contact; development of probable cause to arrest for criminal trespass; seizure of backpack; detention; attempts to identify; formal arrest upon probable cause after Brock provided false information; cursory search of backpack; discovery of contraband; handcuffing; discovery of warrant; fuller search of backpack before transport to jail. It is undisputed that this entire sequence of events took between 10 and 12 minutes.

The majority opinion of the Court of Appeals focused on the time—likely far fewer than 10 minutes—between the seizure of the backpack and the formal arrest, and concluded that the backpack was not in Brock’s possession “immediately” before arrest. This holding implies that once Olson separated Brock from the backpack for officer safety, the backpack stopped being in a fair sense a projection of Brock. This analysis ignores the basis for the second rationale for the search incident to arrest rule; the rationale is based on the fact that items closely associated with a person at the time of arrest are, in effect, part of the person. Byrd, at 621-22. Brock’s backpack did not cease to be associated with him simply because Olson took temporary custody of the item; this was a public park, it was after hours, and nobody else could have taken control of the backpack. When a detention—and attendant seizure of personal effects—quickly ripens into a formal arrest, the effects are still “immediately associated” with their owner.

Although this Court has not defined the scope of “immediately preceding” the time of arrest, it has held that some 9 to 17 minutes between the time of arrest and the search is not a significant delay. State v. Smith, 119 Wn.2d 675, 681-82, 835 P.2d 1025 (1992), abrogated on other

grounds by Byrd, 178 Wn.2d at 623.⁷ Here, Brock's exclusive possession of the backpack ended only when Olson placed it in his patrol car moments prior to formally arresting Brock. This is analogous to Smith. Thus, the fact that an officer secures an arrestee's personal article for safety reasons while conducting his investigation prior to the actual arrest does not mean that the bag stops being "immediately associated" with the arrestee.

Moreover, as Judge Becker pointed out in her Brock dissent, "[t]o hold that the search became invalid because the officer decided to investigate before making an arrest would create an undesirable incentive for hasty arrests." Slip op. at 3 (Becker, J., dissenting). Officer Olson's "way of dealing with the situation was thoroughly professional." Id.

Countless arrestees are in possession of personal articles upon arrest. If the Court of Appeals decision stands, officers will likely be inclined to arrest immediately upon determining that there is probable cause for any arrest, rather than forgo a search of a backpack or be forced to obtain formal judicial authorization to search in each and every such

⁷ In Smith, the defendant's fanny pack fell from his person as the officer was struggling to arrest him. 119 Wn.2d at 677. The officer then placed the fanny pack in her patrol car and continued her investigation by speaking with another officer at the scene, picking up full beer bottles that were lying on the ground, and reporting via radio that she had a person in custody. Id. Although 9 to 17 minutes lapsed and the officer was under exclusive control of the fanny pack at the time of the search, this Court held that the lapse in time did not render the search unreasonable. Id. at 677-78.

case prior to booking. Neither Brock nor the majority articulate a reason to adopt such a rule. Because of its wide-ranging impact on search authority, this issue is of substantial public interest.

For these reasons, the Court of Appeals decision is in conflict with decisions of the Supreme Court, presents a significant question of law under the Constitution of the State of Washington, and is an issue of substantial public interest warranting review under RAP 13.4(b)(1), (3), and (4).

2. REVIEW IS NEEDED BECAUSE THE COURT OF APPEALS DID NOT ADDRESS WHETHER THE INVENTORY SEARCH WAS VALID.

Even if the search of the backpack was not a search incident to arrest, the backpack was properly searched to inventory evidence and property before booking. The trial court ruled that the search done after Olson had found Brock's identification, but before he transported Brock to jail, was not an inventory search. CP 64 (conclusion of law A). A careful reading of the record makes clear that Olson did an inventory search before he booked Brock into jail. The fact that Olson did not complete the documentation of the backpack's contents until later is inconsequential. Despite full briefing by the State, the Court of Appeals failed to address this issue.

A trial court's conclusions of law following a suppression hearing are reviewed *de novo*. The Court may affirm a trial court's decision on a different ground if the record is sufficiently developed. State v. Sondergaard, 86 Wn. App. 656, 657-58, 938 P.2d 351 (1997); see also State v. Louthan, 158 Wn. App. 732, 743-44, 242 P.3d 954 (2010) (affirming the trial court's determination of probable cause to arrest on a ground not considered by the trial court, but developed in the record).

Courts have long recognized that officers may perform an inventory search of personal items subsequent to a lawful arrest without a warrant. Illinois v. Lafayette, 462 U.S. 640, 643-48, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); State v. Smith, 76 Wn. App. 9, 13, 16, 882 P.2d 190 (1994) (recognizing the exception under the federal and state constitutions). Unlike a search incident to arrest or a search based on probable cause, the inventory search must serve a purpose other than discovering evidence of criminal activity. Smith, 76 Wn. App. at 14. An inventory search is justified, in part, "to safeguard the detention facility by preventing the introduction therein of objects which could be used to attempt an escape or by which harm might be done to some prisoner." State v. Garcia, 35 Wn. App. 174, 177, 665 P.2d 1381 (1983) (citing 2 W. LaFave, Search & Seizure § 5.3(a), at 306-07 (1978)). The period of time that elapsed between arrest and a subsequent administrative process

is inconsequential. Garcia, 35 Wn. App. at 175 (citing United States v. Edwards, 415 U.S. 800, 807, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974)).

Olson conducted an inventory search to safeguard the detention facility. Once Olson confirmed Brock's outstanding felony warrant, arrest was mandatory, so Brock was destined to be booked into jail. CP 62 (finding of fact L). Olson said that the jail would not permit him to book Brock unless he had thoroughly searched the backpack. 1RP 51. Olson stated that he must search an arrestee's personal effects for contraband, including weapons, explosives, drugs or other prohibited items. 1RP 51, 70-71. Olson explained that the search was necessary because otherwise "I could bring a bomb there." 1RP 51.

Olson thoroughly searched the backpack before he booked Brock. See CP 20 (Superform). Olson booked Brock on May 21, 2008. CP 20. At that time, Olson listed Brock's backpack and contents as items left for Brock at jail.⁸ CP 20. Olson then listed the items seized and entered into evidence: several checkbooks, a scale with residue, various statements and credit cards.⁹ CP 20. Although Olson did not complete a detailed

⁸ Olson said that he returned many items that he had found in the backpack to Brock, including the three cell phones because he had no reason to think that they were not Brock's. 1RP 51-52.

⁹ Olson said that when he opened Brock's wallet to look for identification and he saw the checks, gift cards and bank statements, he suspected that they were stolen. See Br. of Respondent, Appendix A (arrest report incorporated evidence spreadsheet by reference therein). See also Appendix B (Olson's evidence spreadsheet). These documents were

account of each specific item entered into evidence until some later time, the administrative delay is inconsequential. See Garcia, 35 Wn. App. at 175.

The trial court may have misapprehended Olson's testimony or the applicable law. In her oral findings of fact, the trial judge said, "Subsequently (after Olson determined that he could not leave the backpack at the scene), the officer searched the backpack more thoroughly and filled out a form detailing its contents." 2RP 8. The court found that Olson "had to remove all of the contents of the backpack to ensure that no contraband was inside." CP 62 (finding of fact O). Yet, the court concluded that this was not an inventory search. The court said, "[A]t best, it was a once-over before the backpack was taken to the jail with the defendant." 2RP 11.

In reaching its erroneous conclusion, the trial court apparently focused on when Olson detailed the items that he had placed into evidence, as opposed to when he seized the items. The booking form, CP 20, demonstrates that Olson did more than a "once-over" of the seized items. Olson's inventory search provides an independent basis on which the Court should affirm Brock's convictions.

part of Exhibit 1, admitted for the bench trial. Although exhibit one was not before the trial court at the suppression hearing, the court "examined thoroughly" the discovery documents before denying Brock's motion to reconsider the ruling on the motion to suppress. 2RP 12-18, 20-30.

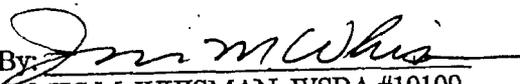
E. CONCLUSION

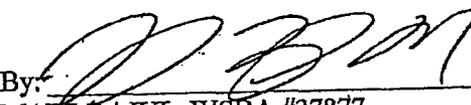
The Court of Appeals erred in holding that Brock was not in actual and exclusive possession of the backpack immediately preceding the time of his arrest. The court also neglected to address whether the inventory search was valid. The State asks this Court to grant review in accordance with RAP 13.4(b)(1), (3), and (4).

DATED this 3rd day of September, 2014.

Respectfully submitted,

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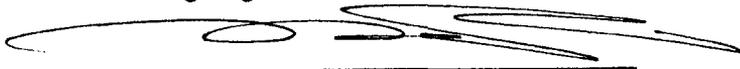
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson, at gibsonc@nwattorney.net; the attorney for the appellant, containing a copy of the **PETITION FOR REVIEW**, in STATE V. ANTOINE LAMONT BROCK, Cause No. 67334-3-I, in the Court of Appeals, Division I, 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

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the men's room, Officer Olson could see a pair of legs. The legs belonged to the appellant in this case, Antoine Brock. Officer Olson waited for roughly 10 minutes for Brock to come out of the restroom.

When Brock emerged, he was wearing baggy clothing and carrying a full backpack. Officer Olson identified himself as a police officer and informed Brock that the park was closed and Brock was not allowed to be there. Officer Olson had probable cause at this time to arrest Brock for trespass, but chose not to.

Instead, Officer Olson decided to perform a Terry stop and frisk. Officer Olson told Brock that he was not under arrest. Officer Olson asked Brock to put down his backpack, and Brock complied. Officer Olson did not find any weapons or any other items during his pat down of Brock. He did not pat down or search the backpack at that time.

After the pat down, Officer Olson asked Brock for identification as part of his trespass investigation. Brock replied that he did not have identification on him. Instead, he told Officer Olson that his name was Dorien Halley and provided a corresponding birth date and social security number.

Officer Olson told Brock to come back to his patrol truck to continue the investigation. With safety concerns in mind, Officer Olson carried Brock's backpack. Officer Olson had Brock stand on the curb 12 to 15 feet from the truck while Officer Olson placed the backpack in the front passenger seat. Officer Olson reminded Brock that he was still not under arrest at the time, but told Brock that he was not free to go.

Officer Olson checked the identification that Brock provided through the Washington State Patrol database. Brock told Officer Olson that he would not find a

record of Brock, because Brock's license was from California. Officer Olson entered the information that Brock had given him, but found no record in either Washington or California.

At that point, Officer Olson felt that he had probable cause to arrest Brock for providing false information. He told Brock that he was under arrest and read him his Miranda² rights. Because Brock had been cooperative and did not have weapons on his person, Officer Olson did not handcuff him. Officer Olson also told Brock that he was not necessarily going to jail.

Officer Olson had not felt a wallet during the pat down, so he decided to look for Brock's identification in the backpack. He left Brock standing on the curb 12 to 15 feet away. The backpack was still in the truck when Officer Olson searched it. Officer Olson kept Brock in view while searching the bag. Officer Olson considered his search of the backpack a search incident to arrest. He did not articulate an officer safety or evidence preservation rationale for his search.

In searching the backpack, Officer Olson immediately saw a wallet-like object and thought it would be a likely place to find identification. In the wallet, he found two small baggies that appeared to contain methamphetamine and marijuana. He also found a Department of Corrections (DOC) inmate identification card. The card displayed Brock's picture and identified him as Antoine L. Brock.

Officer Olson then handcuffed Brock, thoroughly searched his person, and put him in the back of his patrol truck. Officer Olson estimated that the time from initial contact to handcuffing Brock was 10-12 minutes.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Officer Olson then ran Brock's real name through the database and discovered that he had a DOC felony arrest warrant. Once the Washington State Patrol confirmed the warrant, Officer Olson decided to take Brock to jail.

Before doing so, Officer Olson pulled the rest of Brock's belongings out of his backpack. Brock still did not have access to the bag at this point. Officer Olson found a number of items, including checks, credit cards, mail, and more baggies he suspected might contain narcotics. Officer Olson testified that he did not perform a thorough inventory at that time or catalogue the objects in the backpack. However, Officer Olson also testified that he would be unable to bring an arrestee's personal effects to the jail without searching them for contraband, weapons, or explosives.

Brock was ultimately booked for his DOC warrant and possession of methamphetamine. In addition, Officer Olson recognized that the checkbooks, credit cards, and bank statements that he found in Brock's backpack—which had other people's names affixed to them—were possible stolen property. Officer Olson entered these items into evidence. The State ultimately charged Brock with 10 counts of identity theft in the second degree, three counts of forgery, and violation of the Uniform Controlled Substances Act, chapter 69.50 RCW.

Brock moved to suppress the evidence found in his backpack. The court denied Brock's motion, finding that this was a valid search incident to arrest.

Brock waived his right to a jury trial and proceeded by way of stipulated trial. The court found him guilty on all counts except one identity theft count. He appeals his conviction.

DISCUSSION

Brock argues that the search of his backpack was unlawful under article I, section 7 of the Washington Constitution. He contends that there was no officer safety or evidence preservation basis for the search, so the trial court erred in denying his motion to suppress. This court reviews de novo conclusions of law from an order pertaining to the suppression of evidence. State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009).

Article I, section 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Under this provision, a warrantless search is per se unreasonable unless it falls within one of the “carefully drawn and jealously guarded” exceptions to the warrant requirement. State v. Ortega, 177 Wn.2d 116, 122, 297 P.3d 57 (2013).

One such exception is the search incident to arrest. Id. at 123. An officer may, incident to a lawful custodial arrest, make a warrantless search of (1) an arrestee’s person and (2) the area within an arrestee’s immediate control. Valdez, 167 Wn.2d at 769. Only the former is at issue here. A search of an arrestee’s person encompasses both the arrestee and personal articles in the arrestee’s actual and exclusive possession at or immediately preceding the time of arrest. State v. Byrd, 178 Wn.2d 611, 623, 310 P.3d 793 (2013). Constructive possession is insufficient: the search must extend to only those articles immediately associated with the arrestee. Id. Under the time of arrest rule, an article is “immediately associated” with an arrestee’s person if the arrestee has actual possession at or immediately preceding the time of arrest. Id. at

621, 623. Searches of an arrestee's person require no additional justification beyond the validity of the arrest. Id. at 617-18.

In Byrd, the Washington Supreme Court upheld the search of a purse that was on the defendant's lap when she was arrested. Id. at 615, 624. The officer seized the purse and set it on the ground before securing the defendant in his patrol car. Id. at 615. He returned to the purse "within 'moments'" to search it for weapons or contraband, whereupon he found methamphetamine. Id. The court found that the defendant's purse was immediately associated with her person at the time of arrest, leaving her possession only after the arrest. Id. at 623-24. It was thus a constitutional search incident to arrest of the arrestee's person.³ Id. at 624.

The court recently reiterated this rule in State v. MacDicken, No. 88267-3, 2014 WL 766693 (Wash. Feb. 27, 2014). There, the defendant was carrying a laptop bag and pushing a rolling duffel bag when he was arrested. Id. at *1. An officer ordered the defendant to the ground, handcuffed him, and stood him up next to the patrol car. Id. Another officer then moved the bags a car's length away and searched them. Id. The court concluded that the bags were in the defendant's actual and exclusive possession at the time of arrest and were immediately associated with his person. Id. at *3. It held that the search of the bags was a part of a lawful search incident to arrest of the defendant's person. Id.

³ The Byrd court expressed concern about the validity of the underlying arrest, which would then invalidate the resulting search. See 178 Wn.2d at 625 n.3. However, the court stated that, if the underlying arrest was valid, the procedures followed were valid as well. Id. at 625.

Here, the salient facts are: Officer Olson searched the bag roughly 10 minutes after seizing it from Brock. The bag was secured in Officer Olson's truck from the time of seizure through the time of the search. Brock was 12 to 15 feet away from the vehicle and the backpack at the time of arrest and during the search of the backpack. Brock had actual possession of the backpack when Officer Olson initiated the Terry stop and when he seized it. However, Brock did not have actual possession of the backpack at the time of his arrest.

Under Washington case law, most of these facts will not alone render the search unreasonable. See, e.g., MacDicken, 2014 WL 766693 at *1; State v. Smith, 119 Wn.2d 675, 682, 835 P.2d 1025 (1992), abrogated on other grounds by Byrd, 178 Wn.2d 623. In Smith, the court upheld a search of a fanny pack that fell from the defendant's person during his arrest. 119 Wn.2d at 676-77. There, the officer arrested the defendant, placed him in the backseat of the patrol car, and set the fanny pack on the front seat. Id. at 677. The officer searched the fanny pack between 9 and 17 minutes later. Id. The lapse in time of several minutes after separating defendant and bag did not render the search unreasonable. See id. at 677-78. The fact that the officer had secured the bag in his patrol car for a time prior to the search did not render the search unreasonable. See id. In MacDicken, the bag in the suspect's possession at the time of arrest was moved a car's length away from the defendant before it was searched. 2014 WL 766693 at *1. This did not render the search unreasonable. Brock was separated from his bag for a similar amount of time as Smith and was closer to his bag than MacDicken was to his when the search occurred. We conclude that neither the length of time the officer had control of the backpack, the physical distance between

Brock and the backpack, nor the fact that the backpack was secured in the patrol vehicle require us to invalidate the search of the backpack.

However, unlike MacDicken and Byrd, Brock did not have actual possession of his bag at the time of arrest. We therefore ask: was the backpack in Brock's possession immediately preceding his arrest so that this was a valid search of an arrestee's person under the time of arrest rule?

Washington courts have not precisely defined the scope of "immediately preceding" the time of arrest. But, in cases where a defendant has unsuccessfully challenged possession as related to arrest, the lapse of time between possession and arrest has been less significant than here. See, e.g., Smith, 119 Wn.2d at 682; State v. Ellison, 172 Wn. App. 710, 718, 291 P.3d 921 (2013).

In Smith, the defendant's fanny pack fell off during the struggle that ensued after the officer tackled him to the ground. 119 Wn.2d at 677. The officer then arrested the defendant and searched the fanny pack. Id. The court upheld the search. Id. at 682. Although the fanny pack was not on the defendant's person at the exact moment of arrest, the court found that the defendant was in actual possession of the fanny pack "just prior to the arrest."⁴ Id.

In Ellison, officers encountered the defendant with his backpack between his feet. 172 Wn. App. at 718. In the process of arresting the defendant, officers had him move to the ground and placed him in handcuffs. Id. The defendant argued that he

⁴ In upholding the search, the court also found that the fanny pack was within the defendant's reach at the time of arrest, constituting constructive possession. Smith, 119 Wn.2d at 682. Byrd abrogates Smith's holding that constructive possession would be sufficient. 178 Wn.2d at 623.

was thus not in control of the bag at the time of arrest. Id. at 717. The court disagreed, suggesting that, even if the defendant was separated from his bag prior to his arrest, he still had control of the bag immediately prior. Id. at 718, n.4.

In both of these cases, the defendant was separated from his bag while the officer restrained him for the specific purpose of arresting him. See Smith, 119 Wn.2d at 677; Ellison, 172 Wn. App. at 718. The period of time that passed between possession and arrest was very brief. See Smith, 119 Wn.2d at 677; Ellison, 172 Wn. App. at 718.

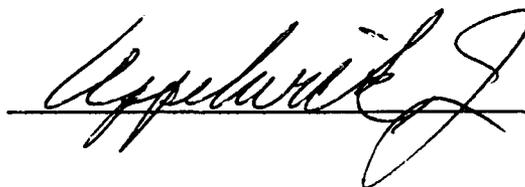
By contrast, Officer Olson separated Brock from his bag during an investigative stop, did not intend to arrest Brock at that time, and explicitly told Brock he was not under arrest. The bag remained in the patrol vehicle unsearched for nearly 10 minutes. When Officer Olson's investigation provided him new information, he arrested Brock, but he did not handcuff Brock and stated Brock was not necessarily going to jail. Then, Officer Olson returned to the bag in his front seat to search it.

Brock's backpack was neither on his person nor within his area of control at the time of his arrest. While Officer Olson had probable cause to arrest Brock when he seized the backpack, it is the arrest itself—not probable cause—that constitutes the necessary authority of law to search under article I, section 7. State v. O'Neill, 148 Wn.2d 564, 585-86, 62 P.3d 489 (2003). Therefore, to find that this was a valid search incident to arrest, we must conclude that, for the purposes of what is in an arrestee's possession, "immediately prior to arrest" includes either the time between a valid Terry stop and the actual resulting arrest or the time between seizure of the backpack during

the Terry stop and the resulting arrest. To date, the language in the Washington Supreme Court's opinions has not gone this far. We decline to do so here.

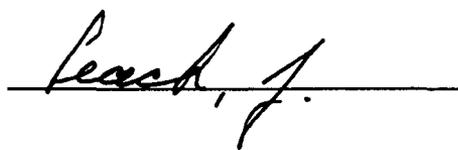
We conclude that Brock did not have actual and exclusive possession of his backpack at or immediately preceding the time of his arrest. This was not a valid search incident to arrest. The trial court erred in denying his motion to suppress.

We reverse and remand.



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WE CONCUR:



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State v. Brock, 67334-3-I

BECKER, J. (dissenting) — I dissent from the majority decision and would hold that the warrantless search of the backpack was justified as a search of the arrestee's person incident to arrest.

Both parties cite the holding of State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013):

We caution that the proper scope of the time of arrest rule is narrow, in keeping with this "jealously guarded" exception to the warrant requirement. It does not extend to all articles in an arrestee's constructive possession, but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest.

Byrd, 178 Wn.2d at 623 (citation omitted).

The backpack was in Brock's actual and exclusive possession shortly before the officer placed Brock under arrest for providing false information. I do not see any significance in the fact that Brock was separated from his backpack for about 10 minutes while the officer conducted an investigative stop. It is true that only a lawful custodial arrest provides authority to search incident to arrest under article I, section 7. State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003). The rule of O'Neill was not violated here, where the officer did not begin searching the backpack until he had placed Brock under arrest.

As set forth in Byrd, the scope of a lawful warrantless search of personal articles as part of a search incident to arrest has three components: (1) the articles must be "personal," (2) they must be "in the arrestee's actual and exclusive possession," and (3) the possession must be "at or immediately

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preceding the time of arrest.” Byrd, 178 Wn.2d at 623. If loosely interpreted, any one of these components has the potential to escape from historical limits and start down the road toward another progressive distortion of the type decried by Justice Frankfurter in his dissent in United States v. Rabinowitz, 339 U.S. 56, 72, 70 S. Ct. 430, 94 L. Ed. 653 (1950) (Frankfurter, J., dissenting), overruled in part by Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). See generally People v. Cregan, 2014 IL 113600, ¶¶ 98, 118; 10 N.E.3d 1196 (Burke, J., dissenting and expressing concern that the test articulated by the Cregan majority will permit a return to full vehicle searches incident to arrest by conceiving of a vehicle as a container immediately associated with an arrestee’s person).

Searching a backpack does go beyond the facts of United States v. Robinson, the Fourth Amendment source of the Byrd holding. United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). In Robinson, the crumpled cigarette package containing heroin was found in a shirt pocket during a routine collar-to-socks search of the arrestee’s clothing. Robinson, 414 U.S. at 221 & n.2. Still, many other courts have seen purses and fanny packs and shoulder bags as sufficiently pocket-like to be regarded as “in a fair sense a projection” of the arrestee’s person. Rabinowitz, 339 U.S. at 78 (Frankfurter, J., dissenting). So far, cases following Robinson have projected the person only as far out as backpacks and briefcases and luggage the arrestee was carrying or pushing.

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I do not perceive the facts of this case as giving cause for alarm that searches of the person incident to arrest will become open-ended as to time. The encounter occurred in a lonely spot in the middle of the night. Officer Olson might have arrested Brock immediately for trespassing. Had he done so, the majority would have recognized the subsequent search of the backpack as valid under Byrd's time of arrest rule. To hold that the search became invalid because the officer decided to investigate before making an arrest would create an undesirable incentive for hasty arrests. The officer was entitled to put the backpack out of reach for his own safety while he decided whether or not to make an arrest. The officer's way of dealing with the situation was thoroughly professional. I would affirm.

Becker, J.

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