

65527-2

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No. 65527-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

HECTOR SERANO SALINAS,

Appellant.

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

The Honorable Charles R. Snyder

APPELLANT'S REPLY BRIEF

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

Police officers seized and searched appellant Hector Salinas' wallet before formally arresting him on a probation warrant. At the precinct, they seized his clothing pursuant to an investigation of rape even though this was not the crime of arrest. These clothes were then sent to the Washington State Patrol Crime Laboratory and subjected to DNA and other forensic analyses without a warrant.

In response, the State claims that Washington's search-incident-to-arrest rule, when applied to a person, is coextensive with the federal constitutional provision. This position is incompatible with article I, section 7's requirement that all invasions of personal privacy be done with authority of law. The State alternatively claims that no warrant was required to search Salinas' clothing on the basis that once it was seized by police, he lost his expectation of privacy in the items. Again, this contention is without merit. Because the remaining evidence was insufficient to support Salinas' convictions, his convictions and sentence must be reversed, and this matter dismissed.

The State additionally concedes that Salinas would have been entitled to an instruction informing the jury to view the dog

track evidence with caution. In light of this concession and the scanty nature of the evidence adduced to convict Salinas, this Court should reverse his convictions.

1. SALINAS' SEARCH WAS NOT INCIDENT TO A
LAWFUL CUSTODIAL ARREST AS REQUIRED
BY ARTICLE I, SECTION 7.

a. The State's contention that the officer's subjective intent is irrelevant to the determination whether a valid custodial arrest has taken place conflicts with article I, section 7's authority of law requirement. The State concedes that under article I, section 7's authority of law requirement, a "valid custodial arrest is a condition precedent to a search incident to arrest as an exception to the warrant requirement under article I, section 7." Br. Resp. at 20; State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003); accord State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007). "Probable cause to arrest is not enough; only an actual custodial arrest provides the authority to justify a search incident thereto." State v. Radka, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004).

The State asserts that the question of whether a custodial arrest has occurred depends not upon the arresting officer's subjective intent but upon the objective "manifestations" of intent. Br. Resp. at 20-21. But Washington appellate decisions are divided

on this point. Compare State v. McKenna, 91 Wn. App. 554, 562, 958 P.2d 1017 (1998) (reversing trial court’s denial of motion to suppress because the arresting officer “never formed an intent, much less manifested an intent, to arrest McKenna custodially”) with Radka, 120 Wn. App. at 48, 50 (applying objective test) and State v. Gering, 146 Wn. App. 564, 567, 192 P.3d 935 (2008) (same).¹

These latter decisions conflict with article I, section 7’s authority of law requirement. The Washington Supreme Court has rejected the Fourth Amendment’s reliance upon an objective standard in similar contexts on the basis that our state constitutional provision expressly requires actual authority of law, not apparent authority. State v. Morse, 156 Wn.2d 1, 12, 123 P.3d 832 (2005). The Court in Morse stressed, “[b]ecause our constitution focuses on the rights of the individual, rather than on the reasonableness of the government action, the apparent authority doctrine, as . . . applied in the Fourth Amendment context is not appropriate to any analysis under article I, section 7.” Id. (emphasis added).

¹ The Washington Supreme Court has not expressly decided this question.

The decision whether an officer has the constitutional right to intrude upon an individual's privacy may not turn upon the post hoc justification that a mere detention bore the objective trappings of an arrest. Indeed, this analytical posture creates perverse incentives for law enforcement to aggressively handle and search people they only suspect of engaging in criminal activity, thus neatly straddling Terry and O'Neill. It must be remembered that the question is whether an officer has the right to conduct a search incident to arrest. Further, under article I, section 7, “[e]xceptions to the warrant requirement are to be ‘jealously and carefully drawn.’” Morse, 156 Wn.2d at 7 (citation omitted). This Court should conclude that the holdings of Radka and Gering are incompatible with article I, section 7’s requirement of actual authority of law and the Washington Supreme Court decisions strictly construing this requirement. The pre-arrest search of Salinas’ wallet was improper.

b. Under article I, section 7, a search incident to arrest is a narrow exception limited to a search for weapons and preventing destruction of evidence related to the crime of arrest.

Relying upon the Washington Supreme Court’s recent decisions in State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) and State v.

Patton, 167 Wn.2d 379, 219 P.3d 651 (2009),² as well as upon State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), Salinas has argued that because Salinas was actually arrested on a probation warrant, any subsequent search done in connection with the State's rape investigation was unconstitutional. Br. App. at 17-23. The State asserts that this Court should not consider Salinas' argument because Salinas has not analyzed the six Gunwall³ factors. Br. Resp. at 25-26.

By so contending, the State apparently has failed to carefully read Ringer, which addresses the precise question presented – the scope of a search of a suspect incident to his arrest under article I, section 7. In Ringer, the Court repudiated Fourth Amendment doctrine based upon the following analysis:

We perceive three stages in the prior development of the search incident to arrest exception to the warrant requirement. The exception began as a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee. This was the scope of the exception when Const. art. I, § 7 was adopted. In the early 20th century, however, both the federal courts and the courts of this state, with little or no reasoned analysis, expanded the exception until it threatened to swallow the general rule that a warrant is required. . . . In those years we neglected our own state constitution to

² Both cases consider the search-incident-to-arrest exception to the warrant requirement in the context of automobile searches.

³ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

focus instead on protections provided by U.S. Const. amend. 4.

We choose now to return to the protections of our own constitution and to interpret them consistent with their common law beginnings.

Ringer, 100 Wn.2d at 698 (emphasis added).

The Court overruled a number of its own decisions which had strayed from the strictly circumscribed limitations of a search incident to arrest under our state constitution. See id. (citing cases). The Court also noted that the so-called “automobile exception” to the rule was a creature of federal constitutional jurisprudence and had previously been rejected by the Court. Id. at 700-01. In Valdez and Patton, the Court reaffirmed the narrow scope of the exception under article I, section 7: a warrantless search is permissible under the search incident to arrest exception only “when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.” Valdez, 167 Wn.2d at 777 (emphasis added); Patton, 167 Wn.2d at 395-96.

Citing State v. Whitney, 156 Wn. App. 405, 232 P.3d 582, rev. denied, 170 Wn.2d 1004 (2010), the State claims that limitations on the “search incident to arrest” exception in the

automobile context do not extend to searches of a person incident to an arrest. Br. Resp. at 27. What the State fails to mention, however, is that Whitney was decided solely under the Fourth Amendment, and without reference to our state constitutional provision. See Whitney, 156 Wn. App. at 408 (“Our issue is legal: whether during a search of Mr. Whitney's person incident to his arrest, the pill bottle removal and inspection violated the Fourth Amendment to the United States Constitution”).

But under article I, section 7, the Washington Supreme Court has declined to carve out a different rule based upon the arbitrary circumstance whether the arrestee was in an automobile or on foot. Rather, a search incident to arrest under article I, section 7 is limited to a search for weapons and prevention of the destruction of evidence of the crime of arrest. Here, the officers repeatedly testified that they were not arresting Salinas on investigation of rape but on a felony probation warrant from Wenatchee. 3/8/10 RP 113-15. Since the officers' subsequent search was unrelated to his arrest, it violated article I, section 7. The after-acquired evidence must be suppressed.

c. No Gunwall analysis is necessary for privacy violations under article I, section 7. In addition to ignoring Ringer, the State disregards the many recent decisions in which our Supreme Court has dispensed with the necessity for a Gunwall analysis where a party advocates that a Fourth Amendment exception to the warrant requirement is invalid under article I, section 7. See e.g. McNabb v. Department of Corrections, 163 Wn.2d 393, 180 P.3d 1257 (2008) (concluding it is unnecessary to engage in a Gunwall analysis where prior caselaw establishes a state constitutional provision has an independent meaning from the corresponding federal provision, and reaffirming that no Gunwall analysis is therefore required under article I, section 7); State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 27 (2007) (noting it is “well-settled” that article I, section 7 “qualitatively differs” from the Fourth Amendment and in some areas provides greater protection than the federal provision, and therefore “a Gunwall analysis is unnecessary” to establish the Court should undertake an independent constitutional analysis); State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003) (same). In short, the State’s contention that a Gunwall analysis is necessary is entirely without merit.

2. THE FAILURE TO OBTAIN A WARRANT TO SEARCH SALINAS' CLOTHING FOR DNA AND OTHER FORENSIC EVIDENCE VIOLATED ARTICLE I, SECTION 7'S WARRANT REQUIREMENT.

The State contends that Salinas' privacy interest in his clothing was extinguished when it was inventoried by police, and that for this reason the police were not obligated to get a warrant before sending the clothing to the crime laboratory for DNA testing. While this may be a correct statement of the law under the Fourth Amendment, article I, section 7's warrant requirement demands a heightened standard.

Under article I, section 7,

Once police have conducted a valid inventory search of an inmate's clothing and other effects at booking, and have placed them in storage for safekeeping in accord with a proper inventory procedure, the inmate has lost any privacy interest in those items that have already lawfully been exposed to police view.

State v. Cheatam, 150 Wn.2d 626, 642, 81 P.3d 830 (2003)

(emphasis added).

Thus, in Cheatam, the defendant's shoes which were "observed" during the booking process could lawfully be compared with the shoeprints at the crime scene. Id.; see also id. at 643 (distinguishing cases cited by defense on the basis that "[i]n neither

case was there a lawful inventory search at booking during which the evidence was exposed to police view”) (emphasis added).

Here, by contrast, what is observable to the naked eye is a far cry from what is discovered through the sophisticated microanalysis involved in forensic testing for DNA evidence. The “search” occurred when the clothing was sent to the crime laboratory, not when the officers confiscated and inventoried Salinas’ clothes. Under article I, section 7, the evidence should be suppressed.

3. DEFENSE COUNSEL’S FAILURE TO PROPOSE AN INSTRUCTION TELLING THE JURY TO VIEW THE DOG TRACK EVIDENCE WITH CAUTION PREVENTED SALINAS FROM RECEIVING THE EFFECTIVE ASSISTANCE HE WAS ENTITLED UNDER THE SIXTH AMENDMENT.

The State concedes that Salinas was entitled to an instruction that would have informed the jury they should consider the dog track evidence with caution. Br. Resp. at 40. The State claims, however, that defense counsel’s failure to do so was harmless, asserting that “significant other evidence” established Salinas was the rapist. Br. Resp. at 41. The State greatly overstates the “other evidence.” In fact, very little evidence corroborated the dog track, and a great deal of evidence undermined the State’s theory that Salinas was the attacker. Most

significantly, when Pellett was first shown a montage containing Salinas' photograph shortly after the incident, she did not make an identification, and told police, weeping, "It doesn't look like any of them." RP 110; Trial RP 1011. Scientific research establishes that an identification tends to be most reliable if it is made soon after confrontation. Gary L. Wells, Leah S. Quinlivan, Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 *Law & Hum. Beh.* 1, 13-14 (2009); see also id. at 14 ("eyewitness identification experiments show that the elapsed time between witnessing an event and later identification accuracy is negatively correlated with accurate identifications and positively correlated with mistaken identifications").

There were also differences in the description Pellett provided of her attacker and Salinas' appearance when he was arrested. Trial RP 108-13. Indeed, the only similarity of note was that Pellett's alleged attacker and Salinas were both Hispanic. There were significant issues with the testing procedure and the reference sample obtained for the DNA analysis. Trial RP 1090-93; 1100-06.

The State notes that Salinas fled when police contacted him, but the evidence established pretrial that Salinas was concerned about his immigration status, 3/8/10 RP 202, 204, and it was uncontested that he had a felony warrant out of Wenatchee. Given that Salinas had these reasons to fear the police, Salinas' flight is not probative of consciousness of guilt of the charged offense,

The State claims that no one else was in the area when the police conducted their search. Br. Resp. at 41. The State does not cite to the record in support of this claim, probably because the record does not establish that the police conducted a full search of the park where the incident took place. Further, it would be expected that someone who had raped a woman at knifepoint would not remain close to the scene of the crime some 45 minutes or more after the crime occurred. What is surprising is that the attacker would be sleeping peacefully a relatively short distance away, which is what was Salinas was doing when he was arrested.

In short, the dog track evidence was a material ingredient of the State's case against Salinas. To establish ineffective assistance of counsel, Salinas only need show that there is a reasonable probability that the result would have been different but for counsel's omission. Strickland v. Washington, 466 U.S. 668,

687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). He has met this burden. His convictions should be reversed.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, this Court should conclude that the trial court erred in denying Salinas' motion to suppress evidence. This Court should further conclude the remaining evidence is insufficient to support a prosecution. In the alternative, this Court should conclude that defense counsel rendered ineffective assistance of counsel and reverse and remand for a new trial.

DATED this 27th day of January, 2012.

Respectfully submitted:



SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 65527-2-I
)	
HECTOR SALINAS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
BELLINGHAM, WA 98225 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] | HECTOR SALINAS
726671
WASHINGTON STATE PENITENTIARY
1313 N 13 TH AVE
WALLA WALLA, WA 99362 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF JANUARY, 2012.

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