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No. 65561-2-I

COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

State of Washington, Respondent

v.

Derek Lee White, Petitioner.

REPLY BRIEF OF APPELLANT

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Issue No. 1—Whether the search of Mr. White’s vehicle was lawful after Mr. White had been handcuffed and placed in the back of the patrol vehicle.

The State argues Trooper “Maupin reasonably believed there was evidence related to the crime for which White was arrested in the passenger compartment of the vehicle.” (*State’s Response Brief*, p. 10).

But this does not necessarily follow. Mr. White was arrested for the crime of DUI-Drugs. The relevant elements of that offense are whether Mr. White was under the influence of drugs while driving his vehicle. The only drugs under whose influence Mr. White could have been driving are those in his system; not any that might be found in his vehicle. Hence, any drugs located subsequently in Mr. White’s vehicle would not constitute “evidence of the offense of arrest,” as required by *Arizona v. Gant*, 566 U.S. --, 129 S.Ct. 1710 at 1723, 173 L.Ed.2d 485 (2009).

The State also argues that if Trooper Maupin had not conducted an immediate search of Mr. White’s vehicle, any contraband inside “would be lost or destroyed.” (*State’s Response Brief*, pp. 6, 11, 12) The state seeks to buttress this argument by adding that “the vehicle was being recovered by a third party.” (*State’s Response Brief*, p. 2).

Law enforcement was in charge of Mr. White's vehicle, which was safely off the road parked in a gore point. It was not incumbent upon law enforcement to relinquish the vehicle to a third party. Law enforcement could have maintained custody of the vehicle at the scene until such time as a search warrant was obtained. Alternatively, law enforcement could have impounded the vehicle and sought a search warrant at a more relaxed pace. To argue that Trooper Maupin was under the necessity of searching Mr. White's vehicle before it was recovered by a third party and any potential evidence "lost or destroyed" does not follow.

Since the time Mr. White filed his briefing with this Court, another case has come down from Division II bearing on the search incident to arrest issue. *State v. Swetz*, --P.3d--, 2011 WL 481028, Docket No. 39617-3 (published February 11, 2011).

There, Swetz approached an officer's vehicle to speak with him about an unrelated matter and the officer smelled a "strong odor of burnt marijuana" on Swetz's breath and person. The officer walked with Swetz back to Swetz's vehicle and "saw a bag of marijuana sitting on the passenger seat." *Swetz*, at 1.

The officer arrested Swetz for possession of marijuana, handcuffed him, placed him in the back seat of the patrol car, and advised him of his Miranda rights. The officer then searched Swetz's car and found additional containers of marijuana in the glove box, glass pipes with marijuana residue, and several containers of Diazepam pills. *Swetz*, at 1.

In holding the search incident to arrest unlawful, the *Swetz* court stated,

In sum, we hold that under *Patton* and *Buelna Valdez*, article I, section 7 limits a search incident to arrest to situations where threats to officer safety or the preservation of evidence prevent the arresting officer from delaying the search to obtain a warrant. See *Buelna Valdez*, 167 Wn.2d at 777; *Patton*, 167 Wn.2d at 394-95. Because the State concedes that the search here was conducted incident to Swetz's arrest and neither of those concerns existed at the time of the search, we reverse Swetz's convictions and remand with instructions to suppress the evidence.

Swetz, at 12.

In *Swetz*, unlike here, the officer smelled the odor of marijuana on Mr. Swetz prior to the search of his vehicle, and even spotted in plain view a baggie of marijuana on the passenger seat of Mr. Swetz's vehicle. If those facts do not support a search of Mr. Swetz's vehicle incident to arrest, the facts of the present case surely do not.

Issue No. 2

Subissue B—*Expert opinion evidence improper where expert not identified as such by state and no discovery provided as to his training and experience that would qualify him as an expert*

Defendant maintains he was not notified by the prosecutor that Trooper Maupin would be called as an expert witness to testify as to the identity of the substance in the two glass pipes as being marijuana. In support of this argument, defendant cited in initial briefing to Criminal Rule 4.7(a)(2)(ii) relating to the prosecutor’s discovery obligations as relating to expert witnesses they intend to call. (*Brief of Appellant*, p. 24).

In response, the State ignores this rule relating specifically to expert witnesses and instead quotes the general rule relating to non-expert witnesses, CrR 4.7(a)(1)(i). (*State’s Response Brief*, at 18).

The State admits Trooper Maupin’s report “did not detail Maupin’s training and education in the detection of controlled substances,” but argues the report nevertheless “inferred” (sic) it (*State’s Response Brief*, at p. 18), and that Trooper Maupin’s report “presupposes” his training and expertise. (*State’s Response Brief*, pp. 19, 20).

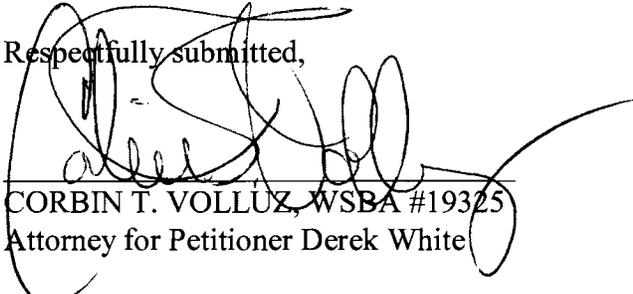
But the discovery obligations of the prosecutor were instituted precisely for the reason that a defendant should not have to “infer” or “presuppose” the evidence to be used against him at trial.

The State argues, “Trooper Maupin’s testimony could not have been a surprise and certainly didn’t prejudice White when he previously expected a scientist to confirm through testing that the residue in the glass pipes was marijuana.” (*State’s Response Brief*, at 19.) But Mr. White had no such expectation. No testing of the marijuana was ever conducted to the knowledge of Mr. White (other than an inadmissible NIK test done on the scene, and which was not sought to be admitted by the prosecutor at trial). No expert witness as to the marijuana was listed on the State’s witness list that would lead to such an expectation on the part of Mr. White. (CP 85).

The fact the trooper was recalled by the prosecutor on the second day of trial as their final witness solely for the purpose of identifying the glass bowl residue as marijuana suggests the prosecutor recognized her discovery failure only after trial had commenced and after Trooper Maupin had concluded testifying initially on the first day of trial. Mr. White was

certainly surprised by Trooper Maupin's testimony the second time he was called to the stand, and the prejudice to Mr. White is manifest.

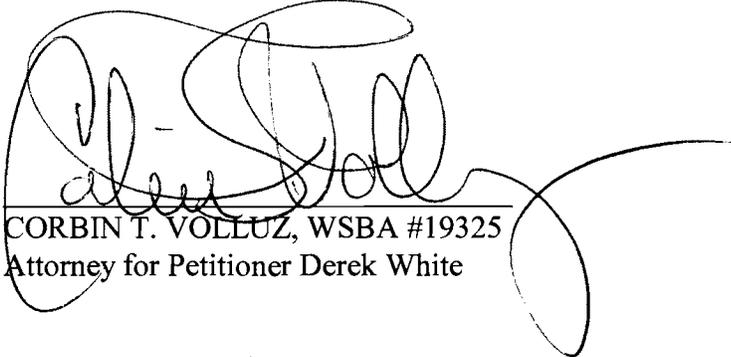
Respectfully submitted,



CORBIN T. VOLLUZ, WSBA #19325
Attorney for Petitioner Derek White

I, Corbin T. Volluz, hereby declare under penalty of perjury under the laws of the state of Washington on the date below, I did place a copy of this reply brief in the United States Mail with sufficient postage affixed, addressed to the Whatcom County Prosecutor's Office at 311 Grand Avenue, Suite 201, Bellingham, WA 98225.

Signed at Mount Vernon, Washington on the 26th day of March, 2011.



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