90292-5

Supreme Court No. (to be set)
Court of Appeals No. 43945-0-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Bradley Fulton
Appellant/Petitioner

Kitsap County Superior Court Cause No. 12-1-00165-9
The Honorable Judge Sally F. Olsen

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Bradley Fulton, the appellant below, asks the Court to review the decision of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Bradley Fulton seeks review of the Court of Appeals Opinion entered on April 29, 2014. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Evidence seized without a warrant is inadmissible at trial, unless the state establishes an exception to the warrant requirement. In this case, police arrested, handcuffed, and locked Mr. Fulton in the back of a patrol car before searching his satchel. Did the trial court err by admitting illegally seized evidence in violation of Mr. Fulton's rights under Wash. Const. art. I, § 7?

ISSUE 2: Wash. Const. art. I, §7 protects privacy interests that have been and should be held safe from governmental intrusion absent a warrant. The "time of arrest" rule allows police to invade a person's private affairs based on what the Supreme Court has described as a "practical reality." Is the "time of arrest" rule inconsistent with Wash. Const. art. I, § 7?

ISSUE 3: Under the "time of arrest" rule, an officer may search any items found in a person's actual possession when arrested. Mr. Fulton was not in actual possession of his satchel at the time of or immediately prior to his arrest. Did the Court of Appeals misapply the "time of arrest" rule in upholding the warrantless search of Mr. Fulton's satchel?

IV. STATEMENT OF THE CASE

While standing outside a Safeway store, Bradley Fulton was approached by Kitsap County Sheriff's Deputy Greg Rice. CP 47. Deputy Rice told Mr. Fulton he was investigating a shoplifting complaint at a nearby auto parts store.[1] RP 9. Rice noticed that Mr. Fulton had a knife whose handle was protected by metal knuckles. Rice arrested Mr. Fulton for carrying a dangerous weapon,[2] and placed him in handcuffs. CP 47.

Nearby stood a bench with a black satchel on it. RP 12. Rice described the bench as "right next to [Mr. Fulton]... just your standard-sized bench." RP 12.

Mr. Fulton asked the deputy to bring the satchel along to the jail, and Rice retrieved it from the bench.[3] CP 47. Rice searched Mr. Fulton and put him in his car. He then searched the satchel and found methamphetamine. CP 48.

The state charged Mr. Fulton with possession of a controlled substance. CP 1. He moved to suppress the evidence. CP 37-44.

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[1] The complaining party had seen Mr. Fulton in the store, believed he had taken items without paying, and had watched him move something from his pocket to his satchel as he walked away. CP 46-47.

[2] *See* RCW 9.41.250(1).

[3] Rice later testified that he would have seized the satchel even if Mr. Fulton hadn't asked him to take it. CP 47.

Following a hearing, the court denied the motion and entered findings and conclusions. The court found that Mr. Fulton had been "standing outside the nearby Safeway" when Rice approached him. The court did not make a finding regarding how much time had passed since Mr. Fulton left the auto parts store carrying the satchel.[4] Nor did the court enter a finding reflecting the distance between Mr. Fulton and the bench at the time Rice approached. The court described the satchel as "sitting on a bench next to [Mr. Fulton]" or "lying on the bench." CP 46-50.

Mr. Fulton waived his right to a jury trial and submitted the case on stipulated facts. CP 45. Following conviction and sentencing, he appealed. CP 20. The Court of Appeals affirmed the conviction. Opinion, pp. 1, 5.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the "time of arrest" rule violates Wash. Const. art. I, § 7.

1. The state constitution does not allow a "pragmatic approach" to the scope of exceptions to the warrant requirement.

The government may not intrude into private affairs without authority of law. Wash. Const. art. I, § 7. A valid warrant provides the

[4] Testimony suggests it was at least 20-25 minutes prior to his contact with Rice. RP 7.

"authority of law" required by the constitution. Absent a warrant, the state must establish "one of the jealously guarded and carefully drawn exceptions to the warrant requirement." *State v. Hinton*, 179 Wn.2d 862, 868-69, 319 P.3d 9 (2014).

Under limited circumstances, the "search incident to arrest" exception provides authority of law. The justification for the exception lies in the possibility that an arrestee will threaten officer safety or destroy evidence. *State v. Snapp*, 174 Wn.2d 177, 189, 275 P.3d 289 (2012). The risk must exist "'at the time of the search.'" *Id.* (quoting *State v. Patton*, 167 Wn.2d 379, 394-395, 219 P.3d 651 (2009)). Once the risk has passed, officers may not search without a warrant. *Id.*, at 189-190.

The court has previously rejected a bright-line rule authorizing vehicle searches in the absence of risk. *Snapp,* 174 Wn.2d at 189-190. According to the court, such a "pragmatic approach [does] not accord with article I, § 7;" instead, it unmoors the search-incident-to-arrest exception from its justifications. *Snapp*, 174 Wn.2d at 190.

The court has recently adopted a different bright-line rule, unrelated to the justification for the exception. In *Byrd,* the court upheld the search of an arrestee's purse even absent any risk to the officer or to evidence at the time of the search. *State v. Byrd*, 178 Wn.2d 611, 621, 310

P.3d 793 (2013). Under *Byrd,* police can search any personal items in the arrestee's possession at the time of the arrest.

According to the *Byrd* court, the "time of arrest" rule reflects the "*practical reality* that a search of the arrestee's 'person' to remove weapons and secure evidence must include more than his literal person." *Id.* (emphasis added). The court reasoned that the exigencies justifying search of the arrestee's body also justify a search of clothing and "all articles closely associated with his person." *Id.*, at 622. The court reaffirmed *Byrd* in *State v. MacDicken*, 179 Wn.2d 936, 941, 319 P.3d 31 (2014).

There are two problems with this reasoning. First, Wash. Const. art. I, § 7 does not recognize exceptions based on "practical reality." *Byrd,* 178 Wn.2d at 621. Art. I, § 7 rests on "a broad right to privacy and the need for legal authorization in order to disturb that right." *State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012).[5] The Supreme Court has described art. I, § 7 as "a jealous protector of privacy." *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

[5] Because of this, our state constitution prohibits searches that would be permitted under the federal constitution. *See, e.g., Snapp*, 174 Wn.2d at 192 (rejecting the "Thornton" exception to the warrant requirement) (citing *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)).

Our state constitution limits the scope of an exception to the underlying justification. *Snapp*, 174 Wn.2d at 190. By divorcing the scope of the search-incident-to-arrest exception from its justification, the *Byrd* court returns to the kind of reasoning repudiated in *Snapp*.

Second, the court's broad exception exceeds the "practical reality" to which it refers. An arresting officer may search a person's clothing because that clothing will remain with them even after they are arrested, secured in a police car, and taken to jail.[6] This "practical reality" does not extend to purses, handbags, briefcases, luggage, and other items that have been separated from their owners at the time of the search.

The Supreme Court should accept review and reconsider its decisions in *Byrd* and *MacDicken*. This case presents significant issues of constitutional law that are of substantial public interest. RAP 13.4(b)(3) and (4).

2. The *Byrd* and *MacDicken* decisions are incorrect and harmful, and should be revisited.

Generally, *stare decisis* requires a clear showing that precedent is both incorrect and harmful. *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). This

[6] Depending on police department policy, a limited class of personal items—certain kinds of jewelry, for example—may also remain in a person's possession following arrest.

includes precedent that was "incorrect when it was announced." *State v. Abdulle*, 174 Wn.2d 411, 415-16, 275 P.3d 1113 (2012).

The *Byrd* decision was incorrect when announced. The *Byrd* court erroneously relied on a "practical reality" as justification for its decision. This approach does not comport with art. I, § 7 jurisprudence. The *MacDicken* court followed *Byrd* without additional analysis. Both decisions are incorrect.

The decisions are also harmful. They permit police officers to search the personal belongings of arrestees without a search warrant, even in the absence of any exigency or risk. Both cases guided the Court of Appeals here, and will undoubtedly guide trial courts throughout the state.

Because the decisions are incorrect and harmful, *stare decisis* does not protect them from review. The court should accept review, reverse Mr. Fulton's conviction, and order the evidence suppressed.

B. The Supreme Court should accept review and hold that the Court of Appeals misapplied the "time of arrest" rule set forth in *Byrd* and *MacDicken*.

As outlined above, the "time of arrest" rule permits police to conduct a warrantless search of items in an arrestee's possession at the time of arrest. *Byrd,* 178 Wn.2d at 621. The scope of the rule is narrow. *Id.*, at 623. Police may not search items in an arrestee's constructive possession. *Id.* Instead, the state must prove the item searched was "in

the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." *Id.* The exception does not extend to items that are merely within the arrestee's reach. *Id.*

The satchel in this case sat on a bench near where Mr. Fulton stood. The state did not prove when he had last held it. Nor did the state prove that he was touching it when approached by Rice. CP 46-50; RP 9-12. Instead, the state proved at most constructive possession. RP 9-12. In *Byrd,* by contrast, the defendant held her purse on her lap at the time of her arrest.[7] *Byrd*, 178 Wn.2d at 625.

Because the state failed to prove actual possession, *Byrd* does not support the search incident to Mr. Fulton's arrest. *Id.* Nor does the traditional justification—a threat to evidence or officer safety—justify the search here: the officer handcuffed Mr. Fulton and locked him in the police car prior to searching the satchel. *See Snapp*, 174 Wn.2d at 190.

This case presents an opportunity for the Supreme Court to clarify the scope of the search-incident-to-arrest exception in the wake of *Byrd* and *MacDicken.* Mr. Fulton raises significant constitutional issues that are of substantial public interest and should be considered by the Supreme Court. The court should accept review under RAP 13.4(b)(3) and (4).

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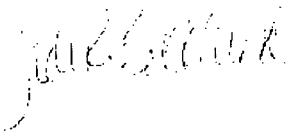
[7] Similarly, *MacDicken* involved a man carrying a laptop bag and pushing a rolling duffle bag. *MacDicken*, 179 Wn.2d at 939.

VI. CONCLUSION

The Supreme Court should accept review, reverse Mr. Fulton's conviction, and order the evidence suppressed.

Respectfully submitted May 27, 2014.

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

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and I sent an electronic copy to

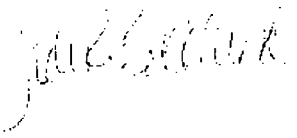
Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 27, 2014.



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APPENDIX A:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRADLEY SCOTT FULTON, Appellant.	No. 43945-0-II UNPUBLISHED OPINION

LEE, J. — Bradley Scott Fulton appeals his possession of a controlled substance conviction, arguing that the trial court erred in failing to suppress drug evidence found in his satchel at the time of his arrest. Because Fulton had actual possession of his satchel at the time of the lawful custodial arrest, under *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013) and *State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014), police were justified in searching the satchel as an extension of their valid, warrantless search of Fulton's person incident to arrest. Accordingly, we affirm Fulton's conviction.

FACTS

On January 23, 2012, O'Reilly Auto Parts employee James Vignati called 911 to report a possible shoplifting incident at his Port Orchard store. Vignati described the suspected shoplifter as a "male in his 20s wearing a black hoodie with white lettering and carrying a black satchel." Suppl. Clerk's Papers (CP) at 47. Vignati further reported that he saw the young man walk towards a nearby Safeway store. Kitsap County Deputy Sheriff Greg Rice responded to the call

and quickly "located a male matching the description standing outside the nearby Safeway." Suppl. CP at 47.

Deputy Rice contacted the suspect who identified himself as Fulton. During the contact, Rice noticed that Fulton was carrying a "large combat style knife approximately 12'' inches long with a 5'' blade . . . [and a] handle that was shaped like brass knuckles with a sharp pointed end." Suppl. CP at 47. Rice arrested Fulton for carrying the dangerous weapon. At the time of his arrest, Fulton had a satchel with him. Fulton requested that Rice bring the satchel with him to jail "because it had all his belongings in it." CP at 5. Concerned about transporting an unsearched bag in his patrol vehicle, Rice checked the satchel for weapons. In an exterior side pocket large enough to conceal a firearm, Rice found a small plastic baggie that appeared to contain illegal narcotics; later testing confirmed that the substance in the baggie was methamphetamine. Rice then transported Fulton and his property to the jail.

On February 21, 2012, the State charged Fulton with possession of a controlled substance [methamphetamine], RCW 69.50.4013.[1] At his CrR 3.6 hearing, Fulton argued that the drug evidence should be suppressed because Deputy Rice's search incident to arrest unlawfully exceeded the allowable scope of such a search. The State argued that the search incident to arrest exception "allows a search of the arrestee's person for evidence of the crime of arrest [and] allows for a search of the defendant's person and the *personal belongings closely associated with*

[1] The record does not reflect whether the State charged Fulton with a dangerous weapon violation, RCW 9.41.250(1)(b). Rice testified at the CrR 3.6 hearing that he did not find any stolen items in Fulton's bag.

that person at the moment of arrest for weapons, evidence, and anything that could be a potential safety risk to the officer." Report of Proceedings (Sept. 11, 2012) at 31-32 (emphasis added).

The trial court ruled that the satchel search was valid and that the drug evidence would be admissible at trial. Fulton's stipulated facts bench trial occurred later that day, and the trial court found him guilty of one count of possession of a controlled substance. Fulton appeals.

ANALYSIS

Fulton contends that the trial court erred in failing to suppress drug evidence found in his satchel at the time of his arrest. Because our Supreme Court's recent decisions in *Byrd* and *MacDicken* squarely control the outcome of this case, we disagree.

We review de novo a trial court's conclusions of law on a motion to suppress evidence. *State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004). Unchallenged findings of fact entered following a suppression hearing are treated as verities on appeal.[2] *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Here, as in our recent decision in *State v. Ellison*, 172 Wn. App. 710, 719, 291 P.3d 921 (2013), we must determine "whether the trial court erred in ruling that police may conduct a warrantless search of an object, like a backpack, that was in a defendant's possession and control at the time of arrest as a valid search incident to arrest."

[2] All the factual findings in this case are treated as verities. Fulton has assigned error to the trial court's factual finding that "Deputy Rice testified he searched the bag for safety reasons [and] it is departmental policy and procedure to search every item and person before placing them in a patrol vehicle for safety reasons." Suppl. CP at 48. However, Fulton has not adequately supported this assignment of error with any argument or persuasive authority germane to the issues addressed in this appeal. Accordingly, we do not further address this issue. *State v. Motherwell*, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990).

A warrantless search is per se unreasonable under article 1, section 7 of the Washington Constitution "unless the State proves that one of the few 'carefully drawn and jealously guarded exceptions'" to the warrant requirement applies. *Byrd*, 178 Wn.2d at 616 (quoting *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013)).[3] "There are two types of warrantless searches that may be made incident to a lawful arrest: a search of the arrestee's person and a search of the area within the arrestee's immediate control." *MacDicken*, 179 Wn.2d at 940.

As the Washington Supreme Court recently stated in *Byrd*, a search of the arrestee's person "including articles of the person such as clothing or personal effects, require[s] 'no additional justification' beyond the validity of the custodial arrest." *Byrd*, 178 Wn.2d at 617-18 (quoting *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 38 L. Ed 2d 427 (1973)). A search of the area within the arrestee's immediate control, in contrast, must be "justified by concerns of officer safety or the preservation of evidence and are limited to those areas within reaching distance at the time of the search." *MacDicken*, 179 Wn.2d at 941.

Washington courts employ the "time of arrest" rule to determine whether a search incident to arrest involves a search of the arrestee (and articles "immediately associated" with the arrestee's person) or a search of the area within the arrestee's immediate control. *Byrd*, 178 Wn.2d at 621. Under this rule, an article is "immediately associated" with the arrestee's person and can be searched under *Robinson*, without further justification for police safety or evidence preservation, if it is a "personal [article] in the arrestee's actual and exclusive possession at or

[3]Although Fulton's arguments also implicate the Fourth Amendment, "article I, section 7 of the Washington Constitution, provides, at the least, co-extensive protection of individual privacy rights." *Ellison*, 172 Wn. App. at 719. Accordingly, we do not separately address Fulton's concerns on Fourth Amendment grounds.

immediately preceding the time of arrest." *Byrd*, 178 Wn.2d at 623. Moreover, it does not matter whether the defendant is separated from the property—such as being handcuffed and secured in a patrol car—at the time the search occurs so long as there is no significant delay between the arrest and the search. *Byrd*, 178 Wn.2d at 624.

Here, it is undisputed that Fulton's satchel was in his exclusive possession and control at the time of his arrest. *See, e.g.*, CP 47 (Fulton asked Deputy Rice to bring the satchel on the bench next to Fulton). Further, it is undisputed that Rice validly arrested Fulton for carrying a dangerous weapon. Accordingly, pursuant to *Byrd* and *MacDicken*, Rice appropriately searched the bag as a lawful search incident to arrest and the trial court properly allowed this evidence to be admitted at trial. We affirm Fulton's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Maxa, J.

Bjorgen, P.J.

BACKLUND & MISTRY

May 27, 2014 - 1:55 PM

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