NO. 44433-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GONZALES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00705-3

BRIEF OF RESPONDENT

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	Jodi R. Backlund, Manek R. Mistry, Skylar T. Brett PO Box 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 6, 2013, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

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2. Whether the Defendant's claim that the trial court erred in denying his motion to suppress the shotgun is without merit when the trial court's finding that the shotgun was seized pursuant to a lawful inventory search was supported by substantial evidence?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Michael Gonzales was charged by information filed in Kitsap County Superior Court with one count of unlawful possession of a firearm in the first degree. CP 1. Following a trial on stipulated facts, the trial court found the defendant guilty of the charged offense and imposed a "Prison-Based DOSA" sentence.[1] CP 22, 158; RP (11/06) 2-6. The Defendant then filed the present appeal.

B. FACTS

At approximately 8:25 am on January 13, 2012, officers from the

[1] The Defendant's standard range was 87 to 116 months, and as part of the DOSA sentence the standard range was waived and the Defendant was sentenced to one-half of the midpoint of the standard range: 50.75 months. CP 159-60; RCW 9.94A.660.

Port Orchard Police Department responded to an automobile accident on Tremont Street in Port Orchard. CP 25. When the officers arrived they found that the Defendant's car had collided "head on" with another vehicle and the Defendant was trapped inside his car. CP 25. The entire engine compartment of the Defendant's car had been pushed back towards the passenger area of the car. CP 25. A fire crew arrived and used the "jaws of life" to cut the Defendant out of his car. CP 25. The Defendant was then transported to a hospital. CP 25.

A towing company was called in order to impound the Defendant's car. CP 25. Before the car was towed, Officer Jerry Jensen of the Port Orchard Police Department inventoried the Defendant's car and found a violin case in the back seat that had been partially broken. CP 29. A sawed off shotgun was found inside the case. CP 29. Subsequent investigation revealed that the Defendant was a convicted felon. CP 29

Detective E.J. Martin later went to the hospital to speak with the Defendant. CP 31. Detective Martin asked the Defendant if he remembered what had happened, and the Defendant stated that something had happened to the steering in his car and he could not steer the car. CP 30. Detective Martin asked the Defendant about the shotgun and the Defendant did not answer initially. CP 30. Detective Martin asked the Defendant if his fingerprints would be on the gun, and the Defendant was

initially silent but the looked at the officer and said "Yes." CP 31. The Defendant then asked if he was going to go to prison. CP 31. The detective told him that he did not know, as that was not his job and he was just investigating the case. CP 31.

The Defendant was later charged with unlawful possession of a firearm. CP 1. Prior to trial the Defendant filed a motion to suppress the shotgun. CP 186. The Defendant argued that the search of his car exceeded the bounds of a proper "inventory" search because the officer opened a closed violin case. CP 198.

On October 8, 2012, a CrR 3.6 hearing was held to address the Defendant's motion and a CrR 3.5 hearing was also held to determine the admissibility of the Defendant's statements to Detective Martin. RP (10/08) 2-62.

With respect to the CrR 3.5 issue, Detective Martin testified that he went to the Defendant's hospital room where the Defendant was lying in a bed with a neck brace on and tubes in his chest. RP (10/8) 6. Detective Martin then said the Defendant's name, and the Defendant opened his eyes and looked at the officer. RP (10/8) 7. Detective Martin then explained that he had a conversation with the Defendant and that the Defendant appeared to understand what the conversation was about. RP (10/8) 8. His responses to the officer's questions were appropriate, and he did not

exhibit any delirium or confusion during the conversation. RP (10/8) 8. Rather, Detective Martin explained that it was a "conversation back and forth" and that at the end the Defendant asked a question that appropriately related to the topic of the conversation. RP (10/8) 8.

Detective Martin further explained that he did not Mirandize the Defendant because he never arrested the Defendant, nor was the Defendant handcuffed or otherwise detained. RP (10/8) 7-9. No police officer was stationed outside the Defendant's room, and no threats or promises were made to the Defendant. RP (10/8) 7-8. The Defendant testified that he was on pain medication at the time and did not remember the conversation. RP (10/8) 12-13.

The trial court ruled that the Defendant's statements were admissible. RP (10/8) 19. Specifically, the trial court held that,

> This is a relatively unique circumstance. Mr. Gonzales was immobilized, but it was certainly not through any action of law enforcement.
>
> The question of whether he was, thus, under arrest for purposes of Miranda is different from our normal situation. Based on what I have heard both from the officer's testimony and from Mr. Gonzales testimony, it is clear to me that Mr. Gonzales was not under arrest, he did not perceive himself to be under arrest, he was neither objectively restrained nor subjectively restrained by law enforcement. The immobility that he suffered was not at the hands of law enforcement.
>
> Further, the notion of whether he was cognizant enough to have a reasonable conversation is certainly an area of

> dispute. But the testimony of the officer was clear that he wasn't certain if Mr. Gonzales was sleeping or passed out but that Mr. Gonzales did respond to his name being quietly whispered and then did have a conversation. There is nothing in that recitation of facts that eliminates the admissibility of the testimony under 3.5.
>
> The further issue is raised by both counsel that Mr. Gonzales' Fifth Amendment rights were violated by the police officer inquiring of him while he was in the hospital. However, I have heard nothing that indicated the police were coercive in any way. They may have been somewhat opportunistic in talking with him at the hospital, but that isn't a violation of this Fifth Amendment rights.
>
> Consequently, whatever Mr. Gonzales said to law enforcement will be admissible. Certainly the weight to be given it by the jury will be a further issue, if it goes to trial.

RP (10/8) 18-19. The trial court also entered written findings and conclusions which mirrored the court's oral ruling and specifically stated that "the statements made by the defendant to Detective E.J. Martin were voluntary and not the product of any threat or coercion that would violate the Fifth Amendment protections of the defendant." CP 12.

With respect to search issue, Officer Jensen testified that as a result of the collision the Defendant's car was sitting in the middle of the road and was an impediment to traffic. RP (10/8) 21. Furthermore, given the damage sustained in the collision, there was "no way" that the Defendant's car could be driven away. RP (10/8) 22. Thus, Officer Jensen called a towing company to remove the car. RP (10/8) 23.

Officer Jensen explained that when a car is towed there is a

procedure that is followed, and that officers "have to inventory the contents of the car". RP (10/8) 24. He further explained that the procedure was not just his personal procedure, but was the procedure used by the Port Orchard Police Department. RP (10/8) 32-33. Officer Jensen further testified that the purpose of the inventory was not to investigate a crime, but rather the purpose was to see if there were valuables in the car and to protect them by inventorying them. RP (10/8) 25-26.

During the inventory of the car, Officer Jensen found a violin case. RP (10/8) 26-27. The "nose" of the case was broken and the case itself was not "latched." RP (10/8) 26-27. Officer Jensen opened the case, and at the CrR 3.6 hearing he explained that he did so because,

> "I wanted to open it up to see if there was a violin in there, and if it was of value, I would take it to our office for safekeeping."

RP (10/8) 26. Officer Jensen opened the case and found a sawed-off 12-gauge shotgun which appeared to have a barrel that was under the legal requirement of 18 inches. RP (10/8) 28-29. Officer Jensen then seized the shotgun as evidence. RP (10/8) 29.[2]

[2] After finding the shotgun, Officer Jensen did not terminate his inventory search. Rather, he continued searching the car and eventually found a closed ammunition box which he opened and inside he found a handgun. RP (10/8) 30-31. The trial court ultimately suppressed the handgun, finding that once the officer found the illegal shotgun the search could not longer be considered solely a "community caretaking" inventory search as it was now also a search for evidence of a crime. See CP 16. Thus the court ruled that the officer should have obtained a search before continuing the search. CP 16.

The trial court ruled that Officer Jensen was performing an inventory search when he came upon the violin case, and that the officer's testimony that he thought it might contain something of value was "persuasive." RP (10/8) 59-60. The court also held that Officer Jensen was following the procedures set out by the Port Orchard Police Department. RP (10/8) 57. The court also noted that,

> Just speaking from common sense, if you are in an accident, you expect your valuables to be secured by the police, as was the dog that apparently found in the vehicle.

RP (10/8) 58. The court also noted that it found the court's analysis in *Mireles*[3] was persuasive, and the trial court thus denied the Defendant's motion to suppress the shotgun. RP (10/8) 58-59.

The trial court also entered written findings of fact and conclusions of law in which the courts specifically held that,

> That the search of the violin case was an appropriate exercise of police prerogative in conducting an inventory search because it was consistent with policy of the agency, and because it was reasonable and appropriate for the officer to determine if the violin case contained valuable property that should be removed from the automobile for safekeeping and the determine if the contents had been damaged before being removed.

CP 15.

The State has not appealed this ruling.

[3] *State v. Mireles*, 73 Wn.App. 605, 871 P.2d 162 (1994)

III. ARGUMENT

A. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION TO SUPPRESS HIS STATEMENTS TO DETECTIVE MARTIN IS WITHOUT MERIT BECAUSE THE TRIAL COURT'S FINDINGS THAT THE DEFENDANT WAS NOT IN CUSTODY AT THE TIME OF THE STATEMENTS AND THAT THE STATEMENTS WERE VOLUNTARY ARE BOTH SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The Defendant argues that the trial court erred by not suppressing his statements, which he claims were involuntary and/or were the product of custodial interrogation without the benefit of *Miranda* warnings. App.'s Br. at 7-12. This claim, however, is without merit because substantial evidence supported the trial court's findings that the statements were voluntary and that the Defendant was not in custody, and thus no *Miranda* warnings were required.

Although in previous years there was some confusion about whether an appellate court should undertake an independent review of the record in a confession case, the Washington Supreme Court resolved this debate in 1997. In *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997) the Court rejected those cases calling for an independent review and stated, "We hold that the rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities

on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record." *Id.* at 131.

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Police must give *Miranda* warnings when a suspect is subject to interrogation while in the coercive environment of police custody. *State v. Rosas-Miranda*, ___ Wn.App. ___, 309 P.3d 728, 731 (2013), *citing State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004).

A suspect is in custody for purposes of Miranda when "a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." *Rosas-Miranda*, ___ Wn.App. ___, 309 P.3d at 731, *quoting Heritage*, 152 Wn.2d at 218, 95 P.3d 345 (*citing Berkemer v. McCarty*, 468 U.S. 420, 441–42, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984)). Courts examine the totality of the circumstances to determine whether a suspect was in custody. *Rosas-Miranda*, ___ Wn.App. ___, 309 P.3d at 731, *citing United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir.2008).

Washington courts have previously addressed the issue of whether Miranda warnings are required and whether a suspect is "in custody" when a suspect is questioned while he or she is a patient at a hospital. In *State v. Butler*, 165 Wn.App. 820, 269 P.3d 315 (2012), for instance, the

defendant was questioned while he was in an intensive care unit and on pain medication. *Butler*, 165 Wn.App at 825. The Court of Appeals explained that the conclusion that a suspect is in custody turns on "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *Butler*, 165 Wn.App at 827, *citing State v. Lorenz,* 152 Wn.2d 22, 36–37, 93 P.3d 133 (2004). "Custody" depends on "whether the defendant's movement was restricted at the time of questioning," and "necessarily that the police restricted that movement." *Butler*, 165 Wn.App at 827. "Custody" does not refer to whether police intend to arrest, whether the environment was coercive, or whether there was probable cause to arrest at the time of the questioning. *Butler*, 165 Wn.App at 827, *citing Lorenz*, 152 Wn.2d at 37. It refers instead to whether the suspect's movement is restricted at the time of questioning. *Butler*, 165 Wn.App at 827, *citing Lorenz*, 152 Wn.2d. at 36–37.

The Court in Butler then noted that the defendant was not arrested and that he was restricted to a hospital room by his own injuries, not by police. *Butler*, 165 Wn.App at 828. In addition, no police were stationed inside or outside Mr. Butler's room. *Id.* The court thus concluded that "These facts support the court's conclusion that Mr. Butler was not in custody when he spoke with Detective Miller." *Id.*

The Court of Appeals further noted that the Washington Supreme Court had previously reached a similar conclusion in *State v. Kelter*, 71 Wn.2d 52, 54, 426 P.2d 500 (1967). In *Kelter* the defendant was in the hospital and under investigation for causing a fatal car crash. The Court refused to conclude that Mr. Kelter was in custody even though he was confined to his hospital room because he had not "been placed under arrest or otherwise restrained by the police;" rather, he was restricted to a hospital room, by his own injuries, not by police. *Kelter*, 71 Wn.2d at 54, cited by *Butler*, 165 Wn.App at 827-2.

In the present case, the Defendant was clearly in the hospital due to his injuries, not because of any police custody. In addition, the Defendant was not otherwise arrested or detained, nor was his freedom curtailed to the degree associated with a formal arrest. The Defendant was never handcuffed and no police officer was stationed outside the Defendant's room. RP (10/8) 7-8. No threats or promises were made to the Defendant. RP (10/8) 7-8. Given these facts and the Washington cases cited above, the trial court did not err in finding that *Miranda* warnings were not required and that there was no Fifth Amendment violation.

The Defendant also argues that his statements were not voluntary because he was on pain medication at the time of the interview. App.'s Br. at 7-9.

Washington courts have explained that they apply two tests to determine the voluntariness of statements: the due process test and the *Miranda* test. *State v. Reuben*, 62 Wn.App. 620, 624, 814 P.2d 1177 (1991). Under the due process test, a defendant makes a voluntary statement if the law enforcement officers' behavior did not overcome his will to resist, thereby coercing the statement. *Reuben*, 62 Wn.App. at 624. A defendant does not make involuntary statements because of intoxication unless the intoxication rises to the level of mania where the defendant could not comprehend what he was saying and doing. *State v. Cuzzetto*, 76 Wn.2d 378, 383, 386–87, 457 P.2d 204 (1969). Intoxication alone does not make a defendant's statements involuntary. *State v. Saunders*, 120 Wn.App. 800, 810, 86 P.3d 232 (2004). Furthermore, an appellate court will not disturb a trial court's determination that statements were voluntary if there is substantial evidence in the record from which the trial court could have found voluntariness by a preponderance of the evidence. *Broadaway*, 133 Wn.2d at 129.

In the present case the Defendant's claim that the fact that he was on pain medication rendered his statements "involuntary" must fail because there is substantial evidence in the record that: the Defendant opened his eyes and looked at the officer; he engaged in a conversation "back and forth" with the officer and appeared to understand what the

conversation was about; his responses to the officer's questions were appropriate; he asked a question that was appropriately related to the topic of the conversation; and he did not exhibit any delirium or confusion during the conversation. RP (10/8) 7-8. Thus, even assuming that the Defendant was under the effects of pain medication, any effects fell short of the level of mania whereby the defendant was unable to comprehend what he was saying and doing as required by *Cuzzetto*.

In short, the Defendant's claims that the trial court erred must fail because the trial court's finding that the Defendant's statements were admissible was supported by substantial evidence in the record.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION TO SUPPRESS THE SHOTGUN IS WITHOUT MERIT BECAUSE THE TRIAL COURT'S FINDING THAT THE SHOTGUN WAS SEIZED PURSUANT TO A LAWFUL INVENTORY SEARCH WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Defendant next claims that the trial court erred in failing to suppress the shotgun found in his car because the search was not a valid inventory search. App.'s Br. at 13-19. This claim is without merit because the trial court properly found that the shotgun was recovered as part of a lawful inventory search of the car.

When reviewing a denial of a CrR 3.6 motion to suppress, an

appellate court looks for substantial evidence in the record to support the trial court's findings of fact. *State v. Tyler*, 166 Wn.App. 202, 208, 269 P.3d 379 (2012); *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The trial court's conclusions of law are reviewed de novo. *Tyler*, 166 Wn.App. at 208; *Mendez*, 137 Wn.2d at 214.

Article I, section 7 of our constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A valid warrant, subject to a few jealously guarded exceptions, establishes the requisite "authority of law." *State v. Afana*, 169 Wn.2d 169, 176–77, 233 P.3d 879 (2010) (quoting Wash. Const. art. 1, § 7). One such exception to the warrant requirement is an inventory search accompanying lawful vehicle impound. *State v. White*, 135 Wn.2d 761, 769–70, 958 P.2d 982 (1998); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

When determining whether the fruits of an inventory search following a vehicle impoundment are admissible evidence of a crime, the first question is whether the State can show reasonable cause for the impoundment. *Tyler*, 166 Wn.App. at 208; *State v. Houser*, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980).

In Washington, "[a] vehicle may lawfully be impounded if authorized by statute or ordinance. 'In the absence of statute or ordinance,

there must be reasonable cause for the impoundment.'" *Tyler*, 166 Wn.App. at 209 n.3; *State v. Bales*, 15 Wn.App. 834, 835, 552 P.2d 688 (1976). As this Court has noted, RCW 46.55.113(2)(b) provides that an officer may "take custody of a vehicle, at his or her discretion" if it is "unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety." *Tyler*, 166 Wn.App. at 209 n.3, quoting RCW 46.55.113(2)(b). That statute also provides that an officer may take custody of a vehicle whenever a police officer "finds an unattended vehicle at the scene of an accident." RCW 46.55.113(2)(c).

Furthermore, the Washington Supreme Court has also recently explained that a vehicle may be lawfully impounded under the "community caretaking function" if (a) the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft and (b) the defendant, the defendant's spouse, or friends are not available to move the vehicle. *Tyler*, 177 Wn.2d at 698.

Furthermore, it is "well settled that police officers may conduct a 'good faith' inventory search following a 'lawful impoundment' without first obtaining a search warrant." *Tyler*, 166 Wn.App. at 209, c*iting State v. Bales*, 15 Wn.App. 834, 835, 552 P.2d 688, 689 (1976), *review denied*, 89 Wn.2d 1003, 1977 WL 64194 (1977); *State v. Montague*, 73 Wn.2d

381, 385, 438 P.2d 571 (1968). Unlike a probable cause search, where the purpose is to discover evidence of a crime, the purpose of the inventory search is to perform an administrative or caretaking function. *Tyler*, 166 Wn.App. at 209; *State v. Dugas*, 109 Wn.App. 592, 597, 36 P.3d 577 (2001).

The principal purposes of an inventory search are: (1) to protect the vehicle owner's property; (2) to protect the police against false claims of theft by the owner; and (3) to protect the police from potential danger. *Tyler*, 166 Wn.App. at 209-10; *White*, 135 Wn.2d at 769–70 (citing *Houser*, 95 Wn.2d at 154). In addition, the Washington Supreme Court has recognized that an additional "valid and important" purpose for the inventory search is to protect the public from vandals who might find a firearm or contraband drugs. *Tyler*, 166 Wn.App. at 210, *citing Houser*, 95 Wn.2d at 154 n. 2 (*citing South Dakota v. Opperman*, 428 U.S. 364, 369, 376 n. 10, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)).

Evidence discovered during an inventory search is admissible "where the search is not made as a general exploratory search for the purposes of finding evidence of crime." *State v. Roberts*, 158 Wn.App. 174, 183, 240 P.3d 1198 (2010), *citing Montague*, 73 Wn.2d at 385, 438 P.2d 571("[W]here the search is not made as a general exploratory search for the purpose of finding evidence of crime but is made for the justifiable

purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed").

In the present case the Defendant's car was seriously damaged as a result of a collision and was left sitting in a roadway where it was obstructing traffic. The police, therefore, were clearly authorized to impound the vehicle and inventory its contents.

The Defendant, however, argues that the police were not allowed to open the violin case as part of the inventory process. App.'s Br. at 18. In support of this claim, the Defendant cites to the *Houser* opinion for the proposition that officers may not open a closed container during an inventory search, but rather must only take note of the item as a "sealed unit." App.'s Br. at 18, citing *Houser*, 95 Wn.2d at 158.

The State acknowledges that in *Houser* the Washington Supreme Court did state that,

> We conclude that where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents. Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit.

Houser, 95 Wn.2d at 158. In reaching this conclusion, however, the

Houser court examined two decisions from the United States Supreme Court for guidance. The Court first mentioned *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), in which the Supreme Court approved of an intrusion into the car's unlocked glove compartment. The Washington court explained that the Supreme Court had found such an intrusion to be reasonable in light of the valid objectives of an inventory search because documents of ownership and registration are customarily stored in the glove compartment and it often serves as a place for the temporary storage of valuables. *Houser*, 95 Wn.2d at 155.

The *Houser* court also cited a later opinion, *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), for the proposition that "in the absence of exigent circumstances, luggage may not be searched in the course of a warrantless probable cause search of an automobile." *Houser*, 95 Wn.2d at 156. Although the *Sanders* opinion did not involve an inventory search, the *Houser* court found the reasoning in *Sanders* to be relevant and the Court cited *Sanders* at length. *See Houser*, 95 Wn.2d at 156-58. The *Houser* court also cited a Colorado case, *People v. Counterman*, 556 P.2d 481 (1976), for its holding that officers had exceeded the proper scope of an inventory search when they opened a closed knapsack. *Houser*, 195 Wn.2d at 159.

The *Houser* court was not only court to question whether *Sanders* meant that officers may not open closed containers during an inventory search of a automobile. This question, however, was resolved several years later by the United States Supreme Court in *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987).

In *Bertine*, the defendant was arrested for DUI and his van was impounded. *Bertine*, 479 U.S. at 369, 107 S.Ct. at 740. Before a tow truck arrived to take the defendant's van to an impoundment lot, an officer inventoried the contents of the van and opened a closed backpack in which he found controlled substances, cocaine paraphernalia, and a large amount of cash. *Id.*

On appeal, the Supreme Court of Colorado recognized that in *Opperman* the Supreme Court had held inventory searches of automobiles to be consistent with the Fourth Amendment. The Colorado court, however, felt, however, that the later decision in *Arkansas v. Sanders*, altered the analysis and that a search of closed suitcase or contained violated the Fourth Amendment. *Bertine*, 479 U.S. at 370, 107 S.Ct. at 740. The Colorado court's reasoning thus closely paralleled the Washington Supreme Court's analysis in *Houser*.

The United States Supreme Court, however, rejected the Colorado court's analysis and held that the court's reliance on *Sanders* was

"incorrect." *Bertine*, 479 U.S. at 371, 107 S.Ct. at 741. The Supreme Court held that officers could open closed containers during an inventory search, and the Court further explained that,

> The Supreme Court of Colorado also thought it necessary to require that police, before inventorying a container, weigh the strength of the individual's privacy interest in the container against the possibility that the container might serve as a repository for dangerous or valuable items. We think that such a requirement is contrary to our decisions in *Opperman* and *Lafayette*, and by analogy to our decision in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982):
>
> > "Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit." *Lafayette, supra*, 462 U.S., at 648, 103 S.Ct., at 2610.
> >
> > "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *United States v. Ross, supra*, 456 U.S., at 821, 102 S.Ct., at 2170.
>
> We reaffirm these principles here: " '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.' " *Lafayette, supra*, 462 U.S., at 648, 103 S.Ct., at 2610 (*quoting New York v. Belton*, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981)).

Bertine, 479 U.S. at 375, 107 S.Ct. at 742-43.

Given this clear language from the United States Supreme Court in *Bertine*, it is clear that the *Houser* court's reliance of *Sanders* for the proposition that closed containers may not be searched during an inventory search was incorrect. In addition, as mentioned above, the court in *Houser* also cited to the Colorado case of *People v. Counterman* to support its holding regarding closed containers. *See Houser*, 195 Wn.2d at 159. After *Bertine*, however, the Colorado Supreme Court has stated that it is clear that *Counterman* is "no longer valid" in light of *Bertine*. *See, People v. Inman*, 765 P.2d 577, 579 n.4 (Colo. 1988). Similarly, the *Houser* court's reliance on *Sanders* and *Counterman* is also clearly no longer valid.

Two Washington Court of Appeals opinions issued after *Bertine* have addressed the issue of closed containers an inventory searches. In *State v. Mireles*, 73 Wn.App. 605, 871 P.2d 162 (1994), a decision relied upon by the trial court in the present case, a State agent had impounded the defendant's truck and during an inventory search an officer opened a canvas bag found on the floorboard. *Mireles*, 73 Wn.App. at 608. When the bag was opened and the officer saw what she believed were narcotics. *Id.* On appeal the Court of Appeals held that the search did not violate the Fourth Amendment or Article 1, section 7. *Id* at 612-14.

In a later case, Division One of the Court of Appeals dealt with a search of a closed container found in a jacket belonging to the defendant. *State v. Dugas*, 109 Wn.App. 592, 36 P.3d 577 (2001). In *Dugas*, officers detained the defendant to talk to him about a report of possible domestic violence. One officer stayed with the defendant while another officer went to speak victim. *Id* at 594. The defendant stated that he was hot and sweaty and was given permission to take of his jacket, which he placed on the hood of his car. *Id.* The Defendant was later arrested and transported to jail. An officer at the scene noticed that the defendant's jacket was still sitting on the car, and the officer seized the jacket and searched it. *Id.* During the search the officer found a closed container in a pocket and opened the "pouch" and found cocaine. *Id.*

On appeal, the court considered whether it was reasonable for the officer to search a closed container found during an inventory search of the jacket. *Dugas*, 109 Wn.App. at 597. The court cited *Houser* for its holding that a closed piece of luggage which gave no indication of dangerous contents cannot be searched during an inventory search. *Id* at 598, *citing Houser*, 95 Wn.2d at 158. The *Dugas* court also specifically mentioned that the *Houser* opinion had cited the Colorado *Counterman* opinion, and the *Dugas* court also recited the facts and holding of *Counterman*. *Dugas*, 109 Wn.App. at 598-99. The *Dugas* court then

concluded that it was unreasonable for the police to search the closed container. *Id* at 599.

Although the *Dugas* court cited *Counterman* at some length, the court failed to note that Colorado Supreme Court had subsequently held that *Counterman* was "no longer valid." *See, Inman*, 765 P.2d at 579 n.4. Similarly, the *Dugas* court briefly cited *Bertine* for the general proposition that inventory searches are recognized exceptions to the warrant requirement that protect against claims of theft, vandalism, or negligence. *Dugas*, 109 Wn.App. at 597. The *Dugas* court, however, made no mention of *Bertine's* holding regarding closed containers or the effect that *Bertine* had on the continuing validity of *Houser*.

Given the *Dugas* court's failure to address the obvious questions regarding the continuing validity of *Houser* and *Counterman*, the opinion itself is of limited utility and is simply not persuasive. In any event, the *Dugas* opinion appears to directly contradict the Court of Appeals' opinion in *Mireles*, and thus, at best, *Dugas* represents conflict between two divisions of the Court of Appeals.

In the present case, the trial court noted that it found the court's analysis in *Mireles* persuasive, and the trial court thus denied the Defendant's motion to suppress the shotgun. RP (10/8) 58-59. As the *Mireles* opinion addressed the relevant standard post-*Bertine*, the trial

court did not err in deciding to follow *Mireles* rather that *Dugas*.

Finally, the Defendant argues that the State failed to establish that the inventory search in the present case was conducted pursuant to "standardized' procedures. App.'s Br. at 15, citing *Florida v. Wells*, 495 U.S. 1, 4, 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990).

In *Wells*, the Florida Highway Patrol had searched a closed container during an inventory search, but the Supreme Court ultimately held the search was unlawful because the Highway Patrol had "no policy whatever with respect to the opening of closed containers." *Wells*, 495 U.S. at 4-5, 110 S.Ct. at 1635. In so doing, however, the Supreme Court rejected the Florida Supreme Court's ruling that,

> "The police under *Bertine* must mandate either that all containers will be opened during an inventory search, or that no containers will be opened. There can be no room for discretion."

Wells, 495 U.S. at 3, 110 S.Ct. at 1635, *quoting State v. Wells*, 539 So.2d 464, 469 (Fla. 1989). Specifically, the Supreme Court held that,

> While this latter statement of the Supreme Court of Florida derived support from a sentence in the *Bertine* concurrence taken in isolation, we think it is at odds with the thrust of both the concurrence and the opinion of the Court in that case. We said in *Bertine*:
>
> > "Nothing in *South Dakota v. Opperman* or *Illinois v. Lafayette*, prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of

criminal activity.".

> Our view that standardized criteria or established routine must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into "a purposeful and general means of discovering evidence of crime," *Bertine*, 479 U.S., at 376, 107 S.Ct., at 743 (BLACKMUN, J., concurring).
>
> But in forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical "all or nothing" fashion. "[I]nventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Id.*, at 372, 107 S.Ct., at 741. A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers or of opening no containers are unquestionably permissible, it would be equally permissible, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors. The allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.

Wells, 495 U.S. at 3-4, 110 S.Ct. at 1635 (some internal citations omitted).

Following *Wells*, numerous courts have addressed what types of standards or procedures must be in place or adopted by local law enforcement agencies before a police officer may search a closed

container during an inventory search.

The Washington Court of Appeals, for instance, addressed this issue the *Mireles* case discussed above. In *Mireles* the search had been conducted by a DSHS officer and at trial a DSHS officer testified that he had participated in five or six seizures for DSHS and an "an inventory search was a 'standard practice.'" *Mireles*, 73 Wn.App. at 611. Although there was also evidence that there were written standardized inventory procedures, there was no specific policy regarding closed containers. *Id* at 612. The Court of Appeals, however, held that "The apparent lack of a specific policy governing closed or sealed luggage or containers does not invalidate the search under *Wells* or *Opperman.*" *Mireles*, 73 Wn.App. at 612. The court further held that because the testimony demonstrated that the search was not a "ruse" to discover incriminating evidence and was consistent with the general purpose of an inventory search, "[t]he search was reasonable under the Fourth Amendment." *Id* at 612.

Numerous other post-*Wells* cases have explained that written policies and standards are not required and that a specific policy regarding closed containers is not necessarily required. The Third Circuit, for instance has explained that "Standardized criteria or routine may adequately regulate the opening of closed containers discovered during inventory searches without using the words 'closed container' or other

equivalent terms." *U.S. v. Mundy*, 621 F.3d 283, 290 (3rd Cir. 2010). Thus the Third Circuit declined "to create a rule of constitutional dimension that requires an inventory search protocol to predict every conceivable scenario an officer may happen upon while conducting an inventory search, and to provide a formulaic directive for each and every one." *Mundy*, 621 F.3d at 290. The court further noted that "Such a requirement would not only prove unworkable, but would run contrary to the letter and spirit of *Bertine* and *Wells*." *Id.*

Similarly, the Fifth Circuit upheld an upholding inventory search involving an officer's discovery of incriminating evidence found inside a notebook recovered pursuant to an inventory search, reasoning that neither *Bertine* nor *Wells* "requires a law enforcement agency's inventory policy to address specifically the steps that an officer should take upon encountering a closed container" *U.S. v. Andrews*, 22 F.3d 1328, 1336 (5th Cir.1994). In Andrews the officer explained that the "standard operating procedure" in every case that when a vehicle was towed the officer was to do an inventory, although there was no step by step procedure. *Id.* at 1335. The Fifth circuit upheld the search and noted that neither *Bertine* nor *Wells* "requires a law enforcement agency's inventory policy to address specifically the steps that an officer should take upon encountering a closed container." *Id* at 1336.

The Seventh Circuit also rejected a defense argument that an agencies policy was insufficient when it required an inventory of the "contents" of an automobile but did not specifically address "closed containers." *U.S. v. Wilson*, 938 F.2d 785, 790 (7th Cir. 1991). The court held that while the "policy may not use the buzz words 'closed container' we are convinced that the term "contents" provides sufficient elucidation to satisfy the requirements of *Wells*." *Id.*

The Nebraska Supreme Court has likewise held that testimony from jail staff that a purse (and a closed container in the purse) was searched pursuant to routine practice was sufficient to show the existence of a standard procedure and that the search was conducted in accordance with that procedure. *State v. Filkin*, 494 N.W.2d 544, 550 (Neb., 1993). In *Filkin* there was "sparse" testimony about the standards used by the agency involved, but an officer had testified that there was a standard procedure and that the search was conducted in accordance with that procedure. *Id* at 550. The Court thus held that "Although not expressly stated, the clear inference from that testimony is that the [closed container] was opened in accordance with that standardized procedure." *Id* at 550.

The Supreme Court of Wisconsin reached a similar conclusion in *State v. Weide*, 155 Wis.2d 537, 549, 455 N.W.2d 899, 905 (1990). In that case the agency's unwritten policy was simply that an inventory of the

contents is required. *Id* at 901, 905. The court found that the agencies policy or procedure "requir[ing] an inventory of the contents of a lost or stolen item that the Department subsequently finds or locates" was sufficient. *Id* at 905. *See also, U.S. v. Kimhong Thi Le*, 474 F.3d 511, 515 (8th Cir. 2007) (policy directing officer to "conduct a detailed inspection and inventory of all impounded vehicles" combined with officer's standard practice of opening closed containers was sufficient); *U.S. v. Lowe*, 9 F.3d 43, 46 (8th Cir.1993) (holding that evidence of a written policy is not required and that oral testimony about a standard policy to open closed containers during an inventory search is sufficient to meet the Fourth Amendment's reasonableness requirement); *U.S. v. Mendez*, 315 F.3d 132, 137 (2d Cir. 2002) (standard procedure requirement "may be proven by reference to either written rules and regulations or testimony regarding standard practices").

In the present case, Officer Jensen testified that pursuant to Port Orchard Police Department procedure, officers "have to inventory the contents of the car" when a car is towed. RP (10/8) 24. He further explained that the procedure was not just his personal procedure, but was the procedure used by the Port Orchard Police Department. RP (10/8) 32-33. Furthermore, the in conducting such a search the officers are looking to see if there are any valuables in the car and to protect such items by

inventorying them. RP (10/8) 25-26. Under Mireles and the other cases cited above, this testimony was sufficient for the trial court to find that the search was "consistent with the policy of the agency" and that the search was department practice to inventory impounded cars in an attempt to locate items of possible value or hazard so that they can be removed from the vehicle for safekeeping. CP 14-15. As the trial court's finding in this regard was supported by substantial evidence, the Defendant ahs failed to show that the trial court erred.

IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED November 6, 2013.

Respectfully submitted,
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