96069-1

No. _____

THE SUPREME COURT OF WASHINGTON

COURT OF APPEALS, DIVISION THREE, CASE No. 34496-7-III

STATE OF WASHINGTON,

v.

MICHAEL NELSON PECK

(co-defendant CLARK ALLEN TELLVIK No. 34525-4-III)

State's Petition for Discretionary Review

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I. IDENTITY OF MOVING PARTY.

The State of Washington asks this Court to accept review of the Court of Appeals decisions designated below in Section II.

II. COURT OF APPEALS DECISIONS.

The Court of Appeals decisions at issue are *State of Washington v. Michael Nelson Peck*, No. 34496-7-III, filed May 8, 2018, (unpublished), and *State of Washington v. Clark Allen Tellvik*, No. 34525-4-III, filed June 14, 2018, (unpublished). Motion to Reconsider denied June 12, 2018, for *State v. Peck*[1]. (Korsmo, J. dissenting). Holding that the results of the inventory search of the stolen truck of which the two men were found to be in possession should have been suppressed, the Court of Appeals reversed both men's convictions for possession with intent to deliver a controlled substance with the associated firearm enhancement.

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[1] Mr. Peck and Mr. Tellvik are co-defendants who were both found guilty on May 13, 2016, of the crimes of Burglary in the First Degree with a Firearm Enhancement, Possession of a Stolen Vehicle with a Firearm Enhancement, Possession of a Controlled Substance with Intent to Deliver with a Firearm Enhancement, and Making or Having Burglary Tools. Mr. Tellvik was also found guilty of Possession of a Stolen Firearm and Unlawful Possession of a Firearm in the Second Degree. The facts regarding the CrR 3.6 motion and the suppression of the methamphetamine located in the stolen truck are the same for each man. While the report of proceedings (RP) for each man is the same in content, their pagination differs. The State will be using the case specific RP references for each of its motions. There are no other differences in the two motions.

III. ISSUE PRESENTED FOR REVIEW.

A. Whether the Court of Appeals erred in suppressing the contents of a zippered CD case located in a stolen vehicle in the course of an inventory search, when neither defendant asserted any possessory interest in the CD case?

IV. STATEMENT OF THE CASE.

On Friday, January 23, 2016, Michael Peck was the passenger in a stolen Dodge Dakota truck driven by Clark Tellvik. RP 36, 37, 53, 56, 79, 82. Mr. Peck and Mr. Tellvik drove to Ms. Poulter's rural Ellensburg home and broke into at least one outbuilding. RP 35, 38, 39, 164, 228, 312, 503. Ms. Poulter, who had had a surveillance system installed just the prior day, observed the two men on her property when she was demonstrating her phone's surveillance feature to a friend. RP 234-35. Law enforcement was immediately called, and the two men, whose stolen vehicle had become stuck in the snow, were contacted on Ms. Poulter's property and arrested. RP 24, 82, 87, 88, 238.

Ms. Poulter and law enforcement later reviewed the video which had captured some of the men's activity on her property. They were able to observe Mr. Tellvik unsuccessfully attempt entry into Ms. Poulter's shop, then run back to the truck, obtain a pry bar,

jimmy the shop door, and enter. RP 321. A 15" blue pry bar was located outside the driver's door of the stolen truck covered with a thin layer of snow. RP 319, 338, 414, 529.

Ms. Poulter watched the video numerous times and believed that she had also seen Mr. Tellvik drop a gun by the driver's side door and cover it with his foot. Coincidentally, a neighbor had plowed Ms. Poulter's drive the day after the burglary and the removal of the stolen vehicle, and law enforcement was initially unable to locate any gun, believing that what Ms. Poulter had observed was the dropping of the pry bar. RP 274, 276, 322, 323, 543. However, Ms. Poulter was convinced that she had seen Mr. Tellvik drop a gun and re-contacted law enforcement. Kittitas County Sheriff's Office Deputy Vraves went to Ms. Poulter's home on January 25, 2016, with a metal detector, and in an area consistent with where the truck had been located on the video, located a Kel-Tec 9 mm handgun and loaded magazine. RP 543-47, 549, 550, 554, 559.

The truck that the two men had arrived in had been reported stolen the day before the burglary and had a screwdriver in the ignition, as well as a broken rear window. RP 108, 383. Nothing in the record indicates that Mr. Tellvik claimed that any of the items in

the truck were his, but Mr. Peck told law enforcement that a cell phone in the cab, as well as a car battery, and bag of tools in the truck bed were his.[2] He did not indicate that any other of the items belonged to him. RP 37, 63, 524.

In the course of an inventory search of the vehicle, a black zippered nylon CD case was located under the passenger seat. Located within the black zippered nylon CD case, were multiple individual bags of different sizes containing methamphetamine weighing 74.18 grams including its packaging. RP 423, 431, 483. Also located within the CD case were digital scales and a glass smoking pipe, the latter of which tested positive for methamphetamine. RP 109, 421-22, 486-87.

The Court of Appeals found that although the deputies were involved in a proper inventory search in the course of a lawful impoundment, it was incumbent upon them to obtain a warrant in order to open the black zippered, *i.e.*, closed, nylon CD case.

> An inventory search must be restricted to the areas required to fulfill the purpose of the search. *State v. Tyler*, 177 Wn.2d 690, 701, 302 P.3d 165 (2013); *Houser,* 95 Wn.2d at 154. If officers conducting an

[2] Two cell phones as well as a GPS system were located within the cab of the truck. Law enforcement assumed that the second phone also belonged to one of the two men. It does not appear that either of the two men claimed ownership of the GPS unit. A search warrant was obtained and executed for both the phones and the GPS unit without any evidentiary results. RP 62, 63, 69, 366, 439.

> inventory search encounter a locked compartment or closed container, it cannot be opened absent exigent circumstances or the consent of the owner. *Wisdom,* 187 Wn.App. at 675-676; *Houser*, 95 Wn.2d at 158; *State v. White*, 135 Wn.2d 761, 771-72, 958 P.2d 982 (1998). If a locked or closed container is encountered, absent exigency or consent, the officers must inventory the container as a sealed unit. *See Houser,* 95 Wn.2d 158-59. Here, the officers opened a closed container in the absence of any exigency and without consent. Before opening it, they needed a warrant.

State v. Peck, No. 34496-7-III at 9.

Ms. Poulter identified items in the back of the truck as possibly being her own, e.g., tools, and a car battery, however, there is no indication that she identified any item within the truck cab as having possibly been stolen. RP 283. None of the video showed either man placing any items originating from the property into the cab of the truck. A warrant will issue only upon probable cause that a crime has occurred and the item sought to be searched contains evidence of that crime. The State is not aware of any facts that would have satisfied the requisite standard. However, the CD case was found in a stolen vehicle that would have to be impounded, and the Sheriff's Office would thus be responsible for identifying and securing its contents.

The trial court stated in its oral CrR 3.6 ruling:

> There was no reason why the officers in this case thought that the CD bag contained any evidence. It was a CD bag and I didn't get the link that Ms. Powers (attorney for Mr. Peck) referenced to the cash that was taken from Mr. Peck. I didn't see that linked up with Deputy McKean, who did the inventory search. But even if he did, like I said, there's no evidence that there were any drugs in that CD case. The officers are required under an inventory search to do the inventory search. They have to look. I mean, you could have a toolbox in the back of the truck. There's no – why would you think there's any crime, evidence of a crime in there? There's no way the judge is going to sign a search warrant for it, but they still need to look to see if there's any tools in there. Otherwise, when the tools come up missing, somebody's going to say there was $12,000 worth of tools in that toolbox. The tow truck operator, the Sheriff's Office, the individual officers are all going to be liable for that.
>
> Now there's a reason we have these inventory searches and it's for the reasons that Deputy McKean spoke of. And I didn't, I didn't see anything out of the ordinary here that would make me think that he was trying to use the inventory search to try to bypass a warrant requirement. He's just doing his inventory search, so I'm going to deny the motion as well. RP 191-192.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

A. STANDARD FOR ACCEPTANCE OF DISCRETIONARY REVIEW

A party may seek discretionary review if the Court of Appeals

"has committed probable error and the decision of the Court of

Appeals substantially alters the status quo or substantially limits the freedom of a party to act." RAP 13.5(b)(2).

> This Court takes into account the following: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Review is warranted here because the decision below presents a question of substantial public interest and erroneously expands an expectation of privacy in closed items, not locked, located by law enforcement in the course of an inventory search. The decision below also erroneously creates an ownership right of privacy to a defendant who is located in a stolen vehicle, and who claims no ownership interest in the item searched.

B. THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS DECISION WHICH NEGATES THE PURPOSE OF THE INVENTORY SEARCH WARRANT EXCEPTION.

Review is warranted as to the Court of Appeals' decision that although law enforcement was engaged in a valid inventory search of the stolen vehicle that Mr. Peck and Mr. Tellvik were located in, it

was incumbent upon them to either forfeit inventorying an easily accessible and innocuous container or to make a meaningless and useless application for a warrant.

One of the narrow exceptions to the warrant requirement is a valid inventory search which is what occurred here. Inventory searches have long been recognized as a practical necessity. *State v. Gluck*, 83 Wn.2d 424, 428, 518 P.2d 703 (1974) (citing *State v. Montague*, 73 Wn.2d 381, 438 P.2d 571 (1968); *State v. Olsen*, 43 Wn.2d 726, 263 P.2d 824 (1953)). Warrantless inventory searches serve many important non-investigatory purposes, and are permissible because they (1) protect the vehicle owner's (or occupant's) property, (2) protect law enforcement agencies/officer and temporary storage bailees from false claims of theft, and (3) *Tyler,* 177 Wn.2d 690, 302 P.3d 165 (2013). An inventory search is permitted only to the extent necessary to achieve its purposes as stated *supra.*

State v. Wisdom, 187 Wn.App. 652, 349 P.3d 953 (2015), relied heavily upon the Court of Appeals in these two matters, can be distinguished from Mr. Peck's and Mr. Tellvik's cases in three significant ways. First, in *Wisdom*, the Court equated a shaving kit to luggage, noting the more intimate and personal nature of such

an item. *Wisdom*, 187 Wn.App. at 675. The Court stated that "a citizen places personal items in luggage in order to transport the items in privacy and with dignity." Id. A CD case has no such aura of intimacy or personal privacy. Second, in *Wisdom*, the defendant identified the shaving bag as his, and the Court noted that while the vehicle the defendant was in was stolen, law enforcement had direct evidence (the statement of Mr. Wisdom), that the shaving kit was not. *Wisdom,* 187 Wn.App. at 677. Third, and most importantly, in *Wisdom,* the deputy acknowledged during the CrR 3.6 hearing that he was on the lookout for controlled substances in the course of his search. *Wisdom* at 661-663. Here, there was no indication at the time of the inventory search that the black zippered nylon CD case belonged to either one. Neither man claimed ownership of the black CD case despite being specifically asked. RP 37, 63, 187, 524, 533, 592. While denial of ownership is not in and of itself sufficient to divest an individual of a privacy interest in an article, the court can consider the status of the area searched to determine whether any privacy interest has been abandoned. *State v. Evans,* 159 Wn.2d 402, 150 P.3d 105 (2007). Where a defendant disclaims ownership of an article seized from an area in which he has a reasonable expectation of privacy, such as his own

home or car, courts have declined to consider the disclaimer of ownership an abandonment of privacy interest in the article itself. Id. at 409-12. Here, not only was the black CD case not claimed by either man, but it was also within a stolen vehicle to which neither man had an objectively reasonable expectation of privacy. There were no indicators for law enforcement to assume that the case contained anything belonging to either defendant or that it contained contraband. RP 108, 116, 191, 418.

As Judge Korsmo observed in his dissenting opinion, whatever privacy interest a car thief may have in the stolen car must give way to the vehicle owner's interest in protecting his or her property.

> It is an open question whether or not a defendant has any privacy interest in a stolen vehicle or its contents. *See State v. Zakel,* 119 Wn.2d 563, 571, 834 P.2d 1046 (1992). I would answer that question "no" because one reason for an inventory search is to protect a vehicle owner's property. State v. White, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998). I would hold that a thief has no privacy interest that overrides that of the true owner. *Wisdom,* 187 Wn.App. at 680.

Nor could the officers have obtained a warrant even if one of the defendants had claimed the black CD case. While the men were seen attempting to break into Ms. Poulter's outbuildings, there was no testimony that either man had been in the interior area of the

stolen truck while on her property. Accordingly, there was no probable cause to believe evidence of the burglary would be in the truck cab and no basis for a search warrant.

The purposes of an inventory search, to protect the vehicle owner's property, to protect law enforcement agencies/officers and temporary storage bailees from false claims of theft, and to protect police officers and the public from potential danger are thwarted by the catch-22 of not being allowed to inventory the item while also not being able to obtain a warrant for the item.

In *State v. Tyler*, 177 Wn.2d 690, 302 P.3d 165 (2013), this Court prohibited the opening of "locked containers" as part of an inventory search. The Court did not similarly restrict the opening of *closed containers. See also State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998).

An earlier Washington Supreme Court case did appear to ban the opening of closed containers. *See State v. Houser*, 95 Wn.2d 143, 156, 622 P.2d 1218 (1980), cited with approval in *Wisdom,* ("the legitimate purposes behind an inventory search could have been effectuated by inventorying as a unit the closed toiletry kit in

which the drugs were found").[3] It appears that the rule announced in *Houser* was based upon the Fourth Amendment. This conclusion is based both upon the *Houser* Court's reliance upon federal case law and its statement in footnote 4 that "[f]or the purposes of this Fourth Amendment question, it suffices to say that no such necessity was shown here." *Houser*, 95 Wn.2d at 156 n. 4. Seven years after *Houser* was issued, the United States Supreme Court clarified that the Fourth Amendment is not violated by an inventory of the contents of closed containers found inside an impounded vehicle. *See generally Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). As such, the continuing legitimacy and/or expansion of *Houser* is at best doubtful.

VI. CONCLUSION.

Because the decision here erroneously expands the limitations of valid inventory searches, placing law enforcement in a catch-22 in which they can neither inventory an innocuous item within a stolen vehicle, nor obtain a warrant for that same innocuous item,

[3] It is worth noting that the closed item in *Houser* was both "a personal item," and located within a locked trunk. While *Houser* found the search of the locked trunk to be impermissible, the court distinguished the case from *South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), in which the Court upheld an inventory search of a glovebox, a location commonly thought of as "closed."

and because this case involves an issue of substantial public interest, review should be granted.

Respectfully submitted this 12th day of July, 2018.

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PROOF OF SERVICE

I, Theresa Burroughs, do hereby certify under penalty of perjury that on July 12th, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Motion for Discretionary Review:

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FILED

MAY 8, 2018

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 34496-7-III
Respondent,	)	
	)	
v.	)	
	)	
MICHAEL NELSON PECK,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — Michael Peck appeals his convictions for first degree burglary, possession of a stolen vehicle, possession of a controlled substance with intent to deliver, third degree theft, and possession of burglary tools. We agree with his challenge to the trial court's denial of his motion to suppress evidence of drugs and paraphernalia found in the warrantless search of a closed container and reverse the controlled substance conviction that was based on that evidence. We find no other error or abuse of discretion and affirm his remaining convictions.

FACTS AND PROCEDURAL BACKGROUND

On a Friday night in January 2016, Laura Poulter traveled to Cle Elum to play cards with friends. At around 1:00 a.m. she was telling her friends about a new security system on her rural Ellensburg home that she could monitor remotely and pulled out her

cell phone to show them. What they saw was a truck in her driveway and someone who appeared to be taking items from her home. One of her friends called 911 and described the events being captured by the surveillance cameras, which soon included the presence of a second person. Kittitas County sheriff's deputies were dispatched and Ms. Poulter left to drive home.

When officers arrived at Ms. Poulter's house, Michael Peck and Clark Tellvik were found standing in deep snow outside a Dodge Dakota truck that was hopelessly stuck in Ms. Poulter's unplowed driveway. The center glass on the rear window of the truck had been broken out, its ignition had been punched, and a screwdriver had to be used to start the vehicle. Officers ran the truck's license plate and confirmed it had been reported stolen only two days earlier. The truck's owner would later testify that he never drove the Dakota in snow because it had high performance "racing slicks" rather than normal tires and couldn't be safely driven in snow or on ice. Report of Proceedings (RP)[1] at 383.

Mr. Peck, who had been the passenger in the truck, was read his *Miranda*[2] rights and agreed to talk to a responding officer. He claimed that Mr. Tellvik had picked him up earlier that evening to go for a drive since neither man was getting along with his

[1] All Report of Proceedings citations refer to the report of proceedings that begins with proceedings on April 29, 2016, and includes the trial.

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

respective girlfriend. According to Mr. Peck, they ended up in the vicinity of Ms. Poulter's home and, not knowing how to get back to the highway or freeway, had pulled in to ask for directions. No one answered Mr. Tellvik's knock on the door. Upon trying to leave, they found they were stuck in the snow. They retrieved hay from an open barn, mats from doorways, and eventually a piece of scaffolding to place under the truck's tires in an effort to get out, but to no avail. Mr. Peck denied that either he or Mr. Tellvik had broken into the home or any closed outbuilding.

When the officer asked Mr. Peck if anything in the truck belonged to him, Mr. Peck at first said that nothing was his, but then corrected himself, saying he had a cell phone inside the truck and that a battery and bag of tools in the bed of the truck were his. He explained that on arriving to pick him up, Mr. Tellvik said the truck he was driving was not running very well, so Mr. Peck brought the battery and tools along "just in case." RP at 525.

Upon Ms. Poulter's return to her home, she told officers she believed the battery and bag of tools in the back of the truck were hers and had been taken from her shop, her carport area, or her tool shed. She pointed out that the door to her shop, which she had left locked, was now open. Officers could see signs of forced entry on and below the doorway to the shop and found a crowbar near the truck. Surveillance video would later show Mr. Tellvik using the crowbar to break into the shop.

After Mr. Peck and Mr. Tellvik were transported to jail, officers remaining at the scene searched the truck and prepared it for impound. During the search, officers found a black zippered nylon case wedged under the passenger seat that looked like it was designed to hold compact disks (CDs). Officers opened the case and found packaged methamphetamine, an electronic scale, and a smoking pipe.

In the days following the burglary, Ms. Poulter arranged for the person who had installed her surveillance system to help her retrieve video recorded of the men's presence on the property so she could provide it to police. Ms. Poulter reviewed the video herself, and thought she saw one of the men drop a gun onto the ground. She called the police to describe what she saw and told them the gun was probably still buried in snow on her driveway, which was by that time snow packed and recently plowed. Officers were shown the relevant footage by Ms. Poulter, which they agreed appeared to show Mr. Tellvik place something on the ground near the driver's side door of the truck and kick snow over it just as the lights of the patrol cars could be seen approaching. Officers searched the area with a metal detector and located a handgun.

Mr. Peck was charged as a principal or accomplice with first degree burglary, possession of a stolen vehicle, possession with intent to deliver a controlled substance, third degree theft, and making or having burglary tools. The first three counts included charges that Mr. Peck or an accomplice were armed with a firearm.

Before trial, Mr. Peck moved the trial court to appoint a forensic media expert to assist with his defense at a projected cost of $7,164. He argued that the videotape from Ms. Poulter's surveillance system had an unexplained seven minute gap and he wanted an expert to examine it for possible alteration or tampering and to enhance images as needed. At argument of the motion, the court questioned the relevance of the gap, asking if something happened during that time period, to which defense counsel responded, "[W]e don't know. There could be." RP at 8. She elaborated:

> [DEFENSE COUNSEL]: . . . [W]hat I need an expert for—is that—the—the gap on this—video purports to show the defendants doing various things, mostly trying to dig their way out of the snow and move their car. But—there are—there are some enhancements that might need to be done. There are some allegations of a gun.

RP at 9. The court confirmed that the prosecutor intended to offer the videotape at trial, but commented that he was being asked to pay a substantial amount for an investigator, "And I don't see why the court should do that right now." RP at 10. It denied the motion.

Also before trial, Mr. Peck moved to suppress evidence obtained during the inventory search of the truck, specifically the drugs and paraphernalia found when officers opened the CD case found under the passenger seat. During argument of the motion, the prosecutor elicited testimony from Corporal Zach Green, who attached importance to the fact that the Dodge Dakota had been determined to be stolen and that

when asked whether any property in the truck was his, Mr. Peck claimed to own only a cell phone, a car battery, and a bag of tools. The corporal also testified that the search was being conducted pursuant to department inventory policy.

Deputy Michael McKean also testified at the suppression hearing and explained the reason for the inventory search as being, "We want to make sure there's nothing inside that vehicle that the owner could be held responsible for if it's illegal. We don't want to return any drugs, any weapons, anything with that vehicle that shouldn't be in it." RP at 104. He testified that an inventory search protects the sherriff's office, the registered owner, and the tow company from someone claiming something that was inside the vehicle is now missing.

At the conclusion of argument, the court denied the motion to suppress, finding the search to have been a valid inventory search and therefore an exception to the warrant requirement. The trial court did not enter written findings of fact and conclusions of law until well after trial and the commencement of this appeal.

The jury acquitted Mr. Peck of the count charging him with third degree theft of the battery and tools, but found him guilty of the remaining charges. It found that he or an accomplice had been armed with a firearm in committing the the burglary, possession of a stolen vehicle, and controlled substance crimes. Mr. Peck appeals.

ANALYSIS

Mr. Peck assigns error to the trial court's denial of his motion to suppress, its failure to enter timely findings of fact and conclusions of law on that motion, and its denial of his motion to appoint a forensic media expert.

Motion to suppress

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." "Authority of law" requires a valid warrant unless one of a few jealously guarded exceptions to the warrant requirement applies. *In re Pers. Restraint of Nichols*, 171 Wn.2d 370, 379, 256 P.3d 1131 (2011) (Fairhurst, J., dissenting). One of those jealously guarded exceptions is a valid inventory search by law enforcement incident to impoundment. *State v. Wisdom*, 187 Wn. App. 652, 671, 349 P.3d 953 (2015).

Police may make a limited inventory of the contents of a vehicle lawfully and necessarily taken into custody, not for the purpose of uncovering evidence of a crime, but to protect the vehicle owner's belongings and protect the police from liability against claims of lost or stolen property. *State v. Houser*, 95 Wn.2d 143, 147-48, 622 P.2d 1218 (1980). In order to justify a warrantless search on grounds of inventory incident to a lawful impoundment, the State must demonstrate that the impoundment was lawful and that the inventory search was proper and not a pretext for an investigative search. *State v.*

Simpson, 95 Wn.2d 170, 188-89, 622 P.2d 1199 (1980) (plurality opinion). A motor vehicle may be impounded and an inventory search conducted when, as here, an officer has probable cause to believe the vehicle was stolen. *State v. Barajas*, 57 Wn. App. 556, 560-61, 789 P.2d 321 (1990).

An inventory search must be restricted to the areas required to fulfill the purpose of the search. *State v. Tyler*, 177 Wn.2d 690, 701, 302 P.3d 165 (2013); *Houser*, 95 Wn.2d at 154. If officers conducting an inventory search encounter a locked compartment or closed container, it cannot be opened absent exigent circumstances or the consent of the owner. *Wisdom*, 187 Wn. App. at 675-76; *Houser*, 95 Wn.2d at 158; *State v. White*, 135 Wn.2d 761, 771-72, 958 P.2d 982 (1998). If a locked or closed container is encountered, absent exigency or consent, the officers must inventory the container as a sealed unit. *See Houser*, 95 Wn.2d at 158-59. Here, the officers opened a closed container in the absence of any exigency and without consent. Before opening it, they needed a warrant.

The State attempts to distinguish *Wisdom* by pointing out that in *Wisdom* the defendant had acknowledged owning the container in which drugs were found whereas here Mr. Peck, by claiming to own only a cell phone, battery, and bag of tools, implicitly denied owning the CD case. In the suppression hearing below, Corporal Green and the trial court also attached importance to Mr. Peck's implicit disclaimer of ownership. But

where a crime charged is a possessory crime such as the controlled substance crime here, the law recognizes a forced incrimination dilemma presented to a defendant and affords the defendant automatic standing to contest a search. A defendant has automatic standing to challenge a search if two elements are present: (1) possession is an essential element of the offense with which the defendant is charged and (2) he or she was in possession of the contraband at the time of the contested search or seizure. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). Both elements are present here.[3]

The court erred in denying the motion to suppress. Reversal of the conviction for possession of a controlled substance renders moot Mr. Peck's assignment of error to the trial court's failure to timely enter findings of fact and conclusions of law following the suppression hearing.

Denial of motion to appoint defense expert

CrR 3.1(f)(1) provides that "[a] lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court." A trial court shall authorize the services "[u]pon finding the services are necessary and that the defendant is financially unable to obtain them." CrR 3.1(f)(2).

[3] We do not examine the issue of abandonment. It was not a basis for the State's justification of the search in the suppression hearing and the State does not attempt to raise it for the first time on appeal.

The right to effective assistance of counsel requires that the State pay for experts for an indigent defendant when those experts are necessary. *State v. Dickamore*, 22 Wn. App. 851, 854, 592 P.2d 681 (1979). This court has held that "a defendant's constitutional right to the assistance of an expert witness 'is no broader than his right to petition for state paid services under CrR 3.1(f).'" *State v. Mines*, 35 Wn. App. 932, 935, 671 P.2d 273 (1983) (quoting *Dickamore*, 22 Wn. App. at 854). The Washington Supreme Court has held that CrR 3.1(f) mandates the appointment of an expert at public expense only when "necessary to an adequate defense." *State v. Young*, 125 Wn.2d 688, 692, 888 P.2d 142 (1995).

A trial court's determination of whether expert services are necessary for an indigent defendant's adequate defense is reviewed for abuse of discretion. *State v. Kelly*, 102 Wn.2d 188, 201, 685 P.2d 564 (1984). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The trial court denied Mr. Peck's motion for a forensic media expert because he failed to demonstrate that the testimony of such an expert was necessary to an adequate defense. What Ms. Poulter knew about the condition of her property upon departing and what she and responding officers found upon arriving and encountering Mr. Peck and Mr. Tellvik was strongly corroborative of what was seen on the surveillance videotape.

Defense counsel could not point to any reason to question what the videotape showed. When the trial court pressed defense counsel on the relevance of the reported gap in the tape and what she hoped to learn or prove with the expert's help, she admitted she didn't know. In essence, the defense hoped that something as yet unknown and unimagined might prove exculpatory.

By stating it could not see a reason to approve engagement of the expert "right now," the trial court's decision allowed Mr. Peck to renew his request if he could later show that an expert's services were needed for an adequate defense. The request was never renewed. The trial court did not abuse its discretion.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds, Mr. Peck raises one. He argues that the State presented insufficient evidence that he was an accomplice to Mr. Tellvik's possession of a stolen vehicle and the corresponding firearm enhancement.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.*

A person is guilty of possession of a stolen motor vehicle if he possesses a stolen motor vehicle. RCW 9A.56.068. The State must prove that the defendant acted with knowledge that the motor vehicle had been stolen. *State v. Porter*, 186 Wn.2d 85, 90, 375 P.3d 664 (2016). A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude the fact exists. RCW 9A.08.010(1)(b). Both circumstantial evidence and direct evidence are equally reliable to establish knowledge. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction." *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946).

Jurors were instructed that a person is an accomplice if, with knowledge that it will promote or facilitate the commission of a crime, he does any number of things, one being to aid the person in commission of the crime. They were told that "aid" means all assistance, however given, although it must consist of more than mere presence and knowledge of the other person's criminal activity. Clerk's Papers at 152.

Mr. Peck admitted to officers that when picked up in the Dodge Dakota, he knew it was not the vehicle Mr. Tellvik usually drove. It was apparent that the truck's center back window had been broken out, its stereo had been removed, and its ignition had been punched. Asked by an officer if he didn't think it odd that Mr. Tellvik started the truck

with a screwdriver, Mr. Peck answered no, and that he'd "had vehicles like that." RP at 520. Jurors could reasonably view that as not credible, and as betraying consciousness of guilt on Mr. Peck's part. Viewed in the light most favorable to the State, the visible hallmarks of a stolen vehicle provided enough information to lead Mr. Peck to conclude that the truck was stolen.

In closing argument, the prosecutor identified two types of assistance from Mr. Peck that jurors could consider. First was his testimony that he had provided a car battery and tools "just in case" he and Mr. Tellvik had trouble with the truck. Since jurors acquitted Mr. Peck of theft of the battery and tools, they appear to have believed that they were his. Second, the prosecutor reminded jurors of the video, and that when stuck in the snow, it was Mr. Peck who was seen outside the truck pushing and taking other steps to try to help Mr. Tellvik get the truck out.

As an accomplice to Mr. Tellvik's possession of a stolen vehicle, Mr. Peck was liable for the firearm enhancement if the State proved that Mr. Tellvik possessed a firearm in committing the crime. *See* RCW 9.94A.825. The videotape and the eventual location of a firearm at the location where the truck became stuck in the snow provided sufficient evidence that Mr. Tellvik possessed a firearm in committing possession of the stolen vehicle.

We reverse Mr. Peck's conviction for possession with intent to deliver a controlled substance and the associated firearm enhancement, affirm his remaining convictions, and remand for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

I CONCUR:

Pennell, A.C.J.

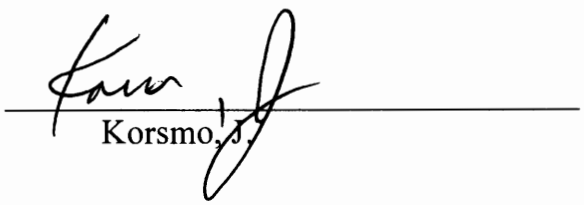
No. 34496-7-III

KORSMO, J. (dissenting) — An asserted right of privacy under art. I, § 7 of our state constitution still "must be reasonable to warrant protection." *State v. Goucher*, 124 Wn.2d 778, 784, 881 P.2d 210 (1994). There is nothing reasonable in allowing a passenger in a stolen vehicle to challenge the scope of an inventory search conducted by police with the intent to ascertain what property they have just taken into their possession and to whom it might be returned. That is particularly the case where, as here, the person asserting the privacy right expressly disclaimed ownership of the item searched. One cannot both assert that an item is not his and still claim that the item is his "private affair."

Given that I have previously expounded on the problems created by this court's expanded restrictions on inventory searches in my dissent in *State v. Wisdom*, 187 Wn. App. 652, 679-684, 349 P.3d 953 (2015) (Korsmo, J., dissenting), there is little more to say here. The facts of this case do illustrate the problem, however. *Wisdom* extended the requirement that locked items be inventoried as a unit to closed or zippered items, even though unlocked. Here, what officers believed was a CD (compact disk) case turned out to be a container of controlled substances. It just as likely could have contained an explosive or the Hope Diamond. Police cannot reasonably protect themselves from

claims or return property to its rightful owner if they are unable to look in unsecured containers.

Mr. Peck's assertion of a privacy interest is not one that is reasonable under either the state or federal constitution. Therefore, I respectfully dissent.



Korsmo, J.

FILED
JUNE 12, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL NELSON PECK, Appellant.	)))))))))	No. 34496-7-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 8, 2018 is hereby denied.

PANEL: Judges Siddoway, Korsmo, Pennell

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT E. LAWRENCE-BERREY,
Chief Judge

FILED
JUNE 14, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 34525-4-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
CLARK ALLEN TELLVIK,	)	
	)	
Appellant.	)	

PENNELL, J. — Clark Allan Tellvik appeals his convictions for first degree burglary, possession of a stolen vehicle, possession with intent to deliver a controlled substance, making or having burglary tools, possession of a stolen firearm, and second degree unlawful possession of a firearm. We reverse Mr. Tellvik's controlled substance conviction, as the evidence in support of that conviction was obtained during an invalid inventory search. The remainder of Mr. Tellvik's convictions are affirmed.

BACKGROUND

The facts of Mr. Tellvik's case are set forth in our decision in the companion case of *State v. Peck*, No. 34496-7-III (Wash. Ct. App. May 8, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/344967_unp.pdf. Those facts need not be recounted in detail here. In summary, a property owner in Ellensburg named Laura Poulter was alerted by video surveillance equipment that a suspicious person was at her residence. A call was placed to 911 and Ms. Poulter, who was visiting friends in Cle Elum, then headed home.

When police arrived at Ms. Poulter's property, they found Mr. Tellvik and Michael Peck in the driveway. The two men were attempting to dislodge a truck that had become stuck in the snow. Further investigation revealed the truck was stolen. Mr. Tellvik and Mr. Peck were arrested and officers performed an inventory search of the truck. The search uncovered a black nylon case that looked like it was designed to hold compact discs (CDs). Officers opened the case and found packaged methamphetamine, an electric scale, and a smoking pipe.

During the days following this incident, Ms. Poulter reviewed the surveillance video of her residence. She came to believe that she saw one of the two men drop a gun in the snow. She believed the gun was still there and called the police to come out and

look. By that time, Ms. Poulter's driveway had been plowed and the area where the truck had been parked was buried in compact snow. Officers responded to Ms. Poulter's residence and looked through the driveway. Their initial search was unfruitful. After Ms. Poulter continued to insist that a gun had been hidden on her property, the police returned with a metal detector and located a handgun.

Mr. Tellvik was charged with first degree burglary, possession of a stolen vehicle, possession with the intent to deliver a controlled substance, third degree theft, making or having burglary tools, possession of a stolen firearm, and second degree unlawful possession of a firearm.

During pretrial proceedings, Mr. Tellvik joined Mr. Peck's motion to suppress the fruits of the inventory search. The trial court denied the motion, but did not enter written findings of fact and conclusions of law until nearly a year later on March 31, 2017.

Also prior to trial, Mr. Tellvik moved for an order prohibiting the State from showing the jury a copy of the surveillance video that had been modified to include captions, noting where the gun was believed to have been dropped. The trial court granted this motion. The court prohibited any "commenting on the evidence." Report of Proceedings (RP) (May 10, 2016) at 210. However, the court specified that witnesses would be able to "describe what it is they think they're seeing" on the video. *Id*. Defense

counsel raised a concern that law enforcement officers, who might be viewed by the jurors as having heightened credibility, should not be able to tell the jurors what is depicted in the video. The court agreed this concern was reasonable. The court ruled that even though witnesses would be allowed to testify as to what they thought they saw in the video, they should not phrase their testimony in terms of what was actually depicted.

At trial, Ms. Poulter was the State's first witness. During questioning about the surveillance video, Ms. Poulter volunteered that what she saw in the video was a gun. She testified, "I saw the gun. . . . [W]ell, I know for sure it was a gun," and "I believe—I know for sure because we still-framed it right on the gun." RP (May 11, 2016) at 330. Ms. Poulter further testified, "it couldn't have been anything but a gun." *Id*. Mr. Tellvik's counsel objected to Ms. Poulter's statements, commenting she "doesn't know for sure what anything was." *Id*. The court overruled the objection. No other witness testified definitively about whether the object in the video was a gun. Mr. Tellvik's attorney did not seek a mistrial.

The jury found Mr. Tellvik guilty of all charges except third degree theft. The court sentenced Mr. Tellvik to 267.5 months' total confinement. Mr. Tellvik appeals.

ANALYSIS

Motion to suppress evidence—inventory search

For the same reasons set forth in our decision in *Peck*, we agree with Mr. Tellvik that the contents of the CD case should have been suppressed as fruits of an illegal inventory search. *Peck*, No. 34496-7-III, slip op. at 7-9. Because the police officers lacked either consent or exigent circumstances, the closed CD case should have been inventoried as a sealed unit. *State v. Wisdom*, 187 Wn. App. 652, 671, 675-76, 349 P.3d 953 (2015); *State v. Houser*, 95 Wn.2d 143, 158, 622 P.2d 1218 (1980). The doctrine of automatic standing applies in this case and confers on Mr. Tellvik the ability to challenge the police search. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007).

The trial court should have granted the motion to suppress the contents of the closed CD case. Mr. Tellvik's conviction for possession of a controlled substance must therefore be reversed. The trial court's failure to enter timely findings of fact and conclusions of law is moot.

Ineffective assistance of counsel

Mr. Tellvik argues his counsel provided ineffective assistance because she failed to move for a mistrial after Ms. Poulter violated the court's in limine ruling by testifying that she knew she saw a gun depicted in the surveillance video. Mr. Tellvik also contends

that had counsel moved for a mistrial, the trial court would have granted the motion. Ineffective assistance of counsel is a manifest error affecting a constitutional right that can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Brown*, 159 Wn. App. 1, 17, 248 P.3d 518 (2010).

To demonstrate ineffective assistance of counsel, Mr. Tellvik must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to satisfy either prong, this court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To show prejudice, Mr. Tellvik must demonstrate there is a probability that, but for counsel's deficient performance, "the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. There is a strong presumption of effective assistance, and Mr. Tellvik bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Failure to move for a mistrial does not constitute ineffective assistance where it is clear that counsel's motion would have been denied. "A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the

defendant will be tried fairly." *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). Three factors are necessary to consider when assessing whether an error warrants a new trial: the seriousness of the alleged error, whether erroneously admitted evidence was cumulative, and whether a proper curative instruction was given to the jury. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

Here, we find no error that would have warranted a mistrial. Ms. Poulter's testimony that she saw a gun depicted on the surveillance video did not carry any special weight that could have prejudiced the jury. Ms. Poulter was not a law enforcement officer. She did not purport to have any unique ability to decipher the video or perceive firearms. The video was admitted into evidence free from captions and the jurors were afforded the same opportunity to assess its contents as Ms. Poulter. At the same time, Ms. Poulter's insistence that she believed she saw a gun in the video was relevant to explain why the police twice returned to Ms. Poulter's residence after the night of Mr. Tellvik's arrest in order to search the driveway.

Given that Ms. Poulter's testimony helped explain why law enforcement went to unusual lengths to search the driveway and that Ms. Poulter's testimony was not particularly prejudicial, the trial court acted within its discretion to alter its in limine

ruling and permit Ms. Poulter's testimony. Mr. Tellvik has not, therefore, shown that counsel was ineffective in failing to request a mistrial.

CONCLUSION

We reverse Mr. Tellvik's conviction for possession of a controlled substance with intent to deliver and the associated firearm enhancement, affirm his remaining convictions, and remand for resentencing consistent with the terms of this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.

KITTITAS COUNTY PROSECUTOR'S OFFICE

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