

63538-7

63538-7

NO. 63538-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,  
Respondent,

v.

JASON ROBERTS,  
Appellant.

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

The Honorable Michael Heavey

APPELLANT'S REPLY BRIEF

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E. ARGUMENT.

1. THE SEARCH OF MR. ROBERTS' VEHICLE WAS UNLAWFUL AND EVIDENCE OBTAINED AS A RESULT OF THE UNLAWFUL SEARCH MUST BE SUPPRESSED.

The State bears the heavy burden of proving that a warrantless search falls within one of the “jealously and carefully drawn” exceptions to the warrant requirement. Jones v. United States, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958); State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The State agrees that, in light of recent case law, the search of Mr. Roberts' vehicle cannot be justified as a search incident to arrest.<sup>1</sup> Br. of Respondent at 60. Nevertheless, the State argues that the search was justified, or in the alternative, that suppression is not the remedy. As explained below, the State is wrong on both counts.

a. There is no “good-faith” exception to the warrant requirement under the Washington Constitution. The State argues at length for a “good-faith” exception because the police acted in reliance on existing case law. Br. of Respondent at 28 – 56. In

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<sup>1</sup> Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009).

support of its position, the State cites to two cases: State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006) and State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006). Br. of Respondent at 40.

However, in both of those cases, there was no constitutional violation of privacy rights, since the arrest and subsequent search incident to arrest were held to be valid. Brockob, 159 Wn.2d at 352; Potter, 156 Wn.2d at 843-44.

Where a search violates an individual's privacy rights, the Washington Constitution mandates exclusion of the illegally-obtained evidence. State v. Winterstein, 167 Wn.2d 620, ¶ 24, 220 P.3d 1226 (2009);<sup>2</sup> State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). In Winterstein, the court rejected an inevitable discovery exception to the exclusionary rule, stating: "article 1, section 7 protects an individual's right to privacy and when a violation occurs, the exclusion of the evidence must follow." 167 Wn.2d at ¶ 24.

The Fourth Amendment to the United States Constitution focuses on the "reasonableness of the government action," and allows for good-faith exceptions to the warrant requirement. State

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<sup>2</sup> For decisions in which published page numbers have not yet been designated by Westlaw, references will be made to paragraph numbers.

v. Eisfeldt, 163 Wn.2d 628, 639, 185 P.3d 580 (2008). The Washington Constitution, however, “focuses on the rights of the individual.” Id. (citing State v. Morse, 156 Wn.2d 1, 12, 123 P.3d 832 (2005)). Since the emphasis in article 1, section 7 is on protecting personal rights, the police officers’ “beliefs, no matter how reasonably had,” are “irrelevant” and “cannot be used to validate a warrantless search under the Washington Constitution.” Eisfeldt, 163 Wn.2d at 639.

The Washington Supreme Court very recently decided State v. Valdez, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2009 WL 4985242 (Dec. 24, 2009). The underlying arrest and search in Valdez, as in the case at hand, occurred prior to the decisions in Gant and Patton. Id. at ¶ 4. Nevertheless, because the search violated both the Fourth Amendment and article 1, section 7, the court ruled: “The evidence gathered during that search is therefore inadmissible.” Id. at ¶ 37 (citing State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002) (“The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means”)).

b. The search of Mr. Roberts’ vehicle falls outside the “exigent circumstances” or “emergency” exception to the warrant requirement. The State argues that the warrantless search of Mr.

Roberts' vehicle is justified based on the presence of a live animal in the vehicle. Br. of Respondent at 56-60. Significantly, at the CrR 3.6 hearing, the trial court posed this very question - whether the search could be justified by the presence of a "living creature" in the vehicle. 2/3/09RP 80. The prosecutor argued that "the officers had justification to search the vehicle for the puppy's safety." 2/3/09RP 89. Defense counsel argued that the police were looking for Mr. Roberts, not puppies. 2/3/09RP 80. Ultimately, the trial court's findings justify the search on one basis only - the arrest of Mr. Roberts for an outstanding warrant, and a subsequent search incident to the arrest. 2/3/09RP 65-66; CP 200-02. In this way, the trial court rejected the State's claim that the possible presence of a puppy in the vehicle justified the search. CP 200-02. "In the absence of a finding on a factual issue," the party with the burden of proof is presumed to have "failed to sustain their burden on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

The State argues that exigent circumstances existed because there was a live puppy in the vehicle. The rationale behind the exigent circumstances exception "is to permit a warrantless search where the circumstances are such that

obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.” State v. Cardenas, 146 Wn.2d 400, 417, 47 P.3d 127 (2002). In this case, Mr. Roberts was already under arrest, handcuffed, and in the back of a patrol car when the search of his vehicle took place. 2/3/09RP 33-34, 39, 62, 69. Because he posed no danger to the police, and was not in a position to escape or to destroy evidence, the exigent circumstances exception is inapplicable.

The State does not raise the “emergency aid” exception to the warrant requirement. The emergency aid exception may apply when:

- (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons;
- (2) a reasonable person in the same situation would similarly believe that there was a need for assistance;
- and (3) there was a reasonable basis to associate the need for assistance with the place searched.

State v. Kinzy, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000). Unlike the exigent circumstances exception, “the emergency aid doctrine does not involve officers investigating a crime but arises from a police officer's community caretaking responsibility to come to the aid of persons believed to be in danger of death or physical harm.”

Id. at 387 n.39 (quoting State v. Leupp, 96 Wn. App. 324, 330, 980 P.2d 765 (1999)).

In this case, the trial court specifically found that the police did not know of the puppy's presence in the vehicle until after they searched it. CP 201 (Finding of Fact 3, Conclusion of Law 10); 2/3/09RP 84; 2/4/09RP 6-8. Unchallenged findings of fact entered following a suppression hearing are verities on appeal. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The State has not challenged this finding. If the puppy was not known to be in the vehicle prior to the search, then no emergency existed that would justify a warrantless search of the vehicle.

The State argues that it was possible a puppy or puppies "might be" in Mr. Roberts' vehicle. Br. of Respondent at 59. This is mere speculation. Even if there was a possibility that a puppy was in the vehicle, the State bears the burden of proving that the "emergency" is of such magnitude that there is no time to obtain a warrant. State v. Smith, 88 Wn.2d 127, 135, 559 P.2d 970, cert. denied, 434 U.S. 876 (1977). The State baldly asserts that there was no time to undergo "the lengthy process of obtaining a search warrant." Br. of Respondent at 60. The arrest took place during the daytime at approximately 8:30 in the morning. 2/3/09RP 60-62.

There was no attempt to obtain a warrant and no evidence that a warrant, telephonic or otherwise, could not have been obtained in a timely manner.

Finally, it is clear that the police searched the vehicle for investigative purposes, not to render emergency aid. In testifying about the search of the vehicle, Officer Ghaderi explained finding the puppy in the vehicle, and then immediately went on to discuss how he and Officer McQuilkin continued to search the vehicle for additional evidence, including contacting dispatch to check if a laptop computer found in the vehicle was stolen. 2/3/09RP 34-35. The State submits that “it was imperative that the officers confirm if there was, or was not, a puppy in the vehicle and if it needed aid or assistance.” Br. of Respondent at 60. However, neither of the arresting officers ever expressed a concern for the well-being of any of the puppies. 2/3/09RP 29-73. And once the puppy was seized, the officers did not administer any aid to the dog or even examine it. 2/3/09RP 29-73. Furthermore, arrangements were made with Mr. Roberts’ father to pick up the vehicle, so the officers knew that it would not remain unattended at the scene. 2/3/09RP 35, 64. The search of the vehicle was not conducted because of any emergency, but rather for investigatory purposes, and the

emergency exception to the warrant requirement does not apply.

Kinzy, 141 Wn.2d at 387.

c. The evidence obtained in the unlawful search must be suppressed. The State suggests that the case be remanded for another CrR 3.6 hearing. Br. of Respondent at 61-62. However, the legality of the search was already fully litigated in a CrR 3.6 hearing, including the question of whether the search was justified by the possible presence of a live puppy inside the vehicle. 2/3/09RP 80, 89. There is no reason to remand the case for further testimony or findings. No exception to the warrant requirement applies, and the unconstitutionally obtained evidence must be suppressed. Valdez, 2009 WL 4985242 at ¶ 37; White, 97 Wn.2d at 110-12.

## 2. THE TWO CONVICTIONS VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

a. As charged and prosecuted, two convictions violate the prohibition against double jeopardy where the evidence required to support a conviction upon one of them is sufficient to warrant a conviction on the other. Two convictions violate the prohibition against double jeopardy, absent clear legislative intent to the contrary, if they are “identical both in fact and in law.” In

Pers. Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004) (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)). Under Reiff, offenses are the same in fact and in law if “the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.” Id. Orange noted that the test employed in Reiff is “indistinguishable from the Blockburger test.”<sup>3</sup> 152 Wn.2d at 816.

The State relies on the test set out in State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). Br. of Respondent at 12-13. This is not the proper test. The U.S. Supreme Court is the “ultimate interpreter” of the U.S. Constitution, and Washington courts are bound to follow case law from the United States Supreme Court in assessing a violation of the prohibition against double jeopardy. Baker v. Carr, 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008).

The State argues that the search for legislative intent is an additional step in a double jeopardy analysis. Br. of Respondent at 11-13. However, the whole purpose of the Blockburger test is to

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<sup>3</sup> Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).

determine legislative intent. No additional step is required. The State also suggests that there is a presumption that the legislature intended for separate punishments. Br. of Respondent at 17. In fact, just the opposite is true. Under the U.S. Constitution, a determination that the legislature intended to allow for separate convictions and punishments must be based on an express statement of legislative intent. Whalen v. United States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). If there is doubt as to the legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Id. at 694. Washington cases which allow courts to make assumptions about legislative intent in the absence of the legislature's express statement of intent are in direct conflict with U.S. Supreme Court law.

b. Mr. Roberts' convictions, as charged and prosecuted, violated double jeopardy. The State argues that the two statutes are not the same because the possession charge required proof that the value of the property exceeded \$1500, and value is not an element of the trafficking charge. Br. of Respondent at 14. However, the U.S. Supreme Court's interpretation of the Fifth Amendment makes clear that it is

irrelevant whether, in another scenario, trafficking in stolen property in the first degree could be established without also proving possession of stolen property in the first degree. Whalen, 445 U.S. at 694; Harris v. Oklahoma, 433 U.S. 682, 682-83, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) (convictions for felony murder with the predicate crime of robbery and for robbery violated the Double Jeopardy Clause even though the felony murder statute on its face did not require proof of robbery).

The State also points out that the trafficking statute requires proof of sale or an intent to sell the property, a requirement not found in the possessing stolen property statute. Br. of Respondent at 14. Under the State's analysis, proof of the possession charge did not also prove the trafficking charge. Br. of Respondent at 14-15. Appellant agrees. However, the reverse is true – as charged and prosecuted, proof of the trafficking charge also proved the possession charge.

It stands to reason that no two separate criminal statutes will have identical elements. This is not a bar to finding a double jeopardy violation. United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (a conviction for criminal contempt barred a subsequent prosecution for a drug offense);

Illinois v. Vitale, 447 U.S. 410, 420-21, 100 S.Ct. 2267, 65 L.Ed.2d 228 (1980); Brown v. Ohio, 432 U.S. 161, 164, 97 S.Ct. 2221, 53 L.Ed.2d 187(1977) (“separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition”).

When conducting a double jeopardy analysis, courts must “look at the facts used to prove the statutory elements” rather than limit the analysis to a comparison of generic statutory language. Orange, 152 Wn.2d at 819. See also Whalen, 445 U.S. at 694. In State v. Hughes, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009), convictions for rape and child rape based on the same act of intercourse violated the prohibition against double jeopardy, even though “the elements of the crimes facially differ” (one element of child rape required proof of age – not an element of rape, and one element of rape required proof of non-consent – not an element of child rape).

The State completely fails to respond to Mr. Roberts’ assertion that possessing stolen property in the first degree is a lesser included offense of trafficking in stolen property under State v. Knight, 54 Wn. App. 143, 154-56, 772 P.2d 1042, rev. denied, 113 Wn.2d 1014 (1989). Appellant’s Opening Brief at 14-15. A

violation of the prohibition against double jeopardy occurs where a defendant is convicted of both a greater and lesser offense.

Brown, 432 U.S. at 169.

Even if possessing stolen property in the first degree is not always a lesser included offense of trafficking in stolen property, it is under the facts of this case. The “property” in both charges was the same; that is, the puppies. 2/3/09RP 96; 2/4/09RP 13. The charging period for both offenses was the same. CP 133-34. As charged and prosecuted, the evidence to prove the trafficking charge also proved the crime of possessing stolen property, as charged and prosecuted. Orange, 152 Wn.2d at 818. Thus, the two offenses constitute the same offense and Mr. Roberts’ convictions violate the prohibition against double jeopardy. Id. at 820.

3. THE TRIAL COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION WHERE THE STATE PRESENTED EVIDENCE OF TWO DISTINCT ACTS OF TRAFFICKING IN STOLEN PROPERTY, EITHER OF WHICH COULD BE THE BASIS OF A CRIMINAL CONVICTION.

Criminal defendants have a constitutional right to a unanimous jury verdict. U.S. Const. amend. 6; Wash. Const. art. 1, § 21. Where evidence is presented of multiple distinct acts any of

which could be the basis of a criminal conviction, either (1) the State must elect which act it is relying on, or (2) the trial court must instruct the jury that they must unanimously agree that the same act has been proven beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

The State argues that no unanimity instruction was necessary because Mr. Roberts' actions constituted a continuing course of conduct as opposed to multiple distinct acts. Br. of Respondent at 22-25. However, evidence tends to show "several distinct acts" where the conduct occurs at different times and places. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); Petrich, 101 Wn.2d at 571; State v. Workman, 66 Wash. 292, 204-95, 119 P. 751 (1911). In State v. King, 75 Wn. App. 899, 903, 878 P.2d 466 (1994), rev. denied, 125 Wn.2d 1021 (1995), the defendant was arrested after police found cocaine in a Tylenol bottle inside a vehicle in which he was a passenger. A search of his fanny pack at the police station revealed additional cocaine. These two acts of possession were held to be "two distinct

instances of cocaine possession” occurring at different times and places. Id.

Similarly, in this case, the evidence presented at trial established two distinct acts. One distinct act was the alleged sale of a puppy on Saturday, August 23, 2008. 2/9/09RP 102-04, 138-39. The other distinct act concerned possession of the remaining four puppies over the next several days with the intent to sell them. 2/9/09RP 99-101, 106-07; 2/10/09RP 43-44, 89. The act of selling the one dog not recovered was separate and distinct from the act of possessing the remaining dogs with the intent to sell them. The prosecutor even acknowledges that “the two acts were distinct and clear.” Br. of Respondent at 27. A unanimity instruction was required.

The State also asserts that the error in failing to provide a unanimity instruction was not harmless beyond a reasonable doubt. Br. of Respondent at 22, 25-28. However, the evidence, State’s closing argument, and jury instructions all invited the jury to base a conviction on either of the alleged acts of trafficking in stolen property without unanimously agreeing as to which act of trafficking had been proven beyond a reasonable doubt. The conviction must be reversed.

F. CONCLUSION.

Reversal of Mr. Roberts' convictions is required where (1) the trial court erred in denying his motion to suppress evidence obtained from a search of his vehicle, (2) the two convictions violate the prohibition against double jeopardy, and (3) the trial court erred in failing to provide a unanimity instruction on the trafficking charge.

DATED this 26th day of January, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63538-7-I
v.	)	
	)	
JASON ROBERTS,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26<sup>TH</sup> DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] STEPHEN HOBBS, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] JASON ROBERTS 769265 WSP 1313 N 13<sup>TH</sup> AVE WALLA WALLA, WA 99362</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

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**SIGNED** IN SEATTLE, WASHINGTON THIS 26<sup>TH</sup> DAY OF JANUARY, 2010.

X \_\_\_\_\_ 

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