

No. 65114-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

PETER GREEN,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
2010 SEP 15 PM 4:54
[Signature]

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

The Honorable Richard Eadie

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The police violated Mr. Green's right to privacy and his right to be free from unlawful searches and seizures.

2. The trial court erred and violated Mr. Green's state and federal constitutional rights by admitting items seized from Mr. Green's vehicle outside the scope of the warrant obtained by police officers at the scene.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An officer may not search a vehicle incident to the arrest of a suspect who has already been handcuffed or removed from the scene. Here, detectives searched Mr. Green's vehicle and removed evidence after he was arrested by DUI officers and transported to Harborview for a mandatory blood draw. Did the warrantless vehicle search violate Mr. Green's rights under the Fourth Amendment and Wash. Const. Article I, Section 7?

2. A search warrant comports with the federal and state constitutions only when it is supported by probable cause, and when the warrant states with particularity the items the warrant seeks to recover. Did the trial court commit an error of constitutional magnitude where it erroneously admitted credit cards seized from a closed backpack found in the car, which were outside

the scope of the search warrant, where the error resulted in prejudice to Mr. Green?

C. STATEMENT OF THE CASE

1. Factual History. On January 4, 2008, at approximately 11:30 p.m., Peter Green was involved in a fatal traffic accident. 10/5/09 RP 50.¹ Seattle Police Department officers responded to the corner of 23rd Avenue and South Dearborn, where they found fire fighters already on the scene administering CPR to a person on a backboard. Id. After the accident, Mr. Green, the driver of a Jeep, had performed a U-turn and waited at the scene for officers. Id. at 54. Mr. Green spoke with officers about the accident, telling them his view of a pedestrian had been blocked by another car that swerved, and he had not seen the pedestrian crossing. Id.

Officers suspected Mr. Green of driving under the influence, and detained him at the scene for processing by a DUI officer. Id. at 57-58; 10/6/09 RP 11. Mr. Green was arrested on suspicion of driving under the influence and was taken to Harborview Medical Center for a mandatory blood draw. 10/6/09 RP 11.

¹ The verbatim report of proceedings consists of two non-consecutively paginated volumes from the 3.5 and 3.6 hearings, conducted on October 5, 2009 and October 6, 2009. The court's ruling appears in the October 6, 2009 volume. The trial was conducted from October 7 through 13, 2009, and sentencing was on March 8, 2010. The VRP will be designated as follows: 10/5/09 RP ____.

Detective Thomas Bacon, meanwhile, arrived at the scene of the accident and searched the vehicle for items related to intoxication or drug use. 10/6/09 RP 13-14. Detective Bacon recovered, among other items, a receipt in a brown paper bag, from the floor of the Jeep. Id. at 15. The receipt was for a large-screen television that had been purchased that day from the Redmond Sears store, and which was sitting in the back of the vehicle, still in its carton. Id. at 15. The detective noted from the receipt that the purchase had been made with three \$500 gift cards, which he deemed suspicious. Id. In addition, the name on the receipt did not correspond with Mr. Green's. Id. at 17.

Detective Bacon continued his search of Mr. Green's Jeep, seizing another Sears bag on the rear passenger floor. 10/6/09 RP 17. This bag contained two disposable cell phones and a receipt from the SoDo Sears location, indicating a purchase on the same date, using the balance of the money from the third Sears gift card. 10/6/09 RP 17. Although Detective Bacon had no warrant and was only investigating a DUI and potential vehicular homicide case, he seized both receipts and the two cell phones. Id.

2. Search Warrants. Detective Bacon determined that parallel investigations of Mr. Green would be conducted – a

vehicular homicide investigation and a theft or fraud investigation. 10/6/09 RP 20. On January 30, 2008, Bacon wrote an affidavit for a search warrant in the vehicular homicide investigation, detailing the facts of the case and his request to search for items suggesting intoxication, dominion or control over the vehicle, and the identity of any other passenger. 10/6/09 RP 21.²

On January 31, 2008, Bacon executed the first search warrant, although he had already seized the receipts and the cell phones. 10/6/09 RP 23-24. In searching the Jeep again, Bacon found a backpack in the rear seat of the vehicle, which he proceeded to unzip and search. Id. at 24-25. Inside the backpack, he found five credit cards with the name Jeanne Russell on them. Id. at 25. Bacon continued to examine the credit cards, noting that they were from different banks and had no security codes on the backs; he concluded that they looked suspicious. Id. at 25-26. Since his warrant was for evidence relating to vehicular homicide, he placed the credit cards back into the backpack and left them in the Jeep. Id. at 26.

² There were witnesses who stated that an unknown male passenger walked away from the scene, but this person was never identified. 10/6/09 RP 11. This warrant, No. 08-066, was signed by Judge Eadie.

On February 8, 2008, Detective Bacon applied for a second search warrant, requesting to search for items related to fraud or identity theft. 10/6/09 RP 30.³ Based in part upon the items seized, Mr. Green was charged with four counts of identity theft in the second degree and driving under the influence. CP 1-7. The information was later amended to add an additional count of identity theft, as well as theft in the second degree. CP 19-22.

3. Denial of Mr. Green's motion to suppress evidence obtained pursuant to the search warrant. Prior to trial, Mr. Green moved to suppress the items seized pursuant to the first search warrant. CP 8-11; 10/6/09 RP 75-76. Mr. Green argued the detective seized evidence outside the scope of the first search warrant, and in obtaining the second search warrant, was attempting to "bootstrap" the second warrant onto evidence he had already seized. 10/6/09 RP 75-76.

The Honorable Richard Eadie denied Mr. Green's motion. CP 75-77; 10/6/09 RP 76-78. The court found that Detective Bacon's "examination" of the credit cards in the backpack was brief and went no further than was necessary to remove the cards from the backpack and briefly glance at the front and back. CP 75-77;

³ The second search warrant was No. 08-091.

10/6/09 RP 76-78. The court found that the backpack was a reasonable place to search for evidence of drug use and/or possession and for evidence relating to the identity of the unknown passenger. CP 77.

4. Jury trial. Mr. Green ultimately was not charged with vehicular homicide, and the DUI case went to trial in July 2009, resulting in an acquittal. 3/8/10 RP 317.

On the identity theft case, the State introduced evidence at trial of the five credit cards that were recovered from the backpack, as well as the receipts from the two Sears bags found in the Jeep. 10/8/09 RP 117, 120. Evidence against Mr. Green included testimony from his former managers at Northwest Airlines, who testified that as a ticketing agent, he had access to customers' credit card numbers. 10/8/09 RP 159-69. A stipulation was admitted from the five individuals who stated that they had noticed fraudulent charges on their credit cards shortly after making internet reservations on Northwest Airlines in late December 2007 or early January 2008. 10/8/09 RP 148-52. Mr. Green's supervisor at Northwest Airlines indicated that Mr. Green was the agent on all five of these transactions, and that all employees use a two-step password-protected log-in system. 10/8/09 RP 159-64, 192.

Employees from Sears stated that Mr. Green had used these credit card numbers to purchase Sears gift cards from the Portland store location. 10/8/09 RP 227-28. Sears loss prevention employees stated that on the date of the car accident, Mr. Green was seen exchanging three of the \$500 gift cards for the large-screen television that was in his Jeep at the time of the collision. 10/8/09 RP 213-18, 223-26.

5. Verdict and sentence. The jury found Mr. Green guilty of five counts of identity theft in the second degree and one count of theft in the second degree. CP 65-70. The court imposed a standard range sentence of 25 months. CP 151-62. Mr. Green timely appeals. CP 163-75.

D. ARGUMENT

1. OFFICERS VIOLATED MR. GREEN'S RIGHT TO PRIVACY UNDER THE FOURTH AMENDMENT AND UNDER ARTICLE I, SECTION 7.

a. Standard of Review. The validity of a warrantless search or seizure is reviewed de novo. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed de novo. Id.

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, appellant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant's] rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); see also State v. Contreras, 92 Wn. App. 307, 313-14, 966 P.2d 915 (1998).

The state and federal constitutions prohibit warrantless searches. U.S. Const. Amend. IV.⁴ Similarly, Article I, Section 7 of the Washington Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Art. I, Sec. 7.

Under both provisions, searches and seizures conducted without authority of a search warrant "are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." Arizona v. Gant, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting Katz v. United States, 389

⁴ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

U.S. 347, 457, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); see also State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008).

The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. State v. Garwin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The State must establish the exception to the warrant requirement by clear and convincing evidence. Id.

b. The first search of Mr. Green's vehicle was conducted without a warrant, and was not justified by any exigency.

One exception to the search warrant requirement is where the search is performed incident to arrest. See Gant, 129 S.Ct. at 1723-24. This exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Police are therefore authorized to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. Gant, 129 S.Ct. at 1723-24.

Here, Mr. Green had been arrested and taken to Harborview for a mandatory blood draw in furtherance of the DUI prosecution. 10/6/09 RP 11. Detective Bacon searched Mr. Green's Jeep and recovered the two Sears receipts and the disposable cell phones prior to applying for either search warrant. 10/6/09 RP 15-17. Accordingly, the search and seizure were not properly incident to Mr. Green's arrest. Gant, 129 S.Ct. at 1723-24; see also State v. Afana, ___ Wn.2d ___, 233 P.3d 879 (2010); State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009).

Even if police had probable cause to obtain a warrant, which appellant does not concede, no exigency precluded Detective Bacon from properly obtaining a warrant before searching Mr. Green's vehicle. Exigent circumstances may, in some cases, justify a warrantless search based on probable cause, but only when the exigency makes it impractical to obtain a search warrant. See State v. Tibbles, ___ Wn.2d ___, 236 P.3d 885, 890 (2010). Here, Mr. Green was already far from the scene when Detective Bacon searched the vehicle, so no exigency prevented the detective from waiting for a warrant. 10/6/09 RP 11. The Detective also stated that it was not until weeks later that he heard there was a male

passenger onboard the Jeep, when he returned to the scene and posted fliers at a local Mini-Mart. 10/6/09 RP 11.⁵

Furthermore, even if the detective had probable cause, no exigent circumstances required that Mr. Green's car be searched immediately. Tibbles, 236 P.3d at 889. The exigent circumstances exception applies where delaying to obtain a search warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. Id. at 888. A reviewing court must look to the totality of the circumstances in determining whether exigent circumstances exist. Id.

Here, as in Tibbles, no exigent circumstances justified a warrantless search. See id. Mr. Green was in custody and in transport to Harborview Hospital. Back-up officers and detectives were on the scene, as well as the fire department and other emergency responders. 10/5/09 RP 50; 10/6/09 RP 11. There was no indication that any evidence was in danger of destruction. Under these facts, the warrantless search violated Mr. Green's Fourth Amendment right to be free from unreasonable searches

⁵ Detective Bacon attempted to justify his search of the closed backpack by explaining that he was looking for evidence of the identity of the missing passenger. 10/6/09 RP 22-23. This was contradicted by his earlier statement that he had not heard that there was a passenger until several weeks later. 10/6/09 RP 11.

and his state constitutional right to privacy under Article I, Section 7. Tibbles, supra.

The receipts and cell phones must be suppressed and Mr. Green's convictions for identity theft in the second degree and theft in the second degree must be reversed, and the charges dismissed with prejudice. Tibbles, supra.

2. MR. GREEN'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN HIS VEHICLE WAS SEARCHED AND ITEMS SEIZED IN A SEARCH THAT EXCEEDED THE SCOPE OF THE SEARCH WARRANT.

a. An officer must execute a search warrant strictly within the bounds set by the warrant. U.S. Const. amend. IV; Wash. Const. art. I, § 7; State v. Kelly, 52 Wn. App. 581, 585, 762 P.2d 20 (1988). Particularity is required to prevent the issuance of a general warrant which would permit unlimited searches and seizures of evidence of any crime. Andresen v. Maryland, 427 U.S. 463, 479-80, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); State v. Thein, 138 Wn.2d 133, 146-47, 977 P.2d 582 (1999).

Under the particularity requirement imposed by the Fourth Amendment, a search warrant must particularly describe both the place to be searched and the items to be seized. State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993); U.S. Const. amend. IV;

Wash. Const. art. I, § 7; CrR 2.3(c). See also State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (citing 2 W. R. LaFave, Search and Seizure, § 4.6(a), at 234-36 (2d ed. 1987)). On appeal, this Court examines questions on the scope of a search warrant de novo. State v. Chambers, 88 Wn. App. 640, 643, 945 P.2d 1172 (1997).

Thus, to the degree that King County police conducted a search of Mr. Green's vehicle and seized items that were not specified within the scope of the search warrant, they conducted a search outside the judicial process, without prior approval, and such a search is per se unreasonable. Katz v. United States, 389 U.S. at 357.

b. The plain language of the search warrant expressly excluded any evidence of identity theft or fraud. The fundamental rule regarding the scope of a search warrant is that the authority to search is limited to the place or items described in the warrant, and may not include different or additional places. See, e.g., State v. Kelly, 52 Wn. App. 581, 584-86, 762 P.2d 20 (1988) (suppressing as beyond scope of warrant, where outbuildings were searched, although warrant only named residence); Bivens v. Six Unknown Named Agents of Fed. Bur. Of

Narcotics, 403 U.S. 388, 394, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Warrant 08-066 authorized Detective Bacon to search Mr.

Green's Jeep for the following:

Evidence consisting of: cloth, fibers, hair, body tissues, glass, food, liquids, impressions, chips and fragments of plastic and paint, finger prints, papers of dominion and control, biological fluid and stains, as well as a mechanical inspection of the braking, tire, steering, suspension, bumpers, ignition, air bags, sensors and power train systems of the vehicle. Also, data relating to vehicle dimensions, damage dimensions and locations for interior and exterior damage, as well as photographs of interior and exterior damage. Also, any evidence of the use of alcohol and/or controlled substances, including marijuana and marijuana paraphernalia. In addition, evidence relating to the identification of an unknown male passenger who was seen exiting the vehicle immediately after the collision occurred.

Ex. 4 (Pre-trial); CP 76.

This language, read in a commonsense manner, indicates the precise items within the scope of the search warrant authorized by the court. Items linked to fraud or identity theft were not among them.

Although search warrants are not statutes, plain reading and common sense are the "landmarks" for the execution and interpretation of the language of a search warrant. United States v.

Gorman, 104 F.3d 272, 275 (9th Cir. 1996) (citing United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965)). It is entirely consistent with the purpose of clear communication from magistrate to law enforcement – and the constitutional dictate of particularity in search warrant descriptions – to apply the common sense rule that language in any provision is not to be read in a way that renders certain words or language superfluous or unnecessary. See State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Items related to identity fraud – specifically, such items as the five credit cards seized from the sealed backpack and then carefully replaced – were clearly not named in the search warrant.

c. The search warrant did not implicitly grant authority to seize evidence of identity fraud. “As a general rule, search warrants must be strictly construed and their execution must be within the specificity of the warrant.” State v. Cottrell, 12 Wn. App. 640, 643, 532 P.2d 644 (1975). Although the warrant granted authority to search the vehicle for evidence of intoxication or drug use, the examination of the credit cards was beyond the scope of the search warrant.

The police officers who arrived at the motor vehicle collision on the night of January 4, 2008 were concerned with the investigation of an apparent vehicular homicide. 10/5/09 RP 50. Officers suspected Mr. Green of driving under the influence, and he was detained for screening by a DUI officer. Id. at 57-58; 10/6/09 RP 11. He was later charged with DUI, and while he was taken to Harborview, his car was searched. 10/6/09 RP 11.

After obtaining the search warrant, Detective Bacon searched the jeep for evidence that Mr. Green had been intoxicated. 10/6/09 RP 23-24. In the rear seat of the vehicle, the detective noticed a closed backpack made of blue fabric. Id. at 24-25. Inside the backpack, he found no evidence of drug use or intoxication. Id. at 25. Instead, the detective found five credit cards with the name Jeanne Russell on them. Id. Bacon continued to examine the credit cards, noting that they were from different banks and that they had no security codes on the backs; he concluded that they looked suspicious. Id. at 25-26.

The trial court found that Detective Bacon's decision to return these five cards back to the backpack – following this extensive examination – and to apply for a second search warrant seeking items relating to identity theft cured this violation. CP 76.

However, Detective Bacon's initial seizure of the credit cards violated Mr. Green's rights, and once this bell was rung, it was impossible to unring it. Mr. Green's constitutional rights had already been violated by the initial search.

This case is distinguishable from State v. Stenson, in which the Supreme Court discussed the examination of documents not named in a search warrant. 132 Wn.2d 668, 694, 940 P.2d 1239 (1997). The Stenson Court noted that "some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." 132 Wn.2d at 694. However, Stenson involved a search warrant that specifically authorized the search and seizure of a person's papers, raising issues "that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable." Id. Here, the initial search warrant obtained by Detective Bacon permitted him to search for items related to intoxication and drug use – not for identity theft or fraud. Unlike Stenson, there was no need to examine, cursorily or otherwise, the credit cards in the backpack for any amount of time.

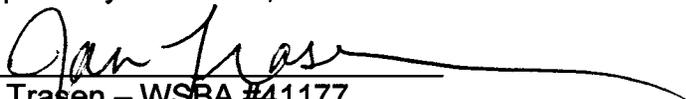
The State's attempt to bootstrap the seizure of the credit cards onto its second search warrant application were a clear violation of Mr. Green's constitutional rights.

E. CONCLUSION

The search conducted of Mr. Green's vehicle prior to the issuance of a search warrant was without probable cause and the items seized should have been suppressed. The second search conducted of Mr. Green's vehicle was outside the scope of the search warrant, and the items seized as a result of the warrant should have been suppressed. This Court should reverse and dismiss Mr. Green's conviction.

DATED this 15th day of September, 2010.

Respectfully submitted,


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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65114-5-I
v.)	
)	
PETER GREEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **OPENING 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:

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