

No. 66816-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT CHAPMAN,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The State properly concedes the search of Mr. Chapman's car was invalid.

Article I, §section 7 of the Washington Constitution provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Here the trial court concluded the warrantless entry search of Robert Chapman's car was permissible. However, as the Stat concedes, there was no lawful basis for either the entry or search of the car. Brief of Respondent at 6.

2. The Court must reject the State's claim that the fruits of the unlawful search would have inevitably been revealed.

"Article I, section 7 provides greater protection of privacy rights than the Fourth Amendment." State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009). (citing State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005)). Whenever the privacy are violated by the State, the remedy must follow." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

Here, the State contends the suppress the fruits of the unlawful search contending their discovery was the product of an independent source. Brief of Respondent at 8. The State says "here, the question is whether Officer Alexander would have asked Chapman whether he had been drinking." (Emphasis added) Brief of Respondent at 11.

The critical distinction between the independent source doctrine and the inevitable discovery exception is that the former requires an actual independent and lawful discovery while the later “is necessarily speculative;” hypothesizing about what the officer might have done. Winterstein, 167 Wn.2d at 634. By framing the questions as asking what the officer “would have done” rather than identify what she actually did, the State’s argument is simply an effort to recast a claim that discovery was inevitable as an independent source argument. Winterstein precludes that argument. 167 Wn.2d 636.

Moreover, because the State did not present this claim to the trial court this Court cannot reach the issue. RAP 2.5(a) permits

A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.

Because the State never raised this claim to the trial court, the factual record is not sufficient for this Court to review the claim. There is no finding by the trial court that Officer Alexander would have asked Mr. Chapman if he was drinking regardless of her discovery of the cans in the car. Nor did the officer provide such testimony.

The court’s findings of fact establish that Officer Alexander had no suspicion that Mr. Chapman was under the influence prior to her search of

the car. CP 129 (Finding of Fact 6). That finding is fully supported by the officer's testimony that only after her discovery of the cans found in the car did the Officer Alexander ask Mr. Chapman if he had been drinking. 1RP 20. Even during this exchange, Officer Alexander did not detect an odor of alcohol or any other signs of intoxication. Id. Mr. Chapman acknowledged he had. 1RP 20-22.

The question and Mr. Chapman's responses are fruits of the illegal search.

Only after her search of the car and Mr. Chapman's acknowledgment that he had been drinking did Officer Alexander elect to administer the Horizontal Gaze Nystagmus. CP 129 Finding of Fact 7. Based upon that test Officer Alexander, for the first time, opined Mr. Chapman was intoxicated. 1RP 27.

And based upon that test and the odor of alcohol, the court concluded the officer had sufficient probable cause to administer a breath test pursuant to RCW 46.20.308. 2RP 122.

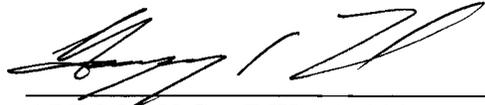
Rather than establish independence, the court's findings plainly establish that the discovery of each piece of evidence in this chain was directly related to the discovery of the preceding link(s). Thus, even if the State's argument was not contrary to established law, because the State did

not present the necessary facts below this Court cannot affirm Mr. Chapman's conviction.

B. CONCLUSION

As is clear, each link in the State's chain of proof flowed from Officer Alexander's unlawful search. Without the fruits of this unlawful search the State could not convict Mr. Chapman. Therefore, this Court must reverse and dismiss Mr. Chapman's conviction

Dated this 25th day of January, 2012.



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF JANUARY, 2012, 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:

[X] BRIDGETT MARYMAN, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF JANUARY, 2012.

X _____ 

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