

COA NO. 68543-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CORYELL ADAMS,

Appellant.

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

The Honorable Thomas J. Wynne, Judge  
The Honorable George F.B. Appel, Judge

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2013 MAR 27 PM 4:30

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE SEARCH INVADED A PRIVATE AFFAIR WITHOUT AUTHORITY OF LAW AND IS UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 7 BECAUSE NO EXCEPTION TO THE WARRANT REQUIREMENT APPLIES.

Trooper Marek testified at the CrR 3.6 hearing that he did not conduct an inventory search. 1RP 14. The trial court agreed. 1RP 25. The State nonetheless argues the warrantless search of the vehicle was lawful because Trooper Marek conducted an inventory search or could have conducted such a search as part of the impound process. Brief of Respondent (BOR) at 18-20. The State's claim fails both factually and legally.

An inventory search occurs when "an inventory of the contents of the automobile preparatory to or following the impoundment of the car" is carried out. State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). Such a search "is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him." Montague, 73 Wn.2d at 385.

Trooper Marek did not inventory the contents of Adams's vehicle. The record indisputably shows he did not do this. Trooper Marek entered the vehicle for the purpose of facilitating the tow and impound process.

1RP 6-7, 13-15. He did not enter it for the purpose of finding, listing and securing the contents of the vehicle from loss.

The State emphasizes the impoundment was justified, but that does not render the search that actually occurred constitutional. BOR at 16-18. A valid impoundment is a necessary component of a lawful inventory search. State v. Houser, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980). But an impoundment can occur without an inventory search taking place at all. There is no stand-alone "preparation for impound" exception to the warrant requirement. See State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (setting forth exceptions). And it is imperative to narrowly confine exceptions that do exist under article I, section 7. State v. Patton, 167 Wn.2d 379, 396, 219 P.3d 651 (2009). There is an inventory search exception, but no inventory search took place here. The trial court got it wrong in other ways, but was quite correct in recognizing "[t]here is no basis to assert there was an inventory search here." 1RP 25.

The facts simply do not support the legal argument that the State wants to make. The State argues the trooper's "subjective" characterization that he did not conduct an "inventory search" is immaterial. BOR at 14-15. The real problem, however, is not the "inventory search" label but the lack of underlying facts that would justify application of that label to the trooper's conduct in this case.

The State always has the burden to establish that an exception to the warrant requirement applies. State v. Afana, 169 Wn.2d 169, 177, 233 P.3d 879 (2010). In particular, the State has the burden of proving facts necessary to establish the lawfulness of a warrantless search. State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008).

The State's argument below, consistent with its argument on appeal, is that Trooper Marek's entry into the vehicle was justified because he needed to complete certain steps to prepare the vehicle "to get to the inventory search." 1RP 22.

The problem is that Marek did not testify, nor did the court find, that Marek intended to do an inventory search. There are no facts upon which it could be concluded that an inventory search took place or that the trooper entered the vehicle intending to conduct such a search. In the absence of a finding on a factual issue, the reviewing court must presume the party with the burden of proof failed to sustain their burden on this issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). There is no finding of fact that Trooper Marek entered that vehicle to make an inventory, i.e., to find, list, and secure the contents of that vehicle from loss. Nor is there any substantial evidence that would support such a finding.

The State argues the trooper could have conducted an inventory search but did not in fact do it: "Trooper Marek could have conducted a full inventory search of the passenger compartment of the vehicle." BOR at 18-19. The suggestion is that the trooper inevitably would have conducted an inventory search as part of the impoundment had he not discovered contraband upon entering the vehicle. Inevitable discovery is not a valid exception to the exclusionary rule under article I, section 7. State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009).

But the deeper flaw underlying the State's argument is that it presumes as a matter of fact that Trooper Marek intended to conduct an inventory search. The record is devoid of any evidence that the trooper intended to conduct an inventory search at any time, before or after the vehicle was towed and impounded. The entry into the vehicle therefore cannot be justified on the basis that doing so was simply incidental to an inventory search. Trooper Marek did not enter that vehicle to conduct an inventory search, there is nothing in the record to establish he intended to conduct an inventory search at a later time, and the court did not find either of these facts.

The State's "could of" reasoning is similar to that rejected in State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). In that case, a police officer approached O'Neill's car and asked for identification and vehicle

registration. O'Neill, 148 Wn.2d at 572. O'Neill said his license had been revoked. Id. When O'Neill stepped out of the car upon request, the officer noticed a spoon on the floorboard with a granular, wet look that led the officer to believe a narcotic had been cooked on it. Id. The officer searched the car and found a drug pipe and a baggie of cocaine inside. Id. at 573. He then arrested O'Neill. Id. at 573, 592. The Court of Appeals held the search was lawful under the search incident to arrest exception to the warrant requirement. Id. at 584.

The Supreme Court reversed, holding "the state constitution requires an actual custodial arrest before a search occurs. Otherwise, the search is in fact conducted without an arrest, and thus without authority of law existing at the time of the search." Id. at 585. While the officer "could have" arrested O'Neill for driving with a revoked license or, in light of his training and experience, for possession of the controlled substance on the spoon, the officer in fact did neither. Id. at 592. "[I]t is the arrest, not probable cause to arrest, that constitutes the necessary authority of law for a search incident to arrest." Id. at 585-86.

Similarly, Officer Marek could have conducted an inventory search as part of the impoundment process, but he did not do in fact do so. It is the inventory search itself, not whether there is a basis to conduct one, that constitutes the necessary authority of law under article I, section 7.

Under O'Neill, the search incident to arrest exception is not triggered until an arrest actually takes place, even though there is probable cause to make an arrest. Id. at 585-86, 592-93. Similarly, the inventory exception is not triggered until an actual inventory search takes place, even though there is a legal basis to conduct one.

One can readily imagine the mischief that would arise if *preparations* to engage in one of the carefully guarded and jealously drawn exceptions to the warrant requirement were grafted onto the exceptions or were treated as exceptions themselves. For example, consent is an exception to the warrant requirement. Suppose an officer, in the course of attempting to locate a homeowner to obtain consent to search the home, opens the door of the house without permission and, in the course of trying to find the homeowner to obtain permission to enter, sees contraband in plain view. Under the State's reasoning, that course of conduct is perfectly legal because it was done for the purpose of realizing an exception to the warrant requirement. But there is not a court in this land that would hesitate to condemn that conduct as an illegal search.

Even if what Trooper Marek did qualifies as an inventory search, the search is still unlawful because Adams did not consent to it. 1RP 8. Consent is required to conduct an inventory search of a vehicle prior to impoundment. See State v. Williams, 102 Wn.2d 733, 743, 689 P.2d 1065

(1984) ("even if impoundment had been authorized, it is doubtful that the police could have conducted a routine inventory search without asking petitioner if he wanted one done. The purpose of an inventory search is to protect the police from lawsuits arising from mishandling of personal property of a defendant. Clearly, a defendant may reject this protection, preferring to take the chance that no loss will occur."); State v. White, 135 Wn.2d 761, 771 n.11, 958 P.2d 982 (1998) ("the record does not indicate White was ever asked whether he would consent to an inventory search, and the State makes no claim that he was. White was never given the opportunity to reject the protection available and, thus, the search is also suspect under State v. Williams, 102 Wash.2d 733, 689 P.2d 1065 (1984) . . . In Washington, an individual is free to reject the protection that an inventory search provides and take the chance that no loss will occur."); cf. State v. Tyler, 166 Wn. App. 202, 213, 269 P.3d 379 (declining to hold a non-owner's lack of consent invalidated an otherwise valid inventory search of vehicle under facts of case), review granted, 174 Wn.2d 1005, 278 P.3d 1112 (2012).<sup>1</sup>

Finally, the State incorrectly claims that Adams cannot challenge finding of fact 5 as being unsupported by substantial evidence because his

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<sup>1</sup> The issue of whether consent to an inventory search is required is pending in State v. Tyler, No. 87104-3 (oral argument heard 10/4/12).

attorney agreed to that fact below. BOR at 9-10. The challenged portion of finding of fact 5 states Trooper Marek opened the driver's door to "ensure the key fit the ignition." CP 115 (FF 5). See Brief of Appellant at 16.

The State cites that portion of argument at the CrR 3.6 hearing where defense counsel states "I actually think Mr. Halloran and I agree factually on everything here." BOR at 9; 1RP 23. Counsel then specified some examples of what they agreed on. 1RP 23. Counsel made this representation in response to the prosecutor's argument and representation of the facts. At no time did the prosecutor allege the fact that Adams challenges on appeal. 1RP 19-23; CP 127-34. Defense counsel can hardly be said to agree to a fact that the prosecutor had not alleged.

The State also notes defense counsel signed the written finding and conclusions. BOR at 9. Defense counsel did nothing more than acknowledge receiving a copy of the written findings of fact and conclusions of law through his signature. CP 116.

The written findings include an entry that "The facts were undisputed." CP 114. That is an accurate recitation of the court's oral remark, which was made before the court actually set forth its findings of fact in its oral ruling. 1RP 24. At no time did the court, after reciting

those oral findings, seek acknowledgment from defense counsel that he agreed with them.

For the invited error doctrine to apply, a party must materially contribute to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error. In re Pers. Restraint of Call, 144 Wn.2d 315, 328-29, 28 P.3d 709 (2001); In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000). The record, viewed in appropriate context, does not show defense counsel knowingly, voluntarily and materially contributed to the entry of a factual finding unsupported by substantial evidence. The trial court simply announced its findings of fact at the close of argument and they were subsequently incorporated into the written findings. 1RP 24-26. Counsel did not set up the error by acknowledging receipt of the written findings and conclusions. CP 114.

Even an "approval as to form," which is not shown here, only means "approval of the structure of something, as opposed to its substance." Guillen v. Pierce County, 127 Wn. App. 278, 287, 110 P.3d 1184 (2005), review denied, 156 Wn.2d 1006, 132 P.3d 146 (2006); see also Harter v. King County, 11 Wn.2d 583, 589-90, 119 P.2d 919 (1941) (approval of findings of fact and conclusions of law treated as "customary approval as to the form" and did not convert decree into consent decree)

(citing Bank of Gauley v. Osenton, 92 W.Va. 1, 114 S.E. 435, 437 (W.Va. 1922) (approval as to form does not show not intent to agree that the order is proper, but that it merely embodies what the court has announced should be in it)).

Form should not be exalted over substance. Substantial evidence must support a challenged factual finding. That is the test. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). As a matter of sound jurisprudence, there is little to recommend an approach that treats a finding of fact as a verity on appeal when it is actually unsupported by substantial evidence and challenged on appeal.

In any event, the matter is foofaraw. The State's only claim on appeal is that the inventory search exception applies. For the reasons forth above, the inventory search exception does not apply. Whether Trooper Marek opened the driver's door to "ensure the key fit the ignition" under Finding of Fact 5 does not change that conclusion.

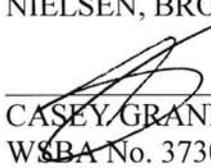
B. CONCLUSION

For the reasons stated, this Court should reverse conviction and dismiss the charge with prejudice.

DATED this 27<sup>th</sup> day of March 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68543-1-I
	)	
CORYELL ADAMS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27<sup>TH</sup> DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF MARCH 2013.

X *Patrick Mayovsky*