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COA NO. 68543-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CORYELL ADAMS,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence. CP 114-16.¹

2. The trial court erred in entering CrR 3.6 finding of fact 5 and conclusions of law 2, 5, 6 and 7. CP 115.

Issue Pertaining to Assignments of Error

Was the warrantless search of appellant's vehicle unconstitutional under article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution because no exception to the warrant requirement applies?

B. STATEMENT OF THE CASE

The State charged Coryell Adams with possession of cocaine, a controlled substance. CP 125. The defense filed a motion to suppress, arguing the search of Adams's vehicle was illegal under article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. CP 117-22. The State opposed the motion. CP 127-34.

At the CrR 3.6 hearing, Trooper Marek of the Washington State Patrol (WSP) testified he stopped Adams's vehicle for lane travel

¹ The trial court's "Certificate Pursuant to CrR 3.6 of the Criminal Rules for Suppression Hearing" is attached as appendix A.

violations on Interstate 5. CP 114 (FF 1); 1RP 4. Marek issued a traffic citation. CP 114 (FF 2); 1RP 4. During this process, a routine check showed Adams's license was suspended. CP 114 (FF 2); 1RP 4-5. The vehicle was in a tow zone. CP 115 (FF 4); 1RP 5. No passengers were present to drive the vehicle. CP 115 (FF 4); 1RP 4-5. Marek tried to call Adams's friends, but none were available to retrieve the vehicle. CP 115 (FF 4); 1RP 5. Marek arrested Adams for third degree driving with a suspended license. CP 114 (FF 3); 1RP 5.

Trooper Marek said the only remaining option was impound. 1RP 5-6. Marek explained, "There is a Washington State Uniform Impound Form that we must complete. On that form, you must include all the proper vehicle information including the mileage." 1RP 6. Marek also said "If there is a key, you need to make sure the ignition key is in it for the tow truck driver." 1RP 6.

Marek opened the vehicle door to prepare for impound. 1RP 7. Marek said he needed to enter the vehicle because he could not see the odometer from outside the vehicle and could not put the key into the ignition from outside the vehicle. 1RP 6, 13-14. He wanted to get the odometer reading and insert the key to facilitate the towing process. 1RP 6, 14, 15. He explained why he wanted to insert the key as follows: "When the tow truck driver arrives, sometimes they need to actually – if

there is no evidence, they are going to need to actually start the car to get it back up on the truck quicker and more safe." 1RP 14.

Marek testified he did not enter the vehicle to do a search incident to arrest. 1RP 14. He also testified he did not enter the vehicle to do an inventory search. 1RP 14.

Upon opening the door, he noticed a newspaper in the driver's side door compartment. 1RP 7. As he looked at the newspaper, he saw a white crystallized substance in a plastic baggy on top. 1RP 7. Based on training and experience, Marek believed the substance to be a narcotic, possibly cocaine or methamphetamine. 1RP 7.

Marek shut the door, secured the vehicle and read Adams his constitutional rights. 1RP 7. Marek asked for permission to search the vehicle. 1RP 7-8. Adams refused consent. 1RP 8. Marek decided to impound the vehicle at headquarters. 1RP 8. Marek explained "I was going to ask that a narcotic K-9 meet me at the bullpen, and if there was a positive hit or other evidence obtained. I was going to apply for a search warrant." 1RP 8.

A tow truck arrived at this point and took Adams's vehicle to the WSP impound lot. 1RP 8. A K-9 alerted on the driver and passenger side door. 1RP 8. Marek then successfully applied for a search warrant. 1RP 9. Upon execution of the warrant, Marek recovered a plastic bag

containing 1.4 ounces of hardened white powder, which was later identified by the WSP crime lab as cocaine. 1RP 9. He also recovered .03 ounces of suspected marijuana and a small black baggy containing chunks of an off-white substance. 1RP 9.

The impound form was admitted into evidence for the CrR 3.6 hearing. Ex. 2. Marek had not filled in the mileage on the form. Ex. 2; 1RP 12. Marek acknowledged the vehicle could be towed without the mileage information. 1RP 12. But when asked if it was unnecessary to write in the mileage on the form, Marek replied "It is necessary. It's not mandatory, but it is necessary." 1RP 12. It is a policy of Marek's department to fill in the mileage information on the form. 1RP 12. But the vehicle would still be towed without the mileage information. 1RP 12. The two company does not look to the mileage on the WSP form in order to tow the vehicle. 1RP 12.

The court denied the motion to suppress, entering the following conclusions of law:

1. There was no pretext involved in the valid traffic stop.
2. Trooper Marek's actions in opening the driver's door to get the mileage and prepare for the tow were reasonable, legal and appropriate. This did not constitute a search.
3. The items observed in the driver's door panel were in plain view once the door was opened. The evidence was not manipulated in any way.

4. The vehicle was properly towed and impounded to the WSP bullpen.
5. The canine inspection of the vehicle at the WSP location was legally proper.
6. Commission [sic] Moon issued a valid and legal search warrant to have the vehicle searched for suspected narcotics.
7. The search of the vehicle did not violate Constitutional protections and was legally valid.

CP 115.²

The first trial ended in a mistrial after the jury deadlocked. 4RP 12-18. After a second trial, the jury found Adams guilty. CP 44. The court sentenced Adams to 18 months confinement. CP 32.

Defense counsel requested an appeal bond, noting the validity of the CrR 3.6 suppression issue. 6RP³ 180. The prosecutor opposed release pending appeal, representing the only issue he could imagine on appeal would be the suppression issue and that the appeal was unlikely to produce a different result. 6RP 180-81. The court set an appeal bond. 6RP 182. This appeal follows. CP 1-27, 28.

² Adams, while represented by counsel, attempted to file a pro se motion to reconsider the suppression ruling. CP 107. The court did not address the merits of the motion to reconsider, denying it on the basis that it was untimely and improperly noted. CP 107. In addition, Adams was represented by counsel and therefore could not represent himself pro se through the motion to reconsider. CP 107.

³ The verbatim report of proceedings is referenced as follows: 1RP - 11/18/11; 2RP - 1/17/12; 3RP - 1/19/12; 4RP - 1/20/12; 5RP - 2/23/12; 6RP - 3/26/12, 3/27/12 and 3/29/12.

C. ARGUMENT

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.

When Trooper Marek opened the car door and looked inside without a warrant, he disturbed Adams's private affairs and conducted a search. No exception to the warrant exception justifies the search. The evidence must be suppressed.

- a. Standard Of Review

When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Unchallenged findings of fact are verities on appeal. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court's conclusions of law and its application of law to the facts are reviewed de novo. State v. Meneese, 174 Wn.2d 937, 942, 282 P.3d 83 (2012); Eisfeldt, 163 Wn.2d at 634.

b. The Washington Constitution Provides Greater Protection Against Warrantless Searches Than The Federal Constitution.

"Under the Washington Constitution, it is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution." State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). Accordingly, a Gunwall⁴ analysis is unnecessary for the reviewing court to take an independent state constitutional analysis. State v. Snapp, 174 Wn.2d 177, 194 n.9, 275 P.3d 289 (2012) (describing the point as "settled") (citing State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 27 (2007); State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002)). "The only relevant question is whether article I, section 7 affords enhanced protection in the particular context." Surge, 160 Wn.2d at 71.

The Fourth Amendment provides the minimum protection against unlawful searches. State v. Young, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994). Article I, section 7 "necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment." State v. Garcia-Salgado, 170 Wn.2d 176, 183, 240 P.3d 153 (2010) (quoting State v. Parker, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999)). But article I,

⁴ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (setting forth the factors for evaluating whether an issue merits independent state constitutional interpretation).

section 7 goes further than the Fourth Amendment and requires actual authority of law before the State may disturb an individual's private affairs. State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). Article I, section 7 "prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional." State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). When a party claims both state and federal constitutional violations, the reviewing court addresses the state constitutional claim first. State v. Patton, 167 Wn.2d 379, 385, 219 P.3d 651 (2009).

c. A Warrantless Search Occurred Under Article I, Section 7 When The Officer Opened The Door And Saw The Drugs In The Interior Of The Car.

Article I, section 7 provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Interpretation and application of article I, section 7 requires a two-part analysis. State v. Puapuaga, 164 Wn.2d 515, 522, 192 P.3d 360 (2008). The analysis begins "by determining whether the action complained of constitutes a disturbance of one's private affairs." State v. Miles, 160 Wn.2d 236, 243-44, 156 P.3d 864 (2007). "If there is no private affair being disturbed, the analysis ends and there is no article I, section 7 violation." Puapuaga, 164 Wn.2d at 522. If, however, the government

disturbs a valid privacy interest, the second step is to determine whether "authority of law" justifies the intrusion. Miles, 160 Wn.2d at 244.

The protections of article I, section 7 are triggered when a person's private affairs are disturbed. City of Seattle v. McCready, 123 Wn.2d 260, 270, 868 P.2d 134 (1994). "A disturbance of a person's private affairs generally occurs when the government intrudes upon 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from government trespass.'" McCready, 123 Wn.2d at 270 (quoting State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)).

Washington citizens have a constitutionally protected privacy interest in vehicles and their contents under article I, section 7. Snapp, 174 Wn.2d at 187; Patton, 167 Wn.2d at 385. "Private affairs" under article I, section 7 encompasses the automobile and all that is in it. State v. Gibbons, 118 Wn. 171, 187, 203 P. 390 (1922).

Under this established law, Trooper Marek invaded Adams's "private affairs" when he opened the door to the car and looked inside. What was inside the vehicle was a private affair under article I, section 7. Snapp, 174 Wn.2d at 187; Gibbons, 118 Wn. at 187. Trooper Marek's visual access to a private space was a search. The trial court therefore erred in concluding no search occurred. CP 115 (CL 2).

The open view doctrine is inapplicable here. Under the open view doctrine, no search occurs where a law enforcement officer is able to detect something at a lawful vantage point through his or her senses. State v. Jackson, 150 Wn.2d 251, 260, 76 P.3d 217 (2003); State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). This is because "what is voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person's private affairs." Young, 123 Wn.2d at 182. Thus, "if an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car." State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986).

The narcotics observed by Trooper Marek in the driver's side door compartment were not observed until he opened the door. CP 115 (FF 6); 1RP 7. There is no testimony that Marek saw the drugs while he remained outside the vehicle with the door closed. The trial court did not and could not conclude the open view doctrine applied here. Trooper Marek's intrusion into the car constituted a disturbance of Adams's private affairs and a warrantless search.

d. The Warrantless Search Was Unconstitutional Under Article I, Section 7 Because No Exception To The Warrant Requirement Applies.

A warrantless search is per se unconstitutional under article I, section 7 unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This iron rule applies to automobiles. Parker, 139 Wn.2d at 496. "Exceptions to the warrant requirement are limited and narrowly drawn." Id. Those exceptions are jealously guarded "lest they swallow what our constitution enshrines." Day, 161 Wn.2d at 894.

The State always carries the "heavy burden" of proving one of the narrow exceptions to the warrant requirement justified a warrantless search. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). To that end, the State has the burden of proving facts necessary to establish the lawfulness of any such search. State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008). "When the state prevails in a suppression hearing it has a further obligation to prepare, present and have entered findings of fact and conclusions of law which will, standing alone, withstand an appellate court's scrutiny for constitutional error." State v. Poirier, 34 Wn. App. 839, 841, 664 P.2d 7 (1983).

The Washington Supreme Court recognizes exceptions for consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry⁵ investigative stops. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). The trial court did not conclude any exception to the warrant requirement applied to this case. This is likely due to the fact that it erroneously concluded no search occurred.

The court concluded the trooper's actions in opening the driver's door to get the mileage and prepare for the tow were "reasonable, legal and appropriate." CP 115 (CL 2). But there is no "reasonableness" exception to the warrant requirement under article I, section 7.

The reasonableness of a search is immaterial under article I, section 7. Eisfeldt, 163 Wn.2d at 634. "Although they protect similar interests, 'the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.'" Id. (quoting McKinney, 148 Wn.2d at 26).

"The Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to any manner of warrantless, but reasonable searches." Eisfeldt, 163 Wn.2d at 634. "By contrast article I, section 7 is unconcerned with the reasonableness of the

⁵ Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

search, but instead requires a warrant before any search, reasonable or not." Id. "Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington." Id. at 635. The trial court ignored this difference.

Assuming Trooper Marek took "reasonable" steps in the impound process, the reasonableness of those steps does not render the search constitutional. Trooper Marek testified it was department policy to obtain the mileage in preparation for towing. 1RP 12. It may have been in some sense reasonable for the trooper to follow department policy in opening the car door to check the mileage. But law enforcement policy is not an exception to the warrant requirement. Simply put, "compliance with established police procedures does not constitutionalize an illegal search." State v. White, 135 Wn.2d 761, 771, 958 P.2d 982 (1998) (citing State v. Jewell, 338 So.2d 633, 640 (1976) ("Unconstitutional searches cannot be constitutionalized by standardizing them as a part of normal police practice.")). Article I, section 7 requires actual authority of law before the State may disturb an individual's private affairs. Day, 161 Wn.2d at 894. Law enforcement policy does not provide the authority of law needed to justify invasion into a protected privacy interest.

The trial court did not conclude the inventory search exception to the warrant requirement applied to this case. This is not surprising. Trooper Marek bluntly testified at the CrR 3.6 hearing that he was not entering the vehicle to conduct an inventory search. 1RP 14. The court, referencing the trooper's testimony on this point, ruled "[t]here is no basis to assert there was an inventory search here." 1RP 25.

The State argued Marek was authorized to do an inventory search and needed to prepare the vehicle to get to that point. 1RP 22. But Marek did not testify, nor did the court find, that Marek intended to do an inventory search after the car was towed.

The question remains: what exception to the warrant requirement justified the search here? The trial court, without acknowledging it, in effect relied on an unprecedented exception to the warrant requirement: a towing facilitation search exception.

There is no such exception to the warrant requirement. Those exceptions that are recognized are jealously guarded and narrowly drawn. Parker, 139 Wn.2d at 496; Day, 161 Wn.2d at 894. There is no odometer check exception to the warrant requirement. There is no key insertion exception to the warrant requirement.

The trial court entered written "finding of fact" 5, which states "To prepare the vehicle for towing, Trooper Marek opened the driver's door to

get the vehicle mileage reading and ensure the key fit the ignition. These were reasonable steps of the impound process." CP 115 (FF 5). Adams challenges "finding of fact" 5 in two respects.

First, whether Trooper Marek's steps were "reasonable" is actually a conclusion of law in this context. "Conclusions of law cannot be shielded from review by denominating them findings of fact." State v. Williams, 96 Wn.2d 215, 220, 634 P.2d 868 (1981). A conclusion of law erroneously denominated a finding of fact is reviewed de novo as a conclusion of law. Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002).

The trial court entered a conclusion of law that Trooper Marek's actions were "reasonable." CP 115 (CL 2). The court's "finding of fact" that Marek took "reasonable" steps is in substance no different than its conclusion of law on the subject. The determination of reasonableness is properly labeled a conclusion of law because the determination carries a legal effect regarding the constitutionality of the search at issue here. See Williams, 96 Wn.2d at 221 (A fact "'is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.'" (internal quotation marks omitted) (quoting Leschi Improvement Council v. Wash. State Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774, 804 P.2d 1 (1974)); see also State v.

Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986) ("If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact, but if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law.").

As set forth above, the reasonability of an officer's actions do not constitute an exception to the warrant requirement under article I, section 7. Eisfeldt, 163 Wn.2d at 634-35. The court therefore erred in ruling Trooper Marek's actions were justified on grounds of reasonableness. CP 115 (FF 5, CL 2).

Adams also challenges the court's finding of fact that Trooper Marek opened the driver's door to "ensure the key fit the ignition." CP 115 (FF 5). This a true finding of fact, but it is not supported by substantial evidence.

Trooper Marek testified "If there is a key, you need to make sure the ignition key is in it for the tow truck driver." 1RP 6. He explained "When the tow truck driver arrives, sometimes they need to actually – if there is no evidence, they are going to need to actually start the car to get it back up on the truck quicker and more safe." 1RP 14. Trooper Marek wanted to put the key in the ignition in the event the tow truck driver needed to start the vehicle and put it onto the tow truck. There is nothing

here about needing to ensure the key fit the ignition. The proposition itself is absurd. Adams was driving the vehicle when he was pulled over by Trooper Marek. 1RP 4. There is no doubt the key would fit the ignition. Otherwise, Adams could not have driven the vehicle.

In its oral ruling, the court said it was "reasonable" for Marek to enter the vehicle to read the mileage because "It protects the State Patrol and the tow truck company against claims that someone was driving and using the vehicle after the tow and, therefore, caused some damage to the vehicle in doing that. He also had to insert the key into the ignition so that the tow truck driver could properly get the vehicle up on the truck to tow it away." 1RP 25.

Trooper Marek did not "insert the key into the ignition so that the tow truck driver could properly get the vehicle up on the truck to tow it away." 1RP 25. There is no evidence that he ever inserted the key. There is no evidence that the tow truck driver actually needed to put Adams's vehicle up on the tow truck, let alone evidence that he needed the ignition key to do this. Trooper Marek testified a tow truck driver "sometimes" needs to start the car to put it on the tow truck. 1RP 14. In other words, Marek did not know if such action was necessary to tow Adams's car away. He was operating under routine policy. After Marek saw the drugs in the driver's side door, he immediately closed the door and secured the vehicle.

1RP 7, 12. No one was allowed to enter the vehicle. 1RP 13. The record shows the tow truck took Adams's vehicle to the impound lot, with no mention of starting the car with the ignition key to enable the tow. 1RP 8. Given that Trooper Marek secured the vehicle after spotting the drugs and did not allow anyone to enter the car thereafter, it is obvious the key was not in fact needed to start the car for the tow.

Furthermore, an odometer reading was not necessary to physically tow the vehicle away. 1RP 12. Trooper Marek acknowledged this. 1RP 12. He did not in fact obtain the odometer reading after noticing the drugs inside the car. Ex. 2. Trooper Marek's insistence that it was "not mandatory" but still "necessary" to write the mileage information on the form stemmed from Trooper Marek's reliance on department policy. 1RP 12. As set forth above, law enforcement policy does not justify a warrantless search. White, 135 Wn.2d at 771.

Trooper Marek never testified the odometer check was necessary to protect the WSP and the tow truck company from liability. The court invented this justification for him. It is obvious it was not necessary, as Trooper Marek never checked the odometer, the tow truck company did not record the mileage, and the tow truck company towed the vehicle without that information. 1RP 12-13; Ex. 2.

Again, the purported reasonability of a search does not carry the day under article I, section 7. Eisfeldt, 163 Wn.2d at 634-35. The court, in claiming the odometer check protects the WSP and the tow company from liability, attempted to justify a search on unprecedented grounds. It is imperative to narrowly confine exceptions to the warrant requirement under article I, section 7. Patton, 167 Wn.2d at 396. The court's ruling here represents either an invention of a new exception or an unprecedented expansion of an existing one. Either way, its conclusion of law is wrong.

There being no exception to the warrant requirement that justified the trooper's initial intrusion into the car interior, the conclusion that the items observed in the driver's door panel were in "plain view" is improper to the extent it implies the "plain view" exception to the warrant requirement rendered the search constitutional. CP 115 (CL 3).

The "plain view" exception applies *after* an officer intrudes into an area where a reasonable expectation of privacy exists. Seagull, 95 Wn.2d at 901. Under the plain view doctrine, an officer must have a prior justification for the intrusion. Kennedy, 107 Wn.2d at 13. Application of this exception would require that Trooper Marek's initial intrusion into the car be justified in the first place. As explained above, Officer Marek was not justified in entering the car by opening the door and looking around. The "plain view" exception does not justify Trooper Marek's initial

intrusion into the vehicle. That exception does not apply if an officer is not in a place where he or she has a right to be. State v. Thorson, 98 Wn. App. 528, 536, 990 P.2d 446 (1999), review denied, 140 Wn.2d 1027, 10 P.3d 407 (2000).

e. The Mandatory Remedy Is Exclusion Of The Unlawfully Obtained Evidence Under Article I, Section 7.

The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search under article I, section 7 of the Washington Constitution. Ladson, 138 Wn.2d at 359; Garvin, 166 Wn.2d at 254. "If the evidence was seized without authority of law, it is not admissible in court. We suppress such evidence not to punish the police, who may easily have erred innocently. We suppress unlawfully seized evidence because we do not want to become knowingly complicit in an unconstitutional exercise of power." Day, 161 Wn.2d at 894. The drug evidence must therefore be suppressed.

Evidence that is the product of illegality is fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Under the fruit of the poisonous tree doctrine, evidence obtained directly or indirectly from illegal police conduct "will be excluded unless it was not obtained by exploitation of the initial illegality or by means sufficiently distinguishable to be purged of the

primary taint." State v. Le, 103 Wn. App. 354, 361, 12 P.3d 653 (2000) (citing Wong Sun, 371 U.S. at 484-85). Where evidence derived from an unconstitutional search is used as the basis for an additional search, suppression of evidence recovered from the additional search is required. Eisfeldt, 163 Wn.2d at 640-41.

Evidence of the K-9 alert following impound is fruit of the poisonous tree. After Trooper Marek illegally discovered the narcotics inside the car and was refused consent to further search the car, Marek decided "I was going to ask that a narcotic K-9 meet me at the bullpen, and if there was a positive hit or other evidence obtained. I was going to apply for a search warrant." 1RP 8. The K-9 alert derived from the illegal action of intruding into the car and observing the narcotics. Marek sought to capitalize upon his initial observation by obtaining a K-9 alert for the presence of narcotics. What he discovered as a result of the initial illegal search motivated him to request a K-9. Contrary to the court's conclusion of law, the canine inspection of the vehicle at the WSP location was legally improper because it is the product of the initial illegal search. CP 115 (CL 5); Eisfeldt, 163 Wn.2d at 640-41.

Evidence obtained from the search pursuant to the search warrant must also be suppressed as fruit of the poisonous tree. Eisfeldt, 163 Wn.2d at 640-41. All of this evidence derived through exploitation of the

initial illegal search of the car. The search warrant for the car must fall because probable cause does not exist to search the car once the tainted information is excised from the warrant. Id. The court therefore erred in concluding "Commission[er] Moon issued a valid and legal search warrant to have the vehicle searched for suspected narcotics" and "The search of the vehicle did not violate Constitutional protections and was legally valid." CP 115 (CL 6, 7).

The conviction must be reversed and the charge dismissed with prejudice because there is insufficient evidence to prove guilt beyond a reasonable doubt once the unlawfully obtained evidence is excluded. State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted); Valdez, 167 Wn.2d at 778-79 (same); State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (same).

2. THE SEARCH WAS ILLEGAL UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

If this Court determines the search violated article I, section 7 of the Washington Constitution for the reasons set forth above (section C. 1. b., c. d., supra), then the question of whether the warrantless search also violated the Fourth Amendment is not reached. Parker, 139 Wn.2d at 492-93; see State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (when

party asserts state and federal constitutional law violations, courts first interpret Washington Constitution "to develop a body of independent jurisprudence because considering the United States Constitution first would be premature."). If, however, this Court declines to do so, it will be necessary to analyze the legality of the search under the Fourth Amendment as well.

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Fourth Amendment searches occur when "the government violates a subjective expectation of privacy that society recognizes as reasonable." Kyllo v. United States, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

"While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police." New York v. Class, 475 U.S. 106, 114-15, 106 S. Ct. 960 (1986). Intrusion into that space constitutes a search. Class, 475 U.S. at 115. Trooper Marek therefore conducted a search when he intruded into the interior of the vehicle.

The touchstone of any search and seizure question is whether officer conduct was reasonable under the circumstances. Pennsylvania v.

Mimms, 434 U.S. 106, 108-09, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977). "The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" New Jersey v. T.L.O., 469 U.S. 325, 337, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)).

Reasonableness "generally means that searches must be conducted pursuant to a warrant backed by probable cause." Class, 475 U.S. at 117. Warrantless searches by law enforcement officers "are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

There is an "automobile exception" recognized under the Fourth Amendment, which allows a warrantless search of an automobile based upon probable cause.⁶ United States v. Ross, 456 U.S. 798, 825, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). That exception does not apply here because Trooper Marek did not have probable cause to search the

⁶ This exception is unavailable under article I, section 7. Snapp, 174 Wn.2d at 192.

automobile when he entered it to check the odometer and insert the key into the ignition.

A proper inventory search following impoundment is an exception to the warrant requirement under the Fourth Amendment. Florida v. Wells, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990); Colorado v. Bertine, 479 U.S. 367, 371, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987). That exception does not apply here because Trooper Marek did not conduct an inventory search. 1RP 14, 25.

The search was unreasonable under the Fourth Amendment because there was no need for it. See T.L.O., 469 U.S. at 337 (reasonableness of search requires balancing the need to search against the invasion which the search entails). Obtaining an odometer reading was unnecessary to tow away the vehicle as part of the impoundment. 1RP 12. In fact, the vehicle was towed away without Trooper Marek ever determining the mileage on the vehicle. 1RP 12; Ex. 2.

Insertion of the key into the vehicle was unnecessary. As set forth in section C.1.d. supra, it was unnecessary to do so under the court's failed finding that Trooper Marek wanted to find out if the key worked. Trooper Marek did not offer this reason as the basis for intruding into the interior of the vehicle. An objectively reasonable officer in Trooper

Marek's position knows full well that the key worked because he pulled Adams over while Adams was driving the vehicle.

Trooper Marek testified he wanted to place the key in the ignition in case the tow truck driver needed to start the car as part of the process of loading it onto the tow truck. 1RP 6, 14. Trooper Marek did not know whether that needed to be done at the time of the search. The balancing of the need to search against the resulting intrusion weighs decidedly in favor of respecting the right to privacy in the interior of Adams's automobile because there was no need for the search itself. The government interest in protecting the public from a traffic hazard was served by towing the vehicle away to the impound lot. The search of the vehicle is gratuitous.

The search was unreasonable under the Fourth Amendment. No exception to the warrant requirement applies. The evidence obtained as a result of the unlawful search must be suppressed as fruit of the poisonous tree and the conviction reversed. Wong Sun, 371 U.S. at 485 ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.").

D. CONCLUSION

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

DATED this 27th day of September 2012

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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WSBA No. 37301
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Attorneys for Appellant

APPENDIX A

FILED

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SONYA KRASKI
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CL15035470

SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

ADAMS, CORYELL LAVOI

Defendant.

No. 11-1-00624-1

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On November 18, 2011, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

The facts were undisputed.

1. Trooper Marek of the State Patrol stopped Defendant Coryell Adams for lane travel violations on NB 15.
2. Defendant was issued a traffic infraction. During this process, a routine check of his license with DOL showed his driver's license was suspended third degree for unpaid child support, effective 2008.
3. Defendant was arrested for driving while suspended third degree.

ORIGINAL

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4. Defendant's vehicle was stopped in a tow zone. No passengers were present to drive the vehicle. Trooper Marek tried to call friends of the defendant but no one was available to retrieve the vehicle.
5. To prepare the vehicle for towing, Trooper Marek opened the driver's door to get the vehicle mileage reading and ensure the key fit the ignition. These were reasonable steps of the impound process.
6. On opening the door, items came into plain view that appeared to be narcotics.

II. CONCLUSIONS OF LAW

1. There was no pretext involved in the valid traffic stop.
2. Trooper Marek's actions in opening the driver's door to get the mileage and prepare for the tow were reasonable, legal and appropriate. This did not constitute a search.
3. The items observed in the driver's door panel were in plain view once the door was opened. The evidence was not manipulated in any way.
4. The vehicle was properly towed and impounded to the WSP bullpen.
5. The canine inspection of the vehicle at the WSP bullpen was legally proper.
6. Commission Moon issued a valid and legal search warrant to have the vehicle searched for suspected narcotics.
7. The search of the vehicle did not violate Constitutional protections and was legally valid.
8. Defendant's motion to suppress evidence and dismiss is denied.

DONE IN OPEN COURT this 21st day of Nov, 2011.

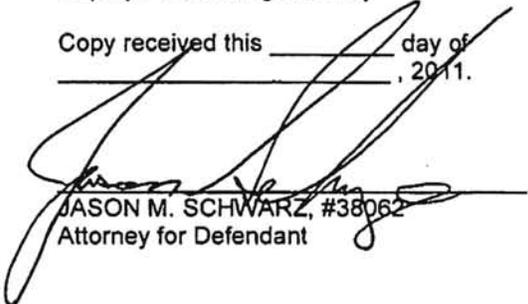
JUDGE 

Presented by:



SCOTT HALLORAN, #35171
Deputy Prosecuting Attorney

Copy received this _____ day of _____, 2011.



JASON M. SCHWARZ, #38062
Attorney for Defendant

CORYELL LAVOI ADAMS
Defendant

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

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

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 28TH DAY OF SEPTEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- [X] CORYELL ADAMS
DOC NO. 970506
LARCH CORRECTIONS CENTER
15314 NE DOLE VALLEY ROAD
YACOLT, WA 98675

[Handwritten signature]
SEP 28 2012 11:35
COA NO. 68543-1-I

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF SEPTEMBER 2012.

x *Patrick Mayovsky*