

FILED  
Mar 20, 2015  
Court of Appeals  
Division I  
State of Washington

No. 71522-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

LISA LIPPINCOTT,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

**1. The State failed to offer sufficient evidence of the ten counts of identity theft.**

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Where additional elements are added to the “to convict” instruction, and the State does not object, the additional element becomes the “law of the case” and must be proved beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). If the State failed to meet this burden with respect to the added element, the conviction must be dismissed. *Id.* at 103.

The State agrees the “to-convict” instructions in this case added the element. Brief of Respondent at 13. The State also acknowledges it offered no proof that Ms. Lippincott did not obtain anything. *Id.* at

Instead, the State responds, since it offered no evidence it therefore proved the element beyond a reasonable doubt. Logical impossibility aside, that contention ignores what the instructions require. The instruction required the State to affirmatively prove beyond a reasonable doubt that Ms. Lippincott did not obtain anything – to affirmatively prove the negative beyond a reasonable doubt. The absence of evidence on whether the sun rose this morning does not prove the sun did not rise. The State’s admitted absence of proof on this point leads inescapably to the conclusion that it did not meet its burden of proof. It is equally clear that the State did not offer any evidence that Ms. Lippincott attempted to or did obtain something with a value of less than \$1500. And the State does not contend otherwise.

The State’s failure to prove the additional element requires reversal of Ms. Lippincott’s convictions.

**2. The court erred in failing to suppress the fruits of a warrantless search of Ms. Lippincott’s purse, car and home.**

Ms. Lippinocott has offered a detailed analysis of the “authority of law” requirement of Article I, section as it pertains to probation searches. She has pointed out that Washington case which have purported to recognize an exception for such searches under Article I,

§ 7 have in fact relied exclusively on a Fourth Amendment analysis centered on the reasonableness of the intrusion and a lessened expectation of privacy. She has provided ample support for the proposition that such consideration are inconsistent with the anlais demanded by Article 1, § 7. Article I, section 7, however, is not concerned with the reasonableness of the intrusion. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 305–06, 178 P.3d 995 (2008); *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Instead, the question is whether the search intrudes upon one’s private affairs. *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012). Further, the Court has held a person’s “expectation of privacy, even if reduced . . . does not constitute an exception to the requirement of a warrant under [Article I, section 7].” *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). Neither the reasonableness of the intrusion nor a purported lessened expectation of privacy can satisfy the authority of law requirement of Article I, section 7.

Ignoring this, the State’s argument relies entirely upon cases which employ the flawed reasonable-expectation analysis all the while acknowledging “[m]ost of these cases rest on the theory that probationers have a diminished right of privacy” Brief of Respondent at

21. In response, to Ms. Lippincott's reasoned argument that that analysis is inconsistent with Article I, section 7, the State make no effort to explain why it is the correct analysis. As *York, Valdez, Snapp*, and *Hendrickson* make clear it is not.

Next the State contends Ms. Lippincott fails to reconcile her argument with RCW 9.94A.640. Brief of Respondent at 26. Ms. Lippincott specifically address that statute in her initial brief. Brief of Appellant at 13-14. As made clear there, the "authority of law" requirement is not met by a statute which eliminates the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 352, n.3, 979 P.2d 833 (1999) (citing *inter alia Seattle v. McCready*, 123 Wn.2d 260, 274, 868 P.2d 134 (1994)). Instead, "authority of law" means a warrant or a "few jealously guarded exceptions." *York*, 163 Wn.2d at 306. Thus, RCW 9.94A.640 cannot constitute the authority of law required by Article I, section 7. The State offers nothing to the contrary.

Finally, even if a probation exception is permitted by Article I, section 7, such a search must be narrowly limited to a search for evidence of a violation which the officer believes the person has committed. *State v. Jardinez*, \_\_ Wn.App. \_\_, 338 P.3d 292, 297 (2014); *see also, State v. Winterstein* 167 Wn.2d 620, 628, 220 P.3d 1226

(2009). Here at the time of the arrest a DOC warrant was issued for Ms. Lippencott's failure to report, the officer did not express any belief that he believed he would evidence of that violation in her car or purse. In fact, it is hard to imagine that any such evidence exists at all as the violation had occurred sometime in the past. Here, the officer did not claim he believed such a nexus instead claiming DOC has a right to search whenever it arrests a probationer, Officer Rongen searched Ms. Lippincott's car and then her purse taken from the car. 10/10/13 RP 13-14. Thus, there was no nexus between the search and the violation and it cannot be permitted as a probation search.

The State suggests the officer could have searched Ms. Lippincott's purse incident to her arrest, but concedes the evidence does not establish where the purse was found Brief of Respondent at 24, n.9. This is a critical failing on the State's part, as the State bears the burden of establishing a search was lawful - either supported by a warrant or an exception to the warrant requirement. To establish the search incident to arrest exception, the State would need to first establish the purse was not in the car at the time of arrest, as the that exception does not permit a search of a vehicle or items contained therein. *Snapp*, 174 Wn.2d at 197. As the State acknowledges it did not

establish where the purse was. Indeed, since Ms. Lippincott was in her car at the time of initial contact, and then placed under arrest, it stands to reason that her purse was in her car. The officers could not seize the purse from her car or otherwise search the car incident to her arrest.

Moreover, there is no reasonable basis to conclude that evidence of her failure to report would be found in an apartment more than 20 miles from the place she was arrested. Instead, Officer Rongen claimed he determined to search the apartment only after he had searched her purse and found gift cards. CP 162; 10/10/13 RP 20-21. If that is the case, the search of her residence is simply the fruit of the unlawful search of her car and purse.

Because that evidence was obtained in violation of the Article I, section 7, the court erred in permitting its admission.

B. CONCLUSION

For the reasons above, and those in her initial brief, this Court should reverse Ms. Lippincott's convictions.

Respectfully submitted this 20<sup>th</sup> day of March 2015.



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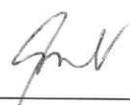
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF MARCH, 2015, 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:

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