

ORIGINAL

NO. 34561-7-II

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

STATE OF WASHINGTON,

Appellant,

v.

GREGORY LEVINGSTON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-01752-8

BRIEF OF APPELLANT

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<p>Michelle Bacon-Adams 623 Dwight St. Port Orchard, WA 98366</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 21, 2006, Port Orchard, WA Original +1 to the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402 Copy to counsel listed at left</p> <p><i>[Signature]</i></p>
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I. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Ms. Aaland's testimony was credible and candid. CP 39 (Finding of Fact 1).
2. The trial court erred in finding that Ms. Aaland had a reasonable expectation and belief that the car was returned to her. CP 41 (Finding of Fact 17).
3. The trial court erred in concluding that Ms. Aaland had a reasonable belief that the car was restored to her and that she acted to secure that right. CP 42 (Conclusion of Law 3).
4. The trial court erred in concluding that there was no basis for a warrantless search of Ms. Aaland's property. CP 42 (Conclusion of Law 3).
5. The trial court erred in concluding that the defendant had automatic standing to contest the admissibility of the fruits of the search of the car. CP 42 (Conclusion of Law 4).
6. The trial court erred in concluding that law enforcement's ability to search the car incident to the arrest of the defendant expired prior to the search. CP 43 (Conclusion of Law 6).

7. The trial court erred in suppressing the evidence found during the search of the car. CP 43.

II. STATEMENT OF ISSUES

1. Whether the trial court erred in ruling that the officers' ability to perform a search incident to arrest had "expired" when the search was made after a lawful arrest and was made before the defendant or the vehicle was removed from the scene?

2. Whether the trial court erred in finding that Levingston had automatic standing to contest the search of the car when Levingston's Fourth and Fifth Amendment Rights were never in conflict, and when, under the defense theory, Levingston was not in possession of the car at the time of the search?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Gregory Levingston was charged by information filed in Kitsap County Superior Court with first-degree unlawful possession of a firearm; possession of a controlled substance (trazodone). CP 1. Levingston filed a Motion to Suppress and Dismiss Pursuant to CrR 3.6, and a hearing on the motion was held on February 1, 2006. CP 5, RP 2/01/06. Following the hearing the trial court granted Levingston's motion and the case was dismissed. CP 38.

B. FACTS

On October 31, 2006, Officer Jerry Jensen of the Port Orchard Police Department pulled over a car driven by Levingston because the car he was driving had a headlight out. RP (2/1) 13, 17. Officer Jensen activated his overhead lights, and Levingston pulled over. RP (2/1) 18. When Officer Jensen contacted Levingston, he stated that he did not have ID with him, and gave the officer a false name. RP (2/1) 13, 18-19. Officer Jensen then arrested Levingston and placed handcuffs on him. RP (2/1) 14, 19. When Levingston was searched, officers found a wallet with an ID in his back pocket. RP (2/1) 14, 19. Levingston was then placed in the backseat of Officer Jensen's car. RP (2/1) 19. Officer Jensen checked Levingston for warrants, and learned that there was an arrest warrant for Levingston. RP (2/1) 14, 19.

Ms. Aaland testified that Levingston called her from his cell phone and told her that he had been pulled over. RP (2/1) 4. She was driving past the scene, so she pulled over to see what was going on because Levingston was driving a car that belonged to her. RP (2/1) 4. Ms. Aaland did not want her car to be impounded and said she was concerned about the cost associated with an impound. RP (2/1) 5. She pulled over across the street from where Levingston had been pulled over, and remained there until she saw the officers take Levingston out of the car and put handcuffs on him. RP (2/1) 6.

She then approached the officers to let them know that the car belonged to her, and asked to take the vehicle that Levingston had been driving. RP (2/1) 6, 14. Levingston had previously shown the officers the registration for the car, which was registered under Ms. Aaland's name. RP (2/1) 16. Officer Jensen told her to stand off to the side in front of the car, and wait until they put Levingston in the patrol car. RP (2/1) 6, 21.

After Levingston was placed in the patrol car, an officer approached her. RP (2/1) 7. Officer Jensen testified that he told Ms. Aaland that she would be allowed to car when the officers were done. RP (2/1) 21, 23. Ms. Aaland, however, testified that the officer told her she could take the keys off the hood of the car and that she could take the vehicle. RP (2/1) 9. She also stated that the officer told her that she could "take the vehicle at that time." RP (2/1) 9.

Ms. Aaland also testified that the officer said she could go talk to Levingston and say goodbye. RP (2/1) 8. Ms. Aaland went and said goodbye to Levingston and then went back and got in the car to shut off all of the headlights and dome lights and locked up the car as she got out. RP (2/1) 9. She also stated that she had made a brief phone call to her brother in an attempt to have him help her remove it, and that she had gone up to the officers and told them that she would be back in an hour to get the car. RP (2/1) 10.

When Officer Jensen went to search the car, he found that locked and that Ms. Aaland had apparently locked it when he wasn't paying attention. RP (2/1) 16. Officer Jensen had not seen Ms. Aaland go into the vehicle, and had not realized she had been in the car until he found it was locked. RP (2/1) 22.

Officer Jensen and Ms. Aaland both testified that the officer then asked Ms. Aaland for the keys to the car. RP (2/1) 10, 16, 23. Ms. Aaland was still on the scene on the same side of the street with the officers. RP (2/1) 23. Ms. Aaland stated that they needed a search warrant, but officer Jensen informed her that it was a search incident to arrest so he did not need a search warrant. RP (2/1) 23. Ms. Aaland then gave Officer Jensen the keys. RP (2/1) 23. Ms. Aaland claimed that an officer grabbed the keys from her hands. RP (2/1) 11. During a search of the vehicle, Officer Jensen found 15 pills later determined to be Trazadone inside a pocket of Levingston's jacket and a loaded handgun was found under the passenger seat. CP 25. Ms Aaland denied knowing anything about it. CP 25.

The defense filed a motion to suppress, arguing that the officers' ability to conduct a search incident to arrest had "expired." CP 7.

A 3.6 hearing was held, and after the testimony of Ms. Aaland and officer, the defense argued that the search of the vehicle was invalid. RP

(2/1) 27. The defense conceded that Levingston had been lawfully arrested. RP (2/1) 27-28. Levingston also pointed out that in searches incident to arrest, officers are allowed to search areas under the arrestee's immediate control. RP (2/1) 28. Levingston, however, argued that the car was no longer under his immediate control because it had been released to the registered owner, Ms. Aaland. RP (2/1) 28. As Levingston argued, "The argument of immediate control is essentially lost at that point." RP (2/1) 28-29. Levingston went on to argue that once the vehicle was released to Ms. Aaland, the officers forfeited their ability to search the car, and further detention of Ms. Aaland was a, "violation to her, which now Mr. Levingston has standing to oppose." RP (2/1) 32. Levingston later summarized the argument as follows,

And my argument was that because Ms. Aaland was permitted access to the vehicle and because there was this interruption of that and also because she was provided the opportunity to take the vehicle, that defeats the idea that Mr. Levingston was actually in immediate control of that area any longer. That is basically the premise of *Stroud* in line of cases after that[sic]; that if he's not in immediate control of those areas, then they're[sic] ability to search incident to arrest had expired.

RP (2/1) 41.

The State argued that under Washington law there is a bright-line rule which authorizes searches of vehicles incident to arrest, and that the officers here were authorized to search the car as Levingston had not yet been

removed from the scene and the car itself was still present. RP (2/1) 33-34. The State also argued that under *State v. O'Neil*, officers still have the right to search a vehicle incident to arrest even if the vehicle is locked. RP (2/1) 37-38.

The trial court asked the State whether, assuming that Ms. Aaland was seized and subject to an unlawful search, “there is any issue with respect to the defendant’s standing?” RP (2/1) 39. The State argued that Levingston did not have standing with respect to the alleged unlawful search of Ms. Aaland, (assuming the car had been returned to her). RP (2/1) 39-40. Levingston, however, argued that he had automatic standing under *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002). CP 29-30.

The trial issued an oral ruling and stated that, in the court’s view, “[B]oth Ms. Aaland and Officer Jensen testified credibly and with complete candor based on their best personal recollection of the events at issue.” RP (2/10) 3. The trial court stated that it viewed the DVD and observed that when Levingston exited the car he put his keys in what appeared to be a hat on the roof of the car, and the officers then began putting handcuffs on Levingston and taking him behind the car. RP (2/10) 3. Several minutes later, the tape showed Ms. Aaland taking the keys from the roof of the car while talking to Officer Jensen, and noted that this took place right in front of Officer Jensen. RP (2/10) 5-6. Several minutes later, the DVD showed Ms.

Aaland entering the vehicle for a period of 16 seconds. RP (2/10) 7-8.

The court then stated,

Now from all of these observations about the evidence I saw, I make the following findings of fact that I think are material to resolving the issues on the 3.6 motion.

I think it's more likely than not that what happened is that Ms. Aaland asked if she can take the car, and that when they satisfied themselves – by “they,” I mean Officer Jensen and Officer Hensen – that she owned it, that Officer Jensen communicated to her that she can take the car when they were done, intending, but not directly communicating, they would search the car before they were done and would release the car. I think that was probably always Officer Jensen's intentions, but I don't believe that the evidence shows that he communicated this to Ms. Aaland, and what corroborates that is his intention in hi march back to the car after he seized the keys from her when she said, “I want to go.”

At that time this was communicated to Ms. Aaland—and that is that she can take the car when they were done – she took possession of the keys in Officer Jensen's immediate presence and view.

When Officer Jensen and Officer Hensen walked back out of the field of vision, presumably to the patrol cars that were there, I believe that Ms. Aaland – I will find that Ms. Aaland assumed they were done. At that point she stepped into the car – or she leaned into the car and then stepped into the car and turned off the dome light and locked it and secured it.

This all happened, as I indicated, over a very short period of time, approximately 16 seconds. Officer Jensen testified that he didn't see that, which is possibly the case, but the court would observe that it happened in his immediate field of vision because it's right there on the video screen.

While she was on the phone to the defendant's brother, she walked back towards the patrol car to advise that she had locked the car and was leaving and would return to pick it up later. At that point in time officer Jensen demanded the keys

off screen, and she surrendered the keys after protesting. She testified that she didn't give the keys up voluntarily, and I think the officer confirmed that in his own testimony. At that point he returned on screen to unlock the car, and the search commenced.

RP (2/10) 11-13. The court later continued its discussion of Ms. Aaland's actions, stating,

She entered the car, secured it, and locked the car in their full field of vision, even if they didn't see her, and she immediately protested when officer Jensen demanded the keys back from her. When I put those specific findings together I think that what they show the Court is that it was her reasonable belief and expectation that the car had been returned to her possession that evening.

RP (2/10) 13-14. The court then the legal conclusion it drew from its findings, stating,

I found it was Ms. Aaland's reasonable belief and expectation that the car had been restored to her, and that she acted to secure that right. At that point, Officer Jensen demanded and seized from her the keys, over her objection, and then performed the search. Ms. Aaland was not a suspect or in custody at that point, and there was no basis for a warrantless search of her property – of the property that was within her domain, and I think this distinction is important in the analysis here, and I would cite *State versus Parker*, 139 Wn.2d 486, 1999, that involved a search of the passenger who was not a suspect in a vehicle where the driver was lawfully arrested. So I think that the search at that point violated her rights and was unlawful.

I believe that Mr. Levingston has automatic standing to contest the admissibility and fruits of the search under the automatic standing rule that is set forth in *State versus Jones*, 146 Wn.2d 328, a 2002 decision that Ms. Atwood cited in her supplemental memorandum.

The central question in this case has always been whether

law enforcement's ability to search the car that Mr. Levingston drove expired before they performed the search. There is no question under the *Stroud* decision that if Ms. Aaland had never come across the scene here – there was a valid arrest made – there was no question that the officers could have searched the car.

Mr. Levingston, in his brief at page five, lines 2 through 20, cites a number of cases where the right to search went away or expired because the defendant's temporal or physical proximity to the car went away. I won't go through those decisions specifically in my decision here today, but I think by way of analogy if the events that are described in those cases ended the State's *Stroud* rights to do a search of a vehicle pursuant to a lawful arrest, clearly restoring a car to a non-suspect owner must do the same.

RP (2/10) 14-16.

The trial court also cited *State v. McKenna*, 91 Wn. App. 554, 958 P.2d 1017 (1998), for the holding that once an officer issues a citation in lieu of arresting a driver, the authority to do a *Stroud* search ceases. RP (210) 16. The court then held "by way of analogy," that once the car was returned to the owner the right to search the car expired, and therefore, granted the motion to suppress. RP (2/10) 16. As the ruling prevented the state from presenting evidence of the two charges, the case was dismissed. RP (2/10) 16.

The trial court later entered written findings of fact and conclusion of law that held,

I. Findings of Fact

1. Port Orchard Police Officer Jerry Jensen and the Defendant's girlfriend, Sharlet Aaland, both testified at the suppression hearing and were both credible and candid in

their testimonies.

...

3. On October 31, 2005, Officer Jensen observed a car traveling with a headlight out. Officer Jensen stopped the car and contacted the Defendant in the driver's seat. The Defendant provided a false name and claimed he had no identification. Officer Jensen arrested the Defendant for not having a license or identification.

...

8. It is more likely than not that Officer Jensen, after being satisfied by Ms. Aaland's proof of ownership, communicated to Ms. Aaland that she could take the car when they (the officers) were done.

...

10. Officer Jensen intended to search the car prior [sic] Ms. Aaland leaving with the keys, however, Officer Jensen did not communicate this to Ms. Aaland. Officer Jensen's intentions are corroborated by the fact that he marched back to the car after he seized the keys from Ms. Aaland, after she said she wanted to leave.

11. When Officer Jensen and Ms Aaland walked out of the field of vision (no longer on video, and away from the car) Ms. Aaland assumed they were done. At this point, Ms. Aaland leaned into the car and stepped inside the car, turning off the dome light and locking and securing the car.

II. Conclusion of Law

3. Ms Aaland had a reasonable belief that the car was restored to her and she acted to secure that right, Ms. Aaland was not a suspect or in custody and therefore there was no basis for a warrantless search of her property. This is consistent with *State v. Parker*, 139 Wn.2d 486, (1999).

4. The defendant has automatic standing to contest the admissibility of fruits of the search, *State v. Jones*, 146 Wn.2d 328 (2002).

5. The arrest of the defendant was valid and under *Stroud*, 106 Wn.2d 144 (1986), the car could have been searched.

6. By way of analogy, the following cases show that the law enforcement's ability to search the car expired upon the car being restored to Ms. Aaland: *State v. Johnston*, 107 Wn. App. 280, (2001); *State v. Wheless*, 103 Wn. App. 749 (2000); *State v. Porter*, 102 Wn. App. 327 (2000); *State v. Perea*, 85 Wn. App. 339 (1997); *State v. Boyce*, 52 Wn. App. 274, (1988).

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN RULING THAT THE OFFICERS' ABILITY TO PERFORM A SEARCH INCIDENT TO ARREST HAD "EXPIRED" BECAUSE THE SEARCH WAS MADE AFTER A LAWFUL ARREST AND WAS MADE BEFORE THE DEFENDANT OR THE VEHICLE WAS REMOVED FROM THE SCENE.

A police officer can search the passenger compartment of a vehicle for weapons or destructible evidence during the arrest process; this includes the time immediately subsequent to arresting, handcuffing, and placing the suspect in a patrol car. *State v. Stroud*, 106 Wn.2d at 152, 720 P.2d 436. In *Stroud*, the court overruled the previous "totality of the circumstances" test, recognizing that a bright line rule was needed in order to aid police officers in the field. *Stroud*, 106 Wn.2d at 150-51. The court, therefore, set forth a new rule, stating,

To weigh the actual exigent circumstances against the actual privacy interests on a case by case basis would create too difficult a rule to allow for both effective police enforcement and also protection of individual rights. However, a reasonable balance can be struck. During the arrest process, including the time immediately subsequent to the suspect's

being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

Stroud, 106 Wn.2d at 152

In the present case, the search of the vehicle occurred immediately subsequent to Levingston's arrest, and thus the search was lawful under *Stroud*. The trial court itself found that the arrest was valid and that pursuant to *Stroud*, the car could have been searched. CP 43.

1. *The cases cited by the trial court to support its conclusion that the officers right to search the car had "expired" are all distinguishable because they involve situations where the defendants had not been in the cars at the time of arrest or had already been removed from the scene at the time of the search.*

The court below cited a number of cases in its Findings of Fact and Conclusion of Law that the court felt supported its position, by way of analogy, that the officers right to search Levingston's car had "expired." CP 43. Those cases, however, all involve defendants who either not in their cars at the time of arrest, or had already been removed from the scene and were on their way to jail when the search incident to arrest was conducted. *See, State v. Johnston*, 107 Wn. App. 280, 288, 28 P.3d 775 (2001)(where record only showed arrest occurred "in the vicinity of the car," a search incident to arrest was not justified because record was insufficient to arrest occurred in a place

where defendant had access to, or immediate control of, passenger compartment.”); *State v. Wheless*, 103 Wn. App. 749, 756-57, 14 P.3d 184 (2000)(arrestee lacked access to truck at time of arrestee when he had parked truck 50-75 feet from tavern, and then went into tavern where he was arrested); *State v. Porter*, 102 Wn. App. 327, 333-34, 6 P.3d 1245 (2000)(arrestee lacked access to van’s passenger compartment at time of arrest because he was walking his dog about 300 feet from where his van was parked at time of arrest); *State v. Perea*, 85 Wn. App. 339, 344-45, 932 P.2d 1258 (1997)(arrestee did not have access to car at time of arrest because arrestee had already exited and locked car and started walking towards his house at the time of arrest); *State v. Boyce*, 52 Wn. App. 274, 279, 758 P.2d 1017 (1988)(search incident to arrest not justified where arrestee had already been removed from the scene and was in route to the jail). In the present case, however, Levingston was arrested from the car, and the search was conducted while Levingston and the car were still on the scene. The cases cited by the trial court, therefore, are distinguishable.

2. *The fact that the door to the car was locked after Levingston was removed from the car, but prior to the search, is not determinative and does not extinguish the officers right to conduct a search incident to arrest under Washington law.*

Furthermore, the fact that in the present case the car was locked is not determinative. In *State v. O’Neil*, 110 Wn. App. 604, 43 P.3d 522 (2002), the defendant was driving a truck that was pulled over. *O’Neil*, 110 Wn. App. at

606. He was then told that he was under arrest, stepped out of the vehicle, was handcuffed, and placed in the back of a patrol car. *O'Neil*, 110 Wn. App. at 606. When the officer went back to search the truck, he found that the doors locked and the keys in the ignition. *O'Neil*, 110 Wn. App. at 606. A tow truck was called, and upon arrival, the tow truck operator opened the truck door and the officer searched the truck. *O'Neil*, 110 Wn. App. at 607. On appeal, the defendant argues that the search was improper, arguing that the holding in *Perea* prevented the officer from searching the locked vehicle. *O'Neil*, 110 Wn. App. at 610. The court however, found that *Perea* was distinguishable, because in *Perea* the defendant had not been arrested from his car, but had locked the car and walked away from it at the time of arrest. *O'Neil*, 110 Wn. App. at 610-11. The *O'Neil* court, however found that the defendant in *O'Neil* was arrested from inside the vehicle, and thus, *Perea* was “factually distinguishable and legally inapplicable.” *O'Neil*, 110 Wn. App. at 611.

3. *Under Washington law, the privacy interests of non-arrested occupants of a vehicle are outweighed by the officers' rights to search the car incident to arrest when a passenger is arrested from the vehicle.*

Even if Ms. Aaland believed that the car had been returned to her, at most this gave her an expectation of privacy in the vehicle similar to the expectation a non-arrested driver would have when a passenger from a car is arrested. In such cases, Washington courts have held that the officers may

still search the vehicle incident to arrest, notwithstanding the privacy rights of a non-arrested driver present in the vehicle.

In *State v. Cass*, 62 Wn. App. 793, 816 P.2d 57 (1991), for instance, the defendant was the driver of a car that was pulled over when an officer recognized a passenger who had several arrest warrants. *Cass*, 62 Wn.App at 794. Once the car was stopped, the officer went immediately to the passenger and arrested him and placed him in a patrol car. *Cass*, 62 Wn.App at 794. Another officer then arrived and contacted the driver and asked her for her license and registration. *Cass*, 62 Wn.App at 794. Three to five minutes later, the original officer went back and conducted a warrantless search of the car, and found methamphetamine. *Cass*, 62 Wn.App at 794. The driver was then charged with possession of methamphetamine. *Cass*, 62 Wn.App at 794.

On appeal, the driver argued that the search was improper because it was not a search incident to her arrest. *Cass*, 62 Wn.App at 795. The court cited *Stroud* and stated that in *Stroud* the court had balanced an individual's privacy interest against those concerns present in an arrest of a person from an automobile. *Cass*, 62 Wn.App at 795, *citing*, *Stroud*, 106 Wn.2d at 149-50. The court then framed the question as follows, "When the driver of the car is not the one arrested, does the balance tilt in favor of individual privacy?" *Cass*, 62 Wn.App at 796. The *Cass* court stated that in *New York*

v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), the Court held that the area of the immediate control of the arrestee includes the entire passenger compartment of the vehicle. *Cass*, 62 Wn.App at 796. The court then went on, and stated, “While *Belton* suggested that the custodial arrest justified the infringement of any privacy right the arrestee may have, the rights of a nonarrestee do not override this police authority.” *Cass*, 62 Wn.App at 796, *citing U.S. v. Hensley*, 469 U.S. 221, 235-36, 105 S. Ct. 675, 684, 83 L. Ed. 2d 604 (1985). The court then concluded,

Because [the passenger] was in handcuffs in the back of a police car, one might assume that there was no immediate threat to the officer's safety or any possibility of escape. However, these two factors did not sway the *Stroud* court and, hence, we refuse to look to the specific facts and circumstances of this case. The *Stroud* court sought to eliminate any such case by case analysis because of the difficult burden it places on police officers “who must make a decision with little more than a moment's reflection.” *Stroud*, 106 Wn.2d at 151, 720 P.2d 436. Consequently, the trial court correctly interpreted the *Stroud* decision in its refusal to suppress the evidence before it.

Cass, 62 Wn.App at 797. Although the dissent in *Cass* called for a different test (one that considered the totality of the circumstances and took into account the privacy interests of the non-arrested driver of the car), the majority disagreed. *Cass*, 62 Wn.App at 797-99. This holding was in accord with *Stroud*, which stated that, “To weigh the actual exigent circumstances against the actual privacy interests on a case-by-case basis would create too

difficult a rule to allow for both effective police enforcement and also protection of individual rights." *Stroud*, 106 Wn.2d at 152, 720 P.2d 436.

Subsequent cases reached the same holding as *Cass* and upheld the search of car after the arrest of a passenger. *See for example, State v. Chelly*, 94 Wn. App. 254, 970 P.2d 376 (1999)(upholding a search of a car after a passenger, and not the driver, was arrested), and *State v. Hill*, 68 Wn. App. 300, 308, 842 P.2d 996 (1993)("A search of the passenger compartment of a vehicle, excluding locked containers, immediately after arrest for weapons or destructible evidence is valid even when a passenger, not the driver, is arrested.").

These cases make it clear that when police arrest a passenger, *Stroud's* bright line rule applies despite any privacy claims of the non-arrested driver. The reasoning of *Cass*, therefore, is applicable in the present case. While it may be true that Ms. Aaland had an expectation of privacy in the car due to the fact that she was the owner, her privacy interests, much like the privacy interests of the non-arrested drivers in *Cass* and *Chelly*, does not override the police authority to conduct a search incident to arrest. Ms. Aaland's "control" over the car in the present case was similar to the "control" over the car that was held by the non-arrested driver in *Cass*. In that case, the driver was left alone in the car while the passenger was removed and arrested.

The only potential difference in the present case was that the trial court here found that Ms. Aaland reasonably believed she was allowed to leave. CP 41. The trial court, however, also specifically found that the officers in the present case told Ms. Aaland that “she could take the car when they (the officers) were done,” and that the officers “intended to search the car prior to Ms. Aaland leaving,” but did not directly communicate this to Ms. Aaland. CP 40. The trial court’s ultimate holding, therefore turned on Ms. Aaland’s beliefs, rather than on the actual intention of the officers. As in *Cass* and *Chelly*, however, the mere fact that Ms. Aaland may have had a reasonable expectation of privacy in the car does not override the officer’s authority to search the car, especially when the trial court did not find that the officers had affirmatively released the car to Ms. Aaland, but rather found that she only assumed they had.

As the officer here arrested Levingston from the car, a valid search incident to arrest was authorized. As the search was conducted within minutes of the arrest, and before either Levingston or the car had left the scene, a search incident to arrest was authorized. The fact that Ms. Aaland assumed the car was hers, and may have had an expectation of privacy in the car, does not override the officers’ ability to search the car incident to arrest.

4. *The trial court’s reliance on Parker was misplaced, because Parker is distinguishable based on the fact that the searches there involved “personal effects” such as purses or jackets which the officers knew*

belonged to non-arrested passengers.

In the present case, the trial court also cited *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999), for the proposition that there was no basis for the warrantless search of Ms. Aaland's property. CP 42. *Parker*, however, is distinguishable, because the searches in *Parker* were not invalidated because they were searches of the passenger compartment of an automobile, but rather, because the searches were of purses or jackets which the officers knew were the personal effects of non-arrested passengers. No such facts exist in the present case, as the items were found in the passenger compartment itself, not in a purse or jacket belonging to Ms. Aaland. Even if this had been the case, Levingston would have lacked standing to challenge the search, as outlined below.

In *Parker*, the court examined three individual cases where the three defendants were all passengers in cars where the drivers had been arrested. *Parker*, 139 Wn.2d at 489-92. In each case the officers had conducted a search incident to arrest and searched the personal effects (two purses and jacket lying on a console) of the defendants who were non-arrested passengers at the time of the searches. *Parker*, 139 Wn.2d at 489-92. The court in *Parker* adopted a straightforward rule that allowed officers to assume all containers within the vehicle may be validly searched, unless officers know or should know the container is a personal effect of a passenger who is

not independently suspected of criminal activity and where there is no reason to believe contraband is concealed within the personal effect immediately prior to search. *Parker*, 139 Wn.2d at 503 (citations omitted). Ultimately, the court in *Parker* held the searches in the three cases were invalid because it was undisputed that the officers in each case knew the items searched belonged to individuals who were not under arrest. *Parker*, 139 Wn.2d at 505.

Even if it could be argued in the present case that the entire car must somehow be viewed as a “personal effect” of Ms. Aaland, the holdings in *Parker* would be distinguishable because Levingston was seen inside the car or inside the “personal effect.” Obviously the defendants in *Parker* had not been observed in the purses or jackets in *Parker*, and thus equating the entire passenger compartment of the car here with the private personal effects in *Parker* is untenable.

Furthermore, the drugs in the present case were found in Levingston’s jacket. This fact further distinguished the present case from the facts of *Parker*. In addition, the firearm was found under a seat and not in a jacket, purse, or other “personal effect” belonging to Ms. Aaland which the officers knew or should have known was a “personal effect” in the sole possession of Ms. Aaland.

The trial court’s ruling in the present case was based on the fact that:

(1) the officers allowed Ms. Aaland to take the keys; (2) allowed her to briefly get into the car (although the trial court stated that the officers may not have seen this); and, (3) Ms. Aaland believed the car had been returned to her despite the fact that the officers had told her that she could only have the car when they were done and intended to search the car prior to Ms. Aaland leaving. From a factual standpoint, the fact that Ms. Aaland was allowed to be in the car and in possession of the keys is indistinguishable from the drivers of the cars in *Cass* and *Chelly* who remained in the car when passengers were arrested from the car. The only unique finding in the present case was the court's finding that Ms. Aaland had a subjective belief that the car had been returned to her, despite the court's finding that the officers intended otherwise. As stated above, however, the courts have recognized that a non-arrestee's expectation of privacy in the car does not override the officer's authority to search the car. In addition, requiring officers in the field to evaluate a non-arrestee's subjective impressions would be an unworkable standard that would render the bright line rule of *Stroud* meaningless.

For all of these reasons, the trial court therefore erred in holding that the officers' ability to conduct a search of the car incident to arrest had "expired."

B. THE TRIAL COURT ERRED IN FINDING THAT LEVINGSTON HAD AUTOMATIC STANDING TO CONTEST THE SEARCH OF THE CAR BECAUSE LEVINGSTON'S FOURTH AND FIFTH AMENDMENT RIGHTS WERE NEVER IN CONFLICT, AND BECAUSE, UNDER THE DEFENSE THEORY, LEVINGSTON WAS NOT IN POSSESSION OF THE CAR AT THE TIME OF THE SEARCH.

1. *The trial court erred in concluding that Levingston had automatic standing to assert a violation of Ms. Aaland's rights because Levingston's Fourth and Fifth Amendment rights were never in conflict.*

Although automatic standing has been the subject of some controversy, and has been abandoned by the U.S. Supreme Court, it “still maintains a presence in Washington.” *State v. Williams*, 142 Wn.2d 17, 22, 11 P.3d 714 (2000).

In *Williams*, the Washington Supreme Court discussed the history of automatic standing and noted that it was created to allow defendant to “challenge police searches without making self-incriminating statements, where the fruits produced evidence of a possessory offense.” *Williams*, 142 Wn.2d at 21. As *Williams* noted, however, the U.S. Supreme Court abandoned the automatic standing doctrine in *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980), where the Court recognized that *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), eliminated most of the defense and prosecutorial dilemmas which had led it to adopt the doctrine. *Williams*, 142 Wn.2d at 21.

As the Court in *Simmons* held that a defendant's testimony in a suppression hearing cannot be used as evidence to help establish guilt during the trial, the *Salvucci* court found that *Simmons* adequately protected the defendant's Fourth and Fifth Amendment interests, and abandoned *Jones* and its automatic standing rule. *Salvucci*, 448 U.S. at 85. The Court thus held that “defendants charged with crimes of possession may only claim the benefits of the exclusionary rule if their own Fourth Amendment rights have in fact been violated.” *Salvucci*, 448 U.S. at 85.

After *Salvucci*, the Washington court addressed the changes to federal law and a plurality of the Court determined that the Washington Constitution's greater privacy protections required adherence to the automatic standing doctrine. *Williams*, 142 Wn.2d at 22, citing *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). As the court in *Williams* outlined,

The plurality recognized that “*Simmons*, as interpreted by the [Supreme] Court in *Salvucci*, does not provide sufficient protection against the self-incrimination dilemma. In Washington, prior statements made by a defendant are admissible at trial for purposes of impeachment.”

Williams, 142 Wn.2d at 22, citing *Simpson*, 95 Wn.2d at 179-80.

Although the *Williams* court found that automatic standing still maintained a presence in Washington law, the court found that there were limitations and that it did not apply to the facts in that case because the defendant's ability to challenge that search in *Williams* did not depend upon

the defendant's admission to possession of contraband or to any other illegal activity. *Williams*, 142 Wn.2d at 23. The court, therefore, held that

We cannot agree that the automatic standing rule as originally conceived by the Supreme Court would have any application where there is no conflict in the exercise of his Fourth and Fifth Amendment rights. Moreover, as expressed by the plurality opinion in *Simpson*, **the automatic standing rule may not be used where the defendant is not faced with “the risk that statements made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment.”** *Simpson*, 95 Wn.2d at 180, 622 P.2d 1199. Automatic standing is not a vehicle to collaterally attack every police search that results in a seizure of contraband or evidence of a crime.

Williams, 142 Wn.2d at 23 (emphasis added).

In the present case, Levingston's Fourth and Fifth Amendment rights were never in conflict. There was no necessity requiring him to testify at a suppression hearing to assert some sort of possessory interest in the car. The uncontested facts already placed him behind the wheel of the car. No testimony from Levingston was necessary. Automatic standing, therefore did not apply, and the trial court erred in holding that Levingston had automatic standing to contest the alleged violation of Ms. Aaland's privacy interests in the car.

2. *Levingston did not have automatic standing to assert a violation of Ms. Aaland's rights because, under the defense theory, the car was no longer in Levingston's control at the time of the search.*

Levingston argued below that, prior to the search of the car, the car

was “no longer under the immediate control of the arrestee, Mr Levingston,” and control of the car had been turned over to Ms. Aaland. RP (2/1) 28. As Levingston put it, “The argument of immediate control is essentially lost at that point.” RP (2/1) 29. The trial court apparently adopted at least a portion of this theory, as it held that the officer’s ability to conduct a search incident to arrest had “expired.” CP 43. Assuming that control of the vehicle had somehow legally transferred to Ms Aaland, the facts were clear that Levingston was, by this time, handcuffed and sitting in the back of a patrol vehicle.

Finally, one of the requirements of automatic standing is that the defendant must be in possession of the subject matter at the time of the search or seizure. *Jones*, 146 Wn.2d at 332, *citing State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980).

Under the defense argument presented below, and under the theory apparently adopted by the trial court, some legal significance was placed on Ms. Aaland’s actions with respect to the car and her reasonable belief that the car was then under her control. The trial court, therefore, examined the legality of the search from this point onward, and concluded that the right to search the car incident to arrest had somehow “expired.” If the proper analysis is that the justification for the search must be examined only from this point of time (namely, the instance where Ms. Aaland reasonable

believed she was in control of the vehicle) forward, there can be no dispute that from that point of time onward Levingston had already been removed from the car, was arrested, handcuffed and placed in the patrol car. In such a timeline, Levingston cannot be said to be in control of the car at the time of the search, and thus Levingston does not have automatic standing under *Jones*.

The trial court therefore, erred in concluding that Levingston had automatic standing because Levingston's Fourth and Fifth Amendment rights were never in conflict. In addition, under the defense timeline, at the critical moment when the right to conduct a search incident to arrest "expired," Levingston was already in custody, and was in the patrol car at the time of the "search," and thus was not in control of the car at the time of the search as would be required for him to assert automatic standing.

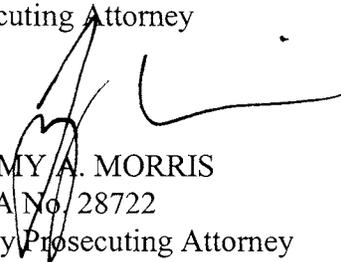
V. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court's order suppressing the evidence found in the search of the car and the subsequent dismissal of the charges, and remand the cause for trial.

DATED August 21, 2006.

Respectfully submitted,

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