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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY DEPUTY

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

NO. 36653-3-II

STATE OF WASHINGTON
Appellant,

vs.

K.C. SHELDON O'MEARA
Respondent

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 06-8-00022-7

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that law enforcement had no right to search K.C. O'Meara's backpack.

2. The trial court erred in finding Law Enforcement had no right to retain possession of K.C. O'Meara's backpack.

3. The trial court erred in finding there were no grounds for obtaining a search warrant on the facts.

4. The trial court erred in finding the threat to obtain a search warrant on the facts invalidated any consent.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were police entitled to search Mr. O'Meara's backpack? Assignments of Error No. 1, 2.

2. Did police have probable cause sufficient to obtain a search warrant for Mr. O'Meara's backpack? Assignments of Error No. 3, 4.

STATEMENT OF THE CASE

Procedural History

Mr. O'Meara was arrested on May 13, 2006, and charged with possession of marijuana less than 40 grams.

Mr. O'Meara made a CrR 3.6 Motion to Suppress on which a hearing was held on September 14, 2006.

The trial court issued Findings of fact on October 26, 2006, and suppressed the backpack evidence.

An Order of Dismissal was entered on August 14, 2007.

This appeal timely followed.

Facts

On May 13, 2006, Port Townsend Police Officer Polizzi arrested Christopher Gilmore for theft. In a search incident to arrest marijuana was found in his pocket. Gilmore was Mirandized and questioned about the marijuana. He eventually said he bought it from Tony Maple at the skateboard park. Officer Polizzi contacted Anthony Maple at the skateboard park who was seated on a wall with three backpacks under his feet. Sgt. Green joined Officer Polizzi at the skateboard park. Maple was arrested and asked if one of the backpacks was his. Sgt. Green heard him say

"Yes, the red one is." All three backpacks were red, so the police collected all three for inspection. CP 14. After Polizzi arrested Maple he tried to identify the owners of the backpacks, but got conflicting responses from the youths present and placed all three backpacks in the patrol vehicle. CP 4. While at the vehicle O'Meara approached Officer Polizzi and said one of the backpacks was his. CP 14. At this time two other youths, K.C. O'Meara and Justin Welter approached the police and said they each owned one of the backpacks and would like them returned. Everyone traveled directly to the police station, about 1 block away (RP 3), arriving shortly thereafter. At the station O'Meara and Welter were asked for permission to search the backpacks. CP 4. Before the search, they were advised that if they did not consent to a search, a search warrant would be requested. CP 10. Both consented to a search of their backpack. CP 4. Marijuana was found in O'Meara's backpack in a yellow prescription medicine vial and O'Meara was arrested.

ARGUMENT

a. The trial court erred in concluding that law enforcement had no right to search K.C. O'Meara's backpack.

Standard of review. Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644, 870 P.2d 313. We review conclusions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996), *State v. Mendez,* 137 Wash.2d 208, 214, 970 P.2d 722 (1999).

A warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, unless the search falls within one of the carefully drawn exceptions to constitutional warrant requirements. *State v. Menz,* 75 Wn.App. 351, 353, 880 P.2d 48 (1994). One of these exceptions is for a search incident to arrest. *United States v. Chadwick,* 433 U.S. 1, 6, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). A search incident to arrest is valid only if (1) the object searched was within the arrestee's control when he was arrested; and (2) the events occurring after the arrest but before the

search did not render the search unreasonable. *State v. Smith,* 119 Wn.2d 675, 681-82, 835 P.2d 1025 (1992) (applying *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)).

An object is within the control of an arrestee as long as the object was within the arrestee's reach immediately prior to the arrest. *Id.* (upholding search of fanny pack that was within one or two steps of defendant at time of arrest); *United States v. Andersson,* 813 F.2d 1450, 1455 (9th Cir.1987) (upholding search of closed suitcase that was on the bed next to arrestee); *cf. State v.. Rathbun,* 124 Wn.App. 372, 380, 101 P.3d 119 (2004) (affirming suppression of evidence from a truck where defendant arrested 40 to 60 feet away from the vehicle). *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 635 (1969), provides a similar test. The United States Supreme Court reversed a decision upholding a search incident to arrest in a house when the police searched every room in the house without a warrant. *Id.* at 763. The Court held that a search incident to arrest permits search of the arrestee and the area within his immediate control to protect the officer from dangerous weapons and to prevent destruction of evidence where the search is not remote in time or place from the arrest. *Id.* Washington applies both Belton and Chimel to the question of the

reasonableness of a search. See *Smith,* 119 Wn.App. at 680 n. 3 (applying Belton to nonvehicle search and noting the majority of federal courts apply Belton to all searches incident to arrest); *State v. Rathbun,* 124 Wn.App. 372, 380, 101 P.3d 119 (2004) (citing Chimel and Belton for vehicle search); *State v. White,* 129 Wn.2d 105, 112, 915 P.2d 1099 (1996) (citing Chimel where search occurred in public toilet stall).

Courts have held a significant delay between the arrest and the search renders the search unreasonable because it is no longer contemporaneous with the arrest. See *Chadwick,* 433 U.S. at 15-16 (delay of 'more than an hour' was too long); *United States v.. Vasey,* 834 F.2d 782, 786-788 (9th Cir.1987) (delay of 30 to 45 minutes unreasonable).

Although the precise lapse of time between the arrest and the search of the backpack is not clear from the record, it is clear that after the arrest of Maple, the police collected the backpacks, conversed with two individuals about backpack ownership, proceeded directly to the police station, and asked permission to search the backpacks. There is no record of any intervening event that might affect the reasonableness of the search. In Smith, the court held a delay of 17 minutes between the arrest and the search

was not unreasonable, where the arresting officer picked up dangerous objects from the scene, consulted with colleagues, reported she had someone in custody, and possibly performed a warrant check. *Smith,* 119 Wn.2d at 684. The court held that the officer's activities in the intervening period were all incident to the arrest, and related to securing the suspect and the scene. *Id.;* see also *United States v. Porter,* 738 F.2d 622, 627 (4th Cir.1984) (search reasonable even though it occurred 15 minutes after arrest). In the instant case, all these actions were incident to the arrest. The backpacks were within Maple's control when he was arrested; the events occurring after the arrest but before the search were all connected with safely transporting Maple and the backpacks to the police station, only about 1 block away; and did not render the search unreasonable.

The trial court finding was erroneous and should be reversed.

b. The trial court erred in finding Law Enforcement had no right to retain possession of K.C. O'Meara's backpack.

The police had made a valid arrest of Maple who was then in control of O'Meara's backpack. The police had a legal right to search the area under Maple's control, including the backpacks he

controlled, independent of ownership. See *State v. Porter,* 102 Wn.App. 327, 330-31, 6 P.3d 1245 (2000).

a. The trial court erred in finding there were no grounds for obtaining a search warrant on the facts.

The police had made a valid arrest of Maple who was then in control of O'Meara's backpack. The police did not need a search warrant to search the backpacks. However they had probable cause to obtain a warrant if desired based on the marijuana found on Gilmore, the statement of Gilmore that he bought it from Maple, and Maple being in control of the backpack when arrested. CP 4. The trial court erred in finding no grounds for a search warrant for the backpack.

d. The trial court erred in finding the threat to obtain a search warrant on the facts invalidated any consent.

The police had made a valid arrest of Maple who was then in control of O'Meara's backpack. The police did not need a search warrant to search the backpacks. However they had probable cause to obtain a warrant if desired based on the marijuana found on Gilmore, the statement of Gilmore that he bought it from Maple, and Maple being in control of the backpack when arrested. CP 4.

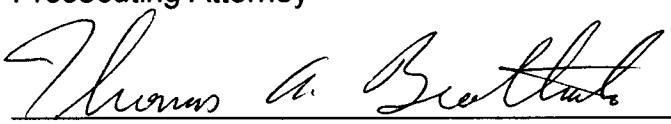
The police delineation of the alternatives was accurate and not coercive. The trial court erred in finding there was a threat to obtain a search warrant invalidated the consent to search. It was a simple statement of fact.

CONCLUSION

The police legally searched O'Meara's backpack and their delineation of alternatives was factual, not coercive. The State respectfully requests that this Court reverse the trial court's suppression of the evidence obtained by police and respondent be required to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

Respectfully submitted this 18TH day of October, 2007

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, vs. K.C. SHELDON O'MEARA, Respondent.	Case No.: 36653-3-II Superior Court No.: 06-8-00022-7 **DECLARATION OF MAILING**

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 13th day of November, 2007, I mailed, postage prepaid, a copy of the State's BRIEF OF APPELLANT to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 13th day of November, 2007, at Port Townsend, Washington.

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