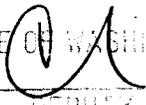


FILED  
COURT OF APPEALS  
DIVISION II

08 AUG -6 AM 11:52

STATE OF WASHINGTON

BY  DEPUTY

NO. 37305-0-II  
Cowlitz County No. 07-1-00047-7

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ROGER LEE HAIGHT**

**Appellant.**

---

**BRIEF OF APPELLANT**

---

ANNE CRUSER/WSBA #27944  
Attorney for Appellant

P. O. Box 1670  
Kalama, WA 98625  
360 - 673-4941

**TABLE OF CONTENTS**

**A. ASSIGNMENT OF ERROR..... 3**

**I. THE SEARCH OF MR. HAIGHT’S VEHICLE VIOLATED  
ARTICLE 1, SECTION 7 OF THE WASHINGTON STATE  
CONSTITUTION. .... 3**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 3**

**I. DOES A SUSPICIONLESS SEARCH OF A VEHICLE, WHEN  
CONDUCTED INCIDENT TO THE ARREST OF THE DRIVER,  
VIOLATE ARTICLE 1, SECTION 7 WHERE THERE ARE NO  
EXIGENT CIRCUMSTANCES AND THE SUSPECT IS  
SECURED AWAY FROM THE VEHICLE IN THE CUSTODY  
OF THE POLICE? ..... 3**

**C. STATEMENT OF THE CASE..... 3**

**D. ARGUMENT..... 4**

**I. DOES A SUSPICIONLESS SEARCH OF A VEHICLE, WHEN  
CONDUCTED INCIDENT TO THE ARREST OF THE DRIVER,  
VIOLATE ARTICLE 1, SECTION 7 WHERE THERE ARE NO  
EXIGENT CIRCUMSTANCES AND THE SUSPECT IS  
SECURED AWAY FROM THE VEHICLE IN THE CUSTODY  
OF THE POLICE? ..... 4**

**E. CONCLUSION..... 10**

## TABLE OF AUTHORITIES

### **Cases**

<i>Camacho v. State</i> , 119 Nev. 395, 75 P.3d 370 (2003).....	10
<i>Chimel v. California</i> , 395 U.S. 752, 89 S.Ct. 2034 (1969).....	5, 6
<i>Commonwealth v. White</i> , 543 Pa.45, 669 A.2d 896 (1995).....	10
<i>Katz v. United States</i> , 389 U.S. 347, 88 S.Ct. 507, 514 (1967) .....	5
<i>New York v. Belton</i> , 453 U.S. 454, 101 S.Ct. 2860 (1981).....	6, 10
<i>State v. Bauder</i> , 924 A.2d 38 (Vt. 2007) .....	10
<i>State v. Buelna-Valdez</i> , No. 80091-0, __ Wn.2d __ (2008).....	8
<i>State v. Eckel</i> , 185 N.J. 523, 888 A.2d 1266 (2006).....	10
<i>State v. Fladebo</i> , 113 Wn.2d 388, 779 P.2d 707 (1989).....	11
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986) .....	8
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	11
<i>State v. Jones</i> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	11
<i>State v. Lopez</i> , 142 Wn.App. 930, 176 P.3d 554 (2008).....	12
<i>State v. Morse</i> , 156 Wn.2d 1, 123 P.3d 832 (2005).....	9
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	11
<i>State v. Patton</i> , review granted, No. 80518-1, __ Wn.2d __ (Apr. 1, 2008) 7, 12	
<i>State v. Pittman</i> , 139 N.M. 29, 127 P.3d 1116 (N.M. Ct. App. 2005).....	10
<i>State v. Smith</i> , 119 Wn.2d 675, 835 P.2d 1025 (1992).....	5
<i>State v. Vrieling</i> , 144 Wn.2d 489, 28 P.3d 762 (2001).....	11
<i>United States v. Vasey</i> , 834 F.2d 782 (1987).....	5, 6

### **Rules**

R.A.P. 2.5.....	13
-----------------	----

### **Constitutional Provisions**

Washington State Constitution, Article 1, Section 7 ....	6, 7, 8, 9, 10, 12, 13
--	------------------------

**A. ASSIGNMENT OF ERROR**

**I. THE SEARCH OF MR. HAIGHT'S VEHICLE, IN WHICH THE OFFICER FOUND THE BAGGIES CONTAINING A FILM OF METHAMPHETAMINE, VIOLATED ARTICLE 1, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

**I. DOES A SUSPICIONLESS SEARCH OF A VEHICLE, WHEN CONDUCTED INCIDENT TO THE ARREST OF THE DRIVER, VIOLATE ARTICLE 1, SECTION 7 WHERE THERE ARE NO EXIGENT CIRCUMSTANCES AND THE SUSPECT IS SECURED AWAY FROM THE VEHICLE IN THE CUSTODY OF THE POLICE?**

**C. STATEMENT OF THE CASE**

Mr. Roger Haight was charged by the Cowlitz County Prosecuting Attorney with Count I: Possession of Methamphetamine and Count II: Driving Under the Influence of Intoxicants. CP 1-2. The facts that led to those charges were that Officer Kevin Sawyer of the Longview Police Department stopped the car Mr. Haight was driving because he made a wide turn and was straddling two lanes as he drove. RP Vol. II, p. 17. After contacting Mr. Haight, Officer Sawyer conducted a DUI investigation and eventually arrested Mr. Haight for DUI. RP Vol. II, p. 27. After placing Mr. Haight under arrest Officer Sawyer put Mr. Haight in the back of his patrol car. RP Vol. II, p. 28. After Mr. Haight was

secured in the back of the patrol car, Officer Sawyer searched his car incident to arrest. RP Vol. II, p. 28.

During the search incident to arrest, Officer Sawyer found two empty baggies, one inside the other, in a cup holder near where Mr. Haight's knee had been. RP Vol. II, p. 28. The empty baggies contained residue of methamphetamine in an infinitesimal, non-usable, immeasurable amount. RP Vol. II, 84-85. The substance was described by Jason Dunn of the Washington State Crime lab as a light film on the inside of a bag, analogous to the way a bag would look if it had sugar or flour in it and its emptied out and some residue remains. RP Vol. II, p. 84-85.

Mr. Haight was convicted after a jury trial of possession of methamphetamine and driving under the influence. CP 24-25. Judgment and sentence was imposed and this timely appeal followed. CP 26-27, 29-42.

**D. ARGUMENT**

**I. DOES A SUSPICIONLESS SEARCH OF A VEHICLE, WHEN CONDUCTED INCIDENT TO THE ARREST OF THE DRIVER, VIOLATE ARTICLE 1, SECTION 7 WHERE THERE ARE NO EXIGENT CIRCUMSTANCES AND THE SUSPECT IS SECURED AWAY FROM THE VEHICLE IN THE CUSTODY OF THE POLICE?**

Warrantless searches are per se unreasonable unless they fall within a narrow class of established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). A search incident to a valid arrest is a well recognized exception to the warrant requirement. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969); *United States v. Vasey*, 834 F.2d 782 (1987); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). In *Chimel*, the United States Supreme Court ruled that incident to a lawful arrest, officers may search the area of the arrestee's wingspan, meaning the area into which a suspect might reach a weapon or evidence. *Chimel* at 762-63; *Vasey* at 787. In *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860 (1981), the United States Supreme Court, based on the rather unfair assumption that officers in the field lacked the ability to make very simple determinations about what areas are within an arrestee's reach and which areas are not, established a rule that when officers search an automobile incident to arrest, they may search the entire passenger compartment of the automobile and any containers found within the passenger compartment, without regard to an arrestee's *actual* ability to reach the areas or items searched.

In *State v. Stroud*, 106 Wn.2d 144, 151, 720 P.2d 436 (1986), the Washington State Supreme Court, applying Article 1, Section 7 of the

Washington State Constitution held that officers in this state may search the entire passenger compartment of a vehicle incident to the lawful arrest of an occupant of that vehicle. Although the rationale behind this rule is that an arrestee may reach for a weapon, thereby putting an officer at risk, or reach evidence that he may destroy, thereby justifying the search, this rationale is a legal fiction because the search may occur even if the arrested subject is already secured and in the custody of the police. The *Stroud* court, like the *Belton* court, reasoned that officers in the field were incapable of identifying obvious exigencies and determined that a bright line rule was required, even though it came at the expense of individual rights. *Stroud* at 151. The *Stroud* court departed from the *Belton* court, however, by ruling that only the passenger compartment and unlocked containers may be searched, as opposed to locked containers. *Stroud* at 151-52.

Appellant acknowledges that under the holding of *Stroud*, the officer was ostensibly permitted to search Mr. Haight's car after placing him under arrest. However, there are strong indicators that the Washington Supreme Court is preparing to reconsider the *Stroud* interpretation of Article 1, Section 7. Recent oral arguments in *State v. Patton*, review granted, No. 80518-1, \_\_ Wn.2d \_\_ (Apr. 1, 2008), and *State v. Buelna-Valdez*, No. 80091-0, \_\_ Wn.2d \_\_ (2008) suggest that this issue

is under consideration. In the interest of preserving the issue, appellate counsel has a responsibility to assign error to the search of Mr. Haight's vehicle as violative of Article 1, Section 7.

As one of the early Article I, Section 7 cases, *Stroud* had little previous jurisprudence to draw upon in determining the appropriate scope of Article 1, Section 7's greater privacy protections. In the decades since *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)—a decision announced the same day as *Stroud*—Washington courts have developed a great deal of case law interpreting Article 1, Section 7 and recognized that it is one of the country's strongest constitutional privacy provisions. The *Stroud* rule is incompatible with this subsequent jurisprudence.

Although it has long been recognized that Article 1, Section 7 is more protective of privacy than the Fourth Amendment, it is only recently that the overarching philosophy of the difference in interpretive approaches has been formulated. "In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under Article 1, Section 7 we focus on expectations of the people being searched." *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). If this basic approach had been recognized in 1986, it is unlikely *Stroud* would have been decided the same way. The focus there was on determining reasonable guidelines for police actions, rather than on

delineating the reasonable expectation of privacy that drivers have in their vehicles. Article 1, Section 7 prohibits the invasion of that privacy without authority of law; invasion cannot be justified in the absence of exigent circumstances simply because officers act “reasonably.”

Several other states that have considered the issue in recent years have drawn much different conclusions than *Stroud* under their own state constitutions. Rejecting *Belton* entirely, they allow vehicle searches incident to arrest only when necessary “to ensure police safety or to avoid the destruction of evidence.” *State v. Eckel*, 185 N.J. 523, 539, 888 A.2d 1266 (2006); see also *Commonwealth v. White*, 543 Pa.45, 669 A.2d 896 (1995); *Camacho v. State*, 119 Nev. 395, 75 P.3d 370 (2003); *State v. Pittman*, 139 N.M. 29, 127 P.3d 1116 (N.M. Ct. App. 2005); *State v. Bauder*, 924 A.2d 38 (Vt. 2007). The weight and trend of these decisions, combined with Washington’s usual status as a national leader in state constitutional privacy guarantees, suggests that it is time for this state to reconsider *Stroud* with the benefit of the substantial Article 1, Section 7 jurisprudence that has been developed since *Stroud* was decided.

*Stroud* was a pragmatic experiment, attempting to create a bright line rule to guide law enforcement and courts, even with some cost to individuals’ privacy. But the *Stroud* rule has failed to provide clarity; the Washington Supreme Court and the Court of Appeals has dealt with

numerous others. See e.g. *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (purse not the equivalent of locked container); *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996) (sleeping unit in truck is part of “passenger compartment”); *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) (cannot search passenger’s belongings incident to arrest of driver); *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001) (entire motor home is part of “passenger compartment”); *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002) (reaffirming *Parker*); see also *State v. Lopez*, 142 Wn.App. 930, 176 P.3d 554 (2008); *State v. Patton*, review granted, No. 80518-1, \_\_ Wn.2d \_\_ (Apr. 1, 2008).

The experience of two decades shows that *Stroud*’s bright line rule has not operated as intended to balance privacy against the needs posed by exigent circumstances. *Stroud* at 152. Instead, it has allowed searches where there are *no* exigent circumstances, and has encouraged fishing expeditions and pretextual searches. The *Stroud* rule is incompatible with continued Article 1, Section 7 jurisprudence, as well as state constitutional interpretations in other jurisdictions.

Mr. Haight did not challenge the lawfulness of the search of his vehicle in the trial court. In *State v. Contreras*, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998), Division II held that so long as the record is sufficiently developed so the Court can determine whether a motion to

suppress would have been granted or denied, a suppression issue can be raised for the first time on appeal, pursuant to R.A.P. 2.5, when it involves a manifest constitutional error. Appellant respectfully asks this court to hold that the search of Mr. Haight's vehicle violated Article 1, Section 7 of the Washington State Constitution, because there were no exigent circumstances which would have justified this search given that Mr. Haight was secured away from the vehicle and handcuffed in the back of Officer Sawyer's patrol car, and to reverse Mr. Haight's conviction for Possession of Methamphetamine.

**E. CONCLUSION**

This Court should reverse Mr. Haight's conviction for possession of methamphetamine and dismiss the case because the search of his vehicle was conducted without authority of law.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of August, 2008.

  
\_\_\_\_\_  
ANNE M. CRUSER, WSBA#27944  
Attorney for Mr. Haight

FILED  
COURT OF APPEALS  
DIVISION II

08 AUG -6 AM 11:53

STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,	)	Court of Appeals No. 37305-0-II
	)	Cowlitz County No. 07-1-00047-7
Respondent,	)	
	)	
vs.	)	AFFIDAVIT OF MAILING
	)	
ROGER LEE HAIGHT,	)	
	)	
Appellant.	)	
_____	)	

ANNE M. CRUSER, being sworn on oath, states that on the 4<sup>th</sup> day of August, 2008 affiant placed a properly stamped envelope in the mails of the United States

addressed to:

Susan I. Baur  
Cowlitz County Prosecuting Attorney  
312 S.W. 1<sup>st</sup>  
Kelso, WA 98626

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

**Anne M. Cruser**  
*Attorney at Law*  
P.O. Box 1670  
Kalama, WA 98625  
Telephone (360) 673-4941  
Facsimile (360) 673-4942  
anne-cruser@kalama.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Mr. Roger L. Haight  
520 17<sup>th</sup> Avenue  
Longview, WA 98632

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) VERBATIM REPORT OF PROCEEDINGS (TO MS. BAUR)
- (3) R.A.P. 10.10 (TO MR. HAIGHT)
- (4) AFFIDAVIT OF MAILING

Dated this 4<sup>th</sup> day of August, 2008

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: August 4, 2008, Kalama, WA

Signature: Anne M. Cruser