

NO. 38002-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

PETER WILLIAMS,

Appellant.

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360-337-7174

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 08-1-00107-3

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BRIEF OF RESPONDENT

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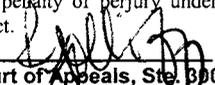
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DATED April 13, 2009, Port Orchard, WA   
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether this Court lacks authority to overrule the Supreme Court's decision in *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986)?
2. Whether Williams has failed to preserve this issue for review where he did not move to suppress the evidence on any grounds below, and the record is therefore inadequate to consider the issues presented?
3. Whether Williams fails to show that *Stroud* is both incorrect and harmful?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Peter Williams was charged by information filed in Kitsap County Superior Court with possession of methamphetamine, DUI (refusal), and driving with a suspended license. CP 6.

Before trial a CrR 3.5 hearing was held, and the trial court suppressed Williams's post-arrest statements in part. CP 99. Williams did not move to suppress any of the evidence or otherwise allege that the police illegally searched his motorcycle.

Williams pled guilty to driving with a suspended license. 1RP 42. A jury found Williams guilty as charged on the remaining counts. CP 79-80.

**B. FACTS**

At the CrR 3.5 hearing, Kitsap Sheriff's Deputy Daniel Twomey testified, in pertinent part, that he stopped Williams for driving his motorcycle with a suspended license. 1RP 50. When Twomey contacted Williams he could smell the odor of alcohol on his breath, and noticed that Williams's speech was slurred. 1RP 51. Department policy called for DUI investigations to be conducted by traffic units, so Twomey called in to see if a traffic unit was available. 1RP 51. Before doing that he asked Williams to remain in an area between his motorcycle and the patrol car. 1RP 51.

Despite this request, while Twomey was at his car calling for a traffic unit, Williams went back to the motorcycle and leaned his backside against the side of the bike. 1RP 51-52. Williams then reached across the motorcycle with his right hand toward a saddlebag that was slung over the gas tank. 1RP 52. Twomey quickly determined that no traffic unit was available, got out of his car and returned to the motorcycle. 1RP 52. Twomey asked Williams to perform voluntary field tests. 1RP 52. Based on the results of the tests, Twomey placed Williams under arrest for DUI. 1RP 53.

At trial, Twomey's testimony was consistent with his pretrial account of the stop and arrest of Williams. 1RP 85-88. He added that the stop occurred about 1:30 a.m. 1RP 87.

Twomey also expanded on his description of Williams's conduct while Twomey was waiting for the traffic unit. While Twomey was at his vehicle, Williams reached across the motorcycle with his right hand toward a saddlebag that was slung over the gas tank. 1RP 88. They were soft saddlebags. 1RP 88. Williams looked like he was manipulating something in the far saddlebag. 1RP 88.

Twomey got out of his car and returned to the motorcycle. 1RP 89. He recounted for the jury that he had asked Williams to perform voluntary field tests, and that based on the results of the tests, Twomey placed Williams under arrest for DUI. 1RP 89-109.

Twomey searched Williams incident to arrest. 1RP 109. Twomey handcuffed Williams and placed him in the back of the patrol car. 1RP 109. Twomey then searched the motorcycle. 1RP 109. He started with the right-side saddlebag he had seen Williams manipulating earlier. 1RP 109. Twomey retrieved a Zip-loc baggie from it. 1RP 109.

In the baggie was a white crystalline substance, later determined to be methamphetamine. 1RP 110, 166. There was also a half-empty bottle of white zinfandel in the rear trunk of the motorcycle. 1RP 111.

On cross-examination, Williams inquired as to whether Twomey was concerned about officer safety:

Q Again, you weren't concerned -- Were you concerned for your safety at that point?

A You know, you are always -- that's always on the forefront of what you are thinking, is if you are concerned for your safety. At that point, nothing had taken place to concern me to the level that I needed to go up and immediately retake control of him.

1RP 126. Twomey did not ask Williams if there were any weapons or needles in the bag before searching it. 1RP 145. When Williams was manipulating the bag it looked to Twomey as if he was trying to conceal something. 1RP 145. Up to that point Williams had done nothing to cause Twomey to be concerned for his safety. 1RP 145. Williams was upset about being stopped, but was not behaving aggressively toward Twomey. 1RP 145. Twomey did not ask Williams about what he was putting in the bag because it did not have anything to do with Twomey's safety. 1RP 144.

### III. ARGUMENT

#### A. WILLIAMS ASKS THIS COURT TO EXCEED ITS AUTHORITY AND OVERRULE BINDING SUPREME COURT PRECEDENT.

Williams argues that *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), which, subject to certain limitations, permits the search of a vehicle incident to the arrest of an occupant, is inconsistent with developing precedent under Const. art. 1, § 7. This Court, however, is bound by the Supreme Court's decisions. *In re Le*, 122 Wn. App. 816, 820, 95 P.3d 1254,

1256 (2004) (citing *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984)), *aff'd sub nom. In re Domingo*, 155 Wn.2d 356 (2005). Once the Supreme Court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by that Court. *Gore*, 101 Wn.2d at 487.

Williams does not argue that the Supreme Court has overruled *Stroud*. Instead, his argument essentially is that if the Supreme Court were to decide *Stroud* today, it would reach a different holding in light of subsequent precedent regarding Const. art. 1, § 7. Respectfully, however, that is a determination for the Supreme Court to make, not this Court.

Moreover, nothing in the case law suggests that the Supreme Court is inclined to revisit its holding in *Stroud*. In numerous cases involving arrests of automobile occupants, the Court has continued to apply *Stroud*.

Williams particularly relies on *State v. Ladson*, 138 Wn.2d 343, 358, 979 P.2d 833 (1999), which held that pretextual traffic stops are unconstitutional. *Stroud*, Williams argues, “is contrary to *Ladson* and to the contemporary understanding of Article 1, § 7, and therefore no longer good law.” Brief of Appellant at 19. Nothing in *Ladson*, however, calls into question the underlying considerations that led to the decision in *Stroud*.

To the contrary, since *Ladson*, the Court has *extended* the rule in *Stroud*, holding that the back of a motor home, while it was being used as a vehicle, was subject to the rule in *Stroud*. *State v. Vrieling*, 144 Wn.2d 489, 496, 28 P.3d 762 (2001). Even the dissent in that case, while concluding that the rear of a motor home should be subject to greater privacy protections, did not question the ongoing viability of *Stroud* itself. *Vrieling*, 144 Wn.2d at 501 (Johnson, J., dissenting) (“I would maintain the equilibrium created by *Stroud*”). Justice Sanders, dissenting separately, did comment that “[w]aiver of the warrant requirement for even ‘the area in the immediate control of the arrestee’ ... is problematic.” *Vrieling*, 144 Wn.2d at 501 (Sanders, J., dissenting) (quoting *Vrieling*, 144 Wn.2d at 501 (Johnson, J., dissenting)). The comment, taken out of context might arguably be read as a criticism of *Stroud*. However, he goes on to say: “I would argue that we need not trouble ourselves to invent a bright-line rule.” *Vrieling*, 144 Wn.2d at 501 (Sanders, J., dissenting). As the bright-line rule in *Stroud* was “invented” some 15 years before *Vrieling* was decided, the more logical reading of the dissent is an objection to the majority holding of *Vrieling*, not to that of *Stroud*.

The Court has also extended the *Stroud* rule in other cases over the years. See *State v. Johnson*, 128 Wn.2d 431, 441, 909 P.2d 293 (1996) (*Stroud* permitted search of sleeper unit of semi truck); *State v. Fladebo*, 113 Wn.2d 388, 395, 397, 779 P.2d 707 (1989) (purse not a locked container for

purposes of *Stroud* rule; Court reaffirmed *Stroud*'s holding that "[d]uring 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" (quoting *Stroud*, 106 Wn.2d at 152; emphasis the Court's));

Even in the cases in which the Supreme Court has declined to further extend *Stroud*, the Court has not questioned its continued viability. *State v. Parker*, 139 Wn.2d 486, 505, 987 P.2d 73(1999) (Johnson, J., plurality) ("Pursuant to *Stroud*, officers may lawfully search a vehicle passenger compartment incident to the arrest of the driver," but may not search containers known to belong to non-arrested passengers); *State v. Jones*, 146 Wn.2d 328, 336, 45 P.3d 1062 (2002) (essentially adopting the plurality holding of *Parker*, but not questioning *Stroud*); *State v. Hendrickson*, 129 Wn.2d 61, 73, 77 P.2d 563, 569 (1996) (declining to extend *Stroud* rule to vehicles seized for purposes of civil forfeiture where the search is not incident to arrest); *State v. Patterson*, 112 Wn.2d 731, 735, 774 P.2d 10 (1989) (unlike in *Stroud*, where the exigencies of the situation warranted an easy-to-apply rule, there was no justification for a bright-line rule permitting the search of a "parked, immobile, unoccupied, secured vehicle"); *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986) (although *Stroud*

“provid[ed] some guidance,” the Court declined to extend *Stroud*’s bright-line rule to the *Terry* stop context because of the differing policy considerations); *Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988) (recognizing *Stroud* as one of the “narrow exceptions” to the warrant requirement, but finding sobriety checkpoints unconstitutional); *see also State v. Kirwin*, \_\_\_ Wn.2d \_\_\_, ¶ 41-43, 2009 WL 781963 (Mar. 26, 2009) (Sanders, J., dissenting) (arguing that *Stroud* should not extend to searches of vehicles upon the arrest of a non-owner passenger, but not questioning *Stroud*’s continuing viability in its original context).

In short, there is no indication that the Supreme Court regards *Stroud* as being in any way inconsistent with Const. art. 1, § 7. Thus, even were this Court empowered to abandon Supreme Court precedent that that Court has not explicitly overruled, there would be no basis for this Court do so here.

**B. WILLIAMS FAILS TO SHOW MANIFEST CONSTITUTIONAL ERROR JUSTIFYING CONSIDERATION OF HIS CLAIM FOR THE FIRST TIME ON APPEAL.**

Even if this Court had the authority to overrule the Supreme Court, it should decline to consider this claim because Williams failed to raise it below. Indeed, he did not move to suppress the evidence on *any* grounds below. No CrR 3.6 hearing was held. Only a CrR 3.5 hearing was conducted to determine the admissibility of Williams’s statements. The record was

therefore not developed to address the question of whether the evidence was lawfully seized.

RAP 2.5(a) provides that a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 7, 161 P.3d 990 (2007) (quoting *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)). The Supreme Court has noted, however, that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *Id.* (quoting *Scott*, 110 Wn.2d at 687) (internal quotation marks omitted).

Whether RAP 2.5(a)(3) should allow the new argument on appeal is determined after a two-part analysis. *Kirkpatrick*, 160 Wn.2d at ¶ 8. First, the Court determines whether the alleged error is truly constitutional. *Id.* Second, the Court determines whether the alleged error is “‘manifest,’ i.e., whether the error had ‘practical and identifiable consequences in the trial of the case.’” *Id.* (quoting *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)). The State concedes that the issue raised is one of constitutional magnitude. The error is not, however, “manifest.”

An error will not be deemed “manifest” where, as a result of the appellant’s failure to raise the issue at trial, this Court would have to engage in fact-finding an appellate “court is ill equipped to perform.” *Kirkpatrick*, 160 Wn.2d at ¶ 11. Additionally, where the alleged constitutional error arises from trial counsel’s failure to move to suppress, the defendant “must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice -- actual prejudice must appear in the record.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). In assessing actual prejudice, the *McFarland* court noted:

In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3).

*McFarland*, 127 Wn.2d at 334; *see also State v. Contreras*, 92 Wn. App. 307, 311-12, 966 P.2d 915 (1998); *State v. McNeal*, 98 Wn. App. 585, 594-95, 991 P.2d 649 (1999), *aff’d* 145 Wn.2d 352 (2002).

Neither of these considerations is met here. First, the record was clearly not developed with an eye to the issues raised on appeal. This is true of both the facts of the instant case, and of the broad factual assertions Williams asserts justify a change in the *Stroud* rule.

For example, Williams argues that the rule “has not operated as intended to balance privacy interests against the needs posed by exigent

circumstances.” Brief of Appellant at 18. He further postulates that *Stroud* “has encouraged fishing expeditions and pretextual searches.” *Id.* Notably Williams offers no citation to any study, report, or other evidence to support this inherently factual claim. Certainly before the Court were to consider throwing out 20 years of jurisprudence and the possibility of reopening 20 years of investigations, prosecutions and convictions based on the certainty provided by the *Stroud* rule, the Court should require Williams to have developed some factual basis for his claims rather than relying on mere editorial conjecture.

Nor is the record developed with regard to the specific facts of Williams’s case. Williams does not argue the exigent circumstances underlying the *Stroud* rule are themselves constitutionally unsustainable. Rather he argues only that the bright-line rule should be eliminated. Brief of Appellant at 17 (*citing State v. Eckel*, 185 N.J. 523, 539, 888 A.2d 1266 (2006)). Before it was overruled by *Stroud*, even *State v. Ringer*, 100 Wn.2d 686, 703, 674 P.2d 1240 (1983), while rejecting a bright-line rule, recognized that the exigencies of the situation might justify a warrantless search. Among the factors alluded to were whether the vehicle was lawfully parked, whether a warrant could reasonably have been obtained, and of course, officer safety and the concern for the destruction of evidence.

Here, what record there is shows that the defendant's motorcycle was pulled over at 1:30 in the morning. 1RP 87. The defendant pulled into the parking lot of a vacant store. 1RP 86, 119. The deputy called for a traffic unit to assist him, but none was available. 1RP 88, 126. Only Williams and the deputy were present. 2RP 190-91. Williams appeared intoxicated and throughout the encounter, continued to argue with the deputy about why he had been stopped. 1RP 121. By Williams's own account, he was angry and became more agitated as the stop continued. 2RP 196, 200. Williams's movements made the deputy concerned that something was being concealed in the saddlebag. 1RP 145.

What the record does not disclose is how secluded the parking lot in which the stop took place was. It does not reveal whether the deputy would have been able to obtain a telephonic search warrant at that hour. There is no indication whatsoever as to what was done with the motorcycle, whether it was just left on the private property on which the stop took place, or whether it was impounded for safe keeping or forfeiture.

The former considerations all bear on whether, absent the *Stroud* rule, exigent circumstances would have existed to conduct the warrantless search. Thus, the record is insufficient, even were *Stroud* not controlling, to show that the evidence would have been suppressed.

Further, the absence of evidence regarding the fate of the motorcycle also makes it impossible to know whether a suppression motion would have been denied under the doctrine of inevitable discovery. *See State v. Richman*, 85 Wn. App. 568, 933 P.2d 1088 (1997) (unlawfully obtained evidence admissible when State proves by preponderance of the evidence that it inevitably would have been discovered under proper and predictable investigatory procedures); *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980) (police may properly conduct a warrantless inventory search when a car is lawfully impounded).

In short, because Williams did not move to suppress the evidence, no evidentiary hearing was held regarding the seizure. As a result the record provides an insufficient basis from which it can be concluded that the alleged error was manifest. The Court should decline to consider Williams's claim for the first time on appeal.

**C. WILLIAMS FAILS TO SHOW THAT *STROUD* IS BOTH INCORRECT AND HARMFUL.**

Even were the issue preserved, and even if this Court had the power to overrule Supreme Court precedent, Williams fails to show that *Stroud* should be abandoned. The Supreme Court has instructed that courts should "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful." *State v.*

*Kier*, 164 Wn.2d 798, 804-805, 194 P.3d 212 (2008). Williams has not met this burden.

The bright-line rule set forth in *Stroud* “was specifically adopted to eliminate the need for a case by case assessment of when a warrantless search of an automobile incident to the arrest of the driver would be permissible, an approach deemed to be too burdensome for police officers in the field.” *Vrieling*, 144 Wn.2d 489, 493-494, 28 P.3d 762 (2001). This bright line rule recognizes that “concerns for the safety of officers and potential destructibility of evidence do outweigh privacy interests and warrant a bright-line rule permitting limited searches.” *Patterson*, 112 Wn.2d 731, 735, 774 P.2d 10 (1989).

Other than his unsupported assertions that the bright-line rule has not carried out its intended purposes, Williams fails to make any showing that *Stroud* is either wrongly decided or harmful.

Nor does he explain how *Stroud*, which was issued on the same day as *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), and contains a lengthy discussion of the history of Washington law on searches incident to arrest, was an erroneous interpretation of Const. art. 1, § 7. Indeed, to simply abandon *Stroud* on the thin reed offered by Williams would violate the very principles upon which *Gunwall* rests.

In *Gunwall*, the Court observed the danger of an unprincipled application of state constitutions:

Many of the courts now resorting to state constitutions rather than to analogous provisions of the United States Constitution simply announce that their decision is based on the state constitution but do not further explain it. The difficulty with such decisions is that they establish no principled basis for repudiating federal precedent and thus furnish little or no rational basis for counsel to predict the future course of state decisional law.

*Gunwall*, 106 Wn.2d at 60. Accordingly, the Court promulgated the now-familiar six criteria to be considered when determining whether the Court should depart from federal constitutional constructions. The Court noted that it would decline to discuss state constitutional grounds that have not been “thoroughly briefed and discussed,” because “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *Gunwall*, 106 Wn.2d at 62 (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

Here, Williams fails to perform any *Gunwall* analysis, contenting himself with the generalized observation that Const. art. 1, § 7 provides greater protection than the Fourth Amendment. Brief of Appellant at 14. The cases he cites, however, by and large do not even address Const. art. 1, § 7. See e.g. *State v. Coutier*, 78 Wn. App. 239, 896 P.2d 747 (1995) (relying on cases that only discuss *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d

889 (1968), and the Fourth Amendment: *State v. Collins*, 121 Wn.2d 168, 847 P.2d 919 (1993) (discussing only the Fourth Amendment and *Terry*); *State v. Terrazas*, 71 Wn. App. 873, 879, 863 P.2d 75 (1993), review denied, 123 Wn.2d 1028 (1994) (applying *Collins*); *State v. Feller*, 60 Wn. App. 678, 682, 806 P.2d 776, review denied, 117 Wn.2d 1005 (1991) (applying *Terry*); *State v. Sistrunk*, 57 Wn. App. 210, 215-16, 787 P.2d 937 (1990) (applying *Terry*).

That Const. art. 1, § 7 provides broader coverage than the Fourth Amendment is undeniable. The question, however, is what protection it provides under particular circumstances. The Supreme Court has explained that merely because a particular provision of the state constitution provides broader protection in one context, it does not follow that it necessarily does so in all contexts. A *Gunwall* analysis must therefore be addressed to the specific circumstances in issue:

[N]either of the parties has adequately briefed the six factors required to be briefed under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). [The appellant] relies instead on previous decisions based on analogous circumstances. This does not provide sufficient argument upon which this court will conduct a state constitutional analysis. “Whether the Washington Constitution provides a level of protection different from the federal constitution *in a given case* is determined by reference to the six nonexclusive *Gunwall* factors.”

*State v. Cantrell*, 124 Wn.2d 183, 190 n.19, 875 P.2d 1208 (1994) (quoting

*State v. Young*, 123 Wn.2d 173, 179, 867 P.2d 593 (1994) (emphasis the Court's). The Supreme Court has repeatedly reiterated this point:

The import of Const. art. 1, § 7 in any given context is not established merely by describing the differences between that provision and the Fourth or Fifth Amendments to the federal constitution. Rather, the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compels a particular result.

*Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994). The Court explained that this was the very purpose, along with “the purpose of assisting counsel in developing state constitutional arguments” that the *Gunwall* factors were originally instituted. *McCready*, 123 Wn.2d at 267. For this reason the Court will usually refuse to consider state constitutional claims “neither timely nor sufficiently argued by the parties,” particularly with respect to the *Gunwall* factors. *McCready*, 123 Wn.2d at 267 (quoting *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988)).

Yet in urging this Court to jettison *Stroud's* bright-line rule, Williams argues only by analogy, and fails to address any of the *Gunwall* factors. Existing precedent over the last 23 years such as *Stroud*, *Fladebo*, and *Johnson* have all concluded that Const. art. 1, § 7 permits searches of the passenger area of vehicles incident to arrest, and to unlocked containers found therein. Williams utterly fails to credit this directly on-point exegesis of the state constitution.

Beyond reference to cases involving factually differing circumstances that the Court has already distinguished from *Stroud*, the only support Williams gives to his argument is by way of cases from other states interpreting their state constitutions. But these cases fail to meet the standards of *Gunwall*.

In *State v. Eckel*, 185 N.J. 523, 888 A.2d 1266, 1275 (2006), the New Jersey court interpreted a state provision that was virtually identical to the Fourth Amendment. *Eckel*, 888 A.2d at 1275 (quoting N.J. Const., art. 1, ¶ 7). The court just essentially disagreed with the United States Supreme Court's interpretation. *Eckel*, 888 A.2d at 1274-75. Given the textual difference between the state constitutions, and the apparent lack of any framework similar to *Gunwall* that is followed by New Jersey courts, *Eckel* provides little guidance, beyond a rehashing of the competing consideration of the issues addressed and resolved by the Court in *Stroud*. *Eckel* thus sheds no light on the meaning of Const. art. 1, § 7. Likewise, *Com. v. White*, 543 Pa. 45, 669 A.2d 896 (1995), interpreted a constitutional provision identical in form to the Fourth Amendment. *White*, 669 A.2d at 899 n.1 (quoting Pa. Const., art. 1, § 8). And again, the Pennsylvania court simply disagreed with the Supreme Court's ruling in *Belton*, and chose to follow its own pre-*Belton* interpretation of the Fourth Amendment. *White*, 669 A.2d at 902. Similarly, in *Camacho v. State*, 119 Nev. 395, 75 P.3d 370, 373-74 (2003), the court,

again interpreting a provision identical to the Fourth Amendment, *see* Nev. Const., Art. 1, § 18, simply disagreed with the federal reading. The same type of reasoning, yet again interpreting a provision identical to the Fourth Amendment, *see* N.M. Const., Art. II, § 10, occurred in *State v. Pittman*, 139 N.M. 29, 127 P.3d 1116, 1120 (App. 2005). Finally, in *State v. Bauder*, 181 Vt. 392, 924 A.2d 38 (Vt.,2007), the Vermont court interpreted Vt. Const., ch. I, art. 11, which in content is much closer to the Fourth Amendment than to Const., art. 1, § 7.<sup>1</sup> Despite the facial similarity, however, the court's opinion revealed a long history of interpreting the Vermont constitution in a manner that would appear to be even more protective than Const., art. 1, § 7. *See Bauder*, 924 A.2d at ¶¶ 10-20. The court reiterated that it had "consistently rejected bright-line rules." *Bauder*, 924 A.2d at ¶ 20. While *Bauder* may shed light on the Vermont Constitution, it does little to illuminate Washington's.

In *Stroud*, the Supreme Court clearly set forth the rationale for its decision:

The Ringer holding makes it virtually impossible for officers to decide whether or not a warrantless search would be permissible. Weighing the "totality of circumstances" is too

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<sup>1</sup> "That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted."

much of a burden to put on police officers who must make a decision to search with little more than a moment's reflection. As the United States Supreme Court stated in *New York v. Belton*, 453 U.S. 454, 458, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), quoting LaFave, "*Case-By-Case Adjudication*" versus "*Standardized Procedures*": *The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 142:

"A highly sophisticated set of rules ... requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be 'literally impossible of application by the officer in the field.'"

We agree with the Supreme Court's decision to draw a clearer line to aid police enforcement, although because of our state's additional protection of privacy rights we must draw the line differently than did the United States Supreme Court.

The Supreme Court, in *Belton*, held that the dangers to the officers and the possible destruction of evidence justified the search of all containers in the passenger compartment of a car pursuant to a lawful custodial arrest. Likewise, in *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), if the officers have probable cause to believe the trunk has contraband, they may search it also. We agree with the Court that these exigencies exist. However, because of our heightened privacy protection, we do not believe that these exigencies always allow a search. Rather, these exigencies must be balanced against whatever privacy interests the individual has in the articles in the car.

In *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980), we recognized that a person in possession of a vehicle has a legitimate expectation of privacy under article 1, section 7 in the vehicle, including the vehicle identification number (VIN), assuming this serial number was not visible from the outside. This analysis also must be true of articles within the vehicle which also are not visible because, for example, they are in a suitcase or the glove compartment. Furthermore, this court also held in *Simpson* that the act of locking a car "manifests a subjective expectation of privacy which is

objectively justifiable”. *Simpson*, at 187. Thus additional privacy expectations must also result from locking articles within a container.

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. The rationale for this is twofold. First, by locking the container, the individual has shown that he or she reasonably expects the contents to remain private. *State v. Simpson, supra*. Secondly, the danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual’s access to the contents of the container. This rule will more adequately address the needs of officers and privacy interests of individuals than the rules set forth by either *Belton* or *Ringer*.

*Stroud*, 106 Wn.2d at 151-153. Williams fails to show that the Court’s conclusions were either wrong or harmful. His claim should be rejected.

**IV. CONCLUSION**

For the foregoing reasons, Williams's conviction and sentence should be affirmed.

DATED April 13, 2009.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R D Hauge', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney

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