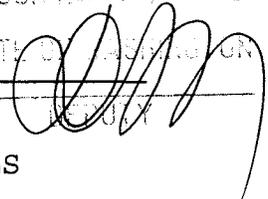


COURT OF APPEALS  
DIVISION II

No. 38402-7-II

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STATE OF WASHINGTON  
BY 

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

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STATE OF WASHINGTON,

Respondent,

vs.

DANIELLE OLAGUE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-8-00113-7

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REPLY BRIEF

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ORIGINAL

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STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in her opening brief.

ARGUMENT

A. THE AUTOMATIC STANDING DOCTRINE APPLIES TO THE FACTS IN THIS CASE.

The Washington Supreme Court has consistently held that defendants in this state have automatic standing to contest unlawful searches in a variety of situations. See State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007).

As indicated in State v. Chenowith, 160 Wn.2d 454, 158 P.3d 595 (2007) it is well established that Article I, § 7 of the Washington Constitution provides greater protections than does the federal constitution and a Gunwall analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis.

State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).<sup>1</sup>

The focus in determining whether the protections of the state constitution apply in a particular context "... is whether the unique

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<sup>1</sup> Article I § 7 provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law."

characteristics of the state constitutional provision in its prior interpretations actually compel a particular result." Id. at 463 (*citing State v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). In doing so, the court should examine the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest.

The analysis is a two step inquiry: first, whether there has been a governmental intrusion to one's home or private affairs; and if so, whether authority of law justifies the intrusion. The state courts have consistently upheld the prohibition against an unlawful government intrusion into one's home or private affairs are exceptions to the warrant requirement are jealously guarded. Chenowith at 463-464 (citations omitted).

In this case, the state officers, without a warrant, rifled through the memory card located in the camera belonging to Ms. Olague. This is so different than the situation of the police

entering a person's house without a warrant and obtaining an item belonging to a person other than the defendant and then suggesting the defendant had no standing to challenge the taking of that particular item.

As noted in State v. Evans, supra, the status of the area searched is critical when one engages in an analysis of whether or not a privacy interest has been abandoned. The courts do not ordinarily find abandonment if the defendant had a privacy interest in the searched area. Id. at 409.

It was the police who took the vehicle, along with the camera and memory card, and placed it in impound, at which time Ms. Olague had no opportunity to abandon the camera. Thus, the court should hold that a warrant was required prior to the search of the camera, including any part thereof.

Moreover, the Evans court found that denial of ownership did not amount to abandonment. Id. at 410-11. Ultimately, as in Evans, and the cases cited therein, Ms. Olague did not abandon any interest in this case once the state impounded the

vehicle and prevented her from having access to the contents therein, including the camera. Finally, the inevitable discovery rule does not apply to this situation. A warrant was required and there is no indication, and certainly no proof by the state, that the photographs would have been inevitably discovered.

B. ADMISSION OF EVIDENCE OF INTOXICATION WAS ERROR.

The state suggests that admission of photographs in relation to consumption of alcohol was not error because the photos strongly suggest that the defendant was consuming alcohol until shortly before she left, which, in turn, would demonstrate disregard for the safety of others. See State's Brief at 36-37. However, there is no evidence that Ms. Olague was under the influence of alcohol, and in fact, the police officers testified to that effect. Thus, there is no evidence that this particular suggestion could have been used, if found to be relevant, for the ultimate question of disregard for the safety of others. As such, the evidence was not relevant and, most certainly, its prejudicial effect outweighed the probative value.

Nor was it reasonable for defense counsel not to object to the admission of the evidence. Indeed, defense counsel sought to keep the evidence out in pre-trial suppression motions. The state bases its reasoning as a legitimate trial tactic based on its own theory of the case. See State's Brief at 39. However, it didn't argue this point at trial and in fact, conceded there was no evidence of intoxication. While the state indicates that this evidence was not unfairly prejudicial because it was a bench trial, as noted in the defense opening brief, the court used the bulk of its decision in finding her guilty of the crime based on the consumption of alcohol.

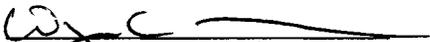
Contrary to what the state suggests, it did not weigh this evidence relatively lower in the context of finding her guilty. Indeed, it gave great weight to this issue. As a result, the court should reverse the conviction.

CONCLUSION

Based on the files and records herein and the arguments previously submitted, Ms. Olague requests that her conviction be reversed.

RESPECTFULLY SUBMITTED this 22 day of June, 2009.

HESTER LAW GROUP, INC. P.S.  
Attorneys for Appellant

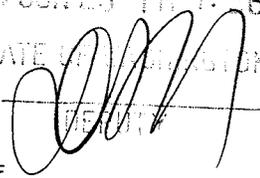
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CERTIFICATE OF SERVICE

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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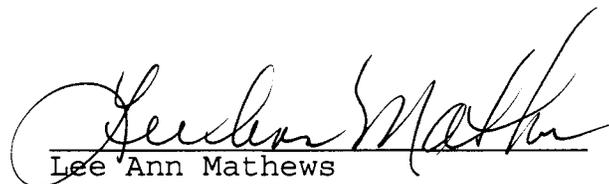


Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 23 day  
of June, 2009.



Lee Ann Mathews