

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

No. 38580-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Thomas Copland,

Respondent.

Grays Harbor County Superior Court Cause No. 08-1-00270-8

The Honorable Judge David Edwards

Respondent's Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Thomas Copland was charged with Possession of a Controlled Substance (oxycodone) With Intent to Deliver. CP 1.

Prior to trial, he moved to suppress the evidence. CP 6-7. At a CrR 3.6 hearing, the state presented the testimony of Aberdeen Police Officer Steve Loyer. Loyer testified that he was in uniform, working security at the Grays Harbor Community Hospital. CP 19. He received an open black plastic bag from Aberdeen Firefighter David Cartwright, and learned that it had been taken from Mr. Copland's pants pocket. CP 20. The bag was opaque, but because it was open Loyer could see that it contained oxycodone pills packaged for sale. CP 20. The bag looked like it had previously been tied at the top. CP 20.

Neither Loyer nor another officer who testified knew how the bag had been opened. CP 20. The state did not present a search warrant or the testimony of the Aberdeen firefighter who had given the bag to Loyer. CP 19-21.

Judge Edwards suppressed the evidence. CP 19-21. He entered Findings of Fact and Conclusions of Law, which included the following:

(2) Aberdeen Firefighter David Cartwright handed Officer Loyer an open black plastic bag. It appeared to be a corner of a larger bag. Officer Loyer did not open the bag and did not know who did...

(5) Officer Loyer handed the black bag to Aberdeen Police Officer David Parkinson. Officer David Parkinson did not know who opened the bag...

(7) The State did not subpoena Aberdeen Firefighter David Cartwright nor any of the nurses involved.

(8) The State presented no evidence as to who or how the black plastic bag was opened.

(9) The State presented no evidence as to whether or not there was State action involved in obtaining the black bag and getting it open.

CP 17, 19-21.

Judge Edwards dismissed the case, and the state appealed. CP 17,

22.

ARGUMENT

THE TRIAL JUDGE PROPERLY SUPPRESSED ITEMS SEIZED PURSUANT TO A WARRANTLESS SEARCH.

The Fourth Amendment to the Federal Constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.¹ Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his

¹ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.²

Under both provisions, searches conducted without authority of a search warrant “are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). The burden is always on the state to prove one of these narrow exceptions. *State v. Kypreos*, 110 Wn.App. 612, 624, 39 P.3d 371 (2002). Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d 775 (2001).

Both the Fourth Amendment and Article I, Section 7 apply to searches conducted by firefighters. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978); *State v. Picard*, 90 Wn.App.

² It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

890, 895, 954 P.2d 336 (1998); *see also State v. Smith*, 163 P.3d 1194, 1197 (Idaho, 2007); *Rose v. State*, 586 So.2d 746 (Miss.,1991). Accordingly, a warrantless search conducted by a firefighter is unconstitutional unless it fits within an exception to the warrant requirement. *Eisfeldt, supra*.

In this case, the state did not produce a warrant, did not establish who opened the bag, and did not assert an exception to the warrant requirement. CP 19-21. From the facts established at the hearing, one clear possibility is that Aberdeen Firefighter David Cartwright opened the bag. CP 19-20. If this is the case, suppression is required. *Picard, supra*. This is so because the state bore the burden of proving an exception to the warrant requirement, and of producing facts necessary to support the exception. *Kypreos, supra; Johnston, supra*. Rather than establishing how the bag was opened, the state simply presented evidence that the police officers did not open the bag. CP 20.

Appellant fails to address the likelihood that Mr. Cartwright opened the bag. Brief of Appellant, pp. 7-12. Instead, Appellant assumes the bag was opened by a nurse or other hospital employee. Brief of Appellant, pp. 7-12. Appellant's focus on *police* action overlooks the likelihood of *government* action (specifically, that Mr. Cartwright opened the bag.) *See* Brief of Appellant, pp. 7-12.

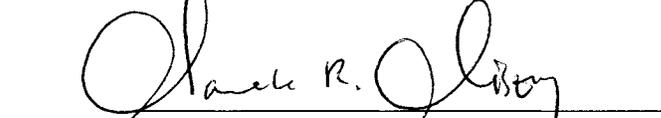
The state's failure to produce a warrant, failure to explain who opened the bag, and failure to prove an exception to the warrant requirement required suppression of the pills. CP 19-21. Judge Edwards' decision granting Mr. Copland's motion must be upheld. *Eisfeldt, supra*.

CONCLUSION

For the foregoing reasons, the lower court decision must be affirmed.

Respectfully submitted on August 6, 2009.

BACKLUND AND MISTRY



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STATE OF WASHINGTON
BY _____

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Thomas Copland
400 West 4th Street
Aberdeen, WA 98520

and to:

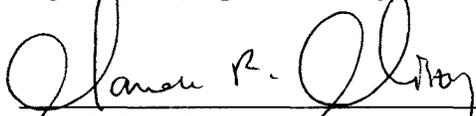
Grays Harbor Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 6, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 6, 2009.



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