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COURT OF APPEALS
DIVISION II

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No. 41712-0-II

STATE OF WASHINGTON

BY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID JOSEPH HARRIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George L. Wood

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

In violation of the Fourth Amendment and article I, section 7, the trial court erred in admitting evidence of Harris' outgoing correspondence from the Clallam County Jail that was seized without a warrant.¹

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Although pretrial detainees, like prisoners and parolees, have a diminished expectation of privacy under the Fourth Amendment and article I, section 7, the government may not intrude upon their private affairs without a warrant or other lawful justification. Security concerns are recognized as a legitimate basis to search a pretrial detainee's outgoing mail from a jail, but in this case a warrantless search was conducted of Harris' outgoing mail solely to satisfy the curiosity of the officer who opened the letters. The letters were subsequently admitted at Harris' trial. Did the warrantless search violate Harris' rights under article I, section 7 and the Fourth Amendment?

C. STATEMENT OF THE CASE

On the evening of September 3, 2010, appellant David Joseph Harris was drinking at the R Bar in Port Angeles,

¹ As of the date of this writing, no findings of fact and conclusions of law as required by CrR 3.6 have been entered by the trial court.

Washington, with a friend, Rebecca Mendes. 4RP 67.² Harris was having a difficult time at that point in his life; his divorce had just been finalized, his ex-wife was preventing him from seeing his children, and he had been out of work for a while. 4RP 70. The bar was crowded and Harris got into an altercation with another man about the man cutting in front of him in line. 4RP 40, 50, 62; 5RP 12. Because of this, the bouncer decided it was time for Harris to leave the bar. 4RP 40-42, 51. Harris did ultimately exit the bar. 4RP 42.

Also at the R Bar that night were Ernesto Sanchez Andalob ("Sanchez") and a couple of friends, including Victor Gallegos. 5RP 72, 75. Sanchez drank a lot that night and became very intoxicated. 4RP 35, 37. According to Sanchez, when he came outside, he saw Gallegos waving his arms aggressively at Harris as if he wanted to fight him. 5RP 76. Harris "was just standing there."
Id.

² Citations to the verbatim report of proceedings are as follows:

10/15/10	-	1RP
10/29/10	-	2RP
12/1/10	-	3RP
12/6/10	-	4RP
12/7/10	-	5RP
12/8/10	-	6RP
12/9/10	-	7RP
12/21/10	-	8RP

Sanchez approached Gallegos to tell him that they should go, but Sanchez also wanted to fight Harris and tried to hit him. 5RP 78-79. Sanchez was too intoxicated to remember whether or not he did hit Harris; the next thing he remembered was lying on the ground. Id. The bouncer who ejected Harris from the bar saw what looked like a man punching Sanchez in the gut. Sanchez crumpled and fell, and the man fled. 4RP 42. Sanchez sustained a stab wound on his left side that fractured a rib and punctured a lung. 4RP 33-34.

Harris later told Mendes and his ex-wife that he had gotten jumped by three to five people, and that he had defended himself. 4RP 78; 5RP 50. His aunt and cousin, who saw him the following morning, documented injuries to Harris' face, head and ankle. 6RP 63, 71-72.

A police officer who responded to a 9-1-1 call that night confirmed that outside the R bar "it was a mob scene" with multiple fights breaking out even while the officer was there. 4RP 107-110. He said that he personally observed four or five fights, involving eight to twelve people. 4RP 107-08.

Based on these events, the Clallam County Prosecuting Attorney charged Harris with assault in the first degree with a

deadly weapon enhancement. CP 103. A jury acquitted him of this charge and convicted him of the lesser included offense of assault in the second degree with a deadly weapon enhancement. CP 26-29. Harris appeals. CP 6. ...

D. ARGUMENT

THE ADMISSION OF LETTERS SENT BY HARRIS FROM THE JAIL VIOLATED HIS RIGHT TO PRIVACY PROTECTED BY ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

1. Harris moved to prohibit the State from introducing evidence of letters he sent from the jail. During the trial, the State sought to introduce letters Harris sent while he was in the jail awaiting trial to his ex-wife, Tricia Deunas-Harris, and to his aunt, Linda Spritz. 5RP 4-5. In the letter to Tricia Deunas-Harris, Harris stated that if he went to prison he would not be able to pay child support, and asked her not to say anything negative about him. 5RP 5. The letter to Spritz requested her to contact the federal authorities regarding Sanchez and Gallegos because they were in the United States illegally. 5RP 4, 156.

Harris moved to prohibit the State from introducing the letters, arguing that the State had to get a warrant to search his mail and seize it, and that any warrant was obtained after the letters

had already been handed over to the police by jail authorities. 5RP 149-150. The court ruled that the letters were relevant to show, in Tricia Deunas-Harris' case, that Harris was trying to influence her testimony, and in Spritz's case, that Harris urgently sought to prevent Sanchez and Gallegos from testifying. 5RP 156-160.

The State presented testimony at a subsequent hearing. Don Wenzl, a corrections officer, testified that at the time of booking, each inmate is issued a handbook of jail rules and regulations that state outgoing mail may be opened and examined.³ 6RP 14. Wenzl admitted that he was aware of Harris' case from reading the newspaper – in Clallam County, it was a case of some notoriety – and that for this reason he decided to open and examine Harris' mail. 6RP 16, 18-20, 23. Wenzl's decision to open the letter was not prompted by security concerns. 6RP 24. Wenzl turned over the two letters to the case detective handling the assault investigation. 6RP 17, 37-38.

Relying principally on Division One's decision in State v. Archie, 148 Wn. App. 198, 199 P.3d 1005, rev. denied 166 Wn.2d 1016 (2009), the trial court ruled that the detective did not require a warrant to search the letters. 6RP 48. The court reasoned that

³ Another corrections officer testified to having personally distributed the handbook and rules and regulations to Harris. 6RP 28-29.

because Harris received a copy of the rule book, he had notice that his mail might be searched and thus no warrant was required. 6RP 51-52.

2. Clallam County Corrections Officers illegally searched Harris' private affairs, in violation of article I, section 7 of the Washington Constitution. Under article I, section 7 of the Washington Constitution, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. I, § 7. This language has been construed as creating “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions. . . .” State v. Buelna Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (quoting State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)). The Fourth Amendment likewise prohibits unreasonable searches and seizures without a warrant. U.S. Const. amend. IV.

Thus, warrantless searches are presumptively invalid unless one of the narrow exceptions to the warrant requirement applies. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const. amend. IV; Const. art. I, § 7. “Exceptions to the warrant requirement are to be ‘jealously and carefully drawn.’”

State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citation omitted). The State bears the burden of establishing an exception to the warrant requirement by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

a. The invasion of privacy occasioned by intrusions into inmate mail is only justified by security concerns. Unlike the Fourth Amendment, article I, section 7 explicitly protects against intrusions into private affairs. Compare Katz, 389 U.S. at 350-51, with State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). Thus, “[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.” Katz, 389 U.S. at 351. Article I, section 7, however, “focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” Myrick, 102 Wn.2d at 511.

Generally speaking, pretrial detainees have a diminished expectation of privacy. Hudson v. Palmer, 468 U.S. 517, 524, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); State v. Puapuaga, 164 Wn.2d 515, 523, 192 P.3d 360 (2008). In certain circumstances, this privacy interest may evaporate altogether, for example as in the context of an inventory search. State v. Cheatam, 150 Wn.2d 626,

642, 81 P.3d 830 (2003) (holding that once police have conducted a valid inventory search of a pretrial detainee's effects, "the inmate has lost any privacy interest in those items that have already lawfully been exposed to police view"). This Court has recently reaffirmed, however, that in the analogous context of incursions upon the privacy of probationers and parolees, "this diminished expectation of privacy is constitutionally permissible only to the extent 'necessitated by the legitimate demands of the operation of the parole process.'" State v. Parris, __ Wn. App. __, __ P.3d __, 2011 WL 3454371 ¶14 (August 9, 2011).

This limitation upon government intrusion into prisoners' affairs extends into inspections of prisoners' mail. The United States Supreme Court addressed the question of to what extent law enforcement officials may intrude upon prisoners' mail at some length in Procunier v. Martinez, 416 U.S. 396, 413-14, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), overruled on other grounds by Thornburgh v. Abbott, 490 U.S. 401, 413-14, 109 S.Ct. 1874, 104 L.Ed.2d 409 (1989). In Martinez the Court stated,

One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task. The identifiable governmental interests at stake in this task

are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners. While the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation, the legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence. Perhaps the most obvious example of justifiable censorship of prisoner mail would be refusal to send or deliver letters concerning escape plans or containing other information concerning proposed criminal activity, whether within or without the prison. Similarly, prison officials may properly refuse to transmit encoded messages.

Martinez, 416 U.S. at 412-13.

In Washington, the opening of sealed mail is generally prohibited. RCW 9.73.020 (providing that opening of sealed letter intended for another person is a misdemeanor). RCW 9.73.095 permits law enforcement to monitor and intercept offender conversations, however by its plain terms the statute applies only to “telephone calls” and “monitored nontelephonic conversations” in spaces where convicted offenders may be present. RCW 9.73.095(1).

Washington’s only published opinion since Martinez that deals with the question of an inspection of a pretrial detainee’s outgoing mail is State v. Copeland, 157 Wn. App. 374, 549 P.2d 26,

rev. denied, 87 Wn.2d 1007 (1976). In that case, the Court of Appeals upheld a prison superintendent's interception and inspection of an inmate's letter to his stabbing victim. The superintendent testified "that he opened the letter because it was written by a suspect to a victim; that he knew that witnesses are influenced in their testimony by other inmates through duress, threat or otherwise; and it was his duty to rule out any possibility of further harm to the victim." Id. at 377. The Court ruled that "any communication from a suspect to a victim in a prison situation is highly suspect and demands the attention of prison officials." Id. at 378. The Court further found the inspection met the Martinez criteria of "furthering the substantial governmental interests of security, order and rehabilitation, and [was] unrelated to the suppression of expression." 157 Wn. App. at 379.

Chapter 137-48 of the Washington Administrative Code ("WAC") addresses the circumstance of inspection of incoming and outgoing mail from a correctional facility run by the Department of Corrections.⁴ While granting broad discretion to officials to inspect incoming and outgoing mail, the WAC makes clear that the

⁴⁴ The preamble to the chapter explains that the chapter's provisions apply to "adult prison facilities operated under the jurisdiction of the department of corrections." WAC 137-48-010.

overriding consideration in permitting such inspection is security. See WAC_138-48-010 (stating that the purpose of the rules is to “maintain the safety, security, and discipline” of adult prison facilities).

While affording jail and prison officials some measure of discretion, most legislation and decisional law from other jurisdictions concerned with inspection of an inmate’s outgoing mail similarly permit such inspection only when justified by security concerns. See e.g. Thornburgh, 490 U.S. at 411-12 (noting that outgoing personal correspondence does not categorically pose a greater threat to prison security, and remarking, “[a]lthough we were careful in Martinez not to limit unduly the discretion of prison officials to reject even outgoing letters, we concluded that the regulations at issue were broader than ‘generally necessary’ to protect the interests at stake”); McFarlin v. State, 409 Md. 391, 975 A.2d 862 (2009) (in case applying Fourth Amendment, acknowledging privacy interest, but finding that inmate confined in highest security penal institution who was required to submit his mail in unsealed envelope did not possess reasonable expectation of privacy); 28 C.F.R. §540.14(c)(1) (outlining limited

circumstances in which inspection of mail sent by inmate of low security institution may be permissible).⁵

b. The search here was not motivated by security concerns, and so required a warrant. In this case, Wenzl's search of Harris' mail was not prompted even by generalized security concerns. Wenzl simply recognized that Harris' case was a high-profile case and this led him to open and examine Harris' personal mail to people who in large part were unconnected to the charges. In contrast, in Copeland, the Superintendent immediately was able to discern from the address on the exterior of the envelope that the letter was being sent to the crime victim. Given the nature of the offense (a stabbing), this communication justifiably raised security concerns. As the superintendent testified, he was motivated by a desire to "protect [the victim's] life from further harm." Id. at 377. As discussed below, since the search was motivated purely by a

⁵ This section provides in pertinent part that mail may be sent unopened and uninspected except in the following circumstances:

- (i) If there is reason to believe it would interfere with the orderly running of the institution, that it would be threatening to the recipient, or that it would facilitate criminal activity;
- (ii) If the inmate is on a restricted correspondence list;
- (iii) If the correspondence is between inmates (see §540.17); or
- (iv) If the envelope has an incomplete return address.

desire to find evidence helpful to Harris' prosecution, it required a warrant.

c. The decision in Archie is not on point. The trial court relied principally on Archie, supra, to uphold the warrantless search and seizure of Harris' mail. But Archie is not on point.

Archie involved the interception and recording of outgoing telephone calls made by Archie while a pretrial detainee to the alleged victim, his ex-girlfriend. The Court conceded that RCW 9.73.095 by its plain terms does not apply to pretrial detainees, but concluded Archie's telephone calls were not "private affairs" protected by article I, section 7. 148 Wn. App. at 203-04. There were two bases for the Court's conclusion. First, the Court rejected the contention that pretrial detainees are entitled to heightened or different protections than individuals who have been convicted of a crime. The Court noted that the Washington Supreme Court has found "no invasion of privacy when other forms of inmate communications are inspected so long as inmates have been informed of that likelihood." Id. at 204 (citing State v. Hawkins, 70 Wn.2d 697, 425 P.3d 390 (1967)).

The Court failed to mention, however, that in Hawkins the letters "were placed in stamped, addressed, but unsealed

envelopes for inspection by the jail authorities before the envelopes were sealed.” 70 Wn.2d at 704 (emphasis added); see also State v. Grove, 65 Wn.2d 525, 527, 398 P.2d 170 (1965) (finding no privacy violation where “the appellant delivered the letter to a jail guard, unsealed, knowing that it would be censored under existing jail rules, and . . . the letter was stamped with a large ‘C’, indicating censorship”). Moreover, in Hawkins the letters were not used as substantive evidence but introduced only in the State’s rebuttal case “to show that the writer was mentally competent at the time of trial.” Id. at 705. Finally, Hawkins was decided prior to Martinez, and thus the Court did not apply the criteria outlined in that decision.

The Archie Court’s alternative basis for approving the admission of the telephone recordings under article I, section 7, was that one person had consented to the recording of the telephone calls. Specifically, after a warning that the call would be monitored and recorded, the call recipient had to press a button in order to continue with the call. Archie, 148 Wn. App. at 204.

Here, Harris delivered sealed letters to be mailed by jail staff. Although he may have had notice that the letters could be monitored, neither he nor the letters’ recipients consented to such

monitoring. The letters were not seized for security reasons, but to satisfy the curiosity of jail staff. The letters were "private affairs" within the meaning of article I, section 7 and Harris had a reasonable expectation of privacy under the Fourth Amendment. The letters should have been excluded.

3. The error was prejudicial. A constitutional error is only harmless if the State can prove beyond a reasonable doubt that the jury would have reached the same verdict absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot meet this standard here.

Harris raised self-defense to the charged assault. Even the alleged victim agreed that before he got stabbed it appeared that his friend Victor wanted to fight Harris and Harris was "just standing there." 5RP 76. The alleged victim was so drunk at the time of the incident that he did not remember if he hit Harris before Harris stabbed him. 5RP 78-79. Harris told his ex-wife and Rebecca Menges that he had been attacked by three to five men, and the first officer at the scene confirmed that there was a violent melee outside the bar. 4RP 78, 107-110; 5RP 50. Harris suffered injuries as a consequence of the incident.

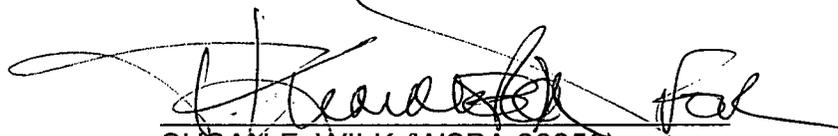
The letters confiscated by Wenzl suggested that Harris had something to hide, because they could be construed (and were construed by the State) as having been written with the intent to influence or suppress testimony. Thus, although the State bore the difficult burden of proving beyond a reasonable doubt that Harris did not act in self-defense, it is entirely likely that the jury dismissed their doubts on the basis of the letters. This Court should conclude that the admission of the letters prejudiced Harris.

E. CONCLUSION

David Harris' rights under article I, section 7 and the Fourth Amendment were violated when the court admitted into evidence his letters that were seized without a warrant or other lawful justification. Because the letters likely swayed the jury to convict, Harris' conviction should be reversed.

DATED this 18th day of August, 2011.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Susan F. Wilk", with a large, sweeping flourish extending to the right.

SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION TWO**

STATE OF WASHINGTON,)
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 v.)
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 DAVID HARRIS,)
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 Appellant.)

NO. 41712-0-II

STATE OF WASHINGTON
 COURT OF APPEALS
 DIVISION II
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|---|--|
| <p>[X] BRIAN WENDT
 ATTORNEY AT LAW
 CLALLAM COUNTY PROSECUTOR'S OFFICE
 223 E 4TH ST., STE 11
 PORT ANGELES, WA 98362</p> | <p>(X) U.S. MAIL
 () HAND DELIVERY
 () _____</p> |
| <p>[X] DAVID HARRIS
 345895
 CLALLAM BAY CORRECTIONS CENTER
 1830 EAGLE CREST WAY
 CLALLAM BAY, WA 98326</p> | <p>(X) U.S. MAIL
 () HAND DELIVERY
 () _____</p> |

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF AUGUST, 2011.

X _____ 

Washington Appellate Project
 701 Melbourne Tower
 1511 Third Avenue
 Seattle, Washington 98101
 ☎(206) 587-2711