

No. 42208-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Bruce Bratton,

Appellant.

Jefferson County Superior Court Cause No. 10-1-00109-9

The Honorable Judge Craddock Verser

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence obtained in violation of Mr. Bratton's Fourth Amendment rights.
2. The trial court erred by admitting evidence obtained in violation of Mr. Bratton's right to privacy under Wash. Const. Article I, Section 7.
3. The trial court erred by denying Mr. Bratton's motion to suppress evidence.
4. Mr. Bratton was unlawfully seized pursuant to an invalid arrest warrant.
5. The search incident to Mr. Bratton's arrest violated his state constitutional right to privacy and his federal constitutional right to be free from unreasonable searches and seizures.
6. The trial court erred by adopting Conclusion of Law No. 4.
7. The trial court erred by adopting Conclusion of Law No. 5.
8. The trial court erred by adopting Conclusion of Law No. 6.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A lawful custodial arrest is a constitutional prerequisite of any warrantless search incident thereto. In this case, Mr. Bratton was arrested pursuant to an invalid arrest warrant. Did the unlawful seizure and subsequent search violate Mr. Bratton's rights under the Fourth Amendment and Wash. Const. Article I, Section 7?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

After being convicted of a felony, Bruce Bratton was placed on Jefferson County's "pay or appear" program. The order placing him on the program directed him to make monthly payments; if he failed to make a payment, he was required to either telephone a woman named Lori Bailey before the second Friday of the following month, or appear in court on that second Friday. Order Placing Defendant on Pay or Appear Calendar (attachment to Motion to Suppress), Supp. CP.

Mr. Bratton made some payments on time, made some payments late, and missed some payments. The court did not hold a hearing or issue a warrant every time Mr. Bratton failed to make a payment. Findings of Fact and Conclusions of Law, Supp. CP. In fact, Mr. Bratton was only added to the court's review docket twice, despite six late or missed payments. Findings of Fact and Conclusions of Law, Supp. CP.

Mr. Bratton appeared in court at least one time, on August 21, 2009 (following service of an arrest warrant). Exhibits 4, 5, and 6 (attachments to Motion to Suppress), Supp. CP. At that hearing, a new order was entered, captioned "Order Re Pay or Appear." Exhibit 7 (attachment to Motion to Suppress). The August 2009 order reiterated that Mr. Bratton was not obligated to appear in court if he made payments. It

also noted that failure to pay could result in conversion of LFOs to jail time, or referral to a collection agency. Exhibit 7 (attachment to Motion to Suppress).

Mr. Bratton's case was also called on July 9th, 2010. No notice had issued prior to the hearing. The court called Mr. Bratton's case, and Lori Bailey reported as follows: "[H]is last payment was in May, and I move for a warrant in the amount of a thousand dollars." Exhibit 8, p. 2 (attachment to Motion to Suppress), Supp. CP. Ms. Bailey did not indicate whether or not Mr. Bratton had called her office prior to that day, and the court did not inquire. Nor did the court inquire about Mr. Bratton's financial circumstances, or the willfulness of his apparent violation. The court issued a warrant. Exhibit 8, p. 2 (attachment to Motion to Suppress), Supp. CP.

When Mr. Bratton was arrested on the warrant, police searched him and found methamphetamine. He was charged with Possession of Methamphetamine. CP 1-2; Findings of Fact and Conclusions of Law, Supp. CP.

Mr. Bratton moved to suppress the evidence, arguing that his arrest was unlawful because the warrant was invalid. Motion to Suppress (filed 9/30/10), Supp. CP; RP (2/4/11). The court denied his motion to suppress. Findings of Fact and Conclusions of Law, Supp. CP.

After a stipulated bench trial, Mr. Bratton was convicted and sentenced. He timely appealed, and his sentenced was stayed pending appeal. CP 3-11, 12; RP (6/7/11) 58.

ARGUMENT

THE ADMISSION OF EVIDENCE SEIZED FOLLOWING ARREST ON AN INVALID WARRANT VIOLATED MR. BRATTON’S RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). The legal validity of an arrest warrant is an issue of law, reviewed *de novo*. *State v. Erickson*, 168 Wash.2d 41, 45, 225 P.3d 948 (2010).

A trial court’s findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002).

- B. The state and federal constitutions prohibit warrantless searches absent an exception to the warrant requirement.

Under the Fourth Amendment to the U.S. Constitution,

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 private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. 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.² *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under both constitutional provisions, searches and seizures conducted without authority of a search warrant “are *per se*

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).

² Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

unreasonable...subject only to a few specifically established and well-delineated exceptions.”” *Arizona v. Gant*, 556 U.S. 332, ___, 129 S.Ct. 1710, 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. Eislefeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a search warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

One exception to the search warrant requirement is where the search is performed incident to arrest. The rationale behind the exception is that an arrest triggers a concern not only for the officer’s safety, but also for the preservation of potentially destructible evidence within the arrestee’s control. *Gant*, at ___; *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

A lawful custodial arrest is a constitutional prerequisite to any search incident to arrest. *State v. Grande*, 164 Wash.2d 135, 139-140, 187 P.3d 248 (2008). Where the arrest violates the Fourth Amendment or Article I, Section 7, the seized items must be suppressed as “fruits of the poisonous tree.” *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *State v. Glossbrener*, 146 Wash.2d 670, 685, 49 P.3d 128 (2002). This rule applies to evidence seized pursuant to execution of an invalid arrest warrant.³ *State v. Parks*, 136 Wash.App. 232, 240, 148 P.3d 1098 (2006).

- C. The warrant was invalid because Jefferson County’s Pay-or-Appear program violated Mr. Bratton’s Sixth and Fourteenth Amendment right to counsel.

The Court of Appeals has recently determined that an offender on Jefferson County’s Pay-or-Appear program is entitled to the assistance of counsel, because of the possibility of incarceration for nonpayment. *State v. Stone*, ___ Wash. App. ___, ___ P.3d ___ (2012). Individuals placed on the program are not provided counsel, and are not advised of their right to counsel, even when jail time is imposed. *Id.* Because of this, the program violates an offender’s Sixth and Fourteenth Amendment right to counsel.

³ Federal law, by contrast, provides an exception to the exclusionary rule where police rely in good faith on an invalid arrest warrant. *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995).

Id. The program has also been found to violate an offender's Fourteenth Amendment due process right, because no inquiry is made into the willfulness of an offender's nonpayment. *Id.*

Because Jefferson County's Pay-or-Appear program is unconstitutional, the warrant issued under that program was invalid. Accordingly, Mr. Bratton's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Nardone, at 341.*

D. The warrant was invalid because the issuing court lacked a well-founded suspicion that Mr. Bratton had violated the terms of his sentence.

A court may issue a bench warrant for a convicted felon who is on conditional release, but only if the court has a well-founded suspicion that the offender has violated the terms of release.⁴ RCW 9.94A.6333; *Erickson, at 50.*

In this case, the court issued a warrant in the absence of a well-founded suspicion that Mr. Bratton had violated the terms of his sentence. To show a violation of the Pay-or-Appear program, the government was required to establish that Mr. Bratton had not made his payments, that the failure to pay was willful, and that he had not called the program coordinator (Lori Bailey) prior to the second Friday of the month

⁴ An offender who has completed any post-release supervision may be entitled to even greater protection.

following his nonpayment. Order Placing Defendant on Pay or Appear Calendar (attachment to Motion to Suppress), Supp. CP; *see also Stone, at* ____.

At the hearing on July 9, 2010, Ms. Bailey told the court that Mr. Bratton had made his last payment in May, but she did not indicate—and was not asked—if he had called her office prior to that date. Exhibit 8, p. 2 (attachment to Motion to Suppress), Supp. CP. Nor did she provide any information on Mr. Bratton’s financial circumstances, or the willfulness of his failure to pay.

The court’s written findings on Mr. Bratton’s suppression motion did not include a finding regarding whether or not Mr. Bratton had called Lori Bailey prior to the hearing date. Nor did the findings indicate that the judge issuing the warrant had any information about the willfulness of Mr. Bratton’s failure to pay. Findings of Fact and Conclusions of Law, Supp. CP. In the absence of a finding on this issue, the state is presumed to have failed to sustain its burden. *Armenta, at 14; Byrd, at 265.*

Because the record doesn’t establish whether or not Mr. Bratton called Ms. Bailey prior to the hearing, the warrant was issued without a well-founded suspicion that he had violated the terms of the pay-or-appear order. Accordingly, the warrant was invalid. *Erickson, at 50.*

Mr. Bratton's motion to suppress should have been granted. His conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Nardone*, at 341.

E. The arrest warrant was invalid because its issuance was unreasonable under the circumstances.

The issuance of an arrest warrant must be reasonable, even when the warrant is for arrest of a person who has already been convicted of a felony. *Erickson*, at 48. In this case, the warrant was invalid, because it was issued under circumstances that were unreasonable.

First, Mr. Bratton was not given adequate notice of the date and time he was expected to appear. Instead, the notice upon which the government relied was conditional. Order Placing Defendant on Pay or Appear Calendar (attachment to Motion to Suppress), Supp. CP.

Rather than requiring Mr. Bratton to appear at a specific date and time, the pay-or-appear order—issued nearly 18 months before his missed court date—gave him three options, only one of which required his appearance in court. Order Placing Defendant on Pay or Appear Calendar (attachment to Motion to Suppress), Supp. CP. Furthermore, the required appearance was not on a specific date and time, but rather on the second Friday of the month following a missed payment, if he failed to call Ms.

Bailey.⁵ Order Placing Defendant on Pay or Appear Calendar (attachment to Motion to Suppress), Supp. CP.

Second, as the record indicates, the court did not hold a hearing or issue a warrant every time Mr. Bratton missed a payment. Findings of Fact and Conclusions of Law, Supp. CP. Given this pattern, it was unreasonable to issue a warrant when Mr. Bratton missed court on July 9, 2010. Instead, the court should have issued a summons, as permitted under RCW 9.94A.6333(2)(a).

Without proof that Mr. Bratton received notice that he was expected to appear on July 9, 2010, issuance of the warrant was unreasonable under these circumstances. *Erickson*, at 48. Accordingly, the motion to suppress should have been granted. Mr. Bratton's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Nardone*, at 341.

⁵ As trial counsel pointed out, this notice would have been inadequate to support a charge of bail jumping. Motion to Suppress, Supp. CP. See, e.g., *State v. Liden*, 118 Wash.App. 734, 77 P.3d 668 (2003); *State v. Cardwell*, 155 Wash.App. 41, 226 P.3d 243 (2010).

CONCLUSION

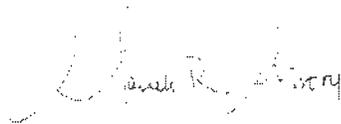
For the foregoing reasons, Mr. Bratton's conviction must be reversed. The evidence must be suppressed, and the case dismissed with prejudice.

Respectfully submitted,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Bruce Bratton
293367 Hwy 101
Quilcene, WA 98376

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Jefferson Prosecuting Attorney
prosecutors@co.jefferson.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 January 4, 2012.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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