

No. 46169-2-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

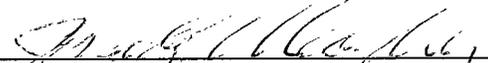
JASON R. DUNHAM,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. STATEMENT OF THE CASE

The defendant was charged, by Amended Information, with Possession of a Controlled Substance, methamphetamine, and Theft in the Third Degree. CP 21. These charges were a result of the defendant's arrest following a shoplift. CP 4-5. Prior to trial, the defendant moved to suppress the controlled substance retrieved from the backpack that was in his possession at the time of his detention. CP 6-18.

On January 29, 2013, Sergeant Gwen Carrell (Chehalis Police Department) was dispatched to K-Mart, in Chehalis, Washington. RP 4. When Carrell arrived, she spoke with the K-mart loss prevention employee, Jenny McCanlis. RP 5. McCanlis said that the defendant had been observed concealing three heart boxes of candy and a stylus.¹ RP 5. The defendant then walked out of K-Mart without paying for the merchandise. RP 5. McCanlis followed the defendant out of the store, confronted him, and walked with him back inside the store. RP 5.

Before Carrell arrived, McCanlis had "detained" the defendant in the backroom of the store. RP 5. Before Carrell

¹ This stylus was a pen-shaped object used for pointing on a computer touch screen.

arrived, McCanlis had searched the Defendant's backpack, and found three knives in the backpack. RP 5.

When Carrell arrived, McCanlis told Carrell that the defendant "...had several knives in his backpack." RP 5. Concerned because of the presence of the knives, Carrell placed the defendant in handcuffs and searched the defendant for knives or other weapons. RP 5. During the search of the defendant's person, Sergeant Carrell found two more knives. RP 6. The knives were of varying sizes. RP 6. Also recovered was an additional piece of stolen merchandise. RP 6. The defendant was placed under arrest for shoplifting. RP 7. The defendant had a backpack and another bag with him. RP 7. The officer's intent was to take the defendant to the Lewis County Jail. RP 7. Because the Lewis County Jail will not accept backpacks or other large items, the Chehalis Police Department places defendant's possessions in the police department's evidence room for safekeeping. RP 7.

At the time of the defendant's arrest, the Chehalis Police Department had an existing policy to inventory all bags placed in evidence. RP 7-8. This policy was the result of an evidence technician cutting herself on a knife that had been logged into evidence. RP 7-8. According to the policy, when property is

inventoried, an officer must go through it and make sure everything is safe for the evidence person that's going to receive it. RP 8. This is done in every case. RP 8.

Pursuant to this policy, and because the defendant was under arrest and going to be transported to the jail, the defendant's backpack was inventoried. RP 8. Everything was removed from the backpack except for the small locked area. RP 8. That area was gently patted down. RP 8. Sergeant Carrell "...could feel long cylindrical type objects with a different shape towards the end of it in the backpack." RP 8-9. Carrell did not squeeze the shape through the fabric because she did not want to cut herself if it was another knife. RP 8-9. When asked about the possibility of it being another knife, Sergeant Carrell replied "Absolutely." RP 9. Sergeant Carrell used a key from the defendant's property to unlock the lock and view the cylindrical item. RP 9. She discovered a butane torch, approximately eight inches long, a flashlight and a pipe with suspected methamphetamine residue. RP 9.

II. ARGUMENT

A. THE DEFENDANT WAS UNDER ARREST. THE SEARCH OF THE LOCKED PORTION OF THE DEFENDANT'S BACKPACK WAS PURSUANT TO A LAWFUL INVENTORY FOR PLACING THE BACKPACK IN SAFEKEEPING WHILE THE DEFENDANT WAS IN THE LEWIS COUNTY JAIL.

1. This Was An Inventory Search Pursuant To An Existing Police Department Policy.

The inventory was initiated after the defendant was under arrest and the officer had made the decision to take the defendant to jail. RP 7. The defendant's backpack was going to be securely stored in the Chehalis Police Department's evidence room while the defendant was in jail. RP 7-8.

Under the Fourth Amendment, once an inmate's property is taken from him and inventoried and placed in a property room, the inmate's expectation of privacy is substantially or entirely reduced to the point that no constitutionally protectable interest remains.

State v. Cheetam, 150 Wn.2d 626, 636, 81 P.3d 830 (2003).

"In accordance with the majority of courts addressing the issue under the Fourth Amendment, we hold that once an inmate's personal effects have been exposed to police view in a lawful inventory search and stored in the continuous custody of the police, the inmate no longer has a legitimate expectation of privacy in the items free of further governmental intrusion." *State v. Cheetam*, 150 Wn.2d at 638, (2003).

Applying this to Mr. Dunham's case, Dunham was under arrest. RP 7-8. Dunham was not yet actually in the jail, but the net effect on his expectation of privacy was the same. He could not leave the K-Mart back room. He was handcuffed. He could not access his backpack. He could not control his backpack. Because he could not access or control his backpack, the arresting officer became responsible for the backpack's safekeeping.

The fact that the backpack was to be stored in a locked evidence facility instead of at the jail is also indistinguishable. Both facilities are secured environments which are manned solely by police. The jail inmate has the same lack of access to his stored personal property, and therefore has the same lack of any privacy interest.

The Appellant may raise an issue regarding timing of the inventory. As quoted above, an inmate's personal effects must be "*stored in the continuous custody of the police...*" before being examined. (emphasis added) *State v. Cheetam*, 150 Wn.2d at 638, (2003). Applying this to Mr. Dunham, it makes no difference to this analysis if his backpack is inventoried at K-Mart or in the Chehalis Police Department evidence room. The backpack was in the continuous custody of the police the entire time, and the defendant

had no access to the backpack the entire time. His lack of expectation of privacy was the same, whether he was arrested in K-Mart or booked into the Lewis County Jail.

2. This Was Not A Search “Incident To Arrest.”

Sergeant Carrell testified she was conducting the search of the backpack for the items to be logged into temporary evidence for safekeeping. RP 7-8. Carrell states that she “had determined [she] was going to book Dunham into jail.” RP 7-8. It is after this statement that Sergeant Carrell indicates that she was searching Mr. Dunham’s bags to be “logged into temporary evidence.” RP 7-8. Had this been a search incident to arrest, there would be no reason for her to state she was going to book Mr. Dunham into jail.

Carrell also testified as to exactly why the knives would need to be retrieved from the backpack. RP 7-8. Again, a statement like this is not necessary if the search in question is justified as a “search incident to arrest.” Moreover, all of the items that Mr. Dunham was believed to have stolen had been recovered by the time Sergeant Carrell conducted the inventory search.

All of these factors, taken as a whole, clearly indicate that Sergeant Carrell’s search of Mr. Dunham’s backpack was conducted to effectuate an inventory, for the purpose of protecting

the police officers who would be handling and storing the backpack while the defendant was locked up in the county jail. Because the search in this case is an inventory, it was not a search incident to arrest.

3. When Balancing The Legitimate Safety Needs Of The Police Against The Defendant's Expectation Of Privacy, The Inventory Of The Backpack In This Case Was Reasonable.

The reasonableness of a search or seizure must be decided in light of the facts and circumstances of each case. *State v. Houser*, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980). Searches pursuant to a routine inventory are well-established exceptions to the warrant requirement. *Id.* Under article I, section 7, and the Fourth Amendment, police officers may search containers or packages as part of an inventory of the arrestee's possessions prior to storing the items for safekeeping. *Illinois v. Lafayette*, 462 U.S. 640, 643-48, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983); *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994).

Inventories, unlike other searches, are not conducted to discover evidence of a crime. *State v. Houser*, 95 Wn.2d at 153 (1980). Because of this, the criteria governing the property found during inventories are largely unrelated to the justifications for other

exceptions to the warrant requirement. *Id.* at 154. The three principal reasons for conducting an inventory are: 1) to protect the owner's property; 2) to protect the police against false claims of theft by the owner; and 3) to protect the police from potential danger. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). The protection of police from potential danger is the principal reason justifying the inventory of the backpack in this case.

Although routine inventory searches pursuant to standard police procedures are usually held to be reasonable, the direction and extent of such searches must be restricted to effectuating the purposes which justify their exceptions to the warrant requirement. *State v. Houser*, 95 Wn.2d 154 (1980). Because of this, the State must show that the search was conducted in good faith and was not simply a pretext for an investigatory search. *State v. Houser*, 95 Wn.2d 155 (1980).

A large majority of cases dealing with inventory searches involve the search of containers, locked or unlocked, within an impounded automobile. However, because the reasonableness of a search or seizure hinges on the particular facts of each case, inventory searches of items within automobiles are distinguishable because of their reliance on the item searched being located within

the impounded automobile. The inside of an automobile is always a constitutionally protected area. *State v. Valdez*, 167 Wn.2d 761, 768, 224 P.3d 751 (2009).

Objects that are inventoried that are not inside an automobile receive different scrutiny. The majority of cases cited by Mr. Dunham in his opening brief fall into the category of cases that rely on the inventory search of an item being located inside an automobile; for example: *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998). That case found that police were not permitted to search the locked trunk of an impounded vehicle, absent a manifest necessity for doing so. *State v. White*, 135 Wn.2d at 772 (1998). As a result, those cases, while illuminating, are not controlling. A backpack is not a car.

One case where there was an inventory search of an item that was actually processed for temporary storage is *State v. Dugas*, 109 Wn. App. 592, 36 P.3d 577 (2001). In *Dugas*, police received a report of a domestic violence incident and arrived at the scene just as the defendant was approaching his vehicle. *State v. Dugas*, 109 Wn. App. at 594 (2001). The police stopped the defendant to talk to him. The police gave Dugas permission to remove his jacket and place it on his vehicle. *State v. Dugas*, 109

Wn. App. at 594 (2001). The defendant was arrested shortly thereafter and transported to jail, but the jacket was left on the vehicle. *State v. Dugas*, 109 Wn. App. at 594 (2001). An officer who remained at the scene impounded the jacket and a subsequent search of it yielded contraband in a closed container found in the jacket pocket. *State v. Dugas*, 109 Wn. App. at 594 (2001).

The court of appeals ruled that the police exceeded the scope of an inventory search when they opened the closed container located in the pocket. *State v. Dugas*, 109 Wn. App. at 599 (2001). The court found that it was not reasonable for the police to search the contents of the closed container found in the jacket because the defendant was no longer present, he did not consent, and there were *no indications of dangerous contents*. (emphasis added) *State v. Dugas*, 109 Wn. App. at 599 (2001). From *Dugas*, one can conclude that if an item had a reasonable potential to pose a danger to police or others, an inventory search of that locked or closed container would be justified. Such is the situation in this case. The Court in *Dugas* also held that:

“Inventory searches are regularly upheld when they are conducted according to standardized police procedures which do not give excessive discretion to the police officers, and when they served a purpose other than discovering evidence of criminal activity.” *State v. Dugas*, 109 Wn. App. at 597 (2001), *citing*

Colorado v. Bertine, 497 U.S. 367, 373, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), and also citing *State v. Garcia*, 35 Wn. App. 174, 665 P.2d 1381 (1983).

Applying this rationale to Mr. Dunham, Sergeant Carrell's sole purpose in inventorying the locked portion of a cloth backpack was to verify whether or not something sharp was inside that would poke her or the Chehalis Police Department's evidence custodian. Carrell had already found multiple knives on the defendant's person. RP 6. The K-Mart loss prevention employee, Jenny McCanlis, had also found multiple knives in the unlocked portion of the backpack. RP 5. Carrell gently felt through the fabric. RP 8-9. She felt a long, cylindrical type object. RP 8-9. She did not "squish" it for fear that it might be another knife. RP 9. She unlocked the cloth pocket and viewed the contents to ensure that the object was not a knife. RP 9. Under the circumstances of this case, the inventory of the locked portion of the backpack was reasonable.

State v. Dugas cites to a Colorado case, *People v. Counterman*, found at 192 Colo. 152, 556 P.2d 481 (1976). *State v. Dugas*, 109 Wn. App. at 598 (2001). Counterman was also a knapsack case. *State v. Dugas*, 109 Wn. App. at 598 (2001). The Colorado court held that the contents were sealed, there was no indication of danger or other reasons for special inventory. *State v.*

Dugas, 109 Wn. App. at 598 (2001). This implies that if there had been an indication of danger, inventorying the pack to ensure officer safety would have been allowed.

III. CONCLUSION

Whether an inventory of a locked portion of a backpack is justified is decided by balancing the legitimate needs of the police (their safety in this case) against the right to be free of warrantless intrusions into one's personal effects. In Mr. Dunham's case, the officers' safety concerns about getting poked with sharp objects was completely justified by the officer's past experience, the existing policy, and the fact that multiple sharp objects (at least 5 knives) had already been found incident to the defendant's arrest. All of this supports the fact that Sergeant Carrell's inventory was based on her obedience to department policy and a genuine concern for her safety, and the safety of the evidence custodian. This was not a pretext to search for contraband. The Superior Court Ruling should therefore be upheld.

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RESPECTFULLY submitted this 16 day of January, 2015.

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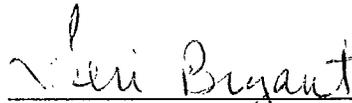
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DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 16, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Thomas E. Doyle, attorney for appellant, at the following email address: ted9@me.com.

DATED this 16th day of January, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

January 16, 2015 - 2:11 PM

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