

FILED
SEP 27 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

**COURT OF APPEALS DIVISION III OF THE STATE OF
WASHINGTON**

STATE OF WASHINGTON

v.

BEAU MEYERS

NO. 286631-III

APPELLANT'S BRIEF

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INTRODUCTION

Laws are not written, or interpreted to arrive at an absurd result. In the case of Mr. Beau Meyers such a result has occurred. Mr. Meyers ran out of gas. Subsequently his vehicle was impounded and a warrantless search of his vehicle took place. It is our argument that this search was unreasonable under any circumstances

STATEMENT OF THE CASE

On December 30th, 2009 Beau Meyers began his journey to work (RP__78). Unfortunately for Mr. Meyers he had forgotten to fill his tank with gas. He subsequently ran out of gas near a local law enforcement officer's home(RP__78,79). Mr. Meyers pulled his vehicle off of the roadway, and left to go get gasoline. Mr. Meyers has testified that he did not block a driveway, and that he was able to pull safely off of the

roadway (RP__79). Once off the road, Mr. Meyers left his vehicle to go get gasoline. Mr. Meyers recalls being away from his vehicle for a total of one half of an hour, or at a maximum 45 minutes (RP__80). Upon returning to his vehicle a police officer had searched his vehicle finding a substantial amount of Marijuana (RP__87).

In the interim a police vehicle arrived on scene, and a warrantless search took place. Interestingly enough the officer conducting the inventory testified that he did not put in his report that Mr. Meyer's vehicle was blocking a driveway, nor did he report that the vehicle was blocking the roadway. In fact he did not give a reason for the impound whatsoever (RP__57 to 58). There was scant evidence if any that the vehicle needed to be impounded. In fact the There was no evidence that the officer even made an effort to contact Mr. Meyers (as is required by statute)(RP__58).

ASSIGNMENT OF ERROR

The trial court erred in the Rule 3.6 motion to suppress evidence when it ruled that the warrantless search of Beau Meyer's vehicle was reasonable.

ISSUES PRESENTED

- 1) WHETHER THE SEARCH OF BEAU MEYER'S VEHICLE WAS REASONABLE UNDER A COMMUNITY CARETAKING FUNCTION?
- 2) WHETHER THE WARRENTLESS SEARCH OF BEAU MEYER'S VEHICLE WAS REASONABLE IN LIGHT OF THE FACT THAT NO STATE OFFICER COULD SHOW AN ARTICUABLE FACT TO JUSTIFY THE SEARCH?

ARGUMENT

The Washington State Constitution, in Article 1 Section 7 states:

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

This protection from Unlawful Searches has been interpreted to grant Washington Citizens “more vigorous” protection from unlawful searches than its federal counterpart *State v. Stroud*, 106 WN 2d 144 at 149 .

Further Courts have held that an individual has an established right to

privacy with regard to items inside the vehicle, and this would include a closed glove box.

“In *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980), we recognized that a person in possession of a vehicle has a legitimate expectation of privacy under article 1, section 7... This analysis also must be true of articles within the vehicle which also are not visible because, for example, they are in a suitcase or the glove compartment. Furthermore, this court also held in *SIMPSON* that the act of locking a car "manifests a subjective expectation of privacy which is objectively justifiable". *SIMPSON*, at 187. Thus additional privacy expectations must also result from locking articles within a container." *Stroud* quoting to *Simpson* *106 WN 2d 144 at 153*.

It is conceded that the cases of *Stroud* and *Simpson* are immediately distinguishable from the case at bar. In both cases the court was dealing with a search incident to arrest. In such cases the court would be seeking to strike a balance between legitimate privacy interests and the necessity of allowing officers to complete their tasks in safety. In the case of *Stroud* it was found that a warrantless search of a vehicle could be conducted for officer safety, or if there was a likelihood that evidence could be destroyed. *Id. at 154*. The court also stated that locked compartments could not be searched without a warrant. In the case *Mr. Meyers* there was simply no reason to impound the vehicle, let alone search it. The Vehicle had run out of gas, and there was virtually no probable cause to show that any crime whatsoever had been committed.

The officer could show no exigent circumstances with regard to Officer safety, and certainly there was an expectation of privacy with regard to the center console.

Washington Courts have held that an individual who is not subject to arrest is afforded an even greater expectation of privacy. It is well settled that a warrantless search may only occur under a very narrow set of circumstances and that “The State bears the burden to prove that one of the narrowly drawn exceptions to the warrant requirement validates the warrantless search”; *State v. Vierling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001).

It is also clear that the officer at the scene, according to his report did not even attempt to notify the registered owner of his intent to impound the vehicle. State law is very clear with regard to the requirements an officer should take when impounding a vehicle:

RCW 46.55.085

Law enforcement impound — Unauthorized vehicle in right-of-way.

(1) A law enforcement officer discovering an unauthorized vehicle left within a highway right-of-way shall attach to the vehicle a readily visible notification sticker. The sticker shall contain the following information:

- (a) The date and time the sticker was attached;
 - (b) The identity of the officer;
 - (c) A statement that if the vehicle is not removed within twenty-four hours from the time the sticker is attached, the vehicle may be taken into custody and stored at the owner's expense;
 - (d) A statement that if the vehicle is not redeemed as provided in RCW 46.55.120, the registered owner will have committed the traffic infraction of littering -- abandoned vehicle; and
 - (e) The address and telephone number where additional information may be obtained.
- (2) If the vehicle has current Washington registration plates, the officer shall check the records to learn the identity of the last owner of record. The officer or his department shall make a reasonable effort to contact the owner by telephone in order to give the owner the information on the notification sticker.
- (3) If the vehicle is not removed within twenty-four hours from the time the notification sticker is attached, the law enforcement officer may take custody of the vehicle and provide for the vehicle's removal to a place of safety. A vehicle that does not pose a safety hazard may remain on the roadside for more than twenty-four hours if the owner or operator is unable to remove it from the place where it is located and so notifies law enforcement officials and requests assistance.
- (4) For the purposes of this section a place of safety includes the business location of a registered tow truck operator.

At no time did the officer attach a sticker to the vehicle, nor did the officer wait the prescribed twenty four hours. Further, the vehicle did have current Washington Plates, and there is no indication that the officer made any effort whatsoever to attempt to contact the owner of the vehicle. Also

the officer was required to wait a prescribed 24 hours prior to impounding the vehicle. In this instance, by the officer's own report the vehicle had been vacant for a maximum of two hours, and by the Defendant's estimation one half hour. Either version is far short of the statutorily prescribed 24 hours. Therefore even the impoundment of the vehicle was improper.

It is long settled that those not currently under arrest are afforded an even greater expectation of privacy with regard to their vehicles. Washington case law places the burden upon the officer to show that the impoundment of the vehicle was reasonable, *State v. Hill*, 68 Wn. App. 300, 305, 842 P.2d 996, review denied,

The State wishes to rest its validity of the search upon the Community Care taking function. Nonetheless one would start from the position that warrantless searches are per-se unreasonable. The rule is that : "Generally, impoundment requires proper justification and must not be a "general exploratory search for the purpose of finding evidence of a crime" *State of Washington v. ferguson*, 131 WN App. 694, (2006) quoting to *State v. Montague*, 73 Wash. 2d 381, 385 (1968). Given the case at bar, the reason for the impoundment is disputed. Mr. Meyers states that he was only away from his vehicle for approximately one half hour. Yet the

Officer's present could not articulate a reason for a detailed search of Mr. Meyer's vehicle.

The crux of the appellant's argument can best be summarized by the quotation: " Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions" *Katz v. United States*, 389 U.S. 347, 352, (1967). Applying the facts above there can be no question that the officers in the case of Mr. Meyers conducted a warrantless search of Mr. Meyer's Vehicle.

It is important to note that Mr. Meyers was not suspected of any crime at the time his vehicle became stranded. One of the exceptions that had previously been widely accepted was one handed down by *Chimel v. California* 395 U.S. 752, (1962). The ruling *Chimel* could search a vehicle incident to arrest only the space within an arrestee's "immediate control" Meaning "the area from within which he might gain possession of a weapon or destructible evidence" *Id* at 752. The court should know that at the time this search was being conducted virtually no crime had occurred. There was no evidence presented that officer safety was at issue. In Fact, the defendant, Mr. Meyers was nowhere in sight. Therefore there was simply no chance that evidence could be destroyed, or that any individual

was in danger. Based upon the testimony of the officer, it is possible the officer placed himself in danger by searching the vehicle on a snowy road.

If one were to reason by analogy the rationale expressed by the United States Supreme Court in: *Arizona v. Gant*, 129 S.Ct. 1710 (2009) is the correct analysis for this court. *Gant*, specifically addresses a citizens interest in privacy specifically that which would apply to a vehicle: “A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.” *Id. at 1721*. In the case of Beau Meyers, the state is asking for just that, “unbridled discretion” *Id.* to search a vehicle absent evidence of a crime. To follow the state’s logic, Mr. Meyers would have to be arrested or suspected of a crime to exercise his fourth amendment rights.

In essence the Community Care taking search is intended to balance an individual's right of privacy when compared to the State's interest of being responsible for theft. The ruling in *Gant* is clear that an individual enjoys a far greater expectation of privacy, than under *Chimel*.

The State will likely cite to this Community Care taking function as was the case in *State v. Ferguson*, 131 Wash. App. 694. However such facts can be easily distinguished as in *Ferguson*, the police suspected the vehicle contained as mobile methamphetamine lab. It would be more proper to apply the rationale used in *State v. Grib*, 218 P.3d 644 (2009). The facts in *Grib* are indeed distinguishable from Mr. Meyers, as Mr. Grib was facing arrest. However, the state in *Grib* did try to assert its rights to a warrantless search under a community caretaking function. However the court concluded that such a search was indeed unreasonable because there was no facts in evidence to suggest that officer safety, or the possible destruction of evidence would be at issue, *Id at 645*.

CONCLUSION

The warrantless search of Beau Meyer's vehicle was unreasonable. To take the State's position would be to assert that an individual would need to be suspected of a crime in order to exercise any sort of expectation

of privacy in a vehicle. Current case law is in direct contravention of such an assertion.

Respectfully Submitted, this the 20th day of September, 2010

A handwritten signature in black ink, appearing to read "Mark D. Hodgson", written over a horizontal line.

Mark D Hodgson WSBA # 34176

Attorney for Beau Meyers

I declare under penalty of perjury of the laws of the State of Washington that I did deposit a true and correct copy of this the Appellant's brief in the United States Mail First Class to:

Deputy Prosecutor

215 S Oak St
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I swear that the Foregoing is true and Correct.


Mark D. Hodgson

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