

FILED

MAY 13 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 31000-1-III

BENTON COUNTY SUPERIOR COURT NO. 11-1-00669-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RODOLFO GALVAN,

Appellant.

REPLY BRIEF OF APPELLANT

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BRIEF OF APPELLANT
TABLE OF CONTENTS

TABLE OF AUTHORITIES
..... i

A. ARGUMENT
..... 1

1. *The warrantless search of the defendant was unlawful*..... 1

2. *The search of the locked compartments was unlawful as the search warrant failed to describe the items to be searched with sufficient particularity*..... 3

3. *The search of the locked compartments was unlawful as it exceeded the scope of the search warrant*..... 4

4. *State v. Monaghan is applicable to the case at hand*..... 9

5. *The statements made by Mr. Galvan were not made after a knowing, intelligent and voluntary waiver of his rights*..... 10

B. CONCLUSION
..... 12

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

McNabb v. Department of Corrections, 163 Wn. 2d 393, 180 P.2d 1257 (2008).....7

Seattle v. Gerry, 76 Wn.2d 689, 458 P.2d 548 (1969).....11

State v. Askham, 120 Wn.App. 872, 878, 86 P.3d 1224 (Div. 3 2004)..... 3-4

<i>State v. Athan</i> , 160 Wn.2d 354, 158 P.3d 27 (2007).....	7
<i>State v. Bailey</i> , 154 Wn.App. 295, 224 P.3d 852 (Div. 3, 2010).....	1
<i>State v. Boursaw</i> , 94 Wn. App. 629, 976 P.2d 130 (Div. 1, 1999).....	2
<i>State v. Campbell</i> , 166 Wn.App. 464, 272 P.3d 859 (Div. 3, 2011).....	8
<i>State v. Carner</i> , 28 Wn. App. 439, 624 P.2d 204 (Div. 2, 1981).....	2
<i>State v. Chrisman</i> , 100 Wn.2d 814, 676 P.2d 419 (1984).....	1
<i>State v. Collins</i> , 74 Wn.2d 729, 446 P.2d 325 (1968).....	11
<i>State v. Cotton</i> , 75 Wn.App. 669, 879 P.2d 971 (Div. 2, 1994).....	9
<i>State v. Cottrell</i> , 12 Wn.App. 640, 532 P.2d 644 (Div. 3, 1975) <i>reversed on other grounds</i> , 86 Wn.2d 130, 542 P.2d 771 (1975).....	5
<i>State v. Davis</i> , 73 Wn.2d 271, 438 P.2d 185 (1968).....	11
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	7
<i>State v. Haverty</i> , 3 Wn.App. 495, 475 P.2d 887 (Div. 1, 1970).....	11
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	7, 10
<i>State v. Johnson</i> , 77 Wn.App. 441, 892 P.2d 106 (Div. 3, 1995).....	7
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	7
<i>State v. McKenna</i> , 91 Wn. App. 554, 958 P.2d 1017 (Div. 2, 1998).....	2
<i>State v. Monaghan</i> , 165 Wn.App. 782, 266 P.3d 222 (Div. 1, 2012).....	9
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	6
<i>State v. Perrone</i> , 119 Wn.2d 538, 834 P.2d 611 (1992).....	4
<i>State v. Simonson</i> , 91 Wn.App. 874, 960 P.2d 955 (Div. 2, 1998).....	8

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997).....4

State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999)..... 3

State v. Walker, 136 Wn.2d 678, 965 P.2d 1079 (1998).....1

State v. White, 97 Wn.2d 92, 640 P.2d 1061, (1982)..... .6, 7

Other Jurisdictions

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 29 L.Ed,2d 619, 91 S.ct. 1999 (1971)..... 4-5

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969)..... 2

Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, (1971).....3-4

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).....10-11

U. S. v. Heldt, 215 D.C. App. 206, 668 F.2d 1238, 1257, *cert. den.* 456 U.S. 926, 72 L.Ed.2d 440, 102 S.Ct. 1971(1981)..... .6

U.S. v. Romero-Bustamente, 337 F.3d 1104, 1107 (9th Cir. 2003).....8

Constitutional Provisions

United States Constitution, Amend IV.....4-7

Wash. Const. Article I, Section 7..... 6-7, 9

A. ARGUMENT

1. *The warrantless search of the defendant was unlawful*

The State misunderstands the appellant's argument: "[t]he argument appears to be that Trooper Brandt never arrested the defendant, and thus the search incident to arrest was invalid." Respondent's Brief, p. 6. The appellant has consistently presented two distinct alternative bases for our assertion of the ultimate conclusion that the warrantless search of Mr. Galvan's person was unlawful. The first was that in the event the court were to find he was not placed under arrest by Trooper Brandt prior to the search, it would have exceeded the permissible scope of a *Terry* "pat down." The second, is that the arrest of Mr. Galvan was non-custodial and therefore the search was unlawful. Appellant set forth both theories to ensure that all possible arguments were preserved on appeal.

Though it is listed as a finding of fact that Mr. Galvan was arrested by Trooper Brandt, CP 103, it is also clear that in determining whether police have seized an individual is a mixed question of law and fact. *State v. Bailey*, 154 Wn.App. 295, 299, 224 P.3d 852 (Div. 3 2010). Further, as there is no doubt the search of Mr. Galvan's person was warrantless, it was "per se" unreasonable. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998); *State v. Chrisman*, 100 Wn.2d 814, 818, 676 P.2d 419 (1984). A search incident to a lawful arrest is

a recognized exception to the warrant requirement. *State v. Boursaw*, 94 Wn. App. 629, 632, 976 P.2d 130 (1999). However, the only legitimate purposes of such a search are to look for weapons and to prevent the destruction of evidence. *Chimel v. California*, 395 U.S. 752, 763 (1969); *State v. McKenna*, 91 Wn. App. 554, 560-61, 958 P.2d 1017 (1998). Furthermore, the right to conduct a search incident to arrest ends the moment the officer decides to release the arrestee rather than book him into jail. *McKenna*, 91 Wn. App. at 561-562; *See also, State v. Carner*, 28 Wn. App. 439, 445, 624 P.2d 204 (1981).

Both the timing and the nature of the arrest play important roles in determining the validity of the search. *McKenna*, 91 Wn. App. at 560-562. If the officer never manifests an intention to make a custodial arrest, there can be no search incident to arrest. *See McKenna*, 91 Wn. App. at 562. The State and the Appellant clearly have a disagreement as to the meaning of *McKenna*, for when the Appellant reads the excerpt provided in the Respondent's Brief, it would appear to apply directly to the case at hand and would seem to support Appellant's argument:

Although an officer may search incident to a lawful custodial arrest, he or she may not search incident to a lawful *non* custodial arrest. It is thought that the officer and arrestee will be in close proximity for only a few minutes, and the arrestee, who is about to be released anyway, will have little motivation to use a weapon or destroy evidence. The officer may pat the arrestee for weapons if he or she reasonably suspects the arrestee is armed.

McKenna, 91 Wn. App. at 561. Clearly, the guidance of the Appellate Court is

needed to resolve this issue.

In this case, it is clear from the context that Trooper Brandt had no intentions of taking Mr. Galvan to jail. If the smell of marijuana alone was sufficient to arrest him and take him to jail¹, after a search of his person resulted in no marijuana being found, he still could have been taken to jail. By not booking Mr. Galvan, Trooper Brandt made his intentions clear, he wanted what was in the vehicle and had no desire to book Mr. Galvan in jail or have anything more than a brief interaction with him to interrogate him and discover incriminating evidence. Further, the search could not have been justified on the basis of officer safety as there was absolutely no indication that Trooper Brandt had any safety concerns about Mr. Galvan. The search of Mr. Galvan was unlawful and the trial court erred in concluding otherwise.

2. *The search of the locked compartments was unlawful as the search warrant failed to describe the items to be searched with sufficient particularity*

The Constitution does not condone general exploratory searches. *State v. Thein*, 138 Wn.2d 133, 149, 977 P.2d 582 (1999). *State v. Askham* states:

The purpose of the particularity requirement is to prevent the State from engaging in unrestricted “exploratory rummaging in a person's belongings” for any evidence of any crime. *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The description of the items to be seized should

¹ The argument could also be made that given the recent de-criminalization of marijuana in this state, the smell of marijuana alone no longer justifies this type of intense intrusion into an individual's privacy.

leave nothing to the executing officers' discretion. *United States v. Hurt*, 795 F.2d 765, 772 (1986), *amended on denial of reh'g*, 808 F.2d 707 (9th Cir.1987). The officers should be able to "identify the property sought with reasonable certainty." *Stenson*, 132 Wn.2d at 692, 940 P.2d 1239. *State v. Askham*, 120 Wn.App. 872, 878, 86 P.3d 1224 (2004). The

description of the items sought in the search must be as specific as circumstances permit. *State v. Stenson*, 132 Wn.2d 668, 692 940 P.2d 1239 (1997). "The use of a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues." *State v. Perrone*, 119 Wn.2d 538, 547, 834 P.2d 611 (1992). In this case it is obvious that the description should have, and could have been more specific and particular as Trooper Brandt is obviously capable of writing exceptionally descriptive warrants, as evidenced by the warrant he originally wrote but did not read to the issuing magistrate. 05/31/12 RP 15-17; CP 104. There was no excuse for the Trooper to fail to include a more definite description of the items to be searched. His failure to do should have resulted in suppression.

3. ***The search of the locked compartments was unlawful as it exceeded the scope of the search warrant.***

The scope of a search pursuant to a warrant is strictly limited to the command of the warrant. As stated by the United States Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394 n. 7, 29 L.Ed,2d 619, 91 S.ct. 1999 (1971): "[T]he Fourth Amendment confines an officer executing a search

warrant strictly within the bounds set by the warrant. *Accord, State v. Cottrell*, 12 Wn.App. 640, 643, 532 P.2d 644 (1975) *reversed on other grounds*, 86 Wn.2d 130, 542 P.2d 771 (1975):

As a general rule search warrants must be strictly construed and their execution must be within the specificity of the warrant. This is true, despite the preference of the law for warrants, because a

search beyond the scope of the warrant is a warrantless search:

Although it would appear that a search made under the authority of a search warrant may extend to whatever is covered by the warrant's description, provided that such description meets the requirement of particularity, the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, and he must comply strictly with all the directions contained in it. Search warrants must be strictly construed, and the fact that persons are commissioned officers and armed with a warrant to enter premises confers on them no exemption from the mandates of the Constitution and laws or from the established rules for proceeding in executing and returning the warrant.

Although searches under a warrant are to be preferred to warrantless searches, the predilection of the law for searches made under a warrant is valid only if the searches are conducted according to law and according to the mandates of the warrants themselves. A search that is not so conducted, even though it purports to be done under a warrant, is a misuse of the statutory, if not of the constitutional, process; the warrant in such a case effects a deceptive assertion of authority upon the person on whom it is served and purportedly gives an undeserved protection to the officer.(Footnotes omitted.)

68 Am.Jur.2d Searches and Seizures, Sec. 107 at 761-62 (1973) cited with approval in *State v. Cottrell, supra* at 644.

The rationale behind the rule, at least in terms of Fourth Amendment analysis is adequately summarized by the court in *United States v. Heldt*, 215 D.C. App. 206, 668 F.2d 1238, 1257, *cert. den.* 456 U.S. 926, 72 L.Ed.2d 440, 102 S.Ct. 1971(1981):

When investigators fail to limit themselves to the particulars in the warrant, both the particularity requirement and the probable cause requirement are drained of all significance as restraining mechanisms, and the warrant limitation becomes a practical nullity. Obedience to the particularity requirement both in drafting and executing a search warrant is therefore essential to protect against the centuries-old fear of general searches and seizures.

Art. 1, Section 7 of the State Constitution forbids invasion of privacy by the agents of the state “without authority of law,” and actually enhances Fourth Amendment protection in the State of Washington “in that it clearly recognizes an individual’s right to privacy with no express limitations.” *State v. White*, 97 Wn.2d 92, 640 P.2d 1061, 1071(1982). A search which exceeds the scope of the warrant is in effect a warrantless search and therefore “without authority of law” under the Washington Constitution.

As such, Appellant must respectfully disagree with the State regarding the necessity of a *Gunwall* analysis. It is “axiomatic” that Article 1, Section 7, provides stronger protection to an individuals 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 1, section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *McNabb v. Department of Corrections*, 163 Wn. 2d 393, 180 P.23d 1257 (2008) (concluding it is unnecessary to engage in a *Gunwall* analysis where prior caselaw establishes a State Constitutional provision has an independent meaning from the corresponding federal provision, and reaffirming that no *Gunwall* analysis is therefore required under Article 1, Section 7); *State v. Athan*, 160 Wn.2d 354, 365, 158 P.3d 27 (2007) (noting it is “well-settled” that Article 1, Section 7 “qualitatively differs” from the Fourth Amendment and in some areas provides greater protections than the federal provision, and therefore, a “*Gunwall* analysis is unnecessary to establish the Court should undertake and independent constitutional analysis”); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Article 1, Section 7 protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *State v. Ladson*, 138 Wn.2d 343, 348-349, 979 P.2d 833 (1999). Freedom from intrusion into locked containers, even those located in a vehicle, is one such “privacy interest.” The State Constitution grants locked containers additional protections and therefore more specific authority to search such containers is required. *State v. Johnson*, 79 Wn.App. 441, 446, 892 P.2d 106 (1995) (the use of a lock demonstrates the individual expectation of privacy).

The case at hand is distinguishable from *State v. Campbell*, 166

Wn.App. 464, 272 P.3d 859 (2011). Officers in *Campbell* requested permission to search the entire “vehicle and all of its contents.” *Id* at 469, 474. In the case at hand, this broad and encompassing wording was never used on the affidavit requesting a search warrant. Additionally, in *Campbell* the court does not at any point refer to the particularity requirement or the specificity requirement at issue in this case. In fact, the court in *Campbell* characterized the issue before it as “whether officers also had the authority to deny Ms. Campbell access to her purse left in the vehicle while the warrant was sought.” *Id* at 472. Despite these distinguishing characteristics between *Campbell* and the case at hand, perhaps the most obvious distinguishing fact is that a purse, specifically connected to a controlled drug buy, is distinguishable from a locked glove box requiring a key to access or padlocked container requiring wire-cutters to open.

The State also cites to *U.S. v. Romero-Bustamente*, 337 F.3d 1104, 1107 (9th Cir. 2003) but this case does not address the Washington Constitution which has been found to grant a greater privacy to locked containers. *State v. Simonson*, 91 Wn.App. 874, 960 P.2d 955 (1998). In fact, *Romero-Bustamente* does not specifically address locked containers at all. Based on the case-law previously outlined, it appears that when an individual takes the additional step to lock a container, this creates an extra level of privacy requiring additional specificity to search.

The Troopers therefore exceeded the scope of the warrant by searching the

locked glove box and the padlocked container² and the trial court erred in failing to grant Mr. Galvan's motion to suppress.

4. *State v. Monaghan is applicable to the case at hand.*

"Exceeding the scope of consent is equivalent to exceeding the scope of a search warrant." *State v. Cotton* 75 Wn.App. 669, 680, 879 P.2d 971 (1994). It is only logical that the reverse of this statement is true; an examination of the scope of consent is applicable to the examination of the scope of the warrant. Consider the following: the authority conferred by a magistrate through a search warrant acts essentially as that magistrate's "consent" to search those items delineated in the warrant and based upon probable cause. To exceed those explicit boundaries is to exceed the "consent" given by the court to search. In both cases the "authority of law" required to pass constitutional muster under Article 1, section 7 is granted by consent to search, the individual granting the authority may be different, but the principle is not.

In the instant case the affidavit for the warrant does not state with particularity that locked containers within the vehicle are subject to search. 05/31/12 RP 12; CP 74-75. The search warrant itself may contain these particular specifics but those specifics had to be excised from the warrant on the basis that Trooper Brandt did not put that information in the affidavit and therefore it was

² The State in its response, limits its argument to the lawfulness of the locked glove-box. It does not present any argument to Appellant's assertion that the search of the padlocked container was unlawful and therefore appellant assumes they concede this point.

never approved by Judge Kathryn who telephonically agreed to significantly different search parameters. 05/31/12 RP 12-15; CP 104. The search of the locked glove compartment and the padlocked case violated the Washington Constitution and the evidence discovered therein must be suppressed.

5. The statements made by Mr. Galvan were not made after a knowing, intelligent and voluntary waiver of his rights.

The State again appears to misunderstand the Appellant's argument. The Appellant contends that the trial court erred in reaching the conclusion of law that Mr. Galvan's statements were admissible. CP. 104. There are no findings of fact stating that Mr. Galvan gave a lawful waiver of his rights or verbally agreed to speak with Trooper Brandt. Therefore, the appropriate standard of review is de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). The Appellant cites to Mr. Galvan's affidavit, which was presented as evidence at the suppression hearing, *because* it does not discuss the reading of rights to Mr. Galvan. This is because Mr. Galvan was never given an opportunity to respond regarding these rights.

Under *Miranda*, the state must show that warnings concerning the defendant's constitutional rights were first given, second, that the statements were voluntarily made and third, that the defendant waived his rights to remain silent. *State v. Haverty*, 3 Wn.App. 495, 498, 475 P.2d 887 (1970). See *State v.*

Davis, 73 Wn.2d 271, 438 P.2d 185 (1968); *Seattle v. Gerry*, 76 Wn.2d 689, 458 P.2d 548 (1969); *State v. Collins*, 74 Wn.2d 729, 446 P.2d 325 (1968).

Trooper Brandt testified that his narrative regarding the stop and investigation of Mr. Galvan was written shortly after the incident itself, within a day or two after. 05/31/12 RP 19. He testified that the reason behind doing so is because his recollection at the time of the report was better than it was in court, over a year after the initial stop. 05/31/12 RP 19. Trooper Brandt also testified that he has been trained to include details about all relevant and important information in his reports, for this very reason. 05/31/12 RP 19.

However, Trooper Brandt testified that he did not include any information about Mr. Galvan acknowledging his rights after they were read to him in his report. 05/31/12 RP 19. Both the report and the affidavit given by Trooper Brandt states only that he “read Mr. Galvan his Constitutional rights from an issued rights card.” 05/31/12 RP 19; CP 74-75 & 79-80. It is completely illogical, and likely against State Patrol training, for a Trooper to write a very detailed and complete report but leave out an exceptionally important detail such as waiver of constitutional rights but then fill in the holes over a year after the event. Trooper Brandt stops hundreds of cars a year. There is a reason why law enforcement officers are trained to put important details such as waivers of rights, in their reports.

It appears that immediately after reading Mr. Galvan his rights, Trooper

Brandt began interrogating him with questions designed to elicit incriminating responses. 05/31/12 RP 19; CP 74-75 & 79-80. Mr. Galvan's actions clearly indicated he did not wish to speak with Trooper Brandt. He would not look at the trooper, he avoided responding and when the Trooper continued to barrage him with questions he would give minimal responses. 05/31/12 RP 7, 9 10; CP 79-80 The trooper characterized these responses as the defendant being evasive or untruthful, but it was clear even to him that the defendant didn't want to answer his questions. *Id.* The State failed to carry their burden at the hearing and therefore the court erred in denying the defendant's motion to suppress these statements.

B. CONCLUSION

The trial court erroneously admitted evidence obtained in violation of the Washington Constitution as well as the United State Constitution. Based on the forgoing, Mr. Galvan respectfully requests that this Court reverse his convictions and remand.

May 10, 2013

Respectfully submitted,
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PROOF OF SERVICE

I, Michelle Trombley, being over the age of 18, hereby declare that on the 4th day of January, 2013, I caused a true and correct copy of the Appellant's Reply Brief – No. 310001 to be served on the following in the manner indicated below:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 10 day of May, 2013

By: 
Michelle Trombley, WSBA 42912