

SUPREME COURT NO. 80113-4

IN THE SUPREME COURT  
OF THE STATE OF THE WASHINGTON

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STATE OF WASHINGTON,

Respondent

vs.

DENNIS RAY KIRWIN,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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Court of Appeals No. 33642-1-II  
Appeal from the Superior Court for Thurston County  
The Honorable Gary R. Tabor, Judge  
Cause No. 05-1-00165-1

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A. IDENTITY OF PETITIONER

Your Petitioner on discretionary review is DENNIS RAY KIRWIN, the Defendant and Appellant in this case.

B. ISSUE PRESENTED FOR REVIEW

Whether the State failed to satisfy his burden of proof that the warrantless search was valid under the recognized incident-to-lawful arrest exception?

D. STATEMENT OF THE CASE

On March 13, 2006, Kirwin filed a brief alleging error in regards to the above-indicated issue. The brief sets out facts and law relevant to this petition and is hereby incorporated herein by reference.

E. ARGUMENT

THE STATE FAILED TO SATISY ITS BURDEN OF PROOF THAT THE WARRANTLESS SEARCH WAS VALID UNDER THE RECOGNIZED INCIEN-TO-LAWFUL ARREST EXCEPTION.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and Art. 1, sec. 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Exceptions

to the warrant requirement are narrowly drawn and jealously guarded.

State v. Parker, 139 Wn.2d at 496; State v. Hendrickson, 129 Wn.2d at 71.

Generally, the burdens of production and persuasion rest upon the movant in a suppression hearing. United States v. De La Fuente, 548 F.2d, 533 (5<sup>th</sup> Cir.), *cert. denied*, 431 U.S. 932, 97 S. Ct. 2640, 53 L. Ed. 2d 249 (1977), and *cert. denied*, 434 U.S. 954, 98 S. Ct. 479, 54 L. Ed. 2d 312 (1997). However, if a defendant produces evidence that a search was conducted and evidence seized without a warrant, the burden shifts to the [State] to justify the warrantless search and seizure. Id.; United States v. Pena, 961 F.2d 333, 338-39 (2<sup>nd</sup> Cir. 1992).

Here, Kirwin established his burden of production, albeit on appeal, that the search and ultimate seizure of incriminating evidence at issue was conducted without a warrant. Thus, the burden of persuasion was upon the State to establish a valid exception to the warrant requirement.

One exception to the warrant requirement is a search incident to a lawful arrest. [Emphasis added]. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The authority for this flows directly from the fact of the arrest itself and the simultaneous lessening of the arrestee's privacy interest. State v. White, 44 Wn. App. 276, 278, 722 P.2d 118, *reviewed denied*, 107 Wn.2d 1006 (1986) (once arrested there is a diminished

expectation of privacy in the person of the arrestee). It is well settled that under Art. 1, sec. 7 of the Washington Constitution, “the search incident to arrest exception to the warrant requirement is narrower than under the Fourth Amendment.” State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

Kirwin, mindful of this authority, has consistently argued that the arrest of his passenger for “littering” was unlawful under RCW 70.93.060(2) and RCW 7.80.120(c) as “littering” is not an arrestable offense, thus any evidence seized was inadmissible. Kirwin went further, mindful of his burden of production, by meticulously arguing that Kirwin had automatic standing to argue the rights of his passenger (the arrest was unlawful) under State v. Jones, 146 Wn.2d 328, 331-34, 45 P.3d 352, *review denied*, 149 Wn.2d 1029 (2003); that a sufficient record existed to decide the issue presented despite the lack of a suppression hearing below (the evidence would be exactly the same had there been a suppression hearing) under State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998), and State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); and that any failure to bring this issue before the trial court constituted prejudicial ineffective assistance of counsel under State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994) and

State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, *cert. denied*, 116 S. Ct. 131 (1995) (acknowledging the Strickland test even where invited); *see also* State v. Nichols, 161 Wn.2d 1, 10, 162 P.3d 1122 (2007), *citing* State v. Grief, 141 Wn.2d 910, 924, 10 P.3d 390 (2000) (a claim of ineffective assistance of counsel can be considered for the first time on appeal even where the issue raised involves a suppression issue not presented to the trial court). Kirwin concluded by arguing given the unconstitutional search and seizure all subsequently uncovered evidence became fruit of the poisonous tree that should have been suppressed under State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999), and Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

The State's response to these arguments was to cite to the Olympia Municipal Code, OMC 9.40.110, OMC 9.64.101, and RCW 10.31.100. Tacitly accepting its burden of persuasion on the issue but apparently failing to recognize the extent of that burden—the State failed to present any argument establishing that the Olympia Municipal Code provisions “trumped,” was not unconstitutionally in conflict with, the authority provided by Kirwin.

At oral argument, Kirwin reminded Division II of the State's burden by arguing that the State had not and could not carry its burden by merely citing an Olympia Municipal Code without any argument as to

why the code “trumped” the constitutional, caselaw, and statutory authority provided by Kirwin given the constitutional mandates of Washington Constitution Art. XI, sec. 11 (any county, city, town or township may make and enforce within its limits all such local police sanitary and other regulations as not in conflict with general laws [Emphasis added]) and Division II’s own precedent, Chaney v. Fetterly, 100 Wn. App. 140, 150, 995 P.2d 1284 (2000) (where a local ordinance cannot be harmonized with a conflicting statute, the statute prevails). Simply stated the statute and the municipal code cannot be harmonized, they are irreconcilable, given one allows an arrest for “littering” and the other does not.

Division II ruled against Kirwin and review was sought and obtained.

Now that review has been granted the State has proffered two arguments as to why it satisfied its burden of persuasion on the issue presented and should prevail—1) the Olympia Municipal Code “trumps,” is not unconstitutionally in conflict with, the state statute; and 2) even if the Olympia Municipal Code does not “trump” the state statute, the officer’s “good faith” reliance on the code prevails. Neither of these arguments should succeed.

First, the Olympia Municipal Code does not “trump” the statute. The code is unconstitutionally in conflict with the state statute. Under Article XI, section II of the Washington Constitution prohibits (any county, city, town or township may make and enforce within its limits all such local police sanitary and other regulations as not in conflict with general laws [Emphasis added]). Under all authority presented, by both the State and Kirwin, where a local ordinance cannot be harmonized, is irreconcilable, with a conflicting statute, the statute prevails. *See e.g. Chaney v. Fetterly*, 100 Wn. App. 140, 150, 995 P.2d 1284 (2000); *Rabon v. City of Seattle*, 135 Wn.2d 278, 957 P.2d 621 (1998); *Tacoma v. Luvane*, 118 Wn.2d 826, 827 P.2d 1374 (1992). Unconstitutional conflict is found where an ordinance permits that which is forbidden by state law, or prohibits that which state law permits. *See Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 269, 877 P.2d 187 (1994).

What could be more irreconcilable than a statute proclaiming an act is not an arrestable offense and a code proclaiming the same act is an arrestable offense? The State’s argument that the Olympia Municipal Code “trumps” the state statute does not survive careful scrutiny because the two cannot be reconciled. The code allows something—a warrantless arrest for “littering”—that the statute prohibits. The State failed to satisfy its burden of establishing the warrantless search was valid under the

recognized exception to the warrant requirement of incident-to-lawful arrest with the result that this court should reverse and dismiss Kirwin's conviction.

Second, the State argues that even if the state statute "trumps" the code, "littering" was not in fact an arrestable offense, then the officer's "good faith" reliance on the code allowing for the warrantless arrest and the subsequent warrantless search was justified under the incident-to-lawful arrest exception citing State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006). Again, the State's argument fails.

In Potter, this court upheld the defendants' convictions because officers had probable cause to believe the defendants were DWLS thus their arrest and subsequent search incident to arrest were valid even though a prior decision by the court had determined that some of the procedures by which DOL determined a person to be DWLS were unconstitutional. However, Potter did not involve a conflict between two laws and never addressed the issue presented here. In the instant case, it is not a question whether the officer had probable cause to believe "littering" occurred; the question presented involves whether the officer had authority to arrest for "littering" and to conduct a warrantless search incident to that arrest given that the statute makes "littering" a nonarrestable offense while the code does not.

Nor is this is a question of vagueness wherein an officer's reliance on a statute/code will be upheld so long as the statute/code is not "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." State v. Potter, 156 Wn.2d at pp. 842-843. In fact, this court has not adopted the "good faith" exception to the warrant requirement. *See* State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982) (no good faith exception for arrests made under unconstitutional statute); State v. Chenoweth, 160 Wn.2d 454, 472-473, 158 P.3d 595 (2007) (acknowledging that Washington has not adopted a "good faith" exception to the warrant requirement even though not necessary for the disposition of the case before the court).

When all is said and done, the issue remains as it always has—did the State satisfy its burden of establishing the recognized exception to the warrant requirement of a search incident-to-lawful arrest. Kirwin submits that the State has failed in its burden below and before this court.

F. CONCLUSION

For the reasons set forth above, this court should reverse and dismiss Kirwin's conviction for unlawful possession of a controlled substance as the State failed to meet its burden of establishing that the warrantless search was valid under the recognized incident-to-lawful arrest exception.

DATED this 27<sup>th</sup> day of February 2008.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 27<sup>th</sup> day of February 2008, I delivered a true and correct copy of the Supplemental brief of Petitioner to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 27<sup>th</sup> day of February 2008.

Patricia A. Pethick  
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