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CLERK OF SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. _____
COA No. 57568-6-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICAH TIBBLES,

Appellant.

PETITION FOR REVIEW

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STATE OF WASHINGTON
JUN 20 2007 11:09 AM

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A. IDENTITY OF MOVING PARTY

Petitioner Micah Tibbles, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Mr. Tibbles seeks review of the Court of Appeals unpublished decision in State v. Tibbles, (Slip Op. filed May 21, 2007). A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

The trial court admitted evidence gained during the prearrest, warrantless search of a vehicle. The officer smelled marijuana at the vehicle, yet there was no threat to officer safety.

Did the search violate article 1, section 7 of the Washington

Constitution and conflict with State v. O'Neill?

D. STATEMENT OF THE CASE

1. Underlying Facts. On an October evening in 2004, Micah Tibbles was driving a vehicle in Island County. Memorandum Decision of Island County District court, attached Appendix B at 2. Trooper Larsen observed that Mr. Tibbles' vehicle had a defective left taillight and stopped him. *Id.* Trooper Larsen contacted Mr. Tibbles at the driver's side of the vehicle and requested his driver's license, vehicle registration, and proof of insurance. *Id.* Mr. Tibbles

produced a license but was unable to produce registration or proof of insurance. *Id.*

While speaking with Mr. Tibbles, Trooper Larsen smelled the odor of marijuana coming from the vehicle. *Id.* Trooper Larsen then asked Mr. Tibbles to step out of the vehicle. *Id.* He did not arrest Mr. Tibbles at this time. *Id.* When Trooper Larsen relayed his observation regarding the odor to Mr. Tibbles, Mr. Tibbles denied possessing any marijuana. *Id.* Trooper Larsen then searched Mr. Tibbles, finding no marijuana. *Id.* After asking Mr. Tibbles whether he had smoked any marijuana that day and being told that he had not, Trooper Larsen searched the interior of Mr. Tibbles' vehicle. *Id.* The search revealed a glass pipe and a substance that appeared to be marijuana under the front passenger seat. *Id.* Mr. Tibbles told Trooper Larsen that the substance was not his. *Id.* Trooper Larsen then arrested Mr. Tibbles for possession of marijuana and paraphernalia. *Id.*

2. Procedural History. Before trial, Mr. Tibbles moved unsuccessfully for suppression, arguing that under *State v. O'Neill*, 148 Wn.2d 564, 62 P.2d 489 (2003), the prearrest search of Mr. Tibbles' vehicle violated article 1, § 7, Washington Constitution. *Id.* In the trial court's March 31, 2005 Memorandum Decision, the court noted that of the seven possible exceptions to the warrant

requirement,¹ “[t]he only exception that could apply in this case is (4) Probable cause/exigent circumstances.” Appendix B at 2. Beginning its decision by noting that probable cause to arrest and search the occupants of a car for possession of a controlled substance exists when a trained, experienced officer detects the odor of a controlled substance emanating from an automobile (*citing State v. Hammond*, 24 Wn. App. 596, 600 (1979)), the trial court concluded based on federal law that “[i]f a car is readily mobile and probable cause exists to believe that it contains contraband, it may be searched without a separate exigency requirement. (*citing Pennsylvania v. Labson*, 115 L.Ed.2d 1031 (1996)). Appendix B at 3.

Despite its conclusion that the plain view doctrine did not apply here, the district court analogized the smell of marijuana in Mr. Tibbles’ vehicle to the officer in *O’Neill* seeing a suspected coke spoon in plain view in the vehicle (*citing State v. O’Neill*, 148 Wn.2d 564, 62 P.2d 489 (2003)). Appendix B at 3. The court termed this an “exigent circumstance.” *Id.* at 3-4. The trial court explained that this exception requires proof of probable cause to believe that a crime has been committed; that items of evidentiary value relating

¹ The court listed the seven exceptions as (1) Consent, (2) Stop and frisk, (3) Search incident to lawful arrest, (4) Probable cause/exigent circumstances, (5) Hot pursuit, (6) Plain view, and (7) Inventory. Memorandum Decision at 2.

to that crime will be found in the premises to be searched; and that exigent circumstances exist which do not permit a reasonable time and delay for a judicial officer to evaluate and act upon probable cause applications for warrants by police officers. *Id.* at 4.

According to the trial court, the factors that govern a finding of exigent circumstances are (1) the degree of urgency and the amount of time necessary to obtain a warrant; (2) a reasonable belief that contraband was about to be removed; (3) the possibility of danger to police officers guarding the area while the warrant was obtained; (4) indications that the possessor of contraband was aware of police activity directed at them; and (5) the ready destructibility of the contraband, and the officer's knowledge that disposal efforts are characteristic behavior of persons engaged in a particular line of criminal activity. Appendix B at 4. The trial court's factors did **not** include seriousness of the offense. *Id.*

The district court determined that exigent circumstances existed here because (1) Trooper Larsen believed that evidence relating to the use or possession of marijuana was present in a vehicle which was under the control of a defendant he intended to cite and release; (2) Trooper Larsen had informed the defendant of his suspicions concerning the marijuana, and had physically searched the defendant; and (3) evidence of controlled substances

crime is readily destroyed. Appendix B at 4-5. The trial court did not make any finding that either Trooper Larsen or the public were in any danger, nor did the court make a finding that there was any urgency or that there was insufficient time to obtain a warrant. *Id*; See also Order Denying Motion To Suppress, attached as Appendix C at 4. Mr. Tibbles timely appealed to Superior Court.

The Superior Court, noting that the facts are undisputed, affirmed the District Court, deciding that exigent circumstances provided authority of law to search Mr. Tibbles' car because (1) the officer was alone, (2) it was late at night, (3) the officer had alerted Mr. Tibbles to the officer's suspicion that marijuana might be in the car, (4) there was probable cause to arrest, (5) the vehicle was mobile, and (6) the contraband might be destroyed if no search occurred. Slip Op. at 2.

Mr. Tibbles then filed a Motion For Discretionary Review to the Court of Appeals, which was accepted. Slip Op. at 3. After oral argument, a panel of Division One wholly accepted the reasoning of the lower courts and affirmed the conviction in an unpublished decision issued on May 21, 2007. Appendix A. Mr. Tibbles timely filed this Petition For Review.

E. REASONS WHY REVIEW SHOULD BE GRANTED

THE TRIAL COURT'S DECISION PRESENTS A
SIGNIFICANT QUESTION OF LAW UNDER
WASHINGTON CONSTITUTION ARTICLE 1, § 7 AND
VIOLATES THE SUPREME COURT'S DECISION IN
State v. O'Neill

1. Washington Constitution, Article I, § 7 provides greater privacy protections than does the Fourth Amendment of the United States Constitution. Article I, § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision differs from the Fourth Amendment in that article I, § 7 "clearly recognizes an individual's right to privacy with no express limitations." *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Accordingly, while article I, § 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment, its scope is not limited to subjective expectations of privacy but, more broadly, 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. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999); *State v. Johnson*, 128 Wn.2d 431, 446, 909 P.2d 293 (1996); *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112

(1990).

It is by now axiomatic that article I, § 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment. *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69, n.1, 917 P.2d 563 (1996); "Any analysis of article I, § 7 in Washington begins with the proposition that warrantless searches are unreasonable per se." *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). This is a strict rule. *White*, 135 Wn.2d at 769. Exceptions to the warrant requirement are limited and narrowly drawn. *Id.*; *Hendrickson*, 129 Wn.2d at 70-71. The State, therefore, bears a heavy burden to prove the warrantless searches at issue fall within the exception it argues for. See *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

When assessing police intrusions into individuals' privacy, courts engage in a delicate balancing of interests, weighing safety and evidentiary concerns against the basic notion that the people of this state enjoy a measure of privacy that is, and will forever be, unassailable. See *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). (Washington Constitution protects those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass and does not

depend on subjective expectations of privacy).

2. The greater protections of Article 1, § 7, extend to the context of automobile searches. Our Supreme Court has long held that the right to be free from unreasonable governmental intrusion into one's "private affairs" encompasses automobiles and their contents. See, e.g., *State v. Mendez*, 137 Wn.2d 208, 217, 219, 970 P.2d 722 (1999); *Hendrickson*, 129 Wn.2d at 69, n.1 (citing cases). "[P]reexisting Washington law indicates a general preference for greater privacy for automobiles and a greater protection for passengers than the Fourth Amendment" *Mendez*, 137 Wn.2d at 219.

Washington law indicates a general preference for greater privacy for automobiles than does the Fourth Amendment. *Mendez*, 137 Wn.2d at 219; *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004). Our Supreme Court has explicitly recognized that "[c]itizens of this state do not expect to surrender their article I, § 7, privacy guaranty when they step into an automobile with others, for as E.B. White put it, 'Everything in life is somewhere else, and you get there in a car.'" *State v. Horrace*, 144 Wn.2d 386, 399, 28 P.3d 753 (2001). For over 80 years, our Supreme Court has closely analogized the privacy rights implicated in automobile searches to those implicated in searches of one's home. *State v. Parker*, 139

Wn.2d 486, 494, 987 P.2d 73 (1999) (citing *State v. Gibbons*, 118 Wn.2d 171, 187-88, 203 P.390 (1922)).

3. Washington applies the exigent circumstances exception to the warrant requirement very narrowly. Our Supreme Court has adopted the factors used in federal cases to determine whether exigency justifies a warrantless intrusion into any private area: (1) a grave offense, particularly a crime of violence; (2) a suspect who is reasonably believed to be armed; (3) trustworthy information that the suspect is guilty; (4) strong reason to believe that the suspect is on the premises; (5) likelihood of escape if the suspect is not swiftly apprehended; and (6) entry can be made peaceably. *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 205 (1986). These six elements supplement the five different exigent circumstances: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or the public; (4) mobility of a vehicle; and (5) mobility or destruction of the evidence. *State v. Ramirez*, 49 Wn. App. 814, 824, 819, n.4, 746 P.2d 344 (1987).

Our Supreme Court has carefully restricted automobile searches to balance an individual's privacy interest against a real state and societal need to search. The mere fact that a car is potentially mobile is not sufficient to support a warrantless search based on exigency; mere convenience is simply not enough. *State*

v. Patterson, 112 Wn.2d 731, 734-35, 774 P.2d 10 (1989); *State v. Parker*, 139 Wn.2d 486, 501-02, 987 P.2d 73 (1999).

This reasoning comports with the general principle that warrantless searches of vehicles are related to the “hot pursuit” doctrine. *Patterson*, 112 Wn.2d 731. In both *McCary* and *Robinson*, the courts focused on the gravity of the offense (bank robberies); the immediacy of the investigation (cars found within 1 to 2 hours); the belief that the suspects were armed; the likelihood that the suspects, who were at large, would escape; and peaceable entry. *McCary v. Commonwealth*, 228 Va. 219, 228, 321 S.E.2d 637, 642 (1984) (listing decisions); *United States v. Robinson*, 533 F.2d 578, 583 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 956, 47 L.Ed.2d 32, 96 S.Ct. 1432 (1976). These decisions all demonstrate that the exigent circumstances exception is narrowly applied.

4. Mr. Tibbles’ situation does not present exigent circumstances. In Washington, “the exigent circumstances doctrine is applicable only within the narrow range of circumstances that present a real danger to the police or the public or a real danger that evidence . . . might be lost.” *State v. Counts*, 99 Wn.2d 54, 63, 659 P.2d 1087 (1983). *State v. McIntyre*, 39 Wn. App. 1, 5, 691 P.2d 587 (1984).

Mr. Tibbles' situation completely lacks the urgency, danger, and seriousness that characterize searches justified by exigent circumstances. There was no threat to the officer or to public safety. The suspected offense, possession of a small amount of marijuana, is not a grave one. Moreover, Washington courts have found that the State's interest in preventing and arresting for possession of marijuana is generally not of sufficient magnitude to justify warrantless searches. *State v. Ramirez*, 49 Wn.2d 814, 821, 746 P.2d 344 (1987); *State v. Chrisman*, 100 Wn.2d 814, 821-22, 676 P.2d 419 (1984). Indeed, there is a substantial body of federal law limiting use of the exigent circumstances exception to the warrant requirement strictly to felony arrests. See *Ramirez*, 49 Wn. App. at 819. Given article 1, § 7's greater protections, it would be inappropriate for Washington law to provide less privacy protections in this situation than that offered by many federal courts.

Viewed with common sense, Mr. Tibbles' case simply does not support a finding of exigency. While vehicles are mobile, the officer never feared that Mr. Tibbles might be armed or dangerous or that he might present a danger to himself or to the public. Although there was a possibility that Mr. Tibbles might be guilty of possessing a small amount of marijuana, there was no evidence showing that the officer had the training or ability to accurately

identify the odor of marijuana. Lacking such evidence, the district trial court erred in finding there was a strong possibility that Mr. Tibbles was guilty of a crime. See Appendix B at 4. At most, any crime Mr. Tibbles might have committed would merely be a misdemeanor, a fact militating against invasion of his privacy without a warrant. See *Chrisman*, 100 Wn.2d at 821-22; *State v. Kull*, 155 Wn.2d 80, 86-87, 118 P.3d 307 (2005). While Mr. Tibbles was certainly present, the record is devoid of any information that he was more likely than any other automobile driver to escape if not swiftly apprehended. But even if he did escape, he was hardly a threat to the health, safety, or welfare of the citizens of Island County. Entry into Mr. Tibbles' vehicle could be made peaceably since he was cooperative during the entire process. Accordingly, there was no "hot pursuit."

In turn, the Superior Court's findings of "exigency" are no more than boilerplate findings that could be used to justify a prearrest search of any vehicle stopped at night that smelled of marijuana, or any vehicle stopped at night that might contain destructible contraband. They completely fail to explain why exigent circumstances demanded that Mr. Tibbles be searched before he be arrested.

Other reasonable options were available to the officer. He

could have arrested Mr. Tibbles and searched him incident to arrest, or he could have obtained a telephonic search warrant. See *City of Seattle v. Altschuler*, 53 Wn. App. 317, 321, 766 P.2d 518 (1989) (holding police could have watched defendant's home while obtaining "the usual warrant or a telephonic warrant" rather than entering the defendant's home when defendant committed only a minor offense). Paradoxically, while finding the search was justified by exigent circumstances, the district trial court noted in its Order ". . . nor was any evidence offered as to the exigent circumstances justifying a warrantless search." Appendix B at 4, "Further Observations."

5. The pre-arrest search cannot be justified as taking place incident to arrest. The basic thrust of the trial court's ruling is that since the officer possessed probable cause to arrest Mr. Tibbles, the search was justified. Order at 2. Because the search here was admittedly pre-arrest, however, it cannot be justified by that doctrine. *State v. O'Neill*, 148 Wn.2d 564, 585, 591, 62 P.3d 489 (2003).

Our Supreme Court has held that when officers conduct a search incident to arrest, the arrest must precede the search, since authority of law for the search derives from the arrest itself. *State v. O'Neill*, 148 Wn.2d 564, 585, 591, 62 P.3d 489 (2003). In *O'Neill*,

the state claimed that the search incident to arrest of O'Neill's car was proper even though the officer did not arrest O'Neill before conducting the search. *Id.* at 583-84. The state argued that search incident to arrest can take place before actual custodial arrest as long as probable cause to arrest exists at the time of the search. *Id.* The Supreme Court disagreed: "Under Const. Art. 1, sec. 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest." *Id.* at 585.

The trial court's reliance upon probable cause to arrest as established in *Hammond* is misplaced since this rationale was rejected in *O'Neill*. Probable cause alone cannot justify a pre-arrest search. Adopting the trial court's rationale would effectively abolish the warrant requirement for automobile searches, since they are all potentially mobile. All that would be needed for an automobile search would be probable cause that any crime had been committed; no warrant or arrest or plain view would be needed. This interpretation violates the meaning of article 1, section 7. Accordingly, the trial court erred in failing to suppress the items found as a result of the illegal search of Mr. Tibbles' vehicle. *O'Neill*, 148 Wn.2d at 585; *Kull*, 155 Wn.2d 86-87.

F. CONCLUSION

The lower court's interpretation of the constitutional protections of *O'Neill* and of the exigent circumstances doctrine creates an exception that swallows both *O'Neill* and article 1, § 7. This Court should grant review.

DATED this 20th day of June, 2007.

Respectfully submitted,

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

Sharon J. Blackford/WSBA #25331
Law Office of Sharon J. Blackford
Attorney for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 57568-6-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
MICAH TIBBLES,)	Unpublished Opinion
)	
Appellant.)	FILED: May 21, 2007
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COLEMAN, J. — The principal issue in this case is whether the smell of marijuana, detected by a trooper making a routine traffic stop, justifies a warrantless search of a vehicle under the exigent circumstances exception to the warrant requirement where the vehicle was mobile, the trooper alerted the defendant that he smelled marijuana and could not find its source, the trooper was alone in a rural area, and it was late at night. A secondary issue is whether the superior court’s decision upholding the search conflicts with State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003), which held that “a valid custodial arrest is a condition precedent to a search incident to arrest[.]” O’Neill, 148 Wn.2d at 587. We conclude that exigent circumstances justified

the warrantless search of the vehicle and that the superior court's decision does not conflict with O'Neill because this case does not involve a search incident to arrest.

FACTS

On October 28, 2004, near midnight, Trooper Norman Larsen, working alone in Island County, stopped Micah Tibbles for a defective taillight. The propriety of the stop is not challenged. Tibbles was alone in the vehicle. Trooper Larsen noticed a strong odor of marijuana coming from the vehicle. Tibbles provided Trooper Larsen with his drivers license but could not find any registration or proof of insurance. Trooper Larsen asked Tibbles to step out of the vehicle and advised him that he smelled marijuana. Tibbles denied possessing any marijuana. Trooper Larsen searched him and found no marijuana. He asked Tibbles if he had smoked marijuana that day, and Tibbles said no. Trooper Larsen then searched the interior of the vehicle and under the front seat found a glass pipe and marijuana, which Tibbles denied belonged to him. Trooper Larsen did not formally arrest Tibbles, but instead issued him a citation and allowed him to drive away.

Before trial, Tibbles moved to suppress the evidence seized by Trooper Larsen. The district court denied the motion, finding that "the prosecutor might be able to establish that the warrantless search was reasonable in this instance under the probable cause/exigent circumstances exception." In a trial on stipulated facts, the court found Tibbles guilty of unlawful possession of marijuana and possession of drug paraphernalia.

Tibbles appealed to the superior court. The superior court affirmed, concluding that the mobility of the vehicle and the potential for the destruction of the evidence

constituted exigent circumstances justifying a warrantless search. Tibbles sought discretionary review of the RALJ decision, which was granted.

ANALYSIS

Tibbles argues that exigent circumstances did not justify Trooper Larsen's warrantless search of the vehicle. We conclude that there were exigent circumstances justifying Trooper Larsen's warrantless search: the mobility of the vehicle, the risk that Tibbles would destroy evidence because he was alerted to Trooper Larsen's suspicion that he had marijuana, the time of night, the rural location of the traffic stop, and the fact that Trooper Larsen was alone.

Absent an exception, a warrantless search is impermissible under article 1, section 7 of the Washington Constitution.¹ State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The exceptions are carefully circumscribed and provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for recourse to a magistrate. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). Washington has identified five circumstances that qualify as being exigent: (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983). The State bears the burden of showing that an exception applies. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001).

¹ Article 1, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Tibbles only argues that his state constitutional rights were violated and does not make an argument under the federal constitution.

In State v. Hammond, 24 Wn. App. 596, 603 P.2d 377 (1979), the court held that an officer who is trained to detect the odor of marijuana can arrest and search a person at a traffic stop when the odor is present.² The court declined to decide whether the search was justified based on probable cause and exigent circumstances. Instead, the court held that the search was valid as a search incident to arrest. In State v. Huff, 33 Wn. App. 304, 654 P.2d 1211 (1982), police had a warrant to search all real and personal property at a certain residence. The police searched a vehicle parked at the residence and found marijuana. The defendant argued that the search was not authorized by the warrant and that no exception to the warrant requirement justified the search. The court held that the vehicle was included in the warrant and then stated,

[A]ssuming arguendo the warrant did not authorize a search of Mr. Huff's automobile, a warrantless search of an automobile is constitutionally permissible if there is probable cause to search the automobile which is stopped, the car is movable, the occupants are alerted, and contents of the car may never be found again if a warrant must first be obtained.

Huff, 33 Wn. App. at 310.

The warrantless search here was justified because of exigent circumstances. Trooper Larsen told Tibbles that he smelled marijuana. Tibbles denied possessing marijuana or consuming any marijuana that day. Trooper Larsen searched Tibbles, but did not find any marijuana. Trooper Larsen then had probable cause to believe marijuana was in the vehicle because he had not discovered the source of the marijuana smell. A warrantless search was necessary because of the mobility of the vehicle and the likelihood that the evidence would be removed or destroyed.

² Tibbles stated in the superior court that he was not disputing that Trooper Larsen had probable cause to arrest based on the odor of marijuana. Verbatim Report of Proceedings (Dec. 7, 2005) at 7.

Additionally, it was late at night in a rural area and Trooper Larsen was alone, making it difficult to obtain a warrant.

Tibbles argues that exigent circumstances did not justify the search because the district court stated in its entry of judgment that there was no “evidence offered as to the exigent circumstances justifying a warrantless search.” Tibbles stipulated to all of the exigent circumstances discussed above—mobility of the vehicle, Tibbles being told by Trooper Larsen that he suspected marijuana was in the vehicle, time of night, and other factors relied on by the court. Therefore, exigent circumstances were established based upon the stipulated facts.

Tibbles contends that the possession of a misdemeanor amount of marijuana is not serious enough to overcome the privacy protections of the Washington Constitution, relying on State v. Ramirez, 49 Wn. App. 814, 746 P.2d 344 (1987). In Ramirez, police entered a hotel room without a warrant after detecting a strong odor of marijuana emanating from the doorway. The State argued that the entry was permissible based on the probable cause and exigent circumstances exception to the warrant requirement. The court agreed that the officers had probable cause but held that exigent circumstances did not exist to justify the officers’ warrantless entry into the hotel room. The court explained that hotel rooms enjoy the same constitutional protection as homes. Ramirez, 49 Wn. App. at 817. The court also noted that the use or possession of marijuana is a misdemeanor. The court then held that under the federal and state constitutions, “the State’s interest in preventing these crimes, though important, is not of sufficient magnitude to justify this warrantless entry and arrest” in an area entitled to the same protection as a home. Ramirez, 49 Wn. App. at 821.

Ramirez is distinguishable because it involved exigent circumstances in the context of a hotel room, not a vehicle. Article 1, section 7 protects vehicles, but historically, vehicles enjoy less protection than homes because “[o]ne does not expect the same degree of privacy in an automobile as in one's home.” State v. Stroud, 106 Wn.2d 144, 167, 720 P.2d 436 (1986) (Durham, J., concurring).

In Ramirez, there was no risk of the defendants suddenly fleeing in a vehicle or purposefully destroying the evidence because they had not been alerted to the fact that police officers suspected drug activity. Here, there were such risks because Trooper Larsen alerted Tibbles that he smelled marijuana and the vehicle Tibbles was driving was mobile. And though this case involves misdemeanors, Tibbles cites no authority stating that in misdemeanor cases, police officers are prohibited from searching a vehicle under the exigent circumstances exception of the warrant requirement. The fact that the crimes at issue here are misdemeanors is not sufficient to overcome the exigent circumstances faced by the officer. Moreover, based on the smell alone, the officer could not know there was only a misdemeanor amount of marijuana in the vehicle.³

Tibbles also argues that the superior court’s decision conflicts with State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). In O’Neill, the court held that “a valid

³ Tibbles also relies on State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419 (1984) for his argument that the possession of a misdemeanor amount of marijuana is not serious enough to overcome the privacy protections of the Washington Constitution. Like Ramirez, however, Chrisman is distinguishable because it involved a dorm room, which the court treated as a home. See Chrisman, 100 Wn.2d at 822 (“The heightened protection afforded state citizens against unlawful intrusion into private dwellings places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement.”). And unlike this case, the Chrisman court found that there was no danger of the evidence being destroyed. Chrisman 100 Wn.2d at 821 (“Neither the officer nor the evidence was threatened.”).

custodial arrest is a condition precedent to a search incident to arrest [.]” O’Neill, 148 Wn.2d at 587. O’Neill is not relevant to this case because it did not concern vehicle searches based on exigent circumstances. The parties agree that the district court and superior court concluded that the search in this case was constitutional because of exigent circumstances—not as a search incident to arrest.

Tibbles essentially argues that O’Neill eliminated the exigent circumstances exception to the warrant requirement in the context of vehicle searches and, therefore, because Trooper Larsen had probable cause, he should have obtained a search warrant or made an arrest and searched the vehicle incident to the arrest. O’Neill concerned a parked vehicle and did not discuss exigent circumstances. It did not eliminate the exigent circumstances exception to the warrant requirement in the context of vehicle searches. We are reluctant to require police officers to make full custodial arrests in order to perform warrantless searches of vehicles. Therefore, we reject Tibbles’ proposed rule that officers must search incident to an arrest in order to search a vehicle without a warrant.

For the foregoing reasons, we affirm.

Columan, J.

WE CONCUR:

Appelwick, J.

Becker, J.