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No.
Court of Appeals No. 60823-1-1
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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO GARCIA-SALGADO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Alejandro Garcia-Salgado asks this Court to accept review, pursuant to RAP 13.4, of the published decision of the Court of Appeals in State v. Garcia-Salgado, __ Wn.App. __, 205 P.3d 914 (2009)¹.

B. OPINION BELOW

The Court of Appeals concluded the pre-trial collection of a biological sample from a defendant is a search which must comport with the warrant requirement of the Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington Constitution. However, the Court of Appeals concluded the warrant requirement was satisfied where: (1) the trial court authorized the search by entering an order rather than a warrant; (2) the order did not contain a finding of probable cause, nor contain facts that would have supported it; and (3) the State's request for the search was not supported by a statement made under oath setting forth the evidence it sought nor the basis to believe why that evidence would be found.

¹ Page cites are not yet available, thus Mr. Garcia-Salgado will cite to the Westlaw page numbers.

C. ISSUES PRESENTED

1. The Fourth Amendment and Article I, § 7 of the Washington Constitution both require that the taking of a biological sample from a person accused of a crime is a search which must be predicated on a search warrant issued upon a sworn statement establishing probable cause to believe the search will lead to evidence of the crime. Is the warrant requirement violated where: (1) there is no statement under oath establishing probable cause to believe the taking of a biological sample from Mr. Garcia-Salgado would yield evidence of the crime, and (2) there is no finding of probably cause to support the search?

2. With respect to post-charging searches does CrR 4.7(b)(2) eliminate the requirement of a search warrant for purposes of the "authority of law" requirement of Article I, §7?

3. In reviewing the adequacy of a search warrant on appeal, may the reviewing court look beyond the face of the warrant and affidavit to find facts that might have supported issuance of the warrant?

4. Is the Court of Appeals's opinion that "oath or affirmation" requirement is satisfied so long as the State has previously filed, in support of the information, an affidavit of probable cause to believe

a person has committed a crime, contrary to decisions of this Court and the United States Supreme Court?

D. SUMMARY OF THE CASE

Pablo Cruz-Guzman and his girlfriend Rachel Jerry, as well as their children, lived in a house owned by Ms. Jerry's mother Joylene Simmons, along with Ms. Simmons's two sons, daughter-in-law, and two other daughters including P.H. 9/19/07 RP 29-30

One evening Mr. Cruz-Guzman invited his friend, Mr. Garcia-Salgado, to the house where the two of them, along with Ms. Jerry and one of her brothers, Derrick, played dice and drank in the garage. 9/20/07 RP 65. While they were doing so, Ms. Simmons and P.H. went to bed upstairs. Id. at 66.

At some point, Mr. Cruz-Guzman, left the house with Derrick and his wife to buy more beer. 9/20/07 RP 69-70. Before they returned P.H. woke her mother. 9/19/07 RP 29-30. P.H. testified she was half asleep when she noticed Mr. Garcia-Salgado enter her bedroom using a cell phone for light. 9/25/07 RP 58. P.H. testified Mr. Garcia-Salgado removed her pants, got on top of her, and that she could "feel his body against [her] body . . . in her private spot." Id. 61.

Police responded to Ms. Simmons's 911 call. 9/19/07 RP 79. Mr. Garcia-Salgado was arrested and while at the Auburn Police station made a statement that he had not had intercourse with P.H. 9/19/07 RP 164.

Mr. Garcia-Salgado was charged with a single count of first degree rape of a child, as well as possession of cocaine, for drugs found at the time of his arrest. CP 1-5.

Prior to trial the deputy prosecutor asked the court to order Mr. Garcia-Salgado to submit a biological sample to permit DNA testing. 3/23/07 RP 3. The deputy prosecutor stated

.... There are DNA issues on the case. I have confirmed with the lab, as of yesterday, they are in the process of doing DNA testing on this case. There were other tests that were already performed - - presumptive test tests that were performed by the lab. I have made sure someone has been assigned for DNA analysis.

The detective did not get a DNA swab from the defendant. I have e-mailed defense counsel about whether or not he is willing to help the detective facilitate that or whether a motion needs to be set to the defendant's DNA swab for DNA testing.

3/23/07 RP 3. Because Mr. Garcia-Salgado objected, the motion was continued. At that subsequent hearing the deputy prosecutor stated

It is typical for defense attorneys not to be ecstatic about giving DNA of the client's to the State.

However, despite this lack of enthusiasm, courts regularly grant State permission to get such a sample in the interest of justice.

3/27/07 RP 3. The trial court specifically inquired whether the samples obtained from the victim had been tested to find DNA other than the victim's. Id. at 4. The State responded: "I believe the presumptive tests were done, and there was something on them: I couldn't say exactly what at this point in time." Id. at 5. Nowhere in the unsworn statement of the deputy prosecutor was there mention of genetic material having been found on the victim's clothing.

Over Mr. Garcia-Salgado's objection, Id. at 4, the court granted the State's request. Id. at 5. Rather than determine probable cause existed to issue a search warrant, the court merely issued an order finding the method of gathering the sample, a cheek swab, was minimally intrusive. CP 6. The court's order similarly lacks any finding of probable cause, and instead provides only:

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KING COUNTY, WASHINGTON

MAR 27 2007

SUPERIOR COURT CLERK
LESLIE J. KEITH
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON Plaintiff, NO. 061122557 K.M.
vs. ORDER ON CRIMINAL MOTION
Alejandro Garcia-Salgado (ORCM)
Defendant

The above-entitled Court, having heard a motion regarding taking of DNA sample of
defendant

IT IS HEREBY ORDERED that a DNA sample of defendant's
DNA shall be taken by a lab
(DNA sample is minimally intrusive, it
under CP 7.02(2)(b) it shall be taken)
& defendant must cooperate.

DATED: 3/26/07 Renee R JUDGE

Deputy Prosecuting Attorney
R. W. Garcia 3/16/07
Attorney for the Defendant
Order on Criminal Motion (ORCM)



30

Id.
Technicians at the Washington State Patrol Crime Laboratory subsequently testified at trial that DNA found in a small amount of semen on the underwear and shirt P.H. was wearing matched Mr. Garcia-Salgado's. 9/20/07 RP 146-52.
The jury convicted Mr. Garcia Salgado as charged. CP 63.

E. ARGUMENT

THE COURT OF APPEALS OPINION IS DIRECTLY
CONTRARY TO WELL-ESTABLISHED CASELAW
OF THE UNITED STATES SUPREME COURT AND
BY PERMITTING WARRANTLESS SEARCHES IN
EVERY INSTANCE IN WHICH CHARGES HAVE
BEEN FILED PRESENTS A SUBSTANTIAL
CONSTITUTIONAL ISSUE

The Fourth Amendment provides “. . . no Warrants shall
issue but upon probable cause supported by Oath or affirmation . . .
.” Article I, § 7 provides “No person shall be disturbed in his private
affairs, or his home invaded, without authority of law.”

In the context of an intrusion of one’s body to collect a
biological sample, “the interests in human dignity and privacy which
the Fourth Amendment protects forbid any intrusion on the mere
chance that the desired evidence might be obtained.” Schmerber
v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908
(1966). Instead, the Fourth Amendment requires “a clear
indication that in fact such evidence will be found.” Id.; State v.
Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991).

The order in this case was not a warrant, was not premised
upon any judicial finding of probable cause, much less “a clear
indication that in fact such evidence will be found.” Further, the
order was not supported by a statement made under oath or

affirmation. The Court of Appeals opinion affirming the search warrants review under RAP 13.4.

1. CrR 4.7 does not eliminate the warrant requirement. The Court of Appeals concluded no search warrant was required in this case because CrR 4.7 provides “the ‘authority of law’ to conduct such a search.” Garcia-Salgado, at 2.

The warrant requirement is particularly important under the Washington Constitution “as it is the warrant which provides ‘authority of law’ referenced therein.” State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes ‘authority of law’ justifying an intrusion into the ‘private affairs’ of its citizens. This defies the very nature of our constitutional scheme and would set a precedent of legislative deference that I am unwilling to accept in our state’s constitutional jurisprudence. It is the court, not the Legislature, that determines the scope of our constitutional protections.” (Citation and footnotes omitted).

Ladson, 138 Wn.2d at 352, n. 3. Thus, CrR 4.7 cannot eliminate the search warrant requirement.

Moreover it is clear for the language of the rule that it does not. CrR 4.7(b)(2) provides in relevant part :

Notwithstanding the initiation of judicial proceedings, **and subject to constitutional limitations**, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to

.....
(vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body . . . which involve no unreasonable intrusion thereof
.....

(Emphasis added). By its very language the court rule requires the taking of any sample from a defendant comport with constitutional limitations rather than eliminate them. As set forth above, the Fourth Amendment and Article I, § 7 require a search warrant based upon probable cause to justify the taking of a biological sample for DNA testing

This Court should review the opinion of the Court of Appeals that CrR 4.7 eliminates the warrant requirement.

2. The pretrial order in this case does not comply with the neutral magistrate requirement and was not based upon a finding of probable cause. The Court of Appeals affirmed Mr. Garcia-Salgado's conviction concluding:

"All that is missing here is a specific finding by the trial court of probable cause."

Garcia-Salgado, at 3. The court allowed that "more specific findings would be helpful." Far from simply being helpful, a finding

of probable cause by a neutral magistrate is a constitutional directive.

This Court has said "a search warrant [may] be issued [only] upon a determination of probable cause." State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). This Court has said further,

in [a] probable cause context the trial court or magistrate necessarily first must find whether the information from these tips is sufficiently competent to qualify as historical fact. See State v. Jackson, 102 Wash.2d 432, 436-43, 688 P.2d 136 (1984). Fact-finding on reliability and credibility is required. Id. On such matters it makes sense for a magistrate or trial judge to be afforded appropriate discretion on review. Id. However, as described later in [Ornelas v. United States, 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)] once the court makes this factual determination, it then must decide the legal issue whether the qualifying information as a whole amounts to probable cause. As to this legal conclusion, de novo appellate review is necessary.

In re the Detention of Petersen, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002). Plainly a judicial finding of probable cause is required.

Consistent with this constitutional mandate CrR 2.3(d)

requires:

A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or anylaw amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded

telephonic statement. The recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. **If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant** or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court shall record a summary of any additional evidence on which it relies.

Rather than merely a preferred or helpful alternative, the issuing judge must in fact make a finding of probable cause. The order in this case does not comply with the neutral magistrate requirement and was not based upon a finding of probable cause.

The opinion of the Court of Appeals is contrary to the clearly settled constitutional jurisprudence of this Court and the United States Supreme Court. This Court should accept review pursuant to RAP 13.4.

3. The order in this case does not comply with the "oath or affirmation" requirement. The Court of Appeals concluded that the affidavit of probable cause filed in support of the original Information satisfies the oath or affirmation. Garcia-Salgado, 205

P.3d 914n. 2. By the court's logic whenever an affidavit of probable cause as been submitted all subsequent requests for a warrant will necessarily comply with the oath or affirmation requirement.

Pursuant to the court's holding once a person has been charged with a crime and the State subsequently seeks to search that person's home no additional statement is required to support that request for a warrant. Indeed, this is precisely what the State argued for in its reply brief, where the State argued:

There is simply no reason to require a "warrant" once a criminal charge is filed: a neutral court has already determined that there is probable cause to believe that the defendant committed this crime, and can regulate discovery to determine whether further requests for discovery are reasonable.

Brief of Respondent at 13. Thus the State contends, because a warrant is not required there is no need that it be supported by a sworn statement. Id.

The United State's Supreme Court has said the existence of probable cause to believe a person has committed the offense, which is the purpose of an affidavit of probable cause, is not alone sufficient to justify such a search; "the mere fact of a lawful arrest does not end our inquiry." Schmerber, 384 U.S. at 769. In fact, Schmerber expressly requires an additional finding beyond simply

probable cause to believe a crime has been committed; "a clear indication" that the desired evidence will be found. The state and federal constitutions require this standard be met even after charges have been filed. See, State v. Gregory, 158 Wn.2d 759, 820-25, 147 P.3d 1201 (2006) (discussing validity of blood draw obtained pursuant to post-arrest search warrant). Thus, the Court of Appeals's conclusion that the affidavit of probable cause satisfies the "oath or affirmation" requirement is contrary to both Schmerber and Gregory.

Beyond that, the Supreme Court has concluded that where an affidavit is insufficient it cannot be rehabilitated by evidence known by the affiant but not disclosed to the issuing magistrate. Whiteley v. Warden, 401 U.S. 560, 564, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).² "In reviewing a probable cause determination the information considered is that which was before the issuing magistrate. State v. Remboldt, 64 Wn.App. 505, 509, 827 P.2d 282 (1992) (citing inter alia State v. Patterson, 83 Wn.2d 49, 55, 515 P.2d 496 (1973)). Thus, regardless of what facts may have been

² In Arizona v. Evans, 514 U.S. 1, 13-14, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995), the Court recognized the correctness of Whiteley's analysis finding a Fourth Amendment violation, the portion relevant to the present discussion, but disagreed with its application of the exclusionary rule to that violation.

alleged in the affidavit of probable cause, that affidavit was not submitted as part of the warrant request in this case and cannot fill the gaps in the State's unsworn statement.

But that is what the Court of Appeals has done. Rather than limit its review to either the face of the warrant or even the prosecutor's unsworn statements made in support of its request for the search, the Court of Appeals instead reviewed the entirety of the record to find the missing facts to support probable cause. For instance the court concluded the fact that P.H. and her family had previously identified Mr. Garcia-Salgado would support a finding of probable cause to permit the search. However, that fact was not mentioned by the deputy prosecutor in her unsworn statement nor does it appear on the face of the order.

In any event, the affidavit of probable does not mention genetic testing, does not mention that genetic material was recovered from the victim nor does it provide any basis to believe such genetic material would be recovered. Further, contrary to the requirement of Schmerber, the affidavit does not provide a "clear indication" that a genetic sample from Mr. Garcia-Salgado would yield evidence of a crime. The mere fact that probable cause

existed to arrest and detain Mr. Garcia-Salgado, does not eliminate the "oath or affirmation" requirement.

There is no statement made under oath, that allowed the trial court to find the search, the physical intrusion of Mr. Garcia-Salgado's body would yield evidence of the crime. The opinion of the Court of Appeals is contrary to Schmerber and presents a substantial constitutional issue.

F. CONCLUSION

Because the opinion of the Court of Appeals is contrary to the clearly settled constitutional jurisprudence of this Court and the United States Supreme Court, this Court should accept review pursuant to RAP 13.4.

Respectfully submitted this 13th day of May, 2009.



GREGORY C. LINK – 25228
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Attorney for Petitioner

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DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 60823-1-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for **respondent: Catherine McDowall - King County Prosecuting Attorney-Appellate Unit**, **appellant** and/or **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 13, 2009

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 60823-1-I
)
 v.) DIVISION ONE
)
 ALEJANDRO GARCIA-SALGADO,) PUBLISHED OPINION
)
 Appellant.) FILED: April 13, 2009

Grosse, J. — The collection of biological samples for DNA (deoxyribonucleic acid) identification purposes may occur during discovery under pertinent court rules that require obtaining a court order based on probable cause. And, the record in this case provides ample factual support for the trial court's order. The trial court is affirmed.

FACTS

Alejandro Garcia-Salgado was charged with first degree rape of a child for raping 11-year-old P.H. on November 25, 2006.¹ The State filed a sworn certification for determination of probable cause in support of the charges.² Prior to trial, the State moved for an order requiring Garcia-Salgado to submit to a cheek swab for DNA testing.

Garcia-Salgado objected, and the court set that matter over for hearing

¹ Garcia-Salgado was also charged with a violation of the Uniform Controlled Substances Act (VUCSA), RCW 69.50.4013, for possession of cocaine found during a search incident to arrest. He pleaded guilty to that charge prior to his trial for rape.

² This formed the basis for the court's issuance of a warrant that the State submitted in its request to supplement the record, which we granted.

the following week. At that hearing, the State informed the court that a rape kit had been performed on P.H. The prosecutor indicated that she had spoken with the lab technician personally and requested that a DNA analysis be performed.

Defense objected on the basis of Garcia-Salgado's privacy interest, arguing that the doctor who had examined P.H. "found no actual, physical evidence of penile-vaginal penetration." In response, the State argued that even if there was no actual penetration, there still could have been DNA evidence left in her vaginal area. The court inquired into whether the swabs were analyzed to find DNA other than the alleged victim's. The prosecutor responded:

Your Honor, the way it works is: the lab does a presumptive test, and then, based on the results of the presumptive test, determines whether or not it's appropriate to take the next step, the most expensive step, of doing a DNA test.

.....

I believe the presumptive tests were done, and there was something on them; I couldn't say exactly what at this point in time.

The trial court found the DNA swab to be minimally intrusive and ordered the taking of the sample under CrR 4.7(b)(2)(vi).

A jury subsequently found Garcia-Salgado guilty of first degree rape of a child as charged. Garcia-Salgado appeals.

ANALYSIS

The taking of DNA constitutes a search and seizure under both the United States and Washington State constitutions.³ In State v. Gregory,⁴ the Washington Supreme Court held that a court order issued pursuant to CrR

³ U.S. Const. amend IV; Wash. Const. art I, § 7.

⁴ 158 Wn.2d 759, 822, 147 P.3d 1201 (2006).

4.7(b)(2)(vi) for a blood draw complies with the Fourth Amendment so long as it is supported by probable cause. Citing the seminal case, Schmerber v. California,⁵ the Gregory court listed three requirements that need to be established to determine whether a blood draw is reasonable: (1) there must be a clear indication that in fact the desired evidence will be found; (2) the chosen test must be reasonable; and (3) such test must be performed in a reasonable manner.⁶ Here, as in Gregory, Garcia-Salgado does not challenge the latter two factors—only the first—that there is no indication that his DNA would be found.

Garcia-Salgado argues that the taking of the DNA was illegal because it was a “warrantless search” and, therefore, the evidence obtained as a result should have been suppressed at trial. We disagree. There was evidence that Garcia-Salgado raped P.H. and that his DNA information would match that obtained from the victim’s rape kit. The victim and several members of her family identified Garcia-Salgado as the rapist. He was arrested as he tried to flee the scene. A rape kit examination was performed on the victim within hours of the crime in part to obtain any potential DNA evidence. P.H.’s clothing was tested by the forensic scientists and genetic material was discovered on the clothing. The State sought Garcia-Salgado’s DNA for the particularized purpose of comparing it with that found on P.H.’s clothing. This information coupled with the prosecuting attorney’s representations to the court, was sufficient to establish probable cause under the facts and circumstances of this case.

Garcia-Salgado argues that a separate search warrant is necessary in

⁵ 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

⁶ Gregory, 158 Wn.2d at 822-23.

this instance, because our courts have held that it is the warrant that provides the "authority of law" to conduct such a search.⁷ But here, the authority of law is provided by CrR 4.7(b)(2), which provides:

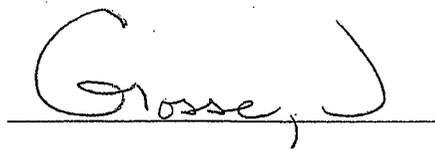
Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

....

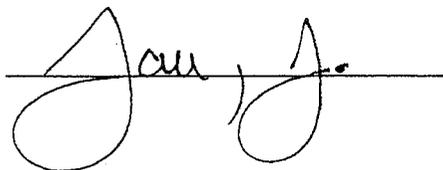
(vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof.

All that is missing here is a specific finding by the trial court that there was probable cause. It is clear from the record, however, that at the time the court issued its CrR 4.7 order, it had been presented with sufficient evidence demonstrating probable cause. While more specific findings would be helpful, the court properly ordered the collection of a DNA sample from Garcia-Salgado.

The judgment and sentence is affirmed.


Grosse, J

WE CONCUR:


Jau, J.


Schindler, CT

⁷ State v. Ladsen, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing City of Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

No. 60823-1-I / 5