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No. 60823-1-I

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO GARCIA-SALGADO,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING THE
FRUITS OF A WARRANTLESS SEARCH

Alejandro Garcia-Salgado contends the searches resulting from the compelled pretrial collection of a biological sample and the subsequent analysis of that sample violated both the Fourth Amendment and Article I, § 7 of the Washington Constitution. Specifically, Mr. Garcia-Salgado contends that both the state and federal constitutions require such searches be predicated on a search warrant issued upon a sworn statement establishing probable cause to believe the search will lead to the desired evidence.

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.” Nowhere in its response brief, does the State identify a single statement made under oath that supports the belief that the search would yield the desired results. The absence of the sworn statement amounts to a violation of the Fourth Amendment and Article I, § 7.

Without a single citation to authority, the State claims the warrant requirement is eliminated upon a person's arrest. The State contends:

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.

Whether the deputy prosecutor believes a "warrant" to be necessary after charges are filed, the warrant requirement of the state and federal constitutions plainly applies post-arrest. The United State's Supreme Court has said the existence of probable cause to believe a person has committed the offense is not alone sufficient to justify such a search like the one in this case; "the mere fact of a lawful arrest does not end our inquiry." Schmerber v. California, 384 U.S. 757, 769, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). In fact, Schmerber expressly requires an additional finding beyond simply probable cause to believe a crime has beyond 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).

Despite the fact that Gregory itself involved a search based on post-arrest search warrant, the State relies upon Gregory for the State's sweeping rewriting of the warrant requirement. Brief of Respondent at 13. Addressing the validity of a post-arrest search, Gregory stated that "in order to comply with the Fourth Amendment a blood draw pursuant to CrR 4.7(b)(2)(vi) must be supported by probable cause." 158 Wn.2d. at 822. Gregory then parroted the Fourth Amendment standard for collection of physical evidence from a suspect. Id. (citing Schmerber, 384 U.S. at 767). Neither Gregory nor the federal cases on which it relied eliminated either the warrant requirement or that the requisite showing be made under oath. Far from eliminating the constitutional requirement, Gregory expressly held that the very portions of CrR 4.7 at issue here must comply with the warrant requirement. 158 Wn.2d. at 822.

The trial court did not have before it facts from which to find a clear indication the search would yield the desired evidence. In

its response the State contends that genetic material had been found on the victims clothing and the State wished to compare Mr. Garcia-Salgado's DNA to that profile. Brief of Respondent at 11. But that is not the evidence that was before the trial court.

The deputy prosecutor requested the search in this case stating:

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. A claim that "there was something on them" is not a clear indication that the search will lead to the desired evidence.

The State asks this Court to construe Mr. Garcia-Salgado's initial failure to arrange transcription of an omnibus hearing against him. The State maintains "It is at least possible, if not likely, that

the basis for the motion was provided in greater detail at the earlier hearing. Brief of Respondent at 14.

The omnibus order along with the transcript of the March 27, 2007, hearing plainly indicate the State had not yet performed any DNA testing and thus did not in fact have a genetic profile with which it wished to compare Mr. Garcia-Salgado's, in direct contradiction of its claim on appeal. Further, it is clear the State's motion was continued from the omnibus hearing because the defense did not consent and thus the State was being afforded an opportunity to present its motion for the first time to the court. 1RP 2. Thus, consistent with RAP 9.2 Mr. Garcia-Salgado provided this Court with the necessary record to address his claims.

In any event, RAP 9.2 not only requires an appellant to arrange transcription of the relevant portions of the record, which Mr. Garcia-Salgado believes he has done, it sets forth a procedure whereby the respondent may demand the appellant transcribe additional hearings. RAP 9.2(b). The State has not availed itself of those provisions.

Nonetheless, Mr. Garcia-Salgado filed a supplemental statement of arrangements seeking transcription of the March 23, 2007, hearing and has provide a copy to the Court and the State.¹

At that earlier hearing 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. Mr. Garcia-Salgado objected to the State's request and the court set the matter could be heard the following week. Id. at 7. As is clear from the previously prepared transcripts that hearing occurred on March 27, 2007.

The record is more than complete. Even with the additional transcripts the record is devoid of any statement made under oath establishing probable cause to believe the searches would yield evidence of a crime. The ensuing searches, the collection and

¹ Because transcription has only recently been completed, Mr. Garcia-Salgado has no objection to affording the State an opportunity to address any new information revealed in that transcript.

subsequent analysis, violated both the Fourth Amendment and Article I, § 7.

B. CONCLUSION

For the reasons above, and those in Mr. Garcia-Salgado's previous brief, this Court must reverse Mr. Garcia-Salgado's conviction.

Respectfully submitted this 29th day of December, 2008.



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF DECEMBER, 2008, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> CATHERINE MCDOWALL, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF DECEMBER, 2008.

X _____ 

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