

TABLE OF CONTENTS

A. PROCEDURAL HISTORY 1

B. ARGUMENT 2

This Court should grant Mr. Nichols’s motion for discretionary review and reaffirm and clarify *Jorden* by holding that private information in a motel registry may not be searched absent a warrant or an established exception to the warrant requirement. 2

C. CONCLUSION 6

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Federal Way v. Koenig, ___ Wn.2d ___, 217 P.3d 1172 (2009) ... 2

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 4, 5

State v. Jordan, 160 Wn.2d 121, 156 P.3d 893 (2007) 1, 3, 4

State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007)..... 5

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994)..... 5

Washington Court of Appeals Decisions

State v. Boyce, 52 Wn. App. 274, 758 P.2d 1017 (1988)..... 4

State v. Walker, 66 Wn. App. 622, 834 P.2d 41 (1992) 6

United States Supreme Court Decisions

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 4, 6

Constitutional Provisions

Const. art. I, § 7..... 1, 3, 4, 5

U.S. Const. amend. IV 1

Rules

RAP 13.4(b) 1

RAP 13.4(d) 2

A. PROCEDURAL HISTORY

On October 9, 2009, Glenn Nichols filed a motion for discretionary review, asking this Court to review the published opinion of the Court of Appeals denying his personal restraint petition. Mr. Nichols raised two issues:

1. Is a petitioner entitled to relief where the record establishes a violation of article I, section 7 under this Court's decision in State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), the petitioner raised the issue in a personal restraint petition ("PRP") well before his direct appeal was decided and before Jorden was decided, and the petitioner has shown he was actually prejudiced by the constitutional error? RAP 13.4(b)(1), (2), (3).

2. Was Mr. Nichols denied the effective assistance of counsel where (a) his attorney did not challenge the warrantless motel registry search without which the State would have no case against Mr. Nichols, and (b) if counsel had exercised his duty to research the relevant law he would have discovered that the Ninth Circuit had held there is no Fourth Amendment protection in this context but that this Court had held on numerous occasions that article I, section 7 is more protective than the Fourth Amendment? RAP 13.4(b)(3).

The State filed an answer on November 16, 2009, urging the Court to deny review, or, in the alternative, to review two additional issues:

1. whether police may search a motel registry based on reasonable suspicion alone, and
2. whether this Court should overrule Jorden.

Pursuant to RAP 13.4(d), Mr. Nichols submits this reply. This Court should grant Mr. Nichols's motion for discretionary review and reaffirm and clarify Jorden by holding that private information in a motel registry may not be invaded absent a warrant or an established exception to the warrant requirement.

B. ARGUMENT

This Court should grant Mr. Nichols's motion for discretionary review and reaffirm and clarify Jorden by holding that private information in a motel registry may not be searched absent a warrant or an established exception to the warrant requirement.

The State asks this Court to grant review on the issue of whether Jorden should be overruled. Answer at 5. Review of this issue would be improper. "Under the doctrine of stare decisis, [this Court] will overturn precedent only if it is incorrect and harmful." City of Federal Way v. Koenig, ___ Wn.2d ___, 217 P.3d 1172 (2009). Jorden was neither incorrect nor harmful. To the contrary, it enforces the constitutional right to privacy for all individuals in Washington.

The State also asks this Court to grant review on the question of whether the State may violate an individual's right to privacy in motel guest registry information based on mere reasonable suspicion. This Court should, in fact, take the opportunity to clarify that it did not create a sweeping new exception to the warrant requirement in Jorden. The State is urging courts to read Jorden as if it did create a new exception, and this Court should not allow the State to distort its holdings in such a manner.

In his briefing before the Court of Appeals, Mr. Nichols argued that his PRP should be granted because the evidence against him was obtained pursuant to a warrantless motel registry search, in violation of article I, section 7 and Jorden. The State initially agreed with Mr. Nichols, stating that relief should be granted because Mr. Nichols "has established that the warrantless search of the motel registry violated his right to privacy under the state constitution." State's Original Response at 1. As the Court of Appeals noted:

The State's initial response recommended that the petition be granted. The State cited the Supreme Court's recent decision in Jorden and agreed with Nichols that the inspection of his motel registration was a warrantless search of a private affair. Conceding that no exception to the warrant requirement applied, the State accepted that the evidence obtained from his detention and arrest should have been suppressed.

Slip Op. at 5.

The State later reversed course and contended that Jorden created a broad new exception to the warrant requirement. The State is wrong.

Jorden held that the viewing of a motel registry is a search, or “private affair,” subject to protection under article I, section 7. Jorden, 160 Wn.2d at 130. As such, it may not be invaded absent authority of law – i.e., a warrant or one of the narrowly drawn exceptions to the warrant requirement. Const. art. I, § 7; State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996).

A warrantless search is per se unreasonable unless it falls under one of Washington’s recognized exceptions. Hendrickson, 129 Wn.2d at 70-71. The exceptions are consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry¹ investigative stops. Id. at 71. Exceptions to the warrant requirement “must be jealously and carefully drawn, and must be confined to situations involving special circumstances.” State v. Boyce, 52 Wn. App. 274, 279, 758 P.2d 1017 (1988).

The State implicitly acknowledges that in this case there was no warrant and no recognized exception to the warrant requirement. But based on dicta in Jorden, the State argues that this Court created a new “reasonable suspicion” exception for evidentiary searches under article I,

¹ Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

section 7. Br. of Resp't at 13-15; Answer at 4. This Court should clarify that it did not so hold.

The issue in Jorden was whether the information in a motel registry constitutes a "private affair," not whether there was a new exception to the warrant requirement under the "authority of law" clause. If reasonable suspicion constituted authority of law for evidentiary searches, as the State contends, then police officers could search a person's house based on mere individualized suspicion. They could search a person's car for evidence based on mere suspicion that a crime had been committed. They could search a person's bank records based on mere suspicion. The State would be wrong on all counts. See State v. Young, 123 Wn.2d 173, 186, 867 P.2d 593 (1994) (to search house government must have warrant or "show a compelling need to act outside of our warrant requirement"); Hendrickson, 129 Wn.2d at 70-71 (reversing conviction where search of car was based on mere individualized suspicion and not on warrant or recognized exception); State v. Miles, 160 Wn.2d 236, 252, 156 P.3d 864 (2007) (banking records are "private affairs" protected by article I, section 7, and may not be searched absent judicially issued warrant or subpoena).

An evidentiary search is never allowed based on mere suspicion. See Hendrickson, 129 Wn.2d at 70-71. The only type of search for which

individualized suspicion is sufficient is a weapons frisk. See Terry, 392 U.S. at 9. And even there, the initial stop of the person must be separately justified. State v. Walker, 66 Wn. App. 622, 629, 834 P.2d 41 (1992).

The search of a motel registry is not a weapons frisk. Accordingly, more than mere “suspicion” is required to provide the authority of law necessary to allow the search. This Court should reaffirm Jorden and reject the State’s invitation to create a sweeping new exception to the warrant requirement.

C. CONCLUSION

Glenn Nichols asks this Court to grant review of the issues raised in his motion for discretionary review and reaffirm and clarify its decision in State v. Jorden.

DATED this 20th day of November, 2009.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND MAILING/DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 83742-2**, 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 Deborah Dwyer - 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
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Date: November 23, 2009

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