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NO. 59750-7-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

IN RE THE PERSONAL RESTRAINT OF GLENN NICHOLS

GLENN G. NICHOLS,

Petitioner.

2009 MAR -9 PM 3:51

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

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A. ARGUMENT

1. *JORDEN* REQUIRES SUPPRESSION OF THE EVIDENCE OBTAINED AS A RESULT OF THE MOTEL REGISTRY SEARCH BECAUSE IT WAS CONDUCTED WITHOUT A WARRANT AND NO EXCEPTION TO THE WARRANT REQUIREMENT APPLIED.

In his opening brief, 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 State v. Jordan, 160 Wn.2d 121, 156 P.3d 893 (2007). The State initially agreed with Mr. Nichols but now contends that Jorden created a sweeping 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).

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

the supreme court created a new “reasonable suspicion” exception for evidentiary searches under article I, section 7. Br. of Resp’t at 13-15. This contention is meritless. 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.

By the State’s reasoning, 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 v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). 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. Because the officers here conducted a registry search without a warrant, and no exception applied, Mr. Nichols’s petition should be granted.¹

2. THIS ISSUE MAY BE RAISED FOR THE FIRST TIME IN A PERSONAL RESTRAINT PETITION.

As explained in Mr. Nichols’ opening brief, his claim is properly before this Court under RAP 16.4 and In re Personal Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). The rule is that a petition should be granted if the petitioner has shown, as

¹ The State’s fourth argument, at pages 15-19, is a stock brief it files to urge the supreme court to reconsider Jorden. See, e.g., supplemental brief of respondent in State v. Lindsey, No. 58626-2-I. As the State acknowledges, the supreme court already refused to consider this argument. To the extent the State tries to tailor the argument to this particular case, it confuses the “private affair” and “authority of law” prongs of article I, section 7. The information in a motel registry is a private affair, and the authority of law necessary to invade it is a warrant or recognized exception to the warrant requirement.

Mr. Nichols has, “actual prejudice stemming from constitutional error.” Id. This is the rule regardless of whether the same issue was raised previously. In fact, our supreme court *prefers* PRP’s that do not relitigate an issue previously raised. See In re Personal Restraint of Gentry, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999) (“a collateral attack by PRP on a criminal conviction ... *should raise new points* of fact and law that were not or could not have been raised in the principal action”) (emphasis added).

The State ignores recent Washington cases and argues that Mr. Nichols’ petition is barred under decades-old federal Fourth Amendment cases. Br. of Resp’t at 7-9 (citing Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); In re Personal Restraint of Rountree, 35 Wn. App. 557, 668 P.2d 1292 (1983)). Mr. Nichols is not filing a federal habeas petition and is not raising a Fourth Amendment issue. Under current *Washington* law, Mr. Nichols’s claim may proceed.

In re Personal Restraint of Brown, 154 Wn.2d 787, 117 P.3d 336 (2005) is instructive. In that case, the defendant filed one PRP in which he argued that his seizure was unlawful because Oregon trip permits were valid in Washington, so the officer should not have stopped the car for having an illegal permit. Id. at 792-93. After

that PRP was dismissed, he filed a second PRP in which he argued his seizure violated article I, section 7 because the officer's request for his identification was improper under State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004). Id. at 790, 793. The supreme court held that the defendant was not procedurally barred from raising Rankin in his second PRP. Id. at 793-96.

In holding the PRP was not barred, the Court noted *with approval* that "the issue Brown raised in his first PRP is not similar to the issue he raises in his second PRP." Id. at 794. The Court further noted that even if it were similar, the "good cause" exception to the procedural bar would apply because Rankin represented a "significant, intervening change in the law." The same is true here: Jorden represents a significant, intervening change in the law, and therefore even if a procedural bar would normally apply, the "good cause" exception would also apply.²

As in Brown, Mr. Nichols raises an article I, section 7 issue that he did not raise earlier because the dispositive case had not

² The State also notes that one reason federal courts frown upon fourth amendment claims raised in habeas petitions is that allowing such claims does not meaningfully further the deterrent purpose of the exclusionary rule. But unlike the federal exclusionary rule, whose primary purpose is deterrence, our state constitutional exclusionary rule's primary purpose is protection and vindication of privacy rights. State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982). Allowing article I, section 7 claims to be raised in PRP's furthers this goal.

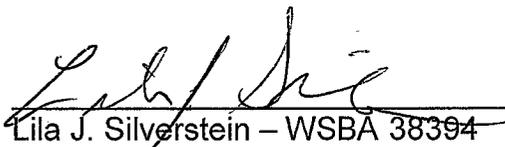
yet been decided. As in Brown, Mr. Nichols's petition is properly before the Court and should be granted.³

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Nichols respectfully requests that this Court grant his personal restraint petition and vacate his convictions.

DATED this 9th day of March, 2009.

Respectfully submitted,


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³ In the alternative, the PRP should be granted based on ineffective assistance of counsel. Either the issue could not have been raised earlier because Jorden had not been decided – in which case the PRP is properly before the Court as described above – or it should have been raised earlier notwithstanding the absence of Jorden, in which case relief should be granted based on ineffective assistance of counsel. Trial counsel should have raised the issue based on other cases holding that article I, section 7 is stronger than the Fourth Amendment. See, e.g., State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999); State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990); State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

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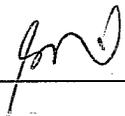
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SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF MARCH, 2009.

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