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May 05, 2011, 1:53 pm
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No. 84223-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL GERALD SNAPP,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON
ASSOCIATION OF PROSECUTING ATTORNEYS

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A. ARGUMENT

The WAPA brief evinces a misunderstanding of article I, section 7 and does not address the arguments in Mr. Snapp's supplemental brief.

As explained in petitioner Daniel Snapp's supplemental brief, the search of his car was unconstitutional because it was performed without a warrant and there were no exigent circumstances. The Court of Appeals recognized there was no warrant, and recognized that the search was not necessary to ensure officer safety or prevent destruction of evidence. But it condoned the warrantless search on the basis that officers had reason to believe there were drugs in the car.¹ While this "Thornton" exception to the warrant requirement exists under the Fourth Amendment, it does not exist under article I, section 7. Mr. Snapp thoroughly explained in his supplemental brief why adopting such an exception would be incompatible with our state constitutional privacy provision.

WAPA does not address the arguments in Mr. Snapp's supplemental brief. In urging this Court to revert to a "pre-Ringer relevant evidence exception" to the warrant requirement, WAPA evinces a misunderstanding of article I, section 7 and essentially acknowledges that this Court would have to jettison 30 years of independent state constitutional interpretation in order to adopt the proposed exception.

¹ As it turned out, there were no drugs in the car.

Contrary to dozens of this Court's cases, WAPA opines that the text of article I, section 7 "merely restated the protections afforded by the Fourth Amendment" and therefore supports the adoption of another exception to the warrant requirement. WAPA brief at 8, 9. Tellingly, the cases WAPA cites for this proposition are from 1905, 1948, and 1977 – all before this Court began interpreting the state constitution independently of the federal constitution. WAPA brief at 8-9. During the last 30 years of independent state constitutional jurisprudence, this Court has emphasized that the text of article I, section 7 does not "merely restate protections afforded by the Fourth Amendment," but rather mandates stronger protection of private affairs against government intrusion:

[T]he language of the federal constitution is substantially different from that of the parallel provision of our state constitution. This is particularly true in that unlike the federal constitution, our state constitution expressly provides protection for a citizen's "private affairs". In a number of cases, this court has held that this difference in language is material and allows us to render a more expansive interpretation to article 1, section 7.

State v. Gunwall, 106 Wn.2d 54, 65, 720 P.2d 808 (1986) (holding warrantless pen register search violated article I, section 7 even though it did not violate Fourth Amendment).

The Fourth Amendment protects only against "unreasonable searches" by the State, leaving individuals subject to any manner of warrantless, but reasonable searches. U.S. Const. amend. IV ("The right of the people to be secure in their ... houses ... against unreasonable searches ... shall not be violated....")

By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). This is because “[u]nlike in the Fourth Amendment, the word ‘reasonable’ does not appear in any form in the text of article I, section 7 of the Washington Constitution.” State v. Morse, 156 Wash.2d 1, 9, 123 P.3d 832 (2005). Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

State v. Eisfeldt, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008) (rejecting Fourth Amendment’s “private search” doctrine); accord State v. Boland, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) (holding warrantless garbage search violated article I, section 7 even though it did not violate Fourth Amendment).

Consistent with its efforts to regress to an era of coterminous interpretation, WAPA describes article I, section 7 as seeking to “balance” the “needs of effective law enforcement and the personal rights of Washington’s citizens.” WAPA brief at 3, 14. But as this Court recently explained in Buelna Valdez, article I, section 7 does not countenance balancing; it mandates that private affairs not be invaded absent authority of law. State v. Buelna Valdez, 167 Wn.2d 761, 775-76, 224 P.3d 751 (2009). This conclusion follows from the differences in language between the state and federal provisions. Id.

The holding in Stroud ... was based upon “a reasonable balance” between the privacy rights afforded under article I, section 7 and considerations for simplicity in law enforcement, mirroring considerations also discussed in Belton. See Stroud, 106 Wash.2d at 152, 720 P.2d 436; id. at 166, 720 P.2d 436 (Durham, J., concurring). To the extent Stroud relied on or was persuaded by its interpretation of Belton, that interpretation failed to adequately account for the distinction between the language of the Fourth Amendment and article I, section 7. The Stroud court balanced privacy interests guaranteed under article I, section 7 with concerns for law enforcement ease and expediency. See Stroud, 106 Wash.2d at 152, 720 P.2d 436; id. at 166, 720 P.2d 436 (Durham, J., concurring). It is not the place of the judiciary, however, to weigh constitutional liberties against arguments of public interest or state expediency. The search incident to arrest exception, born of the common law, arises from the necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of that exception must be so grounded and so limited. **Stroud's balancing of interests is inappropriate under article I, section 7.**

Id. (emphasis added). See also State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009) (rejecting the Fourth Amendment inevitable discovery exception to the exclusionary rule in Washington and stating “the balancing of interests should not be carried out when evidence is obtained in violation of a defendant’s constitutional rights”).

In any event, the needs of law enforcement are not hindered by enforcing the warrant requirement. In Mr. Snapp’s case the officer obtained a warrant for the trunk, and the contents did not magically disappear while he waited for the warrant. He should have done the same for the passenger compartment. Existing exceptions already allow for

warrantless searches where necessary to ensure safety or prevent the destruction of evidence. Expanding the number of exceptions is therefore not necessary for effective law enforcement, and would undermine the constitutional right to privacy. Although allowing more warrantless intrusions might make searches slightly faster, “courts must not sacrifice constitutional rights on the altar of efficiency.” State v. Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010); accord Buelna Valdez, 167 Wn.2d 776 (“It is not the place of the judiciary ... to weigh constitutional liberties against arguments of public interest or state expediency”).

This Court has repeatedly stated that a Gunwall analysis is no longer necessary for article I, section 7 because it is clear that our privacy clause provides stronger protection than the Fourth Amendment – especially in the automobile context. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); State v. Vrieling, 144 Wn.2d 489, 495, 28 P.3d 762 (2001). Yet WAPA purports to perform a Gunwall analysis and argues that preexisting state law supports the adoption of the Thornton exception to the warrant requirement in Washington.² WAPA brief at 10. All of the

² It calls it a “modified” exception based on probable cause rather than reasonable belief, but that is a distinction without a difference. “The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the

cases WAPA cites for this proposition were issued prior to the era of independent state constitutional analysis, and have since been overruled. WAPA brief at 10-11 (citing State v. Hughlett, 124 Wash. 366, 370, 214 P. 841 (1923); State v. Jackovick, 56 Wn.2d 915, 916-17, 355 P.2d 976 (1960); State v. Cyr, 40 Wn.2d 840, 844-45 246 P.2d 480 (1952), overruled by State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), and overruling recognized by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003) and Buelna Valdez, 167 Wn.2d at 774). Indeed, this Court has consistently held that “preexisting Washington law indicates a general preference for greater privacy for automobiles ... than the Fourth Amendment.” State v. Parker, 139 Wn.2d 486, 495, 987 P.2d 73 (1999).

This Court has held car searches and seizures invalid under article I, section 7 in numerous contexts in which there would have been no Fourth Amendment problem. In Jackson, this Court held that the State may not attach a GPS tracking device to a suspect’s car absent a warrant. 150 Wn.2d at 264. In Rankin, the Court held a passenger is seized for purposes of article I, section 7 when an officer requests identification, and

totality of the circumstances. We have stated, however, that “[t]he **substance of all the definitions of probable cause is a reasonable ground for belief of guilt.**” Maryland v. Pringle, 540 U.S. 366, 371, 124 S.Ct. 795 (2003) (citations omitted) (emphasis added). And if an officer has probable cause, he or she can obtain a warrant, so no exception is required. See State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010).

that the officer must have independent authority of law as to the passenger to support such a request. 151 Wn.2d at 695-96. In Parker, this Court held the arrest of a driver does not provide authority of law to search a passenger's belongings. 139 Wn.2d at 496. In Ladson, this Court held pretext stops violate article I, section 7. State v. Ladson, 138 Wn.2d 343, 345, 979 P.2d 833 (1999).

Finally, this Court has rejected the Fourth Amendment "automobile exception" to the warrant requirement under article I, section 7. Tibbles, 169 Wn.2d at 371; State v. Patterson, 112 Wn.2d 731, 734-35, 774 P.2d 10 (1989). As explained in Mr. Snapp's supplemental brief, other states that have rejected the automobile exception have also rejected the Thornton exception the State proposes here. Supplemental Brief at 13-15 (citing cases and explaining reasoning).

Furthermore, as explained in Mr. Snapp's supplemental brief, the genesis of this exception is the outdated and expansive interpretation of the search-incident-to-arrest doctrine adopted in United States v. Rabinowitz,³ which was later overruled in Chimel.⁴ Supplemental Brief at 10-13 (tracing origin of the exception under the Fourth Amendment). The proponent of the exception, Justice Scalia, acknowledged that it is

³ 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).

⁴ Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

“broader” than that approved in Chimel, and also conceded that “carried to its logical end, the broader rule is hard to reconcile with the influential case of Entick v. Carrington, 19 How. St. Tr. 1029, 1031, 1063-64 (C.P. 1765) (disapproving search of plaintiff’s private papers under general warrant, despite arrest).” Thornton v. United States, 541 U.S. 615, 630-31, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (Scalia, J., concurring in the judgment). It is this “broader sort of search incident to arrest” exception that the U.S. Supreme Court adopted in Gant. Id. at 631; Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009).

But exceptions to the warrant requirement are narrower under Washington’s “authority of law” clause than under the Fourth Amendment. O’Neill, 148 Wn.2d at 584-85. This Court rejected the expansive Rabinowitz interpretation of the search-incident-to-arrest exception decades ago. Citing Entick v. Carrington, which Justice Scalia acknowledged was at odds with the Thornton exception, this Court stated, “our state constitutional provision is declaratory of the common-law right of the citizen not to be subjected to search or seizure without a warrant.” Ringer, 100 Wn.2d at 691 (citing Entick, 95 Eng.Rep. 807).

Indeed, while the Thornton exception is derived from the majority holding in Rabinowitz, this Court has repeatedly endorsed the dissent from that case, which lamented, “the right to search the place of arrest is an

innovation based on confusion; without historic foundation, and made in the teeth of a historic protection against it.” Ringer, 100 Wn.2d at 694 (quoting Rabinowitz, 339 U.S. at 79 (Frankfurter, J., dissenting)). See also State v. Patton, 167 Wn.2d 379, 389-90, 219 P.3d 651 (2009).

The [search-incident-to-arrest] exception began as a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee. This was the scope of the exception when Const. art. 1, § 7 was adopted.

Ringer, 100 Wn.2d at 698. Thus, in Washington, “the search incident to arrest exception must be narrowly applied, consistent with its common law origins allowing an arresting officer to search the person arrested and the area within his immediate control.” Patton, 167 Wn.2d at 390 (citing Ringer, 167 Wn.2d at 699). This narrow exception cannot justify the warrantless search of Mr. Snapp’s car.

B. CONCLUSION

For the reasons set forth above and in his supplemental brief, Mr. Snapp respectfully requests that this Court reverse his convictions and remand with instructions to suppress the evidence obtained pursuant to the unconstitutional search.

Respectfully submitted this 5th day of May, 2011.


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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 84223-0
v.)	
)	
DANIEL GERALD SNAPP,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

I, JOSEPH ALVARADO, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 5TH DAY OF MAY, 2011, A COPY OF THE **ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS** WAS SERVED ON THE PARTY/PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

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