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No. 86399-7

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LISA ANN BYRD,

Respondent.

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

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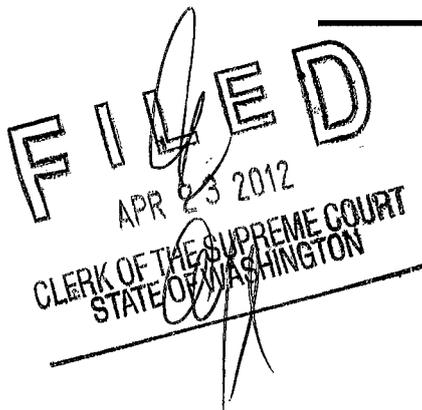


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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 19,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting interference in private affairs without authority of law. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a warrantless search of a person’s purse incident to the arrest of that person violates Article 1, Section 7, when the arrestee has been secured and the purse is in the control of the police at the time of search.

STATEMENT OF THE CASE

On November 17, 2009, Lisa Byrd was arrested for suspicion of having stolen license plates on her vehicle. She was holding her purse at the time of arrest. The officer took Ms. Byrd’s purse away, handcuffed her, and secured her in a patrol car. After securing Ms. Byrd, the officer proceeded to search Ms. Byrd’s purse without obtaining a warrant. The Court of Appeals held that this search exceeded the scope of the “search

incident to arrest” exception to the warrant requirement. *See State v. Byrd*, 162 Wn. App. 612, 258 P.3d 686 (2011).

This case asks whether Article 1, Section 7 of the Washington State Constitution allows for such warrantless searches of an arrestee’s belongings after the arrestee has been secured and the belonging is in the control of law enforcement.

ARGUMENT

“Under article I, section 7 of the Washington Constitution, warrantless searches are *per se* unreasonable.” *State v. Morse*, 156 Wn.2d 1, 3, 123 P.3d 832 (2005). The State asserts that the search of Byrd’s purse falls within a warrant exception for searches incident to arrest, but fails to recognize the narrow scope of that exception. As explained by this Court numerous times, “[e]xceptions to the warrant requirement are jealously and carefully drawn.” *Id.*; *see also, e.g., State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009) (“carefully drawn exceptions”); *State v. Ladson*, 138 Wn.2d 343, 356, 979 P.2d 833 (1999) (“warrants are the rule while exceptions are narrowly tailored”). In fact, this Court has recently addressed this very exception, and reiterated that it is a narrow one:

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or

destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained.

State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

Here, with Byrd secured and the purse in the control of the officers, there was no logistical reason the officers could not have applied for a warrant prior to the search. It seems likely, however, that such an application would have been denied, and no warrant issued, because there was no probable cause to believe the purse contained evidence of a crime. In other words, failing to obtain a warrant here did not merely expedite an otherwise valid search; instead, it entirely circumvented the privacy protections provided by the warrant requirement and Article 1, Section 7.

The State never directly addresses the strong preference for a warrant in Article 1, Section 7, nor does it explain why the warrant requirement could not be satisfied in this situation. It instead views the warrantless search of Byrd's purse as an entitlement of law enforcement, flowing directly from Byrd's arrest and needing no further justification. The weakness of the State's position is shown by its reliance on outdated cases that are no longer good law, or strained interpretations of cases that deal primarily with the parallel, but weaker, privacy protections of the

Fourth Amendment. As discussed below, none of the State's references are applicable to a contemporary analysis of Article 1, Section 7.

A. Modern Interpretations of Article 1, Section 7 Do Not Allow Warrantless Searches of an Arrestee's Belongings Incident to Arrest

The State is able to cite only two cases that are based on state law, and neither is good law. First, the State points to *State v. Hughlett*, 124 Wash. 366, 214 P. 841 (1923). *Hughlett* approved the search of an arrestee's car and luggage within the car, even after the arrestee had been driven away and put in jail. As such, if *Hughlett* were good law, it would indeed support the State's case here. But *Hughlett* was repudiated by this Court decades ago. *State v. Ringer*, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983) (holding searches of vehicles incident to arrest violated Article 1, Section 7 when the drivers had been removed and handcuffed prior to search). *Ringer* found *Hughlett* "to exceed by far any historical justification or precedent," *id.* at 695, and to be "inconsistent with traditional protections against the ability of law enforcement officers to make warrantless searches and seizures," *id.* at 699.

There has been considerable upheaval of vehicle search incident to arrest jurisprudence since *Ringer* was decided. First, *Ringer* was overruled in part by *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) (establishing bright line rule under Article 1, Section 7 to allow a

warrantless search “during the arrest process” of the entire passenger compartment except for locked containers). More recently, *Stroud* was in turn overruled by *Patton* and *Valdez*. This revived *Ringer*, which was described as “a principled and well-reasoned discussion of the search incident to arrest exception as applied to automobiles.” *Valdez*, 167 Wn.2d at 775.

Throughout this history, there has not been even a hint that this Court questioned *Ringer’s* repudiation of *Hughlett*—nor would such questioning be expected, since the search in *Hughlett*, conducted after the arrestee was jailed, would not have been allowed under even the most permissive standard established by *Stroud*. Any possible doubt on this point was recently removed: “*Ringer’s* holding that the vehicle search incident to arrest is based on the dual concerns of officer safety and preservation of evidence stands as valid law, and prior cases that rested on other justifications not involving these concerns are not controlling precedent.” *State v. Snapp*, ___ Wn.2d ___, 2012 WL 1134130, at ¶ 37 (2012). An argument that relies on *Hughlett*, therefore, is simply without merit.

The second state law case cited by the State is *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (allowing search of a purse incident to arrest, when found during search of car incident to arrest). *Fladebo* was

a straightforward application of *Stroud*, holding that the purse was “not a locked container. Consequently, it does not fall within *Stroud’s* exception.” *Id.* at 395. Similarly, when considering the fact that the arrestee had been secured prior to the search, *Fladebo* simply pointed to *Stroud* as justification. *Id.* at 397. Neither of these propositions retain vitality in light of *Patton* and *Valdez*. When this Court overruled *Stroud* in those cases, it effectively overruled *Fladebo* as well, and the State cannot rely on *Fladebo* to justify the search of Byrd’s purse.

Unlike the outdated cases cited by the State, *Patton*, *Valdez*, and *Snapp* are recent decisions by this Court. Their valid precedent compels the conclusion that the warrantless search of Byrd’s purse violated Article 1, Section 7.

B. Fourth Amendment Law Has Minimal Value For Interpreting Article 1, Section 7 and the State’s Reliance on It Should Be Rejected

Given the weakness of the support it finds in state law, the State primarily bases its argument on cases interpreting the Fourth Amendment. Such an approach fails to give proper weight to the significant differences between Article 1, Section 7 and the Fourth Amendment. As explained by this Court,

[Article 1, Section 7] prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed

reasonable searches and thus constitutional. This creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions. The privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment.

Valdez, 167 Wn.2d at 772 (citations and quotations omitted).

This Court should, therefore, be quite skeptical about the persuasiveness of cases based on the Fourth Amendment, and pay heed only if the discussion comports with the strictures of Article 1, Section 7 as well. Here, the State fails to explain the relevance of its Fourth Amendment cases to interpreting the narrow scope of the “search incident” exception to the warrant requirement under Article 1, Section 7—which, unlike the Fourth Amendment, allows warrantless searches only when it is impossible to obtain a warrant in time to ensure safety and protection of evidence of the crime of arrest. *Valdez*, 167 Wn.2d at 777.

For example, the State suggests that the search was justified because it “could well have yielded evidence of the crime of arrest.” Supplemental Brief of Petitioner at 9. Not only is this unlikely, it is irrelevant. There is no way that such evidence could have been destroyed, and the State would have had ample time to secure a warrant if there were probable cause that evidence was inside the purse. Perhaps the State is attempting to bring this search under the so-called *Thornton* exception, which allows under the Fourth Amendment “a warrantless automobile

search incident to arrest ... when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” *Snapp* at ¶ 1. This Court, however, recently held “that the *Thornton* exception does not apply under article I, section 7.” *Id.* at ¶ 46. The State’s reference to Fourth Amendment standards is thus irrelevant to the analysis under Article 1, Section 7.

For that matter, much of the State’s argument does not stand up to examination even if one were to apply the less protective standards of the Fourth Amendment. For example, the State claims a conflict between the present case and *State v. Whitney*, 156 Wn. App. 405, 232 P.3d 582 (2010), but no such conflict exists. *Whitney* involved the search of an arrestee’s *person*, and the discovery of contraband in his pockets. The opinion specifically distinguishes between the search of a person and searches of “*purses*, briefcases or luggage, the latter having a greater expectation of privacy.” *Id.* at 410 (quoting *State v. White*, 44 Wn. App. 276, 278-79, 722 P.2d 118 (1986)) (emphasis added). The standard articulated in *Whitney* would therefore not allow the warrantless search of Byrd’s purse.¹

¹ *Amicus* does not concede that *Whitney* correctly stated the law with regard to warrantless searches of persons incident to arrest under our state constitution. Article 1, Section 7 requires a reasonable belief that the search is necessary for safety reasons or to prevent destruction of evidence of the crime of arrest. *Valdez*, 167 Wn.2d at 177. This

The State is similarly ill-served by its reliance on *State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025 (1992). *Smith* allowed the warrantless search of a fanny pack incident to the arrest of the person wearing it, even though, by the time of the search, the fanny pack had been separated from the arrestee and was in control of the arresting officer. *Amicus* agrees with the State that the facts in the present case are indistinguishable from *Smith* in all relevant ways. However, since *Smith* was decided solely under the Fourth Amendment, and explicitly declined to consider Article 1, Section 7, *id.* at 678 n. 2, it has limited relevance to a state constitutional analysis.

Moreover, *amicus* agrees with the Court of Appeals that *Smith* is no longer good authority, even under the Fourth Amendment. *Byrd*, 162 Wn. App. at 616. *Smith* relied on the then-predominant view that Fourth Amendment law allowed a warrantless search of the entire passenger compartment of a vehicle incident to the arrest of an occupant, with no additional justification needed. *See Smith*, 119 Wn.2d at 679-81 (discussing *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)). This view of *Belton* was repudiated by *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). *Gant* described *Belton*

Court need not address that question in the present case, however, since *Byrd* contests only the search of her purse, not her person.

instead as a narrow holding, applying only to a rare instance in which “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Id.* at 343.

Gant emphasized repeatedly that a correct analysis of searches incident to arrest under the Fourth Amendment must ensure “that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.” *Id.* at 339 (citing *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). Those purposes are not met once the arrestee has been secured. “If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.” *Gant*, 556 U.S. at 339. This is consistent with the holding of *United States v. Chadwick*:

Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

In other words, the justifications used by *Smith* are incompatible with current Fourth Amendment law. *Smith* disregarded *Chadwick*, believing that it had been overruled by *Belton*. We now know that was an erroneous reading of *Belton*, as explained in *Gant*. Thus, even under the Fourth Amendment, *Smith* should be overruled as inconsistent with *Chimel* and *Chadwick*.

Smith therefore has neither precedential nor persuasive value in the present case. Instead, *amicus* urges this Court to consider the reasoning used by *Chadwick*, which was inappropriately dismissed by *Smith*. *Chadwick's* reasoning applies equally well to an analysis under Article 1, Section 7 as it did to an analysis under the Fourth Amendment. As explained by *Valdez*, 167 Wn.2d at 777, “after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile.” There is similarly no risk of obtaining a weapon or destroying evidence located in a purse once the arrestee has been secured and separated from the purse, so a warrantless search is not justified under Article 1, Section 7.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to hold that warrantless searches of an arrestee’s belongings violate Article

1, Section 7 absent an actual risk of destruction of evidence or danger to the arresting officer, and to hold that those risks do not exist once an arrestee has been secured and the belongings are in the control of law enforcement officers. Accordingly, evidence found in Byrd's purse should have been suppressed.

Respectfully submitted this 11th day of April 2012.

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