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NO. 87104-3

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LARRY DEAN TYLER, Petitioner.

STATE'S REPLY TO BRIEF OF *AMICI CURIAE* WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

SCOTT W. ROSEKRANS
Prosecuting Attorney

PAMELA B. LOGINSKY
Special Deputy Prosecuting Attorney
206 10th Ave. SE
Olympia, WA 98501
(360) 753-2175

 ORIGINAL

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I. INTRODUCTION

Amici curiae Washington Association of Criminal Defense Lawyers and American Civil Liberties Union of Washington (hereinafter “WACDL”) request that this Court overrule its prior acknowledgment that inventory searches are a lawful exception to article 1, section 7’s warrant requirement. WACDL requests that this Court substitute consent searches for inventory searches. WACDL, however, has not demonstrated that the current practice of allowing an inventory to be conducted when a vehicle is impounded is both wrong and harmful.¹

Inventory searches serve many important interests. Specifically, inventory searches protect the vehicle owner’s property, protect the police and tow truck companies from false claims of theft by the owner, and protect police and others from potential danger.²

WACDL’s request that the Court substitute consent searches for inventory searches ignores the interests of third parties, including those of tow truck operators, police officers, and the community as a whole. Adopting their proposed rule can cost lives.

¹*See, e.g., State v. Nunez*, 174 Wn.2d 707, 713, ___ P.3d ___ (2012) (there must be a clear showing that an established rule is incorrect and harmful before it is abandoned).

²*See generally South Dakota v. Opperman*, 428 U.S. 364, 370, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); *State v. White*, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998).

II. ARGUMENT

A. An Inventory Search Protects Interests Apart From Those of the Property Owner.

Inventory searches are one of the carefully drawn exceptions to article 1, section 7's warrant requirement. *State v. White*, 135 Wn.2d 761, 769 n. 8, 958 P.2d 982 (1998). While inventory searches protect the vehicle owner's property, such searches also protect police officers, tow truck operators, and other potentially vulnerable individuals from harm.³

Impound inventories protect police and tow truck operators from claims for damage to the impounded vehicles and/or from false claims of theft.⁴ WACDL argues that this concern is overblown, noting that the Montana Supreme Court has said that the police only owe a duty of "slight

³The Towing and Recovery Association of Washington's *amicus curiae* brief contains real world examples of dangerous situations that could have been avoided if an inventory of a vehicle is completed prior to the vehicle's removal from the roadside. Many more examples exist. *See, e.g.*, Tammy Webber, "Infants' remains in Ill. Car trunk in plastic bags", *Seattle Times*, Aug. 17, 2009, available at http://seattletimes.com/html/nationworld/2009679427_apusbabyskeletonsintrunk.html (last accessed Sep. 19, 2012); "Body left in towed car for 2 days after fatal wreck in Ohio", *Seattle Times*, Dec. 16, 2008, available at http://seattletimes.nwsourc.com/html/nationworld/2008526744_apbodyincar.html (last accessed Sep. 19, 2012); Ashley Bach, "Man's body found in van 17 hours after collision", *Seattle Times*, June 8, 2005, available at <http://community.seattletimes.nwsourc.com/archive/?date=20050608&slug=body08e> (last accessed Sep. 19, 2012); Annie Burris, "Suit: Police impounded Jaguar with dog still inside.", *The Orange County Register*, Dec. 30, 2009, available at <http://www.ocregister.com/articles/ninow-226340-claim-fraser.html> (last accessed Sept. 19, 2012).

⁴*State v. Gluck*, 83 Wn.2d 424, 518 P.2d 703 (1974); *State v. Montague*, 73 Wn.2d 381, 385-87, 438 P.2d 571 (1968). *Accord South Dakota v. Opperman*, 428 U.S. 364, 359, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1975).

care”to the vehicle owner.⁵ The argument, however, ignores the higher duty placed upon tow truck operators and tow companies by this Court,⁶ a duty that leaves them more vulnerable to false claims of theft. The clearest protection against such a claim is the inventory conducted by police prior to the tow truck driver taking custody of the vehicle and its contents.⁷

Even courts that downplay the concerns of police allow police to take actions, without the vehicle owner’s consent, to limit civil liability. In *State v. Delao*, 333 Mont. 68, 140 P.3d 1065 (2006), the defendant was arrested for impaired driving. After the defendant was secured in the back seat of the officer’s patrol car, the officer informed the defendant that he would be securing the defendant’s vehicle. Without asking the defendant’s permission, the officer entered the defendant’s vehicle to obtain the keys, so he could start the motor in order to operate the vehicle’s power locks and windows. *Id.*, at 1066. While searching for the keys, the officer noticed a bottle of vodka that was partially covered by the armrest. The officer removed the bottle of

⁵*Brief of Amici Curiae Washington Association of Criminal Defense Lawyers and American Civil Liberties Union of Washington* (hereinafter “WACDL’s Brief”), at 11, citing *State v. Sawyer*, 174 Mont. 512, 571 P.2d 1131, 1134 (1977), *overruled on other grounds*, *State v. Long*, 216 Mont. 65, 700 P.2d 153 (1985).

⁶*See Conger v. Cordes Towing Service, Inc.*, 58 Wn.2d 876, 878, 365 P.2d 20 (1961) (tow truck companies are “common carriers” and are charged with maintaining the highest degree of care in the maintenance and operation of the vehicles they transport).

⁷The State acknowledges that the inventory is not a completely effective means of preventing false claims since items can be taken before the inventory or the inventory can itself be falsified. Courts, however, generally agree that “the existence of the practice tends to discourage the fraudulent assertion of claims for lost or stolen property.” *See, e.g., State v. Atkinson*, 298 Ore. 1, 688 P.2d 832, 836 (1984).

vodka. *Id.*, at 1066-67. The Montana Supreme Court held that the officer's actions were lawful, and that the officer's slight duty of care provided ample justification for his warrantless entry into the vehicle. *Id.*, at 1068-69.

Impound inventories can also save lives – those of tow truck operators, police officers, children, pets, and others. WACDL downplays this third rationale for inventory searches, claiming that “[i]mpounded cars are not inherently more dangerous than other cars”. WACDL’s Brief, at 12. This statement, however, ignores the fact that an impounded vehicle is not treated as a unit.⁸ Rather, the contents will be separated from the vehicle.

Once police impound a vehicle, the vehicle will be removed from the scene by a tow company. A number of regulations and statutes govern the

⁸The assumption that the vehicle will be treated as a single unit clearly underlies the Montana Supreme Court’s decision in *State v. Sawyer*: In *Sawyer*, the Court held that the police officer’s slight duty of care “would be satisfied by simply securing and taking an inventory of any valuable items in plain view from outside the vehicle, rolling up the windows, locking the doors, and returning the keys to the owner.” 571 P.2d at 1134.

This Court made the same assumption in *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). In *Houser*, this Court stated that

property locked in the trunk of an automobile, as here, presents no great danger of theft. It is apparent that a would-be thief would be unaware of the existence of property of value in the trunk. Indeed, countless numbers of automobiles with locked trunks are daily left on the city streets of this country without unreasonable risk of theft. Accordingly, we think that any need to protect property located in a locked trunk is outweighed by the countervailing privacy interests of the individual in the enclosed area of the trunk.

95 Wn.2d at 767. This statement in *Houser* does not take into account the requirement to make the trunk contents available for redemption separately from the vehicle. This statement also overlooks the fact that the contents of the trunk will shift when the vehicle’s front end or rear end is hoisted in the air by the tow truck.

tow truck companies conduct with respect to the vehicle. These statutes and regulations seek to ameliorate the hardships that an involuntary tow may place on the vehicle's owners. Thus, the vehicle's owner may recover the contents of the vehicle even when the vehicle may not be recovered due to a statutory "time-out" period⁹ or an inability to pay the cost of the impound.¹⁰ See RCW 46.55.090.

WAC 204-91A-130,¹¹ the regulation that ameliorates the hardship of the impound by allowing a registered owner to retrieve his or her belongings from the impounded vehicle, requires the tow company to inventory the vehicle's contents within 48 hours of the vehicle's arrival at the storage facility. *Id.* Contraband and certain valuables found during the inventory must be promptly turned over to the Washington State Patrol. *Id.* In other words, an inventory will be performed regardless of the vehicle owner's consent. The only questions are (1) whether the inventory will be performed at the roadside in the presence of the driver or at the storage facility after the driver is taken to jail; and (2) whether the inventory will be performed by a police officer, who is trained in handling weapons,

⁹See Hailey's Law, RCW 46.55.350-.370 (requires the vehicles of a person arrested for driving while under the influence of intoxicants to be held a minimum of 12 hours from arrival at the tow truck operator's storage facility).

¹⁰RCW 46.55.120 through 46.55.140 generally require the registered owner to pay all towing, removal and storage fees prior to recovering his or her vehicle.

¹¹ WAC 204-91A-130 appears, in full, in appendix A.

explosives, and other hazardous materials, or by a civilian tow truck operator.

A registered owner who seeks to retrieve his or her possessions from the impounded vehicle will probably be angry at the loss of use of his or her vehicle. That anger is likely to be directed at the tow company's employees. The reality of violence and the potential for violence is a proper and legitimate concern that supports the roadside inventory search of the personal belongings that will be separately returned to the vehicle's owner.

This conclusion was reached by the Montana Supreme Court when it rejected a request to extend the limitations it placed upon vehicle impounds in *Sawyer* to inventories of possessions that accompany an arrestee to jail:

[The defendant] also asserts that the "less intrusive means rule," discussed in *State v. Sawyer* (1977), 174 Mont. 512, 571 P.2d 1131, and in *Sierra*, should be applied to the inventory of an arrestee's possessions upon his or her incarceration in jail. [The defendant] contends that, as a less intrusive means of dealing with the sorts of potential problems referred to above, the police could have secured his rucksack for safekeeping, could have inventoried valuable items found in plain view, could have marked the rucksack in a manner from which one could determine whether there had been tampering and then could have placed the rucksack in an appropriate area for safekeeping during the arrestee's detention.

Keeping in mind that the protection of the arrestee, the police and other persons in and about the station house from the potential harm posed by weapons, dangerous instrumentalities and hazardous substances concealed on or in the arrestee's possessions is the primary justification for administrative inventory searches, as a practical matter, there are several problems inherent in the "less intrusive means" approach.

First, if, as pointed out above, the closed container contains a weapon, it can take but a matter of seconds for the arrestee to retrieve the weapon and use it against an unsuspecting person. This concern alone vitiates [the defendant's] argument that a less intrusive means of conducting an inventory search will accomplish the State's goal of safeguarding persons and property in the station house. A search of a closed container found on or in the possession of the arrestee is the least intrusive method of alleviating any risk from weapons and dangerous instrumentalities that may be used by an arrestee upon his or her release from the jail.

Second, if an arrestee is carrying a concealed bomb, explosive or incendiary device, there is little, short of a physical search of the arrestee's possessions, that the police can do to protect against the potential harm inherent in such a situation. While [the defendant] suggested at oral argument that the police could store prisoners' personal possessions in a bomb-proof room, it is not likely that Montana police stations and sheriff's offices would have access to such a room and even less likely that city councils, county commissioners and taxpayers would be willing to finance the cost to construct that type of facility. Again, a physical inventory search is the most practical and least intrusive method of dealing with the problem.

Third, it is impractical and unreasonable to expect the police to make decisions on a daily basis about which containers to search and what, if any, is the least intrusive means available to inventory an arrestee's personal property on or in his or her possession. *Lafayette*, 462 U.S. at 648. "It would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit." *Lafayette*, 462 U.S. at 648. The potential for danger alone justifies the inventory of items found on or in the possession of a lawfully arrested person at the station house. "[A] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances

they confront." *Lafayette*, 462 U.S. at 648, citing *New York v. Belton* (1981), 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860. To a certain extent, we must defer to police departments in their development of standardized administrative procedures which will best serve to protect the interests of the arrestee, the police, others incarcerated in jail, and society at large. *Lafayette*, 462 U.S. at 648.

While [the defendant] argues, correctly, that the right of privacy can only be infringed by a compelling state interest closely tailored to effectuate that interest, it does not follow that the less intrusive means rule mandates that the police use some method short of physically searching the arrestee's possessions. The routine, administrative inventory search of the personal property on or in the possessions of the arrestee at the police station following arrest is closely tailored to effectuate the compelling interest of safeguarding persons and property in the station house from weapons, dangerous instrumentalities and hazardous substances which might be concealed in the arrestee's possessions.

State v. Pastos, 269 Mont. 43, 887 P.2d 199, 203-04 (1994). These same rationales apply to the personal belongings that the tow company employees must return to the disgruntled vehicle owner. It is unreasonable to require these civilians to be exposed to greater peril than is acceptable for police officers.

This Court should reject WACDL's request to forbid inventory searches. This Court should also reconsider its dicta that authorizes a vehicle owner to waive the protections of the inventory search, as this leaves third parties vulnerable to legal and physical jeopardy.

B. A Non-Owner Driver's Authority to Demand a Search Warrant Does Not Allow the Non-Owner Driver to Waive the Owner's Ability to Seek Recourse for Theft or Damage

Larry D. Tyler did not own the vehicle that was impounded in this case. Tyler did not produce any proof that he had permission to drive the vehicle. Tyler does not fall within the class of people who may redeem an impounded vehicle. *See* RCW 46.55.120(1)(a).¹² Despite these facts, WACDL contends that because Tyler could consent to a search of the vehicle he may “*refuse* consent to search.” WACDL Brief at 9 (emphasis in the original).

WACDL's premise mixes apples and oranges. The owner of the vehicle yields his or her privacy as to the vehicle and its contents to the borrower of the car. The only protection the owner of the vehicle has against prying is the probity of the borrower, as neither the Fourth Amendment nor

¹²RCW 46.55.120(1)(a) provides, in part, that

Only the legal owner, the registered owner, a person authorized in writing by the registered owner or the vehicle's insurer, a person who is determined and verified by the operator to have the permission of the registered owner of the vehicle or other item of personal property registered or titled with the department, or one who has purchased a vehicle or item of personal property registered or titled with the department from the registered owner who produces proof of ownership or written authorization and signs a receipt therefore, may redeem an impounded vehicle or items of personal property registered or titled with the department.

article 1, section 7 applies to the actions of private citizens.¹³ Thus, when the non-owner driver is asked for consent to search the vehicle, the borrower is only waiving his or her personal right to demand a search warrant.

By contrast, the owner of a vehicle does not waive claims against third persons who harm the vehicle while the vehicle is entrusted to the borrower. Any waiver of liability the borrower would provide to an officer who is impounding a vehicle or the tow company to whom the vehicle is entrusted would be limited to the borrower's own claims for loss. *Cf. Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992) (a parent does not have legal authority to waive a child's own future cause of action for personal injuries resulting from a third party's negligence). This is why this Court currently restricts the ability to waive the protections of an inventory to the vehicle's owner. *See White*, 135 Wn.2d at 771 n. 11.

III. CONCLUSION

The State respectfully requests that this Court affirm Tyler's conviction for possession of Methamphetamine.

¹³*See generally State v. Eisenfeldt*, 163 Wn.2d. 628, 635 n.3, 185 P.3d 580 (2008) ("Article I, section 7 and Fourth Amendment protections apply only to searches by state actors, not to searches by private individuals.").

Dated this 20th day of September, 2012.

Respectfully Submitted,

Scott Rosekrans
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Pamela B. Loginsky". The signature is written in a cursive style with a large, stylized initial "P".

Pamela B. Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney

APPENDIX A

WAC 204-91A-130, states that:

All personal belongings and contents in the vehicle that are not permanently attached must be kept intact, and must be returned to the vehicle's owner or agent during normal business hours upon request and presentation of a driver's license or other sufficient identification. The tow operator must without charge and upon demand, release personal property not being held for evidence purposes by the impounding agency, to the vehicle's owner or agent during normal business hours of 8:00 a.m. to 5:00 p.m. except for weekends and state recognized holidays. Release procedures must also follow guidelines as set forth in chapters 308-61 WAC and 46.55 RCW.

The vehicle contents, less items listed in WAC and RCW, and personal property not picked up prior to the vehicle going to auction must remain with the vehicle and may not be kept by the operator or sold at auction to fulfill a lien against the vehicle.

(1) The items of personal property that the state patrol will not accept in response to RCW 46.55.090 include but are not limited to the following:

- (a) Tire chains;
- (b) Spare tire and wheels;
- (c) Used auto parts and accessories;
- (d) Seat covers;
- (e) Fuel containers;
- (f) Jacks and lug wrenches;
- (g) Radios, stereos, and other items attached to the vehicle by bolts, screws, or some other manner that incorporates them to the vehicle. These items must remain

with the vehicle;

(h) Refuse, trash, garbage, open or empty alcohol containers and perishable items;

(i) Soiled or mildewed items, including clothing, shoes, blankets, and tarps having no actual value;

(j) Miscellaneous unofficial papers and other items having no actual value.

(2) Items that must be turned over to the patrol within forty-eight hours and inventoried include, but are not limited to:

(a) Money;

(b) Wallets and purses;

(c) Bank and check books;

(d) Bank and credit cards;

(e) Official identification cards, operator's license and passports;

(f) Jewelry;

(g) Firearms and any type weapon;

(h) Contraband including controlled substances;

(i) Stocks, bonds, money orders, bank certificates, travelers checks, postage stamps, and food stamps;

(j) Other items of obvious value.

(3) The tow operator must not remove or damage any vehicle parts permanently affixed to the vehicle, i.e., trunk locks or door locks. The tow operator must allow the registered owner or driver of a vehicle to remove specialized hand controls, provided that their removal does not damage

the vehicle.

(4) If a vehicle is equipped with an ignition interlock system as outlined in RCW 46.20.720, the tow operator must contact the ignition interlock company through the phone number provided on the ignition interlock label within forty-eight hours to inform them that the vehicle has been impounded. The ignition interlock system must be removed by a qualified technician and released to the installing company, at no charge and upon proof of ownership, prior to the auction of the vehicle. The removal of the ignition interlock system must not render the vehicle inoperable.

(5) After the certified sale letter has been mailed, the tow operator may dispose of any perishable items or items that may rot, decay, or otherwise cause substantial odor within the interior of the vehicle.

PROOF OF SERVICE

I, Pamela B. Loginsky, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 20th day of September, 2012, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

James L. Reese, III
Attorney at Law
612 Sidney Avenue
Port Orchard, WA 98366

Shelley Williams
Assistant Attorney General
800 Fifth Ave, Ste 2000 TB-14
Seattle, WA 98104-3188

Sarah A. Dunne
ACLU of Washington
901 Fifth Avenue, Suite 630
Seattle, WA 98164

Nancy L. Talner
ACLU of Washington
901 Fifth Avenue, Suite 630
Seattle, WA 98164

Douglas B. Klunder
ACLU of Washington
901 Fifth Avenue, Suite 630
Seattle, WA 98164

Lila J. Silverstein
Wash. Appellate Project
1511 Third Avenue, Ste. 701
Seattle, WA 98101

Stuart Halsan
Law Office of Stuart A. Halsan
P.O. Box 1049
Centralia, WA 98531

Margo Martin
1726 Belmont Ave # 102
Seattle, WA 98122

On the 20th day of September, 2012, I also e-mailed a copy of the document to which this proof of service is attached to

JAMES L. REESE, III – jameslreese@hotmail.com

THOMAS BROTHERTON - tbrotherton@co.jefferson.wa.us

SCOTT ROSEKRANS - srosekrans@co.jefferson.wa.us

STUART HALSAN - stuhalsan@localaccess.com

M. HUBERSDRAKE - m.hubersdrake@gmail.com

LILA SILVERSTEIN - lila@washapp.org

SARAH DUNNE - dunne@aclu-wa.org

DOUG KLUNDER - Klunder@aclu-wa.org

NANCY TALNER - talner@aclu-wa.org

SHELLEY WILLIAMS - ShelleyW1@ATG.WA.GOV

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 20th day of September, 2012, at Olympia, Washington.

A handwritten signature in cursive script, reading "Pamela Beth Loginsky". The signature is written in dark ink and is positioned above a horizontal line.

Pamela B. Loginsky, WSBA No. 18096

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; dunne@aclu-wa.org; Klunder@aclu-wa.org; talner@aclu-wa.org; ShelleyW1@ATG.WA.GOV; Scott Rosekrans; tbrotherton@co.jefferson.wa.us; m.hubersdrake@gmail.com; jameslreese@hotmail.com; stuhalsan@localaccess.com; lila@washapp.org

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Sent: Thursday, September 20, 2012 4:17 PM
To: dunne@aclu-wa.org; Klunder@aclu-wa.org; talner@aclu-wa.org; ShelleyW1@ATG.WA.GOV; Scott Rosekrans; tbrotherton@co.jefferson.wa.us; OFFICE RECEPTIONIST, CLERK; m.hubersdrake@gmail.com; jameslreese@hotmail.com; stuhalsan@localaccess.com; lila@washapp.org
Subject: State v. Tyler, No. 87104-3

Dear Clerk and Counsel:

Attached for filing is the State's Reply to the Brief of Amici Curiae WACDL and ACLU.

Please let me know if you should encounter any difficulty in opening the attachment.

Sincerely,

Pam Loginsky
Staff Attorney
Washington Association of Prosecuting Attorneys
206 10th Ave. SE
Olympia, WA 98501

Phone (360) 753-2175
Fax (360) 753-3943

E-mail pamloginsky@waprosecutors.org