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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

ANTOINE LAMONT BROCK,

Respondent.

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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**ORIGINAL**

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**A. ISSUES**

1. An officer may search "personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." Over a period of time that lasted 10 to 12 minutes, Officer Olson detained Brock for criminal trespass, separated him from the backpack he had been carrying, tried to determine his true identity, placed him under formal arrest for providing false information, then searched his backpack and discovered a plethora of evidence of other crimes. Was the backpack in Brock's possession "immediately preceding the time of arrest" for purposes of the search incident to arrest rule?

2. Officers may, without a warrant, inventory and search personal items before booking a defendant into jail. Brock was arrested and booked into jail. Was the search of his backpack a proper inventory search even if it was not justified as a search incident to arrest?

**B. STATEMENT OF THE CASE**

At approximately 3:00 a.m. on May 21, 2008, Washington Department of Fish and Wildlife Officer Eric Olson was patrolling

Golden Gardens Park in Seattle. 1RP 6, 11.<sup>1</sup> The park closes at 11:30 p.m. 1RP 12. Signs at the park's entrances provide notice of the park's hours and that violators are subject to prosecution for trespass. 1RP 12-13. Olson parked his patrol car close to the restrooms and noticed that the men's restroom door was propped open. 1RP 20-21. Olson saw two legs facing the toilet and he waited outside for about ten minutes before the occupant – Brock – emerged. 1RP 21-23, 26. Brock wore very baggy clothing and carried a backpack. 1RP 23-24. Olson told Brock that he was not permitted in the park and Brock replied that he did not know the park was closed. 1RP 24-25.

Olson asked Brock to place his backpack on the ground. 1RP 25. He patted down Brock for weapons because he was patrolling alone, he did not know Brock, Brock was wearing baggy clothing and Brock's behavior in the bathroom had been suspicious – during the long wait, Olson never heard Brock urinate. 1RP 26, 61. Olson told Brock that he was not under arrest then asked Brock for identification because he needed to know who he was investigating. 1RP 28. Brock replied that he only had a library card and started to retrieve it from his backpack, but he then stopped

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<sup>1</sup> The verbatim report of proceedings will be cited as follows: 1RP - 6/13/11; 2RP - 6/14/11; 3RP - 6/28/11 (sentencing).

and said, "Actually, I don't have any identification on me." 1RP 27. Olson asked Brock for his name, birth date and social security number. 1RP 27. Brock identified himself as "Dorien Halley," with a birth date of "7/19/67," and a social security number of "560-32-4581." 1RP 27. Olson repeated the information back to Brock, who confirmed its accuracy. 1RP 27-28.

Olson asked Brock to stand by his patrol truck while he continued his investigation. 1RP 30. Olson carried Brock's backpack to his vehicle because it was very full and had a lot of pockets, and he did not know if it contained a weapon. 1RP 30, 47. Olson did not know whether Brock was assaultive. 1RP 30.

As Olson returned to his patrol truck, Brock told him that his driver's license had been issued in California, not Washington. 1RP 33-34. Neither state had a record of the information Brock had provided. 1RP 35. Olson then told Brock that he was under arrest for providing false information.<sup>2</sup> He told Brock that he would not necessarily be taken to jail. 1RP 36, 39. Olson did not handcuff Brock. 1RP 39.

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<sup>2</sup> RCW 9A.76.175 provides:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

Olson returned to his patrol car. He knew from his pat-down that Brock did not have a wallet in his pockets. 1RP 40. Olson opened the main backpack pocket to try to find valid identification. As he did so, he kept an eye on Brock, who stood 12 to 15 feet away. 1RP 41, 45. Olson saw a purse or wallet. He opened it because he thought it was a good place for identification. 1RP 41-42. In the wallet, Olson saw two baggies (one containing suspected marijuana and one with suspected methamphetamine), a Department of Corrections (DOC) identification badge<sup>3</sup> with a photograph of Brock and his true name and birth date, and lots of checks and gift cards in various names. 1RP 41-42, 49-50. Olson then handcuffed Brock, searched him, and placed him in his patrol vehicle. 1RP 43.

Olson returned to his truck to run a computer check using Brock's true name and he discovered that Brock had an outstanding felony arrest warrant. 1RP 44. As Olson waited for the Washington State Patrol to confirm the warrant, he did field tests on the suspected marijuana and methamphetamine, which came back positive. 1RP 44-47. Once he confirmed the warrant, Olson had no discretion; he had to transport Brock to jail and book him. 1RP

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<sup>3</sup> Olson knew that the badge was authentic because he had previously worked as a DOC community corrections officer. 1RP 6-7.

50. The total contact between Olson and Brock from the time when Brock came out of the bathroom to the time when Olson began to transport Brock to the jail lasted no more than 10 to 12 minutes. 1RP 54-55.

Olson then more thoroughly searched the backpack. 1RP 48. Olson knew that the jail would not permit him to book Brock with the backpack unless he had searched the bag for contraband, such as weapons, drugs, or explosives. 1RP 51, 70-71. Olson said that the jail required such a search because otherwise, "I could bring a bomb there." 1RP 51. And Olson could not leave the backpack at the park, because it would expose the Department of Fish and Wildlife to tort liability. 1RP 52.

During this second search, Olson found lots of checks, mail, and credit and debit cards in various names, more baggies with possible drugs, and a small electronic scale, and a glass pipe with residue. 1RP 48-49. Before Olson booked Brock on the felony warrant and for possession of methamphetamine, he inventoried the backpack's items, but he did not create a detailed evidence spreadsheet until a later time.<sup>4</sup> 1RP 50-51.

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<sup>4</sup> The inventory search is discussed more fully in section C.2 of the brief, infra.

Brock was subsequently charged with ten counts of second degree identity theft, three counts of forgery, and one count of possession of methamphetamine. CP 35-41. He moved, pursuant to Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), to suppress all of the evidence seized. CP 23-34. On June 13, 2011, after a CrR 3.6 hearing, the trial court ruled that the search was lawful as incident to a valid arrest and declined to suppress the evidence. CP 63.

Brock waived his right to a jury trial and proceeded with a bench trial on stipulated facts. CP 42-45; 2RP 12-15. Later that same day, Brock filed a motion for reconsideration of the court's denial of his suppression motion. CP 79-82. Brock argued that the reasoning of Gant applied not just to vehicles, but to all searches incident to arrest, including searches of personal effects. CP 79-82; 2RP 18-20. The trial court denied the motion. 2RP at 18-20. The court found Brock guilty of all charges, except one count of identity theft (count 10). CP 96-101; 2RP 30-33.

Brock appealed his convictions and challenged the trial court's denial of his motion to suppress evidence, claiming that because there was no officer safety or preservation of evidence basis for the search of his backpack, Olson's warrantless search

violated his right to privacy under article I, section 7 of the Washington Constitution. Brock did not challenge the legality of his arrest at the trial level or on appeal. The State argued that the search incident to arrest was proper.

The Court of Appeals reversed, holding that Brock did not have actual and exclusive possession of his backpack at or immediately preceding the time of his arrest. State v. Brock, 182 Wn. App. 680, 330 P.3d 236 (2014). The Court of Appeals did not address whether the inventory search was valid.

**C. ARGUMENT**

It is undisputed that Brock was trespassing in a park after hours, that he provided false information to a police officer, that he was placed under arrest and *Mirandized* after providing false information, that he had a Department Of Corrections' felony warrant, that he was handcuffed and placed in Officer Olson's official truck to be transported to the King County jail, and that his arrest was lawful. Under these circumstances, the search of Brock's backpack was justified under two exceptions to the warrant requirement: search incident to arrest and/or as an inventory search.

The State respectfully asks this Court to hold, first, that Brock's backpack was associated with him immediately before arrest and this association did not terminate simply because the officer took temporary custody of the bag as he investigated and then arrested Brock. Therefore, Brock's backpack was lawfully searched incident to his arrest. Second, the State also respectfully asks this Court to hold that the search of Brock's backpack was a lawful inventory search; there was no way that a search of his backpack could have been avoided once he was arrested and was going to be delivered to the jail.

**1. THE SEARCH OF A BACKPACK IN THE ARRESTEE'S ACTUAL AND EXCLUSIVE CONTROL MINUTES BEFORE HIS ARREST IS PERMISSIBLE UNDER ARTICLE I, SECTION 7.**

This Court recently held that the long-standing search-incident-to-arrest exception to the warrant requirement encompasses two distinct rationales: 1) a search of the arrestee's immediate area is justified only by concerns for officer safety or evidence preservation, and 2) a search of the arrestee's person and articles of his or her person is justified by the authority of a lawful arrest. State v. Byrd, 178 Wn.2d 611, 625, 310 P.3d 793, 800 (2013). Byrd was arrested in a car and an officer confiscated

and searched a purse that was sitting on Byrd's lap at the time of arrest. This Court applied the second rationale for searches incident to arrest and reiterated that searches of an arrestee's person may include the person's personal effects, such as clothing and all articles closely associated with the arrestee. Id. at 621-22.

In determining whether an article falls within the search of the arrestee's person, this Court reaffirmed the "time of arrest" rule. Id. at 621. Under this rule, the Court defined articles subject to search as "personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." Id. at 623-24. The Court cautioned that such a search does not include "articles within the arrestee's reach but not actually in his possession." Id. In other words, the articles must be in such immediate physical relation to the one arrested "as to be in a fair sense a projection of his person." Id. The Court also observed that a delay – like one of more than an hour – between the arrest and the search could render the search unreasonable. Id. at 623-24 (citing United States v. Chadwick, 433 U.S. 1, 15, 97 S. Ct. 2476, 2486, 53 L. Ed. 2d 538 (1977)). This Court also noted that the officer could not leave Byrd's purse in the car. An officer making an arrest cannot simply abandon an item of personal property because

it might contain contraband or weapons, and the public would be at risk if the item was left unattended. Id. at 624.

The holding in Byrd was reaffirmed a year later in State v. MacDicken, 179 Wn.2d 936, 319 P.3d 31 (2014). MacDicken was arrested for armed robbery. At the time of arrest, he was carrying a laptop bag and pushing a rolling duffle bag. MacDicken was handcuffed and separated from the bags by one officer while another officer searched the bags a car's length away. MacDicken, 179 Wn.2d at 939. This Court held that the search was proper because it extended "only to articles in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person." Id. at 941 (quoting United States v. Rabinowitz, 339 U.S. 56, 78, 70 S. Ct. 430, 94 L. Ed. 2d 653 (1950)).

Here, it is undisputed that Brock was in actual, exclusive, and sole control of the backpack when he was approached by Olson for trespassing in the park, that he was arrested, and that the backpack was searched less than 12 minutes later. The relevant sequence of events may be described as follows: legitimate contact for trespassing in the park after hours; temporary seizure of the backpack; temporary detention to establish Brock's identity; Brock provides false information; the officer attempts to confirm the

information; formal arrest upon probable cause after provided false information; cursory search of backpack for identity; discovery of some contraband (narcotics); handcuffing; discovery of warrant; fuller search of backpack before transport to jail; and discovery of evidence of identity theft and more narcotics. Similar to Byrd and MacDicken, the only time the backpack ceased to be under Brock's sole control was when Olson placed it in his truck as he completed his inquiries. But this brief separation effectuated by the arresting officer for safety reasons did not dissociate Brock from his backpack for purposes of the search incident to arrest rule.

Officers routinely conduct investigatory stops that do not result in arrests. During these encounters officers are allowed to briefly separate a person from his personal articles for officer safety reasons.<sup>5</sup> Such brief separation does not strip the person of his ownership of the articles nor does it end his association with his belongings. In fact, at the conclusion of an investigatory stop that does not result in an arrest officers must return such personal belongings to the owner. And, even following arrest and incarceration, any item of property not taken into evidence must be returned to the defendant upon his release.

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<sup>5</sup> The Court of Appeals concluded that the length of time the officer had control of the backpack was not unreasonable. Brock, 182 Wn. App. at 687.

Simply put, Brock's backpack did not cease to be associated with him simply because Olson took temporary custody of the item; this was a public park, it was after hours, and nobody else could have taken control of the backpack. When a detention – and attendant seizure of personal effects – quickly ripens into a formal arrest, the effects are still “immediately associated” with their owner. This is especially clear where, as here, Olson could have not simply left the backpack in the public park. As this Court observed in Byrd, if an officer cannot prevent an arrestee from leaving his belongings behind, what of other personal articles, such as an arrestee's baggie of drugs or concealed firearm would be left? 178 Wn.2d at 624. Moreover, if the backpack ceased to be associated with Brock during the brief investigatory stop, then nobody was associated with the backpack. But that is not sensible, because clearly the backpack is going to follow Brock to the jail.

The more sensible holding would be to apply the rationale from Byrd. The backpack was in Brock's sole possession immediately before arrest, his possession was temporarily interrupted – for fewer than 12 minutes – by the investigatory detention, but this short interruption did not defeat his property right in the backpack, so it remained closely associated with his person

at the time of arrest, and would remain his property even in jail. Byrd, 178 Wn.2d at 621-22. Under such circumstances, the backpack necessarily remained an extension of his person, and was properly searched incident to arrest.

Furthermore, a holding that the backpack ceased to be associated with Brock when it was placed in the patrol vehicle during Olson's investigation would provide law enforcement officers with a strong incentive to accelerate full blown arrests and searches rather than to take the more measured and less confrontational approach that Olson took in this case. Olson could have fully searched Brock when he *Mirandized* him after arresting him for providing false information. Instead, Olson chose to investigate further in an effort to avoid escalating the contact – which started with a relatively minor violation – into a full booking and search. Olson did not decide to take Brock to the jail until he had no choice as a result of Brock's DOC felony warrant. This more measured and incremental approach to law enforcement should be encouraged, not punished. As Judge Becker pointed out in her Brock dissent, “[t]o hold that the search became invalid because the officer decided to investigate before making an arrest would

create an undesirable incentive for hasty arrests." Brock, 182 Wn. App. at 691 (Becker, J., dissenting).

In sum, Brock's backpack did not cease to be a personal article of the defendant during Olson's investigatory stop, the backpack was properly searched incident to arrest, and applying Byrd to these facts preserves the rationale for the search incident to arrest rule, and will encourage sound police practices.

## **2. THE INVENTORY SEARCH WAS VALID.**

Even if the search of the backpack was not a search incident to arrest, the backpack was properly searched to inventory evidence and property once Olson had decided that Brock was going to be booked into jail.

Courts have long recognized that officers may perform an inventory search of personal items subsequent to a lawful arrest without a warrant. Illinois v. Lafayette, 462 U.S. 640, 643-48, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983); State v. Smith, 76 Wn. App. 9, 13, 16, 882 P.2d 190 (1994) (recognizing the exception under the federal and state constitutions). Unlike a search incident to arrest or a search based on probable cause, the inventory search must serve a purpose other than discovering evidence of criminal

activity. Smith, 76 Wn. App. at 14. An inventory search is justified, in part, "to safeguard the detention facility by preventing the introduction therein of objects which could be used to attempt an escape or by which harm might be done to some prisoner." State v. Garcia, 35 Wn. App. 174, 177, 665 P.2d 1381 (1983) (citing 2 W. LaFave, Search & Seizure § 5.3(a), at 306-07 (1978)). The period of time that elapsed between arrest and a subsequent administrative process is inconsequential. Garcia, 35 Wn. App. at 175 (citing United States v. Edwards, 415 U.S. 800, 807, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974)).

Once Olson confirmed Brock's outstanding felony warrant, arrest was mandatory, so Brock was destined to be booked into jail. CP 62 (finding of fact L). Olson said that the jail would not permit him to book Brock unless he had thoroughly searched the backpack. 1RP 51. He testified that he inventoried all of the backpack because the jail would not allow him to "bring anything in that I have not gone through and inventoried or searched. Heck no. I could bring a bomb there." 1RP 51. To comply with the King County jail procedures, Olson stated that he must search an arrestee's personal effects for contraband, including weapons, explosives, drugs or other prohibited items. 1RP 51, 70-71.

If, however, officers discover items of evidentiary value in the course of a search, they are entitled to seize those items. Under the "plain view" exception to the warrant requirement, a warrantless seizure is permissible if officers have a prior justification for the intrusion; if they discover incriminating evidence inadvertently, and if they have immediate knowledge that they have evidence before them. State v. Burgess, 43 Wn. App. 253, 259, 716 P.2d 948 (1986) (citing State v. Daugherty, 94 Wn.2d 263, 267, 616 P.2d 649 (1980)).

Here, Olson thoroughly searched the backpack before he booked Brock. See CP 20 (Superform). Olson booked Brock on May 21, 2008. CP 20. At that time, Olson prepared an inventory that listed Brock's backpack and contents as items of personal property left for Brock at jail, but he separately listed items seized and entered into evidence, to wit: several checkbooks, a scale with residue, various statements and credit cards. CP 20.<sup>6</sup> This search comports with all the elements of an inventory search.

However, the trial court applied an erroneous legal analysis by attaching significance to the fact that the officer did not complete

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<sup>6</sup> Olson said that he returned to Brock many items found in the backpack, including three cell phones, because he had no reason to think that they were not Brock's. 1RP 51-52.

the documentation of the backpack's contents until after the arrest. In her oral findings of fact, the trial judge said, "Subsequently (after Olson determined that he could not leave the backpack at the scene), the officer searched the backpack more thoroughly and filled out a form detailing its contents." 2RP 8. The court found that Olson "had to remove all of the contents of the backpack to ensure that no contraband was inside." CP 62 (finding of fact O). Yet, the court concluded that this was not an inventory search, concluding that, "[A]t best, it was a once-over before the backpack was taken to the jail with the defendant." 2RP 11.

The time of the search and the timing of the paperwork are uncontested, but the timing of the paperwork has no legal significance to the issue at bar. Although Olson did not complete a detailed account of each specific item entered into evidence until some later time, the preparation of such a list is simply an administrative act, and the delay is inconsequential. See Garcia, 35 Wn. App. at 175. The timing of preparation of the log sheet does not undermine the rationale behind the inventory search, which is two-fold: first, as articulated by Olson in this case, to safeguard the detention facility; and second, to protect law enforcement from liability from accusations that property has been

stolen. If an officer does not conduct an inventory search prior to booking a suspect, the suspect could later claim to have had missing valuables in his belongings. In reaching its erroneous conclusion, the trial court apparently focused on when Olson detailed the items that he had placed into evidence, as opposed to when he seized the items. The booking form, CP 20, demonstrates that Olson did more than a "once-over" of the seized items. The trial court's ruling turned on an error of law premised on an undisputed fact. That ruling was in error.

Thus, because Olson was conducting a lawful inventory search when he discovered the plethora of incriminating evidence, Olson's inventory search provides an independent basis on which the Court should affirm Brock's convictions. Once Olson was required to book Brock in the jail, Olson had the lawful authority to search the backpack and he did so.

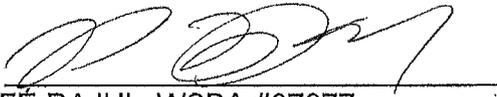
D. CONCLUSION

For all the foregoing reasons, this Court should reverse the Court of Appeals' decision and affirm Brock's conviction.

DATED this 20<sup>th</sup> day of February, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Christopher Gibson, the attorney for the respondent, at Gibsonc@nwattorney.net, containing a copy of the **SUPPLEMENTAL BRIEF OF PETITIONER**, in State v. Antoine Lamont Brock, Cause No. 90751-0, in the Supreme Court, for the State of Washington.

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

Dated this 20 day of February, 2015.

A handwritten signature in black ink, appearing to be "C. Gibson", written over a horizontal line.

Name:  
Done in Seattle, Washington

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Dear Supreme Court Clerk:

Attached for filing in the above-referenced case is Supplemental Brief of Petitioner.

Please let me know if you should have problems opening the attachment.

Sincerely,

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