

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 19, 2015, 9:52 am
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 90926-1

THE SUPREME COURT THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSE FIGEROA MARTINES,

Respondent.

Filed
Washington State Supreme Court

APR 01 2015

Ronald R. Carpenter
Clerk

BRIEF OF AMICUS CURIAE

WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

PAMELA B. LOGINSKY

Staff Attorney

Washington Association of Prosecuting Attorneys

206 10th Ave. S.E.

Olympia, WA 98501

Telephone: (360) 753-2175

E-mail: pamloginsky@waprosecutors.org



ORIGINAL

TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE 1

II. ISSUE PRESENTED 1

III. STATEMENT OF FACTS 1

IV. ARGUMENT 1

 A. ALL SEARCHES MUST BE REASONABLE IN SCOPE
 AND MANNER OF EXECUTION 1

 B. SANCTIONS ARE APPROPRIATE WHEN A SEARCH IS
 NOT REASONABLE IN SCOPE OR MANNER OF
 EXECUTION 7

 C. SUPPRESSION OF EVIDENCE IS UNWARRANTED
 WHEN A SEARCH IS CONDUCTED PURSUANT TO A
 SEARCH WARRANT IN A REASONABLE MANNER
 9

V. CONCLUSION 11

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Alderman v. United States</i> , 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed 2d 176 (1969)	8
<i>Arkansas v. Sanders</i> , 442 U.S. 753, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)	2
<i>Brutsche v. City of Kent</i> , 164 Wn.2d 664, 193 P.3d 110 (2008)	7
<i>Cameron v. Craig</i> , 713 F.3d 1012 (9th Cir. 2013)	3, 7
<i>Jones v. United States</i> , 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)	8
<i>Maryland v. King</i> , 569 U.S. ___, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013)	2
<i>Muehler v. Mena</i> , 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed.2d 299 (2005)	3
<i>Platteville Area Apt. Ass'n v. City of Platteville</i> , 179 F.3d 574 (7th Cir. 1999)	3
<i>Rakas v. Illinois</i> , 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978)	8
<i>State v. Clark</i> , 143 Wn.2d 731, 24 P.3d 1006, <i>cert. denied</i> , 534 U.S. 1000 (2001)	10
<i>State v. Grenning</i> , 142 Wn. App. 518, 174 P.3d 706, <i>aff'd</i> , 169 Wn.2d 47, 234 P.3d 169 (2010)	6
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	2
<i>State v. Houser</i> , 95 Wn.2d 143, 622 P.2d 1218 (1980)	2
<i>State v. Libero</i> , 168 Wn. App. 612, 277 P.3d 708 (2012)	9

<i>State v. Maddox</i> , 116 Wn. App. 796, 67 P.3d 1135 (2003), <i>aff'd</i> , 152 Wn.2d 499, 98 P.3d 1199 (2004)	7
<i>State v. Martines</i> , 182 Wn. App. 519, 331 P.3d 105, <i>review granted</i> , 181 Wn.2d 1023 (2014)	8
<i>State v. Price</i> , 2012 UT 7, 270 P.3d 527 (2012)	6
<i>State v. Snapp</i> , 174 Wn.2d 177, 275 P.3d 289 (2012)	2
<i>State v. Starke</i> , 81 Wis.2d 399, 260 N.W.2d 739 (1978)	5
<i>State v. Walker</i> , 136 Wn.2d 678, 965 P.2d 1079 (1998)	8
<i>State v. Weber</i> , 548 So.2d 846 (Fla. App. 1989), <i>review denied</i> , 558 So.2d 20 (Fla. 1990)	5, 10
<i>Terebesi v. Torres</i> , 764 F.3d 217 (2nd. Cir. 2013)	3
<i>United States v. Burgess</i> , 576 F.3d 1078 (10th Cir.), <i>cert. denied</i> , 558 U.S. 1097 (2009)	4
<i>United States v. Corbett</i> , 518 F.2d 113 (8th Cir. 1975)	5
<i>United States v. Crozier</i> , 777 F.2d 1376 (9th Cir. 1985)	7
<i>United States v. Highfill</i> , 334 F. Supp. 700 (E.D. Ark. 1971)	5
<i>Wilkerson v. State</i> , 88 Md. App. 173, 594 A.2d 597 (Md. App. 1991)	4
<i>Wilson v. Arkansas</i> , 514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995)	2
<i>Ybarra v Illinois</i> , 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979)	2

CONSTITUTIONS

Fourth Amendment 1, 2, 4-6, 8
Washington Constitution article I, section 7 1, 2, 8

STATUTES

RCW 36.27.020 1
RCW 46.61.502 9
RCW 46.61.502(1) 9
RCW 46.61.540 9

OTHER AUTHORITIES

2 Wayne R. Lafave & David C. Baum, *Search and Seizure*
§ 4.10(e) (5th ed. 2012) 6

2 Wayne R. LaFave & David C. Baum, *Search and Seizure*,
§ 4.6(f) (5th ed. 2012) 8

Charles W. Johnson and Debra L. Stephens, *Survey of*
Washington Search and Seizure Law: 2013 Update,
36 Seattle U. L. Rev. 1581 (2013) 6

National Highway Traffic Safety Administration, *Drug-Impaired*
Driving: Understanding the Problem & Ways to Reduce It:
A Report to Congress (Dec. 2009) 10

Tina Cafaro, *Slipping Through the Cracks: Why Can't*
We Stop Drugged Driving?, 32 Western New England
L. Rev. 33 (2010) 10

Washington State Traffic Safety, *Annual Report* (2014) 9

I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also responsible by law for providing advice to the duly elected sheriff. RCW 36.27.020.

WAPA is interested in cases, such as this, which have wide-ranging impact on the ability to investigate criminal activity and on the ability to collect relevant evidence.

II. ISSUE PRESENTED

Whether the manner of executing the search warrant in this case was reasonable?

III. STATEMENT OF FACTS

The facts of this case are discussed in detail in the briefs of the parties and will not be addressed here.

IV. ARGUMENT

A. ALL SEARCHES MUST BE REASONABLE IN SCOPE AND MANNER OF EXECUTION

Both the Fourth Amendment and Washington Constitution article I, section 7 authorize searches conducted pursuant to a judicial warrant issued by a neutral magistrate after finding probable cause. Both the Fourth

Amendment and article I, section 7 authorize warrantless searches under certain “‘jealously and carefully drawn’ exceptions” to the warrant requirement. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979))). Both the Fourth Amendment and article I, section 7¹ require that all searches, those conducted with a warrant and those conducted without a warrant, be reasonable in scope and in manner of execution. *See generally Maryland v. King*, 569 U.S. ___, 133 S. Ct. 1958, 1970, 186 L. Ed. 2d 1 (2013) (warrantless searches); *Ybarra v Illinois*, 444 U.S. 85, 101-02, 100 S. Ct. 338, 347-48, 62 L. Ed. 2d 238 (1979) (the first clause of the Fourth Amendment, which prohibits all unreasonable searches, restricts a policeman’s actions, whether a search is pursuant to a warrant or not).

With respect to search warrants, the reasonableness test governs every aspect of an officer’s conduct. Manner and mode of entry is subject to reasonableness standards that are not explicitly spelled out in the search warrant. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 115 S. Ct. 1914, 131 L.

¹Although this Court stated in *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012), that “article I, section 7 is not grounded in notions of reasonableness,” in context the statement appears to say only that *warrantless* searches are not judged solely by whether they are “reasonable”; there must still be authority of law for an intrusion into private affairs. *Id.* at 194. Article I, section 7 surely does not allow a warrant-based search to be conducted in an *unreasonable* manner. The reasonableness of a search authorized by a warrant is as much a part of article I, section 7, as it is a part of the Fourth Amendment.

Ed. 2d 976 (1995) (knock and announce); *Terebesi v. Torres*, 764 F.3d 217 (2nd Cir. 2013) (use of flash-bang devices); *Cameron v. Craig*, 713 F.3d 1012 (9th Cir. 2013) (number of officers). Manner and mode of controlling the people encountered within the search location is subject to reasonableness standards that are not explicitly spelled out in the search warrant. *See, e.g., Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed.2d 299 (2005) (length of detention and force used to detain persons on premise during execution of search warrant must be reasonable under the totality of the circumstances).

The manner and mode of conducting the actual search is also subject to reasonableness standards that are not explicitly spelled out in the search warrant. A search warrant that authorizes entry into a home in order to seize a person for whom there is probable cause does not specify all the places that the officer may not look. There is no requirement that the search warrant describe the place to be searched to “all areas large enough to secrete a 6-foot-4-inch tall, 280 pound male.” This is because the Fourth Amendment already prohibits looking in places that cannot accommodate the items specified in the search warrant. *See, e.g., Platteville Area Apt. Ass’n v. City of Platteville*, 179 F.3d 574, 579 (7th Cir. 1999) (a valid warrant’s specification of the object of the search “determines the reasonable scope of the search, and all searches, to pass muster under the Fourth Amendment,

must be reasonable. If you are looking for an adult elephant, searching for it in a chest of drawers is not reasonable.”); *Wilkerson v. State*, 88 Md. App. 173, 594 A.2d 597, 605 n. 3 (Md. App. 1991) (“the permitted scope of a search is, logically, whatever is necessary to serve the purpose of that particular search, but don't look for an elephant in a matchbox.”).

The search warrant for a fugitive is not required to specify the order in which the home is to be searched. There is no requirement that the search warrant specify that the officer is to first look in the fugitive's room, then the common areas, then the bedrooms of other occupants, then the attic or cellar, then under kitchen sinks, inside sleeping sofas or the numerous other nooks and crannies where people have secreted themselves in an effort to avoid detection. This is because the Fourth Amendment already requires the search method to be tailored to meet allowed ends. Respect for legitimate rights to privacy generally requires an officer executing a search warrant to first look in the most obvious places and as it becomes necessary to progressively move from the obvious to the obscure, with the search concluding as soon as the specified persons or items are found. *See, e.g., United States v. Burgess*, 576 F.3d 1078, 1094 (10th Cir.), *cert. denied*, 558 U.S. 1097 (2009).

The search warrant is not required to state when the search is to be terminated. The warrant does not contain a 30 minute, 60 minute, or similar period for conducting the actual search of the home for the fugitive. This is

because the Fourth Amendment reasonableness requirement already requires that the search must be terminated when all the described items have been found or it is clear they are not on the premises, vehicle, person, or other things to be searched. *United States v. Highfill*, 334 F. Supp. 700, 701 (E.D. Ark. 1971); *State v. Starke*, 81 Wis.2d 399, 260 N.W.2d 739, 747 (1978).

When a described item may be secreted in more than one place in a residence, the search need not stop as soon as the first blood drop, hair fragment, or narcotic is located. Instead the search may continue so long as it is likely that more could be on the premises. *See, e.g., United States v. Corbett*, 518 F.2d 113, 115 (8th Cir. 1975) (officers acted reasonably in continuing their search after a quantity of marijuana was found in the first of three bedrooms as the marijuana was purportedly being held for breaking down and eventual sale); *State v. Weber*, 548 So.2d 846, 848 (Fla. App. 1989), *review denied*, 558 So.2d 20 (Fla. 1990) (officers were not obliged to confine the search to the first bedroom upon discovery of marijuana in that room, nor were they required to believe the defendant's representations as to the amount and location of contraband).

The search warrant is not required to identify the procedures or tests that may be performed during its execution. The search warrant need not specify that an officer may use a camera, flashlights, screwdrivers, sledge hammers, chemical reagents, or other tools. This is because "it is generally

understood that a lawful seizure of apparent evidence of a crime using a valid search warrant includes a right to test or examine the seized materials to ascertain their evidentiary value.” *State v. Grenning*, 142 Wn. App. 518, 174 P.3d 706, *aff’d*, 169 Wn.2d 47, 234 P.3d 169 (2010). *Accord* 2 Wayne R. Lafave & David C. Baum, *Search and Seizure* § 4.10(e) (5th ed. 2012) (“lawful seizure of apparent evidence of crime pursuant to a search warrant carries with it a right to test or otherwise examine the seized materials to ascertain or enhance their evidentiary value”); Charles W. Johnson and Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 Seattle U. L. Rev. 1581, 1657 (2013) (a court need not issue a separate order authorizing a blood test of a blood sample that was collected pursuant to a search warrant). The Fourth Amendment reasonableness requirement will limit the testing performed pursuant to the warrant to procedures that will identify evidence of the crime under investigation. *Cf. State v. Price*, 2012 UT 7, 270 P.3d 527, 530-31 (2012) (unreasonable under the Fourth Amendment to test blood collected pursuant to a search warrant for impaired driving for HIV status, DNA information, blood type, or other private medical facts).

B. SANCTIONS ARE APPROPRIATE WHEN A SEARCH IS NOT REASONABLE IN SCOPE OR MANNER OF EXECUTION

A police officer who executes a search warrant in an unreasonable manner will face consequences. The consequences will vary by the type of violation. Any sanction, however, must be directed to the constitutional violation and should not provide a windfall to the defendant.

Allegations of excessive use of force or wanton destruction of property will generally result in civil damages. *See, e.g., Cameron v. Craig, supra* (civil lawsuit may be maintained for the use of excessive force while executing a search warrant); *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008) (civil suit may be maintained for damage to property during execution of search warrant when the damage is greater than is consistent with a thorough investigation).

Allegations that the officers exceeded the scope of the search warrant will result in the suppression of evidence found after the search should have terminated or in areas too small to accommodate the items listed in the search warrant. The fact that the officer physically looked in a cookie jar for an elephant, however, does not affect the validity of the search warrant. Thus, all other items will still be admissible in the criminal prosecution of the property owner. *See, e.g., State v. Maddox*, 116 Wn. App. 796, 808, 67 P.3d 1135 (2003), *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004) (quoting *United*

States v. Crozier, 777 F.2d 1376, 1381 (9th Cir. 1985) (“[o]nly those items which fall outside the scope of the warrant need be suppressed”)); 2 Wayne R. LaFare & David C. Baum, *Search and Seizure*, § 4.6(f) at 814- 818 (5th ed. 2012) (collecting cases).

In the instant case, the Court of Appeals ordered suppression of the blood and alcohol test results out of concern that police may, in the future and in a different case, violate the Fourth Amendment or article I, section 7. *See State v. Martines*, 182 Wn. App. 519, 529-30, 331 P.3d 105, *review granted*, 181 Wn.2d 1023 (2014). This was error because even when a constitutional violation has occurred, suppression of evidence is not required unless it was the defendant’s own rights that were infringed. That is, a defendant may not raise a violation of a third party’s rights as a basis for the suppression of evidence. *See Rakas v. Illinois*, 439 U.S. 128, 150, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978) (defendants who did not assert an ownership interest in the automobile that was searched or the rifles or shells that were seized are not entitled to have evidence suppressed); *Alderman v. United States*, 394 U.S. 165, 173, 89 S. Ct. 961, 22 L. Ed 2d 176 (1969) (quoting *Jones v. United States*, 362 U.S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) (one who brings a motion to suppress must allege and establish “that he himself was the victim of an invasion of privacy”)); *State v. Walker*, 136 Wn.2d 678, 965 P.2d 1079 (1998) (evidence obtained in violation of the husband’s

constitutional rights was still admissible against his wife). *State v. Libero*, 168 Wn. App. 612, 619, 277 P.3d 708 (2012) (holding that while a defendant could challenge the legality of a search through asserting automatic standing, he still must show a violation of his own rights to suppress the challenged evidence).

C. SUPPRESSION OF EVIDENCE IS UNWARRANTED WHEN A SEARCH IS CONDUCTED PURSUANT TO A SEARCH WARRANT IN A REASONABLE MANNER

The search warrant in the instant case was executed in a reasonable manner. Law enforcement limited the search to the location identified in the search warrant. Law enforcement seized only the items identified in the search warrant. Law enforcement limited the forensic testing solely to evidence related to the identified crime of “Driving While Under the Influence, RCW 46.61.502.” CP 100-101.

The crime of driving while under the influence (DUI) is committed by consumption of alcohol and/or an extensive list of drugs. *See generally* RCW 46.61.502(1) and RCW 46.61.540. The presence of alcohol does not preclude the presence of drugs. To the contrary, alcohol is frequently accompanied by other drugs. *See generally* Washington State Traffic Safety, *Annual Report*, at 10 (2014)² (many drivers in traffic fatalities were impaired

²This report is available at http://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2014/12/2014-Annual-Report_FINAL12.29.14.pdf (last visited Mar. 16, 2015).

by both drugs and alcohol); National Highway Traffic Safety Administration, *Drug-Impaired Driving: Understanding the Problem & Ways to Reduce It: A Report to Congress*, at 5 (Dec. 2009)³ (“It is not uncommon for drivers to take two or three potentially impairing drugs at the same time. Drivers frequently combine use of drugs with alcohol.”); Tina Cafaro, *Slipping Through the Cracks: Why Can’t We Stop Drugged Driving?*, 32 *Western New England L. Rev.* 33, 48-49 (2010) (many people use more than one drug at a time, frequently combining illicit drugs, prescription drugs, over the counter drugs and alcohol). When, as in DUI cases, it is impossible to know what type of drugs could be present before actually performing forensic testing, the rule of reasonableness is satisfied by circumscribing the search to the crime under investigation. *See, e.g., State v. Clark*, 143 Wn.2d 731, 754, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001).

Although Martines claimed that he only consumed “one Blue Moon,” CP 95-99, this assertion was not binding on the officers in deciding whether there was probable cause to arrest Martines for DUI and it was not binding on the forensic scientists. *See Weber*, 548 So.2d at 848. Those scientists properly tested Martines’ blood for alcohol and those classes of drugs that were most likely to impair Martines’ ability to drive. Testing was not

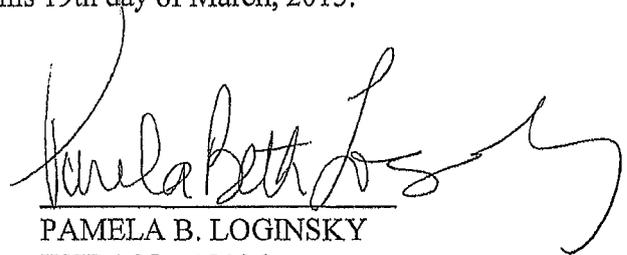
³A pdf copy of this report may be downloaded This report is available at <http://www.nhtsa.gov/Impaired> (last visited Mar. 16, 2015).

conducted for the presence of other drugs, hormones, statins, or anti-virals, that are used to treat specific medical conditions in ways that do not impair a person's ability to drive. The Court of Appeals, therefore, erred in reversing Martines' conviction on the grounds that the alcohol and drug testing results were unlawfully obtained.

V. CONCLUSION

All searches conducted pursuant to a search warrant are subject to the rule of reasonableness. Evidence collected in a reasonable manner pursuant to a search warrant should not be excluded out of fear that law enforcement might execute a different search warrant in an unreasonable manner. The Court of Appeals' decision suppressing the results of alcohol and drug testing in this case must be reversed.

Respectfully submitted this 19th day of March, 2015.

A handwritten signature in black ink, appearing to read "Pamela B. Loginsky", written over a horizontal line.

PAMELA B. LOGINSKY
WSBA No. 18096
Staff Attorney

OFFICE RECEPTIONIST, CLERK

To: Pam Loginsky; Jim Whisman; oliver@washapp.org
Subject: RE: State v. Martines, No. 90926-1

Received 3-18-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pam Loginsky [mailto:Pamloginsky@waprosecutors.org]
Sent: Thursday, March 19, 2015 9:44 AM
To: OFFICE RECEPTIONIST, CLERK; Jim Whisman; oliver@washapp.org
Subject: State v. Martines, No. 90926-1

Dear Clerk and Counsel:

Attached for filing is a motion for leave to file an amicus curiae brief, the proposed brief, and a proof of service.

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

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