

94054-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN DEAN VANHOLLEBEKE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF ADAMS COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT
RE: *GUNWALL* ANALYSIS

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I. ISSUES PRESENTED

1. Whether article 1, section 7 of the Washington State Constitution provides broader rights to the citizens of our State in the context of third-party consent to search borrowed goods?
2. Whether the search of a borrowed vehicle merely possessed by the defendant violated article 1, section 7 of the Washington State Constitution, where the search was consented to by the owner of the vehicle?

II. SUMMARY OF ARGUMENT

Article 1, section 7 of the Washington Constitution often provides our citizens broader rights than the Fourth and Fourteenth Amendments. However, the specific question posed by this case is whether this Court should determine that citizens of this State have broader privacy protections in *borrowed* goods, specifically borrowed vehicles, where the vehicle's owner is under no obligation to allow the borrower continued possession of the vehicle. As explained below, under article 1, section 7, the citizens of our State would not expect any heightened level of privacy in gratuitously bailed goods.

III. ARGUMENT

A. ARTICLE I, SECTION 7 ANALYSIS

The narrow question presented to this Court is whether Washingtonians enjoy greater privacy protection in vehicles or other personal property that is *borrowed*, absent an agreement that abrogates the

actual owner's common law right to demand and expect immediate return of the property.

Whether the State Constitution provides greater protection than the Fourth Amendment depends on considering six nonexclusive criteria: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *State v. Gunwall*, 106 Wn.2d 54, 58-59, 720 P.2d 808 (1986). Factors 1, 2, 3, and 5 are generally uniform in any analysis of article 1, section 7, and support analyzing our State Constitution independently from the Fourth Amendment. *State v. Boland*, 115 Wn.2d 571, 575, 800 P.2d 1112 (1990). But “[a] determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context.” *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) (citations omitted). Such is the case here. Analysis of the remaining factors reveals the State Constitution should be interpreted in like-manner with the Federal Constitution.

Gunwall Factor 4 (Preexisting State Law).

Our legislature has long provided, even before the state constitutional convention in 1889, that “the common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the

state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.” RCW 4.04.010; Rem. Rev. Stat. § 143; Code of 1881 § 1. This Court has also long recognized that the common law, so far as it is not inconsistent with the statutes and institutions of this State, also supplements Washington criminal law. *State v. Sefrit*, 82 Wash. 520, 144 P. 725 (1914).

Our courts have also long recognized the common law rights and duties attendant with bailor/bailee relationships. *See e.g., Reinhart v. Gregg*, 8 Wash. 191, 193, 35 P. 1075 (1894) (one may sell personal property, and remain in possession thereof as the bailee of the purchaser, and the sale is entirely valid); *Maitlen v. Hazen*, 9 Wn.2d 113, 113 P.2d 1008 (1941) (defendants were “gratuitous bailees” where plaintiff left an envelope containing money in their care, where only the plaintiff received a benefit from the relationship). Similarly, our courts have long held that a bailee has a duty to care for bailed goods and return those goods upon a bailor’s demand. *See, e.g., Maitlen*, 9 Wn.2d at 124-125; *Colburn v. Washington State Art Ass’n*, 80 Wash. 662, 141 P.1153 (1914), *citing Pregent v. Mills*, 51 Wash. 187, 98 P. 328 (1908); *Fairchild v. Hedges*, 14 Wash. 117, 44 P. 125 (1896). Common law bailment principles have been influential to our legislature. *See e.g., Hooker v. McAllister*, 12 Wash. 46, 40 P. 617 (1895) (“[T]he idea of bailment no doubt entered into the minds of the

legislature” in promulgating a statute conferring a lien upon persons who undertook possession of livestock and became responsible for them).

This Court has also long accepted that superior and inferior property interests may be probative in questions of criminal law. *See e.g., State v. Pike*, 118 Wn.2d 585, 826 P.2d 152 (1992); *State v. Nelson*, 36 Wash. 126, 78 P. 790 (1904). In *Pike*, this Court held that a property owner may commit theft if the *possessor’s property interest is superior to that of the owner.*¹ *Pike*, 118 Wn.2d at 590 (relying on *Nelson*’s determination that a theft may be committed against someone with a possessory, but not ownership interest). In the case of *gratuitous* bailments, however, it cannot be said that a gratuitous bailor could commit theft of his own property from his bailee, as the bailee only possesses the property at the will of the bailor and the bailor may reclaim the property on demand.² Thus, the common law has been considered by this Court in the development of other areas of criminal jurisprudence.

¹ “[L]iens, pledges, and bailments all have the potential to satisfy the theft statute by creating a superior possessory interest in another against the owner of the item.” *Pike*, 118 Wn.2d at 590.

² Of course, the relationship between bailor and bailee may be modified by contract or other agreement. *See, e.g., Fairchild*, 14 Wash. at 121.

Based on the wealth of precedent regarding how bailments have historically been treated in this State, the fact that our legislature has been influenced by the law on bailments, and that bailment principles have been held applicable to substantive criminal law, the citizens of this State would expect their “private affairs” in borrowed goods to be less private against a gratuitous bailor. The State agrees with the defendant that, in gratuitous bailments, the possessor of bailed goods would generally believe he or she would have the right to exclude the State, Supp. Br. at 26; however, that is an oversimplification of the issue presented by this case.

The true issue presented is whether the citizens of our State would expect their affairs in borrowed property to remain private against *the owner and gratuitous bailor of that property* considering the rights and duties bailors and bailees have to each other and to the property itself. As explained above, the law of bailments has routinely been applied in civil and criminal cases and, under our state’s pre-existing law, our citizens would not expect to maintain privacy against a gratuitous bailor of goods, who, absent an agreement to the contrary, may demand return of his goods at will. Under a *Gunwall* analysis, this factor weighs against the application of an independent state constitutional analysis in this case.

More recently, and specifically with regard to third-party consent to search, this Court has specifically adopted the federal “common authority”

standard enunciated in *U.S. v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974), for the purpose of determining issues of consent under article 1, section 7 of the State Constitution. *State v. Mathe*, 102 Wn.2d 537, 543, 688 P.2d 859 (1984). The defendant has provided no authority why this Court should now abandon that holding. *See State v. Otton*, 185 Wn.2d 673, 374 P.3d 1108 (2016) (“In order to effectuate the purposes of stare decisis, this court will reject its prior holdings only upon ‘a clear showing that an established rule is incorrect and harmful’”). This Court’s prior precedent on this specific issue would also favor this Court determining that Washington’s Constitution continues to operate in harmony with the Federal Constitution in this regard.

Gunwall Factor 6 (Local or State Concern).

The sixth *Gunwall* factor is whether the matter is one of local or state concern. Defendant has provided no support that the third-party consent rule at issue has historically been applied more broadly under State law than under Federal law. *See Russell*, 125 Wn.2d at 62. As discussed in the State’s Supplemental Brief at 5-8, Washington jurisprudence in this context has followed Federal law, with the exception of third-party consent to search a *residence* where the objecting party is present at the home. *State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989). Yet, even in that specific context, Federal law has evolved and is now in harmony with Washington

State's assessment that, in the context of residential searches, a physically present inhabitant's stated refusal of consent to search yields a subsequent search unreasonable and invalid against him. *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006). And, both this Court and the United States Supreme Court have recognized this exception to the common authority rule only applies to *residential* searches with a *present*, objecting inhabitant. *Fernandez v. California*, ___ U.S. ___, 134 S.Ct. 1126, 188 L.Ed.2d 25 (2014); *State v. Cantrell*, 124 Wn.2d 183, 875 P.2d 1208 (1994).

As discussed in the State's Supplemental brief and above, the third-party consent rule derives not from state law, but rather, from common law principles tied directly to the nature of the physical property interest at stake and the privacy interests one would expect to have in that property.³ While the issue of third-party consent does not turn solely on property law itself, it *does* turn on the expectations a possessor or owner of that property would have in maintaining privacy in that property.

³ The common authority rule, as announced in *Matlock*, does not rest upon the law of property itself, "with its attendant historical and legal refinements, ... but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched." 415 U.S. at 172 n. 7.

While, in some instances, a Washingtonian's expectation of privacy in a certain place or article of property might be greater than a nationally recognized expectation, that increased expectation of privacy is not present here. A determination under an independent state constitutional analysis that Mr. Casteel did not have "common authority" to consent to a search of his *own* property and property he had a right to reclaim at *any* time, would necessarily derogate Washingtonians' common law rights in their own personal property to protect another with a clearly inferior, and merely gratuitous, possessory right in the same property. Such is an illogical result. Therefore, in sum, an analysis of the fourth and sixth *Gunwall* factors do not necessitate a determination by this Court that article 1, section 7 requires an independent State Constitutional analysis of the issue.

B. ASSUMING THIS COURT REVIEWS DEFENDANT'S CLAIM UNDER INDEPENDENT STATE CONSTITUTIONAL ANALYSIS, HIS ARGUMENT FAILS.

Under article 1, section 7 the relevant inquiry is whether the government intrudes into a person's private affairs without authority of law. *State v. Carter*, 127 Wn.2d 836, 848, 904 P.2d 290 (1995); *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998). Under article 1, section 7, a search occurs when the government disturbs "those privacy interests which citizens of this state have held and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Myrick*, 102 Wn.2d 506,

511, 688 P.2d 151 (1984). This analysis focuses not on a defendant's actual or subjective expectation of privacy, but rather, "on those privacy interests Washington citizens held in the past and are entitled to hold in the future." *State v. Mendez*, 137 Wn.2d 208, 219, 970 P.2d 722 (1999). The "authority of law" required by article 1, section 7, is a warrant unless the State shows that a search or seizure falls within one of the "jealously guarded and carefully drawn exceptions" to the warrant requirement. *State v. Hinton*, 179 Wn.2d 862, 868-869, 319 P.3d 9 (2014). Vanhollebeke's claim that the search of Mr. Casteel's vehicle over defendant's express objection violated article 1, section 7 fails because the defendant held no privacy interest in the vehicle superior to the owner, Mr. Casteel, and because Mr. Casteel's valid consent provided the "authority of law" necessary for a warrantless search.

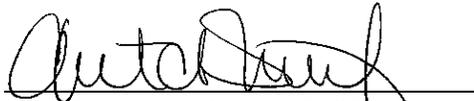
IV. CONCLUSION

Mr. Vanhollebeke certainly had a privacy interest in Mr. Casteel's vehicle as a lawful possessor of that vehicle; however, this privacy interest was only good against all persons except for Mr. Casteel. Mr. Casteel, as the property owner and gratuitous bailor, could repossess or demand return of the property at any time, and, therefore, could also consent to the search over the defendant's objection, because the defendant's interest in the vehicle was inferior to Mr. Casteel's. The privacy expectations the citizens

of this State hold in borrowed property are no broader in this regard than provided by Federal jurisprudence. The State respectfully requests this Court affirm the Court of Appeals.

Dated this 8 day of August, 2017.

RANDY J. FLYCKT
Adams County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

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Special Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In Re Personal Restraint Petition of:	NO. 94054-1
JUSTIN D. VANHOLLEBEKE,	COA 33427-9-III
Petitioner.	CERTIFICATE OF SERVICE

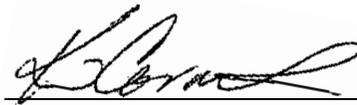
I certify under penalty of perjury under the laws of the State of Washington, that on August 8, 2017, I e-mailed a copy of the Supplemental Brief of Respondent Re *Gunwall* Analysis in this matter, pursuant to the parties' agreement, to:

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8/8/2017
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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