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NO. 96017-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DAVID ZACHERY MORGAN,

Respondent.

SUPPLEMENTAL
BRIEF OF PETITIONER

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TABLE OF CONTENTS

I. ISSUES 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 1

A. SEIZURE OF THE DEFENDANT’S CLOTHING WAS PROPER UNDER THE “PLAIN VIEW” DOCTRINE..... 1

 1. If Police Are Lawfully Present And Immediately Recognize An Item As Having Evidentiary Value, There Is No Further Requirement That The Discovery Be “Inadvertent.” 1

 a. This Court Has Been Inconsistent About Whether “Plain View” Seizures Are Governed By A Two-Part Test Or A Three-Part Test.2

 b. This Court’s Early Decisions Applied A Two-Part Test, Which Did Not Include Any “Inadvertence” Requirement 3

 c. In 1971, A Plurality Of The United States Supreme Court Adopted An “Inadvertence” Requirement, But That Requirement Was Later Repudiated..... 6

 d. This Court Has Interpreted The “Inadvertence” Requirement As Satisfied If Police Are Lawfully Present And Immediately Recognize The Evidentiary Value Of An Item 7

 2. In Determining Whether They Have “Immediate Knowledge” That Items Have Evidentiary Value, Police Can Consider All Information Known To Them..... 9

B. SINCE TRACE EVIDENCE COULD HAVE BEEN READILY DAMAGED BY THE DEFENDANT OR OTHERS, THE SEIZURE OF THE CLOTHING WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES..... 12

IV. CONCLUSION..... 13

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Alger</u> , 31 Wn. App. 244, 640 P.2d 44 (1982)	11
<u>State v. Basil</u> , 126 Wash. 155, 217 P. 720 (1923).....	5, 6
<u>State v. Bunn</u> , 197 Wn. App. 1004, 2016 WL 7109125 (2016).....	2
<u>State v. Hatchie</u> , 161 Wn.2d 390, 166 P.3d 698 (2007)	2, 10
<u>State v. Hudson</u> , 124 Wn.2d 107, 874 P.2d 160 (1994).....	10
<u>State v. Kull</u> , 155 Wn.2d 80, 118 P.3d 307, 309 (2005)	2, 10
<u>State v. LaPierre</u> , 71 Wn.2d 385, 428 P.2d 579 (1967).....	4, 5
<u>State v. Llewellyn</u> , 119 Wash. 306, 205 P. 394 (1922).....	3
<u>State v. Martin</u> , 73 Wn.2d 616, 440 P.2d 429 (1968)	5, 6, 8, 9
<u>State v. Murray</u> , 84 Wn.2d 527, 527 P.2d 1303 (1974).....	6, 7, 11
<u>State v. Myers</u> , 117 Wn.2d 332, 815 P.2d 761 (1991).....	7, 8
<u>State v. O'Neill</u> , 158 Wn.2d 564, 62 P.3d 489 (2003).....	2
<u>State v. Parent</u> , 156 Wash. 604, 287 P. 662 (1930).....	4
<u>State v. Smith</u> , 165 Wn.2d 511, 199 P.3d 396 (2009)	12
<u>State v. Weller</u> , 185 Wn. App. 913, 344 P.3d 695 (2015).....	11
<u>Tacoma v. Houston</u> , 27 Wn.2d 215, 177 P.2d 886 (1947)	5

FEDERAL CASES

<u>Coolidge v. New Hampshire</u> , 403 U.S. 443, 91 S.Ct. 2022, 29	
L.Ed.2d 564 (1971).....	3, 6, 7
<u>Horton v. California</u> , 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d	
112 (1990).....	3, 7, 9

WASHINGTON CONSTITUTIONAL PROVISIONS

Article 1, § 7	7
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I. ISSUES

The court has accepted review of the following issues:

(1) While in a place that they had a right to be, police seized evidence that was in plain view. Was this seizure illegal because police knew in advance that the evidence was present?

(2) When police have probable cause that items have evidentiary value, is a "plain view" seizure nonetheless invalid if the incriminating nature of the evidence is not "immediately apparent"?

(3) Police observed items whose evidentiary value could readily be destroyed by cross-contamination. The items were accessible to both the defendant and third parties. Was seizure of these items justified by exigent circumstances?

PRV at 1.

II. STATEMENT OF THE CASE

The facts are set out in the Brief of Respondent. The facts of the crime are described at pages 2 to 7. The facts surrounding the seizure of the defendant's clothing are at pages 7 and 8.

III. ARGUMENT

A. SEIZURE OF THE DEFENDANT'S CLOTHING WAS PROPER UNDER THE "PLAIN VIEW" DOCTRINE.

1. If Police Are Lawfully Present And Immediately Recognize An Item As Having Evidentiary Value, There Is No Further Requirement That The Discovery Be "Inadvertent."

a. This Court Has Been Inconsistent About Whether “Plain View” Seizures Are Governed By A Two-Part Test Or A Three-Part Test.

This case calls on this court to clarify the application of the “plain view” doctrine. There are currently two formulations of that doctrine. According to some cases, there are two requirements for a valid search:

A plain view search is legal when the police (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize the evidence they see is associated with criminal activity.

State v. Hatchie, 161 Wn.2d 390, 395 ¶ 11, 166 P.3d 698 (2007); see, e.g., State v. O’Neill, 158 Wn.2d 564, 583, 62 P.3d 489 (2003).

According to other cases, however, there are three requirements:

The requirements for plain view are (1) a prior justification for intrusion, (2) inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the officer that he had evidence before him.

State v. Kull, 155 Wn.2d 80, 85 ¶ 8, 118 P.3d 307, 309 (2005); see State v. Bunn, 197 Wn. App. 1004, 2016 WL 7109125 (2016) (unpublished) (summarizing conflicting cases).

The history of the rule reveals the reason for this seeming conflict. Originally, this court’s decisions reflected no “inadvertence” requirement. It was added as a result of a plurality decision of the

United States Supreme Court decision in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The court later repudiated this requirement in Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). This court then interpreted the “inadvertence” requirement as an amalgam of the other two. This court should now acknowledge that “inadvertence” is not an independent requirement.

b. This Court’s Early Decisions Applied A Two-Part Test, Which Did Not Include Any “Inadvertence” Requirement.

The first Washington application of the “plain view” doctrine (as it was later called) came in State v. Llewellyn, 119 Wash. 306, 205 P. 394 (1922). The defendant there ran a shop where soft drinks were sold. On approaching the shop after business hours, police “discovered a number of men, apparently much interested in something that was taking place on the bar.” At this point, someone knocked on the door. When it was opened, the officers entered. They then saw that the men at the bar were gambling with dice and drinking liquor. Police arrested the people present and seized the liquor. Id. at 307-08.

This court held that the liquor was properly admitted into evidence. The officers’ entry into the shop was lawful. “Once in the

place, the officers were justified into taking cognizance of the fact that a crime was being committed by the defendant. It took no search to find it." Id. at 310. The case thus recognized two requirements for a valid seizure: the officers were in a place that they were entitled to be, and the evidence was immediately apparent. There was *no* requirement that the discovery be "inadvertent." To the contrary, the officers clearly entered the shop for the sole purpose of discovering criminal activity, arresting the perpetrators, and seizing any evidence.

The same rule was applied in several subsequent cases. In one case, for example, police entered a public resort. Inside, they saw and seized gambling devices. The court held that since the items were in plain view, they could be seized without a warrant. State v. Parent, 156 Wash. 604, 607, 287 P. 662 (1930). In another case, a shoplifter placed stolen items in a shopping cart. Store employees took the cart into a back room, where it was seen by police. Again, the court held that the seizure was lawful: "Since the evidence in this case was at all times in plain view, there was no unlawful search and seizure and the evidence was properly admissible." State v. LaPierre, 71 Wn.2d 385, 287, 428 P.2d 579

(1967). In both of these cases, there was no indication that the seizure of the items was inadvertent.

The court later formulated the rule as follows:

No search under the constitutional interdiction takes place when items having evidentiary value are outside a building and in plain view, nor if they are in plain sight inside a building to which access has been lawfully gained.

State v. Martin, 73 Wn.2d 616, 621, 440 P.2d 429 (1968).

This court did apply an inadvertence requirement in one situation. If police entry was *illegal*, but it was not motivated by any purpose to search for evidence, then the unlawful entry amounted merely to "a civil trespass." Under such circumstances, evidence discovered in plain view was not subject to suppression." State v. Basil, 126 Wash. 155, 217 P. 720 (1923). An "inadvertence" requirement was thus only imposed when the "lawful entry" requirement was not satisfied.

This result is, however, inconsistent with the rule stated in Martin. Under that formation, items inside a building could be seized only if access had been lawfully gained. See Tacoma v. Houston, 27 Wn.2d 215, 219-21, 177 P.2d 886 (1947) (officers who entered residence illegally could not testify to items observed in plain view). Because of this requirement, a search conducted under

the circumstances of Basil would not be a proper "plain view" search, because entry was not lawfully gained.¹ There is no need to apply an "inadvertence" requirement to reach that result. By 1968, when Martin was required, this court clearly applied a two-part test for "plain view" seizures.

c. In 1971, A Plurality Of The United States Supreme Court Adopted An "Inadvertence" Requirement, But That Requirement Was Later Repudiated.

Three years after Martin, the analysis was seemingly changed in Coolidge. A plurality of the United States Supreme Court said that items in "plain view" could be seized only if their discovery was "inadvertent." Coolidge, 403 U.S. at 469. Based on that decision, this court applied three requirements:

These safeguard requirements needed to justify a "plain view" seizure include: [1] A prior justification for intrusion, [2] an inadvertent discovery of incriminating evidence, and [3] immediate knowledge by police that they have evidence before them.

State v. Murray, 84 Wn.2d 527, 534, 527 P.2d 1303 (1974)

(emphasis omitted).

Of these three requirements, [1] and [3] were essentially the same as the ones previously recognized in Martin: "lawful access"

¹ Although Basil has never been formally overruled, it is clearly inconsistent with subsequent cases. To avoid any confusion in the future, the court should explicitly recognize that Basil is no longer valid.

and a discovery of evidence in "plain sight." Requirement [2] was a new "inadvertence" requirement. In Murray, the seizure was unlawful because "the officers did not have immediate apparent knowledge that they had incriminating evidence before them." Murray, 84 Wn.2d at 534. In other words, requirement [3] was not satisfied.

Later, however, the United States Supreme Court rejected the plurality's reasoning in Coolidge. The court held that the seizure of an object in plain view does not involve an intrusion on privacy. If the initial intrusion is justified, and the incriminating nature of the evidence is immediately apparent, the seizure is proper. Horton v. California, 496 U.S. 128, 141-42, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Federal law thus no longer includes any "inadvertence" requirement.

d. This Court Has Interpreted The "Inadvertence" Requirement As Satisfied If Police Are Lawfully Present And Immediately Recognize The Evidentiary Value Of An Item.

The following year, this court reached essentially the same result under Wash. Const., article 1, § 7. State v. Myers, 117 Wn.2d 332, 346, 815 P.2d 761 (1991). Without citing Horton, the court started by recognizing the same three requirements set out in Murray: "Under the plain view doctrine, an officer must: (1) have a

prior justification for the intrusion; (2) inadvertently discover the incriminating evidence; and (3) immediately recognize the item as contraband." Myers, 117 Wn.2d at 346. The court then explained what "inadvertence" means:

Discovery is inadvertent if the officer discovered the evidence while in a position that does not infringe upon any reasonable expectation of privacy, and did not take any further unreasonable steps to find the evidence from that position. The requirement that a discovery be inadvertent does not mean that an officer must act with a completely neutral, benign attitude when investigating suspicious activity.

Id. (citation omitted).

Under this analysis, "inadvertence" was not an independent requirement. Whenever there was a prior justification for intrusion (requirement (1)) and police immediately knew that they had evidence before them (requirement (3)), the discovery of evidence was sufficiently "inadvertent" to satisfy requirement (2). In effect, the court returned to the two-part rule applied in Martin.

The court's continued quotation of the three-part test has, however, produced confusion. It is now time to make explicit what was implicit in Myers. "Inadvertence" has never been an independent requirement for a "plain view" seizure in Washington. This court originally applied a two-part rule. The court began stating

a three-part test in accordance with a now-repudiated plurality decision from the U.S. Supreme Court. This court held, however, that the “inadvertence” requirement was automatically satisfied by proof of the other two requirements. This analysis makes the third requirement superfluous. To end the confusion, the court should expressly hold that “plain view” seizures are governed by the two-part test set out by this court in Martin and by the U.S. Supreme Court in Horton.

Under this test, the seizure in the present case was proper. It is undisputed that the officers were legitimately present in the hospital room where the clothing was found. 1 CP 306-07. As discussed below, police had immediate knowledge that the clothing contained evidence. The test for a valid “plain view” seizure was therefore satisfied.

2. In Determining Whether They Have “Immediate Knowledge” That Items Have Evidentiary Value, Police Can Consider All Information Known To Them.

The Court of Appeals also believed that the third requirement was not satisfied. The court reasoned that “the incriminating character of the evidence was not in plain view because neither blood nor other relevant crime information could be

seen through the plastic bag.” Slip op. at 27. This is incorrect analysis.

This court has used varying language to describe the third requirement. According to some cases, police must be “immediately able to realize the evidence they see is associated with criminal activity.” Hatchie, 161 Wn.2d at 395 ¶ 11, 166 P.3d 698 (2007). According to others, an officer must have “immediate knowledge ... that he had evidence before him.” Kull, 155 Wn.2d at 85 ¶ 8. There is no substantial difference between these formulations. They are satisfied if “considering the surrounding circumstances, the police can reasonably conclude that the substance before them is incriminating evidence.” State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994).

The Court of Appeals seems to have believed that a “plain view” seizure is justified only if the police observe something incriminating about the items themselves, such as blood or other apparent evidence. Prior case law does not support such a limitation.

For example, in one case a victim told police that she had been raped at a particular house. She said that the rape had occurred on a sleeping bag, and that she was menstruating at the

time. Police went to the house and were invited inside. They saw a sleeping bag and seized it. This was held to be a valid plain view seizure. State v. Alger, 31 Wn. App. 244, 248, 640 P.2d 44 (1982). There is nothing inherently incriminating about a sleeping bag in a house. Nevertheless, police were entitled to consider what they knew from other sources in deciding whether the evidentiary nature of the sleeping bag was obvious.

In another case, police investigated a child beating. While lawfully present in the suspect's garage, they saw a board. The victims told the officers that they had been beaten with that board. This information justified the seizure of the board as potentially incriminating evidence. State v. Weller, 185 Wn. App. 913, 926 ¶¶ 30-32, 344 P.3d 695 (2015). Again, there was nothing inherently incriminating about the board.² It nonetheless became incriminating when viewed in light of other information available to police.

The situation in the present case is similar. Police knew that a victim had been seriously injured in a fire. The defendant had described pulling a burning sweater off of her. 1 CP 314-15, 1 RP

² In Weller, the officer examined the board and saw bloodstains. Weller, 185 Wn. App. at 919 ¶ 9. The court did not, however, rely on that observation in approving the seizure. Id. at 927 ¶¶ 31-32. The "immediate knowledge" requirement does not allow police to examine items in order to determine whether they are evidence. Murray, 84 Wn.2d at 534.

72-73, 81. Gasoline had been smelled on the defendant's clothing, as well as that of the victim. 1 RP 94. Based on these facts, police could reasonably conclude that the defendant's clothing had evidentiary value. No examination of the clothing was necessary to establish that fact. Because probable cause existed, the "immediate knowledge" requirement was satisfied.

B. SINCE TRACE EVIDENCE COULD HAVE BEEN READILY DAMAGED BY THE DEFENDANT OR OTHERS, THE SEIZURE OF THE CLOTHING WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES.

In addition to being admissible under the "plain view" doctrine, the clothing was properly seized on the basis of exigent circumstances. A warrantless seizure is justified if the delay inherent in securing a warrant would permit the destruction of evidence. This is a case-by-case determination that takes into account the gravity of the offense. State v. Smith, 165 Wn.2d 511, 517-18 ¶¶ 15-16, 199 P.3d 396 (2009).

The Court of Appeals rejected the application of the "exigent circumstances" doctrine because it thought there was "no evidence to support the view that anyone would have been successful in contaminating the evidence without the police being able to stop them." Slip op. at 23. This conclusion is factually incorrect. Items

containing trace evidence can readily become cross-contaminated. 1 RP 154. The clothing was in a hospital room. Medical personnel had access to the room. When they entered to perform their duties, the police left. 1 RP 69, 103. Additionally, the defendant himself was present and unrestrained. 1 CP 111-12. It would only take a moment for him or someone else to handle the clothing in a way that impaired its evidentiary value. The Court of Appeals erred in holding that the seizure was not justified by exigent circumstances.

IV. CONCLUSION

The Court of Appeals erred in holding that the defendant's clothing was unlawfully seized. The Court of Appeals rejected the defendant's other arguments, and this court refused to grant review of those issues. The trial court's judgment and sentence should therefore be affirmed.

Respectfully submitted on December 3, 2018.

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

Dated this 3rd day of December, 2018, at the Snohomish County Office.



Diane K. Kremenich
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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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