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NO. 96069-1

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

State of Washington

Petitioner

v.

Michael Nelson Peck and Clark Allen Tellvik

Respondents

BRIEF OF WACDL AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
A. IDENTITY AND INTEREST OF AMICUS.....	2
B. ISSUES OF CONCERN TO AMICUS.....	2
1. Whether the Court should create an exception to the automatic standing doctrine in cases where the searched container is found in a stolen vehicle and the defendant does not expressly claim ownership of the searched container?.....	2
2. Whether the Court should expand the inventory search exception to the warrant requirement to extend to closed containers found in automobiles?.....	2
C. STATEMENT OF THE CASE.....	3
D. ARGUMENT AND AUTHORITY.....	3
1. THERE IS NO BASIS FOR CREATING AN EXCEPTION TO THE AUTOMATIC STANDING DOCTRINE IN CASES WHERE THE SEARCHED CONTAINER IS FOUND IN A STOLEN VEHICLE AND THE DEFENDANT DOES NOT ASSERT AN OWNERSHIP INTEREST IN THE SEARCHED CONTAINER.....	3
2. THE INVENTORY SEARCH EXCEPTION TO THE WARRANT REQUIREMENT DOES NOT PERMIT A SEARCH OF CLOSED CONTAINERS FOUND WITHIN AN AUTOMOBILE.....	10
E. CONCLUSION.....	14

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES:	
<u>State v. Carter</u> , 127 Wn.2d 836, 904 P.2d 290 (1995).....	5, 6
<u>State v. Evans</u> , 159 Wn.2d 402, 150 P.3d 105 (2007).....	5, 8, 9
<u>State v. Goucher</u> , 124 Wn.2d 778, 881 P.2d 210 (1994).....	4
<u>State v. Houser</u> , 95 Wn.2d 143, 622 P.2d 1218 (1980).....	10, 11, 12, 13, 14
<u>State v. Peck</u> , 3 Wn. App. 2d 1053, 2018 WL 2127016 (2018).....	3, 9
<u>State v. O’Dell</u> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	7, 9, 10
<u>State v. Simpson</u> , 95 Wn.2d 170, 622 P.2d 119 (1980)	4, 6, 7, 8, 9
<u>State v. Valdez</u> , 167 Wn.2d 761, 224 P.3d 751 (2009).	4
<u>State v. Williams</u> , 142 Wn.2d 17, 11 P.3d 714 (2000).....	5, 6
<u>State v. White</u> , 135 Wn.2d 761, 768 – 69, 958 P.2d 982 (1998).....	10
<u>State v. Zakel</u> , 119 Wn.2d 563, 834 P.2d 1046 (1992).....	7, 8, 9
FEDERAL CASES AND OTHER AUTHORITY:	
<u>People v. Counterman</u> , 556 P.2d 481 (Colo. 1976).....	11, 12
<u>Jones v. United States</u> , 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).....	7
<u>State v. Daniel</u> , 589 P.2d 408 (Alaska 1979).....	12
<u>United States v. Salvucci</u> , 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980).....	1, 4

INTRODUCTION

This Court has continued to apply the automatic standing doctrine in search and seizure cases even after the Supreme Court of the United States abandoned it in United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). This Court's continued adherence to the automatic standing doctrine is rooted in the broader privacy protections provided by article I, section 7 of the Washington Constitution.

Here, the State seeks to carve out an exception to the automatic standing doctrine in cases where the place searched is a stolen vehicle and where the defendant fails to affirmatively claim an ownership interest in the searched container. Because such an exception would be contrary to the foundational principles underlying the automatic standing doctrine, the Court should reject the State's attempt to limit it in this case.

The Court should also reject the State's efforts to expand the inventory search exception to permit warrantless searches of closed containers found in automobiles. Permitting law enforcement officers to open closed containers found in automobiles during inventory searches would undermine the purposes of the inventory search exception to the warrant requirement and grant law enforcement the ability to conduct a warrantless search of all containers found in automobiles under the pretext of an inventory search.

A. IDENTITY AND INTEREST OF AMICUS

The Washington Association of Criminal Defense Lawyers (WACDL) seeks to appear in this case as *amicus curiae* on behalf of Respondents Michael Nelson Peck and Clark Allen Tellvik. WACDL was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL has approximately 800 members, made up of private criminal defense lawyers, public defenders, and related professionals. It was formed to promote the fair and just administration of criminal justice and to ensure due process and defend the rights secured by law for all persons accused of crime. It files this brief in pursuit of that mission.

B. ISSUE OF CONCERN TO AMICUS

1. Whether the Court should create an exception to the automatic standing doctrine in cases where the searched container is found in a stolen vehicle and the defendant does not expressly claim ownership of the searched container?

2. Whether the Court should expand the inventory search exception to the warrant requirement to extend to closed containers found in automobiles?

C. STATEMENT OF THE CASE

Michael Nelson Peck and Clark Allen Tellvik were convicted of a number of offenses related to the burglary of a home in rural Ellensburg, including one count of possession of a controlled substance with intent to deliver.¹ The drug charge was based on the discovery of drugs and drug paraphernalia found in a black zippered CD case that was opened by law enforcement during an inventory search of the stolen truck that the defendants were driving at the time of the burglary. *Id.* at *2. The trial court denied the defendants' motions to suppress the drug evidence on the ground that the evidence was found as part of a lawful inventory search. *Id.* at *3. The Court of Appeals reversed the defendants' drug convictions holding that the drug evidence should have been suppressed because the search of the closed CD case exceeded the scope of a valid inventory search. *Id.* at * 1 – 3.

D. ARGUMENT AND AUTHORITY

- 1. THERE IS NO BASIS FOR CREATING AN EXCEPTION TO THE AUTOMATIC STANDING DOCTRINE IN CASES WHERE THE SEARCHED CONTAINER IS FOUND IN A STOLEN VEHICLE AND THE DEFENDANT DOES NOT ASSERT AN OWNERSHIP INTEREST IN THE SEARCHED CONTAINER.**

¹ A complete statement of facts is set forth in the decision of the Court of Appeals, *State v. Peck*, 3 Wn. App. 2d 1053, 2018 WL 2127016 at *1 – 3. The facts presented here are taken from the Court of Appeals decision.

It is now axiomatic that article 1, section 7, of the Washington Constitution provides greater protection against searches and seizures by government agents than the Fourth Amendment to the United States Constitution. See State v. Goucher, 124 Wn.2d 778, 783, 881 P.2d 210 (1994). “[W]here the Fourth Amendment precludes only ‘unreasonable’ searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual’s private affairs ‘without authority of law.’” State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009).

Recognizing this constitutional difference and the continued dilemma faced by criminal defendants charged with possessory offenses who are forced to choose between forfeiting their privilege against self-incrimination by admitting ownership of seized items containing contraband or abandoning their constitutional right to privacy by remaining silent when an item is seized and searched, this Court has applied the automatic standing doctrine even after it was abandoned by the United States Supreme Court in United States v. Salvucci, 448 U.S. 83, 92 – 93, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). See State v. Simpson, 95 Wn.2d 170, 174 – 81, 622 P.2d 119 (1980). Although some earlier cases have called the continued viability of the automatic standing doctrine into question, this Court’s more recent decisions have confirmed the continued

existence of the automatic standing doctrine in Washington. See State v. Williams, 142 Wn.2d 17, 22 11 P.3d 714 (2000) (“Although defunct in the federal courts, automatic standing still maintains a presence in Washington.”).

To qualify for automatic standing, a defendant must establish that: “(1) possession was an essential element of the offense and (2) he was in possession of the contraband at the time of the contested search or seizure.” State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (internal citations and quotation marks omitted). Under the automatic standing doctrine, an individual charged with a possessory crime is deemed to have standing to challenge a search without establishing that he or she had a reasonable expectation of privacy in the item seized. State v. Carter, 127 Wn.2d 836, 850, 904 P.2d 290 (1995).

The State seems to challenge the well-established application of the automatic standing doctrine in this case on two grounds. The State’s first contention is that the automatic standing doctrine is inapplicable because the defendants were riding in a stolen vehicle and therefore had no reasonable expectation of privacy in any of the items inside the vehicle. See Petition for Review at 9 – 10. Second, the State suggests that the automatic standing doctrine is inapplicable because the defendants did not claim ownership of the CD case where the drugs were found. See id. at 9.

But this Court has rejected both lines of reasoning in the past and should do so again in this case.

As to the State's first argument, as noted above, due to the policy considerations underlying the automatic standing doctrine, a defendant need not show that he or she has a reasonable expectation of privacy in the place searched for the automatic standing doctrine to apply. As this Court explained in Simpson, the very basis of the automatic standing doctrine is to permit a defendant to argue for suppression of contraband or stolen goods, "even though he or she could not technically have a privacy interest in such property." Simpson, 95 Wn.2d at 175. Thus, the question of whether or not a defendant has a reasonable expectation of privacy in the place searched is irrelevant for purposes of the automatic standing doctrine. While Simpson was a plurality decision, its reasoning has been reaffirmed by this Court in subsequent decisions. In Carter, this Court stated expressly that the automatic standing doctrine "eliminates the requirement of showing a legitimate expectation of privacy before the defendant can challenge a search or seizure." Carter, 127 Wn. App. at 850; Williams, 142 Wn.2d at 23 n.1.

The question of whether a defendant needs to establish a reasonable expectation of privacy in the place searched – by forfeiting his privileges against self-incrimination or abandoning his right to remain

silent – to avail himself of automatic standing was most thoroughly considered by this Court in State v. Zakel, 119 Wn.2d 563, 570 n.3, 834 P.2d 1046 (1992). The Court explained in that case that automatic standing does not only apply in cases where the evidence is found in a place where the defendant has a legitimate right to be, but also in cases where the evidence is found in a place where the defendant does not have a legitimate right to be. The Court explained the distinction between challenging a search based on automatic standing and challenging a search based on having a legitimate right to be in the area search as follows:

A close examination of Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), the case in which automatic standing originated, reveals that the Court of Appeals also incorrectly assumed that automatic standing applies only where a defendant has a legitimate right to be in a place. . . . The United States Supreme Court found that Jones had standing to challenge the search on two *alternative* theories, the first of which has come to be called the automatic standing rule, the second of which is known as the “legitimately on [the] premises” rule.

The Court of Appeals in Zakel erroneously merged these two alternative bases for standing when it stated that automatic standing “was not intended as a means for defendants to acquire standing to challenge the search of an area where they had no legitimate right to be.” The “legitimately on [the] premises rationale, however, is a basis for standing wholly separate from automatic standing. In addition, a plurality of this court in State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980) recognized that a defendant need not have a legitimate right to be in a place to assert automatic standing, when it accorded automatic standing to a defendant to challenge a search of a stolen

truck.

Zakel, 119 Wn.2d at 570 n.3. In summary, this Court's precedents make clear that the question of whether a defendant had a reasonable expectation of privacy in the place searched has no bearing on the application of the automatic standing doctrine, and there is therefore no basis to create an exception to the automatic standing doctrine in this case. The fact that the CD case containing the contraband in question was discovered in a stolen vehicle did not deprive Peck and Tellvik of automatic standing.

Nor is the fact that the defendants did not expressly claim ownership of the searched CD case sufficient to place this case outside the scope of the automatic standing doctrine. As discussed above, the very purpose of the automatic standing doctrine is to prevent a defendant from having to choose between the right to remain silent and the right to privacy. See Simpson, 95 Wn.2d at 174 – 81. This Court has clearly and unequivocally stated that even a defendant who disclaims ownership of a searched item will nonetheless have automatic standing if he or she is charged with a possessory offense. See Evans, 159 Wn.2d at 407.

This Court's analysis in Evans makes clear that that a defendant's assertions regarding ownership have no relevance to the application of the automatic standing doctrine and are relevant only to the question of

whether the search was valid under the voluntary abandonment exception to the warrant requirement. See id. at 407 – 408. And although Evans involved the search of a vehicle owned by the defendant, this Court’s reasoning in Zakel supports the conclusion that a disclaimer of ownership will not preclude a defendant from having automatic standing to challenge a search even where the place searched is a stolen vehicle, as long as the defendant was in possession of the vehicle. See Zakel, 119 Wn.2d at 570 (“Admittedly, this disclaimer of ownership would not be sufficient by itself to justify saying Zakel was not in possession of the [stolen vehicle] at the time of the search.”). While Peck’s implicit disclaimer of ownership of the CD case in question may be relevant to whether the CD case was voluntarily abandoned, the State never raised the issue of abandonment in the trial court or the Court of Appeals. See Peck at *4 n. 3. The State should not be permitted to fold the issue of voluntary abandonment into the automatic standing inquiry in this Court.

Once both elements of the automatic standing are established, a “defendant who has acquired automatic standing in effect stands in the shoes of an individual properly in possession of the property that was searched or seized.” Simpson, 95 Wn.2d at 182. In the instant case, because it is undisputed that the defendants were charged with a possessory offense and were in possession of the vehicle searched and its

contents, the automatic standing doctrine applies and they are entitled to assert the same privacy interests in the vehicle that the owner of the vehicle would be entitled to assert. Id.

2. THE INVENTORY SEARCH EXCEPTION TO THE WARRANT REQUIREMENT DOES NOT PERMIT A SEARCH OF CLOSED CONTAINERS FOUND WITHIN AN AUTOMOBILE.

The Court should also reject the State’s attempt to expand the inventory search exception to the warrant requirement to include searches of closed containers found within an automobile. This Court has held that article I, section 7 of the Washington Constitution imposes stricter limits on inventory searches than the Fourth Amendment to the United States Constitution. See State v. White, 135 Wn.2d 761, 768 – 69, 958 P.2d 982 (1998) (“We have often diverged from the United States Supreme Court’s Fourth Amendment jurisdiction, and we have more narrowly defined the exceptions to the search warrant requirement.”).

In State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980), this Court considered whether the inventory search exception to the warrant requirement allows law enforcement officers to open a closed toiletry bag found in the trunk of an impounded vehicle. The Court found that “where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course

of an inventory search unless the owner consents.” Id. at 158. The Court explained that this is because: “Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit.” Id.

In reaching its conclusion in Houser, the Court considered how the purposes of an inventory search would be furthered by opening and inventorying closed containers found within a vehicle. The Court found that they would not. The purposes behind an inventory search are: (1) securing items belonging to a detained person from loss; (2) protecting police and temporary storage bailees from liability due to false claims of theft; and (3) protecting the public and the police from danger. Id. at 154. The Houser court reasoned that contrary to furthering the purposes behind an inventory search, opening closed containers in a vehicle, in fact, increases the risk of loss and dishonest claims of theft against the police and other temporary bailees because it increases the risk of items slipping out of closed containers and allegations that items inside a container were taken out when the container was opened by law enforcement. See id. at 159.

Notably, in Houser, this Court relied on out-of-state authority from Alaska and Colorado. Like our state Constitution, the constitutions of those two states afford broader protections against unreasonable searches and seizures than the Fourth Amendment. In People v. Counterman, 556

P.2d 481 (Colo. 1976), relied on by this Court in Houser, the Supreme Court of Colorado held that opening a closed knapsack found in the passenger compartment of an automobile as part of an inventory search was unconstitutional because the knapsack's contents were out of the officer's plain view and there was no indication that the contents of the knapsack were dangerous. Counterman, 556 P.2d at 485. Similarly, in State v. Daniel, 589 P.2d 408 (Alaska 1979), the Alaska Supreme Court held that: "a warrantless inventory search of closed, locked or sealed luggage, containers, or packages contained within in a vehicle is unreasonable and thus unconstitutional." Id. at 417 – 18. The court's decision in that case was based on the "reality that persons . . . expect that closed containers will adequately conceal what they regard as private" even if unlocked. Id. at 417.

In the instant case, the State attempts to distinguish the zippered CD case found during the search of the vehicle Peck and Tellvik were riding in from Houser and its progeny on the ground that a CD case does not carry the same "aura of intimacy or personal privacy" as a toiletry bag. Petition for Review at 9. But, this Court's reasoning in Houser and the decisions that Houser relied upon provide no basis for such a distinction. The rationale for inventorying luggage as a closed unit applies equally to a CD case, i.e. inventorying a CD case as a closed unit will protect against

disks contained in the case from slipping out as well as false claims that disks were removed from the case when it was opened by law enforcement. See Houser, 95 Wn.2d at 159.

Further, it is unclear why the contents of a CD case should be considered less private or intimate than those of a toiletry bag. The contents of a CD case can reveal information about the owner's religious beliefs, cultural heritage, political affiliations, mental health, and sexual preferences. For example, an opened CD case may reveal CDs containing religious scripture, foreign music, political speech, self-help programs or erotica, with information and images describing the CDs' contents printed on the face of the CDs. On a more practical level, it is unclear how a law enforcement officer conducting an inventory search can distinguish an opaque CD case from other types of zippered containers such as toiletry bags, manicure kits, notebook cases or a multitude of other containers intended for carrying tools or other personal items, before it is opened. In any event, to the extent that the Houser Court suggested that the nature of the container searched is relevant to whether it may be opened as part of an inventory search, the Court indicated that only containers that present a manifest danger to police or the public may be opened and searched during an inventory search. See id. at 158 ("If, however, the police have reason to believe a container holds instrumentalities which could be

dangerous in even when sitting idly in the police locker, the police may and should search the contents of the container.”). Nothing about an unlocked CD case gives the police a reason to believe it contains dangerous instrumentalities.

The CD case searched in this case was zipped closed and there was no indication at the time it was discovered by police that it contained contraband or that its contents presented a danger to the police or the public. Thus, under Houser, the CD case should have been inventoried as a single closed unit. Opening the CD case did not further purposes behind an inventory search, and the Court of Appeals, therefore, correctly concluded that the contents of the CD case should have been suppressed.

C. CONCLUSION

Amicus urges the Court to affirm the Court of Appeals decision suppressing the fruits of the warrantless search at issue in this case.

Respectfully submitted,

DATED this 11th day of January, 2019

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