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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.

Petitioner's Response to Amicus Curiae Briefs of WACDL and
ACLU

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I. IDENTITY OF PETITIONER

The State of Washington appears through the Kittitas County Prosecuting Attorney's Office.

II. ISSUES PRESENTED

Should this Court find that Respondents Michael Peck and Clark Tellvik lacked standing to challenge the inventory search of the stolen truck that they were apprehended with, or in the alternative, find that law enforcement may open closed, as opposed to locked, containers located within a vehicle in the course of a valid inventory search, and thus reinstate the convictions of Respondents Michael Peck and Clark Tellvik for Possession with Intent to Deliver and an accompanying Firearm Enhancement?

III. STATEMENT OF THE CASE

Mr. Michael Peck and Mr. Clark Tellvik were contacted by deputies of the Kittitas County Sheriff's Office on January 23, 2016, at around 1 a.m. in a stolen truck on the property of Ms. Laura Poulter in Ellensburg, Washington, where the two men were engaged in burglarizing Ms. Poulter's outbuildings. RP Peck 28, 100, 263-267, 270-271, 313, 317, 526, RP Tellvik 80, 152, 317-321, 324-325, 368, 372, 580. In the course of an inventory search of the stolen vehicle prior to its being towed, deputies located a black

zippered CD case under the passenger seat. RP Peck 44, 103-108, 112 RP Tellvik 94, 155-161,164. When that CD case was opened, it was found to contain 74.18 grams of methamphetamine to include packaging, and an electronic scale, as well as a smoking pipe commonly utilized for methamphetamine. RP Peck 109-110, 421-423, 426-432, 478-488, RP Tellvik 161-162, 473-475, 478-484, 530-540.

The Trial Court denied respondents' motions to suppress, finding that the discovery of the contents of the CD case had occurred in the course of a valid inventory search of the stolen vehicle. RP Peck 190-192, RP Tellvik 242-243. The Court of Appeals, Division III, overturned the two men's convictions for Possession of a Controlled Substance with Intent to Deliver as well as the accompanying Firearm Enhancement. (COA 34496-7-III Appellant Peck/COA 34525-4-III Appellant Tellvik).¹

The State in its motion for discretionary review has asked this Court to reinstate the Possession with Intent to Deliver and the accompanying Firearm Enhancement for each man. The Washington Association of Criminal Attorneys (WACDL), and the American Civil Liberties Union of Washington (ACLU) have each

¹ A complete statement of facts is set forth in the Court of Appeals opinion *State v. Peck*, 34496-7-III.

filed amicus briefs in opposition to the State's motion, and this brief is the State's response.

IV. ARGUMENT

A. RESPONDENTS LACKED AUTOMATIC STANDING TO CONTEST THE OPENING OF A CLOSED CONTAINER LOCATED IN A STOLEN VEHICLE DURING THE COURSE OF A VALID INVENTORY SEARCH.

Washington initially granted automatic standing under article I, § 7 in criminal cases when a defendant was charged with a possessory offense and was in possession of the item at the time of the search. *e.g.*, *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980) (plurality opinion). Subsequently, our courts have recognized that typically it is the defendant's "private affairs" that govern whether standing exists. *State v. Carter*, 127 Wn.2d 836, 848-49, 904 P.2d 290 (1995). Nonetheless, the concept of automatic standing "still maintains a presence in Washington." *State v. Williams*, 142 Wn.2d 17, 22, 11 P.3d 714 (2000).² Under either approach, both Mr. Peck and Mr. Tellvik lack standing to challenge the inventory search of the zippered black CD bag. It is an open question whether or not a defendant has any privacy interest in a stolen vehicle or its contents. *See State v. Zake*, 119

² *See State v. Wisdom*, 187 Wn.App. 652, 349 P.3d 953 (2015)(Korsmo, J. dissenting)

Wn.2d 563, 571, 834 P.2d 1046 (1992). The answer to that question should be “no” because one reason for an inventory search is to protect a vehicle owner's property. *State v. White*, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998). The analysis under art. I, §7 of the Washington State Constitution focuses, not on a defendant’s actual or subjective expectation of privacy, but on those privacy interests Washington citizens held in the past and are entitled to hold in the future. A thief should have no privacy interest that overrides that of the true owner. An inventory search to protect and recover the true owner's property should not be constrained by a thief's assertions concerning which of the contents are his and which are not.

Neither Mr. Peck nor Mr. Tellvik ever claimed ownership of anything in the stolen truck other than Mr. Peck’s statements that some tools and a battery in the bed of the pickup along with the two phones within the cab of the vehicle belonged to the two men. RP Peck 37, 63, 524, RP Tellvik 87, 115, 578.

The cases cited by both amicus primarily involve individuals who are lawfully upon the premises where the search occurred at the time of the search with the exception of the cases at issue here, as well as *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 119 (1980),

where the defendant had locked the stolen vehicle, and law enforcement took the key from the defendant to open the vehicle to obtain the VIN, and *State v. Zakel*, 119 Wn.2d 563, 834 P.2d 1046 (1992), in which the defendant was found to lack automatic standing because at the time of the search of the stolen vehicle, Mr. Zakel was not in actual possession of the vehicle.

B. THE COURT SHOULD FIND THAT A CLOSED CONTAINER IS NOT THE SAME AS A LOCKED CONTAINER WITHIN A VEHICLE AND MAY BE OPENED FOR THE PURPOSES OF A VALID INVENTORY SEARCH.

All of the cases cited by amicus ACLU other than the case at issue here, and *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005), which involves automatic standing of the defendant for the search of a home, address the situation of search of a vehicle incident to arrest, and do not involve stolen vehicles. Those searches were carried out to find additional evidence of criminal activity at issue and/or additional crimes. In those cases, the court looked for alternatives to impoundment and inventory searches, and/or whether the officers should have applied for a warrant based upon probable cause. Amicus ACLU illustrates this confusion of the issue when, in their brief, they assert "It is common for vehicles to be impounded when their drivers are arrested as in the present

case.”³ The impound in this matter concerned the status of the vehicle, not the status of the defendants, *i.e.*, the vehicle would have been impounded even if Mr. Peck and Mr. Tellvik had left it abandoned upon Ms. Poulter’s property.

In this case, Deputy McKean testified that he believed that they were unable to contact the owner of the stolen vehicle, and they could not leave the truck on Ms. Poulter’s property, so “one way or another, it was going to be towed.” RP Peck 103, RP Tellvik 155. Deputy McKean testified that an inventory search was done prior to the tow by the private tow company.

Q. (by the deputy prosecutor) All right. Now, so you said you were going to do what before they got there.

A. (Deputy Mc Kean) A (sic) inventory search of the vehicle.

Q. And now why do you do that?

A. We want to make sure there’s nothing inside that vehicle that the owner could be held responsible for if it’s illegal. We don’t want to return any drugs, any weapons, anything with that vehicle that shouldn’t be in it. We want to go through the inside of the vehicle, make sure there’s nothing unsafe, nothing illegal in there.

Q. Okay. All right. So that’s one -- that’s one purpose for it. And, what’s another purpose for an inventory search?

A. Another purpose, to inventory what items are in the vehicle. Another purpose also is if you get an occupied stolen to remove the

³ Brief of Amicus Curiae ACLU page 11

property of the -- occupants, so it's not returned to the owner of the vehicle.

Q. Okay. And -- when you want to make a list of the stuff, what -- what purpose does that serve?

A. To show a list of what was in the vehicle.

Q. Okay. And why would you -- why would you care?

A. Just in case someone claims that their diamond ring was left in that car and now it's gone.

Q. Okay. So, -- who does it protect?

A. Everyone.

Q. And by everyone, it protects -- the sheriff's office?

A. Sheriff's office, the registered owner, the other folks who have property inside that vehicle, their property isn't given away to someone it's not supposed to.

Q. And how about the tow company?

A. It also protects the tow company, yes.

Q. All right. Do you have -- protocols and procedures for how to do a (sic) -- impound, vehicle impound?

A. Yes, we do.

Q. And did you follow those.

A. Yes.

RP Peck 104, 105, RP Tellvik 156, 157.

Deputy McKean then went on to describe the inventory process that had taken place in Mr. Peck's and Mr. Tellvik's case.

RP Peck 106-120, RP Tellvik RP 158-172. During cross-examination, defense counsel attempted to have the deputy testify that the purpose of the inventory search was to look for evidence. The deputy did not so testify. RP Peck 116, 117, RP Tellvik 169, 170.

Stolen vehicles may be lawfully impounded by a police officer. RCW 46.55.113(2)(e) (“a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances: (e) Whenever a police officer discovers a vehicle that the officer determines to be a stolen vehicle;”). Inventories of impounded vehicles are permitted under both the Washington Constitution and the Fourth Amendment. *State v. Tyler*, 177 Wn.2d at 708.

The properly conducted inventory search “is made for the justifiable purpose of finding, *listing*, and securing from loss” property. *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968) (emphasis added); *accord White*, 135 Wn.2d at 770. The scope of the inventory search includes the glove compartment and unlocked containers in the vehicle. *White*, 135 Wn.2d at 766-67. The rule of *Houser* is that *locked* containers cannot be searched.

Tyler, 177 Wn.2d at 708. Thus, anything left in a locked trunk is inside a locked container and cannot be disturbed. *Tyler*, 177 Wn.2d at 708; *White*, 135 Wn.2d at 766-68.

Both amicus mistakenly equate *closed* containers with *locked* containers. The cases cited by amici, *Houser*, 95 Wn. 2d at 143, *White*, 135 Wn.2d at 761, and *State v. Dugas* 109 Wn.App. 592, 36 P.3d 577 (2001), do not aid an analysis on this point. In each instance, a closed container *within another container* was not permitted to be searched. In *Houser*, the court stated that the police could not open and inventory a closed toilet kit found inside a bag inside the locked trunk. 95 Wn.2d at 147, 156. In *Dugas*, the police were not permitted to check the contents of a closed “key ring pouch” found in the pocket of a coat, *Dugas*, 109 Wn. App. 592, 36 P.3d 577 (2001). In *White*, the court declined to consider the validity of the search of an unlocked tackle box found in a locked trunk. 135 Wn.2d at 765, 772, 958 P.2d 982 (1998). In the instances where it addressed the issue, the court could simply have said that the police lacked authority to go inside the container in question (a bag in *Houser*, the coat in *Dugas*, the tackle box in *White*) if the rule were as amici suggests. None of the cases did so. Instead, those courts focused on the lack of need to open a

container found within another container. *Houser, Dugas, and White* do not support the argument that the contents of an unlocked bag sitting under the seat of a truck cannot be inventoried.⁴

Locked containers give clear indicia of prima facie evidence that their contents have been undisturbed and should remain so. The condition of being locked clearly indicates an intent to bar and prohibit opening of, or entry into, the item. In this matter, the deputy found an innocuous closed CD case which one would expect the deputy to open, observe its contents, whether that be twelve CDs, or money, or any other item to be identified, and then note and inventory those contents, before re-zipping the case and replacing it within the vehicle. This would seem to be as requested by amicus “only a relatively cursory inspection, sufficient only to make a general list of the impounded items.”⁵ The argument that observing the presence of the CDs would impart any amount of personal information seems highly speculative and hypothetical.

It is well settled that a police officer may conduct a good faith warrantless inventory search subsequent to the lawful impound of a vehicle. *Montague*, 73 Wn 2d 381, 385, 438 P.2d 571 (1968).

⁴ See *State v. Wisdom*, 187 Wn.App. 652, 349 P.3d 953 (2015)(Korsmo J. dissenting)

⁵ Brief of Amicus Curiae ACLU page 4

State v. Bales, 15 Wn.App. 834, 835, 552 P.2d 688 (1976)

(citations omitted), *review denied*, 89 Wn.2d 1003 (1977)).

Moreover, it is generally recognized that this ability stems from the “community caretaking function of the police, and is wholly separate from criminal investigation. *South Dakota v. Opperman*, 428 U.S. 364, 368-370, 49 L.Ed 2d 1000, 96 S. Ct. 3092 (1976); *State v. Lund*, 10 Wn.App. 709, 711-712, 519 P.2d 1325 (1974). An inventory search is not permitted merely for the purposes of conducting a general exploratory search of a vehicle—such a search requires a warrant. *Montague*, 73 Wn.2d at 385. In this matter, there was no indication that the deputies were on any sort of “fishing expedition.” RP Peck 103-120, RP Tellvik 155-172.

Neither of the two men had been observed placing items into the cab of the truck⁶ nor was there any indication of drug usage and/or possession. Mr. Peck did have a “butane torch” in his pocket which the deputy indicated was like a lighter with a larger flame. RP Peck 163, 488, 489, 493; RP Tellvik 216, 541, 542, 546. Whether or not this item had an association with drug usage was unclear, but the deputies did not find any paraphernalia on either man or within the

⁶ Ms. Poulter discovered the men’s activities when she pulled up a newly installed surveillance program on her phone to show to her friend. RP Peck 235, RP Tellvik 291.

stolen truck other than those items contained within the black CD case.

Inventory searches are necessary to protect the police against false claims. Unless someone is able to testify from personal observation that a container did or did not contain a specific item when seized, the police will be seriously hampered in their ability to defend against a charge that the item was removed from the container while it was in police custody. Testimony that the container itself was stored securely is no substitute for testimony that the “missing item” was never in it in the first place. It should be noted that counsel’s reference to *Houser*, 95 Wn.2d at 155 n.3 (noting doubts about “the actual effectiveness of inventory searches in deterring false claims”) is referring to items located within a locked trunk.

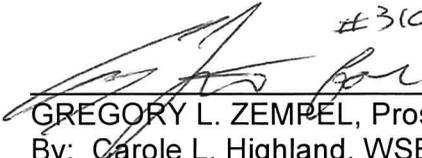
Counsel erroneously argues that the State is seeking to expand valid inventory searches, when in fact, the State seeks to stop the erosion of a legitimate community caretaking exception to the warrant requirement. The State asks that this Court hold that (1) a defendant's “private affairs” do not include items located in a stolen vehicle, (2) a proper inventory search extends to the contents of unlocked containers found inside a vehicle (but not in

the trunk), and (3) when money or other valuable property is visible in an unlocked container, the police have a right to inventory the contents of the container in order to fulfill their obligations under our impound and inventory laws.

V. CONCLUSION

For the foregoing reasons, Petitioner State of Washington asks this Court to find that Mr. Peck and Mr. Tellvik each lacked standing to challenge a valid inventory search of a stolen vehicle, and that the deputy's opening of a closed CD case located under the passenger seat of that stolen vehicle was a permissible exercise of the community caretaking function of the inventory search exception to the warrant requirement.

Respectfully submitted this 12th day of February, 2019.

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