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NO. 96069-1

Supreme Court of the State of Washington

STATE OF WASHINGTON, Petitioner

v.

MICHAEL NELSON PECK, Respondent

SUPPLEMENTAL BRIEF OF RESPONDENT PECK

**COURT OF APPEALS, DIVISION III NO. 34496-7-III
KITTITAS COUNTY SUPERIOR COURT NO. 16-1-00020-6**

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A) IDENTITY OF RESPONDENT

Michael Nelson Peck, defendant in *State v. Peck*, Kittitas County Superior Court Case No. 16-1-00020-6, appellant in *State v. Peck*, Court of Appeals Case No. 34496-7-III, seeks the relief described in Part B, below.

B) COURT OF APPEALS DECISION

Mr. Peck requests this Court affirm the Washington State Court of Appeals, Division III's May 8, 2018 unpublished opinion in *State v. Peck*, Case No. 34496-7-III, which “reverse[d] the controlled substance conviction” in *State v. Peck*, Kittitas County Superior Court Case No. 16-1-00020-6.

C) ISSUES PRESENTED FOR REVIEW

1. Is Mr. Peck Entitled to Automatic Standing?
2. Does an Individual Properly In Possession of a Vehicle Have a Privacy Interest in Closed Containers Therein.
3. Does Opening a Closed Container Further the Goals of an Inventory Search.
4. Does Searching a Vehicle and its Contents for Evidence Invalidate an Inventory Search Rationale?

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D) STATEMENT OF THE CASE

Kittitas County Sheriff's Office Deputies arrested Clark Tellvik and Michael Peck for, *inter alia*, "possession of a stolen vehicle." RP 30-31, 43, 46, 77, 79, 82, 87-88. After "confirm[ing] with the [law enforcement] agency that took the stolen vehicle report," Kittitas County Sheriff's Corporal Zach Green decided to "impound[]" the pickup truck. RP 41. After making the decision to impound the pickup, "[t]he vehicle was searched" by "Dep. McKean...assisted by Dep. Kivi" at the direction of Corporal Green. RP 41, 43; *see also* RP 100-01. Corporal Green testified the vehicle was searched "to see what all was inside" "[f]or the purpose of looking for evidence or anything else that was left in the vehicle." RP 41. Another purpose of the search Corporal Green ordered was to remove "anything in the truck that shouldn't have been in the truck [that the truck owner] didn't want the truck back with it still in there." RP 44; *see also* RP 104. Another purpose of the search Corporal Green ordered was to "show a list of what was in the vehicle...[j]ust in case someone claims that their diamond ring was left in the car and now it's gone" to "protect" the "Sheriff's office, the registered owner, the other folks who have property inside that vehicle...[and] the tow company." RP 104-05. Corporal Green believed he did not need a warrant to search the vehicle because "the vehicle [did] not belong to anyone who was there,"

and “the two subjects [including Mr. Peck]...[didn't] have any right to the vehicle or have any expectation of privacy to the vehicle.” RP 42, 49.

As a result of that search, Deputy McKean found a “black zippered...CD case” in the vehicle. RP 108. Deputy McKean “opened” the CD case. *Id.* Deputy McKean observed a “[s]ubstantial amount of crystalline substance, individually packaged” “[a] digital scale,” and “[a] glass smoking pipe” inside the CD case. RP 109. Deputy McKean did not seek a search warrant to open the CD case because he “[d]idn't think there was a reasonable expectation of privacy in the stolen vehicle,” although he acknowledged he could have sought a search warrant. RP 115, 117-18. Deputy McKean testified he was, at least in part, “looking for evidence” when he was searching the vehicle. RP 116-17.

Mr. Peck was charged with, *inter alia*, Possession with Intent to Deliver a Controlled Substance, with a firearm enhancement. CP 212-214.

Before trial, Mr. Peck moved to suppress “all evidence obtained as a result of an unlawful search and seizure, which includes but [is] not limited to drugs found in an automobile occupied by [Mr. Peck] just prior to [his] arrest.” CP 19. The written motion focused on the search of the pickup truck in general, and the “black zippered bag in the vehicle” in particular. CP 24. The State responded in writing to that motion. CP 47-53.

The trial court conducted an evidentiary hearing on that motion. RP 20-136, 159-69. The trial court heard argument of the parties. RP 180-90. The trial court issued an oral ruling, denying the motion. RP 190-92. However, the trial court declined to issue a written findings of fact and conclusions of law at the time of the hearing. RP 192.

More than ten months later, the trial court entered written findings of fact and conclusions of law concerning that hearing which modified and expanded on the court's oral ruling¹. CP 254-58; *compare* RP 190-192.

After trial, the jury found Mr. Peck guilty of Possession with Intent to Deliver a Controlled Substance, and found Mr. Peck was “armed with a firearm” as to that count. CP 215, 217-23, 228-241.

In an unpublished opinion, the Court of Appeals “reverse[d] Mr. Peck’s conviction for possession with intent to deliver a controlled substance and the associated firearm enhancement” and “remand[ed] for resentencing.” *State v. Peck*, 34496-7-III, slip op. at 14 (Wash. Ct. App., decided May 8, 2018, reconsid. denied June 12, 2018).

The Court of Appeals held Mr. Peck had “automatic standing to challenge the search” because “possession is an essential element of the offense with which [Mr. Peck] was charged” and “he...was in possession

¹ The State does not cite to the Findings of Fact and Conclusions of Law anywhere in its petition for review to this Court. *See* State’s Corr. Pet. for Discr. Review, filed Jul. 13, 2018. Rather, the State instead cites to the trial court’s oral ruling. *Id.* at 6. In this supplemental brief, Mr. Peck is following suit.

of the contraband at the time of the contested search [and] seizure.” *Id.*, slip op. at 9. In a footnote, the Court of Appeals declined to “examine the issue of abandonment” because “[i]t was not a basis for the State’s justification of the search in the suppression hearing and the State [did] not attempt to raise it for the first time on appeal.” *Id.* After finding Mr. Peck had standing to challenge the search, the Court of Appeals held if the deputies were conducting an inventory search, they should have “inventor[ied any closed] container as a sealed unit.” *Id.*, slip op. at 8. Because the deputies instead “opened a closed container in the absence of any exigency and without consent,” the deputies exceeded the scope of a valid inventory search, and thus the trial “court erred in denying the motion to suppress.” *Id.*, slip op. at 8-9.

The Court of Appeals declined to address “Mr. Peck’s assignment of error to the trial court’s failure to timely enter findings of fact and conclusions of law following the suppression hearing.” *Id.*, slip op. at 9. The Court of Appeals also did not address whether the search of the vehicle was a pretext for an investigatory search. *See id.*, slip op. at 7-9.

The State petitioned this Court to review the Court of Appeals decision, framing the issue as “[w]hether the Court of Appeals erred in suppressing the contents of a zippered CD case located in a stolen vehicle in the course of an inventory search, when neither the defendant asserted

any possessory interest in the CD case.” State’s Corr. Pet. for Discr. Rev., 2 (filed Jul. 13, 2018). This Court accepted review. Ord. Granting Pet. for Rev. (entered Oct. 31, 2018).

E) ARGUMENT

“[A]ny party may file and serve a supplemental brief” “after the Supreme Court grants a petition for review.” RAP 13.7(d). Ordinarily, “the Supreme Court will review only the questions raised in the...petition for review and answer.” RAP 13.7(b). However, “[i]f the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.” *Id.*

“No person shall be disturbed in his private affairs...without authority of law.” Wash. Const. art. 1 § 7. “[D]ue to the explicit language of Const. art. 1, § 7, under the Washington Constitution the relevant inquiry for determining when a search has occurred is whether the state unreasonably intruded into the defendant’s ‘private affairs’.” *State v. Myrick*, 102 Wn.2d 506, 510 (1984). “Const. art. 1, § 7 analysis encompasses both legitimate privacy expectations protected by the Fourth Amendment; but is not confined to the subjective privacy expectations of modern citizens.” *Id.* at 510-511. “Rather, it focuses on those privacy

interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” *Id.* at 511.

1. Mr. Peck Is Entitled to Automatic Standing.

“[O]ur constitution’s privacy clause, with its specific affirmation of the privacy interests of all citizens, encompasses the right to assert a violation of privacy as a result of impermissible police conduct at least in cases where...a defendant is charged with possession of the very item which was seized.” *State v. Simpson*, 95 Wn.2d 170, 180 (1980). (plurality). “Any other conclusion allows the invasion of a constitutionally protected interest to be insulated from judicial scrutiny by a technical rule of ‘standing.’” *Id.* “The inability to assert such an interest threatens all of Washington’s citizens, since no other means of deterring illegal searches and seizures is readily available.” *Id.* Furthermore, “automatic standing” avoids “deter[ing]” “a defendant” “from asserting a possessory interest in illegally seized evidence because of the risk that statements made at the suppression hearing will later be used to incriminate him [including incrimination] under the guise of impeachment.” *Id.* In other words, there exists “a continuing policy basis and firm state constitutional grounds for adherence to the automatic standing rule.” *Id.* at 181.

“[A] defendant has ‘automatic standing’ to challenge a search or seizure if (1) the offense with which he is charged involves possession as

an ‘essential’ element of the offense; and (2) the defendant was in possession of the contraband at the time of the contested search or seizure.” *Id.* at 181. “A mere denial of ownership does not eliminate standing.” *State v. Goodman*, 42 Wn. App. 331, 335 (1985) (citing *State v. Allen*, 93 Wn.2d 170, 172 (1980); *see also State v. Evans*, 159 Wn.2d 402, 405-407 (2007) (defendant “denied owning” “the briefcase,” but still “me[an]t both parts of the test for automatic standing”).

Although *Simpson* was a plurality opinion, and subsequent opinions, such as *State v. Zakel*, 119 Wn.2d 563, 564 (1992) have questioned “the continuing validity of the automatic standing rule under [the Washington] state constitution,” more recent Washington Supreme Court opinions have not suggested the automatic standing rule is anything other than settled law. *See e.g. Evans*, 159 Wn.2d at 406-407 (“In Washington, a defendant has automatic standing to challenge the legality of a seizure even though he or she could not technically have a privacy interest in such property”) (internal quotation omitted); *see also State v. Williams*, 142 Wn.2d 17, 22 (2000) (“Although defunct in the federal courts, automatic standing still maintains a presence in Washington”).

Here, Mr. Peck was accused and convicted of “possession with the intent to deliver a controlled substance.” CP 212-214, 220. That crime involves possession as an essential element. *See RCW 69.50.401(a)*; *see*

also CP 169. Furthermore, Mr. Peck was in possession of the vehicle and its contents at the time of the search. RP 46, 58, 60, 63, 79; *see also* CP 218, 220. Thus, Mr. Peck has automatic standing to challenge the propriety of the search of the vehicle and its contents.

2. An Individual Properly In Possession of the Vehicle Has Privacy Interest in Closed Containers Therein.

“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.

“Courts treat 'luggage and other closed packages, bags and containers' as unique for purposes of police searches.” *State v. Wisdom*, 187 Wn. App. 652, 670 (2015) (citing *California v. Acevedo*, 500 U.S. 565, 571 (1991)). “Washington courts recognize an individual's privacy interest in his closed luggage, whether locked or unlocked.” *Id.* (citing *State v. Houser*, 95 Wn.2d 143, 157 (1980)). Furthermore, an individual has a “constitutionally protected privacy interest” in non-abandoned personal property located in a stolen vehicle. *See State v. Samalia*, 186 Wn.2d 262, 272-273 (2016).

Here, based upon the automatic standing doctrine, Mr. Peck stands in the shoes of an individual properly in possession of the CD case at issue. The CD case was a zippered, closed container. RP 108. Although

the CD case was located in a stolen vehicle, an individual properly in possession of that CD case would have a privacy interest in its contents.

3. Opening Closed Container Does Not Further Goals of Inventory Search.

“Any analysis of article I, section 7 in Washington begins with the proposition that warrantless searches are unreasonable per se.” *State v. White*, 135 Wn.2d 761, 769 (1998). “Despite this strict rule, there are jealously and carefully drawn exceptions to the warrant requirement.” *Id.* (internal quotations omitted). “An inventory search of an automobile” is one such exception to the warrant requirement. *Id.*

“Inventory searches, unlike other searches, are not conducted to discover evidence of crime.” *Houser*, 95 Wn.2d at 153. “Accordingly, a routine inventory search does not require a warrant.” *Id.* However, to be valid, an inventory search “must be restricted” in “direction and extent” “to effectuating the purposes” of justify an inventory search's exception to the warrant requirement. *Id.* “[A] noninvestigatory inventory search of an automobile is proper when conducted in good faith for the purposes of (1) finding, listing, and securing from loss during detention property belonging to a detained person; [and] (2) protecting police and temporary storage bailees from liability due to dishonest claims of theft.” *Id.* at 154.

“[T]he scope of [a valid] inventory search should be limited to those areas necessary to fulfill its purpose[s].” *Id.*

“The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function.” *Wisdom*, 187 Wn. App. at 674. An officer conducting an inventory search can “merely list[a] container on the inventory rather than opening the container and listing each individual item inside.” *Id.* at 675. Therefore, the purposes of an inventory search are not furthered by opening a closed container, and searching that closed container is therefore outside the scope of a valid inventory search.

Here, Deputy McKean, in searching the vehicle, found “[a] black zippered...CD case” “partially wedged under the seat.” RP 108. Without seeking a warrant or consent from “the owner of the truck” or “one of the subjects that were there that night” (i.e. Mr. Peck and Mr. Tellvik), Deputy McKean “opened” the CD case. RP 108-109. The CD case contained a “[s]ubstantial amount of crystalline substance, individually packaged[; a] digital scale[; and a] glass smoking pipe.” RP 109. Because Deputy McKean opened a closed container, rather than inventorying the container as a unit, he exceeded the scope of a valid inventory search.

4. Searching Vehicle and Contents For Evidence Invalidates

Inventory Search Rationale.

“[A] noninvestigatory inventory search of an automobile is proper [only] when conducted in good faith.” *Houser*, 95 Wn.2d at 154. “The inventory search is a recognized exception because, unlike a probable cause search and a search incident to arrest, the purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function.” *Wisdom*, 187 Wn. App. at 674. An inventory search is not “conducted in good faith” if it “a pretext for an investigatory search.” *Houser*, 95 Wn.2d at 155.

Here, after “confirm[ing] with the [law enforcement] agency that took the stolen vehicle report,” Kittitas County Sheriff's Corporal Zach Green decided to “impound[.]” the pickup truck. RP 41. After making the decision to impound the pickup, “[t]he vehicle was searched” by “Dep. McKean...assisted by Dep. Kivi” at the direction of Corporal Green. RP 41, 43; *see also* RP 100-01. Corporal Green testified vehicle was searched, in part, “to see what all was inside” “[f]or the purpose of *looking for evidence* or anything else that was left in the vehicle.” RP 41 (emphasis added).

Again, as a result of that search, Deputy McKean found a “black zippered...CD case” in the vehicle. RP 108. Deputy McKean “opened” the

CD case. *Id.* Deputy McKean observed a “[s]ubstantial amount of crystalline substance, individually packaged” “[a] digital scale,” and “[a] glass smoking pipe” inside the CD case. RP 109. Deputy McKean testified he was, at least in part, “looking for evidence” when he was searching the vehicle. RP 116-17.

Because Deputy McKean, in searching the vehicle at Corporal Green's direction, was in part searching for evidence, his search was not a *noninvestigatory* inventory search. The search was, at least in part, pretextual. Therefore, the search could not be justified as a valid investigatory search.

E) CONCLUSION

Mr. Peck had automatic standing to challenge the propriety of the search of the vehicle and its contents. Moreover, an individual properly in possession of that vehicle and its contents would have had a privacy interest in the closed, zippered CD case found in the vehicle. Furthermore, the search of the vehicle conducted by the Kittitas County Sheriff's Office exceeded the scope of a valid inventory search by involving the opening of closed containers, rather than inventorying those containers as a unit.

Finally, the search itself was partially designed to uncover evidence, and

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thus not a good faith inventory search. Thus, this Court should affirm the Court of Appeals opinion.

DATED this 30th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing SUPPLEMENTAL BRIEF OF RESPONDENT PECK was emailed this 30th day of November, 2018 to counsel for the Petitioner, Carole Highland at carole.highland@co.kittitas.wa.us and prosecutor@co.kittitas.wa.us; and to counsel for Respondent Tellvik, Tanesha Canzater at canz2@aol.com; and was mailed, postage prepaid, on this 30th day November, 2018 to Respondent as follows:

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/s/ Christopher Taylor _____
Christopher Taylor

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