

FILED
SUPREME COURT
STATE OF WASHINGTON
11/30/2018 4:37 PM
BY SUSAN L. CARLSON
CLERK

NO. 960691

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

v.

CLARK ALLEN TELLVIK,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Clark Allen Tellvik
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

TABLE OF CONTENTS

I. SUPPLEMENTAL STATEMENT OF THE CASE..... 1

II. SUPPLEMENTAL ISSUES PRESENTED 1

III. ARGUMENT 1

DIVISION THREE’S DECISION IN THIS CASE REAFFIRMS
THE NARROWLY DRAWN PURPOSE OF THE INVENTORY
SEARCH AND UPHOLDS CONSTITUTIONALLY
PROTECTED PRIVACY INTERESTS UNDER ARTICLE 1,
SECTION 7..... 1

1. CD cases and their contents are among those
private affairs protected under article I, section 7 3

2. The officer’s inventory search exceed authority of
law..... 7

IV. CONCLUSION 9

TABLE OF AUTHORITIES

United States Constitution

U.S. Const. amend. 44, 7, 8, 9

Washington State Constitution

Const. article I, section 7 1, 2, 3, 4, 6, 7, 9

United States Supreme Court Decisions

Colorado v. Bertine, 479 U.S. 367, 107 S. Ct. 738, 93 L.Ed.2d 739 (1987)8

United States v. Chadwick 433 U.S. at 13 n. 8, 97 S.Ct. 2476 (1977).....5

Washington State Supreme Court Decisions

In re Pers. Restraint of Maxfield, 133 Wash.2d 332, 339, 945 P.2d 196 (1997).....2, 3

State v. Boland, 115 Wash.2d 571, 580, 800 P.2d 1112 (1990)..3, 4

State v. Carter, 127 Wash.2d 836, 850, 904 P.2d 290 (1995).....5

State v. Duncan, 146 Wash.2d 166, 171, 43 P.3d 513 (2002).....2

State v. Evans, 159 Wash.2d 402, 407, 150 P.3d 105 (2007).....5, 6

State v. Ferrier, 136 Wash.2d 103, 110, 960 P.2d 927 (1998).2

State v. Gresham, 173 Wash.2d 405, 419, 269 P.3d 207 (2012) 1

State v. Houser, 95 Wash.2d 143, 157, 622 P.2d 1218 (1980)5, 7, 8, 9

State v. McKinney, 148 Wash.2d 20, 27, 60 P.3d 46, 49 (2002)4

State v. Miles, 160 Wash.2d 236, 244, 156 P.3d 864 (2007).....2

<u>State v. Montague, 73 Wash.2d 381, 385-87, 438 P.2d 571 (1968)</u>	7, 9
<u>State v. Myrick, 102 Wash.2d 506, 510, 688 P.2d 151 (1984)</u>	3, 4
<u>State v. Reeder, 184 Wash.2d 805, 814, 365 P.3d 1243, 1247 (2015)</u>	2
<u>State v. Snapp, 174 Wash.2d 177, 187, 275 P.3d 289 (2012)</u>	2
<u>State v. Tyler, 177 Wash.2d 690, 700-01, 302 P.3d 165 (2013)</u>	7, 8
<u>State v. White, 135 Wash.2d 761, 771-72, 958 P.2d 982 (1998)</u>	8, 9
<u>State v. Winterstein, 167 Wash.2d 620, 628, 220 P.3d 1226 (2009)</u>	1
<u>State v. Wisdom, 187 Wash. App. 652, 674, 349 P.3d 953, 963 (2015), as amended on reconsideration in part (Sept. 3, 2015)</u>	3, 5, 8

Washington State Court of Appeals Decisions

<u>State v. Rooney, 190 Wash. App. 653, 658, 360 P.3d 913 (2015), review denied, 185 Wash.2d 1032 (2016)</u>	7
<u>State v. VanNess, 186 Wash.App. 148, 162, 344 P.3d 713 (2015)</u>	7

Law Review Articles

<u>Daniel J. Clark, Dropping Anchor: Defining A Search in Compliance with Article I, Section 7 of the Washington State Constitution, 21 Seattle U. L. Rev. 1, 2 (1997)</u>	2
<u>William Jennison, Privacy in the Can: State v. Boland and the Right to Privacy in Garbage, 28 Gonz. L. Rev. 159, 170 (1992)</u>	3, 4
<u>Nock, Seizing Opportunity, Searching for Theory: Article I, Section 7, 8 U.Puget Sound L.Rev. 331, 366 (1985)</u>	7

Unpublished Companion Decision

State v. Peck, No. 34496–7–III (Wash. Ct. App. May 8, 2018)
(unpublished), 1, 8

I. SUPPLEMENTAL STATEMENT OF THE CASE

Clark Allen Tellvik (Mr. Tellvik), the respondent in this case, relies on facts Division Three Court of Appeals (Division Three) set forth in this companion case, State v. Peck, No. 34496–7–III (Wash. Ct. App. May 8, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/344967_unp.pdf.

II. SUPPLEMENTAL ISSUE PRESENTED

The overarching issue is whether Division Three’s decision to reverse Mr. Tellvik’s conviction for possession of a controlled substance and the associated firearm enhancement negates the purpose of the inventory search and unreasonably expands expectations of privacy?

III. ARGUMENT

DIVISION THREE’S DECISION IN THIS CASE REAFFIRMS THE NARROWLY DRAWN PURPOSE OF THE INVENTORY SEARCH AND UPHOLDS CONSTITUTIONALLY PROTECTED PRIVACY INTERESTS UNDER ARTICLE 1, SECTION 7.

Standard of review

This court reviews constitutional issues de novo. State v. Gresham, 173 Wash.2d 405, 419, 269 P.3d 207 (2012). When a trial court denies a motion to suppress, this court also reviews that court’s conclusions of law de novo. State v. Winterstein, 167 Wash.2d 620, 628, 220 P.3d 1226 (2009).

Law and Analysis

The United States Constitution identifies and prohibits inappropriate governmental behavior. By doing so, it outlines the lowest common denominator

of rights afforded to United States citizens. Daniel J. Clark, Dropping Anchor: Defining A Search in Compliance with Article I, Section 7 of the Washington State Constitution, 21 Seattle U. L. Rev. 1, 2 (1997). Our State Constitution also identifies and prohibits inappropriate governmental behavior. But, it provides greater protection for Washington residents than its federal counterpart. State v. Snapp, 174 Wash.2d 177, 187, 275 P.3d 289 (2012).

For example, when it comes to privacy, article I, section 7 provides, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The unique language of article I, section 7, clearly recognizes an individual’s right to privacy with no express limitations. State v. Ferrier, 136 Wash.2d 103, 110, 960 P.2d 927 (1998).

Searches conducted outside the judicial process, without prior approval of a judge or magistrate, are per se unreasonable under article I, section 7, subject only to a few specifically established and well delineated exceptions. State v. Duncan, 146 Wash.2d 166, 171, 43 P.3d 513 (2002). To determine whether a search violates article I, section 7, courts break down the analysis into two parts: (1) “private affairs” and (2) “authority of law.” In re Pers. Restraint of Maxfield, 133 Wash.2d 332, 339, 945 P.2d 196 (1997). If a private affair is not disturbed, then there is no violation of article I, section 7. State v. Miles, 160 Wash.2d 236, 244, 156 P.3d 864 (2007). If a valid privacy interest has been disturbed, then the issue becomes whether the disturbance was justified by authority of law. Id.; State v. Reeder, 184 Wash.2d 805, 814, 365 P.3d 1243, 1247 (2015). That analysis has consistently narrowed the opportunities of the police to engage in

warrantless searches. William Jennison, Privacy in the Can: State v. Boland and the Right to Privacy in Garbage, 28 Gonz. L. Rev. 159, 170 (1992).

Here, the State insists the officer did not disturb Mr. Tellvik's private affairs when he searched the zipped CD case, because a CD case does not share the same intimacy or personal privacy as a shaving kit, like the one searched in State v. Wisdom, 187 Wash. App. 652, 674, 349 P.3d 953, 963 (2015), as amended on reconsideration in part (Sept. 3, 2015). Moreover, unlike the defendant in that case, Mr. Tellvik did not claim the CD case and therefore could not claim any privacy interests in it. And what was more, the officer who searched the car in Wisdom admitted he was looking for evidence, whereas the officer here did not. See State's Petition for Discretionary Review at 8-9. For those reasons, the State believes Division Three's reliance on Wisdom is misplaced.

But, the facts in Wisdom are similar to the facts here. And when those facts are analyzed under the two-part analysis mentioned above, Division Three's decision to suppress the contents of the CD case holds under article I, section 7.

1. CD cases and their contents are among those private affairs protected under article I, section 7. In determining whether a search violates article I, section 7, the court must first decide whether the action in question intruded upon a person's "private affairs." See In re Pers. Restraint of Maxfield, 133 Wash.2d 332, 339, 945 P.2d 196 (1997); State v. Myrick, 102 Wash.2d 506, 510, 688 P.2d 151 (1984). Generally, private affairs are "those privacy interests

which citizens of [Washington] have held, and should be entitled to hold, safe from governmental trespass.” Myrick, 102 Wash.2d at 511, 688 P.2d 151. This determination is not “merely an inquiry into a person’s subjective expectation of privacy but is rather an examination of whether the expectation is one which a citizen of this state should be entitled to hold.” State v. McKinney, 148 Wash.2d 20, 27, 60 P.3d 46, 49 (2002).

For example, State v. Boland, 115 Wash.2d 571, 580, 800 P.2d 1112 (1990) stands in the grand tradition of finding that the citizens of Washington have broader privacy protections under art. I, sec 7 of the Washington State Constitution than those available under the Fourth Amendment to the U.S. Constitution. William Jennison, Privacy in the Can: State v. Boland and the Right to Privacy in Garbage, 28 Gonz. L. Rev. 159, 170 (1992).

In that case, this Court held garbage placed in a closed trash container left outside of a home on a curb is a private affair to be protected under article I, section 7. 115 Wash.2d at 578. This Court emphasized the fact the garbage was in a closed can and that the discarder of the garbage expected that it would be picked up by a licensed garbage collector—not searched by the government. Id. at 578. The court acknowledged that it may be unreasonable to expect that children, scavengers, or snoops will not sift through one's garbage. Id. at 578. However, it concluded that average persons would find it reasonable to believe the garbage they placed in their closed trash cans will be protected from warrantless government intrusion. Id.

Even when it comes to garbage, our courts recognize and uphold individuals' privacy interests. Our courts also recognize an individual's privacy interest in his closed luggage, whether locked or unlocked. See State v. Houser, 95 Wash.2d 143, 157, 622 P.2d 1218 (1980). Exposure of the container to the public does not permit police to search inside the container. United States v. Chadwick, 433 U.S. at 13 n. 8, 97 S.Ct. 2476 (1977); State v. Wisdom, 187 Wash. App. 652, 670, 349 P.3d 953, 961 (2015), as amended on reconsideration in part (Sept. 3, 2015). Therefore, it is not unreasonable for privacy interests to extend to CD cases, whether closed or not. See State v. Houser, 95 Wash.2d 143, 157, 622 P.2d 1218 (1980); State v. Wisdom, 187 Wash. App. 652, 670, 349 P.3d 953, 961 (2015), as amended on reconsideration in part (Sept. 3, 2015).

Not only is the CD case a private affair, like a piece of luggage or shaving kit, Mr. Tellvik did not forfeit any privacy interest in it. Under our liberal constitution, a defendant has automatic standing to challenge a search, even if he might technically lack a privacy interest in the property. State v. Evans, 159 Wash.2d 402, 407, 150 P.3d 105 (2007); State v. Wisdom, 187 Wash. App. 652, 665, 349 P.3d 953, 959 (2015), as amended on reconsideration in part (Sept. 3, 2015). Automatic standing confers standing on anyone charged with a possessory crime, eliminating the requirement of showing a legitimate expectation of privacy before the defendant can challenge a search or seizure. State v. Carter, 127 Wash.2d 836, 850, 904 P.2d 290 (1995).

The doctrine was originally adopted to guard against the risk of self-incrimination by a defendant who would have to admit possession of seized evidence at a suppression hearing to establish standing, then face use of the admission as proof of guilt at trial. Id. at 850, 904 P.2d 290. So, if a defendant is charged with an offense that has possession as an essential element and is in possession at the time of the contested search or seizure, he can invoke automatic standing. State v. Evans, 159 Wash.2d 402, 407, 150 P.3d 105 (2007).

Here, the State acknowledges Mr. Tellvik had automatic standing to challenge the search, even though he did not claim the CD case as his own, but makes the point that “while denial of ownership is not in and of itself sufficient to divest an individual of a privacy interest in an article, the court can consider the status of the area searched to determine whether any privacy interest has been abandoned. See State’s Petition for Discretionary Review at pages 10-11.

According to the State, “whatever privacy interest a car thief may have in the stolen car must give way to the vehicle owner’s interest in protecting his or her property.” See State’s Petition for Discretionary Review at pages 10-11. It essentially argues Division Three’s decision places police at a disadvantage when they are unable either to open an item to catalog its contents, or to obtain a warrant when there is no basis for one. See State’s Petition for Discretionary Review at pages 10-11.

However, if the officer did not have probable cause to believe evidence from the burglary would be in the truck cab, as the State suggests, then the only

other reason he would have had to open the CD case would have been to look for evidence.

2. The officer's inventory search exceeded authority of law. Both the Fourth Amendment and article I, section 7 prohibit warrantless searches unless one of the narrow exceptions to the warrant requirement applies. State v. Rooney, 190 Wash. App. 653, 658, 360 P.3d 913 (2015), review denied, 185 Wash.2d 1032 (2016). The inventory search of an impounded vehicle is one such exception to the warrant requirement. State v. Tyler, 177 Wash.2d 690, 700-01, 302 P.3d 165 (2013).

Under this exception, police are permitted to examine the contents of containers lawfully in police custody in order to compile "inventories" of those contents. The "inventory" is justified on the theory that it protects the police or the bailee from false allegations of theft of the contents or negligence in handling. See a/so Nock, Seizing Opportunity, Searching for Theory: Article I, Section 7, 8 U.Puget Sound L.Rev. 331, 366 (1985).

The purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function, i.e., protect the owner's property, protect the police against false claims of theft by the owner, and protect the police from potential danger. State v. VanNess, 186 Wash.App. 148, 162, 344 P.3d 713 (2015).

An inventory search must be restricted to the areas required to fulfill the purpose of the search. State v. Montague, 73 Wash.2d 381, 385-87, 438 P.2d 571 (1968); State v. Houser, 95 Wash. 2d 143, 154, 622 P.2d 1218, 1225

(1980).State v. Tyler, 177 Wash.2d 690, 701, 302 P.3d 165 (2013); Houser, 95 Wn.2d at 154. If officers conducting an inventory search encounter a locked compartment or closed container, it cannot be opened absent exigent circumstances or the consent of the owner. State v. Wisdom, 187 Wash.App. 652, 675-76, 349 P.3d 953 (2015); Houser, 95 Wash.2d at 158; State v. White, 135 Wash.2d 761, 771–72, 958 P.2d 982 (1998). If a locked or closed container is encountered, absent exigency or consent, the officers must inventory the container as a sealed unit. See Houser, 95 Wash.2d at 158–59.

Here, Division Three found the officers opened the CD case in the absence of any exigency and without consent. Before opening it, they needed a warrant. See State v. Peck, No. 34496–7–III (Wash. Ct. App. May 8, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/344967_unp.pdf.

According to the State, this decision threatens the legitimacy of State v. Houser, 95 Wn.2d 143, 156, 622 P.2d 1218 (1980) because it expands the limits of valid inventory searches. See State’s Petition for Discretionary Review at pages 11-12. The State argues, “it appears the rule announced in Houser was based upon the Fourth Amendment...” If Houser is based on the Fourth Amendment, and the Supreme Court has since clarified in Colorado v. Bertine, 479 U.S. 367, 107 S. Ct. 738, 93 L.Ed.2d 739 (1987), the Fourth Amendment is not violated by an inventory of the contents of closed containers found inside an impounded vehicle, then Houser is no longer legitimate law. See State’s Petition for Discretionary Review at page 12.

However, in State v. White, 135 Wash.2d 761, 764, 958 P.2d 982, 983 (1998), this Court clarified its ruling “in Houser is grounded in article I, section 7 of the Washington State Constitution,” and is centered on the privacy interests of the individual. State v. White, 135 Wash.2d 761, 768, 958 P.2d 982, 985 (1998). “[F]rom the history of article I, section 7 and from the precedent established in State v. Montague, 73 Wash.2d 381, 438 P.2d 571 (1968), police are not permitted to search the locked trunk of an impounded vehicle absent a manifest necessity for so doing. While inventory searches may serve legitimate government interests, these interests are not limitless and do not outweigh the privacy interests of Washington citizens. State v. White, 135 Wash.2d 761, 771, 958 P.2d 982, 987 (1998).

IV. CONCLUSION

The analysis in Houser is not unusual. Our courts have often diverged from the United States Supreme Court’s Fourth Amendment jurisdiction and have more narrowly defined the exceptions to the search warrant requirements. State v. White, 135 Wash.2d 761, 768–69, 958 P.2d 982, 985–86 (1998). Division Three’s decision here falls in line with Houser and with the broader protections afforded under article I, section 7.

Respectfully submitted this 30th day of November, 2018.

s/Tanesha L. Canzater
Tanesha La'Trelle Canzater, WSBA# 34341
Attorney for Clark Allen Tellvik
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362- 2435 (mobile office)
(703) 329-4082 (fax)
Canz2@aol.com

DECLARATION OF SERVICE

November 30, 2018

Case Name: **State of Washington v. Clark Allen Tellvik**

Supreme Court Case Number: **960691**

I declare under penalty and perjury of Washington State laws that on November 30, 2018, I filed this **RESPONDENT'S SUPPLEMENTAL BRIEF** with this court and served copies to:

KITTITAS COUNTY PROSECUTING ATTORNEY'S OFFICE

prosecutor@co.kittitas.wa.us

*The prosecutor's office accepts service via email.

CHRISTOPHER TAYLOR

taylor@crtaylorlaw.com

*This party accepts service via email.

CANDY K. POWERS

ck@ckplawoffice.com

*This party accepts service via email.

CLARK ALLEN TELLVIK, 863699

Coyote Ridge Corrections Center

PO Box 769

Connell, WA 99326

[s/Tanesha L. Canzater](#)

Tanesha L. Canzater, WSBA # 34341

Post Office Box 29737

Bellingham, Washington 98228

(360) 362-2435 (mobile)

(703) 329-4082 (facsimile)

Canz2@aol.com

LAW OFFICES OF TANESHA L. CANZATER

November 30, 2018 - 4:37 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96069-1
Appellate Court Case Title: State of Washington v. Michael Nelson Peck and Clark Allen Tellvik
Superior Court Case Number: 16-1-00020-6

The following documents have been uploaded:

- 960691_Briefs_20181130162325SC875680_8492.pdf
This File Contains:
Briefs - Respondents Supplemental
The Original File Name was Supplemental Briefing TELLVIK A.pdf

A copy of the uploaded files will be sent to:

- Carole.highland@co.kittitas.wa.us
- ck@ckplawoffice.com
- greg.zempel@co.kittitas.wa.us
- prosecutor@co.kittitas.wa.us
- taylor@crtaylorlaw.com

Comments:

Sender Name: Tanesha Canzater - Email: canz2@aol.com
Address:
PO BOX 29737
BELLINGHAM, WA, 98228-1737
Phone: 877-710-1333

Note: The Filing Id is 20181130162325SC875680