

No. 34525-4-III

NO. 345254

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CLARK ALLEN TELLVIK

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY
The Honorable Scott Sparks

AMENDED SUPPLEMAENTAL APPELLANT'S BRIEF

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I. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred when it found there was nothing to show or indicate officers opened the black compact disc case to gather evidence. (Finding of Fact #22) CP 275-279.

2. The trial court abused its discretion when it concluded the officers had a valid and legitimate interest to the black compact disc case that was inside the vehicle, to protect the vehicle's owner and any others, who may have legitimately left items in the vehicle. (Conclusion of Law #2) CP 275-279.

3. The trial court abused its discretion when it denied the motion to suppress contents officers found in the black compact disc case? (Conclusion of Law #3) CP 275-279.

II. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

Whether the trial court abused its discretion when it denied a motion to suppress contents officers discovered in a black compact disc case, after they opened it, without a warrant, during an inventory search? (Assignments of Error 1, 2, and 3)

III. STATEMENT OF THE CASE PERTINENT TO SUPPLEMENTAL ISSUE

Clark Allen Tellvik's (Mr. Tellvik) co-defendant's attorney moved to suppress evidence the officer seized from the black zippered case during the inventory search. She argued the officer's search exceeded that of an "inventory search" and became an "investigative search." For that reason, he was required to apply for a search warrant, before he opened black case. 5/10/16 RP 233-235.

The officer, who conducted the inventory search, told the court he did not apply for a warrant because he did not think there was a reasonable expectation of privacy in a

stolen vehicle. 5/10/16 RP 168. The state maintained Mr. Tellvik's co-defendant had no standing to object to the search because he was in a stolen vehicle. 5/10/16 RP 239.

Mr. Tellvik's attorney joined Mr. Peck's motion and countered to the state's argument with the theory of third party interest. She argued the officer was required to obtain a search warrant to not only to protect the defendants' constitutional rights, but also the rights of the truck's owner. Because the situation was not an urgent one, the officer could have either waited to ask the truck's owner whether the case belonged to him or to apply for a search warrant. 5/10/16 RP 241. The court denied the motion. 5/10/16 RP 242-243.

Almost a year after the hearing, the court entered written findings of fact and conclusions of law. It found there was no indication officers opened the black compact case to gather evidence. It concluded the officers had a valid and legitimate interest to search the case, to protect the registered owner, others who may have left items in the vehicle, the tow truck company, and law enforcement. CP 275-279.

IV. ARGUMENT

UNLESS THERE WAS SUBSTANTIAL EVIDENCE TO PROVE THERE WAS A MANIFEST NECESSITY FOR OFFICERS TO SEARCH THE CASE, THE ONLY OTHER REASON THEY WOULD HAVE HAD TO OPEN IT, WAS TO COLLECT EVIDENCE

Standard of review

This court must review a court's findings of fact in ruling on a motion to suppress under the substantial evidence standard and review conclusions of law de novo. State v. Linder, 190 Wash. App. 638, 643, 360 P.3d 909 (2015). "Unchallenged findings of fact entered following a suppression hearing are verities on appeal." State v. Gaines, 154 Wash.2d 711, 716, 116 P.3d 993 (2005). This court must also review de novo whether the

trial court's findings of fact support its conclusions of law. State v. Armenta, 134 Wash.2d 1, 9, 948 P.2d 1280 (1997).

Here, the trial court entered written findings of fact and conclusions of law, over a year after Mr. Tellvik's trial. The state served us a copy of the findings and conclusions, months after we filed our opening brief. CP 275-279. We recognize although this court disfavors late findings of fact and conclusions of law, findings and conclusions may be submitted and entered while an appeal is pending, if the defendant is not prejudiced by the belated entry of findings. State v. McGary, 37 Wash.App. 856, 861, 683 P.2d 1125 review denied, 102 Wash.2d 1024 (1984). This court will not infer prejudice ... from delay in entry of written findings of fact and conclusions of law. State v. Head, 136 Wash.2d 619, 625, 964 P.2d 1187 (1998). Rather, "a defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is strong indication that findings ultimately entered have been 'tailored' to meet issues raised on appeal." Head, 136 Wash.2d at 624-25.

Despite the trial court's untimeliness, we do not allege any prejudice, here. However, we do take issue with the trial court's findings. Specifically, we take issue with the trial court's finding that the officers did not show or indicate the black compact disc case was opened to collect evidence. We also take issue with the trial court's conclusion the officers had a valid and legitimate interest to search the case to protect the vehicle's owner, others who may have left items in the vehicle, the tow company, and law enforcement. CP 275-279.

Analysis

The purpose of an inventory search is not to discover evidence of a crime, but to perform an administrative or caretaking function. State v. VanNess, 186 Wash. App. 148, 162, 344 P.3d 713 (2015). The principal purposes of an inventory search are to protect the owner's property, protect the police against false claims of theft by the owner, and protect the police from potential danger. 186 Wash. App. at 162, 344 P.3d 713. The scope of an inventory search should be limited to those areas necessary to fulfill its purpose. State v. Wisdom, 187 Wash. App. 652, 674, 349 P.3d 953 (2015) as amended on reconsideration in part (Sept. 3, 2015).

Our courts require a showing of manifest necessity to support an inventory search of a locked container in a vehicle or a locked vehicle trunk. State v. Tyler, 177 Wash.2d 690, 708, 302 P.3d 165 (2013); State v. Ferguson, 131 Wash.App. 694, 703, 128 P.3d 1271 (2006); State v. Houser, 95 Wash.2d 143, 156, 622 P.2d 1218 (1980); State v. Dunham, 194 Wash. App. 744, 749, 379 P.3d 961 (2016). For example, the presence of chemical fumes presents manifest necessity for search because it indicates likelihood highly combustible materials are being transported in the vehicle's trunk. State v. Tyler, 177 Wash. 2d 690, 708, 302 P.3d 165, 175 (2013). On the other hand, the possibility of theft from the locked trunk of an impounded vehicle does not establish the manifest necessity needed to justify an inventory search of the trunk. State v. VanNess, 186 Wash. App. 148, 163–64, 344 P.3d 713, 721 (2015).

While our courts recognize 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 (1998). For

example, to protect against the risk of loss or damage to property in the vehicle, the search “should be limited to protecting against substantial risks to property in the vehicle and not enlarged on the basis of remote risks.” Id. at 155, 622 P.2d 1218; State v. Tyler, 177 Wash.2d 690, 700–01, 302 P.3d 165, 171 (2013). In at least three decisions, our courts suppressed evidence found in a closed container because the officer could have merely listed the container on the inventory rather than opening the container and listing each individual item inside. State v. Wisdom, 187 Wash. App. 652, 675, 349 P.3d 953, 963 (2015), as amended on reconsideration in part (Sept. 3, 2015).

In State v. Houser, 95 Wash.2d 143, 622 P.2d 1218 (1980), our Supreme Court suppressed evidence of drugs obtained through a warrantless search of a toiletry bag located in the locked trunk of an arrestee’s impounded vehicle. The Court held “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., citing Houser, 95 Wash.2d at 158, 622 P.2d 1218. The Court recognized a citizen places personal items in luggage to transport the items in privacy and with dignity. For that reason, citizens have a significant privacy interest in their personal luggage, as opposed to other containers. Id., citing Houser, 95 Wn.2d at 157–58.

In State v. White, 135 Wash.2d 761, 958 P.2d 982 (1998), our Supreme Court adopted its Houser ruling and concluded a permissible scope of an inventory search does not include locked containers or trunks “absent a manifest necessity for conducting such a search.” Houser, 95 Wash.2d at 156, 622 P.2d 1218; see White, 135 Wash.2d at 771, 958 P.2d 982 (“possibility of theft does not rise to the level of manifest necessity”); State

v. Tyler, 177 Wash.2d 690, 711–12, 302 P.3d 165, 176 (2013) citing State v. White 135 Wash.2d at 771, 958 P.2d 982.

Similarly, in State v. Dugas, 109 Wash.App. 592, 599, 36 P.3d 577 (2001), Division One of this court concluded it was unreasonable for officers to search inside a closed container, and held “the purposes of an inventory search do not justify opening a closed container located inside a jacket pocket when there is no indication of dangerous contents.” State v. Dunham, 194 Wash. App. 744, 750, 379 P.3d 958, 962 (2016); Dugas, 109 Wash.App. at 595, 36 P.3d 577.

Here, the trial court found there was nothing to show or indicate officers opened the black compact disc case to gather evidence. (Finding of Fact #22) CP 275-279. Based on that finding, the court concluded the officers had a valid and legitimate interest to open the case to protect the registered owner, others who may have left items in the vehicle, the tow truck company, and law enforcement. (Conclusion of Law #2) CP 275-279. But, it does not explain from what did the registered owner, others who may have left items in the vehicle, the tow truck company, and law enforcement need to be protected.

Houser, White, and Dugas reinforce officers must have a reason to open locked or closed containers, during an inventory search. And that reason must have created a manifest necessity, before they could have searched the contents of a closed container, without a warrant.

It has been well established theft from the locked trunk of an impounded does not create a manifest necessity. State v. VanNess, 186 Wash. App. 148, 163–64, 344 P.3d 713, 721 (2015). So, there had to have been, something along the lines of, chemical fumes or other dangerous contents to create a manifest necessity. The trial court did not offer that here. Without substantial evidence to show there was a manifest necessity for

officers to open the case, the trial court had no basis to conclude they had a valid and legitimate interest to do so. As a result, the trial court abused its discretion when it denied Mr. Tellvik's motion to suppress.

V. CONCLUSION

For the reasons above, we ask this court to reverse the trial court's suppression ruling and to reverse Mr. Tellvik's conviction.

Submitted this 22th day of September, 2017.

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DECLARATION OF SERVICE

September 22, 2017

Court of Appeals Case No. 345254

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

I declare under penalty and perjury of the laws of Washington State that on **Friday, September 22, 2017**, I filed the attached *amended supplemental appellant's* opening brief with Division Three Court of Appeals and served copies to:

KITTITAS COUNTY PROSECUTING ATTORNEY

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*The prosecutor's office accepts service via email.

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