

65331-8

65331-8

NO. 65331-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VICTOR VICTOROVICH TOKARENKO,

Appellant.

COURT OF APPEALS
DIVISION ONE
SEP 25 11 41 AM '11
RECEIVED
65331-8-I

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF

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A. ARGUMENT

THIS COURT MAY REVIEW THE
WARRANTLESS K-9 SEARCH OF MR.
TOKARENKO'S VEHICLE UNDER RAP
2.5(a)(3).

1. Article I, Section 7 of the Washington Constitution prohibits the search of an automobile incident to the driver's arrest unless the driver has access to the passenger compartment at the time of the search. Article I, Section 7 provides: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Granting more protection than the Fourth Amendment, which precludes only "unreasonable" searches and seizures without a warrant, Washington's constitution prohibits any disturbance of an individual's private affairs "without authority of law," whether reasonable or unreasonable in the Fourth Amendment context. State v. Valdez, 167 Wn.2d 761, 771-72, 224 P.3d 751 (2009).¹

2. The K-9 search of Mr. Tokarenko's vehicle was a warrantless intrusion into his private affairs. As in Valdez, the K-9 sniff of Mr. Tokarenko's vehicle took place after he had already

¹ In recognition of these justifications for the exception, once an arrestee is secured and removed from an automobile, that person's presence can no longer support a warrantless search under the search incident to arrest exception. Valdez, 167 Wn.2d at 777.

been removed from the car, cuffed, and locked into a patrol car. 2/24/09 RP 45. Under Valdez, the K-9 sniff violated the Fourth Amendment because Mr. Tokarenko could no longer reach the passenger compartment at the time of the search, and also because the State did not show it was reasonable to believe evidence relevant to the crime underlying the arrest (the open warrant) might be found in the vehicle. Valdez, 167 Wn.2d at 778; Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1723-24, 173 L.Ed.2d. 485 (2009) (“Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”).

Importantly, however, under Article I, Section 7, the crime of arrest is irrelevant and the search is unconstitutional under the Washington Constitution if it occurs after the arrestee is restrained. Valdez, 167 Wn.2d at 778.

The K-9 sniff of the exterior of Mr. Tokarenko’s vehicle constituted an impermissible warrantless search, intruding upon his private affairs in violation of Article I, Section 7. Valdez, 167 Wn.2d

at 778. Accordingly, the evidence gathered during this search – the “alert” on the trunk, which led to the discovery of the cocaine in the duffel bag – should have been suppressed, which would have led to the failure of the search warrant application as well. See Valdez, 167 Wn.2d at 778 (citing State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)). Without the cocaine recovered from the duffel bag, insufficient evidence would remain to sustain a finding of guilt of possession with intent to deliver a controlled substance.

This Court should therefore reverse the conviction and remand for dismissal with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

3. This Court may review the warrantless search under RAP 2.5(a)(3). Mr. Tokarenko may raise this argument regarding the violation of his Article I, Section 7 rights under RAP 2.5(a)(3), if his assignment of error stakes out a claim of “manifest error affecting his constitutional rights.” State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); see RAP 2.5(a)(3).

To meet the criteria of RAP 2.5(a)(3), an appellant must first show that the asserted error was one of constitutional magnitude. McFarland, 127 Wn.2d at 333. Mr. Tokarenko then must show the

“actual prejudice” necessary to establish the error as manifest.

State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

The second requirement of RAP 2.5(a)(3), actual prejudice, is a demand that the constitutional error had identifiable consequences to the defendant that are evident from the record. Where the alleged constitutional error involves the denial of a motion seeking exclusion of evidence under CrR 3.6, the appellant first “must show the trial court likely would have granted the motion if made.” State v. M.R.C., 98 Wn. App. 52, 58-59, 989 P.2d 93 (1999). Here, the absence of legal authority to perform a K-9 search was shown, supra., under Washington law.

Although the State argues that appellant’s failure to object to the warrantless search at trial precludes review, this Court has issued divided opinions on the issue of waiver. Compare State v. Millan, 151 Wn. App. 492, 499-501, 212 P.3d 603 (2009) (holding that defendant’s failure to raise suppression at trial precluded review), review granted 168 Wn.2d 1005 (2010), with State v. McCormick, 152 Wn. App. 536, 540, 216 P.3d 475 (2009) (rejecting Millan and holding that a defendant may challenge a search for the first time on appeal under Gant).

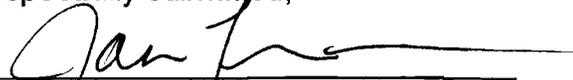
Division Two of this Court in McCormick held that the warrantless search of that defendant not only violated her rights under the United States Constitution, but under Washington's Constitution, as well. 152 Wn. App. at 540-44. In addition, the McCormick Court held that under RAP 2.5(a), the issue had been adequately preserved on appeal.

B. CONCLUSION

For the foregoing reasons, Mr. Tokarenko respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 25th day of February, 2011.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

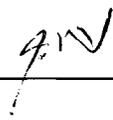
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65331-8-I
v.)	
)	
VICTOR TOKARENKO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF FEBRUARY, 2011.

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