

No. 66816-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT CHAPMAN,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2012 AUG 31 PM 4:41

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF CASE 1

D. ARGUMENT 3

THE TRIAL COURT ERRED IN FAILING TO
SUPPRESS THE FRUITS OF THE
WARRANTLESS SEARCH OF MR. CHAPMAN'S
CAR..... 3

1. Article 1, section 7 prohibits a warrantless search
of a vehicle unless the search falls within one of
a few narrowly-drawn exceptions 3

2. The warrantless search of Mr. Chapman's car
violated Article I, section 7..... 4

3. The trial court erred in failing to suppress the
fruits of the unlawful search of Mr. Chapman's
vehicle 9

E. CONCLUSION..... 13

TABLE OF AUTHORITIES

United States Constitution

Fourth Amendment..... 1, 5, 9

Washington Constitution

Article I, section 7 passim

Washington Supreme Court

State v. Buelna Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) ... 5, 7

State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968) 11

State v. Erho, 77 Wn.2d 553, 463 P.2d 779 (1970)..... 11

State v. Garvin, 166 Wn.2d 242, 207 P.3d 1266 (2009)..... 4

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996)..... 4

State v. Morse, 156 Wn.2d 1, 123 P.3d 832 (2005) 9

State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009) 4, 5, 7

State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981) 4, 8

State v. Tibbles, 169 Wn.2d 364, 236 P.3d 885 (2010) 7, 9

State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982) 9

State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009)..... 9

Washington Court of Appeals

State v. Chesley, 158 Wn.App. 36, 239 P.3d 1160 (2010) 5

State v. Haack, 88 Wn.App. 423, 958 P.2d 1001 (1997)..... 11

United States Supreme Court

Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485
(2009). 5, 6, 7

Court Rules

CrR 3.6..... 1

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to suppress the fruits of the warrantless search of Mr. Chapman's car.

2. The trial court failed to file findings of fact and conclusions of law as required by CrR 3.6.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution generally require suppression of the fruits of a warrantless search, unless the State can establish the search falls within a narrowly-drawn exception to the warrant requirement. Where the State's evidence establishes only that the officer's warrantless search of Mr. Chapman's car was a search for evidence or a crime, other than the crime of arrest and one for which the officer lacked probable cause to arrest, did the court err in failing to suppress the fruits of the search?

C. STATEMENT OF CASE

Clyde Hill Police Officer Di Alexander randomly checked the Department of Licensing (DOL) records of the registered owner of

the car Mr. Chapman was driving. 3RP 21.¹ DOL records indicated the owner's license was revoked. Id. Upon determining Mr. Chapman matched the description of the registered owner, the officer stopped the car, obtained Mr. Chapman's identification, and arrested him for driving with a suspended license. 3RP 22. Officer Alexander handcuffed Mr. Chapman and put him in the back seat of her car. 3RP 27.

Because the DOL records also indicated Mr. Chapman was required to have an Ignition Interlock Device on his car, the officer then returned to his car to search for the device. 3RP 27-28. Upon entering Mr. Chapman's car, Officer Alexander found several mostly empty cans of "Sparks;" an energy drink containing alcohol. 3RP 28-29. Prior to her discovery, the officer had no indication that Mr. Chapman may have been intoxicated or under the influence. 3RP 62.

Officer Alexander told her back-up officer, Medina Police Officer James Martin, what she had found. Officer Martin indicated he detected a "faint" odor of alcohol. 3RP 91-92.

¹ The Verbatim Report of Proceedings consists of four volumes; two pertaining to the suppression hearing and two pertaining to the trial and sentencing. Unfortunately, the two pretrial volumes are designated "Volume I" and "Volume II," while the trial volumes are also designated "Volume I" and "Volume II" and contain multiple dates. To avoid confusion the reports will be cited as "1RP" to "4RP."

Officer Alexander then asked Mr. Chapman if he had been drinking. 3RP 30. Mr. Chapman told the officer he had been drinking the night before, until 4:00 a.m. when he fell asleep. *Id.* Mr. Chapman then said he awoke at 6:30 a.m. and resumed drinking while on his way to work. *Id.*

Officer Alexander arrested Mr. Chapman and administered two breath-alcohol tests. 3RP 35-36. Those tests yielded blood-alcohol levels of .188 and .186. 3RP 149.

Prior to trial the court denied Mr. Chapman's motion to suppress the fruits of Officer Alexander's unlawful search of his car. 2RP 121. However, the court did not enter findings of fact as required by CrR 3.6.

A jury convicted Mr. Chapman of the felony offense of driving under the influence. CP 77, 103-11.

D. ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO
SUPPRESS THE FRUITS OF THE WARRANTLESS
SEARCH OF MR. CHAPMAN'S CAR

1. Article 1, section 7 prohibits a warrantless search of a vehicle unless the search falls within one of a few narrowly-drawn exceptions. Article I, section 7 of the Washington Constitution provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

“Authority of law” means a warrant, subject to limited exceptions.

State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996).

Exceptions to the warrant requirement must be “jealously and carefully drawn.” State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d

1266 (2009). They “are not devices to undermine the warrant

requirement.” State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651

(2009). “The State bears a heavy burden to show the search falls

within one of the ‘narrowly drawn’ exceptions.” Garvin, 166 Wn.2d

at 250 (citation omitted).

2. The warrantless search of Mr. Chapman’s car violated

Article I, section 7. Here the court found the officer lawfully entered

the car, and upon doing so observed the empty cans. 2RP 121.

The “plain view” doctrine permits the seizure of an item if an officer

has lawfully entered a protected area and then sees the item. State

v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). The State did

not prove Officer Alexander was lawfully in Mr. Chapman’s car

when she observed the cans.

It is not disputed that Officer Alexander did not obtain a warrant prior to her search of Mr. Chapman’s car. Officer

Alexander acknowledged she searched the car based upon her incorrect belief that such a search was lawful "incident to arrest." 2RP 77-78. Eight days after the officer's warrantless search of Mr. Chapman's car, the United States Supreme Court made clear no such exception exists under the Fourth Amendment. Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The Washington Supreme Court subsequently clarified that such an exception is at odds with Article I, section 7:

"[A]n automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed."

Patton, 167 Wn.2d at 384.

After an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception.

State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009);

see also, State v. Chesley, 158 Wn.App. 36, 46, 239 P.3d 1160 (2010).

Here, Mr. Chapman was arrested for driving with a revoked license and two misdemeanor warrants. 1RP 15. The officer

handcuffed Mr. Chapman and seated him in the back seat of the officer's car prior to the search of his car. 2RP 75-76. Gant allowed that an officer might be permitted to search the car if she has reason to believe it contains evidence of the crime of arrest. 129 S.Ct. at 1721. It is not necessary to address the incompatibility of this exception with Article I, section 7 in this case as the crimes for which Mr. Chapman was arrested were driving with a revoked license and the warrants. Officer Alexander made clear her search was not to find evidence of that crime but rather to determine if Mr. Chapman's car had an ignition interlock. 2RP 97. Thus, even if the exception to Gant is consistent with the Washington Constitution, it could not apply here.

The trial court found Officer Alexander lawfully entered the car to search for an ignition interlock device. 2RP 121. But to justify the warrantless search, the State was required to establish that Officer Alexander's search for an ignition interlock device was conducted pursuant to a recognized exception to the warrant requirement. The State did not meet that burden. Instead, the Court seems to have concluded the officer was permitted to search for the device merely because she knew Mr. Chapman was supposed to employ one on his car. But there is no "ignition

interlock device” exception to the warrant requirement. Instead, the officer’s search for the device was the very sort of fishing expedition for evidence of potential criminal activity prohibited by Gant, Patton, and Buelna Valdez.

In addition, the officer admitted she did not have probable cause to believe Mr. Chapman had committed the offense of driving without a required interlock device, saying, “I didn’t have any information on that at that time.” 2RP 78. But even if the officer had probable cause to believe Mr. Chapman was committing that offense,

[T]he existence of probable cause, standing alone, does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant.

State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010)

(emphasis in original). The officer had no lawful authority to search Mr. Chapman’s car for an interlock device.

Although it was not mentioned in her report, at the suppression hearing, Officer Alexander claimed that she saw the cans on the floorboard in open view while she stood outside the car. 2RP 94-95. Under the “open view” doctrine no search occurs where an officer observes something while in a constitutionally

protected area. Seagull, 95 Wn.2d at 901-02. The notion being that an observation is not a search. At most that doctrine would allow Officer Alexander to say what she saw while standing outside the car, but does not justify an entry into the car.

First, the trial court discounted Officer Alexander's claim, finding "it is very difficult to stand outside the car and look at the floorboards." 2RP 121. And the court's doubts are amply supported by the officer testimony. While Officer Alexander claimed she may have observed the cans while outside the car, she could not recall whether she might have done so from the driver or passenger-side door. 2RP 99. It is impossible to find a person made an observation from a lawful vantage point if the person cannot recall where that supposed vantage point was.

But setting the court's doubts aside, Officer Alexander candidly admitted she could not determine what the cans were or whether they were empty without entering the car to "manipulate them." 2RP 97. Officer Alexander's claimed observation of cans from outside the car does not justify her subsequent warrantless entry. Again, she admitted she did not know what type of can she saw or whether they were empty or full. An officer's observation of empty soup cans or full alcoholic beverage cans is not evidence of

any illegality. And even supposing she could see what they were, the observation of empty alcohol cans merely supplied probable cause to obtain a warrant and does not justify the warrantless search. Tibbles, 169 Wn.2d at 369.

The State failed to establish any lawful authority for the officer's search of Mr. Chapman's car.

3. The trial court erred in failing to suppress the fruits of the unlawful search of Mr. Chapman's vehicle. "Article I, section 7 provides greater protection of privacy rights than the Fourth Amendment." State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009). (citing State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005)).

The language of [Article I, § 7] constitutes a mandate that the right to privacy shall not be diminished by the gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than curbing governmental actions.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Thus, unlike the Fourth Amendment exclusionary rule, the primary purpose of the exclusionary rule mandated by Article I, section 7 is not to deter government action, but instead "*whenever* the right is unreasonably violated, the remedy *must* follow." (Emphasis in original.) White, 97 Wn.2d at 110.

Officer Alexander stopped Mr. Chapman only because her random check of the Department of Licensing records indicated his license was suspended and that he had an arrest warrant. 1RP 10-12. The officer testified "his driving was fine" and that Mr. Chapman's driving did not provide any basis to believe he was under the influence. 1RP 40-41. Upon her initial contact of Mr. Chapman the officer did not notice any odor of alcohol and did not see any indication that Mr. Chapman was impaired or had been drinking, such as slurred speech or watery eyes. 2RP 68-72. The officer had no suspicion that he had been drinking. 2RP 72. Even after her back-up officer stated he may have smelled alcohol, Officer Alexander did not detect any odor of alcohol. 2RP 82-83.

Only after Officer Alexander's search of the car did Officer Martin tell Officer Alexander that he smelled alcohol on Mr. Chapman's breath. 1RP 19-20. Officer Alexander acknowledged she could not recall whether Officer Martin made his comment before or after she told him about the cans in the car. 2RP 80-81. The State did not call Officer Martin to clarify this point.

The missing witness doctrine provides that when "evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, ... he

fails to do so, the jury may draw an inference that it would be unfavorable to him.” State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968) (Internal quotes omitted). The rule may be invoked in a pretrial suppression hearing where evidence is in dispute and the State fails to produce corroborating testimony from other officers present at the scene. State v. Erho, 77 Wn.2d 553, 558-59, 463 P.2d 779 (1970). In a suppression hearing, the inference arising from the State’s failure to call a witness is sufficient to prevent the State from meeting its burden of proof unless other evidence overcomes the inference. State v. Haack, 88 Wn.App. 423, 434, 958 P.2d 1001 (1997).

The context and timing of Officers Martin’s statement was in dispute based upon Office Alexander’s inability to recall. The State’s failure to call Officer Martin requires this factual dispute be resolved against the State.² Officer Martin’s statement must be deemed a response to the discovery of the cans and a fruit of that illegality.

Moreover, only after her discovery of the cans and Officer Martin’s statement did Officer Alexander ask Mr. Chapman if he had been drinking. 1RP 20. Even during this exchange, Officer

² In his testimony at trial, Officer Martin recalled that he detected a “faint” odor of alcohol, but could not recall when in the course of events he did. 3RP 92.

Alexander did not detect an odor of alcohol or any other signs of intoxication. Id. Mr. Chapman acknowledged he had. 1RP 20-22. The question and Mr. Chapman's responses are fruits of the illegal search.

In response to Mr. Chapman's acknowledgment that he'd been drinking, Officer Alexander elected to administer the Horizontal Gaze Nystagmus test, a test which purports to indicate a person's intoxication. 1RP 22. Based upon that test Officer Alexander, for the first time, opined Mr. Chapman was intoxicated. 1RP 27.

And based upon that test and the odor of alcohol, the court concluded the officer had sufficient probable cause to administer a breath test pursuant to RCW 46.20.308. 2RP 122. Because there was no evidence of impaired driving, without the results of the breath test the State could not prove Mr. Chapman drove while under the influence.

E. CONCLUSION

As is clear, each link in the State's chain of proof flowed from Officer Alexander's unlawful search. Without the fruits of this unlawful search the State could not convict Mr. Chapman. Therefore, this Court must reverse and dismiss Mr. Chapman's conviction

Dated this 31st day of August, 2011.



GREGORY C. LINK – 25228
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66816-1-I
v.)	
)	
ROBERT CHAPMAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING 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:

[X] KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] ROBERT CHAPMAN
347742
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 98331

(X) U.S. MAIL
() HAND DELIVERY
() _____

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 AUG 31 PM 4:41

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF AUGUST, 2011.

X _____
[Handwritten Signature]

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710