

71522-4

71522-4

No. 71522-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LISA LIPPINCOTT,

Appellant.

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CLERK OF COURT

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In the absence of sufficient proof of each element in the "to convict" instruction, Ms. Lippincott's convictions of second degree identity theft deprive her of due process.

2. The trial court erred in failing to suppress the fruits of the warrantless searches of Ms. Lippincott's purse, car and residence.

3. In the absence of sufficient evidence to support it, the trial court erred in entering as part of its findings of fact that Ms. Lippincott's possession of lawful instruments gave rise to a reasonable belief that she was engaged in fraudulent activity.¹

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The law-of-the-case doctrine requires that where the State does not object to the inclusion of additional elements in the "to convict" instruction the State must prove those elements beyond a reasonable doubt. The jury was instructed that to convict Ms. Lippincott of second degree identity theft the State must prove beyond a reasonable doubt that either she used stolen information to obtain something of less than \$1500 in value, or that she did not obtain

¹ Because the court did not separately number the findings of fact Ms. Lippincott cannot comply with the requirement of RAP 10.3(g).

anything. Where the State did not prove either of these elements do Ms. Lippincott's convictions deprive her of due process?

2. Article I, §section 7 prohibits State intrusion of a person's private affairs or home without the authority of law. The "authority of law," means either a search warrant or one of the few narrowly drawn exceptions to the warrant requirement. The Fourth Amendment permits warrantless searches of persons on probation only because such searches are deemed reasonable in light to of the person's lessened expectation of privacy. The Washington Supreme Court has concluded that neither the reasonableness of an intrusion nor a person's lessened expectation of privacy constitute an exception under Article I, section 7. Does Article I, section 7 permit a warrantless search of a person merely because there is reason to believe the person has violated a condition of probation?

C. STATEMENT OF THE CASE

Department of Corrections (DOC) Officer Kris Rongen, together with his partner King County Sheriff's Detective Benjamin Wheeler, determined to arrest Ms. Lippincott for a DOC warrant issued for her failure to report as required by her conditions of community custody. 10/10/13 P 8-12. The officers approached Ms. Lippincott's car

when she stopped at a gas station in South Seattle. The officers arrested Ms. Lippincott. *Id.* at 12.

Claiming DOC has a right to search whenever it arrests a probationer, Officer Rongen searched Ms. Lippincott's car and then her purse taken from the car. 10/10/13 RP 13-14. In Ms. Lippincott's purse, Officer Rongen found a few gift cards and a loose key. *Id.* at 19-20. Speculating that the gift cards were evidence of criminal activity, Officer Rongen decided the officers would also search Ms. Lippincott's residence in Federal Way. *Id.* at 20-21.

At Ms. Lippincott's residence, officers recovered a volume of apparently stolen identity documents, including blank and cancelled checks, and identification documents. 10/16/13 RP 402-03. The State offered no evidence establishing Ms. Lippincott's use or nonuse of any of this information.

The State charged Ms. Lippincott with ten counts of second degree identity theft. CP 15-20. The trial court provided instructions to the jury, submitted by the State, which required the State to prove that Ms. Lippincott did not use any of the identity material to obtain anything, or in the alternative that she only obtained something of a value of less than \$1500. CP 116-25.

The jury convicted Ms. Lippincott of ten counts of second degree identity theft. CP 132-41.

D. ARGUMENT

1. The State failed to offer sufficient evidence of the ten counts of identity theft.

a. Due process required the State prove each element of the offense beyond a reasonable doubt.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Where additional elements are added to the “to convict” instruction, and the State does not object, the additional element becomes the “law of the case” and must be proved beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). If the

State failed to meet this burden with respect to the added element, the conviction must be dismissed. *Id.* at 103.

b. The State did not prove either Ms. Lippincott used or attempted to use the stolen identity information to obtain something with less than \$1500 value or that she did not obtain anything at all.

RCW 9.35.020 provides in relevant part.

(1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

The to convict instruction for each count of identity theft required the he jury find the State proved beyond a reasonable doubt:

....

(3) That the defendant obtained credit of money or goods or service or anything else that is \$1500 or less in value from the acts described in element (1); or did not obtain any credit or money or goods or services or other items of value.

CP 116-125.

This element is the equivalent of the statutory language “under circumstances not amounting to identity theft in the first degree.” Typically, where a defendant is charged with a lesser degree of an offense, but not the greater degree, the State is not required to affirmatively prove the offense “did not amount to” the greater degree. *State v. Ward*, 148 Wn.2d 803, 814, 64 P.3d 640 (2003). Indeed, the note on use for the pattern instruction for second degree identity theft, specifically instructs that the third element “should be used only in cases in which the crime of second degree theft is submitted to the jury as a lesser offense, when the crime needs to be distinguished from the greater offense.” 11A Wash. Prac., *Pattern Jury Instructions Criminal*, WPIC 131.06 (3d ed). Nonetheless, by including this additional element in the to convict instruction in this case, where it was not merely a lesser offense instruction, the State undertook to prove the additional element that these crimes were committed in circumstances “not amounting to identity theft in the first degree.” *Hickman*, 135 Wn.2d at 99. The State did not meet that burden.

Plainly there was insufficient evidence that Ms. Lippincott used the identity information to obtain something but that something had a

value of less than \$1,500. The State offered no evidence that Ms. Lippincott used the information to obtain anything. That is not to say that the State proved she did not obtain anything. Instead, the State offered no proof one way or the other. By requiring the jury to find Ms. Lippincott did not obtain anything the instruction required the State to affirmatively prove that point beyond a reasonable doubt. The State did not.

The State cannot respond that since it offered no proof regarding what she did or did not do with information it necessarily proved she obtained nothing. The absence of evidence of fact is not evidence of the absence of the fact. It would be illogical to conclude that the complete absence of evidence on a point necessarily proves the point beyond a reasonable doubt. The State was required to affirmatively prove the negative beyond a reasonable doubt. The theoretical impossibility of that undertaking, whatever else, is simply a recognition that the State did not meet that burden here.

c. The Court should reverse Ms. Lippincott's convictions.

As in any case involving insufficient evidence, the absence of proof beyond a reasonable doubt of an added element requires dismissal of the conviction and charge. *Hickman*, 135 Wn.2d at 99

(citing *Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). As in any case reversed for insufficient evidence, the Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. *Hickman*, 135 Wn.2d at 99 (citing *inter alia*, *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)). Because the State failed to prove either that Ms. Lippincott obtained something with a value of less than \$1500 or that she obtained nothing at all, Ms. Lippincott's convictions must be reversed.

2. The court erred in failing to suppress the fruits of a warrantless search of Ms. Lippincott's purse, car and home.

Ms. Lippincott sought suppression of the officers' warrantless search of her apartment contending it violated both Article I, section 7 and the Fourth Amendment. CP 82-83. Ms. Lippincott argued the search was premised on nothing more than a curiosity. CP 83. Ms. Lippincott argued there was no reason to believe such a search would yield evidence of her violation – a failure to report to her probation officer. *Id.* The court denied the motion. CP 161.

a. Article I, section 7 protects a person's private affairs without regard to the reasonableness of the intrusion.

Article I, section 7 provides:

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

Unlike the Fourth Amendment, which bars only “unreasonable” searches, Article I, section 7, “provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional.” *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 305–06, 178 P.3d 995 (2008)); *see also State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012) (Article I, section 7 “is not grounded in notions of reasonableness.”). This broader privacy protection creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions.” *Valdez*, 167 Wn.2d at 772 (internal quotations omitted).

Thus, the warrant requirement is particularly important under the Washington Constitution “as it is the warrant which provides ‘authority of law’ referenced therein.” *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing *Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)). Any exception to the warrant requirement must be

carefully drawn and “narrowly tailored to the necessities that justify it.”

Valdez, 167 Wn.2d at 769.

b. Fourth Amendment case law allowing warrantless searches is unhelpful to the analysis.

Under the Fourth Amendment, the United States Supreme Court has recognized two justifications for warrantless searches of probationers’ homes. In *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) the court found a Wisconsin statute authorizing search of a probationer’s home based upon reasonable suspicion satisfied the reasonableness standard of the Fourth Amendment. The Court recognized “[a] probationer’s home, like anyone else’s, is protected by the Fourth Amendment’s requirement that searches be ‘reasonable.’” *Griffin*, 483 U.S. at 873. In that context, the Court found the state’s operation of a probation system presented a ‘special need[]’ beyond normal law enforcement.” *Id.* at 873-74.

In *United States v. Knights*, 534 U.S. 112, 118-19, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) the Court concluded a warrant was unnecessary to search the home of a probationer who, as a statutory condition of his probation, was required to permit such search. *Knights* started its analysis noting the “touchstone” of the Fourth Amendment is reasonableness, and reasonableness is determined by balancing the

degree of intrusion on a person's privacy against legitimate governmental interests. 534 U.S. at 118 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L. Ed. 2d 408 (1999)). In that balancing, the Court concluded probationers have a reduced expectation of privacy by virtue of the requirements and conditions imposed upon them by virtue of being on probation. *Knights*, 534 U.S. at 118-19. Moreover, the Court found the government had a legitimate interest monitoring those conditions through reasonable searches. *Id.*

Both cases asked only whether the search was "unreasonable" under the Fourth Amendment. Article I, section 7, however, is not concerned with the reasonableness of the intrusion. *York*, 163 Wn.2d at 305-06; *Valdez*, 167 Wn.2d at 772. Instead, the question is whether the search intrudes upon one's private affairs. *Snapp*, 174 Wn.2d at 194. Further, the Court has held a person's "expectation of privacy, even if reduced . . . does not constitute an exception to the requirement of a warrant under [Article I, section 7]." *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). Neither the reasonableness of the intrusion nor a purported lessened expectation of privacy can satisfy the authority of law requirement of Article I, section 7.

Griffin and *Knights* recognized the Fourth Amendment applied equally to probationer's homes, the Court merely recognized the Fourth Amendment permitted the probation searches at issues there. *Griffin* specifically relied on the "special needs" exception to the Fourth Amendment. The Washington Supreme Court, however, has never

created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement.

York, 163 Wn.2d at 314. *Knights* permitted a probation search which was nothing more than a search for evidence of a crime, but it did so under the "reasonableness" analysis of the Fourth Amendment. That analysis does not apply under Article I, section 7. *York*, 163 Wn.2d at 305–06. Thus, neither case can permit the searches which occurred in this case.

c. There is no probation search exception to Article I, section 7.

i. A search of a person's purse, car, and residence impacts their private affairs.

Article I, section 7 separately protects both a person's home and their private affairs from intrusion. Thus, it plainly applies to a search of one's home. *State v. Young*, 123 Wn.2d 173, 179, 867 P.2d 593 (1994). A

person's purse and car are plainly private affairs. *State v. Jones*, 146 Wn.2d 328, 336, 45 P.3d 1062, 1066 (2002) (search of purse intrudes upon private affair); *Valdez*, 167 Wn.2d at 772 ("no dispute . . . search [of car] constituted a disturbance of one's private affairs."). If something triggers the Fourth Amendment it necessarily triggers Article I, section 7; i.e., it is a private affair. *State v. Parker*, 139 Wn.2d 486, 493–94, 987 P.2d 73 (1999) (Article I, section 7 "necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment.") Searches of probationers trigger the requirements Fourth Amendment just as searches of nonprobationers. Thus, they must implicate Article I, section 7, i.e., impact ones private affairs. To conclude otherwise would be to conclude Article I, section 7 is less protective of privacy rights. Washington Courts have consistently held otherwise.

ii. The search of Ms. Lippincott's purse, car and residence was done without the authority of law.

RCW 9.94A.631(1) provides:

If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

This statute implicitly recognizes that searches of probationers intrude upon their private affairs and home. The statute purports to provide authority for such intrusions. However, the “authority of law” requirement is not met by a statute which eliminates the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 352, n.3, 979 P.2d 833 (1999) (citing *inter alia Seattle v. McCready*, 123 Wn.2d 260, 274, 868 P.2d 134 (1994)). Instead, “authority of law” means a warrant or a “few jealously guarded exceptions.” *York*, 163 Wn.2d at 306.

Plainly here there was no warrant. Nor do the searches fall within an exception.

Applying the Fourth Amendment, the Supreme Court has applied a probation exception to the warrant requirement to Washington probationers. *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981) (“... there is a body of law holding parolees have diminished Fourth Amendment rights); *State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984) (same). Prior Court of Appeals opinions have concluded a probation exception exists to Article I, section 7. Yet while they purported to rely upon Article I, section 7, these cases merely cite to prior cases which in turn relied only on the Fourth Amendment. In *State v. Patterson*, for example, the court noted prior cases recognized a

probation exception, and concluded “[a] probationer has a diminished right to privacy; a warrantless search of a probationer is reasonable if a police officer or a probation officer has a well-founded suspicion that a probation violation has occurred.” 51 Wn. App. 202, 204-05, 752 P.2d 945 (1988) (citing *State v. Lampman*, 45 Wn. App. 228, 233, 724 P.2d 1092 (1986); *State v. Coahran*, 27 Wn. App. 664, 666, 620 P.2d 116 (1980); *State v. Simms*, 10 Wn. App. 75, 516 P.2d 1088 (1973), *review denied*, 83 Wn.2d 1007 (1974)). These cases simply rely upon the conclusion that probationer’s have a diminished expectation of privacy. That, conclusion relies upon a reasonableness analysis which does not apply under Article I, section 7. *York*, 163 Wn.2d at 305–06. In any event, a lessened expectation of privacy is not an exception to the warrant requirement of Article I, section 7. *Hendrickson*, 129 Wn.2d at 71. Thus, these cases offer nothing more than a Fourth Amendment analysis and cannot support an exception under Article I, section 7.

In *State v. Winterstein* the Court stated in dicta “both parties agree that because Winterstein is under community supervision, he has a lesser expectation of privacy and may be searched on the basis of a well-founded or reasonable suspicion of a probation violation.” 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Because the court found the

search unlawful in any event, the court had no need to test the truth of that concession. *Id.* at 630 (finding search unlawful because specialist Rongen did not possess probable cause to believe the place searched was the probationer's residence). Thus, the existence of a probation exception was never before the Court.

There is no probation exception under Article I, section 7. The justifications which have given rise to an exception to the Fourth Amendment - reasonableness, a lessened expectation of privacy, and special needs - do not similarly create an exception under Article I, section 7.

Even if *Winterstein* is interpreted as having adopted or endorsed a probation exception, it is a far narrower exception than exists under the Fourth Amendment. In *Knights*, the Court endorsed a search which was nothing more than a general search for evidence of a crime without the requirement that it even be justified by probable cause. 534 U.S. at 121. *Knights* did not require the scope of the search be limited by its justification.

By contrast, the dicta in *Winterstein* would require the search be limited to a search for evidence of the violation of supervision. 167 Wn.2d at 628. That narrow scope is consistent with the requirement

that the scope of an any search conducted pursuant to an exception to Article I, section 7 be limited to the justifications of the exception. *Valdez*, 167 Wn.2d at 769. The justification offered for probation searches is the need to ensure compliance with supervision. *Simms*, one of the cases often relied on as having recognized a probation exception in Washington, held a “diminution of Fourth Amendment protection can only be justified to the extent actually necessitated by the legitimate demands of the operation of the parole process” *Simms*, 10 Wn. App. at 86 (internal quotations omitted). If it exists as an exception at all, a probation search cannot simply be a means to a general investigatory search as that is the function of a warrant. Instead, such a search must be narrowly limited to a search for evidence of a violation which the officer believes the person has committed.

Officer Rongen expressed that while he knew Ms. Lippincott had a DOC warrant he did not know what violation Ms. Lippincott had committed. 10/10/13 RP 10. If that is the case, he could not possibly had reason to believe that evidence of that unknown violation would be found in her purse or car, or her residence.

Other evidence established the condition of probation which Ms. Lippincott was alleged to have violated was a requirement she regularly

report to DOC. 10/10/13 RP 65. There is no plausible basis to believe that evidence of her failure to report would be found in her purse or her car. Officer Rongen never claimed he believed he would find evidence of Ms. Lippincott's violation in either her purse or car. Instead, each search occurred simply because the probation officer believed he had "a right to" do so. 10/10/13 RP 13. Thus, even assuming there is a probation-search exception to Article I, section 7, there was no basis to search either Ms. Lippincott's purse or car.

Moreover, there is no reasonable basis to conclude that evidence of her failure to report would be found in an apartment more than 20 miles from the place she was arrested. Instead, Officer Rongen claimed he determined to search the apartment only after he had searched her purse and found gift cards. CP 162; 10/10/13 RP 20-21. If that is the case, the search of her residence is simply the fruit of the unlawful search of her car and purse.

Officer Rongen speculated that because Ms. Lippincott had gift cards in her purse, she was engaged in fraudulent activity and thus believed additional evidence of that activity would be found at her residence. The officer leapt to this conclusion based upon his knowledge that Mrs. Lippincott had previously been convicted of

identity theft. But there was no evidence that Officer Rongen knew the facts of Ms. Lippincott's prior convictions or whether those prior convictions involved the use of gift cards. There was no evidence the gift cards she possessed had been illegally obtained.

Nonetheless, the court accepted this speculation as a basis for the officers' search of Ms. Lippincott's home. The court concluded that because the officer was aware of Ms. Lippincott's prior convictions of identity theft, he reasonably concluded her possession of gift cards was evidence of a crime and that further evidence would be found at her home. CP 162. By the officer's logic, adopted by the trial court, Ms. Lippincott's possession of legal financial instruments, without anything more, is evidence of criminal activity. That is not a reasonable belief. That is bald speculation.

The entire encounter was driven by little more than a desire to conduct a warrantless general criminal search of Ms. Lippincott's home. Assuming it actually exists, the probation-search exception of Article I, section 7 does not permit such generalized searches.²

² Ms. Lippincott never consented to such a search as a condition of her supervision. At some point in her supervision, Ms. Lippincott acknowledged DOC believed it had authority to conduct warrantless searches. CP 74. Specifically she acknowledged:

d. The trial court erroneously admitted the fruits of the unlawful search.

Article I, section 7 requires exclusion of evidence obtained in violation of its terms. *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Officer Rongen's search of Ms. Lippincott's purse and car led to his discovery of some gift cards and a key to the Federal Way apartment subsequently searched. That search in turn yielded a substantial number of documents which the State relied upon at trial to gain a conviction. Each of these was a fruit of the unlawful searches. Because that evidence was obtained in violation of the Article I, section 7, the court erred in permitting its admission.

I am aware that I am subject to search and seizure of my person. Residence, automobile, or other personal property if there is reasonable cause on the part of the Department of Corrections to believe that I have violated the conditions/requirements or instructions above.

Id. Her acknowledgment of DOC's erroneous belief of its authority to search is not a consent to such searches.

E. CONCLUSION

For the reasons above, this Court should reverse Ms. Lippincott's convictions.

Respectfully submitted this 30th day of October 2014.



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

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|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | NO. 71522-4-I |
| |) | |
| LISA LIPPINCOTT, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF OCTOBER, 2014, 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF OCTOBER, 2014.

X _____ *Jan*

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