

NO. 43945-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY SCOTT FULTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-00165-9

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL A. SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE	Jodi R. Backlund PO BOX 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the right, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 31, 2013, Port Orchard, WA <u> </u> Original e-filed at the Court of Appeals; Copy to counsel listed at left.
----------------	--	--

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS1

III. ARGUMENT.....5

 THE TRIAL COURT PROPERLY FOUND THAT OFFICER AND PUBLIC SAFETY CONCERNS JUSTIFIED THE WARRANTLESS SEARCH OF FULTON’S BAG BEFORE PLACING IT IN THE TRUNK OF THE PATROL CAR.5

 1. Standard of Review.....6

 2. Substantial evidence supports the trial court’s finding regarding the deputy’s reasons for searching Fulton’s bag6

 3. Ellison, not Byrd, controls the outcome of Fulton’s case.8

IV. CONCLUSION.....12

TABLE OF AUTHORITIES

CASES

<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S. Ct. 1710, 173 L.E d. 2d 485 (2009).....	9
<i>State v. Byrd</i> , 162 Wn. App. 612, 258 P.3d 686 (2011).....	6, 9, 10, 11
<i>In re Petersen</i> , 145 Wn.2d 789, 42 P.3d 952 (2002).....	6
<i>State v. Acrey</i> , 148 Wn.2d 738, 64 P.3d 594 (2003).....	6
<i>State v. Britton</i> , 137 Wash. 360, 242 P. 377 (1926).....	8
<i>State v. Ellison</i> , 172 Wn. App. 710, 291 P.3d 921 (2013).....	6, 9, 10, 11
<i>State v. Gramps</i> , 146 Wash. 509, 263 P. 951 (1928).....	8
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	6
<i>State v. Motherwell</i> , 114 Wn.2d 353, 788 P.2d 1066 (1990).....	6
<i>State v. Olson</i> , 164 Wn. App. 187, 262 P.3d 828 (2011).....	8
<i>State v. Ortega</i> , 159 Wn. App. 889, 248 P.3d 1062 (2011).....	8
<i>State v. Patton</i> , 167 Wn.2d 379, 219 P3.d 651 (2009).....	9
<i>State v. Smith</i> , 119 Wn.2d 675, 835 P.2d 1025(1992).....	9
<i>State v. Valdez</i> , 167 Wn.2d 761, 224 P3.d 751 (2009).....	9

I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court properly found that officer and public safety concerns justified the warrantless search of Fulton's bag before placing it in the trunk of the patrol car?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Bradley Scott Fulton was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP 1. Fulton moved to suppress the methamphetamine. CP 37. After a hearing, the motion was denied. CP 46. Fulton thereafter entered into a stipulated facts trial, and was convicted as charged. CP 6, 10.

B. FACTS

Kitsap County Deputy Sheriff Greg Rice was the sole witness at the CrR 3.6 hearing. During an early January evening, Rice responded to a reported shoplifting at O'Reilly's Auto Parts. RP 4, 7. He called the store owner while he was en route. RP 5. The owner told him that the suspect, later identified as Fulton, had left walking toward the Safeway parking lot. RP 6, 14. While he was walking away, Fulton took some items from his pockets and put them in a black satchel. RP 7.

Rice arrived shortly after 5:00 and saw Fulton, who matched the owner's description, a white male in a black hoodie, near the Safeway. RP

8. The black satchel was sitting on the bench next to him. RP 8. Fulton was talking to some others, and they walked away when Rice drove up. RP 8. Rice asked Fulton to stay. RP 9.

Rice asked Fulton if he had been at O'Reilly's. While he was talking to him, Rice noticed that Fulton had a large knife, which was protruding from under the hoodie. RP 9. This caused Rice to have safety concerns, so he detained him. RP 9.

Rice placed Fulton in handcuffs and took the knife from him. RP 10. It was a large 12-inch long combat-style knife with brass knuckles built into the grip. RP 10. The grip also had a sharpened point on it. RP 10. The way Fulton was wearing the knife struck Fulton as an attempt to intimidate. RP 11. He could see three-quarters of it protruding from under the hoodie. RP 11. Rice placed Fulton under arrest for a dangerous weapon violation. RP 11. Rice read him his rights. RP 11.

Rice searched Fulton incident to the arrest. RP 13. He did a full body search after cuffing him, including a pat-down, his pockets, and shoes. RP 13. Rice did not recover anything. RP 14.

Rice asked why he was carrying the knife and Fulton said it was for protection because people were after him. RP 11. Rice also asked Fulton about the satchel. RP 12. He said it was his. RP 12. Fulton stated he wanted to bring it with him because it had all his belongings in it. RP

15.

Rice picked up the satchel and escorted Fulton to the car. RP 12. Rice asked him about the shoplifting incident. RP 12. Fulton stated that he had been in the store, but he had not taken anything; he was waiting for his mother to bring him money. RP 12. Rice noted, however, that in the approximately hour and a half that Fulton had been in the store and by Safeway, his mother never showed up. RP 22. Nor did Rice recover any stolen property. RP 22.

Rice then placed Fulton in the back of the patrol car. RP 15. He put the satchel in the trunk. RP 15. Before locking it in the trunk, Rice also searched the satchel. RP 16. He searched it make sure there were not any weapons or “anything that can go boom” in it. RP 16. It was in essence a pat-down search:

We are opening up large compartments, seeing if there's anything explosive in there, any guns, anything that is going to hurt us, harm us in any way, anything that's going to cause alarm to the jail staff. I mean, you know, if it's going with them to jail, I can't just bring it in there without knowing what's inside it.

RP 16.

The satchel was like a laptop bag. It was about 18 inches by eight to ten inches. RP 17. It was wide enough to hold some binders and a laptop, and had some side pockets. RP 17. He just moved things enough to make sure there was nothing that could cause harm in it. RP 17.

In one of the side pockets he found a small baggie containing what appeared to be methamphetamine. RP 17. He could tell what it was without taking it out of the pocket. RP 18. The pocket was six by eight inches. RP 18. It was large enough to have contained a gun or knife. RP 18.

Rice asked the store owner to come and identify Fulton. RP 13. The owner identified Fulton as the suspect. RP 13.

Rice testified as to the Sheriff's Office policy when taking a person into custody and bringing their belongings in a patrol vehicle:

Yeah, our policy and procedure, all persons and personal property is searched prior to transporting, entering into evidence, you know, taking to jail. I know the jail has their own expectations, procedures, as far as what we bring into the jail.

RP 18-19. Rice was intending to transport Rice to the jail. RP 19. The reason for the procedure was for safety. RP 19. He could not introduce anything into the jail without knowing what it contained. He did not know what type of weapons might have been in the bag. RP 19. He was not going to put something that might "go boom" into his car or into evidence. RP 19.

Rice explained that he simply would not put any personal property of an arrestee in his car without searching it:

There's too many safety risks these days. I mean, we deal with improvised explosive devices, we deal with -- I have

found meth labs in backpacks, you know, weapons, guns, you know, things that go boom, so they are all over out there unfortunately, so there's too many risks at stake to just throw it in my trunk and just hope it doesn't, you know -- hope it doesn't go boom when we are going to the jail or something.

RP 23. He would not trust the suspect's statement that there was nothing dangerous in a bag. RP 25.

Rice also noted that he had had handcuffed suspects escape from his patrol car. RP 20. One kicked out the rear window and fled for five blocks before he was apprehended. RP 20. Another forced his way through the screen into the front of the car. RP 20. He had also had numerous cases where suspects either put their legs through their arms to get the handcuffs in front of them, or who slipped out of the cuffs altogether. RP 20.

III. ARGUMENT

THE TRIAL COURT PROPERLY FOUND THAT OFFICER AND PUBLIC SAFETY CONCERNS JUSTIFIED THE WARRANTLESS SEARCH OF FULTON'S BAG BEFORE PLACING IT IN THE TRUNK OF THE PATROL CAR.

Fulton argues that the search of his bag after his arrest was unlawful and contraband found in it should therefore have been suppressed. This claim is without merit because Fulton asked the deputy to take the bag with him, and valid policy and safety concerns about transporting and introducing into the jail an item that might contain

dangerous items justified the search.

Fulton primarily relies on Division III's holding in *State v. Byrd*, 162 Wn. App. 612, 258 P.3d 686, review granted, 173 Wn.2d 1001 (2011). This Court, however, recently distinguished in *State v. Ellison*, 172 Wn. App. 710, 291 P.3d 921 (2013). The facts of this case more closely resemble *Ellison*.

1. Standard of Review

This Court reviews a trial court's findings of fact upon a CrR 3.6 hearing for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The Court reviews de novo a trial court's legal conclusion of whether the evidence meets the probable cause standard. *In re Petersen*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002).

2. Substantial evidence supports the trial court's finding regarding the deputy's reasons for searching Fulton's bag

In his assignments of error, Fulton challenges only Finding of Fact XII. The remainder are thus verities on appeal. Further, Fulton does not actually explore his assignment of error in his brief. Where a party fails to support an assignment of error with any argument or persuasive authority, this Court need not address it. *State v. Motherwell*, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990).

Fulton only argues that the finding does not support the conclusion that the deputy conducted an inventory search. Brief of Appellant at 10-11. However, the State did not claim, and the trial court did not find that the search of the bag was justified as an inventory search. This assignment of error must therefore be rejected.

Even had Fulton addressed the finding, the record shows that substantial evidence supports it. Finding of Fact XII states:

That Deputy Rice searched the bag for safety reasons. That Deputy Rice testified it is departmental policy and procedure to search every item and person before placing them in a patrol vehicle for safety reasons.

CP 48.

Rice testified as to the Sheriff's Office policy when taking a person into custody and bringing their belongings in a patrol vehicle:

Yeah, our policy and procedure, all persons and personal property is searched prior to transporting, entering into evidence, you know, taking to jail. I know the jail has their own expectations, procedures, as far as what we bring into the jail.

RP 18-19. Rice testified that he was intending to transport Rice to the jail.

RP 19.

He explained that the reason for the procedure was for safety. RP 19. He could not introduce anything into the jail without knowing what it contained. RP 19. He did not know what type of weapons might have been in the bag. RP 19. He was not going to put something that might

“go boom” into his car or into evidence. RP 19.

Moreover, Rice simply would not put any personal property of an arrestee in his car without searching it:

There’s too many safety risks these days. I mean, we deal with improvised explosive devices, we deal with – I have found meth labs in backpacks, you know, weapons, guns, you know, things that go boom, so they are all over out there unfortunately, so there’s too many risks at stake to just throw it in my trunk and just hope it doesn’t, you know – hope it doesn’t go boom when we are going to the jail or something.

RP 23. Nor would not trust a suspect’s statement that there was nothing dangerous in a bag. RP 25.

Because the trial court’s findings of fact have not been challenged on appeal, and because the one finding purportedly challenged is supported by substantial evidence, the trial court’s findings of facts should be accepted.

3. Ellison, not Byrd, controls the outcome of Fulton’s case.

That an officer may search a suspect incident to a lawful arrest has long been the established law in Washington. *See State v. Britton*, 137 Wash. 360, 364-65, 242 P. 377 (1926); *State v. Gramps*, 146 Wash. 509, 263 P. 951 (1928). This rule continues to be applied by the courts of Washington. *See State v. Olson*, 164 Wn. App. 187, 262 P.3d 828 (2011); *State v. Ortega*, 159 Wn. App. 889, 894, 248 P.3d 1062 (2011).

It has also been long established that the search of a person

incident to arrest includes those items that are immediately associated with the person, such as backpacks, wallets, purses, etc. *See, e.g. State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025(1992) (search of fanny pack defendant was wearing); *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 1989) (search of purse).

After the decisions in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L.E d. 2d 485 (2009), and its Washington progeny, *State v. Patton*, 167 Wn.2d 379, 219 P3.d 651 (2009), and *State v. Valdez*, 167 Wn.2d 761, 224 P3.d 751 (2009), Division III held that the search of a suspect's purse was invalid where the police removed the purse from the suspect while she was still in her car and subsequently searched it after she was secured in a patrol car. *Byrd*, 162 Wn. App. at ¶ 12. This Division recently examined *Byrd*, 172 Wn. App. at ¶¶ 25-31.

The court noted a number of differences between the two cases. It noted that although Ellison was handcuffed, it was possible that he could have escaped the cuffs and procured a potential weapon from the backpack. *Ellison*, 172 Wn. App. at ¶ 30. Here, Deputy Rice testified to these precise concerns. He had had handcuffed suspects escape from his patrol car. RP 20. One kicked out the rear window and fled for five blocks before he was apprehended. RP 20. Another forced his way through the screen into the front of the car. RP 20. Finally, he had also

had numerous cases where suspects either put their legs through their arms to get the handcuffs in front of them, or who slipped out of the cuffs altogether. RP 20. As this Court noted, the “‘limitations of handcuffs’ effectiveness are widely known to law enforcement personnel.... Despite this widespread knowledge, in 1991 alone ... at least four police officers were killed by persons who had already been handcuffed.” *Ellison*, 172 Wn. App. at ¶ 23 (*quoting United States v. Sanders*, 994 F.2d 200, 209-10 (5th Cir.), *cert. denied*, 510 U.S. 955, 510 U.S. 1014 (1993), ellipses this Court’s).

This Court also pointed out that the officers testified that they searched the bag because of concern that it might contain a live weapon. *Ellison*, 172 Wn. App. at ¶ 30. In *Ellison*, the “officer’s biggest concern was that the backpack might contain a live firearm ... and that leaving it at the scene or transporting it to the jail in the trunk of their car presented an unacceptable safety risk.” *Ellison*, 172 Wn. App. at ¶ 23. Again, Deputy Rice expressed the same concerns that he not be transporting or introducing into the jail something that could “go boom.” RP 19, 23.

Finally the Court noted that unlike in *Byrd*, the officers’ contact with Ellison did not begin the investigation of a traffic infraction; rather they were responding to a criminal complaint, and the circumstances gave rise to a heightened concern for their safety. *Ellison*, 172 Wn. App. at ¶

30. Again, here, Fulton was not detained in a traffic situation. Rice was investigating criminal activity. When Rice approached him, Fulton was wearing an enormous combat knife in a threatening manner. The knife led Rice to immediately arrest Fulton for displaying a dangerous weapon. RP 11.

An additional factor that distinguishes *Byrd*, as the trial court noted, is that in that case, the police removed the purse from the car. They could have left it in the car and secured the vehicle. Here, Fulton was on foot in public area. It was not reasonable for the deputy to have just left the bag sitting in front of a supermarket.

The trial court properly found that the search of the bag was proper under *Ellison*. Its decision should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Fulton's conviction and sentence should be affirmed.

DATED May 31, 2013.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R. Hauge', written over the printed name of the prosecuting attorney.

RANDALL A. SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

KITSAP COUNTY PROSECUTOR

May 31, 2013 - 12:56 PM

Transmittal Letter

Document Uploaded: 439450-Respondents' Brief.pdf

Case Name: STATE OF WASHINGTON VS BRADLEY FULTON

Court of Appeals Case Number: 43945-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lori A Vogel - Email: lvogel@co.kitsap.wa.us