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Washington State
Court of Appeals
Division Two

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHANE R. JACKMAN, Appellant.	No. 48742-0-II UNPUBLISHED OPINION

SUTTON, J. — Shane R. Jackman appeals his convictions for two counts of possession of a stolen motor vehicle, one count of theft of a motor vehicle, and one count of possession of stolen property in the third degree. Jackman argues that because the search of his curtilage was unlawful, all of his convictions should be dismissed. He also argues that the charging document for the two counts of possession of a stolen motor vehicle was deficient. We hold that the officer's search was lawful, that Jackman's statement of additional grounds (SAG) claims have no merit, and that the charging document for both counts of possession of a stolen motor vehicle was insufficient. Thus, we affirm his convictions for theft of a motor vehicle and possession of stolen property in the third degree. However, we reverse and remand to the trial court to dismiss both convictions of possession of a stolen motor vehicle without prejudice because the charging document was constitutionally deficient.

FACTS

Sgt. Pernsteiner and Deputy Newman from the Jefferson County Sheriff's Office received a report of a stolen phone, which had been in an Acura Integra that had been stolen. The owner used a software application to track the phone to Jackman's property. Sgt. Pernsteiner and Deputy Newman went to Jackman's property to contact him about the stolen phone, and discovered a stolen vehicle along with the stolen phone.[1] They spoke with Jackman, who confessed to them that he stole the vehicle, the phone, and other property. Jackman was charged with two counts of possession of a stolen motor vehicle, one count of theft of a motor vehicle, and one count of possession of stolen property in the third degree.

Jackman moved to suppress all the evidence and his statements to Sgt. Pernsteiner and Deputy Newman, asserting that Sgt. Pernsteiner conducted an unlawful and warrantless search of his property.

After conducting a CrR 3.6 hearing, the trial court entered the following relevant findings of fact:

> 7. The residence at 304694 US 101 [Jackman's residence] has a circular gravel driveway that forks shortly before connecting with US 101. As seen from US 101, the driveway continues up straight to the main residence. This part of the driveway is steep. The driveway also branches to the south (which is left as seen from the highway). The driveway travels in front of the garage/ADU [Accessory Dwelling Unit] before circling around behind the garage/ADU to connect with the part of the drive that heads straight to the house. The part of the driveway that heads south is less steep and branches again near a parking area in front of the garage to service another residence behind 304694 US 101.

[1] After speaking with Jackman, Sgt. Pernsteiner and Deputy Newman asked to search the property and Jackman consented. During this search, Sgt. Pernsteiner and Deputy Newman found another stolen vehicle.

8. Deputy Newman has been to this residence numerous times. Based on his prior observations, the typical traffic flow is for cars to pull into the driveway and then turn south so that the circular driveway is traversed in a clockwise fashion.

. . . .

10. As the deputies approached the garage/ADU, they noticed one car parked along the portion of the driveway that heads south and two additional cars in a parking area in front of the garage door. One of the cars was an Acura Integra, similar to the car that was reported stolen. The other car was a green Honda Accord.

11. The garage door on the ADU faces south and the sliding glass door faces east toward US 101.

. . . .

17. The garage that the cars were parked in front of had a security light activated by motion sensor. Immediately beneath the light was a “No Trespassing" sign.

18. The deputies activated the security light as they approached the vehicles. Neither deputy observed a "No Trespassing" sign.

19. The front of the Honda Accord was facing the garage.

20. SGT Pernsteiner walked from the shared driveway up the length of the Honda Accord until he could view the Vehicle Identification Number (VIN) through the windshield using the light provided by the security light

21. SGT Pernsteiner wrote down the VIN and then reported it [to] dispatch. Dispatch informed SGT Pernsteiner that the VIN belonged to a car that had been reported stolen.

22. SGT Pernsteiner turned around and walked back down the shared driveway to a small set of stairs that led to the sliding glass door on the ADU.

. . . .

27. SGT Pernsteiner asked the Defendant if he would step outside so he could talk to him. The Defendant complied and spoke to SGT Pernsteiner about [the] cars in the parking area in front of the garage door. The Defendant was cooperative, admitted that the car was stolen, and informed the deputies of some other stolen items that were on the premises. The Defendant was then placed under arrest.

> 28. The deputies indicated that they intended to go to the garage/ADU to inquire about the phone regardless of whether or not any vehicle had been present in the driveway.

Clerk's Papers (CP) at 136-140

Based on its findings of fact, the trial court concluded that the search was lawful and denied Jackman's motion to suppress the evidence. Jackman waived his right to a jury trial and the parties stipulated to the facts for a bench trial. The trial court found Jackman guilty on all charges. Jackman appeals his convictions.

ANALYSIS

Jackman challenges the trial court's conclusion that Sgt. Pernsteiner's viewing of the VIN through the windshield was not a substantial and unreasonable departure from a non-intrusive area. Jackman argues that the trial court erred when it denied his motion to suppress the evidence because the search of the home's curtilage was unlawful.[2] The State argues that Sgt. Pernsteiner and Deputy Newman accessed Jackman's home as would a reasonable, respectful citizen and did not make a substantial or unreasonable departure from an open public access route. We agree with the State. However, because neither party adequately briefed whether a *Gunwall*[3] analysis was required, we address below this threshold issue.

A. Washington State Constitution

Gunwall held that there are six, nonexclusive criteria to determine whether our state constitution affords broader rights to its citizens in a particular context than does the United States

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[2] Jackman raises identical issues in his SAG.

[3] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Constitution.[4] Jackman's failure to argue, sufficiently cite to authority, and brief these criteria means that the parties have not sufficiently argued the matter, and thus, we may not consider it. *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988).

> "Whether the Washington Constitution provides a level of protection different from the federal constitution *in a given case* is determined by reference to the six nonexclusive *Gunwall* factors." (Italics ours.) *State v. Young,* 123 Wn.2d 173, 179, 867 P.2d 593 (1994). Where the *Gunwall* factors are not adequately briefed by the parties, this court will not consider whether the state constitution provides greater protection than that provided by the federal constitution under the circumstances presented.

State v. Cantrell, 124 Wn.2d 183, 190 n.19, 875 P.2d 1208 (1994) (citations omitted). "A determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context." *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) (citing *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990)).

This historical rule has been repeatedly iterated and reaffirmed recently in *Blomstrom v. Tripp*, ___ Wn.2d ___, 402 P.3d 831 (Oct. 5, 2017).

> Generally speaking, "[i]t is . . . axiomatic that article 1, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (plurality opinion); *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994) ("It is by now commonplace to observe Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment."). Unlike our state constitution, the Fourth Amendment does not explicitly protect a citizen's "private affairs." *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); *McCready*, 123 Wn.2d at 267. *But this enhanced protection depends on the context in question.*

[4] The six criteria are: "(1) the textual language, (2) differences in the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern." *Gunwall*, 106 Wn.2d at 58.

Blomstrom v. Tripp, 402 P.3d at 842 ¶ 47 (emphasis added) (some citations omitted).

The issue in *Blomstrom* was, "whether the petitioners' urinalysis testing requirements violate either article I, section 7 of the Washington Constitution or the Fourth Amendment to the United States Constitution. The parties also ask[ed] that we determine whether Washington Constitution article I, section 7 is more protective than—and should be interpreted separately from—the Fourth Amendment *in this context*." *Blomstrom*, 402 P.3d at 841-42 ¶ 46 (emphasis added). The parties were required to and did brief and analyze the *Gunwall* factors.

We agree with the dissent here that the law is well settled, however, we depart with the dissent in how the law should be applied to the facts of this case. The dissent fails to recognize this long line of cases and even cites to *State v. Jorgenson*[5] to support its position. However, *Joregenson* performed a *Gunwall* analysis. The dissent also cites to *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007). However, although the court stated that a *Gunwall* analysis was not necessary, the court nonetheless undertook one. In determining the protections of article I, section 7 in a particular context, "the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compels a particular result." *McCready,* 123 Wn.2d at 267. "This involves an examination of the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." *Chenoweth*, 160 Wn. 2d at 463.

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[5] 179 Wn.2d 145, 148, 312 P.3d 960 (2013) (right to bear arms).

Here, Jackman fails to provide any analysis of why our state constitution should be treated differently from the federal constitution in the context of search and seizure and the open view doctrine. The dissent says it would threaten "mischief to this State's tradition of strong independent constitutional adjudication," yet it provides no reasoning for this bold statement and little historical support. Dissent at 18. In fact, the principles of stare decisis are well established in our jurisprudence and should not be abandoned absent a showing that an established rule is incorrect and harmful. "'Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change.'" *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)).

Jackman fails to cite sufficient authority showing why we should treat our state constitution *in this context* differently from the United States Constitution. Thus, in accord with *Gunwall* and its progeny, and because he fails to adequately brief this issue, he waives any argument under article 1, section 7, and we consider his claim only under the Fourth Amendment. RAP 10.3(a)(6);[6] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We also note that Jackman and the dissent primarily rely almost exclusively on cases analyzed under the Fourth Amendment.

[6] Appellant's brief should contain "[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."

B. UNITED STATES CONSTITUTION

Jackman argues that the officers' search did not meet any exception to the search warrant requirement under the Fourth Amendment of the United States Constitution and article 1, section 7 of our state constitution. He primarily relies on cases interpreting the Fourth Amendment, including *Florida v. Jardines,*[7] *State v. Seagull,*[8] and *State v. Daugherty.*[9] Under both the Fourth Amendment[10] and article 1, section 7 of our state constitution,[11] a warrantless search is per se unconstitutional unless the search falls within a well-recognized exception to the search warrant requirement. *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). "This constitutional protection is at its apex 'where invasion of a person's home is involved.'" *Eisfeldt*, 163 Wn.2d at 635 (quoting *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007)). Because exceptions to the warrant requirement are narrowly drawn, the State bears a heavy burden of establishing the validity of a warrantless search. *Eisfeldt*, 163 Wn.2d at 635. Whether the particular vantage point breaches the privacy expectation of the resident is a factual determination. *State v. Seagull*, 95 Wn.2d at 903.

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[7] *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013).

[8] *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981).

[9] *State v. Daugherty*, 94 Wn.2d 263, 616 P.2d 649 (1980), overruled on other grounds by *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

[10] The Fourth Amendment provides in relevant part: "The right of the people to be secure in their . . . houses . . . against unreasonable searches . . . shall not be violated . . . ."

[11] Article 1, section 7 of our state constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Our Washington Supreme Court recently addressed the constitutional protections of the Fourth Amendment and article 1, section 7 in the specific context of bodily functions and pretrial release conditions. The court held,

> Generally speaking, "[i]t is . . . axiomatic that article 1, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (plurality opinion); *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994) ("It is by now commonplace to observe Const. art. 1, § 7 provides protections for the citizens of Washington which are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment."). Unlike our state constitution, the Fourth Amendment does not explicitly protect a citizen's "private affairs." *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); *McCready*, 123 Wn.2d at 267. But this enhanced protection depends on the context in question.

Blomstrom, 402 P.3d 831, ¶ 47 (alteration in original).

Under the "open view" exception to the warrant requirement, an observation by law enforcement must take place from a non-intrusive vantage point. *State v. Barnes*, 158 Wn. App. 602, 612, 243 P.3d 165 (2010). Our Supreme Court in *Seagull* held that under the Fourth Amendment "a substantial and unreasonable departure from such an [impliedly open] area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy." *Seagull*, 95 Wn.2d at 902-03.[12]

[12] In *Seagull*, the officer was canvassing the neighborhood for information about an abandoned vehicle, and stopped near the defendant's residence, less than a mile from the abandoned vehicle. 95 Wn.2d at 900. The court held that the officer's limited deviation from the most direct route by walking between the two doors of the residence was not unreasonable under the Fourth Amendment protection under the United States Constitution. 95 Wn.2d at 905.

When reviewing a trial court's denial of a motion to suppress, we determine whether the findings of fact support the conclusions of law. *State v. Ague-Masters*, 138 Wn. App. 86, 97, 156 P.3d 265 (2007). Unchallenged findings of fact are verities on appeal. *Eisfeldt*, 163 Wn.2d at 634. We review conclusions of law de novo. *State v. Budd*, 185 Wn.2d 566, 572, 374 P.3d 137 (2016).

In determining whether an officer exceeded the scope of "open view," we consider whether the officer: "(1) spied into the house, (2) acted secretly, (3) approached the house in daylight, (4) used the normal, most direct access route to the house, (5) attempted to talk with the resident, (6) created an artificial vantage point, and (7) made the discovery accidentally." *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991) (citing *Seagull*, 95 Wn.2d at 905).

In the instant case, Sgt. Pernsteiner and Deputy Newman did not spy into the residence, act secretly, nor create an artificial vantage point.[13] Sgt. Pernsteiner looked into the vehicle which was visible from the driveway, while travelling up the most direct access to the house. The discovery was accidental, in that they did not go to the home for the purpose of discovering two stolen vehicles, but entered the curtilage of Jackman's residence for the lawful purpose of going to the garage/ADU to inquire about the stolen phone. Although they did approach at night, they took what they knew to be the most direct access route to the house and did nothing to obscure their presence.

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[13] As they approached the vehicles, the officers activated the security light, but did not observe the "No Trespassing" sign. CP at 138 (FF 18). A "No Trespassing" sign does not necessarily create a legitimate expectation of privacy, especially without additional indicators such as fences, gates, cameras, or dogs. *Ague-Masters*, 138 Wn. App. at 98. Thus, since neither officer saw the sign and no additional indicators were present, this fact does not change our analysis.

The only action that is potentially open to challenge is that Sgt. Pernsteiner strayed slightly from the most direct route, by walking up the side of the vehicle before going straight to the door. Here, Sgt. Pernsteiner was engaged in legitimate police business but minimally departed from the normal path to the residence. The court in *Seagull* stated that "[i]t would be unreasonable to require, in every case, that police officers walk a tightrope while on private property engaging in legitimate police business." 95 Wn.2d at 905. Therefore, Sgt. Pernsteiner's limited deviation, was not a "substantial and unreasonable departure" from the path that a reasonably respectful citizen would take. *Seagull*, 95 Wn.2d at 903. Thus, the officer's search did not exceed the scope of open view.

Jackman also argues that this case is analogous to *State v. Daughterty*,[14] where the court held that the officer's deviation from the path of travel to the house crossed the line from "plain view" to an illegal search under the Fourth Amendment. Br. of Appellant at 18. However, *Seagull* made clear that *Daugherty* is not an open view situation but a plain view situation.[15] *Seagull*, 95 Wn.2d at 906. Thus, *Daugherty* is not legally analogous to the case at bar.

Here, because Sgt. Pernsteiner's method of viewing into the car was from a non-intrusive vantage point and his path was not a substantial and unreasonable departure from the path a reasonably respectful citizen would take, the State has met its burden to establish that the

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[14] 94 Wn.2d 263, 616 P.2d 649 (1980).

[15] The *Seagull* court noted, "'In the plain view situation, the view takes places *after* an intrusion into activities or areas as to which there is a reasonable expectation of privacy. The officer has already intruded, and, if his intrusion is justified the objects in plain view, sighted inadvertently, will be admissible.'" 95 Wn.2d at 901-02 (internal citations and quotation marks omitted) (quoting *State of Hawaii v. Kaaheena*, 59 Haw. 23, 575 P.2d 462, 466-467 (1978)).

warrantless search was lawful under the Fourth Amendment. *See Eisfeldt*, 163 Wn.2d at 635. Therefore, we hold that the search was lawful and the trial court did not err in denying Jackman's motion to suppress the evidence.

C. CHARGING DOCUMENT

Jackman next argues that the charging document for the two counts of possession of a stolen motor vehicle omitted an essential element of the crime of possession of a stolen motor vehicle—knowledge that the vehicle was stolen. The State concedes the charging document omitted an essential element. We accept the State's concession.

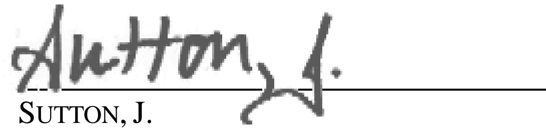
"If the State fails to allege every essential element, then the information is insufficient and the charge must be dismissed without prejudice." *State v. Porter*, 186 Wn.2d 85, 89-90, 375 P.3d 664 (2016). "[T]he knowledge element of possession of stolen property is an essential element." *Porter*, 186 Wn.2d at 93 (citing *State v. Moavenzadeh*, 135 Wn.2d 359, 363-64, 956 P.2d 1097 (1998)). Here, the charging document alleging two counts of possession of a stolen motor vehicle lacked the essential element that Jackman had knowledge that the vehicle was stolen. Therefore, the State's concession is proper. We reverse and dismiss without prejudice the two counts of possession of a stolen motor vehicle.

CONCLUSION

The trial court did not err in denying Jackman's CrR 3.6 motion to suppress because Sgt. Pernsteiner's search was lawful; consequently, Jackman's SAG claims also fail. Thus, we affirm his convictions for theft of a motor vehicle and possession of stolen property in the third degree. We reverse and remand without prejudice to the trial court to dismiss both convictions of

possession of a stolen motor vehicle because the charging document was constitutionally deficient.[16]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



SUTTON, J.

I concur:

MELNICK, J.

[16] Jackman also requests that we decline to impose appellate costs. We refer the issue of appellate costs to a commissioner or clerk of this court under RAP 14.2. Accordingly, a commissioner of this court will consider whether to award appellate costs if the State files a cost bill and the defendant objects to it.

BJORGEN, C.J. (dissenting) — The issue presented is whether the law enforcement officers unconstitutionally intruded into the curtilage of Shane Jackman's residence by walking along the driveway past the door of the residence and looking into a vehicle parked at the side of the residence to obtain its vehicle identification number (VIN). I part with the majority opinion in two ways. First, because the vehicle was not in an area impliedly open to the public, the search, I would hold, violated the Fourth Amendment to the United States Constitution under the well-established case law set out below. Second, the court's failure to consider the more protective article I, section 7 of the Washington Constitution on the basis of *Blomstrom v. Tripp*, ___ Wn.2d ___, 402 P.3d 831 (2017), contradicts the case law and is not warranted by *Blomstrom.*

A. <u>The Search at Issue Violated the Fourth Amendment</u>

Under both the Fourth Amendment and article I, section 7, a warrantless search is generally per se unreasonable unless it falls within a recognized exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Both the Fourth Amendment and article I, section 7 provide strict privacy protections where invasion of a person's home is involved. *City of Pasco v. Shaw*, 161 Wn.2d 450, 459, 166 P.3d 1157 (2007). "We therefore regard the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" *Florida v. Jardines*, 569 U.S. 1, 5-6, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 176, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984)). The curtilage is "'intimately linked to the home, both physically and psychologically,' and is where 'privacy

expectations are most heightened.'" *Jardines*, 569 U.S. at 7 (quoting *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986)).

A warrantless intrusion into the curtilage of a residence, however, is not automatically an unconstitutional invasion of privacy:

> It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing they are free to keep their eyes open. An officer is permitted the same license to intrude as a reasonably respectful citizen. However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

State v. Seagull, 95 Wn.2d 898, 902-03, 632 P.2d 44 (1981) (footnote omitted) (internal citations omitted).[17] In addition, our Supreme Court in *State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761 (1991)[18] (quoting *Seagull*, 95 Wn.2d at 905), set out criteria for determining whether an officer exceeded the scope of a permissible "'open view.'" Of those considerations, discussed below, the one most pertinent to this appeal is the fourth, whether the officers "used the normal, most direct access route to the house." *See Myers*, 117 Wn.2d at 345.

To a reasonably respectful citizen, access to the curtilage that is impliedly open would include normal access to the front door or other entrance where one could reasonably expect to contact the resident. In may also include a driveway such as the one here. However, absent permission, an emergency, or other circumstances suggesting the contrary, a reasonably respectful citizen would not view the implied invitation to access the curtilage of a residence as a

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[17] *Seagull* examined the challenged search under the Fourth Amendment. 95 Wn.2d at 902.

[18] *Myers* examined the challenged search under both the Fourth Amendment and article I, section 7. 117 Wn.2d at 336-37.

license, say, to search along the side or rear walls of the house or to peer into the owner's vehicles parked next to the residence.

Although another door existed on the back side of the residence facing west, Sergeant Andrew Pernsteiner used the sliding glass door and entry steps on its east side to contact Jackman. Before doing that, however, the officers walked past the sliding glass door and entry steps, the obvious entry to the house, and followed the driveway around the south end of the house, which contained two garage doors as depicted in the photograph at exhibit 4. They observed two cars in a parking area in front of the two doors. A "No Trespassing" sign was posted between the garage doors just below a security lamp, although the officers did not see it. The Honda Accord was parked with its nose very close to the garage door. Sergeant Pernsteiner then left the driveway and walked along the length of the Honda Accord until he could view the VIN through the windshield in the light of the security lamp which had been activated by the officers' presence.

Assuming that the driveway was impliedly open to the officers, nothing would further imply to a reasonably respectful citizen a license to leave that driveway, walk to within two or three feet of the residence, after dark, in a location with no relation to obtaining access or contacting the owner, and peer into a vehicle to obtain information. Under the legal principles above, this was an unconstitutional intrusion into the curtilage.

As noted above, the court in *Seagull* also asked whether any departure from the area of implied invitation was "a substantial and unreasonable departure from such an area." *Seagull*, 95 Wn.2d at 903. In addressing that question, the court stated that "[w]hat is reasonable cannot be determined by a fixed formula. It must be based on the facts and circumstances of each case."

Id. (citing *Ker v. California*, 374 U.S. 23, 33, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963)). To answer this question, the *Seagull* court then surveyed cases from other jurisdictions and in its analysis of them focused on the circumstances that later were used in *Myers*, 117 Wn.2d at 345, as elements of a permissible open view. *Seagull*, 95 Wn.2d at 903.

Although the case law may blend somewhat the inquiries into the scope of the area of implied invitation and whether a departure from that area is reasonable, *Seagull*'s use of those criteria is not obscure. The court focused on whether the officer was on a normal access route to a door of the house, whether his actions were part of an honest attempt to contact the occupants, whether he got as close as he could to the structure in which he saw the contraband, whether he spied into a house, whether he created an artificial vantage point, whether the events occurred in daylight, and whether he went to the residence with the purpose of looking for contraband. *Id.* at 905.

With the exception of the last listed consideration, these taken together counsel that leaving the driveway and looking into the Honda next to the house was a substantial and unreasonable departure from the area of implied invitation. The officer was not on a normal access route to a door, his look into the car was not part of an attempt to contact the occupant or to find a door to the house, he got as close to the Honda as possible, the intrusion occurred after dark, and although the officer did not look into the house, he did look into the vehicle.

The officer, rather, left the area of implied invitation and looked into the Honda because he had good reason to believe it was stolen. Under the case law above, that warrantless entry violated the Fourth Amendment. With that, it is unnecessary to examine the more protective article I, section 7 of the Washington Constitution.

B. *Blomstrom* Should Not Be Read to Require a *Gunwall*[19] Analysis Before Article I, Section 7 Can Be Applied to These Circumstances

The majority upholds the search under the Fourth Amendment. It also declines to decide whether the search violated article I, section 7 because a *Gunwall* analysis was not carried out, relying on *Blomstrom*. However, to read *Blomstrom* to require a fresh *Gunwall* analysis for each new context in which a state constitutional provision is independently applied is not warranted by *Blomstrom* and threatens mischief to this state's tradition of strong independent constitutional adjudication. Weakening that tradition in turn weakens the counterbalance of healthy state constitutional protections in our federal system: a balance that our times have shown to be indispensable.

The issue in *Blomstrom* was whether either article I, section 7 of the Washington Constitution or the Fourth Amendment to the United States Constitution prohibited the requirement that defendants charged with driving under the influence and released before trial submit to random urinalysis testing. 402 P.3d at 835, 841. The court noted that it had "not determined if Washington's Constitution provides broader protection in the specific context of bodily functions and pretrial release conditions" and proceeded to a *Gunwall* analysis as part of its examination of the state constitutional provision. *Id.* at 842-43.

The Petitioners, though, had requested the court to perform a *Gunwall* analysis and briefed their view of it. The Respondents in turn proposed their own *Gunwall* analysis. None of the parties raised the issue of whether a *Gunwall* analysis was in fact required in this context.

[19] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Thus, the majority opinion relies on a dictum to suggest a rule of decision that was neither briefed by the parties nor analyzed by the court. Proper judicial restraint counsels that we not rest a potentially consequential pronouncement on such slight support.

More to the point, reading *Blomstrom* to require a new *Gunwall* analysis for every new context in which a state constitutional provision is independently applied contradicts the approach of the case law. For example, the issue in *State v. Winterstein*, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009), was whether the inevitable discovery rule is consistent with article I, section 7. After noting that "[i]t is well-established that article I, section 7 provides greater protection of privacy rights than the Fourth Amendment," 167 Wn.2d at 631, the court analyzed the case law, concluding that

> [c]onsistent with this precedent, we reject the inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under article I, section 7.

Id. at 636. The court did not conduct a *Gunwall* analysis.

The Supreme Court has followed this approach to *Gunwall* in other decisions. In *State v. Jorgenson*, 179 Wn.2d 145, 148, 312 P.3d 960 (2013), the Supreme Court carried out a *Gunwall* analysis to determine that article I, section 24, the right to bear arms, is interpreted independently of the Second Amendment, but then left *Gunwall* and turned to a straight case law review to determine what article I section 24 in fact means and requires. *Jorgenson,* thus, is squarely within the approach of *Winterstein*: a *Gunwall* analysis is required to determine whether a state constitutional provision is interpreted independently or is more protective than its federal counterpart. However, once that is established, a new *Gunwall* analysis is not required to apply that state constitutional provision to each new set of factual circumstances. Similarly, in *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013), the court considered a challenge under both the

Fourth Amendment and article I, section 7 to the search of a purse incident to arrest. The court noted that "article I, section 7 is more protective of individual privacy than the Fourth Amendment, and we turn to it first when both provisions are at issue." *Byrd*, 178 Wn.2d at 616. The court then turned to a case law analysis of the issue under both constitutional provisions. *Byrd*, 178 Wn.2d at 616-20. It did not perform a *Gunwall* analysis.

Finally, in *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007), the court decided whether a warrant is valid under article I, section 7 when a warrant affiant negligently fails to disclose facts that would have negated probable cause. The court began its analysis by stating:

> It is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). Thus, a *Gunwall* analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis. *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).
>
> In determining the protections of article I, section 7 in a particular context, "the focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result." *City of Seattle v. McCready,* 123 Wn.2d 260, 267, 868 P.2d 134 (1994). This involves an examination of the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest. *State v. Walker,* 157 Wn.2d 307, 317, 138 P.3d 113 (2006).

Chenoweth, 160 Wn.2d at 462-63 (footnotes omitted).

The majority attempts to avoid the force of *Chenoweth* by pointing out that the Court in fact carried out a *Gunwall* analysis. This, however, takes nothing away from the Court's message in the excerpt from *Chenoweth* immediately above: once it is established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protection, an additional *Gunwall* analysis is not necessary to apply article I, section 7 to each new set of

circumstances. Instead, the reviewing court carries out the sort of conventional analysis noted in *Chenoweth*. *Id.* at 462-63. This approach conforms to that taken in *Winterstein*, *Jorgensen* and *Byrd,* each discussed above.

The approach of these cases is plain. A *Gunwall* analysis is not required every time article I, section 7 is applied in a new context. Instead, the court acknowledges that article I, section 7 generally is more protective and then engages in a conventional legal analysis to determine its scope and effect in the circumstances presented. This approach to state constitutional adjudication is also consistent with the historical view of the principal academic authority on the subject:

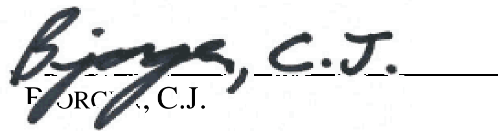
> After *State v. Gunwall*[, 106 Wn.2d 54] (1986), the Washington Supreme Court for a period required that litigants seeking to rely on the state constitution use six criteria to contrast the cited provision with the equivalent provision of the U.S. Constitution. It gradually became well settled that Article I, Section 7 ... provides greater protection to individual rights than the Fourth Amendment. . . . As a result, for this section, the court no longer requires the extensive analysis called for in *Gunwall* (*State v. Ferrier*, 1998; *State v. Parker*, 1999).

Robert F. Utter & Hugh D. Spitzer, THE WASHINGTON STATE CONSTITUTION, at 32 (2d ed. 2013).

To assume that *Blomstrom* requires a new *Gunwall* analysis in every new context contradicts the approach of *Winterstein*, *Jorgenson*, *Byrd*, and *Chenoweth* on the basis of a statement in *Blomstrom* that was not necessary to its analysis and that was not briefed or analyzed. The majority’s approach runs counter to these four cases and thus ignores the same principles of stare decisis on which it presume to lecture. The need for *Gunwall* analyses is an important and potentially subtle matter that warrants thorough argument and treatment. Abandoning past case law on the basis of a dictum in a case that didn't even analyze the issue

falls well short of what constitutional adjudication deserves. Article I, section 7 should have been considered in this appeal.

The search at issue violated the Fourth Amendment. If as the majority holds, it did not offend the Fourth Amendment, then the search should have been judged under article I, section 7. For these reasons, I dissent.



BJORGEN, C.J.