No. 96069-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MICHAEL NELSON PECK,

Respondent,

and

CLARK ALLEN TELLVIK,

Respondent.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization of over 80,000 members and supporters, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae* or as counsel to parties.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether opening a closed container without a warrant during an inventory search disturbs private affairs without authority of law, in violation of Article 1, Section 7.

STATEMENT OF THE CASE

The parties have fully presented the case. The only fact relevant to the present issue is that officers unzipped a CD case without a warrant while conducting an inventory of an impounded vehicle, and discovered drugs and paraphernalia inside. *See State v. Peck*, No. 34496-7-III (May 8, 2018) (unpublished). The State asks this Court to overrule its longstanding prohibition on warrantless opening of closed containers during an inventory search. Corrected Petition for Review at 11-12. *Amicus*

respectfully requests that this Court instead reaffirm its previous holdings, and uphold the privacy guaranteed by Article 1, Section 7.

ARGUMENT

The briefing from respondents Peck and Tellvik has thoroughly shown that opening closed containers during inventory searches is prohibited by this Court's jurisprudence, as articulated in *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980), *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998), and *State v. Tyler*, 177 Wn.2d 690, 302 P.3d 165 (2013). *Amicus* fully supports those arguments, and will not repeat them unnecessarily. We write separately to more fully articulate the privacy interests at risk here, and place them in the context of the protections guaranteed by Article 1, Section 7.

A. Article 1, Section 7 Requires Warrantless Inventory Searches To Be Narrow in Scope

Article 1, Section 7 of the Washington Constitution guarantees that "[n]o person shall be disturbed in his private affairs … without authority of law." It is centered on the privacy interests of the individual, and requires that any infringement of those interests be supported by legal authority. "[T]he word 'reasonable' does not appear in any form in the text of article I, section 7." *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Therefore, "our constitution focuses on the rights of the individual, rather than on the reasonableness of the government action." *Id.* at 12. As

this Court has explained,

> Thus, where the Fourth Amendment precludes only unreasonable searches and seizures without a warrant, article I, section 7 prohibits any disturbance of an individual's private affairs without authority of law. This language prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. This creates an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions.

State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (quotations, citations, and footnotes omitted).[1]

One of those limited exceptions is a warrantless inventory of impounded property. *See, e.g.*, *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). Although labeled a "search," the exception allowing officers to inventory impounded property is narrow both in purpose and scope. "Inventory searches, unlike other searches, are not conducted to discover evidence of crime." *Id.* at 153. Instead, the only purposes of inventories are to protect the impounded property, protect law enforcement against false claims of theft, and limit potential dangers. *See State v. Tyler*, 177 Wn.2d 690, 701, 302 P.3d 165 (2013). Although all three purposes are commonly stated, this Court has recognized that only the first of those

[1] This explanation also shows that reference to Fourth Amendment cases is irrelevant to analysis under Article 1, Section 7. The State's reliance on Fourth Amendment cases is misplaced. Corrected Petition for Review at 12.

purposes, the protection of impounded property, is meaningful in most instances. *Houser*, 95 Wn.2d at 154 n. 2 (protection against danger "in most cases [has] little relevance to the facts"); *White*, 135 Wn.2d at 770 n.9 (protection against false claims is "a justification without merit"); *see also Houser*, 95 Wn.2d at 155 n. 3 (noting doubts about "the actual effectiveness of inventory searches in deterring false claims").

Because the purpose of an inventory is limited, so is the method in which one must be conducted. "[T]he scope of the search should be limited to those areas necessary to fulfill its purpose. Accordingly, it should be limited to protecting against substantial risks to property in the vehicle and not enlarged on the basis of remote risks." *Houser*, 95 Wn.2d at 155; *see also Tyler*, 177 Wn.2d at 701. *Houser* considered both the governmental interest in conducting an inventory and the privacy interests of individuals, and concluded that opening closed containers is not necessary to meet the governmental interest. "Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit." *Houser*, 95 Wn.2d at 143.

In other words, the inventory exception does not allow an intrusive and detailed search of impounded property. Instead, only a relatively cursory inspection is allowed, sufficient only to make a general list of the impounded items. Any search beyond that is best characterized as a

fishing expedition, hoping to find contraband or criminal evidence. Consider, for example, a situation where an impounded vehicle contains a sheaf of papers. There is no need to read the contents of these papers in order to inventory them; a notation of "sheaf of papers" is sufficient. If an officer does read the papers, there is always the possibility of finding incriminating evidence, leading perhaps to a temptation to engage in such a fishing expedition. But that examination of the papers' contents is undoubtedly an invasion of private affairs, as it could easily reveal intimate details (e.g., love letters), private financial information (e.g., bank statements), ideology (e.g., political pamphlets), personal thoughts (e.g., diary entries), and the like. Reading those papers is unnecessary to fulfill the purposes of the inventory, and thus cannot be justified by the inventory search exception to the warrant requirement. There is likewise no need to open closed containers.

An inventory search is much different than a search supported by a warrant, which can authorize quite intrusive searches for specific evidence. For example, a warrant may authorize intensive chemical tests of an apparently innocuous watercolor painting if there is probable cause to believe the paper is being used to transport illicit substances such as LSD—but in the absence of that probable cause and a warrant, an officer

conducting an inventory cannot conduct chemical tests, and should simply list the item as "watercolor painting."

Similarly, warrantless searches allowed under exigent circumstances may be more detailed than inventory searches, depending on the particular circumstances. For example, if there is probable cause to believe that volatile explosives are secreted in hidden compartments in a vehicle, disassembly of parts of the vehicle may be authorized in order to protect the public. That disassembly is, of course, not allowed while taking an inventory of an impounded vehicle. Although any impounded vehicle may theoretically secret explosives, without good reason to believe that explosives are actually present, the mere possibility is only a "remote risk" that does not allow the enlargement of the inventory beyond the basic inspection necessary to list the impounded contents. *Houser*, 95 Wn.2d at 155.

In the present case, there were no such exigent circumstances. Officers had no suspicion of dangerous items in the CD case. Nor did they have reason to believe it contained contraband or evidence of crime. There was no need to write anything other than "black zippered nylon CD case" on the inventory. Nonetheless, officers decided to open the CD case. Whether this was motivated by an overzealous desire to provide extraneous detail on the inventory, or instead was intended as a pure

fishing expedition, looking for evidence of crime or contraband under the guise of conducting an inventory, the upshot is the same: opening the CD case went beyond the authority of law provided by the inventory, and was an unconstitutional intrusion into private affairs.

B. The Privacy Interest in Closed Containers Is Virtually Identical to the Privacy Interest in Locked Areas and Containers

The State concedes that locked containers may not be opened during an inventory, citing *Tyler* and *White*. Yet it claims that closed containers are not similarly protected. Curiously, it fails to engage in any discussion of differences in privacy interests between closed and locked containers. It simply (and incorrectly) dismisses *Houser's* explicit protection of closed containers, and overlooks the mention of closed containers in *Tyler*, 177 Wn.2d at 706. Corrected Petition for Review at 11-12. This superficial approach does not do justice to Washingtonians' constitutionally protected privacy.

Careful consideration of the properties of closed and locked containers shows that closure is the most significant aspect from a privacy standpoint, with locking much less significant. An open container means that the contents are available for any passerby to see, whether that person intends to pry or not. If one wishes to make an item private, the first and most significant step is simply to remove that item from public view.

When an item is in a closed container, it is no longer susceptible to accidental viewing. Its privacy can only be breached by a deliberate act, the opening of the container. Switching from accidental to deliberate viewing is a qualitative change, transforming a public item to a private item.

Locking a container, in contrast, is a mere quantitative change, increasing only the difficulty of opening the container. For that matter, locks come in all varieties; some are extremely difficult to open, while others can be defeated with the slightest of effort. It is hard to see a fundamental difference between using a knotted string, a zipper or a childproof cap to close a container and using a lock that can easily be opened with a paper clip or pocket knife; all require roughly the same amount of effort and deliberation to open.

This concept is far from novel. For example, it is a clear intrusion on privacy to, without invitation, open a door and enter a residence—whether or not that door is locked. It is assumed that anybody can read the writing on a postcard, open to view by anybody who comes in contact with the postcard, but a letter is assumed to be private when it is enclosed in an envelope—whether or not the envelope's flap has been adhered shut or sealed with wax. Again, it is the closure that makes the qualitative

change in privacy, and "locking" simply increases the practical difficulty of successfully breaching the privacy.

This Court has already recognized that the degree of difficulty involved in opening a trunk is irrelevant for purposes of privacy analysis:

> The fact an automobile may have a trunk release mechanism does not diminish an individual's privacy interests. Inside trunk latch releases are merely a substitute for the use of a key to unlock the trunk. Whether a locked trunk is opened by a key or a latch, it is still locked. *The privacy interests are the same*.

White, 135 Wn.2d at 767-68 (emphasis added). While *White* specifically used the terminology of "locking," the same logic applies to an analysis of "closure" and deliberate efforts to open containers. It defies logic to make a distinction between opening something based on whether that is done by unzipping or by pushing a latch. Both opening actions intrude on privacy interests in the same way, and are not allowed by Article 1, Section 7 during an inventory.

It is irrelevant whose privacy interests are invaded; it is still an unconstitutional invasion. The State makes much of the fact that law enforcement did not know who the CD case belonged to. Corrected Petition for Review at 9-10. But why should that matter? *Somebody* had chosen to close the case to maintain privacy. Suppose that the case belonged to the owner of the truck, or even to an unrelated third party. It

could quite possibly have contained personal information, perhaps discs showing the person's viewing habits (whether that involved Disney movies or pornography), perhaps photos, or perhaps other personal items. There was no legitimate reason for law enforcement to snoop through the personal effects of an unknown person—rather than *protecting* the personal property as the impoundment and inventory was intended, it invaded the privacy associated with that property. That is exactly the type of disturbance of personal affairs that Article 1, Section 7 is designed to prevent.

C. Inventory Searches Must Not Be Allowed To Undercut the Strict Limits on Vehicle Searches Incident to Arrest

For decades, law enforcement officers routinely conducted broad searches of vehicles after arresting the drivers of those vehicles, requiring no basis for the search other than the arrest. That was the widespread understanding of rules articulated in both federal and state cases regarding vehicle searches incident to arrest. *See, e.g.*, *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) (generally allowing such searches, but prohibiting the opening of locked containers). Almost ten years ago, both this Court and the United States Supreme Court recognized that such broad searches of vehicles incident to arrest were incompatible with the

strictures of both Article 1, Section 7 and the Fourth Amendment. *See State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009); *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009); *Arizona v. Gant*, 556 U.S. 332, 29 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

The 2009 cases provided vital privacy protection to Washingtonians, promising that their privacy interests in their vehicles would be respected in most cases even after arrest. There is a real risk, however, that these promises will prove illusory if broad inventory searches are allowed. It is common for vehicles to be impounded when their drivers are arrested, as in the present case. *See also, e.g., Tyler*, 177 Wn.2d at 695-96 (car impounded after driver arrested for driving with a suspended license). In such cases, although the vehicle can no longer be searched incident to arrest, it is nonetheless subject to an inventory search. To the extent that the permitted scope of the two types of searches is the same, a prohibition of vehicle searches incident to arrest becomes mere linguistic wordplay rather than genuine privacy protection.

This Court has faced this concern before, in *Tyler*. There, the defendant challenged an inventory search, in part because of the discovery of emails sent by the searching officer, which had talked about circumventing *Gant* by impounding vehicles and performing inventory searches. *See Tyler*, 177 Wn.2d at 704-06. In other words, Tyler's

challenge "rests on the idea that an inventory search can be substituted for the search incident to arrest search that was allowed prior to *Gant*." *Id.* at 705 (footnote omitted). That proposition was rejected because this Court found "that the scope of the [inventory] search is more restrictive (closed containers and trunks cannot be searched). … [An inventory] search cannot simply be substituted for a search incident to arrest as it existed prior to *Gant*." *Id.* at 706.

The State here asks for the restrictions on inventory searches to be lifted, allowing searches of closed containers. In fact, the State's perspective appears to be that a limitless search is its birthright, describing the Court of Appeals decision as requiring law enforcement to "forfeit" its inventory, Corrected Petition for Review at 8, and describing a "catch-22 of not being allowed to inventory the item while also not being able to obtain a warrant for the item," *id.* at 11. This attitude is strikingly reminiscent of historical attitudes about searches incident to arrest, which had "come to be regarded as a police entitlement rather than as an exception justified by" specific, limited rationales. *Patton*, 167 Wn.2d at 394 (quotations and citations omitted). Here, the State similarly does not explain—because there is no explanation—why unzipping the CD case was necessary to fulfill the limited rationales allowing an inventory search.

Just as vehicle searches incident to arrest are only necessary in very limited circumstances to protect against danger or destruction of evidence, the opening of closed containers is only necessary during an inventory in very limited circumstances, if there is good reason to believe the contents of the container are dangerous. In the present case, there was no such danger, so rather than being forced to "forfeit" its inventory or facing a "catch-22," law enforcement could easily have accomplished its legitimate objective by sampling listing the case as "black zippered nylon CD case" on its inventory.

In sum, if closed containers may be opened during an inventory search, that inventory search will, in fact, be able to be substituted for a vehicle search incident to arrest. That would undercut the holdings of this Court in *Patton*, *Valdez*, and *Tyler*, and eviscerate the privacy protections promised by those cases.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to affirm the Court of Appeals, and hold that closed containers may not be opened when conducting an inventory of an impounded vehicle.

Respectfully submitted this 8th day of January 2019.

By s/ Douglas B. Klunder

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