IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. THOMAS S. COPLAND, Respondent.	No. 38580-5-II UNPUBLISHED OPINION

Van Deren, C.J. — The State of Washington appeals an order suppressing evidence allegedly seized from Thomas Copland while he was seen in an examination room at Grays Harbor Community Hospital. The trial court found that the State failed to establish an exception to the constitutional protections against warrantless police searches,[1] suppressed the evidence, and dismissed the State's case. We affirm.

[1] Warrantless searches are per se unreasonable under the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution, "unless they fall within 'a few specific and well-delineated exceptions.'" *State v. Myers*, 117 Wn.2d 332, 337, 815 P.2d 761 (1991) (internal quotation marks omitted) (quoting *State v. Crisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984)).

FACTS

On October 19, 2007, Copland sustained a head injury in a skateboarding accident. Steve Loyer, an Aberdeen police officer, was working as a private security officer at Grays Harbor Community Hospital when Copland was seen in the emergency room. David Cartwright, a firefighter with the Aberdeen Fire Department, handed Loyer an open black plastic bag. Loyer looked into the open bag and saw several small clear plastic bags containing blue pills. Loyer did not know who opened the bag. When Loyer learned that the bag, which he suspected contained controlled substance, came from Copland's examination room, he contacted the Aberdeen Police Department, which dispatched an officer.

Loyer gave the black bag to David Parkinson, the responding officer. The black bag was open when Loyer handed it to Parkinson but it looked like it had previously been tied shut. Parkinson noted that the bag contained suspected illegal drugs packaged for sale or delivery. Neither officer knew who opened the bag.

The State charged Copland with unlawful possession of oxycodone with intent to deliver.[2] Copland filed a motion to suppress the evidence seized at the hospital. Only Loyer and Parkinson testified at the hearing on Copland's motion. The superior court granted Copland's motion to suppress the evidence and entered an order dismissing the State's case against Copland. It entered the following findings of fact and conclusions of law:

UNDISPUTED FACTS

(1) On October 19, 2007 Officer Steve Loyer of the Aberdeen Police Department was working as a security officer at the Grays Harbor Community

[2] Possession of oxycodone with intent to manufacture or deliver is a violation of RCW 69.50.401(2)(a).

Hospital in Grays Harbor County, Washington. Officer Loyer was wearing his Aberdeen Police Officer Uniform.

(2) Aberdeen Firefighter David Cartwright handed Officer Loyer an open black plastic bag. It appeared to be a corner of a larger bag. Office Loyer did not open the bag and did not know who did. Officer Loyer could not see through the black plastic bag. If the bag had been closed Officer Loyer could not see what was in it. Inside the black bag Officer Loyer saw several bundles of clear plastic that had been tied up and contained blue colored pills which appeared to be controlled substances.

(3) Officer Loyer found out later that the bag had come from one of the exam rooms in which the defendant, Thomas Copland was located. Officer Loyer also found out later that Mr. Copland was in the same room and the black bag had come from his pants pocket.[3]

(4) Officer Loyer observed the pills appeared to be packaged up for delivery or sale.

(5) Officer Loyer handed the black bag to Aberdeen Police Officer David Parkinson. Officer David Parkinson did not know who opened the bag. The black bag looked like it previously had been tied at the top. Mr. Copland denied knowledge of the black bag and its contents.

(6) No other witnesses testified.

(7) The State did not subpoena Aberdeen Firefighter David Cartwright nor any of the nurses involved.

(8) The State presented no evidence as to who or how the black plastic bag was opened.

(9) The State presented no evidence as to whether or not there was State action involved in obtaining the black bag and getting it open.

CONCLUSIONS OF LAW

(1) The State failed to establish whether or not the black bag obtained by the police involved State Action and did not involve the police.

(2) The State failed to establish that the black bag was opened by someone other than the police so as to render the contents of the black bag lawfully in plain view as an exception to the warrant requirement for this search.

(3) The police immediately recognized that the contents of the black bag as [sic] evidence.

Clerk's Papers at 19-21 (emphasis omitted). The State appeals.

[3] Although Copland does not raise the issue on appeal, *Crawford v. Washington,* 541 U.S. 36, 50-51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) would seem to require that Copland be allowed to confront any witnesses who made statements about where the bag was found, i.e., Loyer would not be allowed to testify to hearsay.

ANALYSIS

I. Standard of Review

We review a trial court's ruling on a motion to suppress evidence by determining whether substantial evidence supports the trial court's findings of fact, and whether those findings support the trial court's conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). We treat unchallenged findings as verities on appeal. *Ross*, 106 Wn. App. at 880.

II. Findings of Fact and Conclusions of Law

The State challenges findings of fact 8 and 9, arguing that "the record supports a finding that the black plastic bag was not opened as a result of state action or police involvement." Br. of Appellant at 1. Relying on *State v. McWatters*, 63 Wn. App. 911, 822 P.2d 787 (1992) and *State v. Bishop*, 43 Wn. App. 17, 714 P.2d 1199 (1986), the State argues that the evidence showed that a private citizen opened the black bag, not a state actor. Apparently conceding that there is no direct evidence showing who opened the bag, the State argues that the evidence leads to no other conclusion but that emergency personnel opened it and that the law enforcement officers were not even aware the bag existed at the time. It argues that the only reasonable inference is that "the impetus for the search was to provide medical care to the defendant." Br. of Appellant at 9.

In *Bishop*, a nurse who suspected Bishop of consuming alcohol in his hospital room, contacted hospital security, who then searched Bishop's room and found four paper packets of heroin in the receiver of his hospital telephone. 43 Wn. App. at 19. They turned the packets over to the police. *Bishop*, 43 Wn. App. at 19. We held that, because the security guards were not acting at the behest of the police and had opened the packets before turning them over to police,

the search did not violate Bishop's Fourth Amendment rights. *Bishop*, 43 Wn. App. at 20 (discussing *United States v. Jacobsen*, 466 U.S.109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) and finding it indistinguishable).

In *McWatters*, a student paramedic removed McWatters's clothing in order to assess McWatters's injuries as a victim of a motorcycle-car accident. 63 Wn. App. at 912-13. The paramedic found a pouch containing a large amount of money and other items, including a clear plastic container which he turned over to a police officer at the scene. *McWatters*, 63 Wn. App. at 913. The police officer immediately recognized the substance in the container as heroin. *McWatters*, 63 Wn. App. at 913. McWatters argued that the Fourth Amendment protections against a warrantless search applied, relying on cases holding that a fireman's actions are subject to Fourth Amendment protections, absent the applicability of an exception to the warrant requirement. Division Three of this court disagreed, holding, "No authority has been cited which would support extending search and seizure protections in the circumstances present here and we decline to do so." *McWatters*, 63 Wn. App. at 914. The court gave no further explanation for its holding. Division Three also rejected McWatters's claim that the paramedic was acting as an agent for the police when he discovered the pouch, noting that the record contained no evidence to support such a conclusion. *McWatters*, 63 Wn. App. at 914.

Copland responds, arguing that, here, the State failed to prove that an exception to the warrant requirement existed under the circumstances and, thus, the presumption of invalidity prevails. *State v. Kypreos*, 110 Wn. App. 612, 624, 39 P.3d 371 (2002). He further argues that both the state and federal constitutions apply to searches firefighters conduct, citing *Michigan* v.

Tyler, 436 U.S. 499, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978) and *State* v. *Picard*, 90 Wn. App. 890, 954 P.2d 336 (1998). While acknowledging that the record does not show who opened the bag, Copland argues that there is a clear possibility that Cartwright opened it and, thus, a reasonable inference arises that the search violated his constitutional protections.[4]

But the result of this case does not rest solely on who opened the bag. As the trial court noted, the State presented no evidence about who discovered the bag, where it was discovered or whether it was opened or closed when found.

> THE COURT:
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> . . . [Y]ou are asking me to make assumptions about the rest of your theory to justify the warrantless search, when all you had to do was to call a witness or two in here to testify about it, and I don't know why those witnesses weren't here. You can subpoena a nurse. You can subpoena a firefighter. I don't know why that didn't happen.
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> I am not going to assume that everything happened the way you believe it happened.
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> I am suppressing the search. I just don't think I have any choice in the matter.
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> If you want to prosecute people for felonies you need to treat it more seriously than this.

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[4]The State distinguishes cases involving firefighters, pointing out that the firefighters involved were reentering residences to investigate crimes. We agree that *Tyler* does not create a per se rule that firefighters are always state actors. In *Tyler*, the issue was whether the fire investigators needed a warrant to enter a home to look for evidence of arson. The Court emphasized that the Fourth Amendment provided significant protections for fire victims and that in such a criminal investigation, the probable cause requirement applies. *Tyler*, 436 U.S. at 508. The Court also observed that a burning building presents an exigency that renders a warrantless entry "'reasonable'" and, thus, it does not violate the Fourth Amendment when a firefighter seizes evidence in plain view when he has entered the premises. *Tyler*, 436 U.S. at 509.

We also hold *Picard* inapplicable to the circumstances here. In *Picard*, firefighters seized an electric heater they suspected caused the fire they had just extinguished. We noted that firefighters who enter a premises that is ablaze "do not need a warrant and can remain for a reasonable time thereafter to investigate the origin, cause and circumstances of the fire." *Picard*, 90 Wn. App. at 895.

Report of Proceedings (RP) (Oct. 9, 2008) at 19. During the presentation of the dismissal order 11 days later, the trial court again explained its reasons for suppressing the evidence:

> THE COURT: Well, if we examine what happened on this particular date, October 19th, 2007, and create a time line, there is an identifiable time at which Mr. Cop[ ]land arrived in the emergency room of Grays Harbor Community Hospital. And the time line would end with, I suppose, the questioning by him of Officer Parkinson, and the response that he made. And, at the hearing on the motion to suppress, for reasons that I didn't understand at the time of the hearing, and I still don't understand, the State decided to present evidence from about the middle of the time line forward. And, had Officer Loyer testified that a fire fighter came and handed him a bag, and I didn't understand then and I don't understand it now, why one or more witnesses weren't presented to establish where the bag came from, how it was obtained, the condition of the bag when it was obtained, who opened it, who else was present in the emergency room. Whether someone directed the bag to be opened; there are an endless number[ ] of possibilities [t]hat could have happened. And all of that speculation could have been done away with a witness or two, and that didn't happen.
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> . . . . [M]y job is to rule upon what's before me. And what was given to me was completely insufficient to allow this warrantless search to stand.

RP (Oct. 20, 2008) at 23-24.

We agree with the trial court that the State failed to overcome the presumption that the officers' warrantless search of the bag was unreasonable. The lack of evidence in the record about how the bag came to be at the hospital, what evidence showed Copland possessed it, where it was found, who was in the area where it was found, who found it, and who opened it, if it was not already open, leaves the State's case resting solely on speculation. While the State's theory is one possibility, there is no basis in the record to draw only the inference or conclusion that the bag was opened without state action, especially when the police were the first to identify its contents.

As the trial court noted, we begin with the presumption that a warrantless search by police officers is unconstitutional. The State then has the burden of demonstrating either that the

constitutional limitation on admission of the evidence without a warrant does not apply or that an exception to the warrant requirement exists. Here, the State argues only that the evidence was not seized by state action and, thus, there was no basis to suppress the evidence as a result of the warrantless search. It asks us to conclude that the evidence could not have been seized by state action because neither police officer knew the evidence existed until they were shown it at the hospital. We agree with the trial court that, absent the evidence relating to the bag's discovery, seizure, and opening— purportedly before it reached the officers—the State's argument is insufficient to dispel the presumption that the police officers' search of the bag was unreasonable.[5]

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Armstrong, J.

Worswick, J.

[5]We do not address the State's reliance on the open view doctrine. Under the open view doctrine, when an officer is lawfully present in an area, his detection of items by using one or more of his senses does not constitute a search within the meaning of the Fourth Amendment. *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981).