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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN DOUGLAS MAYFIELD, Appellant.	No. 48800-1-II UNPUBLISHED OPINION

Sutton, J. — John D. Mayfield appeals his conviction for one count of possession of a controlled substance (methamphetamine) with intent to deliver. Mayfield argues that the trial court erred by denying his motion to suppress the evidence found in his truck because his consent to search was tainted by an illegal seizure. We hold that the trial court did not err in denying the motion to suppress the evidence found in Mayfield's truck. Accordingly, we affirm his conviction.

FACTS

The State charged Mayfield with one count of possession of a controlled substance (methamphetamine) with intent to deliver.[1] Mayfield filed a CrR 3.6 motion to suppress any and all evidence discovered as a result of the search of Mayfield's vehicle. Deputy Andrew Nunes of the Cowlitz County Sheriff's Office testified at the hearing on the motion to suppress evidence.

The trial court made findings of fact based on Deputy Nunes's testimony. On January 3, 2015, Derek Salte called the Cowlitz County Sheriff's Office to report a suspicious vehicle parked

[1] RCW 69.50.401(1), .401(2)(b).

in his driveway. Deputy Nunes responded to the call. When Deputy Nunes arrived he observed a truck in the driveway. The truck was still running, the passenger side door was open, and the windshield wipers were running. Deputy Nunes closed the door and turned off the truck.

Deputy Nunes contacted Salte. Salte told Deputy Nunes that when he arrived home he found an unfamiliar truck blocking his driveway. Salte observed a male who appeared to be sleeping in the vehicle. Salte was able to wake up the occupant of the vehicle and tell him to move the vehicle. The occupant exited the vehicle from the passenger side and ran down the street. While Deputy Nunes was talking to Salte he observed a male walking toward them on the opposite side of the street. Salte identified the male as the occupant of the vehicle.

Deputy Nunes approached the male and asked him if he was the owner of the truck. The male gave multiple explanations for parking the vehicle in the driveway and for running away from the vehicle. Deputy Nunes asked for the male's identification. Deputy Nunes identified the male as Mayfield, the registered owner of the truck. While Deputy Nunes was confirming Mayfield's identity, a Cowlitz County Sheriff's Office Sergeant arrived. Deputy Nunes learned that Mayfield was a convicted felon on active supervision by the Department of Corrections.

Deputy Nunes asked Mayfield if he had recently used any controlled substances. Mayfield responded that he had last used methamphetamine three weeks earlier. Deputy Nunes requested Mayfield's consent to search him and informed Mayfield that he did not have to consent to the search. Mayfield consented to the search. Deputy Nunes found $464.00, which was bundled in a way indicating that the cash may have been the result of drug transactions.

Deputy Nunes then requested consent to search Mayfield's truck. Deputy Nunes gave Mayfield *Ferrier*[2] warnings by informing Mayfield that he had the right not to consent to the search, he had the right to limit the scope of the search at any time, and he had the right to revoke consent at any time. Mayfield granted consent to search his truck. Mayfield did not revoke or limit his consent at any time. Deputy Nunes located a large bag that contained methamphetamine. Deputy Nunes also located several small plastic baggies containing methamphetamine residue.

Based on its findings of fact, the trial court concluded that Mayfield was not seized during the initial contact during which Deputy Nunes was attempting to discover the circumstances regarding the vehicle. However, the trial court concluded that Mayfield was seized when Deputy Nunes began asking Mayfield about his drug use. The trial court concluded that the seizure was illegal because "Deputy Nunes did not have a reasonable and articulable suspicion that the defendant was engaged in criminal activity." Clerk's Papers (CP) at 20. The trial court also concluded that there "were no significant intervening circumstances between [Mayfield's] detention and his subsequent consent to search his truck." CP at 20. But, the trial court also concluded "Deputy Nunes provided [Mayfield] with his *Ferrier* warnings prior to receiving consent to search his truck. The giving of *Ferrier* warnings under these circumstances sufficiently attenuates search (sic) from any illegal detention." CP at 20. Based on its conclusions of law, the trial court denied Mayfield's motion to suppress the evidence.

A jury found Mayfield guilty of possession of a controlled substance with intent to deliver. The trial court imposed a standard range sentence. Mayfield appeals.

[2] *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

ANALYSIS

Mayfield argues that the trial court erred by applying the federal attenuation doctrine and by denying his motion to suppress the evidence found in this truck because his consent to search was tainted by an illegal seizure in violation of the Fourth Amendment of the United States Constitution and article 1, section 7 of our state constitution.

The issue before us is whether the exclusionary rule requires suppressing the evidence found in Mayfield's truck. The trial court concluded that the search was sufficiently attenuated from the illegal seizure to justify admitting the evidence found in Mayfield's truck. We review a trial court's legal conclusions on a motion to suppress de novo. *State v. Roden*, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). The trial court relied on the federal attenuation doctrine as an exception to the exclusionary rule. The United States Supreme Court has recognized the attenuation doctrine as an exception to the exclusionary rule under the Fourth Amendment. *Utah v. Strieff*, ___, U.S. ___, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016). When the intervening circumstances include giving *Ferrier* warnings, a search is sufficiently attenuated from the illegal seizure. Accordingly, we hold that the trial court did not err by denying Mayfield's motion to suppress the evidence found in his truck, and thus, we affirm his conviction. We address below our state constitution and then address the United States Constitution.

A. WASHINGTON STATE CONSTITUTION

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 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 Constitution.[3] Mayfield'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);

[3] 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.

> *McCready*, 123 Wn.2d at 267. *But this enhanced protection depends on the context in question.*

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*[4] 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.

[4] 179 Wn.2d 145, 148, 312 P.3d 960 (2013) (right to bear arms).

Here, Mayfield fails to provide any analysis of why our state constitution should be treated differently from the federal constitution in the context of the attenuation 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 11. 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)).

Mayfield fails to cite 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);[5] *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We also note that Mayfield and the dissent rely almost exclusively on cases analyzed under the Fourth Amendment.

B. UNITED STATES CONSTITUTION

The attenuation doctrine is a well-established exception to the exclusionary rule under the Fourth Amendment. *Strieff*, 136 S. Ct. at 2061. "The Fourth Amendment protects '[t]he right of

[5] 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."

the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Strieff*, 136 S. Ct. at 2060 (alteration in original). The exclusionary rule is the primary judicial remedy for Fourth Amendment violations. *Strieff*, 136 S. Ct. at 2061. Under the Fourth Amendment, the exclusionary rule requires suppression of evidence obtained as a direct result of an illegal search or seizure. *Strieff*, 136 S. Ct. at 2061. The exclusionary rule also requires suppression of "'evidence later discovered and found to be derivative of an illegality.'" *Strieff*, 126 S. Ct. at 2061 (quoting *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984)). This rule is known as the "'fruit of the poisonous tree doctrine.'" *Strieff*, 126 S. Ct. at 2061 (quoting *Segura*, 468 U.S. at 804).

However, suppression of evidence is a last resort and the United States Supreme Court has recognized several exceptions to the exclusionary rule. *Strieff*, 126 S. Ct. at 2061. The attenuation doctrine is a recognized exception to the exclusionary rule that addresses the causal relationship between the illegal act and the discovery of subsequent evidence. *Strieff*, 126 S. Ct. at 2061.

Under the attenuation doctrine, "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" *Strieff*, 126 S. Ct. at 2061 (quoting *Hudson v. Michigan*, 547 U.S. 586, 593, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006)). Courts apply three factors to determine whether a sufficient intervening event breaks the causal chain. *Strieff*, 126 S. Ct. at 2061-62 (citing *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)). The three factors are: (1) the temporal proximity between the

unconstitutional act and the subsequent discovery of evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the misconduct. *Strieff*, 126 S. Ct. at 2062.

Mayfield argues that the search of his truck was not sufficiently attenuated from the illegal seizure. We disagree.

The first factor, temporal proximity, weighs in favor of concluding that the search was not attenuated from the illegal seizure. However, the other two factors support the trial court's conclusion that the search was sufficiently attenuated from the illegal seizure.

First, there was an intervening circumstance. Deputy Nunes explicitly gave *Ferrier* warnings, even though not required in vehicle searches, before obtaining Mayfield's consent to search his truck. The *Ferrier* warnings that Deputy Nunes gave informed Mayfield that he had the right to refuse consent, had the right to limit the scope of consent, and had the right to revoke consent at any time. By giving Mayfield *Ferrier* warnings, the deputy ensured that Mayfield's consent was voluntary even though there was an illegal seizure.

And the extent of the illegal seizure further supports the conclusion that Mayfield's consent to search the truck was voluntary. Although the seizure was illegal because Deputy Nunes did not have a reasonable, articulable suspicion, Deputy Nunes did not place Mayfield under arrest. Mayfield was not physically restrained and Deputy Nunes did not hold his identification or any of the money found on his person.

Second, there was no purposeful or flagrant misconduct. Here, the illegal seizure resulted from a legitimate contact regarding Mayfield's abandoned vehicle. Due to the suspicious circumstances, Deputy Nunes continued trying to ascertain the situation. And the illegality here

was not flagrant or purposeful. In this case, there was a fine line between the legitimate social contact resulting from the inquiry into Mayfield's abandoned truck and the illegal seizure.

Because *Ferrier* warnings were an intervening circumstance and there was not purposeful or flagrant police misconduct, we hold that the trial court did not err by concluding that the search was sufficiently attenuated from the illegal seizure. Accordingly, we hold that the trial court did not err by denying Mayfield's motion to suppress the evidence found in his truck.

CONCLUSION

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 in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

I concur:

Melnick, J.
MELNICK, J.

BJORGEN, C.J., (dissenting) — The majority cites the recent state Supreme Court decision in *Blomstrom v. Tripp*, 189 Wn.2d 379, 402 P.3d 831 (2017), for the proposition that a fresh *Gunwall*[6] analysis is required for each new context in which a state constitutional provision is independently applied. This reading is not warranted by *Blomstrom* and threatens mischief to this State's tradition of strong independent constitutional adjudication. Weakening that tradition in turn erodes the counterbalance of healthy state constitutional protections in our federal system: a balance that our times have shown to be indispensable. Therefore, I dissent.

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. *Blomstrom*, 189 Wn.2d at 388, 397-98. 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. *Blomstrom*, 189 Wn.2d at 399-402.

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 whether a *Gunwall* analysis was in fact required in this context. Thus, the majority opinion relies on a dictum to suggest a rule of decision that was neither briefed by

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

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. Like the inevitable discovery doctrine, the attenuation doctrine here at issue modifies the reach of the exclusionary rule. If a *Gunwall* analysis was not needed in *Winterstein*, it should not be required here.

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 "[a]rticle 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." *Id*. 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 Wash.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 Wash.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 Wash.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 Wash.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 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*, [136 Wn.2d 103, 960 P.2d 927] 1998; *State v. Parker*, [139 Wn.2d 486, 987 P.2d 73] 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* analysis 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 did not even analyze the issue falls well short of what constitutional adjudication deserves. Because the search of the truck should have been judged under article I, section 7, I dissent.

Bjorgen, C.J.

BJORGEN, C.J.