IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICAH NEWMAN TIBBLES, Petitioner.	NO. 80308-1 EN BANC Filed August 5, 2010

STEPHENS, J.—This case calls upon us to consider once again the scope of an individual's privacy interests under Washington Constitution article I, section 7 in the context of a warrantless automobile search. Micah Tibbles seeks review of his misdemeanor convictions for possession of marijuana and drug paraphernalia arising from a search of his vehicle following a traffic stop. During the stop, Trooper Norman Larsen detected a strong odor of marijuana coming from Tibbles's car. Though he did not arrest Tibbles or seek a warrant, he searched the car. The district court, superior court, and Court of Appeals all upheld the search under the "exigent circumstances" exception to the warrant requirement. We hold the search

was not justified by exigent circumstances and the evidence obtained as a result of the search should have been suppressed. Accordingly, we reverse the Court of Appeals.

Facts and Procedural History

Just before midnight on October 28, 2004, Trooper Larsen noticed that a vehicle driven by Tibbles had a defective taillight. He stopped the car and, upon making contact with Tibbles, detected a strong odor of marijuana. At the trooper's request, Tibbles provided his license but could not find his registration. Trooper Larsen asked Tibbles to step out of his vehicle, and Tibbles complied. The trooper informed Tibbles he could smell marijuana; Tibbles replied that he did not have any in his possession. Trooper Larsen then searched Tibbles but did not find either marijuana or drug paraphernalia. In response to the trooper's questioning, Tibbles denied smoking marijuana that day.

Trooper Larsen then proceeded to search the interior of Tibbles's car. Under the front passenger seat inside a brown paper bag, he found a glass pipe, a glass container with what he believed was marijuana, a knife, and two lighters. Tibbles denied the marijuana was his.

Trooper Larsen did not arrest Tibbles but cited and released him after confiscating the suspected marijuana and drug paraphernalia. Subsequent testing by the Washington State Patrol verified that the substance in the glass container was marijuana.

The State charged Tibbles with misdemeanor possession of marijuana and

drug paraphernalia. Before his trial in district court, Tibbles moved to suppress the evidence seized by Trooper Larsen as the poisonous fruits of an illegal search. The district court denied his motion, concluding exigent circumstances justified the warrantless automobile search. Tibbles was convicted following a stipulated facts trial.

Tibbles appealed the denial of his motion to suppress. Recognizing the legal issue as whether the stipulated facts established exigent circumstances, both the superior court and the Court of Appeals affirmed. *State v. Tibbles*, noted at 138 Wn. App. 1046, 2007 WL 1464456. Tibbles petitioned this court for review, which we granted. *State v. Tibbles*, 163 Wn.2d 1032, 185 P.3d 1196 (2008).

Analysis

The question before us is whether the warrantless search of Tibbles's car violated his right to privacy under article I, section 7 of the Washington State Constitution. We begin with the presumption that warrantless searches are per se unreasonable under our state constitution. *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). And, we have recognized that "the right to be free from unreasonable governmental intrusion into one's 'private affairs' encompasses automobiles and their contents." *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement. *State v. Ringer*, 100 Wn.2d 686, 701, 674 P.2d 1240 (1983) (citing *State v. Smith*, 88 Wn.2d 127, 135, 559 P.2d 970 (1977), *overruled on other grounds by State v.*

Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986)); *see also Hendrickson*, 129 Wn.2d at 70 (noting warrant exceptions are "'jealously and carefully drawn'" (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979))). We have recognized exceptions for: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry*[1] investigative stops. *Hendrickson*, 129 Wn.2d at 71. The State bears the burden to show an exception applies. *Id*.

Preliminarily, there is no issue in this case about probable cause. We recently recognized that the odor of marijuana emanating from an automobile may provide probable cause to search. *State v. Grande*, 164 Wn.2d 135, 146, 187 P.3d 248 (2008) (stating, "In this case, because the officer had training and experience to identify the odor of marijuana and smelled this odor emanating from the vehicle, he had probable cause to search the vehicle."). Tibbles does not appear to challenge the existence of probable cause to search. *Tibbles*, 2007 WL 1464456, at *2 n.2. Nor does he dispute that the odor of marijuana in a vehicle may provide probable cause to arrest the sole occupant, as we recognized in *Grande*, 164 Wn.2d at 146. But, the existence of probable cause, standing alone, does not justify a *warrantless* search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant. *Hendrickson*, 129 Wn.2d at 71. Because Trooper Larsen did not arrest Tibbles, and did not have a warrant when he searched Tibbles's car, the search must be justified by one of our recognized

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

warrant exceptions. The State relies solely on the exception for "exigent circumstances." Clerk's Papers (CP) at 44; *see* Suppl. Br. of Resp't at 4; Suppl. Br. of Pet'r at 5.[2]

The exigent circumstances exception to the warrant requirement applies where "'obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.'" *State v. Smith,* 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). This court has identified five circumstances from federal cases that "*could* be termed 'exigent'" circumstances. *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983) (emphasis added). They include "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence." *Id.* (citations omitted); *see also State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). However, merely because one of these circumstances exists does not mean that exigent circumstances justify a warrantless search. *E.g., State v. Patterson*, 112 Wn.2d 731, 735, 774 P.2d 10 (1989). A court must look to the totality of the circumstances in determining whether exigent circumstances

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[2] Because the State argues only exigent circumstances, Tibbles misplaces reliance on *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). In *O'Neill*, we rejected the State's argument that a warrantless vehicle search was justified under the "incident to arrest" exception because there was probable cause to arrest the defendant, even though the officers did not do so. 148 Wn.2d at 587. The State makes no such argument here, and nothing in our opinion in *O'Neill* precludes the State from relying on the exigent circumstances exception in lieu of the search incident to arrest exception.

[3] Six nonexclusive factors may aid in determining the existence of exigent circumstances:

"(1) the gravity or violent nature of the offense with which the suspect is to

exist.[3] *Smith*, 165 Wn.2d at 518.

Considering the relevant factors in determining an exigency, the State has not shown that exigent circumstances justified the warrantless search of Tibbles's car. *See Hendrickson*, 129 Wn.2d at 71. The situation in this case stands in sharp contrast to other situations in which we have held exigent circumstances to exist. In *Patterson*, we concluded that exigent circumstances justified entry into a parked vehicle where a burglary had very recently been committed, the suspect was likely in the immediate vicinity of the vehicle because the officers discovered the vehicle a mere five minutes after the robbery, information in the automobile could help identify and locate the suspect, and a delay in searching the vehicle could have allowed the suspect to flee the area. 112 Wn.2d at 735-36. Similarly, we found exigencies in *Smith* where there was a tanker truck filled with 1,000 gallons of a dangerous chemical parked next to a house, a rifle had been seen in the house, the rifle went missing, and the two known occupants of the house did not possess the rifle. 165 Wn.2d at 518.

On the stipulated facts in this case, the State has not shown any need for particular haste. The suspect was not fleeing, nor has there been any showing that he presented a risk of flight. While there was probable cause that evidence of

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> be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably."

Smith, 165 Wn.2d at 518 (alteration in original) (quoting *State v. Cardenas*, 146 Wn.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002)).

contraband existed in the vehicle, Tibbles was outside the vehicle when Trooper Larsen searched it and the State has not established that the destruction of evidence was imminent. Additionally, the State has not established that obtaining a warrant was otherwise impracticable. For example, we do not know whether Larsen could have used a cell phone or radio to procure a telephonic warrant or whether he could have called backup to secure the scene while Larsen went to procure a warrant. The record contains no evidence of what Larsen would have had to do to procure a warrant at the time of the search.

With regard to safety concerns, the stipulated facts do not establish that Trooper Larsen felt he or anyone else was in danger as a result of Tibbles's actions. CP at 44. Tibbles was not stopped on suspicion of impaired driving, but rather for a defective taillight. *Id*. Tibbles was alone, was compliant with the trooper's requests, and moreover, was released rather than arrested and allowed to drive away even after Trooper Larsen searched the car and seized the marijuana and drug paraphernalia. *Id.*

It is the State's burden to establish that one of the exceptions to the warrant requirement applies. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003). In the case of hot pursuit or similar situations presenting a risk to officer safety, the State's burden can be met by establishing the immediacy of the risk of flight or risk of harm. The facts, as presented here, do not implicate these concerns, nor has the State attempted to show why it was impracticable for Trooper Larsen to obtain a warrant before conducting his search. To find exigent circumstances based on these

bare facts would set the stage for the exigent circumstances exception to swallow the general warrant requirement. It would give the erroneous impression that an exigency may be based on little more than a late-night stop for defective equipment, an officer working alone, and circumstances indicating possible drug possession. This very likely describes any number of encounters between law enforcement and private citizens that occur everyday.

We conclude that the State has not carried its burden to show that the stipulated facts in this case present an exigency. At best, the State has shown it was expedient for Trooper Larsen to conduct the search as he did. But, whatever relative convenience to law enforcement may obtain from forgoing the burden of seeking a warrant once probable cause to search arises in circumstances such as here, we adhere to the view that "mere convenience is simply not enough." *Patterson*, 112 Wn.2d at 734. The underlying theme of the exigent circumstances exception remains "[n]ecessity, a societal need to search without a warrant." *Id.* at 735. The State has not met its burden to establish exigent circumstances. Accordingly, we hold that the warrantless search of Tibbles's car violated article I, section 7 of the Washington Constitution, and the evidence obtained as a result of the search should be suppressed.[4]

[4] It should be noted that Trooper Larsen likely had probable cause to arrest Tibbles based on the strong odor of marijuana coming from the car. *See Grande*, 164 Wn.2d at 146. Because he did not do so, but instead released Tibbles, the State does not assert the "search incident to a lawful arrest" exception to the warrant requirement. Nor does the State seek to justify the warrantless search under a "plain smell" variation of the "plain view" exception. *See State v. Ladson*, 138 Wn.2d 343, 363-64, 979 P.2d 833 (1999) (Madsen, J., dissenting). The State proffered only the exigent circumstances exception. We emphasize these facts to make clear that we are not presented here with a choice

Conclusion

Exigent circumstances will be found only where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. *Smith*, 165 Wn.2d at 517. Because the State failed to establish exigent circumstances justifying the warrantless search of Tibbles's car, we reverse the Court of Appeals.

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between no search or this search. We decline to apply the exigent circumstances exception to these facts, but this does not mean that another exception would not be available in similar circumstances.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Mary E. Fairhurst

Justice Gerry L. Alexander

Justice Richard B. Sanders

Justice Tom Chambers