No. 83742-2

FAIRHURST, J. (dissenting) — By limiting the privacy interest in motel registry information, the lead opinion contravenes the structure of article I, section 7 of the Washington Constitution, undermines its protections, and attempts to circumvent the warrant requirement. I dissent.

Whether article I, section 7 permits a search is based on a straightforward, two-part inquiry. We first determine whether the State has disturbed a private affair. *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008)). Then, we ask whether authority of law justified the government's intrusion. *Id*. Authority of law requires a valid warrant unless one of "a few jealously guarded exceptions" applies, including exigent circumstances, consent, searches incident to an arrest, inventory searches, plain view doctrine, and *Terry*[1] stops. *York*, 163 Wn.2d at 306, 310. If a defendant's article I, section 7 rights are violated, fruits of the improper search must be suppressed. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

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

In Glenn Gary Nichols' case, *Jorden* answered the first part of this two-part test by holding that "the information contained in a motel registry—including one's whereabouts at the motel—is a private affair under our state constitution, and a government trespass into such information is a search." *State v. Jorden*, 160 Wn.2d 121, 130, 156 P.3d 893 (2007). Because police had no warrant authorizing them to obtain Nichols' information and the State has not argued that any established exception to the warrant requirement applies, no authority of law justifies the search. As such, obtaining Nichols' private information from the Travelodge violated article I, section 7. Suppression of the drugs and buy money was required.

Our particular displeasure at the random, suspicionless nature of the search in *Jorden* does not mean that motel registry information is private only against that type of search. *Jorden*'s implication that a warrantless search of motel registry information could be justified by individualized and particularized suspicion alone was nonbinding dictum, as no individual, particular suspicion existed in that case. Furthermore, *Jorden* did not cite a single case where individualized and particularized suspicion alone justified a warrantless search of a private affair.

To read *Jorden* as authorizing a warrantless motel registry search where only individualized and particularized suspicion exists, would inappropriately undercut

the privacy protections of article I, section 7 in the context of an ordinary, nonemergency criminal investigation. The officers investigating Nichols did not appear to have any particular need for immediate action. Nothing indicated that the occupant of room 56 was likely to cause danger to anyone or destroy evidence. Presumably, the officers could have obtained a warrant in the hours that passed between learning that the occupant of room 56 was dealing drugs and obtaining Nichols' registration information from the motel clerk. The officers also could have staked out the room or performed a proper knock-and-talk investigation. *See State v. Ferrier*, 136 Wn.2d 103, 115-16, 960 P.2d 927 (1998) (outlining requirements for a valid knock-and-talk investigation). "'[W]here the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so.'" *Id.* at 115 (alteration in original) (internal quotation marks omitted) (quoting *State v. Leach,* 113 Wn.2d 735, 744, 782 P.2d 1035 (1989)).

By allowing individualized and particularized suspicion alone to diminish the privacy interest in motel registry information, the lead opinion effectively creates an exception to the warrant requirement. Under this new exception, an individualized and particularized suspicion gives officers authority of law to search an individual's private affairs for purely investigatory purposes despite a complete lack of need for

immediate action. This exception threatens to swallow the rule. It also unnecessarily undermines the warrant requirement's purpose of reducing the risk of erroneous searches "by interposing a neutral and detached magistrate between the citizen and the officer engaged in the 'often competitive enterprise of ferreting out crime.'" *State v. Chenoweth*, 160 Wn.2d 454, 478, 158 P.3d 595 (2007) (quoting *Johnson v. United States,* 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948)).

Beyond the dictum of *Jorden*, the lead opinion relies on two distinguishable cases, *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988) and *York,* to support its conclusion that the privacy right in motel registry information evaporates when confronted with a nonrandom search. It argues that *Mesiani* and *York* support its position because "we have expressed displeasure at random and suspicionless searches, 'fishing expeditions,' while at the same time recognizing that searches of the same person or property with individualized suspicion can pass constitutional muster." Lead opinion at 9. Like *Jorden*, neither *Mesiani* nor *York* actually authorized a warrantless search on the basis of only individualized and particularized suspicion. Moreover, the facts of *Mesiani* and *York* critically differ from Nichols' case.

In *Mesiani*, we held that random sobriety checkpoints violated article I,

section 7. 110 Wn.2d at 458. Although *Mesiani* referred to these checkpoints as lacking "individualized suspicion or probable cause," *Mesiani* did not suggest that police could search drivers or cars on the basis of individualized and particularized suspicion alone. *Id*. at 455. Rather, an established exception to the warrant requirement, the *Terry* stop, permits police officers to stop and briefly detain drivers on the basis of a reasonable and articulable suspicion of drunk driving. *See Ladson*, 138 Wn.2d at 352; *State v. Duncan*, 146 Wn.2d 166, 172-74, 43 P.3d 513 (2002) (*Terry* stop requires a reasonable, articulable suspicion, based on specific, objective facts, that the person stopped has committed or is about to commit a crime or a civil traffic infraction). Thus, contrary to the lead opinion's argument, *Mesiani*'s holding that a random search violates article I, section 7 does not necessarily mean that a search of the same person or property based on individualized and particularized suspicion will be constitutionally valid.

In Nichols' case, unlike in *Mesiani*, no established exception to the warrant requirement justified searching Nichols' motel registry information. The State does not argue that the officers performed a *Terry* stop, which would have entailed a brief, investigatory detention of a particular person based on a reasonable suspicion that criminal activity was afoot. Rather, the officers sought to learn the identity of a

previously unidentified suspect by reviewing private information.

In *York*, we held that random, suspicionless drug testing of students violated article I, section 7. 163 Wn.2d at 307-10. We noted that this holding "should in no way contradict" our decisions allowing searches of a student based on individualized and particularized suspicion because students have a "lower expectation of privacy because of the nature of the school environment." *Id*. at 308. That unique environment included the need to maintain discipline, a task often requiring immediate action incompatible with obtaining a search warrant. *Id*. at 309 (citing *State v. McKinnon*, 88 Wn.2d 75, 81, 558 P.2d 781 (1977)); *see also id.* at 330 (J.M. Johnson, J., concurring) ("a middle and high school drug testing program does not impinge on the jealously guarded private affairs of adult citizens, but on those of adolescents, whose privacy expectations and rights are not the same as those of adults").

A motel is not a special environment like a school. Even assuming unique disciplinary concerns may justify searching a child's person without a warrant, similar concerns do not apply to Nichols' case, where officers searched an inanimate source of information in the course of an ordinary criminal investigation. The information contained in a motel guest registry is one of the "jealously guarded

private affairs of adult citizens" that article I, section 7 protects most highly. *York,* 163 Wn.2d at 330 (J.M. Johnson, J., concurring). Motel registry information may divulge the intimate details of a guest's life, from extramarital affairs to business associations. *Jorden*, 160 Wn.2d at 129. To read *York* as authorizing limits on privacy rights outside the unique school environment would undermine *York*'s acknowledgment that "unlike the Fourth Amendment, article I, section 7 is not based on a reasonableness standard." *York*, 163 Wn.2d at 303.

I believe *Jorden*'s holding that motel registry information is a private affair, combined with the structure of article I, section 7, compels the conclusion that obtaining Nichols' motel registry information without a warrant violated his constitutional right to hold that information free from unjustified government intrusion. The lead opinion's holding to the contrary fails to jealously guard the exceptions to the warrant requirement, as article I, section 7 requires us to do. I therefore respectfully dissent.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Justice Tom Chambers

Richard B. Sanders, Justice Pro Tem

Justice Susan Owens