No. 96183-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOEL VILLELA,

Respondent.

AMICI CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, WASHINGTON DEFENDER ASSOCIATION, WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND INSTITUTE FOR JUSTICE

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INTEREST OF AMICI CURIAE

The identities and interests of amici are set forth in the Motion for Leave to Proceed as Amicus which accompanies this brief.

ISSUE PRESENTED

Can the legislature unilaterally change the protections of Article I, Section 7 of the Washington State Constitution and mandate that all vehicles driven by persons arrested for being under the influence be impounded and searched, even if reasonable alternatives to impoundment exist?

STATEMENT OF THE CASE

Respondent Villela was stopped for driving 42 miles per hour in a 35 miles per hour zone. CP 5. The officer stated that he smelled alcohol, and after Mr. Villela refused a field sobriety test, the officer arrested him, then in conjunction with impounding the car performed a warrantless "inventory search", which revealed drugs and drug paraphernalia. CP 6. The State concedes that although there were two adult passengers in the car, the reason they were not allowed to drive it away, and the sole reason the car was impounded, was the mandate of RCW 46.55.360(1)(a) requiring impound—with the consequence of an attendant warrantless inventory search—whenever a driver is arrested for driving under the influence. CP 6, 34; RP (6/19/18) 5-7.

Mr. Villela was charged with possession of a controlled substance as well as intent to deliver. CP 1-2. The trial court granted a motion to suppress the evidence discovered in the "impound search," adopting the findings of Judge Knodell in *State v. Castro*, ruling that the statute requiring impoundment in all cases, without consideration of reasonable alternatives, is a violation of Washington State Constitution Article I, Section 7, and that the impound in this case, made solely because of the requirement of the statute, is similarly unconstitutional. CP 45-50.

SUMMARY OF ARGUMENT

The trial court was correct in holding that Article I, Section 7 requires a consideration of reasonable alternatives before a vehicle is impounded, and a law contravening that protection is unconstitutional. Impoundment of a person's vehicle is a significant intrusion on "private affairs," particularly because it is accompanied by an intrusive inventory search, and mandating it in every case regardless of necessity should be ruled violative of the state constitution.

In contrast to the significant constitutional interests violated by the mandatory impound law, the State relies on dicta from a 1973 Court of Appeals case to assert that the legislature has "co-equal authority" with this Court to create exceptions to the warrant requirement, and that by mere passage of a mandatory impound law the legislature can create the

"authority of law" required by Article I, Section 7 for a seizure and search of a person's property. Reply Br. of Pet'r 4 (citing *State v. Singleton*, 9 Wn.App. 327, 511 P.2d 1396 (1973)). This reading essentially allows the Legislature to statutorily exempt itself from the Washington Constitution.

This Court has soundly rejected such an annulment of constitutional protections, explaining in *State v. Ladson,* 138 Wn.2d 343, 979 P.2d 833 (1999):

> The dissent contends the 'authority of law' required by article I, section 7, may be supplied by a statute in lieu of a warrant or recognized common law exception to the warrant requirement . . . 'This defies the very nature of our constitutional scheme and would set a precedent of legislative deference that I am unwilling to accept in our state's constitutional jurisprudence. It is the court, not the Legislature, that determines the scope of our constitutional protections.'

Id. at 352 n.3 (quoting *In re Personal Restraint of Maxfield,* 133 Wn.2d 332, 345-46, 945 P.2d 196 (1997) (Madsen, J., concurring)).

Here, the legislature violated article I, § 7 by mandating an impound when reasonable alternatives exist. The rule in Washington is, and should continue to be, that: "even when authorized by statute 'impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties'; 'in Washington, impoundment is inappropriate when reasonable alternatives exist[.]'" *State v Tyler*, 177

Wn.2d 690, 699, 302 P.3d 165 (2013) (quoting *State v. Hill*, 68 Wn.App. 300, 305, 306, 842 P.2d 996 (1993)).

This Court has repeatedly recognized that Article I, Section 7 confers at least as great and often greater protection than that afforded by the Fourth Amendment of the United States Constitution. *See, e.g., State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984). This brief will therefore focus on analysis of Article I, Section 7, to show how the mandatory impound law is unconstitutional, but the federal constitution also limits the circumstances in which a vehicle may be impounded. *See, e.g., Cardwell v. Lewis*, 417 U.S. 583, 593, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). The first portion of this brief demonstrates that a mandatory impound is a seizure that must conform to article I, § 7 and that impound is not constitutionally permissible if reasonable alternatives exist. The second section reviews established law that this Court, and not the Legislature, determines what constitutes the "authority of law" under article I, § 7. The final section of this brief explains why the content and the legislative history of the mandatory impound statute aid in showing the lack of justification for an exception to constitutional protections here.

ARGUMENT

A. Vehicle Impoundment is a Seizure that Must Satisfy Washington State Constitution Article I, Section 7. Impoundment is Not Constitutional if Reasonable Alternatives Exist.

The State focuses much of its argument on the constitutionality of the inventory search of Mr. Villela's vehicle arising out of the impoundment. While the fact of the search demonstrates one significant consequence of an impoundment, and reinforces the caution that should be exercised in authorizing impoundments, it is not in fact the action that is at issue here. At issue here is the mandatory impoundment of Mr. Villela's vehicle regardless of whether reasonable alternatives to impoundment existed.

The scope of the protection of Article I, Section 7 has been explored in the context of vehicle impoundment in a long line of cases, including in *State v. Reynoso*, 41 Wn.App. 113, 702 P.2d 1222 (1985). "An impoundment, because it involves the governmental taking of a vehicle into exclusive custody, is a 'seizure' in the literal sense of that term." *Id.* at 116 (citations omitted). *Reynoso* established that whether a particular impoundment is reasonable must be determined by the facts of each case. *Id.; see also State v. Hill*, 68 Wn.App. 300, 306, 842 P.2d 996 (1993) ("In Washington, impoundment is inappropriate when reasonable

alternatives exist."); *State v. Coss*, 87 Wn.App. 891, 943 P.2d 1126 (1997), (holding that where a driver authorized to remove the vehicle was available, the impound was invalid).

The line of impound cases was well summarized and reaffirmed by this Court in *State v. Tyler*, 177 Wn.2d 690, 302 P.3d 165 (2013), in a passage so comprehensive as to justify quotation in full, making clear that there are limited justifications for a vehicle impound *and* that an impound becomes "unreasonable" if alternatives exist:

> A vehicle may be lawfully impounded (1) as evidence of a crime, when the police have probable cause to believe the vehicle has been stolen or used in the commission of a felony offense; (2) under the "community caretaking function" if (a) the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft *and* (b) the defendant, the defendant's spouse, or friends are not available to move the vehicle; and (3) in the course of enforcing traffic regulations if the driver committed a traffic offense for which the legislature has expressly authorized impoundment. *State v. Williams*, 102 Wash.2d 733, 742–43, 689 P.2d 1065 (1984) (citing *State v. Simpson*, 95 Wash.2d 170, 189, 622 P.2d 1199 (1980)).
>
> However, if there is no probable cause to seize the vehicle and a reasonable alternative to impoundment exists, then it is unreasonable to impound a citizen's vehicle. *State v. Houser*, 95 Wash.2d 143, 153, 622 P.2d 1218 (1980); *State v. Hill*, 68 Wash.App. 300, 305, 306, 842 P.2d 996 (1993) (even when authorized by statute "impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties"; "in Washington, impoundment is inappropriate when reasonable alternatives

> exist"); *State v. Bales*, 15 Wash.App. 834, 837, 552 P.2d 688 (1976); *see In re Impoundment of Chevrolet Truck*, 148 Wash.2d 145, 151 n. 4, 60 P.3d 53 (2002). The police officer does not have to exhaust all possible alternatives, but must consider reasonable alternatives. *State v. Coss*, 87 Wash.App. 891, 899, 943 P.2d 1126 (1997). Reasonableness of an impoundment must be assessed in light of the facts of each case. *Id.* at 898 (citing *State v. Greenway*, 15 Wash.App. 216, 219, 547 P.2d 1231 (1976)).

Id. at 698-99.

This Court should not allow the constitutional requirements for an impoundment to be watered down by the Legislature, especially in light of the adverse and disparate consequences of a mandatory impound rule. Studies have repeatedly shown that drivers of color are more likely to be stopped than white drivers and even without a mandatory impound are more likely to be searched. *See generally* Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States* (March 13, 2019) (Stanford Computational Policy Lab, Working Paper), https://5harad.com/papers/100M-stops.pdf ; Frank R. Baumgartner, Derek A. Epp, Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (Cambridge University Press 2018). Allowing a mandatory impound rule (with its subsequent search) to survive constitutional scrutiny would increase and entrench the racial disparities in treatment.

B. This Court, Not the Legislature, Has the Responsibility for Determining the Protections of Article I, Section 7.

Washington Constitution Article I, Section 7 provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

In *State v. Gunwall*, 106 Wn.2d 54, 68-69, 720 P.2d 808 (1986), the Court made clear that with respect to statutory authorizations invading private affairs, the Court, not the legislature, defines what is permissible ("Generally speaking, the 'authority of law' required by Const. art. 1, § 7 in order to obtain records includes authority granted by a valid (*i.e. constitutional*) statute, the common law or a rule of this court.") (emphasis added).

The issue of legislative authorizations in conflict with Article I, Section 7 was present but avoided in *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992), but came to a head in *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999), where, notwithstanding a statute authorizing a traffic stop in the circumstances, the majority held that a pretextual stop was unconstitutional. The dissent argued that because the statute unquestionably authorized the stop, it provided the "authority of law" required by Article I, Section 7. *Id.* at 360-61. The majority responded:

> The dissent contends the "authority of law" required by article I, section 7, may be supplied by a statute in lieu of a warrant or recognized common law exception to the warrant

> requirement, . . . "statutory authorization" references a statute authorizing a *court* to issue a warrant, not a statute dispensing with the warrant requirement. *Id. See also In re Personal Restraint of Maxfield*, 133 Wash.2d 332, 345–46, 945 P.2d 196 (1997) (Madsen, J., concurring) ("Except in the rarest of circumstances, the 'authority of law' required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena issued by a neutral magistrate. This court has never found that a statute requiring a procedure less than a search warrant or subpoena constitutes 'authority of law' justifying an intrusion into the 'private affairs' of its citizens. This defies the very nature of our constitutional scheme and would set a precedent of legislative deference that I am unwilling to accept in our state's constitutional jurisprudence. It is the court, not the Legislature, that determines the scope of our constitutional protections." (Citation and footnotes omitted.)).

Id. at 362 n.3. *See also In re Chevrolet Truck,* 148 Wn.2d 145, 60 P.3d 53 (2002), striking down a state patrol rule making impoundment mandatory for vehicles driven by a driver without a valid license.

In *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007), this Court reaffirmed that the legislature may not confer authority to search in violation of Article I, Section 7, striking down the portion of the Washington Securities Act that authorized administrative subpoenas without judicial review. "[A] subpoena is not authority of law simply because it is authorized by statute." *Id.* at 248. *See, e.g., Belas v. Kiga,* 135 Wn.2d 913, 920, 959 P.2d 1037 (1998) ("Constitutional provisions cannot be restricted by legislative enactments."); *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 141 (1998) ("Ultimately, however, the

judiciary must make the decision, as a matter of law, whether a given statute is within the legislature's power to enact or whether it violates a constitutional mandate.").

The State relies on dicta in *State v. Singleton*, 9 Wn.App. 327, 511 P.2d 1396 (1973) for the proposition that the legislature has untrammeled discretion to define the protections of Article I, Section 7. Reply Br. of Pet'r 4. The case does nothing of the sort. In *Singleton*, officers had arrested the defendant after he had exited and legally parked his vehicle. 9 Wn.App. at 328. The officers ordered the impound of the vehicle and the question was whether the impound was lawful. *Id.* In dicta the court said "[a]n impoundment is lawful if authorized by statute or ordinance[,]" but proceeded to find that the impoundment was not authorized by ordinance or by any exception to the warrant requirement, and hence suppressed the evidence found in the post-impoundment inventory search. *Id.* at 331, 334, 335. The court did not in any way question the requirement of *Gunwall* that an exception to the warrant requirement may be created only by "a valid (*i.e.* constitutional) statute." *See id.*

The constitutional restrictions on seizure of vehicles are clear. The legislature is not free to override them. If there is no probable cause to seize the vehicle and reasonable alternatives to impoundment exist, the impoundment is unconstitutional.

C. The Content and the Legislative History of the Mandatory Impound Statute Aid in Showing the Lack of Justification for an Exception to Constitutional Protections Here

The law at issue here, RCW 46.55.360, requires the impoundment of any vehicle being driven by a driver who is arrested for being under the influence of drugs or alcohol. Even if a co-owner is sitting in the vehicle, is not under the influence, and is able to drive it away, it must be impounded. Allegedly this is to keep the impaired driver from regaining possession of the vehicle when released from custody. Under the statute, however, the registered owner or co-owner is entitled to proceed immediately to the impound yard and redeem the vehicle without any waiting period. If the owner or co-owner can be trusted to redeem the vehicle without delay, that person is clearly equally trustworthy, as recognized in the case law, to drive it away from the point of arrest. The impound is completely unnecessary and serves only to subject every vehicle driven by an impaired driver to a seizure and search, as well as the costs of redeeming it.[1]

[1] Both the legislation and the case law recognize immediate or almost immediate possession by a third party to be a reasonable course of action when a driver has been arrested for driving under the influence. *See* RCW 46.55.360(3); *State v Tyler*, 177 Wn.2d 690, 698-99, 302 P.3d 165 (2013) (additional cases cited therein). If the legislature wished to go further, and ensure that no one drove the vehicle for 12 hours, it could simply make booting the car mandatory, an action that would achieve the goal of inactivity without requiring either a seizure or search of the vehicle. Under no interpretation of safety needs is a mandatory seizure and search of all vehicles necessary.

The irrationality of the statute is demonstrated in part by its legislative history. A previously convicted driver failed to install an ignition lock as required by the court, and the state patrol failed to confirm such installation. The driver was then again arrested for driving while impaired. Rather than look for a responsible driver to take custody of the vehicle, the state patrol left it on the street. Instead of arresting the driver, the state patrol officer drove the woman home. The driver returned and took the vehicle, got into an accident, and the victim of the accident collected a $5.5 million judgment against the state patrol.

The legislative history of "Hailey's Law" consists of a listing of the number of impaired driving arrests in Washington State and a recounting of this single occurrence. There is no testimony or discussion of whether actually enforcing ignition lock requirements would prevent accidents or, more directly implicated in this case, whether there is any risk in releasing the car to a responsible driver rather than impounding it. There was no evidence that releasing the car to a responsible driver has ever resulted in the impaired driver regaining control and getting into an accident. There was no consideration of use of a boot or other immobilization device as an alternative to impoundment.

Regardless of such evidence or lack thereof, the legislature cannot override the constitutional right to privacy. The law in Washington is

clear. Seizure of a vehicle is not permissible if reasonable alternatives, such as release to a responsible driver, exist. *See State v Tyler*, 177 Wn.2d 690, 302 P.3d 165 (2013); *State v. Bales*, 15 Wn.App. 834, 552 P.2d 688 (1976), *State v. Coss*, 87 Wn.App. 891, P.2d 1126 (1997). The legislature cannot extinguish this constitutional protection.

CONCLUSION

This Court, not the legislature, is the arbiter of whether an abrogation of the warrant requirement of Article I, Section 7 is constitutional. In the context of seizure and impound of vehicles, the law is clear. In the absence of probable cause to seize a vehicle, impoundment is unconstitutional if reasonable alternatives exist. RCW 46.55.360, mandating impounds in all instances of driving under the influence arrests, regardless of whether reasonable alternatives exist, is therefore unconstitutional. The arresting officer in this case testified that he did not consider alternatives in ordering the impound and search of the vehicle. The resulting evidence was unconstitutionally obtained and thus properly suppressed. The order of the trial court should be affirmed.

DATED: July 25, 2019

Respectfully Submitted,

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July 25, 2019 - 3:56 PM

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Appellate Court Case Title:	State of Washington v. Joel A. Villela
Superior Court Case Number:	18-1-00030-3

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