

# SUPREME COURT OF WASHINGTON

## State v. Puapuaga

164 Wash. 2d 515 (2008) · Decided September 18, 2008

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### SUMMARY

The Washington Supreme Court considered whether the State could seize a pretrial detainee's personal property by ex parte orders after hospital staff discovered apparent discovery materials and a threatening note during an inventory at Western State Hospital. The court held that the seizure did not establish a privacy violation or warrant dismissal under CrR 8.3(b), and that the trial court acted within its authority by appointing a special master to review potentially privileged materials. The court affirmed and remanded for further proceedings concerning the property.

### OPINION

JOHNSON, J.

C. Johnson, J. ¶1 This case asks us to determine whether it is proper for the State to seize by ex parte order the personal property of a pretrial detainee who is transferred to Western State Hospital for a competency evaluation. Jesie Pele Puapuaga, who is charged with second degree murder, was transferred to Western State Hospital for a competency evaluation.

Upon arrival, Puapuaga's items were inventoried by hospital staff. Among his personal items was what appeared to be state discovery materials evidently not authorized for release to Puapuaga, plus a threatening note directed to one of Puapuaga's codefendants.

The State was notified of the materials and obtained ex parte orders, seizing the property. The trial court denied Puapuaga's motion for immediate return of \*518the property and for dismissal of the criminal prosecution under Criminal Rule (CrR) 8.3(b), upheld the ex parte orders, and appointed a special master to review the items in camera to protect any privileged materials.

We affirm the trial court. FACTUAL AND PROCEDURAL HISTORY ¶2 Jesie Pele Puapuaga is charged in Pierce County with second degree murder. His case was assigned to Judge Tollefson with a trial date of October 15, 2007.

The court ordered Puapuaga to undergo a competency evaluation at Western State Hospital.<sup>1</sup> Upon his arrival at the hospital on March 16, 2007, staff inventoried Puapuaga's property and found a box containing what appeared to be unredacted state discovery documents, including autopsy photographs of the victim, and what appeared to be a threatening message directed to one of Puapuaga's codefendants and written on a "kite."<sup>2</sup> The State had not approved release of

discovery materials to Puapuaga. ¶3 A mental health evaluator e-mailed the deputy prosecutor and defense counsel about these discoveries.

Later that day, the deputy prosecutor, upon written motion, obtained from Judge Serko an ex parte order “impounding” Puapuaga’s property by Western State.<sup>3</sup> Clerk’s Papers (CP) at 5-7. The prosecutor contacted the mental health evaluator and requested a list of the items taken from Puapuaga, which was e-mailed to her on March 22, 2007.

The following day, the prosecutor obtained another ex parte order from Judge Serko transferring the property to the Pierce County Prosecuting Attorney’s Office. CP at 9-10. \*519 Defense counsel was available both days, and the State claims that although Judge Tollefson was in session both days, he was unavailable. Neither ex parte order was obtained in open court and no record was made of the proceedings.

The State did not inform defense counsel of either ex parte order. ¶4 A search warrant for the kite was also obtained by the Lakewood Police Department, but it is unclear whether it was executed. According to the State, on March 23, 2007, a detective of the Lakewood Police Department went to Western State Hospital and served a warrant for the kite and put it into evidence.

CP at 39. However, in the detective’s affidavit, the detective refers only to the court’s order, and there is no evidence of such a search warrant contained in the record.<sup>4</sup> CP at 51. The detective went to Western State Hospital, secured the lid of the box containing the items with evidence tape, and stored the box in his office.

The detective did not look at the documents. The box has since been transferred to Judge Tollefson’s chambers. ¶5 Defense counsel objected to these developments, asserting a violation of her client’s privacy rights and violation of the attorney-client privilege. Counsel insisted she had provided no discovery materials to her client, suggesting that he might have obtained the materials from someone in the jail.

The State alleged that there had been a discovery violation and that there was possible evidence of witness tampering, and moved for appointment of a special master to review the documents and redact any attorney-client communications. Defense counsel first agreed to appointment of a special master but later opposed the procedure and moved for return of the material and for disqualification of the deputy prosecutor or dismissal of the prosecution. ¶6 On April 13, 2007, Judge Tollefson entered findings and conclusions on admissibility of the impounded materials and concluded that the State’s actions were a reasonable \*520 exercise of police power.

CP at 76-77. The court granted the State’s motion for appointment of a special master and denied Puapuaga’s motions, including his motion to dismiss the prosecution and for immediate return of the property. Under the court order, the special master is to review the impounded materials in the

presence of defense counsel and determine whether they contain any privileged communications or indications of defense preparation.

The special master is then to redact the protected materials and turn the remaining items over to the court. The court will then hold another hearing to determine what items, if any, should be turned over to the State. ¶7 The court stayed its decision to permit Puapuaga to move in this court for a stay and for direct discretionary review of the trial court's order appointing a special master.

Our commissioner granted a stay pending further order of this court and referred the motion for discretionary review to the court. We continued the stay and granted review. **ISSUE** Whether the trial court properly denied Puapuaga's motion to dismiss his second degree murder charge or for return of the seized items and granted the State's motion for appointment of a special master.

**ANALYSIS** ¶8 Two things must be shown before a court can order dismissal of charges under CrR 8.3(b).<sup>5</sup> First, a defendant must show arbitrary action or governmental misconduct. Second, a defendant must show prejudice affecting the defendant's right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). A trial \*521court's decision to dismiss charges is reviewable under the manifest abuse of discretion standard.

I ¶9 Puapuaga claims that the State unlawfully seized and continues to hold his personal property. He claims that by seizing his property through ex parte orders, the State violated his constitutional rights and committed governmental misconduct. These actions, Puapuaga maintains, prejudiced his ability to conduct a timely investigation into his case.<sup>6</sup> Among the constitutional rights violated, Puapuaga asserts violation of the right to privacy under Wash. Const, art. I, § 7 and the U.S. Const, amend.

IV.7 According to Puapuaga, under article I, section 78 and the Fourth Amendment,<sup>9</sup> pretrial detainees have a reasonable expectation of privacy in their property that prohibits government search and seizure absent a showing of legitimate reason for breaching such privacy rights. ¶10 When presented with arguments under both the state and federal constitutions, we review the state constitution arguments first.

*State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007). We have found that article I, \*522section 7 provides greater protection of a person's right to privacy than the Fourth Amendment. In the context of this case, interpretation and application of article I, section 7 requires a two-part analysis.

The first step requires us to determine whether the action complained of constitutes a disturbance of one's private affairs. If there is no private affair being disturbed, the analysis ends and there is no article I, section 7 violation. If, however, a private affair has been disturbed, the second step is to determine whether authority of law justifies the intrusion.

Authority of law may be satisfied by a valid warrant. *Surge*, 160 Wn.2d at 71. ¶11 The private affairs inquiry focuses on those privacy interests that Washington citizens have held and should be entitled to hold safe from governmental trespass absent a warrant. Private affairs are not determined according to a person's subjective expectation of privacy but, in part, are determined by examining the historical treatment of the interest asserted.

If history does not show whether the interest is one entitled to protection under article I, section 7, we then ask whether the expectation is one that a citizen of this state is entitled to hold. This part of the inquiry includes a look into the nature and extent of the information that may be obtained as a result of the governmental conduct and the extent to which the information has been voluntarily exposed to the public.

*Surge*, 160 Wn.2d at 72. ¶12 Here, the private affairs inquiry focuses on a pretrial detainee's asserted privacy interest in their personal effects, not on the privacy interest of the ordinary citizen. Puapuaga does not claim that pretrial detainees historically have maintained any specific privacy interest but argues instead that the privacy expectation is one he is entitled to hold.

He claims the government could obtain an extensive amount of information for its investigation through the seized items. Also, he submits that he did not voluntarily expose the information but took the materials with him to Western State Hospital, affirming his intention to maintain the privacy of his property. \*523 ¶13 Contrary to Puapuaga's contention, the private affairs inquiry in this case is resolved by reviewing historical treatment of the privacy interest asserted.

We have recognized that an inmate's expectation of privacy is necessarily lowered while in custody. *State v. Campbell*, 103 Wn.2d 1, 23, 691 P.2d 929 (1984) (holding State's search and seizure of work release inmate's car did not violate the U.S. Const, amend. IV or Const, art. I, § 7).

In *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003), we held that an arrestee has no reasonable expectation of privacy in personal items once they have been viewed by state officials during a valid inventory search.

In *Cheatam*, the defendant was arrested for rape, and upon booking in jail had his personal effects, including his shoes, taken from him, inventoried, and stored in the jail's property room. Four days later, a detective obtained the shoes from the property room as evidence of an unrelated rape. Cheatam claimed such retrieval violated U.S. Const, amend. IV and Const, art. I, § 7 prohibitions against warrantless searches and seizures.

The trial court denied Cheatam's motion to suppress evidence of the shoes, and we affirmed the denial. ¶14 The State cites to Cheatam to argue Puapuaga's privacy rights have not been violated. Puapuaga makes no reference to Cheatam, nor any distinction between inventory and seizure of

his personal effects upon transfer to Western State Hospital and inventory and seizure of an arrestee's personal effects upon booking.

Certainly, the State may lawfully inventory an arrestee's personal effects, whether shoes or a box of documents.<sup>10</sup> As in *Cheatam*, Puapuaga does not contend the inventory search was unlawful. And like *Cheatam*, Puapuaga does not provide authority suggesting that pretrial detainees have historically held a protectable privacy interest in property properly inventoried, seized, and held by state officials.

*Cheatam*, 150 Wn.2d at 643. To the contrary, history shows the interest is one not entitled to protection. Thus, Puapuaga fails the private affairs prong of the article I, section 7 analysis and consequently fails to establish any privacy right under these facts.<sup>11</sup> ¶15 Next, Puapuaga argues that by obtaining the orders ex parte from a judge not assigned to the case and without making a record, the State violated rules of discovery, which in turn satisfies the governmental misconduct prong of his motion to dismiss.

Puapuaga contends that the rules the State violated are Pierce County Local Rule 40(b) (case assignment), RCW 2.08.030 (superior courts are courts of record), and criminal motion notice requirements.<sup>12</sup> As with his privacy claim, Puapuaga maintains that the deprivation of his items prejudiced him in his ability to prepare for trial. ¶16 While we do not necessarily condone the State's action of proceeding ex parte, we agree with the superior court that this procedure is not a basis to dismiss an underlying charge.

Further, we find that the trial court, by permitting Puapuaga to challenge the State's action in a hearing and by appointing a special master to review the contents of the box, acted well within its authority to regulate discovery.<sup>13</sup> ¶17 At most, if any of the contents of the box are attorney-client privileged communications, which the State intended to introduce in the murder trial proceedings, Puapuaga could then bring a motion raising a more specific objection.

But, unlike the defendant in *Cheatam*, Puapuaga has not filed a motion to suppress the seized items from being used in his criminal trial. Instead, he has moved for dismissal of his murder charge or immediate return of his property. While the shoes seized in *Cheatam* were used as evidence of *Cheatam*'s guilt, here, the contents of the box appear at this stage of the proceedings to be unrelated to Puapuaga's second degree murder charge or any charge at all.

We emphasize that we are unable to establish a nexus between the disputed property and Puapuaga's murder charge. Therefore, we leave to the trial court, which currently possesses the box, the task of determining whether to give the items to the State or return the items to Puapuaga or his counsel. Any requests for return of the box should be addressed to the trial court and may be resolved in the hearings already pending. ¶18 We hold that dismissal of Puapuaga's murder

charge is an extraordinary remedy not fitting for these circumstances and that in the absence of the box as part of the record on review, we will not order return of the items to Puapuaga.

We affirm the trial court's order appointing a special master and its order denying Puapuaga's request for return of his items and for dismissal of his second degree murder charge under CrR 8.3(b). We remand the case to the trial court. Alexander, C.J., and Madsen, Chambers, Owens, Fairhurst, J.M. Johnson, and Stephens, JJ., concur. Western State Hospital is a state hospital designated by ROW 72.23.020.

A "kite" is a form used in prison for communication from inmates to prison staff. In limited circumstances, a kite may be used for correspondence between inmates after the message is first approved by prison administration. Report of Proceedings at 9-10 (Apr. 10, 2007). Nowhere did the trial court define "impound." For purposes of our analysis, we equate impound with seizure of property — meaningful interference with an individual's possessory interest in that property.

United States v. Jacobsen, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). Because it is unclear in the record whether the search warrant for the kite was executed, our analysis is limited to the propriety of the ex parte orders. CrR 8.3(b) reads, "The court, in furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

The court shall set forth its reasons in a written order." Puapuaga's materials were first seized on March 16, 2007. CP at 7. The trial court ordered appointment of a special master on April 13, 2007, CP at 82, and Puapuaga's counsel filed a notice for discretionary review to this court the same day, CP at 79. Had Puapuaga not contested appointment of the special master, he would have been without his materials for approximately one month.

In addition to arguing violation of his right to privacy, Puapuaga asserts violation of the following rights: the right to confrontation under U.S. Const, amend. VI; the right of a criminal defendant to be present at critical stages of the proceedings under Wash. Const, art. I, § 22; the right to effective assistance of counsel; and the right to have a speedy public trial under Wash. Const, art. I, § 22 and U.S. Const, amend.

VI. Puapuaga has not adequately briefed or argued these claims. Therefore, we decline to address them. Wash. Const, art. I, § 7 reads, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." U.S. Const, amend. IV reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be

seized.” The trial court recognized as a disputed fact whether Puapuaga’s materials contained any attorney-client privileged communications or any work product in preparation of the defense.

CP at 75. As special protection, the court appointed a special master to review the contents of the box in the presence of Puapuaga’s counsel. CP at 81-82. It is questionable whether article I, section 7 and the Fourth Amendment are the proper authorities for protection of potentially privileged materials. Cf. *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000) (holding jail officers’ inspection of pretrial detainees’ personal property, which included legal documents containing private communications with attorneys, violated the detainees’ right to counsel protected by U.S. Const, amend.

VI and Wash. Const, art. I, § 22). Puapuaga fails to identify the greater protection provided by article I, section 7, in these circumstances. And to support his privacy claim, Puapuaga cites only to Fourth Amendment jurisprudence — *Block v. Rutherford*, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984) and *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed.

2d 447 (1979), cases upholding policies surrounding “shakedown” searches of inmate cells. Puapuaga is incorrect in his claim that *Wolfish* and *Block* stand for the rule that pretrial detainees have a reasonable expectation of privacy in their property. Only *Wolfish* mentioned pretrial detainees’ privacy interests, describing them as “diminished.” 441 U.S. at 557.

Though often interpreted to mean that a pretrial detainee has a greater privacy expectation than a prisoner, the *Wolfish* decision merely stated that even if a pretrial detainee retained an expectation of privacy, it would necessarily be of diminished scope: “Assuming, arguendo, that a pretrial detainee retains such a diminished expectation of privacy after commitment to a custodial facility, we nonetheless find that the room-search rule does not violate the Fourth Amendment.” 441 U.S. at 557; cf. *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S. Ct.

3194, 82 L. Ed. 2d 393 (1984) (holding prisoners have no legitimate expectation of privacy and that the Fourth Amendment’s prohibition on unreasonable searches does not apply in prison cells). CrR 8.2 refers to Civil Rule (CR) 7(b) as governing criminal motions.

The timing of written motions is set out in CR 6(d), which states in relevant part, “A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 6 days before the time specified for the \*525hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.” (Emphasis added.)

Had the sealed box of Puapuaga’s materials been transferred to this court’s possession for consideration, as was the State’s intent indicated in its supplemental designation of clerk’s papers, we would be able to determine whether Puapuaga has actually been prejudiced by the temporary

deprivation of his items and whether dismissal of the prosecution or return of the items would be appropriate remedies.

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