

## WASHINGTON SUPREME COURT

### **In re the Personal Restraint of Nichols, 171 Wash. 2d 370**

256 P.3d 1202 (2011) · Decided April 28, 2011

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#### SUMMARY

The Washington Supreme Court considers whether Glenn Nichols could raise a state constitutional challenge to a warrantless examination of a motel registry for the first time in a personal restraint petition. The court holds that the claim could be raised in the petition and that the relevant constitutional rule applied retroactively, but concludes that the registry examination did not violate article I, section 7 because police had individualized suspicion of drug activity. The court affirms the denial of Nichols's personal restraint petition and rejects his ineffective assistance claims.

#### OPINION

ALEXANDER, J.

Alexander, J. ¶1 We granted Glenn Nichols's petition to review a decision of the Court of Appeals denying Nichols's personal restraint petition (PRP) in which he challenged his convictions on charges of possession of cocaine with intent to deliver and possession of marijuana.

We reject Nichols's contention that Seattle police officers violated article I, section 7 of our state's constitution when they obtained information from a motel desk clerk that indicated that Nichols was a registered guest at the motel.

We, therefore, affirm the Court of Appeals. I ¶2 On February 26, 2004, a police informant went to the home of Toreka Ativalu intending to make a controlled purchase of cocaine with \$50 of prerecorded Seattle Police Department buy money. Ativalu advised the informant that she had no cocaine at the time but was on her way to obtain some from her supplier.

The informant and Ativalu, together with another person known only as "Robert," drove to a nearby Travelodge motel in south Seattle. At the motel, Ativalu asked Robert to call "O.G." on his cell phone to determine the motel room O.G. was occupying.

After the telephone call was made, the informant observed Ativalu enter room 56 at the Travelodge. Approximately five minutes later, Ativalu returned with cocaine, some of which was provided to the informant. The trio then returned to Ativalu's home. ¶3 Shortly thereafter, the informant told detectives of the Seattle Police Department what he had observed at the Travelodge.

About two hours later, Seattle police officers \*372 went to the front desk of the Travelodge and asked who was registered in room 56. In response, the desk clerk provided the officers with a registration form, which showed that the registrant of room 56 was Glenn Nichols.

The desk clerk also presented the officers with a photocopy of Glenn Nichols's driver's license. After looking at the registration form and the driver's license, which contained a photograph of the licensee, the officers obtained information via a computer in the police officers' car that Nichols's driver's license had been suspended. Shortly after obtaining this information, the detectives observed Nichols drive into the motel parking lot.

When Nichols exited the car he had been driving, the police officers asked him if he was Glenn Nichols. He responded affirmatively. The officers then placed him under arrest for the offense of driving while license suspended. A search of Nichols's person, incident to his arrest, yielded cocaine, marijuana, and \$470 in cash, including "\$10 of SPD [Seattle Police Department] buy money." Verbatim Report of Proceedings (Jan.

5,2005) at 82. ¶4 Nichols was charged with possession of cocaine with intent to deliver and possession of less than 40 grams of marijuana. Following a denial of Nichols's motion to suppress the evidence seized incident to his arrest, the matter proceeded to a bench trial at which Nichols was found guilty of both charges.

After Nichols was sentenced, he appealed his convictions to the Court of Appeals, Division One. Nichols did not, however, raise an issue relating to the motel registry. Because Nichols did raise a challenge to a court-ordered DNA (deoxyribonucleic acid) sampling, the court stayed his appeal pending this court's decision in *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007).

While the appeal was stayed, Nichols filed the instant PRP challenging the search of the motel registry. The Court of Appeals stayed consideration of the PRP pending a decision on Nichols's direct appeal. Shortly thereafter, this court issued our opinion in *State v. Jorden*, 160 Wn.2d 121, 130, 156 P.3d 893 (2007), in which we held that a warrantless, random check of a motel registry violated article I, section 7 of our \*373 state's constitution.

Following our decision in *Surge* and the lifting of the stay on Nichols's direct appeal, a Court of Appeals commissioner affirmed Nichols's conviction. A panel of that court subsequently denied a motion to modify the commissioner's decision. About one month later, the Court of Appeals lifted the stay on Nichols's PRP and denied it. II ¶5 Because Nichols filed his PRP before his direct review became final, he has avoided the one-year time bar on collateral attacks that is set forth in RCW 10.73.090.

Nichols's burden on review here is to establish either a violation of constitutional rights resulting in actual prejudice or a nonconstitutional error that " 'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.' " In *re Pers. Restraint of Lord*, 152 Wn.2d

182, 188, 94 P.3d 952 (2004) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)).

The petitioner must also establish that he is under a “restraint” that is unlawful for one of the reasons listed in RAP 16.4(c). A petition for relief that establishes a constitutional violation resulting in actual prejudice will fall within RAP 16.4(c)(2), which lists as grounds for granting a petition that the conviction was obtained “in violation of the Constitution of the United States or the Constitution... of the State of Washington.” A. May Nichols raise an objection to the motel registry search for the first time in his PRP? ¶6 As noted above, Nichols contends that the alleged search of the motel guest registry violated article I, section 7 of our state constitution.

Because Nichols did not raise that issue at trial or in his direct appeal, we are, at the outset, presented with the question of whether he can raise the issue for the first time in a PRP. The court reasoned that Nichols waived any objection to the search of the motel \*374registry by failing to seek suppression at trial of the evidence obtained from that search.

The Court of Appeals indicated that its decision was compelled by cases that hold that a defendant who fails to move at trial to suppress improperly obtained evidence waives the right to raise the issue on direct appeal. It reasoned that “[i]f the issue is waived and cannot be raised on direct appeal, then it cannot be raised in a personal restraint petition either.” *In re Pers.*

*Restraint of Nichols*, 151 Wn. App. 262, 269, 211 P.3d 462 (2009). ¶7 The Court of Appeals is incorrect. We say that because it is well established that a constitutional issue can be raised for the first time in a PRP if the petitioner demonstrates actual prejudice. Indeed, the seminal case so holding is *In re Personal Restraint of Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983), where this court held that a petitioner did not waive his right to challenge in a PRP an allegedly involuntary guilty plea by failing to raise the issue on direct review.

See also *In re Pers. Restraint of Market*, 154 Wn.2d 262, 111 P.3d 249 (2005); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004). ¶8 The Court of Appeals determined that *Hews* was inapplicable to Nichols’s case because “Nichols’[s] problem is not his failure to raise the suppression issue in his direct appeal” but, rather, a “failure to move to suppress at trial.” Nichols, 151 Wn.

App at 270. While *Hews* is undeniably different than the case before us in the sense that *Hews* dealt with a challenge to the voluntariness of a plea rather than to a search and seizure, the cases are similar in that the petitioner in *Hews* almost certainly did not challenge the voluntariness of his plea at the trial. Furthermore, in *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011) (consolidated with *State v. Millan*, No. 83613-2), we held that a defendant may challenge a search for the first time on appeal following a change in constitutional interpretation. ¶9 The State

contends, additionally, that a search and seizure issue may not be raised for the first time in a PRP \*375because, absent a suppression motion, the record is insufficient for review.

That argument would have more weight if the matter was before us on direct review. In a PRP, however, the petitioner and State are both allowed to present affidavits with relevant evidence outside the existing record.

In *re Pers. Restraint of Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992); RAP 16.7(a)(2). In addition, if necessary, the appellate court can order a reference hearing to develop additional evidence. RAP 16.11-.13. ¶10 Finally, the State submits that we should decline to review search and seizure claims in a PRP because the costs of applying the exclusionary ruling in a collateral attack outweighs its benefits.

We have consistently rejected the sort of balancing test that federal courts apply in applying the exclusionary rule, and we have done so because we view our exclusionary rule as “constitutionally mandated, existing] primarily to vindicate personal privacy rights,” rather than simply as a “judicially-created prophylactic measure designed to deter police misconduct.” *State v. Chenoweth*, 160 Wn.2d 454, 472 n.14, 158 P.3d 595 (2007). ¶11 In sum, for reasons stated above, we hold that a petitioner can raise an article I, section 7 claim for the first time in a PRP.

The claim must, of course, meet the established requirements for a timely PRP that we have set forth above. B. Does this court’s decision in *Jorden* apply retroactively to Nichols’s PRP? ¶12 The Court of Appeals held that Nichols was required to prove that *Jorden* applied retroactively and that it failed to do so.

In reaching that decision, the court relied on *In re Personal Restraint of Taylor*, 105 Wn.2d 683, 717 P.2d 755 (1986). The State concedes that *Jorden* applies retroactively and that the Court of Appeals erred in relying on *Taylor* because that case has been superseded.

The State’s concession is understandable since under current retroactivity analysis, a new rule of criminal procedure applies retroac\*376tively to all cases not yet final at the time of decision. In *re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992). Notably, in *St. Pierre* we explicitly rejected the test applied in *Taylor* and determined that a case that was decided a mere eight days before a petitioner’s motion for reconsideration was denied did apply retroactively.

C. Did examination of the motel registry violate article I, section 7 of the state constitution? ¶13 Nichols contends that the Seattle police officers’ warrantless examination of the Travelodge motel registry was improper under our decision in *Jorden* and that any evidence seized as a consequence of the examination should not have been admitted into evidence.<sup>1</sup> The State responds that *Jorden* is inapplicable to a case like the instant where the law enforcement officers had an individualized and particularized suspicion regarding the subject of the search. ¶14 In *Jorden*, we were called

upon to consider the lawfulness of a search that flowed from a program that had been instituted by the Lakewood Police Department.

The record showed that police officers of that city were encouraged to regularly review guest registries at motels in high crime areas in order to ascertain if there were outstanding arrest warrants for any of the persons registered there. Timothy Jorden, whose presence at a Lakewood motel was discovered via warrantless and random examination of a motel guest registry, was taken into custody under this program.

Because cocaine was found in his possession following a search incident to his arrest, he was charged with unlawful possession of the substance. ¶15 Jorden contended that Lakewood's practice of randomly viewing motel registries violated his rights under \*377article I, section 7 of the state constitution.<sup>2</sup> The State's response in Jorden was that there was no violation of the state constitution because the motel registration information was not a "private affair." Although we concluded that the activity engaged in by the Lakewood police officers was an intrusion on Jorden's private affairs, we went on to imply that our decision was limited to the type of suspicionless search that occurred in that case: We hesitate to allow a search of a citizen's private affairs where the government cannot express at least an individualized or particularized suspicion about the search subject or present a valid exception to a warrantless search.

A random, suspicionless search is a fishing expedition, and we have indicated displeasure with such practices on many occasions. Jorden, 160 Wn.2d at 130 (emphasis added). ¶16 A fair reading of our opinion in Jorden is that motel guest registries are "private affairs" only to a limited extent. Indeed, in Jorden we recognized that in prior cases we have recognized that hotel or motel guest registries were not historically considered private when police officers had an individualized and particularized suspicion regarding a guest.

Id. at 127-28. Such a tiered understanding of what is a private affair under article I, section 7 of our state constitution is not without precedent. In a number of cases 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.

In that regard, see, e.g., *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988), in which this court held that a program involving "random" road block sobriety checkpoints violated article I, section 7 because it lacked particularized and individualized suspicion, and *York v. Wahkiakum School District No. 200*, 163 Wn.2d 297, 178 \*378P.3d 995 (2008), in which we struck down a school district's program of urinalysis drug testing of student athletes where the testing was done without any individualized suspicion of drug use.

D. Claim of ineffective assistance of counsel ¶17 Nichols contends that his trial and appellate counsel were both ineffective because they failed to argue that the examination of the motel registry by the Seattle police violated article I, section 7 of our state's constitution.

To establish an ineffective assistance of counsel claim, a defendant must prove that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant such that there is a reasonable probability that the proceeding would have turned out differently without counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-95, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting *Strickland* in the criminal context). A strong presumption exists that counsel's conduct was reasonable, and the defendant bears the burden of proving that the challenged action was not a legitimate trial strategy. *Strickland*, 466 U.S. at 689; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). ¶18 In light of our conclusion that the examination of the motel registry that took place here did not violate the aforementioned provision in our state constitution, we conclude that Nichols has failed to meet his burden under *Strickland*.

III ¶19 In sum, we conclude that because the questioning of the desk clerk at the Travelodge was not random and was conducted only because the police officers had individualized suspicion that drug selling activity had taken place in room 56 of that motel, the examination of the registry that \*379took place shortly thereafter did not violate article I, section 7 of our state constitution.

The Court of Appeals is affirmed. C. Johnson, J.M. Johnson, and Stephens, JJ., concur. It appears from the record that the Travelodge desk clerk voluntarily disclosed the requested information regarding the occupant of room 56.

We, therefore, make no pronouncement as to the standing or right of the motel corporation to assert that its private affairs were violated. Article I, section 7 of the state constitution provides as follows: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."