

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JONATHAN NEAL JARNIG,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-10519
Trial Court No. 3AN-06-12798 CR

MEMORANDUM OPINION

No. 6155 — March 11, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Patrick J. McKay and Michael R. Spaan, Judges.

Appearances: Douglas O. Moody, Deputy Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. W. H. Hawley and Elizabeth T. Burke, Assistant Attorneys General, Office of Criminal Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.*

JUDGE ALLARD.

Jonathan Neal Jarnig was arrested on suspicion of stealing a car. The police searched the car and found a closed nylon bag wedged under the front passenger seat.

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

The police opened the bag without a warrant, finding various drugs and drug paraphernalia. Based on the evidence the police found in the bag, a jury convicted Jarnig of third-degree controlled substance misconduct.

Jarnig appealed his conviction, asserting that the warrantless search of the closed bag was illegal and that the superior court erred in denying his pretrial motion to suppress.¹ In our previous decision, we concluded that we could not resolve this question on the record before us, and we remanded the case to the superior court for a finding on whether the bag qualified as an item “immediately associated” with Jarnig as required by the Alaska Supreme Court’s decision in *Crawford v. State*.²

On remand, the superior court found that the bag was not an item that was immediately associated with Jarnig’s person, and that the warrantless search of the bag was therefore an invalid search incident to arrest under *Crawford*.³

The State now challenges the superior court’s ruling that the bag was not “immediately associated” with Jarnig. For the reasons explained here, we affirm the superior court’s decision. Because Jarnig’s felony drug conviction was based on the fruits of the invalid search, Jarnig’s conviction is reversed.

¹ *Jarnig v. State*, 309 P.3d 1270, 1272 (Alaska App. 2013).

² 138 P.3d 254 (Alaska 2006).

³ On remand, the superior court also ruled that the search was not a valid weapons search under *Arizona v. Gant*, 556 U.S. 332 (2009), and that a good faith exception did not apply in this case. The State has not challenged those rulings on appeal.

Why we uphold the superior court's ruling that the bag was not an item "immediately associated" with Jarnig

Normally, in the absence of exigent circumstances, the police must seize a closed container found in a vehicle and obtain a warrant before searching its contents.⁴ But as the supreme court explained in *Crawford v. State*, a warrant is not required if the container is an item "immediately associated" with the arrestee and within his immediate control at the time of the arrest.⁵ When both of these conditions are met, the closed container may be searched incident to the arrest even in the absence of exigent circumstances.⁶ The rationale behind this rule is that searching a container that is "immediately associated" with the arrestee involves no greater intrusion into the arrestee's expectations of privacy than the arrest itself.⁷

Applying this reasoning, the Alaska Supreme Court held that the search of an arrestee's purse incident to her arrest involved no greater intrusion into the arrestee's reasonable expectations of privacy than a search of the person, because purses "are often worn on the person and generally serve the same function as clothing pockets."⁸ By contrast, the supreme court struck down the warrantless search of a box the defendant had just received from air freight and was carrying at the time of his arrest, ruling that

⁴ *Id.* at 259.

⁵ *Id.* at 258-59.

⁶ *Id.* at 259.

⁷ *Id.* at 260; *Hinkel v. Anchorage*, 618 P.2d 1069, 1071-72 (Alaska 1980) (discussing *United States v. Berry*, 560 F.2d 861, 864 (7th Cir. 1977), *vacated on other grounds*, 571 F.2d 2 (7th Cir. 1978)).

⁸ *Hinkel*, 618 P.2d at 1071.

the box was not a container “immediately associated” with the defendant, and that there were no exigent circumstances to justify the search.⁹

Relying on this precedent, the supreme court in *Crawford v. State* ruled that a vehicle’s center console is “immediately associated” with the driver because it is permanently located next to the driver’s seat and, like a pocket, “is commonly used to hold money, a cellular telephone, and personal hygiene items.”¹⁰ The court declared that unless the center console is locked, “we can see no reason why a driver would have a greater expectation of privacy in the center console than in his or her purse or wallet.”¹¹

Here, the State argues that the nylon bag found wedged under the front passenger seat of the car Jarnig was driving was “immediately associated” with Jarnig because it was within his reach and shared some of the physical characteristics of a purse (*i.e.*, it was small, transportable, and soft-sided). But, as the superior court found, there were also aspects of the bag that made it unlike a purse — it had no handles and was not carried close to Jarnig’s person, but rather it was wedged deep under the passenger seat.

Under *Crawford*, the analysis of whether a container is “immediately associated” with the arrestee does not hinge solely on the container’s physical resemblance to a purse but rather on evidence of the container’s function and the arrestee’s reasonable expectations of privacy with respect to the container.¹² Thus, a container, like an unlocked center console, that functions as a substitute pocket may be “immediately associated” with the person even if it does not look like a purse and is not

⁹ *Metcalf v. State*, 593 P.2d 638, 639-40 (Alaska 1979).

¹⁰ 138 P.3d at 260.

¹¹ *Id.*

¹² *Id.*

normally carried on the person like a purse. As the Texas Court of Appeals explained in *LaLande v. State*:¹³

The fixed description of the container, while a factor to be considered, is not solely determinative of its being subjected to this type of search. The nature of the object, its customary use as recognized by society's expectations, its customary use by the subject, its actual use at the time of arrest, and society's reasonable view of such actual use are all part of the Fourth Amendment equation. Some objects will virtually always be either susceptible or not susceptible to search incident to arrest. In-pocket wallets are a clear example. Purses, attache cases, and suitcases define a group of objects in which contextual interpretation is more flexible.¹⁴

In this case, the superior court found that the bag was not readily identifiable from its external appearance as a container a person would use to store items that are normally kept in a purse or a pocket.

The State points out that once the police opened the bag, they discovered that it contained items that might be kept in a purse or a pocket (*e.g.*, cell phones and a coin purse). But we do not consider this evidence because it was derived from the challenged search.¹⁵

We note that the detective who searched the bag did not articulate any specific reason to believe Jarnig was using the bag for this purpose rather than to store, for example, a tablet computer or vehicle service records. Moreover, Jarnig did not have

¹³ 651 S.W.2d 402 (Tex. App. 1983).

¹⁴ *Id.* at 405.

¹⁵ *See Howard v. State*, 209 P.3d 1044, 1051 (Alaska App. 2009) (Mannheimer, J., concurring); *cf. Newhall v. State*, 843 P.2d 1254, 1259 (Alaska App. 1992) (“[A] police officer may open a package under the plain view theory only if the contents of the container were identifiable to a virtual certainty[.]”).

the bag on him at the time of his arrest; it was under the front passenger seat, wedged under the lever used to move the seat forward and backward. According to the detective's testimony at the evidentiary hearing on remand, Jarnig would have had to use force to remove the bag from his position in the driver's seat.

Given these circumstances and the superior court's findings on remand, we conclude that the nylon bag was not an item "immediately associated" with Jarnig and that the warrantless search of the bag was therefore not a valid search incident to arrest under *Crawford*.

Conclusion

Jarnig's conviction for third-degree misconduct involving a controlled substance is REVERSED.