No. 46960-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

THEODORE ROOSEVELT RHONE,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 03-1-02581-1
The Honorable Edmund Murphy, Judge

REPLY BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I. ARGUMENT & AUTHORITIES 1

II. CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Arizona v. Gant,
556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).....3

State v. Garcia, 140 Wn. App. 609, 627, 166 P.3d 848 (2007).....4

State v. Gocken, 71 Wn. App. 267, 857 P.2d (1993).....4

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985) 4

State v. Ortega, 177 Wn.2d 116, 297 P.3d 57 (2013).....2

State v. Rhone, 137 Wn. App. 1046 (2007).....1, 4

State v. Roy, 147 Wn. App. 309, 195 P.3d 967 (2008).....1, 2

Terry v. Ohio,
392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) 3

OTHER AUTHORITIES

RAP 2.5 .....1, 2

I. ARGUMENT & AUTHORITIES

In its Brief of Respondent, the State invites this Court to revisit its prior holding in Rhone's direct appeal, wherein the Court held that Rhone was under arrest at the time that Deputy Shaffer conducted a search of the automobile in which Rhone had been riding.[1] (See Brief of Respondent at 12-17) The State refers to RAP 2.5(c)(2), which states:

> "The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review."

"Because the rule uses the term 'may,' application of RAP 2.5(c)(2)'s exception to the law of the case doctrine has been characterized as discretionary, rather than mandatory." State v. Roy, 147 Wn. App. 309, 314-15, 195 P.3d 967 (2008) (citing Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005)). This Court should exercise its discretion and decline the State's invitation to revisit its prior holding.

First, the State does not contend that the law has changed, such that the Rhone Court's original holding is no longer valid. Rather, the State argues that the Rhone Courts original holding was

[1] State v. Rhone, 137 Wn. App. 1046 (2007).

incorrect under then-existing law, but the State had no interest at the time in correct the error and so allowed the incorrect holding to go unchallenged. (See Brief of Respondent at 15-16) This is not exception to the law of the case doctrine under RAP 2.5. Rather, under the plain terms of RAP 2.4(c)(2), review of an earlier decision may be granted "**where the law has changed between the current and former proceedings**." Roy, 147 Wn. App. at 315 (emphasis added).

Furthermore, the relevant law has **not** changed since the time that the Rhone Court issued its decision in Rhone's direct appeal. Despite the State's claims to the contrary, there is still an objective component to the determination of whether a citizen is "under arrest." For example, in State v. Ortega, 177 Wn.2d 116, 128, 297 P.3d 57 (2013), our State Supreme Court recently explained:

> "An arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person." **The inquiry is whether a reasonable person under the circumstances would consider himself or herself under arrest. Examples of conduct that would cause a reasonable person to believe he or she was under arrest include handcuffing the suspect, placing the suspect in a patrol vehicle for transport**, and telling the suspect that he or she is under arrest.

(Emphasis added) (quoting State v. Patton, 167 Wn.2d 379, 387, 219

P.3d 651 (2009) (quoting 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 3104, at 741 (3d ed. 2004)); citing State v. Reichenbach, 153 Wn.2d 126, 135, 101 P.3d 80 (2004); State v. Radka, 120 Wn. App. 43, 49–50, 83 P.3d 1038 (2004)).

Accordingly, this Court should adhere to its prior decision, in Rhone's direct appeal, that Rhone was under arrest before Deputy Shaffer searched the Camaro. And, as argued in detail in Rhone's Opening Brief of Appellant, this Court should also find that the trial court was bound by that holding under the law of the case doctrine; and that under Gant and its progeny, the search was constitutionally invalid.[2] (See Opening Brief of Appellant at 15-18)

But even if this Court finds that the search was not conducted incident to arrest, but was instead a protective Terry search,[3] this Court should still suppress the evidence found as a result. As argued in Rhone' Opening Brief, the search exceeded the proper scope of a protective Terry search. (See Opening Brief of Appellant at 18-21)

The State also argues that any error in failing to grant Rhone's

[2] Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).
[3] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

pretrial motion to suppress is harmless.[4] (Brief of Respondent at 17-24) The error is harmless if the untainted evidence is "so overwhelming that it necessarily leads to a finding of guilt." State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Admission of the evidence seized from the Camaro was not harmless in this case. The untainted evidence presented by the State to establish that Rhone possessed a firearm at the time of the robbery was that Isaac Miller saw what he believed to be a gun on Rhone's lap, and Phyllis Burg saw a gun in a bag after Miller threw money into the Camaro. And there was no untainted evidence presented to establish that Rhone possessed a controlled substance.[5] This is certainly not overwhelming evidence.

Without proof that there was in fact a gun in the Camaro, any reasonable jury could have doubted that Miller and Burg actually saw Rhone with a gun. And, without evidence that Deputy Shaffer found crack cocaine inside a bag in the Camaro, a reasonable jury could not have found sufficient proof that Rhone possessed a controlled

---

[4] This Court applies a harmless error analysis when the trial court improperly admits evidence that is a product of a warrantless search. *See, e.g.,* State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); State v. Garcia, 140 Wn. App. 609, 627, 166 P.3d 848 (2007); State v. Gocken, 71 Wn. App. 267, 279 n. 10, 857 P.2d (1993).

[5] *See* State v. Rhone, 137 Wn. App. 1046 at *2 (2007).

substance.

II. CONCLUSION

For the reasons argued above and in the Opening Brief of Appellant, this Court should hold that the search of the Camaro, conducted when all three occupants of the Camaro were handcuffed and secured in police vehicles, is not justified under any exception to the warrant requirement. Rhone's convictions and firearm enhancements should be vacated, the Superior Court's denial of Rhone's motion to suppress should be reversed, and the evidence collected as a result of the warrantless search should be suppressed.

DATED: September 22, 2015

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Theodore R. Rhone

CERTIFICATE OF MAILING

I certify that on 09/22/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Theodore R. Rhone, #708234, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

September 22, 2015 - 4:33 PM

Transmittal Letter

Document Uploaded: 1-469600-Reply Brief.pdf

Case Name: State v. Theodore R. Rhone
Court of Appeals Case Number: 46960-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: sccattorney@yahoo.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us