No. 46960-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II.

STATE OF WASHINGTON,
Respondant,

v.

THEODORE ROOSEVELT RHONE,
Appellant.

STATEMENT OF ADDITIONAL GROUNDS PURSUANT TO RAP 10.10

Theodore Roosevelt Rhone DOC# 708234,
Appellant
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA. 98520

(Cover)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

Theodore R. Rhone, Appellant	COA No. 46960-0-II
v.	
State of Washington, Respondant.	Statement of Add'l Grounds Pursuant To RAP 10.10(e)

I. TIMELINESS

Petitioner, Theordore R. Rhone brings this Statement of Additional Grounds, ("SAG"), pursuant to RAP 10.10(e), which allows him to file his SAG within 30-days after having received a copy of the transcript, ("VRP"), even if it is beyond the normal time to file under RAP 10.10. However, this SAG being filed, in accordance with GR 3.1, within 30-days of reciept of the VRP, thus it should be considered timely filed in the court.

II. STATEMENT OF THE ISSUES

1. Did the trial court abuse it's discretion by not suppresseing all evidence seized in a warrantless automobile search by Ofr. David Shaffer, after having removed Mr Rhone from

the car placed in a situation indistinguishable from arrest, secured and handcuffed in a police car for an extended period, and having no ability to leave the scene or to threaten officer safety, no the ability hide or destroy evidence, when this case had been remanded back to the trial court by a unanimous panel decision by the Washington Supreme Court directing the trial court to hold a suppression hearing and make ruling consistent with the United States Supreme Court's ruling in Arizona v. Gant 556 US 332 (2009) and the Washington Supreme Court's ruling in State v. Patton 167 Wn2d 379 (2009)?

2. Did the trial court abuse its discretion, demonstrating bias and violating the Appearance of Fairness Doctrine as well as Mr Rhone's federally protected right to Due Process and Equal Protection under the Fourteenth Amendment, by failing to follow the Wasington Supreme Court's directions upon remand to hold a suppression hearing and make ruling consistent with the United States Supreme Court's ruling in Arizona v. Gant 556 US 332 (2009), and the Washington Supreme Court's ruling in State v. Patton 167 Wn2d 379 (2009)?

3. Did the trial court abuse it's discretion when it failed to follow the Washington Supreme Court's directions upon remand for a suppression hearing with ruling consistent with Arizona v. Gant 556 US 332 (2009) and State v. Patton 167 Wn2d 379 (2009).

But instead allowed the Pierce County Prosecutor's Office, which had already conceeded and admitted to the Washington Supreme Court that the search of the automobile was after Mr Rhone had been placed under arrest to asserting that it was a "Terry Stop" and making ruling under Terry not Gant or Patton?

4. Was the Pierce County Prosecutor's Office judicially estopped from asserting that the stop and search of the automobile that Mr Rhone had been in was a "Terry Stop" after having already admitting and conceeding in proceedings before the Washington Supreme Court that the warrantless search of the car was after the occupants were placed under a state of arrest, and did the trial court abused its discretion by diregarding the law of the case, and the Washington Supreme Court's directions upon remand for a suppression hearing?

III. STATEMENT OF FACTS

Appellate, Theodore R. Rhone, incorporates by reference all facts alleged by his Appellate Attorney, Stephanie C. Cunningham and those previously pleaded in prior proceedings as if fully presented herein. Mr Rhone further alleges that:

1. That in its Answer Brief filed with the Washington Supreme

Court responding to Mr Rhone's Motion for Discretionary Review the State, as represented by the Pierce County Prosecutor's Office admitted that the search was incident to arrest.

2. That in making its unanimous ruling remanding Mr Rhone's case back to the Pierce County Superior Court for a suppression hearing giving directions to make ruling "consistent with Gant and Patton", it by extension and corrollary ruled that the search was incident to arrest.

3. The Pierce County Prosecutor's Office changed its position from its admission of "search incident to arrest", and argued several conflicting positions to the Pierce County Supreior Court.

4. The Pierce County Superior Court did not follow the Washington Supreme Court's directions regarding the suppression hearing.

5. No responable person having knowledge of the case history, facts, and law in this action could possibly find that Mr Rhone recieved a fair proceeding upon remand in the Pierce County Superior Court. Nor would a reasonable man believe a fair proceeding in the Pierce County Superior Court could be had by Mr Rhone in the future given the course of the proceedings after remand.

IV. ARGUMENT & PRESENTMENT OF LAW

Appellate, Theodore R. Rhone also incorporates by reference all facts and arguement presented in Opening Brief by his Appellate Attorney, Stephanie C. Cunningham as if fully argued herein. Mr Rhone further alleges that:

1. The Appellate Court Should Apply Judical Estoppel To It's Review of The Suppression Hearing

It has been long settled what the objective standard of what consititutes a person being under "arrest". If the action was taken by a police officer, was not consentual on the detained person, and a reasonable person would not have believed they were able to leave, they are under "arrest". See e.g., Brendlin v. Calif., 551 US 249, 254-55, 127 SCt 2400, 168 LEd2d 132 (2007)(collecting cases on what consitutes a "sezure" or "arrest" under the Fourthen Amendment). See also cf., Yarborough v. Alverado, 541 US 652, 653, 124 SCt 2140, 158 LEd2d 938 (2004)("'The Miranda custody test is an objective test... was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' Thompson, supra, at 112, 116 SCt 457.").

During the Discretionary Review Process, Mr Rhone briefed this issue. The State, represented by the Pierce County Procesecutor's Office admitted and conceeded the fact that the search was "incident to arrest" in its Answer to Appellant Rhone's Motion for Discretionary Review. As such the State should be Judicially Estopped from changing it's position in later proceedings. See e.g., Keller v. Estate of Keller, 172 WnApp 562, 579-80, 291 P.3d 906 (2012)

> "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. Ackison v. Ethan Allen Inc., 160 Wn2d 535, 538, 160 P.3d 13 (2007). The purpose of the doctrine is to protect the integrity of the judicial process. New Hampshire v. Maine, 532 US 742, 749, 121 SCt 1808, 149 LEd2d 968 (2001)."

See also Adelphia Recovery Trust v. Goldman Sachs & Co., 2014 WL 1327864, 4 (2nd Cir 2014)(collecting cases on judicial estoppel). Now having admitted to the Washington Supreme Court in its Answer that the search was "incident to arrest" the Pierce County Prosecutor took two inconsistent positions the first is that the search was proper under inevitable discovery as an impound search, the second was that the search pertained to a "Terry" stop. (See VRP 37-42). Both positions are inconsistent with the State's admission to the Washingotn Supreme Court in Discretionary Review and should be judicially estopped. The shift in position also calls in to question the fundimental fairness of the proceedings upon remand.

Additionally, this court should consider that in addition to the State's admission of "search incident to arrest", the Supreme Court's ruling was for remand for an evidentiary hearing and ruling "consistent with Gant and Patton". It should also be note that much of the rule of law comes from "corrollary rights" that is laws that naturally cerives from a ruling. If A+B=C, then C-A=B. In this case in ordering that the proceedings and ruling be "consistent with Gant and Patton", the Washington Supreme Court made a defacto ruling that the search was as a matter of law incident to arrest. This is now the law of the case and binding on all subsequent proceedings. See e.g., Bank of America v. Owens, 177 WnApp 181, 189-90, 311 P.3d 594 (2013)

> "An appellate court's mandate is binding on the lower court and must be strictly followed. While a remand 'for further proceedings' 'signals this court's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case,' the trial court cannot ignore the appellate court's specific holdings and directions on remand. Also RAP 12.2 provides in part: 'Upon issuance of the mandate of the appellate court as provided in RAP 12.5, the action or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in this action in any court.' These principles embody the law of the case doctrine. Under that doctrine, 'once there is an appellate holding enuncing a principle of of law, that holding will be followed in later stages of the same litigation.' The law of the case binds the parties, the trial court, and subsequent appellate courts to the holding of an appellate court in a prior appeal until such holdings are authoritatively overruled."

See also State v. Strauss, 119 Wn2d 401 412-13, 832 P.2d 78 (1992). The trial court in not following the law of the case, consistent with the Washington Supreme Court's ruling violates Mr

Rhone's fundimental Fourteenth Amendment right to Due Process and Equal Protection and calls into question the fundimental fairness of the proceedings upon remand.

2. The Trial Court Abused It's Discretion In Directing The Proceedings To A Terry Analysis

See e.g., Wilson v. Hurley, 137 Wn2d 500 (1999)

> "[A] trial court's decision 'will not be disturbed on review except on a showing of abuse of discretion, that is, discretion that is manifestly unreasonable, or exercised on untennable grounds, or for untennable reasons.' State ex rel Carrol v. Junker, 76 Wn2d 12, 26... (1971)."

See also In re Marriage of Freeman, 169 Wn2d 664 (2010)(same).

A. A Court Can Abuse It's Discretion In Many Ways!

See e.g., State v. Dixon, 159 Wn2d 65 (2006)(En Banc) where the court said:

> "A decision is based 'on untennable grounds' or made 'for untennable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. A decision is 'manifestly unreasonable' if the court, dispite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take,' and arrives at a decision outside the range of acceptable choices.' State v. Rohrich, 149 Wn2d 647, 654... (2003)(citations omitted)."

B. Federal Courts Have Also Adopted

This View Of Abuse Of Discretion

See e.g., A.D. v. Calif. Hwy. Patrol, 712 F3d 446 (9th Cir 2013)("'A [ ] court by definition abuses its discretion when it makes an error of law.' Koon v. United States, 518 US 81, 100, 116 SCt 2035, 135 LEd2d 392 (1996)."). See also e.g., Berger v. Home Depot USA, 741 F3d 1061, 1067 (9th Cir 2014) saying:

> "A [ ] court abuses its discretion when it 'relies upon an improper factor, omits consideration of a factor entitled to subsequent weight, or mulls the correct mix of factors but makes a clear error of judgement in assaying them.' Wolin, 617 F3d at 1171. In addition, 'an error of law is an abuse of discretion.' Yokoyama, 594 F3d at 1091 (emphasis in original)."

See also e.g., Korab v. Fink, 2014 WL 1302614, 4 (9th Cir 2014),

> "[A] court would necessarily abuse its discretion if it 'based its ruling on an erroneous view of law or on a clearly erroneous assessment of the evidence.' Roe v Anderson, 134 F3d 1400, 1402 (9th Cir 1998)(quoting Cooter & Gill v. Hartmax Corp., 496 US 384, 405, 110 SCt 2447, 100 LEd2d 359 (1990)."

C Abuse Of Discretion Applies To

Proceedings Upon Remand

From A State Supreme Court

See e.g., Williams v. Leone & Keeble, Inc., 170 WnApp 696 704,

285 P.3d 906 (2012) where the court main:

> "[N]umerous decision hold that when the Supreme Court remends to a lower court, the lower court interferes with the Supreme Court's jurisdicition if the lower court makes a decision outside the specific direction to the lower court contained in the remand. Garrett v. Dailey, 49 Wn2d 499, 500, 304 P.3d 681 (1956); Robert Morgan Organ Co. v. Armour, 179 Wash. 392, 396, 38 P.2d 257 (1934); Frye v. King County, 157 Wash. 291, 293-94, 289 P. 16 (1930)

3. The Appearance of Fairness Doctrine

Judges must not only be impartial, but also must appear impartial because judicial fairness is violated when the appearance of fairness is ignored. State ex rel McFarren v. Justice Court of Evangeline Starr, 32 Wn2d 544, 549, 202 P.2d 927 (1949)("'The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of the courts.'" (quoting State ex rel. Barnard v. Bd. of Educ., 19 Wash. 8, 17, 52 P. 317, 320 (1698))); Diimmel v. Campbell, 68 Wn2d 697, 699, 414 P.2d 1022 (1966)("It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties."). This is more then an idealistic sentiment. "Deference to the judgements and rulings of court's depends upon public confidence in theintegrity and independance of the judges." CJC, Cannon 1, cmt.

The United State Supreme Court has repeatedly articulated these principles. When the high Court held, "'every procedure which would offer a possible temptation to the average man as a judge... not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law,'" it did not intend its holding to be limited to the facts of that case. In re Murchison, 349 US 133, 136, 75 SCt 623, 99 L.Ed2d 1955 (1955)(emphasis added)(quoting Tumey v. State of Ohio, 272 US 510, 532, 47 SCt 437, 444, 71 LEd 749 (1927)).

A. The Appearance Of Fairness Is An Objective Standard

See e.g., State v. Finch, 181 WnApp 387, 398-99, 326 P.3d 148 (2014)

> "A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing, state v. Bilal, 77 WnApp 720, 722, 892 P.2d 674 (1995). We analyze whether a judge's impartiality might reasonably be questioned under an objective test that assumes a reasonable person to know and understand all relevant facts. Sherman v. State, 128 Wn2d 164, 205-06, 905 P.2d 355 (1955)."

See also e.g., BMAC v. Everett Chevrolet, 179 WnApp 126, 317 P.3d 1074, 1087 (2014)

> "It is 'fundimental to our system of justice' that judges are fair and unbiased. Moverover, '[t]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of actual bias or prejudice.' 'The law goes further than requiring an impartial judge; it also requires that the judge

appear to be impartial.' even a mere suspicion of. irrgularity, or an appearance of bias or prejudice' should be avoided by the judiciary... The 'critical concern in determining whether a proceeding satisfies the appeance of fairness doctrine is how it would appear to a reaonably prudent and disinterested person.'" (citations & footnotes omitted).

See also State v. Gamble, 168 Wn2d 161, 167-68, 225 P.3d 973 (2010)(to like effect).

B. Federal Courts also Have A View On The Appearance Of Fairness

See e.g., Sanders County Republican Centeral Committee v. Bullock, 698 F3d 741 (9th Cir 2012)

> "(citing Wolfson v. Bremmer, 822 FSupp2d 925, 931 (D.Ariz.2011)('Public confidence in the independance and impartiality of the judiciary is eroded if judges... are percieved to be subject to political influence.'); (Siefert v. alexander, 608 F3d 974, 985-86 (7th Cir 2010)('Due Process requires both fiarness and the appearance of fairness in the tribunal.')."

See also, United States v. Index Newspapers LLC., 766 F3d 1072, 1097 (9th Cir 2014)

> "citing: 'Press-Enterprize Co. v. Superior Court, 464 US 501, 508, 104 SCt 819, 78 LEd2d 629 (1984)(Press-Enterprise I)("Openess thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.").

3. The Appearance Of Fairness Doctrine And Abuse Of Discretion As Applied To Mr Rhone's Supression Hearing

Now, it cannot be said that the suppression hearing, after remand with directions would appear to have been fair to a reasonable and impartial man with knowledge of the history of the case, law, and facts. A reasonable and disinterested man would have to conclude that the trial judge placed his thumb firmly on the scales of justice, abusing his discretion, and violating Mr Rhone's Fourteenth Amendment right to Due Process and Equal Protection. This includes:

(1) The Trial Court allowing the Pierce County Prosecutor's Office to take radically inconsistent positions from those taken in the Discretionary Review before the Washington Supreme Court. This allowed the suppression proceeding to be steered into the turbulant waters of a "Terry" analysis, and ignores the directions of the Washington Supreme Court's remand. It also reeks of bias and cannot pass the "smell test". Mr Rhone should have been judicially estopped from this situation and no deffernce given to the prosecutor's office. It constitutes an abuse of discretion on the part of the court; prosecutorial misconduct; and implicates a violation of Mr Rhone's Sixth Amendment right to the effective assistance of counsel when trial counsel failed to object and assert estopple.

(2) The Trial Court abused its discretion in several other ways which also implicate the appearance of fairness doctrine:

(a) making errors of law;

(b) Making error of fact;

(c) Comming to conclusions outside the range of acceptable choices; and

(d) Disregarding the Supreme Court's remand directions and law of the case.

There can be no doubt that the trial court both abused its discretion and violated the appearance of fairness doctrine by its actions at the suppression hearing upon remand from the Washington Supreme Court. We can have no rule of law or even pretense of the rule of law when lower courts disregard direction from a higher court. Especially when the higher court involved is the Washington Supreme Court. Who with a straight face can claim that a reasonably informed, independant, and disinterested party could feel the proceedings were fair given the assumption that they are aware of the history of the case, law and facts involved.

The trial court also made errors of both law and fact. The well-established record is that Mr Rhone and all other parties were forcably removed from the car they were in, handcuffed, and in custody in a police car for an extended period of time. This is

a seizure, and by extension arrest under the United States Supreme Court's jurisprudence. See Brendlin v. Calif., 551 US at 254-55. It would also require that Mr Rhone be "Mirandized" under Yarbourough v. Alverado, 541 US at 653. That being the case, and given the State's admission to the Washington Supreme Court that the search was "incident to arrest", and the Supreme Court's ruling to hold a suppresseion hearing and make ruling "consistent with Gant and Patton", a reasonable perosn would have to conclude that the rule of law and substantive justice were forced to be check at the door of the court.

Gant is clear. In situations like the one that Mr Rhone was placed in violate the Constitution and require all evidence be suppressed. It was also clear that the lower courts and states had been doing it wrong for several nearly half a century. Patton acknowledges Gant and incorporates our State's history that article 1, section 7 provide greater protection then that of the Fourth Amendment, and that the inevitable discovery doctrine is inconsistent with the Washington Constitution. Either way all evidence from the car should have been suppressed, including the testimony from the people derived from the search.

Now it is incubent on this Court to correct the trial courts obvious and grevious errors. In the interest of justice this Court should:

1. Overturn the trial court's ruling from the suppression hearing.

2. Suppress all evidence whether it be physical, documentary, or testimonial that was derived from the warrantless search incident to arrest.

3. Reverse Mr Rhone's conviction because it cannot stand without the wrongfully-obtained evidence with prejudice. and

4. Order Mr Rhone's immediate release for the custody of the State of Washington.

V. OATH

I, Theodre R. Rhone, appellant, do hereby declare under penalty of perjury under the laws of the State of Wsehington that the forgoing is true and correct tot he best of my knowledge.

Dated the 10th day of June, 2015 at the Stefford Creek Corrections Center, Aberdeen, Washington.

Respectfully Submitted,

6-10-15

Theodure R. Rhone DOC# 708234
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA. 98520

DECLARATION OF MAILING
PURSUANT TO GR 3.1

I, Theodore R. Rhone, Appellant, declare and say: That on the 10th day of June, 2015 I deposited the following document(s) in the Stafford Creek Corrections Center legal mail system, postage pre-paid, United States Mail under cause number COA No. 46960-0-II: Stetement of Addional Grounds fro Review Pursuant to RAP 10.10, or a copy thereof addressed to the following:

Washington Court Of Appeals
Divsion II.
950 Broadway, Ste. 300
Tacoma, WA. 98402-4454

Pierce County Prosecutor's Office
930 Tacoma Ave. S.
Tacoma, WA. 98402

Stephanie C. Cunningham
4616 25th Ave NE. No.552
Seattle, WA. 98105

I, Theodore R. Rhone declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of June, 2015 at the Stafford Creek Corrections Center, Aberdeen, Washington.

6-10-15

Theodore R. Rhone DOC# 708234
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA. 98520

(GR 3.1)