

No. 62076-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
DONALD JORDAN,
Appellant.

FILED U.S. DIV. #1
COURT OF APPEALS
STATE OF WASHINGTON
2009 SEP 16 AM 11 48

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael Heavey

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY UNDER GANT OR ARTICLE I, SECTION 7

In his opening brief, Mr. Jordan argued that in light of Arizona v. Gant, 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the search of Ms. Flygare's vehicle incident to Mr. Jordan's arrest violated Mr. Jordan's rights under Article I, section 7 of the Washington State Constitution and the Fourth Amendment of the United States Constitution. Br. of App. at 32-48.

The State first responds that even if the vehicle search was unconstitutional, this Court should not apply the exclusionary rule because the officers who conducted the search were relying in good faith on pre-Gant case law. Br. of Resp. at 30-46. However, this argument lacks merit because the Gant Court explicitly rejected this argument, and Washington Courts have repeatedly rejected the good faith exception to the exclusionary rule.

a. The Gant Court explicitly rejected the argument that officers are entitled to rely on pre-Gant case law. In Gant, the Court specifically rejected the government's and the dissent's argument that officers were entitled to rely on the continued validity of the Belton rule. Gant, 129 S.Ct. at 1722-23 (citing New York v.

Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)). The Court reasoned,

Although it appears that the State's reading of Belton has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the Chimel exception. [. . .] The fact that the law enforcement community may view the State's version of the Belton rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected.

Id. (citing Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). For the same reasons, this Court should reject the application of the good faith exception in this case.

b. Washington Courts consistently reject the good faith exception to the exclusionary rule. The State also incorrectly argues that the good faith exception to the exclusionary rule applies under the Washington State Constitution. Br. of Resp. at 31-51. To support this notion, the State cites several federal cases, while at the same time acknowledging, "the federal subjective 'good faith' exception to the rule [is] not applicable in Washington." Br. of Resp. at 39, (citing State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).

Washington Courts have consistently rejected the federal good faith exception to the exclusionary rule. See, e.g., State v. Eisfeldt, 163 Wn.2d 628, 639, 185 P.3d 580 (2008); State v. Williams, 148 Wn.App. 678, 697 n. 18, 201 P.3d 371 (2009); State v. Winterstein, 140 Wn.App. 676, 690, 166 P.3d 1242 (2007); State v. Morse, 156 Wn.2d 1, 10, 12, 123 P.3d 832 (2005). Washington Courts reject the good faith exception because,

Unlike the Fourth Amendment, article I, section 7 “focuses on the rights of the individual rather than on the reasonableness of the government action.” [. . .] “while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7, we focus on expectations of the people being searched.” The detectives' beliefs, no matter how reasonably held, cannot be used to validate a warrantless search under the Washington Constitution.

Eisfeldt, 163 Wn.2d at 639 (quoting Morse, 156 Wn.2d at 10). In White, the Washington Supreme Court established that the greater privacy protections of Article I, section 7 require that courts apply the exclusionary rule regardless of whether suppression will result in deterrence of police misconduct. White, 97 Wn.2d at 109-10.

The Court reasoned,

We think the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other

words, the emphasis is on protecting personal rights rather than on curbing governmental actions. [. . .] The important place of the right to privacy in Const. art. 1, s 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow.

White, 97 Wn.2d at 110.

The State ignores Washington Courts' rejection of the good faith exception to the exclusionary rule, and while mistakenly relying on State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), and State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006), argues that officers are entitled to rely on presumptively valid statutes and case law unless the law is flagrantly unconstitutional. Br. of Resp. at 41-43, 51. However, Washington Courts' consistent rejection of the good faith exception to the exclusionary rule is not affected by Potter or Brockob, both of which deal with the question of whether a probable cause determination is altered by a statute later found to be unconstitutional. These cases analyze the question of whether there was probable cause to conduct a search in the first place and not the scope of a Washington state citizen's privacy rights. By concluding police had probable cause, the Potter and Brockob courts both concluded no constitutional violation had

occurred, and thus applied neither the exclusionary rule nor any exceptions to that rule.

In Potter and Brockob, the defendants were arrested based on DOL records indicating they were driving with a suspended license. Potter, 156 Wn.2d at 838-39; Brockrob, 159 Wn.2d at 321. The Court found that the arresting officers were entitled to rely on Department of Licensing (DOL) records to establish probable cause to arrest the defendants, even though the statutes upon which the suspensions were based were subsequently invalidated. Potter, 156 Wn.2d at 843; Brockrob, 159 Wn.2d at 342. The Potter Court reasoned that DOL records are presumed reliable, and

Police must have reliable information about the status of an individual's license, not necessarily the specific basis for which an individual's license was suspended.

Potter, 156 Wn.2d at 843. In Brockob, the Court emphasized that its holding was based on the reasoning in Potter, and not on a good faith exception to the exclusionary rule. 159 Wn.2d at 342, 345.

Therefore, these cases apply only to an officer's reliance on a presumptively valid statute in order to establish probable cause to arrest, and they do not affect the good faith exception to the exclusionary rule. Rather, the State's reliance on these cases acts

as a mere diversion from the long-held, clear rule that the good faith exception to the exclusionary rule does not apply in Washington. For these reasons, this Court should reject the State's request to apply the good faith exception to the exclusionary rule.¹

2. THE VEHICLE SEARCH VIOLATED MR. JORDAN'S RIGHTS UNDER ARTICLE I, SECTION 7

In his opening brief, Mr. Jordan argued that in light of Gant, this Court should hold that Article I, section 7 requires that the search incident to arrest exception apply only when the arrestee is physically able to reach items inside the vehicle, and that Gant's evidentiary exception does not exist under Article I, section 7 jurisprudence. Br. of App. at 32-43. As a result, the search incident to arrest exception under Article I, section 7 does not justify the vehicle search here, because Mr. Jordan was handcuffed and secured in a patrol car during the search.

¹ The State also argues that this Court should weigh the costs and benefits of suppression of this evidence. Br. of Resp. at 40, 46-48 (citing State v. Bond, 98 Wn.2d 1, 14, 653 P.2d 1024 (1982)). However, such an analysis is unnecessary and inappropriate here because

When evidence is obtained in violation of the defendant's constitutional immunity from unreasonable searches and seizures, there is no need to balance the particular circumstances and interests involved.

Bond, 98 Wn.2d at 11 (citing Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)). The only reason the Bond Court balanced the costs and benefits is because, in that case, the violation fell short of a constitutional violation, which is not true here. Id.

a. Gant abrogated Stroud. The State responds by arguing that Gant does not abrogate Stroud because Stroud was not based on federal case law, but rather on the Washington Constitution. Br. of Resp. at 60-61 (quoting State v. Stroud, 106 Wn.2d 144, 149, 720 P.2d 436 (1986)). However, this is incorrect. In Stroud, the Court concluded,

We agree with the Supreme Court's decision to draw a clearer line to aid police enforcement, although because of our state's additional protection of privacy rights we must draw the line differently than did the United States Supreme Court. The Supreme Court, in Belton, held that the dangers to the officers and the possible destruction of evidence justified the search of all containers in the passenger compartment of a car pursuant to a lawful custodial arrest. Likewise, in United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), if the officers have probable cause to believe the trunk has contraband, they may search it also. We agree with the Court that these exigencies exist. However, because of our heightened privacy protection, we do not believe that these exigencies always allow a search. Rather, these exigencies must be balanced against whatever privacy interests the individual has in the articles in the car.

106 Wn.2d at 151. The Court went on to hold that the Belton rule applies in Washington, except where the officers encounter a locked container or glove compartment. Id. at 152. Thus, the Stroud holding was based on federal case law, except for the caveat that the greater protections of Article I, section 7 require that

police obtain a warrant to search locked containers inside the vehicle.

This “divergence from the decisions of federal courts [was] based on [the] heightened protection of privacy required by our state constitution.” Id. at 148-50. Therefore, it would be contrary to the Court’s rationale to interpret Stroud to require a continued adherence to the Belton rule in Washington despite the rejection of Belton by the United States Supreme Court.

b. A search incident to arrest exception based on the *Chimel* exigencies would be a workable, easily applicable rule. The State argues that the “exigent circumstances”/ “totality of the circumstances” rule set out in State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), was an aberration and is not workable in the field. Br. of Resp. at 59-65, 70-73. However, Mr. Jordan does not argue for a duplicate of version of the rule in Ringer. Br. of App. at 36-38. Rather, Mr. Jordan argues for a return to a search incident to arrest exception based on the Chimel exigencies, where a search incident to arrest is permitted only where the defendant is physically able to reach a weapon or evidentiary item inside the vehicle during the search. Id. This rule does not have the problems the Stroud Court was concerned with when it overruled

Ringer, which required officers to evaluate the “totality of the circumstances” to determine whether the exigencies of the particular situation required a warrantless search. Mr. Jordan's proposed approach would provide a bright-line, easily applicable rule to police officers in the field, and would be consistent with the greater privacy protections provided under Article I, section 7.

c. The *Gant* “reason to believe” exception does not exist under Article I, section 7. The State argues that the *Gant* exception for searches incident to arrest, where the officer has “reason to believe” he or she may find evidence of the crime of arrest inside the vehicle, is consistent with Article I, section 7 jurisprudence. Br. of Resp. at 68-70 (citing *State v. Michaels*, 60 Wn.2d 638, 642-47, 374 P.2d 989 (1962); *State v. Johnson*, 71 Wn.2d 239, 243, 427 P.2d 705 (1967)). However, *Michaels* does not support the State's argument because that case discusses the validity of searches for evidence related to the crime of arrest where such evidence was in the arrestee's “immediate environs.” *Michaels*, 60 Wn.2d at 642-44. The *Michaels* Court did not authorize searches for evidence of the crime of arrest where the arrestee is nowhere near the search and poses no threat of

obtaining the evidence. Id. Similarly, Johnson lends no support to the State's argument.

As discussed in detail in Mr. Jordan's opening brief, the Gant Court's "reason to believe" exception is inconsistent with Article I, section 7 jurisprudence. Br. of App. at 38-42. Therefore, this Court should reject this exception.

3. THE VEHICLE SEARCH VIOLATED MR.
JORDAN'S RIGHTS UNDER THE FOURTH
AMENDMENT

The State argues that the vehicle search did not violate Mr. Jordan's Fourth Amendment rights under Gant because Gant's "reason to believe" standard is equivalent to the Terry standard, and the officers had a reasonable suspicion they would find evidence of the crime of arrest inside the vehicle. Br. of Resp. at 52-59 (citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). However, this ignores the fact that the officers in this case conducted the search based on a perceived entitlement to conduct a search incident to arrest, not based on any "reason to believe" they would find evidence of the crime of arrest inside the vehicle. 5/5/08RP 50-53; 5/7/08RP 89. Thus, the vehicle search was a fishing expedition and the exception under Gant does not apply.

4. DEPUTY MORRIS LACKED REASONABLE
ARTICULABLE SUSPICION TO JUSTIFY A
TERRY STOP

In his opening brief, Mr. Jordan argued that Deputy Morris lacked reasonable suspicion of criminal activity before he seized Mr. Jordan by ordering him to show his hands. Br. of App. at 12-24. The State responds by arguing that the seizure occurred when Deputy Morris ordered Mr. Jordan to exit the vehicle, and that reasonable suspicion justified the stop. Br. of Resp. at 10-21. The State's argument lacks merit for reasons already outlined in Mr. Jordan's opening brief.

Further, even if the seizure occurred when Deputy Morris ordered Mr. Jordan to exit the vehicle, Deputy Morris lacked reasonable suspicion to justify a Terry stop. The State agrees the definition of the stop at the point when Deputy Morris ordered Mr. Jordan to exit the vehicle – as opposed to when he ordered Mr. Jordan to show his hands – has little effect on the evaluation of the stop because the only additional fact to take into account is the fact that Mr. Jordan hesitated when the officer told him to show his hands. Br. of Resp. at 13. Even when the Court takes this fact into account, the officer did not have reasonable suspicion of criminal

activity because all of the facts observed by Deputy Morris before the stop were innocuous. Mr. Jordan's brief hesitation when Deputy Morris ordered him to show his hands is yet another innocuous fact.

Approving this stop would allow detentions based on an inarticulable hunch, which Terry forbids, and would threaten citizens' constitutional right to be free of unreasonable searches and seizures. Therefore, this Court should hold that the seizure was unconstitutional.

5. MR. JORDAN HAS AUTOMATIC STANDING
TO CHALLENGE THE VEHICLE SEARCH

In his opening brief, Mr. Jordan argued that the trial court erred when it concluded he did not have automatic standing to challenge the search of the vehicle. Br. of App. at 24-32. Under the Washington State Constitution, a defendant has automatic standing to challenge a violation of his privacy rights if (1) possession is an essential element of the charged crime and (2) the defendant was in possession of the contraband at the time of the contested search or seizure. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002) (citing State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980)).

As discussed in detail in his opening brief, Mr. Jordan has automatic standing to challenge the vehicle search for several reasons. First, as a result of the State's strategy of proving Mr. Jordan's constructive possession of the items inside the vehicle in order to prove that he manufactured the methamphetamine contained within the items, possession became an essential element of the crime. Second, Mr. Jordan faced the same "self-incrimination dilemma" upon which the automatic standing doctrine was based because he did not have standing to challenge the vehicle search unless he admitted to possession of the items inside the vehicle. Finally, the Court must not allow the State to avoid facing constitutional challenges through deliberate manipulation of charges in order to deprive a defendant of standing. Here, the prosecutor's careful distinction that Mr. Jordan's possession charge applied only to the drugs found outside the vehicle, along with the decision to charge Ms. Flygare with possession for only the drugs inside the vehicle, indicates that the State's charging decisions were calculated to deprive Mr. Jordan of automatic standing.

The State first responds that Mr. Jordan lacks automatic standing because manufacture of methamphetamine does not include an element of possession. Br. of Resp. at 23-24 (citing

State v. Ague-Masters, 138 Wn.App. 86, 95-99, 156 P.3d 265 (2007)). In Ague-Masters, the court noted that the defendant did not have automatic standing to challenge a pat-down search of another person because the State did not charge the defendant with possession of the items recovered during that pat-down search. 138 Wn.App. at 99, n. 6. This pat-down search, and the court's holding regarding standing were not related to the defendant's separate charge for manufacture of methamphetamine – which resulted from a separate search. Id. at 95-99. Therefore, the State mischaracterizes the holding of that case.

The State then responds to Mr. Jordan's argument that the State's focus on constructive possession of the items in the vehicle to prove manufacturing had the effect of making possession an essential element of the crime. The State argues that constructive possession has a bearing on the second prong of the automatic standing analysis (whether the defendant was in possession of the contraband at the time it was seized), but not on the first prong (whether possession is an essential element of the crime). Br. of Resp. at 26-27 (citing Jones, 146 Wn.2d at 332-33). However, the discussion in Jones relied upon by the State does not preclude a finding that manufacture of methamphetamine effectively includes a

possessory element when the State's theory of the case is that the jury may infer manufacturing from the fact that the defendant constructively possessed items used for manufacturing. Such an interpretation would not unduly expand the automatic standing doctrine, but rather would result in automatic standing in cases where the original rationale behind the doctrine exists.

The State goes on to argue that Mr. Jordan did not face the "self-incrimination dilemma" because his challenges to the search did not involve claiming possession to the items in the vehicle. Br. of Resp. at 28. However, this argument is based on an incorrect interpretation of the "self-incrimination dilemma," where the defendant must claim possession of contraband in order to gain standing to challenge the seizure of that contraband, at the risk of being impeached with the admission later. Simpson, 95 Wn.2d at 180; Jones, 146 Wn.2d at 334. The "self-incrimination dilemma" does not depend on the type of challenge the defendant wishes to make. Mr. Jordan faced this dilemma because he would have had to admit possession of the items in the vehicle in order to obtain traditional standing to challenge the vehicle search. Such an admission would have been devastating impeachment evidence at trial, as the State's main argument was that manufacturing could be

inferred from Mr. Jordan's constructive possession of the items. Therefore, the rationale behind the automatic standing doctrine applies here.

Finally, the State fails to address Mr. Jordan's argument regarding the prosecutor's deliberate manipulation of charges in order to deprive Mr. Jordan of standing, and distinguishes State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007), because the possession charge here only applies to the drugs found outside of the vehicle. Br. of Resp. at 27-28. Such an arbitrary distinction invites prosecutors to continue to manipulate charges in order to deprive defendants of the right to challenge constitutional violations. This Court should not sanction such questionable practices.

For these reasons, the State's arguments are unpersuasive, and this Court should hold that Mr. Jordan had automatic standing to challenge the vehicle search.

B. CONCLUSION

For the above reasons, Mr. Jordan respectfully requests this Court reverse his convictions for possession of methamphetamine and manufacturing methamphetamine.

DATED this 16th day of September 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mindy M. Ater" followed by a date "25228" and a flourish.

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DIVISION ONE**

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Respondent,)	
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)	
DONALD JORDAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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