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COA NO. 62876-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

RAMON CURRY,

Appellant.

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

The Honorable Palmer Robinson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's motion to suppress evidence found by police in the passenger compartment of his car.

Issues Pertaining to Assignment of Error

1. The trial court upheld the validity of the warrantless search of appellant's car by relying on the search incident to arrest exception to the warrant requirement. Did police violate article I, section 7 of the Washington Constitution by searching appellant's car before placing appellant under full custodial arrest?

2. Did police violate article I, section 7 by searching appellant's car where appellant did not have immediate access to his car at the time of his arrest, given that he was handcuffed and seated across the street while being guarded by police?

3. The reason for the search incident to arrest exception under article I, section 7 is to prevent an arrestee from grabbing a weapon or destroying evidence within the passenger compartment of the car. Where appellant posed no such threat at the time of the search because he did not have immediate access to his car, did the search violate the Fourth Amendment in this respect and is reversal required because article I, section 7 recognizes no other justification for the search incident to arrest exception?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Ramon Curry with one count of possession with intent to deliver marijuana and one count of possession with intent to deliver cocaine. CP 1-2. The court denied Curry's motion to suppress evidence obtained as a result of an unlawful search. CP 76-79.<sup>1</sup> A jury subsequently found Curry guilty as charged. CP 37, 39. The court imposed standard range, concurrent sentences of 40 months confinement for the cocaine offense and 18 months for the marijuana offense. CP 93. This appeal timely follows. CP 80-89.

2. CrR 3.6 hearing

Seattle police officers Robert Brown and Bryan Kennedy were on uniformed bicycle patrol in the University District of Seattle. CP 69 (FF 1.a.). Riding along the edge of a park elevated a few feet above street level, Brown notice a man, later identified as Curry, and a woman, later identified as Gorman, sitting in the front seat of a parked car. CP 69 (FF 1.b.-e., k.). Brown saw Curry displaying a clear plastic bindle containing a white substance in his open palm. CP 71 (FF 2.a.); 1RP 136. Gorman

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<sup>1</sup> The trial court's "Written Findings Of Fact And Conclusions Of Law On CrR 3.6 Motion To Suppress Physical, Oral Or Identification Evidence" are attached as appendix A.

held folded money in her hand. CP 70 (FF 1.n.). There were chronic problems with narcotics dealing on this block. CP 70 (1.i.).

As the officers approached, Curry and Gorman looked up at them. CP 70 (FF 1.m.). Curry quickly reached forward and to the right and dropped the bundle he was holding. CP 70 (FF 1.o.). At the same time, Gorman dropped the money. CP 70 (FF 1.p.). Kennedy yelled at Curry to place his hands on the wheel and ordered him to hand over the keys several times. CP 70 (FF 1.q.). Curry hesitated for several seconds and then gave the keys to Kennedy. CP 70 (FF 1.r.). While Curry remained seated in the driver's seat, Curry acknowledged he owned the car. CP 70 (FF 1.s.-t.).

The officers removed Curry and Gorman from the car to recover the narcotics and currency seen by Brown. CP 70 (FF 1.u.). Curry was handcuffed and moved away from the car. CP 70 (FF 1.u.). He was either placed somewhere east of the car on the same side of the street or across the street, north of the car. CP 70 (FF 1.u.). Kennedy testified Curry and Gorman were taken across the street and sat on the curb. 1RP 36.<sup>2</sup> Curry testified he was handcuffed and placed across street while a search occurred. 1RP 91. Brown testified both were seated on the curb "just in

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<sup>2</sup> This brief references the verbatim transcript of proceedings as follows: 1RP - 11/12/08, 11/13/08; 11/17/08; 2RP - 1/13/09.

front of" Curry's vehicle. 1RP 60. Kennedy said they would have been seated "in a position that's not comprising to us or himself -- themselves [sic] -- while we wait for a transport vehicle." 1RP 27. The street was as much as 12 feet wide.<sup>3</sup> 1RP 15. Kennedy could not recall if Gorman was handcuffed. 1RP 27. Kennedy watched over Curry and Gorman while waiting for backup, which quickly arrived. CP 70 (FF 1.u.); 1RP 27.

Brown then searched Curry's car and recovered the cocaine spindle sloughed by Curry and the cash sloughed by Gorman. CP 70 (FF 1.u.); CP 73 (CL 3.a.); 1RP 21-23, 36-37, 60-61, 75-76.<sup>4</sup> After retrieving the sloughed cocaine bindle and cash, officers placed Curry and Gorman under arrest. CP 73 (CL 3.a.); 1RP 77.

According to Kennedy, the search of the car occurred after a second police vehicle arrived to watch the suspects. 1RP 27. Brown could not recall whether a squad car had arrived before he searched, but did remember Kennedy watched over the two while he conducted the initial search of the car to recover the sloughed cocaine and cash. 1RP 75-

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<sup>3</sup> Officer Brown testified two cars going opposite ways could squeeze by each other on the street. 1RP 50-51.

<sup>4</sup> The court entered a disputed fact that Brown recovered the plastic bindle of cocaine from the front passenger floorboard. CP 71 (FF 2.c.). The court entered an undisputed finding that Brown recovered the sloughed money "he saw Gorman drop on the center console." CP 70 (FF 1.v.).

76. Kennedy could not recall if Curry was placed in a police car at the time of the search. 1RP 28.

In a search incident to Curry's arrest, officers found \$502 in Curry's pants pocket. CP 70 (FF 1.w.). Brown then searched the passenger compartment of Curry's car and found two baggies of marijuana under the front passenger seat and another baggie of marijuana in the unlocked glove box. CP 70 (FF 1.x.); CP 71 (FF 2.d.); 1RP 137.

The backseat had a lowered armrest, which contained an eight by eight inch opening into the trunk. CP 70 (1.y.). There was no locked door covering the opening into the trunk through the backseat. CP 71 (FF 2.e., f.); 1RP 137. The opening to the trunk was within the lunge zone of Curry and the woman. CP 71 (FF. 2.g.); CP 74 CL 3.b.). Officers "popped" the trunk and found 172 grams of cocaine in a backpack, most of it packaged in bulk with some packaged for individual sale. CP 70 (1.z.). Officers also found 184 grams of additional marijuana in a backpack, mostly packaged in bulk. CP 70 (FF 1.aa.). Officers also located a digital scale and \$5050 in currency. CP 71 (FF 1. bb.). One of the officers watched Curry and Gorman at all times during the search of the vehicle. 1RP 77.

Defense counsel argued warrantless searches are per se unconstitutional under article I, section 7 of the Washington Constitution

and that suppression was required unless the State could show the search fell within one of the narrowly drawn exceptions to the warrant requirement. CP 10-11. The State responded the search fell within the search incident to arrest exception to the warrant requirement. Supp CP \_\_\_ (sub no. 31, State's Response To Defendant's Motion to Suppress, 11/12/08).

Defense counsel pointed out there was conflicting testimony as to where Curry and Gorman were located after being removed from the car and indicated this fact was relevant in determining the legitimacy of the search under State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). 1RP 113. The State claimed the fact was irrelevant under Stroud.

Defense counsel also recognized there was conflicting testimony as to when the arrest actually occurred. 1RP 113-15. If the arrest occurred before Brown seized the sloughed cocaine and cash, then officers lacked probable cause to make an arrest and the search incident to arrest doctrine did not apply. 1RP 113-15, 123, 134. The search remained unlawful because retrieval of the sloughed items went beyond the scope of a valid Terry<sup>5</sup> stop. 1RP 108-15. If the arrest occurred after Brown recovered the sloughed items, then that search was illegal because there were no exigent circumstances to justify it. 1RP 115. The State stood behind Kennedy's

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<sup>5</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

testimony that the arrest occurred immediately upon removing Curry from the car. 1RP 116.

The court entered a written finding that officers placed Curry and Gorman under arrest after retrieving the sloughed cocaine bindle and cash. CP 73 (CL 3.a.). The court concluded officers had probable cause to arrest Curry after viewing Curry engage in a drug deal and recovering the sloughed cocaine bindle and cash. CP 71-73 (CL 3.a.). The court also concluded the officers' subsequent search of Curry's car was justified under the search incident to arrest exception to the warrant requirement. CP 73-74 (CL 3.b.). The court cited cases for the proposition that the scope of a search incident to a lawful arrest includes a search of the immediately surrounding area within the "immediate control" of the person arrested, including the passenger compartment of a vehicle. CP 73-74 (CL 3.b.). The court concluded the opening into the trunk turned the trunk into the "passenger compartment" because either occupant could reach through and grab a weapon or conceal evidence, and the area was within the lunge zone of both occupants. CP 74 (CL 3.b.).

Evidence recovered from the car was admitted at trial and formed the basis for conviction. 1RP 180-83, 188-89, 213-16, 264-77, 302.

C. ARGUMENT

1. THE WARRANTLESS SEARCH AND SEIZURE OF THE SLOUGHED COCAINE AND CASH FROM THE CAR WAS NOT A VALID SEARCH INCIDENT TO ARREST BECAUSE CURRY HAD NOT YET BEEN ARRESTED WHEN THE SEARCH OCCURRED.

A search incident to arrest is justified under article I, section 7 of the Washington Constitution only if a lawful custodial arrest precedes the search. In this case, the trial court found Officer Brown retrieved the sloughed cocaine bindle and cash before he arrested Curry. The officer's search was therefore illegal under article I, section 7.

Article I, section 7 provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." A warrantless search is per se unconstitutional under article I, section 7 unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). "Exceptions to the warrant requirement are limited and narrowly drawn." State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State always carries the "heavy burden" of proving a warrantless search is justified. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

A search incident to arrest is an exception to the warrant requirement. Jones, 146 Wn.2d at 335. The exception must be "jealously

and carefully drawn, and must be confined to situations involving special circumstances." State v. Boyce, 52 Wn. App. 274, 279, 758 P.2d 1017 (1988).

The trial court's conclusions of law in a suppression hearing are reviewed de novo. State v. Einfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court's findings must support the conclusions of law. State v. Garvin, \_\_\_ Wn.2d \_\_\_, 207 P.3d 1266, 1270 (2009).

The trial court concluded Brown lawfully searched Curry's car under the search incident to arrest exception to the warrant requirement. CP 73-74. The trial court's findings of fact do not support this conclusion. The court thus erred in failing to suppress the evidence obtained from this unlawful search and seizure.

Brown testified he told Curry he was under arrest *after* he found the sloughed bindle of cocaine and cash inside Curry's car. 1RP 77. The trial court entered a written finding that officers placed Curry and Gorman under arrest *after* retrieving this contraband. CP 73 (CL 3.a.). This factual finding was contained under the "conclusions of law" heading but such placement does not change its status as a factual finding. See Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) ("a finding of fact erroneously described as a conclusion of law is reviewed as a finding of fact."). The court relied on Brown's recovery of the sloughed

cocaine and cash as an additional fact supporting probable cause for the ensuing arrest. CP 73 (CL 3.a.).

Brown's initial search of the car, in which he recovered the sloughed cocaine and cash, was illegal because "under article I, section 7 a warrantless search incident to arrest requires as a prerequisite to the search a lawful custodial arrest as the authority of law justifying the search." State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). "Probable cause alone is insufficient." Id. "Thus, while the search incident to arrest exception functions to secure officer safety and preserve evidence of the crime for which the suspect is arrested, in the absence of a lawful custodial arrest a full blown search, regardless of the exigencies, may not validly be made." Parker, 139 Wn.2d at 497.

O'Neill is dispositive. In that case, a police officer approached O'Neill's car and asked for identification and vehicle registration. O'Neill, 148 Wn.2d at 572. O'Neill said his license had been revoked. Id. When O'Neill stepped out of the car upon request, the officer noticed a spoon on the floorboard with a granular, wet look that led the officer to believe a narcotic had been cooked on it. Id. The officer searched the car and found a drug pipe and a baggie of cocaine inside. Id. at 573. He then arrested O'Neill. Id. at 573, 592. The Court of Appeals held the search

was lawful under the search incident to arrest exception to the warrant requirement. Id. at 584.

The Supreme Court reversed, holding the pipe and cocaine must be suppressed because "the state constitution requires an actual custodial arrest before a search occurs. Otherwise, the search is in fact conducted without an arrest, and thus without authority of law existing at the time of the search." Id. at 585. While the officer could have arrested O'Neill for driving with a revoked license or, in light of his training and experience, for possession of the controlled substance on the spoon, the officer in fact did neither. Id. at 592. "[I]t is the arrest, not probable cause to arrest, that constitutes the necessary authority of law for a search incident to arrest." Id. at 585-86.

O'Neill is on point and requires suppression of the sloughed cocaine bindle and cash found by Brown before he arrested Curry. Brown could not lawfully search Curry's car until an officer made a lawful, custodial arrest.

Officer Kennedy testified Curry was arrested the moment he ordered him out of the car.<sup>6</sup> 1RP 38. The trial court did not enter a written finding to this effect nor did it enter a written finding that Curry

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<sup>6</sup> Curry testified he was placed under arrest as soon as he hopped out of his car or upon being ordered out. 1RP 90, 92.

was arrested before Brown initially searched the car. The court only entered a written finding that the arrest occurred after Brown's initial search.

In its oral decision, the trial court recited the sequence of events leading up to Kennedy asking Curry if he owned the car. 1RP 135. The court then said Kennedy "removed Mr. Curry from the vehicle and at that point, Brown said that he, Brown, had seen a drug -- drug transaction, and that Curry was under arrest." 1RP 135. The court did not make an oral finding that Brown told Kennedy to detain Curry and Gorman rather than arrest them. 1RP 134-15. The court said "Kennedy testified that Brown told him to arrest him and he did." 1RP 137.<sup>7</sup> The court elsewhere remarked Brown saw the bundle of cocaine in Curry's hand and drew Kennedy's attention to the car. 1RP 136. Kennedy quickly arrived and "testified that Mr. Curry was under arrest. They then searched, incident to the arrest, the passenger compartment of the car." 1RP 136.

The trial court's oral decision conflicts with the court's written finding on the matter of when the arrest occurred. The oral decision indicates the initial search for the sloughed cocaine and cash occurred

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<sup>7</sup> When asked why he removed Curry, Kennedy testified "Officer Brown advised that he had seen a drug transaction, and that Mr. Curry was under arrest." 1RP 20. Kennedy also testified he placed Curry under arrest after Curry turned over the keys and that Curry was arrested from the moment Kennedy ordered him out of the car. 1RP 33-34, 38.

after arrest. The written decision specifies after retrieving the sloughed material, "they placed them under arrest" and then a search occurred as a search incident to arrest. CP 70 (FF 1.w.), CP 73 (CL 3.a.)

"An appellate court may consider a trial court's oral decision so long as it is not inconsistent with the trial court's written findings and conclusions." State v. Kull, 155 Wn.2d 80, 88, 118 P.3d 307 (2005). When an oral decision contradicts a written finding, the written finding controls. Id.; State v. Bryant, 78 Wn. App. 805, 812-13, 901 P.2d 1046 (1995). The trial court's written finding that Brown recovered the sloughed cocaine and cash before arresting Curry means the court erred in ruling this action was valid under the search incident to arrest exception. Any oral finding to the contrary cannot impeach the written finding. "When the state prevails in a suppression hearing it has a further obligation to prepare, present and have entered findings of fact and conclusions of law which will, standing alone, withstand an appellate court's scrutiny for constitutional error." State v. Poirier, 34 Wn. App. 839, 841, 664 P.2d 7 (1983). Suppression of the sloughed cocaine and cash found by Brown is required.

2. THE WARRANTLESS SEARCH OF CURRY'S CAR WAS NOT A VALID SEARCH INCIDENT TO ARREST BECAUSE CURRY HAD NO IMMEDIATE ACCESS TO THE VEHICLE WHEN HE WAS ARRESTED.

A search incident to arrest is justified under article I, section 7 only if the passenger compartment of a vehicle is in the immediate control of the arrestee at the time of arrest. When police arrested Curry, he was handcuffed and seated some distance from his car while being guarded by police. The subsequent search incident to arrest was unconstitutional because Curry did not have immediate access to the car's passenger compartment.

The trial court entered the following written finding:

The officers removed both the Defendant and Gorman from the vehicle to recover the narcotics and currency seen by Officer Brown. The defendant was handcuffed and moved away from the car. He either was placed somewhere east of the car on the same side of the street or across the street, north of the car. One of the officers remained with him until back-up officers arrived at the scene.

CP 70 (FF 1.u.).

The court also found "The officers removed both occupants from the vehicle to retrieve the contraband. After retrieving the contraband, they placed them under arrest." CP 73 (CL 3.b). These findings show Curry and Gorman were removed from the vehicle and placed some unspecified distance away from Curry's car after Brown recovered the sloughed cocaine and cash. Curry was handcuffed, Gorman may have

been handcuffed, and both were guarded by an officer while the search was carried out. Kennedy testified the search of the car occurred after a second vehicle arrived to watch the suspects.

"Article 1, section 7 of the state constitution prohibits warrantless searches of vehicles incident to arrest where the suspect is not physically proximate to the vehicle at the time of arrest." State v. Webb, 147 Wn. App. 264, 267, 195 P.3d 550 (2008). Because the State fails in its burden to prove that Curry was physically proximate to the passenger compartment of his vehicle at the time of his arrest, the items that the police seized in the subsequent search must be suppressed. Id.

This Court's decision in Webb shows the search incident to arrest in Curry's case was unlawful. In Webb, a police officer pulled Webb over on suspicion of driving under the influence. Webb, 147 Wn. App. at 267. Webb exited his car upon the officer's request. Id. Another officer arrived and conducted field sobriety tests. Id. Upon failing the tests, the officer arrested Webb, handcuffed him, and placed him in a nearby patrol car. Id. Officers then searched the passenger compartment of Webb's car and discovered illegal drugs. Id. at 267-68.

The issue on appeal was whether Webb was close enough to his vehicle at the time of arrest to justify a search of the passenger compartment of his car incident to arrest. Id. at 269. The trial court's

findings did not address Webb's physical proximity to either the passenger compartment or his vehicle at the time of his arrest. Id. at 270. In the absence of a finding on this critical fact, the State failed its burden to show the search of Webb's vehicle incident to his lawful arrest fell within an exception to the warrant requirement. Id. The "fatal flaw" requiring suppression was the absence of a showing in the record of Webb's proximity to his car at the time of his arrest. Id. at 270, 274.

Here, the State only proved Curry was "somewhere east of the car on the same side of the street or across the street, north of the car." This fact does not establish Curry had immediate access to the passenger compartment of the vehicle. Curry was handcuffed, guarded, and seated on a curb some unspecified distance away from the car at the time of arrest. The distance from the car was disputed and the court made no finding on the matter. 1RP 15, 50-51, 100, 113.

A valid search incident to arrest requires that a suspect have immediate access to the passenger compartment of his vehicle at the time of arrest. State v. Rathbun, 124 Wn. App. 372, 378, 101 P.3d 119 (2004) (proper question is whether vehicle was within the arrestee's immediate control when arrested, "not whether the arrestee had control over the vehicle at some point prior to his or her arrest."). If Curry "could suddenly reach or lunge into the compartment for a weapon or evidence, the police

may search the compartment incident to his arrest. If he could not do that, the police may not search the compartment incident to his arrest." State v. Johnston, 107 Wn. App. 280, 285-286, 28 P.3d 775 (2001), review denied, 145 Wn.2d 1021 (2002). The search incident to arrest was unlawful because the State failed to prove facts showing Curry could suddenly reach or lunge into the passenger compartment at the time of arrest.

The State bears the burden of establishing the "search incident to arrest" exception. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). To that end, the State has the burden of proving facts necessary to establish the lawfulness of any such search. Webb, 147 Wn. App. at 270, 274. The State must establish this exception to the warrant requirement by "clear and convincing evidence." Garvin, 207 P.3d at 1270.

Although the court found Curry was "somewhere east of the car on the same side of the street or across the street, north of the car," the State failed to prove one scenario to the exclusion of the other. The officers presented conflicting testimony on this point and the court did not resolve the conflict. For this reason, this Court should hold the conflicting evidence against the State and, for purposes of determining Curry's proximity to his car, consider him to be located across the street at the time of arrest. But regardless of whether Curry was handcuffed and guarded on the same side of the street or across the street, the State did not

meet its burden of showing Curry was sufficiently close to his car at the time of arrest to justify the search incident to arrest exception.

Other courts have suppressed evidence found during a search of a vehicle incident to arrest under similar circumstances. Johnston held a vehicle search was unlawful where facts did not prove the suspect had "immediate control" or "ready access" to the passenger compartment. Johnston, 107 Wn. App. at 288. The record only showed officers arrested the men in the "immediate vicinity" of their car. Id. at 283. Officers then searched the car and found methamphetamine. Id. Because the arrest occurred in the unspecified "immediate vicinity of the car," the State failed to show the men had "immediate control" of the car's passenger compartment. Id. at 288. Without a more specific description of "immediate vicinity" of the car, the State could not meet its burden of establishing the warrantless search fell within the narrowly construed exception for searches incident to arrest. Id.

In State v. Quinlivan, the court held a search incident to arrest invalid where an officer arrested a driver only after the driver left his vehicle, locked the door, and sat some distance away on a curb. State v. Quinlivan, 142 Wn. App. 960, 963, 970-71, 176 P.3d 605, review denied, 164 Wn.2d 1031, 197 P.3d 1184 (2008). By that time the driver no longer has access to the passenger compartment of his car. Id. at 970-

71. Curry was arrested under similar circumstances. Curry was removed from the vehicle, handcuffed, placed on a curb across the street, and guarded. Only then was he arrested. He did not lock the car door because he gave the officer his keys before he stepped out of the car.

The State cited State v. Adams to the trial court as support for its argument that the search of Curry's car incident to arrest was lawful. 1RP 119. But Adams, which upheld the validity of a vehicle search based on the defendant's proximity to the vehicle at the time of arrest, is distinguishable. State v. Adams, 146 Wn. App. 595, 605, 191 P.3d 93 (2008), review granted, 165 Wn.2d 1036, 205 P.3d 131 (2009). In that case, the suspect was "in close temporal and spatial proximity to his car when he was arrested. He was never more than four or five feet from his car, and was at all times closer to it than was the deputy. He could have reached it quickly in a couple [of] steps." Id. Unlike Adams, Curry was some unspecified distance from his car according to the court's findings, not four or five feet. Moreover, Curry was handcuffed and guarded at the time of his arrest. He was in no position to immediately access anything in his car at that time.

Stroud is also distinguishable. In that case, officers arrested two suspects after seeing evidence of criminal activity, handcuffed them, and placed them in the back of a patrol car. Stroud, 106 Wn.2d at 145. After

the men were in the patrol car, one of the officers searched the car and found a sawed-off shotgun, heroin and methamphetamine. Id. The Court held there was a valid search incident to arrest because "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence." Id. at 152. In so holding, however, the court found the search valid because the men were lawfully arrested next to their car while the engine was running and the door was open. Id. at 153.

Curry's case is different. Curry was arrested across the street from his car while handcuffed and guarded by a police officer. The police had the keys to his car, which was not running. As in Webb, the State here failed to show Curry was close enough to his car under circumstances that would have allowed him to gain immediate access to the car or any of its contents. See State v. Perea, 85 Wn. App. 339, 344, 932 P.2d 1258 (1997) ("Had Perea remained in his car or beside his car, with the door open or unlocked, until he was arrested, Stroud's bright-line rule would have permitted a search of the passenger compartment of the vehicle.").

The trial court relied on Stroud to justify the search incident to arrest. CP 73. Webb shows this reliance was misplaced.<sup>8</sup> In Webb, the State argued the search of Webb's car was valid under Stroud because the search was contemporaneous with the arrest and the arrestee remained at the scene during the search. Webb, 147 Wn. App. at 271. This Court rejected the argument because a long line of cases construed Stroud to require that a person be in close temporal and physical proximity to a vehicle at the time of arrest to permit a warrantless search of that vehicle. Webb, 147 Wn. App. at 271.

The trial court here also relied on State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989) to conclude the search incident to arrest was lawful. CP 73. Webb shows this reliance was misplaced because Fladebo did not decide the issue of whether physical proximity was required. Webb, 147 Wn. App. at 272; see Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) (appellate court opinion that does not discuss a legal theory does not control a future case in which counsel properly raises the theory).

Curry was not in close proximity to his car when he was arrested and did not have immediate access to the passenger compartment. The

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<sup>8</sup> A trial court's interpretation of case law is reviewed de novo. State v. Willis, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004).

search therefore does fall within the "search incident to arrest" exception to the warrant requirement under article I, section 7.

"If the evidence was seized without authority of law, it is not admissible in court. We suppress such evidence not to punish the police, who may easily have erred innocently. We suppress unlawfully seized evidence because we do not want to become knowingly complicit in an unconstitutional exercise of power." State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). The exclusionary rule thus requires suppression of evidence obtained as a result of an unlawful search under article I, section 7 of the Washington Constitution. Ladson, 138 Wn.2d at 359. The marijuana, cocaine, currency and scale found in Curry's car after Brown told Curry that he was under arrest must be suppressed.

3. EVEN IF CURRY WAS ARRESTED AT A TIME WHEN HE HAD IMMEDIATE ACCESS TO THE PASSENGER COMPARTMENT, THE SEARCH IS STILL ILLEGAL BECAUSE HE DID NOT HAVE IMMEDIATE ACCESS AT THE TIME OF THE SEARCH.

If this Court determines the search violated article I, section 7 of the Washington Constitution for the reasons set forth above (C. 1. and 2., supra), then the question of whether the warrantless search also violated the Fourth Amendment is not reached. Parker, 139 Wn.2d at 492-93; see State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (when party asserts state and federal constitutional law violations, courts first interpret

Washington Constitution "to develop a body of independent jurisprudence because considering the United States Constitution first would be premature."). If, however, this Court declines to do so, it will be necessary to analyze the legality of the search under the Fourth Amendment as well.

The United States Supreme Court's recent decision in Arizona v. Gant, \_\_ U.S. \_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) simultaneously closes the door to one justification for the search incident to arrest while opening the door to another. Gant held "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Gant, 129 S. Ct. at 1723.

Curry was not within reaching distance of the passenger compartment at the time of the search and therefore the search incident to arrest could not be justified on that ground under the Fourth Amendment. However, there was an "evidentiary basis" for the search under the Fourth Amendment because he was arrested for a drug crime. See id. at 1719 (contrasting Gant's arrest for driving with a suspended license to cases where suspects were arrested for drug offenses). The search in Curry's case nevertheless remains unlawful under article I, section 7 of the

Washington Constitution because the United States Supreme Court's alternative justification for a search incident to arrest has never been recognized as legitimate under article I, section 7.

- a. Police Could Not Lawfully Search Curry's Car Under The Traditional Basis Justifying A Search Incident To Arrest Because Curry Was Not Within Reaching Distance Of The Passenger Compartment At The Time Of The Search.

Under Chimel v. California, "police may search incident to arrest only the space within an arrestee's 'immediate control,' meaning the area from within which he might gain possession of a weapon or destructible evidence." Gant, 129 S. Ct. at 1714 (quoting Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)) (internal quotation marks omitted). "That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." Gant, 129 S. Ct. at 1716.

The Court applied the Chimel rule to vehicle searches in New York v. Belton, holding an officer who lawfully arrests the occupant of an automobile may contemporaneously search the passenger compartment of the automobile and any containers therein. New York v. Belton, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Many courts

subsequently understood Belton "to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." Gant, 129 S. Ct. at 1718.

Gant rejected this broad reading of Belton because it would "untether the rule from the justifications underlying the Chimel exception." Id. at 1719. For this reason, the Court held "the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Id. "Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." Id.

Police officers searched Gant's car and discovered cocaine after he was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car. Id. at 1714. The Court held the search was unconstitutional under the Chimel rationale because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search. Id.

Gant came out after the trial court decided the suppression issue in Curry's case. The trial court relied on Stroud, which adopted the now

discredited broad reading of Belton, to justify the search incident to arrest. CP 73. This was error under the Fourth Amendment. Curry was secured when officers searched his car. He was handcuffed, guarded by an officer until backup patrol cars quickly arrived and seated some distance away from his car. Under Gant, a search incident to arrest could not be justified under a Belton rationale because Curry was in no position to access weapons or evidence from the car at the time of the search.

The Fourth Amendment of the United States Constitution provides the minimum protection against unlawful searches. State v. Young, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994). "The intentional difference between the state and federal provisions naturally does not permit a reading of the state provision that is more restrictive of defendants' rights than federal law." State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980). For this reason, article I, section 7 must now be read to prohibit searches incident to arrest under a Belton rationale where the arrestee cannot access weapons or evidence inside the car at the time of the search.

- b. The Search Incident To Arrest Exception Under Article I, Section 7 Does Not Recognize Belief That Evidence Of Crime Might Be Found In A Vehicle As A Legitimate Justification For A Warrantless Search.

However, the analysis does not end there. Gant also held for the first time that "circumstances unique to the automobile context justify a

search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." Gant, 129 S. Ct. at 1714. The Court conceded this justification for a search incident to arrest "does not follow from Chimel." Id. at 1719. Rather, the Court adopted this new justification, with little discussion, from Justice Scalia's concurring opinion in Thornton v. United States, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004). Gant, 129 S. Ct. at 1714, 1719.

This new justification for the search incident to arrest exception to the warrant requirement finds no sanctuary under article I, section 7. In Washington, this exception has been narrowly drawn to account for the need to prevent an arrestee from accessing weapons or evidence. There is no other justification nor should there be. The mundane desire of police to uncover evidence of crime does not trump the warrant requirement. That reason for conducting a warrantless search would impermissibly enlarge the deliberately narrow confines of the search incident to arrest exception under article I, section 7.

"Under the Washington Constitution, it is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution." State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). It is particularly well settled that article I, section 7 provides greater

protection against warrantless searches of automobiles than the Fourth Amendment. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996); Webb, 147 Wn. App. at 269. Accordingly, a Gunwall<sup>9</sup> analysis is unnecessary to establish that this Court should undertake an independent state constitutional analysis. Surge, 160 Wn.2d at 71; accord State v. Chenoweth, 160 Wn.2d 454, 462-63, 158 P.3d 595 (2007); State v. Athan, 160 Wn.2d 354, 365, 158 P.3d 27 (2007). "The only relevant question is whether article I, section 7 affords enhanced protection in the particular context." Surge, 160 Wn.2d at 71.

Article I, section 7 goes further than the Fourth Amendment and requires actual authority of law before the State may disturb an individual's private affairs. Day, 161 Wn.2d at 894. "Although they protect similar interests, 'the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.'" Eisfeldt, 163 Wn.2d at 634 (quoting State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). "The Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to any manner of warrantless, but reasonable searches." Eisfeldt, 163 Wn.2d at 634. "By

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<sup>9</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (setting forth the factors for evaluating whether an issue merits independent state constitutional interpretation).

contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not." Id. "Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington." Id. at 635.

"The warrant requirement is especially important under article I, section 7, of the Washington Constitution as it is the warrant which provides the 'authority of law' referenced therein." Ladson, 138 Wn.2d at 350. The parameters of the automobile exception to the search warrant requirement is "not based on federal precedent, as we have independently weighed the privacy interests individuals have in items within their automobile and the dangers to the officers and law enforcement presented during an arrest of an individual inside an automobile." Stroud, 106 Wn.2d at 149.

Exceptions to the warrant requirement are jealously guarded "lest they swallow what our constitution enshrines. Day, 161 Wn.2d at 894 (citing O'Neill, 148 Wn.2d at 584-85 (citing Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 Yale L. & Pol'y Rev. 381 (2001) (comparing Washington's narrower

search incident to arrest exception to its federal counterpart)).<sup>10</sup> The burden is always on the State to prove one of the narrow exceptions to the warrant requirement. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); Ladson, 138 Wn.2d at 349-50. The State therefore has the burden of establishing a search incident to arrest carried out for the purpose of discovering additional evidence relevant to the crime is justified under article I, section 7.

The State cannot do so. "The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception." Ladson, 138 Wn.2d at 357 (pretextual stop invalidated subsequent search incident to arrest). Washington courts recognize only one reason for the search incident to arrest exception: the need to prevent an arrestee from grabbing a weapon or destroying evidence. State v. Valdez, 137 Wn. App. 280, 286, 152 P.3d 1048 (2007); Stroud, 106 Wn.2d at 147, 151-52; Johnson, 128 Wn.2d at 447; State v. Ringer, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983), overruled on other

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<sup>10</sup> Under the search incident to arrest exception, federal law permits the search of the entire passenger compartment, including any containers. Belton, 453 U.S. at 457. Washington does not permit the search of locked containers in the passenger compartment. Stroud, 106 Wn.2d at 152.

grounds by Stroud, 106 Wn.2d at 151. Stroud described these concerns as "exigencies." Stroud, 106 Wn.2d at 151. Washington does not justify a search incident to arrest of a vehicle on the basis that incriminating evidence relevant to the crime of arrest might be found. The desire to obtain evidence of crime is not an exigent circumstance permitting a warrantless search under article, section 7. The search of Curry's car therefore cannot be justified under article I, section 7 on the basis that police had reason to believe they might find evidence relevant to his attempted drug delivery.

In Ringer, the Washington Supreme Court engaged in an extensive historical analysis of the search incident to arrest exception in Washington, concluding that, when article I, section 7 was first adopted, the exception was "a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee" and that subsequent case law had erroneously strayed from this underlying rationale by expanding "the exception until it threatened to swallow the general rule that a warrant is required." Ringer, 100 Wn.2d at 698-99. Stroud subsequently overruled Ringer to the extent it required a case-by-case, totality of the circumstances analysis of whether a warrantless vehicle search was permissible, but retained the limited rationale for allowing the search incident to arrest in the first place. Stroud, 106 Wn.2d at 151.

The search incident to arrest exception under article I, section 7, while well-recognized, "is not an exception without limitations. The exception has been narrowly drawn to address officer safety and prevent the destruction of evidence." Jones, 146 Wn.2d at 335. The exception does not encompass the generalized interest of law enforcement to uncover evidence of crime for its own sake. The exception is justified only because police have a legitimate interest in preventing an arrestee from accessing weapons and destroying evidence. When those concerns are lacking because there is no realistic possibility of either event, the search incident to arrest exception is unavailable under article I, section 7.

"Pursuant to the unique language of our own constitution, we have carefully restricted automobile searches to balance an individual's privacy interest against a real state and societal need to search; mere convenience is simply not enough." State v. Patterson, 112 Wn.2d 731, 734, 774 P.2d 10 (1989). But the new rule announced in Gant permitting officers to search a vehicle as long as there is reason to believe evidence of the crime of arrest might be found amounts to little more than making detection of incriminating evidence more convenient for law enforcement.

Privacy rights under article I, section 7 "include the freedom from warrantless searches absent special circumstances." Stroud, 106 Wn.2d at 148. The search incident to arrest exception must accordingly be

"confined to situations involving special circumstances." Boyce, 52 Wn. App. at 279. There is nothing special about the circumstance of an officer wanting to conduct a warrantless investigatory search for incriminating evidence. That circumstance is omnipresent in all cases where the officer has reasonable suspicion or probable cause to believe a crime has been committed and wants to look for evidence corroborating that belief. It may be reasonable for an officer to search for additional evidence of crime related to an arrest under the Fourth Amendment, thereby "leaving individuals subject to any manner of warrantless, but reasonable searches." Eisfeldt, 163 Wn.2d at 634. But article I, section 7 "requires a warrant before any search, reasonable or not." Id.

Grounding the ability of an officer to search a vehicle incident to arrest based on the belief that evidence of the crime of arrest might be found cannot be reconciled with the need to preserve the deliberately narrow parameters of the search incident to arrest exception under article I, section 7. The new rule announced in Gant means every time an officer lawfully arrests someone in a vehicle based on the belief that the person has engaged in a drug crime, that person is automatically subject to having his car searched for incriminating evidence. In the wake of Gant, foreign courts are rushing to affirm the legality of searches incident to arrest based on nothing more than the simple fact that a person is arrested for a drug-

related offense. See, e.g., United States v. Davis, \_\_\_ F.3d \_\_\_, 2009 WL 1885254 at 3 n.5 (8th Cir. 2009); United States v. Barnum, 564 F.3d 964, 970 (8th Cir. 2009); United States v. Kellam, 568 F.3d 125, 136 n.15 (4th Cir. 2009).

An exception to the warrant requirement is not carefully limited if an entire class of arrestees are automatically exposed to an exploratory search of the vehicle. "[W]hile a bright line rule such as the rule in Stroud makes the police officer's job easier, we refuse to give it 'such broad application that it totally submerges the protections our state's founders obviously had in mind when they adopted article I, section 7 of our state constitution.'" Parker, 139 Wn.2d at 504 (quoting Johnson, 128 Wn.2d at 459-60 (Alexander, J., concurring)). The same caution is warranted here. Application of the alternative rationale for a search incident to arrest espoused by Gant would run counter to the carefully crafted exception to the warrant requirement under Washington law and unjustifiably overwhelm the legitimate privacy rights of Washington citizens.

"[W]hile the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, article I, section 7, holds the line by pegging the constitutional standard to 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a *warrant*.'" "

Ladson, 138 Wn.2d at 349 (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). This Court should hold the line and conclude the warrantless search carried out incident to Curry's arrest was unlawful because he did not have immediate access to his vehicle at the time of the search and there is no alternative justification for a search incident to arrest under article I, section 7. All evidence obtained from Curry's car must therefore be suppressed.

D. CONCLUSION

For the reasons stated, this Court should reverse the convictions and dismiss the charges with prejudice.

DATED this 6th day of July 2009.

Respectfully Submitted,

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\_\_\_\_\_  
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# APPENDIX A

**FILED**  
KING COUNTY, WASHINGTON

JAN 13 2009

SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

RAMON CURRY,

Defendant,

No. 08-1-05710-7 SEA

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.6  
MOTION TO SUPPRESS PHYSICAL,  
ORAL OR IDENTIFICATION  
EVIDENCE

A hearing on the admissibility of physical, oral, or identification evidence was held on November 12, 2008 before the Honorable Judge Palmer Robinson. After considering the evidence submitted by the parties and hearing argument, to wit: testimony from Seattle Police Officers Robert Brown and Bryan Kennedy, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- a. On July 17, 2008, Seattle Police Officers Robert Brown and Bryan Kennedy were on uniformed bicycle patrol in the University District of Seattle.
- b. Just before 5:00 p.m., they were riding through the University Playground at 4745 9<sup>th</sup> Avenue N.E., eastbound along the south side of the park bordering the 800 block of N.E. 48<sup>th</sup> Street.
- c. The south edge of the park is raised about five feet above street level.
- d. At that time, the officers saw a white 1999 Accord sedan parked facing east on the south side of the 800 block of N.E. 48<sup>th</sup> Street about 80 feet west of the intersection with 9<sup>th</sup> Avenue N.E.
- e. Officer Brown was the first to notice the vehicle and its two front seat occupants.
- f. Officer Brown has 12 years of experience with the Seattle Police Department, the last eight spent on bike patrol.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

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- 1 g. Officer Brown has received training on the recognition of various controlled  
2 substances, including flake cocaine. He has also received training on how  
3 cocaine is packaged and sold at the street level.
- 4 h. During the course of Officer Brown's experience, he has witnessed at least 200  
5 street level drug transactions.
- 6 i. The occupants drew Officer Brown's attention because of the chronic problems  
7 with narcotics dealing along this block.
- 8 j. Officer Brown had an unobstructed view through the driver's open window about  
9 15 feet away.
- 10 k. From his raised vantage point, he saw a black male, later identified as the  
11 Defendant, seated in the driver's seat and a black female, later identified as  
12 Gorman, seated in the front passenger seat.
- 13 l. Officer Brown motioned to Officer Kennedy and Officer Kennedy began to  
14 approach the Accord.
- 15 m. When Officer Brown motioned to Officer Kennedy, the Defendant and Gorman  
16 looked up at them.
- 17 n. Gorman held folded money in her hand.
- 18 o. Upon noticing the officers, the Defendant quickly reached forward and to the  
19 right and dropped the bundle he was holding.
- 20 p. At the same time, Gorman dropped the money.
- 21 q. Officer Kennedy yelled at the Defendant to place his hands on the wheel and  
22 ordered him to hand over the keys several times.
- 23 r. The Defendant hesitated for several seconds before handing the keys to Officer  
Kennedy.
- s. While the Defendant was still seated in the driver's seat of the Accord, Officer  
Kennedy asked the Defendant if he was the registered owner of the Accord.
- t. The Defendant acknowledged that it was his car.
- u. The officers removed both the Defendant and Gorman from the vehicle to recover  
the narcotics and currency seen by Officer Brown. The defendant was  
handcuffed and moved away from the car. He either was placed somewhere east  
of the car on the same side of the street or across the street, north of the car. One  
of the officers remained with him until back-up officers arrived at the scene.
- v. Officer Brown recovered the folded money that he saw Gorman drop on the  
center console and found that it was two \$20 bills.
- w. In a search incident to the Defendant's arrest, officers found \$502 in his right front  
pants pocket.
- x. Officer Brown then searched the passenger compartment of the Accord and found  
two sandwich baggies of suspected marijuana under the front passenger seat and  
another baggie of suspected marijuana in the glove box.
- y. The backseat had a lowered center armrest, which revealed an eight inch by  
eighteen inch opening into the trunk.
- z. The officers popped the trunk and found approximately 172 grams of cocaine,  
mostly packaged in bulk with some packaged for individual sale. *in a large black backpack*
- aa. The officers also found approximately 184 grams of additional marijuana also  
mostly packaged in bulk. *in a large black backpack.*

1 bb. Together with the suspected cocaine and marijuana, the officers located a digital  
2 scale and \$5050 in currency.

3 2. THE DISPUTED FACTS

- 4 a. Officer Brown saw the Defendant displaying a clear plastic bindle containing a  
5 white substance in his open right palm.  
6 b. The Defendant fumbled for his keys, lifting his right hand to the steering wheel as  
7 if attempting to start the car as Officer Kennedy approached.  
8 c. Officer Brown recovered the plastic bindle that he had seen in the Defendant's  
9 palm from the front passenger floorboard.  
10 d. The glove box was unlocked when Officer Brown conducted his search and found  
11 a ziplock baggie of marijuana inside.  
12 e. The backseat armrest was down when Officer Brown conducted his search of the  
13 passenger compartment of the vehicle.  
14 f. There was no locked door covering the opening into the trunk through the  
15 backseat.  
16 g. The opening was well within the lunge zone of both the Defendant and Gorman.

17 3. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE  
18 SOUGHT TO BE SUPPRESSED:

- 19 a. **The officers had probable cause to arrest after viewing the Defendant  
20 engaged in a drug deal.**

21 Probable cause to arrest exists where the totality of the facts and circumstances known to  
22 the officers at the time of arrest would warrant a reasonably cautious person to believe an offense  
23 is being committed. State v. Herzog, 73 Wn. App. 34, 53, 867 P.2d 648 (1994). In making this  
determination, reviewing courts must give consideration to an arresting officer's special  
expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980).  
Probable cause to arrest requires more than "a bare suspicion of criminal activity," State v.  
Terravona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), but does not require facts that would  
establish guilt beyond a reasonable doubt. State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261  
(1990).

1 According to RCW 69.50.401(a), it is a crime for any person to possess with intent to  
2 deliver a controlled substance. Possession means having a substance in one's custody or control  
3 and may be either actual or constructive. WPIC 50.03. A person acts with intent or intentionally  
4 when acting with the "objective or purpose to accomplish a result which constitutes a crime."  
5 RCW 9A.08.010(1)(a). Deliver or delivery means "the actual or constructive transfer from one  
6 person to another of a substance." RCW 69.50.101(f). Cocaine and marijuana are controlled  
7 substances. RCW 69.50.101(d); 69.50.206(b)(4); 69.50.204.

8 State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995) provides an analogous  
9 situation where the Court of Appeals found probable cause to arrest. There, an officer with  
10 extensive narcotics training and experience was on routine bike patrol in the Pike Place Market  
11 area of Seattle. Id. at 689. He saw Rodriguez-Torres and another individual standing across the  
12 street with their hands out. Id. He saw the other individual hand money to Rodriguez-Torres  
13 and pick an item out of Rodriguez-Torres's cupped left hand. Id. As the officer approached the  
14 two men, someone yelled, "Police!" Id. The unidentified man grabbed his money back, dropped  
15 the item he had been inspecting, and walked away. Id. Rodriguez-Torres picked the item up off  
16 the ground, put it in his left pants pocket, and started to hurry away. Id. The officer stopped  
17 Rodriguez-Torres a short distance away by grabbing his arms and reached into his left pants  
18 pocket, retrieving a bundle of cocaine. Id. The court found that the officer's observations and  
19 expertise provided probable cause to conclude that a drug offense had been committed. Id. at  
20 693.

21 Here, Officer Brown observed the Defendant involved in a drug transaction with Gorman  
22 in an area with chronic problems for narcotics dealing. Like the officer in Rodriguez-Torres,  
23 Officer Brown had extensive narcotics training and experience. From his vantage point, he saw

1 the bundle of cocaine in the Defendant's hand as well as the money in Gorman's hand. When the  
2 Defendant and Gorman noticed the officers' presence, they both immediately sloughed the drugs  
3 and cash. The officers removed both occupants from the vehicle to retrieve the contraband.  
4 After retrieving the contraband, they placed them under arrest. These circumstances are  
5 analogous to the circumstances in Rodriguez-Torres and justify a reasonably cautious person in  
6 believing a crime was in progress. The officers had probable cause at the time of the arrest.

7 **b. The search of the Accord was justified as a search incident to arrest.**

8 A search incident to arrest is an established exception to the warrant requirement, based  
9 on the need to prevent destruction of evidence and locate weapons in the possession of arrested  
10 person. State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986). The scope of a search  
11 incident to a lawful arrest includes a search of the immediately surrounding area or the area  
12 within the "immediate control" of the person arrested. Chimel v. California, 395 U.S. 752, 762-  
13 63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The rationale for a search incident to arrest rests upon  
14 the need to remove weapons which might be used by the person arrested and the need to prevent  
15 destruction or concealment of evidence. Id. at 763. Thus, the Stroud court held:

16 During the arrest process, including the time immediately subsequent to the  
17 suspect's being arrested, handcuffed, and placed in a patrol car, officers should be  
18 allowed to search the passenger compartment of a vehicle for weapons or  
19 destructible evidence. However, if the officers encounter a locked container or a  
20 locked glove compartment, they may not unlock and search either container  
21 without obtaining a warrant.

22 106 Wn.2d at 152. The Washington Supreme Court subsequently held that the search of the  
23 passenger compartment can occur after the driver and passenger have been removed from the  
vehicle, so long as the search is performed immediately thereafter. State v. Fladebo, 113 Wn.2d  
388, 395-97, 779 P.2d 707 (1989). In a vehicle search incident to arrest, an officer may search  
the passenger compartment of a vehicle, including all areas accessible to persons physically

1 within the compartment, and all unlocked containers in it. State v. Johnson, 128 Wn.2d 431, 909  
2 P.2d 293 (1996) (holding that search of a tractor-trailer's sleeping compartment, accessible from  
3 the cab, was lawful).

4 Federal cases are consistent with this rule, holding that the term "passenger  
5 compartment" includes the trunk area of a hatchback automobile and the rear section of a station  
6 wagon. See United States v. Rojo-Alvarez, 944 F.2d 959 (1<sup>st</sup> Cir. 1991); United States v. Pino,  
7 855 F.2d 357 (6<sup>th</sup> Cir. 1988), amended, 866 F.2d 147 (1989). State courts in other jurisdictions  
8 also have defined "passenger compartment" in a similar manner. See State v. Delossantos, 211  
9 Conn. 258, 559 A.2d 164, 168, cert. denied, 493 U.S. 866, 110 S.Ct. 188, 107 L.Ed.2d 142  
10 (1989) (search incident-to-arrest may extend to hatchback where it was unnecessary to open the  
11 hatchback from the exterior to gain access); Commonwealth v. Bongarzone, 390 Mass. 326, 455  
12 N.E.2d 1183, 1198 (1983) (permissible for police to open tailgate to search within van because  
13 area searched "was within the reach of the defendants without their alighting from the vehicle").

14 Here, the passenger compartment opened directly into the trunk through a lowered  
15 armrest. The opening was approximately eight inches by eighteen inches, thus large enough for  
16 either occupant to reach through and retrieve out a weapon or access and conceal evidence.  
17 Further, Officer Brown noted that the opening was well within the lunge zone of either of the  
18 two front seat occupants. The search, conducted within the "passenger compartment" of the  
19 Accord, was justified as a search incident to arrest.

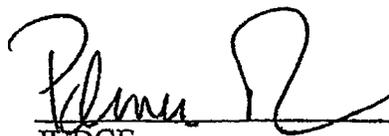
20 In addition to the above written findings and conclusions, the court incorporates by  
21 reference its oral findings and conclusions. Defendant's motion to suppress is denied.  
22  
23

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 6

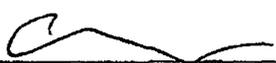
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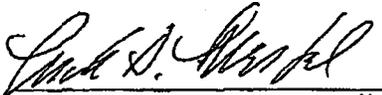
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Signed this 13 day of <sup>January</sup>~~November~~, 2008?

  
\_\_\_\_\_  
JUDGE

Presented by:

  
\_\_\_\_\_  
Deputy Prosecuting Attorney *50437*

  
\_\_\_\_\_  
Attorney for Defendant # *8350*

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 7

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 62876-3-I
	)	
RAMON CURRY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KING COUNTY PROS/APPELLATE UNIT SUPERVISOR  
W554 KING COUNTY COURTHOUSE  
516 THIRD AVENUE  
SEATTLE, WA 98104
  
- [X] RAMON CURRY  
DOC NO. 849162  
OLYMPIC CORRECTIONS CENTER  
11235 HOH MAINLINE  
FORKS, WA 98331

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF JULY, 2009.

x Patrick Mayovsky

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STATE OF WASHINGTON  
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