

63123-3

63123-3

NO. 63123-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TINA BOTTROFF,

Appellant.

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

The Honorable Dean S. Lum

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF
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A. ASSIGNMENTS OF ERROR.

1. The warrantless search of Tina Bottroff's car was unreasonable and without authority of law, in violation of the Fourth Amendment and art. 1, § 7, requiring suppression.

2. The trial court erroneously failed to file written findings of fact and conclusions of law as required under CrR 3.6.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search *or* it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. Tina Bottroff and Christopher Gregory were contacted by police in Ms. Bottroff's car, which she was driving. The police arrested Mr. Gregory on a Department of Corrections escape warrant and searched the vehicle incident to his arrest. At the time of the search, Mr. Gregory was handcuffed in the backseat of a patrol car. Where the arrestee was secured and clearly unable to access the vehicle, and there was no possibility of finding evidence related to the warrant in the vehicle, was the search unreasonable? (Assignment of Error 1).

2. Washington has rejected the federal “good-faith” exception to the exclusionary rule because Washington’s exclusionary rule is focused more on the protection of personal rights than deterring government action. Here, the arrest and trial took place before the United States Supreme Court decided Arizona v. Gant, and the prior rule in Washington might in some circumstances have allowed a search incident to arrest with the arrestee handcuffed in a patrol car. Does the constitutional violation, drawing on the Washington Constitution’s more stringent protection of privacy rights, nonetheless require suppression? (Assignment of Error 1)

3. CrR 3.6 requires the trial court enter written findings of fact and conclusions of law following a CrR 3.6 hearing. In the instant case, the court failed to enter written CrR 3.6 findings of fact and conclusions of law, as required. Does the failure to enter written findings of fact and conclusions of law require remand? (Assignment of Error 2)

C. STATEMENT OF THE CASE.

On June 13, 2008, Tina Bottroff was arrested with co-defendant Christopher Gregory¹ and subsequently charged with Possession of a Controlled Substance with Intent to Deliver. CP 1-30.

At the CrR 3.6 hearing, Bellevue Police Officer Chad Cummings testified he first came in contact with Ms. Bottroff on May 29, 2008. On that date, Officer Cummings initiated a traffic stop of a red Honda Accord driven by Matthew Logstrom, with Ms. Bottroff as the passenger. 9/15/08RP 75-77. Mr. Logstrom, who did not have a driver's license, stated that the vehicle belonged to Ms. Bottroff. 9/15/08RP 77. After a search, Officer Cummings arrested Mr. Logstrom for possession of methamphetamine. 9/15/08RP 8. Ms. Bottroff was not suspected of any crime and was released with the vehicle. 9/15/08RP 81. Bellevue Police Officer Mark Halsted testified he interviewed Ms. Bottroff at the scene, and learned she was living with "Chris" and "Laura." 9/15/08RP 86. With her permission, Officer Halsted followed her to the residence. 9/15/08RP 86.

¹ Christopher Gregory's appeal is already pending before this Court,

Meanwhile, Mr. Logstrom told police he was living with Christopher Gregory in Bellevue. 9/15/08RP 9. Bellevue Police Detective Jeffrey Christiansen testified he was familiar with Mr. Gregory from several prior contacts, and was particularly interested in him because he had heard from a confidential informant that he was stealing cars and selling drugs. 9/15/08RP 27-28. Detective Christiansen subsequently learned Mr. Gregory was wanted on a Department of Corrections escape warrant and was living with Laura Vetter at the same address Ms. Bottroff had shown to Officer Halsted. 9/15/08RP 9, 12.

On June 13, 2009, the Bellevue Police Department set up surveillance of Mr. Gregory's residence. 9/15/08RP 12. At approximately 9:00 am, Detective Christiansen began watching the residence from across the street. 9/15/08RP 15. Soon after, Ms. Bottroff arrived in a red Honda. Id. Later that morning, Detective Christiansen observed her make two or three trips between the car and the apartment; at one point she removed a small dark purse and another bag from the car and took them in the apartment. Id. At some point, Detective Christiansen saw Mr. Gregory leave the apartment, but did not try to arrest him and did not recall seeing him return. 9/15/08RP 39.

In the afternoon, Detective Christiansen moved to a surveillance position around the corner at the intersection of SE 60th and 119th, and Officer Halsted took over the position across the street from the residence. 9/15/08RP 16-17. At approximately 2:30 or 3:00 pm, Officer Halsted informed Detective Christiansen he had just seen Mr. Gregory and Ms. Bottroff get in the Honda, with Ms. Bottroff driving, and drive away. 9/15/08RP 16. From his surveillance position, Detective Christiansen observed the Honda drive past him and pulled in behind them in his unmarked vehicle. 9/15/08RP 17. Very shortly after, the Honda pulled into a gas station. 9/15/08RP 18. Detective Christiansen immediately pulled in behind the Honda, blocking it. As Mr. Gregory was exiting the passenger side of the vehicle, Detective Christiansen activated his lights and Officer Halsted, also in an unmarked vehicle, pulled in front of the Honda, blocking it on the other side. 9/15/08RP 19. Mr. Gregory closed the car door behind him and began walking toward the convenience store. Id. Mr. Gregory made eye contact with Detective Christiansen but continued walking until the detective told him to stop. 9/15/08RP 19-20. Mr. Gregory took a few more steps toward the store, but was then cooperative, and was arrested about eight to ten feet away from the vehicle, then

handcuffed and placed in the back of the patrol car. 9/15/08RP 21, 67.

After taking Mr. Gregory into custody, Detective Christiansen asked Ms. Bottroff to exit the car and told her she was free to leave but he was going to search her car incident to Mr. Gregory's arrest. 9/15/08RP 63. Detective Christiansen began his search on the driver's side of the vehicle, where he found a brown paper bag in the "map holder" compartment on the driver's door panel. 9/15/08RP 23. Inside that bag were several small one-by-one inch baggies, one of which contained a small amount of a white substance. 9/15/08RP 23. In the center console, Detective Christiansen found a small scale and items bearing Ms. Bottroff's name, including her identification. 9/15/08RP 24. At this point Officer Halsted, acting on Detective Christiansen's order, arrested Ms. Bottroff for possession of a controlled substance. Id. In the backseat of the vehicle, Detective Christiansen found the two bags he had seen Ms. Bottroff carrying that morning. 9/15/08RP 15. The purse contained about 50 unused one-by-one inch baggies. Id.

Officer Halsted searched Ms. Bottroff's person and found two baggies containing about 8 grams of suspected

methamphetamine in her pants pocket. 9/15/08RP 25-26.

Detective Christiansen found a cell phone in Mr. Gregory's pants pocket. 9/15/08RP 23.

Search warrants were executed for the contents of the cell phone and the residence, which was searched later the same day. 9/15/08RP 27.

The court denied all motions to suppress. 9/16/08RP 36-48.

In a jury trial before the Honorable Dean S. Lum, Ms. Bottroff was convicted as charged. CP 49. Judge Lum granted her a Drug Offender Sentencing Alternative (DOSA) of six months residential-based treatment followed by twelve months of community custody. CP 53-69.

D. ARGUMENT.

1. THE SEARCH OF MS. BOTTROFF'S VEHICLE WAS UNREASONABLE AND THEREFORE UNCONSTITUTIONAL, REQUIRING SUPPRESSION OF THE EVIDENCE.

a. Because neither defendant could possibly access the vehicle at the time of the search, the search was illegal under *Gant* and *Patton*. Under both the Fourth Amendment and art. 1, § 7, warrantless searches are per se unreasonable, subject only to a few carefully drawn exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Ladson*, 138 Wn.2d 343, 356, 979 P.2d 833 (1999). Under both constitutions, one such exception is the search of a vehicle incident to a recent occupant's arrest. "Like all judicially created exceptions, the automobile search incident to arrest exception is limited and narrowly drawn, and it is the State's burden to establish that it applies." *State v. Patton*, __ Wn.2d __, WL 3384578, slip op. at 2 (Oct. 22, 2009), citing *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

In April 2009, the United States Supreme Court decided *Arizona v. Gant*, holding

[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 if it is reasonable to believe the vehicle contains evidence of the offense of the arrest.

___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

The Court affirmed Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), holding police may search incident to arrest only “the area from within which [the suspect] might gain possession of a weapon or destructible evidence.” However, the Court rejected the expansion of the holding of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), which applied Chimel to vehicle searches. The Court acknowledged that the dominant interpretation of Belton allowed a vehicle search incident to arrest “even if there is no possibility the arrestee could gain access to the vehicle at the time of the search” – including when the suspect is already handcuffed and placed in a patrol car (as Mr. Gregory was here). Gant, 129 S.Ct. at 1718-19.

The Court condemned this practice, explaining:

A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment – the concern about giving police officers unbridled discretion to rummage at will among

a person's private effects.

Id. at 1720. Returning to the underlying reasoning of Chimel, the Gant Court held in no uncertain terms that a search of a vehicle incident to arrest is justified “only when the arrestee is unsecured and within reaching distance of the passenger compartment.” Gant, 129 S.Ct. at 1719. Gant provides one exception to the rule, allowing a vehicle search incident to arrest only if it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” Id. at 1719.

The basic facts of Gant were very similar to the instant case. Gant was arrested for driving with a suspended license, handcuffed, and seated in the back of a patrol car. Id. at 1712. Police searched his vehicle incident to arrested and found cocaine in a jacket in the car. Id. As there was no possibility that Gant could access his vehicle at the time of the search or that the officers could find evidence of driving with a suspended license in the vehicle, the search was unreasonable. Id. at 1719, 1724.

In October 2009, the Washington Supreme Court adopted the Gant rule under the state constitution, calling it a “necessary course correction,” in Patton, slip op. at 7.

Ms. Bottroff's vehicle was searched incident to Mr. Gregory's arrest on the DOC warrant. At the time of the search, Mr. Gregory was handcuffed in the patrol car – obviously unable to access the vehicle. 9/15/08RP 22-23. Clearly no evidence regarding his escape warrant was going to be found in the vehicle. No exception applies, the search was unreasonable, and the evidence must be suppressed.

b. Because the good-faith exception does not apply in Washington, the evidence must be suppressed. The State may argue that even if the search was illegal under Gant and Patton, the evidence should not be suppressed under the good-faith exception. However, the Washington Supreme Court has explicitly rejected the federal good faith doctrine.

In State v. White, 97 Wn.2d 92, 107-08, 640 P.2d 1061 (1982), the Court considered the rule set forth in Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), holding that because “the purpose of the exclusionary rule is to deter unlawful police action[,] [n]o conceivable purpose would be served by suppressing evidence” which was obtained through a search and seizure which the police officer believed in good faith was lawful.

However, the White Court explained that the federal exclusionary remedy is different than Washington's. A historical analysis of Washington's Constitution revealed "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." White, 97 Wn.2d at 110. Moreover, the Court held, "[t]he important place of the right to privacy in Const. art. 1, § 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow." Id. at 110. Therefore, the Court observed, "[t]he issue is not whether a police officer acted in good faith reliance on a statute... 'The question is rather whether the search (or seizure) was reasonable under the Fourth Amendment.'" Id. at 105, quoting Sibron v. New York, 392 U.S. 40, 61, 88 S.Ct. 1889, 1901, 20 L.Ed.2d 917 (1968). Finding it was not, and also that the purpose of deterring unconstitutional legislation serves the public and would be furthered by application of the exclusionary rule in this case, the Court suppressed the evidence. White, 97 Wn.2d at 108. See also State v. McCormick, ___ Wn.App. ___, 216 P.3d 475, 478 (2009), following White in a post-Gant search case and reviewing recent decisions of other

courts refusing to apply the good-faith exception to searches found unconstitutional under Gant.

Notably, in Patton, the Court did not even discuss the possibility of applying the good faith rule or any other exception to the exclusionary rule. That is because no exception is available. Accordingly, all evidence recovered in the search of the vehicle – including the methamphetamine, baggies, scale, and items identifying Ms. Bottroff – must be suppressed. In addition, since the only rationale for the arrest of Ms. Bottroff was the fruit of the unconstitutional vehicle search, her conviction must be reversed.

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED UNDER CrR 3.6(b).

a. No written CrR 3.6 findings of fact and conclusions of law have been entered. A CrR 3.6 hearing was held before the Honorable Dean Lum on September 15 and 16, 2008. Judge Lum admitted all evidence subject to the CrR 3.6 motion, which included all items recovered from Ms. Bottroff's car, her pockets, Mr. Gregory's pockets, Mr. Gregory's residence, and the contents of his cell phone. Judge Lum subsequently sentenced Ms. Bottroff on April 6, 2008. CP 53-69. The Notice of Appeal was filed on March

3, 2009. CP 52. Written findings of fact and conclusions of law as required by CrR 3.6(b) have never been entered.

b. CrR 3.6(b) requires the trial court to enter written findings of fact and conclusions of law. Where a party seeks to suppress evidence, a hearing is held to determine its admissibility. CrR 3.6(a) “If an evidentiary hearing is conducted, at its conclusion the court *shall* enter written findings of fact and conclusions of law.” CrR 3.6(b) (emphasis added). The term “shall” indicates a *mandatory* duty on the trial court. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (“the word ‘shall’ in a statute is presumptively imperative and operates to create a duty”). It is the duty of the prevailing party to submit written findings of fact and conclusions of law following such a hearing. See State v. Wilks, 70 Wn.2d 626, 628, 424 P.2d 663 (1967).

The importance of written findings and conclusions was reinforced by the Supreme Court decision State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998).

A trial court’s oral opinion and memorandum opinion are no more than oral expressions of the court’s informal opinion at the time rendered. An oral opinion “has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.”

Head, 136 Wn.2d at 622 (quoting State v. Dailey, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980)) (construing similar provision of CrR 6.1(d)) (internal citations omitted).

The Head Court determined that in adult bench trials where written findings and conclusions are not filed, remand for entry of findings is the appropriate remedy. Head, 136 Wn.2d at 622. But at the hearing on remand, no additional evidence may be taken, as the findings and conclusions are based solely on the evidence already taken. Id. at 625.

We hold that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Id. at 624.

Appellate courts of this state have routinely condemned the failure of attorneys and trial courts to submit and enter written findings of fact and conclusions of law where required by court rule. See State v. Smith, 67 Wn. App. 81, 834 P.2d 26 (1992), aff'd, 123 Wn.2d 51 (1993) (CrR 3.5 and CrR 3.6); State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1299 (1997) (CrR 3.6); State v.

Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995), rev. denied, 129 Wn.2d 1019 (1996) (CrR 6.1(d)) ; State v. France, 121 Wn. App. 394, 401, 88 P.3d 1003 (2004) (CrR 3.5); State v. Smith, 68 Wn. App. 201, 208, 842 P.2d 494 (1992) (JuCR 7.11(d)); State v. Witherspoon, 60 Wn. App. 569, 572, 805 P.2d 248 (1991) (JuCR 7.11(d)). Nonetheless, no written findings of fact and conclusions of law were entered in this case.

c. This Court must remand for written findings or reverse and dismiss Ms. Bottroff's conviction. The State's case against Ms. Bottroff rested wholly on the evidence recovered from her vehicle and her pockets. Her arrest (and the subsequent search of her person) was based wholly on the evidence recovered from the vehicle. Neither the prosecutor nor the court, however, ensured written findings of fact and conclusions of law were entered following the hearing. Because a trial court's failure to enter written findings of fact and conclusions of law may prejudice an appellant, there is a "strong presumption that dismissal will be the appropriate remedy." Smith, 68 Wn. App. at 209-11. Therefore this Court must remand this matter for the entry of the CrR 3.6 findings, or to reverse and dismiss Ms. Bottroff's conviction.

E. CONCLUSION.

As the unreasonable search violated Ms. Bottroff's rights to privacy under the federal and state constitutions, she respectfully request this Court reverse the conviction and dismiss the charge with prejudice. In the alternative, the case must be remanded for entry of CrR 3.6 findings, or all the convictions reversed and dismissed.

DATED this 24th day of November, 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,)

Respondent,)

v.)

TINA BOTTROFF,)

Appellant.)

NO. 63123-3-I

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **OPENING 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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