

63168-3

63168-3

NO. 63168-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ERIC ROBERTS,

Appellant.

FILED  
COURT OF APPEALS DIVISION #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Chris Washington

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

A King County Sheriff's Deputy conducted a traffic stop of appellant Eric Roberts due to alleged equipment violations and suspended license. After arresting Mr. Roberts for driving with a suspended license, handcuffing, and securing him, a deputy searched Mr. Roberts' car incident to arrest finding a baggie of cocaine. This search violated Mr. Roberts' federal and state Constitutional rights, because Mr. Roberts was not within reaching distance of the passenger compartment at the time of the search, nor was it is reasonable to believe the vehicle contained evidence of the offense of arrest. Accordingly the evidence was illegally obtained from Mr. Roberts' vehicle and his conviction must be reversed and dismissed.

B. ASSIGNMENTS OF ERROR

1. The search of Mr. Robert's vehicle incident to arrest violated the Fourth Amendment of the United States Constitution.

2. The search of Mr. Robert's vehicle incident to arrest violated article 1, section 7 of the Washington Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Under the recently decided *Arizona v. Gant*,<sup>1</sup> The Fourth Amendment allows police to search a vehicle incident to 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. Where an arrestee was handcuffed and removed from his vehicle following an arrest for driving on a suspended license, was the search of his vehicle a violation of his federal constitutional rights?

2. Article 1, section 7 of the Washington Constitution states no person shall be disturbed in his private affairs, or his home invaded, without authority of law. Additionally, article 1, section 7 affords individuals greater protections than the Fourth Amendment. Where an arrestee was handcuffed and removed from his vehicle following an arrest for driving on a suspended license, was the search of his vehicle a violation of his state constitutional rights?

D. STATEMENT OF THE CASE.

On the evening of April 4, 2008 at approximately 10:00 P.M. King County Sheriff's Deputy Joseph Eshom was on patrol in north

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<sup>1</sup> *Arizona v. Gant*, 556 U.S. \_\_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)

Seattle when he observed a vehicle with alleged license plate violations. 01/21/09RP 28-29. Deputy Eshom noticed that the vehicle's license plate light was not working and that there was a plastic covering causing a reflection so that the plate could not be read. Id. However, moving closer and using his headlights the deputy was able to make out the plate. 01/21/09RP 30. He subsequently conducted a records check and discovered that the registered owner of the vehicle, Eric Roberts, driver's license status was suspended in the third degree. 01/21/09RP 31. Deputy Eshom then pulled the vehicle over for the violations.

Mr. Roberts complied with the deputy's request for his driver's license. 01/21/09RP 32. Upon confirming Mr. Roberts' identity, deputy Eshom decided to arrest Mr. Roberts for Driving While License Suspended in the third degree (DWLS 3) and radioed King County Sheriff's Deputy Ryan Mikulcik to assist with the arrest. 01/21/09RP 35. Meanwhile, the deputies allowed Mr. Roberts' female passenger to exit the vehicle and told her she was free to go. Id. Mr. Roberts exited the vehicle, was placed in handcuffs and held by Deputy Eshom at "the back driver's side of the vehicle." 01/21/09RP 36. Deputy Mikulcik then conducted a search of the vehicle and discovered a clear plastic baggie

containing cocaine located between the driver's seat and the center console. 01/21/09RP 36, 58.

The State charged Mr. Roberts with unlawful possession of cocaine. CP 1. At a subsequent jury trial in which the cocaine was introduced, Mr. Roberts was found guilty as charged. 03/05/09RP

1. This appeal timely follows.

E. ARGUMENT.

1. THE SEARCH OF MR. ROBERTS VEHICLE AFTER HE HAD BEEN HANDCUFFED AND SECURED WAS A VIOLATION OF THE FOURTH AMENDMENT.

a. The search of Mr. Roberts' vehicle was a violation of his Fourth Amendment rights. “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Arizona v. Gant, 556 U.S. \_\_\_, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) citing Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The United States Supreme Court has established that search incident to arrest may only include “the arrestee's person and the area ‘within his immediate control.’” Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Furthering this rationale and applying it to

search of vehicles the United States Supreme Court ruled, “that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). The underlying rationale of this exception is to prevent the arrestee from obtaining a weapon or destroying evidence. Chimel, 395 U.S. at 763.

Revisiting the Belton decision, the Court held that,

[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. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 129 S.Ct. at 1723-24. This clarification of Belton was in response to the “courts, scholars, and Members of [the Supreme Court] who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. Id. at 1716.

The facts of Gant are nearly identical to the case at hand. In Gant, the suspect was arrested for driving on a suspended license. After being handcuffed and detained in a police vehicle, officers

searched his vehicle and discovered cocaine in a jacket pocket. Id. at 1714. The Court found that because Gant could not have accessed his car at the time of the search, the search-incident to arrest exception did not justify the search in that case. Id. Here, Mr. Roberts was handcuffed and detained by Deputy Eshom when the search of his vehicle occurred. Because Mr. Roberts could not have accessed his vehicle at the time of the search, Gant requires suppression of the fruits of the unlawful search.

Additionally the Court found “[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.” Id. at 1719. Here Mr. Roberts was being arrested for driving with a suspended license. As was the case in Gant, there was no reasonable basis offered by the State to justify the search of Mr. Roberts’ vehicle. For these reasons this court must find that the warrantless search of Mr. Roberts’ vehicle violated his Fourth Amendment rights.

b. The record is sufficiently developed for this Court to determine the issue despite the lack of a hearing in the trial court. Appellate courts will not review on appeal an alleged error not raised at trial unless it is a “manifest error affecting a constitutional

right.” RAP 2.5 (a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An appellant must show actual prejudice in order to establish that the error is “manifest.” State v. Lynn, 67 Wn.App. 339, 346, 835 P.2d 251 (1992).

Where the record is sufficiently developed, an appellate court can determine whether a motion to suppress clearly would have been granted or denied, and thus can review the suppression issue, even in the absence of a motion and trial court ruling thereon. State v. Contreras, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998) (“We conclude that when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal”).

The record is sufficiently developed for this Court to find his car was illegally searched and the resulting seizure of the cocaine was a product of the unlawful search.

**2. THE SEARCH OF MR. ROBERTS' VEHICLE WAS A VIOLATION OF ARTICLE 1, SECTION 7 OF THE WASHINGTON CONSTITUTION.**

Article 1, section 7 states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. art. 1, § 7. Applying Gant and recognizing that the

Washington Constitution generally provides greater protection to privacy interests than the federal constitution, this Court should hold that the search in this case was unconstitutional under the Washington Constitution. See, e.g., State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984) ("[W]e have recognized that the unique language of Const. art. 1, § 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally"). This Court recognized this notion as well in McCormick. \_\_ Wn.App.\_\_, COA No. 37651-2-II, Slip Op. at 4, WL 3048723 (09/23/09) citing, State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004) citing State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002).

Before Gant, Washington courts have addressed whether a suspect has "immediate control" at the time of his or her arrest. State v. Porter, 102 Wn.App. 327, 332, 334, 6 P.3d 1245 (2000). In Porter, this Court found the search of the defendant's van incident to his son's arrest impermissible because the son had walked 300 feet away from the vehicle before he was arrested and thus, did not have immediate control over the vehicle. Porter, 102 Wn.App. at 334. Furthermore, the van had no connection to the arrest, a testament echoed in Gant. Id. While this Court stated its

holding “requires a case-by-case evaluation of the proper scope of a search incident to an arrest,” it still attempted to maintain an allegiance to State v. Stroud, the current State precedent governing search incident to arrest. State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). In a similar instance of departure from Stroud, this Court held that the key question in applying Belton and Stroud is whether the arrestee had ready access to the passenger compartment at the time of arrest. State v. Johnston, 107 Wn.App. 280, 285-86, 28 P.3d 775 (2001), review denied, 145 Wn.2d 1021, 41 P.3d 483 (2002). The opinion went onto state, “If [the arrestee] could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest.” Id. at 285. These decisions represent an attempt to further narrow the bright-line rule of Belton, prior to and as a precursor to Gant.

Given the Gant decision, the Washington Supreme Court’s reliance on and following of the prior interpretation of Belton encompassed in Stroud can no longer be followed. Stroud itself seems to require that it no longer be followed as it recognized:

If we were to decide this case merely by following United States Supreme Court precedent, the search of the car pursuant to this lawful arrest would clearly

be valid. We decline to do so, however, based on our belief that our Washington State Constitution affords individuals greater protections against warrantless searches than does the Fourth Amendment. We believe this for a variety of reasons. First, when the framers of our state constitution adopted article 1, section 7, they specifically rejected a provision identical to the Fourth Amendment. Journal of the Washington State Constitutional Convention, 1889, at 497 (B. Rosenow ed. 1962). Instead, our forefathers decided on the following: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision, unlike any provision in the federal constitution, explicitly protects the privacy rights of Washington citizens, State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982), and these privacy rights include the freedom from warrantless searches absent special circumstances.

Stroud 106 Wn.2d at 148. The Court further stated,

[r]ecent holdings of this court have indicated that we will protect Washington citizens' right to privacy in search and seizure cases more vigorously than they would be protected under the federal constitution. State v. Simpson, [95 Wn.2d 170, 177, 622 P.2d 1199 (1980)]; State v. White, [97 Wn.2d at 110]; State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983); State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984). During a period in which the federal interpretation more carefully limits an individual's federal privacy rights, we decline to follow the federal lead as our state constitution provides specific additional guarantees of a right to privacy.

Stroud, 106 Wn.2d at 148-49. This commitment of the Supreme Court to more *vigorously* protect citizen's right to privacy, more so than the Fourth Amendment, require this Court to realize the

holding in Stroud is no longer good law and return to the prior holding in Ringer given the new interpretation of Belton. State v. Ringer, 100 Wn.2d at 699-700 (holding, absent actual exigent circumstances, a warrantless search of a suspect's vehicle was impermissible). It is the logical evolution of the State's adherence to the protections of article 1, section 7, and its interpretation thereof to leave the reasoning of Stroud and return to the protections the framers intended.

State cases following Stroud began to recognize the distinction of defendants and their ability to actually access a vehicle following arrest, effectively narrowing Stroud. Other states have gone in this direction as well<sup>2</sup>. This approach was the precursor to the logic and interpretation the Court held in Gant. Because of the greater protection article 1 section 7 affords, logic and precedent dictates that this search also violated the Washington Constitution. This Court properly recognized this in its

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<sup>2</sup> The Court in Gant points to: State v. Bauder, 181 Vt. 392, 401, 924 A.2d 38, 46-47 (2007); State v. Eckel, 185 N.J. 523, 540, 888 A.2d 1266, 1277 (2006); Camacho v. State, 119 Nev. 395, 399-400, 75 P.3d 370, 373-374 (2003); Vasquez v. State, 990 P.2d 476, 488-489 (Wyo.1999); State v. Arredondo, 123 N.M. 628, 636, 944 P.2d 276, 1997-NMCA-081 (Ct.App.), overruled on other grounds by State v. Steinzig, 127 N.M. 752, 987 P.2d 409, 1999-NMCA-107 (Ct.App.); Commonwealth v. White, 543 Pa. 45, 57, 669 A.2d 896, 902 (1995); People v. Blasich, 73 N.Y.2d 673, 678, 543 N.Y.S.2d 40, 541 N.E.2d 40, 43 (1989); State v. Fesler, 68 Or.App. 609, 612, 685 P.2d 1014, 1016-1017 (1984).

recent decision of McCormick. Because Mr. Roberts was handcuffed and detained by a sheriff's deputy, he was unable to access the vehicle. There are no exigent circumstances that the State raised at trial or can offer now that would justify this warrantless search. Accordingly, the search incident to arrest violated Mr. Roberts' privacy rights under article 1, section 7 and must be reversed.

F. CONCLUSION.

The search of Mr. Roberts' vehicle incident to arrest clearly violates Gant and his Fourth Amendment rights, as well as his privacy rights under article one, section seven of the Washington Constitution. Because of this violation, Mr. Roberts respectfully requests this court to reverse and dismiss with prejudice the conviction of unlawful possession of cocaine.

DATED this 14th day of October 2009.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63168-3-I
v.	)	
	)	
ERIC ROBERTS,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF OCTOBER, 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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**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF OCTOBER, 2009.

X \_\_\_\_\_ 

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