

63301-5

63301-5

NO. 63301-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

GARY COOPER,

Appellant.

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

The Honorable Eric Z. Lucas

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON
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A. ASSIGNMENTS OF ERROR

1. The search of Cooper's vehicle incident to his arrest on a misdemeanor warrant violated his rights under Article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution.

2. To the extent the conclusion of law contains factual assertions that are not supported by substantial evidence in the record, the trial court erred in entering conclusion of law III.A., which states in pertinent part:

Officers Tolbert and Lisenby had probable cause to arrest the defendant based on the information Officer Tolbert acquired from Detective Caban of the Bothell Police Department, and for the defendant's confirmed outstanding warrant out of Tacoma[.]

CP 21.¹

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Under both the Fourth Amendment and article I, section 7, law enforcement may not effect a warrantless search of a vehicle incident to the arrest of a recent occupant unless either (1) the occupant poses a safety risk or (2) there is a reasonable basis to believe evidence of the crime of arrest that could be concealed or destroyed will be found in the vehicle. Appellant Gary Cooper was

¹ A copy of the Certificate Pursuant to Cr[R] 3.5 and 3.6 of the Criminal Rules for Superior Court entered by the trial court is attached as an Appendix.

arrested on an unspecified misdemeanor warrant. Although Cooper posed no safety risk, the arresting officers searched his vehicle incident to his arrest. Was the search unlawful under the Fourth Amendment and article I, section 7, requiring suppression of the after-acquired evidence?

C. STATEMENT OF THE CASE

While on patrol in Monroe, Washington, police officer James Tolbert spotted a white sedan with no rear license plate pull up outside the Fairview Apartments. 1RP 10.² About a month previously, Detective Caban of the Bothell Police Department had circulated an email message stating that there was probable cause to arrest appellant Gary Cooper for tampering with evidence. 1RP 10, 21. Caban provided a description of a vehicle similar to the white sedan Tolbert saw and indicated Cooper was known to frequent the Fairview apartment complex. 1RP 10; CP 17-18.

Tolbert contacted Cooper, who was in the front seat of the sedan, and asked him for identification. 1RP 13. Cooper did not have any identification but provided his name and date of birth to Tolbert. Id. Tolbert ran a warrant check on Cooper, which returned

² Two volumes of transcripts are cited herein as follows:
March 6, 2009 - 1RP
March 11, 2009 - 2RP

a misdemeanor warrant out of Tacoma. Id. Tolbert detained Cooper and then contacted his sergeant, who instructed him to arrest Cooper on the warrant. 1RP 15, 33.

Officer Mike Lisenby, who drove the scene upon hearing of the activity on police dispatch, handcuffed Cooper and secured him in the back of his police vehicle. 1RP 30-33. After Cooper's arrest, Tolbert telephoned Caban to see if Caban still had probable cause. 1RP 17. Caban advised Tolbert that he had already booked Cooper on the tampering investigation that was the reason for the communication a month earlier, but that he had new probable cause for additional crimes. 1RP 17, 21.

Tolbert then searched Cooper's vehicle incident to his arrest on the misdemeanor warrant. 1RP 17-18. He found what he suspected to be a methamphetamine pipe, and also a Costco card with a woman's name on it and a Visa debit card with a man's name on it that was not Cooper. 1RP 18. Cooper was booked into Snohomish County Jail, and the Snohomish County Prosecuting Attorney subsequently charged him with possession of stolen property in the second degree. 1RP 19; CP 134-35.

Cooper moved to suppress the evidence acquired pursuant to the search of his vehicle incident to his arrest. CP 82-131. His

motion was heard before the United States Supreme Court issued its decision in Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and consequently the court ruled the search incident to arrest was lawful, reasoning that Cooper was in physical and temporal proximity to the vehicle at the time of the arrest and search. CP 21. Cooper was found guilty following a stipulated facts trial, and now appeals. 2RP 7-10; CP 30.

D. ARGUMENT

THE WARRANTLESS SEARCH OF COOPER'S VEHICLE VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT AND ARTICLE ONE, SECTION SEVEN, AS STATED IN *ARIZONA V. GANT* AND *STATE V. PATTON*.

1. A search of a vehicle incident to a recent occupant's arrest violates the state and federal constitutions unless the arrestee poses a safety risk or it is reasonable to believe evidence of the offense of arrest will be found therein. Both the federal constitution and the Washington State Constitution zealously protect individuals from unwarranted government intrusion. U.S. Const. amend. 4;³ Const. art I, § 7.⁴ Warrantless searches and

³ The Fourth Amendment to the federal constitution prohibits unreasonable searches and seizures.

⁴ Article I, section 7 of the Washington constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

seizures are per se unreasonable. Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980); State v. Williams, 102 Wn.2d 733, 736, 698 P.2d 1065 (1984). Thus, to establish the validity of a warrantless search, the State must show the search is justified under one of the carefully drawn exceptions to the warrant requirement. State v. Patton, ___ Wn.2d ___, ___ P.3d ___ No. 80518-1, 2009 WL 3384578 at 3 (Oct. 22, 2009).⁵ “These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.” Id.

In Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the Supreme Court held that police may search areas within an arrestee’s “immediate control,” “in order to remove any weapons [the arrestee] might seek to use” and “in order to prevent [the] concealment or destruction” of evidence. 395 U.S. at 763. The extent to which this narrow exception subsequently was broadened to permit any search of a vehicle incident to a recent occupant’s arrest hardly needs further elaboration. New York v. Belton, 453 U.S. 454, 460, 101 S.Ct.

⁵ Due to the recency of the Patton decision, no citations to the Washington or Pacific Reporter are available on Westlaw. A copy of the decision is attached as Appendix B and citations herein are to the pagination of that document.

2860, 69 L.Ed.2d 768 (1981); State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986).

In Gant and Patton, recognizing that the exception itself had come to be regarded as “a police entitlement rather than as an exception justified by the twin rationales of Chimel,” Patton, 2009 WL 3384578 at 7 (quoting Gant, 129 U.S. at 1718 (citation omitted)), both the United States and Washington Supreme Courts restricted this exception. Gant, 129 U.S. at 1723; Patton, 2009 WL 3384578 at 7. Now, under both the federal and state constitutions:

[T]he search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.

Patton, 2009 WL 3384578 at 7 (emphasis added); see also Gant, 129 S.Ct. at 1723-24.

2. Cooper did not pose a safety risk. At the time that Tolbert decided to search Cooper’s vehicle, Cooper did not pose a safety risk. Cooper was handcuffed and seated in Lisenby’s patrol car. 1RP 33. Cooper had been cooperative during the investigation, and Lisenby testified that at the time of the search Cooper was secured in his vehicle, and that the doors to the vehicle could only

be opened from the outside. 1RP 37. He agreed that Cooper did not pose any risk to Tolbert at the time. Id.

3. There was no reasonable basis to believe that evidence of the crime of arrest would be found in Cooper's car. As Cooper did not pose a safety risk to the officers, Tolbert and Lisenby were prohibited from searching his vehicle incident to his arrest, as there was no reason to believe that evidence "of the crime of arrest that could be concealed or destroyed" would be found in the car. See Patton, 2009 WL 3384578 at 7.

Cooper was arrested on a misdemeanor warrant out of Tacoma. 1RP 15-16, 32-33. Tolbert and Lisenby, relying on the mistaken belief that having arrested Cooper they could search his vehicle regardless of the reason for his arrest, did not testify about what the warrant was for. Although Tolbert was initially interested in Cooper because of the month-old report that there was probable cause for Cooper's arrest, he did not arrest Cooper for this reason. 1RP 15-16. Tolbert contacted Caban after he arrested Cooper to ascertain whether probable cause still existed, but during this telephone call, Caban admitted he had already booked Cooper on the investigation that was the subject of the initial report. 1RP 17.

In Washington, a valid custodial arrest is a prerequisite for a search incident to arrest; “it is not enough that officers have probable cause to effectuate an arrest.” State v. Patton, 2009 WL 3384578 at 7 (citing State v. O’Neill, 148 Wn.2d 564, 585-86, 62 P.3d 489 (2003)). The misdemeanor warrant was the reason for Cooper’s arrest; consequently, even if the arrest could somehow be tied to Caban’s report, this would be immaterial under Article I, section 7. State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (invalidating search incident to arrest where trial court improperly justified arrest based on reason that was not the actual reason relied upon by officers). Because the search of Cooper’s vehicle was in no way connected to his arrest on the Tacoma misdemeanor warrant, the search violated the Fourth Amendment and article I, section 7.

4. The fruits of the unlawful search must be suppressed.

Where evidence is obtained as a consequence of an unconstitutional search, the evidence must be suppressed. “The important place of the right to privacy in Const. art. I, § 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow.” State v. White, 97 Wn.2d 92, 111-12, 640

P.2d 1061 (1982). This Court must reverse the ruling of the trial court and remand with direction that the charge be dismissed.

E. CONCLUSION

For the foregoing reasons, Gary Cooper's conviction must be reversed and dismissed.

DATED this 4th day of November, 2009.

Respectfully submitted:



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State v. Cooper, No. 63301-5-I

Appendix A

1 Caban about a month previously regarding a male known as "Gary" with which
2 Detective Caban had felony probable cause for Fraud/Identity Theft. During that
3 same prior conversation, Detective Caban reportedly told Officer Tolbert that
4 "Gary" and a female suspect might be associated with a white passenger vehicle
5 with no plate with an apartment in the new section of the Fairview Apartment
6 complex.

7 Officer Tolbert then pulled next to the suspect white vehicle with no plate,
8 and was eventually able to observe a male lying across the front seats of the
9 vehicle. The officer then asked the male what he was doing and requested his
10 name. The male identified himself as [defendant] Gary Cooper and claimed that
11 he was doing his laundry. The defendant stated that he did not have identification
12 (after the officer requested identification), and gave the officer his full name and
13 date of birth. The officer ran the defendant's information through dispatch and
14 subsequently confirmed that the defendant had a misdemeanor warrant out of
15 Tacoma. The officer then explained to the defendant that he was not under arrest,
16 but was being detained for his outstanding warrant. The police then placed the
17 defendant in handcuffs and put him in the rear seat of a patrol vehicle. Officer
18 Tolbert then contacted his sergeant about the above circumstance, and was
19 advised to transport the defendant to Tacoma. The officer subsequently re-
20 contacted the defendant and told him that he was under arrest for the warrant.

21 Officer Tolbert reported that he then contacted Bothell Detective Caban and
22 explained that he had the defendant under arrest for an outstanding warrant and
23 asked Detective Caban if he still had probable cause for Cooper. Officer Tolbert

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1 reported that Detective Caban told him that he booked Cooper a few weeks ago,
2 but had additional probable cause for his arrest.

3 Officer Lisenby arrived on the location shortly thereafter, and was advised
4 by Officer Tolbert that the defendant had an outstanding warrant out of Tacoma,
5 and was a suspect in an on-going case investigated by the Bothell Police
6 Department. Officer Lisenby then initially detained the defendant for the above
7 warrant, applied handcuffs on him, and patted the defendant down for weapons.
8 Officer Lisenby then secured the defendant in his patrol car. Officers Tolbert and
9 Lisenby testified that the defendant was less than twenty (20) feet away from his
10 vehicle when he was sitting in the above patrol vehicle. Officer Lisenby testified
11 that it took less than a couple of minutes to confirm the defendant's warrant, and
12 that he could transport the defendant to Tacoma.
13

14 Officer Tolbert then searched the vehicle the defendant was apparently
15 hiding in incident to arrest, and located a glass pipe with residue, which based
16 upon the officer's training and experience, was a pipe to smoke
17 methamphetamine. The officer also located a VISA credit/debit card with the
18 name Timothy A. Pierce inscribed on it, as well as a Washington State Temporary
19 Driver's License with the name John Faith Brown printed on it, a VISA gift card
20 (reportedly worth \$25.00), and a Costco member card the name and photograph of
21 a Jeannie Flavin on it. The officer also located a piece of notebook paper in the
22 above vehicle. The piece of paper had the handwritten name, date of birth,
23 telephone number, and address of a female, as well as several receipts and other
24 documents. The officers testified that the defendant remained in the patrol vehicle
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26

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1 during the above search, and the above patrol vehicle was approximately less than
2 twenty feet away at that time.

3 Victim Timothy Pierce subsequently reported that his credit card was stolen
4 on January 1, 2009 and told the police that no one was authorized to have or use
5 his credit card. The victim assumed that his credit card was stolen out of his
6 mailbox.

7 Officer Tolbert re-contacted Detective Caban about what he had found in
8 the defendant's vehicle, and the detective told the officer that a name found in
9 some of the evidence located in the above vehicle was a name used on some of
10 the items of evidence he had in his possession.

11 The defendant subsequently requested to talk to Detective Caban on the
12 phone, and Officer Tolbert provided the defendant a cell phone to call and talk to
13 the detective. The defendant reportedly spoke to the detective for approximately
14 twenty minutes. After speaking to the detective on the cell phone, the defendant
15 told Officer Tolbert to "...search my trunk. What he [Detective Caban] is looking
16 for is not in my car." The defendant then explained that the detective was looking
17 for an external hard-drive. The officer then confirmed with the defendant that he
18 consented to the police searching the trunk of his vehicle, and Officer Tolbert
19 reported that nothing of evidentiary value was located inside the trunk of the
20 defendant's vehicle.
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24 II. The Disputed Facts

25 No disputed facts were found in this matter.
26

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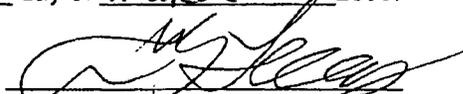
III. Court's Conclusions of Law

The court found the following:

- A. Officers Tolbert and Lisenby had probable cause to arrest the defendant based upon the information Officer Tolbert acquired from Detective Caban of the Bothell Police Department, and for the defendant's confirmed outstanding warrant out of Tacoma, while the defendant was still seated in white car with no license plate;
- B. Officer Lisenby detained and arrested the defendant shortly after the defendant was contacted by Officer Tolbert;
- C. The time period from which the defendant was contacted, detained, and the warrant was confirmed was done in proximity of the vehicle the defendant was found in, and was completed within a limited period of time;
- D. The factual circumstances in the above case are factually distinguishable from the facts in State v. Webb, 147 Wn. App. 264 (2008);
- E. The defendant was less than twenty feet away from the car he was arrested in when the officers performed a search incident to arrest of the above car;
- F. Based upon the totality of the facts presented to the court, the defendant was physically proximate to the passenger compartment of the above vehicle at the time of his lawful arrest.

G. *Defendant* **CONTAINS A WARRANT SHOULD BE REQUIRED TO SEARCH + SEARCH WAS NOT DONE INCIDENT TO ARREST.**
 The defendant's motion to suppress evidence is denied.

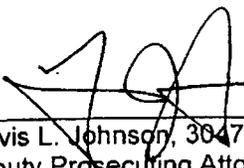
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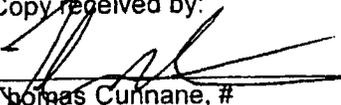

 Judge

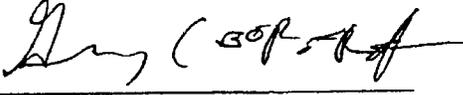
Presented

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State v. Cooper, No. 63301-5-I

Appendix B

Westlaw

2009 WL 3384578

--- P.3d ---, 2009 WL 3384578 (Wash.)

(Cite as: 2009 WL 3384578 (Wash.))

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Only the Westlaw citation is currently available.

Supreme Court of Washington,
En Banc.
STATE of Washington, Respondent,
v.
Randall J. PATTON, Petitioner.
No. 80518-1.

Oct. 22, 2009.

Background: Defendant charged with unlawful possession of methamphetamine and resisting arrest filed motion to suppress evidence. The trial court granted motion. State appealed. The Court of Appeals, 137 Wash.App. 1061, 2007 WL 1064439, reversed. Defendant petitioned for review.

Holdings: The Supreme Court, En Banc, Stephens, J., held that:

(1) defendant was arrested as he stood beside his parked car, even though he fled and was not physically restrained until police caught up with him, but
(2) police were not authorized to search defendant's car under automobile search incident to arrest exception.
Reversed.

J.M. Johnson, concurred and filed opinion.

West Headnotes

[1] Arrest ↪71.1(5)

35k71.1(5) Most Cited Cases

An automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed. West's RCWA Const. Art. 1, § 7.

[2] Searches and Seizures ↪24

349k24 Most Cited Cases

A warrantless search is per se unreasonable, unless

it falls within one of the carefully drawn exceptions to the warrant requirement; these exceptions are limited by the reasons that brought them into existence, and are not devices to undermine the warrant requirement. U.S.C.A. Const.Amend. 4.

[3] Arrest ↪71.1(1)

35k71.1(1) Most Cited Cases

Officer safety and the risk of destruction of evidence of the crime of arrest are the reasons that brought into existence the automobile search incident to arrest exception to warrant requirement, and these factors limit the scope of the exception. West's RCWA Const. Art. 1, § 7.

[4] Arrest ↪71.1(5)

35k71.1(5) Most Cited Cases

The automobile search incident to arrest exception to warrant requirement is limited and narrowly drawn, and it is the State's burden to establish that it applies. West's RCWA Const. Art. 1, § 7.

[5] Arrest ↪68(3)

35k68(3) Most Cited Cases

Whether an officer informs the defendant he is under arrest is only one of all of the surrounding circumstances, albeit an important one, to be considered in determining whether defendant has been arrested. West's RCWA Const. Art. 1, § 7.

[6] Arrest ↪68(3)

35k68(3) Most Cited Cases

Defendant was arrested, for purposes of automobile search incident to arrest exception to warrant requirement, at the time police officer pulled his vehicle into driveway behind defendant's parked car with his lights activated, immediately approached defendant, and told him he was under arrest and to put his hands behind his back; although defendant fled and was not physically restrained until police caught up with him, the fact that defendant chose to flee did not undermine validity of arrest as he stood beside his car. West's RCWA Const. Art. 1, § 7.

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[7] Arrest  **71.1(5)**

35k71.1(5) Most Cited Cases

Automobile search incident to arrest exception to warrant requirement is narrow and should be applied only in circumstances anchored to the justifications for its existence; such a search cannot arise from the simple fortuity that a suspect is arrested near his car. West's RCWA Const. Art. 1, § 7.

[8] Searches and Seizures  **12**

349k12 Most Cited Cases

[8] Searches and Seizures  **26**

349k26 Most Cited Cases

State constitution's express regard for an individual's "private affairs" places strict limits on law enforcement activities in the area of search and seizure. West's RCWA Const. Art. 1, § 7.

[9] Arrest  **71.1(5)**

35k71.1(5) Most Cited Cases

The search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search. West's RCWA Const. Art. 1, § 7.

[10] Arrest  **71.1(5)**

35k71.1(5) Most Cited Cases

Police were not authorized to search defendant's vehicle under automobile search incident to arrest exception to warrant requirement when defendant fled after being arrested as he stood beside his parked car in his driveway; defendant was not a driver or recent occupant of his vehicle, no connected existed between defendant, the vehicle, and his arrest for failure to appear in court for a past offense, there was no basis to believe evidence relating to arrest would have been found in car, defendant was secured in patrol car at time of vehicle search, and there was no evidence of contraband prior to the search. West's RCWA Const. Art. 1, § 7.

STEPHENS, J.

*1 [1] ¶ 1 This case asks us to determine the validity of an automobile search under the "incident to arrest" exception to the general warrant requirement of article I, section 7 of the Washington State Constitution. Sheriff's deputies attempted to effectuate an arrest warrant for Randall J. Patton while he stood in his driveway next to his parked car with his head in the window. When told he was under arrest, Patton fled from the car into his home, where law enforcement officers physically detained him. They subsequently searched his car. The trial court found the search invalid as a search incident to arrest because police did not physically detain Patton while he stood next to his car. The Court of Appeals reversed, finding Patton was arrested next to his automobile, and therefore, the search of his car was valid incident to his arrest. Though we agree Patton was under arrest while he stood next to his car, the search incident to arrest exception requires a nexus between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns or concern for the destruction of evidence of the crime of arrest. Because no such nexus existed here, we reverse the Court of Appeals. We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed. [FN1]

FACTS

¶ 2 The underlying facts are set forth in the unchallenged findings of fact determined at the hearing on Patton's motion to suppress evidence. On March 19, 2005, Skamania County Sheriff Deputy Tim Converse was watching Patton's trailer in the hope of locating Patton to arrest him on an outstanding felony warrant. He ran the license on a blue Chevy parked in the driveway and confirmed that the car belonged to Patton. Deputy Converse called for backup.

¶ 3 After waiting a short time, Deputy Converse

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saw the dome light illuminate in the parked car and saw someone generally fitting Patton's description "rummaging around" inside the car. Clerk's Papers (CP) at 16. Concerned the person might try to drive away, Deputy Converse activated his lights and pulled into the driveway behind the car. He approached Patton, announced that he was under arrest, and ordered him to put his hands behind his back. Patton, who still had his head inside the car when Deputy Converse spoke, stood up and ran inside the trailer. He did not respond to the deputy's verbal commands to exit the trailer.

¶ 4 After two other backup deputies arrived, they entered the trailer and found Patton hiding behind a bedroom door. Patton was taken into custody, handcuffed, and placed in the back of Deputy Converse's patrol car. The deputies then searched Patton's vehicle, where they found two baggies of methamphetamine and \$122 cash under the driver's seat. [FN2]

*2 ¶ 5 The State charged Patton with one count of unlawful possession of methamphetamine and one count of resisting arrest. Patton moved under CrR 3.6 to suppress the evidence obtained from his vehicle. The trial court granted the motion, concluding that the search was not incident to arrest because Patton was not arrested until he was taken into physical custody in the trailer. The State appealed, arguing the arrest occurred beside the car and therefore the search was valid incident to the arrest. The Court of Appeals agreed and reversed the trial court. We granted Patton's petition for review to address whether the search incident to arrest exception applies in these circumstances.

ANALYSIS

¶ 6 Patton claims the search of his car violated his rights under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. When a party claims both state and federal constitutional violations, we turn first to our state constitution. *State v. Johnson*, 128 Wash.2d 431, 443, 909 P.2d 293 (1996). [FN3] Article I, section 7 provides: "No

person shall be disturbed in his private affairs, or his home invaded, without authority of law." We have specifically recognized that Washington State citizens hold a constitutionally protected privacy interest in their automobiles and the contents therein. *State v. Parker*, 139 Wash.2d 486, 496, 987 P.2d 73 (1999); *State v. Gibbons*, 118 Wash. 171, 187- 88, 203 P. 390 (1922).

[2] ¶ 7 Our analysis under article I, section 7 begins with the presumption that a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement. These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement. *State v. Ladson*, 138 Wash.2d 343, 356, 979 P.2d 833 (1999).

[3][4] ¶ 8 One such exception, and the one at issue here, is the automobile search incident to arrest exception. [FN4] Officer safety and the risk of destruction of evidence of the crime of arrest are the reasons that brought this exception into existence. *State v. Ringer*, 100 Wash.2d 686, 693-700, 674 P.2d 1240 (1983) (reviewing historical development of search incident to arrest exception under federal and state law). Necessarily, these factors--also described as exigencies--limit the scope of the exception. [FN5] 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. *Parker*, 139 Wash.2d at 496, 987 P.2d 73.

¶ 9 The focus of Patton's argument is that the search of his vehicle was not valid incident to his arrest because he was not arrested until the sheriff's deputies took him into physical custody inside the trailer. He also argues that the arrest here had no connection to the car and was merely used "to bootstrap a search of the automobile and its contents." Br. of Resp't at 12. Patton is supported by amicus curiae, American Civil Liberties Union of Washington, which urges us to reexamine our decision in *State v. Stroud*, 106 Wash.2d 144, 720 P.2d 436

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(1986), and limit the search incident to arrest exception. We address separately the questions of when Patton was arrested and whether the subsequent search falls within the narrow exceptions we have recognized.

When Was Patton Arrested?

*3 [5] ¶ 10 The trial court concluded Patton was not arrested until he was placed under physical control in the trailer. We disagree. "An arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person. The existence of an arrest depends in each case upon an objective evaluation of all the surrounding circumstances." 12 Royce A. Ferguson, Jr., *Washington Practice: Criminal Practice and Procedure* § 3104, at 741 (3d ed.2004) (footnote omitted). [FN6]

[6] ¶ 11 Although Patton was not physically restrained until the police caught up with him in the trailer, Deputy Converse pulled into the driveway behind Patton's car with his lights activated. He immediately approached Patton, told him he was under arrest and to put his hands behind his back. Under an objective evaluation of all the surrounding circumstances, an arrest occurred. The fact that Patton chose to flee does not undermine the validity of the arrest.

¶ 12 We have seen recently a number of Court of Appeals cases in which a suspect flees from a car prior to being arrested, and the question arises whether a subsequent search of the car is valid incident to the arrest. *State v. Adams*, 146 Wash.App. 595, 191 P.3d 93 (2008); *State v. Quinlivan*, 142 Wash.App. 960, 176 P.3d 605 (2008); *State v. Rathbun*, 124 Wash.App. 372, 101 P.3d 119 (2004); *State v. Perea*, 85 Wash.App. 339, 932 P.2d 1258 (1997). In each of these cases except *Adams*, the Court of Appeals invalidated an automobile search incident to arrest because law enforcement officers did not initiate an arrest before the suspect exited and left the area of the car. See *Quinlivan*, 142 Wash.App. at 962-63, 176 P.3d 605 (noting no dispute over when suspect was arrested, some distance

from car); *Rathbun*, 124 Wash.App. at 378-79, 101 P.3d 119 (distinguishing cases in which the arrestee fled from his vehicle, and noting Rathbun was far from his vehicle at the time police initiated the arrest); *Perea*, 85 Wash.App. at 344-45, 932 P.2d 1258 (noting that Perea was not arrested until after leaving and locking his car and that his actions in fleeing "[did] not diminish the lawfulness of the act of locking his car").

¶ 13 These cases should not be read broadly to suggest that the initiation of an arrest is ineffective so long as the fleeing suspect eludes physical restraint. To adopt Patton's argument that he was not arrested until he was chased down and restrained would send a dangerous message and jeopardize peaceable arrest. It would encourage flight as the means to avoid a search incident to arrest and concomitantly encourage greater force by law enforcement at the first moment of the arrest process to eliminate flight as an option. We have previously held that under article I, section 7, an individual cannot avoid seizure by failing to yield to a show of authority. *State v. Young*, 135 Wash.2d 498, 957 P.2d 681 (1998). We conclude the same is true of attempts to avoid arrest by fleeing instead of yielding to an officer's exercise of authority to arrest. The Court of Appeals correctly held that Patton was placed under arrest as he stood beside his car.

Was the Search of Patton's Car Valid as a Search Incident to Arrest?

*4 [7] ¶ 14 The Court of Appeals seemed to conclude that, if Patton was under arrest at the moment he stood beside his car, the subsequent search of the car was necessarily valid. We find the question requires greater examination, as the search incident to arrest exception is narrow and should be applied only in circumstances anchored to the justifications for its existence. A search incident to arrest cannot arise from the simple fortuity that a suspect is arrested near his car. To determine whether the exception extends to the circumstances of this case, it is helpful to review some of the history of our precedent analyzing and applying the exception.

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¶ 15 In *Ringer*, a consolidated case with two defendants, Ringer and Cocoran, we thoroughly reviewed the history of the search incident to arrest exception in an effort to clarify its basis. 100 Wash.2d at 693-700, 674 P.2d 1240. After police cited defendant Ringer for illegally parking his van in a rest area, they asked him to step away from his vehicle and arrested him on an outstanding felony warrant. Following the arrest, police patted down Ringer, put him in the patrol car, and then searched the vehicle. Similarly, in the companion case, police were seeking to arrest Cocoran on an outstanding felony warrant for boat theft when they saw him drive away from a private residence. Police pulled over Cocoran, arrested and placed him in the patrol car, and then searched his vehicle.

¶ 16 Declaring both searches invalid, we recognized that the automobile search incident to arrest exception rests on concerns for officer safety and the potential destruction of evidence of the crime of arrest. *Ringer*, 100 Wash.2d at 699-700, 674 P.2d 1240. These concerns were not at issue at the time the officers in *Ringer* and *Corcoran*'s cases searched the vehicles. *Id.* at 700, 674 P.2d 1240. In *Ringer*, we expressly overruled a number of prior cases that had resulted in the sort of " 'progressive distortion' " of the exception under article I, section 7 that Justice Frankfurter lamented under the Fourth Amendment in his dissent in *United States v. Rabinowitz*. [FN7] 100 Wash.2d at 694, 674 P.2d 1240 (quoting Justice Frankfurter's dissent), 699. We emphasized that the search incident to arrest exception must be narrowly applied, consistent with its common law origins allowing an arresting officer to search the person arrested and the area within his immediate control. *Id.* at 699, 674 P.2d 1240 (holding that "[a] warrantless search [incident to arrest] is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested").

¶ 17 In *Stroud*, we refined our approach to the auto-

mobile search incident to arrest exception. 106 Wash.2d 144, 720 P.2d 436. There, police arrested the defendants as they were burglarizing a vending machine. While stealing money from the machine, the defendants left their car parked next to it with the car doors open, the engine running, and a gun on the backseat. We held the search of the car was related to the reason for the defendants' arrest, i.e., the burglary and the weapon. *Id.* at 153, 720 P.2d 436.

*5 ¶ 18 There was no majority opinion in *Stroud*. A four-justice lead opinion overruled part of *Ringer* to the extent it read that decision as imposing a case-by-case " 'totality of the circumstances' " analysis of whether concerns for officer safety or destruction of evidence are present at a given arrest. *Stroud*, 106 Wash.2d at 150-51, 720 P.2d 436 (Goodloe, J.) (quoting *Ringer*, 100 Wash.2d at 701, 674 P.2d 1240). In an effort to provide guidance to officers in the field, the lead opinion crafted a bright line rule:

During 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. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

Id. at 152, 674 P.2d 1240 (Goodloe, J.). The lead opinion recognized that this rule as to the scope of a permissible search was based on heightened privacy concerns under article I, section 7 and was more protective than the Fourth Amendment rule articulated in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). See *Stroud*, 106 Wash.2d at 148-50, 720 P.2d 436 (Goodloe, J.).

¶ 19 A four-justice concurring opinion agreed that the search in *Stroud* was valid incident to the defendants' arrest but disagreed with much of the lead opinion's reasoning, including its bright line rule. Because the ninth justice, Justice Dolliver, the au-

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thor of *Ringer*, concurred in result only, the holding of *Stroud* is necessarily the narrowest ground upon which a majority agreed. See, e.g., *Davidson v. Hensen*, 135 Wash.2d 112, 128, 954 P.2d 1327 (1998) (noting that "[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds"). We subsequently described the bright line rule of *Stroud* as determining "the scope of a warrantless search of an automobile incident to an arrest: the police can search the contents of the passenger compartment exclusive of locked containers or locked glovebox." *State v. Fladebo*, 113 Wash.2d 388, 395, 779 P.2d 707 (1989) (emphasis added) (citing *Stroud*, 106 Wash.2d at 152, 720 P.2d 436); see also *State v. Vrieling*, 144 Wash.2d 489, 492, 28 P.3d 762 (2001) (describing *Fladebo* as adopting locked container rule proposed by lead opinion in *Stroud*). [FN8]

¶ 20 Several cases that followed *Stroud* have explored the scope of its bright line rule in various contexts. In *Fladebo*, we upheld the search of the defendant's purse found in her car at the scene of an accident, where she was arrested for driving while intoxicated. 113 Wash.2d at 395-97, 779 P.2d 707. We rejected the argument that a woman's purse is not subject to search because it is akin to a locked container, *id.* at 395, 779 P.2d 707, and further held that the search was "properly timed" insofar as it took place immediately after the defendant was removed from the vehicle and arrested. *Id.* at 397, 779 P.2d 707. We distinguished cases invalidating automobile searches where the search was not contemporaneous with the arrest and the area searched was not within the arrestee's immediate control. *Id.* at 396, 779 P.2d 707 (distinguishing *United States v. Kasey*, 834 F.2d 782 (9th Cir.1987) and *State v. Boyce*, 52 Wash.App. 274, 758 P.2d 1017 (1988)). We noted that *Stroud's* bright line rule grew out of the "grab zone" rule of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and thus, the exigencies that justify the search incident to arrest exception remain dependent on the

closeness in time between the search and the arrestee's immediate control of the area searched. *Fladebo*, 113 Wash.2d at 396, 779 P.2d 707.

*6 ¶ 21 Subsequently in *Johnson* and *Vrieling*, we upheld searches of a sleeping compartment of a semitractor-trailer and a motor home, respectively, on the basis that these areas were within the scope of the passenger compartment subject to search under *Stroud*. *Johnson*, 128 Wash.2d at 447- 50, 909 P.2d 293 (concluding that valid search incident to arrest included sleeping area of vehicle that was readily accessible from passenger compartment); *Vrieling*, 144 Wash.2d at 495-96, 28 P.3d 762 (allowing search of motor home incident to arrest of driver). In these cases, we emphasized the very real concern for officer safety during traffic stops when vehicle occupants are arrested, underscoring the need for an easily applied, bright line rule as to the scope of the area that may be searched. See *Johnson*, 128 Wash.2d at 448-49, 909 P.2d 293; *Vrieling*, 144 Wash.2d at 496, 28 P.3d 762. There was no issue in *Johnson* or *Vrieling* as to the necessary nexus between the person arrested and the vehicle searched because the defendants were driving at the time they were stopped and their vehicles were searched immediately after they were removed and arrested. *Johnson*, 128 Wash.2d at 434-36, 909 P.2d 293; *Vrieling*, 144 Wash.2d at 490-91, 28 P.3d 762.

¶ 22 In *Parker*, we again addressed the scope of the bright line rule under *Stroud* with four separate opinions discussing the history and justification of the search incident to arrest exception. 139 Wash.2d 486, 987 P.2d 73. We held, consistent with article I, section 7's dictate to narrowly construe warrant exceptions, that a valid search incident to arrest does not encompass the search of items belonging to a vehicle's nonarrested passenger absent a showing that the passenger posed a safety risk to officers or had secreted contraband. *Id.* at 505, 987 P.2d 73 (lead opinion of C. Johnson, J.); 516- 17 (Talmadge, J., concurring).

¶ 23 Significantly, each of these cases following

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Stroud focused on the permissible *scope* of a search incident to arrest. None involved directly the question of when the exception applies in the first instance, insofar as when a search is in fact *incident* to an arrest. We addressed part of this question in *State v. O'Neill*, 148 Wash.2d 564, 585-86, 62 P.3d 489 (2003), holding that a valid custodial arrest is a condition precedent to a search incident to arrest, and it is not enough that officers have probable cause to effectuate an arrest. We underscored the importance of not allowing a drift from the threshold requirements given that a search incident to arrest is not merely an exception to the warrant requirement, but allows a suspicionless, warrantless search. *Id.* We held that an actual custodial arrest is necessary to provide " 'authority of law' " under article I, section 7 for such a search. *Id.*

¶ 24 As in *O'Neill*, we are here concerned with the preconditions to a valid search incident to arrest, rather than the scope of such a search once allowed. We cannot presume that every time a car is present at the scene of an arrest, a search of the car falls within the scope of *Stroud's* bright line rule. The question before us, then, is whether it would stretch the search incident to arrest exception beyond its justifications to apply it where the arrestee is not a driver or recent occupant of the vehicle, the basis for arrest is not related to the use of the vehicle, and the arrestee is physically detained and secured away from the vehicle before the search. We believe it would.

*7 ¶ 25 Unfortunately, the scope of the search incident to arrest exception under our article I section 7 has experienced the same sort of progressive distortion that the United States Supreme Court recently recognized resulted in the unwarranted expansion of the search incident to arrest exception under the Fourth Amendment. *Arizona v. Gant*, --- U.S. ----, 129 S.Ct. 1710, 1718-19, 173 L.Ed.2d 485 (2009). In *Gant*, the court observed that many lower courts have followed the broadest possible reading of the search incident to arrest exception as articulated in *Belton*, with the result that it has

come to be regarded as " 'a police entitlement rather than as an exception justified by the twin rationales of *Chimel*.' " *Id.* at 1718 (quoting *Thornton v. United States*, 541 U.S. 615, 624, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (O'Connor, J., concurring in part)). Recognizing that the decision in *Belton* itself purported to follow *Chimel*, the Court in *Gant* issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, 129 S.Ct. at 1719.

[8][9] ¶ 26 Article I section 7 requires no less. We have long recognized that our constitution's express regard for an individual's "private affairs" places strict limits on law enforcement activities in the area of search and seizure. *See, e.g., O'Neill*, 148 Wash.2d at 585-86, 62 P.3d 489. Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search. While we believe this holding is consistent with the core rationale of our cases, we also recognize that we have heretofore upheld searches incident to arrest conducted after the arrestee has been secured and the attendant risk to officers in the field has passed. Today, we expressly disapprove of this expansive application of the narrow search incident to arrest exception.

[10] ¶ 27 Under a proper understanding of the search incident to arrest exception, the circumstances here simply do not involve a search *incident* to arrest. Patton was not a driver or recent occupant of the vehicle searched. There is no indication in the record that Patton even had keys to the vehicle. No connection existed between Patton, the reason for his arrest warrant, and the vehicle. Rather, Patton's warrant was for failure to appear in court for a past offense unrelated to the eventual drug charge

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that arose from the car search. Thus, there was no basis to believe evidence relating to Patton's arrest would have been found in the car. Nor did Patton's brief proximity to the car give rise to safety concerns upon his arrest. At the time of the search, Patton was secured in the patrol car, some distance from his vehicle. Further, the record does not indicate that prior to the search there was any evidence of the crime of arrest or contraband in the car, as in *Stroud*. In the end, the only evident connection between the car and Patton's arrest was that Deputy Converse chose the moment at which Patton went to his parked car to execute the outstanding arrest warrant. That he may have had good reason to do so is not questioned, but to deem the vehicle search here "incident" to Patton's arrest "stretches [the exception] beyond its breaking point." *Thornton*, 541 U.S. at 625 (Scalia, J., concurring in the judgment). [FN9]

Conclusion

*8 ¶ 28 Consistent with the article I, section 7 imperative to narrowly confine exceptions to the warrant requirement, we hold that the automobile search incident to arrest exception to the warrant requirement does not extend to the circumstances here. We reverse the Court of Appeals.

WE CONCUR: GERRY L. ALEXANDER, C.J., SUSAN OWENS, CHARLES W. JOHNSON, MARY E. FAIRHURST, BARBARA A. MADSEN, RICHARD B. SANDERS, TOM CHAMBERS, JJ.

J.M. JOHNSON (concurring).

¶ 29 The United States Supreme Court has decided this case for us, while this court was agonizing for a year over the analysis. That Court issued its opinion in *Arizona v. Gant*, --- U.S. ---, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) on April 21, 2009, holding under the United States Constitution that a search of a vehicle violates the Fourth Amendment where the defendant is remotely restrained and no longer had access to the vehicle. In this case, the majority agreed on the relevant facts: "[Randall J.] Patton

was taken into custody, handcuffed, and placed in the back of Deputy Converse's patrol car. The deputies then searched Patton's vehicle, where they found two baggies of methamphetamine and \$122 cash under the driver's seat." Majority at 3.

¶ 30 Since the relevant facts are identical, the United States Supreme Court holding must be applied, inserting this defendant (Patton) for *Gant*.

Because [Patton] could not have accessed his car to retrieve weapons or evidence at the time of the search, ... the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and applied to vehicle searches in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), did not justify the search in this case.

Gant, 129 S.Ct. at 1714. It is beyond argument that the rulings of the United States Supreme Court are binding on this court through the supremacy clause. Thus, there should be nothing to this case save to affirm the trial court order to suppress the evidence. Instead, this court engages in pages of discussion of precedent of this court considering issues of Washington State Constitutional law, most of which were not raised by the defendant.

¶ 31 Separate analysis of our Washington Constitution may sometimes be necessary, but here we are not free to disregard the directly controlling United States Supreme Court decision. Even if we did so, prior rulings of this court do not authorize this search once it was factually established that Patton was remotely restrained. *State v. Johnson*, 128 Wash.2d 431, 909 P.2d 293 (1996), cited by the majority at 4, actually included a specific reference that resolved the Washington Constitutional arguments: "In *Stroud*, we said that a warrantless search of certain areas within a vehicle was not justified where ... (2) there was little danger that the occupants could grab a weapon or destroy evidence located within the area. See *Stroud*, 106 Wash.2d at 152, 720 P.2d 436." *Id.* at 459 n. 118, 720 P.2d 436 (Alexander, J., concurring).

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Conclusion

*9 ¶ 32 The United States Supreme Court decided this case in June 2009. The majority engages in extensive dicta unnecessary to the decision to suppress the evidence on that basis. Accordingly, I concur.

FN1. Subsequent to our hearing oral argument in this case, the United States Supreme Court issued its decision in *Arizona v. Gant*, --- U.S. ---, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), articulating a similar rule under the Fourth Amendment to the United States Constitution. *Gant* is discussed below.

FN2. The record does not reflect whether the sheriff's deputies also searched Patton's home or whether Patton challenged the entry into his home.

FN3. The concurrence disregards this principle when it suggests that "[t]he United States Supreme Court has decided this case for us" in *Gant*. Concurrence at 1. Whatever that Court's interpretation of the Fourth Amendment may be, it remains for this court to independently interpret our state constitution and doing so can hardly be dismissed as "dicta." *Id.* at 3.

FN4. This exception is a specific application of the search incident to arrest exception where the area to be searched includes an automobile. It should not be confused with so-called "automobile exception," recognized under the Fourth Amendment but not article I, section 7, which allows a warrantless search of an automobile and all containers therein based upon probable cause. See *State v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). The State makes no argument that it had probable cause to search Patton's car.

FN5. Although these factors are also de-

scribed as exigencies, the search incident to arrest exception should be distinguished from the exigent circumstances exception to the warrant requirement. See *Ladson*, 138 Wash.2d at 349, 979 P.2d 833.

FN6. The Court of Appeals suggested that, when an arresting officer has explicitly informed the suspect he is under arrest, consideration of the other factors indicating arrest is "superfluous." *State v. Patton*, noted at 137 Wash.App. 1061, 2007 WL 1064439, at *2 n. 3. Whether an officer informs the defendant he is under arrest is only one of all of the surrounding circumstances, albeit an important one.

FN7. 339 U.S. 56, 75, 70 S.Ct. 430, 94 L.Ed. 653 (1950), *overruled in part by Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

FN8. Though *Stroud* is described as having overruled part of *Ringer*, that result is not without question. As noted, there was no majority opinion in *Stroud*. Justice Durham's concurrence correctly observed that there were two discreet parts to the *Ringer* analysis, one involving the search incident to arrest exception and the other the exigent circumstances exception. *Stroud*, 106 Wash.2d at 166, 720 P.2d 436 (Durham, J., concurring). The case-by-case analysis rejected in *Stroud* was not adopted in *Ringer* with respect to the search incident to arrest exception, but rather was a proper application of the "totality of the circumstances" analysis applicable under the exigent circumstances exception, where the police have probable cause to search but must show specific exigencies that justify not obtaining a warrant. See *Ringer*, 100 Wash.2d at 700, 674 P.2d 1240 ("The question remains whether the search of Ringer's van could be justified under the so-called 'exigent circumstances'

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exception."). In analyzing the search incident to arrest exception, *Ringer* held that the searches at issue were invalid because they were conducted after the concerns that arise during the arrest process had passed, not because the officers failed to prove they in fact feared for their safety or loss of evidence, or had insufficient time to obtain a warrant. *Id.* at 699-700, 674 P.2d 1240. This analysis in *Ringer* focuses on the historical basis for the search incident to arrest exception. At any rate, whether *Ringer* actually stated the rule that *Stroud* is described as having overruled may be academic at this point.

FN9. Because we resolve this case on independent and adequate state grounds under article I section 7, it is not necessary to reach Patton's argument under the Fourth Amendment. We are mindful, however, that our decision is consistent with the United States Supreme Court's recent holding in *Gant*, under which the Fourth Amendment also disallows a vehicle search conducted after the arrestee has been secured and is no longer within reaching distance of the passenger compartment of the vehicle. *Gant*, 129 S.Ct. at 1719.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63301-5-I
v.)	
)	
GARY COOPER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH 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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