

63408-9

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COA No. 63408-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

DWAYNE PARKS,

Appellant.

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

The Honorable Chris Washington

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Parks' CrR 3.6 motion to suppress a firearm found in a warrantless search, not authorized under Arizona v. Gant,¹ of the of the car in which he was a passenger, incident to arrest of the driver.

2. The trial court erred in denying Mr. Parks' motion to discharge his trial counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. May police avoid the requirement of a warrant, and search the passenger compartment of a car following the arrest of the driver, where the arrestee is handcuffed and in a police patrol car, and where, therefore, there is no reason to believe evidence of the crime of arrest (if any) present in the car may be reached and destroyed, and or that a firearm or other weapon (if any) might be reached and wielded by the arrestee?

2. The trial court's "undisputed finding of fact" 10, suggesting that the officer had a concern that the defendant was

¹Arizona v. Gant, 556 U.S. ____, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009).

armed, and that he called for back-up, is not supported by substantial evidence.

3. The trial court's "undisputed finding of fact" 14, that the officer had probable cause to search the car incident to the driver, Mr. Wilson's arrest, was in error, in addition to being an inapposite analysis in the present context.

4. The trial court's factual resolution 7 and 4.a of the "disputed fact" that the officer detained Mr. Parks at the scene because of concerns about the number of people and concern about weapons was not supported by substantial evidence.

5. The trial court erred in denying Mr. Parks' motion to discharge his trial counsel.

C. STATEMENT OF THE CASE

1. Conviction following CrR 3.6 hearing and bench trial.

Dwayne Parks was convicted of Unlawful Possession of a Firearm in the First Degree ("VUFA") pursuant to RCW 9.41.040(1), following a bench trial, based on evidence located after police stopped and searched a vehicle in which he was a passenger. CP 10. The search was conducted incident to the arrest of the driver, Christopher Wilson, for failing to stop after being signaled and

pursued when an officer saw him run a red light, and for driving while his license was suspended. The search of Wilson's vehicle incident to his arrest, which was conducted after Wilson was arrested, handcuffed, and in the rear of the arresting police officer's patrol vehicle, resulted in the locating of a firearm that officers on the scene attributed to the passenger/defendant, Mr. Parks, who had a previous felony conviction. CP 1-2 (Information); CP 3-4 affidavit of probable cause); CP 23 (CrR 3.6 findings on suppression hearing), CP 28 (CrR 6.1 findings on bench trial), CP 10 (judgment and sentence).

Following the trial court's denial of a defense CrR 3.6 motion to suppress the firearm, and the bench trial, the court found Mr. Parks guilty of VUFA per RCW 9.41.040(1) as charged. CP 28, CP 32 (judgment and sentence). Mr. Parks was sentenced within the standard range. CP 32. He timely appealed. CP 40.

2. CrR 3.6 hearing and Findings. Mr. Parks moved to suppress the admission of the gun by arguing, inter alia, that Seattle Police Department ("SPD") Officer J. Briskey had conducted a pretextual stop and arrest of the driver, Mr. Wilson, designed to obtain authority to conduct a search of the car incident

to arrest in order to further an unrelated criminal investigation or hunch. CP 11-12 (citing State v. Ladson, 138 Wn.2d 343, 358, 979 P.2d 833 (1999)); 3/17/09RP at 7.²

Mr. Parks also argued, in the defense's written motion to suppress, and in counsel's oral responses to the court's inquiry as to why the CrR 3.6 hearing was required, that as a passenger he was improperly pulled from the arrested driver's car and detained, without basis; that his arrest was not supported by probable cause; and that the illegal police conduct included the police "ultimately clearing the car and discovering the firearms."³ 3/17/09RP at 11.

²The trial court did not hear testimony from an additional SPD officer, Stewart, who assisted at the scene of Mr. Wilson's arrest. 3/17/09RP at 4. After the court held what was anticipated to be partial CrR 3.6 hearing to first take Officer Briskey's testimony, Mr. Parks conceded to the prosecution's complaints that it had only just been apprised, by the defense suppression theories, that the second officer needed to be pulled off duty that day. 3/17/09RP at 52. The defense also later agreed with the court that the second officer's testimony became unnecessary once the court rejected Mr. Parks' pretext argument based on Officer Briskey's testimony. 3/17/09RP at 4, 51-52. In any event, the police report that is included within the affidavit of probable cause, along with the CrR 3.6 testimony of Officer Briskey, reveals that passengers Dwayne Parks and Tina Raine were pulled from the car by the other officer for no legal reason whatsoever, no concerns having been cited for any legal basis to do so such as a need to control the scene, a concern that they presented a danger, or independent reasonable suspicion of criminal activity. CP 3; see State v. Horrace, 144 Wn.2d 386, 393, 28 P.3d 753 (2001).

³The car's driver, Mr. Wilson, was charged with possession of a second firearm also found in the vehicle, and later entered a guilty plea. CP 1-2.

The trial court entered written CrR 3.6 findings that were supported (except as argued infra) by the testimony of Officer Briskey, who stated that he signaled Mr. Wilson for violating a Seattle Municipal Code red light ordinance, and that Wilson drove his vehicle for a distance before eventually stopping. 3/17/09RP at 23-25. After Officer Briskey arrested the driver for eluding and placed him in handcuffs, he ran Mr. Wilson's name and learned that he was driving with a suspended license. 3/17/09RP at 26-27. The officer stated that Mr. Parks was therefore under arrest for that crime also. 3/17/09RP at 28. He then conducted a routine search of the passenger compartment of Wilson's car, incident to his arrest. 3/17/09RP at 29.

D. ARGUMENT

- 1. THE GUN SUPPORTING THE VUFA CHARGE, FOUND DURING OFFICER BRISKEY'S ILLEGAL VEHICLE SEARCH INCIDENT TO ARREST OF THE DRIVER, MUST BE SUPPRESSED UNDER ARIZONA v. GANT.**

The facts of this case are that the arresting officer located the firearm when he conducted a vehicle search incident to arrest of the driver for no other reason than the fact that such search was

allowed, automatically, under case law that is no longer valid. The Respondent State of Washington may argue in the present case that the gun supporting the VUFA charge was admissible at trial because Officer Briskey had some legitimate concerns that Mr. Wilson, the arrested driver of the car, had a weapon inside the car. However, the question which the Respondent will desire to focus upon – whether a stopped driver’s act of holding his hands outside the car after pulling over justifies concern for a threat of armed violence -- is immaterial to the present appeal, because in this case the officer did not have any concern that Mr. Wilson, once he was arrested and handcuffed, might reach his vehicle and grab such gun, if any had been suspected, which it was not.

The brief testimony of Officer Briskey and the trial court’s CrR 3.6 findings are consistent with each other except with regard to the challenged findings, and establish that the discovery of the firearm allegedly possessed by Mr. Parks was the result of a routine police search of a driver’s vehicle incident to his arrest under prior constitutional authority no longer valid. See 3/17/09RP at 17-35; CP 23-27 (CrR 3.6 findings).

In any event, even if the officer had possessed such concern that Mr. Wilson might grab a weapon from the vehicle, it would have been unreasonable as a basis for the vehicle search, for the reason that Wilson was indeed handcuffed and secured in the patrol vehicle. Arizona v. Gant, 556 U.S. ____, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009). The CrR 3.6 evidence and supported findings of fact below mandate reversal of the trial court's order denying Mr. Park's CrR 3.6 motion to suppress.⁴

1. An officer may not search a vehicle incident to arrest of the driver unless the officer has a reasonable belief that an unsecured arrestee may reach and destroy evidence or reach and wield a weapon present in the vehicle. The Fourth

Amendment to the United States Constitution provides:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

⁴Because Mr. Parks challenged the search at the trial court level in a CrR 3.6 hearing, no waiver issue is presented. State v. Valdez, 167 Wn.2d 761, 766-67, 224 P.3d 751 (2009); State v. Patton, 167 Wn.2d 379, 385, 219 P.3d 651 (2009). In addition, Mr. Parks may raise the issue under RAP 2.5(a)(3) and State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992), as manifest constitutional error. See State v. Harris, 154 Wn. App. 87, 224 P.3d 830 (2010); see also State v. Contreras, 92 Wn. App. 307, 314, 966 P.2d 915 (1998) (where adequate record exists, appellate court can review suppression issue, even in absence of motion or trial court ruling thereon).

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. 4. Under this provision, “searches 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) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)).

Warrantless searches are presumptively unreasonable, and will be deemed improper absent a valid exception. Chimel v. California, 395 U.S. 752, 764-65, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

One exception to the warrant requirement is a search incident to a lawful arrest. Gant, 129 S. Ct. at 1716 (citing Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914)). This exception stems from the officer’s interest in his or her safety and preserving evidence of the crime. Gant, at 1716 (citing Chimel, 395 U.S. at 763).

The United States Supreme Court’s decision in Gant held that under the Fourth Amendment, the police may search a vehicle

incident to arrest only if the arrestee is unsecured and able to reach into the passenger compartment of the vehicle at the time of the search, and the police have a reasonable belief that evidence of the crime or a weapon exists in the vehicle that the arrestee might reach, and wield or destroy. Gant, 129 S. Ct. at 1719. In Gant, the defendant was arrested for driving with a suspended license and for an outstanding warrant also for driving with a suspended license. Gant, at 1715. The police subsequently handcuffed him and locked him the back of a patrol car. Gant, at 1714. The police then conducted a search incident to arrest and discovered cocaine in a jacket pocket and a gun, both located within the car's passenger compartment. Gant, at 1715. The defendant filed a motion to suppress the evidence seized from the car as a violation of his Fourth Amendment rights. Gant, at 1715. The Court held:

Police 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.

Gant, at 1723-24. Because the defendant in Gant was handcuffed and locked in the back of a patrol car, he was not within reaching distance of his car at the time of the search. Gant, at 1719. Furthermore, because he was arrested for driving with a suspended license, the police could not have reasonably expected to obtain any additional evidence of that crime. Gant, at 1719. The Court ultimately declared:

Because police would not reasonably have believed either that [the defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Gant, at 1719. Importantly, the Gant Court relied on its previous holding in Chimel. Gant, at 1719. In Chimel, the Court identified the full and exclusive set of exigencies permitting a search incident to arrest:

- (1) "in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and
- (2) "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."

Chimel, 395 U.S. at 763. The scope of such a search must be strictly tied to and justified by the circumstances which rendered its

initiation permissible. Chimel, at 761-62 (citing Terry v. Ohio, 392 U.S. 1, 29, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Furthermore, the search may only include “a search of the arrestee's person and the area ‘within his immediate control’ – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” Chimel, at 763.

The Gant Court referenced Chimel, and held that if the arrestee could not reach into the area the officers sought to search, then the exigencies permitting the search incident to arrest do not exist, and the exception to the warrant requirement does not apply. Gant, 129 S. Ct. at 1716.

The Washington Supreme Court has likewise confirmed that, under Article 1, § 7 of the state constitution,⁵ the exceptions to Gant's prohibition against vehicle searches incident to arrest require not only a belief on the officer's part that destructible evidence or a weapon exists, but also that there be a concern that the arrestee might reach into the vehicle for the item. State v.

⁵Article 1, § 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law[.]” Wash. Const. Art. 1, § 7.

Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). In our State's highest Court's opinion, following a discussion of the circuitous route followed by the case law delineating when a search is permissible incident to arrest, the Court emphasized the requirement under the state constitution of concern, specifically, for actual exigent circumstances:

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. . . . A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.

(Emphasis added.) State v. Valdez, 167 Wn.2d at 777. Therefore, the Supreme Court of Washington has clearly held that under the state constitution, the police must be in possession of reasonable concern amounting to exigency of one or both of the types of described in Chimel. See Chimel, supra, at 763.

Here, Officer Briskey's concise testimony was that he arrested Mr. Wilson for failure to stop and driving with a suspended license, and not "[a]nything else other than that." 3/17/09RP at 28.

There was no belief that evidence of the crimes of arrest, eluding or driving while license suspended, was present in Wilson's car.

When he eventually pulled over, Mr. Wilson stuck his hands out of his driver's side window. 3/17/09RP at 25. This caused the officer to be concerned that Mr. Wilson might have a weapon, because he had previously been told by drivers who did this that they did so because they were armed, but wanted to show the police they were not a threat. 3/17/09RP at 25-26.

However, although Officer Briskey commented that a driver's failure to stop could be concerning because it gives people inside the car time to "plan" and "conceal weapons," he specifically testified that it was his normal practice to wait for back-up officers to arrive on the scene to assist in handcuffing an arrestee and to keep an eye on passengers for safety reasons. 3/17/09RP at 26. The officer concluded by stating that there was nothing about this particular car or its passengers that caused him concern for anything other than his objective of the arrest of the driver for the two stated offenses, and indeed he did not call for back-up because of a concern for weapons or any other concern; rather,

officers who had heard the matter on the radio came to the location unsolicited. 3/17/09RP at 27, 33.

In this regard, the trial court's finding of fact 10, suggesting that the officer had a concern that the defendant was armed and that he called for back-up for that reason, is not supported by substantial evidence. The evidence was the opposite. In addition, the court's factual resolution (labeled 7 and 4.a) of the "disputed fact" that the officer detained passenger Mr. Parks at the scene because of concerns about the number of people and concern about weapons was not supported by substantial evidence. The officer in fact stated that this was not a concern.

More importantly, at the critical juncture when the search was conducted, Officer Briskey had no concern, actual or reasonable, for evidence of the crime of arrest or a weapon being accessed by the arrested driver. Mr. Wilson was handcuffed and secured. Officer Briskey later repeated that he had no concern for anything illegal going on other than the "red light violation and the failure to stop." 3/17/09RP at 35. Instead, after arresting Wilson, Officer Briskey simply proceeded to the "[n]ext" step of conducting a routine vehicle "search incident to arrest" of the driver Mr.

Wilson's car. 3/17/09RP at 29. The officer conducted the search incident to arrest as the procedure he followed in "every case, every time." 3/17/09RP at 29.

But Gant, and also our Supreme Court's decision in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), wherein the police arrested Patton on an outstanding felony warrant while he was standing "next to" his car parked in his driveway, affirms that Officer Briskey did not have grounds to search the vehicle incident to Mr. Parks' arrest.

In Mr. Patton's case, after handcuffing Patton and placing him in a patrol car, the police searched the car and found methamphetamine and cash under the driver's seat. Patton, 167 Wn.2d at 381. The Patton Court specifically held that in the absence of a nexus between the arrestee, the crime of arrest, and the vehicle, an automobile search incident to arrest violates article I, section 7 of the Washington State Constitution. Patton, 167 Wn.2d at 382-84. In the course of so ruling, the Court resurrected its prior case law regarding the "search of an automobile incident to arrest" exception to the warrant requirement as set forth in State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983). The Court

reaffirmed its rejection of the bright line rule adopted in State v. Stroud, 106 Wn .2d 144, 720 P.2d 436 (1986), that allowed officers to conduct a warrantless search incident to arrest of the passenger compartment of a vehicle. Patton, 167 Wn.2d at 391. The Court stated that under Article I, § 7,

[t]he 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 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[.]

(Emphasis added.) Patton, 167 Wn.2d at 394-95.

This now bright-line requirement of a reasonable belief of not just the presence of exigency-creating articles in the vehicle, but for the risk that the driver might reach that vehicle and those articles, has been repeated in subsequent Washington decisions under both the Fourth Amendment, and the state constitution.

Thus, in State v. Scalara, the Court of Appeals reasoned:

Here, as in Valdez, it is undisputed that (1) the deputies had no search warrant; (2) Maier conducted an “extensive” and “exhaustive” 30-minute search of

the items in the back of Scalara's car, relying solely on the search incident to arrest exception to the warrant requirement as the legal basis for conducting the warrantless search; (3) Scalara remained handcuffed and locked in the patrol car's backseat while Maier searched his car and, thus, he (Scalara) could not access the car to remove any weapons or to destroy any evidence; and (4) because the deputies arrested Scalara for DWLS in the third degree, a licensing violation, it was unreasonable for them to believe that evidence relevant to this crime might be found in his car. See Valdez, 167 Wn.2d at 766-67, 224 P.3d 751; see Gant, 129 S.Ct. at 1719.

(Emphasis added.) State v. Scalara, ___ P.3d ___, 2010 WL 1039278 (Wash.App. Div. 2, 2010, at p. 3). And similarly, in State v. Burnett, the facts and outcome were as follows:

Deputy McIvie searched Burnett's car after he arrested Burnett, removed him from the vehicle, handcuffed him, and placed him in a patrol car. Burnett was not within reaching distance during the search and the record shows no officer safety concerns or concerns that evidence of driving with license suspended or revoked stood to be concealed or destroyed. McIvie's testimony unmistakably shows that he searched the vehicle . . . simply because he had arrested Burnett. Current case law clearly establishes that this search was unlawful under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. Arizona v. Gant, 519 U.S. - ___, 129 S.Ct. 1710, 1718-19, 173 L.Ed.2d 485 (2009); State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009); State v. Valdez, --- P.3d ---- 2009 WL 4985242 (2009).

State v. Burnett, ___ P.3d ___ (2010 WL 611498) (Wash.App. Div. 2, 2010, at p. 1).

The rule is clear – even if a police officer has a belief that a weapon is possibly present in the vehicle, this is only the first requirement for a vehicle search incident to arrest. The officer must also reasonably believe that the gun might be reached by the arrestee. In any given case, therefore, the fact that the arrestee was handcuffed and locked in a patrol car will preclude any passenger compartment search. Such is the circumstance here in Mr. Park’s case. 3/17/09RP at 26-27.

The Court of Appeals recent decision in the case of State v. Wright is an anomaly. State v. Wright, ___ P.3d ___, 2010 WL 1531484 (Wash.App. Div. 1, 2010, at p. 7). Although the Wright Court did not expressly address the issue whether the police must have a concern for destruction of evidence believed to be in the car in question, by approving an order denying suppression under the facts presented, it implicitly ruled that the law merely requires a belief that evidence of the crime of arrest is present in the car. State v. Wright, at p. 7. But our Supreme Court's view of the matter as plainly expressed in Valdez and Patton is that a further

concern, for destruction or concealment of such evidence, is a requirement. Whether the concerning article is a weapon, or evidence of the crime of arrest, exigency does not exist for a vehicle search where the driver is handcuffed and secured inside a police vehicle.

In the present case, there can be no question that the search incident to arrest of Mr. Wilson's vehicle was illegal because Officer Briskey did not possess any reasonable concern that the arrestee might reach any firearm from his secured position, handcuffed in the officer's patrol car.

2. Mr. Wilson was secured in the back of Officer Briskey's patrol vehicle and was unable to reach anything in his car at the time of the search. No exception to the warrant requirement as outlined in Gant and Valdez is satisfied in this case. Like the defendants in Gant and Valdez, Mr. Wilson was secured in handcuffs in the back of a patrol vehicle when the officer conducted his search of the vehicle. Mr. Wilson was not in "reaching distance of the passenger compartment at the time of the search." Gant, 129 S. Ct. at 1719. Thus the search was not necessary to prevent access to a weapon or acts of concealment or destruction of

evidence of the crime of arrest. State v. Valdez, 167 Wn.2d at 777. At the time of the search, it would have taken “the skill of Houdini and strength of Hercules” for Mr. Wilson to access the vehicle to grab a gun. See Thornton v. United States, 541 U.S. 615, 626, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring).

Mr. Wilson “clearly was not within reaching distance of [the car] at the time of the search.” Gant, 129 S. Ct. at 1719. As the Court held in Gant, “[b]ecause [the] police could not reasonably have believed . . . that [the defendant] could have accessed his car at the time of the search . . . the search in this case was unreasonable.” Gant, at 1719. The search of the vehicle in this case was unreasonable and the trial court should have suppressed the evidence discovered from the search, and not have relied on it during the bench trial.

3. Because the search incident to arrest exception did not apply to the search of the vehicle, the resulting evidence must be suppressed. The search incident to arrest exception under Gant and Valdez does not apply to the vehicle search in this case, and the evidence of the firearm was inadmissible against Mr. Parks. Where there has been a violation of the Fourth Amendment

or the state constitution's privacy guarantee, courts must suppress evidence discovered as a direct result of the search, as well as evidence which is derivative of the illegality, the latter being "fruits of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002).

4. The suppression of the firearm requires reversal of Mr. Parks' VUFA conviction. Absent the firearm evidence, there was insufficient evidence to support Mr. Parks' conviction at a bench trial for VUFA, and that conviction must therefore be reversed as violative of due process. See RCW 9.41.040(2) (unlawful possession of a firearm in the second degree); State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000) (firearm is critical element of VUFA conviction); U.S. Const. amend. 14.

2. THE DEFENDANT'S MOTION FOR NEW COUNSEL WAS IMPROPERLY DENIED WITHOUT FACTUAL INQUIRY AND FOR THE INADEQUATE SOLE REASON THAT IT WAS TOO SOON BEFORE THE TRIAL START DATE.

Prior to trial, Mr. Parks sought new appointed counsel, specifically alleging that there had been inadequate performance, a failure to allow him to assist in his own defense, and a breakdown in communication with his current attorney. 3/6/09RP at 3. His counsel, George Sjursen, confirmed that Mr. Parks had been desiring a new attorney 3/6/09RP at 3. The trial court denied the motion for substitute counsel, stating simply that the request for a new lawyer was "too late" and that the court was obligated to deny it. 3/6/09RP at 4.

It is true that as a rule, a defendant's wholly conclusory claim of ineffective assistance or breakdown in communications is insufficient to require the appointment of substitute criminal trial counsel. See, e.g., State v. Rosborough, 62 Wn. App. 341, 346-47, 814 P.2d 679 (1991).

However, the trial court is required to conduct a thorough examination of the circumstances raised by the defendant to

determine whether new counsel should be appointed. State v. Dougherty, 33 Wn. App. 466, 471, 655 P.2d 1187 (1982); Rosborough, 62 Wn. App. at 346-47.

This rule has been applied where defendants made factual allegations including: a breach of the attorney-client relationship by passing confidential information to the prosecutor, Dougherty, 33 Wn. App. at 467-68; failing to investigate or call certain witnesses, Rosborough, 62 Wn. App. at 347; State v. Allen, 57 Wn. App. 134, 141, 787 P.2d 566 (1990); or failing to investigate viable defenses. State v. Garcia, 57 Wn. App. 927, 933, 791 P.2d 244 (1990).

Here, the trial court erred. First, the trial court in this case failed in its duty to conduct a thorough examination to determine whether substitute counsel should be appointed for Dwayne Parks. In his complaints to the trial court, Mr. Parks noted that counsel had failed to allow him to assist in his own defense, and in general that there had been a serious breach of communication between himself and his lawyer. 3/6/09RP at 3-4. Mr. Sjursen did not visit Mr. Parks adequately to prepare a defense. 3/6/09RP at 4.

Mr. Parks argues that if a criminal defendant accused of a serious offense like the present crime, risking multiple years of

incarceration, cannot communicate effectively with his lawyer or is not allowed by his counsel to assist in his own defense, he cannot secure the most basic of constitutional protections as the lawyer of his choice, and fundamental fairness is violated. In particular, a criminal defendant's right to assist his counsel in preparing his defense is so sacred that an accused who is unable to do so is deemed incompetent, and may not be placed on trial. State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992)

Genuine factual issues were raised by Mr. Parks' contentions as to whether his lawyer was providing effective assistance or allowing Mr. Parks to assist in preparation of his defense to a serious gun crime allegation. Where the record raised significant factual issues, as here, it was an abuse of discretion by the trial court to decline to appoint new counsel for Mr. Parks without conducting an even minimal examination into the defendant's concerns. State v. Young, 62 Wn. App. 895, 907-08, 802 P.2d 829 (1991).

Second, Mr. Parks contends that the trial court may not refuse to conduct inquiry into factual issues raised by a defendant seeking counsel of his choosing, nor may it deny a motion for

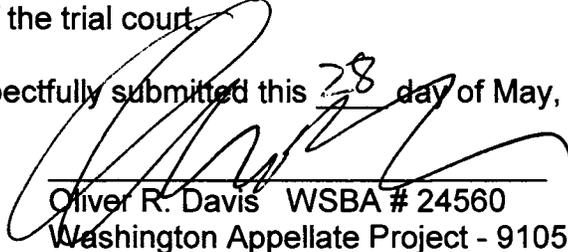
substitute counsel, solely on grounds that the request is too soon before trial. In new-counsel rulings, the court considers: "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) (adopting test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir.1998)).

Plainly, the timeliness question is merely one factor for the trial court to consider. Mr. Parks' request was not on the eve of trial. See State v. Chase, 59 Wn. App. 501, 505-06, 799 P.2d 272 (1990) (holding that a request for a continuance to obtain new counsel made on the day of trial was untimely). And in particular, Mr. Parks notes that the trial start date was shortly thereafter continued multiple times. A request for new counsel should have been granted because it would not have had any negative effect on the scheduled proceedings. See State v. Stenson, 132 Wn.2d at 734.

D. CONCLUSION

Based on the foregoing, the appellant Dwayne Parks respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 28 day of May, 2010.



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Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63408-9-I
v.)	
)	
DWAYNE PARKS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MAY, 2010, 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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<input checked="" type="checkbox"/> DWAYNE PARKS 715685 WASHINGTON CC PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MAY, 2010.

X _____
grd

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