

64347-9

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No. 64347-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON

Appellant

v.

TREVOR H. DAVIS

Respondent

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FILED
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APPEAL FROM THE KING COUNTY SUPERIOR COURT

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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I. ASSIGNMENT OF ERROR

A. ASSIGNMENT OF ERROR

1. The trial court did not error when it determined that the good faith exception to the exclusionary rule did not apply under either the Fourth Amendment of the United States Constitution or Article I, §7 of the Washington State Constitution.
2. The trial court did not error when it suppressed the firearm found in the vehicle and suppressed the statement of the defendant.

II. STATEMENT OF THE CASE

A. Statement of Proceedings

As a result of his arrest, the Respondent, hereinafter Mr. Davis was charged Unlawful Possession of a Firearm and Possession of a Controlled substance. (CP 1) On September 16, 2009, Mr. Davis filed a Motion to Suppress the Evidence seized from his vehicle as the result of an illegal search. (CP 47) Mr. Davis also moved to suppress all statements made at the time of his arrest. (CP 47) At the conclusion of the hearing, the trial court suppressed the evidence. (RP 164)

B. Statement of the Case

Mr. Davis would agree with the facts stated in the State's Opening Brief. Mr. Davis did not file objections to the Finding of Facts and Conclusions of Law signed by the Court. (CP 50)

III. ARGUMENT

A. The trial court did not error when it suppressed the evidence under the Fourth Amendment or Article 1, §7 of the Washington State Constitution.

The Supreme Court has consistently held that a warrantless search or seizure is per se unreasonable and subject only to a few specific exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed. 2d. 576 (1967). One exception is the search incident to a lawful arrest. Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 2d 652 (1914). This exception arose out of concern for officer safety and evidence preservation. United States v. Robinson, 414 U.S. 218, 230-34, 94 S.Ct. 467, 38 L.Ed. 2d 427 (1973)).

Mr. Davis moved to suppress the evidence seized from his vehicle and his statements based on Arizona v. Gant, ___ U.S. ___ 129 S.Ct. 1710 (2009) There is no issue that Gant applies to the case at bar. Griffith v. Kentucky, 479 U.S. 314 107 S. Ct. 798 93 L.Ed 2d 649 (1987) However, the State maintains that the good faith exception to the exclusionary rule applies. The State's position is unattainable.

Under the good faith exception, an officer's good faith reliance on the law in effect at the time of the search insulates evidence from that search from later exclusion at trial. Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S.Ct. 2627, 61 L.Ed. 2d 343 (1979). However Washington State does not recognize the good faith

exception. State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982), See State v. McCormick 216 P.3d 475, 152 Wn.App. 536, (2009); See Also State v. Chenowith, 160 Wn. 2d 454, 158 P. 3d 595 (2007)(no good faith exception for arrests made under unconstitutional statutes.)

The Ninth Circuit rejected the good faith exception to the exclusionary rule in favor of the doctrine of retroactivity when faced with an argument nearly identical to the State's position in this appeal. United States v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009). The court reasoned that to apply the good faith exception would "'violate the principle of treating similarly situated defendants the same' by allowing only one defendant to be the beneficiary of a newly announced rule." Gonzalez at 1140 The court ultimately concluded, "Because both Johnson and Griffith remain binding precedent, we cannot apply the good faith exception here without creating an untenable tension within existing Supreme Court law." Gonzalez.

The Washington State Supreme Court has "long declined to create 'good faith' exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement." State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005).

The Washington State Supreme Court recently refused to recognize the existence of the inevitable discovery doctrine as an

exception to "the nearly categorical exclusionary rule under article 1, section 7." State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). In so holding, the court stressed that Article 1, section 7 differs from its federal counterpart in that article 1, section 7 "clearly recognizes an individual's right to privacy with no express limitations." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Based on the intent of the framers of the Washington Constitution, we have held that the choice of their language "mandate[s] that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." *Id.* Because the intent was to protect personal rights rather than curb government actions, we recognized that "whenever the right is unreasonably violated, the remedy must follow." *Id.*

Finally, it is abundantly clear that the Washington State Supreme Court would not follow the "good faith exception based on recent decisions that are controlled by recent decisions in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), and State v. Valdez, No. 80091-0, 2009 WL 4985242 (Wash. Dec. 24, 2009),

Based on the stated holdings, the State's request should be denied. Simply put, this Court should not establish a "good faith" exception.

As for Article 1, §7 of the Washington State Constitution, Mr. Davis also prevails. A search without a warrant lacks authority of law unless it falls within an exception to the warrant requirement. State v.

Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State bears the heavy burden of proving that a warrantless search falls within an exception. Parker, 139 Wn.2d at 496. One exception is a search incident to a lawful arrest. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

Article I, section 7 of Washington's Constitution provides greater protection than the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Because Washington does not recognize the good faith exception, there is no basis to affirm this unconstitutional search. White, 97 Wn.2d at 109-10 Thus Mr. Davis is protected under the Washington State Constitution and the trial court was correct in dismissing the charge.

The State argues that based on the decisions in State v. Brockob, 159 Wn. 2d 311 (2006) and State v. Potter, 156 Wn. 2d 835 (2006) as well as this Court's decision in State v. Riley, ___ Wn. App. ___ (2010) the "good faith exception now exists. The State misreads Brockob and Potter. Mr. Davis would further contend that this Court also misreads these cases when it issued the decision in Riley.

The Washington State Supreme Court has issued two decisions, Valdez and Patton, in which the Court could have addressed the "good faith exception" the Court did not do so. Finally, there is ample evidence that the Court will not establish the exception.

As for out of state decisions, the Colorado Supreme Court recently ruled en banc that the “good faith exception” did not apply to a search incident to arrest and application of Gant. See People v. McCarty, No. 09SA161 (May 10, 2010)

With regards to the Tenth Circuit Court case, United States v. McCane, 573 F.3d 1037 (10th Cir. 2009), the trial court ruled that it was no going to apply the case and followed United States v. Gonzalez.

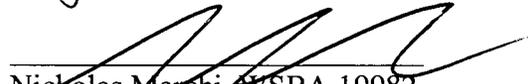
The State requests that this Court overturn the trial court’s decision to suppress the evidence and establish the “good faith exception”. Mr. Davis would respectfully request that this Court follow the Washington State Supreme Court and hold that there is no “good faith exception”.

IV. CONCLUSION

For the reasons stated herein it is respectfully requested that the decision of the trial court be affirmed and that the charge for Unlawful Possession of a firearm be dismissed.

DATED this 15 day of June, 2010.

Respectfully Submitted,



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