

NO. 65114-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

PETER GREEN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

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**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. Washington courts have long held that defendants are barred from raising search and seizure claims for the first time on appeal. At trial, Green moved to suppress evidence based on the argument that the police exceeded the scope of the first search warrant by seizing the evidence. For the first time on appeal, Green argues that the police unlawfully searched his vehicle at the scene. Did Green waive his right to challenge the initial search of his vehicle by failing to raise the issue below?

2. RAP 2.5(a)(3) is a narrow exception allowing defendants to raise "manifest" constitutional errors for the first time on appeal. To obtain review, the defendant must show "actual prejudice" based on the record. If the record is insufficient to determine the merits of the defendant's claim, then the error is not manifest. At the suppression hearing, the parties focused on the singular challenge raised by Green, the scope of the first search warrant. The parties did not inquire whether the initial search of Green's vehicle was a valid inventory search or a lawful search incident to arrest. Given the insufficient factual record, can Green show "actual prejudice?"

3. Courts use a common sense, practical approach to evaluating and interpreting search warrants. Here, the first search warrant the police obtained authorized them to search Green's vehicle and seize papers of dominion and control, along with evidence relating to the identity of Green's unknown passenger. While searching the vehicle, police located a backpack and briefly looked at five credit cards inside the backpack. Did police exceed the scope of the first search warrant by briefly examining the credit cards?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged Peter Green with five counts of Identity Theft in the Second Degree and one count of Theft in the Second Degree.<sup>1</sup> CP 23-26. The jury convicted Green as charged and the trial court imposed a sentence within the standard range on all

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<sup>1</sup> Additionally, the State charged Green with Driving While Under the Influence, which was severed for trial. CP 27.

counts: 25 months for each count of identity theft and 18 months for second degree theft. CP 65-70, 151-62; 7RP 328.<sup>2</sup> Additionally, the court imposed a range of 9 to 12 months of community custody. CP 155.

## **2. SUBSTANTIVE FACTS**

On January 4, 2008, Peter Green hit and killed a woman who was jaywalking across the street.<sup>3</sup> CP 4, 8. Police arrested Green at the scene for Driving Under the Influence based on indications that Green was intoxicated and had beer cans near his vehicle. 1RP 55; 2RP 11. Green was transported to Harborview Hospital for a mandatory blood draw while police investigated and photographed the scene. 2RP 10-13.

Seattle Police Detective Thomas Bacon conducted an initial search of Green's vehicle for both inventory and investigatory purposes while Green was at the hospital. 2RP 13-14. During his search, Det. Bacon discovered a large-screen television in the back

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<sup>2</sup> The Verbatim Report of Proceedings consists of seven volumes. The State has adopted the following reference system: 1RP (10/5/09), 2RP (10/6/09), 3RP (10/7/09), 4RP (10/8/09), 5RP (10/12/09 and 10/13/09), 6RP (10/13/09 - Verdict), and 7RP (3/18/10).

<sup>3</sup> For various reasons, the State ultimately declined to file Vehicular Homicide charges against Green.

seat of the car along with a receipt for its purchase dated the same day. 2RP 14-15. Det. Bacon thought it was “very unusual” that someone had purchased the television with three \$500 Sears gift cards. 2RP 15. Det. Bacon became even more suspicious when he discovered another receipt from a different Sears store later in the day using the remaining balance on the gift cards. 2RP 15. Det. Bacon seized the receipts along with two disposable cell phones that he discovered in the vehicle. 2RP 17.

A few weeks later, Det. Bacon obtained a search warrant to locate further evidence of the vehicular homicide. 2RP 23. The warrant authorized Det. Bacon to search Green’s vehicle for evidence of drug and alcohol use, “papers of dominion and control,” and evidence relating to the identity of a male passenger seen leaving Green’s vehicle immediately after the collision. Ex. 4; CP 76. Although Det. Bacon’s affidavit referenced the initial search, the affidavit did not reference the receipts, cell phones, or television located in the vehicle. Ex. 3.

While serving the search warrant, Det. Bacon found a backpack in Green’s back seat. 2RP 24-25. Det. Bacon opened the backpack looking for alcohol, drugs, and paperwork to help him

identify Green's passenger or confirm that Green had been driving the vehicle. 2RP 25.

Inside the backpack, Det. Bacon found five credit cards all with the same cardholder's name, Jeanne Russell. 2RP 25.

Det. Bacon learned the cardholder's name by picking up the cards and looking at them. 2RP 47. Det. Bacon "briefly" glanced at the front and the back of the credit cards and then replaced them in the backpack. CP 77. Det. Bacon did not believe that he could seize the credit cards under the search warrant. CP 76. Consequently, Det. Bacon obtained a second search warrant for the credit cards and seized them a week later. CP 76; 2RP 29-30.

Prior to trial, Green moved to suppress the credit cards, arguing solely that Det. Bacon exceeded the scope of the first search warrant when he "examined" the credit cards. CP 10-11; 2RP 70-72, 75. Given Green's singular basis for the motion to suppress neither the State nor defense counsel, asked Det. Bacon in detail about his inventory and investigatory search of Green's vehicle. The trial court denied Green's motion and found that Det. Bacon's "brief" examination of the credit cards fell within the

scope of the first search warrant and went no further than necessary.<sup>4</sup> CP 77.

Various witnesses testified against Green at trial, including his former manager at Northwest Airlines who testified that Green had access to customers' credit card numbers as part of his job. 4RP 191. A Northwest Airlines fraud investigator testified that internal computer records showed that Green had accessed the victims' credit card information in the months before and after the collision. 4RP 163-68. The court admitted the parties' stipulation that the out-of-state victims neither knew Green, nor gave him their permission to use or possess their credit card information. CP 89-91; 4RP 148-52.

A Sears loss prevention officer testified that one of the victims' credit card numbers was used to buy the gift cards that were later used to purchase the television. 4RP 228. Video surveillance captured Green using the gift cards to buy the television on the day of the incident. 4RP 224, 230-32.

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<sup>4</sup> The court also found that Det. Bacon could have seized the credit cards under the authority of the first search warrant although "seeking a second warrant was probably the best practice." CP 77.

**C. ARGUMENT**

**1. GREEN WAIVED HIS RIGHT TO CHALLENGE THE INITIAL SEARCH OF HIS VEHICLE.**

For the first time on appeal, Green challenges the warrantless search of his vehicle at the scene. Green's failure to raise this issue at trial precludes him from seeking review on appeal.

Washington courts have held for decades that defendants are barred from raising search and seizure claims for the first time on appeal.<sup>5</sup> E.g., State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995); State v. Silvers, 70 Wn.2d 430, 432, 423 P.2d 539, cert. denied, 389 U.S. 871 (1967); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); State v. Hartness, 147 Wn. 315, 317, 265 P. 742 (1928).

Although the state and federal constitutions protect against unreasonable searches and seizure, defendants must timely object to the admission of illegally obtained evidence or they waive the

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<sup>5</sup> Nonetheless, Division Two of the Court of Appeals has recently divided on this issue. Compare State v. Millan, 151 Wn. App. 492, 499-501, 212 P.3d 603 (2009) (holding defendant's failure to raise suppression issue at trial precluded review under longstanding precedent and RAP 2.5(a)(3)), review granted 168 Wn.2d 1005 (2010), with State v. McCormick, 152 Wn. App. 536, 540, 216 P.3d 475 (2009) (rejecting Millan and holding that a defendant can challenge a search under Arizona v. Gant, \_\_ U.S. \_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), for the first time on appeal).

privilege of having it excluded.<sup>6</sup> Baxter, 68 Wn.2d at 423. The purpose of this rule is to afford the trial court an opportunity to rule on a disputed issue of fact, while ensuring that a trial proceeds in an orderly fashion without having to stop and try collateral matters. Id. at 422.

Moreover, there is “no per se constitutional prohibition against admitting unchallenged evidence that may have been obtained in violation of a defendant’s Fourth Amendment property and privacy rights.” State v. Millan, 151 Wn. App. 492, 501, 212 P.3d 603 (2009), review granted, 168 Wn.2d 1005 (2010). A defendant must affirmatively seek the protection of the exclusionary rule before evidence is admitted at trial. Id. at 502. Any error in admitting unlawfully seized evidence, even though constitutionally based, “does not undermine the truth-seeking function of the proceeding appealed.” Id.

Here, Green failed to challenge the initial search of his vehicle at a pretrial motion to suppress. Green premised his entire argument in favor of suppression on the sole ground that

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<sup>6</sup> The only exception to this rule arises when it becomes clear during trial that evidence was unlawfully obtained and the defendant, exercising reasonable diligence, could not have known of the illegality. Baxter, 68 Wn.2d at 422-23.

Det. Bacon exceeded the scope of the first search warrant. CP 10-11; 2RP 70-72, 75. Green lost. 2RP 77. Green should not now be permitted, post-conviction, to raise new search and seizure claims that he could have raised below. Any error in admitting the receipts discovered in the initial search of Green's vehicle does not change the fact that Green stole Northwest Airlines customers' identities and credit card numbers for his own gain. Green waived his right to seek the protection of the exclusionary rule when he failed to timely object to the initial search of his vehicle. The Court should adhere to decades-long precedent and reject Green's untimely claim.

**2. GREEN CANNOT SHOW "ACTUAL PREJUDICE" BASED ON THE INSUFFICIENT RECORD.**

Despite and without reference to Washington's longstanding precedent against litigating search and seizure claims for the first time on appeal, Green argues that his claim should be considered because the warrantless search of his vehicle amounts to a manifest constitutional error under RAP 2.5(a)(3). *App. Br.* at 8. Green's claim fails, however, because Green cannot show that he

suffered "actual prejudice" based on the insufficient record developed at trial.

RAP 2.5(a)(3) is a narrowly drawn exception allowing appellate courts to consider constitutional errors raised for the first time on appeal only if they are "manifest." State v. Kirkman, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007); State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992) ("permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts") (emphasis in original). For a constitutional error to be "manifest," the defendant must show "actual prejudice" and identify practical consequences resulting from the alleged error. Kirkman, 159 Wn.2d at 935.

If the record is insufficient to determine the merits of the alleged constitutional error, then the error is not manifest and review is not warranted. Id. For example, in State v. McFarland, the Washington Supreme Court refused to consider challenges, raised for the first time on appeal, to evidence obtained during a warrantless arrest because the record was insufficient for review. 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The Supreme

Court held that the defendants could not show, based on the record before the trial court, that their motions to suppress would have been granted. Id. Based on the insufficient record, the defendants could not show “actual prejudice.” Id.

This Court recently reached the same result in State v. Roberts, No. 63168-3-I, 2010 WL 4226617 (Wash. Ct. App. Oct. 25, 2010). In Roberts, this Court concluded that the defendant could not challenge the search of his vehicle for the first time on appeal, under Arizona v. Gant, \_\_ U.S. \_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), based on the insufficient record developed at trial. Id. at ¶1. Although Gant invalidated the search of the defendant's vehicle incident to his arrest for driving with a suspended license, this Court could not determine based on the record whether the inventory search was reasonable or whether reasonable alternatives to impoundment existed. Id. at ¶25. Consequently, this Court held that the record was insufficient to determine the merits of the defendant's claim. Id.

The Court faces the same problem here. Given that Green moved to suppress the evidence against him based solely on the scope of the first search warrant, the record contains little testimony about Det. Bacon's initial search of the vehicle. CP 10-11; 2RP

70-72, 75. Prior to trial, Det. Bacon testified that he simultaneously conducted an inventory and investigatory search of Green's vehicle:

Q: As part of processing the scene in a situation like this (vehicular homicide), are you going to impound the vehicle?

A: Yes.

Q: Why?

A: The vehicle is evidence and possibly evidence in a crime. . .

Q: As part of impounding the vehicle, did you conduct an inventory?

A: Yes.

Q: Why do you do that?

A: Well, to determine – a number of reasons – one of the reasons is to just assure that if there are any valuable items in the vehicle, money, anything like that, that it's documented, so there are no losses or no claims; and just to make sure that we are accounting for whatever is in the vehicle.

Q: Did you, in fact, impound Mr. Green's Jeep Cherokee?

A: I did.

Q: Did you conduct an investigatory search?

A: I did.

2RP 13-14.

Based on Green's limited challenge to the scope of the first search warrant, neither party at trial probed further into Det. Bacon's inventory search of the vehicle or his simultaneous investigatory search incident to Green's arrest for Driving Under the Influence. Given the sparsely developed factual record, it is

unclear whether Det. Bacon's inventory search or investigatory search incident to Green's arrest was lawful.

Whether a warrantless inventory search prior to impound is valid depends on the facts of each case. Roberts, at ¶23 (citing State v. Greenway, 15 Wn. App. 216, 219, 547 P.2d 1231 (1976)). The State must show that the police reasonably impounded the vehicle, considered reasonable alternatives to impoundment, and properly limited the scope of their search. State v. Houser, 95 Wn.2d 143, 147-48, 153, 622 P.2d 1218 (1980).

Here, the State did not attempt to make such a showing, beyond a cursory reference to the fact that an inventory search had occurred, because Green framed the suppression issue with a singular focus on the scope of the first search warrant. The Court cannot find that Green's motion to suppress would have been granted based on the insufficient factual record from which to determine whether Det. Bacon conducted a valid inventory search.

Similarly, it is unclear based on the record whether Det. Bacon's search of Green's vehicle was lawful incident to Green's arrest. Unlike the defendants in Roberts, Gant, and other recent Washington Supreme Court decisions issued in Gant's wake, Green was arrested for Driving Under the Influence. Roberts, at ¶3

(defendant arrested for driving with a suspended license); Gant, 129 S. Ct. at 1714 (defendant arrested on outstanding warrant); State v. Patton, 167 Wn.2d 379, 383, 219 P.3d 651 (2009) (same); State v. Valdez, 167 Wn.2d 761, 765, 224 P.3d 751 (2009) (same).

Det. Bacon may have lawfully searched Green's vehicle for evidence of the crime of vehicular homicide. See State v. Wright, 155 Wn. App. 537, 541, 230 P.3d 1063 (holding neither Gant nor Patton warranted suppression where officer arrested defendant for possession of marijuana), review granted, 241 P.3d 413 (2010); State v. Snapp, 153 Wn. App. 485, 495-97, 219 P.3d 971 (2009) (holding Gant did not warrant suppression where trooper arrested defendant for use of drug paraphernalia), review granted, 241 P.3d 413 (2010).

In Wright, this Court upheld the admission of evidence under Gant and the Fourth Amendment where the arresting officer reasonably believed that evidence of the defendant's crime of arrest, possession of marijuana, might be in the defendant's car based on the strong odor of marijuana emanating from the vehicle, the defendant's agitated and furtive behavior, the large roll of money in his glove compartment, and his statements that he had smoked marijuana earlier. 155 Wn. App. at 549.

Additionally, this Court upheld the officer's search under article I, section 7 and the Washington Supreme Court's decision in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), based on the officer's probable cause to arrest the defendant for marijuana possession and the nexus that existed between the defendant, his crime of arrest, and the search of his vehicle. Wright, 155 Wn. App. at 556 ("As soon as Wright opened the car window and the strong odor of marijuana wafted into the outside air, the officer had probable cause to arrest and search for evidence of the crime the officer knew he was committing.").

Here, it is unclear from the record whether Det. Bacon had a reasonable belief under Gant, or whether a nexus existed under Patton, to justify the initial search of Green's vehicle. Neither the State nor defense counsel inquired why Det. Bacon conducted an "investigatory search" of Green's vehicle. The parties focused instead on the evidence of identity theft that Det. Bacon initially located in the vehicle, his conclusions about that evidence, and his follow-up efforts to find out more. 2RP 14-20, 24-30, 39-47.

Although Det. Bacon likely conducted an investigatory search of Green's vehicle for evidence of recent drug or alcohol use, such as a cold beer bottle, a smoldering marijuana blunt, or a

receipt for alcohol, there is no such testimony in the record, likely because the question was never asked.

Det. Bacon's initial search of Green's vehicle may have been a valid inventory search or a lawful search incident to Green's arrest for vehicular homicide. The Court, however, cannot decide based on the inadequate factual record and the lack of a trial court ruling to review. The Court should reject Green's efforts to challenge the initial search of his vehicle for the first time on appeal.

**3. DET. BACON'S BRIEF EXAMINATION OF THE CREDIT CARDS FELL WITHIN THE SCOPE OF THE FIRST SEARCH WARRANT.**

On appeal, Green renews his argument that Det. Bacon exceeded the scope of the first search warrant by examining the credit cards in the backpack in Green's vehicle. The trial court denied Green's motion to suppress on this ground, finding that Det. Bacon "briefly" examined the credit cards and "went no further than was physically (and inevitably) necessary." CP 77: Green does not challenge the court's factual finding, but rather the court's legal conclusion that Det. Bacon's brief examination of the credit cards fell within the scope of the first search warrant. Green's argument fails in light of case law requiring a "common sense"

approach to interpreting search warrants and recognizing that officers searching for documents necessarily examine documents outside a search warrant's scope to determine whether the documents should be seized.

When reviewing a suppression motion, an appellate court accepts the trial court's unchallenged factual findings as verities on appeal and reviews any challenged factual findings for substantial evidence. State v. Cheatam, 112 Wn. App. 778, 782, 51 P.3d 138 (2002), aff'd, 150 Wn.2d 626, 81 P.3d 830 (2003). The trial court's conclusions of law are reviewed *de novo*. Id.

Under the Fourth Amendment, search warrants must be supported by probable cause and must describe the person or place to be searched with particularity. U.S. Const. amend. IV. To satisfy the particularity requirement, search warrants must be sufficiently definite to inform the officer executing the warrant what is being sought with reasonable certainty. State v. Stenson, 132 Wn.2d 668, 691-92, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Courts evaluate and interpret search warrants in a "common sense, practical manner rather than in a hypertechnical sense." State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). Courts determine the scope of a search warrant by giving

the words used in a warrant their common sense meaning.

Cheatam, 112 Wn. App. at 783.

When a person's papers are searched, "it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." Stenson, 132 Wn.2d at 694 (citing Andresen v. Maryland, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). In Stenson, the Washington Supreme Court upheld officers "necessarily looking" at documents not listed in a search warrant in order to determine the documents' contents.<sup>7</sup> Id. at 695. The Supreme Court upheld the officers' search and concluded further that the officers could seize documents outside the warrant's scope that the officers reasonably believed would aid their investigation and had a sufficient nexus to the crime being investigated. Id.

Here, Green claims that Det. Bacon exceeded the scope of the first search warrant by looking at the credit cards contained in the backpack. Although Green correctly notes that the search warrant does not authorize a search for evidence of fraud or identity

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<sup>7</sup> The search warrant authorized the officers to seize "personal records" and "correspondence" evidencing a relationship between the defendant and the victims. Id. at 688.

theft, Green fails to acknowledge other language in the search warrant authorizing Det. Bacon to seize “papers of dominion and control” and “evidence relating to the identification of an unknown male passenger” seen exiting the vehicle. Ex. 4; CP 76. Applying a common sense reading to this language and the lessons of Stenson, this Court should conclude that Det. Bacon acted within the scope of the first warrant.

Green does not challenge on appeal, and therefore the Court must accept as true, the trial court’s factual finding that Det. Bacon briefly examined the credit cards and “went no further than was physically (and inevitably) necessary to remove the cards from the backpack and briefly glance at the front and back.” CP 77; Cheatam, 112 Wn. App. at 782. Further, Green does not challenge Det. Bacon’s search of the backpack. Rather, the crux of Green’s argument is that Det. Bacon exceeded the scope of the search warrant by looking at the credit cards in the backpack. *App. Br.* at 15.

Det. Bacon’s “brief” glance at the credit cards, however, falls within a common sense reading of the warrant authorizing Det. Bacon to search and seize “papers of dominion and control” and evidence of the male passenger’s identity. Ex. 4; CP 76. The

persons listed on each card could have provided Det. Bacon with the missing link to identifying Green's unknown passenger, or provided Det. Bacon with additional evidence of Green's ownership and operation of the vehicle prior to the collision. Det. Bacon could not have divined the names listed on the credit cards without picking up the cards and looking at them. Moreover, Det. Bacon could not have known ahead of time that all five credit cards listed the same cardholder. Similar to the officers in Stenson, Det. Bacon "necessarily looked" at the credit cards to determine whether they fell within the bounds of the search warrant and could thus be seized. 132 Wn.2d at 695.

Green's attempts to distinguish this case from Stenson are unpersuasive. Green suggests that Stenson differs from this case because "Stenson involved a search warrant that specifically authorized the search and seizure of a person's papers." *App. Br.* at 17. Yet, the search warrant here similarly authorized Det. Bacon to search and seize a person's papers, specifically "papers of dominion and control" in the defendant's vehicle. Ex. 4; CP 76. The only way for Det. Bacon to know if the credit cards could be considered "papers of dominion and control" was for Det. Bacon to look at the credit cards and determine to whom they belonged.

Taking a common sense approach and heeding the lessons of Stenson, the Court should find that Det. Bacon's "brief" examination of the credit cards fell within the scope of the first search warrant.

**D. CONCLUSION**

For the reasons stated above, the Court should affirm Green's convictions.

DATED this 2nd day of December, 2010.

Respectfully submitted,

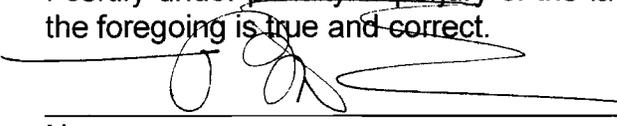
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. PETER GREEN, Cause No. 65114-5-I, in the Court of Appeals, Division I, for the State of Washington.

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