

65558-2
TWJ

65558-2

No. 65558-2-I
Consolidated with No. 65559-1-I

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

STATE OF WASHINGTON,

Appellant,

v.

RHIENNA MARIE VIRDEN,

Respondent.

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

The Honorable Susan K. Cook, Judge

BRIEF OF RESPONDENT

LILA J. SILVERSTEIN
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. COUNTERSTATEMENT OF ISSUE..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 4

 THE TRIAL COURT PROPERLY RULED THAT THE
 WARRANTLESS SEARCH OF MS. VIRDEN’S CAR
 VIOLATED ARTICLE I, SECTION 7 BECAUSE MS.
 VIRDEN HAD BEEN ARRESTED AND WAS NOT ABLE
 TO ACCESS A WEAPON OR DESTROY EVIDENCE..... 4

 a. Standard of Review..... 4

 b. Under *Patton* and *Buelna Valdez*, a warrantless car search
 is not justified under the search-incident-to-arrest exception
 unless the arrestee is unsecured and able to access a
 weapon or destroy evidence of the crime of arrest. 4

 c. The *Thornton* exception does not exist in Washington..... 8

D. CONCLUSION..... 14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Buelna Valdez</u> , 167 Wn.2d 761, 224 P.3d 751 (2009)	3, 5, 7, 13
<u>State v. Garvin</u> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....	4
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	4
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	4
<u>State v. O’Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	10
<u>State v. Patton</u> , 167 Wn.2d 379, 219 P.3d 651 (2009).....	passim
<u>State v. Ringer</u> , 100 Wn.2d 686, 674 P.2d 1240 (1983).....	10, 11, 13
<u>State v. Tibbles</u> , 169 Wn.2d 364, 236 P.3d 885 (2010).....	7, 13

Washington Court of Appeals Decisions

<u>State v. Chesley</u> , ___ Wn. App. ___, 239 P.3d 1160 (2010).....	7
<u>State v. Martinez</u> , 135 Wn. App. 174, 143 P.3d 855 (2006).....	4
<u>State v. Snapp</u> , 153 Wn. App. 485, 219 P.3d 971, <u>review granted</u> 231 P.3d 413 (2010).....	3, 7, 8
<u>State v. Wright</u> , 155 Wn. App. 537, 230 P.3d 1063, <u>review granted</u> 231 P.3d 413 (2010).....	3, 7, 8

United States Supreme Court Decisions

<u>Arizona v. Gant</u> , ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) 9, 10	
<u>Chimel v. California</u> , 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)	9, 10

<u>Thornton v. United States</u> , 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004).....	9, 10
<u>United States v. Rabinowitz</u> , 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).....	9, 10, 11
<u>United States v. Ross</u> , 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).....	12

Decisions of Other Jurisdictions

<u>Camacho v. State</u> , 119 Nev. 395, 75 P.3d 370 (Nev. 2003)	12, 13
<u>Entick v. Carrington</u> , 19 How. St. Tr. 1029 (C.P. 1765)	9, 10
<u>State v. Bauder</u> , 181 Vt. 392, 924 A.2d 38 (Vt. 2007)	11, 12
<u>State v. Eckel</u> , 185 N.J. 523, 888 A.2d 1266 (N.J. 2003).....	12
<u>State v. Peña Flores</u> , 198 N.J. 6, 965 A.2d 114 (N.J. 2009)	13
<u>State v. Roswell</u> , 144 N.M. 371, 188 P.3d 95 (N.M. 2008).....	12, 13

Constitutional Provisions

Const. art. I, § 7.....	1, 4, 8, 13
-------------------------	-------------

A. COUNTERSTATEMENT OF ISSUE

Whether the trial court properly ruled that the police officer's warrantless search of respondent Rhienna Virden's car violated article I, section 7 of the Washington Constitution because it was performed "incident to the arrest" of a person who was secured in the back of a patrol car, unable to access a weapon or destroy evidence.

B. STATEMENT OF THE CASE

On November 14, 2009, Rhienna Virden was arrested following a vehicle stop because troopers smelled marijuana in her car. CP86¹ at 33 (Finding of Fact 1). One trooper secured Ms. Virden in a police vehicle while the other detained her passengers. *Id.* (Findings of Facts 3, 4). The trooper who had arrested Ms. Virden then searched her car without a warrant. Neither Ms. Virden nor any of her passengers had access to the car at the time of the search. *Id.* (Finding of Fact 5). "There was no risk that Ms. Virden nor anyone else would obtain a weapon or conceal or destroy evidence of the crime of arrest in the car at the time of the search." CP86 at 34 (Finding of Fact 6). The trooper found drugs in the car, and Ms. Virden was charged with one count of possession with intent to

¹ There are two consolidated cases in this appeal, number 10-1-00086-0 and 10-1-00087-8. Ms. Virden will refer to the Clerk's Papers in the first case as "CP86", and the Clerk's Papers in the second as "CP87".

deliver a controlled substance and one count of possession of a controlled substance. CP86 at 1-2, 4.

On December 25, 2009, Ms. Virden was driving alone when she was stopped for speeding. The officer who stopped her arrested her based on the odor of marijuana. CP87 at 19 (Finding of Fact 1). The trooper secured Ms. Virden in the police vehicle, then searched Ms. Virden's car. Neither Ms. Virden nor anyone else had access to the vehicle at the time of the search. Id. (Findings of Fact 2, 3). "There was no risk that Ms. Virden nor anyone else would obtain a weapon or conceal or destroy evidence of the crime of arrest in the car at the time of the search." Id. (Finding of Fact 4). The trooper found drugs in the car, and Ms. Virden was charged with possession of a controlled substance. CP87 at 1-3.

The cases were consolidated for trial, and Ms. Virden moved to suppress the evidence against her because it was obtained pursuant to warrantless searches. CP86 at 9-18; CP87 at 4-9. The State attempted to justify the searches under the search-incident-to-arrest exception to the warrant requirement. CP86 19-25. Ms. Virden pointed out that the exception did not apply because in both instances, she was arrested and secured in the back of a police vehicle, unable to access a weapon or destroy evidence. CP86 at 32. The State argued that the exception applied because "the trooper was likely to find evidence of her crime of

arrest,” regardless of the fact that Ms. Virden was in no position to conceal or destroy the evidence. CP86 at 19.

The trial court granted the motion to suppress in both cases, ruling that because Ms. Virden was secured in the back of the patrol car and there was no chance of anyone accessing a weapon or destroying evidence, the warrantless search could not be justified under the search-incident-to-arrest exception. CP86 at 33-34.

The State filed a motion for reconsideration, citing this Court’s decisions in State v. Wright, 155 Wn. App. 537, 230 P.3d 1063, review granted 231 P.3d 413 (2010) and State v. Snapp, 153 Wn. App. 485, 219 P.3d 971, review granted 231 P.3d 413 (2010). CP86 at 35-40. The court denied the motion, relying on the Supreme Court cases of State v. Patton, 167 Wn.2d 379, 384, 219 P.3d 651 (2009) and State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). CP86 at 42.

The State appeals. CP 45-51.

C. ARGUMENT

THE TRIAL COURT PROPERLY RULED THAT THE WARRANTLESS SEARCH OF MS. VIRDEN'S CAR VIOLATED ARTICLE I, SECTION 7 BECAUSE MS. VIRDEN HAD BEEN ARRESTED AND WAS NOT ABLE TO ACCESS A WEAPON OR DESTROY EVIDENCE.

a. Standard of Review. Where, as here, the appellant does not assign error to the trial court's findings of fact, they are verities on appeal. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The constitutionality of a warrantless search based on those facts is reviewed de novo. State v. Martinez, 135 Wn. App. 174, 179, 143 P.3d 855 (2006).

b. Under Patton and Buelna Valdez, a warrantless car search is not justified under the search-incident-to-arrest exception unless the arrestee is unsecured and able to access a weapon or destroy evidence of the crime of arrest. Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. "Authority of law" means a warrant, subject to limited exceptions. State v. Hendrickson, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). Exceptions to the warrant requirement must be "jealously and carefully drawn." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). They "are not devices to undermine the warrant requirement." State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). "The State bears a

heavy burden to show the search falls within one of the ‘narrowly drawn’ exceptions.” Garvin, 166 Wn.2d at 250 (citation omitted).

The State cannot meet its burden here. The State acknowledges that both times officers searched Ms. Virden’s car they did so without a warrant. But it argues the intrusion was constitutional under the “vehicle search incident to arrest” exception. The State is wrong, because, as the trial court recognized, that exception is limited to situations in which the arrestee is within reaching distance of the car and could grab a weapon or destroy evidence of the crime of arrest before the officer could obtain a search warrant.

“[A]n 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.” State v. Patton, 167 Wn.2d 379, 384, 219 P.3d 651 (2009).

After an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee’s presence does not justify a warrantless search under the search incident to arrest exception.

State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

In other words, the Supreme Court has held that the vehicle search-incident-to-arrest exception to the warrant requirement applies only if two conditions are satisfied:

- 1) The arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and
- 2) The search is necessary to ensure officer safety or prevent destruction of evidence of the crime of arrest.

Patton, 167 Wn.2d at 384.

Here, the State did not establish either of these preconditions, let alone both. Indeed, the State does not assign error to any factual findings, and the trial court specifically found that Ms. Virden was secured in the police vehicle at the time of the searches and “[t]here was no risk that Ms. Virden nor anyone else would obtain a weapon or conceal or destroy evidence of the crime of arrest in the car at the time of the search.” CP86 at 34 (Finding of Fact 6); CP87 at 19 (Finding of Fact 4).

The State provides no argument to the contrary, but claims the search was constitutional anyway because it was “reasonable to believe that evidence of the offense of arrest might be found in the vehicle.” Appellant’s Opening Brief at 10. However, the fact that evidence might be found does not justify performing the search without authority of law. If the officers had probable cause to believe drugs were in the car, the proper course of action was to obtain a warrant.

[T]he existence of probable cause, standing alone, does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant.

State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (emphasis in original).

The State argues the searches were proper under Snapp, 153 Wn. App. 485 and Wright, 155 Wn. App. 537. Appellant's Opening Brief at 11-14. But as the trial court observed, those cases are inconsistent with the Supreme Court's decisions in Patton and Buelna Valdez. Indeed, the Supreme Court has granted review in Snapp and Wright, and this Court has recently recognized the error of those decisions. State v. Chesley, ___ Wn. App. ___, 239 P.3d 1160 (2010). In Chesley, although officers had reason to believe the car contained evidence of the crime of arrest, this Court held the warrantless search was unconstitutional because it was "not necessary at the time of the search to preserve officer safety or prevent concealment or destruction of evidence of the crime of arrest." Id. at 1166 (citing Buelna Valdez, 167 Wn.2d at 777; Patton, 167 Wn.2d at 394-95). The trial court properly applied the same rule in Ms Virden's case.

Because officers searched Ms. Virden's car without a warrant and no exception to the warrant requirement applied, the search violated article I, section 7 of the Washington Constitution. This Court should affirm.²

c. The *Thornton* exception does not exist in Washington. The State argues that this Court should follow federal Fourth Amendment caselaw to hold that under article I, section 7, a warrantless car search is permissible not only under the circumstances outlined in Patton and Buelna Valdez, but also when an officer has reason to believe evidence of the crime of arrest will be in the car. The State argues this exception applies regardless of whether the arrestee was in a position to destroy the evidence before the officer could obtain a warrant. Appellant's Opening Brief at 10-14.³

This exception does not exist under article I, section 7. The United States Supreme Court adopted the exception under the Fourth Amendment in Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1714, 173 L.Ed.2d 485

² Because the State relies solely on this Court's decisions in Wright and Snapp, the State and Ms. Virden agree that this appeal should be stayed pending the Supreme Court's decision in those cases. See Appellant's Opening Brief at 12, n. 2. A motion to stay has been filed contemporaneously with this brief.

³ Indeed, the State goes so far as to say that the rules set forth in Patton and Valdez are "dicta," because "the United States Supreme Court has already decided what happens in those cases." Appellant's Opening Brief at 15. It goes without saying that the U.S. Supreme Court has no authority to decide matters of state constitutional law, and our supreme court properly interpreted article I, section 7 in Patton and Buelna Valdez.

(2009). The genesis of the exception was Justice Scalia's concurring opinion in Thornton v. United States, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004). Gant, 129 S.Ct. at 1719. This "Thornton exception," in turn, was based on the outdated and expansive interpretation of the search-incident-to-arrest exception adopted in United States v. Rabinowitz, which was later overruled in Chimel⁴:

If Belton searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested. This more general sort of evidence-gathering search is not without antecedent. For example, in United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950), we upheld a search of the suspect's place of business after he was arrested there. We did not restrict the officers' search authority to "the area into which the arrestee might reach in order to grab an item," Chimel, 395 U.S. at 763, and we did not justify the search as a means to prevent concealment or destruction of evidence. Rather, we relied on a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.

Thornton, 541 U.S. at 629 (Scalia, J., concurring in the judgment).

Justice Scalia acknowledged that this exception was "broader" than that approved in Chimel, and also conceded that "carried to its logical end, the broader rule is hard to reconcile with the influential case of Entick v. Carrington, 19 How. St. Tr. 1029, 1031, 1063-64 (C.P. 1765)

⁴ Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

(disapproving search of plaintiff's private papers under general warrant, despite arrest)." Thornton, 541 U.S. at 630-31 (Scalia, J., concurring in the judgment).

But if we are going to continue to allow Belton searches on stare decisis grounds, we should at least be honest about why we are doing so. Belton cannot reasonably be explained as a mere application of Chimel. Rather, it is a return to the broader sort of search incident to arrest that we allowed before Chimel.

Id. at 631 (emphasis added). It is this "broader sort of search incident to arrest" exception that the U.S. Supreme Court adopted in Gant. 129 S.Ct. at 1719.

But exceptions to the warrant requirement are narrower under Washington's "authority of law" clause than under the Fourth Amendment. State v. O'Neill, 148 Wn.2d 564, 584-85, 62 P.3d 489 (2003). Our Supreme Court rejected the expansive Rabinowitz interpretation of the search-incident-to-arrest exception decades ago. Citing Entick v. Carrington, which Justice Scalia acknowledged was at odds with the Thornton exception, the Court stated, "our state constitutional provision is declaratory of the common-law right of the citizen not to be subjected to search or seizure without a warrant." State v. Ringer, 100 Wn.2d 686, 691, 674 P.2d 1240 (1983) (citing Entick, 95 Eng.Rep. 807).

Indeed, while the Thornton exception is derived from the majority holding in Rabinowitz, the Washington Supreme Court has repeatedly endorsed the dissent from that case, which lamented, “the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it.” Ringer, 100 Wn.2d at 694 (quoting Rabinowitz, 339 U.S. at 79 (Frankfurter, J., dissenting)). See also Patton, 167 Wn.2d at 389-90.

The [search-incident-to-arrest] exception began as a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee. This was the scope of the exception when Const. art. 1, § 7 was adopted.

Ringer, 100 Wn.2d at 698. Thus, in Washington, “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.” Patton, 167 Wn.2d at 390 (citing Ringer, 167 Wn.2d at 699).

Several other states have rejected the Thornton exception under their state constitutions. For example, in Vermont, as here, “a warrantless automobile search based ‘solely on the arrest of a person unable to endanger the police or destroy evidence cannot be justified under any exception to the warrant requirement and is unreasonable.’” State v. Bauder, 181 Vt. 392, 401, 924 A.2d 38 (Vt. 2007) (quoting State v. Eckel,

185 N.J. 523, 888 A.2d 1266, 1277 (N.J. 2003)). The Vermont Supreme

Court declined to adopt Justice Scalia's additional exception:

The so-called Belton variation endorsed by the dissent is just that, a variation of Belton. Although the rationale is different – the arrest purportedly provides the probable cause to search – the reasoning remains essentially the same, based on a perceived need to authorize routine warrantless searches absent any particularized showing that the delay attendant upon obtaining a warrant is impracticable under the circumstances. As earlier observed, however, such an approach is fundamentally at odds with Article 11 [of the Vermont Constitution], under which warrantless searches are presumptively unconstitutional absent a showing of specific, exigent circumstances justifying circumvention of the normal judicial process.

Bauder, 181 Vt. At 402-03. Other states also reject the Thornton exception, and require a warrant unless the arrestee is in a position to access a weapon or destroy evidence. See, e.g., Eckel, 185 N.J. at 541; Camacho v. State, 119 Nev. 395, 400, 75 P.3d 370 (Nev. 2003); State v. Roswell, 144 N.M. 371, 376, 188 P.3d 95 (N.M. 2008).

The Thornton exception is consistent with the Fourth Amendment's "automobile exception," under which a car may be searched based on probable cause alone even if there are no exigent circumstances. See United States v. Ross, 456 U.S. 798, 820-21, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). But like the states listed above, Washington does not have an "automobile exception." Rather, if officers have probable cause

to believe a vehicle contains evidence of a crime, they must obtain a warrant unless exigent circumstances make waiting for a warrant impracticable. Tibbles, 169 Wn.2d at 371; State v. Patterson, 112 Wn.2d 731, 734-35, 774 P.2d 10 (1989); Ringer, 100 Wn.2d at 700-01. As the Nevada Supreme Court explained, the Thornton exception makes no sense in states like Washington that have rejected the automobile exception:

In light of our prior decisions holding that under the Nevada Constitution police may not conduct a warrantless search of a vehicle, even if police may have probable cause to believe that contraband is located therein, absent exigent circumstances, it would be inconsistent to now hold that police may, without a warrant, search a vehicle incident to a lawful custodial arrest without exigent circumstances.

Camacho, 119 Nev. at 400. See also Roswell, 144 N.M. at 376, 378; State v. Peña Flores, 198 N.J. 6, 11, 965 A.2d 114 (N.J. 2009).

In sum, under article I, section 7, a warrantless car search may not be justified under the search-incident-to-arrest exception unless the arrestee has access to the passenger compartment at the time of the search and could access a weapon or destroy evidence of the crime of arrest.

Patton, 167 Wn.2d at 384; Buelna Valdez, 167 Wn.2d at 777. Neither of these exigencies existed in this case, so the trial court properly ruled that the warrantless car search violated article I, section 7. This Court should affirm.

D. CONCLUSION

For the reasons stated above, respondent Rhienna Virden respectfully requests that this Court affirm the trial court's order suppressing the evidence and dismissing the charges against her.

DATED this 17th day of December, 2010.

Respectfully submitted,


Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Respondent

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

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	NO. 65558-2-I
v.)	
)	
RHIENNA VIRDEN,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** 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:

- | | | | |
|-----|--|-------------------|-------------------------------------|
| [X] | ERIK PEDERSEN, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] | RHIENNA VIRDEN
1717 S 6 TH ST.
MOUNT VERNON, WA 98273 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF DECEMBER, 2010.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711