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NO. 67334-3-I

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

REC'D
DEC 28 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ANTOINE BROCK,

Appellant.

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

The Honorable Susan Craighead, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by denying Appellant's CrR 3.6 motion to suppress evidence.

Issue Pertaining to Assignment of Error

Did the court err in denying Appellant's motion to suppress on the basis that the warrantless search of Appellant's backpack was lawful under article 1, section 7 of the Washington Constitution as a search incident to arrest, when by the time of the search Appellant had no access to the backpack, the search was not necessary for officer safety reasons, and there was no concern a prompt search was needed to preserve evidence?

B. STATEMENT OF THE CASE

The King County Prosecutor charged Appellant Antoine Brock with ten counts of second degree identity theft, three counts of forgery, and one count of possession of methamphetamine. CP 35-41; RCW 9.35.020(1), (3); RCW 9A.60.020(1)(a); RCW 69.50.4013. All charges stemmed from a warrantless search of Brock's backpack following his arrest in the early morning hours of May 21, 2008, at Golden Gardens Park for providing "false information" to Washington Department of Fish and Wildlife Officer Eric Olson. CP 6-20.

Pretrial, Brock moved to suppress the evidence recovered from his backpack. CP 23-34. Brock argued the search of his backpack violated his rights under article 1, section 7 of the Washington Constitution because an immediate warrantless search of the backpack was not necessary for officer safety or to preserve evidence. CP 32-34. In response, the prosecution argued the search was lawful for three reasons: (1) Brock claimed the pack was not his so he had no standing to challenge the search; (2) the search was lawful as a search incident to arrest of Brock for criminal trespass and providing false information; and (3) because Brock was going to be arrested, the search was lawful "as part of the booking procedure." Supp CP __ (sub no. 37, State's Response to Defendant's Motion to Suppress and Trial Memorandum, 6/15/11, at pages 6-11).

A hearing on Brock's suppression motion was heard by the Honorable Susan J. Craighead. 1RP.¹ The only testimony presented was that of Officer Olson. 1RP 6-72.

Olson noted that Golden Gardens Park is closed to the public from 11:30 pm to 6 a.m. 1RP 13. Olson explained he was patrolling the park at

¹ There are three volumes of verbatim report of proceedings referenced as follows: 1RP - 6/13/11; 2RP - 6/14/11; and 3RP - 6/28/11.

about 3 am on May 21, 2018, when he noticed an individual in the men's bathroom. 1RP 11, 21. Olson waited outside the bathroom until Brock came out wearing baggy clothes and carrying a backpack. 1RP 23-24, 26.

Olson had decided to detain the person in the bathroom for criminal trespass, so when Brock came out Olson announced he was a police officer and told Brock he was not allowed in the park because it was closed. 1RP 24-26. When Brock replied he was unaware the park was closed, Olson asked Brock to set down his backpack and told him he was going to pat Brock down for weapons. 1RP 25-26. Brock complied and Olson found no weapons. 1RP 26.

When Brock said he had no identification on him, Olson asked for his name, date of birth and social security number. According to Olson, Brock "said his name was Dorien Halley, his date of birth was 07/19/67 with a social security number 560-32-4581." 1RP 27. Olson then seized Brock's backpack and directed Brock to stand or sit near Olson's patrol car so he could continue his investigation. 1RP 30, 32-33. Olson placed Brock's backpack inside the front passenger-side of his patrol car. 1RP 32. The compartments to the backpack were all zipped closed. 1RP 57-58.

Olson was unable to validate the identification information Brock provided. 1RP 33, 35. Olson therefore told Brock he was under arrest for

providing false information and read him his Miranda warnings, but did not handcuff him. 1RP 36, 38.

Olson returned to his patrol car and conducted a preliminary search of Brock's backpack to try to determine Brock's true identity, and in the process discovered a small bag of marijuana, a small bag of methamphetamine, and a "green inmate DOC badge" with Brock's picture and name on it. 1RP 40-43. As Olson returned to Brock to take him into full custody, Brock said, "Backpack's not mine." 1RP 43. Olson handcuffed Brock and secured him in the back of his patrol car. 1RP 44, 58.

After securing Brock, Olson conducted a more thorough search of the backpack and discovered the evidence leading to the identify theft and forgery charges and more suspected drugs and drug paraphernalia. 1RP 48-50. Olson also checked for warrants and found an active "DOC arrest warrant." Olson said that at that point he was committed to booking Brock into the King County jail. 1RP 50.

In its oral ruling denying the suppression motion, the trial court determined Olson had probable cause to stop and arrest Brock for trespass upon discovering him in the closed park. 2RP 4, 9. With regard to the search of Brock's backpack, however, the court expressed concern that it

may have run afoul of the United State's Supreme Court's decision in Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), which the trial court noted changed the law to preclude warrantless searches of automobiles once a defendant no longer has access. 2RP 9-10.

Ultimately, the trial court felt constrained to limit application of Gant to vehicle searches and therefore found the Olson's post-arrest search of Brock's backpack lawful as a search incident to arrest. Id. The court specifically rejected the prosecution's arguments that the search was simply a pre-booking "inventory search," that it was lawful because Brock denied the backpack was his, or that discovery of the evidence was inevitable. 2RP 11. Subsequently filed written findings and conclusions track the court's oral rulings. CP 59-65.² Brock's subsequent motion to reconsider was denied. Supp CP __ (sub no. 36, Motion to Reconsider Court's Denial of Motion to Suppress Fruits of Illegal Search Incident to Arrest, 6/14/11); 2RP 18-19.

Brock was convicted by bench trial on stipulated evidence of all charged except one count of identity theft. CP 42-45; Supp CP __ (sub no. 46B, Order on Stipulated Facts - Finding of Fact and Conclusions of Law, 6/28/11); 2RP 30-33. Brock was sentenced to concurrent 24-month terms

² A copy of the court's findings and conclusions is attached as an appendix.

for each of the forgery and methamphetamine convictions, and concurrent 50-month Drug Offender Sentencing Alternative sentences for the identity theft convictions. CP 47-58; 3RP 19-20. Brock appeals. CP 66-78.

C. ARGUMENT

BECAUSE THERE WAS NO OFFICER SAFETY OR PRESERVATION OF EVIDENCE BASIS FOR THE SEARCH OF BROCK'S BACKPACK, OLSON'S WARRANTLESS SEARCH OF THE BACKPACK VIOLATED BROCK'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION ARTICLE 1, SECTION 7.

A warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution. See State v. Rankin, 151 Wn.2d 689, 695 92 P.3d 202 (2004); Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971). A warrantless search is presumed unlawful unless the State proves it falls within one a few narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears a “heavy burden” of establishing an exception to the warrant requirement by a preponderance of the evidence. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

A search incident to arrest has historically been an exception to the warrant requirement, and allows an immediate search to be conducted in

order to secure the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. State v. Valdez, 167 Wn.2d 761, 773, 224 P.3d 751 (2009); Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). This exception has been broadly applied to searches of bags, backpacks and purses incident to the arrest of their owners, and to searches of automobiles incident to the arrest of their occupants. See e.g., State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), State v. Stroud, 106 Wn.2d 144, 150–51, 720 P.2d 436 (1986); State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992); New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Over time, however, “the search incident to arrest exception has been stretched beyond [its] underlying justifications, permitting searches beyond what was necessary for officer safety and preservation of the evidence of the crime of arrest.” Valdez, 167 Wn.2d at 774.

The scope of a permissible search incident to arrest was set forth by the U.S. Supreme Court in Chimel. In Chimel, an arrest warrant was issued the suspect arrested at his home for burglary of a coin shop. 395 U.S. at 753. Upon arrest, officers conducted a detailed searched of his entire home. 395 U.S. at 754. The Court held the search extended far beyond the arrestee’s person and area within his immediate control, and

thus was not necessary to secure the safety of the officers or preserve evidence that could be concealed or destroyed, and was therefore unconstitutional. 395 U.S. at 768.

In Belton, the reasoning in Chimel was adapted to the context of a search incident to arrest involving occupants of an automobile. 453 U.S. at 460. The Belton court cited Chimel for its holding that the scope of the officer's search could extend to the area within the immediate control of the arrestee to prevent the arrestee from securing weapons or concealing or destroying evidence, and reasoned that the occupant of an automobile would have immediate control over the entire passenger compartment. 453 U.S. at 460. Under the facts of Belton, the warrantless search was reasonable, and thus constitutional, because the four arrestees were not physically restrained and were sufficiently proximate to the car to gain access. 453 U.S. at 455.

In Stroud, the Washington Supreme Court recognized that the State constitution provides more privacy protection than its Federal counterpart. 106 Wn.2d at 148-50. The Stroud Court nevertheless broadened the scope of the exception, stating: "During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger

compartment of a vehicle for weapons or destructible evidence.” 106 Wn.2d at 152. Thus, under Stroud, the fact that a defendant is in custody and in a patrol car during the search, and unable to access evidence or a weapon, was immaterial. 106 Wn.2d at 152.

Subsequently in Smith, the Washington Supreme Court, relying on Belton, adopted a two-part test to establish the validity of a search incident to arrest: “(1) if the object searched was within the arrestee's control when he or she was arrested; and (2) if the events occurring after the arrest but before the search did not render the search unreasonable.” 119 Wn.2d at 681.³

The Smith Court held that both requirements were met in that case.

As to the first prong:

Smith was wearing the fanny pack when Officer Gonzales tackled him. The fanny pack fell off during the struggle that preceded the arrest, and was within “one or two steps” of Smith at the time of the arrest. Thus Smith was in actual physical possession of the fanny pack just prior to the arrest, and the fanny pack was within his reach at the moment of arrest.

119 Wn.2d at 682. As to the second prong:

³ It should be noted as well that the Smith court analyzed the exception under the Fourth Amendment, not under Washington’s more protective Article 1, section 7. 119 Wn.2d at 678; see also Parker, 139 Wn.2d at 493 (Art. 1, § 7 provides greater protection to an individual’s right of privacy than that guaranteed by the Fourth Amendment).

[Smith] asserts that the fact that he was handcuffed and in the back of the police car when Gonzales opened his bag rendered the search unreasonable. . . . We reject [this] argument[] . . . [O]nce she arrested Smith, Officer Gonzales acted reasonably in taking steps necessary to assure her safety. Gonzales' actions were reasonable because Smith initially tried to run away, he disobeyed Gonzales' order to stop, and because the arrest occurred in a parking lot filled with a large group of people. Handcuffing Smith and placing him in the back of the police car prior to any search of the fanny pack were reasonable actions under those circumstances. Therefore the fact that Smith was handcuffed in the back of the police car during the search does not make that search unreasonable.

119 Wn.2d at 682-83.

But in Arizona v. Gant, the United States Supreme Court rejected such broad readings of Belton and of the search incident to arrest exception. Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car. 129 S. Ct. at 1715. Police officers then searched his car and discovered cocaine in the pocket of a jacket on the backseat. 129 S. Ct. at 1715.

Gant was charged with possession of a narcotic drug for sale and possession of drug paraphernalia. He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant argued Belton did not authorize the search of his car because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a

traffic offense for which no evidence could be found in his vehicle. 129 S. Ct. at 1715.

The Supreme Court agreed, and rejected the then prevailing interpretation of Belton as authorizing a vehicle search incident to every recent occupant's arrest. 129 S. Ct. at 1714. The Court specifically 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.

129 S. Ct. at 1723

Thereafter, the Washington Supreme Court observed:

[T]he Court in Gant issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Gant, 129 S. Ct. at 1719.

State v. Patton, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). The Court held likewise that under article 1, section 7:

[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.

167 Wn.2d at 383. The risk to officer safety or the possibility that evidence will be destroyed must “exist at the time of the search.” 167 Wn.2d at 395.

Then in Valdez, the Washington Supreme Court again noted the improper overexpansion of the search incident to arrest exception:

[A]fter 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. Stroud's expansive interpretation to the contrary was influenced by an improperly broad interpretation of Belton[.]

167 Wn.2d at 777. The Court further noted “The search incident to arrest exception, born of the common law, arises from the necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of that exception must be so grounded and so limited.” 167 Wn.2d at 775.

Here, Brock argued below that the limitations on searches incident to arrest expressed in and subsequent to Gant also apply to searches of personal items. Brock argued Gant is not exclusive to searches of automobiles, but applies equally to searches of cars and “everything else.” 2RP 19. Despite “significant doubts about whether searches incident to arrest can, post-Gant, be justified broadly[.]” the trial court determined it

did "not have a basis under current law to apply Gant to the search of [Brock's] backpack." 2RP 19-20.

Recently, however, the Division Three of this Court determined Gant does apply to searches of personal items incident to arrest, and specifically held that the overly permissive test in Smith is no longer good law. State v. Byrd, 162 Wn. App. 612, 616, 258 P.3d 686, review granted, __ Wn.2d __ (November 21, 2011).

In Byrd, Lisa Byrd was arrested for possession of stolen property, and after the arresting officer handcuffed Byrd and secured her in his patrol car, he conducted a search of her purse incident to arrest. The trial court, relying on Gant and Valdez, ruled the search was improper and suppressed the contraband found in Byrd's purse. 162 Wn. App. at 614. The State appealed, and Division Three addressed whether Gant applies beyond vehicle searches.

The Byrd court noted Gant limits Belton "to authorizing the 'search [of] a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.'" 162 Wn. App. at 616 (quoting Gant, 129 S. Ct. at 1719). The Byrd court also recognized that Washington cases, including Smith, that authorized the search of a vehicle

incident to a recent occupant's arrest after the arrestee has been secured and cannot access the inside of the vehicle, were "based on a rejected interpretation of Belton; an interpretation that Gant overruled." 162 Wn. App. at 616. The court went on to hold:

We are bound by Gant's interpretation of Belton. And, while the State argues that Gant should not apply because it involved the search of a vehicle incident to arrest, Gant and Belton simply applied the general rules of the search incident to arrest exception set out in Chimel to the automobile context. A search incident to an arrest is a search incident to an arrest whether the object searched is a car or a purse.

162 Wn. App. at 616-17 (citations omitted).

As noted by both the Byrd and Gant courts, Chimel "continues to define the boundaries of the [search incident to arrest] exception." Gant, 129 S. Ct. at 1716; Byrd, 162 Wn. App. at 617. Chimel did not involve the search of a vehicle. And under Chimel, an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search. Chimel, 395 U.S. at 763-64, 768; Gant, 129 S. Ct. at 1719.

The Byrd court correctly determined that Gant applies to any search incident to arrest, and "an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search." 162 Wn. App. at 617 (citing Gant, 129 S. Ct. at 1719; Chimel, 395 U.S. at 763-64, 768). The court also correctly found that because Byrd was

secured in handcuffs and in the patrol car when her purse was searched, and that she had no way to access the purse at the time, the justifications for the search incident to arrest exception did not exist. 162 Wn. App. at 617.

Similarly here, at the time of the search, Brock was handcuffed and secured in the back of a patrol car when Officer Olson searched the backpack, which had been out of Brock's reach since before his arrest. 1RP 30, 43-48. Brock could not have accessed the backpack to obtain a weapon or destroy evidence. Brock was arrested for providing false information and not for any crime relating to the backpack. 1RP 36. There was no basis for Officer Olson to search the backpack without first obtaining a search warrant.

Officer Olson attempted to justify his initial search of the backpack in part on grounds that he was trying to establish Brock's true identity. CP 61 (finding of fact J). Brock attempted to justify his subsequent and more thorough search of the backpack at least in part on grounds that it was required before the jail would take possession of Brock's belongings once he was booked. CP 62 (finding of fact N). While establishing Brock's true identity and attempting to comply with jail policies may be worthy goals, these are not recognized as exception to the warrant requirement.

Furthermore, even if the officers could have done an inventory search before or after arriving at the jail, this does not cure the taint of the prior illegal search, because Washington does not recognize the “good faith” or “inevitable discovery” doctrines. State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009); State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010).

In sum, Brock was secured in handcuffs and separated from his backpack at the time of the search. Because Brock was unable to access the backpack or its contents, there was no threat to officer safety and no possibility that evidence related to his arrest could be destroyed. Under Chimel, Gant, Patton, Valdez, and Byrd, the warrantless search of Brock's backpack incident to arrest was unconstitutional, and all evidence seized as a result should have been suppressed. See State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The trial court's failure to do so requires reversal.

D. CONCLUSION

The limitations on a valid search incident to arrest, as established by Chimel and reaffirmed by Gant, Patton, Valdez, and Byrd, apply both to searches of automobiles and searches of personal items. A search

incident to arrest is necessary only to ensure officer safety and to protect evidence of the crime of arrest. A search incident to arrest is improper if the arrestee is secured and unable to access the interior of the vehicle or personal item. Because Brock was secured and unable to access the backpack, the justifications for a search incident to arrest were not present, and the search was unconstitutional. The evidence seized as a result of the search should have been suppressed.

DATED this 28th day of December 2011

Respectfully submitted,

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1 shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so
2 advised, the defendant did not testify at the hearing.

3 After considering the evidence submitted by the parties and hearing argument, to wit: the
4 testimony of Washington State Department of Fish and Wildlife Officer Eric Olson, the court
5 enters the following findings of fact and conclusions of law as required by CrR 3.5 and CrR 3.6.

6 1. FINDINGS OF FACT:

- 7 A. At 3:00 a.m. on May 21, 2008, Fish and Wildlife Officer Eric Olson, who was in
8 full uniform, was patrolling Golden Gardens Park alone in his marked patrol
9 truck. Officer Olson is the only Fish and Wildlife Officer assigned to patrol the
10 Seattle area. The park closed at 11:30 p.m. At least one sign posted the hours at
11 the southern entrance to the park.
- 12 B. Officer Olson drove to the north end of the parking lot, closest to the bathhouse,
13 where the restrooms are located. The bathhouse was approximately 75 yards
14 from where Officer Olson parked his truck. It was dark outside, but there were
15 illuminated outdoor lights on the bathhouse building. Officer Olson walked down
16 the concrete path to the north side of the bathhouse and saw that the door to the
17 women's restroom was open. Officer Olson then walked around to the men's
18 restroom, which was also unlocked with the light on and the door open. Officer
19 Olson went into the men's restroom and saw a pair of legs standing facing the
20 toilet in one of the stalls. Officer Olson could not see anything other than the
21 person's legs.
- 22 C. Officer Olson waited at least ten minutes for the person in the restroom to come
23 out. During that time, he did not hear any sounds consistent with a person using
the toilet. When the person, later identified as the defendant, Antoine Brock,
came out of the bathroom, he was wearing loose clothing, including baggy jeans,
and a sweatshirt, and was carrying a full backpack. Officer Olson identified
himself as a police officer and informed Brock that the park was closed. Brock
responded that he was not aware of the park being closed.
- D. Officer Olson told Brock that he was not under arrest at that time, but that he
going to pat him down for weapons and instructed Brock to remove his backpack.
Brock complied. Officer Olson decided to pat Brock down because he did not
know Brock, he (Brock) was wearing baggy clothing and carrying a backpack, it
was dark, he was working alone, and believed that Brock had committed the
crime of trespass. Officer Olson did not pat down or search the backpack at that
time. Officer Olson did not find any weapons or any other items during the pat
down.

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- E. After patting down Brock, Officer Olson asked Brock if he had any identification. Brock stated that he did not have official ID but did have a library card with him. Officer Olson asked Brock to retrieve his library card. Brock leaned down toward his backpack and then stopped, telling Officer Olson that he did not have his card with him. Officer Olson then asked Brock for his name, date of birth, and social security number.
- F. Brock stated that his name was "Dorien L. Halley" with a date of birth of "7-19-1967" and a social security number of "560-32-4581." Officer Olson repeated the information back to him, which Brock confirmed was correct. Officer Olson told Brock that he was not under arrest at that time and to follow him back to his patrol truck. Officer Olson carried the backpack because he did not know what was inside, and was concerned for his safety. When they reached his truck, Officer Olson had Brock stand on curb near the driver's side. He placed the backpack in the front passenger seat of his truck, which was 12 to 15 feet from where Brock was standing. Officer Olson also informed Brock that he was not under arrest, but was not free to leave either.
- G. Before Officer Olson could run the name Brock gave him through the Washington State Patrol computer database, Brock told him that he had not been issued any Washington State identification but had been issued identification in California. Officer Olson entered "Dorien L. Halley" into the database, along with the date of birth and social security number Brock had given him, but no record was located in Washington or California.
- H. Officer Olson walked back over to Brock and told him that he was under arrest for providing false information to him and advised Brock of his Miranda rights from his department issued card. Brock stated that he understood. Officer Olson did not handcuff Brock, told him that the investigation was just beginning, and that Brock might not go to jail. Officer Olson did not search Brock's person because he knew that Brock did not have any weapons, Brock had been cooperative and had not made any furtive movements. He left Brock where he had been standing.
- I. Officer Olson did not request back up because it would have been difficult to get another officer from the State Patrol or the Seattle Police Department to respond quickly, due to his position as a Fish & Wildlife Officer.
- J. Officer Olson returned to the patrol truck to examine the backpack. He searched the backpack in an effort to find valid identification. He opened the large pocket of the zipped backpack and found a small purse or wallet inside. He opened the wallet and found two small plastic baggies—one with methamphetamine and one with marijuana. Next to the baggies was a Department of Correction inmate identification card. The card had Brock's picture affixed and identified him as

1 Antoine L. Brock with a date of birth of June 22, 1967. Officer Olson's search
2 the backpack was incident to Brock's arrest. Officer Olson did not articulate any
3 officer safety reason to search the backpack, nor did he articulate any reason to
4 believe that a search was necessary to prevent the destruction of evidence. The
5 Officer considered this a search incident to arrest.

6 K. As Officer Olson walked toward him, Brock stated that the backpack was not his.
7 This statement was spontaneous and not in response to any question or statement
8 by Officer Olson. The Officer did not believe the defendant's statements. Officer
9 Olson asked Brock why he lied to him (Officer Olson). Brock said that he did not
10 want to talk to Officer Olson any further. Officer Olson did not ask Brock any
11 further questions. Officer Olson handcuffed Brock and searched him incident to
12 arrest. Officer Olson then secured Brock in the rear passenger seat of his truck,
13 which is separate from the front passenger compartment.

14 L. Officer Olson then ran Brock's name through the Washington State Patrol
15 database and found a Department of Correction felony arrest warrant. When the
16 warrant was confirmed, Officer Olson had no choice but to take Brock to the King
17 County Jail.

18 M. After arresting Brock, Officer Olson returned to the backpack and saw checks,
19 credit cards, sales receipts, and mail that did not bear Brock's name. An
20 electronic scale, empty baggies and a glass pipe with burnt residue were also
21 found. Officer Olson conducted field tests of the methamphetamine and
22 marijuana, which were positive.

23 N. The Officer testified that when booking a person into the King County Jail, any
personal effects belonging to the arrestee that are going to be given to the jail staff
must be searched for contraband, including weapons, explosives, drugs or other
prohibited items.

O. Officer Olson had to remove all of the contents of the backpack to ensure that no
contraband was inside. He did not fill out an inventory form and he did not ask
the defendant if he wanted an inventory to be performed.

P. The Officer testified that he could not just leave the backpack at the park without
exposing the Department to a tort claim.

Q. The entire contact with Brock prior to his arrest—from the time he came out of
the men's restroom to the time Officer Olson handcuffed him—took ten minutes.

R. The Court finds Officer Olson's testimony credible.

1 2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S
 2 STATEMENTS:

3 A. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

4 The following statements of the defendant are admissible in the State's case-in
 5 chief:

6 The defendant's statement of identification as "Dorien L. Halley", as well as the
 7 birth date and social security number that he gave Officer Olson in association
 8 with that name are admissible because they are statements of identification. The
 9 defendant's statement that the backpack was not his is admissible because it was a
 10 spontaneous statement not in response to any remarks or questioning by Officer
 11 Olson. Officer Olson properly advised the defendant of his Miranda rights.

12 3. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE
 13 SOUGHT TO BE SUPPRESSED:

14 A. PHYSICAL EVIDENCE

15 The Court concludes that Officer Olson had probable cause to arrest the defendant
 16 for trespassing as soon as he encountered him in the men's restroom at Golden
 17 Gardens Park; therefore, Officer Olson's seizure of the defendant and the
 18 backpack were lawful.

19 As set forth more fully in the court's oral ruling, the Court concludes that under
 20 current law the search of the defendant's backpack was valid based only on the
 21 search incident to arrest exception to the warrant requirement under Art. I., § 7 of
 22 the Washington State Constitution. To date, the rationale of Arizona v. Gant, ___
 23 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) has not been held to apply to
 searches of the belongings of arrested persons outside of the automobile context.
 There are many similarities between the facts of this case and those of Gant: the
 backpack was not within the defendant's reach, it was in the control of the officer
 and the officer articulated neither an officer safety reason for searching the
 backpack nor an evidence destruction justification for doing so. Nonetheless,
 there are significant differences between vehicles and personal effects for
 purposes of requiring a search warrant. Unlike a vehicle, a backpack cannot be
 locked and towed while awaiting a search warrant. Police Departments could
 become virtual storage lockers for the belongings of arrested persons if every
 purse or backpack had to be held pending issuance of a warrant. This court has
 significant doubts about whether search incident to arrest can, post-Gant, be
 justified broadly. However, it is for our appellate courts to determine how Gant
 should be applied in situations such as this one.

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The Court further concludes that the search was not an inventory search and, because Officer Olson did not believe the defendant when he claimed that the backpack was not his, the Court cannot find the search valid based on abandonment of the property. The Court also finds, pursuant to State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009) that the inevitable discovery doctrine does not apply in Washington.

In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

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Signed this 20th day of June, 2011.

Susan Craighead
JUDGE SUSAN CRAIGHEAD

PRESENTED BY:

DANIEL T. SATTERBERG
KING COUNTY PROSECUTING ATTORNEY
OBJECTIONS NOTED ON THE RECORD

Jennifer H. Atchison
JENNIFER H. ATCHISON, WSBA #33263
DEPUTY PROSECUTING ATTORNEY

APPROVED AS TO FORM, COPY RECEIVED BY:
NORTHWEST DEFENDERS ASSOCIATION

Jesse Dubow
JESSE DUBOW, WSBA #39999
COUNSEL FOR DEFENDANT

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67334-3-1
)	
ANTOINE BROCK,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF DECEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTOINE BROCK
DOC NO. 877154
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONORE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF DECEMBER 2011.

x *Patrick Mayovsky*