

COURT OF APPEALS  
THURSTON COUNTY

COUNTY 19 2018-02

No. 38196-6-II

STATE OF WASHINGTON  
BY *cm*

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ERIC C. BURNETT,

Appellant.

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

The Honorable Gary R. Tabor, Judge  
Cause No. 08-1-00844-8

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the warrantless search of the vehicle Burnett was driving was unlawful and if so whether the evidence obtained during the search should be suppressed.

2. Whether defense counsel was ineffective because he failed to bring a motion to suppress the drugs found in the warrantless search of the vehicle.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts.

C. ARGUMENT.

1. There was sufficient evidence presented to establish that, under Washington law, he was in proximity to the vehicle so as to justify a search incident to arrest.

Burnett argues that because, after he was arrested and placed in the patrol car, he was more than four or five feet from his vehicle, which the arresting officer then searched incident to the arrest. State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008). In Adams, however, the court did not place a four-to-five-foot limit on the distance the defendant must be from his car at the time of the search; it merely set forth the fact that Adams was within that distance and found it sufficient proximity to support a search incident to arrest. Before his vehicle was searched, he had locked

it, been arrested, and placed in handcuffs. Adams, *supra*, at 598-99.

The bright line rule in Washington has long been that established in State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986)

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. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

Id., at 152.

Here the evidence was that Burnett was placed under arrest and seated in the patrol car. [RP 16] The trooper had made a traffic stop on Interstate 5, [RP 8-9], and while there was nothing in the record as to the exact distance between the two vehicles, common sense and experience tells us that it was not more than a few feet. Under the rule in Stroud, *supra*, the search of Burnett's vehicle was permissible.

2. Under the rule announced in the recent United States Supreme Court case of Arizona v. Gant, the search of Burnett's vehicle was not permissible.

On April 21, 2009, the United State Supreme Court issued an opinion in Arizona v. Gant, 556 U. S. \_\_\_\_\_ (2009), No. 07-542, which held that a search of a vehicle immediately following the arrest of an occupant can follow only if the occupant is unsecured and within reaching distance of the passenger compartment of the vehicle, or if there is reasonable grounds to believe that the vehicle contains evidence relevant to the crime for which the person was arrested. In Burnett's case he was secured in the patrol vehicle at the time of the search. He was arrested for driving while suspended and on an outstanding warrant; thus there was no reason to believe evidence pertaining to the crimes for which he was arrested would be found in the vehicle. Therefore, because the state constitution cannot be less restrictive than the federal constitution, Des Moines Marina Ass'n. v. City of Des Moines, 124 Wn. App. 282, 296, 100 P.3d 310 (2004), Arizona v. Gant must control.

3. It is unnecessary for this court to reach the issue of ineffective assistance of counsel.

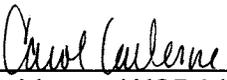
Because the State concedes that reversal is required based on Arizona v. Gant, it is unnecessary to reach Burnett's claim of ineffective assistance of counsel. However, based upon the law before Arizona v. Gant, as set forth above, counsel would not have

been ineffective for failing to move to suppress the evidence recovered in the search.

D. CONCLUSION.

The State concedes that under Arizona v. Gant the search in this case was unconstitutional and the evidence must be suppressed. Because without that evidence the State has no case, dismissal is appropriate.

Respectfully submitted this 15<sup>th</sup> day of May, 2009.

  
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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

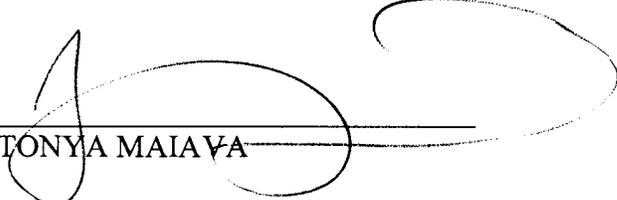
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STATE OF WASHINGTON  
COUNTY OF PUYALLUP  
BY: *sm*  
MINUTE  
COMM. TO: 11/15/09  
COMM. TO: 11/15/09

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 15<sup>th</sup> day of May, 2009, at Olympia, Washington.

  
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TONYA MAIVA