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COURT OF APPEALS
DIVISION II

NO. 38659-3-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

BY _____
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

KARLA G. PEARSALL,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Christine A. Pomeroy, Judge
Cause No. 08-1-01082-5

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to suppress evidence seized as a result of the warrantless search of Pearsall's vehicle incident to her arrest under the U.S. Supreme Court's recent decision in Arizona v. Gant, which applies to this case.
02. The trial court erred in failing to suppress evidence seized as a result of the warrantless search of Pearsall's vehicle incident to her arrest where the State failed to prove where the State failed to prove that she was in close physical proximity to the vehicle at the time of the search.
03. The trial court erred in permitting Pearsall to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence seized as a result of the warrantless search of her vehicle.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether reversal and dismissal of Pearsall's conviction for possession of Vicodin is required where the conviction was based upon evidence that was found and seized in an unconstitutional warrantless search under Arizona v. Gant? [Assignment of Error No. 1].
02. Whether the warrantless search of the vehicle was unlawful and the evidence should be suppressed? [Assignment of Error No. 2].
03. Whether the trial court erred in permitting Pearsall to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence seized as a result of the warrantless search of her vehicle?

[Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Karla G. Pearsall (Pearsall) was charged by information filed in Thurston County Superior Court on June 18, 2008, with unlawful possession of a controlled substance, count I, and making a false or misleading statement to a law enforcement officer, count II, contrary to RCWs 69.50.4013(1) and 9A.76.175. [CP 4].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 7]. Trial to a jury commenced on December 1, the Honorable Christine A. Pomeroy presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 56, 90].

The jury returned verdicts of guilty as charged, Pearsall was sentenced within her standard range and timely notice of this appeal followed. [CP 9-10, 41, 50-57].

02. Substantive Facts¹

On June 13, 2008, Officer Patricia Bell stopped a vehicle because the registered owner's driving status was suspended. [RP 18-19]. The driver, Pearsall, initially identified herself as "Candice R.

¹ All references to the Report of Proceedings are to the transcript entitled Volume II, December 2, 2008.

Johnson,” provided an Idaho driver’s license and, after further questioning, admitted her true identity and explained she had given the false information because she did not want to be arrested for driving while her license was suspended. [RP 24-25, 39-40, 42]. She was arrested for this offense, handcuffed and placed in the rear of Bell’s patrol car before a search of her vehicle incident to her arrest produced two and a half Vicodin tablets found in Pearsall’s purse on the passenger seat. [25-26, 29, 31, 60].

George Gallant testified he had a prescription for Vicodin and had put two and a half tablets of the drug in a baggy inside a bottle he had placed in his pocket before using Pearsall’s car a couple of days before her arrest. [RP 64-67, 71-72]. He realized the pills were missing from his pocket about a week later and had no idea how the pills wound up in Pearsall’s purse. [RP 74-76]. “Unless it fell out of my pocket, you know, when I sat back down in the car.” [RP 74]. He could not say for sure that the pills found in Pearsall’s purse were his missing pills. [RP 74].

Pearsall admitted she was driving on a suspended license and had given the police a false name in an attempt to avoid getting a ticket. [RP 79-80, 83]. She did not know the pills were in her purse or how they had got there. [RP 82, 87].

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D. ARGUMENT

01. THE WARRANTLESS SEARCH OF PEARSALL'S VEHICLE INCIDENT TO HER ARREST WAS UNCONSTITUTIONAL UNDER THE U.S. SUPREME COURT'S DECISION IN ARIZONA V. GANT, WHICH APPLIES TO THIS CASE.

01.1 The Record

A claimed manifest error affecting a constitutional right may be raised for the first time on appeal where, as here, an adequate record exists.

[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.

State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998) (court accepts review of search and seizure issue raised for first time on appeal where record is sufficiently developed for court to determine whether a motion to suppress clearly would have been granted or denied). "Where the alleged constitutional error arises from trial counsel's failure to move to suppress, the defendant 'must show the trial court likely would have granted the motion if made....'" Contreras, 92 Wn. App. at 312 (quoting State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995)).

The record here is sufficient for review; it fully demonstrates that after Pearsall was arrested for driving while license suspended, she was

handcuffed, removed from the scene and placed in the rear of Officer Bell's patrol car before the search of her vehicle incident to her arrest. [RP 25-26, 29, 31, 60].

01.2 Overview of Law

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and art. I, § 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). One exception to the warrant requirement is the search of an automobile incident to a lawful custodial arrest. State v. Stroud, 106 Wn.2d 144, 147, 720 P.2d 436 (1986). Under both constitutional provisions, the State bears the burden of proving that a warrantless search is valid under a recognized exception to the warrant requirement. State v. Parker, 139 Wn.2d at 496.

01.3 Arizona v. Gant Controls

Until recently, it was generally understood that a warrantless search of a vehicle incident to a recent occupant's arrest was permissible under New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1991), even if the person arrested was handcuffed and secured in a police car at the time of the search. See, e.g., State v.

Stroud, 106 Wn.2d at 152; State v. Rathbun, 124 Wn. App. 372, 376-80, 101 P.3d 119 (2004); United States v. Mapp, 476 F.3d 1012, 1017-19 (D.C. Cir.), cert. denied, __ U.S. ___, 127 S. Ct. 3031 (2007); United States v. Hrasky, 453 F.3d 1099, 1102 (8th Cir. 2006), cert. denied, 550 U.S. 903 (2008). In Stroud, the Washington Supreme Court limited the scope of Belton to unlocked containers because of the greater protection granted Washington citizens under Article I, §7 of our state constitution. Stroud, 106 Wn.2d at 152.

On April 21, in a 5-4 decision, the U.S. Supreme Court reversed the broad reading of the above longstanding bright-line rule in Arizona v. Gant, 556 U.S. ___, (2009), a case in which Gant's vehicle had been searched incident to his arrest after he had been handcuffed and placed in the back of a patrol car. Gant, 556 U.S. ___, *3. In affirming the lower court's opinion that the seizure of the cocaine and other items in the vehicle was the result of an unreasonable search within the meaning of the Fourth Amendment, the court reasoned:

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 the arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Gant, 556 U.S. ___, *11.

This holding applies and compels reversal and dismissal of Pearsall's conviction for possession of Vicodin in this case under similar facts. Pearsall was secured in the patrol vehicle at the time of the search after her arrest for driving while license suspended. Given that 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), Gant must control. Where a higher court enters a constitutional ruling in a criminal case, that ruling applies to all cases on direct review. Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); State v. McCormack, 117 Wn.2d 141, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111 (1992); State v. Blanks, 139 Wn. App. 543, 161 P.3d 455 (2007), review denied, 163 Wn.2d 1046 (2008). The reasons for this mandate are clear: "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," taints the "integrity of judicial review" and would result in "actual inequity." Griffith, 479 U.S. at 322-323. As a result, there is "no exception for cases in which the new rule constitutes a clear break from the past." In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 326-27, 823 P.2d 492 (1992). Nor will concerns

of “reliance” by the State justify departing from the rule. See State v. Hanson, 151 Wn.2d 783, 789-91, 91 P.3d 888 (2004).

Further, the ruling of Gant applies regardless whether the defendant moved to suppress and argued the search was illegal below. State v. Rodriguez, 65 Wn. App. 409, 417, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992). There can be no “waiver” of the right to raise the issue because, at the time of trial, the parties would have reasonably relied on the then-current understanding of what Belton held and would have assumed the search was lawful under that case. See Rodriguez, 65 Wn. App. at 417. This issue is of constitutional magnitude and manifest and may be raised for the first time on appeal under RAP 2.5(a)(3). Id.

Under the facts of this case, the warrantless search of the vehicle incident to Pearsall’s arrest was unconstitutional under Gant, which applies to this case, and reversal and dismissal of her criminal conviction for possession of Vicodin is required.

02. THE WARRANTLESS SEARCH OF
PEARSALL’S VEHICLE CANNOT BE
JUSTIFIED AS A SEARCH INCIDENT TO
HER ARREST WHERE THE STATE FAILED
TO PROVE THAT SHE WAS IN CLOSE
PHYSICAL PROXIMITY TO THE VEHICLE
AT THE TIME OF THE SEARCH.

It is well settled that under art. I, § 7 of the Washington Constitution, “the search incident to arrest exception to the

warrant requirement is narrower than under the Fourth Amendment.”

State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). Art. I, § 7 “of the state constitution prohibits warrantless searches of vehicles incident to arrest where the suspect is not physically proximate to the vehicle at the time of arrest.” State v. Webb, 147 Wn. App. 264, 195 P.3d 550 (2008) (citing State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008)). There must be “a close physical and temporal proximity between the arrest and the search.” State v. Fore, 56 Wn. App. 339, 347, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990).

In State v. Adams, Division I of this court upheld a vehicle search based on the defendant’s proximity to the vehicle where “(h)e was never more than four or five feet from his car, and was at all times closer to it than was the deputy. He could have reached it in a couple steps.” 146 Wn. App. at 605 (footnote omitted). In contrast, the same division, in State v. Webb, reversed the denial of the defendant’s suppression motion where the evidence demonstrated that the defendant had been arrested and then placed in a patrol car nearby prior to the search of his vehicle incident to his arrest:

In sum, the record is devoid of evidence showing that the search of Webb’s car falls within the narrowly drawn search incident to arrest exception as required by article I, section 7. The State has failed to carry its burden to show a valid exception to the warrant requirement for searches of

the passenger compartment of a vehicle incident to arrest.
Reversal of the suppression order is required.

State v. Webb, 147 Wn. App. 274.

Unlike Adams, here no evidence was presented nor could have been presented placing Pearsall “within four or five feet” of the car and “at all times closer to it than was the deputy” at the time of the search of the vehicle. Similar to Webb, however, Pearsall was handcuffed, and placed in the rear of Officer Bell’s patrol car before the search of her vehicle incident to her arrest. [RP 25-26, 29, 31, 60].

Because the State failed in its burden to prove that Pearsall was physically proximate to the vehicle at the time of the search, the Vicodin seized in that search must be suppressed. A motion to suppress the Vicodin seized in the car would have been granted, and any evidence seized or obtained through the exploitation of this illegality is tainted and therefore inadmissible as “fruits of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992). Pearsall’s conviction for possession of Vicodin should be reversed and dismissed.

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03. PEARSALL WAS PREJUDICED AS A RESULT OF HER COUNSEL'S FAILURE TO PROPERLY MOVE TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF HER VEHICLE.²

A criminal defendant claiming ineffective

assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

² While it is submitted that this issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

Should this court find that trial counsel waived the error claimed and argued in the preceding sections of this brief by failing to move to suppress evidence, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to move to suppress the evidence, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to move to suppress the evidence, there would have been insufficient evidence to convict Pearsall of possession of Vicodin.

Counsel's performance was deficient because he failed to move to suppress the evidence on the grounds argued herein, which was highly prejudicial to Pearsall, with the result that she was deprived of her

constitutional right to effective assistance of counsel, and is entitled to reversal of her conviction for possession of Vicodin.

E. CONCLUSION

Based on the above, Pearsall respectfully requests this court to reverse and dismiss her conviction for possession of Vicodin.

DATED this 22nd day of May 2009.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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