

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

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STATE OF WASHINGTON,

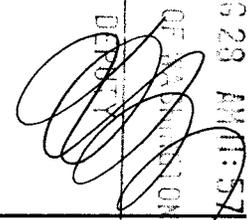
Respondent,

v.

KARLA G. PEARSALL,

Appellant.

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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COURT OF APPEALS  
DIVISION II

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

The Honorable Christine A. Pomeroy, Judge  
Cause No. 08-1-01082-5

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BRIEF OF RESPONDENT

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Carol La Verne  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

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**Statutes and Rules**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the evidence of illegal drugs should be suppressed and the conviction dismissed based on the holding of Arizona v. Gant, where Pearsall did not bring a motion to suppress in the trial court.

2. Whether the evidence of illegal drugs should be suppressed and the conviction reversed because the State did not prove that Pearsall was in close physical proximity to the vehicle at the time of the search.

3. Whether Pearsall received ineffective assistance of counsel because her attorney failed to move to suppress the evidence seized during the search of her vehicle.

B. STATEMENT OF THE CASE.

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

C. ARGUMENT.

1. Pearsall failed to challenge the admissibility of the evidence in the trial court, and thus cannot raise the issue on appeal.

Pearsall argues correctly that, where an adequate record exists, a manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). However, failure to challenge in the trial court evidence obtained as a result of an illegal search or seizure constitutes a waiver of any error by the

court in admitting such evidence. State v. Millan, \_\_\_ Wn. App. \_\_\_, 212 P.3d 603, 2009 Wash. App. LEXIS 1975 at \*11. See also In re Personal Restraint of Nichols, \_\_\_\_\_ Wn.App.\_\_\_\_\_, 211 P.3d 462, 2009 Wash. App. Lexis 1733, \*8.

Until 2009, the rule in Washington regarding search of vehicles incident to arrest was based upon New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), which held that a police officer making a lawful custodial arrest of the occupant of a vehicle could, incidental to that arrest, search the passenger compartment of the vehicle, including the contents of any containers in that vehicle. Belton, 453 U.S. at 460-61. In 1986 the Washington Supreme Court decided State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), in which it analyzed the search of a vehicle incident to arrest under Article I, section 7 of the state constitution, and which it found to be more protective of individual rights than the federal constitution. Applying the state constitution, the court found that law enforcement was in need of a clear standard in regard to a search incident to arrest, and held that during the arrest of an individual in or near a vehicle, including the time immediately after the individual has been handcuffed and

placed in a patrol vehicle, the passenger compartment of the arrestee's vehicle and any unlocked containers within that compartment may be searched without a warrant. Stroud, 106 Wn.2d at 152. This has been the standard for searches of vehicles incident to arrest until the recent U.S. Supreme Court decision in Arizona v. Gant, \_\_\_ U. S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed 2d 485 (2009).

In Gant, the court found that, since law enforcement officers presently have many means of securing an arrested person, the situation where a warrantless search of the vehicle can be justified by the circumstances of the arrest will be the rare exception. Thus, the court announced the rule that a search of a vehicle incident to an arrest is justified only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the arrest, or if the officer has reason to believe that the vehicle might contain evidence relevant to the specific crime for which the individual has been arrested.

Pearsall argues, and she is correct, that the holding of Gant applies to cases pending on appeal. However, that does not end the inquiry. Even long and well-settled law would not apply to her

case because, by failing to bring a suppression motion in the trial court, she waived any error in admitting the evidence of the drugs found in her purse. Her situation is virtually identical to that in Millan, which was decided after Gant. Millan was convicted of unlawful possession of a firearm. Tacoma Police pulled over the vehicle Millan was driving because there had been a report of a domestic violence incident occurring in that car. Because he had taken a significant amount of time to pull over, the officers immediately restrained and frisked him, and then placed him in the back of the patrol vehicle. He was yelling at the female passenger, who was upset and appeared fearful. A routine investigation determined that Millan's driver's license was suspended, and he was placed under arrest. During the search of the vehicle incident to the arrest, a pistol was found; a records check showed he had a felony conviction and he was arrested on the additional charge of unlawful possession of a firearm.

Like Pearsall, Millan did not move to suppress the evidence, nor did he object to its admission at trial. He was convicted, moved for a mistrial, which was denied, and sentenced. He appealed, and while his appeal was pending, the Gant decision was issued. He

argued that the firearm should have been suppressed and that trial counsel was ineffective for failing to file a suppression motion. Like Pearsall, Millan asserted that he could challenge the admissibility of evidence on the grounds of an unlawful search and seizure for the first time on appeal, but the Court of Appeals disagreed.

The Millan court cited to a series of cases which demonstrate that the long-standing rule in Washington is this: “[A] defendant waives the right to challenge the trial court’s admission of evidence gained by an illegal search or seizure by failing to move to suppress the evidence at trial.” Millan, 2009 Wash. App. LEXIS at \*11. Like Pearsall, [Appellant’s Brief at 8] Millan cited to State v. Rodriguez, 65 Wn. App. 409, 828 P.3d 636, *review denied* 119 Wn.2d 1019 (1992), for the proposition that he could challenge a search for the first time on appeal. The Millan court distinguished Rodriguez on the grounds that Rodriguez had moved to suppress evidence in the trial court, but withdrew his motion based on a Court of Appeals decision which was later reversed. Rodriguez was allowed to revive his challenge. Millan, 2009 Wash. App. LEXIS at \*12-13. Millan had not raised the issue at all and was barred from doing so for the first time on appeal. So, then, is Pearsall. Had she

brought a suppression motion below, the State agrees that Gant would support a reversal of her conviction. She did not. While it is true that constitutional errors can be raised for the first time on appeal, that applies only where the errors have not been previously waived.

2. Pearsall cannot challenge the search of the vehicle on the grounds that she was not in close physical proximity to the vehicle at the time of the search any more than she can challenge it based upon Gant. She did not bring a motion to suppress in the trial court and cannot challenge the search for the first time on appeal.

For all the reasons discussed in the section above, Pearsall cannot challenge the search of her vehicle for the first time on appeal on any grounds, including that she was not in close physical proximity to the car at the time of the search incident to arrest. She argues that no evidence was presented that she was within four or five feet of the car, and that is exactly the reason why she cannot challenge a search where she did not bring a suppression motion in the trial court.

[A] motion to suppress must be made at trial or the issue is waived. That holding makes sense. A trial court cannot even begin to assess whether a search is unreasonable under article I, § 7 or the Fourth Amendment unless the underlying facts and the legal

argument are brought to the court's attention through a motion to suppress. It would be unreasonable to view as constitutional error a trial court's failure to apply the exclusionary rule sua sponte.

Nichols, 2009 Wash. App. LEXIS at \*12-13.

Here the State did not produce the evidence about the search because it was not required to do so. This does not result in unfairness to the defendant. The purpose of the exclusionary rule is to deter unlawful police conduct, not to "redress the injury to the privacy of the search victim." Millan, 2009 Wash. App. LEXIS at \*15. At the time of this search, the police were abiding by the law as it existed then, and there is no purpose served by dismissing Pearsall's conviction.

Further, even if Pearsall could challenge the search for the first time on appeal, she has failed to establish that it was not an appropriate search incident to arrest under State v. Stroud. Pearsall cites to State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008), apparently for the proposition that a defendant must be within four or five feet of the car at the time of the search. That is not the holding of Adams. That case cited to the holding of Stroud that Washington permits searches of vehicles incident to arrest

“immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car,’ even though, presumably, the exigencies justifying the search no longer exist.” Adams, 146 Wn. App. at 600. In applying that standard to Adams’ situation, the court merely noted that since he was never more than four or five feet from his car he was in close spatial proximity to it. Id., at 605.

Pearsall also cites to State v. Fore, 56 Wn. App. 339, 783 P.2d 626 (1989), to support her argument that the person arrested must be in close physical proximity to the vehicle at the time of the search. The State does not dispute that. In Fore, however, the court upheld the search, merely noting that the search occurred while Fore was still at the scene. Id., at 348. In State v. Webb, 147 Wn. App. 264, 195 P.3d 550 (2008), the defendant brought a motion to suppress in the trial court, which was denied. That decision was reversed on appeal because there was insufficient evidence for the court to determine how close Webb was to the car at the time of the search. Id., at 270. “Close proximity” depends on the circumstances of the case, and there is no “five-foot rule” setting the outer limits of proximity.

Because Pearsall failed to raise the issue in the trial court, there is not an adequate record for this court to determine the constitutionality of the search. She cannot raise it now on appeal.

3. Defense counsel is not ineffective for failing to anticipate a change in the law. Pearsall has not established that her attorney had grounds to claim an unconstitutional search of her vehicle under the law as it existed at the time of her trial.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and prejudice resulting from it. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption

that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

“The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

In Nichols, a confidential informant had purchased drugs at a motel room. The police conducted a warrantless search of the registry at the motel, learned Nichols’ name, and a routine check showed his driver’s license was suspended. He was arrested a short time later when he drove into the motel parking lot, and in the search incident to arrest the police seized cocaine, marijuana, and cash, including some marked buy money. Nichols moved to suppress the evidence based upon a recent Supreme Court decision finding the driving while suspended statute to be unconstitutional. The motion was denied and he was convicted of unlawful possession of cocaine with intent to deliver and unlawful possession of marijuana. He appealed, but did not raise the motel registry issue. Nichols also filed a personal restraint petition (PRP)

challenging the search of the motel registry shortly before State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), was decided. Jorden held that the practice of randomly checking names in motel registries for outstanding warrants violated article I, § 7 of the Washington Constitution.

Nichols argued that both his trial and appellate counsels were ineffective because they had not raised the issue, but the court disagreed and denied his PRP. It noted that at the time of his trial, no case had addressed the constitutionality of the search of motel registers and counsel did not fall below the professional norm by failing to anticipate it, particularly when there was no indication in the record that his counsel was unprepared or careless. 2009 Wash. App LEXIS at \*2-7, \*16-18.

Pearsall is in a similar position. At the time of her trial, Stroud was settled law and her counsel would have had no reason to raise a suppression issue that would have been denied. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

In Millan, this court specifically found that a pre-Gant failure to move to suppress evidence seized in a search incident to arrest, based on Gant's reasoning, does not constitute ineffective assistance of counsel. The search was valid at the time of Millan's trial, as it was at the time of Pearsall's.

D. CONCLUSION.

Pearsall failed to bring a motion to suppress evidence in the trial court and thus waived her right to challenge the admission of the evidence on appeal. Her attorney did not provide ineffective assistance of counsel. The State respectfully asks this court to affirm her conviction.

Respectfully submitted this 27<sup>th</sup> day of August, 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 Brief of Respondent, on all parties or their counsel of record on the date below as follows:

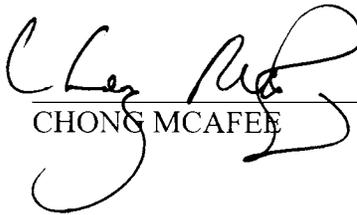
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\_\_\_\_\_  
TO: THOMAS E. DOYLE  
ATTORNEY AT LAW  
PO BOX 510  
HANSVILLE, WA 98340

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

Dated this 27th day of August, 2009, at Olympia, Washington.

  
\_\_\_\_\_  
CHONG MCAFEE