



**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ASSIGNMENTS OF ERROR ..... 1**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3**

**ARGUMENT..... 4**

**I. Ms. Gay’s conviction was obtained in violation of her  
right to privacy under Wash. Const. Article I, Section 7.  
..... 4**

A. The officer violated Article I, Section 7 by removing  
Ms. Gay’s cell phone and lighter, feeling in her coin  
pocket, and asking her what was in her coin pocket..... 5

B. The officer violated Article I, Section 7 by searching  
Ms. Gay’s vehicle incident to her arrest after she had  
already been handcuffed and secured in his patrol car. .... 7

**CONCLUSION ..... 9**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Arizona v. Gant</i> , ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).....	7, 8
<i>California v. Carney</i> , 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985).....	8
<i>Chimel v. California</i> , 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).....	7
<i>Weeks v. United States</i> , 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).....	7

### WASHINGTON CASES

<i>State v. Allen</i> , 138 Wn.App. 463, 157 P.3d 893 (2007).....	6
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008).....	5
<i>State v. Garvin</i> , ___ Wn.2d. ___, 207 P.3d 1266 (2009).....	6
<i>State v. Gatewood</i> , 163 Wn.2d 534, 182 P.3d 426 (2008).....	5
<i>State v. Glossbrener</i> , 146 Wn. 2d 670, 49 P.3d 128 (2002) .....	5, 6, 7
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986) .....	5
<i>State v. Maddox</i> , 152 Wn.2d 499, 98 P.3d 1199 (2004).....	8
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	5
<i>State v. Patterson</i> , 112 Wn.2d 731, 774 P.2d 10 (1989).....	8
<i>State v. Valdez</i> , 137 Wn.App. 280, 152 P.3d 1048 (2007) .....	8
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 962 (1998).....	5
<i>State v. Williams</i> , 148 Wn.App. 678, 201 P.3d 371 (2009).....	5, 7

*State v. Xiong*, 164 Wn.2d 506, 191 P.3d 1278 (2008)..... 6

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. IV ..... i, 5

Wash. Const. Article I, Section 7..... 1, 2, 4, 5, 7

### **ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Ms. Gay's motion to suppress.
2. The officer violated Ms. Gay's right to privacy under Article I, Section 7 of the Washington State Constitution.
3. The officer unlawfully searched Ms. Gay in the absence of specific and articulable facts that she was armed and presently dangerous.
4. The officer exceeded the scope of a pat-down search because the state failed to prove when the officer determined the bulge in Ms. Gay's jeans was made by a cell phone and lighter.
5. The officer unlawfully entered Ms. Gay's vehicle without a warrant.
6. The officer unlawfully entered Ms. Gay's vehicle in the absence of probable cause or exigent circumstances.
7. The trial court erred by adopting Finding of Fact No. 3.
8. The trial court erred by adopting Finding of Fact No. 4.
9. The trial court erred by adopting Finding of Fact No. 5.
10. The trial court erred by adopting Conclusion of Law No. 6.
11. The trial court erred by adopting Conclusion of Law No. 7.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To conduct a pat-down search, an officer must have a reasonable belief, based on specific and articulable facts, that the person is armed and presently dangerous. Here, the officer lacked a reasonable belief that Ms. Gay was armed and presently dangerous. Did the pat-down search violate Ms. Gay's right to privacy under Wash. Const. Article I, Section 7?

2. A pat-down search must be limited in scope to a search for weapons. In this case, the prosecutor did not establish when the officer determined that the bulge in Ms. Gay's pants pocket was not a weapon. Did the state fail to prove that the pat-down search was within the scope of a permissible frisk for weapons?

3. Warrantless searches are unconstitutional unless authorized by an exception to the warrant requirement. Here, an officer intruded into Ms. Gay's car without a warrant and without the authorization provided by any exception to the warrant requirement. Did the warrantless intrusion into Ms. Gay's car violate her right to privacy under Wash. Const. Article I, Section 7?

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

While driving, Tracy Gay made two turns without signaling, and was stopped for committing a traffic infraction. CP 3-4. She identified herself to the officer, and told him she didn't have her license, registration, or proof of insurance. CP 4. The officer moved behind her car to call dispatch, but returned and removed her from the car after he saw her make "movements." CP 4. He believed she was either trying to grab something or stuff something in the space between her seat and the center console. RP (11/6/08) 8-9. After he removed her, he thought she might have a weapon, and noticed a bulge in the pocket of her tight jeans. RP (11/6/08) 9. The bulge, made by her cell phone and lighter, was approximately five inches by three inches by one inch. RP (11/6/08) 9. He reached into her pocket and removed the cell phone and lighter, and as he did so, felt an additional item in the small coin pocket of her jeans. RP (11/6/08) 9.

At this point, the officer was no longer concerned that she was armed and dangerous, and did not believe the item was a weapon. RP (11/6/08) 16. He "grabbed" the item from the outside of her pants, and asked her what it was. RP (11/6/08) 9. She admitted that it was cocaine, and he seized the item and arrested her. RP (11/6/08) 10. IT was a small container like those used for hearing aid batteries. RP (11/6/08) 10. He

handcuffed her, put her in his patrol car, and then searched her car.

Statement of Defendant on Submission of Case for Trial on the Record (Attachment p. 3), Supp. CP. He found more cocaine inside the car. RP (11/6/08) 10.

Ms. Gay was charged with possession of cocaine. CP 1. She moved to suppress the evidence, and a CrR 3.6 hearing was held. Motion and Affidavit to Suppress, Supp. CP; RP (11/6/08). At the hearing, the officer was not asked to clarify when he realized that the bulge in Ms. Gay's jeans was caused by her cell phone and lighter. RP (11/6/08).

The trial judge denied the motion, and Ms. Gay waived her right to a jury and stipulated to the facts contained in the police report. Statement of Defendant on Submission of Case for Trial on the Record, Supp. CP. She was convicted, and she appealed. CP 8, 1.

### **ARGUMENT**

**I. MS. GAY'S CONVICTION WAS OBTAINED IN VIOLATION OF HER RIGHT TO PRIVACY UNDER WASH. CONST. ARTICLE I, SECTION 7.**

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home

invaded, without authority of law.” Wash. Const. Article I, Section 7.<sup>1</sup> Searches conducted without the authority of a search warrant are *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions. *State v. Eisfeldt*, 163 Wn.2d 628, 584, 185 P.3d 580 (2008). The state bears the burden of showing one of those exceptions applies. *State v. Williams*, 148 Wn.App. 678, 683, 201 P.3d 371 (2009). The validity of a warrantless search is reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426 (2008).

A. The officer violated Article I, Section 7 by removing Ms. Gay’s cell phone and lighter, feeling in her coin pocket, and asking her what was in her coin pocket.

A protective frisk for weapons is justified only when an officer can point to specific and articulable facts that create an objectively reasonable belief that a suspect is armed and presently dangerous. *State v. Glossbrener*, 146 Wn. 2d 670, 680, 49 P.3d 128 (2002). The scope of the frisk must be limited to the protective purpose. *State v. Garvin*, \_\_\_\_

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<sup>1</sup> It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Wn.2d. \_\_\_\_, 207 P.3d 1266 (2009); *see also State v. Xiong*, 164 Wn.2d 506, 191 P.3d 1278 (2008). As soon as the officer realizes that an object is not a weapon, further manipulation of the object is unjustified. *Garvin*, at \_\_\_\_.

In this case, the search violated Ms. Gay's rights for two reasons. First, the officer lacked a basis to perform a pat-down search. Ms. Gay was stopped for a traffic violation, which, by itself, could not justify the subsequent search. *See State v. Allen*, 138 Wn.App. 463, 470, 157 P.3d 893 (2007) (scope of stop for traffic infraction must be limited to purpose of stop). When Ms. Gay made "movements" toward the car's center console, the officer thought she might have grabbed a weapon; however, this fear was not objectively reasonable; the officer did not describe Ms. Gay's movement toward the console as "furtive," did not describe her demeanor as threatening, and did not indicate that she was in any way uncooperative. RP (11/6/08) 6-18. *See, e.g., Glossbrener* (furtive movements and unsatisfactory explanation did not justify weapons search in light of other surrounding circumstances).

Second, the state failed to prove that the officer's search was within the permissible scope of a weapons frisk. The officer did not clarify when during his pat-down he realized that the bulge in Ms. Gay's pocket consisted of a lighter and cell phone. RP (11/6/08) 9-10. If he

identified them from the outside of her jeans, or when he reached in her pockets to remove them, then the basis for the frisk evaporated. Absent clarification of when he identified the cell phone and lighter, the state failed to sustain its burden of proving that the discovery of the cocaine in Ms. Gay's coin pocket occurred during a proper weapons frisk, and thus failed to prove an exception to the warrant requirement. *Williams, supra*.

Because the state failed to prove that a pat-down was justified or that the frisk here was within the permissible scope of the weapons search exception, Ms. Gay's conviction must be reversed. The evidence must be suppressed and the case dismissed with prejudice. *Glossbrener, supra*.

B. The officer violated Article I, Section 7 by searching Ms. Gay's vehicle incident to her arrest after she had already been handcuffed and secured in his patrol car.

One exception to the search warrant requirement is where the search is performed incident to arrest. *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (citing *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914)). This exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, at \_\_\_; see also *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

Accordingly, police are authorized "to search 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.” *Gant*, at

\_\_\_\_.<sup>2</sup>

In this case, the officer arrested Ms. Gay prior to searching her car. RP (11/6/08) 10-11, 17-18; CP 5. At the CrR 3.6 hearing, the state failed to prove that she had ongoing access to the car after her arrest, and, in fact, the stipulated trial record shows that she was handcuffed and placed in the officer’s patrol car prior to the search. Statement of Defendant on Submission of Case for Trial on the Record (Attachment p. 3), Supp. CP.

Because Ms. Gay was arrested and secured in the patrol car at the time of the search, the search was unlawful. *Gant, supra; Patterson, supra*. Her conviction must be reversed, the evidence from the car suppressed, and the case remanded to the trial court.

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<sup>2</sup> The Supreme Court noted an exception for car searches when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Gant*, at \_\_\_\_\_. However, this exception does not apply in Washington, because our state does not have a generalized “automobile exception” that permits warrantless intrusions into motor vehicles. Instead, probable cause must be joined with proof of exigent circumstances, beyond those created by the vehicle’s inherent mobility. *State v. Patterson*, 112 Wn.2d 731, 734, 774 P.2d 10 (1989) (joining Oregon in declining to follow the federal standards in *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985)). Probable cause exists when the facts and circumstances to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *State v. Valdez*, 137 Wn.App. 280, 285, 152 P.3d 1048 (2007) (citing *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004)).

**CONCLUSION**

For the foregoing reasons, Ms. Gay's conviction must be reversed, the evidence suppressed, and the case dismissed. In the alternative, the evidence from the car must be suppressed and the case remanded to the trial court for a new trial.

Respectfully submitted on July 13, 2009.

**BACKLUND AND MISTRY**

  
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DIVISION II

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STATE OF WASHINGTON

DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to: BY \_\_\_\_\_

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 13, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 13, 2009.



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