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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 39193-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY D. EVERETT

Appellant.

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COURT OF APPEALS
DIVISION ONE
SEP 29 2009

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding police were lawfully allowed to search the passenger compartment of the appellant's car subsequent to his arrest. CP 59 (Conclusion of Law No. 5).

2. The trial court erred in concluding the search of appellant's car was valid. CP 59 (Conclusion of Law No. 6).

3. The trial court erred in concluding that the officers had a reasonable and articulable suspicion appellant could possibly be involved in criminal activity and that the brief detention was proper. CP 59-60 (Conclusion of Law No. 7).

4. The trial court erred in denying appellant's CrR 3.6 motion to suppress evidence obtained after he was unlawfully seized. RP 25.

Issues Pertaining to Assignments of Error

1. Was appellant illegally seized and improperly detained when police stopped him without a reasonable and articulable suspicion he was involved in criminal activity? (Assignment of Error No. 3)

2. Did the trial court err in failing to grant appellant's motion to suppress evidence found in appellant's car as a result of an illegal? (Assignment of Error No. 4)

3. Do the Washington State and United States Constitutions require police to demonstrate a threat to their safety or a need to preserve

evidence related to the crime of arrest to justify a warrantless vehicular search incident to arrest conducted after the vehicle's occupants have been arrested and secured? (Assignments of Error Nos. 1 and 2)

B. STATEMENT OF THE CASE¹

1. Procedural History

Larry Everett was charged by information with possession of methamphetamine. CP 1-2. The court found Everett guilty after a trial on the record. RP 36; CP 10-47, 56-60.

The standard range sentence was 6 months and a day to 18 months. RP 40, CP 68. Everett was sentenced to twenty-four months community custody pursuant to a Drug Offender Sentencing Alternative. RP 43, CP 69.

2. Substantive Facts

On December 30, 2008, the Aberdeen police responded to a possible fraud at the Dennis Company. RP 5. Shawn Vandervort was inside the Dennis Company building attempting to pass a bad check. RP 9. Officer Fellows arrived after Officer Watts. RP 5. Officer Watts requested that Officer Fellows make contact with two people in a car in the parking lot of the Dennis Company. RP 5. Officer Watts said he had "some knowledge" that the people in the car were possibly involved with the fraud. RP 5. Any actual connection with the fraud was unknown to Officer Fellows. RP 13.

¹ The hearings for February 19, 2009, March 12, 2009, and April 15, 2009 are referred to as RP and are sequentially numbered.

The occupants of the car, Larry Everett and Candace Moe, were told that they were not free to leave because the police were investigating their friend, inside the business. RP 6-7. They were not yet placed under arrest. RP 7. Either fifteen to twenty minutes later (RP 8) or over an hour later (RP 20), the police found there were outstanding warrants for Everett and Moe's arrest. Everett and Ms. Moe were arrested. RP 8-9.

Officers Hudson and Watts placed Everett into custody. RP 9. Police searched the care and on the floor of the driver's seat, officers found a black day-planner. CP 57. The day-planner held a bag containing methamphetamine and a small digital scale with white powder residue. CP 57-58.

C. ARGUMENTS

1. EVERETT'S SEIZURE WAS UNREASONABLE BECAUSE POLICE DID NOT HAVE A REASONABLE AND ARTICULABLE SUSPICION HE WAS INVOLVED IN CRIMINAL ACTIVITY

Everett's detention violated the Fourth Amendment to the United States Constitution² and Article 1, § 7 of the Washington State Constitution. Both the federal and state constitutions prohibit

² The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

unreasonable police seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968); State v. Lesnick, 84 Wn.2d 940, 530 P.2d 243, cert. denied, 423 U.S. 891 (1975). A search or seizure without a warrant is presumed to be unreasonable “subject to a few specifically established and well-delineated exceptions.” State v. Hastings, 119 Wn.2d 229, 233-34, 830 P.2d 658 (1992) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 219, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973)).

An investigative stop, although less intrusive than an arrest, is nevertheless a seizure and must be reasonable under the Fourth Amendment and Article 1, § 7 of the Washington Constitution. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); State v. Larson, 93 Wn.2d 638, 641, 611 P.2d 771 (1980). Such a stop is constitutional only if the officer has a well-founded suspicion, based on specific and articulable facts that the person seized has or is about to engage in criminal activity. State v. Rowe, 63 Wn.App. 750, 753, 822 P.2d 290 (1991).

Fellows detained Everett based on Watts’ statement that he thought the people in the car were involved with the alleged fraud. RP 5. The State did not present any evidence to corroborate Watt’s belief that the occupants of the car were suspects in the fraud. The police observed no suspicious behavior on the part of Everett and he did not attempt to evade

police. See, State v. Randall, 73 Wn.App. 225, 868 P.2d 207 (1994) (that the defendant walked away upon spotting the police officer supported a reasonable suspicion that he was one of the suspects described by police dispatch).

The burden is on the State to demonstrate that a warrantless search or seizure is constitutional. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). The state presented no evidence to support a reasonable suspicion that Everett was involved in criminal activity. It thus failed to prove police lawfully seized Everett. When a detention is illegal, all evidence seized as a result must be suppressed. Wong Sun v. United States, 37 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); State v. Larson, 93 Wn.2d at 611. Everett was unlawfully detained and the evidence found in the car should have been suppressed.

2. THE SEARCH VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1 § 7 OF THE WASHINGTON CONSTITUTION BECAUSE SUFFICIENT EXIGENT CIRCUMSTANCES DID NOT EXIST TO JUSTIFY A SEARCH INCIDENT TO ARREST.

Even if this Court finds the seizure legitimate, the search of Everett's car violated the Fourth Amendment to the United States Constitution and Article 1, § 7 of the Washington State Constitution and was illegal under the Supreme Court's recent holding in Arizona v. Gant,

556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). The Supreme Court issued its decision in Gant, on April 21, 2009, after Everett's bench trial and while his appeal was pending before this Court. CP 78.

a. This is a Manifest Constitutional Error

Everett did not specifically raise the Gant issue. RAP 2.5(a)(3), however, permits an appellant to raise for the first time a manifest constitutional error. Erroneous suppression rulings have been found to constitute such error. See, e.g., State v. Littlefair, 129 Wn. App. 330, 339, 119 P.3d 359 (2005) (A trial court's failure to suppress evidence seized as the result of an unlawful search affects a constitutional right and may thus be raised for the first time on appeal.). Everett asks this Court to answer a purely legal question; because he moved to suppress the evidence, the trial court held a hearing and all pertinent facts are of record. This court needs nothing more to determine whether Everett raises a manifest error of constitutional magnitude. Cf. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) ("If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.").

Moreover Everett raised the suppression issue below. Because the issue was raised and the Gant decision was decided while this appeal was pending the holding in Gant applies to this case. State v. McCormick, __

Wn. App. ___, __ P.3d. ___ (2009) (WL 3048723, September 23, 2009); See, State v. Millan, __ Wn. App. ___, 212 P.3d 603 (2009) (Gant applies to cases not yet final on April 21, 2009 if a suppression motion was made in the trial court).

b. Unlawful Search

“Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (footnote omitted). Among the exceptions to the warrant requirement is a search incident to lawful arrest. Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 2d 652 (1914). The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. See United States v. Robinson, 414 U.S. 218, 230-234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

In Chimel, the United States Supreme Court held a search incident to arrest may only include the arrestee’s person and the area “within his immediate control” – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel, 395 U.S. at 763. If there is no possibility an arrestee could reach into the area that police seek to search, both justifications for the search-incident-to-arrest exception – officer safety and evidence preservation – are absent and the rule does not apply. Preston v. United States, 376 U.S. 364, 367-368, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964).

Following Chimel, the Supreme Court considered the search-incident-to-arrest exception in the automobile context. New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). The Court held that when an officer lawfully arrests “the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and any containers therein.”³ Belton, 453 U.S. at 460.

As the Supreme Court recently observed, its opinion in Belton “has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.” Gant, 129 S. Ct. at 1710. But as the Gant Court explained, the unique circumstances in Belton guided its opinion.

³ This Court has held the Washington Constitution provides further protection and prohibits police from searching locked containers within the passenger compartment. State v. Stroud, 106 Wn.2d 144, 152-53, 720 P.2d 436 (1986).

A lone police officer in that case stopped a speeding car in which Belton was one of four occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and noticed an envelope marked "Supergold" – a name the officer associated with marijuana. Having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees (the officer had but one pair of cuffs), the officer split them up into four separate areas of the thoroughfare to prevent them from touching each other, searched the car and found cocaine. Belton, 453 U.S. at 456.

Significantly, "[t]here was no suggestion by the parties or amici that Chimel authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle. Gant, 129 S. Ct. at 1717. Thus, the Gant Court clarified that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Id. at 1714. On the contrary, "the Chimel rationale authorizes police 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." Id. at 1719.

Consistent with its holding in Thornton v. United States⁴, however, the Court also held that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Gant, 129 S. Ct. at 1719. The Court recognized that in many cases, as when a recent occupant is arrested for a traffic violation, however, there will be no reasonable basis to believe the vehicle contains relevant evidence. Id., at 1719.

Under Gant, the officers' search of Everett's car was not legal under the search-incident-to-arrest exception. Officers Hudson and Watts placed Everett in custody. RP 9. Officer Fellows testified that although he witnessed Everett being taken into custody he left the scene before the car was searched. RP 10. Accordingly, the search happened after Everett was in custody and therefore officer safety was not implicated. Under Gant, the safety concern must exist at the time of the search, not the arrest.

Second, Everett was arrested on an outstanding warrant. Accordingly, the need for evidence preservation was not implicated. Gant, 129 S. Ct. at 1720 ("Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant's car").

⁴ 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 768 (1981).

Under Gant, there was no justification for the search. Because officers secured Everett and there was no basis to believe they would find evidence of the offense of arrest, neither officer safety nor evidence preservation were implicated. The search was illegal and evidence found in the car as a result of the search should have been suppressed. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)

Article I, section 7 of Washington's Constitution provides greater protection than the Fourth Amendment. State v. Rankin, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). Under Gant, the search incident to arrest violated the Fourth Amendment because it was not performed for officer safety or evidence preservation purposes. 129 S.Ct. at 1723-24. Because Washington does not recognize the good faith exception, there is no basis to affirm this unconstitutional search. See State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982). Thus, Everett also prevails under Washington's Constitution.

D. CONCLUSION

The trial court erred in denying Everett's motion to suppress the methamphetamine and a small digital scale. This Court should reverse the conviction and remand the case back to the trial court ordering the evidence suppressed.

DATED this 19 day of September, 2009.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39193-7-II
)	
LARRY D. EVERETT,)	
)	
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 29TH DAY OF SEPTEMBER 2009, 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.

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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF SEPTEMBER 2009.

x *Patrick Mayovsky*

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