

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 39617-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSHUA ARVID SWETZ,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	1
C. STATEMENT OF THE CASE	2
D. ARGUMENT	
UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AS INTERPRETED IN <i>STATE v. PATTON</i>, THE OFFICER VIOLATED THE DEFENDANT’S RIGHT TO PRIVACY WHEN HE SEARCHED THE DEFENDANT’S VEHICLE AFTER ARRESTING THE DEFENDANT, PLACING HIM IN HANDCUFFS, AND PUTTING HIM IN THE BACK OF A LOCKED PATROL VEHICLE	4
E. CONCLUSION	9
F. APPENDIX	
1. Washington Constitution, Article 1, § 7	10
2. United States Constitution, Fourth Amendment	10

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Arizona v. Gant</i> , 556 U.S. —, 129 S.Ct. 1710, — L. Ed. 2d — (2009)	5, 7, 9
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State Cases

<i>State v. Boland</i> , 115 Wn.2d 571, 800 P.2d 1112 (1990)	5
<i>State v. Carter</i> , 127 Wn.2d 836, 904 P.2d 290 (1995)	5
<i>State v. Patton</i> , No. 80518-1 (filed October 22, 2009)	5, 7-9
<i>State v. Stroud</i> , 106 Wn.2d 144, 720 P.2d 436 (1986)	6
<i>State v. Valdez</i> , Washington Supreme Court No. 80091-0 (filed December 24, 2009)	8

Constitutional Provisions

Washington Constitution, Article 1, § 7	5-9
United States Constitution, Fourth Amendment	5-8

ASSIGNMENT OF ERROR

Assignment of Error

Under Washington Constitution, Article 1, § 7, as interpreted in *State v. Patton*, the officer violated the defendant's right to privacy when he searched the defendant's vehicle after arresting the defendant, placing him in handcuffs, and putting him in the back of a locked patrol vehicle.

Issues Pertaining to Assignment of Error

Under Washington Constitution, Article 1, § 7, as interpreted in *State v. Patton*, does a police officer violate a defendant's right to privacy if he or she searches a defendant's vehicle after arresting that defendant, placing him in handcuffs, and putting him in the back of a locked patrol vehicle, when no exigent circumstances necessitate that search?

STATEMENT OF THE CASE

At about 1:30 in the morning on August 19, 2008, Morton Police Office Doug Osterdahl was on routine patrol on Main Avenue in the city of Morton when he was flagged down by the defendant Joshua Arvid Swetz, who was driving on the same street. RP 25-27. The defendant and his passenger told the officer that they had just seen a black bear within the city limits. *Id.* Officer Osterdahl then went looking for the bear, which he thought he saw being chased by a dog. *Id.* A little while later, Officer Osterdahl saw the defendant's vehicle at a skate park on Main Avenue and stopped to talk to him. RP 27-29. As he pulled to the curb, the defendant got out of his vehicle, leaving the door open, and walked over to the officer's patrol car and spoke with him through the open driver's window. *Id.*

During the conversation through the open window, Officer Osterdahl smelled a strong odor of burnt marijuana coming from the defendant's person. RP 27-29. Based upon this smell, the officer exited his patrol car, walked with the defendant back to his vehicle, and as saw what he believed to be a baggie of marijuana sitting on the passenger seat. *Id.* Based upon these observations, Officer Osterdahl arrested the defendant for possession of marijuana, handcuffed him, placed him in the rear of his patrol vehicle, and read him his rights under *Miranda*. *Id.* He then returned to the defendant's vehicle and searched it, finding marijuana and three glass pipes

in the unlocked glove compartment, along with more marijuana and 225 tablets of Diazepam in pill bottles in a pouch behind the driver's seat. *Id.* The pill bottles did not have any prescription information on them. RP 31-35. Upon being confronted with the pill bottles, the defendant stated that he had obtained them on the internet. RP 34-35.

The state later charged the defendant with illegal possession of Diazepam and illegal possession of under forty grams of marijuana. CP 1-3, 7-8. The case later came on for trial before a jury, during which the state called Officer Osterdahl as its first witness. RP 24-59. He testified to the preceding facts. *Id.* The state also called two expert witnesses, one who identified the pills Officer Osterdahl seized as containing Diazepam, and one of who identified the green, vegetable matter Officer Osterdahl seized as marijuana. RP 40-52, 52-57. Following this testimony, the state rested its case. RP 59. The defense then rested its case without calling any witnesses. RP 60-62.

After the reception of evidence, the court instructed the jury with neither party making any objections or taking any exceptions. RP 61. Counsel then presented closing arguments, after which the jury retired for deliberations, eventually returning "guilty" verdicts on both counts. CP 83-84, RP 62-71. Following sentencing within the standard range, the defendant filed timely notice of appeal. CP 85-94, 95-105.

ARGUMENT

UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AS INTERPRETED IN *STATE v. PATTON*, THE OFFICER VIOLATED THE DEFENDANT’S RIGHT TO PRIVACY WHEN HE SEARCHED THE DEFENDANT’S VEHICLE AFTER ARRESTING THE DEFENDANT, PLACING HIM IN HANDCUFFS, AND PUTTING HIM IN THE BACK OF A LOCKED PATROL VEHICLE.

Washington Constitution, Article 1, § 7, provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The portion of the Washington Constitution’s Bill of Rights is significantly different from the language of the Fourth Amendment to the United States Constitution, and has long been interpreted by the court of this state to afford more protection to individuals from searches and seizures by government than the Fourth Amendment to the United States Constitution. *See State v. Carter*, 127 Wn.2d 836, 904 P.2d 290 (1995); *see also State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). In *State v. Patton*, No. 80518-1 (filed October 22, 2009), the Washington Supreme Court first addressed the issue of whether or not Washington Constitution, Article 1, § 7, provides more protection during vehicle searches than that provided by the Fourth Amendment as applied in *Arizona v. Gant*, 556 U.S. —, 129 S.Ct. 1710, — L. Ed. 2d — (2009). The following examines the decision in *Patton*.

In *Patton*, a police officer approached the defendant as he got out of

his vehicle and approached the defendant, telling him that he was under arrest on an outstanding warrant. Upon hearing this, the defendant got out of his car and fled into his trailer. Once backup arrived, the officer entered the defendant's home, found him, put him in handcuffs, took him outside and placed him in the back of a patrol vehicle. At this point, the officer searched the defendant's vehicle incident to arrest and found methamphetamine. After being charged, the defendant moved to suppress, arguing that at the time he was arrested, he was not in the vicinity of his vehicle. Thus, the search was not valid under *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986). The trial court agreed and suppressed the evidence.

Following dismissal of the drug charge, the state then sought review, and the Court of Appeals reversed, finding that for the purposes of an analysis under *Stroud*, the defendant was "under arrest" at the point that the officer approached him and stated that he was under arrest. Since this happened as the defendant was exiting his car, the search of the vehicle while the defendant was handcuffed and in the back of the patrol vehicle was valid under *Stroud*. The defendant then sought and obtained review before the Washington Supreme Court, arguing that the search was improper under both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

During the pendency of the case before the state supreme court, the

United States Supreme Court issued its decision in *Gant*. The court then reversed the Court of Appeals and reinstated the trial court's order to suppress. However, the court did not base its decision on a conclusion that the police officer had violated the Fourth Amendment as interpreted in *Gant*. Rather, the court based its decision upon Washington Constitution, Article 1, § 7. In so holding, the court followed the rule that "[w]hen a party claims both state and federal constitutional violations, we turn first to our state constitution." *State v. Patton*, at page 4 (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

In addressing the defendant's claims under Washington Constitution, Article 1, § 7, the court began its analysis by noting the following concerning warrantless searches and exceptions to the warrant requirement.

Our analysis under article 1, section 7 begins with the presumption that a warrantless search is per se unreasonable, unless it falls within one of the carefully drawn exceptions to the warrant requirement. These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.

State v. Patton, at 4 (citing *State v. Ladson*, 138 Wn.2d 343, 356, 979 P.2d 833 (1999)).

The court then reviewed automobile search exception and "the reasons that brought [it] into existence." The court noted:

One such exception, and the one at issue here, is the automobile search incident to arrest exception. Officer safety and the risk of

destruction of evidence of the crime of arrest are the reasons that brought this exception into existence. *State v. Ringer*, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983). (reviewing historical development of search incident to arrest exception under federal and state law). Necessarily, these factors – also described as exigencies – limit the scope of the exception. Like all judicially created exceptions, the automobile search incident to arrest exception is limited and narrowly drawn, and it is the State’s burden to establish that it applies. *Parker*, 139 Wn.2d at 496.

State v. Patton, at 4-5.

At this point, the court undertook a lengthy examination of automobile search exception under *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), under *State v. Stroud*, *supra*, and under the numerous decision that subsequently interpreted and expanded *Stroud*. See *State v. Patton*, pages 4-14. Following this analysis, the court declared the following standard for automobile searches under Washington Constitution, Article 1, § 7:

Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, ***and that these concerns exist at the time of the search.***

State v. Patton, at 15 (emphasis added); accord *State v. Valdez*, Washington Supreme Court No. 80091-0 (filed December 24, 2009).

A comparison of the standard for analyzing the validity of warrantless vehicle searches under the Fourth Amendment as applied in *Gant* to the standard for analyzing the validity of warrantless vehicle searches under

Article 1, § 7, reveals one key distinction. Under Fourth Amendment as applied in *Gant*, the police may search the vehicle for evidence of the crime for which the defendant is arrested even after the defendant is handcuffed and placed in the back of a patrol vehicle. By contrast, under Article 1, § 7, as applied in *Patton*, once a defendant is handcuffed and placed in the back of a patrol vehicle, that defendant can no longer pose a risk or access evidence in the vehicle to destroy it. Thus, once a defendant is handcuffed and placed in the back of a patrol vehicle, the police may no longer make a warrantless search of the vehicle.

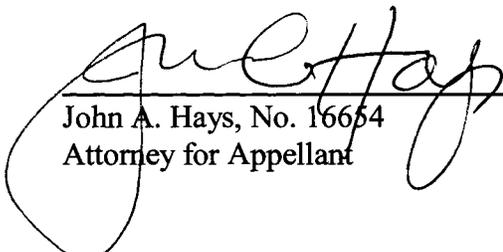
In the case at bar, the undisputed facts as presented by the state in both the CrR 3.5 hearing and the trial reveal that the police did not attempt to search the defendant's vehicle until after the defendant was arrested, handcuffed, and placed in the rear of a patrol vehicle. Thus, the police had no concerns that the defendant could access weapons or destroy evidence "at the time of the search." Consequently, the officer's actions violated the defendant's privacy rights under Washington Constitution, Article 1, § 7. As a result, this court should reverse the defendant's conviction and remand with instructions to suppress the evidence the officer found upon his search of the defendant's vehicle.

CONCLUSION

Officer Osterdahl obtained the evidence used against the defendant following a search of the defendant's vehicle that violated Washington Constitution, Article 1, § 7. As a result, this court should vacate the convictions and remand with instructions to suppress this evidence.

DATED this 24th day of December, 2009.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

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 and things to be seized.

