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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY *[Signature]*
DEPUTY

No. 39940-7-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

NATHAN C. FEASEL,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable Amber L. Finlay, Judge

Cause No. 09-1-00278-9

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Feasel to be convicted of unlawful possession of a controlled substance on evidence that should have been suppressed where the evidence was unconstitutionally obtained from a search incident to an arrest in violation of Arizona v. Gant.
2. The trial court erred in entering CrR 3.6 Findings of Fact Nos. 14, 15, 16, 17, 18; Conclusions of Law Nos. 2, 3, 4 following the suppression hearing. [CP 27-32].
3. The trial court erred in failing to find insufficient evidence to convict Feasel beyond a reasonable doubt of unlawful possession of a controlled substance where the evidence in support of this conviction should have been suppressed.
4. The trial court erred in entering CrR 6.1 Findings of Fact Nos. 14, 15, 16, 17, 18 Conclusions of Law Nos. 2 and 3 following the bench trial. [CP 22-26].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing Feasel to be convicted of unlawful possession of a controlled substance on evidence that should have been suppressed where the evidence was unconstitutionally obtained from a search incident to an arrest in violation of Arizona v. Gant? [Assignments of Error Nos. 1 and 2].
2. Whether the trial court erred in failing to find insufficient evidence to convict Feasel beyond a reasonable doubt of unlawful possession of a controlled substance where the evidence in support of this conviction should have been suppressed? [Assignments of Error Nos. 3 and 4].

C. STATEMENT OF THE CASE

Nathan Feasel (Feasel) was charged by first amended information filed in Mason County Superior Court with one count of unlawful possession of a controlled substance. [CP 33].

Prior to trial, Feasel made a CrR 3.6 motion to suppress the evidence based on Arizona v. Gant. [CP 42-44]. The matter came before the Honorable Amber L. Finlay for hearing. [RP 10-58]. After hearing testimony from Washington State Patrol Trooper Matthew Wood, and hearing argument from both the State and Feasel's counsel; the court denied Feasel's motion to suppress. [RP 53-58]. The court entered the following written findings and conclusions pursuant to CrR 3.6:

FINDINGS OF FACT

1. That the acts complained of occurred in the County of Mason, State of Washington on or about February 18, 2009.
2. On February 19, 2009 Washington State Patrol Trooper Wood, while on random patrol in Mason County Washington, observed a maroon Oldsmobile approaching on State Highway 101. It appeared to Trooper Wood that the driver was not wearing a seatbelt as required by law.
3. Trooper Wood entered the license plate of the Oldsmobile in the ACCESS computer in his patrol vehicle.
4. The driver of the Oldsmobile pulled into the Twin Totems gas station, and Trooper Wood followed, parking his patrol vehicle immediately to the left of the Oldsmobile. At this time, Trooper Wood could see that the driver was wearing

a seatbelt, and that it was loose and not clearly visible earlier when hi passed. Trooper Wood advised the driver of the situation, and that there was no problem. Trooper Wood then left the immediate area. The computer return on the registration of the Oldsmobile had not yet come in.

5. As Trooper Wood continued his patrol, the return came back on the registration of the Oldsmobile, which included information that the registered owner had a driver's license that had been suspended. The registered owner was Nathan C. Feasel, and the physical descriptors matched the individual driving the Oldsmobile and with whom Trooper Wood had made brief contact.
6. Trooper Wood then observed the Oldsmobile enter Reservation Road from the back side of the Twin Totems gas station. As Trooper Wood turned onto Reservation Road to make contact, the Oldsmobile accelerated to a high rate of speed. As Trooper Wood attempted to catch up to the Oldsmobile, he observed that it turned left near the Skokomish Flats Road, leaning heavily to the right indication a high rate of speed. The driver did not signal the turn.
7. As Trooper Wood reached the area of the intersection, he could observe by the debris that the Oldsmobile had actually turned left onto a long driveway that led to a residence, rather than Skokomish Flats Road. As he followed, Trooper Wood activated his emergency lights and could observe the driver furtively reaching around the area of the passenger seat. Trooper Wood was concerned that the driver may be attempting to access a weapon.
8. The Oldsmobile came to a stop in a large puddle as the driveway curved around to the left towards the residence. The area was heavily wooded, and not visible from the roadway. Multiple subjects were outside the residence as Trooper Wood approached in his patrol vehicle, at which time they all hurried into the residence, closing doors and drapes.

9. The driver of the Oldsmobile had abandoned the vehicle, and was hurrying toward the residence. Trooper Wood called out, "Hey Nathan." The driver stopped, and when asked if he was the registered owner of the vehicle admitted that he was Nathan C. Feasel, defendant herein. Trooper Wood placed the defendant under arrest at that time for Driving While License Suspended Third Degree.
10. Trooper Wood secured the defendant in his patrol car, after a quick search of his person incident to arrest. Trooper Wood then called for additional units due to the unsafe nature of their location. While securing the defendant, Trooper Wood noticed that there was a young child in the Oldsmobile, who was not secured. The child was identified as the defendant's six year old son, B.D. (08-16-02).
11. Trooper Wood allowed the defendant to speak with his son through the open patrol window once he was secure. Trooper Wood asked the defendant if he wanted to walk his son up to the residence, at which time the defendant emphatically said no. The defendant acknowledged that he had tried to "ditch" Trooper Wood because of the suspended license.
12. While dealing with Feasel, Trooper Wood observed that Feasel's pupils were dilated and his eyes were bloodshot. His skin was flushed, and his speech was rapid. Trooper Wood also noticed a burn mark on the defendant's upper lip. Trooper Wood could detect an odor of alcohol, and when asked when he last smoked methamphetamine the defendant replied, "a long time ago."
13. During the contact with the defendant away from the vehicle, the odor of alcohol subsided.
14. In addition to being a fully trained and commissioned Washington State Patrol Trooper, Trooper Wood is trained and certified Drug Recognition Expert. He is also a Narcotics Detecting K9 handler. His assigned K9 is Dilly, who was with him on this occasion. Trooper Wood only

utilizes Dilly when he has an articulable suspicion that illegal drugs may be present.

15. Based upon his training and experience as a trooper and drug recognition expert, along with his observations of the defendant's person and his driving, Trooper Wood suspected that the defendant was under the influence of alcohol and/or drugs. Trooper then deployed his K9 Dilly had began a search of the vehicle, based upon his articulable suspicion that there may be drugs in the vehicle having caused or contributed to the impairment of the defendant. Due to the unsafe location and nature of the stop, as well as the condition of the surrounding surface area, Trooper Wood elected to wait until he transported the defendant to the jail to conduct the field sobriety tests.
16. During the search of the vehicle, Trooper Wood and Dilly located suspected methamphetamine and a glass smoking device with suspected burnt methamphetamine residue in the area of the passenger seat, tucked down between the seats, where the defendant had been reaching earlier as observed by Trooper Wood. Trooper Wood also located a few open alcohol containers.
17. The suspected methamphetamine was later confirmed by chemical analysis at the Washington State Patrol Crime Lab. A copy of the crime lab report is filed herein.
18. Once at the jail, the defendant performed poorly on the field sobriety tests that he voluntarily performed. Trooper Wood further noticed that the odor of alcohol had subsided to the point that it no longer was present. Trooper Wood arrested the defendant fro Driving Under the Influence of Drugs, and obtained a sample of the defendant's blood. The analysis of the defendant's blood revealed the presence of methamphetamine and the blood was negative for alcohol. A copy of the toxicology report is filed herein.

Based upon the foregoing findings of fact, the court hereby makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of these proceedings and the parties hereto.
2. Trooper Wood had reasonable belief that evidence of the crime of arrest would be found inside the defendant's vehicle.
3. Trooper would also had a reasonable and articulable suspicion that he defendant's vehicle contained evidence of a crime, to wit: Driving Under the Influence of Drugs, Unlawful Possess of Controlled Substance, and/or Unlawful Use of Drug Paraphernalia.
4. The evidence located during the search incident to arrest is admissible, and the defendant's motion to suppress is hereby denied.

[CP 27-32].

The matter then proceeded to a bench trial in which the court reviewed the record and found Feasel guilty of unlawful possession of a controlled substance. [RP 59-60]. The court entered the following written findings and conclusions pursuant to CrR 6.1:

FINDINGS OF FACT

1. That the acts complained of occurred in the County of Mason, State of Washington on or about February 18, 2009.
2. On February 19, 2009 Washington State Patrol Trooper Wood, while on random patrol in Mason County Washington, observed a maroon Oldsmobile approaching on State Highway 101. It appeared to Trooper Wood that the driver was not wearing a seatbelt as required by law.

3. Trooper Wood entered the license plate of the Oldsmobile in the ACCESS computer in his patrol vehicle.
4. The driver of the Oldsmobile pulled into the Twin Totems gas station, and Trooper Wood followed, parking his patrol vehicle immediately to the left of the Oldsmobile. At this time, Trooper Wood could see that the driver was wearing a seatbelt, and that it was loose and not clearly visible earlier when he passed. Trooper Wood advised the driver of the situation, and that there was no problem. Trooper Wood then left the immediate area. The computer return on the registration of the Oldsmobile had not yet come in.
5. As Trooper Wood continued his patrol, the return came back on the registration of the Oldsmobile, which included information that the registered owner had a driver's license that had been suspended. The registered owner was Nathan C. Feasel, and the physical descriptors matched the individual driving the Oldsmobile and with whom Trooper Wood had made brief contact.
6. Trooper Wood then observed the Oldsmobile enter Reservation Road from the back side of the Twin Totems gas station. As Trooper Wood turned onto Reservation Road to make contact, the Oldsmobile accelerated to a high rate of speed. As Trooper Wood attempted to catch up to the Oldsmobile, he observed that it turned left near the Skokomish Flats Road, leaning heavily to the right indicating a high rate of speed. The driver did not signal the turn.
7. As Trooper Wood reached the area of the intersection, he could observe by the debris that the Oldsmobile had actually turned left onto a long driveway that led to a residence, rather than Skokomish Flats Road. As he followed, Trooper Wood activated his emergency lights and could observe the driver furtively reaching around the area of the passenger seat. Trooper Wood was concerned that the driver may be attempting to access a weapon.

8. The Oldsmobile came to a stop in a large puddle as the driveway curved around to the left towards the residence. The area was heavily wooded, and not visible from the roadway. Multiple subjects were outside the residence as Trooper Wood approached in his patrol vehicle, at which time they all hurried into the residence, closing doors and drapes.
9. The driver of the Oldsmobile had abandoned the vehicle, and was hurrying toward the residence. Trooper Wood called out, "Hey Nathan." The driver stopped, and when asked if he was the registered owner of the vehicle admitted that he was Nathan C. Feasel, defendant herein. Trooper Wood placed the defendant under arrest at that time for Driving While License Suspended Third Degree.
10. Trooper Wood secured the defendant in his patrol car, after a quick search of his person incident to arrest. Trooper Wood then called for additional units due to the unsafe nature of their location. While securing the defendant, Trooper Wood noticed that there was a young child in the Oldsmobile, who was not secured. The child was identified as the defendant's six year old son, B.D. (08-16-02).
11. Trooper Wood allowed the defendant to speak with his son through the open patrol window once he was secure. Trooper Wood asked the defendant if he wanted to walk his son up to the residence, at which time the defendant emphatically said no. The defendant acknowledged that he had tried to "ditch" Trooper Wood because of the suspended license.
12. While dealing with Feasel, Trooper Wood observed that Feasel's pupils were dilated and his eyes were bloodshot. His skin was flushed, and his speech was rapid. Trooper Wood also noticed a burn mark on the defendant's upper lip. Trooper Wood could detect an odor of alcohol, and when asked when he last smoked methamphetamine the defendant replied, " a long time ago."

13. During the contact with the defendant away from the vehicle, the odor of alcohol subsided.
14. In addition to being a fully trained and commissioned Washington State Patrol Trooper, Trooper Wood is trained and certified Drug Recognition Expert. He is also a Narcotics Detecting K9 handler. His assigned K9 is Dilly, who was with him on this occasion. Trooper Wood only utilizes Dilly when he has an articulable suspicion that illegal drugs may be present.
15. Based upon his training and experience as a trooper and drug recognition expert, along with his observations of the defendant's person and his driving, Trooper Wood suspected that the defendant was under the influence of alcohol and/or drugs. Trooper then deployed his K9 Dilly had began a search of the vehicle, based upon his articulable suspicion that there may be drugs in the vehicle having caused or contributed to the impairment of the defendant. Due to the unsafe location and nature of the stop, as well as the condition of the surrounding surface area, Trooper Wood elected to wait until he transported the defendant to the jail to conduct the field sobriety tests.
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17. The suspected methamphetamine was later confirmed by chemical analysis at the Washington State Patrol Crime Lab. A copy of the crime lab report is filed herein.
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Drugs, and obtained a sample of the defendant's blood. The analysis of the defendant's blood revealed the presence of methamphetamine and the blood was negative for alcohol. A copy of the toxicology report is filed herein.

Based upon the foregoing findings of fact, the court hereby makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of these proceedings and the parties hereto.
2. That said defendant, Nathan C. Feasel, in the County of Mason, State of Washington, On or about February 18, 2009, did commit the crime of Unlawful Possession of a Controlled Substance, in that said defendant did unlawfully possess a controlled substance, to-wit: methamphetamine; contrary to RCW 69.50.4013(1) and against the peace and dignity of the State of Washington.
3. The defendant is guilty beyond a reasonable doubt of the crime of Unlawful Possession of a Controlled Substance as charged herein.

[CP 22-26].

The court sentenced Feasel to a DOSA sentence including intensive treatment followed by 24 months community supervision. [CP 6-21; RP 67].

A timely notice of appeal was filed on October 27, 2009. [CP 5].

This appeal follows.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN ALLOWING FEASEL TO BE CONVICTED OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE BASED ON EVIDENCE THAT SHOULD HAVE BEEN SUPPRESSED WHERE THE EVIDENCE WAS UNCONSTITUTIONALLY OBTAINED FROM A SEARCH INCIDENT TO AN UNLAWFUL ARREST IN VIOLATION OF ARIZONA V. GANT.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and Art. 1, sec. 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); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Exceptions to the warrant requirement are narrowly drawn and jealously guarded. State v. Parker, 139 Wn.2d at 496; State v. Hendrickson, 129 Wn.2d at 71. In each case, the State bears the burden of demonstrating that a warrantless search falls within an exception. State v. Parker, 139 Wn.2d at 496.

One exception to the warrant requirement is a search incident to a lawful arrest. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The authority for this flows directly from the fact of the arrest itself and the simultaneous lessening of the arrestee's privacy interest. State v.

White, 44 Wn. App. 276, 278, 722 P.2d 118, *reviewed denied*, 107 Wn.2d 1006 (1986) (once arrested there is a diminished expectation of privacy in the person of the arrestee). It is well settled that under Art. 1, sec. 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).

Recently, the United States Supreme Court held that law enforcement officers may search a vehicle incident to arrest only if it is reasonable to believe that the arrestee could access the vehicle at the time of the search or that the vehicle contains evidence relevant to the arrest offense. Arizona v. Gant, 556 U.S. ___, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009); State v. Valdez, 167 Wn.2d 761, 766-67, 224 P.3d 751 (2009); *see also* State v. Scalara, ___ P.3d ___, 2010 WL 1039278 (Wash. App. Div. 2); State v. Cardwell, ___ Wn. App. ___, 226 P.3d 243 (2010). Absent these justifications, “a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.” Arizona v. Gant, 129 S. Ct. at 1723-24.

Here, it cannot be disputed that Feasel was arrested for driving while licensed suspended in the third degree, removed from his vehicle, and placed in Trooper Wood’s patrol car. These facts are set forth in the

unchallenged CrR 3.6 Findings Nos. 9 and 10. [CP 29]. At this point, under Arizona v. Gant, Trooper Wood was prohibited from searching Feasel's vehicle unless he obtained a warrant (the exception involving further evidence of the arrest offense does not apply here since it was the fact of driving with a suspended license that constituted the crime for which Feasel was arrested and that crime was completed). In fact, Feasel was so securely in custody that Trooper Wood returned to his vehicle, retrieved Feasel's son and allowed Feasel to speak with the child through the window of the patrol car. [Unchallenged CrR 3.6 Finding of Fact No. 11; CP 29].

However, Trooper Wood did not obtain a warrant but conducted a warrantless search Feasel's vehicle and discovered the methamphetamine that resulted in Feasel's conviction for unlawful possession of a controlled substance. This evidence should have been suppressed. While the trial court's CrR 3.6 Findings Nos. 14-18, [CP 30-31], attempt to provide an alternative basis for the search of Feasel's vehicle based on his suspected intoxication, this matters not given that Feasel had already been arrested for driving while license suspended in the third degree and the field sobriety tests/blood test were not administered until after his vehicle had been unconstitutionally searched and the incriminating evidence discovered. These findings are merely an attempt to justify the

unconstitutional search after the fact as demonstrated by Trooper Wood's testimony at the suppression hearing admitting that now that he is aware of the holding in Arizona v. Gant in a situation similar to that involving Feasel, he would get a warrant. [RP 42]. Moreover, the trial court's CrR 3.6 Conclusions of Law Nos. 2-4 are not supported by the record and demonstrate the trial court's fundamental lack of understanding of the United States Supreme Court's ruling in Arizona v. Gant. The trial court should have granted Feasel's motion to suppress as the search of his vehicle incident to his arrest for driving while license suspended when he have had been placed in Trooper Wood's patrol car was unconstitutional.

When "an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Feasel's arrest for driving while license suspended in the third degree and his placement in the patrol car made any subsequent search of his vehicle unconstitutional under Arizona v. Gant. Therefore, all evidence seized as a result of the search of Feasel's vehicle which was the evidence supporting his conviction for unlawful possession of a controlled substance should have been suppressed. 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).

- (2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT THE BENCH TRIAL FOR THE COURT TO FIND BEYOND A REASONABLE DOUBT THAT FEASEL WAS GUILTY OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WHERE THE EVIDENCE SUPPORTING THIS CRIME SHOULD HAVE BEEN SUPPRESSED.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Feasel was charged and convicted after a bench trial of unlawful possession of a controlled substance. As argued above, the evidence necessary to support this crime should have been suppressed and

absent this evidence Feasel's convictions cannot be sustained. The trial court erred in entering CrR 6.1 findings of fact and conclusions of law [CP 22-26] to the contrary finding Feasel guilty of unlawful possession of a controlled substance. This court should reverse and dismiss Feasel's conviction.

E. CONCLUSION

Based on the above, Feasel respectfully requests this court to reverse and dismiss his conviction.

DATED this 16th day of April 2010.

Patricia A. Pethick
PATRICIA A. PETHICK
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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 16th day of April 2010, I delivered a true and correct copy of the brief of appellant to which this certificate is attached by United States Mail, to the following:

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STATE OF WASHINGTON
BY KCP
DEPUTY

Signed at Tacoma, Washington this 16th day of April 2009.

Patricia A. Pethick
Patricia A. Pethick