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NO. 39991-1-II

STATE OF WASHINGTON

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

DEPUTY *SW*

STATE OF WASHINGTON, Appellant

v.

MARKEL SCOTT BRIDGMAN, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE M. WOOLARD
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01873-3

BRIEF OF APPELLANT

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I. ISSUES

- A. **Was the police officer justified in searching the person of the defendant for weapons and contraband?**
- B. **Was the search of the defendant's vehicle a permissible warrantless search?**

II. STATEMENT OF THE FACTS

On October 1, 2009, the Superior Court held a 3.6 Hearing concerning the arrest and subsequent charging of the defendant with drug matters, dealing with possession of methamphetamine.

The witness that was called in this matter was Trooper Joshua Winborne, of the Washington State Patrol. The officer indicated to the court that he was employed by the Washington State Patrol and during the course of his duties he had training in identification of controlled substances and drug paraphernalia. (RP 2-3). He was asked specifically about whether or not he had drug recognition training as it relates to methamphetamine and drug paraphernalia regarding methamphetamine and he responded positively to that. (RP 3). He further indicated that in the field he had conducted over 300 drug crime investigations. He testified that on November 4, 2008, he was performing normal patrol duties for the Washington State Patrol. (RP 4). He testified that he came in contact with

the defendant and described the circumstances of how he came in contact with him:

QUESTION (Deputy Prosecutor): Describe for the judge what you observed when you first came into visual contact with the defendant?

ANSWER (Trooper Winborne): I observed that it appears that he had Oregon plates and that they might be expired. So I ran the plates through my dispatch which runs them through the Department of Licensing which then returned that they were expired in January of '08.

QUESTION: And at approximately what time on November 4 of last year did this occur?

ANSWER: I believe it was just after midnight.

QUESTION: And having made these observations regarding the expired tabs, what did you do next?

ANSWER: I turned around and went to go effect a – a stop on Mr. Bridgman.

QUESTION: And where was that location where you stopped him?

ANSWER: It was 39th – I believe Daniels Street but I'd have to check on my report. I – I don't recall the exact street.

QUESTION: Would westbound 39th Street and Main Street refresh your recollection?

ANSWER: That's where I first observed Mr. Bridgman traveling, westbound.

QUESTION: Did you stop him near that location?

ANSWER: I stopped him west of that location.

QUESTION: The location where you stopped him, for the record, was that in Clark County, Washington?

ANSWER: Yes it was.

QUESTION: When you – when you stopped the defendant's vehicle, what did you do next?

ANSWER: I then contacted him, advised him why I stopped him, got his response and then asked for his license and any paperwork that he had on the vehicle.

-(RP 5, L6 – 6, L15)

At this initial stop, the defendant did tell the officer that he was a suspended driver. (RP 7). He further indicated there was a female passenger in the front passenger seat. The officer testified that once he confirmed that the license was suspended he asked the defendant to exit the vehicle and advised him that he was under arrest for driving while suspended.

QUESTION (Deputy Prosecutor): Did you verbally advise the defendant, Mr. Bridgman that he was under arrest for DWS?

ANSWER (Trooper Winborne): Yes, I did.

QUESTION: When you did that, what did you do? For instance, did you cuff him?

ANSWER: I did cuff him, behind his back.

QUESTION: Did you – did you make any other statements to the defendant Bridgman – Mr. Bridgman?

ANSWER: I did. I informed him that depending on – I guess – how he acts – it was going to depend on whether I was going to take him to jail or not, but I wasn't going to promise that he wasn't going to go to jail or not.

QUESTION: At that time was he under custodial arrest?

ANSWER: Yes he was.

QUESTION: Did you ultimately search his person incident to arrest?

ANSWER: Yes I did.

QUESTION: At any time prior to searching his person incident to arrest did you tell him he was free to leave?

ANSWER: I did not tell him he was free to leave.

QUESTION: Did you then search his person incident to arrest?

ANSWER: Yes I did.

QUESTION: What did you find, if anything?

ANSWER: I found a digital scale with residue on it and a baggie of methamphetamine.

QUESTION: You mentioned residue on the scale. Based on your training and experience, what type of residue?

ANSWER: It appeared to be methamphetamine residue.

-(RP 8, L10 – 9, L15)

The officer then, in making the arrest, discovered on the person of the defendant some knives. He described that he had a pocket knife, which was located in a knife case that was attached to his belt and that he found

another pocket knife and a Leatherman tool, elsewhere secreted on the defendant. (RP 10). The officer further indicated that he was going to arrest the defendant concerning what he had found on his person.

QUESTION (Deputy Prosecutor): Thank you. Having found the baggie with suspected methamphetamine and the scale with suspected methamphetamine residue, were you going to at that time – at that moment when you found those items – were you going to arrest the defendant for those drug crimes as well?

ANSWER (Trooper Winborne): Yes.

QUESTION: At the very least for possession of methamphetamine?

ANSWER: Yes.

QUESTION: Possession of drug paraphernalia?

ANSWER: Yes.

-(RP 10, L23 – 11, L10)

In addition to the scale with suspected methamphetamine residue and the baggie of suspected methamphetamine found on the defendant's person, Trooper Winborne also found over \$400 in US currency on the defendant's person. (RP 10, L 4-8). Based on these items found on the defendant's person, Trooper Winborne, based on his training and experience in drug crimes investigations, reasonably believed that he would find evidence of these drug offenses (Possession of a Controlled Substance Methamphetamine and Unlawful Use of Drug Paraphernalia) in

the defendant's vehicle. (RP 11, L 14-24; and RP 12, L 2-11). Upon finding these items on the defendant's person, Trooper Winborne felt he had probable cause to arrest the defendant for Possession of Methamphetamine and Unlawful Use of Drug Paraphernalia (hereinafter "Drug Paraphernalia"); and at the moment of finding these items, Trooper Winborne was going to arrest the defendant for these two drug offenses (RP 10, L 23-24; and RP 11, L 2-5).

Trooper Winborne subsequently found in the defendant's vehicle: eight separate baggies of suspected methamphetamine, three empty baggies and a blackjack hanging from the gearshift of the steering wheel. (RP 13, L 3-16).

Based on the discoveries, among other crimes, the defendant was charged and booked in on a charge of Possession of a Controlled Substance – Methamphetamine and also Drug Paraphernalia, and DWS 3. (RP 16).

During cross-examination of the officer, the officer acknowledged that he did arrest the defendant immediately upon exiting his vehicle and handcuffed his hands behind his back and moved him to an area away from the driver's door. (RP 19-20). He indicated that the defendant was cooperative and did not make any threatening moves. (RP 20). The officer again indicated that the weapons that he recovered were the basis of a pat-

down when he found those items on the defendant. (RP 25). He indicated that during the pat-down, one of his concerns was whether or not the defendant had any needles that would stick him in the hand. It was also during this time of the pat-down that he removed the knives and felt the hard object scale, and removed that as well. (RP 27-28). He indicated that he found the scale, which was a rectangular object approximately three inches by two inches in the defendant's right, front vest pocket. (RP 28). He described when he felt it in the pocket (prior to removal) as something hard and rectangular. He further indicated that he felt that it could have contained a weapon. (RP 29-30).

QUESTION (Defense attorney): Now was there anything about whatever it was that you felt that caused you to believe it was a weapon?

ANSWER (Trooper Winborne): It felt like some kind of hard case, I guess. I mean it could have contained a weapon.

-(RP 30, L3-6)

On redirect, the officer indicated that the defendant was being arrested for the DWS when he was searched and the knives and scale were located. On re-cross, by the defense attorney, he further indicated that at some point the incident to the arrest for driving while suspended continued into an inquiry as to possible drugs and drug paraphernalia as a result of

finding the “rectangular box”. The officer indicated that was correct and that was “under the new arrest”. (RP 39, L3).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

As a result of the hearing, the court entered Findings of Fact and Conclusions of Law (CP 59). A copy of those Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein.

The State takes no exceptions to the Findings of Fact that were entered by the court, but maintains that they do not support the Conclusions of Law reached by the Judge. In our situation, the officer had probable cause to arrest and in fact had effectuated an arrest. And further, that he discovered “objective facts” that justified his belief that the defendant was armed and potentially dangerous. In other words, the officer had a reasonable, objective belief that the suspect was armed. This is obvious from the fact that he found weapons on the person of the defendant. And continuing that search to determine if there were other weapons secreted on the defendant, he discovers a hard rectangular object in a pocket. The officer’s testimony was that he really wasn’t sure what it was, but it may possibly contain or be a weapon, or some innocuous object. The officer just didn’t know without physically inspecting it. This

was not based on some arbitrary or harassing action by the officer, but was based on the totality of the circumstances that the officer found there at the scene. It is obvious that the defendant was not displaying any nervousness or undue behavior toward the officer, but it's also obvious that the defendant had at least two, possibly three, weapons on him at the time of the search of his person, incident to the arrest. The fact of objective reasonableness on the part of the officer to believe that the man may have additional weapons is also borne out by the fact that the defendant had a blackjack hanging from the gear shift by his steering wheel. (Findings of Fact and Conclusions of Law, Page 3).

Moreover, Trooper Winborne had found evidence of drug crimes on the defendant's person: a digital scale with suspected methamphetamine residue, a baggie with suspected methamphetamine, along with over \$400 in US currency. (Findings of Fact and Conclusions of Law, Page 2). In addition, Trooper Winborne subsequently found in the defendant's vehicle: eight separate baggies of suspected methamphetamine, three empty baggies and a blackjack hanging from the gearshift of the steering wheel. (Findings of Fact and Conclusions of Law, Page 3).

The Appellant notes here that it is in agreement with the Trial Court's Conclusion of Law that once Trooper Winborne found the drug

items on the defendant's person, the U.S. Supreme Court case of Arizona v. Gant, _____ U.S. _____, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), did not preclude the search of the defendant's vehicle for drug evidence. (Findings of Fact and Conclusions of Law, Page 4).

IV. ARGUMENT

A. The police officer was justified in searching the person of the defendant for weapons and contraband.

To review a trial court's ruling on a suppression motion, the Appellate Court examines whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises," State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (*quoting* Olmstead v. Dep't of Health, 61 Wn. App. 888, 893, 812 P.2d 527 (1991) (*quoting* Green Thumb, Inc. v. Tiegs, 45 Wn. App. 672, 676, 726 P.2d 1024 (1986))). The Court does not review credibility determinations on appeal, leaving them to the fact finder. State v. Frazier, 82 Wn. App. 576, 589 n.13, 918 P.2d 964 (1996) (*citing* Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799

(1990)). And the Court treats unchallenged findings as verities on appeal. Ross, 106 Wn. App. at 880.

The Washington Constitution mandates that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” WASH. CONST. art. I, § 7. In contrast to the Fourth Amendment to the United States Constitution, the article I, section 7 provision “recognizes a person's right to privacy with no express limitations.” A warrantless search is per se unreasonable unless it falls within one of the few narrowly drawn exceptions. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Under the fourth amendment to the United States Constitution and article I, section 7 of the Washington Constitution, an arrest must be lawful to justify a search incident to it. Michigan v. DeFillippo, 443 U.S. 31, 35, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979) (“The fact of a lawful arrest, standing alone, authorizes a search.”); State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003) (“There must be an actual custodial arrest to provide the 'authority' of law justifying a warrantless search incident to arrest under article I, section 7.”). State law is the starting point for determining the lawfulness of the arrest. DeFillippo, 443 U.S. at 36.

“[T]he search incident to arrest exception to the warrant requirement is narrower” under article I, section 7 than under the Fourth

Amendment. Under the Washington Constitution, a lawful custodial arrest is a constitutional prerequisite to any search incident to arrest. The lawfulness of an arrest stands on the determination of whether probable cause supports the arrest. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). Probable cause exists when the arresting officer has “knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed” at the time of the arrest. *Id.*

To arrest a person, the officer must have probable cause to believe that an offense has been or is being committed. A search incident to arrest can occur prior to the arrest, so long as a sufficient basis for the arrest existed before the search commenced. State v. Ward, 24 Wn. App. 761, 765, 603 P.2d 857 (1979) (*citing* State v. Smith, 88 Wn.2d 127, 559 P.2d 970 (1977)); State v. Brooks, 57 Wn.2d 422, 357 P.2d 735 (1960)). Here, the search was conducted after arrest on the DWS III. Where police, during the course of a protective search for weapons, happen across some other item that is “immediately recognizable” as incriminating, the item may be seized. State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 160 (1994). If the incriminating character of the item is immediately apparent, “there has been no invasion of the suspect's privacy beyond that already authorized by the search for weapons.” Hudson, 124 Wn.2d at 114.

Clearly in our situation, the officer had probable cause to believe an offense had been committed (DWS 3) and this was obviously a search incident to arrest. It was not a normal Terry stop situation, because the officer was making an arrest. It's also clear that during the course of the protective search that weapons were found. The State maintains that this justified the officer in continuing the search to make sure that there were no other weapons on the person of the defendant.

So the defendant contends that the trooper was not justified in continuing the pat-down search for weapons after placing the defendant in handcuffs and seizing the knives. An officer may frisk a suspect for weapons if: (1) he justifiably stopped the person before the frisk (the officer in our case was making an arrest of the defendant), (2) he has a reasonable concern of danger (this is obvious from the finding of deadly weapons secreted on the person of the defendant), and (3) the frisk's scope is limited to finding weapons (there is absolutely nothing in this record to indicate that the officer was doing anything other than searching for weapons or other items (needles, ect.) that may be used in a harmful way). State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). But coupled with this concept is also the following: "The Appellate courts are reluctant to substitute their judgment for that of police officers in the field". State v. Belieu, 112 Wn.2d 587, 601, 773 P.2d 46 (1989). Here, the

trooper had a prior justification for the frisk. He had discovered the weapons inadvertently and he immediately recognized those weapons as potentially dangerous and continued the search to make sure that the suspect did not have additional items on him. During the course of this frisk for weapons, he discovered evidence inadvertently, which he immediately recognized as incriminating evidence. This record supports the conclusion that the trooper discovered this evidence inadvertently while searching for weapons, and from his training and experience, recognized the substance as methamphetamine. On this record, the trial court erred in granting a Motion to Suppress and thus terminating the State's case.

In our situation, it appears the defendant's argument is that the trooper lacked a reasonable safety concern to search. "A reasonable safety concern exists, and a protective frisk for weapons justified, when an officer can point to specific and articulable facts which create an objectively reasonable belief that the suspect is armed and presently dangerous". This principle is further clarified for example, in State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993):

A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to "specific and articulable facts" which create an objectively reasonable belief that a suspect is "armed and presently

dangerous." Terry, 392 U.S. at 21-24. As the Court in Terry further explained:

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger.

Terry, 392 U.S. at 27.

This court recently phrased the principle thusly:

[C]ourts are reluctant to substitute their judgment for that of police officers in the field. "A founded suspicion is all that is necessary, *some basis from which the court can determine that the [frisk] was not arbitrary or harassing.*"

(Footnote omitted.) State v. Belieu, 112 Wn.2d 587, 601-02, 773 P.2d 46 (1989) (*quoting* Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966)).

-(State v. Collins, 121 Wn.2d at 173-174)

The State submits that the trial court should have considered the entirety of the circumstances in determining the validity of the protective search pursuant to the arrest. State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002). The Findings of Fact that have been submitted in this case justified the officer in conducting the search and gave him specific and articulable facts that he related to the court. Those facts dealt with the finding of deadly weapons on the person of the defendant and justified the continuing search to determine whether other items of potentially dangerous contraband were on his person.

B. The search of the defendant's vehicle was a permissible warrantless search.

The Appellant notes here that it is in agreement with the Trial Court's Conclusion of Law that once Trooper Winborne found the drug items on the defendant's person, the U.S. Supreme Court case of Arizona v. Gant, _____ U.S. _____, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), did not preclude the search of the defendant's vehicle for drug evidence. (Findings of Fact and Conclusions of Law, Page 4). The search of the defendant's vehicle was a permissible warrantless search because Trooper Winborne had developed probable cause that the defendant had committed the crimes of Possession of a Controlled Substance (hereinafter PCS) Methamphetamine and Drug Paraphernalia regarding the digital scale prior to searching the vehicle; and it was reasonable for Trooper Winborne to believe that evidence of these drug offenses would be found in the defendant's vehicle.

The Fourth Amendment and article I, section 7 of the Washington Constitution prohibit unreasonable intrusions into an individual's private affairs, without the authority of law. State v. Bakke, 44 Wn. App. 830, 840, 723 P.2d 534 (1986). As such, warrantless searches are generally considered per se unreasonable. State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999). This is a rule that extends to vehicles. State v.

Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Further, our courts have found the privacy protections provided under article I, section 7, are greater than those that are provided under the federal constitution. See Bakke, 44 Wn. App. at 840, (citing State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986)). With that said, the courts have consistently recognized the validity of specially established exceptions to the warrant requirement – exceptions that include a “search incident to arrest.” Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); State v. Ringer, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983).

In Chimel, the U.S. Supreme Court held a search incident to arrest may only include “the arrestee’s person and the area ‘within his immediate control’ ...the area from within which he might gain possession of a weapon or destructible evidence.” Chimel, 395 U.S. at 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685.

In New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), the Supreme Court applied its holding in Chimel to the context of a vehicle search incident to arrest. Belton, 453 U.S. at 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (holding, when an officer lawfully arrests the occupant of a vehicle, he may, incident to the occupant’s arrest, search the passenger compartment of the automobile and any containers therein).

The Washington Supreme Court interpreted the search incident to arrest exception, as it applied to vehicle searches, in State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983). In Ringer, the Court found the search incident to arrest exception was born out of a concern for protecting officer safety and preventing the destruction of evidence; as such, it held a “totality of the circumstances” test should be applied on a case-by-case basis to determine whether these concerns existed, so as to justify a warrantless search. Ringer, 100 Wn.2d at 693-700.

The Washington Supreme Court then overruled the totality of the circumstances test adopted in Ringer, finding it was unfairly burdensome to officers in the field who must make decisions at a moment’s notice. State v. Stroud, 106 Wn.2d 144, 150-151, 720 P.2d 436 (1986) (“the Ringer holding makes it virtually impossible for officers to decide whether or not a warrantless search would be permissible, [w]eighing the ‘totality of the circumstances’ is too much of a burden to put on police officers who must make a decision to search with little more than a moment’s reflection”). Instead, the Court adopted the “bright line rule” set forth in Belton. Stroud, 106 Wn.2d 144 at 150.

In Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 1721, 173 L. Ed. 2d 485 (2009), the U.S. Supreme Court revisited its holding in Belton, in order to examine how it had been applied by the lower courts over the

years, in the context of vehicle searches incident to arrest. In Gant, the suspect was arrested for driving while his license was suspended prior to a warrantless search of his vehicle in which cocaine was found in a jacket which was in the vehicle.

Consequently, the Court upheld the Arizona Supreme Court's conclusion that the search of Gant's vehicle was unreasonable under the Fourth Amendment. Gant, at 1713. However, the Court's review of the search incident to arrest exception did not end here. The Court went on to find there were other circumstances unique to the vehicle context that justified a search incident to arrest, even when the arrestee was secured in a patrol vehicle and presented no risk to the officer or to the preservation of evidence. Id., at 1719. These other circumstances unique to the vehicle context included situations in which it was "reasonable to believe evidence of the crime of arrest might be found in the vehicle". Id., citing Thornton v. United States, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed 2d 905 (2004) (Scalia, J., concurring in judgment).

In Gant, the Court held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. 129 S. Ct. at 1723-1724. The standard articulated by the Court in Gant is

a Reasonable Belief standard, a standard less than probable cause. Id. In so holding, the US Supreme Court in Gant stated that “other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand.” Id. at 1721. The Court then went further by giving examples of established exceptions to the warrant requirement which authorize a vehicle search. Pertinent to this present Bridgman case, the Court in Gant expressly stated:

“If there is probable cause to believe a vehicle contains evidence of criminal activity, U.S. v. Ross, 456 U.S. 798, 820-821 (1982), authorizes a search of any area of the vehicle in which the evidence might be found.” Id.

Also of significance to the present case, the Court in Gant states that “Ross allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search.” Id. (emphasis added). The Court goes on to note that such exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle’s recent occupant justify a search. Id. Thus, the “offense of arrest” articulated by the Court in Gant

include offenses for which an officer has developed probable cause to arrest prior to beginning the search of the vehicle.

In addition, it is significant that the Court in Gant distinguishes the Gant case from Belton [New York v. Belton, 453 US 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981)] and Thornton [Thornton v. US, 541 US 615, 124 S. Ct. 2127, 158 L. Ed 2d 905 (2004)] noting that the offense of arrest prior to the search of the vehicle in Belton and Thornton were, as in this present Bridgman case, drug offenses rather than a traffic offense. Regarding drug offense cases in the vehicle context, the Court in Gant expressly states that such offenses of arrest “will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein.” Gant, 129 S. Ct. at 1719.

Subsequently, the Washington Courts have reviewed a number of cases that concern the lawfulness of warrantless vehicle searches incident to arrest, in light of Gant. State v. Snapp, 153 Wn. App. 485, 219 P.3d 971 (2009) (published in part); State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009); State v. Grib, 152 Wn. App. 885, 218 P.3d 644 (2009); State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009); and State v. McCormick, 152 Wn. App. 536, 216 P.3d 475 (2009).

Many of these cases have involved fact patterns similar to the underlying facts in Gant and, therefore, have resulted in holdings similar

to the Court's holding in Gant. Valdez involved an arrest of a suspect on a bench warrant after a stop for a traffic infraction. 167 Wn.2d at 765. In Grib, the suspect was arrested for the offenses of attempt to elude and assault in the third degree. 152 Wn. App. at 886-887. Patton involved an attempted arrest of a suspect for an outstanding bench warrant in which the suspect was initially next to his vehicle. 167 Wn.2d at 395.

McCormick involved a driver who had been arrested on a warrant and driving while his license was suspended. 152 Wn. App. at 538-539. In each of these cases, the question presented was whether it was "per se" lawful for an officer to conduct a warrantless vehicle search incident to arrest. In each case, the Courts held, pursuant to Gant, it was no longer "per se" lawful to conduct such a search. However, the reviewing Courts in these cases were never asked whether the warrantless searches would have been permissible had the officers had reason to believe the vehicles contained evidence of the offense of arrest, as in this instant case regarding the defendant Bridgman.

In contrast, in State v. Snapp, the question was raised as to whether a warrantless vehicle search was lawful when the officer had reason to believe the vehicle contained evidence of the offense of arrest. 153 Wn. App. 485 (2009). In Snapp, a state trooper initiated a traffic stop of Snapp's vehicle for a violation. During contact with the suspect in his

vehicle, the trooper observed a plastic bag with what appeared to be suspected methamphetamine in the suspect's vehicle; and also noticed that the suspect appeared to be under the influence of a drug. The suspect ultimately told the trooper that there was a methamphetamine pipe in the vehicle. The trooper found the pipe and then arrested Snapp for Drug Paraphernalia. After Snapp was placed in the patrol vehicle, the trooper searched the suspect's vehicle for additional evidence of the offense of arrest (Drug Paraphernalia) and ultimately found items related to identity theft crimes.

In Snapp, Division II found it was reasonable for the trooper to arrest Snapp for the crime of possession of drug paraphernalia and it was reasonable for the trooper to believe Snapp's vehicle contained evidence of the offense of arrest. Id. at 496-497 (finding the proximity of the pipe to a controlled substance "would help determine whether the pipe was... used for paraphernalia"). Therefore, the Court held it was reasonable for the trooper to search Snapp's vehicle for evidence of the offense of arrest, even though Snapp was secured in the trooper's patrol car at the time of the search. Id. at 497, *citing* Gant, at 1719 ("police officers may search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search

or if it is reasonable to believe that the vehicle might contain evidence of the crime of arrest”) (emphasis added).

The facts in our case are similar to the facts in Snapp. The defendant in our instant case was arrested for drug offenses for which supporting evidence could be found in the vehicle. In the present case regarding the defendant Bridgman, the “offense of arrest” for which the trooper had developed probable cause to arrest prior to beginning the search of the defendant’s vehicle were, at the very least, the drug offenses of PCS Methamphetamine and Drug Paraphernalia. In our case, Trooper Winborne arrested the defendant for driving while his license was suspended. Then, search incident to arrest of the defendant’s person, Trooper Winborne ultimately found on the defendant’s person a digital scale with suspected methamphetamine residue, a baggie of suspected methamphetamine and over \$400 in US currency. (RP 10, L 4-8). Upon finding these items on the defendant’s person prior to beginning any search of the defendant’s vehicle, Trooper Winborne, based on probable cause to arrest the defendant for PCS Methamphetamine and Drug Paraphernalia, at that moment was going to arrest the defendant for these two drug offenses (RP 10, L 23-24; and RP 11, L 2-5).

Moreover, based on his training and experience in drug crimes investigations and the drug related items he found on the defendant’s

person, Trooper Winborne reasonably believed that he would find additional evidence of the noted drug offenses in the defendant's vehicle. (RP 11, L 14-24; and RP 12, L 2-11).

In addition, similar to Snapp, in our case there was a close proximity in space and time between when and where the defendant was arrested and when and where the offense of arrest had occurred. In our instant case, there was a concern for the preservation of evidence of the offense of arrest (regarding the drug offenses of PCS Methamphetamine and Drug Paraphernalia for which there was probable cause) in that Trooper Winborne had discovered the previously mentioned drug items on the defendant's person within seven minutes, if not almost instantaneously, from the moment the defendant exited his vehicle. (RP 34, L 23-24; and RP 35, L 2-24). Trooper Winborne then searched the defendant's vehicle himself rather than waiting for a canine unit to do so. (RP 18, L 21-42; and RP 19, L 2). Furthermore, this circumstance is distinguishable from the Valdez case in which at the Court of Appeals level, Division II (which reversed and remanded with instructions to suppress) held that the search of the suspect's vehicle in that case was an impermissible warrantless search because it was no longer contemporaneous because too much time had passed between the arrest and the arrival of the canine unit. 167 Wn.2d at 767.

The cases discussed previously: Gant, Valdez, Grib, Patton and McCormick, are distinguishable from our instant case in that in those other cases the arresting officers had no reason to believe that evidence of the offenses of arrest would be found in the course of the vehicle searches. Gant, at 1714; Valdez, at 765; Grib, at 886-887; Patton, at 395; and McCormick, at 538-539. Our instant case is different in that Trooper Winborne conducted a permissible warrantless search which was based on a reasonable belief the defendant's vehicle contained evidence of the offense of arrest (here, PCS Methamphetamine and Drug Paraphernalia). Therefore, the trooper's search in our case is permissible under the fourth amendment, pursuant to the U.S. Supreme Court's holding in Gant. Further, the trooper's search was permissible even under the stricter constitutional protections of article I, section 7, pursuant to Division II's holding in Snapp.

In the instant case, having made a custodial arrest of the defendant for driving with a suspended license, Trooper Winborne searched the defendant's person incident to arrest. Pursuant to the search incident to arrest, Trooper Winborne found on the defendant's person a scale with suspected methamphetamine residue, a baggie with suspected methamphetamine and over \$400 in US currency. (RP 10, L 4-8). Upon finding these items on the defendant's person, Trooper Winborne had

probable cause to arrest defendant for PCS Methamphetamine and Drug Paraphernalia (the offenses of arrest); and at that moment Trooper Winborne was going to arrest the defendant for these two drug offenses (RP 10, L 23-24; and RP 11, L 2-5). Trooper Winborne had found these items on the defendant's person prior to searching the vehicle. (RP 12, L 12-24; and RP 13, L 2-4). In addition, based on his training and experience in drug crimes investigations, Trooper Winborne had a reasonable belief that evidence of these drug offenses would be found in the vehicle. (RP 11, L 14-24; and RP 12, L 2-11). The Appellant notes here that although the standard set by the Court in Gant is a Reasonable Belief standard; here in the present case, Trooper Winborne had actually developed more than a reasonable belief by developing probable cause regarding the drug offenses.

As a consequence, distinguishable from Gant and the line of cases such as Valdez and Patton, but similar to Snapp and Thornton, Trooper Winborne had developed probable cause to arrest (per Gant, "offenses of arrest") the defendant for the drug offenses of PCS Methamphetamine and Drug Paraphernalia prior to beginning any search of the defendant's vehicle. As a result, Trooper Winborne had established a permissible basis for a warrantless search of the defendant's vehicle with a reasonable belief that evidence of these drug offenses would be found in the car.

V. CONCLUSION

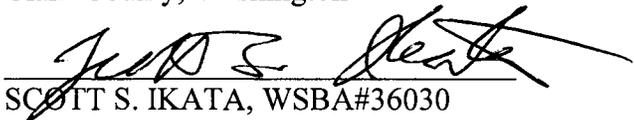
The State submits that the trial court should be reversed on the Suppression Hearing and this matter returned to the Superior Court for adjudication.

DATED this 26 day of March, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


SCOTT S. IKATA, WSBA#36030
Deputy Prosecuting Attorney

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

FILED

OCT 23 2009

9:00
Sherry W. Parker, Clerk, Clark Co.

STATE OF WASHINGTON,

Plaintiff,

vs.

MARKEL SCOTT BRIDGMAN,

Defendant

Case No.: 08-1-01873-3

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

FINDINGS OF FACT

Washington State Trooper Winborne graduated from the Washington State Patrol Academy, his training included drug identification and drug paraphernalia, and he has participated in over 300 field investigations involving controlled substance including methamphetamines.

Just after midnight, on November 4, 2008, Trooper Winborne, while on patrol duty in the vicinity of 39th Street and Main, Vancouver, WA, observed a vehicle traveling westbound with what he believed to be expired Oregon plates. Trooper Winborne ran the plates through his communications system. They came back expired as of January, 2008.

Trooper Winborne turned around and stopped the vehicle, which was being driven by Mr. Bridgman, just west of that location.

Trooper Winborne contacted Mr. Bridgman, advised him why he had been stopped, asked for his license and any paperwork he had on the vehicle. When contacted, Mr. Bridgman responded saying that he had just bought the vehicle, and that his license was suspended. Trooper Winborne confirmed the license suspension through dispatch.

During the initial contact, Trooper Winborne was alone. Ms. Brown, a passenger was sitting in the front seat of Mr. Bridgman's car.

Trooper Winborne asked Mr. Bridgman to step out and advised him that he was under arrest for driving while suspended.

1 Mr. Bridgman stepped out of his car. Trooper Winborne immediately handcuffed Mr. Bridgman
2 with his hands behind his back and told Mr. Bridgman that he had not decided whether Mr. Bridgman
3 would be taken to jail or released with a citation. That depended on how Mr. Bridgman acted while in
4 custody, and Trooper Winborne was not promising Mr. Bridgman that Mr. Bridgman wasn't going to jail.

5 Mr. Bridgman was cooperative with Trooper Winborne at all times during the incident and did
6 not make any threatening moves which would cause Trooper Winborne to have concern for his safety.

7 At the conclusion of the incident, the passenger, Ms. Brown, was permitted to make arrangements
8 to remove Mr. Bridgman's car from the scene.

9 Trooper Winborne moves Mr. Bridgman away from the driver's door and to the rear of Mr.
10 Bridgman's car where Trooper Winborne conducted a patdown search.

11 During the initial patdown, Trooper Winborne conducted both an external and in-pocket search
12 finding two pocket knives and a Leatherman's tool. When Trooper Winborne asked Mr. Bridgman if he
13 had anything which could stick, poke or hurt him, Mr. Bridgman gave up two pocket knives and a
14 Leatherman's tool.

15 Trooper Winborne continued the search by patting the outside of Mr. Bridgman's right front vest
16 pocket where he felt a hard rectangular object, which was approximately ½ x 3 x 2 inches. There was
17 nothing unique about the object. It didn't feel like a knife, or a gun. Trooper Winborne didn't know what
18 the object was. It was just a square hard object and he removed it. After feeling and removing the object
19 from Mr. Bridgman's pocket, Trooper Winborne saw that it was a digital scale and it had what he thought
20 to be methamphetamine residue on its surface. Prior to observing the digital scale, Trooper Winborne had
21 not acquired any information of drug activity by Mr. Bridgman.

22 After finding the digital scale, Trooper Winborne continued searching Mr. Bridgman for drug
23 evidence and found a suspected baggie of methamphetamine in a pocket and \$431.00. Although he had
24 found what he believed to be drug residue on the digital scale, Trooper Winborne did not decide to take
25 Mr. Bridgman to jail until after he found the baggie on Mr. Bridgman's person.

26 After completing the search of Mr. Bridgman's person, Trooper Winborne put Mr. Bridgman in
27 the patrol car, advised him of his Miranda rights, had Ms. Brown get out of the car, patted Ms. Brown
28 down for weapons, and searched Mr. Bridgman's car.

1 During the car search Trooper Winborne found a binocular case under the front passenger seat
2 located near the back seat. Inside the binocular case Trooper Winborne found eight separate small
3 baggies, which Trooper Winborne thgouth to be methamphetamine. Additionally, Trooper Winborne
4 found three empty baggies in the center console and a sack or black jack hanging from the gear shift by
5 the steering wheel.

6 After Trooper Winborne advised Mr. Bridgman of his Miranda rights, Mr. Bridgman responding
7 to questions by Trooper Winborne said that Ms. Brown had nothing to do with the items found in the car
8 and there was a half ounce of dope in a binocular case.

10 CONCLUSIONS

11 In this case we have a traffic stop and an arrest for Driving While Suspended.

12 In STATE v. BEE XIONG, 164 Wn.2d 506 (2008), the defendant was initially detained because
13 the officers mistook him for his brother, and he was detained on a felony arrest warrant which certainly
14 heightened the issues.

15 Bee was handcuffed and patted down almost immediately after the officers contacted him. After
16 this initial frisk, Bee, like Setterstrom, made no movements that could be interpreted as an attempt to
17 retrieve a weapon. Futhermore , he neither gave an indication that he could reach his pants pocket while
18 he was not handcuffed, nor did he attempt to do so. Finally, it is noteworthy that Bee, like Galbert and
19 Setterstrom, was not uncooperative with the police officers.

20 In the recent case, State v. Setterstrom, 163 Wn2d 621, 183 P.3d 1075 (2208), this court reached
21 a result similar to that reached by the Court of Appeals in Galbert. In Setterstrom, the record disclosed
22 that the Tumwater Police Department received a report that two men were at the Department of Social
23 and Health Services office in Tumwater and appeared to be under the influence of drugs. Two police
24 officers responded to the scene and made contact with the men, one of whom was Michael Setterstrom.
25 After questioning Setterstrom, the officers determined that he was lying to them about his true identity.
26 They also noticed that he appeared to be "nervous (and fidgeting)." ID at 627 Setterstrom did not
27 however, make any threatening gestures and indeed, he did not even stand when the officers approached
28 him. Nevertheless, one of the police officers performed a patdown of Setterstrom for weapons. Feeling
hard objects in Setterstrom's front pants pocket, the officer reached into the pocket and removed

1 everything inside, including a small plastic baggie filled with white powder. The officer testified that he
2 took his action even though the objects did not feel like a gun. ***This showing, we concluded was not
3 sufficient to justify a frisk for weapons, observing that "(a)t most, the record show(ed) that Setterstrom
4 was under the influence (and that) this is not a crime."

5 ****

6 Bee Xiong, supra, goes on to say:

7 Where the propriety of the initial detention of Bee is established) law enforcement officer may
8 perform, as they did here, a protective frisk in the in the nature of a patdown in order to ascertain if the
9 suspect is carrying a weapon or weapons. The scope of the frisk, however, must be limited to protective
10 purposes. If an officer cannot point to specific articulable facts that create an "objectively" reasonable
11 belief that a suspect is armed and "presently" dangerous, then no further intrusion is justified.

12 Mr. Bridgman was cooperative, the knives and leather tool were taken, and then there was the
13 feeling of this hard rectangular object inside the pocket. There is not articulation that this was a weapon
14 of any kind. Mr. Bridgman had his hands cuffed behind his back. Mr. Bridgman was cooperative and
15 made no threatening moves to any of the people there. I'm going to suppress the evidence. And, I do
16 note that the legal community didn't start becoming aware of the ramifications of Bee Xiong, supra, until
17 shortly after this incident.

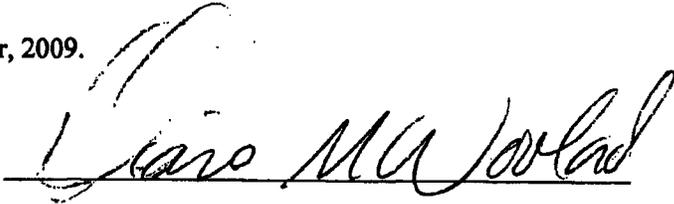
18 We have Mr. Bridgman stopped for a DWS: I cannot say that there is any way because of the
19 situation that the drugs ultimately would have been found since the officer had not decided whether to
20 take Mr. Bridgman to jail when he located and removed the scale form Mr. Bridgman's pocket.

21 Once the initial drug packet was found in Mr. Bridgman's pocket, Arizona v. Gant did not
22 preclude search of the car for drug evidence.

23 An officer may "frisk a person for weapons, but only if (1) he justifiably stopped the person
24 before the frisk, (2) he has a reasonable concern of danger, and (3) the frisk's scope is limited to finding
25 weapons. State v. Sutterstrom, 163 Wn.2d 621.

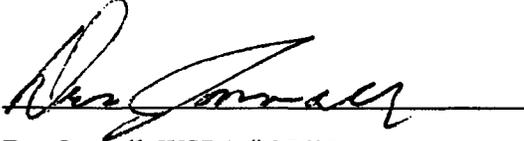
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DATED this 22nd day of October, 2009.



JUDGE DIANE M. WOOLARD

Presented by:



Des Connall, WSBA # 37695

FILED
COURT OF APPEALS
DIVISION II

10 MAR 29 AM 11:02

STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,
Appellant,

v.

MARKEL SCOTT BRIDGMAN,
Respondent.

No. 39991-1-II

Clark Co. No. 08-1-01873-3

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On 3/26, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: Markel Scott Bridgman
7650 N Drummond
Portland, OR 97217

DOCUMENTS: Brief of Appellant

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

Yathleen DeStael
Date: 3/26, 2010.
Place: Vancouver, Washington.