

No. 40937-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AUGUST IRA BASS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Lisa E. Tabbut
The Honorable Jill Johanson

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT1

 1. MR. BASS WAS UNDER ARREST WHEN
 SEIZED BY THE TROOPER AND THE
 RESULTING SEARCH OF THE CAR
 VIOLATED THE FOURTH AMENDMENT AND
 ARTICLE I, SECTION 71

 2. A *TERRY* SEARCH OF A VEHICLE
 VIOLATES ARTICLE I, SECTION 7 OF THE
 WASHINGTON CONSTITUTION WHERE THE
 PERSON STOPPED IS SAFELY IN THE
 POLICE CAR2

B. CONCLUSION4

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV3

WASHINGTON CONSTITUTIONAL PROVISIONS

article I, section 73

FEDERAL CASES

Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485
(2009).....2

WASHINGTON CASES

State v. Glenn, 140 Wn.App. 627, 166 P.3d 1235 (2007).....1

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986).....3

State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009)2

A. ARGUMENT

1. MR. BASS WAS UNDER ARREST WHEN SEIZED BY THE TROOPER AND THE RESULTING SEARCH OF THE CAR VIOLATED THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7

The State places great emphasis on the fact the Trooper told Mr. Bass he was not under arrest for the purpose of showing this was just a detention and not arrest. The Trooper's testimony that Mr. Bass was not under arrest when he handcuffed Mr. Bass is immaterial to this Court's determination. The relevant inquiry is not whether the officer's intent but whether a reasonable person in Mr. Bass' circumstances would consider himself under full arrest. *State v. Radka*, 120 Wn.App. 43, 49, 83 P.3d 1038 (2004). *See also State v. Glenn*, 140 Wn.App. 627, 639, 166 P.3d 1235 (2007) ("The officers' subjective, unspoken perception that [the defendant] was not under formal arrest is irrelevant.").

The State also invokes the mantra of "officer safety" to infer that it trumps any constitutional considerations. The issue as framed by Mr. Bass was whether he was under arrest when the Trooper handcuffed him and placed him in the rear of the police car. As stated in the opening brief, Trooper Moon had probable cause to arrest Mr. Bass for either the misdemeanor offense of hit

and run or driving while license suspended in the third degree, and in fact did arrest Mr. Bass for those offenses. RP 56. Further, when the trooper took Mr. Bass out of his car, the trooper handcuffed Mr. Bass, read Mr. Bass the *Miranda* warnings, and placed Mr. Bass in the rear of the police car. Under these circumstances, a reasonable detainee in Mr. Bass's shoes would have felt he was under arrest.

Since Mr. Bass was under arrest when placed in the rear of the police car, officer safety was no longer an issue. *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *State v. Patton*, 167 Wn.2d 379, 384, 219 P.3d 651 (2009) (“[A]n automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.”).

2. A *TERRY* SEARCH OF A VEHICLE VIOLATES ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION WHERE THE PERSON STOPPED IS SAFELY IN THE POLICE CAR

Mr. Bass contended that, in light of the decisions in *Gant* and *Patton*, the decision in *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d

445 (1986), can no longer stand. First, Mr. Bass contended the *Kennedy* Court relied upon Fourth Amendment cases in determining that a protective search for weapons was authorized under art. I, § 7. 107 Wn.2d at 10-13. Second, and more importantly, the decision in *Kennedy* allows police searches not authorized under either the Fourth Amendment or art. I, § 7 for searches incident to *arrest* under *Gant* and *Patton*. Art. I, § 7 requires “no less” than the Fourth Amendment. *Patton*, 167 Wn.2d at 394.

In response, the State merely cites the *Kennedy* decision and those cases relying upon it to justify searches without addressing Mr. Bass’ argument that *Kennedy* is no longer valid in light of *Gant* and *Patton*. Thus, in view of *those* decisions, had Mr. Bass been arrested, the question would have been whether the search of the car was justified by a concern for the safety of the arresting officer. But the trial court ruled Mr. Bass was restrained in the back of the police car, thus a search of his car based upon concerns about officer safety does not even apply: the police cannot search the car absent a valid arrest.

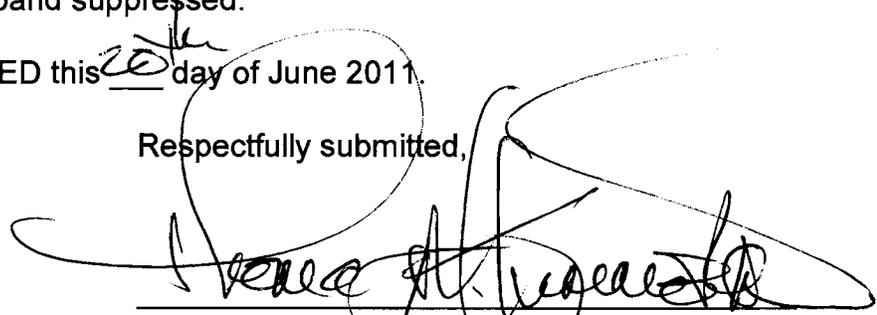
Mr. Bass submits the search of the car and resulting seizure of contraband violated his rights under the United States and Washington Constitutions. His conviction must be reversed.

B. CONCLUSION

For the reasons stated in the opening brief and this reply brief, Mr. Bass requests this Court reverse his conviction and order the contraband suppressed.

DATED this 20th day of June 2011.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Thomas M. Kummerow". The signature is written over a horizontal line and extends across the width of the typed name below it.

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 40937-2-II
v.)	
)	
AUGUST BASS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JASON LAURINE	(X)	U.S. MAIL
COWLITZ COUNTY PROSECUTING ATTORNEY	()	HAND DELIVERY
312 SW 1 ST AVE	()	_____
KELSO, WA 98626-1739		

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JUNE, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711