

NO. 41235-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

BLAKE CHARLES TAMBLYN,

Appellant.

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

The Honorable Jill M. Johanson

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in denying appellant's motion to suppress evidence seized from his car during an unlawful search incident to arrest.

Issue Pertaining to Assignment of Error

Is reversal and dismissal required because the trial court erred in denying appellant's motion to suppress evidence seized from his car where the warrantless search incident to arrest violated his right to privacy under article 1, section 7 of the Washington Constitution?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On August 7, 2008, the State charged appellant, Blake Charles Tamblyn, with one count of unlawful possession of a controlled substance, heroin, and driving under the influence of a drug, heroin. CP 1-2. On March 17, 2010, Tamblyn filed a motion to suppress evidence found behind the driver's seat of his car. CP 19-23. The trial court held a CrR 3.6 hearing on August 5, 2010 and denied the motion, but did not enter written findings of fact and conclusions of law. 10RP 43-45. On September 16, 2010, the court found Tamblyn guilty of unlawful possession of a controlled substance based on stipulated facts and the State

¹ There are 11 volumes of verbatim report of proceedings: 1RP - 08/19/08; 2RP - 12/09/08; 3RP - 02/11/09; 4RP - 05/12/09; 5RP - 01/20/10; 6RP - 03/10/10; 7RP - 03/17/10; 8RP - 05/26/10; 9RP - 06/29/10; 10RP - 08/05/10; 11RP - 09/16/10.

dismissed the charge of driving under the influence. 11RP 3-4; CP 28-30. The court sentenced Tamblyn to twenty days in jail. 11RP 7; CP 31-42. Tamblyn filed a timely notice of appeal. CP 44.

2. Substantive Facts of CrR 3.6 Hearing

While on duty on August 4, 2008, Trooper William Knudson was notified by dispatch at about 9:00 a.m. that a car was “traveling erratically” on I-5. 10RP 6-7. Knudson testified that he located and followed the car and saw it drifting in and out of lanes. He activated his lights and the car pulled over on the shoulder of the highway. 10RP 7-9. Knudson identified Tamblyn as the lone driver that he “stopped for severe lane travel.” 10RP 9.

Knudson noticed that Tamblyn had “pinpoint pupils” and several needle punctures on his arms. 10RP 10. He suspected that Tamblyn was under the influence of drugs because he did not smell any alcohol. 10RP 10. Knudson asked Tamblyn if he would undergo some field sobriety tests and Tamblyn agreed. 10RP 11. Knudson administered various sobriety tests to check Tamblyn’s balance, coordination, and ability to count. After Tamblyn failed all but one of the tests, Knudson placed him under arrest for driving under the influence of alcohol or drugs. 10RP 12-14. He handcuffed Tamblyn, read him his rights, and locked him in the back of the patrol car. 10RP 14.

Knudson returned to Tamblyn's car and conducted a search incident to arrest. 10RP 14, 22. While searching behind the driver's seat, he found a bag containing drug paraphernalia and a "baggie with a rock-like substance." 10RP 17. Knudson asked Tamblyn about the substance and he said it was heroin. 10RP 17.

Knudson believed he had probable cause to arrest Tamblyn for driving under the influence without finding anything in the car. 10RP 13-14, 19. He acknowledged that he had no fear for his safety during the incident. 10RP 22.

Defense counsel argued that the evidence found in the car should be suppressed because the warrantless search incident to arrest was unlawful. 10RP 24-28, 40-43. The State argued that the search was lawful because Trooper Knudson arrested Tamblyn for DUI and had reason to believe the car contained evidence of the crime of arrest. 10RP 28-35. The trial court noted that Knudson testified that "he searched the vehicle incident to arrest, not to look for further evidence." 10RP 44. Nonetheless, the court found that Knudson had reasonable grounds to believe that evidence of the crime of DUI would be found in the vehicle. 10RP 44. The court denied the motion to suppress and admitted the evidence. 10RP 43-45.

- C. THE TRIAL COURT ERRED IN DENYING TAMBLYN'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS CAR BECAUSE THE WARRANTLESS SEARCH INCIDENT TO ARREST WAS UNLAWFUL UNDER ARTICLE I, SECTION SEVEN OF THE WASHINGTON STATE CONSTITUTION.

Reversal is required because the trial court erred in denying Tamblyn's motion to suppress where the evidence seized from his car during a warrantless search incident to arrest violated his right to privacy under article I, section 7 of the Washington State Constitution.

Article I, section 7 provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Our Supreme Court has specifically recognized that Washington State citizens hold a constitutionally protected interest in their automobiles and the contents therein. State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999); State v. Gibbons, 118 Wash. 171, 187-88, 203 P. 390 (1922). As a general rule, warrantless searches and seizures are per se unreasonable subject to a few jealously and carefully drawn exceptions which provide for those cases where the societal costs of obtaining a warrant outweigh the reasons for prior recourse to a neutral magistrate. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999)(citations omitted). One such exception is the automobile search incident to arrest, which arose out of concerns for officer safety and destruction of evidence. State v. Patton, 167 Wn.2d 379,

386, 219 P.3d 651 (2009)(citing State v. Ringer, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983). 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. Patton, 167 Wn.2d at 386)(citing Parker, 139 Wn.2d at 496).

Article I, section 7 provides greater protection of a person's right to privacy than the Fourth Amendment.² State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998). The state provision "clearly recognizes an individual's right to privacy with no express limitations." State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982).³ It is well settled that under article I, section seven, the search incident to arrest exception to the warrant requirement is narrower than the Fourth Amendment. State v. O'Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

Here, Trooper Knudson testified that at around 9 a.m. on August 4, 2008, he pulled Tamblyn over on I-5 for driving erratically. 10RP 6-9.

² The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

³ Historical evidence reveals that the framers of the Washington Constitution intended Const. art. 1, s 7 to have a meaning different from the federal provision. The Constitutional Convention of 1889 was presented with a proposed state provision with language identical to the Fourth Amendment. This proposal was rejected in favor of our current version of Const. art. 1, s 7. See The Journal of the Washington State Constitutional Convention: 1889 497 (B. Rosenow ed. 1962). White, 97 Wn.2d at 110.

He noticed that Tamblyn had “pinpoint pupils” and several needle punctures on his arms. 10RP 10. When Tamblyn failed various field sobriety tests which he voluntarily performed, Knudson arrested him for driving under the influence of alcohol or drugs. After handcuffing Tamblyn and locking him in the back of his patrol car, Knudson searched Tamblyn’s car and found a baggie containing heroin. 10RP 11-17. Knudson had probable cause for the arrest without finding evidence of alcohol or drugs in the car. 10RP 13-14, 19, 22-23. He searched the car incident to the arrest because “that was standard operating procedure after an arrest.” 10RP 15, 22. Knudson had no fear for his safety. 10RP 22.

The trial court denied Tamblyn’s motion to suppress the evidence seized from his car relying on Arizona v. Gant:⁴

. . . . So, the officer believes drugs are involved. We see track marks all over the guy’s arms. That is probable cause to believe that he’s driving a vehicle under the influence of drugs. Based on that probable cause he arrests him.

He testified he arrested him incident -- sorry, he searched the vehicle incident to arrest, not to look for further evidence. So, maybe this case I will get reversed on, I don’t know, but I’ll find that there was reasonable grounds to believe that evidence of the crime, Driving Under the Influence of Drugs, would reasonably be found in the vehicle. It doesn’t matter whether he’s looking for

⁴ The United States Supreme Court held in Arizona v. Gant, 129 S. Ct. 1710, 1723, 173 L. Ed. 2d 485 (2009) that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”

heroin, meth, anything, because all drugs, basically, would be found in the same location, very small compartments, you know, et. cetera. . . .

10RP 43-45.⁵

The trial court erred in admitting the evidence under the United States Supreme Court's holding in Gant based on the Fourth Amendment because our Supreme Court has held that Washington citizens are entitled to greater privacy protections under the State Constitution:

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime or arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained. A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.

State v. Valdez, 16 Wn.2d 761, 777, 224 P.3d 751 (2009)(Emphasis added.)

Citing State v. Valdez, and State v. Patton, this Court held in State v. Swetz, ____ Wn. App. ____, 247 P.3d 802, 807 (2011) that “article I, section 7 limits a search incident to arrest to situations where threats to

⁵ The trial court did not enter written findings and conclusions as required under CrR 3.6 but the error was not prejudicial because the court's oral ruling permits meaningful review of its decision. State v. Smith, 76 Wn. App. 9, 16-17, 882 P.2d 190 (1990), review denied, 88 Wn.2d 1017 (1977).

officer safety or the preservation of evidence prevent the arresting officer from delaying the search to obtain a warrant.” In Swetz, an officer noticed a strong odor of marijuana and saw a bag of marijuana lying on the passenger seat of Swetz’s car. The officer arrested Swetz for possession of marijuana, handcuffed him, and after placing him in the back of the patrol car, he searched Swetz’s car and found drug paraphernalia. 247 P.3d at 804. This Court reversed and remanded with instructions to suppress the evidence seized from the car. 247 P.3d at 809.

Under Valdez and Swetz, the warrantless search of Tamblyn’s car violated his right to privacy under article I, section 7 where the record establishes that there were no concerns of officer safety or destruction of evidence because Tamblyn, the lone driver, was handcuffed and locked in the back of the patrol car. Furthermore, although Knudson testified that he conducted the search based on his training and understanding of the law at that time, the good faith exception to the exclusionary rule is inapplicable under article I, section 7. State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010). Our Supreme Court reasoned that “if a police officer has disturbed a person’s ‘private affairs,’ we do not ask whether the officer’s belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite ‘authority of law.’ If not, any evidence seized unlawfully will be suppressed. With very few exceptions,

whenever the right of privacy is violated, the remedy follows automatically.” Afana, 169 Wn.2d at 180.

Accordingly, reversal and dismissal is required because the search was conducted without a warrant even though the circumstances did not preclude the officer from obtaining one prior to the search and there was no showing that a delay to obtain a warrant would have endangered the officer or resulted in the destruction of evidence. Valdez, 167 Wn.2d at 779.

D. CONCLUSION

“We have long recognized that our constitution’s express regard for an individual’s ‘private affairs’ place strict limits on law enforcement activities in the area of search and seizure.” Patton, 167 Wn.2d at 394. For the reasons stated, this Court should reverse and dismiss Mr. Tamblyn’s conviction for unlawful possession of a controlled substance.

DATED this 7th day of April, 2011.

Respectfully submitted,


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Attorney for Appellant, Blake Charles Tamblyn

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Susan I. Baur, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626 and Blake Charles Tamblyn, 1425 West 8th Avenue, #4, Spokane, Washington 99204.

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

DATED this 7th day of April 2011, in Kent, Washington.


VALERIE MARUSHIGE

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