

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

STATE OF WASHINGTON,

Respondent,

v.

BLAKE CHARLES TAMBLYN,

Appellant.

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STATE OF WASHINGTON
BY *[Signature]*
DEFENDANT
COURT OF APPEALS
DIVISION TWO

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

The Honorable Jill M. Johanson

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN DENYING TAMBLYN'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM HIS VEHICLE WHERE THE WARRANTLESS SEARCH INCIDENT TO ARREST WAS UNLAWFUL IN VIOLATION OF ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.

The State argues that the trial court correctly denied Tamblyn's motion to suppress because there was probable cause to search for evidence of the crime of arrest, relying on State v. Louthan, 158 Wn. App. 732, 242 P.3d 954 (2010). In Louthan, this Court decided that our Supreme Court's conclusion in State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) that "after an arrestee is secured and removed from the automobile, he or she poses no risk of . . . concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception" is dicta and merely advisory. Louthan, 158 Wn. App. at 751-52. The State's reliance on Loutham is misguided because the Louthan Court misconstrues the holding in Valdez.

In Valdez, our Supreme Court faced the issue of whether and to what extent a search of a vehicle can be conducted incident to an arrest under the Fourth Amendment and article I, section 7 following the United States Supreme Court decision in Arizona v. Gant, 556 U.S. 332, 129 S.

Ct. 1710, 173 L. Ed. 2d 485 (2009), Valdez, 167 Wn.2d at 767-68. The Court recognized that in order to make a decision, it was “required to consider the previous decisions of the United States Supreme Court and this court in light of [the Gant] decision.” Id. at 768. Accordingly, the Court thoroughly analyzed the search incident to arrest exception under the Fourth Amendment and article I, section 7 of the Washington Constitution, overruling State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). Id. at 768-777. The Court concluded that the “privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment.” Id. at 771-72.

Upon the conclusion of its comprehensive analysis, the Court held that a search of a vehicle incident to arrest violates the Fourth Amendment when the arrestee is secured and not within reaching distance of the passenger compartment, there is no concern for officer safety or destruction of evidence, and there is no reason to believe that evidence of the underlying crime might be found in the car. Id. at 778. Importantly, the Court held that a search of a vehicle incident to arrest violates article I, section 7 when the arrestee has no access to the vehicle at the time of the search and there is no concern for officer safety or destruction of evidence. Id. It is clear from our Supreme Court’s holding in Valdez, that under article I, section 7, a warrantless search of a vehicle is permissible under

the search incident to arrest exception only “when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.” Id. at 777.

Contrary to the Louthan Court’s reading of Valdez, our Supreme Court’s decision in Valdez is neither dicta nor merely advisory where it settled the law in Washington regarding warrantless searches of a vehicle incident to arrest under the Washington Constitution.¹ As this Court properly concluded in State v. Swetz, 160 Wn.App. 122, 247 P.3d 802 (2011), under Valdez and State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), “article I, section 7 limits a search incident to arrest to situations where threats of officer safety or the preservation of evidence prevent the arresting officer from delaying the search to obtain a warrant.” Swetz, 160 Wn. App. at 132. This Court emphasized that it is significant that the Supreme Court recognized that Gant allows officers to search the vehicle when it is reasonable to believe there may be evidence of the crime of arrest, but “chose not to extend its own holding to include this justification.” Id. at 131-32.

¹ It should be noted that this Court’s decision in State v. Snapp, 153 Wn. App. 485, 219 P.3d 971 (2009), where this Court held that under Gant, a warrantless search of a vehicle incident to arrest is lawful when there is reason to believe that evidence of the crime of arrest could be found in the vehicle, is pending before the Washington Supreme Court. However, Snapp has no application here because unlike Tamblyn, Snapp did not challenge the search under article I, section 7.

Reversal is required because the search of Tamblyn's vehicle 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.

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Mr. Tamblyn's conviction for unlawful possession of a controlled substance pursuant to Patton and Valdez. Godefroy v. Reilly, 146 Wn. 257, 259, 252 P. 539 (1928)(when the court has once decided a question of law, that decision, when the question arises again, is binding on all lower courts).

DATED this 3rd day of October, 2011.

Respectfully submitted,



VALERIE MARUSHIGE

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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 James B. Smith, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 3rd day of October 2011, in Kent, Washington.


VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

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