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No. 41573-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Steven Maggard,**

Appellant.

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Lewis County Superior Court Cause No. 10-1-00435-6

The Honorable Judge James Lawler

**Appellant's Opening Brief**

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TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES..... iii

ASSIGNMENTS OF ERROR .....1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS.....3

ARGUMENT.....4

**I. The warrantless seizure of a rifle from Mr. Maggard’s van violated his right to privacy under Article I, Section 7, as well as his Fourth Amendment right to be free of unreasonable searches and seizures. ....4**

A. Standard of Review.....4

B. The state and federal constitutions prohibit warrantless searches, absent an exception to the warrant requirement...5

C. The prosecution failed to meet its heavy burden of establishing an exception justifying the warrantless intrusion into Mr. Maggard’s van.....6

**II. Mr. Maggard was denied his constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the U.S. Constitution because he did not personally approve his attorney’s implied waiver.....8**

**III. Mr. Maggard's conviction was entered in violation of his trial rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 9 and 22 of the Washington Constitution. ....9**

**CONCLUSION .....10**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) .5,  
6

*Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)  
.....6

*Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)  
.....8

*Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) ..8,  
9, 10

*Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) 6

*Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).....5

*Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646, 98 L. Ed. 2d 798 (1988)..8,  
9

*Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) .6

**WASHINGTON STATE CASES**

*State v. Day*, 161 Wash.2d 889, 168 P.3d 1265 (2007).....6

*State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008) .....6

*State v. Garvin*, 166 Wash.2d 242, 207 P.3d 1266 (2009) .....6

*State v. Gatewood*, 163 Wash.2d 534, 182 P.3d 426 (2008) .....4

*State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).....5

*State v. Parker*, 139 Wash.2d 486, 987 P.2d 73 (1999) .....5

*State v. Patton*, 167 Wash.2d 379, 219 P.3d 651 (2009).....7

<i>State v. Robinson</i> , ___ Wash.2d ___, ___ P.3d ___ (2011) .....	7, 8
<i>State v. Setterstrom</i> , 163 Wash.2d 621, 183 P.3d 1075 (2008) .....	6
<i>State v. Treat</i> , 109 Wash.App. 419, 35 P.3d 1192 (2001) .....	9
<i>State v. White</i> , 135 Wash.2d 761, 958 P.2d 962 (1998) .....	5

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. IV .....	1, 4, 5, 8
U.S. Const. Amend. V .....	2, 9, 10
U.S. Const. Amend. VI .....	1, 2, 8, 9, 10
U.S. Const. Amend. XIV .....	1, 2, 5, 8, 9, 10
Wash. Const. Article I, Section 22 .....	2, 9, 10
Wash. Const. Article I, Section 7 .....	1, 4, 5, 7, 8
Wash. Const. Article I, Section 9 .....	2, 9, 10

### **ASSIGNMENTS OF ERROR**

1. The police violated Mr. Maggard's right to privacy and his right to be free from unreasonable searches and seizures.
2. The trial court erred by admitting evidence obtained in violation of Mr. Maggard's Fourth Amendment rights.
3. The trial court erred by admitting evidence and statements obtained in violation of Mr. Maggard's rights under Wash. Const. Article I, Section 7.
4. The warrantless entry into Mr. Maggard's van was not justified by any exception to the warrant requirement.
5. The trial court erred by convicting Mr. Maggard following a bench trial in the absence of a jury waiver.
6. The trial court erred by convicting Mr. Maggard following a stipulated facts trial, in the absence of a waiver of his constitutionally protected trial rights.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A warrantless search is unconstitutional unless it falls within a recognized exception to the warrant requirement. In this case, the prosecutor failed to establish facts justifying the warrantless entry into Mr. Maggard's van. Did the warrantless vehicle search violate Mr. Maggard's rights under the Fourth Amendment and Article I, Section 7?
2. An accused person's waiver of the constitutional right to a jury trial must be done in writing or orally on the record. Although Mr. Maggard did not waive his right to a jury trial in writing or orally on the record, he was convicted following a stipulated facts bench trial. Was his UPF 1 conviction entered in violation of his Sixth and Fourteenth Amendment rights to due process and to a jury trial?

3. The state and federal constitutions guarantee an accused person numerous trial rights, including the right to be present, the right to confront witnesses, the right to testify or to remain silent, the right to present evidence, and the right to compel the attendance of witnesses. In this case, the record does not show that Mr. Maggard knowingly, intelligently, and voluntarily waived his trial rights. Did the conviction based on stipulated facts violate Mr. Maggard's rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 9 and 22 of the Washington Constitution?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Steven Maggard was pulled over after turning a corner at an unsafe speed. CP 4. He was arrested for driving with a suspended license (DWLS). CP 5. He was handcuffed, searched, and locked in the back of a patrol car, which was parked approximately 15 feet behind his van. CP 5. After securing Mr. Maggard, the arresting officer did not perceive him as a threat. RP (10/13/10) 13. While the arresting officer dealt with Mr. Maggard, a second officer arrived and spoke with the van's other occupant, who remained in the front passenger seat. CP 5.

After securing Mr. Maggard, the arresting officer saw a rifle under a back seat near the middle of the van. CP 5; RP (10/13/10) 14. Mr. Maggard's passenger was removed from the passenger seat, patted down, handcuffed, and made to sit approximately 10 feet from the van. CP 5. At least one officer stood between the passenger and the van at all times. CP 5. The arresting officer then opened the van's sliding door, entered, and removed the rifle from under the back seat. CP 5; RP (10/13/14) 21.

Mr. Maggard, who had previously been convicted of second-degree burglary, was charged with Unlawful Possession of a Firearm in the First Degree. CP 1. He moved to suppress the firearm, and the court

held a hearing. Motion to Suppress, Memorandum in Support, Reply Memorandum in Support, Supp. CP; RP (10/13/10).

The trial court denied the motion, and entered Findings of Fact and Conclusions of Law upholding the seizure as necessary to ensure officer safety. CP 4-6. Mr. Maggard signed a document captioned “Stipulated Facts;” however, he did not waive his right to a jury trial or his other constitutionally guaranteed trial rights. *See* RP, generally; *see also* Stipulated Facts, Supp. CP. The court reviewed the stipulated facts, found Mr. Maggard guilty, and sentenced him to 28 months in prison. CP 10.

Mr. Maggard timely appealed. CP 16.

## ARGUMENT

**I. THE WARRANTLESS SEIZURE OF A RIFLE FROM MR. MAGGARD’S VAN VIOLATED HIS RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7, AS WELL AS HIS FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES.**

**A. Standard of Review**

The validity of a warrantless search or seizure is reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). A trial court’s findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.*

- B. The state and federal constitutions prohibit warrantless searches, absent an exception to the warrant requirement.

The Fourth Amendment to the federal constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.<sup>1</sup> Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.<sup>2</sup> *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under both provisions, searches and seizures conducted without authority of a search warrant “are *per se* unreasonable...subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009)

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<sup>1</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>2</sup> Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

(quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008).

Without probable cause and a warrant, an officer is limited in what he or she can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008). Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence.

*Id.*

C. The prosecution failed to meet its heavy burden of establishing an exception justifying the warrantless intrusion into Mr. Maggard's van.

One exception to the search warrant requirement is where the search is performed incident to arrest. *Gant*, at \_\_\_ (citing *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914)). This exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, at \_\_\_; *see also Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Accordingly, police are authorized "to search a

vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Gant*, at \_\_\_\_.

Under Article I, Section 7, officers may not make a warrantless entry into a vehicle following arrest of the driver unless "there is 'a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.'" *State v. Robinson*, \_\_\_ Wash.2d \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2011) (quoting *State v. Patton*, 167 Wash.2d 379, 394–95, 219 P.3d 651 (2009)).

In this case, the seizure of the rifle was not justified by concerns for the officers' safety. Mr. Maggard had been arrested for DWLS, handcuffed, and locked in the back of a patrol car. CP 5. He did not pose a safety risk to either officer.<sup>3</sup> Furthermore, when the officer entered the van and seized the rifle, even the passenger had been removed, handcuffed, and made to sit some distance from the vehicle, under guard by one of the two officers. CP 5.

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<sup>3</sup> Indeed, the arresting officer testified that he did not perceive Mr. Maggard as a threat. RP (10/13/10) 13.

The presence of the rifle in the empty van posed no threat to the officers (or to the public). The intrusion into the van violated Mr. Maggard's rights under the Fourth Amendment and Article I, Section 7. *Robinson*, at \_\_\_\_\_. Accordingly, the evidence must be suppressed and the case dismissed with prejudice. *Id.*

**II. MR. MAGGARD WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION BECAUSE HE DID NOT PERSONALLY APPROVE HIS ATTORNEY'S IMPLIED WAIVER.**

The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L. Ed. 1461 (1938). The federal constitutional right to a jury trial is one of the most fundamental of constitutional rights, one which an attorney "cannot waive without the fully informed and publicly acknowledged consent of the client..." *Taylor v. Illinois*, 484 U.S. 400, 418 n. 24, 108 S.Ct. 646, 98 L. Ed. 2d 798 (1988).

Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; furthermore, the waiver must either be in

writing, or done orally on the record. *State v. Treat*, 109 Wash.App. 419, 427-428, 35 P.3d 1192 (2001). In the absence of a valid waiver of the federal right, a criminal defendant's conviction following a bench trial must be reversed. *Treat, supra*.

Here, Mr. Maggard did not waive his constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the U.S. Constitution. The record does not contain a written waiver signed by Mr. Maggard; nor did Mr. Maggard ratify his attorney's implied waiver on the record. Accordingly, his conviction must be reversed and the case remanded to the superior court for a jury trial. *Treat, supra; Taylor, supra*.

**III. MR. MAGGARD'S CONVICTION WAS ENTERED IN VIOLATION OF HIS TRIAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 22 OF THE WASHINGTON CONSTITUTION.**

The state and federal constitutions guarantee the accused certain trial rights, including the rights to be present, to confront witnesses, to testify (or to remain silent), to present testimony and compel the attendance of witnesses. U.S. Const. Amend. V, VI, XIV; Wash. Const. Article I, Sections 9 and 22. Courts indulge every reasonable presumption against waiver of these fundamental rights. *Zerbst*, at 464.

In this case, Mr. Maggard was convicted following an abbreviated proceeding, based solely on the judge's review of the stipulated facts.

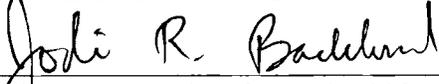
However, the record does not show that he knowingly, intelligently, and voluntarily waived his constitutionally protected trial rights, including the right to testify or to remain silent, the right to confront witnesses, and the right to call his own witnesses. *See* Stipulated Facts, Supp. CP; RP (11/10/10) *generally*. In the absence of such waivers, the conviction violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, and his rights under Article I, Sections 9 and 22 of the Washington Constitution. *Zerbst, supra*. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

### CONCLUSION

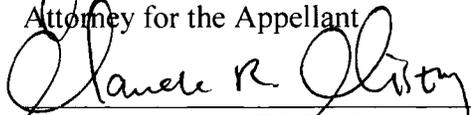
For the foregoing reasons, Mr. Maggard's Unlawful Possession of a Firearm conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on June 6, 2011.

#### **BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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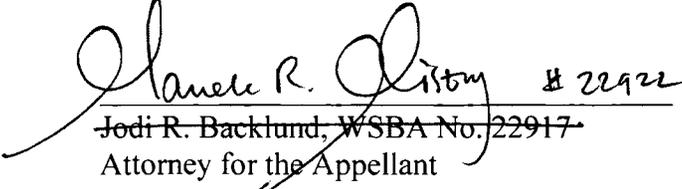
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 6, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 6, 2011.

  
~~Jodi R. Backlund, WSBA No. 22917~~  
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