

ORIGINAL

FILED

JUN 17 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY: _____

NO. 274152-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

MICHELLE MONIQUE DELCHAMBRE, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 07-1-01020-7

SUPPLEMENTAL BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

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UNITED STATES SUPREME COURT CASES

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ISSUE

Due to the holding of *State v. Robinson*, No. 83525-0 (April 14, 2011), the State must concede that Ms. Delchambre did not waive her right to protest the search incident to arrest of her automobile, under *Arizona v. Gant*, 556 U.S. ____, 129 S.Ct. 1710, 173 L.Ed. 2d 485, (2009). The Washington Supreme Court has ruled that the principles of waiver and issue preservation do not apply when the criteria of *State v. Robinson* are met:

(1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation."

State v. Robinson, No. 83525-0, slip op at 14.

In addition, the Court ruled that *Gant*, and its affirmation in the Supreme Court of Washington, *State v. Patton*, fulfilled those requirements. *Arizona v. Gant*, 129 S.Ct. 1710

(2009); *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009); *State v. Robinson*, No. 83525-0. As a result, the State concedes that the issue requires a rehearing.

PROPER REMEDY

As a result of the State's concession, there still remains the issue of the proper remedy. The defendant has requested that the case either be remanded for a rehearing on the suppression issue, or dismissed. The State strenuously objects to the latter remedy.

State v. Robinson forecloses any possibility that the proper remedy is dismissal. As the Court states in *Robinson*:

The inquiry does not end here, however. There may be additional facts justifying the search incident to arrest, which the State had no incentive to develop. Further, even if the search incident to arrest exception to the warrant requirement does not apply, other exceptions to the warrant requirement may. Again, because, at the time of trial, the evidence was admissible under then-existing interpretations of the state and federal constitutions, there was no

incentive for the State to develop the record with respect to other exceptions to the warrant requirement.

State v. Robinson, No. 83525-0, slip op at 18.

In addition, as the Court in *Robinson* further states, there exists the possibility that the conviction could be sustained even without the evidence in question, were it to be suppressed. *Id.*

This case requires a remand for a proper suppression hearing. The State has additional arguments it wishes to make, which it cannot do with the record in its current state. The State must be given a chance to develop facts justifying the search incident to arrest, or other justifications for the search of the car. As well, it must be given a chance to determine "whether the remaining evidence was sufficient to uphold the conviction. If so, the conviction is affirmed. If not, the conviction is reversed." *Id.*

CONCLUSION

The State respectfully requests that *State v. Delchambre* be remanded to the Superior Court of Benton County, for further hearings pertaining to suppression of the evidence, as well as sufficiency of the evidence, if necessary.

RESPECTFULLY SUBMITTED this 16th day of June
2011.

ANDY MILLER

Prosecutor



ANITA I. PETRA, Deputy

Prosecuting Attorney

Bar No. 32535

OFC ID NO. 91004

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 274152

vs.

DECLARATION OF SERVICE

MICHELLE MONIQUE DELCHAMBRE,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Supplemental Brief of Respondent* and this *Declaration of Service*, on June 16, 2011.

Dennis W. Morgan
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Ritzville, WA 99169

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

EXECUTED at Kennewick, Washington, on June 16, 2011.


PAMELA BRADSHAW