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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

27895-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER D. BROWN, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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SUPPLEMENTAL BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by admitting evidence obtained pursuant to a warrantless search of defendant's car incident to his arrest.

II.

ISSUE PRESENTED

1. Do the decisions in *Gant v. Arizona* and *State v. Patton* apply to the case herein by virtue of the decisions in *State v. Robinson*, No. 83525-0, and *State v. Millan*, No. 83613-2?

III.

STATEMENT OF THE CASE

The original Statement of the Case is included herein to provide a quick reference to facilitate the argument proffered. On March 2, 2008, around 3:00 p.m., Spokane County Sheriff Sgt. Matt Lyons was on patrol eastbound on Mission Avenue when he noticed Christopher Brown's vehicle approaching westbound. RP 128. Sgt. Lyons noted that the defendant's vehicle was well in excess of the posted 25 m.p.h. speed limit, so he activated his moving radar and it locked defendant's speed at 42

m.p.h. RP 129. Sgt Lyons made a traffic stop of defendant's vehicle. RP 131. As Sgt. Lyons approached, defendant opened the door, so Sgt. Lyons ended up standing next to the rear door. The defendant provided his license and registration. When Sgt. Lyons started to return to his car to check the information, defendant stated in an icy voice that he had something else for Sgt. Lyons as he was turning to return to his car. RP 137. Sgt. Lyons testified that the change in defendant's voice alerted him that something was wrong so he immediately looked back at the defendant. RP 137. The statement startled Sgt. Lyons until he observed defendant's hand reach for the butt of a gun between the seat and the center console. RP 138.

Sgt. Lyons saw defendant grab the gun in a firing position with his finger on the trigger and brought it around to bear on the Sgt. RP 138-39. Sgt. Lyons saw the gun coming up, so he backed away and drew his service weapon to defend himself. RP 141. As the defendant brought the gun around it struck the car and was flipped out of his grip onto the pavement a few feet away. RP 142. Sgt. Lyons testified that he believed that defendant was trying to shoot the Sgt. Rp143. Sgt. Lyons drew his weapon in reaction to what he perceived as a deadly threat. RP 143.

After the defendant lost control of the gun, Sgt. Lyons grabbed him out of the car as Deputy Hubbell arrived. RP 146. Sgt. Lyons was so

shaken by the assault that Deputy Hubbell took control of defendant. RP 146. The deputies processed the vehicle incident to his arrest. RP 146, 150. The vehicle search found crack cocaine in an open plastic grocery bag along with a razor, a knife, syringes and a glass crack pipe on the front passenger seat. RP 156. The unlocked glove compartment contained more cocaine and another crack pipe. RP 53. Thereafter, the vehicle was turned over to the towing company for impounding.

When the towing company inventoried defendant's vehicle, they found needles and a portable safe which contained money, a knife, and a razor with a white substance on the blade. RP 66. The towing company notified the Sheriff's Office of the impound inventory results. RP 67. Sheriff Deputies obtained a search warrant for the vehicle and the portable safe, then they found the cocaine and other items sought. RP 84-86.

The case was set for oral argument before this Court for March 15, 2010. Then on March 16, 2010, the Court entered an Order Staying Decision pending the Supreme Court's decision in *State v. Robinson*, No. 83525-0, and *State v. Millan*, No. 83613-2. On April 14, 2011, the Supreme Court issued its decision in *Robinson* and *Millan*. On May 20, 2011, this Court requested supplemental briefing regarding the applicability of the *Robinson* and *Millan* decisions on the instant case.

This brief is submitted in response to the Court's request for supplemental briefing.

#### IV.

#### ARGUMENT

##### A. THE TRIAL COURT'S ADMISSION OF THE EVIDENCE OF THE POSSESSION OF CONTROLLED SUBSTANCES WAS PROPER PURSUANT TO THE *GANT V. ARIZONA* AND *STATE V. PATTON* DECISIONS.

On appeal, defendant contends that the trial court committed error in admitting the evidence discovered pursuant to the search of defendant's vehicle incident to his arrest. Originally, defendant claimed that his decision not to move the trial court to suppress the results of the search was excusable because it constituted a "manifest error affecting a constitutional right" under RAP 2.5(a)(3). As previously noted, a party may assign evidentiary error on appeal only for specific grounds made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) *cert. denied*, 475 U.S. 1020, 105 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). This procedure provides the trial court with the opportunity to prevent or cure error. *State v. Boast*, 87 Wn.2d 447, 553 P.2d 1322 (1976). Here, the defendant chose not to move to suppress the results of the search incident to his arrest, thereby preventing the trial court from ruling on the issue.

Hence, defendant did not preserve the issue for appellate review pursuant to RAP 2.5(a).

Nevertheless, RAP 2.5(a)(3) provides that a claim of error may be raised for the first time on appeal where it is a “manifest” error affecting a constitutional right. *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). As noted, this threshold requires that the defendant identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. Obviously, it is the showing of *actual* prejudice which makes the error “*manifest*” and triggers appellate review. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The Supreme Court’s decisions in *State v. Robinson*, No.83613-2, and *State v. Millan*, No. 83525-0, held that the provisions of *Gant v. Arizona*, 556 U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and *State v. Patton*, 167 Wash.2d 379, 219 P.3d 651 (2009), apply to cases pending on direct appeal at the time *Gant* was decided. Here, defendant’s appeal was pending when the *Gant* decision was issued, so it can apply retroactively to this case. Accordingly, the issue then becomes whether the circumstances of defendant’s case qualify for analysis under *Gant*, and *Patton*.

Here, defendant was stopped for speeding and contacted for his license and registration. Thereafter, defendant assaulted the officer with a

firearm, so law enforcement had a legal basis to search defendant's vehicle for evidence of weapons that could have been used to assault the officer. *See Gant v. Arizona, supra*; and *State v. Patton, supra*.

It was in that context that law enforcement observed in plain view on the front passenger seat of defendant's vehicle the open plastic grocery bag. RP 49-50. Law enforcement observed tied clear baggies containing an off-white, rock-like substance that tested positive as crack cocaine. RP 49-50. Law enforcement also checked the unlocked glove compartment for weapons and discovered additional crack cocaine and drug paraphernalia. RP 53. Finally, defendant admitted that the crack cocaine belonged to defendant. RP 159.

Applying *Gant* and *Patton* to the circumstances of this case, the trial court can be found to have properly admitted the evidence despite the defendant's failure to bring a suppression motion. Hence, the question next becomes whether a suppression motion is required to resolve the issue herein. Unlike, the circumstances in *State v. Robinson*, No.83613-2, and *State v. Millan*, No. 83525-0, the record is sufficient to determine the admissibility of the evidence absent an evidentiary hearing. Accordingly, the trial court's decision that the search incident to arrest was lawful and that the evidence discovered was admissible means that this case need not be returned to the trial court for a suppression hearing.

As previously noted, the defendant bears the burden of proof on appeal that the trial court would most likely have granted the suppression motion had it been afforded the opportunity. *State v. McFarland, supra*.

The application of *Gant* and *Patton* to the circumstances herein would not necessarily have resulted in the trial court's granting of a suppression motion by defendant. Hence, defendant cannot show how the trial court's evidentiary rulings would have been changed by the application of the *Gant* and *Patton* decisions to this case. It is *not* highly likely that the trial court would have suppressed the evidence even if defendant had filed the motion based upon the record herein. There was no error.

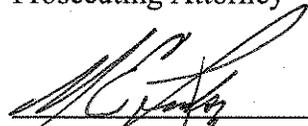
V.

#### CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 5<sup>th</sup> day of June, 2011.

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