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No. 80091-0

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JESUS DAVID BUELNA VALDEZ, et al.,

Respondents.

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STATE OF WASHINGTON
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**SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON**

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself.

ISSUE TO BE ADDRESSED BY *AMICUS*

The applicability of *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, ___ L. Ed. 2d ___ (2009) to the Article 1, Section 7 doctrine of vehicle searches incident to arrest.

ARGUMENT

Amicus has previously argued, in both this case and in *State v. Patton*, No. 80518-1, that warrantless searches of vehicles incident to arrest violate Article 1, Section 7 absent true exigencies (i.e., a need protect officers or prevent destruction of evidence). We asked this Court to overrule *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), which held that a vehicle search incident to arrest was always allowed, permitting a

fishing expedition by police even when there was clearly no reason to believe weapons or evidence would be found. Our argument is unaffected—but strengthened—by the recent decision of the United States Supreme Court in *Arizona v. Gant*, 556 U.S. ____, 129 S. Ct. 1710, __ L. Ed. 2d ____ (2009). Accordingly, we continue to urge this Court to overrule *Stroud*. As discussed below, resolution of this case requires nothing further.

A. *Gant* Supports Overruling *Stroud*

During the pendency of this case, the United States Supreme Court decided *Gant* and ruled that, under the Fourth Amendment, a vehicle may be searched incident to 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.” *Gant*, 129 S. Ct. at 1723. The Court effectively overruled *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), or at least the common interpretation of *Belton*, which permitted an unrestricted search of the entire passenger compartment of a vehicle incident to the arrest of an occupant or recent occupant.

As a Fourth Amendment decision, *Gant* is not controlling of Article 1, Section 7 jurisprudence—but it strongly supports the argument

previously presented by *amicus* in favor of overruling *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986). *Gant* joins the chorus of decisions that have rejected *Belton* in recent years under state constitutional privacy provisions. See, e.g., *State v. Rowell*, 144 N.M. 371, 188 P.3d 95 (2008); *State v. Bauder*, 181 Vt. 392, 924 A.2d 38 (2007); *State v. Eckel*, 185 N.J. 523, 888 A.2d 1266 (2006); *Camacho v. State*, 119 Nev. 395, 75 P.3d 370 (2003). All of these courts have recognized that allowing an automatic search of a vehicle upon the arrest of an occupant “has nothing to do with its underlying justification—preventing the arrestee from gaining access to weapons or evidence.” *Rowell*, 144 N.M. at 376.

Article 1, Section 7 has long been acknowledged to be more protective of privacy than the Fourth Amendment. See, e.g., *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984). As we explained in our prior *amicus* brief in this case, *Stroud* is wholly inconsistent with Article 1, Section 7 principles developed since it was decided. ACLU Amicus Brief at 4-6. Coupling that argument with the fact that *Stroud* was itself based on the now-discredited *Belton* logic under the Fourth Amendment leads to the clear conclusion that *Stroud* must be overruled.

This Court need go no further than that to decide this case. The State concedes that there was no justification for the search of the van other than the *Stroud* rule. If, however, the Court finds it necessary to

announce a replacement rule for vehicle searches incident to arrest, *amicus* respectfully suggests that Article 1, Section 7 dictates that rule: vehicles may be searched incident to arrest only when there truly are exigent circumstances. That is the rule adopted by other courts to consider the issue under their own state constitutions; searches are allowed only when necessary “to ensure police safety or to avoid the destruction of evidence.” *Eckel*, 185 N.J. at 539; *see also, Rowell*, 144 N.M. at 377; *Bauder*, 181 Vt. at 401; *Camacho*, 119 Nev. at 400.

In fact, almost no state that rejected *Belton* agrees with *Gant* in nevertheless allowing, without exigency, a warrantless search of a vehicle incident to arrest for the purpose of discovering evidence. In a single sentence, with minimal reasoning, *Gant* allows a search “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Gant*, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring in judgment)).

Although it is far from clear, *Gant* describes the justification for this rule as “circumstances unique to the vehicle context.” *Id.* It would therefore appear that the genesis of this rule lies in the so-called “automobile exception” under the Fourth Amendment, which allows the warrantless search of a vehicle when there is probable cause to believe the

vehicle contains criminal evidence, “because the vehicle can be quickly moved.” *Carroll v. United States*, 267 U.S. 132, 153, 45 S. Ct. 280, 69 L. Ed. 543 (1925); see also *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).

New York has adopted a rule similar to *Gant* under its state constitution, but has explicitly explained the link to the automobile exception:

We have also recognized, however, that when the occupant of an automobile is arrested, the very circumstances that supply probable cause for the arrest may also give the police probable cause to believe that the vehicle contains contraband, evidence of the crime, a weapon or some means of escape. If so, a warrantless search of the vehicle is authorized, not as a search incident to arrest, but rather as a search falling within the automobile exception to the warrant requirement.

People v. Blasich, 73 N.Y.2d 673, 678, 541 N.E.2d 40 (1989).

This Court, however, rejected the automobile exception under Article 1, Section 7 more than 25 years ago. See *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983) (rejecting both the automobile exception and the *Belton* rule). *Ringer* was overruled in part by *Stroud*, but only insofar as it applied to searches incident to arrest; the rejection of the automobile exception remains good law. See *State v. Patterson*, 112 Wn.2d 731, 774 P.2d 10 (1989). *Patterson* held to the expansive *Stroud* rule for vehicle searches incident to arrest, but outside the arrest context, it

reaffirmed that “no bright line rule is necessary. If exigencies in addition to potential mobility exist, they will justify a warrantless search.” *Id.* at 735.

Vermont has also rejected the automobile exception under its state constitution. *See State v. Savva*, 159 Vt. 75, 616 A.2d 774 (1991). It is therefore not surprising that Vermont has also rejected an entitlement to search a vehicle for evidence of the crime of arrest. *See Bauder*, 181 Vt. at 402-04. The court refuted several assumptions, finding that an arrest does not automatically provide probable cause that evidence of the crime is present, and that the vagueness of the “related to the crime” standard undercuts the asserted value of a bright line rule. Most significantly, however, the court held that “such an approach is fundamentally at odds with [the Vermont constitution], under which warrantless searches are presumptively unconstitutional absent a showing of specific, exigent circumstances justifying circumvention of the normal judicial process. ... [N]o amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.” *Id.* at 403 (quotations and citations omitted).

The *Patterson* and *Bauder* reasoning is compelling. There is no justification under Article 1, Section 7 to create the *Gant* bright line entitlement to a search for evidence of the crime of arrest—and certainly

not with a relaxed “reasonable belief” standard, which is even lower than required by the general automobile exception under the Fourth Amendment. Once an arrestee is secured, officers can always obtain a warrant to search a vehicle if there is probable cause to believe it contains relevant evidence—thereby complying with Article 1, Section 7’s strong preference for a warrant to provide the “authority of law” for a search. *See, e.g., State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007). The only warrantless vehicle searches justified by Article 1, Section 7 jurisprudence are those pursuant to true exigencies, as in the rare cases where the arrestee remains unsecured, and there is either a reasonable threat to officer safety or a reasonable likelihood of destruction of evidence related to the crime that is the basis of the arrest.

B. Article 1, Section 7 Requires the Exclusion of Evidence Discovered During the Illegal Search of the Van

Conceding that the search of the van was unconstitutional, the State has changed its theory at the last minute. The State now asks for the admission of the evidence obtained by the search, despite its illegal provenance and Washington’s long-standing exclusionary rule.

Supplemental Brief of Petitioner. *Amicus* respectfully urges the Court to decline the State's invitation.¹

Neither of the exceptions to the exclusionary rule apparently urged by the State—so-called “good faith” and “inevitable discovery” exceptions—is supported by Article 1, Section 7 jurisprudence. Washington courts interpreting Article 1, Section 7 have “long declined to create ‘good faith’ exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement.” *State v. Morse*, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005); *see also, e.g., State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008); *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993). Similarly, this Court has consistently stated that the question of “inevitable discovery” under Article 1, Section 7 has not been decided. *See, e.g., State v. Gaines*, 154 Wn.2d 711, 716 n. 5, 116 P.3d 993 (2005); *State v. O’Neill*, 148 Wn.2d 564, 592 n.11, 62 P.3d 489 (2003).

The issue of exceptions to the exclusionary rule was not properly raised by the State. The State could have raised this issue at any point in the proceedings, but chose instead to rest on its confidence that the search

¹ It is worth noting that the evidence in *Gant* itself was suppressed, despite the officers’ good faith reliance on the interpretation of *Belton* widely accepted at the time.

would be upheld—even after the Court of Appeals ruled otherwise. By waiting until this last minute, the State has denied this Court the benefit of briefing by opposing parties, as well as consideration of a well-developed record by the lower courts. “This is a wholly adequate and sufficient ground to deny review.” *Ongom v. Dep’t of Health, Office of Prof’l Standards*, 159 Wn.2d 132, 137 n. 3, 148 P.3d 1029 (2006) (declining to reach issue raised in supplemental briefing); *see also* RAP 2.5(a).

This case does not present a reason to deviate from the normal practice of declining to consider issues raised for the first time on appeal. Possible exceptions to the exclusionary rule have wide-ranging effects, going far beyond the present case. Before considering such an important issue, this Court should receive the benefit of full briefing by both parties and interested *amici*, along with oral argument. There will doubtless be other opportunities to consider this question in the future, as the State continues to press its argument.

If the Court nonetheless decides to consider the merits of the issue, *amicus* respectfully urges the rejection of an “inevitable discovery” exception to the exclusionary rule, for the reasons discussed in the argument submitted by *amicus* to this Court in *State v. Gaines*, incorporated herein by reference.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to hold that Article 1, Section 7 prohibits a search of a vehicle incident to the arrest of an occupant absent truly exigent circumstances, and that evidence obtained through such a search must be suppressed.

Respectfully submitted this 3rd day of June 2009.

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