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No. 84223-0
Consolidated with No. 84569-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL GERALD SNAPP and
ROGER WRIGHT,

Petitioners.

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CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
2011 APR 26 P 2:37

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES

UNION OF WASHINGTON

DOUGLAS B. KLUNDER, WSBA #32987
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

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Attorney for *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*

Whether a warrantless search of a vehicle incident to arrest of the driver violates Article 1, Section 7 when conducted in an attempt to find evidence of the crime of arrest.

STATEMENT OF THE CASE

These consolidated cases ask whether Article 1, Section 7 of the Washington State Constitution allows for a warrantless search of a vehicle incident to the arrest of the driver. The facts and procedure of the cases are adequately presented by the parties’ briefing. A few facts bear repeating, as they are relevant to the argument below:

Both defendants were secured at the time their vehicles were searched, and there was no reason to believe that any evidence that existed was at risk of being destroyed or hidden, or that there was any risk to officer safety. There is nothing in the record to indicate that officers in either case attempted to get a warrant, or in any way subjected to independent evaluation their beliefs about the likelihood of finding evidence of criminal activity.¹ Finally, although the Court of Appeals justified the search of Mr. Snapp's vehicle as based on a reasonable belief the officer would find evidence of the crime of possession of drug paraphernalia, no evidence of drugs or paraphernalia was actually discovered (beyond the meth pipe that had been retrieved earlier). *See State v. Snapp*, 153 Wn. App. 485, 219 P.3d 971 (2009), *review granted*, 169 Wn.2d 1026 (2010); *State v. Wright*, 155 Wn. App. 537, 230 P.3d 1063 (2010), *review granted*, 169 Wn.2d 1026 (2010).

ARGUMENT

This Court has already addressed the issue in this case, and has twice held that warrantless searches of vehicles incident to arrest are not allowed absent exigent circumstances, i.e., "when that search is necessary

¹ *Amicus* takes no position as to whether officers in either case were aware of facts that would have constituted probable cause and justified the issuance of warrants if they had applied for them.

to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.” *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009); *see also State v. Patton*, 167 Wn.2d 379, 384, 219 P.3d 651 (2009). The State now invites the Court to revisit those decisions, and additionally allow warrantless searches for evidence of the crime of arrest, corresponding to the so-called *Gant* exception under the Fourth Amendment. The *Gant* exception was created by the United States Supreme Court two years ago, which held that “circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” *Arizona v. Gant*, --- U.S. ----, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009) (quotation omitted).

Amicus has previously briefed this Court on the incompatibility between the *Gant* exception and Article 1, Section 7 jurisprudence, in our Supplemental Brief submitted in *State v. Valdez*, incorporated herein by reference. Similarly, we fully support the argument presented by Snapp in his Supplemental Brief, which also demonstrates the incompatibility between Article 1, Section 7 and such warrantless searches. We write separately today to discuss more fully the risks to privacy and likelihood of police misconduct created by the *Gant* exception—risks that are

irreconcilable with the privacy guaranteed to Washingtonians by Article 1, Section 7.

A. The Participation of a Neutral Magistrate Is Necessary to Protect Privacy

It is by now axiomatic that “[u]nder article I, section 7 of the Washington Constitution, warrantless searches are *per se* unreasonable [and] exceptions to the warrant requirement are jealously and carefully drawn.” *State v. Morse*, 156 Wn.2d 1, 3, 123 P.3d 832 (2005); *see also*, *e.g.*, *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009) (“carefully drawn exceptions”); *State v. Ladson*, 138 Wn.2d 343, 356, 979 P.2d 833 (1999) (“warrants are the rule while exceptions are narrowly tailored”). It is less often, however, that courts examine the reasons underlying the warrant requirement. An examination of some of those cases show that a warrant is not required simply for technical compliance with the text of Article 1, Section 7—which doesn’t even use the term “warrant,” but allows disturbance of private affairs only with “authority of law.” Instead, it is clear that the use of warrants provides fundamental protection for the privacy interests to which Washingtonians are entitled.

Certainly one purpose of the warrant requirement is to increase the reliability of a determination of probable cause. Simply put, two heads are better than one, so we have more confidence in the outcome if two people

(the officer and the magistrate) both agree that a search is justified. But for decades, it has been recognized that there is value—constitutionally mandated value—in warrants beyond ensuring that probable cause exists. “Belief, however well founded ... furnishes no justification for a search ... without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.” *Agnello v. United States*, 269 U.S. 20, 33, 46 S.Ct. 4, 70 L.Ed. 145 (1925).

Instead, the warrant requirement recognizes the practical realities of human nature and is designed to provide effective protection of privacy. “It is not an inconvenience to be somehow ‘weighed’ against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the ‘well-intentioned but mistakenly over-zealous, executive officers’ who are a part of any system of law enforcement.” *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (citation omitted).

A key aspect of the warrant process is the participation of a neutral magistrate:

The point of the [warrant requirement], which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and

detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Constitution] to a nullity and leave the people's homes secure only in the discretion of police officers.

Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (footnotes omitted); *see also United States v. Lefkowitz*, 285 U.S. 452, 464, 52 S.Ct. 420, 76 L.Ed. 877 (1932) (“Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.”).

Although several of these discussions were made in the context of the Fourth Amendment, they are equally applicable to Article 1, Section 7. “Except in the rarest of circumstances, the ‘authority of law’ required to justify a search pursuant to article I, section 7 consists of a valid search warrant or subpoena *issued by a neutral magistrate.*” *Ladson*, 138 Wn.2d at 352 n. 3 (quoting *In re Personal Restraint of Maxfield*, 133 Wn.2d 332, 345, 945 P.2d 196 (1997) (Madsen, J., concurring)) (emphasis added).

This Court recently reiterated the important role of the neutral magistrate, explaining some of the ways in which a warrant protects privacy:

Warrant application and issuance by a neutral magistrate limit governmental invasion into private affairs. In part, the warrant requirement ensures that some determination has been made which supports the scope of the invasion. *See, e.g., State v. Jackson*, 150 Wn.2d 251, 263-64, 76 P.3d 217 (2003) (without a warrant requirement there is no limitation on the State's intrusion "whether criminal activity is suspected or not."); RCW 10.79.015; CrR 2.3(c). The scope of the invasion is, in turn, limited to that authorized by the authority of law. *Jackson*, 150 Wn.2d at 261 (installation of GPS (global positioning system) device "clearly in excess of the scope of the warrant"). The warrant process, or the opportunity to subject a subpoena to judicial review, also reduces mistaken intrusions.

State v. Miles, 160 Wn.2d 236, 247, 156 P.3d 864 (2007).

In order to reduce mistaken intrusions, it is essential for judicial intervention to occur *prior* to the intrusion, as happens with a warrant. In contrast, adoption of the *Gant* exception would allow officers to search vehicles based on their own beliefs. The only opportunity for judicial intervention would come after the fact, perhaps in a suppression hearing if evidence was uncovered as a result of the search. At best, in such cases the remedy for an unjustified search would be suppression of evidence—but the harm to privacy would have already occurred. And in the majority of instances, when no evidence resulted from the search, there would be no effective opportunity for judicial intervention at all, and no remedy whatever for an unlawful search.

B. The *Gant* Exception Leads Inevitably to *Post Hoc* Rationalizations

Unlike the warrant process, the *Gant* exception would allow officers to justify their reasons for a vehicle search incident to arrest only after the fact. (If ever; as mentioned above, it is unlikely that searches will be challenged if they don't turn up evidence or contraband.) The State has a strong interest in having evidence admitted, so acceptance of the *Gant* exception will inevitably lead to *post hoc* rationalizations as the State characterizes the facts and beliefs at the time of arrest in the most favorable light. Since this characterization will only be necessary in cases where evidence or contraband was found, it will be all too easy to slant the description of events to point towards the likelihood of a successful search. Even with the best of faith on the part of the State, all testimony and recollections will be shaded with the rose-colored glasses of hindsight, resulting in a description of the investigation that is inherently unreliable.

The risks to privacy are perhaps most obvious when considering one common category of arrests, those for possession of drugs or drug paraphernalia, or outstanding warrants for such offenses. It appears to be a common belief that evidence of possession at one time and location automatically makes it likely that the person will carry drugs in his or her car at any other time. Officers can therefore easily be tempted to search a

vehicle whenever there is an arrest for any offense related to drugs, without having articulated specific facts to support such a search—especially officers who grew accustomed to routine vehicle searches incident to arrest prior to the *Gant* and *Patton* decisions. And if challenged, it is all too easy to “remember” facts that would support the search, such as distinctive odors, fidgety behavior, or fleeting glimpses of something that maybe resembled drugs in one form or another (e.g., “white powder”). This is especially true if drugs are actually found, where the perception of the item actually found can easily merge with the memory of what had been seen or smelled prior to the search.

The dangers of *post hoc* rationalization are exacerbated by the sometimes uncertain nature of the basis for an arrest. As the State points out, officers do not necessarily inform arrestees of the crime at the moment of arrest, and officers may develop probable cause for additional crimes as the investigation continues. Supplemental Brief of Respondent in Snapp at 18. The absence of a clear crime of arrest creates an even broader opportunity for *post hoc* rationalization. Not only would an officer and prosecutor be able to characterize otherwise innocuous facts as providing reasonable belief of evidence of the crime, they would be able with hindsight to decide which crime that evidence was supposed to relate to. With such leeway, it would be surprising if a zealous prosecutor was

unable to characterize facts to support a search when something significant is found as a result of that search.

Rather than recognizing the danger of unjustified searches, the State's solution to this ambiguity is to argue that the "crime of arrest" for purposes of the *Gant* exception should include any crime for which there was probable cause to arrest the suspect at the time of the search. Supplemental Brief of Respondent in Snapp at 18-19. This is the reverse of the "narrow tailoring" constitutionally required for exceptions to the warrant requirement. *Ladson*, 138 Wn.2d at 356. At a minimum, so there is no question as to the basis for the warrantless search, the *Gant* exception must be limited to searches for evidence of crimes that the officer has explicitly announced as a basis of arrest prior to the search. A better view, however, is that the very existence of ambiguity in the first place counsels against adoption of the *Gant* exception. The risk of *post hoc* rationalization and unjustified searches incident to arrest is simply too great to justify an exception to the warrant requirement after the arrestee has been secured and there is no risk of destruction of evidence.

C. The *Gant* Exception Would Encourage Police Misconduct

In assessing the risks to privacy created by the *Gant* exception, it is necessary to look not at a single case, but instead to consider the

incentives created for an officer who has made a valid arrest in a variety of scenarios. The first conclusion that can be drawn is that the *Gant* exception is likely to have a significant effect on only a narrow subset of searches incident to arrest—those in which there is neither an exigency nor probable cause. If an exigency exists, it would justify a search by itself; and absent an exigency an officer can easily obtain a search warrant (e.g., by telephone) if probable cause exists. That conclusion is troubling in and of itself; at best, the *Gant* exception is desired to allow searches in cases where probable cause is lacking (but reasonable suspicion exists). Even more worrisome, however, is its effect on situations where there is not even a reasonable belief, supported by articulable facts, that evidence will be found in a search.

The warrant requirement, coupled with the exclusionary rule, deters misconduct because police officers who detect crime want to maximize the likelihood of a conviction. The exclusionary rule creates a clear and effective deterrent to misconduct by insuring that unwarranted searches are not rewarded with admissible evidence that would contribute to a conviction. That deterrent is undermined if an officer knows that an illegal search might indeed be rewarded with admissible evidence, if the prosecutor can successfully argue after the fact that the search was justified after all.

Lacking probable cause or exigency, the major factor an officer considering a search of the vehicle is likely to consider is the probability of probable cause being developed. If the probability is high, a rational officer will invest his efforts in pursuing leads to develop probable cause and then obtain a search warrant. But if it seems unlikely that further investigation will ever support probable cause, a result-oriented officer will see little to lose by conducting an immediate search, since the alternative is not to obtain the evidence at all. The *certainty* of inadmissibility is all that will stop such an officer.

The *Gant* exception upsets this delicate balance, giving a risk-tolerant officer the choice between *two* possibilities of obtaining admissible evidence: development of probable cause or successful *post hoc* characterization of the search as reasonably likely to obtain evidence of the crime of arrest—a characterization created by a competent prosecutor with the benefit of hindsight. Coupled with the potential investigatory usefulness of even inadmissible evidence, and an awareness of the natural reluctance of courts to exclude evidence of serious criminal wrongdoing, it is easy to see how an officer could be tempted to stretch the limits of the law and conduct an impermissible search. Even if the later attempt to argue applicability of the *Gant* exception fails, the officer has

likely lost nothing, because the evidence would not have been otherwise discovered.

It is all too easy to rely on hindsight when considering the effect of the *Gant* exception, framing the question as whether or not to exclude evidence after the fact—both after we know the existence and relevance of the evidence, and after the State has had an opportunity to construct a description justifying the belief that evidence of the crime of arrest was to be found. As with all suppression motions, the question arises in a context where the prosecutor has some grounds for believing the defendant is guilty. But it is the searches of innocent people, which are almost never examined by any court, that we most want to deter. And those are exactly the searches that are most likely to occur under the *Gant* exception: cases where there is very low probability of developing probable cause. The upshot is that recognition of the *Gant* exception will likely result in some increase in the number of illegal searches conducted, including instances where searches do not uncover evidence of the crime of arrest, but where there is no reason to believe such evidence existed in the first place. This is exactly the type of unreasonable intrusion into private affairs that Article 1, Section 7 of the Washington Constitution prohibits.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to hold that warrantless searches of vehicles incident to the arrest of drivers violates Article 1, Section 7 absent an actual risk of destruction of evidence or danger to the arresting officers. Accordingly, evidence found in both Mr. Snapp's and Mr. Wright's vehicles should have been suppressed.

Respectfully submitted this 18th day of April 2011.

By



Douglas B. Klunder, WSBA #32987
ACLU of Washington Foundation

Attorney for *Amicus Curiae*
American Civil Liberties Union of
Washington