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IN THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 62142-4-I

STATE OF WASHINGTON,

Respondent,

v.

ROGER WRIGHT,

Petitioner.

BRIEF *AMICUS CURIAE*
OF THE
WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS (WACDL)

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I. INTRODUCTION

The Court of Appeals in Mr. Wright's case held that there is an exception to the warrant requirement for a law enforcement officer who has a "reasonable belief" or "reasonable suspicion" that a search of the vehicle from which the arrestee was taken will yield evidence of the crime of arrest or of other crimes, even when the officer has no belief that the car contains weapons; no suspicion that the car contains evidence that is evanescent or dissipating; and, hence, there is no exigency necessitating an immediate search before a warrant can be obtained. *State v. Wright*, 155 Wn. App. 537, 230 P.3d 1063, 1068 (2010).

Whatever the merits of this holding may be under the Fourth Amendment, it flatly conflicts with this Court's controlling decisions interpreting Art. 1, section 7 of the Washington State Constitution.

II. THE APPELLATE COURT'S HOLDING REQUIRES NO PROOF OF OFFICER DANGER OR EXIGENT CIRCUMSTANCES BEFORE SEARCHING A CAR INCIDENT TO ARREST; IT THUS CONFLICTS WITH THE JUSTIFICATIONS FOR A SEARCH INCIDENT TO AUTO ARREST EXCEPTION

First and foremost, this Court has held that there are two justifications for the search incident to automobile arrest exception to the warrant requirement under Art. 1, section 7: the existence of the exigent circumstances of "concerns for officer safety and the potential destruction

of evidence of the crime of arrest.” *State v. Patton*, 167 Wn.2d 379, 389, 219 P.3d 651 (2009) (citing *State v. Ringer*, 100 Wn.2d 686, 699-700, 674 P.2d 1240 (1983) with approval for this rule). Accord *State v. Stroud*, 106 Wn.2d 144, 150-51, 720 P.2d 436 (1986), *overruled in part*, *State v. Buelna-Valdez*, 167 Wn.2d 761, 777 224 P.3d 751 (2009) (following arrest, officer permitted to search passenger compartment for weapons or destructible evidence).

Neither exigency existed in this case. In fact, neither the trial court nor the appellate court in Mr. Wright’s case cited any kind of exigency that justified an immediate search – they did not cite any reasonable suspicion that the car contained weapons or that it contained evidence that was in danger of destruction or dissipation. No witness or judge has mentioned any fear of dangerous weapons becoming available or detonating in the car; no witness or judge has mentioned any suspicion that any drugs in the car might be flushed down a toilet, swallowed, or otherwise dissipate.

In Washington, however, the exceptions to the warrant requirement are “limited by the reasons that brought them into existence,” *State v. Patton*, 167 Wn.2d 379, 386 (citing *State v. Ladson*, 138 Wn.2d 343, 356, 939 P.3d 833 (1999), with approval for this point), and the reasons that brought the automobile search exception into existence are “officer safety

and the risk of destruction of evidence of the crime of arrest.” *Id.* (citing with approval *State v. Ringer*, 100 Wn.2d at 693-700).

The appellate court’s decision in *Wright* thus conflicts with *Patton*, *Ringer*, and Art. 1, section 7. It permits a search of an automobile, purportedly pursuant to a search incident to arrest of an automobile exception, when it serves neither the purpose of officer safety nor the purpose of preventing destruction of evidence. Because this holding allows warrantless searches of a vehicle after the arrestee has been removed from the vehicle and disabled, it conflicts with the rationale for any exception to the warrant requirement in Washington – because every exception to the warrant requirement, including the search incident to automobile arrest exception, in Washington, is based on some notion of exigency or emergency.

III. THE APPELLATE COURT’S HOLDING ESTABLISHES AN AUTO EXCEPTION TO THE WARRANT REQUIREMENT WHICH REQUIRES NO PROOF OF OFFICER DANGER OR EXIGENT CIRCUMSTANCES; IT THUS CONFLICTS WITH THIS COURT’S DECISIONS HOLDING THAT THERE IS NO AUTO EXCEPTION IN WASHINGTON

The *Wright* court’s holding also conflicts with prior Washington case law in that it endorses – *sub silentio* – a pure automobile exception to the warrant requirement. There can be no other way to characterize its

holding that following an arrest in an automobile, the passenger compartment can be searched for not just dangerous or destructible evidence, but for evidence of any crime at all.

Certainly, the so-called “Scalia exception” in *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009), may carve out such an exception.

But the U.S. Supreme Court has ruled that there is an “automobile exception” to the Fourth Amendment’s warrant requirement. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

This Court has not. In fact, this Court has rejected such an exception. *See State v. Patton*, 167 Wn.2d 379, 386 n.4.

The *Wright* appellate court’s holding thus creates a pure automobile exception to the warrant requirement for the first time in Washington. It conflicts directly with this Court’s decisions holding that there is no such automobile exception under Art. 1, section 7. This Court has specifically ruled that Washington recognizes no generalized “automobile” exception to the warrant requirement allowing auto searches whenever a probable cause requirement is met. *State v. Patton*, 167 Wn.2d 379, 386 n.4.

IV. THE APPELLATE COURT'S HOLDING ESSENTIALLY CREATES A DRUG EXCEPTION TO THE WARRANT REQUIREMENT; THIS COURT, THE SUPREME COURT, AND THE SISTER JURISDICTIONS, HOWEVER, HAVE REJECTED SUCH A "DRUG CASE" EXCEPTION IN THE SIMILAR KNOCK-AND-ANNOUNCE CONTEXT

The *Wright* appellate court's rule essentially creates a drug case exception to the limited search incident to automobile arrest rule, an exception which would allow such searches without reasonable suspicion of danger to the officer or destruction of evidence. Instead, it equates the existence of a drug arrest, alone, with the possibility of destruction of evidence – a possibility so great that it rises to the level of an exigency justifying an otherwise unlawful warrantless search.

This Court, along with the majority of jurisdictions, however, rejects any such presumption of exigency in a drug case like this one. Instead, they require actual proof of exigent circumstances before any exception to our privacy rights, without a warrant, will be tolerated.

In *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), for example, the Supreme Court rejected a felony drug case exception to the knock-and-announce requirement when serving a felony drug warrant. Instead, it held that to justify a no-knock entry, the officers must have a reasonable suspicion not just that there are drugs in

the house, but that under the particular circumstances of the case, knocking and announcing might jeopardize their own safety or result in the destruction of evidence. The fact that the arrest is for drugs, alone, is insufficient; particularized suspicion is required.

This Court has come to the same conclusion. *State v. Cardenas*, 146 Wn.2d 400, 411-412, 47 P.3d 127, *amended*, 57 P.3d 1156 (2002), *cert. denied*, 538 U.S. 912 (2003). So have other federal and state courts.¹

¹ *E.g.*, *United States v. Becker*, 23 F.3d 1537, 1541 (9th Cir. 1994) (absent specific information that defendant was armed and dangerous in methamphetamine lab case, "the claimed fear was simply a generalized and non-specific one" and this does not constitute exigent circumstances; reversing due to failure to comply with knock and announce rule, 18 U.S.C. § 3109); *United States v. Lucht*, 18 F.3d 541, 551 (8th Cir.), *cert. denied*, 513 U.S. 949 (1994) (no "drug case" exception to knock and announce rule); *United States v. Mendonsa*, 989 F.2d 366, 368 (9th Cir. 1993) ("inherently dangerous job of arresting drug dealers" insufficient to excuse compliance with knock and announce rule; waiting "three to five seconds" between announcing and entering, after hearing only nonspecific noise inside not exigency – "ome noise is normal to ordinary living and leaving one's seat to open the door"); *People v. Jennings*, 562 N.E.2d 1239, 1241 (Ill. App. Ct. 5th Dist. 1990) ("sketchy information indicating that defendant has weapons on the premises does not alone create an exigent circumstance"). The Arizona Supreme Court explained when it rejected a drug exception to the knock and announce rule:

The mere fact that this search warrant was executed for the purpose of discovering narcotics does not necessarily create an exigent circumstance justifying immediate entry... [S]tanding by itself, the easy destructibility of narcotics evidence is insufficient to provide reasonable cause for officers to believe that announcement of the purpose of their entry would frustrate the search... There must be "substantial evidence" to cause the police to believe

The appellate court's decision in this case conflicts in principle with all these authorities. It crafts a drug case exception to the search incident to automobile exception requirement, which would allow searches of the passenger compartment in any drug case, without proof that there is any exigency involved.

V. CONCLUSION

The *Wright* appellate court's holding conflicts in principle with several lines of this Court's authority. It conflicts with the rule that the rationale for the search incident to automobile exception to the warrant requirement is to deal with exigencies created by criminals who might be dangerous or whose evidence might dissipate before a warrant can be obtained; and since that rationale is not served by a blanket rule allowing searches of passenger compartments for evidence of a crime in all cases, that rationale cannot support the *Wright* court's decision. It conflicts with the rule that the search incident to automobile arrest exception is limited to exigencies, and there is no blanket "drug case" exception to the requirement of actual proof of an exigent circumstance.

Finally, the appellate court's holding is based on the *Gant* Court's decision that the federally-recognized automobile exception to the Fourth

evidence would be destroyed.

State v. Bates, 587 P.2d 747, 749) (Ariz. 1978).

Amendment's warrant requirement allows search of a passenger compartment even for evidence of a crime. But neither Art. 1, section 7, nor this Court, recognizes such a blanket "automobile exception." In fact, this Court has rejected such an exception to the warrant requirement.

The *Wright* appellate court's decision therefore conflicts with several different lines of this Court's decisions and with Art. 1, section 7, on a significant question of constitutional law. The petition for review should be granted.

DATED this 19th day of July, 2010.

Respectfully submitted,



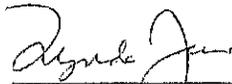
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CERTIFICATE OF SERVICE

I certify that on the 19th day of July, 2010, a true and correct copy of the foregoing BRIEF AMICUS CURIAE OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (WACDL) was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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Attached is the motion for permission and brief. Thank you.

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