

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Aug 29, 2013, 3:58 pm
BY RONALD R. CARPENTER
CLERK

No. 88267-3

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM MacDICKEN,

Petitioner.

FILED
2013 SEP -3 P 3:49
BY RONALD R. CARPENTER
CLERK

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Joseph P. Wilson

ANSWER TO *AMICUS CURAE* BRIEF OF
WASHINGTON STATE PATROL

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

ORIGINAL

TABLE OF CONTENTS

A. ISSUE IN RESPONSE 1

B. ARGUMENT 1

THE RULE ADVOCATED BY MR. MacDICKEN
ADEQUATELY CONSIDERS AND PROTECTS
OFFICER SAFETY 1

1. The facts here belie any claim that the officer feared for his
safety, 1

2. Established decisions of this Court and the United States
Supreme Court adequately consider and protect officer
safety. 3

C. CONCLUSION 6

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 1, 4, 5, 6

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 7 1, 4, 6

FEDERAL CASES

Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485
(2009)..... 3, 4, 5

Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685
(1969)..... 1, 4, 5

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290
(1978)..... 3

United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538
(1977)..... 1, 4, 5

WASHINGTON CASES

State v. Buena Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) 2, 5

State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009)..... 5

State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983)..... 4, 5

A. ISSUE IN RESPONSE

Officer safety is adequately considered and protected under the Fourth Amendment by the decisions in *Chimel*, *Sanders*, and *Chadwick*, as well as those decisions interpreting article I, section 7 of the Washington Constitution.

B. ARGUMENT

THE RULE ADVOCATED BY MR. MacDICKEN
ADEQUATELY CONSIDERS AND PROTECTS
OFFICER SAFETY

1. The facts here belie any claim that the officer feared for his safety. *Amicus*, Washington State Patrol (WSP), argues that the rule advocated by Mr. MacDicken would endanger officer safety. Initially, the actions of the officer here belie any fear that the officer had about his safety. Further, the rule advocated by Mr. MacDicken is not a new rule but merely an application of established decisions of this Court as well as the United States Supreme Court, which adequately consider and protect officer safety.

It is important to consider the facts as found by the trial court here when discussing officer safety. WSP agrees that the bags were a car's length away from Mr. MacDicken, but opines that the fact he was handcuffed was not sufficient to assure officer safety given the

circumstances faced by the officer. *Amicus* brief at 6-9. Following the rule as advocated by Mr. MacDicken, once the officer seized the bags, he could have secured them inside his police car, and then focused his full attention on the risk he and the other officers perceived they were facing. Instead, based upon the threats WSP claims the officer faced, the officer took his focus off the threats and focused instead on searching the bag. This is simply counterintuitive. Instead of taking the route that most guaranteed officer safety, taking the threat (the bags) and securing them in the police car away from anyone who could access them, he further endangered himself and the other officers by taking his focus off the alleged threats he faced and focusing instead on inventorying the contents of the bags.

The easiest, safest way to assure officer safety and make sure that no one will access the bag is to secure it in a police car and obtain a search warrant to search it at a later, safer location. *See State v. Buena Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009) (“when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained”). That simply didn’t happen here.

2. Established decisions of this Court and the United States Supreme Court adequately consider and protect officer safety. WSP seems to be arguing that Mr. MacDicken is advocating a new and different rule from that currently in place, and he is instead advocating for a rule that places officers at risk. Mr. MacDicken is not doing any such thing. Instead, Mr. MacDicken is merely advocating for courts to apply the established rule and find that officer safety here did not authorize search of the bags.

One must remember why the United States Supreme decided *Gant* as it did. The Court determined that the rule it had announced in *Belton* had been consistently abused in the name of officer safety:

Although it appears that the State's reading of *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the *Chimel* exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence. Cf. *Mincey v. Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)

(“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment”).

Arizona v. Gant, 556 U.S. 332, 349, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In *Gant*, the Supreme Court overruled *Belton* and returned to the rule it had announced years before in *Chimel*, which allowed searches only for items within the suspect’s reach, colloquially known as the suspect’s “wingspan.” *Id.* at 343.

Under the Fourth Amendment, both *Chimel* and *Chadwick* authorized searches incident to arrest to the area within the suspect’s immediate control, i.e. “the area into which an arrestee might reach in order to grab a weapon or evidentiary inte[m].” *United States v. Chadwick*, 433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). This is well-settled under the Fourth Amendment. *See Chimel*, 395 U.S. at 768 (“Application of sound Fourth Amendment principles to the facts of this case produces a clear result.”).

This Court has followed a similar and similarly well-settled rule. *See State v. Ringer*, 100 Wn.2d 686, 699-700, 674 P.2d 1240 (1983) (“Based on our understanding of Const. art. 1, § 7, we conclude that, when a lawful arrest is made, the arresting officer may search the

person arrested and the area within his immediate control.”). This is not a new rule but a return to common sense and a constitutional balance between officer safety and the private affairs of the individual.

WSP advocates for a rule that the search should be authorized if the arrestee has control of the bags immediately before the arrest and, *there is any conceivable possibility of access to the bag*. Amicus brief at 2, 11. This rule goes well beyond that enunciated in *Chadwick*, *Chimel*, *Gant*, and the Washington cases *Ringer*, *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), and *Buena-Valdez*. It is also the type of conduct by the police in *Chimel* which led to the rule that only those items within the suspect’s immediate area can be searched:

It is argued in the present case that it is ‘reasonable’ to search a man’s house when he is arrested in it. But that argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on consideration relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point. It is not easy to explain why, for instance, it is less subjectively ‘reasonable’ to search a man’s house when he is arrested on his front lawn-or just down the street-than it is when he happens to be in the house at the time of arrest.

Chimel, 395 U.S. at 754, 764-65. One could always conceive of some possibility that a person could acquire a weapon, thus allowing the police to conduct a search that would exceed that authorized under

current Fourth Amendment and article I, section 7 jurisprudence. This Court should reject WSP's suggested rule.

C. CONCLUSION

For the reasons stated, Mr. MacDicken asks this Court to reject the rule advocated by WSP, which tips the balance too much in favor of the police at the expense of the privacy of the individual, and is contrary to the well established jurisprudence interpreting the Fourth Amendment and article I, section 7.

DATED this 29th day of August 2013.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)

tom@washapp.org

Washington Appellate Project -- 91052

Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

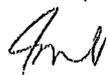
STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 88267-3
)
 ABRAHAM MACDICKEN,)
)
 Petitioner.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2013, I CAUSED THE ORIGINAL **ANSWER TO AMICUS CURIAE BRIEF** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|-----|--|---|
| [X] | MARY KATHLEEN WEBBER, DPA
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | (X) U.S. MAIL
() HAND DELIVERY
() _____ |
| [X] | ABRAHAM MACDICKEN
774117
COYOTE RIDGE CORRECTIONS CENTER
PO BOX 769
CONNELL, WA 99326 | (X) U.S. MAIL
() HAND DELIVERY
() _____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 29TH DAY OF AUGUST, 2013.

X  _____

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Subject: RE: 882673-MACDICKEN-ANSWER

Received 8-29-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [<mailto:maria@washapp.org>]
Sent: Thursday, August 29, 2013 3:58 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Webber, Kathy; Tom Kummerow
Subject: 882673-MACDICKEN-ANSWER

Please accept the attached document for filing in the above-subject case:

Answer to *Amicus Curiae* Brief

Thomas M. Kummerow- WSBA #21518
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: tom@washapp.org

By

Maria Arranza Riley

Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.