

NO. 88267-3

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

Respondent

v.

ABRAHAM MACDICKEN,

Petitioner.

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STATE OF WASHINGTON  
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ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

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## **I. STATEMENT OF THE CASE**

The statement of facts has been adequately set out in the State's response brief and in the Court of Appeals decision. Those facts are incorporated herein by reference.

## **II. ARGUMENT**

### **A. THE COURT OF APPEALS' CONCLUSION THAT THE WARRANTLESS SEARCH WAS JUSTIFIED AS VALID SEARCH INCIDENT TO ARREST IS A FACT SPECIFIC DECISION.**

The Court of Appeals concluded the warrantless search of the bags that the defendant had been carrying prior to his arrest fell within the search incident to arrest exception to the warrant requirement. Slip Opinion at 7-8. The defendant asks this Court to review this decision pursuant to RAP 13.4(b).

A petition for review will be accepted by this Court only if one of the four circumstances outlined in RAP 13.4(b) exists. This Court may accept review of a decision of the Court of Appeals if that decision conflicts with a decision of this Court or another decision of the Court of Appeals. RAP 13.4(b)(1) and (2). The Court may also accept review if the issues raised constitute a significant question of law under either the state or federal constitution. RAP 13.4(b)(3). Finally, this Court may accept review if the petition involves an issue of substantial public interest that

should be determined by this court. RAP 13.4(b)(4). The defendant does not articulate which of the four circumstances justify review in this case. Because the issue raised by the petitioner is fact specific, and does not otherwise meet the criteria for review, the petition should be denied.

The question presented in this appeal involves the application of the search incident to arrest exception to the warrant requirement. Under both the Fourth Amendment and article 1, § 7 of the Washington constitution police may search an arrestee and the area within his immediate control without a warrant. Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), State v. Valdez, 167 Wn.2d 761, 772-773, 224 P.3d 751 (2009). The justification for that exception lies in the necessity to search for weapons or destroyable evidence. Valdez, 167 Wn.2d at 773. If the arrestee obtains either a weapon or destructible evidence the arrest itself may be rendered meaningless because the arrestee will escape or destroy evidence implicating him. Id. A search for weapons is also justified on the basis of officer safety. State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

The Court of Appeals articulated and applied this exception in its decision. The defendant's contention is not that the Court

articulated the wrong standard. Rather he argues that the Court erred in applying the standard to the facts of this case. Thus the issue raised by the defendant is a fact specific inquiry. It does not involve an issue of public interest that should be considered by this Court.

Nor is it a decision that conflicts with either a decision of this Court or another decision of the Court of Appeals, or raise a significant question of law under either the state or federal constitutions. The defendant argues that the search of the bags he carried just before his arrest was not justified because he had been handcuffed. He supports his assertion by citation to Thornton v. United States, 541 U.S. 615, 625-27, 124 S.Ct. 127, 158 L.Ed. 903 (2004) (Scalia, J. concurring), and Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Petition at 7-9.

Thornton and Gant do not support his position for two reasons. First, each case articulated the same justification for search incident to arrest which this Court has recognized supports that exception under article 1, § 7. Thornton, 541 U.S. at 621, Gant, 556 U.S. 332, 339, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009). Thus the legal principal and its justification are not at issue. Second, the facts in Thornton and Gant differ from the facts here.

While the defendants in each of those cases were secured in the back of a locked patrol car at the time of the search the defendant here was not. This is a critical distinction on which the Court of Appeals justifiably relied.

The defendant argues there was no reasonable possibility that he could access the bags at the moment of the search under the facts of the case. He asks this Court to accept review to reassess those facts. In doing so he relies only on two facts; that he was in handcuffs, and the bags were taken out of his immediate control. However he fails to address other facts supporting the conclusion that the twin justifications for a search incident to arrest existed under these circumstances.

Acting on his own the defendant had committed a bold daylight armed robbery just the day before his arrest. Clearly he was a person who was willing to take risks. Police had reason to believe that he was still armed. The defendant had three associates present in the parking lot at the time of the search. Any of these associates could have easily assisted the defendant in an escape, either by creating a diversion for police, or by directly interfering with his arrest. Police did not outnumber the defendant's group. While handcuffing the defendant diminished the risk that he

would escape or present a danger to the police or nearby public, it did not virtually eliminate that risk as it would have had he been secured in a locked patrol car. Courts have recognized that handcuffs have limitations. There have been documented cases in which even handcuffed person have managed to kill police officers. Slip Opinion at 7-8, n. 17. Given the highly volatile situation facing officers there was a reasonable possibility that the defendant could have reached the bags, even given the precautions taken by officers.

The defendant faults the Court of Appeals' assessment of the facts. The facts do support the conclusion the warrantless search was justified. This Court should decline review of this issue.

Finally, the defendant asks this Court to accept review for the purpose of findings the United States Supreme Court's decision in Gant, and this Court's decisions in Patton and Valdez, have overruled this Court's earlier decision in State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992). Smith, like Gant, Patton, and Valdez apply the search incident to arrest exception to a fact pattern significantly different from the one presented here.

In Smith the arrestee was in the patrol car at the time the officer searched the fanny pack he had been wearing when he was

arrested. Smith, 119 Wn.2d at 677. Additionally Smith was arrested for consuming liquor in a public place, a non-violent offense. Those circumstances are more factually similar to those already under review by this court in State v. Byrd, 162 Wn. App. 612, 258 P.3d 686, review granted, 173 Wn.2d 1001 (2011). For those reasons, review of this case would be unhelpful and unnecessary.

**B. IF THE COURT DOES ACCEPT REVIEW IT SHOULD ADDRESS WHETHER THE DEFENDANT HAD STANDING TO CHALLENGE THE SEARCH AS IT RELATED TO THE ROBBERY CHARGE.**

The defendant was charged with two counts of first degree robbery and one count of unlawful possession of a firearm. 1 CP 55-56. The State argued that the defendant did not have a privacy interest in the bag in which the gun and laptop were found because it had been stolen. Brief of Respondent at 8-11. The Court of Appeals did not address this ground for affirming the trial court's order denying the motion to suppress evidence. 1 CP 67-68. If the Court accepts review the State asks this Court to address whether the defendant may challenge the search of the laptop bag as it relates to the robbery counts as an alternative basis on which to affirm the trial courts order. RAP 13.7(b).

**III. CONCLUSION**

For the foregoing reasons the State asks the Court to deny review.

Respectfully submitted on January 31, 2013.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: Kathleen Webber  
KATHLEEN WEBBER WSBA #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent

*via e-mail*  
On this day I mailed a properly stamped envelope enclosed to the attorney for the defendant that contained a copy of this document.

I swear under penalty of perjury under the laws of the State of Washington that this is true.

Done at the Snohomish County Prosecutor's Office  
this 31<sup>st</sup> day of Jan, 2013

*Diane Valle*

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Good Afternoon...

RE: State v. Abraham MacDicken  
Supreme Court No. 88267-3  
Petition for Review

Attached is the state's Answer to Petition for Review.

Let me know if there is a problem opening the attachment.

Thanks.

Diane.

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