

NO. 88267-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

ABRAHAM MACDICKEN,

Appellant

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SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

1. Was the search of bags in the defendant's possession at the time of arrest a lawful search incident to arrest?

2. Did the defendant have standing to contest the search of a laptop bag as it related to the robbery charges when he admitted he had stolen the bag and laptop and the trial court found this evidence more credible than the defendant's testimony at a CrR 3.6 hearing claiming ownership of the bag and computer?

II. STATEMENT OF THE CASE

On June 8, 2010 Krystal Steig was robbed at gunpoint by the defendant, Abraham MacDicken. The defendant took Ms. Steig's cell phone and laptop computer, among other items. As the defendant was leaving Ms. Steig's hotel room he encountered Thomas Brinkley, who had been living with Ms. Steig. Mr. Brinkley saw the defendant carrying Mr. Brinkley's suitcase. When Mr. Brinkley challenged him the defendant turned and displayed his gun to Mr. Brinkley, inviting Mr. Brinkley to "come over." Mr. Brinkley chose to run the other way. 1 RP 46, 50-53, 112-114, 134.

The victims called the police as soon as they were certain the defendant had driven away. Brinkley and Steig identified the defendant from still photos taken from a security tape obtained from

the hotel. Later they identified the defendant in a photo line-up. 1 RP 115-117, 177-178; 2 RP 223-224, 244.

The next day police traced Steig's cell phone to another hotel by "pinging" it. Police learned that one of the defendant's known associates were registered to a room in that hotel. They arrested the woman on a warrant. The woman said the defendant was not in her room, although two female friends were there. 2 RP 300-305.

As police walked the woman out to the parking lot the two other women who were in the room walked quickly to the arrested woman's car. Detective Adams went to talk to the women while Detective Gillebo stayed with the arrested woman. While Adams talked to the two women Gillebo released the arrested woman, because the agency that had the warrant for her was unable to take custody of her. 2 RP 232-233, 306-307.

Adams learned that one of the other two women had a warrant. As he was arresting her Officer Reorda arrived. Just as Reorda arrived Adams saw the defendant walking across the parking lot with a rolling duffel bag and carrying a computer bag. Due to the nature of the reported crime Adams and Reorda ordered the defendant to the ground at gunpoint. Gillebo handcuffed the

defendant and patted him down, finding Steig's cell phone in the defendant's pocket. 2 RP 234-236, 307-309.

Gillebo stood the defendant up and read the defendant his Miranda rights and the defendant agreed to talk to officers. The defendant told Adams that he had been at Steig's room the day before and stolen several items including the laptop and laptop bag. Within two minutes of arresting the defendant Gillebo moved the bags the defendant had been carrying about one car length away from the defendant and searched them incident to his arrest. In the computer bag Gillebo found a .9mm Kel Tec handgun that matched the description given by Steig. It also contained Steig's computer and other items associated with Steig. A fingerprint on the gun was later analyzed and determined to be the defendant's. 2 RP 237, 239-242, 268-270, 282-287, 309-312.

The defendant was charged with two counts of first degree robbery, each with a firearm allegation, and one count of unlawful possession of a firearm. 1 CP 55-56. At a CrR 3.6 suppression hearing Adams and Gillebo testified consistently with the facts outlined above. Adams testified that there were insufficient officers present to affect the arrest against the defendant and secure the

females, so the females were left standing in the parking lot when the defendant was arrested. 4-28-11 RP 13-22, 35-44.

The defendant testified that the laptop bag belonged to him and that he had not stolen it. He admitted that he told Adams that he had stolen the lap top computer, but denied saying anything about the bag. 4-28-11 RP 4-5.

The court rejected the defendant's testimony as not credible and found Adams' testimony was credible. The court found the defendant had no expectation of privacy in the laptop bag, and therefore evidence found in the search was admissible with respect to the first degree robbery counts. The defendant had automatic standing to contest the search in regard to the remaining charge. The court concluded that the search was valid as a search incident to arrest. 1 CP 67-68.

The defendant was convicted of all charges at trial. 1 CP 28-32. He challenged the search of the bags on appeal. The Court of Appeals did not address the standing issue as it related to the robbery charges. Instead the Court held the search was a valid search incident to arrest. State v. MacDicken, 171 Wn. App. 169, 286 P.3d 413 (2012).

III. ARGUMENT

A. THE SEARCH OF THE LAP TOP BAG WAS A VALID SEARCH INCIDENT TO ARREST.

Generally a warrantless search is per se unreasonable under both the Fourth Amendment and Art. 1, §7 of the Washington Constitution. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). A search incident to arrest is one of the few exceptions to that general rule. State v. Nordstrom, 7 Wash. 506, 35 P. 382 (1893), affirmed, 164 U.S. 705 (1896), State v. Ellison, 172 Wn. App. 710, 719, 291 P.3d 921 (2013). The rationale for this exception is based on concerns for officer safety and to secure evidence of the crime of arrest so as to preserve it for trial. State v. Valdez, 167 Wn.2d 761, 773, 224 P.3d 751 (2009). The scope of the search includes the arrestee's person and the area within his immediate control, i.e. "the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

Under the circumstances of this case the Court of Appeals held that the search of the defendant's bags at the time of his arrest was a valid search incident to arrest. MacDicken, 171 Wn App. at 174-75. The Court relied on the nature of the crime, the location of

the arrest and search, the existence of the defendant's associates in the area, and the location of the bags, just a few feet away from the defendant's location to conclude the bags were still within reaching distance. The defendant characterizes this conclusion as "specious" pointing to evidence that he was handcuffed at the time of the search. The defendant claims that the handcuffs eliminated any reasonable possibility that he could retrieve anything from the bags or to destroy property. Petition at 7-8.

The Department of Justice has collected reports which refute the defendants claim. The Law Enforcement Officer Killed & Assaulted (LEOKA) summaries reported an officer killed where a handcuffed suspect in the back of a patrol car was able to open the sliding partition between the front and back seats to retrieve the officer's backup weapon on January 26, 2008.¹ On September 21, 2006 a handcuffed arrestee seated in the back of a patrol car was able to retrieve a handgun concealed on his person to shoot through the partition between the front and back seat killing the officer. The arrestee then fired shots at the driver of a wrecker that

¹ <http://www2.fbi.gov/ucr/killed/2008/summaries.html>. Located under reports for Texas (TX).

came on scene before being subdued by other officers arrived.² On March 29, 1985 three handcuffed arrestees escaped when one arrestee was able to obtain a weapon to shoot an officer, causing injuries which ultimately led to the officer's death in 2011³. In 2010 an officer was killed while cuffing a suspect, who struggled, reached over a sofa and shot the officer.⁴ In 2009 an officer was shot and killed by a handcuffed burglary suspect who fired five rounds at the officer.⁵ Courts have relied on the LEOKA reports to conclude that handcuffing alone will not render an arrestee so completely "secured" that he may not reach into an area to access a weapon or destroy evidence.

In Shakir the Court rejected the defendant's argument that a search of a gym bag in his possession immediately before his arrest for an armed robbery was invalid because he was handcuffed, and thus had no access to the bag to obtain a weapon or other evidence. United States v. Shakir, 616 F.3d 315, 317 (3rd

² <http://www2.fbi.gov/ucr/killed/2006/summaries.html>. Located under reports for Texas.

³ <http://www.fbi.gov/about-us/cjis/ucr/leoka/2011/officers-feloniously-killed/summaries-of-officers-feloniously-killed>. Located under reports for Colorado.

⁴ <http://www.fbi.gov/about-us/cjis/ucr/leoka/leoka-2010/summaries-of-officers-feloniously-killed>. Located under reports for Michigan.

⁵ <http://www.fbi.gov/about-us/cjis/ucr/leoka/2009/leoka-2009>. Located under reports for New Mexico.

Cir. 2010), cert. denied, 131 S.Ct. 841 (2010). The Court applied the rule announced in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009), limiting the permissible search to the area into which the suspect may reach at the time the search incident to arrest is conducted. Shakir, 616 F.3d at 318. The Court interpreted Gant to forbid searches only “when there is no reasonable possibility that the suspect might access it.” Id. at 320. To determine whether the search was lawful the Court considered the totality of the circumstances. Handcuffing alone did not invalidate the search because they were not failsafe. The Court relied in part on the 2006 and 2008 LEOKA reports when it concluded the police lawfully searched Shakir’s bag, despite being handcuffed. Id.

The Court relied on LEOKA reports when considering whether police acted reasonably when frisking a handcuffed detainee during a Terry⁶ detention. United States v. Sanders, 994 F.2d 200, 208-09 (5th Cir. 1993), cert. denied, 510 U.S. 955, 1014 (1993). The court recognized officer safety justified both a Terry frisk and search incident to arrest. Id. Just as the defendant

⁶ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

argues here, Sanders's argument was based on the assumption that by handcuffing the defendant all risk that the defendant would flee or assault the officers was eliminated. In rejecting that argument the Court said that handcuffs do not restrain a person's legs, and their effectiveness is dependent on numerous factors. "Albeit difficult, is it by no means impossible for a handcuffed person to obtain and use a weapon concealed on his person or within lunge reach, and in so doing cause injury to his intended victim, to a by-stander, or even to himself." *Id.* at 209. The Court went on to note that in 1991 alone 4 officers were killed by people who had been handcuffed. *Id.*⁷

⁷ United States Department of Justice, *Law Enforcement Officers Killed and Assaulted* (1991). In California, a suspect managed to slip out of his handcuffs and obtain the arresting officer's duty gun, which he used to kill the officer. *Id.* at 38. A handcuffed suspect sitting in the back of a patrol car in Illinois managed to retrieve a handgun from his own boot. He shot both officers sitting in the car, killing one. The suspect then used one of the officers' handcuff key to free himself from the handcuffs. *Id.* at 39. In Indiana, a police officer arrested, handcuffed, and searched a DWI suspect, but apparently failed to find a .25 caliber pistol that the suspect was carrying. (As previously noted, Sanders was also carrying a very concealable .25 caliber pistol.) While being transported to jail, the suspect retrieved this gun and killed the arresting officer. *Id.* at 40. Finally, in Minnesota, a Deputy U.S. Marshall was killed by two prisoners who had been restrained not only with handcuffs, but also with waist chains. A waist chain is, as the name implies, a chain that encircles a person's waist, and to which the handcuffs are fastened, thereby even further restraining him. One of the prisoners managed to free himself from this more comprehensive restraint and attack the two deputies, gaining control of one of their handguns. Both deputies were shot and one died from his wounds. *Id.* at 42. *Sanders*, 994 F.2d 200, 210, n. 60 (5th Cir. 1993).

In circumstances similar to those presented here the Court of Appeals relied on Sanders reasoning when considering whether a search of a bag that had been in the defendant's possession before his arrest was a lawful search incident to arrest. Ellison, *supra*. The Court found that neither Gant nor State v. Byrd, 162 Wn. App. 612, 258 P.3d 686, review granted, 173 Wn.2d 1001 (2011) invalidated the search. Because the defendant there was not securely placed in the back of a patrol car like either the defendant in Gant or Byrd had been, it was possible, despite being handcuffed, for the defendant to escape his restraints and procure a weapon from his backpack. Ellison, 172 Wn. App. at 722-725.

As in the foregoing cases, Gant considered the totality of the circumstances when considering whether the search was justified in that particular case. The Court did not overrule its earlier decision in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Rather, it refocused the reading of that case back to its origins; pursuant to Chimel a search of a vehicle incident to a recent occupant's arrest is justified "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." Gant, 556 U.S. at 343. The Court differentiated the facts in Gant from those in Belton in part on

the basis that there was more than one suspect in the vicinity. Id. at 344.

Like Shakir and Belton the presence of other people nearby who were associated with the defendant is a circumstance that increased the possibility the defendant could reach the bags to access a weapon or destroy evidence, despite the handcuffs. The three women in the parking lot that were associated with the defendant were not secured. Those women certainly could have created a distraction or otherwise aided the defendant in an escape attempt. While officers attention were drawn to that distraction the defendant would be afforded the opportunity to access the bags and obtain a weapon which could be used to assist in his escape.

The inherent risk in taking custody of unexamined bags is also justified by the concerns for officer safety and to prevent escape or destruction of evidence. The Court recognized this risk is regularly present, so that an officer's judgment as to when and how to search a suspect has been presumed. United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973). Weapons of any kind may be easily concealed in a bag, backpack, purse or other container in the arrestees' possession at the time of arrest. Recent history has shown that firearms in

particular can be unstable, firing accidentally in some circumstances.⁸ The potential presence of firearms and other weapons which could risk the safety of the officer, the arrestee, and others in the vicinity justify the search of those bags incident to an arrest.

This Court has recognized that there is a balance between the individual privacy concerns, and safety concerns for law enforcement officers. State v. Grande, 164 Wn.2d 135, 146, 187 P.3d 248 (2008). An arrestee has a diminished expectation of privacy that justifies intrusion into their personal effects that would not be permitted as to other citizens. State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999). Given that diminished expectation of privacy, and the very real risk that any bag or other container in the arrestees' possession may contain a weapon that could result in injury if not secured from the bag or other container, this Court should find that police may lawfully search those bags and containers which police have taken custody of.

⁸See Police say girl accidentally shot at Bremerton elementary school, <http://www.king5.com/news/cities/bremerton/Child-shot-at-Bremerton-elementary-school-140049723.html>.

B. THE DEFENDANT DID NOT HAVE STANDING TO CONTEST THE SEARCH AS IT RELATED TO THE ROBBERY CHARGES.

Both parties addressed whether the defendant had standing to challenge the search incident to arrest in the Court of Appeals. The Court did not address that argument, instead focusing on the validity of the search. The State asks the Court to address this issue when deciding this case.⁹ If the Court concludes the search was not valid incident to arrest, whether the defendant has standing to challenge the search is important to the disposition of the robbery charges. If the Court concludes the search was valid, then failure to address the standing issue could be implied as a tacit waiver of that issue in future cases. In order to avoid any confusion in the future, the State asks the Court to address that issue.

Article 1, § 7 protects the “private affairs” of a person from disturbance without “authority of law.” State v. Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). “The relevant inquiry is whether the State unreasonably intruded into the Defendant’s private affairs.” State v. White, 135 Wn.2d 761, 768, 958 P.2d 982 (1998). Reasonableness, history, precedent, and commonsense define the privacy interests protected from disturbance and the scope of

⁹ In the State’s answer to petition for review the State asked the Court to address the standing issue if it did accept review. Answer to petition for review at page 6.

disturbance that may be authorized by law. Arreola, 176 Wn.2d at 291. A person's subjective expectation does not control whether he had a privacy interest in the area searched. If a person's private affairs have not been disturbed by State action then there is no violation of Article 1, § 7. State v. Puapuaga, 164 Wn.2d 515, 522, 192 P.3d 360 (2008).

The defendant argues he had an expectation of privacy in the laptop bag because he testified at the suppression hearing that the bag belonged to him. BOA 18-19, Reply BOA 1, 3. However the trial court specifically found the defendant told Detective Adams that he had stolen the laptop and laptop bag. 1 CP 360-61. The court also found the defendant's testimony that he owned both items was less credible than the detective's testimony on this point. Id. The defendant did not specifically assign error to any finding of fact, and therefore they are verities on appeal as long as there is substantial evidence to support those findings. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Credibility determinations are not reviewed by the Court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Based on those findings the court concluded the defendant did not have an expectation of privacy in the laptop bag. 1 CP 67-

68. Those findings were supported by the evidence that the defendant admitted the bag and computer had been stolen at the time of his arrest. The court's conclusions were supported by previous decisions. Historically the Court has held a person does not have a privacy interest in stolen property. State v. Hayden, 28 Wn. App. 935, 940, 627 P.2d 973, review denied, 95 Wn.2d 1028 (1981), State v. Cleator, 71 Wn. App. 217, 223, 857 P.2d 306 (1993), review denied, 123 Wn.2d 1024 (1994). Thus the trial court did not err when it concluded the defendant may not contest the search of the bags as it related to the robbery charges.

A defendant may contest the search if he has automatic standing to do so. State v. Zakel, 119 Wn.2d 563, 570 n.3, 834 P.2d 1046 (1992). A defendant has automatic standing to contest a search and seizure if (1) the offense he is charged with contains possession as an essential element of the charge and (2) the defendant was in possession of the contraband at the time of the search. State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). The defendant here was charged with Unlawful Possession of Firearm. Since possession is an essential element of that charge the defendant had automatic standing to contest the search. Possession is not an essential element of robbery however. State

v. Truong, 168 Wn. App. 529, 277 P.3d 74, 78, review denied, 175 Wn.2d 1020, 290 P.3d 994 (2012). Therefore the defendant had no standing to contest the search as it related to the robbery charges.

IV. CONCLUSION

The State asks the Court to affirm the Court of Appeals. The interest of officer safety and evidence preservation justified the search of the bags in the defendant's possession at the time he was arrested despite being handcuffed at that time. Appellate courts have relied on reports from the Department of Justice which establish that handcuffs are not failsafe, and alone do not completely eliminate the danger that an arrestee will access a weapon to injure an officer or bystander, and to effect an escape. Because the search is justified under the dual rationales in Chimel, which has been adopted by this Court, the conviction should be affirmed.

Respectfully submitted on July 25, 2013.

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