

63168-3

63168-3

NO. 63168-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERIC ROBERTS,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JAN -4 AMT: 12

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

The Honorable Chris Washington

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. GANT IS APPLICABLE AND THE ISSUE OF AN ILLEGAL SEARCH IS PROPER FOR REVIEW UNDER RAP 2.5(3).

a. Adoption of *Gant* by the Supreme Court. Since submitting Appellant's opening brief, the Washington Supreme Court has adopted *Gant* under both the Fourth Amendment of the United States Constitution and the more stringent protections under Article I, section 7 of the Washington Constitution. *Arizona v. Gant*, U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) See *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009) and *State v. Valdez*, \_\_\_ Wn.App. \_\_\_, SupCt No. 80091-0., WL 4985242, (12/24/09). *Valdez* even addressed the standing of *Stroud* in light of *Gant* stating, "*Stroud's* expansive interpretation to the contrary [of *Gant*] was influenced by an improperly broad interpretation of *Belton*, and that portion of *Stroud's* holding is overruled. *Valdez* at 7 citing *State v. Stroud*, 106 Wn.2d 144, 147, 720 P.2d 436 (1986) and *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). These holdings firmly establish the application of *Gant* in Washington and are applicable to the case at hand.

b. Application of RAP 2.5(3). As stated in appellant's opening brief, appellate courts will not review on appeal an alleged

error not raised at trial unless it is a “manifest error affecting a constitutional right.” RAP 2.5 (a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Furthermore, “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Thus, the defendant must show the motion likely would have been granted based on the record in the trial court. State v. Contreras, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998), quoting McFarland, 127 Wn.2d at 334 n.2.

The State argues there is limited evidence in the record concerning the search, yet proffers ample testimony from the Deputies to support an alternative basis for the search. Br. of Respon. at 3-4, 10. The State argues that the search incident to arrest could be an inventory search. Id. at 10. The State defeats its own argument by pointing to the evidence it does. The evidence available offers the only two plausible explanations for the search in this case: search incident to arrest and an inventory search.

In this case, the State attempts to cast doubt on the underlying reason for the search by highlighting Deputy testimony regarding an inventory search. However, the State failed to include

the Deputies' full testimony. When asked why an automobile is searched when the driver is arrested, Deputy Mikulcik indicated it was for inventory, but also a search for evidence, stating, "[w]e have the right to search the car when someone's arrested from the vehicle." 01/21/09RP 57. Deputy Eshom testified that it is standard operating procedure to search the car when the driver is arrested to search for contraband. Id. at 36. He further stated that it was also for inventory, but concluded, "everybody we arrest, we search their person and the vehicle they were in anywhere in the vehicle they could reach." Id.

After looking at the complete testimony of the Deputies, it is clear that the record is sufficiently established for this Court to make the determination that the search was conducted primarily to seek evidence of an additional crime. While the Deputies did reference an inventory search, even their reasons for that went beyond the established rationale for inventory searches.

In State v. Montague, the State Supreme Court established the rule for inventory searches:

[W]here the search is not made as a general exploratory search for the purpose of finding evidence of a crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to

him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). In this case the Deputies referred to searching the vehicle for evidence and contraband, with one going as far as to say that they have the right to do so.<sup>1</sup> This is exactly the mentality that Gant attempts to address. The expansion of Belton to an entitlement to automatically conduct a search incident to arrest or a search for evidence under the guise of an inventory search is a manifest error affecting Mr. Roberts' Constitutional rights. Because the record is sufficiently established this issue is proper for review in this Court.

2. THERE CAN BE NO "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE OF ARTICLE I, SECTION 7.

"Article I, section 7 provides greater protection of privacy rights than the Fourth Amendment." State v. Winterstein, \_\_\_Wn.2d\_\_\_, SupCt No. 80755-8, Slip Op at 6, WL 4350257, (12/03/09) (citing State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005)).

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<sup>1</sup> Additionally, State v. Williams established that a defendant may reject the protection of an inventory search, which Mr. Roberts did to no avail, if he prefers to take the chance of a loss of property. State v. Williams, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984).

The language of [Article I, § 7] constitutes a mandate that the right to privacy shall not be diminished by the gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than curbing governmental actions.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Thus, unlike the Fourth Amendment exclusionary rule, the primary purpose of the exclusionary rule mandated by Article I, section 7 is not to deter government action, but instead “*whenever* the right is unreasonably violated, the remedy *must* follow.” (Emphasis in original.) White, 97 Wn.2d at 110.

Recognizing the greater protections provided by the Washington Constitution, White specifically rejected the “good faith” standard set out in Michigan v. DeFilippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). See White, 97 Wn.2d at 109.

The Court concluded

The result reached . . . in DeFilippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. . . . This approach permits the exclusionary remedy to be completely severed from the right to be free from unconstitutional governmental intrusions.

White, 97 Wn.2d at 109; see also, Morse, 156 Wn.2d at 9-10

(Washington courts have “long declined to create ‘good faith’ exceptions to the exclusionary rule in cases in which warrantless

searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement”).

Nonetheless, in the present case the State contends this Court should apply a standard similar to that of DeFilippo. The State’s brief does not properly acknowledge the reasoning of White nor does it address the long line of cases refusing to adopt a “good-faith” exception. See State v. Wallin, 125 Wn.App. 648, 105 P.3d 1037, review denied, 155 Wn.2d 1012 (2005); State v. Riley, 121 Wn.2d 22, 30, 846 P.2d 1365 (1993); State v. Canady, 116 Wn.2d 853, 857-58, 809 P.2d (1991); State v. Nall, 117 Wn.App. 647, 651, 72 P.3d 200 (2003); State v. Crawly, 61 Wn.App. 29, 808 P.2d 773, review denied, 117 Wn.2d 1009 (1991). The Supreme Court has held that the good faith exception is “unworkable and contrary to well established principles.” White, Wn.2d at 106 n.6. The State has offered no valid reason to reconsider that position.

In fact, the Supreme Court has recently reaffirmed the correctness of White. Relying on White and its recognition of the constitutionally mandated exclusion of unlawfully obtained evidence, Winterstein rejected a lower court’s application of the inevitable discovery exception. Winterstein found such an

exception failed to properly “emphasiz[e] the individual privacy rights guaranteed in Article I, section 7” and instead focused upon deterrence. Winterstein, at 8.

Washington Courts have never endorsed an exception to the exclusionary rule which permits admission of the fruits of an unlawful search. The chief flaw the Supreme Court identified with the inevitable discovery exception as it relates to the protection of privacy rights, was that the exception “does not disregard illegally obtained evidence.” Winterstein, at 8. That flaw exists equally in the “good-faith” exception. In both instances the evidence sought to be admitted is by definition unlawfully obtained, unlike the independent source doctrine in which lawfully obtained evidence will not be suppressed merely because it was also obtained as a result of an independent but unlawful means. See Winterstein, at 7-8. As with the inevitable discovery exception, the “good-faith” exception “is incompatible with the nearly categorical exclusionary rule under Article I, section 7.” Winterstein, at 9.

“Our constitutionally mandated exclusionary rule saves Article I, section 7 from becoming a meaningless promise.” State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). “Without an immediate application of the exclusionary rule whenever an

individual's right to privacy is unreasonably invaded, the protections of the Fourth Amendment and Article I, section 7 are seriously eroded". White, 97 Wn.2d at 111-12. As Washington Courts have repeatedly demonstrated, these are not empty words. Consistent with this holding, Washington Courts have never allowed admission of unconstitutionally obtained evidence under the exclusionary rule of Article I, section 7.

The State has offered nothing that warrants departure from that reasoned course. Contrary to the State's argument neither State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), nor State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006), are relevant to this discussion. Each of those cases addressed the question of whether a probable cause determination is altered by a statute later found to be unconstitutional. These cases analyze the question of whether there was probable cause to conduct a search in the first place and not the scope of a Washington state citizen's privacy rights. By concluding police had probable cause, both Potter and Brockob concluded no constitutional violation had occurred, and thus did not apply either the exclusionary rule or any exceptions to that rule. The question here is not whether the arrest was lawful,

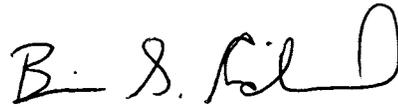
but rather, whether police may automatically search a vehicle as a result of that arrest.

**B. CONCLUSION**

For the reasons stated in this reply brief as well as the previously filed brief of appellant, Mr. Roberts submits this Court must order the evidence in his matter suppressed and reverse his conviction.

DATED this 31st day of January 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "B. S. Carmichael", written over a horizontal line.

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DIVISION ONE**

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Respondent,	)	
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	)	
ERIC ROBERTS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** 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:

<input checked="" type="checkbox"/> STEPHEN HOBBS, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ERIC ROBERTS PO BOX 12345 SEATTLE, WA 98111	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF DECEMBER, 2009.

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