

66609-6

66609-6

NO. 66609-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEANTE MAY,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRIS WASHINGTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

BRIDGETTE E. MARYMAN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Officers may conduct an investigatory stop when they have a reasonable, articulable suspicion that a suspect is involved in criminal activity. An informant's report can provide that reasonable suspicion, as long as the circumstances suggest the informant's reliability, or corroborative observation suggests that the informant's information was obtained in a reliable fashion. Here, seven witnesses called 911 to report a fight in a grocery store parking lot and several witnesses suspected that May used a gun during the fight. Were the 911 callers sufficiently reliable to justify officers stopping May?

2. Under the "plain feel" doctrine, when police feel an object that is immediately recognizable as a weapon or contraband, the item may be seized. Here, Officer Tierney felt a gun inside May's bag and searched it in order to secure the gun. Was Tierney's search of the bag lawful under the plain feel exception when he recognized the feel of the gun immediately? If not, was the search a valid search incident to arrest?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Juvenile respondent Deante May was charged by information with unlawful possession of a firearm in the second degree; specifically, the State alleged that May was under 18 years of age at the time he possessed a .38 Smith and Wesson revolver. CP 1. The case proceeded by way of a bench trial. The trial court consolidated testimony for the CrR 3.5 and CrR 3.6 hearings with trial testimony. The court ruled that May's statements were admissible and denied his motion to suppress the gun. CP 39-44. The trial court found May guilty as charged. CP 45-49. The court imposed the mandatory minimum sentence of 10 days on electronic home monitoring. CP 24-30.

2. SUBSTANTIVE FACTS.

At around 3:00 p.m. on June 6, 2010, Renton Police Officer Chris DeSmet was dispatched to a fight involving a gun in a Safeway parking lot. 1RP¹ 12. Dispatch reported that the fight involved two groups of black males. 1RP 14. Before DeSmet

¹ The verbatim report of proceedings consists of two volumes: 1RP (1/6/2011) and 2RP (1/14/2011 and 2/22/2011).

could reach the parking lot, he was advised that some of the suspects, including the one with the gun, were traveling northbound on Rainier Avenue South. Id. By the time DeSmet made it to Rainier Avenue, he was advised that another caller had seen the suspects headed eastbound on South Third Street. Id. The suspect with the gun was described as a medium build, short-haired black male, in his late teens to early 20s, wearing a black jacket and blue jeans, carrying a small duffel bag or backpack. 1RP 15. DeSmet spotted May, who matched the description, walking with several others on Rainier. Id.

DeSmet ordered the group to stop and show their hands. 1RP 16. DeSmet asked May where the bag was that he had been carrying. 1RP 18. Before May could answer, DeSmet saw the bag at May's feet. Id. Concerned for his safety based on the reports of a fight involving a gun, DeSmet ordered the group to sit on the curb, with their legs crossed in front of them. 1RP 19. Once the group was seated, DeSmet grabbed May's bag by its top and moved it away from the group. 1RP 20. The bag was a soft, draw-string bag, with no rigid structure to it. Id.

Officer Shawn Tierney was also dispatched to investigate the fight. 1RP 46. At the Safeway, Tierney contacted Gloria Butler, who described the gun that she had seen during the fight. 1RP 47-49. Tierney drove Butler to DeSmet's location in order to see if she could identify any suspects. 1RP 51. As soon as they arrived, Butler told Tierney, "That's the black bag, that's it." 1RP 52. Tierney wanted to give Butler a closer look at the bag in order to confirm the identification. Id. As soon as Tierney picked up the bag, he felt an object that he immediately recognized as a gun. 1RP 54-55. For officer safety purposes, Tierney announced the gun, to which May responded, "They had nothing to do with it, just me. Just want you guys to know that none of these guys had anything to do with it." 1RP 70. May was arrested and the gun was removed from his bag. 1RP 58.

After being advised of his constitutional rights, May admitted buying the .38 Smith and Wesson off "some guy on the street" for \$75.00. 1RP 59, 105.

C. ARGUMENT

1. MULTIPLE 911 CALLS PROVIDED OFFICER DeSMET WITH A REASONABLE, ARTICULABLE SUSPICION THAT MAY WAS INVOLVED IN CRIMINAL ACTIVITY.

May argues that Officer DeSmet did not have a reasonable, articulable suspicion to stop him because the 911 calls did not have sufficient indicia of reliability. May's argument should be rejected. Multiple 911 callers reported that a person matching May's description used a gun during a fight. Considering the totality of the circumstances, the calls were sufficiently reliable to provide DeSmet with a basis to conduct an investigatory stop.

When reviewing the denial of a motion to suppress, appellate courts review findings of fact for substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed.2d 132 (2007). Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). A trial court's conclusions of law are reviewed de novo. Mendez, at 214.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution,

warrantless seizures are per se unreasonable, unless they fall under one of the "jealously and carefully drawn exceptions" to the warrant requirement.' State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 62 L. Ed.2d 235 (1979)). An investigatory stop is one such exception to the warrant requirement. Doughty, 170 Wn.2d at 61 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)). An investigatory stop must be supported by reasonable suspicion of criminal activity based on objective, articulable facts. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing Terry, 392 U.S. at 21).

Because no single rule can be fashioned to meet every encounter between the police and citizens, courts evaluate the reasonableness of police action in light of the particular circumstances facing the officer. State v. Kennedy, 107 Wn.2d 1, 7-8, 726 P.2d 445 (1986). The reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008), review denied, 166 Wn.2d 1016 (2009).

A report of criminal activity from a citizen-witness, or an informant, may provide reasonable suspicion to justify an investigatory detention. State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). In contrast to tips provided by paid informants, police officers may presume that citizen-witness reports are credible. Lee, 147 Wn. App. at 919. A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described. Id. at 918.

Under the totality of the circumstances test, an informant's tip has sufficient "indicia of reliability" when there are "[1] ... circumstances suggesting the informant's reliability, or some corroborative observation which suggests either [2] the presence of criminal activity or [3] that the informer's information was obtained in a reliable fashion." Sieler, 95 Wn.2d at 47 (quoting State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243 (1975)). Unlike the Aguilar–Spinelli² inquiry for probable cause, the "veracity" and "basis of knowledge" prongs are not distinct under the totality of the circumstances test; rather, these elements are relevant, but are no

² Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637 (1969).

longer both essential. State v. Marcum, 149 Wn. App. 894, 904, 205 P.3d 969 (2009).

When assessing the totality of the circumstances, the nature of the crime is an important factor that must be considered. For example, in State v. Franklin, an anonymous informant reported to a police officer that he had just seen a man in a public restroom with a gun. 41 Wn. App. 409, 410, 704 P.2d 666 (1985). The informant provided a description of the man's clothing and location. Id. The officer found Franklin, who matched the description given by the informant, in the middle stall. Id. at 11. During the investigatory stop, the officer found a gun on Franklin. Id.

On appeal, Franklin argued that the anonymous informant was not reliable and that the officer verified only the innocuous details of the tip. Id. at 412. The appellate court held that, given the potential danger to the public, "immediate police verification of the tip's innocuous details supports reasonable inferences that the anonymous informant's information is based on eyewitness observation, and that the unverified portion of the tip may also be accurate." Id. at 413. Therefore, the informant's reliability was sufficiently established. Id. The appellate court also rejected Franklin's argument that the informant's tip contained insufficient

objective facts to justify the detention, finding that the potential danger posed by an armed individual calls for immediate action and that the police may forgo lengthy and unnecessary questioning in favor of an immediate investigation. Id. at 414.

Similarly, in State v. Randall, a patrol officer saw two men about six blocks away from the site of a recently-reported robbery. 73 Wn. App. 225, 226, 868 P.2d 207 (1994). One of them matched a reported description of the robber. Id. Before the officer could approach the two men, they left the area. Id. The officer later found them in a nearby building and found marijuana during a weapons frisk. Id. at 226-27. On appeal, Randall argued that the officer lacked sufficient information to make an investigatory seizure and search. Id. Affirming, the appellate court held that the nature of the suspected crime was an important factor in the totality of the circumstances analysis. Id. at 229. "An officer acting on a tip involving the threat of violence and rapidly developing events does not have the opportunity to undertake a methodical, measured inquiry into whether the tip is reliable...." Id. at 229-30. In such circumstances, requiring officers to "undertake an in-depth analysis of the reliability of the information received by the police dispatcher

would greatly impede the officer's discharge of duty and would greatly increase the threat to the public safety." Id. at 230.

Here, 911 dispatch received seven calls reporting a fight in the Safeway parking lot. Officers were informed that May was believed to be carrying a gun. Just as in Franklin and Randall, the incident posed a significant public safety threat, and this Court must consider the nature of the crime when considering the totality of the circumstances. Franklin, 41 Wn. App. at 417; Randall, 73 Wn. App. at 229. As citizen-witnesses, the 911 callers were presumably reliable, especially because they were eyewitnesses to the fight. Lee, 147 Wn. App. at 918-19. Because there were multiple calls, each call corroborated the others. Finally, Officer DeSmet corroborated that May matched the description of the suspect and was in the location reported by a 911 caller. Based on the totality of the circumstances known to DeSmet, the 911 calls had sufficient "indicia of reliability" to provide him with a reasonable, articulable suspicion that May was involved in criminal activity.

May assigns error to the trial court's failure to include a finding of fact that "none of the 911 callers had seen a gun." Brief of Appellant at 1. May offers no argument or authority to support his claim that the trial court was required to include the substance

of the 911 calls in its findings of fact. This Court should not address assignment of errors not supported by argument or authority.

RAP 10.3(a)(6).³

However, even if the trial court was required to consider the substance of the 911 calls, the calls clearly support the trial court's conclusion that officers had a reasonable, articulable suspicion to support the stop. The 911 calls can be summarized as follows:

- Track 1: An unnamed store employee reported a gang-related fight⁴ in the parking lot. Although the *caller* did not see a gun, a customer had reported seeing a gun. The caller reported that "a lot of customers are seeing it" and that "they're scattering away from the glass windows...; nobody wants to be there."
- Track 2, part 1: Safeway's assistant manager reported that somebody pulled a gun out in the parking lot. He said that the suspects were still in the parking lot, yelling

³ May also assigns error to the trial court's failure to include the finding that Officer DeSmet seized him before Officer Tierney interviewed Gloria Butler. App. Br. at 1. May argues that the trial court improperly relied upon Butler's statement to justify the stop. App. Br. at 12. May is correct that DeSmet was unaware of Butler's statement at the inception of the stop. 1RP 51. Although the trial court's oral findings reveal some confusion about the chronology of events, in its written findings, the court did not rely on Butler's statement to Tierney to justify the stop. 1RP 71-72; CP 41. Because DeSmet was not aware of Butler's statement before he stopped May, the State agrees that her statement cannot be used to support the initial seizure.

⁴ The transcription of the 911 calls in the verbatim report of proceedings includes many "inaudibles," presumably because the courtroom's recording device did not capture the quieter portions of the 911 calls. For instance, the description of the fight as "gang-related" is listed as "inaudible." 1RP 13-14. Similarly, the verbatim report of proceedings does not include background sounds, such as the intercom announcements advising customers to stay in the store until the disturbance has cleared (Track 3). For these reasons, the State urges this Court to listen to Exhibit 11 in its entirety, just as the trial court did.

back and forth. The assistant manager did not see the gun.

- Track 2, part 2: Lisa Green, a customer, described a suspect reaching into a bag, to which another kid responded, "Go ahead, pull it, pull it if you want to." Green never saw the suspect pull the gun out of his bag, but said that the suspect "put his hand in there to pull it out." Green also heard a customer in the parking lot yell, "Please don't pull it out; my baby's out here in the car." Green provided her contact information to the dispatcher.
- Track 3: Mr. Rivas, another Safeway customer, reported that "apparently there's someone outside with a weapon." Rivas was inside the store when witnesses in the parking lot had yelled to "call 911." When asked if he could get more information, Rivas explained that he did not want to "stick [his] head out there now." Rivas provided his contact information. During Rivas's call, an intercom announcement advised customers to remain in the store.
- Track 4: Christina Sheffield reported a "disturbance brewing" at the Safeway. Sheffield did not see a weapon, but noted that Safeway was advising that there was a disturbance and that people should not go outside. Sheffield gave a description of the suspects and the direction in which they were traveling. Sheffield, who was hesitant to say her name loudly enough for others around her to hear it, provided her contact information.
- Track 5, part 1: An unnamed caller reported a fight in the parking lot. She was not in the store and did not see any weapons, but was calling because "she did not want to see any of the kids get hurt."
- Track 5, part 2: Timothy⁵ Freegard reported where the suspect was traveling. Freegard, who clearly sounds excited, said that the suspect "got guns out" during the

⁵ Although the verbatim report of proceedings lists Freegard's name as "Kevin B.," review of the 911 call reveals that his first name is Timothy.

fight. Freegard explained that he did not want to get involved, but he called because "I just didn't want to see, uh, innocent people get shot. It was definitely coming to that." Freegard further explained that he did not see a gun brandished, but that the suspect was gesturing and walking towards another male in such a way that "everybody thought he had a gun the way he was acting."⁶

Exhibit 11.

May argues that the calls did not support the Terry stop because none of the callers saw a gun. May claims that the callers only saw an argument, and that engaging in an argument is not a crime. App. Br. at 12.

First, although no caller reported seeing a gun, both Green and Freegard said that the suspect gestured in such a way that they believed he had a gun. Freegard described the suspect advancing on another person. Green reported hearing one of the participants say, "Go ahead, pull it, pull it if you want to," and a woman in the parking lot yell, "Please don't pull it out; my baby's out here in the car." Clearly the people yelling at May also believed that he had a gun and was about to use it in the course of the fight.

⁶ Track 6 of Exhibit 11 is a woman who presumably saw DeSmet stop May and his group. The woman apparently called to find out whether there was a safety threat that she needed to be aware of. Track 6 was not played for the trial court. 2RP 30.

In addition to Green and Freegard, Rivas and the store employees had heard reports that someone involved in the fight had a gun. The possibility of a gun, or at least a dangerous fight, was corroborated by the fact that people were afraid to go outside, customers were scattering away from the windows, and Safeway was warning customers to remain in the store. Clearly the 911 callers witnessed more than simply an argument.

Relying on State v. Hopkins,⁷ State v. Vandover,⁸ and Florida v. J.L.,⁹ May also argues that the 911 calls did not have sufficient indicia of reliability to provide Officer DeSmet with a basis to stop him. May's case is distinguishable from Hopkins, Vandover, and J.L.

In Hopkins, an informant called 911 to report that a minor might be carrying a gun and that he was on a pay phone at a certain address. 128 Wn. App. at 858. The informant gave his name and two telephone numbers to the dispatcher. Id. The officers did not know the informant and did not attempt to contact

⁷ 128 Wn. App. 855, 177 P.3d 377 (2005).

⁸ 63 Wn. App. 754, 822 P.2d 784 (1992).

⁹ 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed.2d 254 (2000).

the informant. Id. The officers went to the pay phone and saw a man resembling the description. Id. at 859. The officers ordered the suspect to put his hands in the air and frisked him, finding a gun and drugs. Id. On appeal, the court held that the named, unknown telephone caller was no more reliable than an anonymous informant because the officers did not know anything about the caller or the circumstances of the call. Id. at 863. The court also held that the informant's tip did not contain sufficient information to suspect criminal behavior, where Hopkins was not a minor and where neither the informant nor the officers observed any criminal or suspicious behavior. Id. at 864.

May also relies on Vandover, where officers responded to an anonymous report that a man in a *gold* Maverick was brandishing a gun. 63 Wn. App. at 755. After an unsuccessful search for the gold Maverick, officers stopped Vandover's *green* Maverick and recovered a shotgun. Id. at 756. Noting that there was no indication as to whether the caller was an eyewitness to the incident, the appellate court held that the anonymous caller was not sufficiently reliable. Id. at 759-60. The court also ruled that the source of the caller's information did not appear to be reliable, given

that the details of the tip did not match what the police actually observed. Id. at 760.

Finally, May relies on Florida v. J.L. In J.L., police received an anonymous telephone call reporting that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.” 529 U.S. at 268. When police arrived at the bus stop six minutes later, they found J.L., who matched the general description. Id. at 268. J.L. made no threatening or unusual movements, and the officers could not see a firearm. Id. at 268. However, based on just the anonymous tip, one of the officers searched J.L. and found a gun in his pocket. Id. at 268. The Supreme Court held that this search was an invalid Terry stop because the anonymous tip did not contain the indicia of reliability required to provide the officer with reasonable suspicion that J.L. was carrying a gun. Id. at 272-74.

May's reliance on Hopkins, Vandover, and J.L. is misplaced. In each case, there was just one 911 caller, and police knew nothing about the circumstances of the call. Here, seven different witnesses contacted 911 about a fight in the Safeway parking lot. Without knowing anything else about the callers, the sheer number of calls would create a reason to believe that the calls were

reliable.¹⁰ Unlike in each of the cases cited by May, the record here establishes that the callers were Safeway customers and employees, and were eyewitnesses to the incident. The callers also gave descriptions of May's appearance and location, which officers were able to corroborate. The callers in this case were certainly more reliable than the callers in Hopkins, Vandover, or J.L.

Likewise, in Hopkins and J.L., the courts held that the 911 callers did not provide sufficient reason for the officers to suspect criminal activity. Here, multiple 911 callers reported a fight in the parking lot, and most of them believed that a gun was brandished, or at least involved. Those calls certainly provided sufficient information to suspect that May was involved in a crime.

Because the 911 calls bore sufficient indicia of reliability, they provided the reasonable suspicion necessary for Officer DeSmet to stop May. This Court should affirm the trial court's ruling that the stop was lawful.

¹⁰ The trial court found that the 911 calls were credible. CP 42. May does not assign error to this finding.

2. OFFICER TIERNEY LAWFULLY RETRIEVED THE GUN FROM MAY'S BAG.

May argues that Tierney conducted an unlawful search incident to arrest when he removed the gun from May's bag. May's claim fails because the search was lawful under the "plain feel" exception to the warrant requirement. Alternatively, because the bag likely contained evidence of the crime of arrest, Tierney conducted a valid search incident to May's arrest.

In denying May's motion to suppress the gun, the trial court relied primarily upon the "plain feel" exception to the warrant requirement. CP 42. The trial court ruled in the alternative that it was a lawful search incident to arrest. CP 43. Although May assigns error to the trial court's ruling that the search was lawful, May's argument focuses solely on whether it was a valid search incident to arrest. May offers no argument or authority challenging the trial court's conclusion that the search was justified under the plain feel exception. This Court should decline to address any assignment of error not supported by argument or authority. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).

The plain feel or plain touch doctrine has been recognized as a corollary of the "plain view" doctrine. The plain view doctrine

requires: (1) a prior justification for police intrusion—whether by warrant or by a recognized exception to the warrant requirement; (2) an inadvertent discovery of incriminating evidence; and (3) immediate recognition that the evidence is contraband. State v. Myers, 117 Wn.2d 332, 346, 815 P.2d 761 (1991). Under the plain feel corollary, police may seize contraband detected through the officer's sense of touch during a legitimate pat-down search. Minnesota v. Dickerson, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 124 L. Ed.2d 334 (1993); State v. Hudson, 124 Wn.2d 107, 114, 874 P.2d 160 (1994). The object will be admissible only if its “contour or mass makes its identity immediately apparent.” Dickerson, 508 U.S. at 365-76.

Although the plain feel doctrine is typically applied to weapons frisks during Terry stops, the rationale of the underlying plain view doctrine applies here: if, during the course of constitutionally-valid contact, an officer happens upon an item and the incriminating character of the item is immediately recognized, the officer may retrieve it. Hudson, 124 Wn.2d at 114.

Here, the trial court found that Gloria Butler identified May's bag as the one she had seen with the gun at Safeway.¹¹ CP 41. Officer Tierney picked up the bag to bring it closer to Butler, and immediately felt an object that he recognized as a gun. Id. After Tierney announced the gun, May said, "They had nothing to do with it, just me. I want you guys to know that none of these guys had anything to do with it." CP 42. May was arrested and officers then recovered a gun from inside his bag. Id.

Based on these findings, the trial court concluded that the gun was admissible under the plain feel exception to the warrant requirement because the officer had a reasonable suspicion to stop May and lawful access to the outside of the bag, and Tierney immediately recognized the object in the bag as a gun. CP 43. The trial court also concluded that based on officer safety purposes, it was reasonable to open the bag and secure the gun to prevent accidental discharge and to assure safe handling and transport. Id. May does not assign error to the trial court's conclusion that the discovery of the gun was justified under the

¹¹ Unlike the 911 callers, Butler actually saw May's gun during the fight. 1RP 49.

plain feel exception, or that officer safety justified retrieving the gun prior to transport. This Court should affirm the trial court's ruling.

The trial court also concluded that the search was a lawful search incident to arrest. May argues that the search was unlawful under Division Three's decision in State v. Byrd, 162 Wn. App. 612, 258 P.3d 688 (2011).¹² This Court should decline to adopt the rule announced in Byrd, as that case was wrongly decided. Even if this Court adopts the holding in Byrd, May's case is distinguishable.

In Byrd, Division Three dramatically expanded the United States Supreme Court's holding in Arizona v. Gant, 566 U.S. 332, 129 S. Ct. 1710, 173 L. Ed.2d 485 (2009). Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of the patrol car. Gant, 129 S. Ct. at 1714. Officers searched his car and discovered cocaine in the pocket of a jacket on the backseat. Id. The Court concluded that searching the vehicle violated the Fourth Amendment because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search and the officers had no possibility of discovering offense-related evidence. Id. at 1719-20. The court stated that

¹² A petition for review has been filed in Byrd; a decision on the petition is pending.

“[p]olice may search a *vehicle* incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” Id. at 1723 (emphasis added).

Officers stopped Byrd's car because it had stolen license plates on it. 162 Wn. App. at 614. Byrd was in the front passenger seat with her purse on her lap. Id. Officers arrested Byrd for possessing stolen property. Id. After she was handcuffed and secured in the patrol car, officers searched her purse, where they found methamphetamine. Id. Division Three held that under Gant, the search incident to arrest exception did not allow police to search a defendant's purse following arrest, where the defendant was secured in the patrol car at the time of the search. Id. at 617.

In Byrd, Division Three wrongly extended the holding of Gant beyond searches of vehicles to include personal property. Courts have long recognized that a search incident to arrest may include those items that are immediately associated with the person. State v. Smith, 119 Wn.2d 675, 677-78, 835 P.2d 1025 (1992). The holding in Gant was limited to searches of a car incident to arrest. The Supreme Court did not extend the holding to searches of

personal effects found on defendants at the time of their arrest and neither should this Court.

Byrd also did not consider the circumstances unique to personal items like purses and backpacks. In the case of a vehicle, officers can usually leave a vehicle secured while they transport a defendant. On the other hand, officers cannot simply leave a personal item like a backpack or a purse at the scene of an arrest, particularly if they believe that the bag contains a weapon or evidence of the arrest. Courts have long recognized that officers may perform an inventory search of personal items subsequent to a lawful arrest. Illinois v. Lafayette, 462 U.S. 640, 643-48, 103 S. Ct. 2605, 77 L. Ed.2d 65 (1983); State v. Smith, 76 Wn. App. 9, 16, 882 P.2d 190 (1994). The Supreme Court's decision in Gant does not preclude an inventory search of personal items. See United States v. Ruckes, 586 F.3d 713, 719 (9th Cir. 2009) (although vehicle search was not a valid search incident to arrest under Gant, search was admissible under the inventory exception). Here, Officer Tierney testified that once he knew that a gun was in the bag, he was not going to return the bag to May or leave it at the

scene. 1RP 67. It was therefore reasonable for officers to conduct an inventory search of the bag.

Finally, Byrd is distinguishable from May's case. Although it was possible that Byrd's purse contained evidence supporting the crime of arrest—possessing stolen property—officers did not have probable cause to believe that there was evidence in the purse. Byrd, 162 Wn. App. at 617. Nor did the officers have any reason to suspect that there was a weapon in the purse. Id. In contrast, Officer Tierney certainly had probable cause to believe that there was a gun in May's bag after he felt the gun and May implicitly admitted to knowing that it was in the bag. The gun was not only a dangerous weapon, but also evidence of the crime of arrest. Therefore, even under Byrd, Tierney's search of the bag was a lawful search incident to arrest.

This Court should affirm the trial court's unchallenged conclusion that the search of May's bag was lawful under the plain feel exception. Alternatively, the trial court correctly concluded that the search was a valid search incident to arrest.

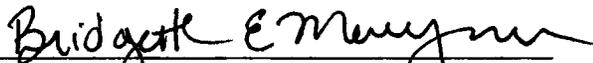
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm May's conviction.

DATED this 16 day of November, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
BRIDGETTE E. MARYMAN, WSBA #38720
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

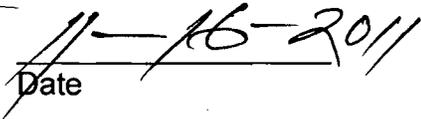
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. DEANTE MAY, Cause No. 66609-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date