

68444-2

68444-2

No. 68444-2 I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

PETER GREEN,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

---

JTB

JAN TRASEN  
Attorney for Appellant

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

TABLE OF CONTENTS

A. ARGUMENT ..... 1

THE STATE VIOLATED MR. GREEN'S RIGHT TO PRIVACY  
UNDER THE FOURTH AMENDMENT AND UNDER ARTICLE  
I, SECTION 7. .... 1

1. The receipts were admitted under an exception to the  
exclusionary rule that our Supreme Court has held no  
longer exists..... 1

2. The State cannot get around the inevitable discovery  
exception to the warrant requirement by calling it  
independent source. .... 3

B. CONCLUSION ..... 7

## TABLE OF AUTHORITIES

### **Washington Supreme Court**

<u>State v. Afana</u> , 169 Wn.2d 169, 233 P.3d 879 (2010) .....	3
<u>State v. Buelna Valdez</u> , 167 Wn.2d 761, 224 P.3d 751 (2009) .....	2
<u>State v. Coates</u> , 107 Wn.2d 882, 735 P.2d 64 (1987) .....	5
<u>State v. Gaines</u> , 154 Wn.2d 711, 116 P.3d 993 (2005) .....	5
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003) .....	3, 4
<u>State v. Patton</u> , 167 Wn.2d 379, 219 P.3d 651 (2009) .....	2
<u>State v. Snapp</u> , 174 Wn.2d 177, 275 P.3d 289 (2012) .....	1, 2, 3, 6
<u>State v. Winterstein</u> , 167 Wn.2d 620, 220 P.3d 1226 (2009) .....	3, 6

### **United States Supreme Court**

<u>Arizona v. Gant</u> , 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) .....	1, 2
<u>Katz v. United States</u> , 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) .....	1
<u>Thornton v. United States</u> , 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) .....	2
<u>Nix v. Williams</u> , 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) .....	4

### **Federal Courts**

<u>U.S. v. Herrold</u> , 962 F.2d 1131 (1992) .....	4, 5
---	------

**Washington Constitution**

Article I, section 7 ..... 1, 2, 3, 4, 6

**United States Constitution**

U.S. Const. Amend. IV ..... 1

A. ARGUMENT

THE WARRANTLESS SEARCH OF MR. GREEN'S  
VEHICLE VIOLATED HIS PRIVACY RIGHTS UNDER  
ARTICLE I, SECTION 7.

a. The receipts were admitted under an exception to the exclusionary rule that our Supreme Court has held no longer exists. The state and federal constitutions prohibit warrantless searches. U.S. Const. Amend. IV. Article I, Section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Art. I, Sec. 7.

Under both constitutional provisions, searches and seizures conducted without authority of a search warrant "are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." Arizona v. Gant, 556 U.S. 332, 338-39, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting Katz v. United States, 389 U.S. 347, 457, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); State v. Snapp, 174 Wn.2d 177, 188, 275 P.3d 289 (2012).

In Snapp, our Supreme Court expressly held that a search incident to arrest, based upon a belief that evidence of the crime of

arrest might be found in the vehicle, violates article I, section 7 (“We hold that the Thornton exception does not apply under article I, section 7”). 174 Wn.2d at 197; Thornton v. United States, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004). The Snapp Court held that under either a Fourth Amendment or an article I, section 7 analysis, a warrantless vehicle search incident to arrest is authorized only when the arrestee would be able to obtain a weapon from the vehicle or reach evidence of the crime of arrest to conceal or destroy it. 174 Wn.2d at 190 (citing Gant, 556 U.S. at 343-44; State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009); see State v. Patton, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009).

Here, the State argued in the remand hearing and subsequent briefing that the basis for the warrantless search of Mr. Green’s vehicle resulting in the seizure of the receipts was the following: 1) search incident to arrest (pre-Snapp); 2) plain view; 3) inventory/impound search; and 4) independent source. 1/6/12 RP 70-80; CP 202-07. In its response brief, the State concedes the search incident to arrest exception is foreclosed by Snapp – which was the precise finding and conclusion reached by the trial court in this case. Respondent’s Brief at 10.

The State's post hoc justifications regarding the search should not be accepted, because a search must be justified at its inception. See, e.g., State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) (no good faith exception, even where probable cause ultimately found). The receipts here were discovered, as Judge Eadie found, in an investigatory search incident to arrest, which is no longer constitutional under our case law. Snapp, 174 Wn.2d at 197.

b. The State cannot get around the inevitable discovery exception to the warrant requirement by calling it independent source. Although the two exceptions are often conflated, the State argues that the receipts seized from Mr. Green's car were admissible subject to the independent source exception to the warrant requirement. Resp. Brief at 15-25. This is convenient, considering Washington recognizes independent source, but does not recognize the inevitable discovery exception. State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (no inevitable discovery exceptions to violations of right to privacy under article I, section 7, as Washington's exclusionary rule is "nearly categorical"); Afana, 169 Wn.2d at 233; State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003). In O'Neill, the Supreme

Court refused to apply the inevitable discovery exception to the exclusionary rule, noting that it would create “no incentive for the State to comply with Article I, section 7’s requirement[s].” 148 Wn.2d at 592.

However, rather than address Washington law, the State asks this Court to follow a twenty year-old case from the Third Circuit, U.S. v. Herrold, 962 F.2d 1131 (1992). Interestingly, Herrold discusses the difficulty distinguishing between the two exceptions to the warrant requirement, noting in a footnote: “The independent source and inevitable discovery doctrine are closely related, see Nix v. Williams, 467 U.S. at 443, 104 S.Ct. at 2508, and thus it is not surprising that the government has conflated its references to them in its brief.” Id. at 1139 n.8.

In addition to Herrold’s jurisdictional and temporal remoteness, it is hardly “on all fours with the instant case,” as the State suggests. Resp. Brief at 21. As the State concedes, Officer Bacon removed the receipts from Mr. Green’s car, rather than leave the evidence pending the eventual execution of a search warrant. 10/6/09 RP 11; 1/6/12 RP 23, 26, 32-33, 46-48. This distinguishes the instant case from Herrold, in which the officers maintained the

crime scene, although they saw narcotics and paraphernalia in plain view, awaiting a search warrant. Herrold, 962 F.2d at 1134.<sup>2</sup>

Like this Third Circuit case, the Washington case law on which the State relies is also inapposite. The State suggests that under Washington law, the receipts would have eventually been discovered pursuant to the search warrant. The State calls this an independent source. Resp. Brief at 15-25. However, In State v. Gaines, our Supreme Court stressed that the evidence in question, admissible under the independent source exception, "was not seized during the initial [unlawful] glance into Norman's trunk," but only pursuant to a lawful warrant. 154 Wn.2d 711, 717, 116 P.3d 993 (2005) (emphasis added). The same was true in State v. Coates, the primary case relied upon in Gaines: "In both cases, a constitutional violation occurred that revealed that a weapon was inside an automobile. In neither case was the evidence immediately seized." Id. at 720 (discussing State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987) (emphasis added)).

Here, where the officer testified to removing the receipts from a closed container – the paper bag – then testified to removing

---

<sup>2</sup> The only item seized by officers immediately in Herrold was a loaded firearm, which also distinguishes that matter from the instant case. 962 F.2d at 1134.

the bag with receipts from the car and placing them into evidence in order to begin his investigation, the cases cited by the State do not support the State's position.

The State has argued that the warrantless search of Mr. Green's jeep was an inventory search. CP 179-84, 1/6/12 RP 70-75. Following remand, and the trial court's specific finding that the search was an "investigatory search incident to the defendant's arrest," CP 209-10 (FF I), the State did not cross-appeal. This finding was made in a pre-Snapp universe. Once the State recognized that Snapp would remove the search incident to arrest exception, the State changed its theory to independent source, although the facts seem more closely aligned with inevitable discovery which is incompatible with Article I, section 7 of our constitution. Winterstein, 167 Wn.2d at 636.

Since the warrantless search resulting in the seizure of the receipts was determined by the trial court to be investigatory, reversal is required. State v. Snapp. 174 Wn.2d 194; Winterstein, 167 Wn.2d at 636.

E. CONCLUSION

For the above reasons, Mr. Green respectfully asks this Court to reverse, finding that the warrantless search of his vehicle was in violation of his right to privacy under article I, section 7.

Respectfully submitted this 14<sup>th</sup> day of December, 2012.

  
\_\_\_\_\_  
JAN TRASEN – WSBA # 41177  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68444-2-I
v.	)	
	)	
PETER GREEN,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF DECEMBER, 2012, 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:

[X] SAMANTHA KANNER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] PETER GREEN 2001 E YESLER WAY APT 36 SEATTLE, WA 98122	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF DECEMBER, 2012.

X \_\_\_\_\_ 

*[Handwritten signature]*  
2012 DEC 14 10:15 AM  
COURT OF APPEALS  
DIVISION ONE

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710