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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY
DEPUTY

NO. 43244-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO JAVIER MILLAN,

Appellant.

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

The Honorable Thomas P. Larkin

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence seized during a warrantless search of his vehicle incident to arrest.

2. The trial court erred in entering finding of fact 10 and conclusions of law 5, 6, 7, and 8. CP 135-37.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court err in denying appellant's motion to suppress evidence seized during a warrantless search of his vehicle incident to arrest where the search was not necessary to preserve office safety or prevent destruction or concealment of evidence and the open view exception to the warrant did not apply?

C. STATEMENT OF THE CASE[1]

1. Procedural Facts

On April 02, 2007, the State charged appellant, Francisco Javier Millan, with one count of unlawful possession of a firearm in the first degree and one count of driving while in suspended or revoked status in the first degree. CP 1-2. Millan pleaded guilty to driving while in suspended or revoked status in the first degree and received a suspended

[1] There are six volumes of verbatim report of proceedings: 1RP - 10/29/07; 2RP - 10/30/07; 3RP - 10/31/07; 4RP - 11/01/07; 5RP - 12/07/07; 6RP - 01/04/12, 01/11/12, 03/23/12.

sentence. CP 15-19; 1RP 3-33. A jury found Millan guilty of unlawful possession of a firearm in the first degree and the court sentenced him to 42 months in confinement. CP 3-14; 4RP 279-83.

Millan filed a notice of appeal on January 3, 2008. CP 20-32. This Court affirmed his conviction in State v. Millan, 151 Wn. App. 492, 212 P.3d 603 (2009). The Washington Supreme Court reversed and remanded for a suppression hearing in State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011)(consolidated cases).

On December 1, 2011, Millan filed a motion to suppress. CP 64-70. The trial court held a 3.6 hearing and denied the motion on January 11, 2012. 6RP 35-38. Millan filed a motion for reconsideration on January 17, 2012, which the court denied on March 23, 2012. CP 76-132, 6RP 44-45. The court entered Findings of Fact and Conclusions of Law, concluding that the evidence was admissible. CP 135-37.

Millan filed a timely notice of appeal. CP 138.

2. Substantive Facts

a. Trial Testimony

Officers Christopher Shipp and Tim Caber were on duty on April 1, 2007 when they received a call from dispatch around 1 a.m. about "a disturbance." 2RP 59-60. Shipp testified that Caber was driving and when they arrived at the scene "the reporting party" pointed out the car

that they called about. 2RP 61-62. The officers drove up behind the car and activated their lights and siren. The car gradually slowed down and eventually pulled into a parking stall and stopped. 2RP 63-64. The driver made no furtive movements. 2RP 72-73. Shipp approached the passenger side of the car and asked the woman to step outside. She identified herself as the driver's wife and "appeared to be very upset, had been crying, and appeared fearful." 2RP 64-65, 68. Shipp had her wait in front of the car while he spoke with the reporting party. 2RP 65. Caber contacted Millan, the driver. 2RP 65-66. After conducting an investigation, they arrested Millan. 2RP 65. Caber searched the car incident to arrest and they released the car to Mrs. Millan. 2RP 68-69.

Officer Caber testified that neither the driver nor the passenger made any furtive movements when they pulled the car over. 2RP 96-97. Caber asked Millan to step out of the car and he was compliant. 2RP 88. Caber placed him in wrist restraints, patted him down, and put him in the back of the patrol car. 2RP 89. While walking up to the Millans' car to conduct a search, Caber saw a pistol through the window. He retrieved the pistol that was lying on the floorboard behind the driver's seat. 2RP 91, 99. Thereafter, Caber ran a records check and learned that Millan was a convicted felon and that his driver's license had been suspended. 2RP

92-93. The pistol was not loaded and it was not registered to Millan. 2RP 101, 103-04.

b. Testimony at 3.6 Hearing

Officer Shipp testified that he and Officer Caber responded to a 911 domestic violence call. 6RP 5. The 911 caller reported an altercation between a male and female at 25th and Pacific Avenue and claimed that the male pulled the female back in a car and drove down the street. 6RP 6. There was no report of a weapon. 6RP 13. The officers responded to the scene and pulled up behind the car and activated their lights and siren. The car slowed down and eventually stopped. The driver displayed no furtive movements. 6RP 6-7, 14. Shipp approached the passenger side of the car and spoke with Mrs. Millan who said she had been arguing with her husband but no physical assault had taken place. 6RP 7-8. He did not "observe any signs of assault." 6RP 14. Then Shipp spoke with the witnesses who had called 911 and followed the Millans' car. They claimed that Millan chased down his wife in the street, pulled her back in the car by her hair, and punched her in the head. 6RP 8-9. Millan was arrested for assault in the fourth degree and driving with a suspended license. 6RP 15. The car was released to Mrs. Millan. 6RP 12.

Officer Caber testified that he approached the driver's side of the car and asked Millan to step out of the car. Caber placed Millan in wrist

restraints because "he was a suspect in a DV assault" and put him in the patrol car. 6RP 17-18. Once Shipp advised him that there was probable cause for a domestic violence assault, Caber conducted a search of the car incident to arrest. 6RP 18, 21. Caber saw a pistol behind the driver's seat when he opened the rear door of the car. He "took it into custody and ensured that it was in a safe state." 6RP 18-19. Caber could not recall if he initially saw the pistol through the car window or whether they decided to release the car to Mrs. Millan. 6RP 19-20.

c. Trial Court's Ruling

Following argument from the State and defense counsel, the court stated that it would review the trial transcripts and relevant case law before ruling on Millan's motion to suppress. 6RP 31-32. Thereafter, the court denied the motion:

> And so the issue is, what do we do with a gun that's in plain view? And I think an exception to the rule is that allows the officers to search is that in order to protect the safety of the officers and the general public, the officers should be permitted to check the status of a weapon when the weapon is in plain view. I don't think it matters whether the vehicle's going to be released or not. I suppose there's some consideration there.
>
> The bottom line is, we have a very emotional situation for which we know and understand those in this business that domestic violence situations bring out the worst in people. And too often, we have people seriously injured or killed as a result of those things between family

> members. And it just wouldn't make any sense to not allow the officer to safely secure that weapon.

6RP 35-38.

The court subsequently denied Millan's motion for reconsideration. 6RP 44-45.

D. ARGUMENT

> THE TRIAL COURT ERRED IN DENYING MILLAN'S MOTION TO SUPPRESS EVIDENCE SEIZED DURING A WARRANTLESS SEARCH OF A VEHICLE INCIDENT TO ARREST WHERE THE SEARCH WAS NOT NECESSARY TO PRESERVE OFFICER SAFETY OR PREVENT THE DESTRUCTION OF EVIDENCE AND THE OPEN VIEW EXCEPTION TO A WARRANT DID NOT APPLY.

Reversal is required because the trial court erred in denying Millan's motion to suppress evidence seized during a warrantless search of his car incident to his arrest where the search was not necessary to preserve officer safety or prevent destruction of evidence and the open view exception to a warrant did not apply.

Appellate courts review the denial of a suppression motion to determine whether substantial evidence supports the trial court's findings and whether those findings support the conclusions. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The trial court's conclusions of law are reviewed de novo. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008).

1. The warrantless search of Millan's car incident to his arrest was unlawful, in violation of article I, section 7, where at the time of the search, he did not pose a safety risk and evidence could not be concealed or destroyed.

Article I, section 7 of the Washington State Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision differs from the Fourth Amendment of the United States Constitution in that it "clearly recognizes an individual's right to privacy with no express limitations." State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). The right to be free from unreasonable governmental intrusion into one's 'private affairs' encompasses automobiles and their contents. State v. Afana, 169 Wn.2d 169, 176, 233 P.3d 879 (2010); State v. Parker, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). "From the earliest days of the automobile in this state, this court has acknowledged the privacy interest of individuals and objects in automobiles." Seattle v. Mesiani, 110 Wn.2d 454, 456-57, 755 P.2d 775 (1988)(citing State v. Gibbons, 118 Wn. 171, 187, 203 P. 390 (1922).

Under article I, section 7, a warrantless search is per se unreasonable unless it falls within one of the carefully drawn exceptions to the warrant requirement. State v. Patton, 167 Wn.2d 379, 386, 219 P.3d 651 (2009). When a vehicle search is conducted pursuant to the search incident to arrest exception, the search "is unlawful absent a reasonable

basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search." Patton, 167 Wn.2d at 394-95. "[A]fter an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception." State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

Under article I, section 7 and the Fourth Amendment of the United States Constitution, "a warrantless vehicle search incident to arrest is authorized 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." State v. Snapp, 174 Wn.2d 177, 190, 275 P.3d 289 (2012)(citing Arizona v. Gant, 556 U.S. 322, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). In Gant, the United States Supreme Court identified a second form of vehicle search incident to arrest. The Court held that "circumstances unique to the automobile context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' " Gant, 566 U.S. at 343 (quoting Thornton v. United States, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905

(2004)). Even broader than the "Thornton exception" is the "automobile exception" to the warrant requirement recognized under the Fourth Amendment. The automobile exception allows for a warrantless search of a vehicle when "there is probable cause to believe a vehicle contains evidence of criminal activity." Gant, 566 U.S. at 346 (citing United v. Ross, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)). Unlike under the Fourth Amendment, the Thornton exception and automobile exception do not apply under article I, section 7 of the Washington Constitution. Snapp, 174 Wn.2d at 192, 197.

"A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest." Snapp, 174 Wn.2d at 192 (quoting Buena Valdez, 167 Wn.2d at 773). The record here substantiates that the warrantless search of the Millans' car was not necessary to preserve officer safety or prevent destruction or concealment of evidence. Officer Shipp testified that after they stopped the Millans' car, he approached the passenger side of the car and asked Mrs. Millan to step outside and wait in front of the car while he spoke with the witnesses who called 911. 2RP 63-65, 68; 6RP 6-9. Officer Caber testified that he approached the driver's side of the car and asked Millan to step out of car and he complied. Millan was arrested,

placed in wrist restraints, patted down, and put him in the back of the patrol car. 2RP 65, 88-89, 6RP 17-18.

At trial, Caber testified that while he walked up to the Millans' car to conduct a search incident to arrest, he saw a pistol through the window, but at the 3.6 hearing he testified that he saw a pistol behind the driver's seat when he opened the rear door. 2RP 91, 99; 6RP 18-19. He retrieved the pistol that was lying on the floorboard behind the driver's seat. 2RP 91, 99. After recovering the pistol, he ran a records check and learned that Millan was a convicted felon and that his driver's license had been suspended. 2RP 92-93.

Both officers testified that they did not see any furtive movements when they pulled the car over. 2RP 72-73, 96-97; 6RP 6-7, 14. Millan was compliant when Caber asked him to step out of the car. 2RP 88. He was handcuffed and secured in the back of the patrol car. Neither officer expressed concerns for their safety or for the destruction or concealment of evidence. Clearly, the officers could have obtained a warrant before searching the car and consequently the search was unlawful under article I, section 7. "[W]hen a search can be delayed to obtain a warrant without running afoul of concerns for the safety of the officer or to preserve evidence of the crime of arrest from concealment or destruction by the arrestee (and does not fall within another applicable exception), the

warrant must be obtained." Snapp, Wn.2d at 195 (quoting Buena Valdez, 167 Wn.2d at 773)(emphasis added by the court).

2. The open view exception to the warrant does not apply where at the time of the search, the officers did not have probable cause to believe that the pistol was evidence of a crime and they were not faced with exigent circumstances.

There are "a few jealously guarded exceptions" to the warrant requirement and "[i]t is always the State's burden to establish that such an exception applies." State v. Swetz, 160 Wn. App. 122, 133, 247 P.3d 802 (2011), review denied, 174 Wn.2d 1009, 281 P.3d 686 (2012)(citing Afana, 169 Wn.2d at 177). One exception to the warrant requirement is the open view doctrine, which applies when an officer observes evidence from a nonconstitutionally protected area. State v. Jones, 163 Wn. App. 354, 361, 259 P.3d 351 (2011), review denied, 173 Wn.2d 1009, 268 P.3d 941 (2012). The open view doctrine does not, however, provide authority to enter constitutionally-protected areas to seize evidence without first obtaining a warrant. Id. In order to seize items in open view, the officer must have probable cause to believe the items were evidence of a crime and be faced with " 'emergent or exigent circumstances regarding the security and acquisition of incriminating evidence,' " such that it is impracticable to obtain a warrant. Id. at 361-62 (citing State v. Gibson,

152 Wn. App. 945, 956, 219 P.3d 964 (2009)(quoting State v. Smith, 88 Wn.2d 127, 137-38, 559 P.2d 970 (1977)).

The existence of probable cause standing alone does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (citing State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). The exigent circumstances exception to the warrant applies where " 'obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.' " Tibbles, 169 Wn.2d at 370 (citing State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009)(quoting State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). The Washington Supreme Court has identified circumstances from federal cases that "*could* be termed 'exigent' " circumstances. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)(emphasis added by the court). The circumstances include (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence. Tibbles, 169 Wn.2d at 370. The existence of one of the circumstances does not mean that exigent circumstances justify a

warrantless search. The court must look to the totality of the circumstances in determining whether exigent circumstances exist. Id.

The record here reveals conflicting testimony by Officer Caber as to when he first saw the pistol in the Millans' car. At trial, Caber said that he saw the pistol through the car window, but at the 3.6 hearing, he said he saw the pistol when he opened the rear door. 2RP 91, 99; 6RP 18-19. Even if Caber initially saw the pistol through the car window, the open view exception to the warrant does not apply. Caber testified that after he retrieved the pistol, he ran a records check and learned that Millan was a convicted felon and that his driver's license had been suspended. 2RP 92-93. Consequently, he did not have probable cause to believe the pistol was evidence of a crime at the time of the search. Furthermore, Caber was not facing exigent circumstances such that it was impracticable to obtain a warrant because neither he nor Shipp claimed that waiting for a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. Millan was handcuffed and secured in the back of the patrol car so he did not pose a danger to the officers or the public and he could not destroy evidence. 2RP 91, 99; 6RP 17-18. To find exigent circumstances here "would set the stage for the exigent circumstances exception to swallow the general warrant requirement." Tibbles, 169 Wn.2d at 372.

> [I]f an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car. Because there has been no search, article [I], section 7 is not implicated. Once there is an intrusion into the constitutionally protected area, article [I], section 7 is implicated and the intrusion must be justified if it is made without a warrant.

State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986).

The record substantiates that under the totality of the circumstances, there was no justification for the warrantless search of the car. The trial court erred in entering finding of fact 10 because there was no testimony that the "officers used a flashlight." The court erred in entering conclusions of law 5, 6, 7, and 8 because the firearm was not "in plain view," there was no safety concern for the officers and the public, the officers were not justified in securing the firearm, and the evidence seized was not admissible. CP 135-37.

Reversal is required because the warrantless search of the car violated Millan's right to privacy under article I, section 7 of the Washington Constitution.

E. CONCLUSION

"Constitutional safeguards must not be sacrificed upon the altar of expediency." State v. Aiken, 72 Wn.2d 306, 355, 434 P.2d 10 (1967). For the reasons stated, this Court should reverse the trial court's denial of Mr. Millan's motion to suppress.

DATED this 19th day of September, 2012.

Respectfully submitted,

VALERIE MARUSHIGE
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Attorney for Appellant, Francisco Javier Millan

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Francisco Javier Millan, Alien # A42-989-309, Northwest Detention Center, 1623 East J Street, Tacoma, Washington 98421.

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

DATED this 19th day of September, 2012 in Kent, Washington.

Valerie Marushige

VALERIE MARUSHIGE
Attorney at Law
WSBA No. 25851

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