

NO. 65558-2-I
NO. 65559-1-I (Consolidated Case)

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Appellant,

v.

RHIENNA MARIE VIRDEN,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

APPELLANT’S OPENING BRIEF

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I. SUMMARY OF ARGUMENT

Rhienna Virden was arrested in two separate cases as the driver of a vehicle where troopers observed a strong odor of marijuana from the vehicle. Virden was placed under arrest for possession of marijuana and use of drug paraphernalia. Troopers searched the vehicle on both occasions for evidence relating to the crime of arrest.

In both cases, the trial court declined to follow decisions from Divisions I and II involving searches related to evidence of the crime of arrest and instead applied an analysis from a state Supreme Court case involving arrest on a warrant.

The State contends the searches here were lawful since the searches were for evidence relating to the crime of arrest. The State contends that the trial court erred in failing to follow binding precedent on that issue. As a result, this Court should reverse the suppression order of the trial court and reinstate the charges.

II. ASSIGNMENTS OF ERROR

1. In both cases, the trial court erred in concluding that whether the officer would have found evidence of the crime of arrest is irrelevant.

2. In both cases, the trial court erred in concluding that “[b]ecause there was no risk of any potential evidence being concealed or destroyed, the search of the vehicle was not lawful.”

3. In both cases, the trial court erred in concluding that the warrantless search for evidence of the crime of arrest was not lawful.

4. In both cases, the trial court erred in suppression of the evidence.

5. In both cases, the trial court erred in ordering dismissal of the charges as a practical effect of the improperly granted suppression of evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a defendant is being placed under arrest for a crime, did the trial court err in concluding that whether the officer would have found evidence of the crime of arrest is irrelevant to whether the search was lawful? (Assignment of Error Number One.)

2. Where a defendant was being placed under arrest for a crime did the trial court err in concluding that “[b]ecause there was no risk of any potential evidence being concealed or destroyed, the search of the vehicle was not lawful?” (Assignment of Error Number Two.)

3. Did the trial court err in concluding that the warrantless search for evidence relating to the crime of arrest was not lawful?

(Assignment of Error Number Three.)

4. Did the trial court err in granting suppression of the evidence? (Assignment of Error Number Four.)

5. Did the trial court err in ordering dismissal of the charges as a practical effect of the suppression of evidence? (Assignment of Error Number Five).

IV. STATEMENT OF THE CASE

1. Procedural history of cases.

On January 28, 2010, Rhienna Virden was charged with Possession with Intent to Deliver Heroin and Possession of Vicodin, alleged to have occurred on November 14, 2009. CP 1-2. Virden was charged along with a co-defendant, Casey Olson. CP 1.

On January 28, 2010, Virden was also charged in a separate case with Possession of Hydrocodone alleged to have occurred on December 25, 2009. CP 1 (10-1-00087-8).¹

¹ Cause 10-1-00086-0 was assigned the Court of Appeals number 65559-1-I. This case was consolidated into Court of Appeals number 65558-2-I which was case number 10-1-00087-8 at the trial court. The State will make references to the record to case involving 10-1-00087-8 by adding that number in parentheses.

On March 23, 2010, Virden filed a motion to suppress in both cases upon the allegation of an unlawful search. CP 9-18, CP 4-9 (10-1-00087-8).

On March 30, 2010, the State filed a response. CP 19-30 CP 10-16 (10-1-00087-8).

On April 5, 2010, Virden filed a reply. CP 31-2, CP 17-18 (10-1-00087-8).

On April 7, 2010, the trial court heard oral argument on the motion in both cases at the same time. 4/7/10 RP 3. The argument was based upon the police reports which had been submitted as attached to the briefs.

At the close of the argument, the trial court determined that the case of State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), controlled and granted the motion to suppress. 4/7/10 RP 17. The trial court also held that the opinion involving arrest on a warrant was not dicta applicable to a search incident to arrest. 4/7/10 RP 17.

On April 12, 2010, the trial court entered written findings of fact and conclusions of law upon the suppression motion in each case. CP 33-4, CP 19-20 (10-1-00087-8).

On April 21, 2010, the State filed a motion for reconsideration based upon State v. Wright, 155 Wn. App. 537, 230 P.3d 1063 (2010). CP 35-40, CP 21-6 (10-1-00087-8).

On May 7, 2010, the case came on for reconsideration. 5/7/10 RP.
3. The case was continued one week for the court to review the motion for reconsideration. 5/7/10 RP 5.

On May 13, 2010, the trial court entered a written ruling denying reconsideration. CP 42, 28 (10-1-00087-8).

On May 28, 2010, the trial court entered written orders finding that as a result of the suppression of evidence, there is insufficient evidence to pursue the charges and the practical effect was dismissal of the charges. CP 43-4, CP 29-30 (10-1-00087-8).

On June 3, 2010, the State timely filed a notice of appeal on both cases from the dismissal and the denial of reconsideration. CP 45-51 & CP 28 (10-1-00087-8).

2. Relevant facts pertaining to suppression rulings.

On November 14, 2009, Trooper Jason Betts of the Washington State Patrol stopped a vehicle being driven by the defendant, Rhienna Virden, for a number of traffic infractions. CP 26. The defendant admitted to driving erratically. CP 26. Upon contacting the defendant, he was able to smell the obvious odor of marijuana and alcohol coming from the vehicle. CP 26. Trooper Betts arrested Virden for possession of marijuana and use of drug paraphernalia based upon the odor he observed

in the vehicle. CP 26. After a second trooper arrived for back up, all three male passengers were removed and frisked for weapons. CP 27. The second trooper was outside of the vehicle while Trooper Betts searched for marijuana in the vehicle. CP 27.

Trooper Betts found marijuana flakes throughout the vehicle and some marijuana in a compartment next to the steering wheel. CP 27. In the center console he found a sandwich bag with marijuana in it, a sandwich bag with several white pills (Vicodin), one blue pill (Xanax), and a third sandwich bag with large brown chunks (13.27 grams of heroin). CP 27, 29. There was also a scale with marijuana residue and a brown sticky substance on it which the Crime Lab Report found contained heroin and cocaine. CP 27, CP 8.

The defendant's vehicle was parked on the side of the road, locked and left there. CP 27. After being transported to the police station, the defendant told Trooper Betts that the drugs belonged to the guys in the back seat. CP 28. She then stated that some guy that she didn't know had her car for a week to fix it. CP 28. She said she did not know his name or how to contact him, but let him take her car for a week. CP 28. The defendant admitted that the scale was hers. CP 28.

On December 25, 2009, Trooper Clancey Agüero of the Washington State Patrol stopped a vehicle being driven by the defendant,

Rhienna Virden, for speeding. CP 16. Upon contacting Virden, Trooper Aguero smelled an obvious odor of marijuana coming from the vehicle. CP 16. The defendant admitted that marijuana had been smoked in the vehicle, but stated that it was the night before. CP 16. She was then removed from the vehicle and placed under arrest for possession of marijuana and use of drug paraphernalia. CP 16. A search of the vehicle revealed a small glass pipe in the center console with marijuana residue and a hydrocodone pill in a wallet in the defendant's purse. CP 16.

3. Trial Court Rulings.

From the incident on November 14, 2009, the trial court found that Virden was arrested prior to the search of her vehicle, but that neither she nor anyone else had access to the vehicle at the time of the search. CP 33. The trial court concluded that State v. Valdez, 167 Wn.2d 761 (2009) was controlling authority and was not dicta as applied to the present case. CP 34. The trial court also concluded that the Court of Appeals decision of State v. Snapp, 153 Wn. App. 485 (2009) was not controlling authority. CP 34. As a result the trial court found that since there was no risk of concealment or destruction of evidence and the search of the vehicle was not lawful the evidence located was ordered suppressed. CP 34.

From the incident on December 25, 20009, the trial court entered substantially similar written factual findings to those for the other case. CP 19 (10-1-00087-8). The trial court's conclusions of law were identical. CP 20 (10-1-00087-8).

After reconsideration where the trial court was specifically made aware of authority from Division I of State v. Wright, the trial court denied reconsideration. CP 42, 28 (10-1-00087-8). In doing so trial court specifically noted that State v. Wright, addressed the issue before the court. CP 42, CP 28 (10-1-00087-8). However, the trial court believed that State v. Wright failed to address the issue about whether the crime of arrest could be concealed or destroyed. CP 42, CP 28 (10-1-00087-8). Therefore, the trial court applied that portion of the analysis from State v. Valdez, 167 Wn.2d 761 (2009) and denied reconsideration. CP 42, CP 28 (10-1-00087-8).

V. ARGUMENT

1. The standard of review of a trial court's conclusions of law is de novo.

Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

The State is not contesting any factual findings of the trial court

except for the determination that there was no risk that any potential evidence being concealed could be easily destroyed. Otherwise, the facts at the trial court were not disputed and were based upon the copies of the police reports filed with the briefs. CP 19-30, CP 10-16 (10-1-00087-8).

2. The exception to the warrant requirement of a search of the vehicle related to the crime of arrest applies.

A warrantless search is unreasonable under both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution, unless the search falls within one or more specific exceptions to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The State has the burden to prove that a warrant exception applies. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001); State v. Ladson, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999). The exceptions include consent, exigent circumstances, plain view, inventory searches, investigatory Terry stops, and searches incident to a valid arrest. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor involving the use or possession of cannabis shall have the authority to arrest the person. RCW 10.31.100.

In Arizona v. Gant, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the United States Supreme Court adopted two new rules concerning vehicle searches incident to arrest. The first is that police may search a vehicle incident to arrest only when the passenger is unsecured and within reaching distance of the vehicle's passenger compartment. Gant, at 1723 – 24. The second is that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Id.

The State contends that in the present cases, the search of the vehicle in which Virden was driving was a valid search of the vehicle for evidence relating to the crime of arrest.

In State v. Wright, 155 Wn. App. 537, 230 P.3d 1063 (2010), the defendant was arrested for possession of marijuana, which was based on the officer smelling the odor of marijuana in the vehicle. The police then searched the vehicle incident to arrest after the defendant was arrested, handcuffed and placed in the patrol car. The search of the passenger compartment of the vehicle revealed a couple of baggies of marijuana, oxycodone and a scale.

The Court of Appeals for Division I reviewed this case and considered the cases of Arizona v. Gant, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), and

State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009). After a thorough review of not only these cases, but both the Federal and Washington history that preceded these decisions, the Court concluded that:

Here, the unchallenged facts establish a clear nexus between Wright, the crime of the arrest, and the search of the car. Wright was the only occupant in the car. As soon as Wright opened the car window and the strong odor of marijuana wafted into the outside air, the officer had probable cause to arrest and search for evidence of the crime the officer knew he was committing. ...

Because the police had probable cause to arrest Wright for possession of marijuana and to search the car for evidence of the drug crime, the search of the passenger compartment of the car incident to arrest did not violate article I, section 7.

State v. Wright, 155 Wn. App. 537, 556, 230 P.3d 1063 (2010).

The facts of this case are nearly identical to the fact in Wright. Here, the defendant was stopped after committing a number of traffic infractions. When the trooper approached the vehicle he noticed an obvious odor of marijuana coming from the vehicle. Based on the odor of marijuana, the defendant was arrested, handcuffed and placed in the patrol car. The passengers were then removed from the vehicle and the vehicle was searched incident to arrest. As stated by the Court of Appeals for Division I in Wright the search of the defendant's vehicle incident to her arrest was lawful. The same analysis was also put forth by Division II in State v. Snapp, 153 Wn. App. 485, 489, 219 P.3d 971 (2009).

Like the officer in Wright, and unlike the officers in Patton and Valdez, the police here were not conducting a “fishing expedition” for evidence of a crime unrelated to the crimes for which Mills was arrested. See Wright, 155 Wn. App. at 555, 230 P.3d 1063 (2010). Because the facts of this case show the necessary connection between Virden’s arrests and the warrantless search of her car for evidence of the crime of arrest the search of the passenger compartment did not violate article I, section 7.

3. The trial court erred in concluding that the search was unlawful because there was no risk of any potential evidence being concealed or destroyed.

i. The trial court erred by failing to follow the binding authority of State v. Wright, and State v. Snapp.²

The trial court here was specifically aware of both State v. Wright and State v. Snapp at the time of the ruling at the trial court. In fact on reconsideration, the trial court even noted that State v. Wright, addressed the issue before the court. CP 42, CP 28 (10-1-00087-8). However, the

² There has been a petition for review filed in State v. Snapp. It was assigned Washington Supreme Court number 84223-0. As of September 17, 2010, according to the Supreme Court website, that case is presently set on the Supreme Court petition for review calendar for October 5, 2010.

Similarly, there has been a petition for review filed in State v. Wright. It was assigned Washington Supreme Court number 84569-7. As of September 17, 2010, according to the Supreme Court website, the case is presently set on the Supreme Court petition for review calendar for October 5, 2010.

The State intends to stay the present case at the Court of Appeals if review is accepted in Snapp or Wright.

trial court disregarded the binding authority of State v. Wright. CP 42, CP 28 (10-1-00087-8). Instead, the trial court claimed since Wright failed to address the issue about whether evidence of the crime of arrest could be concealed or destroyed it applied that portion of the analysis from State v. Valdez. CP 42, CP 28 (10-1-00087-8).

In State v. Snapp, the trooper searched the defendant's vehicle after placing the defendant in his patrol car. State v. Snapp 153 Wn. App. 485, 489, 219 P.3d 971 (2009). However, unlike in Gant, the trooper searched the defendant's vehicle for evidence related to the crime for which he was arrested. Id. The trooper arrested the defendant for escape, driving while license suspended, and for possession of drug paraphernalia. State v. Snapp 153 Wn. App. at 495, 219 P.3d 971 (2009)495. The trooper stated at the suppression hearing that he was searching the car for drugs. State v. Snapp 153 Wn. App. at 496, 219 P.3d 971 (2009) The Court of Appeals held that the trooper's search falls under the exception laid out in Gant because the trooper searched the defendant's vehicle for evidence related to the crime for which he arrested the defendant and Gant did not warrant suppression of the evidence. State v. Snapp 153 Wn. App. at 497, 219 P.3d 971 (2009). The Court further held that the trooper finding evidence of identity theft was proper because he was searching for evidence related to the crime of arrest (drug paraphernalia). Id.

Similar to Snapp, the defendant's vehicle in these cases was searched for evidence of her crime of arrest. Immediately upon contacting the defendant, the trooper smelled an obvious odor of marijuana and alcohol coming from the vehicle. As the defense concedes, the defendant was lawfully arrested. Based on the odor of marijuana emanating from the vehicle, it was likely that the trooper would find evidence of the crime of arrest in the vehicle.

Stare decisis requires the trial court be bound by the precedential decisions of State v Wright from Division I and State v. Snapp from Division II. RCW 2.06.040.

ii. The trial court erred applying the analysis from State v. Valdez, in concluding that the search was unlawful because there was no risk of any potential evidence being concealed or destroyed.

The trial court erred by applying the analysis from State v. Valdez, because that case involved a search incident to arrest on a warrant.

In State v. Valdez, the defendant, like the defendant in Patton, was arrested on a warrant. State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009). Justice J.M. Johnson again remarked in his concurrence about the unnecessary dicta used by the majority:

The United States Supreme Court decided this case for us in Arizona v. Gant, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In that case, the Court held that the Fourth

Amendment was violated by a vehicle search where the defendant was handcuffed and secured in a police vehicle and there was no reasonable expectation that evidence related to the crime of arrest would be obtained by the search. Gant, 129 S.Ct. at 1715, 1723. The facts of Valdez's situation match the controlling facts in Gant: Valdez was arrested, handcuffed, and secured in a police vehicle, and there were no grounds for reasonable belief that the vehicle contained evidence of the "offense of arrest." Gant, 129 S.Ct. at 1723. **The United States Supreme Court's interpretation of the United States Constitution is binding on the State of Washington, including its courts, through the supremacy clause. Therefore, under settled Fourth Amendment jurisprudence, the search of Valdez's vehicle incident to his arrest was unlawful. This should end the discussion.**

This court recognized that the Gant decision was crucial to the outcome of this case when we called for supplemental briefing on that decision (addressing *only* that issue). A court is ill advised to engage in unnecessary constitutional interpretation. **Here, an analysis of article I, section 7 of the Washington Constitution is unnecessary because established Fourth Amendment jurisprudence clearly and unequivocally addresses and answers the matter.** On the basis of Gant, I concur in the result of the majority's decision.

State v. Valdez, 167 Wn.2d at 761, 224 P.3d 751 (2009) (emphasis added).

Both Patton and Valdez deal with defendants who were arrested on outstanding warrants. The United States Supreme Court has already decided what happens in those cases and anything additional coming from the Washington Supreme Court is simply dicta. In fact, Patton was not even driving a vehicle, he just happened to be in close proximity to the

vehicle when the officer decided to arrest him, so it was not even a case of search of a vehicle incident to arrest.

The trial court erred in applying that portion of the analysis from Valdez.

4. As a result of the trial court's errors in legal conclusions, the suppression order and dismissal must be reversed.

Because the suppression of the evidence resulted in the State's inability to pursue the charges, the reversal of the suppression of the evidence must result in the charges being reinstated. CP 43-4, CP 29-30 (10-1-00087-8)

VI. CONCLUSION

For the foregoing reasons, this Court must conclude that the trial court erred in suppression of the evidence where the search of the vehicle was related to the crime of arrest, reverse the order of suppression and dismissal and reinstate the charges.

DATED this 20th day of September, 2010.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: WASHINGTON APPELLATE PROJECT, addressed as 1511 Third Avenue, Suite 701, Seattle, WA 98101.. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 20th day of September, 2010.

A handwritten signature in cursive script that reads "Karen R. Wallace". The signature is written in black ink and is positioned above a solid horizontal line.

KAREN R. WALLACE, DECLARANT