

NO. 65876-0-I

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

*TS*  
REC'D

JUN 08 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RICHARD D. COUSINS,

Appellant.

2011 JUN -8 PM 3:54

COURT OF APPEALS  
DIVISION ONE  
*TS*

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

The Honorable Douglass A. North, Judge

REPLY BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR<sup>1</sup>

1. The trial court erred by finding, "Officer Bailey was reasonably concerned that the passenger could take, hide, or destroy the baggie." CP 63; FOF 6.

2. The trial court erred by finding, "Officer Bailey recovered the baggie [under the driver's seat] to prevent its destruction by the passenger." CP 63; FOF 7.

3. The trial court erred by concluding, "The alleged cocaine recovered is admissible." CP 63; COL 2.

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<sup>1</sup> Counsel is aware of the general rule that arguments raised for the first time in a reply brief are too late to warrant the court's consideration. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). But in Cousins' case, the trial court's written Findings of Fact and Conclusions of Law under CrR 3.6 were entered nearly two months after he filed his Brief of Appellant. CP 62-66. The prosecutor has appended a copy of that document to its brief. This is therefore the first opportunity Cousins' has had to formally assign error. Furthermore, because each challenged finding is implicated in the argument contained in the Brief of Appellant, Cousins is not raising a new issue for the first time in a reply brief. Cousins therefore respectfully requests this Court to consider the assignments of error in this brief.

B. ARGUMENT IN REPLY

THE WARRANTLESS SEARCH OF COUSINS' CAR VIOLATED HIS RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7 BECAUSE IT WAS NOT A VALID SEARCH INCIDENT TO ARREST.<sup>2</sup>

1. Background

Richard D. Cousins was convicted of possession of cocaine after Seattle police officers discovered cocaine inside his vehicle pursuant to a warrantless search incident to his arrest for possession of cocaine. The pertinent facts, as well as citations to the record, are set forth in the Brief of Appellant (BOA) at 2-3.

Briefly, two bicycle patrol officers rode up to Cousins, the driver of an SUV, to tell him to turn his music down. A passenger sat in the front passenger's seat. As Cousins reached toward the volume knob, Officer Bailey, standing at the drivers' door, observed a clear plastic baggie containing what he believed was crack cocaine in Cousins' hand. The other officer was not watching the passenger at the time.

Intending to arrest Cousins for possession of cocaine, Bailey ordered Cousins out of the vehicle. As Cousins got out, Bailey observed him toss the baggie onto the floorboard near his seat. Bailey ordered

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<sup>2</sup> Cousins rests on his argument contained in section (C)(1)(c) of the Brief of Appellant with respect to the "exigent circumstances" exception to the warrant requirement.

Cousins to place his hands on the rear driver's side door of his SUV. Bailey then quickly reached into the vehicle and retrieved the bag. 1RP 20-21. After that he arrested and handcuffed Cousins. 1RP 21, 56, 60, 67-70. Bailey testified he grabbed the baggie before securing Cousins because the passenger could have reached over and quickly concealed or destroyed the evidence. 1RP 22-24, 63-64. After arresting and handcuffing Cousins, Bailey searched under the driver's seat and found another baggie containing crack cocaine. 1RP 24-26, 60-61.

2. Pertinent legal rules

Cousins contends Bailey's search was not valid because it did not fit within the narrow "search incident to arrest" exception to the warrant requirement. Cousins relied primarily on two recent Washington Supreme Court cases, State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), and State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010).<sup>3</sup>

The general rule that has emerged from these cases is as follows:

The search of a vehicle incident to the arrest of a recent occupant 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.*

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<sup>3</sup> These cases were spawned by Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). They followed a similar case in this fecund legal area, State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009).

State v. Patton, 167 Wn.2d 379, 394–95, 219 P.3d 651 (2009) (emphasis added). That is because once an arrestee is secured and removed from a vehicle, he "poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest" inside the vehicle. Valdez, 167 Wn.2d at 777.

In other words, the Supreme Court has held that the search incident to arrest exception applies only if two conditions are satisfied: 1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; and 2) the search is necessary to ensure officer safety or prevent destruction of evidence of the crime of arrest. Patton, 167 Wn.2d at 384.

3. Reply to state's response

The state does not dispute this is the applicable rule. Brief of Respondent (BOR) at 10. Instead, the state responds by arguing Cousins reads Valdez and Afana too broadly and that each case, as well as Gant and Patton, is distinguishable. Brief of Respondent (BOR) at 6-8, 10-13.

The state accurately notes that in those cases, the operative arrests were for warrants or for driving on a suspended license. BOR at 10-11. As a result – contrary to Cousins' case – in none of those cases was there reason for the officers to believe they would find evidence of the crime of arrest in the vehicle. BOR at 10-11.

Because of this distinction, the State argues, this Court should follow State v. Wright, 155 Wn. App. 537, 230 P.3d 1063, review granted, 169 Wn.2d 1026 (2010).<sup>4</sup> An officer arrested Wright for possession of marijuana and placed him in a patrol car after smelling the odor of marijuana emanating from Wright's car during a traffic stop. Wright, 155 Wn. App. at 542. The officer searched the passenger compartment of the car incident to the arrest and found marijuana, oxycodone, and a scale. Wright, 155 Wn. App. at 542-53.

On appeal, this Court found Patton did not apply because the search was based on probable cause to arrest for the crime of arrest -- possession of marijuana. Wright, 155 Wn. App. at 549.

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.

Wright, 155 Wn.2d at 556.

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<sup>4</sup> In Wright, this Court upheld the search under both the Fourth Amendment and article I, section 7. Cousins challenges the search only on the state constitutional ground, and thus will not address Wright's analysis under federal law. See Patton, 167 Wn.2d at 396 ("Because we resolve this case on independent and adequate state grounds under article I section 7, it is not necessary to reach Patton's argument under the Fourth Amendment.").

The state maintains that as in Wright, Officer Bailey had probable cause to arrest Cousins for possession of cocaine, and probable cause to believe the cocaine lay on the floorboard in front of the driver's seat. BOR 10-11.

Cousins respectfully maintains the Wright Court ignored the Supreme Court's requirement that the search be necessary to prevent destruction of evidence at the time of the search. Plainly, Wright could not have destroyed evidence in the vehicle because he was secured in a patrol car away from his vehicle at the time of the search. Therefore, even if the officer saw multiple small baggies full of contraband in plain view, a search would not have been necessary to prevent concealment or destruction of the evidence. See State v. Swetz, 160 Wn. App. 122, 130, 247 P.3d 802 (2011) ("The Patton court did not carve out an additional exception allowing officers to search for evidence of the crime of arrest once the arrestee is secured.").

Because the Wright Court did not properly consider the preconditions to a search incident to arrest established by Patton and Valdez, its conclusion is not persuasive and should not affect this Court's analysis of Cousins' case.

Furthermore, the Wright court failed to consider whether officers could have obtained a warrant before the search but after determining

there was probable cause to believe evidence of the crime of arrest was contained in the car. This was important to the Court in Valdez:

[W]hen an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained.

Valdez, 167 Wn.2d at 777. There was no other applicable exception in Wright, because "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).

It is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court. State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009). That is what the Wright Court did. This Court should find the state's reliance on Wright misplaced.

This does not, however, end the analysis in Cousin's case. Unlike in Wright, in addition to reasonably believing there was cocaine on the floorboard of Cousin's vehicle, an unrestrained passenger sat in the front passenger's seat as Bailey reached in and retrieved the first tossed baggie of cocaine. The trial court found "Bailey was reasonably concerned that the passenger could take, hide, or destroy the baggie." CP 63, FOF 6.

As he did in the opening brief, Cousins maintains that under Afana, the search incident to arrest exception hinges on the actions and location of the *arrestee* at the time of the search. BOA at 9-12. In Afana there was a driver and a passenger, and the passenger had been lawfully arrested on a warrant before the search. Afana, 169 Wn.2d at 174. The Court held the presence of the unsecured driver did not justify the search. "[T]he search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the *arrestee* poses a safety risk." Afana, 169 Wn.2d at 179 (quoting Patton, 167 Wn.2d at 394-95) (emphasis in original). See State v. Abuan,<sup>5</sup> (citing Afana for proposition that "an individual, not under arrest, is not an 'arrestee' contributing to circumstances that justify a warrantless search of a vehicle incident to arrest.").

The state disagrees with Cousins' argument, instead maintaining that "courts are concerned about evidence destruction in general, rather than destruction specifically at the hands of the arrestee." BOR at 11-12. Therefore, according to the state, the presence of the unrestrained passenger in the car, near the suspected cocaine on the floorboard, justified Bailey's concern about evidence destruction. Id.

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<sup>5</sup> \_\_\_ Wn. App. \_\_\_, \_\_ P.3d \_\_ 2011 WL 1496182, \*6 (2011)

The state apparently assumes Bailey was without reasonable options other than immediately searching the car. That assumption is not correct. Bailey had authority to order the passenger out of the SUV. State v. Parker, 139 Wn.2d 486, 502, 987 P.2d 73 (1999). Furthermore, had Bailey feared the passenger would either grab the cocaine or injure him, he could have called to one of his two nearby colleagues on the scene for help.

By doing neither, Bailey implicates Justice Scalia's concerns in this legal area. In Gant, Justice Scalia warned a rule permitting a vehicle search incident to arrest whenever a suspect remains within reaching distance of the passenger compartment "invit[es] officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search." 129 S. Ct. 1724-25 (Scalia, J, concurring); see also Thornton v. United States, 541 U.S. 615, 627, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004):

If 'sensible police procedures' require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search. Indeed, if an officer leaves a suspect unrestrained nearby *just to manufacture authority to search*, one could argue that the search is unreasonable precisely because the dangerous conditions justifying it existed only by virtue of the officer's failure to follow sensible procedures.

(Scalia, J., concurring) (emphasis added).

In other words, upholding a search incident to arrest because a docile passenger<sup>6</sup> remains inside a vehicle and within grabbing distance of contraband encourages officers to evade the warrant requirement by merely initiating the search while the passenger remains in the vehicle. The facts here suggest that is what Bailey did.

First, police did remove the passenger from the vehicle, but only after Bailey finished his searches. BOA at 3. Second, Bailey testified he could see what the passenger was doing "but for that brief second" when he removed Cousins from the vehicle. 1RP 57; BOA at 14. Third, two other police officers, including one who rode up to Cousins' car with Bailey, were nearby. 1RP 17-18, 31; 2RP 9; BOA at 2. Bailey could have called for assistance from one of his colleagues to restrain the passenger if he was truly reasonably concerned about imminent destruction of evidence. Bailey's actions belie his asserted concern.

To summarize, Cousins asks this Court to find the state misplaced its reliance on State v. Wright, which was wrongly decided. Furthermore, insofar as there was probable cause to believe Cousins' vehicle contained evidence of the crime of arrest, i.e., cocaine, at the time of the search, this Court should reject the state's claim that the presence of the passenger

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<sup>6</sup> As set forth in Cousins' opening brief, the passenger quietly remained where he was, unsecured and making no furtive gestures. BOA at 3.

inside the vehicle at the time of search justified Bailey's intrusion into Cousins' private affairs.

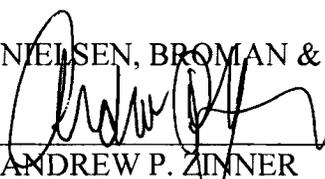
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, this Court should reverse Cousins' conviction and remand for a new trial.

DATED this 9 day of June, 2011.

Respectfully submitted, Δ

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\_\_\_\_\_  
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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	COA NO. 65876-0-1
	)	
RICHARD COUSINS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8<sup>TH</sup> DAY OF JUNE 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD COUSINS  
3731 S. ORCHARD, #1  
TACOMA, WA 98466

**SIGNED** IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF JUNE 2011.

x *Patrick Mayovsky*