

No. 67314-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM MACDICKEN,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2012 FEB 23 PM 3:52

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

The Honorable Larry E. McKeeman
The Honorable Joseph P. Wilson

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. CONTRARY TO THE STATE'S ARGUMENT, MR. MACDICKEN HAD STANDING TO CHALLENGE THE SEARCH OF THE DUFFLE BAG AND COMPUTER BAG

- a. Mr. Macdicken's personal claim established

standing. The State contends in its response brief that Mr.

Macdicken lacked standing to challenge the search of the bags.

The State conveniently ignores Mr. Macdicken's testimony at the CrR 3.6 hearing admitting that the bags were his.

Fourth Amendment rights are personal rights that may not be vicariously asserted. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). A defendant who does not *personally claim* a legitimate expectation of privacy in the area searched or property seized generally has no standing to challenge the search or seizure. *State v. Gocken*, 71 Wn.App. 267, 279, 857 P.2d 1074 (1993) (emphasis added), *quoting State v. Foulkes*, 63 Wn.App. 643, 647, 821 P.2d 77 (1991). Thus, to establish standing to challenge a search or to suppress evidence obtained as "fruit of the poisonous tree," the challenger must show that the search or seizure violated their own expectation of privacy or property

interest. *Rakas*, 439 U.S. at 137-38; *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The decision in *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007), provides the basis for analyzing this issue. In *Evans*, during a search of the truck, a police officer located a silver briefcase in the backseat. Because it was locked, the officer asked Evans if he had a key. Evans did not respond. The officer asked if the briefcase belonged to Evans, which he denied and said that he could not give the officer permission to open the briefcase and that he objected to it being seized. Despite Evans's objection, the officer seized the briefcase. Several days later, the briefcase was searched pursuant to a warrant, and the police found materials consistent with the production of methamphetamine inside. The Supreme Court ruled Mr. Evans had standing to object to the search:

To establish that he had a reasonable expectation of privacy in the contents of the briefcase, Evans must satisfy a two fold test: (1) Did he "exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?" and (2) "[d]oes society recognize that expectation as reasonable?" *State v. Kealey*, 80 Wn.App. 162, 168, 907 P.2d 319 (1995). Evans satisfies both parts of this test. Although the burden is on the defendant to establish a subjective expectation of privacy, he easily meets that burden. He kept the briefcase in his truck, it was

closed and locked, and he objected to its seizure. Compare *State v. Hepton*, 113 Wn.App. 673, 680, 54 P.3d 233 (2002) (leaving garbage at an abandoned house did not show a subjective expectation of privacy). Evans satisfies the second part of the test because society recognizes a general expectation of privacy in briefcases. See *Kealey*, 80 Wn.App. at 170, 907 P.2d 319 (“Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.”) citing *Arkansas v. Sanders*, 442 U.S. 753, 762, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

Evans, 159 Wn.2d at 409.

Here, Mr. Macdicken specifically stated the bags were his personal property, thus under *Evans*, establishing his standing to object.

The State’s reliance on the decisions in *State v. Hayden*, 28 Wn.App. 935, 627 P.2d 973, *review denied*, 95 Wn.2d 1028 (1981), and *State v. Cleator*, 71 Wn.App. 217, 857 P.2d 1993), *review denied*, 123 Wn.2d 1024 (1994), is misplaced. In *Hayden*, a stolen purse was found in the defendant’s car. The defendant *explicitly denied* any possessory interest in the purse, claiming instead that it belonged to his “old lady.” 28 Wn.App. at 940 (“Tymony may have had a subjective and reasonable expectation of privacy as to the glove compartment of the automobile he was driving. However, when he permitted the officers to look inside the glove compartment

and view the stolen purse, which he stated belonged to his “old lady,” it is clear that he did not have subjective expectation of privacy in the purse.”). Here Mr. Macdicken admitted in his testimony at the suppression hearing that the bags were his.

Similarly, in *Cleator*, the defendant was arrested after the tent he was staying in was searched by police and contraband from a burglary found. The tent was on public property without permission. This Court ruled Mr. Macdicken lacked standing because he was trespassing and had no legitimate expectation of privacy in the tent. *Cleator*, 71 Wn.App. at 222. This Court acknowledged the defendant still held a legitimate expectation of privacy in his personal belongings. *Id.* Mr. Cleator did not admit possessing the property, hence he lacked standing to challenge its seizure. *Id.* at 223. Here, Mr. Macdicken did admit the bags and items inside were his, thus *Cleator* is inapplicable.

b. Mr. Macdicken had automatic standing.

Alternatively, the State claims that Mr. Macdicken did not have automatic standing because he was charged with robbery; an offense which does not have possession as an element. Once again the State conveniently ignores that it also charged Mr.

Macdicken with unlawful *possession* of a firearm, an offense which does have possession as an essential element.

A claimant has automatic standing if (1) possession was an “essential’ element of the offense,” and (2) he “was in possession of the contraband at the time of the contested search or seizure.” *Evans*, 159 Wn.2d at 407, *quoting State v. Simpson*, 95 Wn.2d 170, 175, 181, 622 P.2d 1199 (1980). The State focuses solely on the robbery count to argue Mr. Macdicken lacked automatic standing, conveniently forgetting that he was also charged with unlawful *possession* of a firearm in count III. The unlawful possession count gave Mr. Macdicken automatic standing to challenge the search.

2. THE SEARCH OF THE BAGS EXCEEDED THE SCOPE OF THE SEARCH INCIDENT TO ARREST EXCEPTION TO THE WARRANT REQUIREMENT

In the opening brief, Mr. Macdicken submitted that the rule announced in *State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025 (1992), allowing the search of items within an arrestee’s control has been subsequently overruled by *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The State, while acknowledging that there are no Washington cases determining this issue since the decision in *Gant*, relies upon several federal

circuit court decisions to support its argument that the search here was proper. The State's argument should be rejected.

The State initially relies upon the Eighth Circuit's decision in *United States v. Perdoma*, 621 F.3d 745 (8th Cir. 2010), *cert. denied*, 131 S.Ct. 2446, 179 L.Ed.2d 1216 (2011). In *Perdoma*, the police arrested Mr. Perdoma at a bus station, searched the bag he was carrying incident to the arrest, and discovered drugs. Prior to the search of the bag, Mr. Perdoma was handcuffed and taken from the scene. The search was affirmed because Mr. Perdoma had not established a record to show why *Gant* should apply. *Perdoma*, 621 F.3d at 751-52. ("Perdoma has not meaningfully argued, on appeal or before the district court, how the circumstances of his arrest in a public bus terminal rendered him "secured" and out of reaching distance of his bag in a manner analogous to the circumstances in *Gant*. Therefore, we need not contemplate here to what extent *Gant* has application beyond the context of vehicle searches."). Thus, *Perdoma* does not stand for any grand proposition; merely that the defendant bears the burden of establishing a sufficient record.

The State subsequently relies upon the Third Circuit's decision in *United States v. Shakir*, 616 F.3d 315 (3rd Cir.), *cert.*

denied, 131 S.Ct. 841, 178 L.Ed.2d 571 (2010). In *Shakir*, the defendant dropped a bag he was holding shortly before he was arrested in a hotel lobby. The police searched the bag while the defendant was handcuffed and held by two police officers, but while the bag was still at his feet. The immediate proximity of the defendant was the major rationale for the circuit court authorizing the search but accepting the fact that *Gant* had altered the landscape on searches of belongings of the defendant incident to a lawful arrest. *Shakir*, 616 F.3d at 318-21 (“For the foregoing reasons, we hold that a search is permissible incident to a suspect’s arrest when, under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched. Although this standard requires something more than the mere theoretical possibility that a suspect might access a weapon or evidence, it remains a lenient standard.”).

Here, at the time of the search of the bags, Mr. Macdicken was handcuffed, leaning against a car, and restrained by police. CP 59-60. The bags were no longer in Mr. Macdicken’s immediate control, and there was no possibility of Mr. Macdicken retrieving

anything from the bags or attempting to destroy anything. Thus the concerns expressed in *Shakir* were not present.¹

Since the rationale for the search was not justified under the Fourth Amendment and art. I, sec. 7, the trial court should have suppressed the evidence seized from the bags. This Court should reverse the trial court's denial of the motion to suppress.

B. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant as well as the instant reply brief, Mr. Macdicken requests this Court reverse his convictions and order the items seized from the bags suppressed.

DATED this 22nd day of February 2012.

Respectfully submitted,



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¹ The State alternatively claims the search was justified as a search for evidence relative to the crime of arrest. Brief of Respondent at 18-19. Under art. I, sec. 7, a search incident to arrest for evidence of the crime of arrest is justified only for evidence that could be concealed or destroyed. *State v. Patton*, 167 Wn.2d 379, 395, 219 P.3d 651 (2009). The State wrongly contends the police may search for evidence of the crime ignoring the requirement that it be evidence that *could be concealed or destroyed*. *Id.* The State can make no argument that the evidence in the bags could be concealed or destroyed since Mr. Macdicken was handcuffed and restrained by the police.

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DIVISION ONE**

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|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
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| Respondent, |) | |
| |) | NO. 67314-9-I |
| |) | |
| ABRAHAM MACDICKEN, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF FEBRUARY, 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:

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SIGNED IN SEATTLE, WASHINGTON, THIS 23RD DAY OF FEBRUARY, 2012.

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