

67314-9

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No. 67314-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM MACDICKEN,

Appellant.

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

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

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Abraham Macdicken was arrested on suspicion of first degree robbery. When arrested, Mr. Macdicken was carrying a laptop bag and pulling a duffel bag on wheels. After Mr. Macdicken was handcuffed, placed against a police car, and the bags placed a distance away from him so that he could no longer reach them, the police searched the bags without a warrant. The trial court found the search proper as a search incident to Mr. Macdicken's arrest.

Mr. Macdicken submits that in light of recent decisions of the United States and Washington Supreme Courts, searches incident to arrest have been limited, and items in the possession of the defendant when he is arrested may be searched without a warrant only where the defendant still has access to the items and could obtain a weapon or destroy evidence. Since Mr. Macdicken was handcuffed and the items were no longer accessible to him, the warrantless search of the bags was constitutionally invalid. Mr. Macdicken asks this Court to reverse his convictions and order the fruits of the searches of the bags suppressed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Macdicken's motion to suppress.

2. The trial court erred in ruling the police were authorized to search the bags as a search incident to arrest.

3. The trial court erred in ruling that the decision in *State v. Smith*, 119 Wn.2d 675, 835 P.3d 1025 (1992), was unaffected by the subsequent decisions in *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 75 (2009).

4. To the extent it contains findings of fact, in the absence of substantial evidence, the trial court erred in entering the Conclusion of Law following the CrR 3.6 hearing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the search incident to arrest exception to the warrant requirement of the Fourth Amendment and article I, section 7, the police may search the defendant but may only search any luggage or bags in the defendant's possession where the defendant can reach the items and gain access to a weapon or destroy evidence. Where the defendant is handcuffed and no longer has access to the items, interests justifying a search incident

to arrest are no longer present. Where Mr. Macdicken was handcuffed and the two bags subsequently searched by the police without a warrant were no longer within his reach, did the trial court err in failing to suppress the fruits of the officers' invalid search?

2. Has the decision in *State v. Smith, supra*, been overruled *sub silentio* by the subsequent decisions in *Arizona v. Gant, supra*, and *State v. Valdez, supra*?

D. STATEMENT OF THE CASE

On June 8, 2010, Krystal Steig and Thomas Brinkley were robbed at gunpoint at a hotel in Lynnwood. CP 58. Among the items taken from Steig and Brinkley were a laptop bag and a duffel bag. A police investigation led to the identification of Abraham Macdicken as the person who committed the robberies. CP 58. A tip led the police to another hotel in Lynnwood where Mr. Macdicken was purported to be. CP 59.

While in the parking lot of this hotel, police officers saw Mr. Macdicken walking out from the hotel carrying a laptop bag and pushing a duffel bag. CP 59. Mr. Macdicken was ordered to the ground, where he was handcuffed. CP 59. Officer Gillebo of the Lynnwood Police turned his attention from Mr. Macdicken to a woman standing nearby who was alleged to be associated with Mr.

Macdicken. CP 59. Gillebo arrested this woman, then returned to Mr. Macdicken. CP 59.

By this time, Mr. Macdicken had been helped to his feet by the police and he was leaning against a police car, still handcuffed. CP 59. Gillebo took the two bags that had been in Mr. Macdicken's presence a short distance away and began searching them. CP 60. Inside the bag, Gillebo discovered a handgun, a laptop computer, women's clothing and a letter addressed to Steig. CP 60; 4/28/2011RP 40-41. Gillebo turned the computer on and discovered it belonged to Steig as well. 4/28/2011RP 41-42.

Mr. Macdicken was charged with two counts of first degree robbery while armed with a firearm and first degree unlawful possession of a firearm. CP 55-56. Pretrial, Mr. Macdicken moved to suppress the items seized from him and the fruits discovered inside the bags as exceeding the scope of a search incident to arrest. CP 75-111. At the hearing, Mr. Macdicken testified that the bags were his and did not belong to Steig. 4/28/2011RP 4-5. The trial court denied the motion to suppress, finding the search valid as a search incident to arrest under *State v. Smith, supra*. CP 61-68. The court also ruled that the decision in *Smith* was unaffected by

the subsequent decision of the United States Supreme Court in *Gant*. CP 65-68.

Following a jury trial, Mr. Macdicken was convicted as charged. CP 29-32.¹

E. ARGUMENT

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

a. Warrantless searches are per se unconstitutional.

The Fourth Amendment to the United States Constitution protects against unlawful search and seizure. Article I, section 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. Warrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). These exceptions are “jealously and carefully drawn.” *Id.*, quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

¹ Mr. Macdicken did not testify at trial.

The language of article I, section 7 prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional, which creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions” *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), *overruled in part by State v. Stroud*, 106 Wn.2d 144, 150–51, 720 P.2d 436 (1986). The privacy protections of article I, section 7 are thus more extensive than those provided under the Fourth Amendment. *State v. White*, 97 Wn.2d 92, 109–10, 640 P.2d 1061 (1982).

Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement. *Ringer*, 100 Wn.2d at 701, *citing State v. Smith*, 88 Wn.2d 127, 135, 559 P.2d 970 (1977), *overruled on other grounds by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986).

“Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.” *State v. Kealey*, 80 Wn.App. 162, 170, 907 P.2d 319 (1995), *citing Sanders*, 442 U.S. at 762. The very purpose of piece

of luggage is to serve “as a repository for personal, private effects” when one wishes to carry them. *Sanders*, 442 U.S. at 762 n. 9. Thus, in order to search the laptop bag and the duffel bag, the police needed either a warrant or show that one of the enumerated exceptions applied.

b. The police may search incident to arrest as an exception to the warrant requirement. A search incident to lawful arrest is one of the “few specifically established and well-delineated exceptions” to the warrant requirement of the Fourth Amendment, and is conducted for the twin purposes of finding weapons the arrestee might use, or evidence the arrestee might conceal or destroy. *Chimel v. California*, 395 U.S. 752, 762–63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A search incident to arrest is an exception to the warrant requirement based on officer safety concerns and the need to prevent the destruction of evidence. *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). But this exception to the search warrant requirement is narrowly drawn. *State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).

“[A] search incident to arrest is valid under the Fourth Amendment . . . (1) if the object searched was within the arrestee's control when he or she was arrested; and (2) if the events occurring after the arrest but before the search did not render the search unreasonable.” *State v. Smith*, 119 Wn.2d 675, 681, 835 P.2d 1025 (1992), *citing United States v. Turner*, 926 F.2d 883, 887 (9th Cir.1991). “An object is, therefore, within the control of an arrestee for the purposes of a search incident to an arrest as long as the object was within the arrestee's reach immediately prior to, or at the moment of, the arrest.” *Smith*, 119 Wn.2d at 681-82.

This Court reviews the reasonableness of a search or seizure *de novo*. *State v. Hoffman*, 116 Wn.2d 51, 97-98, 804 P.2d 577 (1991).

c. The search incident to arrest exception requires something more than mere proximity to the defendant; officer safety must be compromised as well. In *United States v. Chadwick*, the United States Supreme Court ruled that mere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the warrantless search. 433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565, 571, 111

S.Ct. 1982, 114 L.Ed.2d 619 (1991) (“warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest, or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.”) (internal quotations and citations omitted).

In *Chadwick*, federal agents arrested the defendants, placed them in custody, and seized a locked footlocker, which the agents had probable cause to believe contained narcotics. About an hour and a half after the arrest, at a federal building, the agents opened and searched the footlocker, while it was under their exclusive control and while the defendants were securely in custody.

Chadwick, 433 U.S. at 4-5. The Supreme Court concluded that the search of the footlocker could not be justified, because “[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the

arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.” *Id.* at 15.

The Washington Supreme Court in *Smith* rejected the *Chadwick* requirement of something more than mere proximity, relying on the United States Supreme Court’s decision in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). *Smith*, 119 Wn.2d at 679-80. According to the *Smith* Court, “the [United States Supreme] Court did not base its decision on the ‘automobile exception’ to the warrant requirement,” rather, the Court “interpret[ed] the *Belton* rule as applying to all searches incident to arrest, including those not involving automobiles.” *Id.*, at 680 n.3.

However, *Belton*’s continued viability regarding the search incident to arrest exception must be questioned in light of the United States Supreme Court’s subsequent decision in *Gant*, *supra*, which overruled the courts’ broad interpretation of *Belton*. In *Gant*, the Supreme Court observed that many lower courts had followed the broadest possible reading of the search incident to arrest exception as articulated in *Belton*, with the result that it had come to be regarded as “a police entitlement rather than as an

exception justified by the twin rationales of *Chimel*.” *Id.* at 1718, quoting *Thornton v. United States*, 541 U.S. 615, 624, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (O'Connor, J., concurring in part). Recognizing that the decision in *Belton* itself purported to follow *Chimel*, the Supreme Court issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Gant*, 129 S.Ct. at 1719.

In *State v. Patton*, the Washington Supreme Court agreed that its jurisprudence on the search incident to arrest doctrine had been grossly overextended:

Unfortunately, the scope of the search incident to arrest exception under our article I section 7 has experienced the same sort of progressive distortion that the United States Supreme Court recently recognized resulted in the unwarranted expansion of the search incident to arrest exception under the Fourth Amendment.

167 Wn.2d 379, 394, 219 P.3d 651 (2009).

Similarly, in a companion case to *Patton*, the Supreme Court attempted to rein in the overextension of the search incident to arrest exception:

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when 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.

State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).²

Thus, under article I, section 7, a warrantless search incident to arrest is permissible only when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.

² Division Three's decision in *State v. Whitney*, 156 Wn.App. 405, 232 P.3d 582 (2010), does not alter Mr. Macdicken's analysis. *Whitney* refused to apply *Gant* to the search of the defendant's *pockets* where he had been arrested for driving while license suspended. *Id.* at 409. Mr. Macdicken acknowledges that the search of the defendant's *person* will always be reasonable under the search incident to arrest exception.

d. The search of the bags while Mr. Macdicken was handcuffed and the bags were no longer accessible to him was unreasonable under the Fourth Amendment and article I, section 7. Here, the officer who ultimately searched the bags had searched Mr. Macdicken's *person* immediately after Mr. Macdicken had been arrested, then went and arrested one of the other people who were with Mr. Macdicken for rendering criminal assistance. 4/28/2011RP 39-40. It was only then, after Mr. Macdicken had been handcuffed, searched, and placed against the police car that the officer searched the bags. 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.

Instructive on this issue are Division Three's decision in *State v. Byrd*, 162 Wn.App. 612, 258 P.3d 686 (2011), *review granted*, ___ Wn.2d ___ (November 21, 2011), and the Ninth Circuit's decision in *United States v. Maddox*, 614 F.3d 1046 (9th Cir.2101). In *Byrd*, the defendant was a passenger in a car stopped for using stolen license plates. The police contacted Ms. Byrd, took her purse and placed it on the ground nearby, and arrested her for possession of stolen property. The police handcuffed her and placed her in the rear of the police car. The

police then searched her purse in a search incident to arrest and discovered methamphetamine. The trial court suppressed the methamphetamine and Division Three affirmed. *Byrd*, 162 Wn.App. at 617. The appellate court ruled that the decision in *Smith, supra*, was “based on a rejected interpretation of *Belton*; an interpretation that *Gant* overruled. We are bound by *Gant*’s interpretation of *Belton*.” *Byrd*, 162 Wn.App. at 616, citing *Valdez*, 167 Wn.2d at 780.

And while the State argues that *Gant* should not apply because it involved the search of a vehicle incident to arrest, *Gant* and *Belton* simply applied the general rules of search incident to arrest exception set out in *Chimel* to the automobile context. A search incident to arrest is a search incident to an arrest whether the object searched is a car or purse.

...

Here, Ms. Byrd was secured in a patrol car when her purse was searched. She had no way to access the purse at that time. And the arresting officer was not concerned that she could access a weapon or destroy evidence. The justifications for the search incident to arrest exception, then, did not exist here. The exception did not apply. And the warrantless search of Ms. Byrd’s purse violated the Fourth Amendment.

162 Wn.App. at 617.

Similarly, the Ninth Circuit in *Maddox* rejected an argument similar to the Washington Supreme Court’s reading of *Turner*,

supra, and ruled consistent with *Chadwick* in finding the police exceeded the scope of the search incident to arrest exception:

Contrary to the dissent's opening description, this was *not* a search of Maddox's person incident to arrest. Maddox's person was handcuffed in the back of the squad car, incapable of either destroying evidence or presenting any threat to the arresting officer. While the key chain was within Maddox's immediate control while he was arrested, subsequent events—namely Officer Bonney's handcuffing of Maddox and placing Maddox in the back of the patrol car—rendered the search unreasonable. In *Turner*, we found valid the search of baggies found *after* the defendant was handcuffed and taken into the next room because of a legitimate concern for the officers' safety: “they had already discovered a concealed weapon beneath the bedding.” *Id.* at 888; accord *United States v. Hudson*, 100 F.3d 1409, 1420 (9th Cir.1996) (search of bedroom valid search incident to arrest even after defendant had been arrested and removed from the room, where “[w]hen Hudson was called out of his bedroom and arrested, one of the arresting officers noticed a rifle case near his feet”). No such weapon or threat was found here, and Maddox's demeanor, . . . did not provide such legitimate concern for Officer Bonney's safety, as after initially yelling, Maddox subsequently cooperated with the officer and the arrest . . . With Maddox handcuffed in the backseat of the patrol car, no possibility of Maddox concealing or destroying the key chain and the items contained therein, and no sighting of weapons or other such threats, Officer Bonney's search of Maddox's key chain was not a valid search incident to arrest.

Maddox, 614 F.3d at 1048-49.

Here, in a similar vein to *Byrd* and *Maddox*, Mr. Macdicken was arrested, handcuffed, and placed against the police car. The

police took the luggage away from him and placed it a safe distance from him while taking the time to arrest another person. Only then did the police come back and search the luggage. The justifications for a search incident to arrest were simply not present.

e. The evidence seized from Mr. Macdicken's luggage should have been suppressed, thus he is entitled to reversal of his convictions. Because the search of the luggage was invalid, the resulting evidence and contraband should have been suppressed as a fruit of the illegal search. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) ("When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed."). See also *State v. Winterstein*, 167 Wn.2d 620, 633, 636, 220 P.3d 1226 (2009) ("Washington's exclusionary rule is nearly categorical. . . Evidence obtained as a result of an unreasonable search or seizure must be suppressed.").

The trial court should have suppressed the evidence, specifically the firearm critical to the conviction of unlawful possession of a firearm taken from the luggage. This Court should reverse and order the evidence seized from the luggage suppressed and reverse Mr. Macdicken's convictions.

2. MR. MACDICKEN HAD STANDING TO CHALLENGE THE SEARCH OF THE DUFFLE BAG AND COMPUTER BAG

It may be argued that since the items in the bags were claimed by Ms. Steig as hers that Mr. Macdicken lacked standing to challenge the search of those bags. This argument should be rejected in light of Mr. Macdicken's claim of ownership.

a. Mr. Macdicken had automatic standing in light of the firearm seized from inside the laptop bag.³ "To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure." *State v. Jones* 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). *See also State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000) ("Inherent in the conditions for automatic standing is the principle that the 'fruits of the search' bear a direct relationship to the search the defendant seeks to contest.").

The automatic standing doctrine's purpose is to protect defendants forced to choose between their respective rights under the Fourth and Fifth Amendments:

³ The trial court found Mr. Macdicken had automatic standing. CP 68. Mr. Macdicken addresses this issue in light of the State's cross-appeal.

[W]ithout automatic standing, a defendant will ordinarily be deterred from asserting a possessory interest in illegally seized evidence because of the risk that statements made at the suppression hearing will later be used to incriminate him albeit under the guise of impeachment. For a defendant, the only solution to this dilemma is to relinquish his constitutional right to testify in his own defense.

State v. Simpson, 95 Wn.2d 170, 180, 622 P.2d 1199 (1980)
(footnote omitted).

The trial court correctly found that Mr. Macdicken had automatic standing since unlawful possession of a firearm is a possessory offense, and that finding should not be disturbed.

b. Mr. Macdicken testified the bags were his, thus he had a protected interest in the bags. 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).

To establish standing based on an expectation of privacy, a defendant must establish an actual subjective expectation of privacy in the property searched and this expectation must be

reasonable. *Gocken*, 71 Wn.App. at 279. "Thus, a defendant seeking to suppress evidence on Fourth Amendment grounds 'must in every instance first establish that he had a legitimate expectation of privacy in the place where the allegedly unlawful search occurred.'" *State v. Jones*, 68 Wn.App. 843, 847-48, 845 P.2d 1358, *United States v. Freitas*, 716 F.2d 1216, 1220 (9th Cir.1983), *review denied*, 122 Wn.2d 1018 (1993).⁴

Here, Mr. Macdicken testified the laptop bag and duffel bag seized by the police when he was arrested were his property. 4/28/2011RP 5. Mr. Macdicken established he had standing to object to the subsequent police search of those bags.

⁴ The United States Supreme Court has held that the testimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of his guilt at trial. *United States v. Salvucci*, 448 U.S. 83, 88, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

F. CONCLUSION

For the reasons stated, Mr. Macdicken requests this Court order the fruits of the unlawful search of the bags in which he had possession suppressed, and order his convictions reversed.

DATED this 28th day of November, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummwerow', is written over a horizontal line. The signature is fluid and cursive.

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 2011, I CAUSED THE ORIGINAL **OPENING 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 30TH DAY OF NOVEMBER, 2011.

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