

68444-2

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No. 68444-2 I

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

STATE OF WASHINGTON,

Respondent,

v.

PETER GREEN,

Appellant.

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

OPENING BRIEF OF APPELLANT

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FILED
JAN 21 2011
CLERK OF COURT
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A. ASSIGNMENTS OF ERROR

1. The police violated Mr. Green's right to privacy and his right to be free from unlawful searches and seizures.

2. The trial court erred by entering Finding of Fact J, to the degree it is construed as a finding of fact, as it is actually a conclusion of law; "reasonableness" is also not relevant to article I, section 7 analysis.

3. The trial court erred by entering Finding of Fact K, to the degree it is construed as a finding of fact, as it is actually a conclusion of law; "reasonableness" is also not relevant to article I, section 7 analysis.

4. The trial court erred by entering Finding of Fact M, stating that had Detective Bacon not seized the receipts during the warrantless search, he "would have found the receipts inside the paper bag during his search of the Jeep pursuant to the first warrant."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under article I, section 7, warrantless searches are per se unreasonable, and automobile searches incident to arrest are not justified unless an arrestee is within reaching distance at the time of the search. Police conducted a warrantless search of

Mr. Green's car when Mr. Green had already been placed under arrest and transported to the hospital. Did the search violate article I, section 7? Where the trial court failed to suppress this evidence, and our Supreme Court has since decided State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012), which is dispositive, is reversal required?

2. Article I, section 7 of the Washington Constitution is not grounded in notions of reasonableness, but in the prohibition against the disturbance of an individual's private affairs without the authority of law. Snapp, 174 Wn.2d at 194 (citing State v. Buelna Valdez, 167 Wn.2d 761, 773, 224 P.3d 751 (2009)). Where the trial court upheld a warrantless search of Mr. Green's car because it was "reasonable," but the Snapp Court noted that "reasonableness" is irrelevant to article I, section 7 analysis, is reversal required?

3. Unlike its federal counterpart, the exclusionary rule of article I, section 7 of the Washington Constitution is "nearly categorical." State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009). The trial court found the seized items eventually would have been found pursuant to the first warrant. Where the evidence failed to support discovery under the "independent source" exception to the exclusionary rule, must these receipts be

suppressed, since the “inevitable discovery” exception is invalid under article I, section 7?

C. STATEMENT OF THE CASE

1. Procedural History. On January 4, 2008, Peter Green was involved in a fatal traffic accident. 10/5/09 RP 50.¹ Seattle Police Department officers responded to the corner of 23rd Avenue and South Dearborn, where they found first responders already on the scene. Id. After the accident, Mr. Green, the driver of a Jeep, waited at the scene for officers and gave a full statement. Id. at 54; 1/6/12 RP 52-53.

Officers suspected Mr. Green of driving under the influence and detained him at the scene for processing by a DUI officer. 10/5/09 RP 57-58; 10/6/09 RP 11. Mr. Green was arrested and taken to Harborview Medical Center for a mandatory blood draw. 10/6/09 RP 11.

Meanwhile, Detective Thomas Bacon arrived at the scene of the accident and searched Mr. Green’s vehicle for items related to

¹ The verbatim report of proceedings from the original trial consists of two non-consecutively paginated volumes from the 3.5 and 3.6 hearings, conducted on October 5, 2009 and October 6, 2009. The court’s ruling appears in the October 6, 2009 volume. The trial was conducted from October 7 through 13, 2009, and sentencing was on March 8, 2010. Following remand, additional testimony is contained in three non-consecutively paginated volumes from November 4, 2011, January 6, 2012, and February 17, 2012 (trial court’s findings contained here). The VRP is designated by date.

intoxication or drug use. 10/6/09 RP 13-14. Detective Bacon recovered, among other items, a receipt in a closed brown paper bag, from the floor of the Jeep. Id. at 15. The receipt was for a large-screen television that had been purchased that day from the Redmond Sears store, and which was sitting in the back of the vehicle, still in its carton. Id. at 15. The detective noted from the receipt that the purchase had been made with three \$500 gift cards, which he deemed suspicious. Id.

Detective Bacon continued his search of Mr. Green's Jeep, seizing another Sears bag on the rear passenger floor. 10/6/09 RP 17. This bag contained two disposable cell phones and another receipt from the downtown Sears location, indicating a purchase on the same date, using the balance of the money from the third Sears gift card. 10/6/09 RP 17. Although Detective Bacon had no warrant and was investigating a DUI and potential vehicular homicide case, he seized both receipts and the two cell phones. Id.

2. Search Warrants. Detective Bacon determined that parallel investigations of Mr. Green would be conducted – a vehicular homicide investigation and a theft or fraud investigation. 10/6/09 RP 20. On January 30, 2008, Bacon wrote an affidavit for a search warrant in the vehicular homicide investigation, detailing

the facts of the case (other than what he had found in the warrantless search), and his request to search for items suggesting intoxication, dominion or control over the vehicle, and the identity of any other passenger. 10/6/09 RP 21.²

On January 31, 2008, Bacon executed the first search warrant, although he had already seized the receipts and the cell phones. 10/6/09 RP 23-24. In searching the Jeep again, Bacon found a backpack in the rear seat of the vehicle, which he proceeded to unzip and search. Id. at 24-25. Inside the backpack, he found five credit cards with the name Jeanne Russell on them. Id. at 25. Bacon continued to examine the credit cards. Noting that they were from different banks and had no security codes on the backs, he deemed them suspicious. Id. at 25-26. Since his warrant was for evidence relating to vehicular homicide, he placed the credit cards back into the backpack and left them in the Jeep. Id. at 26.

On February 8, 2008, Detective Bacon applied for a second search warrant, requesting to search for items related to fraud or identity theft. 10/6/09 RP 30 (referencing search warrant no. 08-

² There were witnesses who stated, weeks later, that an unknown male passenger had walked away from the scene, but this person was never identified. 10/6/09 RP 11. Warrant no. 08-066 was signed by Judge Eadie.

091). Based in part upon the items seized, Mr. Green was charged with four counts of identity theft in the second degree and driving under the influence. 2CP 1-7.³

3. Denial of Mr. Green's motion to suppress evidence obtained pursuant to the search warrant. Prior to trial, Mr. Green moved to suppress the items seized pursuant to the first search warrant. 10/6/09 RP 75-76. Mr. Green argued the detective seized evidence outside the scope of the first search warrant, and in obtaining the second search warrant, was attempting to "bootstrap" the second warrant onto evidence he had already seized. 10/6/09 RP 75-76.

The Honorable Richard Eadie denied Mr. Green's motion to suppress. 2CP 75-77; 10/6/09 RP 76-78. The court found that Detective Bacon's "examination" of the credit cards in the backpack was brief and went no further than was necessary to remove the cards from the backpack and briefly glance at the fronts and backs. 2CP 75-77; 10/6/09 RP 76-78. The court found that the backpack was a reasonable place to search for evidence of drug use and/or

³ The information was later amended to add an additional count of identity theft, as well as theft in the second degree. 2CP 19-22. Clerks' papers from the 2009 proceeding are referred to as "2CP."

possession and for evidence relating to the identity of the unknown passenger. 2CP 76, 77.

4. Jury trial. Mr. Green ultimately was not charged with vehicular homicide, and was acquitted of DUI following a July 2009 trial. 3/8/10 RP 317.

In a separate trial for identity theft, the State introduced evidence of the five credit cards that were recovered from the backpack, as well as the receipts from the two Sears bags found in the Jeep. 10/8/09 RP 117, 120.

The jury found Mr. Green guilty of five counts of identity theft in the second degree and one count of theft in the second degree. 2CP 65-70.

5. Appellate Proceedings. Mr. Green appealed his conviction. 2CP 163-75. In an unpublished opinion, Division One of the Court of Appeals remanded pursuant to State v. Robinson, 171 Wn.2d 292, 305-06, 253 P.3d 84 (2011), so that another suppression hearing could be conducted, and so that Mr. Green might "raise his argument of an unlawful search incident to arrest." State v. Green, 162 Wn. App. 1069, 2011 WL 3244724.

On January 6, 2012, the suppression hearing was reopened. 1/6/12 RP 1-80. Police Officer Mark Witherbee and Detective Thomas Bacon each testified again. Id.

On February 17, 2012, following the reopened hearing, the trial court found, contrary to the State's argument, that the warrantless search resulting in the seizure of the Sears receipts was not an inventory search. 2/17/12 RP 5. The court found that the warrantless search constituted an investigatory "search for evidence of the crime of arrest." Id. The court again denied Mr. Green's motion to suppress both the receipts and the cell phones, citing existing case law. Id.; 1/6/12 RP 11; CP 208-11.⁴

At the January 6, 2012 remand hearing, the State acknowledged that there existed a split of authority on this type of search, and conceded the Washington Supreme Court would ultimately likely determine "that there won't be an exception absent exigent circumstances, again talking about officer safety, etcetera." 1/6/12 RP 71. Indeed, on April 5, 2012, the Washington Supreme Court decided State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2009), which is dispositive.

⁴ The trial court cited Arizona v. Gant, 556 U.S. 332, 338-39, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009).

D. ARGUMENT

THE STATE VIOLATED MR. GREEN'S RIGHT TO
PRIVACY UNDER ARTICLE I, SECTION 7.

1. Standard of Review. The validity of a warrantless search or seizure is reviewed de novo. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed de novo. Id.

The state and federal constitutions prohibit warrantless searches. U.S. Const. Amend. IV.⁶ Similarly, Article I, Section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Art. I, Sec. 7.

Under both provisions, searches and seizures conducted without authority of a search warrant "are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." Arizona v. Gant, 556 U.S. 332, 338-39, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting Katz v. United States, 389 U.S. 347, 457, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote

⁶ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

omitted)); State v. Snapp, 174 Wn.2d 177, 188, 275 P.3d 289 (2012). The State must establish an exception to the warrant requirement by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

2. A warrantless search incident to arrest must be based on the dual concerns of officer safety and the preservation of evidence, which were not present here. The search incident to arrest exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); see Gant, 556 U.S. at 350-51; Snapp, 174 Wn.2d at 188 (limiting the search incident to arrest exception when applied to automobile searches). In Washington, police are authorized to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. Gant, 556 U.S. at 350-51; Snapp, 174 Wn.2d at 190; State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009); State v. Patton, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009).

In Snapp, the Washington Supreme Court expressly held that a search incident to arrest conducted without these exigencies, based upon a belief that evidence of the crime of arrest might be found in the vehicle, violates article I, section 7 (“We hold that the Thornton⁷ exception does not apply under article I, section 7”). 174 Wn.2d at 197. The Snapp Court noted that under either a Fourth Amendment or an article I, section 7 analysis, a warrantless vehicle search incident to arrest is authorized only 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. 174 Wn.2d at 190 (citing Gant, 556 U.S. at 343-44; Buelna Valdez, 167 Wn.2d at 777; see Patton, 167 Wn.2d at 394-95).

The Snapp Court thus distinguished between those situations where “time is of the essence” -- either due to officer safety or because a delay to obtain a warrant might permit an arrestee to destroy evidence – and those other situations ‘when a search can be delayed to obtain a warrant without running afoul of concerns for the safety of the officer or to preserve evidence.’ 174

⁷ Thornton v. United States, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004) (Scalia, J., concurring) (referring to proposed automobile exception when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle”).

Wn.2d at 195 (quoting Buelna Valdez, 167 Wn.2d at 773, 777).

The Snapp Court held:

Contrary to the urgency attending the search incident to arrest to preserve officer safety and prevent destruction or concealment of evidence, there is no similar necessity associated with a warrantless search based upon either a reasonable belief or probable cause to believe that evidence of the crime of arrest is in the vehicle.

Snapp, 174 Wn.2d at 195-96.

Where an arrestee has already been removed from his or her vehicle, and there is no risk to the evidence by the arrestee, a warrant must be obtained. Snapp, 174 Wn.2d at 195 (citing Buelna Valdez, 167 Wn.2d at 777, emphasis in Snapp); State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (“the existence of probable cause does not justify a warrantless search”).

3. The initial search of Mr. Green’s vehicle was conducted without a warrant, and was not justified by any exception to the warrant requirement, in clear violation of *Snapp*. The trial court found, following the 2012 remand hearing, that the initial search had a “duel [sic] purpose: inventorying the contents, and investigating and obtaining evidence related to the fatal collision.” CP 209 (FF H) (emphasis added). The court specifically found the

receipts in the paper bag “were not part of the inventory search, but the investigatory search incident to the defendant’s arrest.” CP 210 (FF I).

Law enforcement officers testified at both the 2009 and 2012 proceedings that at the time of the warrantless vehicle search, Mr. Green had already been arrested and taken to Harborview for a mandatory blood draw. 10/6/09 RP 11; 1/6/12 RP 10, 16-18.

Detective Bacon searched Mr. Green’s Jeep and recovered the two Sears receipts and the disposable cell phones at a time when it would have been impossible for Mr. Green to conceal or destroy evidence of a crime. 10/6/09 RP 11; 1/6/12 RP 10, 16-18.

Detective Bacon testified that he seized the receipts in the paper bag as part of his investigatory function, hoping they might reveal information relevant to the potential DUI or vehicular homicide prosecutions, such as the identity of the driver⁸ or a theoretical passenger, or information material to the consumption of alcohol or drugs. 1/6/12 RP 23, 46-48.

⁸ Detective Bacon’s testimony that he needed the receipts to prove the identity of the driver was belied by the fact that Mr. Green had already made a full statement to officers upon arrest – including the fact that he was driving and that his car had hit the pedestrian -- which Bacon conceded he already knew before he searched the vehicle. 1/6/12 RP 52-53.

Back-up officers and detectives were at the accident scene, as well as the fire department and other emergency responders. 10/5/09 RP 50; 10/6/09 RP 11; 1/6/12 RP 13-14, 16-18, 44-45. According to Detective Bacon, from the time of his arrival at the scene, the vehicle was in his control, and the police department did not allow anyone else access to the vehicle. 1/6/12 RP 45. There was no proof adduced at either proceeding that any evidence was in danger of destruction.

4. The remedy for the violation of article I, section 7, is suppression. Accordingly, because Mr. Green was far from the scene and no threat to officer safety or to the preservation of evidence at the time of the warrantless search, the search violated Mr. Green's rights under article I, section 7; the receipts must therefore be suppressed. Snapp, 174 Wn.2d at 197; Buelna Valdez, 167 Wn.2d at 779; Patton, 167 Wn.2d at 395; see also State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (no inevitable discovery exception to violations of right to privacy under article I, section 7, as Washington's exclusionary rule is

“nearly categorical”); State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010) (no good faith exception).⁹

The State has consistently maintained its position that the warrantless search of Mr. Green’s jeep was an inventory search. CP 179-84, 1/6/12 RP 70-75. Following remand, the trial court specifically found that the receipts were not part of the inventory search, but part of “the investigatory search incident to the defendant’s arrest.” CP 209-10 (FF I). The State never cross-appealed, and therefore the finding is a verity. Accordingly, since the warrantless search resulting in the seizure of the receipts was determined by the trial court to be investigatory, reversal is required under State v. Snapp. 174 Wn.2d 194.

⁹ Although the trial court found the investigatory search “reasonable,” appellant assigns error to these findings. CP 210 (FF J, K). As our Supreme Court recently held in Snapp:

As we have so frequently explained, article I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual’s private affairs without authority of law. (citing Buelna Valdez, 167 Wn.2d at 773).

174 Wn.2d at 194.

E. CONCLUSION

For the above reasons, Mr. Green respectfully asks this Court to reverse, finding that the warrantless search of his vehicle was in violation of his right to privacy under article I, section 7.

Respectfully submitted this 2nd day of August, 2012.



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STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68444-2-I
v.)	
)	
PETER GREEN, JR.,)	
)	
Appellant.)	

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