

FILED
COURT OF APPEALS
DIVISION II

NO. 38128-1-II

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IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

TIFFANY DAWN DOLL,

Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

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I. Assignment of Error

1. The Search of Ms. Doll's vehicle incident to arrest violated both article I, section 7 of the Washington State Constitution and the Fourth Amendment of the United States Constitution.

II. Issues Pertaining to Assignments of Error

Under article 1, section 7 of the Washington State Constitution and the Fourth Amendment of the United States Constitution, does a warrantless search of a vehicle incident violate the defendant's rights when a finding of guilt is based on evidence obtained in search incident to arrest when the defendant was detained at the time of the search, the items searched were not within reach of the defendant at the time of the search and no evidence for the offense which led to the arrest could be found in the vehicle searched?

III. Statement of the Case

The following pertains to the specific issue contained in this brief and is intended to supplement the statement of facts provided for in the previously filed brief of the appellant. Ms. Doll was charged with possession of methamphetamine in Count One of the Third Amended Information. That count alleged that Ms. Doll possessed methamphetamine on November 24, 2007. CP 35. Ms. Doll was found guilty of that charge. CP 172. Detective Manchester testified at trial that he recognized a vehicle owned by Ms. Doll and he believed that Ms. Doll

had an outstanding warrant at that time and her license to drive had been suspended. RP (5/20/08) 32-33. Detective Manchester conducted a traffic stop. RP (5/20/08) 33. Ms. Doll was arrested for driving with a suspended license and an outstanding warrant. RP (5/20/08) 33.

Ms. Brasch was a passenger in the vehicle at the time of the stop. RP (5/20/08) 33. Ms. Brasch identified herself using the name of her twin sister. Id.

Deputy Manchester searched the vehicle incident to arrest, including a backpack that was located on the backseat of the vehicle. RP (5/20/08) 51. Ms. Doll was detained before the search occurred. RP (5/20/2008) 33. During the search of the backpack Deputy Manchester found an identification card for Candace Brasch, with a photograph. RP (5/20/2008) 53. This discovery led the Detective to believe that Ms. Brasch had provided an incorrect name. RP (5/20/08) 34. Ms. Brasch was then arrested for providing false information and warrants outstanding for her arrest. RP (5/20/08) 50. Deputy Manchester next searched Ms. Brasch's purse and found a large amount of controlled substances. RP (5/20/08) 34, 45. Ms. Brasch had been detained and secured before the search of her purse. RP (5/19/08) 34. Ms. Doll was charged with possessing the methamphetamine found in the purse inside the vehicle on November 24, 2007. CP 35.

IV. Argument

The search of Ms. Doll's vehicle incident to her arrest was unconstitutional where Ms. Doll was detained prior to the search, the items searched was within reach of Ms. Doll at the time of the search and no evidence for the offense which led to the arrest could be found in the vehicle.

A. This issue may be raised for the first time on appeal.

This issue was not raised at the trial court level. However, an issue may be raised for the first time on appeal if it pertains to manifest error involving a constitutional right. RAP 2.5(a)(3); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

A four step process is utilized to determine if an error is a manifest constitutional error. Those steps are as follows: 1) determine whether the alleged error is in fact a constitutional issue; 2) then determine whether the error is manifest; 3) next address the merits of the constitutional issue; 4) determine whether the error was harmless. *State v. Barr*, 123 Wn.App. 373, 380, 98 P.3d 518 (2004), (citing *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992)).

As to the first step in the analysis, issues of illegal searches and seizures violate the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution. *Mapp v.*

Ohio, 367 U.S. 643, 647, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081 (1961); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The issue raised here is whether the search incident to arrest was lawful, therefore a constitutional issue has been raised. Therefore, application of the first test supports review for the first time on appeal.

The second test requires the Court to determine whether the issue raised is a manifest error. A manifest error has been defined as an error having “practical and identifiable consequences in the trial of the case”. *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). In this case the conviction for possession of methamphetamine is solely based on the methamphetamine found in Ms. Doll’s vehicle during a search incident to her arrest. If that evidence was suppressed, no other evidence would support a conviction. Consequently, the error is manifest error.

The third test requires a determination of the merits of the constitutional issue. The argument in support of Ms. Doll’s challenge to the officer’s authority under Federal and Washington State Constitutions to search her vehicle incident to arrest is set forth further in this brief. The claim has merit and should be considered by this Court.

The fourth test requires a determination of whether the error was harmless beyond a reasonable doubt. Under this test, the Appellate Court is to examine whether the untainted evidence is so overwhelming that it leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705

P.2d 1182 (1985); *State v. Carlin*, 40 Wn.App. 698, 703, 700 P.2d 323 (1985), overruled on other grounds by *City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993). In this case there is no untainted evidence to support a conviction for possession of methamphetamine. The tainted evidence includes the methamphetamine found in the purse located in Ms. Doll's vehicle. That evidence was obtained through an illegal search. There is no evidence to support a conviction if that evidence was suppressed. Therefore, the error was not harmless.

Alternatively, the failure of trial counsel to contest the search of the vehicle was ineffective. Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). Assertions of ineffective assistance of counsel are determined with the application of a two part test. To establish a claim of ineffective assistance of counsel a defendant must prove counsel's deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In Re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct. 421, 121 L.Ed.2d 344 (1992). To prove deficient performance, a defendant must prove the representation fell below an objective standard of reasonableness under professional norms and a reasonable possibility exists that but for counsel's error, the result would have been different. *State v. Rice*, 118 Wn.2d at 888-89. The court starts

with the presumption counsel's representation was effective. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish ineffective assistance of counsel for failure to object, the defendant must show the absence of a legitimate or tactical reason for not objecting and that the trial court would have sustained the objection if it had been made and the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). In this case defense counsel did not conduct a hearing to address the admissibility of the methamphetamine found on November 24, 2007. Defense counsel did contest the admissibility of the methamphetamine found in Ms. Doll's vehicle on December 10, 2007. RP (5/19/08) 6.

B. Search incident to arrest was improper.

A warrantless search is impermissible under both Article I, Section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution unless an exception to the warrant requirements exists. *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). A search of a vehicle incident to arrest is a recognized exception to the warrant requirement. *State v. Vrieling*, 114 Wn.2d 489, 492, 28 P.3d 762 (2001), citing *State v. Stroud*, 109 Wn.2d 144, 152, 720 P.2d 436 (1986).

The case of *Arizona v. Gant*, 556 U.S. ____ (2009) represents a change in the permissible scope of a search incident to arrest. The

appellant believes that the search of her vehicle on November 24, 2007 was impermissible under *Arizona v. Gant*, 556 U.S. _____ (2009). Therefore, the conviction for possession of methamphetamine on that date should be vacated.

Under the case of *Arizona v. Gant*, 556 U.S. _____ (2009), law enforcement may conduct a search of a vehicle incident to arrest only if the arrestee is within arms reach of the passenger compartment at the time of the search or if it reasonable to believe that vehicle contains evidence of the offense for which the arrest occurred.

The unlawful search of the backpack led to the discovery of the methamphetamine that Ms. Doll was ultimately found guilty of possessing. Ms. Doll was detained and secured before the search of her vehicle including the backpack on the backseat of the vehicle occurred. RP (5/20/08) 33. Consequently, the backpack was not within Ms. Doll's reach at the time of the search. For those reasons the search was unlawful pursuant to the case of *Arizona v. Gant, supra*.

Furthermore, Ms. Doll was arrested for a warrant and for driving with a suspended license. RP (5/20/08) 32-33. No evidence for either of these offenses could be found in the vehicle. Therefore, it was not reasonable for the Detective to search the vehicle based on a theory that the vehicle could contain evidence of the offense for which Ms. Doll was arrested. The search continued with the search of Ms. Brasch's purse.

Both Ms. Brasch and Ms. Doll were in custody at the time of the search. Methamphetamine was found in the purse.

The application of *Arizona v. Gant* renders the search of Ms. Doll's vehicle, including the backpack and Ms. Brasch's purse, unconstitutional. The searches were not lawful because the searches occurred after both individuals were detained and secured. The searches were not lawful because the searches could not have reasonably led to the discovery of evidence for the offense each individual was arrested for. First, no evidence could be located in the vehicle that could be relevant evidence for the arrest on the outstanding warrants for either individual. Secondly, the officer had the evidence he needed in his possession regarding Ms. Brasch's true name prior to the search of Ms. Brasch's purse. Therefore the officer had no basis to search the purse.

Even if the court holds that the search of the backpack was lawful, no lawful grounds existed to allow a search of Ms. Brasch's purse. Ms. Brasch was in custody before the purse was searched. The purse was not in Ms. Brasch's reach at the time of the search. Secondly, the Detective had in his possession the identification evidence necessary for an arrest for providing false information prior to the search of the purse. No other evidence was necessary, or would likely be available. Generally a person has only one identification card and that card was located in the backpack prior to the search of the purse. Therefore, the search for

evidence exception cited in *Arizona v. Gant, supra*, does not legitimize the search here. Additionally, if the search of the backpack had not occurred, no grounds would have existed to permit the arrest and subsequent search of Ms. Brasch and her purse. The search of the Ms. Brasch's purse is fruit of the poisonous tree. The evidence located in the search conducted on November 24, 2007 should be suppressed.

This court should reverse the jury's verdict of guilty which was based solely on the evidence obtained in the illegal search and remand for dismissal of the charge of possession of methamphetamine with prejudice.

Under the case of *Arizona v. Gant, supra*, Detective Manchester could not lawfully search Ms. Doll's vehicle including the backpack and Ms. Brasch's purse. It is anticipated the State may raise the issue of standing. Specifically, whether Ms. Doll has standing to contest the search of Ms. Brasch's purse where the methamphetamine was found.

Ms. Doll has standing to seek suppression of the items found in Ms. Brasch's purse. The rule of automatic standing still applies in the State of Washington. *State v. Williams*, 142 Wn.2d 17, 22, 11 P.3d 714 (2000). It is well settled that Article 1, Section 7, of the Washington State Constitution provides greater protection to individual privacy rights than the Fourth Amendment to the United States Constitution. *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996); *State v.*

Stround, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); *State v. Williams*, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984). Consequently, no *Gunwall* analysis is necessary to resolve this issue. *State v. White*, 135 Wn.2d 761, 769 958 P.2d (1998). Article I, Section 7 of the Washington State Constitution provides as follows: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision of the Constitution is violated when the State unreasonably intrudes on a person's private affairs. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984); *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990).

The case of *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002), holds "a person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be used against him". *Jones* at 332, citing *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). There are two factual requirements in asserting 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.

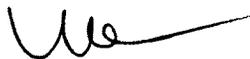
Jones at 332, citing *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). Possession may be actual or constructive. *Jones* at 333, citing *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

In the case at hand Ms. Doll has standing to contest the search. The charge at issue is possession of methamphetamine. That is a possessory charge which falls within the first test for determining if automatic standing applies. Secondly, the purse had been in the vehicle, presumably near the front seat of the vehicle since Ms. Brasch was holding the purse during the traffic stop. Consequently, Ms. Doll was in constructive possession of the purse. Constructive possession occurs when an individual has dominion and control over the item. *Id.* Dominion and control is defined as the ability to immediately take actual possession of an item. *State v. Kypreos*, 115 Wn.App. 207, 212-213, 61 P.3d 352 (2002) quoting *State v. Jones*, 146 Wn.2d at 333, 45 P.3d 1062 (2002). Ms. Doll could have taken possession of the purse. Consequently, the second test for automatic standing has been met. Ms. Doll's request for suppression of the methamphetamine is properly before this court.

V. Conclusion

For the reasons previously stated, the conviction for possession of a controlled substance should be dismissed with prejudice.

Respectfully submitted this 30 day of June, 2009.



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