

NO. 38196-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ERIC C. BURNETT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Gary R. Tabor, Judge
Cause No. 08-1-00844-8

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in failing to suppress evidence seized as a result of the warrantless search of the vehicle Burnett had been driving incident to his arrest under the U.S. Supreme Court's recent decision in Arizona v. Gant, which applies to this case.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

Whether reversal and dismissal of Burnett's conviction for possession of methamphetamine is required where the conviction was based upon evidence that was found and seized in an unconstitutional warrantless search under Arizona v. Gant?

C. SUPPLEMENTAL STATEMENT OF THE CASE

For purposes of this Supplemental Brief, Appellant Eric C. Burnett (Burnett) incorporates and adopts by reference the statement of the case and arguments presented in his opening brief, the verbatim report of proceedings and clerk's papers, and provides the following review of the relevant facts pertaining the supplemental argument presented here.

Burnett was driving a vehicle with a suspended license when he was stopped for a traffic infraction, arrested and handcuffed and "removed from the area" and placed in the rear of the arresting officer's "patrol vehicle" prior to the search of his vehicle incident to his arrest, which produced a crystal substance that tested positive for methamphetamine

found inside a CD case located in a small bag on the backseat. [RP 16-23, 26-27, 55; CP 2]. No evidence was presented to prove that Burnett was physically proximate to the vehicle at the time of the search.

In the Brief of Appellant filed herein on February 12, Burnett argued, in part, that the warrantless search of the vehicle incident to his arrest was invalid under Article I, §7 of the Washington Constitution because the State had failed to prove he was in close proximity to the vehicle at the time of the search.

D. SUPPLEMENTAL ARGUMENT

THE WARRANTLESS SEARCH OF THE
VEHICLE BURNETT HAD BEEN DRIVING
INCIDENT TO HIS ARREST WAS UNCONSTITU-
TIONAL UNDER THE U.S. SUPREME
COURT'S DECISION IN ARIZONA V.
GANT, WHICH APPLIES TO THIS CASE.

Until recently, it was generally understood that a warrantless search of a vehicle incident to a recent occupant's arrest was permissible under New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1991), even if the person arrested was handcuffed and secured in a police car at the time of the search. See, e.g., State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986); State v. Rathbun, 124 Wn. App. 372, 376-80, 101 P.3d 119 (2004); United States v. Mapp, 476 F.3d 1012, 1017-19 (D.C. Cir.), cert. denied, ___ U.S. ___, 127 S. Ct. 3031

(2007); United States v. Hrasky, 453 F.3d 1099, 1102 (8th Cir. 2006), cert. denied, 550 U.S. 903 (2008). In Stroud, the Washington Supreme Court limited the scope of Belton to unlocked containers because of the greater protection granted Washington citizens under Article I, §7 of our state constitution. Stroud, 106 Wn.2d at 152.

On April 21, in a 5-4 decision, the U.S. Supreme Court reversed the broad reading of the above longstanding bright-line rule in Arizona v. Gant, 556 U.S. ___, (2009), a case in which Gant's vehicle had been searched incident to his arrest after he had been handcuffed and placed in the back of a patrol car. Gant, 556 U.S. ___, *3. In affirming the lower court's opinion that the seizure of the cocaine and other items in the vehicle was the result of an unreasonable search within the meaning of the Fourth Amendment, the court reasoned:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Gant, 556 U.S. ___, *11.

This holding applies and compels reversal and dismissal of Burnett's conviction in this case under similar facts, as set forth above.

Where, as here, a higher court enters a constitutional ruling in a criminal case, that ruling applies to all cases on direct review. Griffith v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 l. Ed. 2d 649 (1987); State v. McCormack, 117 Wn.2d 141, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111 (1992); State v. Blanks, 139 Wn. App. 543, 161 P.3d 455 (2007), review denied, 163 Wn.2d 1046 (2008). The reasons for this mandate are clear: “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication,” taints the “integrity of judicial review” and would result in “actual inequity.” Griffith, 479 U.S. at 322-323. As a result, there is “no exception for cases in which the new rule constitutes a clear break from the past.” In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 326-27, 823 P.2d 492 (1992). Nor will concerns of “reliance” by the State justify departing from the rule. See State v. Hanson, 151 Wn.2d 783, 789-91, 91 P.3d 888 (2004).

Further, the ruling of Gant applies regardless whether the defendant moved to suppress and argued the search was illegal below. State v. Rodriguez, 65 Wn. App. 409, 417, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992). There can be no “waiver” of the right to raise the issue because, at the time of trial, the parties would have reasonably relied on the then-current understanding of what Belton held and would have

assumed the search was lawful under that case. See Rodriguez, 65 Wn. App. at 417. Further, this issue is of constitutional magnitude and manifest and may be raised for the first time on appeal under RAP 2.5(a)(3). Id.¹

Under the facts of this case, the warrantless search of the vehicle incident to Burnett's arrest was unconstitutional under Gant, which applies to this case, and reversal and dismissal of Burnett's criminal conviction for possession of methamphetamine is required.

E. SUPPLEMENTAL CONCLUSION

For the reasons stated above, and in addition the arguments presented in the previously filed Brief of Appellant, Burnett respectfully requests this court to reverse and dismiss his conviction for possession of methamphetamine.

DATED this 14th day of May 2009.

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¹ Of course, the ineffective assistance claim raised in Burnett's initial Brief of Appellant, which has been incorporated by reference, supra at 1, is equally applicable here should this court disagree with this assessment.

CERTIFICATE

I certify that we mailed a copy of the above supplemental brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 14th day of May 2009.

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