

NO. 38325-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MICHAEL ABUAN,

Appellant.

09 DEC -8 PM 12:04
STATE OF WASHINGTON
BY  DEPUTY

FILED
COURT OF APPEALS
DIVISION II

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

The Honorable Bryan E. Chushcoff

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THE SEARCH OF THE VEHICLE IN WHICH ABUAN WAS A PASSENGER CONSTITUTES AN UNREASONABLE AND UNLAWFUL SEARCH AND CONSEQUENTLY THE EVIDENCE SEIZED FROM THE VEHICLE AND ABUAN'S ALLEDGED CONFESSION MUST BE SUPPRESSED.

The State asserts that because Abuan did not bring a motion to suppress before the trial court he has waived his right to raise the suppression issue on appeal under Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), arguing that this Court should follow its decision in State v. Millan, 151 Wn. App. 492, 212 P.3d 630 (2009) rather than State v. McCormick, ___ Wn. App. ___, 216 P.3d 475 (2009). Brief of Respondent at 13-23. However, the same day that the State filed its response brief, the Washington Supreme Court issued its opinion in State v. Patton, No. 80518-1, 2009 WL 3384578 (October 22, 2009), noting that its decision is consistent with the United States Supreme Court's holding in Gant. Patton at 15.

In Patton, officers were watching Patton's trailer hoping to arrest him on an outstanding felony warrant. After waiting a short time, officers saw Patton at his car parked in the driveway. When the officers approached Patton and announced that he was under arrest, Patton ran inside his trailer. The officers entered the trailer, arrested Patton, placed

him in the back of a patrol car, and searched his vehicle. They found two baggies of methamphetamine and charged Patton with unlawful possession of methamphetamine. Patton moved to suppress the evidence and the trial court granted the motion. The State appealed and this Court reversed the trial court. Patton at 1-2.

The Washington Supreme Court reversed, holding that under the Washington Constitution, art. I, section 7, “the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.” Patton at 14. In reaching its conclusion, the Court recognized that “Washington State citizens hold a constitutionally protected privacy interest in their automobiles and the contents therein” and emphasized that “[o]fficer safety and the risk of destruction of evidence of the crime of arrest are the reasons that brought [the automobile search incident to arrest] exception into existence.” Patton at 3.

The Court determined that “the search incident to arrest exception is narrow and should be applied only in circumstances anchored to the justification for its existence. A search incident to arrest cannot arise from the simple fortuity that a suspect is arrested near his car.” Patton at 7.

Referring to Gant, the Court observed that “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.” Patton at 13. The Court reasoned that because “many lower courts have followed the broadest possible reading” of the search incident to arrest exception to a warrant, 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 reading distance of the passenger compartment at the time of the search.’ ” Patton at 13. Recognizing that “we have heretofore upheld searches incident to arrest conducted after the arrestee has been secured and the attendant risk to officers in the field has passed,” the Court expressly disapproved of “this expansive application of the narrow search incident to arrest exception.” Patton at 14.

Under Gant and Patton, it is evident that suppression of the evidence on appeal is not contingent upon whether a defendant brought a motion to suppress below because obviously the search is unconstitutional regardless of whether the defendant moved to suppress the evidence. Moreover, a defendant can hardly be at fault for not moving to suppress

the evidence in light of the fact that appellate courts have historically upheld expansive searches incident to arrest. The United States Supreme Court held that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Gant and Patton clearly establish a new rule that constitutes a clear break with the past which applies to this case.

Contrary to the State’s assertion, the doctrine of waiver has no application here. The State argues that waiver is particularly applicable because it could have argued “inevitable discovery” as an alternative theory if Abuan had brought a motion to suppress the evidence. Brief of Respondent at 22-23. Fatal to the State’s argument is the Washington Supreme Court’s rejection of the inevitable discovery doctrine in State v. Winterstein, No. 80755-8, 2009 WL 4350257 (December 3, 2009). The Supreme Court determined that “the inevitable discovery doctrine is necessarily speculative and does not disregard illegally obtained evidence.” Winterstein at 14. Citing its disapproval of the inevitable discovery doctrine in State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (2003), the Court held that “[c]onsistent with this precedent, we reject the

inevitable discovery doctrine because it is incompatible with the nearly categorical exclusionary rule under article I, section 7.” Winterstein at 16.

The State argues further that even if this Court considers the merits of appellant’s argument, the evidence should not be suppressed pursuant to the “good faith” exception to the exclusionary rule. Brief of Respondent at 23-35. The State’s argument fails pursuant to the Washington Supreme Court’s holding in Patton, that under the Washington Constitution, a search of a vehicle incident to arrest is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed. Patton at 14. Unlike its federal counterpart, the Fourth Amendment, there is no “good faith” exception to the article I, section 7 exclusionary rule. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)(Const. art. I, section 7 differs from the Fourth Amendment in that it clearly recognizes an individual’s right to privacy with no express limitations.)

Like in Gant and Patton, because the search of the car in which Abuan was a passenger was unreasonable and unlawful, evidence of the gun and Abuan’s alleged confession must be suppressed. Reversal and dismissal is required because without evidence that the car and gun connected Abuan to the shooting and that Abuan confessed to being the

driver in the shooting, there was insufficient evidence to convict Abuan of the crimes.

2. REVERSAL IS REQUIRED BECAUSE DETECTIVE BAIR IMPROPERLY COMMENTED ON ABUAN'S CONSTITUTIONAL RIGHT TO REMAIN SILENT AND THE ERROR WAS NOT HARMLESS.

The State argues that Detective Bair's statement was not a comment on the defendant's right to remain silent but "an explanation of the course of the interview in response to the prosecutor's question about the chronology of the statements, as well as the extent to which the defendant admitted coordinating his story with Howell." Brief of Respondent at 43. Importantly, the State omits the critical portion of Bair's testimony. The record reflects that Bair stated that after he accused Abuan of conveniently getting his story straight after talking to Howell, "he didn't want to talk about it anymore after that once I confronted him that I believe that's what took place." 7RP 660. "A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). Clearly, Bair's statement constitutes a comment on Abuan's silence so as to infer guilt.

The State argues further that "[e]ven if the court were to hold that Detective Bair's statement was error, any such error was nonetheless

harmless.” Brief of Respondent at 43. The State’s conclusory argument is unsubstantiated by the record. Bair’s improper comment implied guilt, undoubtedly leading the jury to believe that Abuan’s confession was true but he changed his story after collaborating with Howell. In light of the fact that the jury had reservations about Abuan’s confession because it asked to see a written confession, Bair’s comment on Abuan’s right to remain silent was not harmless error. See Brief of Appellant at 18-20.

In reversing the conviction of the accused in State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996), the Washington Supreme Court concluded:

An accused’s right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call to the attention of the trier of fact the accused’s pre-arrest silence to imply guilt.

Easter, 30 Wn.2d at 243.

Reversal is required because Bair’s improper comment that Abuan did not want to talk to him implied guilt, in violation of his constitutional right to remain silent, and the error was not harmless. Easter, 30 Wn.2d at 242.

3. REVERSAL AND DISMISSAL IS OF COUNT VI IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT ABUAN ASSAULTED FOMAI LEOSO.

The State argues that “where Abuan or an accomplice fired the gun at the residence of Fomai Leoso and hit the garage, the jury could find that the defendant or his accomplice assaulted Fomai Leoso.” The State contends that the jury could find “that this was an act intended to inflict bodily injury . . . that it was an act to create fear of bodily injury” and the jury could reasonably infer that Fomai “feared future injury from subsequent shots, even if he couldn’t see who was shooting.” Brief of Respondent at 45. The record belies the State’s argument.

When a jury is instructed on alternative means of committing the same crime, there must be sufficient evidence to support a conviction under each alternative. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Under the jury instruction defining assault, the State had to prove beyond a reasonable doubt that Abuan intended to inflict bodily injury

upon Fomai and intended to create apprehension and fear of bodily injury and in fact created in Fomai a reasonable apprehension and imminent fear of bodily injury. CP 240. Fomai testified that he was in the house when the shooting occurred, the shots hit the wall outside the garage, he did not see the shooter or where the shots were coming from, and he ran outside after he heard the gunshots. 11RP 1287-88, 1317. Fomai never testified that he felt apprehension and imminent fear of body injury and obviously he would not have ran outside if he felt apprehensive or fearful. In light of Fomai's testimony and the undisputed fact that the shots were fired at the garage and not the house where Fomai was located, there was insufficient evidence that Abuan assaulted Fomai. As the State acknowledges, "[w]hether or not an assault occurs in a particular case depends more on the apprehension created in the mind of the person assaulted than in the undisclosed intention of the person assaulting." Brief of Respondent at 44 citing State v. Murphy, 7 Wn. App. 505, 511, 500 P.2d 1726 (1972).

The record substantiates that even when viewing the evidence in the light most favorable to the State, no trier of fact could have found all the elements of the crime beyond a reasonable doubt. Consequently, Abuan's conviction for assault in the second degree as charged in Count VI must be reversed and dismissed. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss Mr. Abuan's convictions.

DATED this 7th of December, 2009.

Respectfully submitted,


VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Kevin Michael Abuan

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Stephen Trinen, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of December, 2009 in Kent, Washington.


Valerie Marushige
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