

NO. 38540-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

JESSE JOHNSON, Appellant.

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STATE OF WASHINGTON  
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DEPUTY  
COURT OF APPEALS  
DIVISION II

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SUPPLEMENTAL APPELLANT'S BRIEF

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4/18/14 WJH

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## **I. SUPPLEMENTAL ASSIGNMENTS OF ERROR**

1. The warrantless search of Johnson's car incident to his arrest for outstanding warrants was unreasonable under the Fourth Amendment to the United States Constitution and the United States Supreme Court's recent opinion in *Arizona v. Gant*.
2. Johnson's rights under the Fourth Amendment to the United States Constitution were violated when the arresting officer conducted a warrantless search of the car after the driver and Johnson were both handcuffed, placed under arrest and secured in the patrol car.

## **II. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR**

1. Was the warrantless search of the car unreasonable under the Fourth Amendment to the United States Constitution and United States Supreme Court's recent opinion in *Arizona v. Gant*, where Johnson had already been placed under arrest and secured in the officer's patrol vehicle before the officer conducted the search of his car and the search was not for evidence relating to his arrest?

### III. SUPPLEMENTAL STATEMENT OF THE CASE

Johnson hereby incorporates by reference the Statement of the Case contained in the Opening Brief of Appellant.

### IV. SUPPLEMENTAL ARGUMENT & AUTHORITIES

**ISSUE 1: WAS THE WARRANTLESS SEARCH OF THE CAR UNREASONABLE UNDER THE FORTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND UNITED STATES SUPREME COURT'S RECENT OPINION IN *ARIZONA V. GANT*, WHERE JOHNSON HAD ALREADY BEEN PLACED UNDER ARREST AND SECURED IN THE OFFICER'S PATROL VEHICLE BEFORE THE OFFICER CONDUCTED THE SEARCH OF HIS CAR AND THE SEARCH WAS NOT FOR EVIDENCE RELATING TO HIS ARREST?**

Although Johnson did not raise this issue below, it can be raised for the first time on appeal because it is an issue of constitutional law and the record concerning the search of the vehicle has been fully developed in the record below. RAP 2.5(a) (Appellant may raise “manifest error affecting a constitutional right” for the first time on appeal).

The warrantless search of the vehicle in this case was unconstitutional. “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (footnote omitted); U.S. Const. amd. IV. Among the exceptions to the warrant requirement is

a search incident to a lawful arrest. See *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

In *New York v. Belton*, the United States Supreme Court held that “when a policeman has made a lawful custodial arrest of the occupants of an automobile he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). In *Thornton v. United States*, the Supreme Court clarified that the *Belton* rule applies “even when an officer does not make contact until the person arrested has left the vehicle.” 541 U.S. 615, 617, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).

In *State v. Stroud*, the Washington State Supreme Court adopted the *Belton* Court's “bright-line rule,” holding that “[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle.” 106 Wn. 2d 144, 152, 720 P.2d 436 (1986).

Recently, in *Arizona v. Gant*, 2009 Westlaw 1045962, the United States Supreme Court overturned that rule. (A copy of the majority opinion in *Gant* is attached in the Appendix.) In that case, Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car. 2009 Westlaw 1045962 at 3. Police officers

then searched his car and discovered cocaine in the pocket of a jacket on the backseat. 2009 Westlaw 1045962 at 3.

Gant was charged with possession of a narcotic drug for sale and possession of drug paraphernalia. He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. Among other things, Gant argued that Belton did not authorize the search of his vehicle because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. 2009 Westlaw 1045962 at 3.

The Supreme Court agreed, and rejected a broad reading of Belton as authorizing a vehicle search incident to every recent occupant's arrest.

2009 Westlaw 1045962 at 7. The Court specifically held:

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 an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

2009 Westlaw 1045962 at 11 (emphasis added).

In this case, Johnson was arrested on outstanding warrants, removed from his car, arrested and placed in the patrol vehicle. RP2 31.

The officer then returned to Johnson's car to search it incident to arrest. RP2 32. During the search, the officer discovered drug paraphernalia and trace amounts of heroin and cocaine. RP2 32-37, 39, 41, 43-44. Johnson was charged with unlawful possession of a controlled substance and unlawful use of drug paraphernalia. CP 45-46.

The warrantless search in this case is clearly improper under the new rule articulated by *Gant*. As in *Gant*, it occurred after Johnson was secured in police vehicles and posed no danger to the officers. Further, the search was not conducted in an effort to secure evidence relating to the outstanding warrants for which Johnson was arrested. The search was therefore unconstitutional under *Gant* and the evidence found in this warrantless search must be suppressed.

## V. CONCLUSION

Because the warrantless search of the vehicle violated the fourth amendment, the evidence found in the vehicle must be suppressed and Johnson's convictions for unlawful possession of a controlled substance and unlawful use of drug paraphernalia must be reversed.

DATED: April 28, 2009

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CERTIFICATE OF SERVICE

I certify that on April 28, 2009, I caused a true and correct copy of this Supplemental Appellant's Brief to be served on the following via prepaid first class mail:

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