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DIVISION II

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STATE OF WASHINGTON
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Nº. 38740-9-II

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

STATE OF WASHINGTON
Respondent,

v.

KAREN LOUISE SMITH,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 08-1-00987-2
The Honorable Anna M. Laurie, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient admissible evidence to convict Ms. Smith of any crime.
2. The trial court erred in denying the motion to suppress the evidence found in Ms. Smith's vehicle.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the baggie of methamphetamine admissible where it was discovered pursuant to a search of Ms. Smith's vehicle after her arrest and where Ms. Smith was handcuffed and locked inside Officer Halsted's vehicle, where Ms. Smith was stopped for driving with a suspended license, and where Officer Halsted had no basis to believe that any evidence of the crime of Ms. Smith's arrest would be found inside her vehicle? (Assignments of Error Nos. 1&2)
2. Are automatic searches of a vehicle incident to the arrest of an occupant of that vehicle lawful under the Fourth Amendment post *Arizona v. Gant* where the occupant is secured in the back of the arresting officer's police vehicle and the officer has no basis to believe that evidence of the crime of the vehicle occupant's arrest will be found in the vehicle? (Assignments of Error Nos. 1 & 2)
3. Are automatic searches of a vehicle incident to the arrest of an occupant of that vehicle lawful under Article 1, § 7 and *State v. Stroud* post *Arizona v. Gant* where the occupant is secured in the back of the arresting officer's police vehicle and the officer has no basis to believe that evidence of the crime of the vehicle occupant's arrest will be found in the vehicle? (Assignments of Error Nos. 1 & 2)
4. Are automatic searches of a vehicle incident to the arrest of an occupant of that vehicle still lawful under Article 1, § 7 of the Washington Constitution in light of the twenty years of developing interpretation of Article 1, § 7 post *State v. Stroud*? (Assignments of Error Nos. 1 & 2)
5. Was Ms. Smith's confession, standing alone, sufficient to establish the corpus delicti of unlawful possession of a controlled substance? (Assignments of Error Nos. 1 & 2)
6. Was the evidence discovered in Ms. Smith's vehicle admissible under the doctrine of inevitable discovery since the police would have impounded her vehicle and conducted an inventory search of the vehicle? (Assignments of Error Nos. 1 & 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On September 5, 2008, Officer Halsted was driving southbound on Belfair Valley Road when he observed a vehicle, later identified to be driven by Ms. Karen Smith, travelling northbound. CP 1-5. Officer Halsted noted the license plate on the vehicle and ran the plate via his in-car mobile data computer. CP 1-5. The license plate was registered to a vehicle matching the description of Ms. Smith's vehicle and indicated that the vehicle was registered to Ms. Smith. CP 1-5. Officer Halsted checked Ms. Smith's driving status and discovered that her license was suspended. CP 1-5. Officer Halsted turned around, caught up to Ms. Smith's vehicle, activated his emergency lights, and stopped Ms. Smith's vehicle. CP 1-5.

Officer Halsted approached the vehicle and observed that the driver was the only occupant. CP 1-5. Officer Halsted asked the driver for her driver's license and the driver provided a license that identified her as Karen Smith. CP 1-5. Officer Halsted informed Ms. Smith that her license was suspended, then had her step out of the car and placed her under arrest for driving with a suspended license. CP 1-5.

Officer Halsted handcuffed Ms. Smith, searched her person, and then placed her in the back seat of his patrol car. CP 1-5. Prior to *Mirandizing* Ms. Smith, Officer Halsted asked her if there was anything illegal in her car such as drugs or guns. CP 1-5. Ms. Smith told Officer Halsted that she had an "empty baggie" in a duffel bag in the back seat. CP 1-5. Ms. Smith told Officer Halsted that the baggie used to contain meth. CP 1-5.

Officer Halsted then searched Ms. Smith's car and found a black duffel bag in the

back seat. CP 1-5. Officer Halsted opened the duffel bag and found a camera bag on top of some clothes. CP 1-5. Inside the camera bag, Officer Halsted found a white plastic cylindrical container that had a small zippered baggy inside. CP 1-5. Inside the zippered baggie was around 1/4 gram of a crystal substance which field tested positive for methamphetamine. CP 1-5. The zippered baggy also held four other baggies with a crystal residue and three empty zip baggies. CP 1-5. Officer Halsted took these items into evidence and continued to search Ms. Smith's vehicle while a Port Orchard Police canine unit arrived to assist. CP 1-5.

Officer Halsted returned to his vehicle, advised Ms. Smith of her *Miranda* rights and asked Ms. Smith if she was willing to speak with him. CP 1-5. Ms. Smith acknowledged her rights and indicated she was willing to speak with Officer Halsted. CP 1-5. Ms. Smith told Officer Halsted that the substance in the baggie belonged to her and admitted that she had slipped back into using methamphetamine after having stopped previously. CP 1-5.

Officer Halsted had Ms. Smith's vehicle impounded and towed. CP 1-5.

On September 8, 2008, Ms. Smith was charged with one count of unlawful possession of a controlled substance in violation of RCW 69.50.4013 and 69.50.206(d)(2). CP 1-5.

On November 6, 2008, Ms. Smith filed a motion to suppress all her statements made to Officer Halsted and all the evidence found inside her vehicle. CP 7-18. Ms. Smith argued that the statements made to Officer Halsted after her arrest but before she was *Mirandized* should be suppressed on the grounds that she was interrogated in custody without having been advised of her Constitutional rights. CP 7-18. Ms. Smith argued

that her statements made to Officer Halsted after he searched her vehicle and had advised her of her Constitutional rights should be suppressed because the statements were tainted by the improper previous questioning by Officer Halsted. CP 7-18.

Ms. Smith argued that the search of her vehicle incident to her arrest was invalid under Article 1, § 7 of the Washington Constitution and the Fourth Amendment because Ms. Smith had no immediate access to her vehicle after she had been arrested. CP 7-18. Ms. Smith argued that the search was unlawful because there was no evidence which would suggest that evidence of the crime of driving with a suspended license would be found inside Ms. Smith's vehicle and there was no basis to believe that Ms. Smith posed any threat to the officer or that there was a weapon in Ms. Smith's vehicle. CP 7-18.

At the hearing on the motion to suppress, Officer Halsted testified the he searched Ms. Smith's vehicle incident to her arrest as a matter of standard protocol and not in response to anything that Ms. Smith said to him. RP 9-10, 11-19-08.¹ Officer Halsted testified that, other than the registration of the vehicle which might indicate that Ms. Smith owned the vehicle, he did not expect to find any evidence in Ms. Smith's vehicle relating to the crime of driving with a suspended license. RP 16-17, 11-19-08. Officer Halsted testified that, at the time he searched Ms. Smith's vehicle, Ms. Smith was handcuffed in the back of Officer Halsted's vehicle and no other people were in the area except the canine officer who responded to assist in the search. RP 19, 11-19-08.

The State stipulated that Ms. Smith's statements to Officer Halsted prior to Officer Halsted's search of her vehicle were inadmissible. RP 21-22, 11-19-08. However, the trial court denied Ms. Smith's motion to suppress her other statements and

¹ The volumes of the Report of Proceedings are not numbered continuously. Reference to the transcript will be made by giving the page number, followed by the date of the proceeding.

the evidence found in her vehicle, finding that Officer Halsted was permitted to search Ms. Smith's vehicle under *State v. Stroud*. CP 24-26; RP 30-31, 11-19-08. The trial court also found that Ms. Smith's statements to Officer Halsted after the search were admissible because the lawful intervening search removed the taint of the improper questioning of Ms. Smith prior to the search. CP 24-26; RP 32, 11-19-08. However, the trial court indicated that its ruling would have been different had the search of Ms. Smith's vehicle been unconstitutional. CP 24-26; RP 32, 11-19-08.

On November 19, 2008, Ms. Smith waived her right to a jury trial and agreed to be tried via a stipulated facts bench trial. CP 23; RP 32-33, 36, 11-19-08.

On November 24, 2008, the Superior Court found Ms. Smith guilty of one count of unlawful possession of a controlled substance in a stipulated facts bench trial. CP 27-29, 30-40; RP 3-4, 11-24-08.

Ms. Smith was sentenced on December 26, 2008. CP 41-51; RP 2-11, 12-26-08.

Notice of Appeal was timely filed on January 12, 2009. CP 52.

D. ARGUMENT

The State presented insufficient admissible evidence to convict Ms. Smith of any crime.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Where a criminal defendant challenges the sufficiency of the evidence, appellate courts review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829

P.2d 1068. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). If there is insufficient evidence to prove an element, reversal is required and retrial is ‘unequivocally prohibited.’ *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Here, Ms. Smith was charged with one count of unlawful possession of a controlled substance in violation of RCW 69.50.4013 and 69.50.206(d)(2). CP 1-5. RCW 69.50.4013 makes it a class C felony for “any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice.” RCW 69.50.206(d)(2) classifies methamphetamine as a controlled substance.

Thus, the State’s burden in this case was to present sufficient evidence to permit the trial court to find that Ms. Smith possessed methamphetamine. The State’s evidence consisted of Ms. Smith’s statements to Officer Halsted and the baggie containing methamphetamine found in the duffle bag in Ms. Smith’s vehicle. As will be discussed below, the search of Ms. Smith’s vehicle was unconstitutional under both the Fourth Amendment and Article 1, § 7 of the Washington Constitution, and Ms. Smith’s statements, standing alone without any other evidence, were insufficient to establish the corpus delicti of the crime of unlawful possession of a controlled substance.

- a. *The search of Ms. Smith's vehicle incident to her arrest was unlawful under the Fourth Amendment.*

The Fourth Amendment to the US Constitution provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the United States Supreme Court held that when an individual was arrested, it was reasonable for the arresting officer to search the person arrested in order to remove any weapons the suspect might later use to resist arrest or escape or otherwise injure the officer. *Chimel*, 395. U.S. at 762-763, 89 S.Ct. 2034, 23 L.Ed.2d 685. The *Chimel* court went on to extend the authority of police officers to search the area into which an arrestee might reach in order to grab a weapon or evidentiary items because, "A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." *Chimel*, 395. U.S. at 762-763, 89 S.Ct. 2034, 23 L.Ed.2d 685.

Prior to *Chimel*, the most recent U.S. Supreme Court decision discussing the permissible scope of a search incident to an arrest was *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950). The *Chimel* court held that,

Rabinowitz has come to stand for the proposition, inter alia, that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested. And it was on the basis of that proposition that the California courts upheld the search of the petitioner's entire house in this case.

Chimel, 395. U.S. at 760, 89 S.Ct. 2034, 23 L.Ed.2d 685. The *Chimel* court then held,

“Th[e *Rabinowitz*] doctrine, however, at least in the broad sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis.” *Chimel*, 395. U.S. at 760, 89 S.Ct. 2034, 23 L.Ed.2d 685. The *Chimel* court reached this conclusion after taking great pains to emphasize the importance of the warrant requirement:

Mr. Justice Frankfurter wisely pointed out in his *Rabinowitz* dissent that the Amendment’s proscription of ‘unreasonable searches and seizures’ must be read in light of ‘the history that gave rise to the words’-a history of ‘abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution * * *.’ The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the [Fourth] Amendment, therefore, the requirement that ‘no Warrants shall issue, but upon probable cause,’ plays a crucial part. As the Court put it in *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 [1948]:

‘We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional [sic] requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.’

Id., at 455-456, 69 S.Ct., at 193.

Chimel, 395. U.S. at 761, 89 S.Ct. 2034, 23 L.Ed.2d 685 (internal citations omitted).

In ruling that searches of a person and the area immediately within that person’s

control were lawful, the *Chimel* court likened the search incident to arrest to a *Terry* stop and held that searches incident to arrest were permissible for the same reasons as *Terry* stops:

Only last Term in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, we emphasized that ‘the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure,’ *id.*, at 20, 88 S.Ct. at 1879, and that ‘(t)he scope of (a) search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.’ *Id.*, at 19, 88 S.Ct., at 1878. The search undertaken by the officer in that ‘stop and frisk’ case was sustained under that test, because it was no more than a ‘protective * * * search for weapons.’ *Id.*, at 29, 88 S.Ct., at 1884. But in a companion case, *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917, we applied the same standard to another set of facts and reached a contrary result, holding that a policeman’s action in thrusting his hand into a suspect’s pocket had been neither motivated by nor limited to the objective of protection. Rather, the search had been made in order to find narcotics, which were in fact found.

A similar analysis underlies the ‘search incident to arrest’ principle, and marks its proper extent. When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee’s person and the area ‘within his immediate control’-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel, 395 U.S. at 762-763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (internal citations omitted).

In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the United States Supreme Court held as a “bright-line rule” that when an arrestee is occupying the passenger compartment of a car at the time of arrest, he might grab a

weapon or destroy evidence located anywhere within the compartment, therefore the arresting officer may search the entire passenger compartment, including closed containers, incident to the arrest of the occupant. *Belton*, 453 U.S. at 460, 101 S.Ct. 2860, 69 L.Ed.2d 768. The *Belton* court reached this decision in order to provide police officers affecting arrests a “workable rule” as to the permissible scope of a search of a vehicle incident to the arrest of an occupant. *Belton*, 453 U.S. at 459-460, 101 S.Ct. 2860, 69 L.Ed.2d 768.

In clarifying the permissible scope of a search of a vehicle incident to the arrest of an occupant, the *Belton* court pointed out that “[this] holding...does no more than determine the meaning of *Chimel’s* principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.” *Belton*, 453 U.S. at 460 n. 3, 101 S.Ct. 2860, 69 L.Ed.2d 768.

Thus, the search incident to arrest warrant exception was created in order to protect officers from suspects who may have a weapon on or near their person at the time of arrest and to discover and prevent the destruction of evidence which is on or near the suspect’s person at the time of arrest.

However, in *Arizona v. Gant*, 556 U.S. ----, 129 S.Ct. 1710, ---L.Ed.2d ---- (2009), the U.S. Supreme Court overruled *Belton* and its “bright-line” rule regarding searches of a vehicle incident to the arrest of an occupant of that vehicle. *See Montejo v. Louisiana*, --- S.Ct. ----, 2009 WL 1443049 (2009), Alito, J. and Kennedy, J., concurring (“Earlier this Term, in *Arizona v. Gant*, 556 U.S. ----, 129 S.Ct. 1710, ---L.Ed.2d ---- (2009), the Court overruled *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69

L.Ed.2d 768 (1981)).

In *Gant*, Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket. The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses. Reversing, the State Supreme Court distinguished *Belton* on the ground that it concerned the scope of a search incident to arrest but did not answer the question whether officers may conduct such a search once the scene has been secured. Because *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, requires that a search incident to arrest be justified by either the interest in officer safety or the interest in preserving evidence and the circumstances of Gant's arrest implicated neither of those interests, the State Supreme Court found the search unreasonable. The State petitioned the US Supreme Court to review the case and the Supreme Court granted certiorari.

The US Supreme Court agreed with the Arizona Supreme Court's holding that,

Because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search...the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, as defined in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and applied to vehicle searches in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), did not justify the search in this case.

Gant, 129 S.Ct, at 1714.

In reaching its decision, the US Supreme Court rejected a reading of *Belton* which would authorize an automatic search of a vehicle subsequent to the arrest of an occupant even though the occupant may not be able to reach the passenger compartment at the time of arrest:

Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the

arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it “in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.” 453 U.S., at 460, n. 3, 101 S.Ct. 2860. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police 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, 129 S.Ct, at 1719.

In reaching this decision, the *Gant* court noted that “Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains.” *Gant*, 129 S.Ct, at 1719, n. 4.

Although it overruled *Belton*, the *Gant* court did “conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” *Gant*, 129 S.Ct, at 1719. But, in promulgating this rule, the *Gant* Court also held that “In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.”

Gant, 129 S.Ct, at 1719.

The *Gant* court ultimately ruled,

Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched *Gant*'s car. Under those circumstances, *Gant* clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas

Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant’s car. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Gant, 129 S.Ct, at 1719.

In reaching its decision, the *Gant* court rejected arguments made by the State of Arizona that police should be allowed to conduct automatic searches of the passenger compartment of a vehicle under *Belton* “regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee’s limited privacy interest in his vehicle.”

Gant, 129 S.Ct, at 1720. The *Gant* court rejected the State’s arguments for several reasons:

First, the State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist’s privacy interest in his vehicle is less substantial than in his home...the former interest is nevertheless important and deserving of constitutional protection... It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.

At the same time as it undervalues these privacy concerns, the State exaggerates the clarity that its reading of *Belton* provides. Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee’s vehicle an officer’s first contact with the arrestee must be to bring the encounter within *Belton*’s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene. The rule

has thus generated a great deal of uncertainty, particularly for a rule touted as providing a “bright line.”

Contrary to the State’s suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests. Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. For these reasons, we are unpersuaded by the State’s arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals’ privacy.

Gant, 129 S.Ct, at 1720-1721 (internal citations omitted).

The *Gant* court ultimately concluded,

The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely “within ‘the area into which an arrestee might reach,’ “ 453 U.S., at 460, 101 S.Ct. 2860, and blind adherence to *Belton* ‘s faulty assumption would authorize myriad unconstitutional searches. The doctrine of stare decisis does not require us to approve routine constitutional violations.

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.

Gant, 129 S.Ct, at 1723-1724.

Thus, post-*Gant*, warrantless searches of vehicles incident to the arrest of an occupant of the vehicle violate the Fourth Amendment of the US Constitution unless: (a) the arrestee is within reaching distance of the passenger compartment at the time of the

search (however, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains); (b) it is reasonable to believe the vehicle contains evidence of the offense of arrest (however, when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence); or (c) some other exception to the warrant requirement applies.

This case is nearly identical to *Gant*. As in *Gant*, Ms. Smith was stopped and arrested for driving with a suspended license. As in *Gant*, the officer who arrested Ms. Smith searched her vehicle incident to her arrest even though she had already been handcuffed and placed in the back of the police car, eliminating the possibility that Ms. Smith would be able to access the passenger compartment of her vehicle. As in *Gant*, the officer had no reason to believe that he would find any evidence relating to the offense for which Ms. Smith was arrested inside her car.² In fact, Officer Halsted even testified that he searched Ms. Smith's vehicle as a matter of standard protocol - not because of anything Ms. Smith said or because any exigent circumstance required an immediate warrantless search. RP 9-10, 11-19-08. Therefore, as in *Gant*, the search of Ms. Smith's vehicle incident to her arrest violated the Fourth Amendment and was unlawful.

² Officer Halsted even testified that the only thing he expected to find in the car which related to the fact that Ms. Smith had been driving with a suspended license was the registration of the vehicle. RP 16-17, 11-19-08. However, Officer Halsted had already confirmed that the vehicle was registered to Ms. Smith (CP 1-5) and ownership of the vehicle being driven is not an element of the crime of driving with a suspended license. RCW 46.20.342(1) makes it "unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state." (Emphasis added). Thus, whether or not Ms. Smith owned the vehicle she was driving is irrelevant as to the crime of driving with a suspended license. The crime is committed when the person drives *any* vehicle while his or her license is suspended.

b. *The search of Ms. Smtih's vehicle violated Article 1, § 7 of the Washington Constitution.*

i. Developments in the interpretation of Article 1, § 7 have impliedly overruled *Stroud*.

State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983), *overruled in part by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), was the first post-*Belton* case where the Washington Supreme court addressed the issue of whether or not police could search the passenger area of a vehicle incident to the arrest of an occupant. In *Ringer*, the court ruled that, absent actual exigent circumstances, a warrantless search of a suspect's vehicle was impermissible under Article 1, § 7. The defendant in *Ringer* was lawfully parked in a rest area when two officers discovered that a felony arrest warrant existed justifying the defendant's arrest. The officers ordered the defendant out of his van, arrested him, handcuffed him, and placed him in the back of the patrol car. During this arrest process, the officers noticed a strong odor of marijuana emanating from defendant's van. The officers subsequently searched the van and discovered closed, unlocked suitcases which contained marijuana, cocaine, and other controlled substances.

The Washington Supreme Court held that the search violated article 1, section 7 because, where police had probable cause to search, warrantless searches were permissible only where emergencies or exigencies existed which do not permit reasonable time and delay for a judicial officer to evaluate and act upon a search warrant application. *Ringer*, 100 Wn.2d at 699-701, 674 P.2d 1240. The *Ringer* court reasoned that “[u]nder the doctrine of exigent circumstances, the totality of circumstances said to justify a warrantless search will be closely scrutinized. The burden is on those seeking the exemption to show that the exigencies of the situation made that course imperative.”

Ringer, 100 Wn.2d at 701, 674 P.2d 1240 (internal citations omitted). Because *Ringer* had already been arrested, handcuffed, and searched, and because his van was lawfully parked, immobile, and did not impede traffic or threaten public safety, the *Ringer* court held that no exigencies existed and the officers had made no showing that a telephonic warrant could not have been obtained to search the vehicle. *Ringer*, 100 Wn.2d at 703, 674 P.2d 1240.

Thus, post-*Ringer*, the rule under Article 1, § 7 was that, absent actual exigent circumstances, a warrantless search of a suspect's vehicle was impermissible. However, the law soon changed.

In *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986), the court revisited the question of vehicle searches incident to the arrest of an occupant and rejected the *Ringer* rule. In overruling *Ringer*, the *Stroud* court was concerned with the ability of police officers to decide whether or not a warrantless search was permissible: "The *Ringer* holding makes it virtually impossible for officers to decide whether or not a warrantless search would be permissible. Weighing the 'totality of circumstances' is too much of a burden to put on police officers who must make a decision to search with little more than a moment's reflection." *Stroud*, 106 Wn.2d at 148, 720 P.2d 436.

Citing *Belton*, 453 U.S. at 458, 101 S.Ct. 2860, 69 L.Ed.2d 768, the *Stroud* court reasoned

A highly sophisticated set of rules requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.

We agree with the Supreme Court's decision to draw a clearer line to aid police enforcement, although because of our state's additional protection of privacy rights we must draw the line differently than did the United

States Supreme Court.

Stroud, 106 Wn.2d at 151, 720 P.2d 436.

While recognizing that the search incident to arrest exception had been narrowly drawn to address officer safety and prevent the destruction of evidence, the *Stroud* court observed that “because of our heightened privacy protection [under article I, section 7], we do not believe that these exigencies always allow a search.” *Stroud*, 106 Wn.2d at 151, 720 P.2d 436. The *Stroud* court rejected the *Ringer* totality of the circumstances test and followed *Belton* except for locked containers:

During the arrest process...officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.... [T]he danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual’s access to the contents of the container.

Stroud, 106 Wn.2d at 152, 720 P.2d 436.

Thus, post-*Stroud*, under article 1, § 7, where an occupant of a vehicle was arrested, police could lawfully search the entire passenger compartment of the vehicle, save for locked containers, in order to prevent the suspect from either obtaining a weapon to harm the officers or from destroying evidence, even if these exigent circumstances did not actually exist.

However, an examination of Washington law post-*Stroud* reveals that *Stroud* was an aberration in the interpretation of article 1, § 7, and should be abandoned in favor of the *Ringer* standard.³

³ Portions of this briefing have been adapted with permission from the ACLU Amicus Brief authored by Douglas B. Klunder, WSBA #32987, and submitted to the Washington Supreme Court in *State v. Buelna-*

Modern interpretation of Article 1, Section 7 began in the early 1980's when the Washington Supreme Court "indicated that [it] will protect Washington citizens' right to privacy in search and seizure cases more vigorously than they would be protected under the federal constitution." *Stroud*, 106 Wn.2d at 148, 720 P.2d 436 (citing the few previous instances: *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982); *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983), *overruled in part by Stroud*; *State v. Myrick*, 102 Wn.2d 506, 688 P.2d 151 (1984)). *Stroud* itself was a modest example of that greater privacy protection. It generally followed the Fourth Amendment rule which permits a search of the entire passenger compartment incident to the arrest of the driver, *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Giving only slightly greater deference to privacy, the rule announced in *Stroud* allows a search of the entire passenger compartment except for locked containers. *Stroud*, 106 Wn.2d at 52, 720 P.2d 436 .

As one of the early Article 1, Section 7 cases, *Stroud* had little previous jurisprudence to draw upon in determining the appropriate scope of Article 1, § 7's greater privacy protections. In the decades since *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) - a decision announced the same day as *Stroud* - Washington courts have developed a great deal of case law interpreting Article 1, Section 7 and recognized that it is one of the country's strongest constitutional privacy provisions, stronger than the privacy protections afforded by the Fourth Amendment. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) ("It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth

Valdez, No. 80091-0. *Buelna-Valdez* was argued before the Supreme Court on June 10, 2008, and an opinion has not yet been rendered.

Amendment”). The *Stroud* rule is incompatible with this subsequent jurisprudence.

Although it has long been recognized that Article I, Section 7 is more protective of privacy than the Fourth Amendment, it is only recently that the overarching philosophy of the difference in interpretive approaches has been formulated: “In short, while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article 1, section 7 we focus on expectations of the people being searched.” *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). If this basic approach had been recognized in 1986, it is unlikely *Stroud* would have been decided the same way. The focus there was on determining reasonable guidelines for police actions, rather than on delineating the reasonable expectation of privacy that drivers have in their vehicles. Article 1, Section 7 prohibits the invasion of that privacy without authority of law; invasion cannot be justified in the absence of exigent circumstances simply because officers act “reasonably.”

An examination of post-*Stroud* caselaw reveals that, in non-arrest situations, courts have returned to the *Ringer* standard of requiring true exigent circumstances in examining the lawfulness of warrantless searches conducted for officer safety or to prevent the destruction of evidence. For example, where police desire to search a home or other protected area, “an officer must be able to articulate reasons supporting a belief that [officer] safety may be compromised if [the officer] does not undertake a protective search and such belief must be objectively reasonable.” *State v. Coutier*, 78 Wn.App. 239, 244, 896 P.2d 747 (1995), *review denied*, 128 Wn.2d 1019, 911 P.2d 1343 (1996).

Similarly, when police conduct a *Terry* stop on a vehicle and search the vehicle for officer safety, the reasonableness of the search is reviewed under the totality of the

circumstances. *State v. Glenn*, 140 Wn.App. 627, 633-634, 166 P.3d 1235 (2007), *citing State v. Glossbrener*, 146 Wn.2d 670, 679, 49 P.3d 128 (2002).

Thus, where an officer *has not* arrested the occupant of a vehicle, the officer must be able to articulate reasons supporting an objectively reasonable belief that his safety will be compromised if he does not search that vehicle in order for the search of the vehicle to be lawful, and the reasonableness of the search is reviewed under the totality of the circumstances. This is the *Ringer* standard that was rejected by *Stroud*.

Similarly, a warrantless search may not be justified if the suspect or evidence is under the control of the police so that they may prevent its destruction. *State v. Hall*, 53 Wn.App. 296, 302-04, 766 P.2d 512, *review denied*, 112 Wn.2d 1016 (1989).

The Washington Supreme Court has held that the search incident to arrest warrant exception is not a “right” of the State, but is dependent upon the existence of actual exigent circumstances. *See State v. White*, 129 Wn.2d 105, 112-113, 915 P.2d 1099 (1996) (“The validity of a search incident to arrest depends upon the existence of exigent circumstances such as the need to seize weapons which the arrestee may seek to use to resist arrest or escape or the need to prevent the destruction of evidence of the crime”; *see also State v. Rathbun*, 124 Wn.App. 372, 380, 101 P.3d 119(2004) (“Contrary to the State’s position, the ability to search a vehicle incident to the arrest of a vehicle’s occupant is not a police entitlement justifying a rule that police may search a vehicle incident to arrest regardless of how far a suspect is from the vehicle. If a suspect flees from a vehicle so that the vehicle is no longer within his or her immediate control at the time of arrest, the exigencies supporting a vehicle search incident to arrest no longer exist and there is no justification for the police to search the vehicle without first obtaining a

warrant...[B]ecause Rathbun was not in close proximity to his truck when he was arrested, the officers were not justified in conducting a warrantless search of the vehicle.”)

The continued application of the *Ringer* “totality of the circumstances” standard to exigent circumstances searches which do not involve the arrest of the occupant of a vehicle highlights the flawed logic of *Stroud*. The *Stroud* court rejected the *Ringer* standard because it wanted to give officers a bright-line rule applicable by the officer in the field. However, as post-*Stroud* jurisprudence indicates, police officers in the field must still apply the *Ringer* standard to all searches performed due to exigent circumstances *except* where the officer has just arrested the occupant of a vehicle. Further, the successful arrest of a suspect eliminates the exigent circumstances which supposedly justify the search of a vehicle – the potential destruction of evidence and officer safety – obviating the need for police officers to conduct a search without first obtaining a warrant. Thus, in all exigent circumstances searches except those involving the arrest of a vehicle occupant, police officers are still required to apply the non-bright-line *Ringer* standard, and the arrest of the person eliminates the exigent circumstances which theoretically authorize the warrantless search.

Several other states that have considered the issue in recent years have drawn much different conclusions than *Stroud* under their own state constitutions. Rejecting *Belton* entirely, they allow vehicle searches incident to arrest only when necessary “to ensure police safety or to avoid the destruction of evidence.” *State v. Eckel*, 185 N.J. 523, 539, 888 A.2d 1266 (2006); *see also Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896 (1995); *Camacho v. State*, 119 Nev. 395, 75 P.3d 370 (2003); *State v. Pittman*, 139

N.M. 29, 127 P.3d 1116 (N.M. Ct. App. 2005); *State v. Bauder*, 924 A.2d 38 (Vt. 2007).

Stroud was a pragmatic experiment, attempting to create a bright line rule to guide law enforcement and courts, even with some cost to individuals' privacy. But the *Stroud* rule has failed to provide clarity; the Washington Supreme Court has since dealt with a variety of cases involving searches of vehicles incident to arrest, and the Court of Appeals has dealt with numerous others. *See, e.g., State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989) (purse is not equivalent of locked container); *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996) (sleeping unit in truck is part of "passenger compartment"); *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) (cannot search passenger's belongings incident to arrest of driver); *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001) (entire motor home is part of "passenger compartment"); *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2002) (reaffirming Parker); *see also State v. Lopez*, 142 Wn. App. 930, 176 P.3d 554, *review denied* 164 Wn.2d 1015, 195 P.3d 88 (2008).

The experience of two decades shows that *Stroud's* bright line rule has not operated as intended to balance privacy against the needs posed by exigent circumstances. *Stroud*, 106 Wn.2d at 152. Instead, it has allowed searches where there are no exigent circumstances, and has encouraged fishing expeditions and pretextual searches. *Stroud* has created an aberration in the law where a police officer who has arrested the occupant of a vehicle must meet a lower legal standard to search that vehicle for officer safety or to prevent destruction of evidence than the officer would if the occupant had not been arrested. This is simply illogical since the underlying purpose of the search of the vehicle is to prevent the destruction of evidence or obtainment of a weapon by the occupant of the vehicle. If the occupant of the vehicle has been taken into

custody, the exigent circumstances allowing the warrantless search no longer exist. The *Stroud* rule is incompatible with continued Article 1, Section 7 jurisprudence, as well as state constitutional interpretations in other jurisdictions.

The Washington State Supreme Court has stated: “The ultimate teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.” *State v. Ladson*, 138 Wn.2d 343, 357, 979 P.2d 833 (1999).

Once the occupant of a vehicle has been arrested, handcuffed, and removed from his vehicle, it is impossible for that person to destroy evidence in or retrieve a weapon from his or her vehicle. The arrest of the occupant of a vehicle removes any exigent circumstance relating to officer safety or the destruction of evidence which might provide justification for a warrantless search of the vehicle. *Stroud* is contrary to *Ladson* and to the contemporary understanding of Article 1, § 7, and is therefore no longer good law.

Here, the trial court ruled that the search of Ms. Smith’s vehicle incident to her arrest was lawful under *Stroud*. CP 24-26; RP 30-31, 11-19-08. However, as discussed above, and as will be discussed below, *Stroud* is no longer good law and twenty years of interpretation of Article 1, § 7 require this court to find that *Stroud* is in conflict with a modern understanding of the protections offered by Article 1, § 7 and that the search of Ms. Smith’s vehicle was therefore unlawful.

ii. *Arizona v. Gant* has overruled *Stroud*.

When the *Stroud* court overruled *Ringer* and adopted *Belton*, the court did so with the following interpretation of *Belton*:

In recent cases, the United States Supreme Court has enlarged the narrow exceptions to the prohibition in the Fourth Amendment against warrantless searches. The effect has been to make lawful a warrantless search of a passenger compartment of a car, and all containers (luggage, paper bags, etc.) inside it, pursuant to a lawful custodial arrest. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

Stroud, 106 Wn.2d at 152, 720 P.2d 436. In other words, the *Stroud* court interpreted *Belton* as authorizing a search of a vehicle incident to all arrests of an occupant of the vehicle with no regard to the individual facts of the case.

This interpretation of *Belton* was discussed and explicitly rejected in *Gant*:

Despite the textual and evidentiary support for the Arizona Supreme Court's reading of *Belton*, **our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.** This reading may be attributable to Justice Brennan's dissent in *Belton*, in which he characterized the Court's holding as resting on the "fiction ... that the interior of a car is always within the immediate control of an arrestee who has recently been in the car." 453 U.S., at 466, 101 S.Ct. 2860. Under the majority's approach, he argued, "the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car" before conducting the search. *Id.*, at 468, 101 S.Ct. 2860.

Since we decided *Belton*, Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee's reach to justify a vehicle search incident to arrest, but Justice Brennan's reading of the Court's opinion has predominated. As Justice O'Connor observed, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Thornton*, 541 U.S., at 624, 124 S.Ct. 2127 (opinion concurring in part). Justice SCALIA [sic] has similarly noted that, although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in "this precise factual scenario ... are legion." *Id.*, at 628, 124 S.Ct. 2127 (opinion concurring in judgment) (collecting cases). Indeed, some courts have upheld searches under *Belton* "even when ... the handcuffed arrestee has already left the scene." 541 U.S., at 628, 124 S.Ct. 2127 (same).

Under this broad reading of *Belton*, a vehicle search would be

authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it “in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.” 453 U.S., at 460, n. 3, 101 S.Ct. 2860. **Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police 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. ____, *7 (emphasis added).

Thus, *Stroud* was based on an interpretation of *Belton* which has been explicitly rejected by the US Supreme Court in *Gant*. This court should find that *Stroud* has been implicitly overruled by *Gant*.

As discussed above, prior to *Stroud*, *Ringer* governed the law regarding searches of vehicles incident to the arrest of an occupant. Under *Ringer*, the law was that, under Article 1, § 7, absent **actual** exigent circumstances, a warrantless search of a suspect's vehicle was impermissible. *Ringer*, 100 Wn.2d at 699-701, 674 P.2d 1240.

Post-*Gant*, a return to this standard is logical. Under *Ringer*, unless exigent circumstances (in other words some exception to the warrant requirement) existed when the totality of the situation known to the arresting officers is considered, warrantless searches of a vehicle incident to the arrest of an occupant violated article 1, § 7. Under *Gant*,

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.

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

In effect, *Gant* and *Ringer* require the same test to determine whether the search of a vehicle by an arresting officer following the arrest of an occupant of the vehicle is lawful- unless some exception to the warrant requirement exists, police officers must obtain a warrant prior to searching the passenger compartment of a vehicle following the arrest of an occupant of that vehicle. *Gant* was decided under the 4th Amendment and *Ringer* was decided under Article 1, § 7, but, given that Article 1, § 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment (*State v. Hendrickson*, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996); *State v. Williams*, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984)), a search which is unlawful under the 4th Amendment is per se unlawful under Article 1, § 7. By the same logic, the test used for the lawfulness of a search under Article 1, § 7 can be no less stringent than the test used to determine the lawfulness of a search under the 4th Amendment.

Gant and *Ringer* propound the same test for determining the lawfulness of the search of a vehicle incident to the arrest of an occupant of that vehicle. Because *Stroud* was based on an incorrect interpretation of *Belton*, this court should find that *Stroud* has been overruled and return to the analysis mandated by *Ringer* as the proper test for judging the lawfulness of the search of a vehicle incident to the arrest of an occupant of that vehicle under Article 1, § 7.

c. *All evidence discovered during the search of Ms. Smith's vehicle was inadmissible.*

In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, this Court held nearly half a

century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.

Wong Sun v. U.S., 371 U.S. 471, 484-485, 83 S.Ct. 407 (1963).

Whether this court finds the search of Ms. Smith's vehicle to violate the Fourth Amendment, Article 1, § 7, or both, the search of Ms. Smith's vehicle was unconstitutional. As such, all evidence discovered pursuant to that search should have been suppressed and was inadmissible.

d. The admissible evidence presented by the State was insufficient to establish the corpus delicti of the crime of unlawful possession of a controlled substance.

A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

Corpus delicti means the "body of the crime" and must be proved by evidence sufficient to support the inference that there has been a criminal act. **A defendant's incriminating statement alone is not sufficient to establish that a crime took place. The State must present other independent evidence to corroborate a defendant's incriminating statement. In other words, the State must present evidence independent of the incriminating statement that the crime a defendant described in the statement actually occurred.**

In determining whether there is sufficient independent evidence under the corpus delicti rule, we review the evidence in the light most favorable to the State. **The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in a defendant's incriminating statement. Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a logical and reasonable inference of the facts sought to be proved.**

Notably, we are among a minority of courts that has declined to adopt a more relaxed rule used by federal courts. Under the federal rule, the State need only present independent evidence sufficient to establish that the incriminating statement is trustworthy. **Under the Washington rule, however, the evidence must independently corroborate, or confirm, a**

defendant's incriminating statement.

In addition to corroborating a defendant's incriminating statement, the independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence. If the independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause, it is insufficient to corroborate a defendant's admission of guilt.

As noted above, **the corpus delicti rule requires the State to present evidence that is independent of the defendant's statement and that corroborates not just a crime but the specific crime with which the defendant has been charged.** The dissent claims the purpose of the rule is only to ensure that "some evidence, however slight, supports an inference that a crime was committed."...But the rule is not so forgiving. The State's evidence must support an inference that the crime with which the defendant was charged was committed. This is a much higher standard than the dissent implies. **It requires that the evidence support not only the inference that a crime was committed but also the inference that a particular crime was committed.**

State v. Brockob, 159 Wn.2d 311, 327-329, 150 P.3d 59 (2006) (internal citations omitted) (emphasis added).

If the State cannot provide sufficient independent evidence which would support a logical and reasonable inference that the crime charged occurred, the defendant's confession or admission cannot be used to establish the corpus delicti and prove the defendant's guilt at trial. *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996).

In *Brockob*, Mr. Brockob was observed attempting to steal numerous boxes of various kinds of cold medicines. *Brockob*, 159 Wn.2d at 318, 150 P.3d 59. Mr. Brockob was detained by store security and the police were called. *Brockob*, 159 Wn.2d at 318-319, 150 P.3d 59. In the store security office, Mr. Brockob confessed that he had been stealing the medicine. *Brockob*, 159 Wn.2d at 319, 150 P.3d 59. When asked if he was stealing the medicine to make methamphetamine, Mr. Brockob replied that he was not

going to make methamphetamine, but that he was stealing the medicine for someone else who was going to make methamphetamine. *Brockob*, 159 Wn.2d at 319, 150 P.3d 59.

The State charged Mr. Brockob with one count of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. *Brockob*, 159 Wn.2d at 319, 150 P.3d 59. The State argued that Mr. Brockob intended to manufacture methamphetamine regardless of whether he manufactured it himself or gave the Sudafed to someone else to manufacture methamphetamine. *Brockob*, 159 Wn.2d at 319, 150 P.3d 59. Mr. Brockob's trial attorney argued that because there was insufficient evidence to show how many tablets Brockob had, there was no proof of intent to manufacture methamphetamine-the only intent the State could prove was to shoplift. *Brockob*, 159 Wn.2d at 319-320, 150 P.3d 59. Mr. Brockob was convicted and appealed arguing insufficient evidence to support the corpus delicti, insufficient evidence to support his conviction. *Brockob*, 159 Wn.2d at 320, 150 P.3d 59.

The Washington Supreme Court vacated Mr. Brockob's conviction and found that the State had presented insufficient evidence to establish Mr. Brockob had the intent to manufacture methamphetamine. *Brockob*, 159 Wn.2d at 332, 150 P.3d 59. In reaching this decision, the *Brockob* court reasoned as follows:

the corpus delicti rule revolves around whether independent evidence corroborates the crime described in a defendant's incriminating statement. Applying that rule to the facts of this case, the State presented evidence that Brockob stole somewhere between 15 and 30 packages of Sudafed. **That evidence is sufficient only to support the logical and reasonable inference that Brockob intended to steal Sudafed. Officer Fecteau testified that he knew that Sudafed is used in the manufacture of methamphetamine; however, the mere assertion that Sudafed is known to be used to manufacture methamphetamine does not necessarily lead to the logical inference that Brockob intended to do so, without more.**

Brockob, 159 Wn.2d at 331-332, 150 P.3d 59 (emphasis added).

The evidence presented by the State to establish that Ms. Smith possessed the methamphetamine consisted of the methamphetamine found in Ms. Smith's vehicle and Ms. Smith's confession to Officer Halsted that the methamphetamine in her car belonged to her and that she had begun using methamphetamine again. However, as discussed above, the search of Ms. Smith's vehicle was unlawful, and the methamphetamine was therefore inadmissible. This leaves Ms. Smith's confession as the only admissible evidence she committed the crime of possession of a controlled substance. Under Washington's corpus delicti rule, without the methamphetamine, the State had insufficient evidence to establish that Ms. Smith actually possessed a controlled substance since the independent evidence did not confirm Ms. Smith's confession that the methamphetamine in her car belonged to her. Thus, the State presented insufficient evidence to convict Ms. Smith of any crime.

e. The methamphetamine found in Ms. Smith's vehicle was not admissible under the doctrine of inevitable discovery as evidence which would have been found in an impound inventory search of the vehicle.

It is anticipated that the State will argue that the evidence found in Ms. Smith's car was admissible in the trial court under the doctrine of inevitable discovery since the evidence would have been found during an inventory search of the vehicle after the vehicle was impounded. This argument fails.

Evidence that is the fruit of an unlawful search or seizure is generally inadmissible. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). An exception to the rule is when the State can establish, by a preponderance of the evidence, "that the evidence ultimately or inevitably would have been discovered

using lawful procedures.” *State v. O’Neill*, 148 Wn.2d 564, 591, 62 P.3d 489 (2003).

“Police officers may conduct a good faith inventory search following a lawful impoundment without first obtaining a search warrant” and may lawfully impound a vehicle if authorized to do so by statute. *State v. Bales*, 15 Wn.App. 834, 835, 552 P.2d 688 (1976), *review denied*, 89 Wn.2d 1003 (1977). An officer may not, however, resort to an inventory search as a “device and pretext for making a general exploratory search of the car without a search warrant.” *State v. White*, 135 Wn.2d 761, 770, 958 P.2d 982 (1998) (*quoting State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968)).

RCW 46.55.113(2)(d) provides that “a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety” if the officer arrests the driver of a vehicle and takes the driver into custody.

- i. Even if the police could impound Ms. Smith’s vehicle, the police could not conduct a lawful inventory search of the vehicle without first obtaining Ms. Smith’s permission.

Even if police may impound a vehicle due to the arrest of the driver, police must still obtain permission from an arrestee before conducting an inventory search of that vehicle:

[E]ven if impoundment [is] authorized, it is doubtful that the police could have conducted a routine inventory search without asking petitioner if he wanted one done. The purpose of an inventory search is to protect the police from lawsuits arising from mishandling of personal property of a defendant. Clearly, a defendant may reject this protection, preferring to take the chance that no loss will occur.

State v. Williams, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984).

Here, Ms. Smith never consented to an inventory search of her vehicle. Therefore, any such search would have been unlawful and the doctrine of inevitable discovery would not apply.

- ii. Even if an inventory search of Ms. Smith's vehicle would have been permissible, the police would have had to exceed the permissible scope of an inventory search to locate the methamphetamine.

Inventory searches are regularly upheld when they are conducted according to standardized police procedures which do not give excessive discretion to the police officers, and when they serve a purpose other than discovering evidence of criminal activity. *Colorado v. Bertine*, 479 U.S. 367, 375-76, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). But an inventory search may not be unlimited in scope. *State v. Houser*, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980). The permitted extent of such searches must be restricted to effectuating the purposes that justify their exception to the Fourth Amendment. *State v. Dugas*, 109 Wn.App. 592, 597, 36 P.3d 577 (2001), citing *United States v. Edwards*, 577 F.2d 883, 894 (5th Cir.1978).

As stated above, the purpose of the inventory exception to the warrant requirement is to "protect the police from lawsuits arising from mishandling of personal property of a defendant." *Williams*, 102 Wn.2d at 743, 689 P.2d 1065.

In *Dugas*, police stopped Dugas to talk to him and, at his request, gave him permission to remove his jacket and place it on his vehicle. He was arrested shortly thereafter for domestic violence and transported to the jail, but the jacket remained on the vehicle. An officer who remained at the scene impounded the jacket, and a subsequent search of it yielded contraband in a closed container found in the jacket pocket. Dugas was convicted for possession of a controlled substance. He appealed the denial of his motion to suppress, arguing that the police exceeded the scope of an inventory search when they opened the closed container located in the closed pocket. The Washington Supreme Court agreed with Dugas and reversed his conviction because

the purposes of an inventory search d[id] not justify opening a closed container located inside a jacket pocket when there is no indication of dangerous contents. The search of the jacket was conducted in the field, outside the presence of Dugas or other witnesses. Opening a closed container found in the jacket was not a step necessary or reasonable to guard against a false property loss claim. The officers testified that their standard procedure for an inventory search included a search for illegal drugs, a purpose outside the scope of a valid inventory search.

Balancing the legitimate needs of the police against the right to be free of warrantless intrusions into ones personal effects, we conclude that it was unreasonable to search inside the closed container.

Dugas, 109 Wn.App. at 599, 36 P.3d 577.

In reaching its decision, the *Dugas* court discussed the *Houser* decision:

In *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980)[,], the supreme court considered whether a search of a piece of luggage found in the trunk of an automobile during the course of an inventory search was reasonable. It stated that the court must balance “the governmental and societal interests advanced to justify such intrusions against the constitutionally protected interest of the individual citizen in the privacy of his effects.” *Houser*, 95 Wn.2d at 157, 622 P.2d 1218 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 378, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976) (Powell, J., concurring)); *United States v. Bloomfield*, 594 F.2d 1200, 1203 (8th Cir.1979). The *Houser* court held that where a closed piece of luggage in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of the luggage in the course of an inventory search unless the owner consents. Absent exigent circumstances, a legitimate inventory search only calls for noting such an item as a sealed unit. *Houser*, 95 Wn.2d at 158, 622 P.2d 1218.

In reaching its decision, the court in *Houser* relied on *People v. Counterman*, 192 Colo. 152, 556 P.2d 481 (1976). In that case, the court held that police had exceeded the proper scope of an inventory search in opening and searching the contents of a knapsack. The court noted that the contents were securely sealed and did not give any indication of danger or other reasons for special inventory. They concluded that the legitimate purposes of the inventory search could have been fully accomplished by noting the knapsack as a sealed unit, and by offering the defendant a choice of a full inventory of the contents. Because the knapsack was tightly sealed and there was no danger of anything slipping out, the court noted that the purposes of the inventory search are better served if the knapsack is inventoried as a unit. *Counterman*, 556 P.2d at 485. “In this way the knapsack, which is locked up as a whole in police

headquarters, has never been opened and its contents have never been removed, reshuffled and replaced.” *Houser*, 95 Wn.2d at 159, 622 P.2d 1218 (quoting *U.S. v. Bloomfield*, 594 F.2d 1200, 1202 (8th Cir.1979)). The court concluded that “this would minimize the possibility of loss and the possibility of false claims against police by the owner.” *Houser*, 95 Wn.2d at 159, 622 P.2d 1218 (quoting *Bloomfield*, 594 F.2d at 1202).

Dugas, 109 Wn.App. at 598-599, 36 P.3d 577.

Thus, under *Dugas* and *Houser*, where officers encounter a closed container during an inventory search of a vehicle, unless the container gives some indication that the contents of the container are dangerous, police may not open a closed container and must simply note that the container is sealed.

Applying *Dugas* and *Houser* to an inventory search of Ms. Smith’s vehicle, in order to discover the methamphetamine, the police would have had to exceed the permissible scope of the inventory search. The methamphetamine found in Ms. Smith’s vehicle was found in a closed plastic container which was inside of a closed camera bag which was inside of a closed duffel bag. CP 1-5. The black duffel bag in the back seat of Ms. Smith’s vehicle gave no indication that it contained any sort of dangerous material. Had Officer Halsted been performing an inventory search, he would have been permitted to note that a closed duffel bag was present in the back seat but would not have been permitted to open it and search the contents of the duffel bag, much less the contents of closed containers in the duffel bag.

Any inventory search which would have located the methamphetamine found in Ms. Smith’s car would have been an unconstitutional search since the search would have had to exceed the permissible scope of an inventory search in order to locate the methamphetamine. Thus, the doctrine of inevitable discovery would not apply to render the drugs admissible.

- iii. The State should not be permitted to “get around” the holding of *Gant* by attempting to characterize otherwise unlawful searches as inventory searches.

It is anticipated that the State, if not in this case then in other cases which will come before this court in the future, will attempt to avoid the effect of the *Gant* decision by characterizing searches conducted incident to the arrest of an occupant of a vehicle as inventory searches rather than searches incident to arrest. It is further anticipated that, in response to *Gant*'s limitation on the ability of police to search a vehicle incident to the arrest of an occupant, police agencies will, instead, engage in liberal and broadened automobile impound procedures in order to conduct searches of those vehicles under the guise of inventory searches. This court should not permit the State to ignore the ruling of US Supreme Court in *Gant* and should prevent the State from conducting unconstitutional searches by implementing a broadened and more liberal policy regarding the impound of vehicles and then conducting inventory searches on those vehicles.

As the court held in *Gant*,

A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Arizona v. Gant, S.Ct. ----, 2009 WL 1045962 (2009), * 8.

Further, as cited above, an officer may not resort to an inventory search as a “device and pretext for making a general exploratory search of the car without a search warrant.” *White*, 135 Wn.2d at 770, 958 P.2d 982.

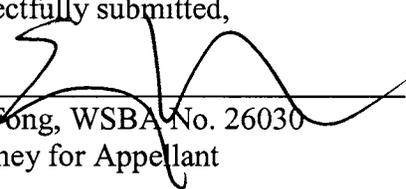
A rule allowing police agencies to avoid *Gant*'s prohibition of warrantless vehicle searches and, instead, conduct pretextual inventory searches is precisely the sort of rule the *Gant* court warned would give police "unbridled discretion to rummage at will among a person's private effects." Any such attempts by law enforcement to avoid the warrant requirement to search a vehicle by engaging in pretextual impoundment of that vehicle would be unlawful. This court should take this opportunity to emphasize and clarify the law that an inventory search conducted pursuant to the impounding of a vehicle may not be used as a "device and pretext for making a general exploratory search of the car without a search warrant."

E. CONCLUSION

The search of Ms. Smith's vehicle incident to her arrest was unlawful under both the Fourth Amendment and Article 1, § 7. Accordingly, the methamphetamine found in Ms. Smith's vehicle was not admissible at trial. Without the methamphetamine, the only evidence presented by the State that Ms. Smith had committed the crime of unlawful possession of a controlled substance was Ms. Smith's confession to Officer Halsted that the drugs were hers and she had slipped back into her addiction to methamphetamine. The State presented no admissible evidence to corroborate the crime described in Ms. Smith's statement; therefore the State presented insufficient evidence to establish the corpus delicti of the crime of unlawful possession of a controlled substance and insufficient evidence to convict Ms. Smith of having committed this crime. This court should vacate Ms. Smith's conviction and remand for dismissal with prejudice.

DATED this _____ day of June, 2009.

Respectfully submitted,



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▷

Court of Appeals of New Mexico.
STATE of New Mexico, Plaintiff-Appellee,
v.
Michael PITTMAN, Defendant-Appellant.
No. 24,671.

Nov. 23, 2005.
Certiorari Granted, No. 29,584, Jan. 10, 2006.

Background: Defendant pled guilty in the District Court, Lea County, Don Maddox, D.J., to being a felon in possession of a firearm. Defendant appealed.

Holding: The Court of Appeals, Sutin, J., held that officer who arrested defendant for having an outstanding warrant for failure to appear following stop for traffic offense was not justified in conducting search of defendant's vehicle as incident to his arrest under State Constitution.

Reversed and remanded.

Robinson, J., dissented and filed a separate opinion.

West Headnotes

[1] Criminal Law 110 ↪ 1139

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In General. Most Cited Cases

Criminal Law 110 ↪ 1144.12

110 Criminal Law

110XXIV Review

110XXIV(M) Presumptions

110k1144 Facts or Proceedings Not Shown by Record

110k1144.12 k. Reception of Evidence. Most Cited Cases

An appellate court reviews the denial of a motion to suppress by first reviewing the trial court's

factual determinations for substantial evidence in a light favorable to the prevailing party and then by reviewing the legal conclusions de novo.

[2] Arrest 35 ↪ 71.1(5)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(5) k. Particular Places or Objects. Most Cited Cases

The evidence concealment/destruction rationale for a search of a vehicle as incident to an arrest is based on the need to act quickly or else lose critical evidence of a crime which the police have probable cause to believe the suspect committed, and when there is no such critical evidence to be found either on a occupant or in the vehicle, the search of the vehicle under the evidence concealment/destruction rationale is unreasonable. U.S.C.A. Const.Amend. 4; West's NMSA Const. Art. 2, § 10.

[3] Criminal Law 110 ↪ 1134.32

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)4 Scope of Inquiry

110k1134.32 k. Particular Issues in General. Most Cited Cases

(Formerly 110k1134(1))

When a defendant appeals under both the Federal and State constitutions, an appellate court applies the interstitial approach to constitutional analysis; under such approach, if the right being asserted is protected under the Federal Constitution, court need not reach the State constitutional claim, but if defendant's rights are not fully protected under the Federal Constitution, court must then determine whether the State Constitution provides broader protection, and may diverge from federal precedent if distinctive State characteristics require a different result.

[4] Searches and Seizures 349 ↪ 24

349 Searches and Seizures

349I In General

349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

Under provision of State Constitution that prohibits unreasonable searches and seizures, strong preference for warrants is recognized. West's NMSA Const. Art. 2 § 10.

[5] Searches and Seizures 349 ↪ 192.1

349 Searches and Seizures

349VI Judicial Review or Determination

349k192 Presumptions and Burden of Proof

349k192.1 k. In General. Most Cited Cases

When a defendant challenges the validity of a search under State Constitution, the State bears the burden of proving facts that justify a warrantless search. West's NMSA Const. Art. 2, § 10.

[6] Searches and Seizures 349 ↪64

349 Searches and Seizures

349I In General

349k60 Motor Vehicles

349k64 k. Emergencies or Exigencies. Most Cited Cases

In order to permissible under State Constitution, warrantless search of automobile and its contents requires particularized showing of “exigent circumstances,” which include emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. West's NMSA Const. Art. 2, § 10.

[7] Arrest 35 ↪71.1(5)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(5) k. Particular Places or Objects. Most Cited Cases

State Constitution requires fact-specific inquiry in determining whether a warrantless search of vehicle and its contents is valid as search incident to arrest. West's NMSA Const. Art. 2, § 10.

[8] Automobiles 48A ↪349.5(1)

48A Automobiles

48AVII Offenses

48AVII(B) Prosecution

48Ak349.5 Search or Seizure Consequent to Arrest, Stop or Inquiry

48Ak349.5(1) k. In General. Most Cited Cases

Automobiles 48A ↪349.5(10)

48A Automobiles

48AVII Offenses

48AVII(B) Prosecution

48Ak349.5 Search or Seizure Consequent to Arrest, Stop or Inquiry

48Ak349.5(5) Object, Product, Scope, and Conduct of Search or Inspection

48Ak349.5(10) k. Weapons; Protective Searches; Pat-Down. Most Cited Cases

Officer who arrested defendant for having an outstanding warrant for failure to appear following stop for traffic offense was not justified in conducting search of defendant's vehicle as incident to his arrest under State Constitution; defendant had been handcuffed and secured in patrol car, officer testified that he did not believe that defendant presented a danger to him once he was handcuffed and placed in the patrol car, State did not demonstrate that the car would contain any evidence related to defendant's outstanding warrant, and nothing in the record reflected any knowledge on the officer's part of defendant's felony record before the officer searched defendant's vehicle. West's NMSA Const. Art. 2, § 10.

[9] Arrest 35 ↪ 71.1(5)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(5) k. Particular Places or Objects. Most Cited Cases

Even after a valid arrest, before an officer may search a vehicle without a warrant as incident to arrest under State Constitution, there must be either a need to remove a weapon the arrestee might use to resist arrest or escape, or a need to prevent the concealment or destruction of evidence. West's NMSA Const. Art. 2, § 10.

[10] Arrest 35 ↪ 71.1(5)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(5) k. Particular Places or Objects. Most Cited Cases

Under State Constitution, a gun in a car does not automatically constitute either danger to public or exigent circumstances to justify search of car as incident to arrest. West's NMSA Const. Art. 2, § 10.

[11] Searches and Seizures 349 ↪ 172

349 Searches and Seizures

349V Waiver and Consent

349k172 k. Words or Conduct Expressing Consent; Acquiescence. Most Cited Cases

A mere showing that an accused gave officers the keys to her car upon their request is insufficient to show a voluntary waiver of her Fourth Amendment rights. U.S.C.A. Const. Amend. 14.

****1118** Patricia A. Madrid, Attorney General, Arthur W. Pepin, Assistant Attorney General, Santa Fe, for Appellee.

John Bigelow, Chief Public Defender, Cordelia A. Friedman, Assistant Appellate Defender, Santa Fe, for Appellant.

***31 OPINION**

SUTIN, J.

{1} We consider the legality of a search of Defendant's car that occurred after Defendant was arrested, handcuffed, and placed in a patrol car. We conclude that under Article II, Section 10 of the New Mexico Constitution the search was illegal. We reverse the district court's denial of Defendant's motion to suppress and remand for further proceedings.

BACKGROUND

{2} Hobbs police officer Orin Tubbs saw Defendant's Cadillac pull out into traffic, on the opposite side of the roadway, from an apartment parking lot without stopping. He decided to stop Defendant, turned on his emergency equipment, and began a u-turn. As he did so, he saw Defendant pull into the parking area of an apartment building, park his car, quickly get out of the car, and lock the door. There were no other occupants in the car.

{3} Officer Tubbs pulled into the parking lot and asked for Defendant's license and registration. Defendant returned to his car, opened the passenger door, and retrieved the requested documents. The officer ran a wants and warrants check and discovered that there was an outstanding warrant for Defendant's failure to appear in municipal court. Based on that discovery, he arrested Defendant, handcuffed him, and put him in the rear seat of his patrol car.

{4} At that point, Defendant asked the officer to give the car keys to his grandmother, who Defendant said lived in the apartment complex. The officer took the keys, but chose instead to unlock Defendant's car and search it. He found a loaded .40 caliber handgun underneath the driver's seat. Officer Tubbs testified that at the time he searched the car, he did not feel he was in any danger, nor did he expect to find any evidence in the car related to the arrest for failure to appear.

{5} Defendant was charged with a traffic violation and with being a felon in possession of a firearm. He moved to suppress the evidence. The court denied the motion, whereupon Defendant entered a conditional no contest plea to the crime of felon in possession of a firearm reserving the right to appeal the suppression issue.

DISCUSSION

STANDARD OF REVIEW

[1] {6} We review the denial of a motion to suppress by first reviewing the district court's factual determinations for substantial evidence in a light favorable to the prevailing party and then by reviewing the legal conclusions de novo. State v. Garcia, 2005-NMSC-017, ¶ 27, 138 N.M. 1, 116 P.3d 72; see also State v. Attaway, 117 N.M. 141, 144-46, 870 P.2d 103, 106-08 (1994) (addressing the district court's exigency determination, determining that the question “extends beyond fact-finding and implicates an assessment of broader legal policies that the New Mexico Constitution entrusts to the reasoned judgment of the appellate courts of this state,” and concluding that the mixed question of fact and law involved in determining exigent circumstances “lies closest in proximity to a conclusion of law” and “that such determinations are to be reviewed de novo”).

SEARCH INCIDENT TO ARREST

{7} The State seeks to validate the search of Defendant's car as a search incident to arrest. The United States Supreme Court in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), held a search incident to an arrest justifiable as an exception to the warrant requirement under two rationales: the need to remove a weapon the arrestee might use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence. Id. at 762-63, 89 S.Ct. 2034. Those two rationales are *32 **1119 still applied. Thornton v. United States, 541 U.S. 615, 620, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004); see State v. Martinez, 1997-NMCA-048, ¶¶ 6-8, 123 N.M. 405, 940 P.2d 1200 (citing to Chimel in formulating the test to be used under the New Mexico Constitution regarding searches incident to arrest of a person in his home).

{8} Chimel described the spacial area of concern to be an area “into which an arrestee might reach.” 395 U.S. at 763, 89 S.Ct. 2034. Application of this spacial limitation became problematic in later cases when the arrest involved an occupant of a vehicle, and over the years the Supreme Court widened the area of the arrestee's “reach” in considering his temporal and spacial relationship to the vehicle. See Thornton, 541 U.S. at 620, 124 S.Ct. 2127; New York v. Belton, 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); United States v. Robinson, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

{9} Underlying the weapon removal rationale for a search incident to an arrest is a very “legitimate and weighty” concern for officer safety. See Knowles v. Iowa, 525 U.S. 113, 117, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998) (internal quotation marks and citation omitted); see also State v. Gutierrez, 2004-NMCA-081, ¶ 11, 136 N.M. 18, 94 P.3d 18 (permitting a search of an automobile incident to arrest where the defendant reported that there was a weapon in the vehicle and a passenger had access to it under an officer safety rationale); cf. State v. Paul T., 1999-NMSC-037, ¶¶ 10, 11, 14, 128 N.M. 360, 993 P.2d 74 (considering the Terry search circumstances “in light of a concern for officer safety”).

[2] {10} The evidence concealment/destruction rationale for a search incident to an arrest is based on the need to act quickly or else lose critical evidence of a crime which the police have probable cause to believe the suspect committed. See Cupp v. Murphy, 412 U.S. 291, 296, 301,

93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) (Douglas and Brennan, JJ., dissenting in part) (determining, in accordance with *Chimel*, that a limited search to “preserve the highly evanescent evidence” under a detainee's fingernails to be appropriate, agreeing with the Court “that exigent circumstances existed making it likely that the fingernail scrapings ... might vanish if [the detainee] were free to move about”). When there is no such critical evidence to be found either on an occupant or in the vehicle, a search is unreasonable if purportedly done under the evidence concealment/destruction rationale. See *Knowles*, 525 U.S. at 119, 119 S.Ct. 484 (declining to extend the authority to conduct a search incident to an arrest “to a situation where the concern ... for destruction or loss of evidence is not present at all”).

{11} “[*Belton*] ... held that when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest.” *Thornton*, 541 U.S. at 617, 124 S.Ct. 2127. *Belton* became the Supreme Court's most influential case in *Chimel* automobile search situations. As set out in LaFave's treatise on search and seizure, “[g]iven the *Belton* majority's avowed purpose of foreclosing the need for case-by-case determinations of an arrestee's control of the car” and its abandonment of the *Chimel* “immediate control” requirement for a broader rule, many federal and state cases have held that a search of a car incident to arrest is valid even if the arrestee is safely placed in the police car. 3 Wayne R. LaFave, Search and Seizure § 7.1(c) at 517-18 & n. 89 (4th ed.2004) (citing cases and noting Justice Brennan's statement in his dissent in *Belton* that “the result would presumably be the same even if [the officer] had handcuffed *Belton* and his companions in the patrol car before placing them under arrest” (internal quotation marks omitted)).

{12} Interestingly, *Thornton* involved a vehicle search after the arrestee was handcuffed and placed in a patrol car. However, these facts were not pertinent to the issue addressed by the Supreme Court. See *Thornton*, 541 U.S. at 617, 124 S.Ct. 2127. In *Thornton*, the issue on certiorari was whether the rule in *Belton* “is limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, or whether it applies as well *33 **1120 when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle.” *Thornton*, 541 U.S. at 617, 124 S.Ct. 2127. The Supreme Court held in *Thornton* that police may search an automobile as a search incident to arrest “even when an officer does not make contact until the person arrested has left the vehicle.” *Id.* The Court permitted a search so long as an arrestee is “ the sort of ‘recent occupant’ of a vehicle such as petitioner was here.” *Id.* at 623-24, 124 S.Ct. 2127. Because it was outside the question on which the Court granted certiorari, the majority in *Thornton* declined to address the defendant's argument that the Court “should limit the scope of *Belton* to recent occupants who are within reaching distance of the car.” *Thornton*, 541 U.S. at 622 n. 2, 124 S.Ct. 2127 (internal quotation marks omitted).

INTERSTITIAL AND NEW MEXICO CONSTITUTIONAL ANALYSES

[3] {13} When a defendant, as here, appeals under both the federal and state constitutions, we apply the interstitial approach to constitutional analysis. See *State v. Gomez*, 1997-NMSC-006,

¶¶ 17, 19, 122 N.M. 777, 932 P.2d 1; Gutierrez, 2004-NMCA-081, ¶ 9, 136 N.M. 18, 94 P.3d 18. If the right being asserted is protected under the federal constitution, we need not reach the state constitutional claim. Gomez, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1. If Defendant's rights are not fully protected under the federal constitution, we must then determine whether the state constitution provides broader protection. *See id.* We may diverge from federal precedent if distinctive state characteristics require a different result. *See id.* ¶¶ 19-20 (listing three independent reasons which justify departure from federal constitutional law precedent, including “a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics”). Based on *Belton, Thornton*, and the body of case law upholding vehicular searches incident to arrest as listed in LaFave, supra, at 517 n. 89, we think it apparent that Defendant is not likely to prevail under the federal constitution. We therefore examine New Mexico law.

[4][5] {14} New Mexico law expresses a strong preference for a warrant. Gomez, 1997-NMSC-006, ¶ 36, 122 N.M. 777, 932 P.2d 1. When a defendant challenges the validity of a search, the State bears the burden of proving facts that justify a warrantless search. *See id.* ¶ 39 (stating that “a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances”). Under Article II, Section 10 of the New Mexico Constitution, our courts have provided criminal defendants greater protection against searches than that provided under the United States Constitution.^{FN1} *See, e.g., State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 12, 130 N.M. 386, 25 P.3d 225* (listing various situations in which we have interpreted our state constitutional search and seizure provision more expansively than federal precedent); State v. Marquart, 1997-NMCA-090, ¶ 16, 123 N.M. 809, 945 P.2d 1027 (same). In particular, we have departed from federal search and seizure precedent when automobiles are involved. *See Cardenas-Alvarez, 2001-NMSC-017, ¶ 15, 130 N.M. 386, 25 P.3d 225; Gomez, 1997-NMSC-006, ¶¶ 39, 44, 122 N.M. 777, 932 P.2d 1. Significantly, in departing from federal precedent, our Supreme Court in *Cardenas-Alvarez* said that “[t]he extra layer of protection from unreasonable searches and seizures involving automobiles is a distinct characteristic of New Mexico constitutional law.” 2001-NMSC-017, ¶ 15, 130 N.M. 386, 25 P.3d 225. This extra layer of protection for automobiles was again recognized and confirmed recently in Garcia, 2005-NMSC-017, ¶ 29, 138 N.M. 1, 116 P.3d 72. *Garcia* notes that federal precedent expansively allows for searches of and seizures from a car without a warrant, but that “New Mexico law departs from federal precedent on this issue” and that the state constitution “provides greater protection, requiring a warrant or the presence of exigent circumstances to remove evidence.” *Id.**

^{FN1}. According to *LaFave*, several states “have declined to permit searches in as broad a set of circumstances as *Belton* would authorize.” *See LaFave, supra, § 7.1(a), at 505 n. 24. But see LaFave, supra, § 7.1(c), at 517-18 nn. 89-93.*

****1121 *34 [6][7] {15}** Exigent circumstances embrace “an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.” Gomez, 1997-NMSC-006, ¶ 39, 122 N.M. 777, 932 P.2d 1 (internal quotation marks and citation omitted); *accord Garcia, 2005-NMSC-*

017, ¶ 30, 138 N.M. 1, 116 P.3d 72. New Mexico has rejected the federal bright-line rule authorizing a search of the passenger compartment of a vehicle pursuant to a search incident to arrest. State v. Arredondo, 1997-NMCA-081, ¶ 28, 123 N.M. 628, 944 P.2d 276, overruled on other grounds by State v. Steinzig, 1999-NMCA-107, ¶ 29, 127 N.M. 752, 987 P.2d 409; see also Garcia, 2005-NMSC-017, ¶ 29, 138 N.M. 1, 116 P.3d 72 (noting that federal precedent allows warrantless vehicle searches “based on a bright line automobile exception to the warrant requirement” and that the New Mexico Constitution provides greater protection). Rather, our law endorses a “ fact-specific inquiry under the particular facts of this case.” Arredondo, 1997-NMCA-081, ¶ 28, 123 N.M. 628, 944 P.2d 276.

THE SEARCH WAS UNLAWFUL

{8}[9] {16} Given that we have rejected *Belton* 's bright-line approach under the federal constitution, we now turn to the protections guaranteed under New Mexico's Constitution. Because of New Mexico's strong preference for a warrant, we hold that even after a valid arrest, one of *Chimel* 's two rationales must be present before an officer may search a vehicle without a warrant. Applying this extra layer of protection, neither *Chimel* rationale supported the search of Defendant's vehicle in this case. Defendant posed no danger to the officer's safety, and the officer knew of no evidence a search and seizure would preserve from destruction. See Martinez, 1997-NMCA-048, ¶¶ 7, 12, 13, 15, 123 N.M. 405, 940 P.2d 1200 (holding the search incident to an arrest in a bedroom of the defendant's home unlawful where the officers testified there was no threat to their safety, they did not sense immediate danger, and nothing indicated that the evidence seized was within an area from which the defendant “might gain possession of a weapon or destructible evidence,” and noting that an officer's evaluation of danger is indicative of the facts at the time of the search (internal quotation marks and citation omitted)).

{17} In the present case, Defendant, handcuffed and secured in the patrol car, posed no danger to the officer. See Ferrell v. State, 649 So.2d 831, 833 (Miss.1995) (holding that where the defendant was arrested, handcuffed, and placed in the patrol car, the subsequent search of a container in his car was not incident to arrest because the officer could have no reasonable fear that the defendant might have access to a weapon); cf. State v. Kaiser, 91 N.M. 611, 613-14, 577 P.2d 1257, 1259-60 (Ct.App.1978) (holding that exigent circumstances did not exist to search the defendant's luggage where he had already been placed in custody). Nothing in the record indicates that the officer ever had any intention of searching the car until Defendant unexpectedly presented him with the keys. The facts belie danger or urgency.

{18} The State's reliance on *Gutierrez* and *Arredondo* is misplaced. In *Gutierrez*, the defendant, who was arrested, told the officer there was a handgun in his car, under circumstances where a passenger who was not arrested was near the car, and the gun was located between the passenger and the officer. 2004-NMCA-081, ¶ 11, 136 N.M. 18, 94 P.3d 18. We held that under those circumstances it was reasonable for the officer to search and seize the gun for safety reasons. *Id.* ¶¶ 11-12. In *Arredondo*, the defendant was stopped because he was suspected in connection with an assault involving a gun that had just been reported, thus, we held that the officer's reasonable be-

lief that the suspect was armed and dangerous amounted to an exigent circumstance justifying the search. 1997-NMCA-081, ¶¶ 18-19, 123 N.M. 628, 944 P.2d 276.

{19} We are unpersuaded by the State's attempts to create a sense of danger and urgency by characterizing the grandmother as an unknown, possibly sinister person who might use the gun to try to help Defendant escape, or who might pose some danger to the public. During the suppression hearing, *35 **1122 no testimony was elicited about the grandmother's nature or the officer's judgment of her nature. Moreover, if the officer really feared possible consequences from delivering the keys to Defendant's grandmother, he had the option of keeping the car keys and transporting Defendant to jail.

[10] {20} The State includes the public as an endangered target from the presence of the gun in the passenger compartment. We disagree. A gun in a car does not automatically constitute either danger or exigent circumstances. *See Garcia, 2005-NMSC-017, ¶ 31, 138 N.M. 1, 116 P.3d 72.* The presence of the gun in Defendant's locked car parked in the parking area of the grandmother's apartment complex, without more, did not create a danger to the public or exigent circumstances.

{21} The State also relies on Defendant's driving, conduct, and a prior conviction for conspiracy to commit armed robbery, to argue perceived danger or, at the very least, that the officer "possessed a reasonable concern" that Defendant might have hidden a weapon under the seat. We reject these arguments. The State has exaggerated Defendant's traffic offense. It asserts that the officer had observed "wildly inappropriate driving" and that Defendant had "raced" out of the parking lot into the street. The officer's actual testimony was that Defendant "didn't slow down" when entering the roadway. At most, we are presented with a garden variety traffic offense. We also disagree that Defendant's act of "carefully" obtaining required documents through the passenger side suggested that a weapon was in the car. Many people keep their documentation in the glove box, which is located on the passenger side. Moreover, the officer expressed no concern about the manner in which Defendant retrieved the documents.

{22} We also reject the State's assertion that, upon stopping Defendant, the officer learned through a computer check that Defendant had a prior conviction for a violent felony, and that this information could provide justification for the search. Officer Tubbs never testified that before his search of the car, he knew or relied on the fact that Defendant had been convicted of a violent felony. The State never argued in the district court that the officer's awareness of Defendant's criminal history was a reason to support a finding of any concern for danger. In support of its assertion, the State cites only to a criminal complaint against Defendant after his arrest. But the criminal complaint is far from clear on this point. The complaint discusses the computer check, but does not state when the computer check showing the prior conviction was conducted. The manner in which the complaint is written strongly suggests that the officer learned of the prior felony after he conducted the search. Additionally, in the suppression proceedings, the State never referred to or relied on the criminal complaint. Most importantly, regardless of when the officer learned of Defendant's prior conviction, the officer testified that he did not believe that

Defendant presented a danger to him once he was handcuffed and placed in the patrol car.

{23} The State asserts that “[e]ven a handcuffed arrestee may be foolhardy enough to try to seize a nearby firearm.” *Martinez*, 1997-NMCA-048, ¶ 7, 123 N.M. 405, 940 P.2d 1200. It argues that we should defer to the judgment of police officers, regarding danger, in a swiftly-developing situation. *See id.* ¶¶ 7-8 (stating that “we must be sensitive to the dangers to law enforcement officers in an unpredictable and highly charged situation”). We agree with these propositions, but they do not apply here. At the time of the search, the situation had been neutralized by handcuffing Defendant and placing him in the patrol car. The officer expressed no safety concern. This was not a swiftly-developing situation. Handcuffed and secured in the patrol car, Defendant had no realistic opportunity to escape, wrestle the car keys from the officer, rush over to his locked car, unlock the door, and seize the weapon from under the seat. The circumstances simply do not justify this search.

{24} Turning to the question of preservation of evidence, the State argues general rules with respect to the propriety of a search to assure that evidence left in a parked car or in a car released to someone else is preserved. However, the State does not tie the general rules to the facts in this *36 **1123 case. Here, the officer had no such evidence in mind. We do not see how the officer could have reasonably believed that evidence would be found in Defendant's car connected with his charge for failing to appear in court. *See Ferrell*, 649 So.2d at 833 (holding that search was not incident to arrest where the defendant was locked in the patrol car and the officer could have no reason to think that evidence related to the arrest for driving on a suspended license would be found in the car). Furthermore, if the officer was afraid that the grandmother might destroy evidence, he did not have to comply with Defendant's request that he give the keys to her, or he could have sought a warrant before searching the vehicle. *See Gomez*, 1997-NMSC-006, ¶ 44, 122 N.M. 777, 932 P.2d 1 (stating that “if there is no *reasonable* basis for believing an automobile will be moved or its search will otherwise be compromised by delay, then a warrant is required”).

{25} We conclude that a departure from federal precedent is warranted in this case because of distinctive state characteristics, as noted in a sufficiently developed body of New Mexico case law. The State must justify a warrantless search of an automobile incident to arrest through articulated facts in the record showing a reasonable likelihood of either a potential danger or the concealment or destruction of evidence. Here, the officer engaged in exploratory rummaging after receiving keys that were to be delivered to Defendant's grandmother. The officer was not concerned about any danger Defendant might pose, and, in fact, Defendant posed no danger. Additionally, the State did not demonstrate that the car would contain any evidence related to Defendant's warrant for failure to appear. Nothing in the record reflects any knowledge on the officer's part of Defendant's felony record before the officer searched Defendant's vehicle. Under these circumstances, the search cannot be characterized as reasonable under Article II, Section 10 of the New Mexico Constitution.

THE DISSENT

{26} We have several observations in regard to the Dissent in this case.

{27} The Dissent states that the real issue in this case is whether the arresting officer misrepresented his intentions when he searched the car before delivering the car keys to Defendant's grandmother and whether the search was reasonable under the circumstances. Following this statement, the Dissent sets out its position in two sections, one called "search by deception," the other called "government's justification of an inventory search."

[11] {28} A premise throughout the Dissent seems to be that the delivery of the keys after Defendant locked up his car constituted "consent" of some sort. The officer, however, never requested consent to search the car and Defendant never provided it. "[A] mere showing that an accused gave officers the keys to her car upon their request was insufficient to show a voluntary waiver of her Fourth Amendment rights." Hall v. State, 399 So.2d 348, 353 (Ala.Crim.App.1981). Here we have neither a request nor any conversation concerning a search and no apprehension by Defendant that the officer would undertake a search once he had the keys.

{29} Under the "search by deception" section, the Dissent states that the officer conducted an inventory search. The Dissent also states that the search stemmed from Defendant's consent. The concerns we have with this aspect of the Dissent are: (1) the State nowhere asserts that the search the officer conducted was an inventory search; (2) there is no evidence that Defendant consented to any search whatsoever; and (3) after raising search by deception as an important issue, the Dissent actually concludes that search by deception does not violate the Fourth Amendment or the New Mexico Constitution.

{30} Under the "government's justification of an inventory search" section, the Dissent acknowledges that the State raises the issue for the first time on appeal that the officer could have conducted an inventory search. The State's argument below was that the search was valid because it was a search incident to an arrest. The Dissent nevertheless feels compelled to address the question, and to do so not based on any right of the State but rather based on a right of *37 **1124 Defendant, namely, Defendant's fundamental right of privacy. We do not see how Defendant's fundamental rights or general public importance justifies the Dissent's position, given the State's failure to preserve.

{31} The Dissent's ultimate determination is that the search was reasonable and justified because the officer had an "obligation to secure the car" and, in order to fulfill that obligation the officer "had to inventory its contents to avoid any liability from any claims that something valuable might be taken from the car." Based on United States v. Prazak, 500 F.2d 1216 (9th Cir.1974), the Dissent interprets Defendant's request to the officer to give the keys to his grandmother to instead be a request to park and secure his car. No facts in either *Prazak* or the present case support any such interpretation. Defendant's car was already parked where his grandmother resided and Defendant's only request was that the keys be delivered to his grandmother. The State did

not argue below or on appeal this new theory that the Dissent raises.

CONCLUSION

{32} The district court erred when it failed to suppress the evidence gathered as a result of an unconstitutional search of Defendant's vehicle. We therefore reverse and remand for further proceedings consistent with this opinion.

{33} **IT IS SO ORDERED.**

KENNEDY, J., concurs.

ROBINSON, Judge (dissenting).

ROBINSON, Judge (dissenting).

{34} I am unable to concur in the holding of the Majority's opinion that the search of Defendant's car was unreasonable. In addition, while I do agree that under New Mexico law there is a significant body of case law affording greater protection for search cases, I write separately because the real issue in this case is not whether the search incident to a lawful arrest was justified, but rather, whether the search by the arresting officer was justified under the circumstances when Defendant gave him the car keys and he searched Defendant's car before delivering the keys to Defendant's grandmother.

SEARCH BY DECEPTION

{35} As the Majority points out, Officer Tubbs arrested Defendant and put him in the rear seat of his patrol car, after which Defendant asked Officer Tubbs to give his car keys to his grandmother, who lived in the apartment complex. Officer Tubbs took the car keys, but instead of taking the keys directly to Defendant's grandmother, he first conducted an inventory search of Defendant's car where he found a loaded .40-caliber handgun underneath the driver's seat.

{36} Under *Garcia*, New Mexico's state constitution "provides greater protection, requiring a warrant or the presence of exigent circumstances to remove evidence" to conduct a search incident to an arrest. 2005-NMSC-017, ¶ 29, 138 N.M. 1, 116 P.3d 72. As the Majority notes, Officer Tubbs testified that, at the time he searched the car, he did not feel he was in any danger, nor did he expect to find any evidence in the car related to the arrest. However, Officer Tubbs' search stems basically from Defendant's consent, not exigent circumstances. By voluntarily giving up his car keys to Officer Tubbs, any legitimate expectation of privacy to his car that Defendant may have had, ceased at that point.

{37} Arguably, Defendant was under the impression that Officer Tubbs was going to deliver the car keys to his grandmother and, when Officer Tubbs searched his car, he may have exceeded the scope of Defendant's consent. In other words, Officer Tubbs may have misrepresented his true intentions when he agreed to deliver Defendant's car keys to his grandmother. It is reasonable to conclude that the reason Defendant did not want the police to get custody of his car by impound-

ing it is that he did not want them to find his gun in the car.

{38} Nonetheless, this Court has recognized that entry by deception does not violate the Fourth Amendment. *See, e.g., State v. Allen*, 114 N.M. 146, 835 P.2d 862 (Ct.App.1992). In *Allen*, this Court held that an undercover officer's entry by deception into the home of the defendant convicted as an accessory in cocaine trafficking did not result *38 **1125 in breach of privacy and, thus, did not violate the defendant's rights under the state constitution or the Fourth Amendment. *Id.* at 147, 835 P.2d at 863. *Allen* reasoned that, since there was no forcible entry by the officer into Defendant's residence, by taking the officer into the house, "there was no breach of defendant's legitimate interest in privacy." *Id.*

{39} Here, like in *Allen*, Officer Tubbs gained access to Defendant's car through what might have amounted to deception, but certainly was not coercion or force. Furthermore, one's reasonable expectation of a privacy interest does not extend to an arrestee like Defendant, who voluntarily gives up his car keys to an arresting uniformed officer contemporaneously with his arrest. "[P]olice deception which [is] not coercive in nature will not invalidate a consent to search if the record otherwise shows the consent to have been voluntary." Matthew Bender, 1-8 *Search and Seizure* § 8.17 at 258 n. 262 (2004). Here, the officer did not demand that Defendant give him the car keys. Defendant did this voluntarily with the request that the officer deliver the keys to his grandmother. Since entry by deception into one's home does not violate the Fourth Amendment, it would not violate it by entry into a car where there is a lesser expectation of privacy. *See State v. Ryon*, 2005-NMSC-005, ¶ 23, 137 N.M. 174, 108 P.3d 1032 (stating that the constitutional distinction between vehicles and homes for purposes of search and seizure analysis turns on the privacy expectation; a lesser expectation of privacy attaches to a vehicle).

GOVERNMENT'S JUSTIFICATION OF AN INVENTORY SEARCH

{40} Furthermore, it has been held that officers may take reasonable steps to safeguard property in a vehicle which has not been seized. 3 Wayne R. LaFave, *Search and Seizure* § 7.4(b) at 658 n. 117 (4th ed.2004); *see, e.g., United States v. Prazak*, 500 F.2d 1216 (9th Cir.1974). In *Prazak*, the defendant was arrested for DWI. He requested that his car be parked and secured by an arresting officer. To secure the car, one officer, without arrestee's request or consent, removed a sport coat from the rear seat, locked the car doors, and opened the locked trunk to place the coat inside. When he opened the trunk, the officer discovered a zip gun. That court held that this type of search was not unreasonable. *Id.* at 1217.

{41} Although the State raises this issue for the first time on appeal, I am compelled to address it because this case involves Defendant's fundamental right of privacy and the reasonableness of Officer Tubbs' search under the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution. *See State v. Pacheco*, 85 N.M. 778, 517 P.2d 1304 (Ct.App.1973); *see also* Rule 12-216(B)(1)-(2) NMRA 2005 (providing that questions involving jurisdiction, general public interest, fundamental error, or fundamental rights of a party are exceptions to the preservation requirement).

{42} When Defendant gave Officer Tubbs his car keys, he received constructive possession of Defendant's car and, therefore, it was under the control and custody of the officer, who is an agent of the city's police department. The government interests that make an inventory search reasonable to safeguard the property from loss or theft, and to protect the police or city from liability and false claims, justified the officer to conduct an inventory search of Defendant's vehicle. See State v. Williams, 97 N.M. 634, 637, 642 P.2d 1093, 1096 (1982) (holding that a warrantless inventory search of the defendant's car, following his arrest for armed robbery, and after discovery that the defendant's automobile was parked legally behind the grocery store, was reasonable). Furthermore, federal courts have adopted a similar rationale regarding inventory searches of vehicles seized after an arrest. See United States v. Scott, 665 F.2d 874 (9th Cir.1981) (holding that the police procedures, in conducting an inventory of arrestee's legally parked car in order to protect the arrestee's belongings, was an appropriate caretaking function); United States v. Staller, 616 F.2d 1284 (5th Cir.1980) (upholding that a search, subsequent to police taking custody of the defendant's legally parked automobile, was a legitimate exercise of a caretaking function because of the risk to the car parked overnight in a mall parking lot).

****1126 *39** {43} The Majority points out in Hall v. State, 399 So.2d 348, 353 (Ala.Crim.App.1981) that “a mere showing that an accused gave officers the keys to her car upon their request was insufficient to show a voluntary waiver of her Fourth Amendment rights.” I agree with this statement under the facts presented in Hall. However, in Hall, appellant had refused several requests to allow the officers to search the trunk of his car but, afterwards, involuntarily submitted to a search based on the officers' threats. That court held that “[i]t is apparent that the appellant was *submitting* rather than *consenting* to the search.” *Id.* at 354 (emphasis in original). That court added “in examining all the surrounding circumstances to determine if, in fact, the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.” *Id.* (internal quotation marks omitted). Thus, Hall is completely distinguishable from our case because, in Hall, the officer used coercive and threatening techniques to acquire appellant's consent or submission. In our case, Defendant voluntarily handed over his keys without any coercive actions from Officer Tubbs. Officer Tubbs never asked for the keys and never threatened Defendant, unlike Hall, where that defendant specifically refused a requested search. Here, Defendant's consensual relinquishment of control over his vehicle by voluntarily giving his keys to Officer Tubbs is what makes the ensuing search reasonable.

{44} The events of this case flow from one stage to another. Once Officer Tubbs received Defendant's consent to possession and control of the car by the keys being turned over to him, he had an obligation to secure the car. In order to secure the vehicle, he had to check out its contents to avoid any liability from any claims that something valuable might be taken from the car. Therefore, under Prazak, Officer Tubbs' actions were justified and constituted “a reasonable means of rendering the car and its contents secure.” 500 F.2d at 1217.

{45} Whether the Majority's opinion labels this an inventory search, or a search incident to ar-

rest, which I do not believe it was, does not really matter. At this point, the search was not constitutionally unreasonable and evidence of the gun seized should not be suppressed.

{46} I would affirm. I, therefore, respectfully dissent.

N.M.App.,2005.
State v. Pittman
139 N.M. 29, 127 P.3d 1116, 2006 -NMCA- 006

END OF DOCUMENT

Date of Printing: Jun 02, 2009

KEYCITE

▸ **State v. Pittman**, 139 N.M. 29, 127 P.3d 1116, 2006-NMCA-006 (N.M.App., Nov 23, 2005) (NO. 24,671)

History

Direct History

=> 1 **State v. Pittman**, 139 N.M. 29, 127 P.3d 1116, 2006-NMCA-006 (N.M.App. Nov 23, 2005) (NO. 24,671)

Certiorari Granted by

H 2 **State v. Pittman**, 139 N.M. 273, 131 P.3d 660, 2006 -NMCERT- 1 (N.M. Jan 10, 2006) (Table, NO. 29,584)

Certiorari Quashed by

H 3 **State v. Pittman**, 141 N.M. 165, 152 P.3d 152, 2007 -NMCERT- 1 (N.M. Jan 31, 2007) (Table, NO. 29,584)

H

Supreme Court of Vermont.

STATE of Vermont

v.

Brian E. BAUDER.

No. 04-438.

March 16, 2007.

Background: Defendant, charged with possession of marijuana, possession of ecstasy, and possession of stolen property, filed a motion to suppress evidence. The District Court, Unit No. 2, Chittenden Circuit, Howard E. Van Benthuyzen, J., denied the motion. After entering a conditional plea of guilty to one count of possession of ecstasy, defendant appealed.

Holdings: The Supreme Court, Johnson, J., held that:

- (1) law-enforcement officers may not search a motor vehicle without a warrant, after its occupant has been arrested, handcuffed, and secured in the back seat of a police cruiser, absent a reasonable need to protect the officers' safety or preserve evidence of a crime;
- (2) search of vehicle was not permissible under the plain-view exception to the warrant requirement;
- (3) search of vehicle was not permissible under the "automobile exception" to the warrant requirement; and
- (4) illegal search of vehicle could not be validated as an inventory search under the inevitable-discovery doctrine.

Reversed.

Dooley, J., filed a dissenting opinion.

Reiber, C.J., filed a dissenting opinion.

West Headnotes

[1] Searches and Seizures 349 ↪ 62

349 Searches and Seizures

349I In General

349k60 Motor Vehicles

349k62 k. Probable or Reasonable Cause. Most Cited Cases

Law-enforcement officers may not search a motor vehicle without a warrant, after its occupant has been arrested, handcuffed, and secured in the back seat of a police cruiser, absent a reasonable need to protect the officers' safety or preserve evidence of a crime. Const. C. 1, Art. 11.

[2] Criminal Law 110 ↪ 394.6(5)

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k394 Evidence Wrongfully Obtained

110k394.6 Motions Challenging Admissibility of Evidence

110k394.6(5) k. Hearing and Determination. Most Cited Cases

(Formerly 110k1134(3))

A motion to suppress evidence presents a mixed question of fact and law.

[3] Criminal Law 110 ↪ 1139

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)13 Review De Novo

110k1139 k. In General. Most Cited Cases

Criminal Law 110 ↪ 1158.12

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.8 Evidence

110k1158.12 k. Evidence Wrongfully Obtained. Most Cited Cases

(Formerly 110k1158(4))

In reviewing a trial court's ruling on a motion to suppress evidence, Supreme Court will uphold the trial court's factual findings absent clear error, but will review the trial court's conclusions of law de novo.

[4] Searches and Seizures 349 ↪ 104

349 Searches and Seizures

349II Warrants

349k103 Authority to Issue

349k104 k. Impartial Magistrate Requirement. Most Cited Cases

State constitution's warrant requirement serves as a check on the executive power by guaranteeing review by a neutral and detached magistrate before a search is carried out, thereby deterring

“searches on doubtful grounds” and assuring the people of “an impartial objective assessment” prior to a governmental invasion. Const. C. 1, Art. 11.

[5] Searches and Seizures 349 ↪24

349 Searches and Seizures

349I In General

349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

Searches outside the normal judicial process are presumptively unconstitutional, and permissible only pursuant to a few narrowly drawn and well-delineated exceptions; such rare exceptions are allowed only in those extraordinary circumstances which make the warrant and probable-cause requirement impracticable. Const. C. 1, Art. 11.

[6] Searches and Seizures 349 ↪24

349 Searches and Seizures

349I In General

349k24 k. Necessity of and Preference for Warrant, and Exceptions in General. Most Cited Cases

Exceptions to the state constitution's warrant requirement must be factually and narrowly tied to exigent circumstances and reasonable expectations of privacy. Const. C. 1, Art. 11.

[7] Searches and Seizures 349 ↪60.1

349 Searches and Seizures

349I In General

349k60 Motor Vehicles

349k60.1 k. In General. Most Cited Cases

A warrantless automobile search based solely on the arrest of a person unable to endanger the police or destroy evidence cannot be justified under any exception to the warrant requirement and is unreasonable. Const. C. 1, Art. 11.

[8] Searches and Seizures 349 ↪44

349 Searches and Seizures

349I In General

349k42 Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

349k44 k. Presence of Probable Cause. Most Cited Cases

No amount of probable cause can justify a warrantless search or seizure absent exigent circumstances. Const. C. 1, Art. 11.

[9] Searches and Seizures 349 ↪40.1

349 Searches and Seizures

349I In General

349k40 Probable Cause

349k40.1 k. In General. Most Cited Cases

Searches and Seizures 349 ↪113.1

349 Searches and Seizures

349II Warrants

349k113 Probable or Reasonable Cause

349k113.1 k. In General. Most Cited Cases

The finding of probable cause is a decidedly fact-specific determination, turning on whether the particular circumstances establish a nexus between the crime, the suspect, and the place to be searched. Const. C. 1, Art. 11.

[10] Constitutional Law 92 ↪976

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)2 Necessity of Determination

92k976 k. Resolution of Non-Constitutional Questions Before Constitutional Questions. Most Cited Cases

It is a fundamental tenet of judicial restraint that courts will not address constitutional claims-least of all novel or unresolved constitutional claims-when adequate lesser grounds are available.

[11] Searches and Seizures 349 ↪63

349 Searches and Seizures

349I In General

349k60 Motor Vehicles

349k63 k. Plain View. Most Cited Cases

Officer's warrantless search of vehicle driven by defendant following his arrest was not permissible under the plain-view exception to the warrant requirement; while officer stated that the parking meter inside the vehicle was visible from outside the vehicle, he repeatedly acknowledged that he did not see the parking meter during his initial contact with defendant outside the vehicle, and that he became aware of its existence only during the more probing search inside the car. Const. C. 1, Art. 11.

[12] Searches and Seizures 349 ↪47.1

349 Searches and Seizures

349I In General

349k47 Plain View from Lawful Vantage Point

349k47.1 k. In General. Most Cited Cases

The plain-view doctrine is predicated on two principles: first, that when a police officer has observed an object in plain view from a legal vantage point the owner's privacy interests are forfeited; and second, that requiring a warrant once the police have obtained a first-hand perception of the object would be a needless inconvenience. Const. C. 1, Art. 11.

[13] Searches and Seizures 349 ↪60.1

349 Searches and Seizures

349I In General

349k60 Motor Vehicles

349k60.1 k. In General. Most Cited Cases

Officer's warrantless search of vehicle driven by defendant following his arrest was not permissible under the "automobile exception" to the warrant requirement; despite officer's suspicion that the car defendant was driving might have been stolen, he did not arrest defendant on that basis and identified no ground, much less probable cause, to believe that proof of ownership might be discovered behind or underneath the driver's seat, where the parking meter and glass jar containing marijuana were found, and even assuming that the inadequate proof of ownership established probable cause to believe that the car was stolen, the circumstances did not establish that element of urgency essential to the execution of a warrantless search, as officer readily acknowledged that he had no concerns about the possibility of evidence inside the vehicle being removed or destroyed. Const. C. 1, Art. 11.

[14] Searches and Seizures 349 ↪62

349 Searches and Seizures

349I In General

349k60 Motor Vehicles

349k62 k. Probable or Reasonable Cause. Most Cited Cases

Searches and Seizures 349 ↪64

349 Searches and Seizures

349I In General

349k60 Motor Vehicles

349k64 k. Emergencies or Exigencies. Most Cited Cases

For a warrantless search to be permissible under the "automobile exception" to the warrant requirement, there must be a showing of both probable cause that the vehicle contains evidence of a crime, and exigent circumstances suggesting that the evidence may be lost during the delay attendant upon obtaining a warrant. Const. C. 1, Art. 11.

[15] Searches and Seizures 349 ↪66

349 Searches and Seizures

349I In General

349k60 Motor Vehicles

349k66 k. Inventory and Impoundment; Time and Place of Search. Most Cited Cases

Improper warrantless search of vehicle driven by defendant following his arrest could not be validated as an inventory search under the inevitable-discovery doctrine; prior to the illegal search, officer testified that they had determined only to “ground” the vehicle, i.e., to leave it in place in the private lot where it was parked, and the decision to impound the vehicle was not made until after the warrantless search, and was based on the evidence obtained during that illegal search. Const. C. 1, Art. 11.

****40** Robert Simpson, Chittenden County State's Attorney, and Colin McNeil, Deputy State's Attorney, Burlington, for Plaintiff-Appellee.

Matthew F. Valerio, Defender General, Henry Hinton, Appellate Defender, and Stephanie Pessin, Law Clerk (on the Brief), Montpelier, for Defendant-Appellant.

Present: REIBER, C.J., DOOLEY, JOHNSON and SKOGLUND, JJ., and ALLEN, C.J. (Ret.), Specially Assigned.

¶ 1. JOHNSON, J.

[1] ***393** The question presented in this case is whether law-enforcement officers may routinely search a motor vehicle without a warrant, after its occupant has been arrested, handcuffed, and secured in the back seat of a police cruiser, absent a reasonable need to protect the officers' safety or preserve evidence of a crime. ****41** We hold that such warrantless searches offend the core values underlying the right to be free from unreasonable searches and seizures embodied in Chapter I, Article 11 of the Vermont Constitution. Accordingly, the trial court judgment to the contrary is reversed.

¶ 2. During the early morning hours of September 23, 2003, South Burlington police officer David Solomon observed a vehicle on Shelburne Road that appeared to be traveling at a speed of forty-five to fifty miles per hour in a thirty-five mile-per-hour zone. The officer ***394** followed the vehicle, which weaved several times and continued to travel in excess of the speed limit. Based on these observations, the officer activated his blue lights. The vehicle, in response, pulled into the lot of a service station on Shelburne Road.

¶ 3. While speaking with the driver, later identified as defendant, the officer detected a faint odor of intoxicants and observed defendant's eyes to be watery and bloodshot. At the officer's request, defendant exited the vehicle and performed a number of field sobriety tests. Based on his further observations, the officer arrested defendant for driving under the influence (DUI), handcuffed him, and placed him in the rear of his police cruiser. A woman passenger in the vehicle was iden-

tified, released, and left the scene. Defendant produced an unsigned bill of sale that purported to vest title to the vehicle in himself, but a check of the vehicle registration failed to identify defendant as the vehicle's owner. A further records check disclosed that defendant's Texas driver's license was suspended.

¶ 4. After defendant was arrested and placed in the police cruiser, Officer Solomon and another officer who had arrived as backup searched defendant's car. Officer Solomon later testified that he routinely searches the vehicles of drivers arrested for DUI under the "incident-to-arrest" doctrine, confining his search to what he described as the "lungeable" area of the vehicle, i.e., the area that the driver or passengers could potentially reach. The officer acknowledged, however, that he did not feel in any danger from defendant, who was handcuffed and seated in the back of the police cruiser at the time of the search. Nor did the officer harbor any concern that evidence in the vehicle might be removed or destroyed.

¶ 5. In their initial search of the vehicle, the officers discovered the head of a parking meter behind the driver's seat, a pipe with burnt residue in an open compartment attached to the driver's door, and an empty beer can and a glass jar containing fragments of a green leafy substance under the driver's seat. The officers opened the jar and smelled the contents, confirming their suspicion that it had contained marijuana. Officer Solomon also detected a very faint odor of marijuana in the vehicle, although he acknowledged in his affidavit that the odor was not consistent with having been freshly smoked.

¶ 6. Having previously concluded that they would not permit the vehicle to be driven from the scene absent proof of ownership and insurance, the officers further determined-based on their initial search-to impound the car, tow it to the police station, and apply for a search warrant. A warrant was granted, and the subsequent search of *395 a backpack on the back seat of the vehicle uncovered a clear plastic bag containing a white powdery substance, later determined to be 7.2 grams of the drug ecstasy.^{FN1}

FN1. The officer testified several times to the effect that "the car wasn't going to be driven because we had no documentation of who it belonged to, that it was registered or that it was insured." In other words, the decision to "ground" the car was made *before* the initial search, based on the lack of proof of ownership. Later, based on the evidence obtained during the search, the officers determined that the vehicle would be impounded and a warrant obtained for a more thorough search. With respect, the dissent is simply mistaken in asserting that the decision to ground the vehicle was made after the search.

**42 ¶ 7. Defendant was charged with possession of marijuana, possession of ecstasy, and possession of stolen property. He moved to suppress all of the evidence on the ground that it had been discovered pursuant to an illegal search incident to arrest. In his memorandum in support of the motion, defendant urged rejection of the federal Fourth Amendment standard set forth in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), which automatically permits the warrantless search of a motor vehicle following the arrest of its operator under the

search-incident-to-arrest doctrine. Defendant argued for a more protective standard under Chapter I, Article 11 of the Vermont Constitution, to require a showing by the government that exigent circumstances justified the warrantless search to secure the officers' safety or preserve evidence of a crime.^{FN2}

FN2. The full text of Article 11 reads:

That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.

Vt. Const. ch. I, art. 11.

¶ 8. Following a hearing in which Officer Solomon testified to the circumstances of the stop and search, the court issued a written decision denying the motion to suppress. The court found that the warrantless search comported with both state and federal law as a search incident to arrest. Defendant later entered a conditional plea of guilty to one count of possession of ecstasy, and received a suspended sentence of two to five years and an order of restitution, all stayed pending the outcome of this appeal.

[2][3] *396 ¶ 9. A motion to suppress evidence presents a mixed question of fact and law. While we uphold the trial court's factual findings absent clear error, we review the trial court's conclusions of law de novo. State v. Simoneau, 2003 VT 83, ¶ 14, 176 Vt. 15, 833 A.2d 1280.

¶ 10. As noted, this appeal presents a fundamental question concerning the extent to which Article 11 authorizes a search incident to arrest following a motorist's arrest for DUI. In addressing this issue, we do not write on a clean slate. While we have recognized that the Fourth Amendment and Article 11 both seek to protect our “ ‘freedom from unreasonable government intrusions into ... legitimate expectations of privacy,’ ” State v. Kirchoff, 156 Vt. 1, 6, 587 A.2d 988, 992 (1991) (quoting Oliver v. United States, 466 U.S. 170, 187, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (Marshall, J., dissenting)), we have also long held that our traditional Vermont values of privacy and individual freedom-embodied in Article 11-may require greater protection than that afforded by the federal Constitution. See State v. Rheume, 2005 VT 106, ¶ 8 n. *, 179 Vt. 39, 889 A.2d 711 (recalling the extensive case law holding that Article 11 “affords individuals greater privacy rights than its federal counterpart in certain circumstances”). Recently, for example, we held that law-enforcement officers must have a **43 reasonable basis to believe that their safety is at risk or a crime requires investigation to order a driver stopped for a motor vehicle violation out of his or her vehicle. State v. Sprague, 2003 VT 20, ¶ 16, 175 Vt. 123, 824 A.2d 539. Although the United States Supreme Court has ruled-to the contrary-that the Fourth Amendment permits routine exit orders in such circumstances, Pennsylvania v. Mimms, 434 U.S.

106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), we concluded in *Sprague* that “a rule requiring a minimal level of objective justification ... strikes the proper balance ... between the need to ensure the officer's safety and the constitutional imperative of requiring individualized, accountable decisionmaking for every governmental intrusion upon personal liberties.” *Sprague*, 2003 VT 20, ¶ 16, 175 Vt. 123, 824 A.2d 539.

¶ 11. *Sprague* is especially instructive for our purposes here because it illustrates the principles that this Court applies in weighing the competing interests of individual freedom and effective law enforcement that invariably underlie Article 11 cases. In *Mimms* the Supreme Court embraced a “bright-line” rule for officers to follow by allowing them to order drivers out of their vehicles without any particularized suspicion or safety concern. In *Sprague*, however, we rejected administrative simplicity as an adequate basis for a seizure when weighed against the individual's right to be free from arbitrary police intrusions. “[D]ispensing entirely with the requirement that an officer provide *397 some reasoned explanation for an exit order,” we observed, “invites arbitrary, if not discriminatory, enforcement.” *Id.* ¶ 19. Hence, we required an individualized showing of some “objective circumstance” that would cause a reasonable officer to believe the order was necessary to protect the officer's safety or to investigate a suspected crime. *Id.* ¶ 20.

¶ 12. Although the specific holding in *Sprague* was new, its basic reasoning was consistent with many of our earlier decisions. A similar balance was struck, for example, in *Kirchoff*, where we rejected a Supreme Court ruling that privacy in land may not extend beyond the immediate area surrounding the home, observing that “[t]his per se approach cannot be squared with Article 11.” 156 Vt. at 8, 587 A.2d at 993. *State v. Savva* similarly stands for the principled rejection of “bright-line” rules or administrative efficiency as adequate grounds for dispensing with the constitutionally based warrant requirement. 159 Vt. 75, 616 A.2d 774 (1991). Confronted, as in *Kirchoff*, with several longstanding Supreme Court precedents—in this case granting police authority to automatically search closed containers within a vehicle—we nevertheless rejected the high court's “bright-line tests ... because these tests fail to do justice to the values underlying Article 11.” *Savva*, 159 Vt. at 87, 616 A.2d at 781 (quotation omitted).

[4] ¶ 13. The values illustrated by these and many other decisions of this Court rest-at their core-on the fundamental principle of limited government. Article 11's warrant requirement represents one of the essential checks on unrestrained government determined by the framers-and confirmed through hard experience-to be necessary to the preservation of individual freedom. The warrant requirement serves as a check on the executive power by guaranteeing review by a neutral and detached magistrate *before* a search is carried out, thereby deterring “searches on doubtful grounds” and assuring the people of “an impartial objective assessment” prior to a governmental invasion. *Id.* at 86-87, 616 A.2d at 780; see also *State v. Geraw*, 173 Vt. 350, 352, 795 A.2d 1219, 1221 (2002) (observing that the **44 warrant requirement “reflects a deeply-rooted historical judgment that the decision to invade ... privacy ... should normally be made by a neutral magistrate, not by the agent of the search itself”).^{FN3}

FN3. The dissent's assertion that State v. Martin, 145 Vt. 562, 496 A.2d 442 (1985), represents “essentially a bright-line rule” adopted by this Court, *post*, ¶ 68, is well wide of the mark. There, we rejected the claim that DUI roadblocks “constitute a per se violation of the Fourth Amendment,” *id.* at 565, 496 A.2d at 445, adopting instead a balancing test “directly related to the characteristics of the DUI roadblock *in each case.*” *Id.* at 570, 496 A.2d at 448 (emphasis added). This is the opposite of a bright-line standard.

[5][6] *398 ¶ 14. Searches outside the normal judicial process are, therefore, presumptively unconstitutional, and permissible only pursuant to a few narrowly drawn and well-delineated exceptions. Savva, 159 Vt. at 86, 616 A.2d at 780; State v. Meunier, 137 Vt. 586, 588, 409 A.2d 583, 584 (1979). Such rare exceptions are allowed “only in those extraordinary circumstances which make the warrant and probable-cause requirement impracticable.” State v. Petruccelli, 170 Vt. 51, 62, 743 A.2d 1062, 1070 (1999) (quotation omitted). As we explained in Petruccelli, “[e]xceptions to the warrant requirement ‘must be factually and narrowly tied to exigent circumstances and reasonable expectations of privacy.’ ” *Id.* (quoting Savva, 159 Vt. at 87, 616 A.2d at 781).^{FN4}

FN4. Although the word “unreasonable” does not appear in the text of Chapter I, Article 11 of the Vermont Constitution, see *supra*, note 2, we have consistently construed the provision to forbid only unreasonable searches and seizures. State v. Record, 150 Vt. 84, 85, 548 A.2d 422, 423 (1988). As discussed above, we have also consistently held that warrantless searches are presumptively unreasonable unless justified by a well-recognized exception. State v. Mountford, 171 Vt. 487, 493, 769 A.2d 639, 646 (2000), *abrogated on other grounds by Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006).

¶ 15. One such exception is the search-incident-to-arrest doctrine. Although its scope has varied over time, the essential elements of the doctrine were settled by the United States Supreme Court in the landmark case of Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Reconciling years of debate, the high court held that, when a suspect has been lawfully arrested, the police may conduct a warrantless search of the person arrested for “any weapons that the latter might seek to use” to resist arrest or facilitate an escape, and “any evidence on the arrestee's person in order to prevent its concealment or destruction.” *Id.* at 763, 89 S.Ct. 2034. In a famous subsequent passage, the Court observed further that “the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.” *Id.*

¶ 16. This so-called “grab rule” defined and limited the doctrine for more than a decade, and was routinely applied in every state including Vermont. See, e.g., Meunier, 137 Vt. at 588, 409 A.2d at 584 (citing Chimel for the principle that a search incident to arrest must be “reasonable in time and scope”); State v. Mayer, 129 Vt. 564, 567, 283 A.2d 863, 865 (1971) (citing Chimel to uphold a warrantless “protective *399 search” of defendant for weapons at the time of his arrest); see generally 3 W. LaFare, Search and Seizure § 7.1, at 502-14 (4th ed. 2004) (reviewing history

and development of search-incident-to-arrest doctrine). In *Belton*, 453 U.S. at 460, 101 S.Ct. 2860, however, the Supreme Court revisited the doctrine in the context of a motor-vehicle search, explaining that police officers remained uncertain after *Chimel* about the precise scope of their authority and required a more “workable **45 rule.” To provide such a bright-line rule, the Court held that when police officers have arrested the occupant of a vehicle, they may routinely search its passenger compartment and the contents of any containers found therein as a “contemporaneous incident of that arrest.” *Id.* at 460-61, 101 S.Ct. 2860. More recently, in *Thornton v. United States*, 541 U.S. 615, 623-24, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the Supreme Court reaffirmed the rule announced in *Belton*, holding that it applied even where the driver had been arrested, handcuffed, and secured in the back seat of a police cruiser.

¶ 17. *Belton* was the subject of sharp criticism when it was decided, and it has remained controversial ever since. Justice Brennan, writing in dissent, observed that the rule was “analytically unsound and inconsistent with every significant search-incident-to-arrest case” with similar facts in the Court’s recent history. 453 U.S. at 468, 101 S.Ct. 2860. The Court had always required that exceptions to the warrant clause be firmly grounded in, and narrowly tailored to, the extraordinary circumstances justifying the exception. Plainly, however, an arrestee who has been secured away from the vehicle is in no position to seize a weapon or evidence from its interior. See *id.* at 465-66, 101 S.Ct. 2860 (Brennan, J., dissenting) (“When the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel*’s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband.”). Nor, as Justice Brennan observed, had the Court ever held that mere administrative simplicity was a sufficient basis for a warrant exception. See *id.* at 469, 101 S.Ct. 2860 (“[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.”(quotation omitted)). Furthermore, as Justice Brennan noted, the need for so-called “bright lines” was simply unsupported; the search-incident-to-arrest doctrine under *Chimel* placed no greater demands on law enforcement officers than other Fourth Amendment rules requiring the exercise of considered police judgment in light of the facts and circumstances, as when deciding whether reasonable suspicion justifies an investigatory stop and frisk, or whether probable cause supports a warrantless arrest. *Id.* at 471, 101 S.Ct. 2860*400 (“The standard announced in *Chimel* is not nearly as difficult to apply as the Court suggests.”). Indeed, Justice Brennan observed, the bright-line rule forged by the *Belton* majority was not even likely to eliminate the continued need for the exercise of police judgment in determining, for example, the exact nature of a “contemporaneous” search incident to arrest. *Id.* at 470, 101 S.Ct. 2860 (“Would a warrantless search incident to arrest be valid if conducted five minutes after the suspect left his car? Thirty minutes? Three hours?”).

¶ 18. The concerns identified in the *Belton* dissent have continued to gather support from courts and commentators alike. Professor LaFave and others have questioned the warrantless search rationale based on either safety or simplicity, particularly as studies have shown that the police almost invariably handcuff and remove arrested drivers from the area of the vehicle. See 3 LaFave, *supra*, § 7.1(c), at 525; see also M. Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 Wis. L.Rev. 657, 697 (suggesting that auto

searches following arrest should require a showing of “particular and unusual facts” that hinder the police from their usual procedure of “restraining and removing the suspect from any area that might contain**46 a weapon or evidence”); A. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L.Rev. 227, 274 (1984) (“If any bright line rule had been necessary to resolve issue in *Belton*, it would have been the opposite of the rule that the Court announced.”); E. Shapiro, *New York v. Belton and State Constitutional Doctrine*, 105 W. Va. L.Rev. 131, 137 (2002) (noting that “[c]riticism of *Belton* has been vigorous and sustained,” based principally on the lack of support for the Court's rationale that “existing law had proven to be so unworkable that it was necessary to forego *Chimel's* approach in favor of a bright-line rule”).

¶ 19. In addition, while a majority of states continue to apply the rule in *Belton*, a number have either rejected or modified it under their state constitutions. See Shapiro, *supra*, 105 W. Va. L.Rev. at 141-42 (listing and discussing the state decisions that have declined to follow *Belton* or have applied a modified federal approach). New Jersey, Pennsylvania, New Mexico, and Nevada have all unequivocally rejected *Belton* under their state constitutions, applying instead the familiar standard predicated upon a showing of necessity to secure the officer's safety or preserve evidence. See *Camacho v. State*, 119 Nev. 395, 75 P.3d 370, 373-74 (2003) (rejecting *Belton* and concluding that “under the Nevada Constitution, there must exist both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile*401 incident to a lawful custodial arrest”); *State v. Eckel*, 185 N.J. 523, 888 A.2d 1266, 1276-77 (2006) (declining to adopt *Belton* and holding that under the New Jersey Constitution the search-incident-to-arrest doctrine applies only “to ensure police safety or to avoid the destruction of evidence”); *State v. Pittman*, 139 N.M. 29, 127 P.3d 1116, ¶ 16 (Ct.App.2005) (“Because of New Mexico's strong preference for a warrant, we hold that even after a valid arrest, one of *Chimel's* two rationales must be present before an officer may search a vehicle without a warrant.”) *cert. granted*, 139 N.M. 273, 131 P.3d 660 (2006); *Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896, 902 (1995) (invalidating warrantless vehicle search where the arrestee was a secure distance from his vehicle, and holding that under the Pennsylvania Constitution the police may search only “the arrestee's person and the area in which the person is detained in order to prevent the arrestee from obtaining weapons or destroying evidence”).

[7] ¶ 20. In our judgment, these decisions more closely reflect the principles and values underlying Article 11 as expressed in numerous opinions of this Court than the “abrupt shift in the standard of fourth amendment protections” represented by the *Belton* decision. C. Hancock, *State Court Activism and Searches Incident to Arrest*, 68 Va. L.Rev. 1085, 1085 (1982). As earlier explained, we have consistently rejected bright-line rules-however laudable their purpose in easing the burden on law-enforcement officers-as an adequate basis for relaxing the fundamental limitation on governmental power represented by the warrant requirement. Indeed, we have scrupulously maintained the principle-even, as here, in the face of contrary United States Supreme Court holdings-that any exception to the warrant requirement must be factually and narrowly tied to the exigencies that rendered a warrant application impracticable under the circumstances. Absent such circumstances, Article 11 simply forbids a warrantless search. As the New Jersey Supreme Court explained in admirably clear and unambiguous terms in *Eckel*, a warrantless auto-

mobile search based “solely on the arrest of a person unable to endanger the police or destroy evidence cannot be justified under any exception to **47 the warrant requirement and is unreasonable.” 888 A.2d at 1277.

¶ 21. The State here offers no serious argument that the warrantless search in this case was justified as a search incident to arrest on any basis other than the blanket authority of *Belton*. Although our dissenting colleague claims that the search was somehow necessary to protect the officer's safety or preserve evidence, no persuasive evidence *402 or argument is offered to demonstrate how defendant-handcuffed in the back seat of the police cruiser-or his passenger who had left the scene, presented any form of threat. The dissent's further assertion that the search here was actually consistent with pre-*Belton* decisional law is equally unsound. One need only read the impassioned *Belton* dissent to understand how fundamentally at odds that decision was with prior law. Contrary to the dissent's additional claim, moreover, it is clear that under *Chimel* and its progeny a showing of exigent circumstances in the form of a threat either to officer safety or to the preservation of evidence is essential to justify a warrantless vehicle search.

¶ 22. Having rejected *Belton* in favor of the traditional rule requiring that officers demonstrate a need to secure their own safety or preserve evidence of a crime, and finding no evidence of either need in this case, we are compelled to conclude that the trial court order denying defendant's motion to suppress must be reversed.

¶ 23. Although, in our view, the reasons that compel rejection of *Belton* apply with equal and obvious force to the so-called “*Belton* variation” adopted by several states, and although the State has not argued otherwise, we defer closing this portion of the discussion to consider this alternative in light of the dissent's strong endorsement of it. As the dissent notes, several states have allowed the police to conduct warrantless searches of automobiles after the occupant has been arrested in order to obtain evidence related to the crime that formed the basis of the arrest. As the dissent observes, the rationale of these decisions appears to be that “the arrest itself provides the probable cause basis for the search.” *Post*, ¶ 90. The dissent would adopt this approach so long as the search was for “evidence related to the crime” and limited to the passenger compartment of the vehicle. *Post*, ¶ 90.^{FNS}

FNS. As the dissent notes, this variation also appears to have been endorsed by Justice Scalia in a concurring opinion in *Thornton*. While sharply criticizing *Belton*, Justice Scalia nevertheless opined that, “[i]f *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.” 541 U.S. at 629, 124 S.Ct. 2127 (Scalia, J., concurring).

[8] ¶ 24. The so-called *Belton* variation endorsed by the dissent is just that, a variation of *Belton*. Although the rationale is different-the arrest purportedly provides the probable cause to search-the *403 reasoning remains essentially the same, based on a perceived need to authorize routine warrantless searches absent any particularized showing that the delay attendant upon obtaining a

warrant is impracticable under the circumstances. As earlier observed, however, such an approach is fundamentally at odds with Article 11, under which warrantless searches are presumptively unconstitutional absent a showing of specific, exigent circumstances justifying circumvention of the normal judicial process. As we explained in *State v. Trudeau*, “no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances.” 165 Vt. 355, 360, 683 A.2d 725, 729 (1996)**48 (quoting *Horton v. California*, 496 U.S. 128, 137 n. 7, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) (quotation omitted)). Surely this principle applies with equal or greater force where the probable cause is merely presumed from the fact of an arrest.

[9] ¶ 25. Inherent, too, in the *Belton* variation are a number of assumptions that simply do not withstand scrutiny. First, as earlier discussed, support for the assumption that case-by-case evaluations are unworkable in the context of warrantless vehicle searches is simply lacking. Second, the assumption that an arrest automatically provides probable cause for a search is highly questionable. The finding of probable cause is a decidedly fact-specific determination, turning on whether the particular circumstances establish a “nexus between the crime, the suspect, and the place to be searched.” *State v. Towne*, 158 Vt. 607, 616, 615 A.2d 484, 489 (1992). A driver arrested for DUI may have been drinking at home, at a friend's, in a restaurant or bar, or at a sporting event, but not necessarily in his or her car. While the facts-e.g., the strong odor of intoxicants coming from inside the vehicle or an actual admission by the suspect-might indicate the presence of alcohol in the vehicle, the arrest itself does not invariably establish the requisite nexus to search. Nothing about the fact that the search occurs in a vehicle, moreover, would justify a reduced probable-cause standard. Indeed, while we have acknowledged that vehicles support a somewhat diminished expectation of privacy, this is not to say-and we have never held-that they carry no expectation of privacy, or that an arrest of the driver obviates the need to establish specific probable cause to search.

¶ 26. The dissent's additional assumption of administrative simplicity is equally questionable. The dissent would permit searches only for evidence “related to the crime” for which the suspect was arrested. *Post*, ¶ 90. Would this permit a vehicle search following an arrest of the driver on an outstanding warrant for failure to appear? What if the *404 underlying charges on the outstanding warrant related to possession of cocaine? Would an arrest for assaulting an officer during a routine vehicle stop authorize a search, and if so, for what? Does the nature of the arrest define the scope of the search, i.e., would an arrest based on possession of stolen televisions authorize a search under the car seat? The so-called bright-line rule advocated by the dissent raises as many questions as it answers. It most assuredly does not, however, commend itself as superior to the traditional search-incident-to-arrest rule in any respect.

[10] ¶ 27. Finally, in view of the dissent's strenuous claims to the contrary, we take the opportunity to explain the necessity of today's holding. Our dissenting colleague proffers essentially three separate doctrinal exceptions to the warrant requirement as more suitable “independent grounds” of decision. *Post*, ¶ 40, at 53. It is, of course, a fundamental tenet of judicial restraint that courts will not address constitutional claims-least of all novel or unresolved constitutional claims-when adequate lesser grounds are available. See *In re Sealed Documents*, 172 Vt. 152,

156, 772 A.2d 518, 523 (2001) (noting “[o]ur tradition of addressing issues of constitutional significance only when the matter is squarely and necessarily presented”).

[11] ¶ 28. First, it is asserted that the parking-meter head discovered behind the driver's seat was “in plain view” and therefore—as patent contraband—provided an independent basis to search the car under the well-settled plain-view exception to the warrant requirement. *Post*, ¶¶ 42-51, at 54-57. The claim is predicated upon the investigating officer's statement, in response**49 to a question from the trial court, that the parking meter was visible from outside the vehicle. As noted, however, the search here did not proceed from a plain-view observation of the parking meter. Indeed, the officer repeatedly acknowledged that he did not see the parking meter during his initial contact with defendant outside the vehicle; he became aware of its existence only during the more probing search inside the car. The trial court addressed this seeming anomaly by finding unequivocally that the officer discovered the parking meter during the search incident to arrest, while noting that it “was arguably exposed to plain view.” ^{FN6}

^{FN6}. The dissent asserts that we mischaracterize the record “with respect to whether the parking meter was in plain view.” *Post*, ¶ 43, at 54. Not so. The officer's testimony was clear, unequivocal, and undisputed that he did not observe the parking meter from outside the vehicle, and was unaware of its existence until it was discovered during the vehicle search.

*405 ¶ 29. Thus, the facts underlying the dissent's proposed plain-view analysis may be characterized, at best, as uncertain. The legal basis, however, can only be described as dubious. The dissent relies on a single statement in *Trudeau*, 165 Vt. at 358, 683 A.2d at 727, quoting *Horton v. California*, 496 U.S. at 136, 110 S.Ct. 2301, to the effect that an “essential predicate” underlying the plain-view doctrine is that “the officer did not violate the Fourth Amendment in arriving at the place from which the evidence *could* be plainly viewed.” (Emphasis added.) Nothing in either decision, however, remotely suggests that the underscored language was intended by this Court or the United States Supreme Court to establish a constructive plain-view standard, to be satisfied whenever an officer asserts in hindsight that the evidence could have been plainly viewed, although in fact it was not. On the contrary, in both cases, as indeed in virtually every case dealing with the doctrine that we have uncovered, the plain-view exception was based on the officer's actual observation of the evidence in question.

[12] ¶ 30. This is hardly surprising, as it is the police officer's *perception* of the object which establishes, in each case, its “plain-view” status. As the high court explained in *Texas v. Brown*, the plain-view doctrine is predicated on two principles: first, “that when a police officer *has observed* an object in plain view” from a legal vantage point the owner's privacy interests are forfeited; and second, that requiring a warrant once the police “have obtained a first-hand perception of [the object] would be a needless inconvenience.” 460 U.S. 730, 739, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (emphasis added, quotation omitted). Thus, as the Court observed, “our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers *perceive* a suspicious object, they may seize it immediately.” *Id.* (emphasis

added). This basic rule has been applied in every case to come before the Court, including those where the objects in question were observed through aerial surveillance, or with the aid of illumination. See, e.g., Florida v. Riley, 488 U.S. 445, 448-49, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (search upheld where police in helicopter were able to observe with the “naked eye” marijuana growing in greenhouse); California v. Ciraolo, 476 U.S. 207, 213-15, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (police observed marijuana visible to “naked eye” from aircraft); Brown, 460 U.S. at 739, 103 S.Ct. 1535 (use of flashlight to enhance visibility did not invalidate seizure of drugs observed by officers). To modify the doctrine by allowing the seizure of objects ****50** which the officers did *not* observe-as advocated by the dissent-would eviscerate its fundamental evidentiary and legal grounding.

***406 ¶** 31. In essence, therefore, the dissent proposes that we forgo addressing an issue-the scope of the search-incident-to-arrest doctrine in the context of a vehicle search-that the police officers here expressly relied on, that the parties briefed and argued at trial and on appeal, that formed the core of the trial court's decision, and that-as explained earlier-has been the subject of extensive discussion and debate among courts and commentators. Instead, the dissent urges that we address a novel constitutional issue based on questionable facts and even less legal support. With respect, we fail to see how this proposed alternative makes any sense, or serves any sound jurisprudential purpose.

[13][14] ¶ 32. The dissent also claims that defendant's failure to provide a valid driver's license, registration, or insurance card, coupled with irregularities in the vehicle's plates and bill of sale, authorized the police to conduct a warrantless search for proof of ownership. The argument is unpersuasive. It relies, essentially, on the so-called “automobile exception” to the warrant requirement, which-as we have elsewhere explained-requires a showing of both probable cause that the vehicle contains evidence of a crime, and exigent circumstances suggesting that the evidence may be lost during the delay attendant upon obtaining a warrant. See Savva, 159 Vt. at 89-90, 616 A.2d at 782 (holding that warrantless search of bags found within car “was not supported by exigent circumstances because a less intrusive option was available” and therefore must be invalidated); State v. Girouard, 135 Vt. 123, 129, 373 A.2d 836, 840 (1977) (describing the “well-delineated preconditions” to the automobile exception as “1) probable cause to believe that the vehicle contains evidence of crime and 2) exigent circumstances”).

¶ 33. Neither requirement was satisfied here. Despite the officer's suspicion that the car might have been stolen, he did not arrest defendant on that basis and identified no ground, much less probable cause, to believe that proof of ownership might be discovered behind or underneath the driver's seat, where the parking meter and glass jar containing marijuana were found. Even if it were assumed, however-as the dissent urges-that the inadequate proof of ownership established probable cause to believe that the car was stolen, the circumstances did not establish that element of urgency essential to the execution of a warrantless search. The officer readily acknowledged that he had no concerns about the possibility of evidence inside the vehicle being removed or destroyed. Indeed, prior to the search, the officers had not ***407** observed any evidence of a crime in the vehicle, let alone evidence that might conceivably be lost or destroyed.^{FN7}

FN7. Contrary to the assertion of the dissent, we neither “emphasize” nor “repeatedly” rely on the office's subjective perception that he did not feel threatened or pressed to preserve evidence. We merely note the officer's testimony in this regard as further proof of the absence of evidence of exigent circumstances in this case.

¶ 34. Furthermore, defendant was under arrest, the car was not on a public highway but safely parked in a commercial lot, and the police had determined that it would be grounded, i.e., locked and kept there until they determined its ownership. Hence, there was no exigency compelling an immediate search rather than a subsequent warrant application. In *Trudeau*, the principal case on which the dissent relies, the police had observed evidence in **51 plain view within the vehicle that related directly to the offense for which defendant was arrested. Indeed, we analyzed *Trudeau* as a plain-view case, not an automobile-exception case, emphasizing that the officers violated no privacy rights of the defendant when they observed an open beer can in plain view on the floor of the defendant's car before arresting him for DUI. 165 Vt. at 358, 683 A.2d at 727-28. Here, in contrast, the officers had no indication that defendant's vehicle contained any contraband or evidence of a crime. Furthermore, the record in *Trudeau* revealed the presence of two additional passengers in the vehicle who also appeared to be intoxicated and who had remained near the vehicle during the police encounter, although they had not been arrested. This was sufficient to suggest that they might have had not only the opportunity, but the incentive, to seek access to the vehicle to remove the evidence the police had observed therein, and thus established the exigency necessary to forgo a warrant. *Trudeau*, 165 Vt. at 357, 361, 683 A.2d at 726, 729. Neither circumstance was present here. The police had not observed any evidence of a crime in the vehicle, and there was nothing to indicate that the passenger, who had been questioned by the police and had departed, would have any reason to return to the vehicle or ability to remove its contents. Accordingly, we are not persuaded that the automobile exception provides a viable basis to uphold the trial court decision.^{FN8}

FN8. To be sure, other courts have held that, under the traditional automobile exception to the warrant requirement, a driver's failure to produce documentation of ownership may establish a reasonable suspicion that the vehicle is stolen and thereby establish the basis for a limited search of the vehicle in those places, such as the glove compartment or sun visor, where such documents are normally stored. See, e.g., *State v. Holmgren*, 282 N.J.Super. 212, 659 A.2d 939, 940 (App.Div.1995) (holding that failure to produce registration allows search of vehicle for evidence of ownership “confined to the glove compartment or other area where a registration might normally be kept in a vehicle”) (quotations omitted); *State v. Barrett*, 170 N.J.Super. 211, 406 A.2d 198, 200 (Law Div.1979) (invalidating search of vehicle for registration where there was “no expectation that any indicia of title would be found in the rear of the vehicle”). Other courts have even held that such proof of ownership might be found in places other than the glove compartment, such as under seats. *In re Arturo D.*, 27 Cal.4th 60, 115 Cal.Rptr.2d 581, 38 P.3d 433, 446-47 (2002). These cases rely, however, on either the Fourth Amendment or a state equivalent under which exigent circumstances have not been deemed to be an essential

element of a warrantless automobile search. As noted, our law is directly to the contrary.

[15] *408 ¶ 35. Finally, the dissent proposes in a footnote that the search here could be validated as an inventory search under the inevitable-discovery doctrine. Courts have approved inventory searches of lawfully impounded vehicles to protect the owner's property while in police custody, see, e.g., *Colorado v. Bertine*, 479 U.S. 367, 372-73, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), and have upheld the admission of evidence that the police would have “inevitably discovered” during such a search. *United States v. Seals*, 987 F.2d 1102, 1107-08 (5th Cir.1993). The doctrine has no application here because, prior to the illegal search, the officer testified that they had determined only to “ground” the vehicle, i.e., to leave it in place in the private lot where it was parked. The decision to impound the vehicle was not made until after the warrantless search, and was based on the evidence obtained during that illegal search. Accordingly, there was no legal basis to impound the vehicle, and hence no grounds for applying the inevitable-discovery doctrine.

¶ 36. In closing, we believe that it is essential to be as clear about what this **52 case concerns as what it does not. Although the dissent repeatedly and emphatically asserts that our holding somehow removes important safety protections for law-enforcement officers, it cites not one shred of evidence in the record nor a single statistic, relevant public-safety study, or other empirical evidence outside the record to support the claim. Indeed, as we have explained, the evidence and authorities demonstrate that, far from removing safety protections, our holding is entirely consistent with existing, standard police procedures and removes no essential safeguards. We yield to no one on this Court in our commitment to the safety of Vermont law-enforcement officers in the field. Strident assertions, however, are no substitute for proof. In the absence of a demonstrated need, we are not at liberty to disregard the fundamental constitutional requirement of a search warrant. By limiting the exercise of arbitrary governmental *409 power, this constitutional safeguard protects the police no less than the public.^{FN9}

FN9. The study to which the dissent refers, *post*, ¶ 85, and which has been cited by the United State Supreme Court on several occasions, shows the high frequency of shootings of police officers as they “approach a suspect seated in an automobile.” *Adams v. Williams*, 407 U.S. 143, 148 n. 3, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). That is not the situation here. Indeed, the study in question is particularly inapposite in the search-incident-to-arrest context, where studies have shown that, in fact, police officers invariably remove suspects from anywhere near their vehicles and often-as here-handcuff and place them in the back seat of the police cruiser, where there is no risk of their gaining access to a weapon or evidence in the detained vehicle. See M. Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 Wis. L.Rev. 657, 676 (observing that a survey of police practices reveals that “*Belton's* generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary item is-at least in general-false” (quotation omitted)); 3 LaFave, *supra*, § 7.1(c), at 525 (observing that, be-

cause “the police can, and typically do, immediately remove the arrestee from the vehicle,” close and lock his or her vehicle, and place him or her in handcuffs, “the ‘difficulty’ and ‘disarray’ the *Belton* majority alluded to has been more a product of the police seeing how much they could get away with (by not taking the above-mentioned procedures) than their being confronted with inherently ambiguous situations”).

¶ 37. Justice Robert Jackson once observed that “[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.” *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). Any other rule, he explained, “would reduce the [right] to a nullity” and leave us secure in our homes and persons “only in the discretion of [law-enforcement] officers.” *Id.* Where, as here, the sole justification for dispensing with the fundamental safeguard of personal liberty represented by the warrant requirement is law-enforcement efficiency, we have consistently ruled in favor of liberty. As our own Justice Larrow once observed, “[t]his seems a slight price to pay for the fundamental rights preserved by” the Constitution. *State v. Connolly*, 133 Vt. 565, 571, 350 A.2d 364, 368 (1975).

Reversed.

¶ 38. DOOLEY, J., dissenting.

This has turned into one of the most important decisions from this Court, in large part because the majority has decided to render a broad and unnecessary constitutional ruling. The circumstances presented in this case are, with variations, played out every day many times throughout the state as law-enforcement officers interact with drivers who are dangerous to **53 others and may be *410 dangerous to the officers. Indeed, stopping and approaching a vehicle, particularly as here in the middle of the night, is one of the most dangerous activities in which police officers engage. In these circumstances, the officers must act quickly and decisively and cannot become constitutional law scholars to determine what actions are appropriate, particularly to protect their own safety. Such circumstances led a broad range of commentators to urge the adoption of a bright-line standard to determine the perimeters of lawful searches following automobile stops—a bright line that can be easily applied by the officer and understood by the citizen. In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the United States Supreme Court responded with a bright-line test. *Belton* in turn has led to a large number of state constitutional law decisions confronting the issues of whether a bright-line test is appropriate and, if so, where the bright line should be drawn. As a result, there are many thoughtful alternatives from which to choose.

¶ 39. In my judgment, the Court's decision removes an important safety protection for officers, while offering little additional privacy to motorists whose vehicles and vehicle interiors are already on display to the public. Thus, the decision makes the job of an officer who stops a vehicle at two o'clock in the morning, as this officer did, more dangerous. To a large extent, the decision will preclude searches of vehicles made pursuant to the arrest of the driver or occupant, leaving weapons, contraband and evidence for which the occupant was arrested inaccessible to the offi-

cer. In general, the majority reaches this result by arguing that the only law-enforcement interest involved is administrative efficiency, which must give way to the legitimate privacy interests of citizens. In my opinion, this analysis trivializes the very important safety and evidence-gathering interests that are at stake in this decision, while exaggerating the privacy interests. I cannot subscribe to this result, especially where the gain in legitimate privacy protection is so limited.

¶ 40. Before addressing the perimeters of the search-incident-to-arrest exception under Article 11 of the Vermont Constitution, I emphasize that the majority's broad constitutional holding is wholly unnecessary because the search of defendant's vehicle in this case is fully justified under principles this Court has already adopted. There are two independent grounds under which we should affirm the trial court's denial of defendant's motion to suppress, and the search is also justified by pre-*Belton* jurisprudence from this state and others. First, undisputed testimony and the court's findings demonstrate that the stolen parking meter found in the vehicle defendant was operating was *411 in plain view at the time the police lawfully stopped and approached the vehicle, and thus the seizure of the parking meter and other evidence plainly visible in the open passenger compartment of the vehicle was justified under the plain-view exception to the warrant requirement. Second, defendant's failure to produce a valid driver's license, a vehicle registration card, or any proof of insurance, coupled with irregularities concerning the vehicle's plates and bill of sale, created a reasonable suspicion that the car had been stolen and authorized the police to conduct a limited warrantless search of the vehicle to look for proof of ownership. Third, the search is justifiable even under the search-and-seizure law existing prior to the *Belton* bright-line rule.

¶ 41. The majority passes over the first ground and ignores the second ground in part because it views the facts most favorably to defendant and ignores the trial court's findings, contrary to our standard **54 of review. See *State v. Simoneau*, 2003 VT 83, ¶ 14, 176 Vt. 15, 833 A.2d 1280 (stating that motion to suppress involves mixed question of fact and law, and that reviewing court must accept trial court's findings unless they are clearly erroneous). The relevant facts are as follows. At two o'clock in the morning, the arresting officer observed defendant traveling at an excessive speed and driving erratically. After pulling the vehicle over, the officer noted that defendant had bloodshot eyes and smelled of alcohol. Defendant was unable to produce a valid driver's license, car registration, or proof of insurance, and the bill of sale he produced did not have a buyer's name on it. Moreover, a computer search revealed that defendant's Texas driver's license had been suspended, that defendant had a multi-state arrest record, and that the license plates on the vehicle had been assigned to a different car. When defendant failed to satisfactorily perform dexterity tests administered by the officer, he was arrested for DUI, handcuffed, and placed inside the police cruiser. The passenger in the car was then allowed to leave the scene, and the officer conducted a limited search of the vehicle, which revealed a stolen parking meter, an empty beer can, and drugs. A sample of defendant's breath provided at the police station revealed a blood-alcohol content of .162, more than double the legal limit.

¶ 42. With these facts in mind, I first examine the plain-view exception to the warrant requirement. For that exception to apply, (1) the officer must have lawfully been in a “ ‘place from

which the evidence *could be* plainly viewed’ ”; (2) the item must be plainly visible and its incriminating nature must be immediately apparent; and (3) “ not only must the officer be lawfully located in a place from which the object *can be* plainly seen, but he or she must also have a lawful right of access to *412 the object itself.’ ” State v. Trudeau, 165 Vt. 355, 358, 683 A.2d 725, 727 (1996) (quoting Horton v. California, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)) (emphasis added).

¶ 43. Here, notwithstanding the majority's suggestion to the contrary, the evidence was undisputed that the stolen parking meter was in plain view from outside the vehicle defendant was operating at the time of the stop. The officer at the scene testified unequivocally on direct examination that a parking meter was laying uncovered on the floor of the vehicle behind the driver's seat in plain view from outside the vehicle. In response to a direct question from the court, the officer again testified that “the parking meter head was visible from outside the vehicle.” During cross-examination of the officer, defense counsel questioned whether the parking meter head was actually visible from outside the car, given that the officer had acknowledged not noticing it until he opened the car door to search the vehicle. The officer reiterated that the parking meter head was uncovered and plainly visible from outside the car. In the end, defendant did not attempt to dispute that fact. The district court stated in its decision that the seized parking meter was “arguably” exposed to plain view, and, in response to defendant's motion for reconsideration, the court elaborated that “the stolen parking meter was readily visible through the car windows given its size and nature.” Thus, the majority incorrectly states that the record is at best “uncertain” with respect to whether the parking meter was in plain view.

¶ 44. Nor was there any dispute that the officer had made a lawful stop and was lawfully positioned outside the vehicle in a location from which the parking meter was visible. Further, the incriminating nature of the disconnected parking meter was manifest.

****55** ¶ 45. Hence, two issues remain concerning the applicability of the plain-view exception in this case. The first is whether the officer had to have actually seen the parking meter while he was in a lawful position, or whether it was sufficient that the parking meter was in plain view from where the officer was legally positioned moments earlier, even though he did not actually notice the parking meter until he commenced the challenged search by opening the car door. In my view, it is immaterial that the officer did not happen to notice the plainly visible parking meter before he began searching the car. The test, as quoted above, is whether the item “ ‘could be’ ” plainly viewed from a lawful location. Trudeau, 165 Vt. at 358, 683 A.2d at 727 (quoting Horton, 496 U.S. at 136, 110 S.Ct. 2301). This objective test is consistent with the general rule that search-and-seizure analysis is not subjective, and that an inquiry into *413 the reasonableness of particular police conduct is a purely objective one. See United States v. Messino, 871 F.Supp. 1035, 1039 (N.D.Ill.1995) (“[T]he Supreme Court's rejection of the inadvertency requirement for a plain view seizure in Horton v. California can be read as a rejection of subjective inquiry as an element of plain view analysis in general.”); see Horton, 496 U.S. at 138, 110 S.Ct. 2301 (“[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”).

¶ 46. An objective test is also consistent with the theoretical underpinning of the plain-view exception—that there can be no reasonable expectation of privacy in items left in plain view of officers lawfully positioned to see them. In this case, defendant chose to place a stolen parking meter on the floor of his vehicle in a location that made it plainly visible from outside the car. Although the officer in this case did not happen to notice the parking meter until he opened the car door to commence a search of the vehicle, the parking meter was plainly visible from the officer's lawful position outside the car, and the officer may well eventually have seen the parking meter even if he had decided not to search the vehicle.

¶ 47. The majority cites *Texas v. Brown*, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), for the principle that an officer must have actually seen the evidence in plain view before conducting any search, but *Brown* did not even address that issue. Indeed, it was undisputed in *Brown* that the seized items were in plain view—the only issue was whether the incriminating nature of those items was immediately apparent. *Id.* at 740-41, 103 S.Ct. 1535. The majority believes that we would be eviscerating the “fundamental evidentiary and legal grounding” of the plain-view rule by allowing the admission of a parking-meter head that, for example, was tied to a roof-rack in plain view or displayed prominently on a dashboard but not initially noticed by officers occupied with other concerns. Yet, as the Court observed in *Brown*, “[t]here is no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.” *Id.* at 740, 103 S.Ct. 1535 (citations omitted). Here, defendant had no legitimate expectation of privacy in the parking-meter head, given that he chose to leave it in a place that was plainly observable from outside his vehicle.

¶ 48. The second issue regarding application of the plain-view exception to this case is whether there were exigent circumstances that allowed the officer to seize the plainly visible incriminating item. *414 According to the majority, there were no exigent **56 circumstances because the passenger had left the scene, the driver had been secured in the patrol car, the vehicle was to be impounded, and the officer was not concerned that evidence might be removed from the car. Once again, however, the majority provides an inaccurate statement of the facts in finding the absence of exigent circumstances. The majority states that the vehicle was to be impounded, but fails to indicate when the police decided that they had grounds to impound the car. The undisputed testimony of the arresting officer was that the decision to impound the vehicle or to leave it at the scene safely off of the highway—which the officer called “grounding”—was based on the results of the initial search of the vehicle and was not made before the search commenced.^{FN10}

FN10. Despite the majority's criticism in footnote one, I emphasize that the officers did not decide what to do with the car until after the search. Moreover, because “grounding” simply involves leaving the car where it is stopped, anyone could come along and drive the car away. Grounding in that sense does not involve a seizure at all.

¶ 49. In other words, at the time of the initial search, no determination had been made that defen-

dant's car warranted seizure or, alternatively, that it would be left at the scene.^{FN11} The fact that the *415 passenger had been released and had left the scene increased the possibility that she or someone else could return to the car and remove evidence in the event the car were left at the scene. As the trial court stated, "the other occupant was not arrested and the true owner's identity was not known, and therefore the lawful owner might have returned to remove the vehicle and the contraband in it." Finally, the officer's testimony that he was not concerned about **57 evidence being removed or destroyed does not demonstrate the lack of exigent circumstances because it is an objective view of the circumstances, not the officer's subjective motivation, that determines whether there was an exigency permitting the officers to seize incriminating items left in plain view.

FN11. Ironically, the majority's version of the facts brings us to another clearly applicable ground to validate the search. If, as the majority suggests, the arresting officer had determined from the onset of his encounter with defendant that the vehicle was to be seized and impounded, then the evidence could have been admitted pursuant to the inevitable-discovery rule, which is an exception to the exclusionary rule. Under that rule, illegally obtained evidence will not be suppressed if the prosecution demonstrates that the seized evidence would have been obtained inevitably even if there had been no statutory or constitutional violation. *United States v. Mendez*, 315 F.3d 132, 137 (2d Cir.2002); *Nix v. Williams*, 467 U.S. 431, 440, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) (noting that the "vast majority of all courts, both state and federal, recognize an inevitable discovery exception to the exclusionary rule" (internal quotation omitted)). Here, the trial court declined to apply that rule because the officer was unable to testify as to any established written policy that the South Burlington Police Department had regarding inventory searches of impounded cars. Ironically, in the case that the trial court relied on, which has similar facts to the instant case, the United States Court of Appeals for the Second Circuit admitted evidence pursuant to the inevitable-discovery rule based on the police department's *unwritten* inventory search policy. *Mendez*, 315 F.3d at 138-39. In any event, the purpose of requiring an established policy is to assure that police have limited discretion in terms of how inventory searches are conducted, not necessarily to foreclose application of the inevitable-discovery rule in the absence of such a policy. See 6 W. LaFare, *Search and Seizure* § 11.4(a), at 278-79 (4th ed. 2004) (noting that "[c]ircumstances justifying application of the 'inevitable-discovery' rule are most likely to be present" where evidence would have been revealed pursuant to standardized procedures or established routines). Here, even if the South Burlington Police Department had imposed the most severe limitations imaginable with respect to inventory searches, any inventory of the impounded vehicle would have immediately revealed the parking-meter head laying in plain view. Therefore, if the arresting officer had in fact determined before he searched the vehicle that it was to be impounded, admission of the incriminating evidence in this case would have been admissible under the inevitable-discovery rule.

¶ 50. In sum, the release of the passenger, the uncertainty over ownership of the vehicle, and the possibility of the police leaving the car by the roadside constituted exigent circumstances allow-

ing the officers to conduct a warrantless seizure of incriminating evidence left in plain view in the vehicle. On this point, this case should be controlled by State v. Trudeau, 165 Vt. at 361, 683 A.2d at 729, a factually similar case in which we found exigent circumstances because defendant's vehicle "would have remained in a public parking lot, and the two other occupants of the vehicle, neither of whom were arrested, would have had access to the vehicle and the evidence contained therein." The majority makes a vain attempt to distinguish *Trudeau*, but cannot do so. Here, as in *Trudeau*, there was a passenger who could have accessed the vehicle, which may have been left unattended at the scene of the stop.

¶ 51. Thus, all three elements of the plain-view exception were satisfied in this case. On these facts, I would affirm the decision not to suppress the evidence found in the search of the car under Article 11 of the Vermont Constitution, without reaching the search-incident-to-arrest issue.^{FN12} Cf. State v. Savva, 159 Vt. 75, 88, 616 A.2d 774, 781 (1991) (recognizing "a separate and higher expectation of privacy for containers*416 used to transport personal possessions than for objects exposed to plain view within an automobile's interior").

FN12. After opening the car door, the investigating officers also observed (1) a glass jar containing a green leafy substance on the floor behind, not underneath, the driver's seat, and (2) a small pipe easily visible in an open compartment of a side door.

¶ 52. As a second ground for affirming the denial of defendant's motion to suppress in this case, I would find that the search was proper where the circumstances indicated that the vehicle might have been stolen. One of the leading commentators on the law of search and seizure supports case law holding that it is reasonable for a police officer to make a limited warrantless search of a vehicle to determine ownership of the vehicle or to investigate the possible theft of the vehicle. 3 LaFave, supra, § 7.4(d)-(e), at 662-66. According to LaFave:

The better view is that if the driver has been given an opportunity to produce proof of registration but he is unable to do so, and even if he asserts that there is no such proof inside the car, the officer is not required to accept such an assertion at face value, at least when [the suspect's] previous conduct would ... cast doubt upon his veracity; at that point, the officer may look for registration papers on the dashboard, sun visor and steering column and, if not found in those places or seen in plain view, in the glove compartment, [and] all places where it may reasonably be found.

Id. at 663 (internal quotations and citation omitted); accord In re Arturo D., 27 Cal.4th 60, 115 Cal.Rptr.2d 581, 38 P.3d 433, 446 (2002) (accepting LaFave reasoning and finding officer justified in conducting warrantless search of passenger compartment, including under seats, for evidence of vehicle's ownership). LaFave describes as "sound" the basic principle that if an officer has probable cause to believe that a vehicle has been the subject of a theft, he may make a limited warrantless**58 entry of the vehicle and search areas he reasonably believes might contain evidence of ownership. 3 LaFave, supra, § 7.4(e), at 664-66.

¶ 53. As noted, in this case defendant was unable to produce a valid driver's license, car registration, or proof of insurance. See 23 V.S.A. §§ 301, 307 (motor vehicle shall not be operated on highway unless vehicle is registered and registration is carried in some easily accessible place in vehicle); 23 V.S.A. § 1012(b) (operator "shall produce his or her operator's license and the registration certificate for the motor vehicle"). Further, the vehicle's license plates did not match the vehicle, see 23 V.S.A. § 513 (owner of motor vehicle shall not attach to vehicle number plates not assigned to that vehicle), and the bill of sale defendant showed to police did not indicate that defendant was the owner of the vehicle. See 23 V.S.A. § 1012(a) (operator shall give "name and *417 address of the owner of the motor vehicle"). Given these circumstances, the police officer had a responsibility to assure himself that the vehicle had not been stolen.

¶ 54. The majority insists that no exigent circumstances existed, relying heavily on the fact that defendant had been placed in custody. To the extent that question is relevant in these circumstances, however, this Court has held that "[t]he mere placing of a suspect vehicle's occupants in custody does not extinguish exigency, if it otherwise exists." State v. Girouard, 135 Vt. 123, 132-33, 373 A.2d 836, 842 (1977). Here, the possibility that the vehicle had been stolen created exigent circumstances authorizing the officer to conduct a limited warrantless search to look for documents indicating its ownership. See People v. Todd, 35 Cal.Rptr.2d 790, 794 (Ct.App.1994) (given officer's duty to ascertain owner of vehicle to determine whether to release or impound vehicle, "statute authorizing an officer to inspect vehicle registration also authorizes the officer to enter a stopped vehicle and conduct a warrantless search for the required documents" within constitutional limits); State v. Holmgren, 282 N.J.Super. 212, 659 A.2d 939, 940 (App.Div.1995) (driver's failure to produce vehicle's registration or proof of insurance supported reasonable suspicion that vehicle was stolen and authorized police "to conduct a limited warrantless search of areas in the vehicle where such papers might normally be kept by an owner"). This would be true regardless of the officer's actual motivation underlying the search. See Todd, 35 Cal.Rptr.2d at 794 (as long as search was legally authorized, officer's "subjective intentions for his activities are not relevant").

¶ 55. The majority repeatedly relies upon the purported subjective motivations of the arresting officer in this case, and yet it is well settled that "[s]ubjective intent alone ... does not make otherwise lawful conduct illegal or unconstitutional." Scott v. United States, 436 U.S. 128, 136, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). Indeed, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification of the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." Id. at 138, 98 S.Ct. 1717; see Whren v. United States, 517 U.S. 806, 812, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (noting that the Supreme Court has repeatedly rejected the notion "that an officer's motive invalidates objectively reasonable behavior under the Fourth Amendment"); United States v. Robinson, 414 U.S. 218, 221 n. 1, 236, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (holding that a traffic violation arrest would not be rendered invalid merely because it was a pretext for a narcotics search, and further, that a lawful post-*59 arrest search of a person would not be *418 rendered invalid merely because it was not motivated by officer-safety concerns). Cf. State v. Lussier, 171 Vt. 19, 23-24, 757 A.2d 1017, 1020 (2000) ("In determining the

legality of a stop, courts do not attempt to divine the arresting officer's actual subjective motivation for making the stop; rather, they consider from an objective standpoint whether, given all of the circumstances, the officer had a reasonable and articulable suspicion of wrongdoing.”).

¶ 56. The majority's emphasis on the officer's subjective motivation highlights the problem with decisions that have the effect of turning police officers into constitutional law scholars who have to predict the developing law and how this Court will rule. The officer understood he could search incident to the DUI arrest and gave answers related to that justification. The majority is requiring that he also understand the law relating to whether he was dealing with a stolen car and answer that he was searching for evidence of ownership of the vehicle. The reality is that officers will not invariably give the right constitutional law answer in describing the purposes of the search. The only reasonable rule has to be that the validity of the search must be based on the objective evaluation of the circumstances and not our evaluation of the level of constitutional law knowledge of the searching officer.

¶ 57. The majority also incorrectly contends that the officer did not observe any evidence of a crime in the vehicle. The officer's affidavit and testimony indicated that defendant was speeding and driving erratically. After the stop occurred, the officer smelled a faint odor of alcohol emitting from the vehicle. Further, defendant exhibited signs of intoxication, and he failed dexterity tests, which led to his arrest for driving while intoxicated. Thus, there was evidence that defendant had committed several crimes connected with the vehicle.

¶ 58. In short, either of the two grounds discussed above, and certainly both in combination, provided adequate grounds for the police to search the vehicle without a warrant for evidence of the crimes-DUI and stealing a parking meter or possessing a stolen meter-or to determine the ownership of the vehicle. Thus, we need not reach broad constitutional questions in this case.

¶ 59. This leads me to the majority's broad constitutional holding that rejects the decision of the United States Supreme Court in Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768. Before I address Belton, however, I emphasize that the majority's broad holding is unnecessary even if we hold that neither the stolen car nor plain-view exceptions apply. The majority rejects Belton in favor of the so-called “case-by-case” approach taken in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), but, in my view, an analysis under *419 Chimel would not result in overturning the trial court's decision in this case. Chimel allows police to search areas within the reach of suspects contemporaneously with arrests to protect themselves and to prevent the destruction of evidence. 395 U.S. at 766, 89 S.Ct. 2034.^{FN13} The officer in this case testified specifically **60 that he searched only in that area. As a practical matter, officers protect themselves by conducting searches *after* suspects have been arrested and secured. Yet that did not prevent courts from permitting searches and seizures conducted contemporaneously with the arrest within the area of control described in Chimel, even when the suspect had been secured before the actual search or seizure. See, e.g., United States v. Dixon, 558 F.2d 919, 922 (9th Cir.1977) (permitting, under Chimel, a search and seizure of items on a vehicle's floorboard while other officers patted down and handcuffed the suspect outside of the vehicle); United

States v. Sanders, 631 F.2d 1309, 1313-14 (8th Cir.1980) (permitting, under *Chimel*, a search and seizure that was conducted within the immediate vicinity of the suspects' vehicle and that "was substantially contemporaneous with the arrest," even though the officers had secured control over the suspects).

FN13. Contrary to the majority's assertion, however, neither *Chimel* nor its progeny has required a showing of "exigent circumstances" to justify a search incident to an arrest. See *ante*, ¶ 21, at 47. Exigent circumstances is a legal term of art that has been applied to automobile searches. *Chimel* did not even involve the search of an automobile. In effect, *Chimel* narrowed the area that could be searched incident to arrest, thereby creating a bright-line "grab rule," but did not incorporate a requirement that there be a showing of exigent circumstances.

¶ 60. Moreover, in many encounters involving vehicle stops, as in the one before us, there are several suspects or passengers. In those cases, officers may search the area within the reach of any or all of those persons. See State v. Mayer, 129 Vt. 564, 567-68, 283 A.2d 863, 865 (1971) (relying on *Chimel* to permit search on ground that either the defendant or the defendant's girlfriend could have reached a weapon at the time of the defendant's arrest). Here, the passenger apparently remained in the car while the officer was administering field dexterity tests to defendant. Under these circumstances, *Chimel* would have allowed the officer to search the open inner compartment of the vehicle contemporaneously with defendant's arrest to protect himself and to preserve potential evidence. Thus, even if *Belton* had never been decided, and this Court were required to analyze the case under *420 *Chimel*, I would affirm the trial court's denial of defendant's motion to suppress.

¶ 61. This leads me to the principal basis for my dissent, which does require an in-depth analysis of the perimeters of the search-incident-to-arrest exception to warrantless searches under Article 11 of the Vermont Constitution. Assuming this to be the controlling issue under the circumstances of this case, I would still affirm the district court's denial of defendant's motion to suppress because, in my view, the values underlying Article 11 do not prohibit police from conducting warrantless searches of the passenger compartment of automobiles following the arrest of the operator for an offense involving the use of the vehicle. The district court found both the automobile and search-incident-to-arrest exceptions to be applicable in this case. The court explained that exigent circumstances existed because the police had released defendant's companion without ascertaining whether she had keys to the vehicle, and ownership of the vehicle had not been established. The court also cited the "well-established" principle that police can lawfully conduct a warrantless search of a person and his immediate surroundings following a valid stop and arrest.

¶ 62. In support of its decision, the district court relied on *Belton*, the leading federal case addressing the search-incident-to-arrest exception in the context of an automobile stop. The question before the Court in that case was the following: "When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search in-

cident to his arrest include the passenger compartment of the automobile in which he was riding?” Belton, 453 U.S. at 455, 101 S.Ct. 2860. The Court accepted review of this issue because the lower courts had been struggling with whether ****61** or how to apply *Chimel* in cases involving arrests following automobile stops. Prior to *Chimel*, the Court had allowed a full warrantless search of a suspect's home or vehicle following the suspect's arrest. See 3 LaFave, supra, § 7.1(a), at 502 (discussing cases leading to *Belton* decision). In *Chimel*, the Court overruled that line of cases in the context of a search of a home, reasoning that the warrantless search of a suspect's home following his arrest is unreasonable under the Fourth Amendment if it extends beyond the area in which the suspect could either reach a weapon that would endanger the arresting officers or conceal or destroy evidence that could be used against him. 395 U.S. at 768, 89 S.Ct. 2034.

¶ 63. Following the decision in *Chimel*, the lower courts were divided on whether, or the extent to which, that holding applied in the context of the search of an automobile following the arrest of its occupant. See *421 3 LaFave, supra, § 7.1(a), at 503-04. Recognizing that the lower courts had found the holding in *Chimel* “difficult to apply in specific cases,” particularly automobile stops, the Court in *Belton* reasoned that Fourth Amendment protections “ ‘can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.’ ” Belton, 453 U.S. at 458-59, 101 S.Ct. 2860 (quoting W. LaFave, “*Case-by-Case Adjudication*” *Versus* “*Standardized Procedures*”: *The Robinson Dilemma*, 1974 S.Ct. Rev. 127, 142). According to the Court, a “ ‘single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.’ ” Belton, 453 U.S. at 458, 101 S.Ct. 2860 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)).

¶ 64. The Court concluded, however, that “no straightforward rule ha [d] emerged” from the litigated federal or state cases regarding “the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.” Belton, 453 U.S. at 459, 101 S.Ct. 2860. Based on its conclusion that articles within the passenger compartment of an automobile are “generally, even if not inevitably” within an area in which a suspect could reach a weapon or evidence, the Court held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” Id. at 460, 101 S.Ct. 2860. In addition, the Court held “that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.” Id. In *Thornton v. United States*, the Court further concluded “that *Belton* governs 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). Thus, in the context of automobile searches following a lawful arrest, the Court rejected a case-by-case application of the *Chimel* rule in favor of a workable, bright-line rule that provides guidance to police officers.

¶ 65. The majority rejects the analysis of *Belton*, particularly the adoption of a bright-line rule, as an “abrupt shift in the standard of fourth amendment protections.” *Ante*, ¶ 20, at 46. The so-called “abrupt shift” is actually none at all. *Belton* creates a bright-line rule allowing warrantless searches incident to the roadside **62 arrest of automobile occupants. The majority recognizes that the “search-incident-to-arrest doctrine” is an established exception to the warrant requirement. *Ante*, *422 ¶ 15, at 44. Moreover, this Court has adopted this exception. See *State v. Meunier*, 137 Vt. 586, 588, 409 A.2d 583, 584 (1979) (quoting both the Fourth Amendment and Article 11, and stating that reasonable warrantless searches incident to arrest are permissible); *State v. Greenslit*, 151 Vt. 225, 227, 559 A.2d 672, 673 (1989) (“It is axiomatic that a search incident to a lawful arrest is constitutional.”).

¶ 66. The use of a bright-line rule for searches incident to arrest is explained in *United States v. Robinson* where the Court rejected a case-by-case adjudication of “whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.” 414 U.S. at 235, 94 S.Ct. 467. The Court explained that neither its own “long line of authorities” nor “the history of practice in this country and in England” compelled such a result. *Id.* It stated: “A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.” *Id.* The Court further explained that the *Chimel* holding, on which the majority relies in this case, allows searches in areas within the immediate control of the arrestee in a home. *Id.* at 226, 94 S.Ct. 467. Thus, *Chimel* itself establishes a bright-line rule, one that the majority apparently endorses here.^{FN14}

FN14. I say “apparently endorses” because the majority also requires a showing of exigent circumstances in the individual case, a requirement wholly inconsistent with *Chimel* and the cases that apply it, including *Robinson*.

¶ 67. But even if we were not dealing with the definition of an accepted bright line—as opposed to creating a new one—I would reject the majority's holding that our precedents *prohibit* bright-line rules. In fact, our interpretations of Article 11, and the federal court interpretations of the Fourth Amendment, are essentially the same on this point. At its strongest, the federal policy on the propriety of bright-line rules was recently stated in *United States v. Drayton*: “[F]or the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of all the circumstances surrounding the encounter.” 536 U.S. 194, 201, 122 S.Ct. 2105, 153 L.Ed.2d 242 (2002) (citation and internal quotation omitted). The majority is correct that two of our decisions have rejected federal search-and-seizure decisions because they embodied specific bright-line rules. See *423 *Savva*, 159 Vt. at 87, 616 A.2d at 781; *State v. Kirchoff*, 156 Vt. 1, 8, 587 A.2d 988, 993 (1991).^{FN15} Neither decision, however, categorically rejects bright-line rules. Indeed, as noted above, the majority's endorsement of *Chimel* would be inconsistent with such a rejection.

FN15. I do not think that *State v. Sprague*, 2003 VT 20, 175 Vt. 123, 824 A.2d 539, the

main case relied on by the majority, should be seen as an example of a rejection of a federal decision *because* it embodied a bright-line rule. If the issue is the bright-line nature of the federal rule, the decision essentially trades one bright-line rule for another. It does not call for application of the totality of the circumstances to determine whether an exit order is constitutionally valid.

¶ 68. On the other hand, in circumstances where there was a need for certainty, we adopted what is essentially a bright-line rule in *State v. Martin*, 145 Vt. 562, 571, 496 A.2d 442, 448 (1985), a decision**63 upholding the constitutionality of DUI roadblocks under Article 11 in controlled circumstances. We held that “[a]s a general rule, a DUI roadblock will pass constitutional muster if” it meets six specific and objective standards, one of which is that “the discretion of the officers in the field, as to the method to be utilized in selecting vehicles to be stopped, is carefully circumscribed by clear objective guidelines established by a high level administrative official.” *Id.* The majority’s assertion that “we have consistently rejected bright-line rules,” *ante*, ¶ 20, at 46, is a gross exaggeration.

¶ 69. Hence, the proper question is not whether *Belton* should be rejected because it embodies a bright-line rule, but rather, whether a bright-line rule is justified in the circumstances and whether *Belton* embodies a reasonable bright line. I believe that the answer to the first part of the question is clearly yes. Although I believe that the *Belton* bright line is misplaced—and thus the answer to the second part of the question is no—I believe that the search in this case is within a reasonably drawn line so that the *Belton* misplaced line does not affect the outcome.

¶ 70. The reasons for a bright-line rule in cases like the present are best explained by Professor LaFave, as quoted in *Belton*, who explained that because the Fourth Amendment is “ ‘primarily intended to regulate the police in their day-to-day activities,’ ” it “ ‘ought to be expressed in terms that are readily applicable by the police in the context of law enforcement activities in which they are necessarily engaged.’ ” *Belton*, 453 U.S. at 458, 101 S.Ct. 2860 (quoting LaFave, “*Case-by-Case Adjudication*” *Versus* “*Standardized Procedures*”: *The Robinson Dilemma*, 1974 S.Ct. Rev. at 141). He stated that although rules that *424 require “subtle nuances and hair-line distinctions” might be “the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed,” such rules “may be literally impossible of application by the officer in the field.” *Id.* (internal quotations omitted). Similarly, in writing for the majority, Justice Souter recently reiterated the Court’s recognition of the government’s “essential interest in readily administrable rules” in this context because:

[A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.

Atwater v. City of Lago Vista, 532 U.S. 318, 347, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) (internal citation omitted).

¶ 71. I can think of no greater example of the need to apply constitutional search-and-seizure rules “on the spur (and in the heat) of the moment” than during a roadside stop of an automobile of a likely intoxicated driver in the middle of the night. Nor are there many recurrent law-enforcement activities that are more dangerous for the officer involved. For this reason, the case for a bright-line rule involving automobile searches incident to an arrest is a strong one.

¶ 72. There is an additional reason why a bright-line rule is appropriate for automobile searches incident to the arrest of an occupant of a vehicle. In applying search-and-seizure law, courts have unanimously recognized that a vehicle is fundamentally**64 different from a home in the sense that its mobility, its function as transportation on public highways, and its extensive regulation (1) increase the likelihood of the existence of exigent circumstances justifying warrantless searches and (2) result in frequent contact between the vehicle's occupants and government authorities or members of the public in both criminal and noncriminal contexts, thereby reducing the expectation of privacy in items placed in the open passenger compartment of the vehicle. See 3 LaFare, *supra*, § 7.2(b), at 548.

¶ 73. People regularly expose the interior of their vehicles to public view by driving them on public streets and parking them in public *425 places. Indeed, the many windows in the vehicle leave little in the interior of the passenger compartment, apart from that placed in closed containers, outside of public view, and thus there is little expectation of privacy in the passenger compartment of an automobile.

¶ 74. Consequently, similar to other courts, we have consistently emphasized within our Article 11 jurisprudence the distinction between searches of homes and cars. See State v. Geraw, 173 Vt. 350, 352-53, 795 A.2d 1219, 1221 (2002) (holding that our case law “underscore[s] the significance of the home as a repository of heightened privacy expectations”). This distinction is particularly highlighted in a pair of cases we decided fifteen years ago. In State v. Blow, 157 Vt. 513, 520, 602 A.2d 552, 556 (1991), we held that obtaining evidence without a warrant through surreptitious electronic monitoring in the defendant's home violated Article 11. See also Geraw, 173 Vt. at 351, 795 A.2d at 1220 (holding that Article 11 prohibits secret recording of police interviews conducted in suspect's home). In so holding, we stated that one of the core values embodied by Article 11 is “the deeply-rooted legal and societal principle that the coveted privacy of the home should be especially protected.” Blow, 157 Vt. at 518, 602 A.2d at 555.

¶ 75. In contrast, in State v. Brooks, 157 Vt. 490, 494, 601 A.2d 963, 965 (1991), we held that the warrantless, electronic participant monitoring of individuals conversing through the open windows of cars parked alongside each other in a public lot did not violate the protections provided by Article 11. See also State v. Bruyette, 158 Vt. 21, 37, 604 A.2d 1270, 1278 (1992) (Dooley, J., concurring, joined by Allen, C.J., and Gibson, J.) (suggesting that secret monitoring

of conversation between defendant and his girlfriend in parked car was outside protection of Article 11). In distinguishing *Blow*, we stated that “[t]he distinction between the reasonable expectation of privacy within the home and outside of it is well-grounded in the law and in our culture.” *Brooks*, 157 Vt. at 493, 601 A.2d at 964. We further explained that our refusal to subject participant monitoring of individuals in their cars to the same strict standards applied to such monitoring within the home is “simply a reflection of the [less restrictive] standards that apply to nonhome searches generally.” *Id.*; see *State v. Charpentier*, 131 Idaho 649, 962 P.2d 1033, 1037 (1998) (stating that extensive regulation of automobiles on public highways does not directly address issue of automobile searches, but is “indicative of the fact that the automobile is not comparable to the home” in that “[t]he expectation of privacy within the automobile falls far short of that accorded the sanctuary of the home”).

*426 ¶ 76. The acknowledgment of a reduced expectation of privacy in automobiles, as opposed to homes, is incorporated directly into the automobile exception and indirectly into the search-incident-to-arrest exception to the warrant requirement. With **65 regard to the automobile exception, although we have not followed federal law in allowing warrantless searches of automobiles based on probable cause absent a particularized showing of exigent circumstances, *Trudeau*, 165 Vt. at 361, 683 A.2d at 729 (rejecting notion that mobility of automobiles is per se exigent circumstance allowing warrantless search), we have acknowledged that automobiles often may present exigent circumstances, and that “people may have a lesser expectation of privacy in their vehicles, which are exposed at least in part to the public eye.” *Savva*, 159 Vt. at 83, 616 A.2d at 778.

¶ 77. In *Savva*, we identified the issue before us as “whether defendant had a reasonable expectation of privacy, *not in the vehicle as a whole*, but specifically in the contents of the brown paper bag in which the drugs, contained in plastic bags, were found,” and we acknowledged that “Article 11’s requirement for an expectation of privacy may not be met” if a container’s contents were discernable. *Id.* at 89-90, 616 A.2d at 782 (emphasis added). In reversing the district court’s denial of defendant’s motion to suppress, we concluded that the lesser expectation of privacy in vehicles does not carry over to sealed containers within the vehicle, as the United States Supreme Court had held. *Id.* at 87, 616 A.2d at 781. Accordingly, we recognized “a separate and higher expectation of privacy for containers used to transport personal possessions than for objects exposed to plain view within an automobile’s interior.” *Id.* at 88, 616 A.2d at 781. Thus, our holding in *Savva* is narrowly restricted to closed containers within vehicles and, in fact, recognizes a diminished expectation of privacy in items placed in the open passenger compartment of vehicles.

¶ 78. Like the automobile exception, *Belton*’s bright-line rule allowing police to search the passenger compartment of a vehicle following the lawful arrest of its occupants is based, at least in part, on the mobility of, and reduced expectation of privacy in, automobiles. See *Girouard*, 135 Vt. at 132-33, 373 A.2d at 842. Yet, the majority has simply ignored this distinction, holding that a rule created for the home in *Chimel* should be applied without any modification to an automobile. This is the real “abrupt shift in the standard of Fourth Amendment protections” in this case.

¶ 79. It is important to understand that the majority has not only refused to adopt a bright-line rule, but it has gone as far in the opposite *427 direction as is realistically possible by requiring a showing of exigent circumstances on a case-by-case basis. Anyone who reads both the majority's and the dissent's analysis of the presence of exigent circumstances in *Trudeau*, and the majority's attempt to distinguish *Trudeau* from this case, will immediately recognize that it is difficult to predict whether exigent circumstances can be found. Many courts have noted that “exigent circumstances” are difficult to define even in the context of deliberate and painstaking review based on appellate hindsight. See *State v. Aviles*, 277 Conn. 281, 891 A.2d 935, 944 (2006) (recognizing that the term exigent circumstances “does not lend itself to a precise definition”) (quotation and citation omitted); *State v. Clark*, 65 Haw. 488, 654 P.2d 355, 360 (1982) (same); *State v. Wren*, 115 Idaho 618, 768 P.2d 1351, 1356 (Ct.App.1989) (same); *State v. Nishina*, 175 N.J. 502, 816 A.2d 153, 162 (2003) (same). Requiring a showing of exigent circumstances on a case-by-case basis in the context of a search incident to a highway arrest is not a workable policy.

¶ 80. The majority asks that a lone police officer who stops a vehicle at two o'clock in the morning not only be a constitutional**66 law expert but also exercise twenty-twenty hindsight on whether a majority of this Court will find exigent circumstances.^{FN16} No law enforcement system can operate this way safely and effectively. The majority's case-by-case exigent circumstances regime is the equivalent of holding that a vehicle cannot be searched incident to an arrest of an occupant of the vehicle.

FN16. Without attempting to explain how an officer will make the decisions the majority requires, the majority simply responds that “support for the assumption that case-by-case evaluations are unworkable in the context of warrantless vehicle searches is simply lacking.” *Ante*, ¶ 25, at 48. At some point, the obvious needs no further support.

¶ 81. In the majority's view, the only advantage to a bright-line rule is “law-enforcement efficiency” and “administrative simplicity.” As I said in the opening of this dissent, the majority has trivialized very important interests in officer safety and evidence gathering, making them seem insignificant when balanced against the privacy interests of citizens. But we have not always been so hostile to the realities of limited resources available for law enforcement functions. In *State v. Oakes*, in response to an argument that a consensual search of defendant's home had been discontinued and required new authority to be recommenced, we explained:

The discontinuity of the investigation was, in some measure, due to the limitations implicit in police work in most *428 Vermont villages. The small manpower of the local force must, of necessity, be supplemented by the personnel and the expertise the state police can furnish, once they arrive.... Delay, or interruption of police presence at the premises, on this account, does not undercut the right of the police to complete, within a reasonable time, their investigative work, or require a renewed authority to enter.

129 Vt. 241, 252, 276 A.2d 18, 25 (1971). Similarly, the realities of lone officers stopping vehi-

cles in the middle of the night necessarily must inform the choices available to the officer to protect his or her safety and discharge the law-enforcement function.

¶ 82. As for the majority's main objection to a bright-line rule authorizing a search of a vehicle—that the arrested occupant is often restrained such that he or she could never reach a weapon or destroy evidence by the time the search occurs—the best response is to examine the nature of automobile stops. The majority attributes the circumstance of a secured suspect to the recent decision in *Thornton*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905, but it was also true in *Belton* and virtually every search-incident-to-arrest case in the automobile context. It was also probably true in *Chimel* and virtually every search-incident-to-arrest case where the search goes beyond the person. The reason is simple: no police officer should or would ever leave a suspect who is to be arrested unrestrained while the officer conducts a search. See M. Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 Wis. L.Rev. 657, 676, 696 (describing “common sense” need of police to restrain suspect upon arrest). Self-protection generally demands restraint of the suspect first. Thus, the majority's objection is really to the “grab rule” of *Chimel* and not to the bright line established in *Belton*. See *id.* at 677.

¶ 83. There are very important reasons for a “grab rule,” and they are particularly strong for vehicle searches, which often involve more than one occupant of the vehicle. To ensure their safety, police must be cognizant of the potential threat **67 posed not only by the suspect, but also by the suspect's companions. For example, in an early post-*Chimel* Vermont case, *Mayer*, defendant was arrested in a motel room also occupied by his female companion. 129 Vt. at 566, 283 A.2d at 864. The search incident to the arrest of defendant recovered a gun located under the pillows to the bed occupied by the female companion. *Id.* In response to the argument that the police had searched outside the “grab area,” this Court said:

*429 Upon entering the motel room ... it was an essential security function for the enforcement officers to search the accused and the area within his reach. It was equally reasonable that the protective search extend to the area within reach of his female companion. It appears that the weapon was within the grasp of both. Until the weapon was secured, either occupant of the room had the capability of impeding the arrests and endangering the lives of those present.

Id. at 567-68, 283 A.2d at 865. Just as the officer was permitted to search the motel bed in *Mayer*, the officer in this case must be able to search the passenger compartment of defendant's vehicle, which was occupied by defendant's companion while defendant was performing dexterity tests. Even if the issue were solely personal security, it is unacceptable to put the officer in the position of making a constitutional calculation of whether the restrained defendant can reach a gun or whether another occupant is likely to do so.

¶ 84. The majority tries to avoid these security interests by “factualizing” the case, see generally W. LaFave, *Being Frank About the Fourth: On Allen's “Process of ‘Factualization’ in the Search and Seizure Cases”*, 85 Mich. L.Rev. 427 (1986), to say there is no security concern. Thus, in its introductory paragraph it characterizes the question in this case as: “whether law-

enforcement officers may routinely search a motor vehicle without a warrant, after its occupant has been arrested, handcuffed, and secured in the back seat of a police cruiser, absent a reasonable need to protect the officers' safety or preserve evidence of a crime." *Ante*, ¶ 1. In fact, its categorical rejection of *Belton* and any alternative to *Belton* that involves a bright-line review represents a far broader holding than its statement of the issue admits. Thus, its holding is much broader than the facts of this case and involves many instances where security of the officer is the prime concern.

¶ 85. The majority responds that there is no proof that stopping vehicles is inordinately dangerous. In fact, the evidence is powerful. Relying on a published study, the United States Supreme Court noticed and relied upon that danger in *Adams v. Williams*, 407 U.S. 143, 148 n. 3, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972): "[A]pproximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile." The Court reiterated and relied on this evidence in *Pennsylvania v. Mimms*, 434 U.S. 106, 110, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) (noting the "inordinate risk confronting an officer as he approaches a person seated in an automobile") and more recently in *Michigan v. Long*, 463 U.S. 1032, 1048-49, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). *430 The United States Court of Appeals recently amplified and updated the statistics in *United States v. Holt*, 264 F.3d 1215, 1223 (10th Cir.2001) (en banc) (noting that "in 1999, 6,048 officers were assaulted during traffic pursuits and stops and 8 were killed," based on FBI statistics). The court concluded from the evidence:

The terrifying truth is that officers face a very real risk of being assaulted with a dangerous weapon each time they **68 stop a vehicle. The officer typically has to leave his vehicle, thereby exposing himself to potential assault by the motorist. The officer approaches the vehicle not knowing who the motorist is or what the motorist's intentions might be. It is precisely during such an exposed stop that the courts have been willing to give the officers wide latitude to discern the threat the motorist may pose to officer safety.

An officer in today's reality has an objective, reasonable basis to fear for his or her life every time a motorist is stopped. Every traffic stop, after all, is a confrontation. The motorist must suspend his or her plans and anticipates receiving a fine and perhaps even a jail term. That expectation becomes even more real when the motorist or a passenger knows there are outstanding arrest warrants or current criminal activity that may be discovered during the course of the stop. Resort to a loaded weapon is an increasingly plausible option for many such motorists to escape those consequences, and the officer, when stopping a car on a routine traffic stop, never knows in advance which motorists have that option by virtue of possession of a loaded weapon in the car.

Id. at 1223 (internal quotation and citation omitted).^{FN17}

FN17. The majority responds to the clear evidence of danger to officers with the argument that the evidence is irrelevant because defendant was under arrest in the police car when the vehicle was searched. As I emphasized above, however, no reasonable officer

will leave a suspect unrestrained in order to conduct a search. On the other hand, many suspects will return to their vehicles, and many vehicles will be left with passengers. The rule that the majority announces today will leave the officer exposed to danger in either of these circumstances. The statistics in Holt, 264 F.3d at 1223, are based on circumstances where, as is the case in the vast majority of jurisdictions, the officer can reduce or eliminate the risk from passengers and returning operators by searching for weapons. If the risk shown by the statistics is so great with the power to search, it must be even greater without the power to search.

*431 ¶ 86. Here, in addition to issues of safety, there was the potential of lost evidence. The single officer who initiated the stop had to leave the passenger in the darkened vehicle while the defendant performed the dexterity tests. We know that the passenger did not use a weapon at that time, although she could have done so, but we do not know what evidence she may have removed from the vehicle. Although the officer testified that she had left the scene by the time of the search, it is impossible to know how far away she went in the middle of the night. For all the officer knew, she could have returned later to remove evidence. Moreover, if there had been no vehicle search and defendant had been released after DUI processing as normally occurs, he could have returned and driven the vehicle away.

¶ 87. My point is that, irrespective of the timing of the arrest or search, or the restraint or release of passengers for whom there is no probable cause to arrest, a bright-line rule is necessary to protect the officer and the evidence at the scene. See State v. Watts, 142 Idaho 230, 127 P.3d 133, 137 (2005) (stating importance of knowing that “when an arrest has been made of the occupant or occupants of an automobile ... the automobile can be left untended with the assurance that any weapons, evidence of crime or contraband have been removed from the reach of passersby or confederates in unlawful activity”). The limited expectation of privacy in the passenger compartment of the automobile, as opposed to a home, justifies a bright-line rule to search the full extent of the passenger compartment.

**69 ¶ 88. As the majority reluctantly acknowledges, most states have followed *Belton* and embraced a bright-line rule for searches incident to arrest. See Vasquez v. State, 990 P.2d 476, 483 n. 3 (Wyo.1999) (citing cases accepting and rejecting *Belton*); see also Stout v. State, 320 Ark. 552, 898 S.W.2d 457, 460 (1995) (declining to diverge from *Belton* rule under Arkansas Constitution because of great difficulty in balancing competing interests in this area and because of workable nature of *Belton* rule); State v. Waller, 223 Conn. 283, 612 A.2d 1189, 1193-94 (1992) (reaffirming that *Belton* rule governs under state constitution even if arrestee was handcuffed and placed in police cruiser before search); State v. Sanders, 312 N.W.2d 534, 539 (Iowa 1981) (concluding that *Belton* rule “strikes a reasonably fair balance between the rights of the individual and those of society”); State v. Murrell, 94 Ohio St.3d 489, 764 N.E.2d 986, 991-92, 993 (2002) (overruling previous case law and joining majority of other states in adopting *Belton* under state constitution); Charpentier, 962 P.2d at 1037 (adopting *Belton* under Idaho Constitution as clear rule that gives guidance and protection to police without *432 unduly restricting public’s expectation of privacy); State v. Fry, 131 Wis.2d 153, 388 N.W.2d 565, 574-75 (1986) (adopting *Bel-*

ton under Wisconsin Constitution as simple and reasonable rule that fosters uniformity and predictability).

¶ 89. Indeed, notwithstanding “the drumbeat of scholarly opposition to *Belton*,” *State v. Eckel*, 185 N.J. 523, 888 A.2d 1266, 1272-73 (2006), the vast majority of state courts have recognized the reduced expectation of privacy in automobiles and the need for a bright-line rule to allow vehicle searches following a lawful arrest. See generally E. Shapiro, *New York v. Belton and State Constitutional Doctrine*, 105 W. Va. L.Rev. 131 (2002) (discussing jurisdictions accepting, modifying, and rejecting *Belton*). For example, the Washington Supreme Court drew a bright-line rule slightly narrower than that in *Belton* under its state constitution by holding that immediately following an arrest, even if the suspect has been handcuffed and placed in a patrol car, the police may “search the passenger compartment of a vehicle for weapons or destructible evidence,” but may not search a locked container or glove compartment. *State v. Stroud*, 106 Wash.2d 144, 720 P.2d 436, 441 (1986).

¶ 90. Other states, such as New York, Oregon, and Wyoming, have relied on the reasoning underlying both the automobile and search-incident-to-arrest exceptions to allow police to conduct limited searches of the passenger compartment of automobiles following an arrest to obtain evidence related to the crime for which the suspect was arrested.^{FN18} For example, the Supreme**70 Court of Oregon has “expanded the justification for a search incident to arrest beyond considerations of the officer's safety and destruction of evidence to permit a reasonable *433 search when it is relevant to the crime for which defendant is being arrested.” *State v. Lowry*, 295 Or. 337, 667 P.2d 996, 1003 (1983) (internal quotations and citation omitted). Under this approach, in essence, the arrest itself provides the probable cause basis for the search. See *State v. Fesler*, 68 Or.App. 609, 685 P.2d 1014, 1016 (1984).

FN18. This approach is also favored by Justice Scalia, who proposed it in a concurrence joined by Justice Ginsburg. *Thornton*, 541 U.S. at 630, 124 S.Ct. 2127 (Scalia, J., concurring). As Justice Scalia explained:

There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of a prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.

Id. Thus, Justice Scalia would allow a search of a vehicle following the arrest of its occupants “where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” *Id.* at 632, 124 S.Ct. 2127. This approach has gained some favor on the Supreme Court, and, according to one leading commentator, there is a “distinct possibility” that Justice Scalia's position will eventually win the day. 3 LaFave, *supra*, § 7.1(c), at 534. The Scalia approach would allow a search in this case, and indeed evidence related to the crime of DUI was found.

¶ 91. Similarly, although the New York Court of Appeals did not adopt *Belton's* bright-line test under its state constitution, it recognized that “when the occupant of an automobile is arrested, the very circumstances that supply probable cause for the arrest may also give the police probable cause to believe that the vehicle contains contraband, evidence of the crime, a weapon or some means of escape.” *People v. Blasich*, 73 N.Y.2d 673, 543 N.Y.S.2d 40, 541 N.E.2d 40, 43 (1989). In light of the inherent mobility of, and reduced expectation of privacy in, automobiles, the court held that police may contemporaneously search the passenger compartment of a vehicle, including any containers found therein, following a valid arrest if they have reason to believe that the vehicle may contain evidence related to the crime for which the occupant was arrested. *Id.* at 43-44.

¶ 92. In particular, courts have employed this rule following arrests for DUI. For instance, while rejecting the full reach of *Belton*, the Wyoming Supreme Court held that its state constitution authorized police to search the passenger compartment of a vehicle for evidence of DUI, the offense for which the driver was arrested. *Vasquez*, 990 P.2d at 488. According to the court, “[t]he characteristics of a driving while under the influence arrest for suspected alcohol intoxication permit a search of the passenger compartment of the vehicle for any intoxicant, alcohol or narcotic, as evidence related to the crime of driving while under the influence.” *Id.*; see also *State v. Brody*, 69 Or.App. 469, 686 P.2d 451, 453 (1984) (holding that once officers arrested suspect for DUI, it was reasonable for them to search cab for evidence of crime, but not to expand search to closed containers).

¶ 93. This brings me to what should be the question in this case if we reach a broad constitutional holding: Where should the bright line be established? I believe that a bright-line rule allowing officers to search the passenger compartment of vehicles for evidence of the crime for which an occupant of the vehicle was lawfully arrested is completely consistent with our case law and the values Article 11 protects. It would be inconsistent with Article 11, however, to grant a broader authorization for searches of automobiles because in *Savva* we held that a warrant was necessary before police could search items or areas—such as closed containers or compartments—in which a person had *434 demonstrated a legitimate expectation of privacy. I see no reason to revisit *Savva* and thus would not adopt the full extent of the *Belton* holding allowing essentially a complete search of a vehicle, including any closed containers within the vehicle, following an arrest. But, as the majority of state courts have recognized, a bright-line rule allowing searches of a vehicle's passenger compartment, most of which can be viewed from outside the vehicle, does not unduly infringe upon reasonable expectations**71 of privacy of those operating motor vehicles on our highways.

¶ 94. When an operator or occupant of a vehicle is arrested for DUI, a crime that is committed with the vehicle, it is eminently reasonable to allow police to conduct a warrantless search of the open passenger compartment of the vehicle for evidence related to the crime, such as alcohol or other drugs.^{FN19} There is plainly a logical inference supporting a conclusion that the passenger compartment may contain evidence of the crime. See *State v. Towne*, 158 Vt. 607, 616, 615 A.2d

484, 489 (1992) (rejecting more-likely-than-not standard for probable cause, and instead requiring only nexus between crime, suspect, and place to be searched). Moreover, as we have often recognized, the occupant of a vehicle has only a limited expectation of privacy in items placed in the passenger compartment of a vehicle. See 3 LaFave, supra, § 7.2(c), at 563 (“[P]erhaps a warrantless search of a vehicle is sometimes reasonable even if there *is* lacking that amount of particularity concerning what is sought which would be needed to search a house or apartment.”); Murrell, 764 N.E.2d at 992 (“Concerns about a possible lack of probable cause to conduct a search in a *Belton* situation are eased by the fact that probable cause *must* have been present to arrest the occupant of the vehicle in the first place.”).

FN19. The majority criticizes this rule by raising hypothetical questions about its scope and extent, as if any legal rule was ever beyond debate. In my opinion, this criticism is an application of the observation of Justice Rehnquist that “[o]ur entire profession is trained to attack ‘bright lines’ the way hounds attack foxes.” Robbins v. California, 453 U.S. 420, 443, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) (Rehnquist, J., dissenting).

¶ 95. In this case, defendant was lawfully arrested after he showed indicia of intoxication and failed dexterity tests. A police check revealed that the records of the Department of Motor Vehicles did not show defendant as the registered owner of the vehicle. Furthermore, defendant was unable to produce a bill of sale with his name on it and had only a vague explanation for how he had obtained the vehicle's plates. Finally, the vehicle's passenger was released from the scene, and, until they *435 completed the initial search of the passenger compartment of the vehicle, the police were unsure whether they were going to impound, or merely ground, the vehicle. Under these circumstances, it was entirely reasonable for the officers to conduct a brief, warrantless search of the open passenger compartment of the vehicle to secure any evidence related to defendant's arrest for DUI and to determine the owner of the vehicle. Where the vehicle is essentially the instrument of the serious offense of drunken driving, police should be allowed to search the passenger compartment of the vehicle to prevent the loss of evidence related to that offense.

¶ 96. The majority's opinion suggests that the arresting officer was on a fishing expedition, but even assuming the relevance of the officer's subjective motivation, he expressly testified that his initial concern was “evidence of the [DUI] in relation to the [DUI] arrest-whether it's beer bottles, prescription pills, drugs, that sort of thing that would have impaired that particular person.” This Court has explicitly rejected a motive-based rationale in almost exactly the same context in a previous decision. See Trudeau, 165 Vt. at 360, 683 A.2d at 728 (stating that it was irrelevant with respect to officer's motives that police did not retain partially full beer can as evidence following DUI arrest, given that State's reliance on officer's testimony regarding beer can made retention of can as physical evidence unnecessary). In my **72 view, the officer's actions in this case were reasonable and did not violate values protected by Article 11.

¶ 97. In conclusion, I repeat that the broad constitutional ruling of the majority is wholly unnecessary if we decide this case under the settled law that is applicable. If we must decide the constitutional question, however, I cannot accept the majority's answer. The rule that the majority an-

nounces today will seriously impede legitimate law-enforcement activities and increase the danger to law-enforcement officers, without providing any real benefit for the privacy interests of Vermont citizens. Accordingly, I would affirm the district court's denial of defendant's motion to suppress. I respectfully dissent.

¶ 98. REIBER, C.J., dissenting.

I respectfully dissent from the majority's holding that the search in this case was unconstitutional. I agree with the majority that the search was not justified by the plain-view exception to the warrant requirement, *ante*, ¶¶ 28-31, at 48-50, or by the search-incident-to arrest doctrine, *ante*, ¶¶ 15-26, at 44-48. However, I concur with my dissenting colleague's position that the search was justified by the circumstances indicating that the vehicle might have been stolen, and would affirm on that narrow ground, as articulated *ante*, ¶¶ 52-54, at 57-58.

Vt., 2007.

State v. Bauder

181 Vt. 392, 924 A.2d 38, 2007 VT 16

END OF DOCUMENT

KEYCITE

H State v. Bauder, 181 Vt. 392, 924 A.2d 38, 2007 VT 16 (Vt., Mar 16, 2007) (NO. 04-438)

History

Direct History

▾ 1 State v. Bauder, 2004 WL 5388997 (Trial Order) (Vt. Dist. Ct. Apr 27, 2004) (NO. 5216179-03CN)

Reversed by

=> 2 **State v. Bauder**, 181 Vt. 392, 924 A.2d 38, 2007 VT 16 (Vt. Mar 16, 2007) (NO. 04-438)

Related References

H 3 State v. Bauder, 2004 WL 5632875 (Trial Order) (Vt. Dist. Ct. May 11, 2004) (NO. 5216-9-03CNCR, 5217-9-03CN)

Court Documents

Appellate Court Documents (U.S.A.)

Vt. Appellate Briefs

4 STATE OF VERMONT, Appellee, v. Brian BAUDER, Appellant., 2004 WL 3214725 (Appellate Brief) (Vt. Dec. 14, 2004) **Brief of the Appellant** (NO. 2004-438)

5 State of Vermont, Appellee, v. Brian BAUDER, Appellant., 2005 WL 673594 (Appellate Brief) (Vt. Feb. 18, 2005) **Appellee's Brief** (NO. 2004-438)

Trial Court Documents (U.S.A.)

Vt.Dist.Ct. Trial Pleadings

- 6 State of Vermont, v. Brian E BAUDER., 2003 WL 25778429 (Trial Pleading) (Vt.Dist.Ct. Sep. 24, 2003) **Information by State's Attorney Count 1 of 2** (NO. 5216-9-03)

Vt.Dist.Ct. Trial Motions, Memoranda And Affidavits

- 7 State of Vermont, v. Brian BAUDER., 2003 WL 25608623 (Trial Motion, Memorandum and Affidavit) (Vt.Dist.Ct. 2003) **Defendant's Memorandum of Law in Support of Motion to Suppress and Dismiss** (NO. 5216/7-9-03, 6179-11-03CN)
- 8 State of Vermont, v. Brian BAUDER., 2004 WL 5633716 (Trial Motion, Memorandum and Affidavit) (Vt.Dist.Ct. Apr. 22, 2004) **Defendant's Memorandum of Law in Support of Motion to Suppress and Dismiss** (NO. 5216-9-03, 5217-9-03, 6179-11-03CN)
- 9 State of Vermont, v. Brian BAUDER., 2004 WL 5406856 (Trial Motion, Memorandum and Affidavit) (Vt.Dist.Ct. Apr. 23, 2004) **State's Response to Defendant's Motion to Suppress and Dismiss** (NO. 5216903CN)
- 10 State of Vermont, v. Brian BAUDER., 2004 WL 5633717 (Trial Motion, Memorandum and Affidavit) (Vt.Dist.Ct. Apr. 23, 2004) **State's Response to Defendant's Motion to Suppress and Dismiss** (NO. 5216903)
- 11 State of Vermont, v. Brian BAUDER., 2004 WL 5633715 (Trial Motion, Memorandum and Affidavit) (Vt.Dist.Ct. May 10, 2004) **Motion for Reconsideration of Decision** (NO. 5216-9-03CNCR, 5217-9-03CN)

▷

Supreme Court of Pennsylvania.
COMMONWEALTH of Pennsylvania, Appellee,
v.
William WHITE, Appellant.
Dec. 29, 1995.

Defendant filed motion to suppress evidence obtained in warrantless search of his vehicle. The Court of Common Pleas, Allegheny County, Criminal Division, No. CC9005273, John L. Musmanno, Joseph H. Ridge, JJ., suppressed evidence on grounds that defendant was not arrested until after warrantless search uncovered marijuana cigarette and cocaine. The Superior Court, 1137 Pittsburgh 1991, 423 Pa.Super. 641, 616 A.2d 721, reversed. Defendant appealed. The Supreme Court, No. 31 WD Appeal Docket 1993, Flaherty, J., held that: (1) search was not permissible under “automobile exception” and there were no exigent circumstances to justify warrantless search of automobile; (2) search was not justifiable as search incident to arrest; and (3) warrantless search was not permissible as inventory search.

Superior Court order reversed.

Montemuro, J., filed concurring opinion.

Castille, J., filed dissenting opinion.

West Headnotes

[1] Constitutional Law 92 ↻967

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)1 In General

92k964 Form and Sufficiency of Objection, Allegation, or Pleading

92k967 k. Particular Claims. Most Cited Cases

(Formerly 92k46(2))

In cases implicating provision of Pennsylvania Constitution, it is important that litigants brief and analyze at least text of Pennsylvania constitutional provision, history of provision, including Pennsylvania case-law, related case-law from other states, and policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

[2] Criminal Law 110 ↪1130(5)

110 Criminal Law
110XXIV Review
110XXIV(I) Briefs
110k1130 In General
110k1130(5) k. Points and Authorities. Most Cited Cases
(Formerly 92k43(1))

Defendant did not waive claim that search of his automobile was illegal under Pennsylvania Constitution where defendant clearly raised claim under Constitution, he cited cases in support of his claim, and related cases to claim. Const. Art. 1, § 8.

[3] Searches and Seizures 349 ↪62

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k62 k. Probable or Reasonable Cause. Most Cited Cases

Searches and Seizures 349 ↪64

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k64 k. Emergencies or Exigencies. Most Cited Cases

As exception to general rule that search warrant is required before police may conduct any search, police may search vehicle without warrant where there is probable cause to believe that automobile contains evidence of criminal activity, unless car is searched or impounded, occupants of automobile are likely to drive away and contents of automobile may never again be located by police, and police have obtained this information in such way that they could not have secured warrant for search, i.e., there are exigent circumstances. Const. Art. 1, § 8.

[4] Searches and Seizures 349 ↪64

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k64 k. Emergencies or Exigencies. Most Cited Cases

There were no exigent circumstances warranting warrantless search of vehicle and search was not permissible under “automobile exception” where police had been surveilling defendant for some time and knew in advance what automobiles might be involved and they could have requested warrants for search of automobiles, just as they did for persons and dwellings. Const.

Art. 1, § 8.

[5] Arrest 35 ↪ 68(3)

35 Arrest
35II On Criminal Charges
35k68 Mode of Making Arrest
35k68(3) k. What Constitutes Arrest. Most Cited Cases

“Arrest” is any act that indicates intention to take person into custody and subjects him to actual control and will of person making arrest.

[6] Arrest 35 ↪ 71.1(8)

35 Arrest
35II On Criminal Charges
35k71.1 Search
35k71.1(8) k. Search Not Incident to Arrest; Time and Distance Factors. Most Cited

Cases
Warrantless search of defendant's automobile after he had been arrested and removed from vehicle was not justifiable search incident to arrest under Pennsylvania Constitution where defendant was not free to return to his vehicle and there were no exigent reasons, such as danger to police, which would have justified warrantless search of car; there is no justifiable search incident to arrest under Pennsylvania Constitution save for search of person in immediate area which person occupies during his custody. Const. Art. 1, § 8.

[7] Searches and Seizures 349 ↪ 66

349 Searches and Seizures
349I In General
349k60 Motor Vehicles
349k66 k. Inventory and Impoundment; Time and Place of Search. Most Cited Cases

Warrantless search of defendant's vehicle after defendant was arrested and taken outside car was not permissible as inventory search where search was conducted as part of criminal investigation and not for purposes of protection of defendant's property while it remained in police custody. Const. Art. 1, § 8.

****897 *47 Robert E. Stewart, Pittsburgh, for Appellant.**

Robert E. Colville, District Attorney, Claire C. Capristo, Deputy District Attorney, Kemal A. Mericli, Michael W. Streily, Assistant District Attorneys, for Appellee.

****898 Before NIX, C.J., and FLAHERTY, ZAPPALA, PAPADAKOS, CAPPY, CASTILLE and MONTEMURO, JJ.**

OPINION OF THE COURT

FLAHERTY, Justice.

The sole issue raised in this case is whether the police may conduct a warrantless search of an automobile, absent exigent circumstances, after its occupants have been arrested and are outside the automobile in police custody. For the reasons that follow, we hold that such a search is illegal and that evidence seized as a result must be suppressed.

The facts of record are that in late 1989 Pittsburgh police received anonymous telephone calls identifying William White and Henry Bennett as drug dealers. The caller described the two men and gave their addresses and locations where they allegedly dealt drugs. Subsequently, police met with a confidential informer who confirmed the information given by the anonymous caller and added a description of Bennett's car and the method by which the two made drug deliveries.

*48 In late January, 1990, police arranged a controlled purchase of cocaine using the confidential informer. One of the two officers who witnessed the purchase and the informer identified White as the person who sold cocaine to the informer. The material purchased from White tested positively as cocaine.

In February, 1990, the confidential informer told police that he had seen a large supply of cocaine in Bennett's house; that Bennett told him that he would be selling cocaine that weekend; and that the drugs were being moved back and forth between Bennett's and White's residences. He also told detectives that the dealers intended to make a sale of cocaine behind Abbott's Beer Distributor on Saturday, February 17, 1990.

Police arranged to have the area put under surveillance on February 17. The two detectives who had been working on the case met with others who would be assisting that day and briefed them. The essence of what the other police were told was that a blue car was expected to be involved in an illegal drug sale. Early on February 17, the two detectives who controlled the investigation drove by Bennett's house and witnessed Bennett, White and another man standing on the front porch.

Based on the totality of their information, the detectives secured search warrants for Bennett's residence, his vehicle, and his person as well as White's residence and person. They did not obtain a search warrant for White's vehicle. The detectives then returned to the stakeout area and communicated to other officers that they had secured search warrants.

Shortly thereafter, White drove his blue Ford into the area. An unidentified man got into White's car, and as this was happening, Bennett drove into the area and passed White's car several times before leaving the area. When Bennett was gone, police converged upon White's car.

Although police accounts of what happened during White's arrest differ somewhat, the essence is

that six or eight police officers converged upon White's car and took both the passenger*49 and White into custody. According to one officer's account, the driver emerged at gunpoint; another officer, who was also present, said that the driver exited the car voluntarily after the officer identified himself and asked him to come out of the car.

Next, two officers partially entered the car from both open doors. The officer on the passenger side of the car first noticed and communicated to his colleague that a marijuana cigarette was present on the console between the seats; moments after that the officer on the driver's side retrieved a brown paper bag from between the two front seats, which he took outside the car to open. Upon discovering that the bag contained cocaine, the officer announced to the others that he had "the dope," and the occupants of the car were handcuffed.

The court of common pleas, sitting as a suppression court, suppressed the evidence on the grounds that White was not arrested until after the warrantless search uncovered a marijuana cigarette and the cocaine. The court further observed that there were no **899 exigent circumstances justifying a warrantless search of the car and that police had time to secure a search warrant for the vehicle because they received information about the February 17 transaction between thirty-six and forty-eight hours before the search.

Superior Court reversed, holding that a search warrant for White's automobile was not required because police had probable cause to search the vehicle and the search was properly conducted pursuant to the "automobile exception" to the warrant requirement. The rationale for this exception is said to be that it is impracticable to obtain warrants for vehicles in transit because of their highly mobile nature, and that absent the search it is possible that the vehicle will be moved and contraband will disappear. Superior Court acknowledged that a warrantless search of a vehicle is permissible only when probable cause arises in an unforeseen way, but concluded that probable cause was unforeseen in this case because it was unknown what vehicle would be used.

*50 Superior Court also held that in any event, the search occurred "incident to a lawful arrest," and was, therefore, justified.

We granted allowance of appeal in order to address the question of when police must secure search warrants in order to conduct vehicle searches.

[1][2] Before addressing these substantive matters, however, it is necessary to address the Commonwealth's claim that White has waived his claim that the search of his automobile was illegal under Article I, Section 8 of the Pennsylvania Constitution^{FN1} because he did not set forth his state constitutional claims in the manner required by Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991). This claim is meritless. White clearly raises a claim under the Pennsylvania Constitution, cites cases in support of his claim, and relates the cases to the claim. That is sufficient. In *Edmunds*, in dicta, this court clearly stressed the importance of briefing and analyzing certain factors in order to aid the courts in reviewing state constitutional issues.^{FN2} While not mandating the analysis, we reaffirm its importance and encourage its use. In other words, *Ed-*

munds expresses the idea that it may be helpful to address the concerns listed therein, not that these concerns must be addressed in order for a claim asserted under the Pennsylvania Constitution to be cognizable.

FN1. Art. 1, § 8 provides:

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

FN2. As stated in *Edmunds*:

as a general rule it is important that litigants brief and analyze at least the following four factors:

- 1) text of the Pennsylvania constitutional provision;
- 2) history of the provision, including Pennsylvania case-law;
- 3) related case-law from other states;
- 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

526 Pa. at 390, 586 A.2d at 895.

*51 Having concluded that White has raised cognizable claims under the Pennsylvania Constitution, it remains to address whether the search was justified because it was conducted pursuant to the “automobile exception”; whether the search was justified because the probable cause on which it was based arose in an unforeseen manner; whether the search was permissible because it was incident to an arrest; and whether the search is to be excused because an inventory search would have disclosed the same evidence.

With respect to the claim that the search of the vehicle was permissible under the “automobile exception,” the Commonwealth and Superior Court are in error. The so-called “automobile exception” to the requirement for a search warrant is perhaps best articulated in *Chambers v. Maroney*:

In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also **900 required the judgment of a magistrate on the probable-cause issue and the issuance of a warrant before a search is made. *Only in*

exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. Carroll, *supra*, holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible.

399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419, 428 (1970) (Emphasis added).

[3] In sum, the general rule is that a search warrant is required before police may conduct any search. As an exception to this rule, police may search a vehicle without a warrant where: (1) there is probable cause to believe that an automobile contains evidence of criminal activity; (2) unless the car is searched or impounded, the occupants of the automobile are likely to drive away and contents of the automobile may never *52 again be located by police; and (3) police have obtained this information in such a way that they could not have secured a warrant for the search, i.e., *there are exigent circumstances*.

This court addressed the “automobile exception” in *Commonwealth v. Ionata*, 518 Pa. 472, 544 A.2d 917 (1988), where police applied for and received a search warrant for the person and the apartment of Ionata based on information that he was involved in the drug business and that drugs were hidden in the hood compartment of his car. In *Ionata*, as in this case, police did not request a warrant for the search of the suspect's automobile. Nonetheless, when Ionata drove up to his apartment, police removed him from the car and searched the car, finding illegal narcotics and drug paraphernalia. At that point, Ionata was placed under arrest. The Commonwealth argued that because there was probable cause to have obtained a search warrant for the automobile, the search was permissible even though no warrant had been obtained. A three-member plurality of this court disagreed:

While certain exceptions to constitutional requirements of obtaining warrants have been recognized in the realm of vehicle searches, it cannot be said that searches of motor vehicles are, *per se*, exempt from warrant requirements. In *Commonwealth v. Milyak*, 508 Pa. at [2] 7-8, 493 A.2d [1346] at 1349 (1985), this Court stated,

While searches and seizures conducted outside the judicial process, without prior approval by a magistrate, are generally unreasonable under the Fourth Amendment ... there is an established departure from the warrant requirement for *certain* automobile searches based on the inherent mobility of vehicles, with the consequent *practical problems in obtaining a warrant* prior to infringing a legitimate expectation of privacy....

(Emphasis added). See also *Commonwealth v. Cockfield*, 431 Pa. 639, 644, 246 A.2d 381, 384 (1968) (“[A]n automobile is not *per se* unprotected by the warrant procedure of the Fourth Amendment. Although it *sometimes* may be reasonable to search a movable vehicle without a warrant, the movability of the area to be searched is not alone a sufficiently*53 ‘exigent circumstance’ to justify a warrantless search.”); Pennsylvania Constitution, Art. I, § 8...

518 Pa. at 476-77, 544 A.2d at 919 (Opinion in Support of Affirmance).

[4] The present case, with respect to the “automobile exception,” is analytically identical to *Ionata*. In both cases the police had ample advance information concerning the fact that a search of an automobile would likely be involved in apprehending the suspect. When that is true, a warrant is required before the automobile may be searched. As the United States Supreme Court stated in *Chambers v. Maroney*:

Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without extra protection for privacy that a warrant affords. *But the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable....*

****901** 399 U.S. at 51, 90 S.Ct. at 1980-81, 26 L.Ed.2d at 428. (Emphasis added.) In other words, although the Fourth Amendment generally requires probable cause to be determined and a warrant to be issued by a magistrate before a search may be conducted, unforeseen circumstances involving the search of an automobile coupled with the presence of probable cause, may excuse the requirement for a search warrant. In *Ionata* and in this case, there were no unforeseen circumstances. Police knew in advance what automobiles might be involved and could have requested warrants for the search of the automobiles, just as they did for persons and dwellings.^{FN3} Superior Court was in error, therefore in determining that the search was permissible under the “automobile exception” and that exigent circumstances existed to justify the search.

FN3. In this case, the mere fact that police did not know which car would be used to conduct the drug transaction is not sufficient to qualify as an unforeseen circumstance. Police could have drafted their request for a warrant in terms that were “as particular as is reasonably possible,” *Commonwealth v. Grossman*, 521 Pa. 290, 296, 555 A.2d 896, 899 (1989), in order to secure the warrant.

***54** [5] Next, Superior Court determined that in any event, the search was permissible because it occurred incident to an arrest. Although White contends that he was not under arrest at the time the search was conducted and that he was put under arrest only after the warrantless search of his car was completed, this claim is meritless. In *Commonwealth v. Rodriguez*, we reiterated the test for determining whether an arrest has occurred:

“We have defined an arrest as any act that indicates an intention to take the person into custody and subjects him to the actual control and will of the person making the arrest....”

532 Pa. 62, 74, 614 A.2d 1378, 1384 (1992), quoting *Commonwealth v. Duncan*, 514 Pa. 395, 400, 525 A.2d 1177, 1179 (1987). Under either officer's account of the arrest, it is fair to say that White was not free to leave and that he was subject to the control of the officers who removed him from the car. Had he attempted leave, it seems likely that he would have been looking down

the barrels of several guns. He was, therefore, under arrest.

That White was under arrest at the time of the search does not, however, dispose of the matter of the legality of the warrantless search. Superior Court's view that a warrantless search of an automobile is permissible if it is incident to arrest is in accord with the United States Supreme Court's view in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). In *Belton*, a police officer stopped a car for a traffic violation and smelled marijuana. He also saw on the floor of the vehicle an envelope marked "Supergold," a term he associated with marijuana. The officer removed the driver and three passengers from the car and placed them under arrest. He searched each of the occupants of the car and then searched the car, where he found a black leather jacket in the back seat. He unzipped one of the pockets and discovered cocaine. The United States Supreme Court held that the search of the vehicle was lawful even though the jacket was not accessible to any of the occupants of the car, who could not, therefore, retrieve any weapons from the jacket or destroy*55 any contraband which might be contained therein. The holding in *Belton* is as follows:

[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

Id. at 460, 101 S.Ct. at 2864, 69 L.Ed.2d at 775.

One year before *Belton* was decided, this court had occasion to address the same question in *Commonwealth v. Timko*, 491 Pa. 32, 417 A.2d 620 (1980). In *Timko*, police arrested a driver who had been operating his vehicle erratically and who, after stopping, would not open the doors or windows of the vehicle. As police attempted to gain entrance to the van, Timko reached for a zipped bag and then attempted to drive away. At that point, police broke into the van and dragged Timko from the vehicle. After Timko was searched and handcuffed, police searched the bag into which he had attempted**902 to reach, finding two packages of marijuana and a loaded revolver. We held that the fruits of the search must be suppressed. In response to the Commonwealth's claim that there is an "automobile exception" based on the inherent mobility of automobiles, practical problems in obtaining warrants and the diminished expectation of privacy, we stated:

In the case of luggage, no such considerations operate to diminish the citizen's expectation of privacy. A piece of luggage is not mobile once it is taken into police custody.... Thus, a zippered valise, analogous to personal luggage, may not be searched without a warrant simply because it has been seized from an automobile.

491 Pa. at 38-39, 417 A.2d at 623.

Thus, the *Timko* court limited the warrantless search of an automobile incident to an arrest to areas and clothing immediately accessible to the person arrested. Further, the court made it clear

that the purpose of this search is to prevent the arrestee from securing weapons or destroying contraband. *Id.*^{FN4}

FN4. The *Timko* court writes:

A police officer may conduct a search of an arrestee's person and the area within an arrestee's immediate control as a matter of course because of the ever-present risk in an arrest situation that an arrestee may seek to use a weapon or to conceal or destroy evidence.... However,

“[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.”

United States v. Chadwick, supra, 433 U.S. [1] at 15, 97 S.Ct. [2476] at 2485 (1977).

491 Pa. at 37, 417 A.2d at 622-23.

***56** It is axiomatic that the Supreme Court of Pennsylvania may provide more protection for the citizens of Pennsylvania under the Pennsylvania Constitution than the federal courts provide under the United States Constitution, and it is our view that the rule of *Timko* is as valid today as it was fifteen years ago when *Timko* was decided. In fact, the thrust of *Timko* is even more compelling today than it was in 1980 because this court has increasingly emphasized the privacy interests inherent in Article I, Section 8 of the Pennsylvania Constitution. See *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991). By contrast, the United States Supreme Court has deemphasized the privacy interests inherent in the Fourth Amendment. As the Court stated in *Belton*:

[T]he justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

453 U.S. 454, 461, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768, 775 (1981). As we stated in *Commonwealth v. Mason*, 535 Pa. 560, n. 3, 637 A.2d 251, n. 3 (1993), this court, when considering the relative importance of privacy as against securing criminal convictions, has struck a different balance than has the United States Supreme Court, and under the Pennsylvania balance, an individual's privacy interests are given greater deference than under federal law.

[6] We disagree, therefore, with Superior Court's determination that White's vehicle was permissibly searched because ***57** White was under arrest. Merely arresting someone does not give police carte blanche to search *any* property belonging to the arrestee. Certainly, a police officer

may search the arrestee's person and the area in which the person is detained in order to prevent the arrestee from obtaining weapons or destroying evidence, but otherwise, absent an exigency,^{FN5} the arrestee's privacy interests remain intact as against a warrantless search. In short, there is no justifiable search incident to arrest under the Pennsylvania Constitution save for the search of the person and the immediate area which the person occupies during his custody, as stated above.^{FN6}

FN5. We do not propose to invalidate warrantless searches of vehicles where the police must search in order to avoid danger to themselves or others, as might occur in the case where police had reason to believe that explosives were present in the vehicle. Emergencies such as this, however, are not part of this case.

FN6. The record indicates that after White was removed from the car, he was patted down for weapons and then moved a short distance from his car under close police guard. He was not free to return to his vehicle, as a police officer testified:

Q: Did you have any concern at that time that Mr. White perhaps would run back to his vehicle?

A: When he was with me?

Q: When he was with you ten feet away by your car.

A: No. I believe I was standing in his path back to his vehicle.

Thus, whatever was contained in the vehicle was not accessible to White, and there is nothing of record to indicate that there were any exigent reasons, such as danger to police, which would justify a warrantless search of the car.

****903** [7] Finally, it remains to consider the Commonwealth's claim that the warrantless search should be excused because an inventory search would have disclosed the same evidence. In *Timko* we summarily dismissed a similar argument by reference to *Commonwealth v. Brandt*, 244 Pa.Super. 154, 366 A.2d 1238 (1976), which held that an inventory search is permissible when the vehicle is lawfully in the custody of police and when police are able to show that the search was in fact a search conducted for the purposes of protection of the owner's property while it remains in police custody; protection of the police against claims of lost or stolen property; and protection of the police against danger. If the search was conducted as part of a criminal investigation, it is not an ***58** inventory search. There is no doubt that the warrantless search in this case was conducted as part of a criminal investigation, and it is not, therefore, permissible as an inventory search.

The order of Superior Court is reversed.

PAPADAKOS, J., did not participate in the decision of this case.
MONTEMURO, J., files a concurring opinion.
CASTILLE, J., files a dissenting opinion.
MONTEMURO, J., participates by designation as a senior judge as provided by Rule of Judicial Administration 701(f). MONTEMURO, Justice, concurring.
I respectfully concur in the result reached by the Majority.

Four years ago, in *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991), this Court asserted the right to provide broader protections to our citizens under the Pennsylvania Constitution than provided by the United States Constitution. Our decision in *Edmunds* provides a clear analytical framework for discussion of when additional protections under our own state constitution are warranted. This framework requires the courts of our Commonwealth to analyze the following four factors:

- 1) the text of the Pennsylvania constitutional provision
- 2) the history of the provision, including Pennsylvania case-law
- 3) related case-law from other states;
- 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Id. at 390, 596 A.2d at 895.

We further held in *Edmunds* that it was “essential” that our courts “undertake an independent analysis under the Pennsylvania Constitution.” *Id.* at 391, 567 A.2d at 895. We also *59 recognized that it was “important” for litigants to analyze and brief the four prongs of this analysis when implicating a provision of the Pennsylvania Constitution. *Id.* at 390, 567 A.2d at 895.

In the instant case, the Majority has failed to employ the *Edmunds* analysis in deciding that Article I, Section 8 of the Pennsylvania Constitution provides more protections than the Fourth Amendment of the United States Constitution as interpreted in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). The Majority has also held that litigants asserting additional rights under the Pennsylvania Constitution do not have to argue the *Edmunds* analysis before this Court in any meaningful way. Combined, I believe that these two actions have the effect of weakening our decision in *Edmunds*. The Majority has sent a message to the lower courts and to litigants that the **904 *Edmunds* analysis does not have to be argued by the parties nor used by our courts in deciding when additional rights are extended under the Pennsylvania Constitution. I disagree. Instead, I would reaffirm the *Edmunds* analysis as vital in deciding when additional rights are required under the Pennsylvania Constitution by requiring litigants to argue it and by requiring courts, including this Court, to employ it in their decisions.

Within that framework, I believe that it is essential for this Court to engraft a standard on to the *Edmunds* analysis. This case demonstrates that the *Edmunds* analysis is a rather loose analytical tool which, as currently interpreted, fails to provide sufficient guidance to litigants or to the lower courts. Thus, in addition to making the four prongs of *Edmunds* mandatory, I believe that we need to provide a clear constitutional standard for evaluating these prongs. In my opinion, the standard implicitly created by *Commonwealth v. DeJohn*, 486 Pa. 32, 403 A.2d 1283 (1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 704, 62 L.Ed.2d 668 (1980) and *Edmunds* encourages us to deviate from the reasoning of the United States Supreme Court when there are important and substantial reasons for doing so. My analysis of our *Edmunds* jurisprudence is that we have not departed from the federal interpretation unless *60 there was an important reason to do so. Compare *United Artist Theater Circuit, Inc. v. City of Philadelphia*, 535 Pa. 370, 635 A.2d 612 (1993) (Pennsylvania takings clause does not provide more protections than federal takings clause) with *Blum v. Merrell Dow Pharmaceuticals*, 534 Pa. 97, 626 A.2d 537 (1993) (rejecting federal case-law and holding that Pennsylvania Constitution requires 12 member jury to parties who request them). In short, I would make explicit this implicit standard so as to provide a maximum amount of guidance to our lower courts and to litigants.

In summation, I believe that we must re-affirm the *Edmunds* analysis and strengthen it. I would do this by (1) making it mandatory for litigants to brief the four prongs of *Edmunds*; (2) making it mandatory for the courts of our Commonwealth to engage in the *Edmunds* analysis; and (3) adopting an “important and substantial reason” standard for departing from decisions of the United States Supreme Court. Only with these reforms, I believe, will litigants and the lower courts have clear guidance as to when our Constitution provides additional protections.

Analyzed under the four prongs of *Edmunds*, I believe that this case presents important reasons for departing from the United States Supreme Court's holding in *Belton* and providing additional protections under our Constitution. The first prong we are required to analyze under *Edmunds* is the text of the Pennsylvania Constitutional provision. In *Edmunds*, we noted that Article I, Section 8 of the Pennsylvania Constitution is “similar in language” to the Fourth Amendment of the United States Constitution. *Edmunds*, 526 Pa. at 391, 586 A.2d at 887. However, we concluded that we “are not bound to interpret the two provisions as if they were mirror images, even where the text is similar or identical.” *Id.* at 391, 586 A.2d at 895-96. Therefore, the similarity between the text of Article I, Section 8 of the Pennsylvania Constitution and the text of the Fourth Amendment of the United States Constitution does not require us to adopt *Belton* as the rule in this Commonwealth.

*61 Next, *Edmunds* requires us to examine the history of the provision along with the relevant case-law. In *Edmunds*, we concluded that Article I, Section 8 “is meant to embody a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries.” *Id.* at 394, 586 A.2d at 897. However, I cannot accept the Majority's blanket assertion that Pennsylvania “has struck a different balance than has the United States Supreme Court, and under that balance, an individual's privacy interests are given greater deference than under federal law.” Majority Opinion at 56. The Majority would apparently extend additional privacy protections under

Article I, Section 8 to all who assert them. Instead, I believe *Edmunds* commands that we must carefully scrutinize the asserted privacy interest to determine whether it is protected under Article I, Section 8 of the Pennsylvania Constitution.

****905** In the instant case, Appellant is asserting a privacy interest in his automobile. Of course, our cases have long recognized a diminished privacy interest in an automobile based on federal case-law. See, e.g., *Commonwealth v. Milyak*, 508 Pa. 2, 7, 493 A.2d 1346, 1349 (1985); *Commonwealth v. Timko*, 491 Pa. 32, 38, 417 A.2d 620, 623 (1980); *Commonwealth v. Mangini*, 478 Pa. 147, 156, 386 A.2d 482, 487 (1978); *Commonwealth v. Swanger*, 453 Pa. 107, 110, 307 A.2d 875, 877 (1973). However, that federal privacy interest was substantially curtailed by the United States Supreme Court in *Belton*. My research indicates that we have also recognized a constitutionally protected reasonable expectation of privacy in an automobile under Article I, Section 8 of the Pennsylvania Constitution. See *Commonwealth v. Holzer*, 480 Pa. 93, 101 & n. 4, 389 A.2d 101, 105-6 & n. 4 (1978); *Commonwealth v. Baker*, 518 Pa. 145, 148, 541 A.2d 1381, 1383 (1988), overruled on other grounds by *Commonwealth v. Rosario*, 538 Pa. 400, 648 A.2d 1172 (1994); *Commonwealth v. Morris*, 537 Pa. 417, 422 & n. 3, 644 A.2d 721, 724 & n. 3 (1994), cert. denied, 513 U.S. 1031, 115 S.Ct. 610, 130 L.Ed.2d 519 (1994). In *Holzer* we held that “constitutional protections are applicable to a person’s car” under Article I, Section 8 of the Pennsylvania Constitution. *62 *Holzer*, 480 Pa. at 103, 389 A.2d at 106. In *Baker*, we held that “[i]t is well established that automobiles are not *per se* unprotected by the warrant requirements of ...Article I, Section 8 of the Pennsylvania Constitution.” *Baker*, 518 Pa. at 148, 541 A.2d at 1383.

Thus, the history of Article I, Section 8 and case-law interpreting it reveal a history of according a limited expectation of privacy in an automobile independently under the Pennsylvania Constitution. Therefore, the question before us today is not whether we wish to extend additional privacy protections to the Appellant but whether we wish to follow the United States Supreme Court and sharply curtail a privacy interest long recognized by this Court. In my opinion, this prong weighs against automatically adopting *Belton*. Instead, I believe we must carefully consider the merits of severely diminishing a privacy right independently recognized under our own constitution.

The third prong of the *Edmunds* analysis requires that we examine related case-law from our sister states. A review of this case-law reveals that the vast majority of states have adopted the reasoning of the United States Supreme Court in *Belton*. See, e.g., *Baxter v. State*, 274 Ark. 539, 626 S.W.2d 935, 937 cert. denied, 457 U.S. 1118, 102 S.Ct. 2930, 73 L.Ed.2d 1331 (1982); *People v. Henry*, 631 P.2d 1122, 1128 (Colo.1981); *State v. Waller*, 223 Conn. 283, 612 A.2d 1189, 1193 (1992); *Traylor v. State*, 458 A.2d 1170, 1173 (Del.1983); *State v. Calegar*, 104 Idaho 526, 530, 661 P.2d 311, 315 (1983); *People v. Hoskins*, 101 Ill.2d 209, 78 Ill.Dec. 107, 111, 461 N.E.2d 941, 945, cert. denied, 469 U.S. 840, 105 S.Ct. 142, 83 L.Ed.2d 81 (1984); *Jackson v. State*, 597 N.E.2d 950, 957 (Ind.1992); cert. denied, 507 U.S. 976, 113 S.Ct. 1424, 122 L.Ed.2d 793 (1993); *State v. Sanders*, 312 N.W.2d 534, 539 (Iowa 1981); *State v. White*, 230 Kan. 679, 640 P.2d 1231, 1232 (1982); *Brown v. Commonwealth*, 890 S.W.2d 286, 290

(Ky.1994); State v. Lamare, 463 A.2d 279, 280 (Me.1983); Ricks v. State, 322 Md. 183, 586 A.2d 740, 746 (1991); People v. Bullock, 440 Mich. 15, 485 N.W.2d 866, 869 (1992); State v. Liljedahl, 327 N.W.2d 27, 30 (Minn.1982); *63Horton v. State, 408 So.2d 1197, 1198-99 (Miss.1982); State v. Harvey, 648 S.W.2d 87, 88 (Mo.1983); State v. Roth, 213 Neb. 900, 331 N.W.2d 819, 821 (1983); State v. Cooper, 304 N.C. 701, 286 S.E.2d 102, 104 (1982); State v. Rice, 327 N.W.2d 128, 131 (S.D.1982); State v. Cabage, 649 S.W.2d 589, 591-92 (Tenn.1983); State ex rel. K.K.C., 636 P.2d 1044, 1046 (Utah 1981); State v. Phillips, 140 Vt. 210, 436 A.2d 746, 749 (1981); State v. Smith, 119 Wash.2d 675, 835 P.2d 1025 (1992); State v. Boswell, 170 W.Va. 433, 441-42, 294 S.E.2d 287, 295 (1982); State v. Fry, 131 Wis.2d 153, 388 N.W.2d 565, 571-72 (1986), cert. denied, 479 U.S. 989, 107 S.Ct. 583, 93 L.Ed.2d 586 (1986); Lopez v. State, 643 P.2d 682, 685 (Wyo.1982).

However, a close examination of these cases shows that few of our sister states have addressed the applicability of *Belton* in light of their own state constitutions. Only a handful of these states have engaged in an independent state constitutional analysis. See, e.g., Waller, 612 A.2d at 1193; **906Hoskins, 78 Ill.Dec. at 111, 461 N.E.2d at 945; Sanders, 312 N.W.2d at 539; State v. Hensel, 417 N.W.2d at 849, 853 (1988); Rice, 327 N.W.2d at 131; Fry, 388 N.W.2d at 574.

For example, in *Hoskins*, the Supreme Court of Illinois adopted *Belton* after rejecting the assertion that its own state constitution provided more protections than the United States Constitution:

Any suggestion that it was intended that section 6 of the bill of rights in our own constitution was to be interpreted differently from the Supreme Court's interpretations of the search provisions of the fourth amendment cannot be supported. The constitutional debates do not indicate any wish or intent to provide protections against unreasonable searches and seizures broader than those existing under decisional interpretations of the United States Constitution.

Hoskins, 78 Ill.Dec. at 111, 461 N.E.2d at 945.

In *Sanders*, the Supreme Court of Iowa deferred to the balance struck by the United States Supreme Court and refused to adopt a stricter standard under its state constitution than the one set forth in *Belton*:

*64 “Defendant's objections to the search and seizure are based on both federal and state constitutional protections. We can, if we choose, impose stricter standards in applying our own constitutional provisions than the United States Supreme Court did in *Belton*. However, we believe that *Belton* strikes a reasonably fair balance between the rights of the individual and those of society. We adopt it now as our rule.”

Sanders, 312 N.W.2d at 539.

In *Fry*, the Supreme Court of Wisconsin voiced concerns for national uniformity of Fourth Amendment law in not extending additional protections under its own state constitution:

“By adopting the Belton rule, Wisconsin police officers can follow the fourth amendment's mandates without worrying about whether some different restrictions might be imposed on them under the Wisconsin Constitution. Uniformity of interpretation, as long as consistent with the protections of art. 1, sec. 11 of the Wisconsin Constitution, reduces to a minimum the confusion and uncertainty under which police must operate. Moreover, conforming Wisconsin's search and seizure law to that developed by the Supreme Court under the fourth amendment is not only consistent with the text of Wisconsin's search and seizure provision, its constitutional history and its judicial history, but is also in accord with sound public policy.”

Fry, 388 N.W.2d at 575.

In contrast, several of our sister states have refused to follow *Belton*. See, e.g., *State v. Hernandez*, 410 So.2d 1381, 1385 (La.1982); *Commonwealth v. Toole*, 389 Mass. 159, 448 N.E.2d 1264, 1266 (1983); *State v. Greenwald*, 109 Nev. 808, 858 P.2d 36, 37 (1993); *New Jersey v. Pierce*, 136 N.J. 184, 642 A.2d 947, 963 (1994); *People v. Belton*, 55 N.Y.2d 49, 447 N.Y.S.2d 873, 874, 432 N.E.2d 745, 746 (1982); *State v. Brown*, 63 Ohio St.3d 349, 588 N.E.2d 113, 115 (1992), *cert. denied*, 506 U.S. 862, 113 S.Ct. 182, 121 L.Ed.2d 127 (1992).

For example, in *Pierce*, the Supreme Court of New Jersey refused to apply *Belton* to a case involving an arrest after a *65 routine traffic stop. The court relied exclusively on state constitutional grounds holding that “under article I, paragraph 7 of the New Jersey Constitution the rule of *Belton* shall not apply to warrantless arrests for motor vehicle offenses.” *Pierce*, 642 A.2d at 959. The Supreme Court of New Jersey noted that motorists arrested for traffic offenses are usually removed from the vehicle and secured. Thus, the court reasoned:

When an arrestee, as was the case with [the defendant], has been handcuffed and placed in the patrol car, and the passengers are removed from the vehicle and frisked, the officer's justification for searching the vehicle and the passenger's clothing is minimal. Thus, in the context of arrests for motor-vehicle violations, the bright-line *Belton* holding extends the [United States v.] *Chimel*[, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)] rule beyond the logical limits of its principle.

Id. at 960.

The court concluded:

****907** We acknowledge the virtue of simple, straightforward rules to guide police officers in applying Fourth Amendment doctrine. Nevertheless, we are convinced that automatic application of the *Belton* bright-line rule to authorize vehicular searches incident to all traffic arrests poses too great a threat to rights guaranteed to New Jersey's citizens by their state constitution, and that threat to fundamental rights outweighs any incidental benefit that might accrue to law enforcement because of the simplicity and predictability of the *Belton* Rule.

Id. at 963.

Similarly, the Supreme Court of Ohio in *Brown* refused to apply the *Belton* bright line rule. The court opined: “We do not believe that the certainty generated by a bright-line test justifies a rule that automatically allows police officers to search every nook and cranny of an automobile just because the driver is arrested for a traffic violation.” *Brown*, 588 N.E.2d at 115. Accordingly, the court held that the warrantless*66 search of the defendant's automobile violated the Ohio Constitution. *Id.*

My review of these decisions of our sister states reveals that they are inconclusive on the question of whether Pennsylvania should adopt the *Belton* rule. Few of these cases present any detailed analysis of state constitutional concerns in deciding to follow or reject the *Belton* rule. The only case which engages in any meaningful analysis under its state constitution is *Pierce* which I find well reasoned in its criticism of the *Belton* bright-line rule.

The fourth prong of the *Edmunds* analysis requires us to examine public policy considerations. *Belton* was a case essentially decided on policy grounds. In *Belton*, the United States Supreme Court lamented the fact that “no straightforward rule has emerged from the litigated cases respecting the question involved here—the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.” *Belton*, 453 U.S. at 459, 101 S.Ct. at 2863. The Court stated the proposition that “[w]hen a person cannot know how a court will apply a settled principle to a recurrent situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.” *Id.* at 459-60, 101 S.Ct. at 2864. The Court then concluded that courts had found no workable definition of the “area within the immediate control of the arrestee” test formulated in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Thus, the United States Supreme Court established a “bright-line” rule holding “that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” *Belton*, 453 U.S. at 460, 101 S.Ct. at 2864. The Court explained that “the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.” *Id.* at 461, 101 S.Ct. at 2864.

*67 The *Belton* bright-line rule has been widely criticized. See, e.g., Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 Va.L.Rev. 1085, 1130-31 (1982) (*Belton* rule dramatically reduces the level of Fourth Amendment protection afforded to motorists); David S. Rudstein, *The Search of an Automobile Incident to an Arrest: An Analysis of New York v. Belton*, 67 Marq.L.Rev. 205, 261 (1984) (urging return to *Chimel* rule) David M. Silk, *When Bright Lines Break Down: Limiting New York v. Belton*, 136 U.Pa.L.Rev. 281, 313 (1987) (urging that *Belton* be applied narrowly). One such commentator has stated that the *Belton* rule “does a disservice to the development of sound Fourth Amendment doctrine.” Wayne R. Lefavre, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith”*, 43

U.Pitt.L.Rev. 307, 325 (1982). Another has specifically criticized *Belton* for allowing searches once the occupant has been removed from the vehicle and arrested:

If any bright line rule had been necessary to resolve the issue in *Belton*, it would have been the opposite of the rule that the court announced.... [O]ccupants almost invariably are removed before an automobile**908 is searched; and once they have been removed, there is no longer much chance that they can secure weapons from the automobile or destroy evidence there.

Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U.Pitt.L.Rev. 227, 274 (1984).

I agree that the *Belton* rule is seriously flawed and has no place in Pennsylvania jurisprudence. It has long been the rule in this Commonwealth that the police may search the passenger compartment of a car incident to an arrest only to protect their safety or to prevent the occupants from destroying contraband. *Timko*, 491 Pa. at 37, 417 A.2d at 622. In contrast, the *Belton* rule allows the police to search the passenger compartment and any containers contained therein even where no such exigency exists. The instant case demonstrates this point. Here, the defendant was removed from the car and arrested. At this point, the safety of the officers was no longer in jeopardy, and the defendant was unable to *68 destroy any evidence contained in the passenger compartment. Had the officers wanted to conduct an evidentiary search of the car, they could have secured the vehicle and obtained a proper search warrant. In my opinion, *Belton* carves too wide an exception to the warrant requirement where none is justified. We are asked today to follow *Belton* and dispense with the privacy interest in an automobile long recognized in our state constitution for the sake of a bright line rule. I am not convinced that our previous rule found in *Timko* and based upon *Chimel* created such practical law enforcement problems in this Commonwealth as to mandate that we dramatically curtail the privacy rights of motorists for the sake of a bright-line rule. In short, I do not believe that the reasoning of the United States Supreme Court's opinion in *Belton* carries the day. In my opinion, the widely criticized reasoning of *Belton*, the long-recognized privacy interest in an automobile under the Pennsylvania Constitution, and the lack of any evidence of insurmountable law enforcement problems in enforcing the current rule in this Commonwealth convince me that there are important and substantial reasons for departing from federal Fourth Amendment jurisprudence in this case. Like several of our sister states, I would not follow the *Belton* bright line rule; instead I would maintain the rule set forth in *Chimel*.

CASTILLE, Justice, dissenting.

The majority holds that even though the police in this matter had probable cause to believe that illegal drugs were located in appellant's car, and even though they saw a marijuana cigarette sitting on the console of appellant's automobile at the time they stopped his vehicle and lawfully removed him from the car pursuant to a valid warrant for appellant's person, and even though police found an eighth of an ounce of cocaine on appellant's person when they removed him from the car and lawfully searched him, the cocaine found in his vehicle nevertheless must be suppressed because police *could have* obtained a warrant for the automobile before entering *69

and searching it. Because I believe this holding leads to an absurd result, I must respectfully dissent.

Both the United States Supreme Court and this Court have recognized that the remedy of suppression of evidence seized is not a constitutional requirement. United States v. Leon, 468 U.S. 897, 906, 104 S.Ct. 3405, 3411-12, 82 L.Ed.2d 677 (1984). As remarked by Mr. Justice Larsen in Commonwealth v. Corley, 507 Pa. 540, 552, 491 A.2d 829, 835 (1985) (Larsen J., concurring): “Both the United States Supreme Court and this Court have made it clear that the exclusionary rule will not be extended to areas where its application would not tend to achieve its primary purpose of deterring unlawful misconduct.” This Court has stated that:

A rule of exclusion is properly employed where the objection goes to the reliability of the challenged evidence ... or reflects intolerable government conduct which is wide-spread and cannot otherwise be controlled.

Commonwealth v. Musi, 486 Pa. 102, 115, 404 A.2d 378, 384 (1979) (citations omitted). In the present case, there was no police misconduct that would warrant suppression.

It is not disputed that police inadvertently failed to secure a warrant for appellant's **909 vehicle at the time they secured the warrant for his person. While police are normally required to obtain warrants for searches where time allows them to do so, I believe that under these circumstances the suppression of the illegal contraband unnecessarily penalized *inadvertent* conduct by the police and does nothing to deter a perceived misconduct by the police. In short, it prioritizes form over substance and raises technicality to a high art.

Here, upon removing appellant from the vehicle, police saw drugs in the car *and* found drugs on appellant's person. These observations and discoveries of illegal contraband provided independent probable cause for the officers to suspect that additional contraband was in the car and which would allow police to lawfully search appellant's car. See *70Commonwealth v. Rosenfelt, 443 Pa.Super. 616, 627-28, 662 A.2d 1131, 1136 (1995) (probable cause to search entire interior and trunk of vehicle where parole officer stopped parolee for parole violation and observed drug paraphernalia in plain view); Commonwealth v. Evans, 443 Pa.Super. 351, 367, 661 A.2d 881, 889 (1995) (probable cause to search where officer observed brick of marijuana in plain view during valid traffic stop); Commonwealth v. Grimes, 436 Pa.Super. 535, 543, 648 A.2d 538, 542 (1994), *alloc. denied*, 543 Pa. 702, 670 A.2d 642 (1995) (probable cause to search where police officer observed drugs and drug paraphernalia in plain view during valid DUI stop); Commonwealth v. Hoffman, 403 Pa.Super. 530, 544, 589 A.2d 737, 744 (1991), *alloc. denied*, 530 Pa. 652, 608 A.2d 28 (1992) (where police officers executing search warrant for residence observed drug paraphernalia in plain view in automobile, probable cause existed to search the car and evidence seized was admissible at trial). Accordingly, I believe that the eight ounces of cocaine found in the car should be allowed in a trial against appellant on drug and drug-related charges. See Commonwealth v. Ionata, 518 Pa. 472, 544 A.2d 917 (1988) (McDermott, J., opinion in support of reversal) (where police inadvertently failed to obtain warrant for automobile but

did obtain warrants for appellant's person and home, and police in their zeal searched automobile for which they had probable cause to search prior to search of car, glassine packets, scale, fifteen hypodermic syringes and bags of methamphetamine should be admissible); Commonwealth v. Milyak, 508 Pa. 2, 493 A.2d 1346 (1985) (even though police had over two hours before search to obtain a warrant, warrantless search of a car was permitted where independent probable cause existed to believe that vehicle had been used in furtherance of a felony, or that evidence of a crime was concealed within.)

I further believe that the automobile exception to the warrant requirements of this Commonwealth should be a *per se* rule regardless of how much time police may have to obtain a warrant. This Court has previously adopted bright line rules where “experience proved it to be difficult for law enforcement *71 officials to administer” more flexible rules based on the totality of the circumstances. Commonwealth v. Johnson, 516 Pa. 407, 415, 532 A.2d 796, 800 (1987), citing Commonwealth v. Jenkins, 500 Pa. 144, 149-50, 454 A.2d 1004, 1006-07 (1982) (both setting forth bright line rules concerning station house confessions). The United States Supreme Court, in adopting a bright line rule permitting searches incident to arrest, reasoned that a “police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step of the search.” United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973).

This rationale is equally applicable to the present situation. To require a police officer who has independent probable cause to search a vehicle to first consider whether there was sufficient probable cause based on other factors upon which he could have obtained a warrant prior to stopping the car creates uncertainty and confusion for both the police and the citizen who may be subject to the search. In order to deter what some may consider police misconduct and to afford citizens a clear understanding of what the law is, I would urge the adoption of a bright line rule that would allow warrantless **910 searches of all automobiles for which police have independent probable cause to believe: “that a felony has been committed by the occupants of the vehicle, or that it has been used in the furtherance of the commission of a felony, or the officer must have a basis for believing that evidence of a crime is concealed within the vehicle, or that there are weapons therein which are accessible to the occupants.” Commonwealth v. Lewis, 442 Pa. 98, at 101, 275 A.2d 51, at 52 (1971). Such a bright line rule would prevent police from having to make a Solomon's choice of whether to either try to obtain a warrant and risk flight of the automobile and its occupants, or to not obtain a warrant and risk suppression of the contraband in the automobile.

*72 I must further note that the majority's statement declining to adopt the bright line rule of New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), is unnecessary dicta and as such would not be binding authority. The issue in the present case is whether suppression is required where police failed to obtain a warrant even though they had sufficient probable cause to do so before the search, and *not* the permissible scope of a search once a car is stopped, which is the issue presented in *Belton*. Indeed, neither party even cited *Belton* or addressed the *Belton* is-

sue in their briefs or in oral argument. Because the issue of whether this Commonwealth should adopt *Belton* was therefore not before this Court, any ruling on that issue is merely dicta. *Tulewicz v. SEPTA*, 529 Pa. 588, 594, 606 A.2d 427, 429 (1992) (Court's comments on issue not raised or argued by either party before the Court are dicta). As Mr. Justice Flaherty so aptly stated in *Commonwealth v. Blouse*, while dicta may be instructive in predicting what direction this Court is likely to take on a given issue, it “is not what is meant by precedential authority in our system of jurisprudence.” 531 Pa. 167, 176, 611 A.2d 1177, 1182 (1992) (Justice Flaherty, dissenting). Therefore, the majority's assertion that *Belton* does not apply in this Commonwealth does not have the authority of *stare decisis*.

Furthermore, I agree with Mr. Justice Montemuro that in providing Pennsylvania citizens broader protections under the Pennsylvania Constitution than are provided under analogous provisions of the federal constitution, as the majority purports to do, the four-prong test set forth by this Court in *Commonwealth v. Edmunds* should be applied. 526 Pa. 374, 390, 586 A.2d 887, 895 (1991) (setting forth “certain factors to be briefed and analyzed by litigants in each case hereafter implicating a provision of the Pennsylvania Constitution”); cf. *Commonwealth v. Swinehart, Appeal of DeBlase*, 541 Pa. 500, 509 n. 6, 664 A.2d 957, 961 n. 6 (1995) (this Court stated that *Edmunds* analysis is merely “helpful” and therefore litigants' failure to brief four-prong test was not fatal; the Court nonetheless applied the *Edmunds* analysis in determining *73 whether to provide broader coverage under Pennsylvania Constitution than is provided under federal constitution).

Pa.,1995.
Com. v. White
543 Pa. 45, 669 A.2d 896

END OF DOCUMENT

KEYCITE

▽ **Com. v. White**, 543 Pa. 45, 669 A.2d 896 (Pa., Dec 29, 1995) (NO. 31 W.D. 1993)

History**Direct History**

▽ 1 **Com. v. White**, 423 Pa.Super. 641, 616 A.2d 721 (Pa.Super. Jun 17, 1992) (Table, NO. 01137PGH91)

Appeal Granted by

H 2 **Com. v. White**, 534 Pa. 639, 626 A.2d 1157 (Pa. Jun 17, 1993) (Table, NO. 0511 W.D. 1993)

AND Order Reversed by

⇒ 3 **Com. v. White**, 543 Pa. 45, 669 A.2d 896 (Pa. Dec 29, 1995) (NO. 31 W.D. 1993)

Negative Citing References (U.S.A.)*Disagreed With by*

▽ 4 **People v. Dieppa**, 357 Ill.App.3d 847, 830 N.E.2d 870, 294 Ill.Dec. 458 (Ill.App. 2 Dist. Jun 17, 2005) (NO. 2--04--0087) * *

Disapproval Recognized by

▽ 5 **Com. v. Glass**, 718 A.2d 804 (Pa.Super. Sep 15, 1998) (NO. 411 HSBG. 1997) * * **HN: 1 (A.2d)**

Distinguished by

▽ 6 **Com. v. Luv**, 557 Pa. 570, 735 A.2d 87 (Pa. Jul 22, 1999) (NO. 0021 M.D.ALLOC. 1998) * * * * **HN: 3,4,6 (A.2d)**

H 7 **Chantilly Farms, Inc. v. West Pikeland Tp.**, 2001 WL 290645 (E.D.Pa. Mar 23, 2001) (NO. CIV. A. 00-3903) * * **HN: 2 (A.2d)**

▽ 8 **Com. v. Rogers**, 578 Pa. 127, 849 A.2d 1185 (Pa. May 27, 2004) (NO. 37WAP2000) * * * **HN: 3,6,7 (A.2d)**

▷

Supreme Court of New Jersey.
STATE of New Jersey, Plaintiff-Appellant,
v.
William B. ECKEL, Defendant-Respondent.
Argued Sept. 13, 2005.
Decided Jan. 10, 2006.

Background: Defendant pled guilty in the Superior Court, Law Division, Cape May County, to third degree possession of cocaine with intent to distribute. Defendant appealed. The Superior Court, Appellate Division, 374 N.J.Super. 91, 863 A.2d 1044, reversed and remanded.

Holding: On grant of State's petition for certification, the Supreme Court, Long, J., held that under State Constitution, police may not conduct a warrantless search of an automobile as incident to arrest after the occupants have been removed from the vehicle and are secured in police custody.

Remanded.

West Headnotes

Arrest 35 ↻ 71.1(5)

35 Arrest

35II On Criminal Charges

35k71.1 Search

35k71.1(4) Scope of Search

35k71.1(5) k. Particular Places or Objects. Most Cited Cases

Under State Constitution, police may not conduct a warrantless search of an automobile as incident to arrest after the occupants have been removed from the vehicle and are secured in police custody; two purposes of the search incident exception, protection of police and preservation of evidence, would not be advanced by searching a vehicle of a person who effectively is incapacitated. N.J.S.A. Const. Art. 1, par. 7.

****1266** Maura K. Tully, Deputy Attorney General, argued the cause for appellant (Peter C. Harvey, Attorney General of New Jersey, attorney).

Gilbert G. Miller, Designated Counsel, argued the cause for respondent (Yvonne Smith Segars, Public Defender, attorney).

Sharon Bittner Kean, on behalf of amicus curiae, Association of Criminal Defense Lawyers of

New Jersey, relied upon her brief submitted in *State v. John D. Dunlap*.

Justice LONG delivered the opinion of the Court.

***524** The issue raised in this appeal is whether the police may conduct a warrantless search of an automobile as incident to an arrest after the occupants have been removed from the vehicle and are secured in police custody. Because the search incident to arrest exception to the warrant requirement was limited for two specific purposes—the protection of the police and the preservation of evidence—and because neither purpose can be advanced by searching the vehicle of a person who effectively is incapacitated, we hold that such a search is incompatible with Article I, Paragraph 7 of the New Jersey Constitution. To the extent *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), has concluded otherwise in interpreting the Federal Constitution, we respectfully part company with the United States Supreme Court.

I

On June 30, 2002, at around 3:20 p.m., while on routine patrol, Officer Douglas Whitten received a report of a stolen vehicle, described as a green Mercury Cougar bearing the license plate FTY1380. Earlier in the day, the owners of the vehicle, Mr. and Mrs. Sanfillipo, reported that the car had been stolen by their daughter, Dana, and that Dana's boyfriend, defendant William B. Eckel, also might be in the ****1267** car. At the time, Officer Whitten knew that there was a warrant issued by Upper Township for Eckel's arrest based on failure to appear for municipal court dates.

Officer Whitten waited across the street from defendant's residence on Seashore Road and observed the green Mercury Cougar pulling out of the driveway. A young woman, later identified as Dana Sanfillipo, was at the wheel and defendant was in the front passenger seat. A male juvenile was sitting in the rear passenger ***525** seat. Officer Whitten stopped the vehicle with the assistance of Sergeant Jack Beers.

When Officer Whitten approached the driver's side of the vehicle and asked Dana Sanfillipo for her license, registration and insurance documents, Sergeant Beers approached the passenger side and asked defendant to exit the car. Sergeant Beers informed defendant that he was under arrest on an outstanding warrant, placed him in handcuffs and put him in the rear seat of the patrol car, which was parked behind the Sanfillipo vehicle. Officer Whitten estimated that it took only “a couple of minutes” for Sergeant Beers to arrest defendant and place him in the back of the patrol car.

Officer Whitten then asked Dana Sanfillipo to exit the vehicle and step to the rear, off to the side of the road. During a subsequent conversation with Officer Whitten, Dana asked permission to kiss defendant goodbye and give him the clothing he had left in the car. Officer Whitten told Dana to stay where she was and that he would retrieve the clothing. He testified that he would not let Dana go to the vehicle to retrieve defendant's clothes because it could have jeopardized

the officers' safety.

Officer Whitten went to the front passenger side of the vehicle, where the door was open, and began picking up the clothing from the floor by the passenger seat. Underneath the clothing, Officer Whitten observed a phone book with some "green vegetation and stems" lying on top that he believed to be marijuana. The officer also observed an open box of "Philly Blunt" ^{FN1} cigars behind the passenger seat, which contributed to his belief that the vegetation was marijuana.

FN1. "A blunt is an inexpensive cigar, typically a 'Philly Blunts' brand cigar, that has been split open and emptied of tobacco. Marijuana is substituted for the removed tobacco, and the exterior tobacco leaf of each cigar is used to rewrap the new contents." National Institute on Drug Abuse, *Assessing Drug Abuse Within and Across Communities*, <http://www.drugabuse.gov/DESPR/Assessing/AppendixH1.html> (last visited Nov. 30, 2005).

***526** Officer Whitten then retrieved a pair of blue denim shorts from behind the passenger seat. The officer found a softball-sized baggie rolled up in the shorts and opened it.^{FN2} Inside, there was an additional baggie, inside of which were several different items, including a clear plastic baggie containing a white powdery substance, an electronic scale with white residue on the tray, and several different types of small glassine bags. Officer Whitten suspected the white powder to be cocaine. He asked the juvenile to step out of the back seat of the car, and continued to search the passenger compartment. In between the rear seat and the door, Officer Whitten found a larger baggie containing green vegetation that he believed to be marijuana.

FN2. Defendant's sole argument is directed to Officer Whitten's right to search the vehicle. No separate argument has been advanced regarding the opening of the baggie.

When questioned, the occupants all denied ownership of the suspected marijuana and cocaine found in the vehicle. Dana Sanfillipo indicated that the shorts might ****1268** belong to her brother who also used the car.

Defendant and Dana Sanfillipo were charged with third-degree possession of a controlled dangerous substance, cocaine, in violation of *N.J.S.A. 2C:35-10a(1)* (count one), third-degree possession of a controlled dangerous substance, cocaine, with intent to distribute, in violation of *N.J.S.A. 2C:35-5a(1)* and *N.J.S.A. 2C:35-5b(3)* (count two), and fourth-degree possession of a controlled dangerous substance, marijuana, with intent to distribute, in violation of *N.J.S.A. 2C:35-5a(1)* and *N.J.S.A. 2C:35-5b(12)* (count three). There were no charges relating to the stolen vehicle because, at the scene, Mr. and Mrs. Sanfillipo indicated that they did not wish to press charges.

Defendant moved to suppress the evidence against him. The trial judge credited Officer Whitten's testimony that he entered the vehicle in response to a request by Dana Sanfillipo. The court concluded that, under the circumstances, Officer Whitten's entry ***527** into the car was rea-

sonable and that his observations at that point, along with the fluid nature of what was transpiring, constituted probable cause and exigent circumstances to search.

On that same date, defendant entered a plea of guilty to count two of the indictment. He was sentenced to three years of probation, upon service of weekend county jail time of 180 days. The court also imposed a number of conditions along with fines and penalties, none of which are at issue here.

Defendant appealed, challenging the denial of the motion to suppress on a number of grounds. More particularly, he argued that the warrantless search could neither be justified as incident to a valid arrest nor as having occurred pursuant to the consent, community caretaking, or automobile exceptions to the warrant requirement. Defendant also challenged his sentence. In the Appellate Division, the State waived all justifications for the search save one: the search incident to arrest exception as interpreted in *Belton*.

The Appellate Division reversed, *State v. Eckel*, 374 N.J.Super. 91, 863 A.2d 1044 (App.Div.2004), stating that “unless and until our Supreme Court *definitively* decides otherwise, *Belton* does not represent the law in New Jersey under the greater protections provided by our State Constitution ... and we decline to follow it.” *Eckel, supra*, 374 N.J.Super. at 100, 863 A.2d 1044 (citation omitted). The panel concluded that because defendant was already in custody in the rear of the patrol car before the vehicle search took place, the interior of the vehicle was not under his control and the evidence seized should have been suppressed. *Id.* at 101, 863 A.2d 1044.^{FN3}

FN3. The issue of defendant's sentence was not reached by the Appellate Division because the conviction was reversed.

We granted the State's petition for certification, 183 N.J. 214, 871 A.2d 92 (2005), limited to the single issue raised: whether the search was lawful under *Belton*. We also granted the motion *528 of the Association of Criminal Defense Lawyers of New Jersey to appear as amicus curiae.

II

The State argues that the Sanfillipo vehicle was properly searched as incident to defendant's arrest and that under *State v. Pierce*, 136 N.J. 184, 642 A.2d 947 (1994), *Belton* is applicable in New Jersey except in cases involving motor vehicle violations. Again, as in the Appellate Division, the **1269 State has declined to advance any other justification for the warrantless search.

Citing *Pierce, supra*, 136 N.J. 184, 642 A.2d 947, and *State v. Welsh*, 84 N.J. 346, 419 A.2d 1123 (1980), defendant counters that the warrantless search of the vehicle cannot be justified as incident to his arrest because, at the time it took place, he was secured in the back of the patrol car and was therefore no threat to the officers or the evidence. Put differently, defendant argues that *Belton's* contrary holding is not the law in New Jersey. Amicus, the Association of Criminal De-

fense Lawyers of New Jersey, support defendant's argument.

III

We detailed the full history of the search incident to arrest exception to the warrant requirement under the Federal Constitution in *Pierce, supra*, 136 N.J. at 196-97, 642 A.2d 947. In brief, the source of the exception is dictum in *Weeks v. U.S.*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), to the effect that law-enforcement officials could “search *the person* of the accused when legally arrested, to discover and seize the fruits or evidences of crime.” *Id.* at 392, 34 S.Ct. at 344, 58 L.Ed. at 655 (emphasis added). In the years following *Weeks*, the search incident to arrest doctrine fluctuated in scope.^{FN4} Eventually the so-called *Harris-Rabinowitz* rule developed, declaring that the exception *529 includes not only the person of defendant and the area within his reach, but also the entire area over which defendant has a possessory interest. *Pierce, supra*, 136 N.J. at 197, 642 A.2d 947 (citing *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); 2 Wayne R. LaFave, *Search and Seizure* § 6.3(b) at 623-24 (2d ed.1987)); see also *Harris v. United States*, 331 U.S. 145, 154-55, 67 S.Ct. 1098, 1103, 91 L.Ed. 1399, 1408-09 (1947)(approving thorough search of four-room apartment incident to defendant's arrest therein for prior offense); *Trupiano v. United States*, 334 U.S. 699, 709, 68 S.Ct. 1229, 1234, 92 L.Ed. 1663, 1671 (1948) (disapproving seizure of items in plain view after entry to make arrest because of failure to secure and use search warrants); *United States v. Rabinowitz*, 339 U.S. 56, 63-66, 70 S.Ct. 430, 434-35, 94 L.Ed. 653, 658-60 (1950) (relying on *Harris, supra*, overruling *Trupiano, supra*, and upholding as reasonable thorough search of one-room office where arrest is made).

FN4. See, e.g., *Carroll v. United States*, 267 U.S. 132, 158, 45 S.Ct. 280, 287, 69 L.Ed. 543, 553 (1925)(approving search after arrest for “whatever is found upon his person or in his control”); *Agnello v. United States*, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145, 148 (1925)(approving search after arrest of the person and “the place where the arrest is made”); *Marron v. United States*, 275 U.S. 192, 199, 48 S.Ct. 74, 77, 72 L.Ed. 231, 238 (1927) (approving, after arrest for offense occurring on premises, power to search extending “to all parts of the premises used for the unlawful purpose”); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358, 51 S.Ct. 153, 158, 75 L.Ed. 374, 383 (1931) (disapproving search of office in which defendants were arrested).

In 1969, the Supreme Court decided *Chimel v. California, supra*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, reconciling fifty years of sometimes conflicting Fourth Amendment jurisprudence. In so doing, the Court overruled the *Harris-Rabinowitz* line of cases and restricted the constitutionally permissible scope of a search of a home incident to an arrest. *Chimel* involved the arrest of a coin-shop burglary suspect at his home by police armed with an arrest warrant but no search warrant. *Id.* at 753-54, 89 S.Ct. at 2035, 23 L.Ed.2d at 688. Over the defendant's objections, the officers conducted a complete search of the entire premises and seized various **1270 items later introduced at trial. *Ibid.* The California Supreme Court upheld the search under the Federal Constitution as incident to a valid arrest. *530 *People v. Chimel*, 68 Cal.2d 436, 67 Cal.Rptr. 421,

439 P.2d 333, 337 (1968). The Supreme Court reversed, overruling both *Harris, supra*, and *Rabinowitz, supra*, declaring:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs-or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

[*Chimel, supra*, 395 U.S. at 762-63, 89 S.Ct. at 2040, 23 L.Ed.2d at 694 (footnote omitted).]

The Supreme Court subsequently reaffirmed *Chimel's* dual rationales for the search incident to arrest exception. See *Knowles v. Iowa*, 525 U.S. 113, 116-17, 119 S.Ct. 484, 487, 142 L.Ed.2d 492, 498 (1998)(stating, "[i]n [*United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)], we noted the two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial"); *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 2004, 36 L.Ed.2d 900, 906 (1973)("Chimel stands in a long line of cases recognizing an exception to the warrant requirement when a search is incident to a valid arrest.... The basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy incriminating evidence.").

Later, the Supreme Court applied *Chimel* to an automobile search in *531 *Belton, supra*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768. There, after a New York State trooper stopped a vehicle for speeding, he smelled the odor of burned marijuana and observed an envelope marked "Supergold" on the floor of the car that he suspected contained marijuana. *Id.* at 455-56, 101 S.Ct. at 2861-62, 69 L.Ed.2d at 772. He ordered the occupants out of the car and placed them under arrest for possession of marijuana. *Id.* at 456, 101 S.Ct. at 2862, 69 L.Ed.2d at 772. He patted them down, directed them to stand in separate areas and opened the envelope. *Ibid.* Finding marijuana, the trooper searched the occupants and the passenger **1271 compartment of the vehicle where he discovered cocaine in the zipped pocket of the defendant's jacket. *Ibid.* Defendant was in-

dicted and later moved to suppress the cocaine. *Ibid.* The New York Court of Appeals invalidated the search, concluding that

[a] warrantless search of the zippered pockets of an inaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.

[*People v. Belton*, 50 N.Y.2d 447, 429 N.Y.S.2d 574, 407 N.E.2d 420, 421 (1980).]

The Supreme Court reversed. Although stressing its re-affirmation of the fundamental principles of *Chimel*, the Court nevertheless accepted the notion that articles “inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’ ” *Id.* at 460, 101 S.Ct. at 2864, 69 L.Ed.2d at 774-75 (quoting *Chimel, supra*, 395 U.S. at 763, 89 S.Ct. at 2040, 23 L.Ed.2d at 694). Over the dissents of Justices Brennan and Marshall, who declared that the opinion was not a reaffirmation but a rejection of *Chimel*, the Court broadly held:

[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile [and] ... may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.

*532 [*Id.* at 460, 101 S.Ct. at 2864, 69 L.Ed.2d at 775 (citing *Robinson, supra*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)); *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959)(footnotes omitted).]

In *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the Supreme Court revisited *Belton*. There, an officer discovered that the defendant's license plates belonged to another car. *Id.* at 618, 124 S.Ct. at 2129, 158 L.Ed.2d at 911. Before he had a chance to pull the car over, defendant “drove into a parking lot, parked, and got out of the vehicle.” *Ibid.* The officer approached, patted down, and questioned defendant who admitted to having narcotics, pulled out a bag of marijuana and crack cocaine, and handed it to the officer. *Ibid.* The officer arrested the defendant, handcuffed him, and placed him in his patrol car and then proceeded to search the defendant's vehicle, uncovering a handgun. *Ibid.* In denying the defendant's motion to suppress, the trial judge found the search valid pursuant to *Belton*. *Id.* at 618-19, 124 S.Ct. at 2129-30, 158 L.Ed.2d at 911-12. The Fourth Circuit affirmed. *Id.* at 619, 124 S.Ct. at 2130, 158 L.Ed.2d at 912.

The Supreme Court in *Thornton* upheld the vehicle search under *Belton*, affirming

[t]he need for a clear rule, readily understood by police officers and not depending on differing

estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

[*Id.* at 622-23, 124 S.Ct. at 2132, 158 L.Ed.2d at 914.]

****1272** Applying that rule, the Court stated, “[s]o long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.” *Id.* at 623-24, 124 S.Ct. at 2132, 158 L.Ed.2d at 915. Several Justices pronounced their reservations regarding that application of *Belton*. Justice O’Connor concurred, expressing her “dissatisfaction with the state of the law in this area,” declaring that lower court decisions seem to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California*. That erosion is a direct consequence of *Belton’s* shaky foundation.

***533** [*Id.* at 624-25, 124 S.Ct. at 2133, 158 L.Ed.2d at 915 (O’Connor, J., concurring).]

Justice Scalia, urging a return to *Harris-Rabinowitz*, also concurred, joined by Justice Ginsburg: When petitioner’s car was searched in this case, he was neither in, nor anywhere near, the passenger compartment of his vehicle. Rather, he was handcuffed and secured in the back of the officer’s squad car. The risk that he would nevertheless “grab a weapon or evidentiary item” from his car was remote in the extreme. The Court’s effort to apply our current doctrine to this search stretches it beyond its breaking point, and for that reason I cannot join the Court’s opinion.

[*Id.* at 625, 124 S.Ct. at 2133, 158 L.Ed.2d at 916 (Scalia, J., concurring).]

Those criticisms of *Belton* have been widely recapitulated in scholarly writings. In *Pierce*, we cited a number of them.^{FN5} Since *Pierce* the drumbeat of scholarly ****1273** opposition to *Belton* has remained ***534** constant. See³ Wayne R. LaFave, *Search and Seizure* § 7.1(c) at 527 (4th ed.2004)(stating that “[o]n balance ... there is good reason to be critical of the Court’s work in *Belton*”); Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and Its Progeny*, 79 *Tul. L.Rev.* 365, 399 (2004)(acknowledging *Belton* has “weak relation to its supporting *Chimel* rationales”); Carson Emmons, Note, *Arizona v. Gant: An Argument for Tossing Belton and All Its Bastard Kin*, 36 *Ariz. St. L.J.* 1067, 1091 (2004) (arguing *Belton* and *Thornton* created legal fiction that “decrees that officer safety and preservation of evidence are in jeopardy when, in fact, they are not because the suspect is outside of the vehicle at the time of encounter and handcuffed in back of a squad car at the time of search”); Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 *Wis. L.Rev.* 657, 676 (2002)(arguing *Belton’s* “generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon or evidentiary item is-at

least in general-false”); Tim Thomas, Note, *Belton is Not Welcome: Idaho's Rejection and Subsequent Adoption of the Belton Rule in State v. Charpentier*, 35 *Idaho L.Rev.* 125 (1998) (stating, “[t]he problem with the *Belton* rule is that when the defendant is handcuffed and in the back of the police car, the rationale for conducting a search no longer applies”).

FN5. See Jeffrey A. Carter, *Fourth Amendment-Of Cars, Containers and Confusion*, 72 *J.Crim. L. & Criminology* 1171, 1173, 1217-21 (1981) (characterizing *Belton* as “disappointing,” the efficacy of its bright-line rule “questionable,” and its legacy “confusion”); Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 *Va. L.Rev.* 1085, 1130-31 (1982) (observing that “[b]y the elimination of *Chimel's* case-by-case measure of grabbing areas * * * *Belton* dramatically lowered the level of Fourth Amendment protection afforded to motorists in almost every state”); Yale Kamisar, *The “Automobile Search” Cases: The Court Does Little to Clarify the “Labyrinth” of Judicial Uncertainty*, in 3 *The Supreme Court: Trends and Developments 1980-81* 96 (Jesse Chaper et al. eds., 1982) (arguing that “automobile exception” recognized in *Carroll, supra*, 267 *U.S.* at 147, 45 *S.Ct.* at 283, 69 *L.Ed.* at 548-49, and based on probable cause constituted preferable basis for authorizing warrantless search in *Belton*); John Parker, *Robbins and Belton-Inconsistency and Confusion Continue to Reign Supreme in the Area of Warrantless Vehicle Searches*, 19 *Hous. L.Rev.* 527, 552 (1982) (arguing that “[r]easonableness and exigency have given way to predictability in *Belton* ”); David S. Rudstein, *The Search of an Automobile Incident to an Arrest: An Analysis of New York v. Belton*, 67 *Marq. L.Rev.* 205, 232, 261 (1984) (reading *Belton* to allow car search even if arrestee was handcuffed and placed in squad car and urging reconsideration of *Belton* and return to rationale of *Chimel*, allowing search of vehicle and containers therein only if within potential control of arrestee); David M. Silk, *When Bright Lines Break Down: Limiting New York v. Belton*, 136 *U. Pa. L.Rev.* 281, 313 (1987) (urging that *Belton* be read and applied narrowly and not expanded beyond intended scope); Robert Stern, *Robbins v. California and New York v. Belton: The Supreme Court Opens Car Doors to Container Searches*, 31 *Am. U.L.Rev.* 291, 317 (1982) (describing *Belton* as subordinating privacy interests to bright-line rule and allowing warrantless searches of containers in automobile passenger compartments incident to arrest of driver or occupants); *The Supreme Court 1980 Term*, 95 *Harv. L.Rev.* 93, 260 (1981) (noting that “the Court has turned its back on the logic of its earlier decision in *Chimel* * * *, which restricted police searches incident to arrest to the arrestee's immediate area of control”).

Some states have simply followed *Belton*. See generally *Stout v. State*, 320 *Ark.* 552, 898 *S.W.2d* 457 (1995); *State v. Waller*, 223 *Conn.* 283, 612 *A.2d* 1189 (1992); *State v. Charpentier*, 131 *Idaho* 649, 962 *P.2d* 1033 (1998); *State v. Sanders*, 312 *N.W.2d* 534 (Iowa 1981); *State v. Tognotti*, 663 *N.W.2d* 642 (N.D.2003); *535 *State v. Murrell*, 94 *Ohio St.3d* 489, 764 *N.E.2d* 986 (2002); *State v. Rice*, 327 *N.W.2d* 128 (S.D.1982); *State v. Fry*, 131 *Wis.2d* 153, 388 *N.W.2d* 565 (1986). However, a number have declined to do so based upon their own constitutional provisions. See *Commonwealth v. Toole*, 389 *Mass.* 159, 448 *N.E.2d* 1264, 1267 (1983) (holding invalid search of truck's passenger compartment incident to arrest under Massachusetts law where

defendant was “already arrested, ... handcuffed, and ... in the custody of two State troopers while the search was conducted”); Camacho v. State, 119 Nev. 395, 75 P.3d 370, 374 (2003)(stating, “[w]e ... elect to follow our previous cases where we rejected *Belton's* reasoning and followed the earlier United States Supreme Court case of *Chimel v. California*”) (footnote omitted); State v. Arredondo, 123 N.M. 628, 944 P.2d 276, 284-85 (Ct.App.1997), *overruled on other grounds* by State v. Steinzig, 127 N.M. 752, 987 P.2d 409 (1999) (holding, “New Mexico Constitution requires a fact-specific inquiry” rather than *Belton's* “bright-line rule”); People v. Blasich, 73 N.Y.2d 673, 543 N.Y.S.2d 40, 541 N.E.2d 40, 43 (1989) (stating, “[t]his court has not adopted [*Belton's*] brightline approach to automobile searches incident to arrest as a matter of State constitutional law”); State v. Kirsch, 69 Or.App. 418, 686 P.2d 446 (1984) (stating, “*Belton* is not the law of Oregon”); Commonwealth v. White, 543 Pa. 45, 669 A.2d 896, 902 (1995) (stating, “this court ... has struck a different balance than has the United States Supreme Court ... there is no justifiable search incident to arrest under the Pennsylvania Constitution save for the search of the person and the immediate area which the person occupies during his custody”); Vasquez v. State, 990 P.2d 476, 489 (Wyo.1999) (stating Wyoming Constitution “requires a **1274 search be reasonable under all circumstances,” resulting in “a narrower application than *Belton*”). That is the backdrop for our inquiry.

IV

A.

New Jersey's traditional approach to the search incident to arrest exception parallels *Chimel*. In *536Welsh, *supra*, 84 N.J. 346, 419 A.2d 1123, a case decided less than one year before *Belton*, this Court applied a *Chimel* analysis to decide the validity of a search incident to arrest in the motor vehicle context under the Federal Constitution. *Id.* at 353-54, 419 A.2d 1123. There, we ruled that “once the occupant has been removed from the vehicle, placed under custodial arrest and seated in a police car, there is no danger that the arrestee might reach into his own vehicle to gain possession of a weapon or destructible evidence,” thus obviating resort to the search incident to arrest exception to the warrant requirement. State v. Alston, 88 N.J. 211, n. 15 235, 440 A.2d 1311 (1981)(citing *Welsh*, *supra*, 84 N.J. at 355, 419 A.2d 1123).

Alston, decided several months after *Belton*, did not require us to reach the *Belton* question because the automobile search at issue was valid under the automobile exception. *Ibid.* We acknowledged, however, that *Welsh* would have been decided differently under *Belton* and expressly reserved decision on *Belton*, stating, “we leave to future consideration the question of the continued viability of our analysis of the scope of the *Chimel* exception as expressed in *Welsh*.” *Ibid.*

We later considered the applicability of *Belton* under the New Jersey constitution in Pierce, *supra*, 136 N.J. 184, 642 A.2d 947. There, the driver of a motor vehicle was pulled over and subsequently arrested, handcuffed, and placed in the patrol car for driving while his license was suspended. *Id.* at 187-88, 642 A.2d 947. Additionally, both passengers were removed from the car,

patted down, and secured behind the vehicle by “back-up officers.” *Ibid.* The arresting officer then searched the interior of the vehicle and found a stolen revolver and cocaine. *Ibid.* The trial judge found the search to be valid and citing *Belton*, the Appellate Division affirmed. *Id.* at 188, 642 A.2d 947.

We granted certification. In ruling that *Belton* does not apply to warrantless arrests for motor-vehicle offenses, we observed in *Pierce* that the two *Chimel* justifications for a search incident to arrest (officer safety and avoidance of the destruction of evidence) have little relevance when the arrest is for a routine motor vehicle *537 violation. *Id.* at 210, 642 A.2d 947. We further acknowledged that “motorists arrested for traffic offenses almost invariably are removed from the vehicle and secured,” and “[w]hen an arrestee ... has been handcuffed and placed in the patrol car ... the officer's justification for searching the vehicle and the passenger's clothing and containers is minimal.” *Id.* at 210, 642 A.2d 947. Therefore, we held that

in the context of arrests for motor-vehicle violations, the bright-line *Belton* holding extends the *Chimel* rule beyond the logical limits of its principle.... We reject not the rationale of *Chimel*, but *Belton's* automatic application of *Chimel* to authorize vehicular searches following all arrests for motor-vehicle offenses.

[*Id.* at 210-11, 642 A.2d 947.]

We acknowledged the virtue of simple, straightforward rules to guide police officers in applying Fourth Amendment doctrine. Nevertheless, we are convinced that automatic application of the *Belton* bright-line rule to authorize vehicular searches incident **1275 to all traffic arrests poses too great a threat to rights guaranteed to New Jersey's citizens by their State Constitution, and that that threat to fundamental rights outweighs any incidental benefit that might accrue to law enforcement because of the simplicity and predictability of the *Belton* rule.

[*Id.* at 215, 642 A.2d 947.]

We saved for another day the question whether *Belton* or *Chimel*, as adopted in *Welsh*, applies to arrests other than those occurring as a result of minor motor vehicle offenses.

B.

We now determine that issue.^{FN6} Article I, Paragraph 7 of the New Jersey Constitution provides:

FN6. The State's reliance on our 2002 decision in *State v. Goodwin*, 173 N.J. 583, 803 A.2d 102 (2002), as a declaration of our adoption of *Belton* is misplaced. The reference to *Belton* in that opinion was pure dictum and did not address the fundamental issue of the conflict between *Welsh* and *Belton* that we left open in *Pierce*.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

***538** [*N.J. Const.* art. I, ¶ 7.]

Although that paragraph is almost identical to the text of the Fourth Amendment to the Federal Constitution, we have not hesitated in the past to afford our citizens greater protection against unreasonable searches and seizures under Article I, Paragraph 7 than would be the case under its federal counterpart. See *State v. Cooke*, 163 N.J. 657, 666, 751 A.2d 92 (2000) (declining to adopt conclusion of Supreme Court in *Pennsylvania v. Labron*, 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996), that dispensed with the need for exigent circumstances under automobile exception); *Pierce, supra*, 136 N.J. at 208-09, 642 A.2d 947 (refusing to adopt blanket rule that would have permitted warrantless automobile searches incident to motor vehicle arrests); *State v. Hempele*, 120 N.J. 182, 215, 576 A.2d 793 (1990) (finding privacy interest in curbside garbage); *State v. Novembrino*, 105 N.J. 95, 158, 519 A.2d 820 (1987) (declining to find good-faith exception to exclusionary rule); *State v. Hunt*, 91 N.J. 338, 348, 450 A.2d 952 (1982) (finding privacy interest in phone billing records); *State v. Johnson*, 68 N.J. 349, 353-54, 346 A.2d 66 (1975) (finding heavy burden to show validity of non-custodial consent to search). Indeed, it is

an established principle of our federalist system that state constitutions may be a source of “individual liberties more expansive than those conferred by the Federal Constitution.” *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752 (1980); see *Oregon v. Hass*, 420 U.S. 714, 718, 95 S.Ct. 1215, 1218-19, 43 L.Ed.2d 570, 575 (1975); *State v. Gilmore*, 103 N.J. 508, 522, 511 A.2d 1150 (1986); “Symposium: The Emergence of State Constitutional Law,” 63 *Tex. L.Rev.* 959 (1985); Pollock, “State Constitutions as Separate Sources of Fundamental Rights,” 35 *Rutgers L.Rev.* 707 (1983); “Developments in the Law—The Interpretation of State Constitutional Rights,” 95 *Harv. L.Rev.* 1324 (1982); Brennan, “State Constitutions and the Protection of Individual Rights,” 90 *Harv. L.Rev.* 489 (1977); Note, “The New Jersey Supreme Court’s Interpretation**1276 and Application of the State Constitution,” 15 *Rutgers L.J.* 491 (1984).

[*Novembrino, supra*, 105 N.J. at 144-45, 519 A.2d 820.]

Moreover, as we have said, the United States Supreme Court interpretations of the Federal Constitution establish not the ceiling but only “the floor of minimum constitutional protection.” *Gilmore, supra*, 103 N.J. at 524, 511 A.2d 1150.

***539** Our conclusion regarding whether to tether ourselves to federal jurisprudence in this matter is influenced simultaneously by a number of considerations. Initially, we return to the text of our constitution: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” *N.J. Const.* art. I, ¶ 7. It

is against that clear recognition of the privacy interests of our citizens that a specific warrantless search is to be judged. Clearly, the search of an automobile is an invasion of privacy, Cooke, supra, 163 N.J. at 670, 751 A.2d 92, and the fact of an arrest does not render that invasion less substantial. Without doubt, we have acknowledged that there is a somewhat lesser expectation of privacy in an automobile than in a home or office, State v. Colvin, 123 N.J. 428, 429, 587 A.2d 1278 (1991), thus allowing for distinct analyses of searches in those settings. However, we have never agreed that the word “automobile” is a “talisman in whose presence the Fourth Amendment fades away and disappears.” Coolidge v. New Hampshire, 403 U.S. 443, 461, 91 S.Ct. 2022, 2035, 29 L.Ed.2d 564, 580 (1971). Thus, a warrantless search of an automobile will violate our constitution unless it falls squarely within a known exception to the warrant requirement.

In this matter our concern is the search incident to arrest exception. As we have indicated, both our prior case law and federal case law have recognized the specific contours of that exception: it is invocable to ensure police safety or to avoid the destruction of evidence. See Chimel, supra, 395 U.S. at 762-63, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685, 694; Welsh, supra, 84 N.J. at 355, 419 A.2d 1123 (stating, “[t]he relevant facts, then, appear to be those which disclose what places the person under arrest presently could reach at the time the arrest is undertaken and how likely it is that he would attempt resistance or escape or destruction of evidence”); Pierce, supra, 136 N.J. at 211, 642 A.2d 947 (stating, “[w]e reject not the rationale of *Chimel*, but *Belton's* automatic application of *Chimel* to authorize vehicular searches following all arrests for motor-vehicle offenses”).

*540 However, in *Belton*, and later in *Thornton*, the Supreme Court altered *Chimel*, establishing a bright-line rule that essentially validates every automobile search upon the occupant's arrest, regardless of whether the occupant has the capacity to injure the police or destroy evidence. In concluding as it did, *Belton* detached itself from the theoretical underpinnings that initially animated the search incident to arrest exception. Unmoored as it is from *Chimel* and established Fourth Amendment jurisprudence, all that is left in *Belton* is the benefit to police of a so-called bright line rule. See, *Belton, supra*, 453 U.S. at 464, 101 S.Ct. at 2865, 69 L.Ed.2d at 777 (Brennan, J., dissenting). Without question, along with protecting privacy and “regulat[ing] the distribution of power between the people and the government,” guiding the police is one distinct level on which the Fourth Amendment operates. *The Supreme Court, 1980 Term*, 95 Harv. L.Rev. 93, 258 (1981). However, it cannot, standing alone, support an exception to the warrant requirement. By focusing solely on procedure and writing **1277 out of the exception the two *Chimel* justifications, the Supreme Court in *Belton* reached a result that is detached from established Fourth Amendment jurisprudence.

We decline to adopt *Belton* and its progeny because to do so would require us to accept a theoretically rootless doctrine that would erode the rights guaranteed to our own citizens by Article I, Paragraph 7 of our constitution—the right to be free from unreasonable searches and seizures. To us, a warrantless search of an automobile based not on probable cause but solely on the arrest of a person unable to endanger the police or destroy evidence cannot be justified under any exception to the warrant requirement and is unreasonable.

We do not view Article I, Paragraph 7 as a procedural matter but as a reaffirmation of the privacy rights guaranteed to our citizens and of our duty as judges to secure them. So viewed, the *Belton* rationale simply does not pass muster. That is not to suggest that bright lines are not salutary, only that they cannot be the sole justification for a warrantless search. Indeed, a bright-line*541 that remains true to an exception's roots is a worthy consideration. In that connection, one scholar has observed:

If any bright line rule had been necessary to resolve the issue in *Belton*, it would have been the opposite of the rule that the Court announced [O]ccupants almost invariably are removed before an automobile is searched; and once they have been removed, there is no longer much chance that they can secure weapons from the automobile or destroy evidence there.

[Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 *U. Pitt. L.Rev.* 227, 274 (1984).]

That is the line we draw here. Once the occupant of a vehicle has been arrested, removed and secured elsewhere, the considerations informing the search incident to arrest exception are absent and the exception is inapplicable. We thus return to *Chimel* and to *Welsh* and declare their reasoning to be the critical path to the application of the search incident to arrest exception under Article I, Paragraph 7 of our constitution. That, in turn, answers the open issue in *Pierce*.

Obviously, where a defendant has been arrested but has not been removed and secured, the court will be required to determine, on a case-by-case basis whether he or she was in a position to compromise police safety or to carry out the destruction of evidence, thus justifying resort to the search incident to arrest exception.

One final note, we emphasize that we do not diverge lightly from federal constitutional interpretation. However, as Justice Clifford so eloquently put our relationship with our federal counterpart:

although that Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.

[*Hempele, supra*, 120 *N.J.* at 196, 576 *A.2d* 793.]

In charting a course distinct from *Belton*, that is what we have done.

*542 V

That is not the end of the inquiry. The trial judge did not base her decision on the search incident

to arrest exception but on theories including consent, plain view, and the automobile exception to the warrant requirement. Those exceptions, which defendant challenged on appeal, were not **1278 reached by the appellate panel because of the State's refusal to address them, apparently in order to force an adjudication of the *Belton* issue. In any event, the merits of the trial judge's decision have never been tested against the arguments advanced by defendant on appeal. We therefore return the matter to the Appellate Division to consider the remaining unresolved issues.

VI

For the reasons to which we have adverted, and notwithstanding the Appellate Division's entirely correct disposition of the *Belton* issue, the case is remanded for consideration of outstanding issues.

For remandment-Chief Justice PORITZ and Justices LONG, LaVECCHIA, ZAZZALI, ALBIN, WALLACE and RIVERA-SOTO-7.

Opposed-None.

N.J., 2006.

State v. Eckel

185 N.J. 523, 888 A.2d 1266

END OF DOCUMENT

KEYCITE

1 State v. Eckel, 185 N.J. 523, 888 A.2d 1266 (N.J., Jan 10, 2006) (NO. A-95 SEPT.TERM 2004)

History**Direct History**

1 State v. Eckel, 374 N.J.Super. 91, 863 A.2d 1044 (N.J.Super.A.D. Dec 29, 2004) (NO. A-0363-03T4)

Certification Granted by

2 State v. Eckel, 183 N.J. 214, 871 A.2d 92 (N.J. Mar 11, 2005) (Table, NO. 57,371, C-742 SEPT.TERM 2004)

AND Remanded by

3 State v. Eckel, 185 N.J. 523, 888 A.2d 1266 (N.J. Jan 10, 2006) (NO. A-95 SEPT.TERM 2004)

On Remand to

4 State v. Eckel, 2004 WL 4054840 (N.J.Super.A.D. Jun 30, 2006) (NO. A-0363-03T4)

Negative Citing References (U.S.A.)

Declined to Follow by

5 Purnell v. State, 171 Md.App. 582, 911 A.2d 867 (Md.App. Dec 04, 2006) (NO. 210 SEPT.TERM 2005) *HN: 1 (A.2d)**

Declined to Extend by

6 State v. Pena-Flores, 2007 WL 600736 (N.J.Super.A.D. Feb 28, 2007) (NO. A-5961-05T5) **HN: 1 (A.2d)**

Distinguished by

7 State v. Hall, 2006 WL 889475 (N.J.Super.A.D. Apr 07, 2006) (NO. A-1049-04T4, A-2686-04T4, A-6298-03T4) **HN: 1 (A.2d)

8 State v. Mitchell, 2007 WL 2198236 (N.J.Super.A.D. Aug 02, 2007) (NO. A-4015-

05T4) * * * * **HN: 1 (A.2d)**

H

9 State v. Best, 403 N.J.Super. 428, 959 A.2d 243, 238 Ed. Law Rep. 345
(N.J.Super.A.D. Nov 10, 2008) (NO. A-0891-07T4) * * * **HN: 1 (A.2d)**

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STATE OF WASHINGTON
BY Kyle
DEPUTY

IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
Respondent,)
)
vs.)
)
KAREN LOUISE SMITH,)
)
Appellant.)
_____)

Appeal No. 38740-9-II
Superior Court No. 08-1-00987-2

DECLARATION OF MAILING

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

Mr. Randall Sutton
Attorney at Law
614 Division Street, MS-35
Port Orchard, WA 98366

Ms. Karen Smith
P.O. Box 2727
Belfair, WA 98528

a true copy of the Brief of Appellant.

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

Dated this 4th day of June 2009, at Port Orchard, Washington.

Ann Blankenship
ANN BLANKENSHIP

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