

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 39094-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Philip Pedersen,

Appellant.

Lewis County Superior Court Cause No. 08-1-00713-2

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The warrantless vehicle search violated Mr. Pedersen's right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments.
2. Mr. Pedersen's convictions were entered in violation of his right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A vehicle search performed incident to the arrest of the driver is unlawful unless, at the time of the search, the driver is in a position to grab a weapon or evidence from the vehicle's interior. In this case, the officer searched the vehicle after arresting the driver and securing him in the back of a patrol car. Did the warrantless vehicle search violate Mr. Pedersen's right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments, and his right to privacy under Wash. Const. Article I, Section 7?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Philip Pedersen was a passenger in a Ford Explorer stopped by Deputy Adkisson of the Lewis County Sheriff's Office. CP 18, 23. Deputy Adkisson arrested the driver for driving while suspended and secured him in a patrol car. CP 24.

Adkisson described Mr. Pedersen and a second passenger as very cooperative. RP (1/30/09) 10. Adkisson knew both passengers, and didn't believe they were a threat. RP (1/30/09) 10.

Mr. Pedersen and the other passenger were told to remove their belongings from the car while Adkisson searched the car incident to the driver's arrest. CP 19, 24. The two men waited twenty-five feet from the Explorer while Adkisson and a second deputy searched. CP 19, 24. During their search, the deputies found a wallet containing two bindles of methamphetamine. CP 19-20, 24-25. The wallet also contained Mr. Pedersen's driver's license, and he acknowledged that the wallet belonged to him. RP (1/30/09) 22.

Mr. Pedersen was charged with Possession of Methamphetamine and Unlawful Use of Drug Paraphernalia. CP 26. He moved to suppress the evidence, and the court held a CrR 3.6 hearing on January 30, 2009. Defendant's Motion to Suppress, Defendant's Memorandum in Support,

Supp. CP; RP (1/30/09). After the motion was denied, Mr. Pedersen waived his right to a jury and was convicted following a stipulated trial. Stipulation and Order Waiving Jury, Supp. CP; CP 18.

He timely appealed. CP 3.

ARGUMENT

THE WARRANTLESS VEHICLE SEARCH VIOLATED MR. PEDERSON'S FOURTH AND FOURTEENTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES, AND HIS STATE CONSTITUTIONAL RIGHT TO PRIVACY.

The Fourth Amendment to the Federal 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.

U.S. Const. Amend. IV.¹ Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.² Under both provisions, searches conducted

¹ The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

² It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the

without authority of a search warrant “are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, ___ U.S. ___, ___, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wn.2d 628, 584, 185 P.3d 580 (2008). The burden is always on the state to prove one of these narrow exceptions. *State v. Kypreos*, 110 Wn.App. 612, 624, 39 P.3d 371 (2002). Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d 775 (2001). The validity of a warrantless search is reviewed *de novo*. *Kypreos*, at 616 (2002).

One exception to the search warrant requirement is where the search is performed incident to arrest. *Gant*, at ___ (citing *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914)). This exception “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” *Gant*, at ___; *see also Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23

six-part *Gumwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gumwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

L.Ed.2d 685 (1969). Accordingly, police are authorized “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*, at ____.

In this case, the driver had been arrested and secured in the officer’s patrol car at the time of the search. RP (1/30/09) 5, 17-18, 36. Accordingly, the search was unreasonable, and the evidence should not have been admitted against Mr. Pedersen at trial. Mr. Pedersen’s convictions violated his Fourth and Fourteenth Amendment right to be free from unreasonable searches and seizures, and his state constitutional right to privacy. *Gant, supra; Eislefeldt, supra*. The convictions must be reversed, and the case dismissed with prejudice. *Gant, supra; Eislefeldt, supra*.

CONCLUSION

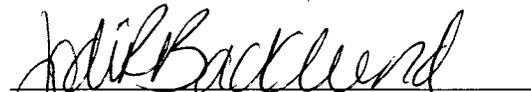
For the foregoing reason, Mr. Pedersen’s convictions must be reversed. The evidence must be suppressed, and the case dismissed with prejudice.

Respectfully submitted on July 30, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 30, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 30, 2009.



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