

No. 39617-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

JOSHUA SWETZ  
Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
10 MAR 26 PM 12:37  
STATE OF WASHINGTON  
BY  DEPUTY

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Appeal from the Superior Court of Washington for Lewis County

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**RESPONSE BRIEF**

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## STATEMENT OF THE CASE

The statement of the case set out by the appellant is adequate for purposes of responding to this appeal.

## ARGUMENT

**A. THIS CASE SHOULD BE STAYED PENDING THE WASHINGTON SUPREME COURT'S DECISION IN STATE V. MILLAN REGARDING THE RIGHT TO CHALLENGE A VEHICLE SEARCH UNDER GANT FOR THE FIRST TIME ON APPEAL.**

Swetz claims for the first time on appeal that the search of his vehicle was unlawful under the United States Supreme Court decision in Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)(hereafter "Gant"). Because this very Court is split as to whether a defendant may raise a search issue under Gant for the first time on appeal, Respondent respectfully suggests that this matter be stayed pending the Supreme Court's decision in State v. Millan, 151 Wn.App. 492, 212 P.3d 603 (2009), *review granted*, No. 83613-2(Jan. 9, 2010).

The instant case is a pre-Gant case that occurred on August 19, 2008. Gant was handed down in 2009. Mr. Swetz did not raise any suppression issues below. *RP et seq.* Accordingly, the State believes that Mr. Swetz has waived the right to challenge the search of his vehicle on appeal. Millan, supra. However, as previously mentioned, this Court is split on this waiver issue.

### ***Division Two Split on the Waiver Issue***

For example, one panel of this Court has found that a defendant waives the right to challenge a vehicle search for the first time on appeal if he has not raised the issue in the trial court in the following cases: State v. Cardwell, 2010 WL 774958(2010); Millan, *supra*, State v. Nyegaard, 2010 WL 610764(2010). On the other hand, a different panel of this Court has held that a defendant may challenge a vehicle search under Gant for the first time on appeal in the following cases: State v. McCormick, 152 Wn.App. 536, 216 P.3d 475 (2009), *petition for review filed* October 27, 2009; State v. Harris, 2010 WL 45755(2010); State v. Burnett, 2010 WL 611498(2010). In sum, as pointed out in the Nyegaard case, "[t]o date, Judges Quinn-Brintnall, Bridgewater, and Hunt have followed the Millan analysis and Judges Houghton, Armstrong, Van Deren, and Penoyar have followed the McCormick and Harris analysis."

Thus, the State quite simply does not know what the prevailing rule is regarding the right to raise a suppression issue for the first time on appeal. Nonetheless, given the fact that Mr. Swetz failed to raise *any* search issue below, and given this Court's split on the waiver issue after Gant, and further considering that review has been granted in Millan, the State requests that this matter be

stayed pending the Washington Supreme Court's decision in Millan (review granted February 9, 2010, *consolidated* with State v. Robinson).

**" Crime of Arrest" Exception to Vehicle Search**

In the event that Mr. Swetz *is* allowed to raise the search issue for the first time on appeal, the search of his vehicle might nonetheless fall under an exception left open in Gant. That is, unless our Valdez case forecloses this exception. State v. Valdez, 157 Wn.2d 761, \_\_\_ P.3d \_\_\_ (December 2009).

In Gant, the United States Supreme Court mentions that search of a vehicle incident to arrest might be proper if it is done to search for "evidence of the crime of arrest." The facts of the present case might fit under that exception.

Here, when Mr. Swetz walked over to Officer Osterdahl's patrol vehicle, the officer smelled marijuana on Swetz's breath and person. RP 16,27. Officer Osterdahl then got out of his vehicle and walked over to Swetz's vehicle and saw in open view a baggie with marijuana in it, as well as a couple of pipes containing burnt residue. RP 16, 27. The officer then placed Mr. Swetz under arrest for possession of marijuana. RP 16,17, 28. The vehicle was registered to Mr. Swetz. RP 28. Officer Osterdahl searched

Swetz's vehicle incident to his arrest for possession of marijuana.

RP 29. Thus, the crime of arrest was possession of marijuana.

Since the crime of arrest was possession of marijuana, it seems logical that the officer might expect to find evidence of "the crime of arrest" in Swetz's vehicle.

In Gant the United States Supreme Court seemingly left open a couple of scenarios in which a search incident to arrest might still be appropriate. The Gant Court explained such an exception as follows:

we also 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." *Thornton*, 541 U.S., at 632, 124 S.Ct. 2127 (SCALIA, J., concurring in judgment). 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. See, e.g., *Atwater v. Lago Vista*, 532 U.S. 318, 324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *Knowles v. Iowa*, 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

*Arizona v. Gant* 129 S.Ct. 1710, 1719 (2009)(emphasis added).

Thus, under Gant, a search of a vehicle incident to arrest might still be allowed when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Id. And the facts of the present case seem to fit that exception.

However, it also appears that the Washington Supreme Court's recent Valdez opinion forecloses such an "evidence-of-the-crime-of-arrest" vehicle search where, as here, *the sole occupant of the vehicle has been handcuffed and placed in the patrol car.* State v. Valdez, 157 Wn.2d 761, \_\_\_ P.3d \_\_\_, 2009 WL 4985242(2009).

As the Valdez Court explained:

...when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained. A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.

Valdez, supra (emphasis added). Thus, Valdez seemingly takes a narrower view of the "crime of arrest" exception mentioned in Gant.

Applying Valdez here, we see that Mr. Swetz was the sole occupant of the vehicle. RP 38. Mr. Swetz was arrested for possession of marijuana--a baggie of which was seen by the officer in open view lying on the passenger seat of Swetz's vehicle. RP 28. Thus, the "crime of arrest" here was possession of a controlled substance--and it is logical that additional unlawful substances would be found in Swetz's vehicle (and indeed were found there).

RP 29. However, Swetz was apparently already in handcuffs at the time the officer searched the vehicle, so, at least under a strict reading of Valdez-- Swetz could no longer "destroy or conceal" any evidence of the crime of arrest remaining in his vehicle.

So, where does leave us? If Swetz has not waived the search issue, and if by any chance Valdez has not "closed the door" on Gant's "evidence-of- the-crime-of-arrest" exception, then the search of Swetz's vehicle was lawful under that exception. On the other hand, if the facts of this case do not meet such an exception, and if Swetz has not waived the search issue, then the search of his vehicle was indeed unlawful, and this case must be reversed and dismissed.

### CONCLUSION

Because this Court is split as to whether a vehicle search issue under Gant can be raised for the first time on appeal, this case should be stayed until the Washington Supreme Court decides that issue in the Millan case. If Swetz is allowed to raise the search issue, then the facts of the search in this case may fall under the "evidence-of-the-crime-of-arrest" exception, and the search here would thus be lawful.

Accordingly, if Swetz is deemed to have waived the search issue, his conviction should be affirmed. If Swetz is allowed to challenge the search, and if these facts do not meet the "crime of arrest" exception for vehicle searches, this case should be remanded for dismissal.

RESPECTFULLY SUBMITTED this 24th day of March,  
2010.

MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTORNEY

by:

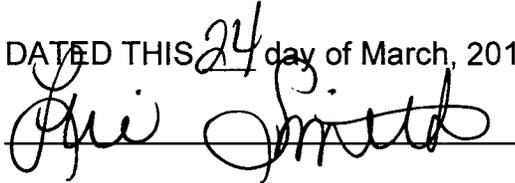
  
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**DECLARATION OF SERVICE BY MAIL**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on <sup>3/24/2010</sup> a copy of this response brief was served upon the Appellant by placing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows:

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DATED THIS 24 day of March, 2010, at Chehalis, WA.

  
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