

NO. 39627-1-II

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

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STATE OF WASHINGTON, Appellant

v.

TYLER SCOTT BARNES, Respondent

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROBERT A. LEWIS  
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01936-5

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR..... 1

II. ISSUES PRESENTED ..... 1

    A. **Under art. I, § 7 and Arizona v. Gant, evidence of the firearm was admissible because the defendant was arrested for the crime of felony harassment (threatening to shoot people at a bank) and the officer had reason to believe the defendant’s vehicle contained evidence of the crime of arrest. .... 1**

    B. **In the alternative, under the “open view” doctrine, evidence of the firearm was admissible because the officer observed a firearm case (containing the firearm) on the front passenger seat of the defendant’s vehicle, while she was standing in a public parking lot and looking through a window of the vehicle..... 1**

    C. **The State takes exception with Finding of Fact No. 9 entered by the trial court (finding there was evidence the defendant’s vehicle was impounded) because this finding is not consistent with the evidence that was presented at the CrR 3.6 hearing. .... 1**

III. STATEMENT OF THE CASE .....2

    A. SUBSTANTIVE FACTS.....2

    B. PROCEDURAL HISTORY.....4

IV. ARGUMENT.....6

    A. **Under art. I, § 7 and Arizona v. Gant, evidence of the firearm IS admissible because the defendant was arrested for the crime of felony harassment (threatening to shoot people at a bank) and the officer had reason to believe the defendant’s vehicle contained evidence of the crime of arrest. ....6**

    B. **In the alternative, under the “open view” doctrine, evidence of the firearm Is admissible because the officer observed a firearm case (containing the firearm) on the front passenger seat of the defendant’s vehicle, while she was standing in a public parking lot and looking through a window of the vehicle.....20**

C.	<b>The State takes exception with Finding of Fact No. 9 entered by the trial court (finding there was evidence the defendant’s vehicle was impounded) because this finding is not consistent with the evidence that was presented at the CrR 3.6 hearing.</b> .....	30
V.	<b>CONCLUSION</b> .....	32

## TABLE OF AUTHORITIES

### Cases

<u>Arizona v. Gant</u> , ___ U.S. ___, 129 S. Ct. 1710, 1721, 173 L. Ed. 2d 485 (2009).....	1, 4, 6, 9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 24, 32, 33
<u>Arkansas v. Sanders</u> , 442 U.S. 753, 761, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979).....	22
<u>Chimel v. California</u> , 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).....	7, 8
<u>Ex parte Hurn</u> , 92 Ala. 102, 112, 9 So. 515, 519-520 (1891).....	12
<u>Green Thumb, Inc. v. Tiegs</u> , 45 Wn. App. 672, 676, 726 P.2d 1024).....	7
<u>King v. Barnett</u> , 3 Car. & P. 600, 601 (1829).....	12
<u>King v. Kinsey</u> , 7 Car. & P. 447 (1836).....	12
<u>King v. O'Donnell</u> , 7 Car. & P. 138 (1835).....	12
<u>New York v. Belton</u> , 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).....	8, 9, 10, 14, 15
<u>Olmstead v. Dep't of Health</u> , 61 Wn. App. 888, 893, 812 P.2d 527 (1991).....	7
<u>Queen v. Frost</u> , 9 Car. & P. 129, 131-134 (1839).....	12
<u>Smith v. Jerome</u> , 47 Misc. 22, 23-24, 93 N. Y. S. 202, 202-203 (1905)...	11
<u>Spalding v. Preston</u> , 21 Vt. 9, 15 (1848).....	12
<u>State v. Bakke</u> , 44 Wn. App. 830, 840; 723 P.2d 534 (1986).....	6, 7, 22
<u>State v. Counts</u> , 99 Wn.2d 54, 60, 659 P.2d 1087 (1983).....	22
<u>State v. Gibson</u> , COA No. 37663-6-II (Nov. 9, 2009) 21, 22, 23, 24, 26, 29	
<u>State v. Grib</u> , COA No. 27292-3-II, 218 P.3d 644; 2009 Wash. App. LEXIS 2677 (Oct. 27, 2009).....	14, 15, 19
<u>State v. Gunwall</u> , 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).....	7
<u>State v. Jeannotte</u> , 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).....	7
<u>State v. Ladson</u> , 138 Wn.2d 343, 356, 979 P.2d 833 (1999).....	6
<u>State v. McCormick</u> , COA No. 37651-2-II (Sept. 23, 2009).....	14, 19
<u>State v. Ozuna</u> , 80 Wn. App. 684, 911 P.2d 395 (1996).....	27, 28, 29
<u>State v. Parker</u> , 139 Wn.2d 486, 496, 987 P.2d 73 (1999).....	7
<u>State v. Patterson</u> , 112 Wn.2d 731, 735, 774 P.2d 10 (1989).....	28
<u>State v. Patton</u> , No. 80518-1, 2009 Wash. LEXIS 975.....	13, 14, 15, 19
<u>State v. Perez</u> , 41 Wn. App. 481, 482, 704 P.2d 625 (1985).....	21
<u>State v. Remboldt</u> , 64 Wn. App. 505, 510, 827 P.2d 282 (1992).....	22
<u>State v. Ringer</u> , 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983).....	7, 8, 9
<u>State v. Ross</u> , 106 Wn. App. 876, 880, 26 P.3d 298 (2001), review denied, 145 Wn.2d 1016 (2002).....	7

<u>State v. Seagull</u> , 95 Wn.2d 898, 632 P.2d 44 (1981).....	20, 21
<u>State v. Simpson</u> , 95 Wn.2d 170, 189, 622 P.2d 1199 (1980) .....	31
<u>State v. Smith</u> , 88 Wn.2d 127, 137-38, 559 P.2d 970 (1977).....	21, 22
<u>State v. Snapp</u> , COA No. 37210-0-II, 2009 Wash. App. LEXIS 2771 (November 9, 2009).....	14, 16, 17, 18, 20
<u>State v. Stroud</u> , 106 Wn.2d 144, 150-151, 720 P.2d 436 (1986).....	9, 22
<u>State v. Williams</u> , 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984).....	31
<u>State v. Winterstein</u> , No. 80755-8, 2009 Wash. LEXIS 1073 (December 3, 2009) .....	32
<u>State v. Young</u> , 28 Wn. App. 412, 419, 624 P.2d 725 (1981).....	22
<u>Thatcher v. Weeks</u> , 79 Me. 547, 548-549, 11 A. 599, 599-600 (1887).....	12
<u>Thornton v. United States</u> , 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed 2d 905 (2004).....	11, 12
<u>United States v. Ross</u> , 456 U.S. 798, 820-821, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).....	13
<u>United States v. Wilson</u> , 163 F. 338, 340, 343 (CC SDNY 1908).....	11
<b>Statutes</b>	
RCW 9.41.040(2)(a).....	4
RCW 9A.46.020(1)(a)(i), (2)(b)(ii) .....	4
<b>Rules</b>	
CrR 3.6.....	1, 4, 5, 30
<b>Constitutional Provisions</b>	
Wash. Const. art. I, § 7 .....	1, 6

## I. ASSIGNMENT OF ERROR

Under Wash. Const. art. I, § 7 and Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 1721, 173 L. Ed. 2d 485 (2009), the trial court erred when it granted the defendant's motion to suppress evidence of a firearm that was discovered in the defendant's vehicle, pursuant to a search incident to arrest.

## II. ISSUES PRESENTED

- A. **Under art. I, § 7 and Arizona v. Gant, evidence of the firearm was admissible because the defendant was arrested for the crime of felony harassment (threatening to shoot people at a bank) and the officer had reason to believe the defendant's vehicle contained evidence of the crime of arrest.**
- B. **In the alternative, under the "open view" doctrine, evidence of the firearm was admissible because the officer observed a firearm case (containing the firearm) on the front passenger seat of the defendant's vehicle, while she was standing in a public parking lot and looking through a window of the vehicle.**
- C. **The State takes exception with Finding of Fact No. 9 entered by the trial court (finding there was evidence the defendant's vehicle was impounded) because this finding is not consistent with the evidence that was presented at the CrR 3.6 hearing.**

### III. STATEMENT OF THE CASE

#### A. SUBSTANTIVE FACTS

On November 13, 2008, at approximately 12:20 p.m., the defendant entered the Washington Mutual Bank in Washougal, Washington, demanding assistance with his bank account. (RP 3, 6). The defendant (a known bank customer) spoke to a bank teller named Jaqueline Cowen. Cowen could not provide the defendant with the assistance he demanded, which made the defendant visibly upset. The defendant exclaimed to Cowen “I am sick of everyone wanting to take my money; I am sick of having a bank account; I feel like going and getting a gun and shooting everyone.” (RP 4). The defendant then fled the bank.

Cowen called the Washougal Police department to report the threat. (RP 3). Sergeant Kim Yamashita responded to the call. (RP 3). Sergeant Yamashita said it was not common to get calls like this from the bank; therefore, she treated the call very seriously. (RP 4-5).

Sergeant Yamashita was familiar with the defendant from prior dispatches involving the defendant and assaultive behavior. (RP 5). Yamashita located the defendant approximately two hours after she received the initial call regarding the threat. (RP 5). The defendant was exiting a Napa Auto Parts store and returning to his vehicle, which was in

the store's parking lot. Id. Napa Auto Parts is approximately one-half mile away from the bank where the threat was made. (RP 5).

Yamashita approached the defendant and asked him to exit the vehicle. (RP 21.) She then placed the defendant in handcuffs, advised him he was under arrest for the crime of felony harassment, and placed him in the back of her patrol car. (RP 7, 21).

Yamashita searched the defendant's vehicle incident to arrest. (RP 8). However, prior to opening any doors to the vehicle, Yamashita stood in the public parking lot, next to the defendant's vehicle, and from that vantage point, observed, through the front passenger window, a black case that said "Taurus" on it. (RP 9-10). The case was perched on the front passenger seat. (RP 9-10). Based on her training and experience, Yamashita knew that a "Taurus" was a common type of gun immediately recognized the black case as a "gun box." (RP 10). Yamashita testified that her gun came in a very similar, if not the same, case. (RP 10). When asked what she believed was inside the gun case, Yamashita responded, without hesitation: "a gun." (RP 10). Yamashita believed the gun was evidence of the crime of arrest (felony harassment). (RP 17-18). Yamashite testified: "based on [the defendant's] statements that he was gonna get a gun and shoot everyone, ... I felt like we had stopped

something bad from happening, [I] felt like that was his intent – [t]o go back to the bank with that gun”. (RP 17-18).

Sergeant Yamashita entered the defendant’s vehicle and seized the gun case. (RP 10-11). The case was unlocked. (RP 11). Yamashita opened the case and discovered it contained a 9 millimeter Taurus Semi-automatic hand gun. (RP 11). Yamashita did not obtain a warrant to search the vehicle.<sup>1</sup>

#### B. PROCEDURAL HISTORY

On November 17, 2008, the Office of the Clark County Prosecuting Attorney charged the defendant with one count of Felony Harassment – threat to kill (RCW 9A.46.020(1)(a)(i), (2)(b)(ii)), and one count of Unlawful Possession of a Firearm in the Second Degree – prior conviction for crime of domestic violence (RCW 9.41.040(2)(a)). (CP 3).<sup>2</sup>

On May 11, 2009, the defendant filed a CrR 3.6 motion to suppress, in light of the United States Supreme Court’s ruling in Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L.Ed 2d 485 (2009). On

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<sup>1</sup> Following his arrest, Sgt. Yamashita learned the defendant had a 2008 conviction for violating a domestic violence no contact order (which prohibited him from possessing a firearm). This information was not known to Yamashita at the time of the search and, therefore, was not raised during the CrR 3.6 hearing.

<sup>2</sup> The State filed an Amended Information on January 30, 2009, adding one count of Attempted Assault in the Second Degree (CP 11-12). The State is not seeking to re-file an Attempted Assault in the Second Degree charge and does not the Court to review this charge.

June 29, 2009, the trial court granted the defendant's motion to suppress, following a hearing.

On July 16, 2009, the court entered findings of fact and conclusions of law as to its CrR 3.6 ruling. (CP 36). The court's findings of fact and conclusions of law are attached as "Appendix A" and incorporated by reference herein.

In pertinent part, the court found there was probable cause to believe the defendant committed the crime of felony harassment. (CP 36, Finding of Fact No.3, p.2). It also found the officer arrested the defendant prior to searching his vehicle. (CP 36, Finding of Fact No.5, p.2). Further, the court found, by looking through the window of the defendant's vehicle, the officer was readily able to observe a case she reasonably believed was used to transport firearms. (CP 36, Finding of Fact No.6, p.2). The court concluded the gun case was in "open view" and the officer had probable cause to believe the gun case (presuming it contained a gun) was evidence of the crime of felony harassment. (CP 36, Conclusion of Law No. 12-13, p.3). However, the court went on to conclude the warrantless search of the defendant's vehicle was not justifiable as a search incident to arrest because the defendant was secured in the officer's patrol car and was unable to access the vehicle at the time of the search. (CP 36, Conclusion of Law No. 15, p.3-4). Additionally,

the court concluded no exigent circumstances justified the warrantless seizure of the gun/gun case. (CP 36, Conclusion of Law No. 16, p.4).

On July 23, 2009, the State filed a motion for reconsideration of the court's findings of fact and conclusions of law. (CP 40). Following a hearing on July 24, 2009, the court denied the State's motion for reconsideration. On that same date, the court granted the State's motion to dismiss, without prejudice, count one (Felony Harassment) and count two (Unlawful Possession of a Firearm in the Second Degree), because proof of either allegation was substantially impaired by the Court's granting of the defendant's motion to suppress. (CP 49, 50-51).

#### IV. ARGUMENT

- A. **Under art. I, § 7 and Arizona v. Gant, evidence of the firearm IS admissible because the defendant was arrested for the crime of felony harassment (threatening to shoot people at a bank) and the officer had reason to believe the defendant's vehicle contained evidence of the crime of arrest.**

The Fourth Amendment and article I, section 7 of the Washington Constitution prohibit unreasonable intrusions into an individual's private affairs, without the authority of law. State v. Bakke, 44 Wn. App. 830, 840, 723 P.2d 534 (1986). As such, warrantless searches are generally considered per se unreasonable. State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999). This is a rule that extends to vehicles. State v.

Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). Further, our courts have found the privacy protections provided under article I, section 7, are greater than those that are provided under the federal constitution. See Bakke, 44 Wn. App. at 840, (citing State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986)). With that said, the courts have consistently recognized the validity of specially established exceptions to the warrant requirement – exceptions that include a “search incident to arrest.” Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); State v. Ringer, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983).

In reviewing a trial court’s ruling on a motion to suppress, the appellate court examines whether substantial evidence supports the trial court’s findings of fact, and whether those findings support the trial court’s conclusions of law. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), review denied, 145 Wn.2d 1016 (2002). Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997) (quoting Olmstead v. Dep’t of Health, 61 Wn. App. 888, 893, 812 P.2d 527 (1991) (quoting Green Thumb, Inc. v. Tiegs, 45 Wn. App. 672, 676, 726 P.2d 1024)). Unchallenged findings are treated as verities on appeal. Ross, 106 Wn. App. at 880. Conclusions of law are reviewed de novo. Ross, at 880.

In Chimel, the U.S. Supreme Court held a search incident to arrest may only include “the arrestee’s person and the area ‘within his immediate control’...the area from within which he might gain possession of a weapon or destructible evidence.” Chimel, 395 U.S. at 763, 89 S. Ct 2034, 23 L. Ed. 2d 685.

In New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), the Supreme Court applied its holding in Chimel to the context of a vehicle search incident to arrest. Belton, 453 U.S. at 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (holding, when an officer lawfully arrests the occupant of a vehicle, he may, incident to the occupant’s arrest, search the passenger compartment of the automobile and any containers therein).

The Washington Supreme Court interpreted the search incident to arrest exception, as it applied to vehicle searches, in State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983). In Ringer, the Court found the search incident to arrest exception was born out of a concern for protecting officer safety and preventing the destruction of evidence; as such, it held a “totality of the circumstances” test should applied on a case-by-case basis to determine whether these concerns existed, so as to justify a warrantless search. Ringer, 100 Wn.2d at 693-700.

Only three years later, the Washington Supreme Court overruled the totality of the circumstances test adopted in Ringer, finding it was

unfairly burdensome to officers in the field who must make decisions at a moment's notice. State v. Stroud, 106 Wn.2d 144, 150-151, 720 P.2d 436 (1986) (“the Ringer holding makes it virtually impossible for officers to decide whether or not a warrantless search would be permissible, [w]eighing the ‘totality of the 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”). Instead, the Court adopted the “bright line rule” set forth in Belton. Stroud, 106 Wn.2d 144 at 150.

In Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 1721, 173 L. Ed. 2d 485 (2009), the U.S. Supreme Court revisited its holding in Belton, in order to examine how it had been applied by the lower courts over the years, in the context of vehicle searches incident to arrest.

Gant was arrested for driving with a suspended license. Gant, 129 S. Ct. at 1714. Once handcuffed and secured within the officer’s patrol car, the officer conducted a warrantless search of Gant’s vehicle (“incident to arrest”). Gant, at 1714. During the vehicle search, the officer discovered cocaine in the pocket of a jacket located in the backseat. Id. This discovery resulted in Gant being charged with, and convicted of various drug-related offenses. Id., at 1715. At the time of the search, the officer had no reason to believe Gant had the ability to access his vehicle

and had no reason to believe he would find evidence related to the crime of arrest inside the vehicle. Id., at 1716.

The Court reiterated the primary purpose behind the search incident to arrest exception was to protect arresting officers and to safeguard evidence from tampering with or destruction. Gant, at 1716. An arrestee presented neither a threat to officer safety nor a threat to the preservation of evidence when he was handcuffed and secured in a patrol car. Id. The fact that searches such as the one conducted in Gant had been sanctioned by the lower courts, was indicative to the Court that the search incident to arrest exception (as set forth in Belton) had been stretched to a point that was an “anathema” to the Fourth Amendment. Id., at 1721.

According to the Court,

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...[while giving] police officers unbridled discretion to rummage at will among a person’s private affairs.

-(Gant, at 1720).

Consequently, the Court upheld the Arizona Supreme Court’s conclusion that the search of Gant’s vehicle was unreasonable under the Fourth Amendment. Gant, at 1713. However, the Court’s review of the

search incident to arrest exception did not end here. The Court went on to find there were other circumstances unique to the vehicle context that justified a search incident to arrest, even when the arrestee was secured in a patrol vehicle and presented no risk to the officer or to the preservation of evidence. Id., at 1719. These other circumstances unique to the vehicle context included situations in which it was “reasonable to believe evidence of the crime of arrest might be found in the vehicle”. Id., citing Thornton v. United States, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed 2d 905 (2004) (Scalia, J., concurring in judgment) (finding, in other cases, “the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein”).

In making this finding, the Court relied on Justice Scalia’s concurring opinion in Thornton. Id. In Thornton, Justice Scalia noted there was a long history of the courts permitting warrantless searches incident to arrest, which had nothing to do with the arrestee’s ability to harm the officer or to tamper with evidence. Thornton, 541 U.S. at 630. Instead, it was based on “a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.” Thornton, at 629, citing United States v. Wilson, 163 F. 338, 340, 343 (CC SDNY 1908); Smith v. Jerome, 47 Misc. 22, 23-24, 93 N. Y. S. 202, 202-203 (1905); Thornton v. State, 117 Wis. 338, 346-347, 93 N. W. 1107, 1110

(1903); Ex parte Hurn, 92 Ala. 102, 112, 9 So. 515, 519-520 (1891); Thatcher v. Weeks, 79 Me. 547, 548-549, 11 A. 599, 599-600 (1887); 1 F. Wharton, Criminal Procedure §97, pp. 136-137 (J. Kerr 10th ed. 1918); 1 J. Bishop, Criminal Procedure §211, p. 127 (2d ed. 1872); cf. Spalding v. Preston, 21 Vt. 9, 15 (1848) (seizure authority); Queen v. Frost, 9 Car. & P. 129, 131-134 (1839) (same); King v. Kinsey, 7 Car. & P. 447 (1836) (same); King v. O'Donnell, 7 Car. & P. 138 (1835) (same); King v. Barnett, 3 Car. & P. 600, 601 (1829) (same).

Justice Scalia stated this basis for a warrantless search incident to arrest was not antithetical to the Fourth Amendment; rather, it represented a reasonable balancing of individual privacy interests with the needs for effective and efficient law enforcement. See Thornton, at 630. Justice Scalia went on to state:

[t]here 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 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.

With its reliance on the rationale set forth by Justice Scalia in Thornton, the Court in Gant was careful to point out that this additional

basis for a warrantless vehicle search was not to be confused with the “automobile exception” to the warrant requirement. Gant, at 1721. Under the automobile exception, an officer may search a vehicle “when there is probable cause to believe a vehicle contains evidence of criminal activity”. Id., citing United States v. Ross, 456 U.S. 798, 820-821, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982) (emphasis added). The Court noted the automobile exception (though still valid under the federal constitution), was “broader” than the additional basis it was setting forth. Id. This was the case because the automobile exception permitted warrantless vehicle searches for evidence relevant to offenses other than the offense of arrest; whereas, the additional basis being set forth by the Court in Gant applied only to evidence related to the offense of arrest. Id.<sup>3</sup>

Based on its finding that it is unreasonable to conduct a warrantless vehicle search unless the arrestee is within reaching distance of his vehicle or the officer has reason believe the arrestee’s vehicle contains evidence of the crime of arrest, the Court in Gant held:

[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching

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<sup>3</sup> The State acknowledges that, under article I, section 7, the automobile exception is not recognized in Washington as a valid exception to the warrant requirement. State v. Patton, No. 80518-1, at \*6, 2009 Wash. LEXIS 975. The State does not ask the Court to reverse the trial court’s decision to suppress evidence pursuant to the automobile exception; rather it asks the Court to reverse the trial court’s decision because the officer had reason to believe the defendant’s vehicle contained evidence of the offense of arrest, to wit: felony harassment. Gant, at 1721.

distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the crime of arrest, [w]hen 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, at 1723-1724 (thereby "limiting" the holding it previously set forth in Belton)).

The Washington Courts have reviewed a number of cases that concern the lawfulness of warrantless vehicle searches incident to arrest, in light of Gant. State v. Snapp, COA No. 37210-0-II, 2009 Wash. App. LEXIS 2771 (November 9, 2009) (published in part); State v. Grib, COA No. 27292-3-II, 218 P.3d 644; 2009 Wash. App. LEXIS 2677 (Oct. 27, 2009); State v. Patton, No. 80518-1, 2009 Wash. LEXIS 975 (Oct. 22, 2009); State v. McCormick, COA No. 37651-2-II (Sept. 23, 2009).

Many of these cases have involved fact patterns similar to the underlying facts in Gant and, therefore, have resulted in holdings similar to the Court's holding in Gant. For example, in State v. Grib, Division III held a warrantless vehicle search incident to arrest was not lawful when Grib was arrested for the offenses of attempt to elude and assault in the third degree, and was secured and unable to access his vehicle at the time of the search. Grib, No. 27292-3-II, at \*1-2; see also Patton, No. 80518-1, at \*22 (holding search incident to arrest was not lawful when Patton was arrested for an outstanding warrant for failing to appear in court and was

cuffed and secured in the officer's patrol car at the time of the search); and see McCormick, No. 37651-2-II, at \*1, (holding search incident to arrest was not lawful when the driver, who was arrested for outstanding warrants and for driving with a suspended license, was secured in the officer's patrol car at the time of the search, and when McCormick was a passenger in the vehicle, and had been removed from the vehicle at the time of the search).

In each of these cases, the question presented was whether it was "per se" lawful for an officer to conduct a warrantless vehicle search incident to arrest. In each case, the Courts held, pursuant to Gant, it was no longer "per se" lawful to conduct such a search. The Courts thereby effectively limited the holding in Stroud in the same way the U.S. Supreme Court limited the holding in Belton.

However, the reviewing Courts in these cases were never asked whether the warrantless searches would have been permissible had the officers had reason to believe the vehicles contained evidence of the crimes of arrest. In fact, in Patton, the Supreme Court made it clear it was not addressing that issue: "[t]he State makes no argument that it had probable cause to search Patton's car." Patton, at \*6. Similarly, in Grib, the Appellate Court recognized this second basis, under Gant, to justify a search incident to arrest, but declined to address it. Grib, at \*7, citing

Gant, at 1719 (stating “[t]he Court [in Gant] also held that it would be acceptable for officers to search an arrestee’s vehicle related to the arrested offense...[b]ecause this rationale was not used to justify the search, we do not address it here).

In contrast, in State v. Snapp, the question was raised as to whether a warrantless vehicle search was lawful when the officer had reason to believe the vehicle contained evidence of the offense of arrest. In Snapp, a state trooper initiated a traffic stop of Snapp’s vehicle when he saw debris hanging from the vehicle’s window and noticed Snapp’s seatbelt was patched together with what appeared to be a rock-climbing carabiner. Snapp, No. 37210-0-II, at \*1. When Snapp attempted to retrieve his registration from his glove box, the trooper noticed a plastic bag containing white powder inside Snapp’s glove box. Snapp, at \*1. The trooper observed Snapp exhibiting signs of being under the influence of drugs. Id., at \*2. The trooper had Snapp exit the vehicle, at which point Snapp informed him there was a methamphetamine pipe underneath the driver’s seat. Id. The trooper retrieved the pipe and, at that time, arrested Snapp for possession of drug paraphernalia. Id. After he secured Snapp in the back of his patrol car, the trooper searched Snapp’s vehicle. Id. Inside the vehicle, he discovered items related to identity theft. Id. Based on the evidence discovered during the vehicle search, Snapp was charged

with and convicted of multiple counts related to identity theft (in addition to being charged with possession of drug paraphernalia and other crimes). Id., at \*3.

In its opinion, Division II acknowledged: “[t]he trooper was not looking for weapons, nor was he concerned that either item contained evidence that could be immediately destroyed, [b]ut he was searching for drugs.” Id., at \*2. The Court found it was reasonable for the trooper to arrest Snapp for the crime of possession of drug paraphernalia and it was reasonable for the trooper to believe Snapp’s vehicle contained evidence of the crime of arrest. Id. at \*9-10 (finding the proximity of the pipe to a controlled substance “would help determine whether the pipe was... used for paraphernalia”). Therefore, the Court held it was reasonable for the trooper to search Snapp’s vehicle for evidence of the crime of arrest, even though Snapp was secured in the trooper’s patrol car at the time of the search. Id. at \*10, citing Gant, at 1719 (“police officers may search a vehicle incident to arrest only if the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe that the vehicle might contain evidence of the crime of arrest”) (emphasis added).

The facts in our case are analogous to the facts in Snapp. Similar to Snapp, the defendant in our case was arrested for a crime for which

supporting evidence could be found in the vehicle. The defendant in our case was arrested for felony harassment. Granted, in most cases, an officer would not expect to find tangible evidence of this crime; however, here, the specific nature of the defendant's threat (that he wanted to "get a gun" and "shoot people") made it likely that a gun would, in fact be found in the defendant's vehicle. (RP 4). Evidence of a gun would support the offense of arrest because it would make it more likely (1) that the threat had been made, and (2) that the defendant intended to carry out his threat.

Further, similar to Snapp, in our case there was a close proximity in space and time between when and where the defendant was arrested and when and where the crime for which he was arrested had occurred. The defendant was located, with his vehicle, less than one-half mile away from the bank where he made the threat, and less than two hours after the threat had been made. (RP 5). Both of these factors increased the likelihood that evidence of the crime of felony harassment (the crime of arrest) would be located inside his vehicle.<sup>4</sup>

The only fact that distinguishes our case from Snapp is that, unlike in Snapp, Sergeant Yamashita did not have to engage in any speculation as

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<sup>4</sup> The trial court agreed there was probable cause to believe the defendant committed the crime of felony harassment (CP 36, Finding of Fact No.3, p.2). The court also agreed it was reasonable for Sgt. Yamashita to believe the case she observed was used to transport firearms (CP 36, Finding of Fact No.6, p.2). Further, the court agreed it was reasonable for Sgt. Yamashita to believe the gun case was evidence of the crime of arrest, presuming it contained a gun. (CP 36, Conclusion of Law No. 12-13, p.3).

to whether evidence of the offense of arrest would, in fact, be found in the defendant's vehicle. This is the case because Sergeant Yamashita could see the defendant's gun case (which she believed contained a gun) when she looked through his car window while standing in the Napa Auto Parts parking lot. (RP 9-10).

In contrast, the facts in our case are distinguishable from those which were presented in Gant, Patton, Grib, and McCormick. Namely, the officers in Gant, Patton, Grib, and McCormick, had no reason to believe evidence of the offenses of arrest would be found in the course of the vehicle searches, when the defendants were arrested for driving with a suspended license, outstanding warrants, attempting to elude and officer and assaulting an officer, and for being a passenger in a car where the driver was arrested for outstanding warrants. Gant, at 1714; Patton, at \*22; Grib, at \*1-2; and McCormick, at \*1. In each of these cases, the officers used a traffic stop, and subsequent arrest, as subterfuge in order to "rummage at will" among the defendants' property in the hopes of finding evidence of any criminal conduct. Gant, at 1720. The officers engaged in the sort of "unfettered police discretion" that is antithetical to the privacy protections provided under the fourth amendment and under article I, section 7. Their conduct is that which is now specifically proscribed under the Court's holding in Gant.

In contrast, the officer in our case conducted a search that was a based on a reasonable belief the defendant's vehicle contained evidence of the offense of arrest. This is in no way similar to the "fishing expeditions" engaged in by the officers in the above cases. Therefore, the officer's search in our case is permissible under the fourth amendment, pursuant to the U.S. Supreme Court's holding in Gant. Further, the officer's search was permissible even under the stricter constitutional protections of article I, section 7, pursuant to Division II's holding in Snapp.

**B. In the alternative, under the "open view" doctrine, evidence of the firearm is admissible because the officer observed a firearm case (containing the firearm) on the front passenger seat of the defendant's vehicle, while she was standing in a public parking lot and looking through a window of the vehicle.**

The Court's holding in Gant limited the application of the "search incident to arrest" exception to the warrant requirement; however, it did not affect the lawfulness of other, previously recognized, exceptions to the warrant requirement. Gant, 1721 (holding "[o]ther established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand").

The "open view" doctrine is one of the recognized exceptions to the warrant requirement. State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981). Evidence discovered in "open view", as opposed to "plain view,"

is not the product of a “search” within the meaning of the fourth amendment or article I, section 7. Seagull, 95 Wn.2d at 901-02. The court in Seagull explained that in the “plain view” situation “the view takes place *after* an intrusion into activities or areas as to which there is a reasonable expectation of privacy.” Seagull, at 901-02. In contrast, in the “open view” situation, the observation takes place from a non-intrusive vantage point, where the object of the observation is not subject to any reasonable expectation of privacy. Id.

An item located inside an automobile, in a location that is visible from a non-intrusive vantage point, is in “open view”. State v. Perez, 41 Wn. App. 481, 482, 704 P.2d 625 (1985); State v. Gibson, COA No. 37663-6-II (Nov. 9, 2009), at \*9. “A person has a diminished expectation of privacy in the visible contents of an automobile parked in a public place.” Gibson, No. 37663-6-II, at \*10.

An officer has not conducted a search when he observes an item in open view; however, in order to seize the item without a warrant, the officer must have probable cause to believe the item is “evidence of a crime,” and must be faced with exigent circumstances. Gibson, at \*11, citing State v. Smith, 88 Wn.2d 127, 137-38, 559 P.2d 970 (1977).

Probable cause is not proof beyond a reasonable doubt; rather, it is based on “probabilities.” State v. Remboldt, 64 Wn. App. 505, 510, 827

P.2d 282 (1992). The officer's experience and expertise, and the information available to him at the time, are critical when reviewing determinations of probable cause. Remboldt, 64 Wn. App. at 510.

The courts have never precisely defined "exigent circumstances;" however, they have held what constitutes an exigent circumstance in the context of vehicle searches, should be interpreted more broadly than what constitutes an exigent circumstance in the context of building searches. Gibson, at \*12, citing State v. Young, 28 Wn. App. 412, 419, 624 P.2d 725 (1981); Stroud, at 147 (quoting Arkansas v. Sanders, 442 U.S. 753, 761, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)) ("[t]he configuration, use, and regulation of automobiles may often dilute the reasonable expectation of privacy that exists with respect to differently situated property").

Washington Courts have consistently held "'danger to the arresting officer or to the public' can constitute an exigent circumstance." Gibson, at \*12, (quoting State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)); State v. Bakke, 44 Wn. App. 830, 834, 723 P.2d 534 (1986), review denied, 107 Wn.2d 1033 (1987).

Further, the level of exigency required to justify a warrantless search is proportional to the reasonableness of the expectation of privacy under the particular circumstances. See Gibson, at \*12.

In State v. Gibson, Division II reviewed the “open view” doctrine in light of the Supreme Court’s holding in Gant. State v. Gibson, No. 37663-6-II. Gibson was stopped for a traffic infraction and was ultimately arrested for an outstanding arrest warrant. Gibson, at \*2. After Gibson was handcuffed and placed in the back of the officer’s patrol vehicle, the officer walked around the Gibson’s vehicle and, by looking through the windows, observed items that included a bottle of “Drano,” a bottle of “Drain Out,” and a bag of ammonia sulfate. Id. at \*3. Based on his training and experience, the officer recognized these items as being commonly used to manufacture methamphetamine. Id. The officer knew moving the items around without proper safety equipment could be harmful to him or to other officers. Id., at \*13. Further, he knew that “leaving such chemicals in Gibson’s vehicle, which was parked in a public area, also posed a potential threat to passersby.” Id. The officer entered the vehicle in order to secure the items; after which he obtained a warrant to seize them. Id., at \*3.

The Court in Gibson found the “open view” doctrine applied to the facts of the case because Gibson’s vehicle was parked in a public parking lot and the officer observed the drain cleaner and chemicals by “merely looking through the vehicle’s windows”. Id., at \*11. Further, the Court found the officer had probable cause to believe the items were “evidence

of a crime,” based on his extensive training and experience in identifying ingredients typically used in manufacturing methamphetamine. Id., at \*12. Lastly, the court found exigent circumstances justified a warrantless seizure of the items. Id., at \*13. In making this finding of exigency, the Court did not consider whether it was impractical for the officer to obtain a warrant or if the vehicle could have been impounded; rather, it found a warrantless seizure was justified because the chemicals and drain cleaner presented a potential risk to the safety of officers and to the public. Id.<sup>5</sup>

For these reasons, the Court held the officer’s warrantless search was permissible under the “open view” doctrine; consequently it declined to review the case under Gant. Id., at \*8. In reaching its holding, the Court balanced Gibson’s reasonable expectation of privacy (as to the chemicals and drain cleaner left in open view inside his vehicle) against the officer’s responsibility to protect the public from the danger potentially presented by these items. Id. The Court stated:

[c]ombining the minimal expectation of privacy that Gibson had in the contents of his vehicle displayed in open view with the exigencies of safety to officers and to the public, we hold that the search was reasonable under the Fourth Amendment.

-(Gibson, at \*13.)

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<sup>5</sup> Although the officer obtained a warrant to seize the items, the Court stated, due to the presence of exigent circumstances, he was not required to do so. Gibson, at \*13.

The facts in our case are analogous to those presented in Gibson. First, the gun case (containing the gun) was in open view. The defendant's vehicle was parked in a public parking lot (Napa Auto Parts), the gun case was perched on the front passenger seat, and the case was readily visible to Sergeant Yamashita as she stood in the lot and looked through the car's front passenger window.<sup>6</sup> Gibson, at \*11.

Second, based on her training and experience, Sergeant Yamashita had probable cause to believe the gun case contained a gun. Yamashita knew the name on the case ("Taurus") was the name of a gun; she knew the case was the kind typically used to house guns; and she knew her gun was kept in a very similar, if not the same, case. (RP 10). Further, Sergeant Yamashita had probable cause to believe the gun case (containing the gun) was evidence of the crime of arrest: the defendant had allegedly threatened to get a gun and shoot people at a bank – evidence of the gun made it more likely that (1) the threat had actually been made, and (2) the defendant intended to carry it out. Sergeant Yamashita testified at the suppression hearing: "based on [the defendant's] statements that he was gonna get a gun and shoot everyone, ... I felt like we had stopped something bad from happening, [I] felt like that was his intent – [t]o go back to the bank with that gun." Id. In fact, Sergeant

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<sup>6</sup> The trial court agreed the gun case was in open view. (CP 36, Conclusion of Law No. 12-13, p.3).

Yamashita had more specified probable cause than that which the officer in Gibson had, because she had probable cause to believe the defendant's vehicle contained evidence of the crime of arrest, not simply evidence of "criminal activity."<sup>7</sup> Contrast Gibson, at \*12.

Lastly, the gun in the defendant's vehicle gave rise to an exigent circumstance that justified its warrantless seizure. In Gibson, the Court held the chemicals and drain cleaner gave rise to an exigent circumstance because these items were dangerous, if they fell into untrained hands. This potential danger was exacerbated by the fact the items were readily visible to any passersby who looked through the windows of Gibson's vehicle, and the fact that there were likely to be "passersby," since Gibson's vehicle was located in a public parking lot. Gibson, at \*13. Similarly, in our case, a gun is a dangerous weapon that is capable of causing serious injury or death when it falls into untrained hands. Also similar to Gibson, the danger presented by the gun was exacerbated by the fact that (1) the gun was readily identifiable as such (given that it was contained in a black case that said "Taurus" on it); (2) the gun case was perched atop the front passenger seat of the vehicle, where it was visible to any passersby; and (3) the vehicle was located in a public parking lot of a

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<sup>7</sup> The trial court agreed Sgt. Yamashita had probable cause to believe the gun case (presuming it contained a gun) was evidence of the crime of felony harassment (CP 36, Conclusion of Law No. 12-13, p.3).

popular auto parts store, in the middle of the day, where it was likely to be encountered by numerous passersby.<sup>8</sup>

Despite these facts, the trial court in our case relied on Division III's opinion in State v. Ozuna, 80 Wn. App. 684, 911 P.2d 395 (1996) to conclude exigent circumstances did not exist. (CP 36, Conclusion of Law No. 16, p.4). The officer in Ozuna responded to a report of a vehicle prowl (a witness called to report he saw two men running from his car at the same time heard his car's alarm go off). Ozuna, 80 Wn. App at 686. Near the area of the report, the officer observed a parked, unoccupied, vehicle that was partially obscured by bushes (the two men were seen running in a direction opposite to where the car was located). Ozuna, at 686, 689. The officer ran a record's check on the vehicle and discovered it belonged to Shanedoah Ozuna, a known criminal. Id., at 686. Looking through the vehicle's windows, the officer observed an "expensive-looking briefcase and attaché case" inside the vehicle, which appeared to oddly contrast with the "unkempt condition" of the car. Id., at 689. The officer concluded the items inside the vehicle were evidence from the

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<sup>8</sup> In addition, the defendant testified at the suppression hearing that he gave his car keys to an officer because he wanted the officer to give the keys to his "to a good friend." RP 56. No evidence was presented as to whether this "friend" was ever contacted or whether he/she would have been available to pick up the defendant's car. However, the defendant's friend could be viewed as a potential accomplice, capable of removing evidence, which would have created an additional exigent circumstance. State v. Young, 28 Wn. App. 412, 419, 624 P.2d 725 (1981) (finding an exigent circumstance when the defendant is in custody but his accomplices or others acting for him have not yet been apprehended).

vehicle prowl (even though no items had been reported stolen). He proceeded to open the vehicle, flip the identification tag on a gym bag in the backseat, and ultimately learned the items belonged to a victim of an unrelated vehicle prowl. Id., at 687. The defendant was charged with, and convicted of, one count of possession of stolen property in the second degree. Id.

The Court in Ozuna found the officer had no reason to believe the items he observed in Ozuna's car were evidence of a crime, let alone evidence of the reported vehicle prowling. Ozuna, at 689. Further, it found even if the officer had probable cause to believe the items were evidence of a crime, no exigent circumstances existed to justify a warrantless search of the items. Id., at 690; citing State v. Patterson, 112 Wn.2d 731, 735, 774 P.2d 10 (1989) (reiterating the fact that mere mobility of a vehicle is not enough of an exigency to justify a warrantless search).

The facts and circumstances in our case are distinguishable from those presented in Ozuna. First, in our case, unlike in Ozuna, there was no question as to the identity of the suspect. Second, the suspect in our case was located alongside his vehicle. Third, the vehicle, alongside which our suspect was located, contained an item (in open view) that Sergeant

Yamashita had probable cause to believe was evidence of criminal activity.

Most importantly, in Ozuna, even if the officer had probable cause to believe the expensive looking brief case and attaché case were evidence of a crime, the fact that these items were in open view and visible to any passersby, could not have given rise to an exigent circumstance. This is the case because there was no risk that these innocuous items could have posed a potential threat to public safety. In contrast, the evidence that was on display in our case was a dangerous weapon, it was contraband, and it was an item that posed a potential threat to the community, if it fell into the wrong hands. For each of these reasons, the facts in our case are not at all related to the facts in Ozuna and the Division III's holding in Ozuna should not be controlling here.

While our facts are distinguishable from those presented in Ozuna, they are analogous to those presented in Gibson; therefore, the balancing test that was applied in Gibson, to find the officer's warrantless search reasonable, should likewise be applied in our case. Similar to Gibson, the defendant in our case had only a minimal expectation of privacy for the contents of his vehicle that were displayed in open view. Gibson, at \*13. Meanwhile, similar to the officer in Gibson, Sergeant Yamashita had an elevated interest in protecting the public from the injury or death that

could result if the defendant's Taurus 9 millimeter semi-automatic handgun fell into the wrong hands. Under this balancing test, Sergeant Yamashita's warrantless search struck a reasonable balance between the defendant's minimal expectation of privacy for the gun/gun case he left in open view and Sergeant Yamashita's right to protect the public from the harm that could have been caused by the defendant's gun.

**C. The State takes exception with Finding of Fact No. 9 entered by the trial court (finding there was evidence the defendant's vehicle was impounded) because this finding is not consistent with the evidence that was presented at the CrR 3.6 hearing.**

The State takes exception with the following finding of fact:

There is evidence that the car was impounded at some point but not by who[m]. It could have been the police or it could have been the NAPA people.

-(Findings of Fact and Conclusions of Law re: CrR3.6 Hearing (CP 36), Finding of Fact No. 9, page 3).

The criteria for impound of a vehicle is the following:

A motor vehicle may be lawfully impounded in certain specific circumstances: (1) as evidence of a crime, if the officer has probable cause to believe that it was stolen or used in the commission of a felony; (2) as part of the police "community caretaking function," if the removal of the vehicle is necessary (in that it is abandoned, or impedes traffic, or poses a threat to public safety and convenience, or is itself threatened by vandalism or theft of its contents), *and* neither the defendant nor his spouse or friends are available to move the vehicle; and (3) as part of the police function of enforcing traffic regulations, if the driver has

committed one of the traffic offenses for which the legislature has specifically authorized impoundment.

-(State v. Williams, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984); citing State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980))

In the present case, Sergeant Yamashita never testified that the defendant's vehicle was impounded. In fact, the only testimony regarding the defendant's vehicle being impounded came from Jaqueline Cowen (the bank teller who heard the defendant's threat and called the police). Cowen testified she saw the defendant's vehicle the day after the crime. (RP 49). When asked "where," she responded she saw his vehicle: "across the street, [i]t was impounded I believe." Id. These facts are insufficient to support the trial court's finding that the defendant's vehicle was impounded.

Further, the criteria for lawful impoundment are not present in our case. First, the defendant's vehicle was not used in the commission of a felony. Second, it was not abandoned or impeding traffic. Most importantly, the defendant testified that he gave his keys to an officer so that a friend of his could collect his car. (RP 56). No evidence was presented as to whether this friend was in fact available to collect the defendant's car.

The trial court presumably used its finding that the vehicle was impounded to support its conclusion that there were no exigent circumstances to permit a warrantless search of the defendant's vehicle. Neither this finding, nor the conclusion that it bolstered, are supported by the record.

Further, it is without merit to argue that the contents of the defendant's "impounded" vehicle were subject a warrantless search under the "inevitable discovery doctrine," because the Washington Supreme Court no longer considers a warrantless search valid under this doctrine. State v. Winterstein, No. 80755-8, 2009 Wash. LEXIS 1073 (Dec. 3, 2009).

## V. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court reverse the the trial court's decision to grant the defendant's motion to suppress. The officer's search of the defendant's vehicle was permissible under Arizona v. Gant because the officer had reason to believe the defendant's vehicle contained evidence of the offense of arrest (to wit: felony harassment). The officer's reasonable belief was based on her observation of what she believed to be a gun case (containing a gun), perched on the passenger seat of the defendant's vehicle, visible through

the vehicle's windows, at a time and location that was proximate to when and where the defendant had threatened to get a gun and shoot people. In Gant, the U.S. Supreme Court held a warrantless search under these circumstances was permissible under the Fourth Amendment. In Snapp, Division II held a warrantless search under these circumstances was permissible, under article I, section 7, in light of Gant.

Permitting a warrantless search under these circumstances protects an individual's privacy interests and prevents police officers from having unbridled discretion to rummage through an individual's vehicle, because the vehicle may not be searched unless the officer has a reasonable belief it contains evidence of the offense of arrest.

In the alternative, the officer's search is unaffected by the Court's ruling in Gant because the search was permissible under the "open view" exception to the warrant requirement. The gun case (containing the gun) was visible through the vehicle's window and the officer had probable cause to believe it was evidence of criminal activity. In addition, the gun case (containing the gun) gave rise to an exigent circumstance because it was easily visible to the public and could pose a danger to the public, if it fell into the wrong hands. Under these circumstances, the defendant had a minimal privacy interest in the gun/gun case he displayed in open view, while the officer had a heightened duty to protect the public from the

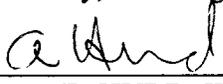
dangers presented by the gun. Consequently, under the balancing test set forth by the Court in Gibson, the officer's warrantless search was reasonable and, therefore, permissible.

DATED this 14 day of December, 2009.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
\_\_\_\_\_  
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Deputy Prosecuting Attorney

## **APPENDIX A**

FILED

JUL 16 2009  
945AM  
Sherry W. Parker, Clerk, Clark Co.

**THE SUPERIOR COURT OF WASHINGTON  
CLARK COUNTY**

STATE OF WASHINGTON

Plaintiff

v.

TYLER SCOTT BARNES

Defendant

N<sup>o</sup> 08-1-01936-5

**FINDINGS OF FACT &  
CONCLUSIONS OF LAW: 3.6  
Hearing**

This matter having come duly and regularly before the court on 29 June 2009 the court hereby makes the following:

**FINDINGS OF FACT**

1. On November 21st 2008 in Clark County, the State of Washington Ofc. Yamashita of the Washougal Police Department received a report that Tyler Barnes had been in a bank in Washougal, Washington.
2. Tyler Barnes made some statements cause concern on the part of bank employees that he may be intending some violence. They reported that he talked about getting a gun and

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1 shooting people.

2 3. The officers had probable cause to believe that Mr. Barnes may have committed felony  
3 harassment.

4 4. Mr. Barnes vehicle was observed parked in a parking lot at the NAPA Auto Parts store in  
5 Washougal, less than one-half a mile from the bank and within about two hours of the  
6 threats having been made.

7 5. Officer Yamashita approached Mr. Barnes, it is not clear whether he was in or out of the  
8 car, at the point that she arrested him, placed in handcuffs and placed him in the patrol  
9 vehicle.

10 6. She was with Officer Houts and at some point both she and Officer Houts looked  
11 through the passenger window of the vehicle. The court finds the persuasive evidence, the  
12 more credible evidence, to be that the officers looked through the window and saw a case  
13 with the words Taurus on it. In Ofc. Yamashita's experience that was a type of case used  
14 <sup>and that was a reasonable belief.</sup> to transport firearms and the case was readily visible through the window. 

15 7. There is no evidence to believe that the officers manipulated or moved the evidence.

16 8. Both officers relying on a number of cases believed they had a right to search Mr. Barnes  
17 car because he was under arrest even though he wasn't in the car. They then searched the  
18 car including the gun case. They opened the vehicle seized the gun case, opened it, and  
19 found a gun in the case, which as far as the court can tell was unlocked. There were also  
20 some other items found the court's understanding is that the State is not contending that  
21 those items are admissible because they were not admissible given the Gant case, Arizona

1 v. Gant, 566 U.S. \_\_\_\_ (2009) No. 07-542.

2  
3 9. There is evidence that the car was impounded at some point but not by who. It could  
4 have been the police and it could have been the NAPA people.

5 10. The question is whether the seized gun is admissible under our State Constitution. Was  
6 there a basis for a warrantless search and collection of the gun case.  
7

8 **CONCLUSIONS OF LAW**

9 11. The court has jurisdiction over the parties and the subject matter.

10 12. The observation of the gun case was permissible it was in open view. No search was  
11 involved any person who walked by and looked in could have seen the gun case and that's  
12 what Officers Yamashita and Houts did.  
13

14 13. Officer Yamashita had probable cause, given the proximity in time and the proximity  
15 of the bank, that the gun case might be evidence of a crime if there was a gun inside.  
16

17 14. The police had control of Mr. Barnes, the vehicle and the keys to the vehicle. There is  
18 no evidence that the could not have kept the car under surveillance or impounded it and  
19 searched it after a warrant was obtained. There was nothing that obstructed their ability to  
20 get a warrant.  
21

22 15. The cited Perez case is not on point, the officers saw a partially covered shotgun, the  
23 suspect was partially restrained, and some distance from the vehicle performing a DUI test.  
24 The seizure was upheld in Perez, finding a search incident to arrest and exigent  
25 circumstances. The exigencies in that case was that the person would be immediately  
26  
27  
28

FINDINGS OF FACT & CONCLUSIONS OF LAW - 3 of 5

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1 released and was partially unrestrained. This was their reasoning, the court in Perez, even  
2 though he was with an officer, 18 feet away and performing some sobriety tests, that he  
3 was still mobile enough that he could have gotten to the vehicle and seized the weapon  
4 and if he passed the sobriety tests he would have been released back to where the weapon  
5 was he might have gotten to it. The court does not necessarily accept the validity of the  
6 reasoning in the Perez case. Obviously, that is not the case here Mr. Barnes was in custody,  
7 had handcuffs on and was in the back of a patrol car at the time that the gun case was  
8 collected and searched.

9  
10  
11  
12 16. Under Article 1, § 7 of our State Constitution there were no exigent circumstances  
13 which justified the warrantless seizure and collection of the item. As held in State v.  
14 Ozuna, 80 Wn.App. 684 (1996):

15  
16 Even if we had found probable cause here, the warrantless search was  
17 unlawful because no exigencies existed. Patterson, 112 Wn.2d at 735-36.  
18 Washington courts have held that the mere fact that a car is potentially  
19 mobile is not enough of an exigency to support a warrantless search.  
20 Patterson, 112 Wn.2d at 735; Gwinner, 59 Wn. App. at 124. Inconvenience  
21 to the officers is also inadequate. Young, 28 Wn. App. at 418. Exigencies  
22 have been found when the defendant is still at large, has accomplices who  
23 could remove the evidence, or when there is an immediate need to pursue a  
24 promising investigation. Patterson, 112 Wn.2d at 736; Young, 28 Wn. App. at  
25 419.

26 Other cases cited by the State predate Ringer, 100 Wn.2d 686 (1983). The State has not  
27 carried its burden that the item was not unreasonably seized and it is therefore suppressed,  
28 mere mobility is not a sufficient showing.

This 16<sup>th</sup> day of July 2009.

  
EDD

  
Judge

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