

NO. 39627-1-II

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

STATE OF WASHINGTON, Appellant/Cross-Respondent

v.

TYLER SCOTT BARNES, Respondent/Cross-Appellant

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

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

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I. ISSUES

A. It was reasonable for the officer to believe the firearm was evidence of the offense of arrest (Felony Harassment).

1. The firearm made it more likely that the defendant threatened to get a gun and shoot everyone.

A person is guilty of Felony Harassment – Threat to Kill, when:

(1)...

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person...[and]

....

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out...[and]

(2)...

(b)... the person harasses another person under *subsection (1)(a)(i)* of this section by threatening to kill the person threatened or any other person.

-(RCW 9A.46.020)

The Felony Harassment statute is comprised of two elements: (1) a threat to kill, and (2) a reasonable belief that this threat will be carried out.

RCW 9A.46.020(1)(a)(i), (b), (2)(b). The first element focuses on the intent of the speaker. *See State v. Schaler*, 145 Wn. App. 628, 637, 186 P.3d 1170 (2008), *citing State v. Johnston*, 156 Wn.2d 355, 360-36, 127

P.3d 707 (2006). The second element focuses on the reasonable belief of the listener. State v. J.M., 101 Wn. App. 716, 728, 6 P.3d 607 (2000). Both elements require proof that the defendant uttered particular words and/or engaged in particular conduct.

In Arizona v. Gant, the U.S. Supreme Court held, under the Fourth Amendment, a police officer may conduct a warrantless search of a vehicle incident to arrest if it is “reasonable to believe the vehicle contain[s] evidence of the offense of arrest.” (Brief of respondent/cross appellant, at 8 (hereinafter “BR”)), *citing* Arizona v. Gant, __ U.S. __, 129 S.Ct. 1710, 1723-1724, 173 L.Ed.2d.485 (2009).

In the case at bar, the respondent/cross appellant argues “the defendant’s possession of the firearm in his vehicle was not evidence of the crime for which the police arrested him,” because its existence had no bearing on whether the victim believed the defendant’s threat would be carried out. (BR, at 8, 10). The respondent/cross appellant’s argument is without merit because it fails to acknowledge the following: before the State can prove the victim’s fear that the defendant’s threat would be carried out was reasonable, the state must first prove the defendant made a particular threat (i.e. uttered particular words and/or engaged in particular conduct).

According to Washington Mutual bank teller Jacqueline Cowen, the defendant was visibly upset that he could not access his bank account; consequently, he uttered: "I feel like going and getting a gun and shooting everyone," and then stormed out of the bank (RP 4). The defendant was found down the road from the bank, less than two hours after he made the threat, and was arrested, at his vehicle, for the crime of Felony Harassment. (RP 5, 7, 21). While standing outside the defendant's vehicle, in the Napa Auto Parts parking lot, the arresting officer observed, through the vehicle window, a black "Taurus" gun case perched on the front passenger seat. (RP 9-10). The case contained a nine millimeter Taurus semi-automatic handgun. (RP 9-10).

It is reasonable to infer the defendant was threatening to shoot all people present at the bank, when he threatened to get a gun and shoot everyone. However, there is no evidence (1) that the defendant admitted to making this threat, or (2) that anyone at the bank, other than bank teller Jacqueline Cowen, heard the threat being made. The fact that there was a gun found inside the defendant's vehicle (found at a time and in a location close in proximity to when the threat was made) corroborates Jacqueline Cowen's story. Specifically, the existence of the gun makes it more likely that the defendant, in fact, said he felt like getting a gun and shooting everyone at the bank.

2. The firearm made it more likely the defendant's threat was a "true threat."

The felony harassment statute criminalizes only "true threats," so as to avoid an over breadth challenge under the First Amendment.

Schaler, 145 Wn. App. at 638, *citing* Johnston, 156 Wn.2d at 360, 364.

"[W]hether a true threat has been made is determined under an objective standard that focuses on the speaker...[a] true threat is a serious threat, not one said in jest, idle talk, or political argument." Johnston, at 361 (*quoting* State v. Kilburn, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004)).

In the case at bar, evidence that the defendant had retrieved a gun and was driving with it (at a time and in proximity close to where he made the threat) is evidence that the defendant's threat to get a gun and shoot everyone was not said "in jest," was not "idle talk," and was not "political argument." Johnston, at 361 (*quoting* Kilburn, 151 Wn.2d at 43-44).

Therefore, the gun is not only evidence the defendant made the threat to get a gun and shoot everyone, it is evidence the defendant meant what he said and intended to carry out his threat.

3. The firearm made it more likely the defendant intended to carry out his threat immediately or in the future.

Contrary to the respondent/cross appellant's assertion, the crime of Felony Harassment was not complete "at the time the defendant left the bank." (BR, at 10). The crime was ongoing and would have been carried out, but for the interception of the Washougal Police Department.

The fact that the defendant had retrieved a gun and was arguably returning to the bank with it, is also evidence the defendant intended to carry out his threat "immediately or in the future," per RCW 9A.46.020(1)(a)(i).

4. The firearm made it more likely the defendant committed the crime of Felony Harassment.

In order to prove the crime of Felony Harassment, the State must prove the defendant made a "threat to kill" (as opposed to a "threat to cause bodily injury," which is that which must be proven for misdemeanor harassment). The natural consequence of getting a gun and shooting people is death. Evidence of a gun inside the defendant's vehicle (as opposed to a baseball bat) makes it more likely the defendant made a threat to kill and, therefore, more likely the defendant committed the crime of Felony Harassment.

For each of these reasons, it was reasonable for the officer to believe the gun was evidence of the crime of arrest (Felony Harassment). Consequently, the warrantless search of the defendant's vehicle was permissible under the Fourth Amendment, in light of Gant.

B. The Supreme Court's holding in State v. Patton is not controlling in the case at bar.

1. The facts in *Patton* are distinguishable from the facts in the case at bar.

In State v. Patton, Patton was arrested, at his vehicle, for an outstanding warrant for failing to appear in court. State v. Patton, No. 80518-1, at *22, 2009 Wash. LEXIS 975 (Oct. 22, 2009). The arresting officer had no reason to believe Patton's vehicle contained evidence of the offense of arrest and the State never argued this was the basis for the officer's search. Patton, at *6.

With its holding in Patton, the Court was proscribing vehicle searches incident to arrest that were nothing more than fishing expeditions conducted by law enforcement officers for evidence of any criminal activity. It was not proscribing vehicle searches (such as the search in the instant case) that were based on the officer's reasonable belief the vehicle contained evidence of the offense of arrest. In fact, the Court in Patton made it clear it was not considering the reasonableness of a vehicle search

in this context. Patton, at *6 (stating “[t]he State makes no argument that it had probable cause to search Patton’s car”).¹

Alternatively, in State v. Snapp, Division II did address whether a vehicle search incident is permissible when the officer has a reasonable belief the vehicle contains evidence of the offense of arrest. State v. Snapp, COA No. 37210-0-II, 2009 Wash. App. LEXIS 2771 (November 9, 2009) (published in part). Snapp was arrested, at his vehicle, for possession of drug paraphernalia. After Snapp was secured in the officer’s patrol car, the officer searched Snapp’s vehicle for evidence of the offense of arrest. In its opinion, the Appellate Court acknowledged: “[t]he trooper was not looking for weapons, nor was he concerned that [Snapp’s vehicle] contained evidence that could be immediately destroyed...” Snapp, No. 37210-0-II, at *2. Despite this acknowledgment, the Court found it was reasonable for the officer to believe Snapp’s vehicle contained evidence of the offense of arrest because Snapp was arrested at his vehicle, he was

¹ Similarly, in State v. Valdez (the Supreme Court’s most recent opinion, in light of Gant), when the defendant was arrested for an outstanding warrant, the Court did not consider whether the search of his vehicle would have been permissible if the officer had had a reasonable belief the vehicle contained evidence of the offense of arrest. State v. Valdez, No. 80091-0, at *1, 20, 2009 Wash. LEXIS 1156 (December 24, 2009) (stating “the State has not shown that it was reasonable to believe that evidence relevant to the underlying crime might be found in the vehicle”).

exhibiting signs of being under the influence of a controlled substance at the time of his arrest, and the pipe that was the basis of the arrest was located inside his vehicle. Snapp, at *9-10. Consequently, the Court found, pursuant to Gant, the officer's warrantless vehicle search was constitutionally permissible. In support of its holding, the Court cited the following passage from Gant:

[p]olice 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.

-(Id., at *10, *citing* Gant, at 1719 (emphasis added))

Similarly, in the case at bar, it was reasonable for the officer to believe the defendant's vehicle contained evidence of the offense of arrest. The defendant was arrested for Felony Harassment (for threatening to get a gun and shoot everyone at a bank); he was found with his vehicle down the road from the bank, less than two hours after this threat was made; and the officer observed, through the window of the defendant's vehicle a Taurus gun case that, based on her training and experience, she reasonably believed contained a gun.

For these reasons, it is the Appellate Court's holding in Snapp, as opposed to the Supreme Court's holding in Patton, which is applicable

here. Pursuant to Snapp, the warrantless search of the defendant's vehicle was permissible under article I, § 7.

To be sure, art. I, § 7 provides greater individual privacy protections than does the Fourth Amendment; however, these greater privacy protections are ensured by the exception to the warrant requirement that was elucidated by the Court in Gant and was applied by the Appellate Court in Snapp. Under this exception, an officer may conduct a warrantless vehicle search only when he has a reasonable belief the vehicle contains evidence “of the offense of arrest.” Gant, at 1719, Snapp, at *10 (emphasis added). In contrast, under the federally recognized “automobile exception,” an officer may conduct a warrantless vehicle any time he has a reasonable belief the vehicle contains evidence of “any criminal activity.” Gant, at 1721, *citing* United States v. Ross, 456 U.S. 798, 820-821, 102 S. Ct. 2157, 72 L. Ed. 2D 572 (1982) (emphasis added); Patton, at *6. The exception set forth by the Court in Gant and applied by the Appellate Court in Snapp is far more stringent than the automobile exception; therefore, it protects the privacy interests provided under art. I, § 7 and prevents the police-initiated “fishing expeditions” that are proscribed by the Court in Patton.

2. In the alternative, the search in the case at bar was permissible under the “open view doctrine.”

Neither the U.S. Supreme Court's holding in Gant nor the Washington Supreme Court's holding in Patton did anything to limit the lawfulness of “other, previously recognized exceptions to the warrant requirement.” Gant, 1721.

The “open view doctrine” is an exception to the warrant requirement that has consistently been recognized both the federal courts and by the courts in Washington. State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981); State v. Perez, 41 Wn. App. 481, 704 P.2d 625 (1985); State v. Gibson, COA No. 37663-6-II (Nov. 9, 2009). Evidence is discovered in “open view” when the observation of the evidence takes place from a non-intrusive vantage point, where the object of the observation is not subject to any reasonable expectation of privacy. Seagull, 95 Wn.2d at 901-02. An object is in “open view” when it is located inside an automobile, in a location that is visible from a non-intrusive vantage point. Perez, 41 Wn. App. at 482; Gibson, No. 37663-6-II at *9.

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 an exigent circumstance. Gibson, at *11, *citing* State v. Smith, 88 Wn.2d 127, 137-38, 559 P.2d 970 (1977). What constitutes an exigent circumstance in the context of a vehicle search is interpreted more broadly than what constitutes an exigent circumstance in the context of a building search. Id., at *12. “‘Danger to the arresting officer or to the public’ can constitute an exigent circumstance.” Id. (*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))). 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 Id.

In State v. Gibson, Division II reviewed the “open view doctrine” in light of the Supreme Court’s opinion in Gant. Gibson was stopped for a traffic infraction and was ultimately arrested for an outstanding arrest warrant. Gibson, at *2. Gibson’s vehicle was located in a public parking lot at the time of his arrest. Id. After Gibson was handcuffed and placed in the back of the officer’s patrol vehicle, the officer looked through the window of Gibson’s vehicle and observed items he recognized, through his training and experience, as being commonly used to manufacture methamphetamine (drain cleaner and a bag of ammonia sulfate). Id.

The Court found the items inside Gibson's vehicle were in "open view" because the officer was able to observe them by looking through the vehicle's window, while standing in a public parking lot. Id., at *11. Further, the Court found the officer had probable cause to believe the items were evidence of a crime, based on his training and experience in drug manufacturing. Id. Lastly, the Court found the presence of these items, in open view, gave rise to an exigent circumstance because they presented a potential risk to the safety of the officer as well as to any passersby. Id., at *13. For these reasons, the Court held the officer's warrantless search was permissible, and the officer's warrantless seizure of the items would have been permissible, under the "open view doctrine". Id., at *8.

In reaching its holding, the Court balanced Gibson's privacy interest in the items that he displayed in open view in his vehicle against law enforcement's interest in protecting the public from the dangers presented by these items. Under these circumstances, the Court found a warrantless search was reasonable because Gibson's privacy interest was minimal, while the officer's interest in protecting the public was great. Id., at *13.

The facts in the case at bar are similar to the facts in Gibson. First, the gun case (containing the gun) was in open view because the officer

was able to observe it while looking through the window of the defendant's vehicle, while his vehicle was parked in a public parking lot. Second, the officer had probable cause to believe the gun case (containing the gun) was evidence of the crime of arrest (see argument *supra* at 1-5). Lastly, the gun gave rise to an exigent circumstance because, like the drain cleaner and ammonia sulfate in Gibson, the gun was an item capable of causing extreme harm and/or death to the public if it fell into the wrong, untrained, hands. The fact that the gun was in "open view," in a popular auto parts parking lot, during business hours, increased the likelihood that it would, in fact, fall into the wrong hands.

In addition, the defendant's privacy interest in the contraband he displayed in open view in his vehicle was minimal, while the officer's interest in protecting the public from the dangers presented by this contraband was great.

For these reasons, the Appellate Court's holding in Gibson is applicable here. Accordingly, the warrantless search of the defendant's vehicle was reasonable and was permissible under art. I, § 7, pursuant to the "open view doctrine."

C. Substantial evidence supported the trial's court's finding that the gun case was unlocked.

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. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002). Substantial evidence is not proof beyond a reasonable doubt; rather, it 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)). Evidence may be either direct or circumstantial; the law makes no distinction between the two. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999), *citing* WPIC 5.01. WPIC 5.01. Circumstantial evidence is evidence from which the finder of fact may reasonably infer something, based on his or her common sense and experience. WPIC 5.01.

In the case at bar, the respondent/cross appellant claims the trial court properly granted the defendant's motion to suppress because evidence was not presented during the CrR 3.6 hearing from which the trial court could conclude the defendant's gun case was unlocked. (BR, at

17) Specifically, the respondent/cross appellant takes exception with finding of fact No. 8, wherein the trial court found

...[the officers] opened the vehicle, seized the gun case, opened it, and found a gun in the case, which as far as the court can tell was unlocked.

-(Findings of Fact and Conclusions of Law re: CrR3.6 Hearing (CP 36), Finding of Fact No. 8, page 2).

The defendant never challenged the validity of the search on this basis. However, at the CrR 3.6 hearing, Sergeant Yamashita's responses, to both the State and to defense counsel's questions regarding her retrieval of the gun from the gun case, provided circumstantial evidence that the gun case was, in fact, unlocked. For example, the State asked Sergeant Yamashita the following:

QUESTION: [A]t some point did you retrieve the gun box from the vehicle?

ANSWER: Yes we did.

QUESTION: And did you open the box?

ANSWER: Yes I did.

QUESTION: What was inside it?

ANSWER: It was a Taurus nine mil. I believe it was a nine millimeter – but it was a handgun.

-(RP 10 – 11).

Meanwhile, defense counsel asked Sergeant Yamashita the following:

QUESTION: You opened [the case] up later and discovered the gun, correct?

ANSWER: Yes.

QUESTION: All right.

ANSWER: [A]fter we retrieved the box, yeah.

-(RP 16).

In both instances, common sense and experience dictate, had the gun case been locked, Sergeant Yamashita would have testified that, in order to open the case, she first had to “retrieve a key from the defendant,” “unlock the case,” “find a skeleton key,” or “pry the case open,” for example. Common sense and experience do not dictate that, in each instance, Sergeant Yamashita would have simply testified she “opened the case” and “retrieved the gun.” Sergeant Yamashita’s responses provided circumstantial evidence that the gun case was unlocked. The circumstantial evidence provided by Sergeant Yamashita’s testimony was evidence “in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” Jeannotte, 133 Wn.2d at 856.

For these reasons, the trial court's finding that the gun case was unlocked was supported by substantial evidence. Consequently, the

warrantless search of the defendant's vehicle (and subsequent seizure of the gun) was permissible under art. I, § 7.

II. ARGUMENT AS CROSS-RESPONDENT

A. **The trial court did not abuse its discretion when it dismissed the Felony Harassment charge without prejudice.**

Washington Superior Court Criminal Rule 8.3(a) addresses when the trial court may dismiss a criminal charge on the State's motion. CrR 8.3(a) provides:

[t]he court may, in its discretion, upon written motion of the prosecuting attorney, setting forth the reasons therefore, dismiss an indictment, information or complaint.

-(CrR 8.3(a))

Washington Rule of Appellate Procedure 2.2(b)(2) addresses when the State may appeal a criminal case. RAP 2.2(b)(2) provides:

(b) ... [t]he State ...may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(2) ... [a] pretrial order suppressing evidence if the trial court expressly finds that the practical effect of the order is to terminate the case.

-(RAP 2.2(b)(2))

Neither rule states the trial court must dismiss a criminal charge, with prejudice, in order for the State to appeal the court's order. Therefore, under the plain language of CrR 8.3(a) and RAP 2.2(b), the trial court may dismiss a charge, on the State's motion, with or without prejudice. The decision to dismiss a criminal charge lies within the sound discretion of the trial court and is reviewed for an abuse of discretion. State v. Koerber, 85 Wn. App. 1, 2, 931 P.2d 904 (1996). Discretion is abused if the court's decision is "manifestly unreasonable or is based on untenable grounds." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

In the case at bar, pursuant to the State's motion, the trial court dismissed Count One (Felony Harassment) without prejudice, because the State's ability to prove the allegations in that count was substantially impaired by the court's granting of the defendant's motion to suppress (evidence of the gun). (CP 49, 50-51). The trial court dismissed Count Two (Unlawful Possession of a Firearm in the Second Degree), and Count Three (Attempted Assault in the Third Degree), with prejudice, because the practical effect of the court's granting of the defendant's motion to suppress was to terminate the remainder of the case. (CP 49, 50-51).

The respondent/cross appellant argues the trial court abused its discretion when it dismissed Count One (Felony Harassment), without prejudice, because "the defendant's possession of the firearm in his

vehicle was not evidence of the crime for which the police arrested him.” (BR, at 19). The respondent/cross appellant supports his argument by noting evidence of the firearm did not contribute to the officer’s decision to arrest the defendant for felony harassment. (BR, at 19).

The State’s burden of proof in a criminal trial is proof “beyond a reasonable doubt.” In contrast, the officer’s burden when arresting a suspect is “probable cause.” The fact that the officer was not aware of the existence of the firearm at the time she arrested the defendant is a red herring because the level of proof necessary for the officer to lawfully arrest the defendant was far inferior to the level of proof that would have been necessary for the State to convict the defendant at trial.

As argued by the appellant/cross respondent, *supra*, evidence of the firearm was necessary for the State to prove the charge of felony harassment because (1) it made it more likely the defendant threatened to get a gun and shoot everyone at the bank; (2) it made it more likely the defendant’s threat was a “true threat;” (3) it made it more likely the defendant intended to carry out his threat immediately or in the near future; and (4) it made it more likely the defendant made a threat to kill, as opposed to a threat to cause bodily injury.

Given these facts, it was not manifestly unreasonable or based on untenable grounds for the trial court to find the State’s ability to prove the

charge of Felony Harassment was substantially impaired by the court's suppression of evidence of the firearm. Under the plain language of CrR 8.3(a) and RAP 2.2(b) the trial court was not required to dismiss the Felony Harassment charge "with prejudice." Further, neither of the cases cited by the respondent/cross appellant supports a conclusion that it was manifestly unreasonable or based on untenable grounds for the trial court to dismiss the charge of Felony Harassment "without prejudice."² For these reasons, the trial court did not abuse its discretion when it dismissed Count One (Felony Harassment) without prejudice.

III. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court reverse the trial court's decision to grant the defendant's motion to suppress. Further, the State respectfully requests that the Court affirm the

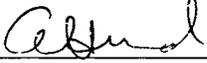
² In Neal, the appellate court found the trial court manifestly abused its discretion when it admitted evidence of a laboratory test at trial without proper certification. Neal, 144 Wn.2d at 611. In Koerber, the appellate court found the trial court abused its discretion when the court, on its own motion, dismissed a criminal case "in furtherance of justice" without making a finding of egregious mismanagement or misconduct by the State. Koerber, 85 Wn. App. at 906.

trial court's decision to dismiss Count One (Felony Harassment) without prejudice.

DATED this 27 day of January, 2010.

Respectfully submitted:

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

STATE OF WASHINGTON,
Appellant/Cross-Respondent,

v.

TYLER SCOTT BARNES,
Respondent/Cross-Appellant.

No. 39627-1-II

Clark Co. No. 08-1-01936-5

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On January 28, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk
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DOCUMENTS: Reply Brief of Appellant/Cross-Respondent

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

Nina K. Downs

Date: January 28, 2010.

Place: Vancouver, Washington.