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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

NO. 40114-2--II

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

STATE OF WASHINGTON,

Respondent,

v.

DYLAN PALMER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson E. Hunt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence.

2. The trial court erred in finding the officer knew there was drug residue on the spoon appellant said was in his car. CP 17 (Findings of Fact Conclusions of Law for Suppression Hearing, Finding of Fact 1.9).[1]

3. The trial court erred in concluding the officer had probable cause to arrest appellant for possession of heroin. CP 18 (Findings of Fact Conclusions of Law for Suppression Hearing, Conclusion of Law 2.4).

4. The trial court erred in concluding police were allowed to search appellant's car incident to the arrest. CP 18 (Findings of Fact Conclusions of Law for Suppression Hearing, Conclusion of Law 2.5).

5. The trial court erred in concluding that the automobile exception allowed police to search appellant's car without a warrant. CP 18 (Findings of Fact Conclusions of Law for Suppression Hearing, Conclusion of Law 2.6).

6. The trial court erred in concluding that evidence discovered following a search of appellant's car was admissible under the inevitable

[1] The court's written findings and conclusions are attached as an appendix and incorporated herein.

discovery doctrine. CP 18 (Findings of Fact Conclusions of Law for Suppression Hearing, Conclusion of Law 2.7).

Issues Pertaining to Assignments of Error

1. Did the court err in concluding that the arrest for possession of heroin was supported by probable cause based on appellant's statements there was a spoon in the car used for heroin and the officers assertion he knew there would be drug residue on the spoons?

2. Did the evidence support the trial court's finding the officer knew there would be drug residue on the spoon appellant said was in the car and used to ingest heroin?

3. Did the court err by concluding that the search of the vehicle was supported by Arizona v. Gant, 556 U.S.__, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), even though appellant was not within reaching distance of the passenger compartment when he was arrested?

4. Was the search of appellant's car for evidence of possession of heroin illegal under both the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution where appellant was handcuffed and in the back of the patrol car when he was arrested for the crime and before police conducted the search?

5. Did the trial court err by concluding that the evidence discovered was admissible under the inevitable discovery doctrine?

B. STATEMENT OF THE CASE[2]

1. Procedural History

Dylan H. Palmer was charged by information with two counts of possession of a controlled substance, and third degree driving while license suspended or revoked. CP 1-3. Prior to trial a CrR 3.6 hearing was held on the defense motion to suppress evidence found in Palmer's car. CP 6-8, 10-15; RP 3-24. The court denied the suppression motion. CP 16-19; RP 20-23. After a stipulated facts trial, Palmer was found guilty of possession of methamphetamine, possession of heroin, and third degree driving while license suspended. CP 24-26. Palmer, under the Drug Offender Sentencing Alternative, was sentenced to 24 months on each drug count, which is within the standard range. CP 29-37. Notice of appeal was timely filed on December 9, 2009. CP 38-47.

2. Facts Pertaining to Assignments of Error

On July 6, 2009, Washington State Trooper Jason Hicks stopped Palmer for speeding. RP 5-6, 14. A routine check showed that Palmer's driving status was suspended in the third degree. RP 8, 14-15. Hicks then placed Palmer under arrest, seated him in the patrol car and

[2] The hearings on October 14, November 13, and December 9, 2009, are referred to as RP and are sequentially numbered.

read Palmer his Miranda rights. RP 8, 15. Hicks' car was 20 to 30 feet away from Palmer's car. RP 11.

Palmer appeared nervous. RP 9. Hicks asked Palmer if he had anything in the car Hicks needed to be concerned with. RP 9, 15. Hicks implied that the car would be towed. RP 15. In response to Hick's question, Palmer said he had spoons that were used for heroin. RP 9, 15. Hicks testified that he had "never found a spoon that has been used in this manner that does not contain some type of residue of the drug that was cooked and injected" and that he "knew there was going to be heroin residue on the spoons. RP 9-10. Hicks arrested Palmer for felony possession of a controlled substance. RP 10. Palmer remained handcuffed in the back of the Hicks' car. RP 10-11, 15. Hicks then searched Palmer's car and found spoons with residue, a knife with residue, several needles (including one in the glove box) loaded with a brown liquid, and scales with residue. RP 10. The items field tested positive for heroin. RP 10. Hicks said that had Palmer not admitted the spoons were in the car, he would not have had reason to search the car. RP 12.

At the conclusion of the CrR 3.6 hearing the court entered written findings of fact and conclusions of law. CP 16-19.

C. ARGUMENTS

1. THERE WAS NO PROBABLE CAUSE TO ARREST PALMER FOR POSSESSION OF HEROIN.

Palmer's arrest for possession of heroin, which the court found justified the search of Palmer's car, was unsupported by probable cause. The arrest was based on Palmer's statement that he had spoons in the car that were used for heroin and Hicks' testimony he had never discovered a spoon used for drugs that did not contain drug residue so he knew the spoon would have heroin residue. The finding Hicks knew the spoon would have heroin residue is unsupported by substantial evidence. Thus, the evidence did not establish probable cause to arrest Palmer for possession of heroin. And, because there was no probable cause to arrest Palmer for that offense, the search of his car incident to his arrest was illegal and the evidence found in the car inadmissible.

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." "Although they protect similar interests, 'the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.'" State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). (quoting State v. McKinney, 148 Wn.2d 20, 26, 60

P.3d 46 (2002)). "The Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to any manner of warrantless, but reasonable searches." Eisfeldt, 163 Wn.2d at 634. "By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not." Id. "The warrant requirement is especially important under article I, section 7, of the Washington Constitution as it is the warrant which provides the 'authority of law' referenced therein." State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

A warrantless search is per se unconstitutional unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Exceptions to the warrant requirement are jealously guarded "lest they swallow what our constitution enshrines." State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007) (citing State v. O'Neill, 148 Wn.2d 564, 548-85, 62 P.3d 489 (2003) (citing Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 Yale L. & Pol'y Rev. 381 (2001) The State has the burden to prove that a warrant exception applies. Rankin, 151 Wn.2d at 669. A search incident to arrest is an exception to the warrant requirement. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).

Probable cause for a warrantless arrest exists "where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986) (quoted in State v. Flowers, 57 Wn.App. 636, 641, 789 P.2d 333, review denied, 115 Wn.2d 1009, 797 P.2d 511 (1990)). The determination of probable cause rests on the totality of facts and circumstances within the officer's knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer. State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

The court ruled Hicks had probable cause to arrest Palmer for possession of heroin based on Palmer's statement he had a spoon in the car used for heroin and Hicks' testimony he had "never found a spoon that has been used in this manner that does not contain some type of residue of the drug that was cooked and injected" and that he "knew there was going to be heroin residue on the spoons." The trial court found that "[t]rooper Hicks knew that when a person uses spoons there is drug residue left on that spoon." CP 17. The finding is not supported by substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Hicks did not see or touch the spoons before he arrested Palmer. Hicks asserted he never found a spoon that did not have residue, but there is no evidence how many spoons Hicks has ever found with residue or any other evidence to support Hicks' assertion he knew there would be drug residue on the spoon. Thus, whether the spoon Palmer said was used for heroin had residue was necessarily based on Hicks' speculation. An officer's speculation even if based on past experience does not support probable cause. See, State v. Rangitsch, 40 Wn. App. 771, 780, 700 P.2d 382 (1985) (Police officer's affidavit that it was the experience of officers in the narcotics department that cocaine users would commonly have cocaine and drug paraphernalia in their vehicles and residences did not establish probable cause to search home).

Because Hicks' testimony that he knew there would be residue on the spoon is not supported by substantial evidence and based on that the court found probable cause to arrest Palmer for possession of heroin, the facts and circumstances did not support probable cause for the arrest.

Hicks likewise did not have probable cause to arrest Palmer for the use of drug paraphernalia. To make a lawful arrest, "[t]he arresting officer must have probable cause to believe a [misdemeanor] offense has been or is being committed in his presence." State v. Montgomery, 31 Wn.App. 745, 752, 644 P.2d 747 (1982); RCW 10.31.100. Under RCW 69.50.412

it is a crime to use drug paraphernalia but mere possession of drug paraphernalia is not a crime and does not give rise to probable cause to arrest. State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003) (citing RCW 69.50.412(1)); State v. Neeley, 113 Wn.App. 100, 52 P.3d 539 (2002); See, State v. McKenna, 91 Wn.App. 554, 563, 958 P.2d 1017 (1998) ("The drug paraphernalia in the duffle bag did not give cause to arrest, because mere possession of drug paraphernalia is not a crime.")).

While possession of drug paraphernalia alone will not support probable cause for an arrest, other evidence indicating that the drug paraphernalia has been used to ingest or inhale a controlled substance provides probable cause to arrest for the misdemeanor offense of using drug paraphernalia. Neeley, 113 Wn. App, at 107 (citing RCW 69.50.412(1). see also, State v. Lowrimore, 67 Wn.App. 949, 841 P .2d 779 (1992) (combination of possession of drug paraphernalia and bizarre and emotionally unstable behavior gave rise to probable cause to arrest for violation of RCW 69.50.412(1)).

Here, Hicks did not see Palmer use the spoon. There is no evidence Palmer exhibited any bizarre behavior nor was there any other evidence that would indicate he was using the spoon. Thus, Hicks would not have had probable cause to arrest Palmer for possession of drug paraphernalia.

Because there was no probable cause to arrest Palmer for possession of heroin or the use of drug paraphernalia, the search of the car under the search incident to arrest exception to the warrant requirement was illegal. The evidence discovered in the search should have been suppressed. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

2. THE SEARCH OF PALMER'S CAR WAS NOT JUSTIFIED UNDER THE SEARCH INCIDENT TO ARREST EXCEPTION EVEN IF HICKS HAD PROBABLE CAUSE TO ARREST PALMER FOR POSSESSION OF HEROIN.

The court concluded Hicks properly searched Palmer's car under Arizona v. Gant, 556 U.S.__, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), because he had reason to believe the car contained evidence of possession of heroin. CP 18 (Conclusion of Law 2.5). In Gant the Court held that under the Fourth Amendment to the United States Constitution, "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Gant, 129 S. Ct. at 1723 (quoting Chimel v. California, 395 U. S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)) (internal quotation marks omitted). "That limitation, which continues to define the boundaries of the exception, ensures that the scope

of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." Gant, 129 S. Ct. at 1716.

Police officers searched Gant's car and discovered cocaine after he was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car. Gant, 129 S. Ct. at 1714. The Court held the search was unconstitutional under the Chimel rationale because Gant could not have accessed his car to retrieve weapons or evidence at the time of the search. Id.

Moreover, it is well settled that article I, section 7 of the Washington Constitution provides greater protection against warrantless searches of automobiles than the Fourth Amendment. State v. Webb, 147 Wn.App. 264, 269, 195 P.3d 550 (2008). In State v. Patton, 167 Wn.2d 379, 219 P.3d 651, 652 (2009), the Court held an automobile search incident to arrest is not justified under article 1, section 7, unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

Patton was followed by State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009). There, a police officer stopped the minivan Valdez was driving, discovered Valdez had an outstanding warrant, arrested him, handcuffed him, and placed him in the backseat of his patrol car. Id. at 766. Police then search the minivan and found drugs. Id. The Valdez Court held because Valdez was handcuffed and in the back of the patrol car he no longer had access to any portion of the minivan, thus, the search of the minivan was unconstitutional under both the Fourth Amendment and article I, section 7. Id. at 778; See, State v. Rathbun, 124 Wn.App. 372, 378, 101 P.3d 119 (2004) (proper question is whether vehicle was within the arrestee's immediate control when arrested, "not whether the arrestee had control over the vehicle at some point prior to his or her arrest").

Like Gant and Valdez, Palmer was already handcuffed in the back of Hicks' car, which was 20 to 30 feet away from his own car when he was arrested for possession of heroin and Hicks searched the car. Like Gant and Valdez, Palmer, did not have immediate control over the car or access to the car at the time of his arrest.

The State bears the burden of establishing the "search incident to arrest" exception. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). To that end, the State has the burden of proving facts necessary to

establish the lawfulness of any such search. Webb, 147 Wn. App. at 270, 274.

The State failed to show under these facts Palmer could have gained immediate access to the car or any of its contents. Under the holdings in Gant, Patton and Valdez, the search here violated both the Fourth Amendment and article 1, section 7 and the evidence found in the car should have been suppressed. State v. Valdez, 167 Wn.2d at 778.

3. THE TRIAL COURT ERRED BY CONCLUDING THAT THE EVIDENCE WAS ADMISSIBLE UNDER THE INEVITABLE DISCOVERY DOCTRINE.

In the alternative, the Court found that Hicks would inevitably have discovered the drugs and paraphernalia in the car pursuant to a lawful inventory search following impoundment of the car. CP 18 (Conclusion of Law 2.7). The court's conclusion is factually and legally unsupported.

First, it is inappropriate for an appellate court to speculate as to whether the improperly acquired evidence would have inevitably been discovered where the necessary facts have not been determined. Webb, 147 Wn.App. at 275. The State presented no evidence that the car was subject to lawful impoundment, that Hicks intended to impound the car, or that he would have inventoried the contents of the car. The State failed to

present any facts to meet its burden of proof the car would have been legally impounded and its contents inventoried.

Secondly, Washington has rejected the inevitable discovery rule. In State v. Winterstein, 167 Wn.2d 620, 631-636, 220 P.3d 1226, 1230-1233 (2009), the Court rejected the inevitable discovery exception to the exclusionary rule as incompatible with article I, section 7 of the Washington Constitution. The Winterstein Court reasoned because the intent behind article I, section 7 "was to protect personal rights rather than curb government actions" the remedy for illegally obtained evidence is exclusion of the evidence. Id. at 632.

The inevitable discovery doctrine does not remedy the errors above. The evidence found during the search of Palmer's car was inadmissible under the inevitable discovery rule.

D. CONCLUSION

The search of Palmer's car was an illegal search incident to arrest because the officer did not have probable cause to arrest Palmer for possession of heroin. Assuming, however, there was probable cause to arrest Palmer for possession of heroin, the search of his car was illegal because Palmer did not have immediate access to the car when he was arrested. Lastly, the court's conclusion the evidence would have been discovered under the inevitable discovery rule pursuant to impoundment

of the car is factually unsupported and as a matter of law the inevitable discovery rule is inapplicable under article I, section 7. For these reasons, the trial court erred by failing to suppress the evidence found in Palmer's car. Without that evidence the convictions for possession of methamphetamine and possession of heroin cannot stand. This court should therefore reverse the trial court's denial of Palmer's motion to suppress and remand for dismissal of those convictions.

DATED this 12 day of May, 2010.

Respectfully submitted,

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Attorneys for Appellant

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON, Plaintiff, vs. DYLAN HARRIS PALMER, Defendant.	NO. 09-1-00399-2 FINDINGS OF FACT CONCLUSIONS OF LAW FOR SUPPRESSION HEARING

On October 14, 2009, a Suppression Hearing was held before this court, the Honorable Judge Nelson Hunt. The Defendant was present, with his attorney, Kenneth Johnson. The State was represented by Deputy Prosecuting Attorney Sara Beigh. The court heard testimony from the State's witnesses; Trooper Jason Hicks of the Washington State Patrol. The court heard testimony from the Defendant. This court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1.1 On July 6, 2009 Washington State Patrol Trooper Jason Hicks saw a car traveling westbound on State Route 12 around milepost 82. The car appeared to be traveling over the 55 mph speed limit. Trooper Hicks activated his radar and got a reading of 73 mph.

1.2 Trooper Hicks initiated a traffic stop on the car for speeding. Trooper Hicks contacted the driver, who was later identified as Dylan Palmer, the Defendant.

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1.3 Trooper Hicks ran a check on the Defendant's driving status through Washington State Patrol Communications. The Defendant's license returned as suspended in the third degree.

1.4 Trooper Hicks had the Defendant step out of his car and placed him under arrest for driving while license suspended in the third degree.

1.5 Trooper Hicks walked the Defendant back to his patrol car. Trooper Hicks advised the Defendant of his Constitutional rights. The Defendant stated he understood his rights.

1.6 Trooper Hicks searched the Defendant's person incident to arrest.

1.7 Trooper Hicks asked the Defendant if there was anything in the car that Trooper Hicks should be concerned with. The Defendant responded that there were spoons in his backpack that he had used to ingest heroin.

1.8 Trooper Hicks is a graduate of the Drug Recognition Expert School and was previously certified as a Drug Recognition Expert. Trooper Hicks also has extensive training and experience in regards drugs and drug related crimes.

1.9 Trooper Hicks knew that when a person uses spoons to there is drug residue left on that spoon.

1.10 Trooper Hicks placed the Defendant under arrest for felony drug possession and searched the Defendant's car incident to the arrest for evidence relating to the drug possession charge.

1.11 Trooper Hicks found several needles in the Defendant's backpack located in the Defendant's car. There was brown liquid residue inside two of the needles. Trooper Hicks also found a brown sticky residue on a spoon and a set of digital scales. Trooper Hicks also located a pipe.

1.12 Trooper Hicks asked the Defendant about the items Trooper Hicks found in the car. The Defendant told Trooper Hicks he was diabetic.

1.13 Trooper Hicks field tested the brown residue inside one of the needles and it tested positive for heroin.

1.14 The residue inside the pipe field tested positive for methamphetamine.

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II. CONCLUSIONS OF LAW

Based on the foregoing findings

2.1 The court has jurisdiction over the Defendant and the subject matter of this action.

2.2 There was a valid arrest for driving while license suspended.

2.3 The Defendant was advised of his rights, including his right to remain silent. The Defendant voluntarily gave up the right to remain silent.

2.4 Trooper Hicks had probable cause to arrest the defendant for Violation of the Uniform Controlled Substances Act, Possession of Heroin, based on the statements made by the Defendant.

2.5 Pursuant to Arizona v. Gant, ___ U.S.___, 129 S.CT. 1710 (2009), Trooper Hicks is allowed to search the vehicle because there was a reasonable belief that the vehicle contained evidence of the possession of heroin.

2.6 The automobile exception allows an officer to search the entire vehicle, without a warrant, if the officer has probable cause to believe the automobile contains contraband, regardless of an arrest, arrest status, or location of the occupants. Especially in a case where the automobile is going to be impounded, it's very mobility does allow for a search absent a warrant.

2.7 Inevitable discovery of the contraband is supported because there is no evidence of bad faith and the impound inventory would have discovered the drugs.

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ORDER

3.1. The Defendant's motion to suppress evidence is denied.

DONE IN OPEN COURT this 29 day of October, 2009

Superior Court Judge

Presented by:

SARA I. BEIGH, WSBA #35564
Prosecuting Attorney

Approved as to form:

KENNETH JOHNSON, WSBA # 6194
Attorney for Defendant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 40114-2-II
	)	
DYLAN PALMER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF MAY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LORI SMITH
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CHEHALIS, WA 98532

[X] DYLAN PALMER
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SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF MAY 2010.

x Patrick Mayovsky