

FILED
COURT OF APPEALS

No. 40114-2-II

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STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

vs.

DYLAN PALMER

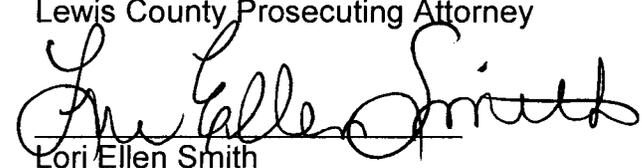
Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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By:



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STATEMENT OF THE CASE

Without waiving the right to challenge any facts later, and except as referenced in detail in the State's argument section below, Appellant's Statement of the Case is adequate for the purpose of responding to this appeal.

ARGUMENT

A. THE TROOPER HAD PROBABLE CAUSE TO ARREST PALMER FOR USE OF DRUG PARAPHERNALIA AND/OR POSSESSION OF HEROIN RESIDUE SO THE SEARCH OF PALMER'S VEHICLE WAS LAWFUL UNDER THE "CRIME OF ARREST" EXCEPTION DISCUSSED IN GANT AND STATE V. WRIGHT.

Palmer claims that the trial court erred when it denied his motion to suppress evidence found in the search of his vehicle pursuant to Arizona v. Gant, and its Washington progeny. The State disagrees, because under the facts presented here, the search of Palmer's vehicle incident to his arrest for a drug offense was proper under State v. Wright, 155 Wn.App. 537, 547-560, 230 P.3d 1063 (2010).

After the United States Supreme Court decision in Arizona v. Gant, --- U.S. ----, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), searches of a vehicle incident to arrest are generally unlawful, once the occupant has been arrested and placed in the patrol car away from the vehicle. However, there remain exceptions to this rule.

Relevant here, an officer may conduct a vehicle search incident to a lawful arrest when it is reasonable to believe evidence related to the “crime of arrest” may be found in the vehicle. Gant, supra., 129 S.Ct. at 1979; Wright, 155 Wn.App. at 547-560(vehicle occupant arrested for possession of marijuana after appearing agitated and making furtive movements, and the vehicle smelled of marijuana—search justified under Gant as officer had reason to believe vehicle contained evidence of the crime of arrest); State v. Snapp 153 Wash.App. 485, 488, 219 P.3d 971(2009)(vehicle searched for drugs incident to arrest for drug crime and thus the search falls under the “crime of arrest” exception laid out in Gant); State v. Pearsall, 156 Wn.App. 357, 360, 231 P.3d 849 (2010)(noting in passing that Gant “does not prohibit searches incident to arrest for evidence of the crime of arrest”).

Furthermore, subsequent to Gant --under article I, section 7 of the Washington Constitution, the search incident to arrest exception “requires a nexus between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns or concern for the destruction of evidence of the crime of arrest.” State v. Patton, 167 Wn.2d 379, 394, 219 P.3d 651 (2009).

In the present case, the officer had probable cause to arrest Palmer for a drug offense. “Probable cause for 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). The validity of an arrest depends upon the objective reasonableness of the arresting officer’s belief that probable cause exists. State v. Potter, 156 Wn.2d at 840, 132 P.3d 1089 (*). Stopping a vehicle for a traffic violation and detaining the person during a brief investigation falls within the due process standards of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The use of drug paraphernalia is a crime. RCW 69.50.412. This offense is a misdemeanor. Id. When determining whether an object is drug paraphernalia under this statute, a factor that may be considered is any statements by the owner of the object concerning its use. RCW 69.50.102(b). A vehicle occupant’s behavior can also be considered when determining whether paraphernalia has been used to ingest a controlled substance. State v. Neeley, 113 Wn. App. 100, 108, 52 P.3d 539 (2007)(the timing and location of

the car, her physical behavior, and the drug paraphernalia lying on the passenger seat raised a reasonable inference that she used the paraphernalia to ingest a controlled substance); State v. Lowrimore, 67 Wn.App. 949, 959, 841 P.2d 779 (1992)(possession of paraphernalia, coupled with bizarre and emotionally unstable behavior gives rise to probable cause to arrest for violation of RCW 69.50.412 (1)).

A recent Washington case seems particularly relevant to the circumstances and issues presented in the instant case. See e.g. Wright, supra . In Wright, a police officer stopped Wright for a traffic infraction, but the officer then smelled the odor of marijuana coming from the car, saw that Wright appeared nervous and observed furtive movements, and saw a large roll of money in the glove box. Wright, supra . The officer, having developed probable cause at the scene, arrested Wright for possession of marijuana, handcuffed him, and placed him in the back of a patrol car. Wright admitted he had smoked marijuana earlier in the day. Wright at 155.

On appeal, the Wright Court held that under Gant and its Washington progeny, the officer had probable cause to arrest Wright for a drug offense and thus had probable cause to search

the vehicle for evidence of the crime of arrest, given the clear nexus between the crime of arrest and the search of the vehicle. Wright 155 Wn.App. at 549. In so holding, the Wright Court reiterated that “Gant recognized that ‘circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” Id. (citations omitted). The Wright Court further noted, “[w]hile the Court did not elaborate on the reasonable belief standard, the opinion makes clear it requires less than probable cause.” Id. citing Gant, 129 S.Ct. at 1721.

Respondent submits that the decision in Wright and the other authorities cited therein, controls the disposition of the instant case, and this Court should therefore affirm Palmer’s convictions.

Here, the facts elicited at the suppression hearing are as follows: Washington State Patrol Trooper Jason Hicks completed Drug Recognition Expert School and was certified as a Drug Recognition Expert (DRE) until April, 2008. At the time of the suppression hearing in this case, Trooper Hicks was in the process of getting recertified as a DRE. 10/14/09 RP 4. Trooper Hicks also received training as a member of the severe highway crime apprehension team, which specializes in drug interdiction and drug

related traffic stops. Id. 4,5. Trooper Hicks also served as a military police officer for eight years, and has attended trainings put on by agencies such as the Drug Enforcement Agency (DEA). Id. 5.

While on duty and on patrol in Lewis County on July 6, 2009, Trooper Hicks clocked the speed of a Nissan Sentra at 73 miles per hour in a posted 55 mile per hour zone. 10/14/09 RP 6. Trooper Hicks performed a traffic stop on the vehicle. Id. The driver of the vehicle was the defendant, Dylan Palmer. Id. 7. When Trooper Hicks performed a records check, he discovered that Palmer's driving status was suspended in the third degree, and that there was an outstanding "non-extraditable," King County warrant for Palmer's arrest on that offense, and that Palmer had seven priors for that same offense. Id. 8. Trooper Hicks then placed Palmer under arrest, read him his rights, and placed Palmer in his patrol car. Id. Palmer said he understood his rights. Id. Trooper Hicks said Palmer appeared nervous and that he explained to Palmer that he was not being arrested on the warrant—he was being arrested for driving with a suspended license. Id. 8,9. Still, Trooper Hicks noted Palmer's continuing nervousness:

[a]s I was escorting him back to the vehicle, he was nervous and continued—where, generally, whenever you quell the

person's fears, the nervousness subsides. And I contact thousands of people a year, and people are generally nervous to being with, but that nervousness in the innocent motoring public generally subsides after a few minutes of contact. Mr. Palmer's nervousness did not. Once I got him back to the vehicle after advising him of his rights, I began to search his person asking if he had anything on him that would stick me, poke me, cut me, slice me, things of that nature. He said no. The nervousness still continued. I asked him if there was anything in the car I need to be concerned with and that's when Mr. Palmer answered that question. . . . He stated he had some spoons in his backpack that he used to ingest heroin.

10/14/09 RP 8,9 (emphasis added).

Trooper Hicks also said that based on his training and experience he knew that certain drugs are injected, such as heroin and methamphetamine. 10/14/09 RP 9. Trooper Hicks also said that based on his training and experience, he had never found a spoon that had been used to ingest heroin that did not have remaining residue of the drug still on the spoon. Id. 9,10.

Accordingly, when Palmer told Trooper Hicks that he had spoons that he had used to ingest heroin, the Trooper placed Palmer under arrest for possession of the heroin that the Trooper "knew was going to be on the spoon" and then the Trooper put Palmer in the back of the patrol car. Id.

After placing Palmer under arrest for use of drug paraphernalia/possession of heroin (residue remaining on the

spoons), Trooper Hicks searched Palmer's vehicle for evidence of the crime of arrest—that being a drug offense. 10/14/09 RP 9,10. Upon searching the vehicle, Trooper Hicks found spoons with residue, a knife with residue, several needles, and a loaded needle in the glove box that was "ready to go with a brown liquid." Id. 10. Trooper Hicks also located scales with residue, more paraphernalia, and additional needles with brown residue in them. 10/14/09 RP 10. Trooper Hicks filed tested some of the items and they field-tested positive for heroin. 10/14/09 RP 11.

These facts put this case squarely under the reasoning and ruling of Wright, supra. Here, as in Wright, Palmer was initially stopped for a traffic violation, and it was then discovered that Palmer had a suspended driver's license in the third degree. However, based upon the officer's training and experience in drug-related traffic stops, together with Palmer's nervous behavior and Palmer's statement that the vehicle contained spoons which were used to ingest heroin (used paraphernalia that would also have heroin residue on them) additional facts developed on the scene which provided Trooper Hicks with probable cause to arrest for the additional crime of use of paraphernalia and/or possession of heroin (residue). 10/14/09 RP 9,10.

In other words, under Wright, supra., and the exception set out in Gant, supra., the search of Palmer's vehicle under the facts presented here was permissible, because Palmer was arrested for a drug crime, and it was therefore "reasonable to believe evidence of the crime of arrest might be found in the vehicle." Wright, 155 Wn.App. at 555, 556; Gant, supra.; Snapp, supra.

Furthermore, this vehicle search was proper under Wright, even though Palmer was secured in the back of the police vehicle at the time of the search. Wright, supra. Thus, Palmer's argument that the search was improper under Patton because Palmer was locked in the back of the patrol vehicle and could not access the vehicle is incorrect. Additionally, the facts in Patton are distinguishable, because the search of the vehicle in Patton was not conducted under the "crime of arrest" exception in Gant. Instead, Patton was arrested pursuant to an outstanding felony warrant and the officers searched incident to Patton's arrest on that warrant only. Patton, supra. This distinguishes Patton from the present case and from Wright, supra. Unlike in Patton, in the present case, the search of the vehicle was conducted because it was reasonable to believe that the vehicle might contain evidence of the crime of arrest. Wright, supra. As set out in Wright, the

facts of the instant case meet the “crime of arrest” exception noted in Gant.—and by the trial court here. Accordingly, Palmer’s convictions should be affirmed.

Inevitable Discovery Doctrine in Washington

As to Palmer’s claims regarding the “inevitable discovery” doctrine in Washington, the State concedes that this doctrine is no longer viable under Article 1 Section 7 of the Washington Constitution. See e.g., State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009). However, even without the trial court’s erroneous discussion of this no-longer-valid-doctrine, the search of Palmer’s vehicle was lawful, as previously explained above. Because the search here was lawful, Palmer’s convictions should be affirmed.

CONCLUSION

For the reasons set out fully above, the search of Palmer’s vehicle was proper, and his convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 24th day of August, 2010.

L. MICHAEL GOLDEN
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BY:

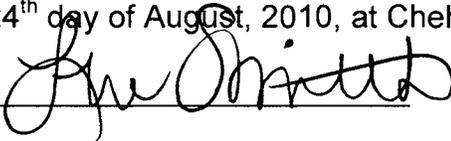

LORL SMITH, WSBA 27961
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Declaration of Service

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

Eric J. Nielsen
1908 E. Madison Street
Seattle, WA 98122

Dated this 24th day of August, 2010, at Chehalis, Washington.



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