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COURT OF APPEALS  
DIVISION II

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NO. 40114-2--II

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

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STATE OF WASHINGTON,

Respondent,

v.

DYLAN PALMER,

Appellant.

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

The Honorable Nelson E. Hunt, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY<sup>1</sup>

1. THERE WAS NO PROBABLE CAUSE TO ARREST PALMER FOR A DRUG RELATED OFFENSE AND SEARCH HIS CAR FOR EVIDENCE RELATED TO A DRUG OFFENSE.

The State contends Hicks had probable cause to arrest to Palmer for possession of heroin. Brief of Respondent (BR) at 8. The State further contends that although Palmer was handcuffed in the back of Hicks' patrol car, Hicks was nonetheless justified in searching Palmer's car under what it terms the "crime of arrest" exception, citing Gant.<sup>2</sup> BR at 9-10. The State relies almost entirely on State v. Wright, 155 Wn. App. 537, 230 P.3d 1063 (2010), to support its arguments and claims the decision in Wright controls this case. BR at 1, 5. The State's reliance on Wright is misplaced, Wright is not controlling authority under a proper article 1, section 7 analysis and the State's arguments are unpersuasive.

In Wright, the officer stopped Wright for driving without headlights. When the officer approached the car he immediately smelled the "strong odor of marijuana" emanating from the car and Wright appeared nervous and was physically shaking. Wright, 155 Wn. App. at 542. When Wright opened the glove compartment to retrieve the car's

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<sup>1</sup> The State concedes the inevitable discovery doctrine is inapplicable under the Washington Constitution. Brief of Respondent at 10.

<sup>2</sup> Arizona v. Gant, 556 U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

registration, the officer saw a large roll of money and Wright quickly closed the glove compartment was moving his hand “uncontrollably.” Id.

Wright was handcuffed and placed in the patrol car. He gave police permission to retrieve the registration from the glove compartment and when the officer leaned into the car to get the registration, he noticed the odor of marijuana was much stronger. Wright, 155 Wn. App. at 542. After reading Wright his Miranda rights, the officer asked why he smelled marijuana in the car. Wright admitted smoking marijuana earlier. Id. A drug sniffing dog was called in and alerted to the presence of drugs in the car. Id. at 543. The car was searched and police recovered two baggies of marijuana in the console of the passenger compartment, and two baggies of marijuana in the back seat. Id.

The Wright court found that because Wright was the only person in the car and there was a strong odor of marijuana emanating from the car, Wright exhibited furtive behavior, there was a large roll of money in the glove compartment and Wright admitted he smoked marijuana earlier, the officer had probable cause to arrest Wright for possession of marijuana and a reasonable belief the car contained evidence of the possession of marijuana. On these facts the court concluded the search was justified under the Fourth Amendment and article 1, section 7 even though Wright was handcuffed in the back of the patrol car a the time of the search.

Wright, 155 Wn. App. at 549, 556. The Wright court merely noted the Washington Supreme Court's holding in State v. Valdez, 167 Wash.2d 761, 224 P.3d 751 (2009) did not change its analysis. Id. at 556, n. 11.

Wright is factually distinguishable because there was no probable cause to arrest Palmer for possession of heroin or search the car for evidence of drugs. The State emphasizes Hicks' training as a drug recognition expert and experience in drug related traffic stops to support its argument that when Palmer told Hicks there were spoons in the car used to ingest heroin, it supplied the probable cause to arrest Palmer based on Hicks' assertion that he never saw a spoon that did not contain drug residue. BR 5-7.

In State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008), police stopped a car and noticed the smell of marijuana coming from the car. Grande, 164 Wn.2d at 139. Police arrested both the driver and passenger for possession of marijuana then searched the car. Id. The Grande Court held that while the smell of gave police probable cause to search the car, without more it was insufficient to establish probable cause to arrest the occupants. Id. at 146-147. Because the search occurred after the two were arrested, the Court held the search was illegal. Id. at 147.

Regardless of Hicks' training and experience, there was no evidence or factual basis to establish probable cause to arrest Palmer for

possession of heroin or search the car of evidence of the drug. Here, Palmer told Hicks there were spoons in the car used to ingest heroin. Unlike the smell of marijuana emanating from a car, which would lead a reasonable person to believe the drug is in the car, here there was no objective basis to believe there was heroin in the car or heroin residue on the spoon. 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). Hicks' belief there would be drug residue on the spoon was nothing more than speculation and did not establish probable cause to search the car for evidence of heroin.

Moreover, even if Palmer's statement was sufficient to establish probable cause to search the car, without more, it did not establish probable cause to arrest Palmer for possession of heroin before determining there were drugs in the car. Because Hicks arrested Palmer before searching the car, as in Grande, the search was illegal.

Additionally, despite the State's contrary contention, Hicks did not have probable cause to arrest Palmer for drug paraphernalia either. There was no evidence the spoon was used in Hicks' presence. See State v. O'Neill, 148 Wn.2d 564, 584, n. 8, 62 P.3d 489 (2003) (there is no

evidence that the “cook spoon” was used in the officer’s presence thus, the officer could not have arrested O’Neill for use of the drug paraphernalia). Furthermore, Palmer did not exhibit any bizarre behavior or other indicia that Palmer was using the spoon to ingest heroin. See 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 ); see also State v. Neeley, 113 Wn.App. 100, 52 P.3d 539 (2002) (location of car in high drug area late at night when businesses were close, head bopping up and down as if ingesting something and presence of drug paraphernalia gave rise to probable cause to arrest).

In sum, unlike in Wright where police had probable cause to arrest Wright for a drug offense, Hicks did not have probable cause to arrest Palmer for either possession of heroin or drug paraphernalia. Because Hicks did not have probable cause to arrest Palmer for either of those offenses the warrantless search of Palmer’s car for evidence of drugs was unconstitutional.

2. UNDER THE HOLDING IN STATE V. VALDEZ, THE WARRANTLESS SEARCH OF PALMER'S CAR VIOLATED THE FOURTH AMENDMENT AND ARTICLE 1, SECTION 7.

Assuming for the sake of argument there was probable cause to arrest Palmer for either possession of heroin or drug paraphernalia, the warrantless search was nonetheless illegal. A warrantless search of a car is only constitutionally permissible when the search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest. Valdez, 167 Wn.2d at 777.

It is undisputed Palmer was arrested for driving on a suspended license, handcuffed and placed in the back of Hicks' patrol car before he told Hicks about the spoons. It was then Palmer arrested for the drug offense and the car searched pursuant to that arrest. Palmer argued in his opening brief that because he was secured in the patrol car when Hicks decided to search Palmer's car, under the holding in Valdez, the search violated both the Fourth Amendment and article 1 section 7. Brief of Appellant at 11-13.<sup>3</sup>

The State fails to mention the Valdez decision in its brief. Instead, it cites Wright for the legal proposition that under the Fourth Amendment

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<sup>3</sup> When both state and federal constitutional violations are asserted, this Court reviews the state constitutional claim first. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

and article 1, section 7, where police have probable cause to arrest a person for a drug offense they can search a car for evidence of the crime of arrest regardless of whether the arrestee has access to the car. BR at 9-10. Under Fourth Amendment jurisprudence the holding in Wright may be correct. See Gant, 129 S. Ct. 1710, 1723-24 ("Police 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."). Under article 1, section 7, jurisprudence, Wright is wrong.

The Fourth Amendment prohibits unreasonable searches. The Valdez Court recognized that under the Fourth Amendment's expectation of privacy standard there is a reduced expectation of privacy in an automobile, which is "outweighed by law enforcement needs heightened by the difficulties arising from an automobile's mobility." Valdez. 167 Wn. 2d at 771 (citation omitted). Based on that rationale, and Fourth Amendment's prohibition against unreasonable searches, the Supreme Court in Gant held the warrantless search of an automobile where there is a reason to believe evidence relevant to the crime of arrest might be found in the vehicle is reasonable under the Fourth Amendment. Id. (citing Gant, 129 S.Ct. at 1719).

Article 1, section 7, however, prohibits any disturbance of a person's private affairs without authority of law. Valdez, 167 Wn.2d at 772. Generally, only a search warrant provides the authority of law to intrude on a person's private affairs unless the State proves the search is justified under a few jealously guarded exceptions to the warrant requirement. Id.; see State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (a warrant provides the authority of law under the Washington Constitution). One exception to the warrant requirement is a search incident to valid arrest. Valdez, 167 Wn.2d at 773. As applied to car searches, a search under that exception is only justified where the officer needs to immediately conduct the search for safety reasons or to prevent the concealment or destruction of evidence of the crime of arrest. Id. at 777; State v. Ringer, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983). Thus, under an article 1, section 7 analysis, the focus is not on whether the search is reasonable based on an expectation of privacy but on whether it is necessary. Where the arrestee is secured and not within reaching distance of the car the necessity for an immediate search is simply not present absent some other exigent circumstance. Valdez, 167 Wn.2d at 777-778.

The Valdez Court adopted a bright line rule. Under the Washington Constitution, "[A]fter an arrestee is secured and removed

from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception." Valdez, 167 Wn.2d at 777.<sup>4</sup>

In Valdez, police stopped the minivan Valdez was driving, discovered Valdez had an outstanding warrant, arrested him, handcuffed him, and placed him in the backseat of a patrol car. Valdez, 167 Wn.2d at 766. Police then searched the minivan and found drugs. Id. The Valdez Court held because Valdez was arrested on an outstanding warrant, handcuffed in the back of the patrol car and there was no showing it was reasonable to believe that evidence relevant to the crime of arrest (arrest warrant) might be found in the minivan, the search of the minivan was unconstitutional under the Fourth Amendment. Id. at 778.

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<sup>4</sup> In State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009) issued just two months before Valdez, the Court held that the search of an automobile incident to arrest "is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, *and* that these concerns exist at the time of the search." State v. Patton, 167 Wn.2d at 394-95 (emphasis added). The Valdez majority did not cite Patton. Patton was a different case than Valdez. In Patton the Court found there was no connection between Patton, the car and the reason for Patton's arrest. The Patton Court, however, foreshadowed the Valdez rule when it pointed out, "we also recognize that we have heretofore upheld searches incident to arrest conducted after the arrestee has been secured and the attendant risk to officers in the field has passed. Today, we expressly disapprove of this expansive application of the narrow search incident to arrest exception." Id. at 395.

Importantly, the Court also held because Valdez was secured in the back of the patrol car and had no access to the minivan at the time of the search, the search was not necessary to remove any weapons or to secure any evidence of the crime of the arrest that could be concealed or destroyed, therefore on that basis alone the search was unconstitutional under article I, section 7. Valdez, 167 Wn.2d at 778. The Valdez Court clarified the search was unlawful under the Washington Constitution simply because Valdez was handcuffed and secured in the back of a patrol car. The Court did not invalidate the search on article 1, section 7 grounds because it was unreasonable to believe evidence of the crime of arrest could be found in the car.

It is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court. State v. Pedro, 148 Wn. App. 932, 950, 201 P.3d 398 (2009). Because the Wright Court did not properly consider Valdez, its conclusion is not persuasive nor does its holding control this Court's analysis of Palmer's case. Valdez is the controlling authority.

a. The Warrantless Search Violated The Fourth Amendment.

Here, because Hicks did not have probable cause to arrest Palmer for possession of heroin or drug paraphernalia the only valid basis for his

arrest was the initial basis: driving with a suspended license. Palmer was handcuffed in the back of the patrol car when Hick's searched Palmer's car. At the time of the search Palmer did not have access to his car and there was no reason to believe evidence of the crime of driving with a suspended license would be found in the car. The warrantless search was unconstitutional under the Fourth Amendment. Valdez, 167 Wn.2d at 778.

b. The Warrantless Search Violated Article 1, Section 7.

Assuming, however, Hicks had probable cause to arrest Palmer for a drug offense and search for evidence of drugs, the warrantless search was unconstitutional under article 1, section 7. The search was not necessary to remove any weapons Palmer could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest that could be concealed or destroyed because Palmer was handcuffed in the back of Hicks' patrol car at the time of the search. Valdez, 167 Wn.2d at 778.

Because Hicks' search of Palmer's car was unconstitutional the evidence gathered during that search must be suppressed. Valdez, 167 Wn.2d at 778 (citing State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)). Without the evidence found in the car there is insufficient

evidence to sustain a finding of guilt for the two drug possession charges. This Court should therefore reverse the conviction and remand for dismissal. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

B. CONCLUSION

The State's reliance on Wright is misplaced. Wright is factually distinguishable and its article 1, section 7 analysis conflicts with the Washington Supreme Court's decision in Valdez---a decision the Wright court did not address.

The warrantless search of Palmer's car cannot be justified under the search incident to arrest exception to the warrant requirement because the officer did not have probable cause to arrest Palmer for a drug related offense. The search violated both the Fourth Amendment and article 1, section 7.

Assuming, however, there was probable cause to arrest Palmer for possession of heroin or drug paraphernalia, the search of his car was illegal under article 1, section 7 and the Valdez rule because Palmer was secured in the back of the patrol car and did not have access to his car when he was arrested and his car searched.

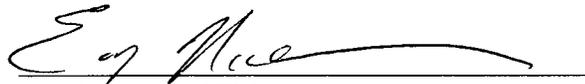
For the above reasons and the reasons in appellant's opening brief, the trial court erred by failing to suppress the evidence found in Palmer's car. Without that evidence there is insufficient evidence to support

Palmer's two drug convictions. This court should therefore reverse the convictions and remand for dismissal.

DATED this 3 day of September, 2010.

Respectfully submitted,

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

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

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**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 3<sup>RD</sup> DAY OF SEPTEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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DEPUTY

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF SEPTEMBER 2010.

x *Patrick Mayovsky*