

COA No. 40160-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

AMY CRITCHFIELD,

Appellant.

10 APR 28 PM 12:44
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS

ON APPEAL FROM THE CLALLAM COUNTY SUPERIOR COURT
IN THE STATE OF WASHINGTON

The Honorable George Wood

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
WSBA No. 24560
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

01/16/10
pm 4/27/10

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 1

 1. Conviction following CrR 3.6 hearing and stipulated trial. 1

 2. Police report. 3

 3. Trial court’s factual findings and rejection of defense arguments in support of suppression. 5

D. ARGUMENT 9

 THE FRUITS OF THE OFFICER’S SEARCH OF THE VEHICLE IN WHICH THE ARRESTEE, MS. CRITCHFIELD, WAS A PASSENGER MUST BE SUPPRESSED. 9

 1. Officer Nutter had no basis under *Rankin* or the fellow officer rule to request Ms. Critchfield's identification. 9

 2. Alternatively, an officer may not search a vehicle incident to arrest unless the officer has a reasonable belief that evidence of the crime of arrest might be destroyed or concealed by an unsecured arrestee. 12

 3. Ms. Critchfield was secured in the back of Officer Nutter’s patrol vehicle and was unable to reach any items in the vehicle at the time of the search. 22

 4. Because the search incident to arrest exception did not apply to the search of the vehicle, the resulting evidence must be suppressed. 23

D. CONCLUSION 24

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Brown</u> , 154 Wn.2d 787, 117 P.3d 336 (2005)	10
<u>State v. Burnett</u> , ___ P.3d ___ (2010 WL 611498) (2010).	20
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002).	12,24
<u>State v. Gaddy</u> , 152 Wn.2d 64, 93 P.3d 872 (2004).	10
<u>State v. Maesse</u> , 29 Wn. App. 642, 629 P.2d 1349 (1981), <u>review denied</u> , 96 Wn.2d 1009 (1981)	11
<u>State v. Patton</u> , 167 Wn.2d 379, 219 P.3d 651 (2009)	18,19
<u>State v. Rankin</u> , 151 Wn.2d 689, 92 P.3d 202 (2004)	9,10,12
<u>State v. Ringer</u> , 100 Wn.2d 686, 674 P.2d 1240 (1983).	18
<u>State v. Scalara</u> , ___ P.3d ___, 2010 WL 1039278 (2010).	19,20
<u>State v. Stroud</u> , 106 Wn. 2d 144, 720 P.2d 436 (1986)	18
<u>State v. Valdez</u> , 167 Wn.2d 761, 224 P.3d 751 (2009).	17,22
<u>State v. Wright</u> , ___ P.3d ___, 2010 WL 1531484 (2010).	21

UNITED STATES SUPREME COURT CASES

<u>Arizona v. Gant</u> , 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009)	passim
<u>Chimel v. California</u> , 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).	13,14,15,16
<u>United States v. Hensley</u> , 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985)	10

<u>Katz v. United States</u> , 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)	13
<u>Nardone v. United States</u> , 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939)	24,12
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)	12
<u>Thornton v. United States</u> , 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)	23
<u>Weeks v. United States</u> , 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914)	13
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)	12,24
 <u>CONSTITUTIONAL PROVISIONS</u>	
U.S. Const. amend. 4.	10,13
Article 1, § 7	12,16

A. ASSIGNMENTS OF ERROR

The trial court erred in denying Ms. Critchfield's CrR 3.6 motion to suppress drugs found in a warrantless search of the passenger compartment of the car in which she was a passenger.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the fellow officer rule allow the trial court to justify one officer's detention of a person based on what another officer knew, but did not communicate to the first officer, where the first officer also did not act at the second's direction?

2. May police avoid the requirement of a warrant, and search the passenger compartment of a car in which an arrestee had been a passenger, where there is reason to believe evidence of the crime of arrest may be present, but where the arrestee is handcuffed and in a police patrol car, and where there is no concern that such evidence might be destroyed or concealed?

C. STATEMENT OF THE CASE

1. **Conviction following CrR 3.6 hearing and stipulated trial.** Amy Critchfield was convicted in a stipulated bench trial on multiple counts of drug possession and one count of criminal impersonation, based on evidence located, and events occurring,

after police pulled her from a vehicle in which she was a passenger and searched the car, locating various illegally possessed prescription drugs. CP 44 (Information), CP 5 (Findings on bench trial), CP 10 (judgment and sentence).

The convictions turned on the outcome of the CrR 3.6 hearing held on the defendant's motion to suppress. The trial court's factual findings were based on its reading of a police report authored by Port Angeles Police Officer John Nutter, describing his actions, and those of Washington State Patrol Trooper Mike Dufour at the scene of a vehicle stop and arrest of the car's driver, Ronald Critchfield (the defendant's husband).¹

Following the trial court's denial of the motion to suppress and a stipulated bench trial, the court found Ms. Critchfield guilty on five counts of illegal drug possession and one of count criminal impersonation in the first degree (RCW 9A.60.040(1)(a)). CP 5 (bench trial findings), CP 10 (judgment and sentence). Ms. Critchfield was sentenced within the standard range. CP 10. She timely appealed. CP 22.

¹Ms. Critchfield's lawyer allowed the court to decide the facts based on its reading of Officer Nutter's police report, and abandoned her original intention to call the law enforcement officers as witnesses at the CrR 3.6 hearing. CP 24.

2. Police report. According to Officer Nutter's report, he was patrolling the Port Angeles area during the midday hours of January 5, 2009, when he saw a vehicle and driver he recognized from previous law enforcement contacts as Ronald Critchfield. Dispatch advised Officer Nutter that Mr. Critchfield's license was suspended in the third degree, so the officer stopped the vehicle after it pulled into a gas station. CP 42-43 (police report, as attached to defense motion for CrR 3.6 hearing).

Officer Nutter contacted the driver, Ronald Critchfield, and informed him that he was under arrest for driving with a suspended driver's license. He took Ronald Critchfield into custody and placed him in the back seat of the patrol car. CP 42-43.

While Officer Nutter was arresting Ronald Critchfield, Washington State Patrol Trooper Mike Dufour had arrived and was interacting with the woman in the passenger seat of Critchfield's car. Trooper Dufour later explained to Officer Nutter that when he arrived on the scene he observed the passenger acting in a furtive manner. Concerned that she could retrieve a concealed weapon, Dufour requested that the passenger step out of the vehicle, but she ignored his request and continued to reach between the seats.

Trooper Dufour opened the passenger door and physically removed the passenger from the vehicle for officer safety reasons, and threatened to arrest her for obstructing a law enforcement officer by failing to follow his commands to get out of the vehicle. Trooper Dufour did not take the passenger into custody, rather, he requested that she sit on the front bumper of Officer Nutter's patrol car, which she voluntarily did. CP 42-43.

Prior to searching the vehicle incident to arrest of the driver's arrest per then authority under Stroud, Officer Nutter asked the passenger what her name was, and she stated it was Nicole R. Critchfield with a date of birth of June 15, 1989. When Officer Nutter checked that name, Dispatch advised that Nicole Critchfield was "clear with no warrants." Because the passenger had no photograph identification with her, Officer Nutter requested the physical description of Nicole Critchfield, which Dispatch gave him, including the fact that Nicole had blue eyes. CP 42-43.

Officer Nutter noticed that the passenger had hazel colored eyes. Officer Nutter asked her for the last four numbers of her social security number, whereupon Ms. Critchfield started to cry, and told the officer that she did not know what her social security

number was. Officer Nutter looked down into the open black purse that was on the floor of the passenger compartment of the vehicle and saw a pill bottle with the name "Amy Critchfield" on it. He checked Amy Critchfield's name, and Dispatch advised him that this person had an outstanding arrest warrant, and had hazel-colored eyes. Ms. Critchfield then admitted to Officer Nutter that "it was her." Critchfield arrested the defendant and placed her in the backseat of his patrol car. CP 42-43.

According to his police report, Officer Nutter then "next searched the vehicle incident to arrest of both occupants and found" various unprescribed prescription schedule IV and legend drug pills. The officer advised in his report that he believed that there was probable cause to charge Amy Critchfield with various counts of illegal drug possession, and the offense of criminal impersonation in the third degree. CP 42-43.

3. Trial court's factual findings and rejection of defense arguments in support of suppression. Following briefing and argument before the trial court on July 29, 2009, the court, the Honorable George Wood, issued a memorandum opinion denying Ms. Critchfield's motion to suppress. The court first found the

following facts:

According to the police report dated January 5, 2009 (Exhibit 1) Trooper Dufour contacted the Defendant, who was a passenger in the vehicle, while Officer Nutter was arresting the driver. During the interaction between Trooper Dufour and the Defendant, Trooper Dufour observed the Defendant reach between the seats of the car. Concerned that the Defendant might be attempting to retrieve a concealed weapon, the Trooper requested that she step out of the vehicle, but ". . . she ignored his request and continued to reach between the seats." At which time Trooper Dufour opened the passenger door and physically removed the Defendant from the car "for officer safety reasons." The Trooper also threatened to arrest her for obstructing a law enforcement officer "for failing to follow his command to get out of the vehicle." Defendant was not taken into custody at that time, but was "requested" by the Trooper to sit on the front bumper of Officer Nutter's patrol car "which she voluntarily did". Shortly thereafter, Officer Nutter approached the Defendant and asked for her identification. After a series of events detailed in Exhibit 1, the Defendant was arrested on an outstanding warrant and for criminal impersonation. The vehicle was subsequently searched at the scene and evidence supporting the current charges of drug possession was seized.

CP 24 (Memorandum opinion).

Ms. Critchfield argued at the suppression hearing, first, that although Trooper Dufour had authority to remove her from the vehicle for officer safety reasons based upon the observations made by the Trooper, the subsequent request by Officer Nutter for

identification was illegal. 7/29/09RP at 4-10.

The trial court concluded that under the standards set forth in State v. Rankin, 151 Wn.2d 689, 694-95, 699, 92 P.3d 202 (2004), and State v. Allen, 138 Wn. App. 463, 471, 157 P.3d 893 (2007), which held that a passenger in a vehicle stopped by police is unconstitutionally detained when an officer requests identification "unless there is an independent reason that justifies the request," the request for identification was proper because "Trooper Dufour believed that the Defendant's actions in ignoring his command to exit the vehicle constituted a crime, i.e. obstructing a law enforcement officer," and this knowledge could be imputed to Officer Nutter, which satisfied Rankin's requirement of an "independent reason" to request identification from Critchfield. CP 24. The trial court relied on the "fellow officer rule" in this regard:

Although it can certainly be implied from the report which Officer Nutter wrote, it is not totally clear from Exhibit 1 if Officer Nutter had been directly advised at the scene of the Defendant's actions. The "fellow officer" rule, however, does provide a basis for his inquiry of the Defendant. According to said rule information known to one officer may be considered in deciding whether or not there was probable cause to arrest, even if it was not expressly communicated to the arresting officer. State v. Wagner-Bennett, 148 Wn. App. 538 (2009). Certainly this same rule would

apply in the case of an investigatory detention.

CP 24. The trial court further stated:

RCW 9A.76.020 provides that a person is guilty of obstructing when that person willfully "hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." In the present case, Trooper Dufour was discharging his official duties. There is sufficient evidence to suggest that the Defendant hindered or delayed or obstructed his efforts to secure the safety of the scene. Officer Nutter certainly had sufficient cause to pursue investigation of that criminal activity. Identification of the Defendant was the first step in that process and was proper under the Rankin analysis.

CP 24.

Ms. Critchfield next argued that the search of the vehicle was illegal under the authority of the recent Supreme Court case of Arizona v. Gant.² She argued that Gant proscribed the subsequent search of the car "incident to arrest" in this case because the search occurred after she had been arrested and placed in the patrol car. CP 24.

The trial court ruled, however, that while Gant had seriously limited the traditional search of a vehicle incident to arrest, it did not completely prohibit all such searches, and allowed such a search

²Arizona v. Gant, 556 U.S. ____, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009).

when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. The court ruled that it was reasonable to believe that evidence of Ms. Critchfield's true identity would be found in the vehicle – prior to the search, Officer Nutter had observed on the floor of the passenger compartment an open black purse containing a pill bottle with the name "Amy Critchfield" on it, and that the purse was of potential evidentiary value not only for the pill bottle but for other identification normally kept in a purse, which would be evidence of the crime of impersonation for which Ms. Critchfield had been arrested. CP 24.

D. ARGUMENT

THE FRUITS OF THE OFFICER'S SEARCH OF THE VEHICLE IN WHICH THE ARRESTEE, MS. CRITCHFIELD, WAS A PASSENGER MUST BE SUPPRESSED.

1. Officer Nutter had no basis under *Rankin* or the fellow officer rule to request Ms. Critchfield's identification. Article 1 § 7 prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent basis that justifies the request. *State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004). An independent basis is an

"articulable suspicion of criminal activity." State v. Brown, 154 Wn.2d 787, 796, 117 P.3d 336 (2005) (citing Rankin, 151 Wn.2d at 699). A request for identification from a passenger for investigatory purposes constitutes a seizure under both the Fourth Amendment and the state constitution. Rankin, 151 Wn.2d at 697; U.S. Const. Amend. 4; Article 1, § 7.

Here, the trial court concluded that Officer Nutter's request for Ms. Critchfield's identification was proper under the above standard, along with operation of the fellow officer rule. Under the fellow officer rule, police may make an arrest on the basis of reasonable suspicion of grounds for arrest communicated by a fellow officer. State v. Gaddy, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). The rule does allow reasonable suspicion for a detention (and assumedly for an ID request, which requires the same standard be satisfied) to be 'imputed' to another officer under this legal fiction). See United States v. Hensley, 469 U.S. 221, 233, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) (valid Terry investigative stop and arrest on basis of "wanted flyer" issued by police in neighboring state, who themselves had reasonable suspicion justifying a stop).

But the doctrine the trial court employed has no basis in Washington law. The fellow officer rule allows one law enforcement officer who is in possession of reasonable suspicion or probable cause, to communicate those facts to another officer or to order another officer to detain or arrest an individual based on that knowledge. Nothing in the fellow officer rule allows a trial court to evaluate challenged police conduct unilaterally instigated by that officer alone, by searching the knowledge possessed by other officers to determine if any facts within their possession might possibly justify the first officer's actions. The rule merely provides that an arresting officer who does not personally possess sufficient information to constitute probable cause may still make an arrest if (1) he or she acts upon the direction or as a result of a communication from a fellow officer, and (2) the police, as a whole, possess sufficient information to constitute probable cause. State v. Maesse, 29 Wn. App. 642, 646-47, 629 P.2d 1349 (1981), review denied, 96 Wn.2d 1009 (1981).

In this case. Officer Nutter did not have any basis to walk up to the passenger, Ms. Critchfield, and request her identification. Rankin, 151 Wn.2d at 699. The fruits of that detention, its resulting

arrest for impersonation and/or on the basis of the discovered warrant, must be suppressed. See Part D.4, infra.

Suppression of the drugs found in the resulting car search is required. Where there has been a violation of the Fourth Amendment or the state constitution's privacy guarantee, courts must suppress evidence discovered as a direct result of the search, as well as evidence which is derivative of the illegality, the latter being "fruits of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). Because the vehicle search and discovery of the drugs was the direct unattenuated product of a detention that violated Ms. Critchfield's constitutional rights, the evidence must be suppressed. Wong Sun, 371 U.S. 484. This Court must reverse the trial court's order denying suppression of the evidence.

2. Alternatively, an officer may not search a vehicle incident to arrest unless the officer has a reasonable belief that evidence of the crime of arrest might be destroyed or concealed by an unsecured arrestee. The Fourth Amendment

to the United States Constitution provides:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. 4. Under this provision, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.” Arizona v. Gant, 556 U.S. ____, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)).

Warrantless searches are presumptively unreasonable, and will be deemed improper absent a valid exception. Chimel v. California, 395 U.S. 752, 764-65, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

One exception to the warrant requirement is a search incident to a lawful arrest. Gant, 129 S. Ct. at 1716 (citing Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914)). This exception stems from the officer’s interest in his or her safety and preserving evidence of the crime. Gant, at 1716

(citing Chimel, 395 U.S. at 763).

The United States Supreme Court's decision in Gant held that under the Fourth Amendment, the police may search a vehicle incident to arrest only if the arrestee is unsecured and able to reach into the passenger compartment of the vehicle at the time of the search, or the police have a reasonable believe that evidence of the crime exists in the vehicle. Gant, 129 S. Ct. at 1719. In Gant, the defendant was arrested for driving with a suspended license and for an outstanding warrant also for driving with a suspended license. Gant, at 1715. The police subsequently handcuffed him and locked him the back of a patrol car. Gant, at 1714. The police then conducted a search incident to arrest and discovered cocaine in a jacket pocket and a gun, both located within the car's passenger compartment. Gant, at 1715. The defendant filed a motion to suppress the evidence seized from the car as a violation of his Fourth Amendment rights. Gant, at 1715. The Court held:

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. When 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 1723-24. Because the defendant in Gant was handcuffed and locked in the back of a patrol car, he was not within reaching distance of his car at the time of the search. Gant, at 1719.

Furthermore, because he was arrested for driving with a suspended license, the police could not have reasonably expected to obtain any additional evidence of that crime. Gant, at 1719. The Court ultimately declared:

Because police would not reasonably have believed either that [the defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Gant, at 1719. Importantly, the Gant Court relied on its previous holding in Chimel. Gant, at 1719. In Chimel, the Court identified the exigencies permitting a search incident to arrest:

- (1) “in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape” and
- (2) “to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.”

(Emphasis added.) Chimel, 395 U.S. at 763. The scope of such a

search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. Chimel, at 761-62 (citing Terry v. Ohio, 392 U.S. 1, 29, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Furthermore, the search may only include “a search of the arrestee's person and the area ‘within his immediate control’ – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” Chimel, at 763.

The Gant Court commented on Chimel, and held that if the arrestee could not reach into the area the officers sought to search, then the exigencies permitting the search incident to arrest do not exist, and the exception to the warrant requirement does not apply. Gant, 129 S. Ct. at 1716.

Subsequently, the Washington Supreme Court expressly held, under Article 1, § 7 of the state constitution,³ that the “evidence” exception to Gant’s prohibition against vehicle searches incident to arrest requires not only a belief on the officer’s part that

³Article 1, § 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law[.]” Wash. Const. Art. 1, § 7.

evidence of the crime of arrest is to be found in the vehicle, but also that there be a concern that the arrestee might reach, and destroy or conceal, such evidence. State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). In our state's highest court's opinion, following a discussion of the circuitous route followed by the case law delineating when a search is permissible incident to arrest, the Court emphasized the requirement under the state constitution of concern for the destruction of evidence when it wrote:

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained. A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.

(Emphasis added.) State v. Valdez, 167 Wn.2d at 777. Therefore, whether or not the United States Supreme Court has specifically required a concern on the part of police that evidence of the crime

of arrest may be destroyed or concealed, the Supreme Court of Washington has clearly held that under the state constitution, the police must be in possession of this reasonable concern.

Additionally, the Court's decision in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), wherein the police arrested Patton on an outstanding felony warrant while he was standing "next to" his car parked in his driveway, affirms this view of the limits of the authority of officers to search a vehicle incident to arrest. There, after handcuffing Patton and placing him in a patrol car, the police searched the car and found methamphetamine and cash under the driver's seat. Patton, 167 Wn.2d at 381. The Patton Court specifically held that in the absence of a nexus between the arrestee, the crime of arrest, and the vehicle, an automobile search incident to arrest violates article I, section 7 of the Washington State Constitution. Patton, 167 Wn.2d at 382-84.

In the course of so ruling the Court resurrected its prior case law regarding the "search of an automobile incident to arrest" exception to the warrant requirement as set forth in State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983). The Court reaffirmed its rejection of the bright line rule adopted in State v. Stroud, 106 Wn

.2d 144, 720 P.2d 436 (1986), that allowed officers to conduct a warrantless search incident to arrest of the passenger compartment of a vehicle. Patton, 167 Wn.2d at 391. The Court stated that under Article I, § 7,

[t]he 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. Because no such nexus existed here . . . we hold that the search of a vehicle incident to the arrest of a recent occupant 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[.]

(Emphasis added.) Patton, 167 Wn.2d at 394-95.

This requirement of concern for the destruction of evidence has been repeated in subsequent Washington decisions under both the Fourth Amendment, and the state constitution.

Thus, in State v. Scalara, the Court of Appeals reasoned:

Here, as in Valdez, it is undisputed that (1) the deputies had no search warrant; (2) Maier conducted an “extensive” and “exhaustive” 30-minute search of the items in the back of Scalara's car, relying solely on the search incident to arrest exception to the warrant requirement as the legal basis for conducting the warrantless search; (3) Scalara remained handcuffed and locked in the patrol car's backseat while Maier searched his car and, thus, he (Scalara)

could not access the car to remove any weapons or to destroy any evidence; and (4) because the deputies arrested Scalara for DWLS in the third degree, a licensing violation, it was unreasonable for them to believe that evidence relevant to this crime might be found in his car. See Valdez, 167 Wn.2d at 766-67, 224 P.3d 751; see Gant, 129 S.Ct. at 1719.

State v. Scalara, ___ P.3d ___, 2010 WL 1039278 (Wash.App.

Div. 2, 2010, at p. 3). And similarly, in State v. Burnett, the facts and outcome were as follows:

Deputy McIvie searched Burnett's car after he arrested Burnett, removed him from the vehicle, handcuffed him, and placed him in a patrol car. Burnett was not within reaching distance during the search and the record shows no officer safety concerns or concerns that evidence of driving with license suspended or revoked stood to be concealed or destroyed. McIvie's testimony unmistakably shows that he searched the vehicle for drugs or contraband simply because he had arrested Burnett. Current case law clearly establishes that this search was unlawful under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. Arizona v. Gant, 519 U.S. - ___, 129 S.Ct. 1710, 1718-19, 173 L.Ed.2d 485 (2009); State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009); State v. Valdez, --- P.3d ---- 2009 WL 4985242 (2009).

State v. Burnett, ___ P.3d ___ (2010 WL 611498) (Wash.App. Div. 2, 2010, at p. 1).

The rule is clear – a police officer's belief that evidence of

the crime of arrest (or a reachable weapon) is present in the vehicle is only the first requirement for a vehicle search incident to arrest. The officer must also reasonably believe that the evidence might be reached, and then destroyed or concealed, by the arrestee. In any given case, therefore, the fact that the arrestee was handcuffed and locked in a patrol car will preclude any passenger compartment search, no matter what evidence of the crime of arrest the officer believes he might find therein.

The Court of Appeals recent decision in the case of State v. Wright is an anomaly. State v. Wright, ___ P.3d ___, 2010 WL 1531484 (Wash.App. Div. 1, 2010, at p. 7). Although the Wright Court did not expressly address the issue whether the police must have a concern for destruction of evidence, by approving an order denying suppression under the facts presented, it implicitly ruled that the law merely requires a belief that evidence of the crime of arrest is present in the car. State v. Wright, at p. 7. But our Supreme Court's view of the matter as plainly expressed in Valdez and Patton is that a further concern, for destruction or concealment of such evidence, is a requirement.

In the present case, there can be no question that under the

Washington Constitution, the law enforcement officers were required to have more than just a reasonable belief that there was evidence of Ms. Critchfield's crime of arrest in the vehicle. The officers were required to possess, but as argued below, they did not possess, a reasonable concern that the arrestee might reach, and destroy or conceal, any such evidence.

3. Ms. Critchfield was secured in the back of Officer Nutter's patrol vehicle and was unable to reach any items in the vehicle at the time of the search. No exception to the warrant requirement as outlined in Gant and Valdez is satisfied in this case. Like the defendants in Gant and Valdez, Ms. Critchfield was secured in handcuffs in the back of a patrol vehicle when the officer conducted his search of the vehicle. CP 42-43. Ms. Critchfield was not in "reaching distance of the passenger compartment at the time of the search." Gant, 129 S. Ct. at 1719. Thus the search was not "necessary to . . . prevent destruction or concealment of evidence of the crime of arrest." State v. Valdez, 167 Wn.2d at 777. At the time of the search, it would therefore have taken "the skill of Houdini and strength of Hercules" for Ms. Critchfield to access the vehicle to destroy or conceal evidence.

See Thornton v. United States, 541 U.S. 615, 626, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring).

Ms. Critchfield “clearly was not within reaching distance of [the car] at the time of the search.” Gant, 129 S. Ct. at 1719. As the Court held in Gant, “[b]ecause [the] police could not reasonably have believed . . . that [the defendant] could have accessed his car at the time of the search . . . the search in this case was unreasonable.” Gant, at 1719. The search of the vehicle in this case was unreasonable and the trial court should have suppressed the evidence discovered from the search, and not have relied on it during the stipulated bench trial.

4. Because the search incident to arrest exception did not apply to the search of the vehicle, the resulting evidence must be suppressed. The search incident to arrest exception under Gant and Valdez does not apply to the vehicle search in this case, and the evidence of the drugs was inadmissible against Ms. Critchfield. Where there has been a violation of the Fourth Amendment or the state constitution’s privacy guarantee, courts must suppress evidence discovered as a direct result of the search, as well as evidence which is derivative of the illegality, the latter

the latter being "fruits of the poisonous tree." Nardone v. United States, 308 U.S. at 341; Wong Sun v. United States, 371 U.S. at 484; State v. Duncan, 146 Wn.2d at 176.

D. CONCLUSION

Based on the foregoing, the appellant Amy Critchfield respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 27th day of April, 2010.


Oliver R. Davis WSBA # 24560
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 40160-6-II
)	
AMY CRITCHFIELD,)	
)	
Appellant.)	

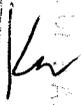
DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN WENDT, DPA CLALLAM COUNTY PROSECUTOR'S OFFICE 223 E 4 TH ST., STE 11 PORT ANGELES, WA 98362	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] AMY CRITCHFIELD 43 ROLL IN PARK #21 PORT ANGELES, WA 98362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF APRIL, 2010.

X _____ 

FILED
COURT OF APPEALS
10 APR 28 PM 12:44
STATE OF WASHINGTON
BY 
DEPUTY

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711