

NO. 40303-0-II

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

STATE OF WASHINGTON, Respondent

v.

DANIEL JOHN KEMP, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE DIANE M. WOOLARD
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-00509-5

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth in the Appellant's Brief. A copy of the Stipulated Facts on Non-Jury Trial (CP 33) is attached hereto and by this reference incorporated herein; a copy of the Findings of Fact and Conclusions of Law (CP 38) are also attached and incorporated by this reference.

Pursuant to Arizona v. Gant, __ US __, 129 S. Ct. 1710, 173 L. Ed.2d 485 (2009), the U.S. Supreme Court held that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. 2009 US LEXIS 3120 (2009). The standard articulated by the court in Gant is a reasonable belief standard, a standard less than probable cause. Id. In so holding, the U.S. Supreme Court in Gant stated that "Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. 2009 US LEXIS 3120 at 25-26. The court then went further by giving examples of established exceptions to the warrant requirement which authorize a vehicle search. Pertinent to this present Kemp case, the court in Gant expressly stated:

If there is probable cause to believe a vehicle contains evidence of criminal activity, U.S. v. Ross, 456 U.S. 798, 820-821 (1982), authorizes a search of any area of the vehicle in which evidence might be found.

-(Gant, 2009 US LEXIS 3120 at 26)

While the Court did not elaborate on the reasonable belief standard, the opinion makes clear it requires less than probable cause. Gant, 129 S. Ct. at 1721. The Court in Gant also emphasized that a search incident to arrest is not the only exception to the warrant requirement, and its holding does not implicate other established exceptions. Those exceptions include situations where an officer has reasonable suspicion that an individual is dangerous “and may gain immediate control of weapons” in the car, Michigan v. Long, 463 U.S. 1032, 1049, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), and the recognized automobile exception under the Fourth Amendment that allows a warrantless search of an automobile for evidence relevant to both the offense of arrest and other offenses. United States v. Ross, 456 U.S. 798, 807-09, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). Thus, the “offense of arrest” articulated by the court in Gant included offenses for which an officer has developed probable cause to arrest prior to beginning the search of the vehicle.

In addition, it is significant that the court in Gant distinguishes the Gant case from New York v. Belton, 453 U.S. 454 (1981) and Thornton v.

U.S., 541 U.S. 615 (2004) noting that the crime of arrest prior to the search of the incident in Belton and Thornton were, as in our case, drug offenses rather than a traffic offense. Regarding drug offense cases in the vehicle context, the court in Gant expressly states that such offenses of arrest “will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein. Gant, 2009 US LEXIS 3120 at 20.

Moreover, an officer has probable cause for a warrantless search of a vehicle when the odor of marijuana emanating from the vehicle leads to a reasonable belief that a drug offense is being committed in his presence. State v Wright, 155 Wn. App. 537, 230 P.3d 1063 (2010). In our case, upon contact with the defendant pursuant to a traffic stop, Trooper Jordan smelled the odor of marijuana coming from the defendant’s vehicle. Trooper Jordan subsequently arrested defendant for DWS 3. Post Miranda, defendant admitted that there was a pipe with marijuana in it and six or seven Vicodin pills (defendant also confirmed that he did not have a prescription for the Vicodin), in the center consol of his vehicle. With the odor of marijuana coming from the subject vehicle and defendant’s admissions regarding the Vicodin pills and the pipe with marijuana, Trooper Jordan had probable cause to arrest defendant for PCS Vicodin, PCS Marijuana, and Unlawful Use of Drug Paraphernalia; and at that

moment Trooper Jordan was going to arrest defendant for those additional drug crimes. The probable cause for the drug offenses was obtained prior to any search of the vehicle by the trooper. In addition, based on his training and experience in drug crimes investigations, Trooper Jordan had a reasonable belief that evidence of those drug offenses would be found in the car (the State notes here that although the standard set by the court in Gant is a reasonable belief standard, here in our case, Trooper Jordan had actually developed probable cause regarding the drug offenses). As a consequence, distinguishable from Gant, but similar to Belton and Thornton, Trooper Jordan had developed probable cause to arrest defendant for drug offenses prior to beginning the search of defendant's vehicle; and as such, he had established a proper basis to search defendant's vehicle with a reasonable belief that evidence of the drug offenses would be found in the car.

An issue similar to ours has recently been addressed by the State Supreme Court in State v. Tibbles, Supreme Court No. 80308-1, filed August 5, 2010. In the Tibbles case, during a traffic stop, the trooper detected a strong odor of marijuana coming from the car though he did not arrest Tibbles or seek a warrant, he searched the car. The District Court, Superior Court, and Court of Appeals all upheld the search under exigent

circumstances exception to the warrant requirement. This was the issue then addressed in the State Supreme Court.

When Tibbles was questioned by the trooper he denied everything: he denied smoking marijuana, denied the smell of marijuana coming from his car, and denied any smoking of marijuana that day. After this non-responsive attitude, the trooper went ahead and proceeded to search the interior of the car and under the front passenger seat inside a brown paper bag he found a glass pipe containing what he believed was marijuana and other paraphernalia.

The State charged Tibbles with misdemeanor possession of marijuana and drug paraphernalia. The defendant moved to suppress, claiming it was an illegal search. The District Court denied the motion concluding exigent circumstances justified the warrantless automobile search. The Supreme Court notes:

Preliminarily, there is no issue in this case about probable cause. We recently recognized that the odor of marijuana emanating from an automobile may provide probable cause to search. State v. Grande, 164 Wn.2d 135, 146, 187 P.3d 248 (2008) (stating, “In this case, because the officer had training and experience to identify the odor of marijuana and smelled this odor emanating from the vehicle, he had probable cause to search the vehicle.”). Tibbles does not appear to challenge the existence of probable cause to search. [cite omitted]. Nor does he dispute that the odor of marijuana in a vehicle may provide probable cause to arrest the sole occupant as we recognized in Grande, 164 Wn.2d at 146. But, the existence of probable cause standing alone,

does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant. Hendrikson, 129 Wn.2d at 71. Because Trooper Larsen did not arrest Tibbles, and did not have a warrant when he searched Tibbles' car, the search must be justified by one of our recognized warrant exceptions. The State relies solely on the exception of "exigent circumstances".

-(State v. Tibbles, Supreme Court No. 80308-1, at 3-4)

The Supreme Court held that exigent circumstances had not been established by the State. This is to be distinguished from our case where the defendant has not only admitted to the potential felony, but the defendant has also admitted additional felony (possession of the Vicodin) and told the officer exactly where, in the vehicle, the evidence of felony activity would be located. For the exigent circumstances exception to the warrant requirement to apply, there must be both probable cause to search and exigent circumstances that justify not obtaining a warrant. State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009); State v. Ringer, 100 Wn.2d 686, 700, 674 P.2d 1240 (1983), overruled on other grounds by State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). We have frequently noted that exigent circumstances include the mobility of a vehicle and the mobility or possible destruction of evidence. E.g., State v. Smith, 165 Wn.2d 511, 521, 199 P.3d 386 (2009).

The officer went no further than to search where the individual indicated the items were and he recovered the items the defendant said would be there. The State submits that this is a far cry from the situation as set forth in Tibbles. The “exigent circumstances” in our case clearly compel the officer to recover the items when the defendant has acknowledged exactly where these items are to be located in the vehicle. The State submits that it has established one of the exceptions to the warrant requirement applies. State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003).

As discussed in State v Wright, 155 Wn. App at 549:

In Gant, the police arrested Gant on an outstanding warrant for driving with a suspended license. The police handcuffed Gant and placed him in the back of a patrol car. In a search of the interior of the car, the police found a gun and a bag of cocaine. The Court held the search violated the Fourth Amendment. Because Gant was arrested for driving with a suspended license and was secured in a patrol car before officers searched his vehicle and found cocaine, the Court concluded that Gant clearly was not within reaching distance of the passenger compartment at the time of the search. Gant, 129 S. Ct. at 1719. The Court also concluded that an evidentiary basis for the search was lacking because “Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car.” Gant, 129 S. Ct. at 1719. Thus, there was no reason to believe evidence of the crime of arrest might be found in the car. Gant, 129 S. Ct. at 1719.

Here, while Wright was initially stopped for a traffic violation, he was actually arrested for possession of marijuana, a drug offense. The arresting officer smelled the strong odor of marijuana emanating from the car, observed Wright's agitated and furtive behavior, and saw a large roll of money in the glove compartment. After waiving his Miranda rights, Wright admitted that he had smoked marijuana earlier. Because the unchallenged facts establish there was reason to believe the car contained evidence of the offense for which he was arrested, the search was justified under Gant and the Fourth Amendment.

The State submits that the officer had the justification at the time for the search and that the Findings of Fact were reasonably supported by the evidence in the Stipulated Facts trial and thus the conviction should stand. The mobility of defendant's car, plus the danger of destruction of evidence, qualifies as exigent circumstances.

II. CONCLUSION

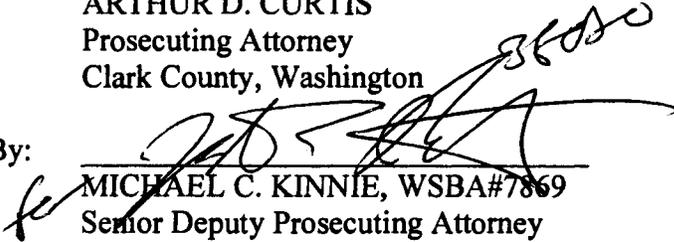
The trial court should be affirmed in all respects.

DATED this 19 day of Aug., 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

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FILED
DEC 16 2009 9:00 AM
Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,
Plaintiff,
v.
DANIEL JOHN KEMP,
Defendant.

No. 09-1-00509-5
STIPULATED FACTS ON
NON-JURY TRIAL

COME NOW Plaintiff State of Washington appearing by and through Scott S. Ikata, Deputy Prosecuting Attorney for Clark County, and Defendant Daniel John Kemp, in person and with his attorney Mark Muenster, Defendant having previously entered a knowing, intelligent and voluntary written waiver of his right to trial by a jury, and of his right to hear and confront witnesses against him and of his right to call witnesses on his own behalf and to compel their attendance, and the Defendant and the Plaintiff stipulate to the following undisputed facts:

1. On November 24, 2008, at approximately 0734 hours, in Clark County, Washington, Washington State Police Trooper Bill Jordan stopped defendant Kemp for a traffic infraction, defendant was not wearing a seatbelt. Upon contact with defendant

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1 in his vehicle, Trooper Jordan smelled the odor of marijuana coming from the car.
2 Trooper Jordan confirmed that defendant was Driving While Suspended in the Third
3 Degree (hereinafter DWS 3) status; and was arrested for DWS 3. Defendant stipulates
4 that on the day in question, he was driving a vehicle on a public road while his driver's
5 license was suspended. Also, defendant was the sole occupant in the vehicle.

6 2. Having been arrested for DWS 3, defendant was advised of his Miranda rights
7 to which he responded that he understood and then verbalized that he chose to waive
8 his rights. Defendant made a knowing, intelligent and voluntary waiver of his Miranda
9 rights. Post Miranda, defendant admitted that there was a pipe with marijuana in it and
10 six or seven Vicodin pills in the center console of his vehicle. When asked by Trooper
11 Jordan if defendant had a valid prescription for the Vicodin, defendant responded that
12 he did not.

13 3. Based on the odor of marijuana and defendant's post Miranda statement about
14 a pipe with marijuana in his car, defendant was then also under arrest for Possession of
15 Marijuana. Based on his training and experience as a law enforcement officer, in
16 handling drug crimes investigations, and also the odor of marijuana coming from the
17 vehicle, Trooper Jordan reasonably believed that evidence of the drug offense of
18 Possession of Marijuana, would be located in defendant's vehicle.

19 4. Pursuant to the search of defendant's vehicle, Trooper Jordan found the pipe
20 with burnt marijuana [See Photograph Exhibit No. 1] in the center console of
21 defendant's car, along with nine suspected Vicodin pills which were white and oval
22 shaped [See Photograph Exhibit No. 1] in a wadded paper towel also in the center
23 console. Each drug item was found by Trooper Jordan in the spot where defendant had
24 previously stated they would be located. Based on Trooper Jordan's training and
25 experience in identifying controlled substances such as marijuana by sight and smell,
26 the pipe contained marijuana residue.

27 5. Defendant stipulates to the entry of the Photograph of Exhibit No. 1 (which

1 shows the pipe and the nine Vicodin pills) into the court record rather than the actual
2 physical items themselves.

3 6. During transport to the jail, defendant additionally admitted that he used the
4 pipe to smoke marijuana the night prior; and that he would get Vicodin pills from a
5 friend.

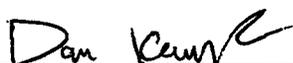
6 7. Trooper Jordan collected as evidence the nine suspected Vicodin pills which
7 were white and oval shaped (as shown in Photograph Exhibit No. 1); and he
8 subsequently sent the pills to forensic scientist Jason W. Dunn of the Washington State
9 Patrol Crime Laboratory. Mr. Dunn tested one of the nine pills and found that the pill
10 contained Dihydrocodeinone (Vicodin). [See Exhibit No. 2 - a copy of the lab report by
11 Jason W. Dunn dated 2/24/09].

12 8. The Defendant Kemp's date of birth is April 26, 1985. He is a white male, 5'
13 8" tall and 165 pounds, with blue eyes and sandy hair.

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16 DATED this 14 day of December, 2009.

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21 SCOTT S. IKATA, WSBA #36030
22 Deputy Prosecuting Attorney
23 Attorney for Plaintiff

20 *Mark W. Muenster*
21 MARK MUENSTER, WSBA # 11228
22 Attorney for Defendant
23 *subject to objection to*
24 *#1, #3 + #4*

25 
26 DANIEL JOHN KEMP
27 Defendant

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

STATE OF WASHINGTON, Plaintiff, v. DANIEL JOHN KEMP Defendant.	No. 09-1-00509-5 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON 3.6 HEARING
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THIS MATTER having come duly and regularly before the Court on the 17th day of September, 2009, for a 3.6 Hearing, Plaintiff State of Washington appearing by and through Scott S. Ikata, Deputy Prosecuting Attorney for Clark County, State of Washington; and defendant Daniel John Kemp appearing in person and with his attorney Mark Muenster, the court now finds the following facts to have been proven beyond a reasonable doubt:

FINDINGS OF FACT

1. On November 24, 2008, at approximately 0734 hours, in Clark County, Washington, Washington State Police Trooper Bill Jordan stopped defendant Kemp for a traffic infraction, defendant was not wearing a seatbelt. Upon contact with defendant in his vehicle, Trooper Jordan smelled the odor of marijuana coming from the car. Trooper Jordan confirmed that defendant was Driving While Suspended in the

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2 Third Degree (hereinafter DWS 3) status; and defendant was then arrested for DWS 3.
3 Defendant was the only occupant in the vehicle.

4 2. Having been arrested for DWS 3, defendant was advised of his Miranda rights
5 to which he responded that he understood and then verbalized that he chose to waive
6 his rights. Post Miranda, defendant admitted that there was a pipe with marijuana in it
7 and six or seven vicodin pills in the center console of his vehicle. When asked by
8 Trooper Jordan if defendant had a valid prescription for the vicodin, defendant
9 responded that he did not.

10 3. Based on the odor of marijuana and defendant's post Miranda statement
11 about a pipe with marijuana in his car, defendant was then also under arrest for
12 Possession of Marijuana. Based on his training and experience as a law enforcement
13 officer, in handling drug crimes investigations, and also the odor of marijuana coming
14 from the vehicle, Trooper Jordan reasonably believed that evidence of the drug
15 offenses of Possession of Marijuana, as well as Unlawful Possession of a Controlled
16 Substance Vicodin, would be located in defendant's vehicle.

17 4. There was no particularity issue as to the odor of the marijuana coming from
18 defendant's vehicle because defendant was the only occupant in the car. In addition,
19 the court finds that the circumstances were clear that the trooper had a right to search
20 the vehicle because of possible destruction of the evidence.

21 5. Pursuant to the search of defendant's vehicle, Trooper Jordan found the
22 pipe with burnt marijuana in the center console of defendant's car, as well as nine
23 suspected vicodin pills in a wadded paper towel in the center console. Each drug item
24 was found by Trooper Jordan in the spot where defendant had previously stated they
25 would be located.

26 6. During transport to the jail, defendant additionally admitted that he used the
27 pipe to smoke marijuana the night prior; and that he would get vicodin pills from a
28 friend.

29 *7. The police did not attempt to obtain a search warrant, although
he could have done that.*

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2 Based on the foregoing Findings of Fact, the court makes the following:
3

4 **CONCLUSIONS OF LAW**

5
6 1. The Court has jurisdiction of the defendant Daniel John Kemp and the
7 subject matter.

8 2. Based on the odor of marijuana coming from defendant's vehicle which
9 Trooper Jordan noticed and defendant's post-Miranda admissions that there was
10 marijuana in the center console of his vehicle, as well as vicodin pills without a
11 prescription, Trooper Jordan had sufficient probable cause, not just a reasonable
12 belief, to search the vehicle incident to defendant's arrest for Possession of Marijuana.
13

14 3. Prior to any search of the vehicle in this case, there was sufficient probable
15 cause for the crime of Possession of Marijuana; and Trooper Jordan had a reasonable
16 belief that evidence of the subject drug offense would be found in defendant's vehicle.
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18 4. In addition, the circumstances were clear that the trooper had a right to search
19 the vehicle because of possible destruction of the evidence.
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2 5. On the grounds set forth above, defendant's motion to suppress the evidence
3 is DENIED.
4

5 DONE in open Court this 16 day of Dec, 2009.
6

7 [Signature]
8 JUDGE OF THE SUPERIOR COURT
9

10
11 Presented by:

12 [Signature]
13 Scott S. Ikata, WSBA #36030
14 Deputy Prosecuting Attorney
15

16
17 Copy received and approved as to form only
18 this 16 day of DEC., 2009.
19

20 [Signature]
21 Mark Muenster, WSBA# 1128
22 Attorney for Defendant

23 Obj to PDP 1, 2, 3, 4
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COURT OF APPEALS

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STAFF

BY _____

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

STATE OF WASHINGTON,
Respondent,

v.

DANIEL JOHN KEMP,
Appellant.

No. 40303-0-II

Clark Co. No. 09-1-00509-5

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

COUNTY OF CLARK)
: ss

On Aug 19, 2010, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk Court Of Appeals, Division II Attn: Christina 950 Broadway, Suite 300 Tacoma, WA 98402-4454	John A. Hays Attorney at Law 1402 Broadway Longview WA 98632
DANIEL JOHN KEMP c/o appellate attorney	

DOCUMENTS: signature page for Brief of Respondent

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

Shirley Casey
Date: Aug 19, 2010
Place: Vancouver, Washington.

