

No. 40937-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

AUGUST IRA BASS,

Appellant.

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STATE OF WASHINGTON  
BY DEP/OK

COURT OF APPEALS  
DIVISION II

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

The Honorable Lisa E. Tabbut  
The Honorable Jill Johanson

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BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

August Bass was stopped by the police for investigation of hit and run. The police officer subsequently determined Mr. Bass was driving on a suspended driver's license in the third degree. While waiting for the State Patrol to arrive and investigate the hit and run, the officer saw Mr. Bass engage in furtive movement in the car. Once the trooper arrived, the trooper placed Mr. Bass in handcuffs, read him his *Miranda*<sup>1</sup> rights, and placed him the police car. He then searched the car and discovered marijuana, scales, packaging material, and money. Mr. Bass was charged with possession of marijuana with intent to deliver. His motion to suppress the drugs was denied.

Mr. Bass submits that he was under arrest when the search occurred making it an illegal search under *Gant*<sup>2</sup> and *Patton*<sup>3</sup>. Further, Mr. Bass submits that a protective search as part of an investigatory stop can no longer stand in light of the *Gant* and *Patton* decisions. Mr. Bass submits his conviction must be reversed.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

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

<sup>3</sup> *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009).

## **B. ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Bass's Fourth Amendment and article I, section 7 rights when it denied his CrR 3.6 motion to suppress.

2. In the absence of substantial evidence, the trial court erred in entering Finding of Fact 9, which stated: "At that time, Trooper Moon did not know whether he would release the defendant."

3. To the extent it is considered a Finding of Fact, in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 4 stating: "The search of the vehicle was reasonable."

4. To the extent it is considered a Finding of Fact, in the absence of substantial evidence, the trial court erred in entering Conclusion of Law 5 stating: "The evidence found within the vehicle is admissible."

### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fourth Amendment and art. I, § 7 bar searches of vehicles incident to arrest when the arrestee is safely detained in the police car. Here, a reasonable person in Mr. Bass's place would believe they were under arrest when placed in the rear of the police vehicle. Did the subsequent search of his car incident to arrest violate the United States as well as Washington Constitutions?

2. In light of the decisions in *Gant* and *Patton*, warrantless searches of automobiles where the driver and any passengers are detained in a police car violate the Fourth Amendment and art. I, § 7. Here, Mr. Bass was handcuffed and placed in the rear of the police car prior to the police search of the car. Did the search of the car violate the United States and Washington Constitutions?

### D. STATEMENT OF THE CASE

August Bass was stopped by Castle Rock police for investigation of a hit and run accident on Interstate 5. RP 5-8. Castle Rock Police Officer Neves contacted Mr. Bass and discovered Mr. Bass was driving on a suspended license in the third degree. RP 23. Since the accident was outside the Castle

Rock police jurisdiction, Neves waited for the State Patrol to arrive to investigate the accident. RP 13.

While waiting for the trooper, Officer Neves watched as Mr. Bass apparently reached under the seat, in the center console, the passenger seat and the passenger door. RP 11. Feeling apprehensive, the officer asked the trooper to speed up his arrival. RP 16.

Once Trooper Moon arrived, he and Neves spoke briefly about what Neves had seen. RP 39-41. The trooper contacted Mr. Bass, had him get out of the car and handcuffed him. RP 42. The trooper then read Mr. Bass the *Miranda* warnings and placed Mr. Bass in the rear of the State Patrol car. RP 42-46.<sup>4</sup> The trooper searched the area around the driver's side of the car and seized two glass pipes from the center console. RP 49. A further search revealed an amount of money in the passenger door pocket as well as a digital scale, a quantity of marijuana packaged in small baggies inside a large baggie and empty baggies. RP 56. The trooper arrested Mr. Bass for DWLS 3 and hit and run. RP 56. The

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<sup>4</sup> The trooper did a pat-down search of Mr. Bass and discovered a small amount of marijuana. RP 43. The trooper could not remember where on Mr. Bass the marijuana was discovered. RP 52. Ultimately the Commissioner suppressed the marijuana because it was beyond the scope of a pat down search especially in light of the fact the trooper could not remember where he had discovered it. CP 53, RP 78-79.

State subsequently charged Mr. Bass with possession of marijuana with intent to deliver and hit and run. CP 1-2.

Mr. Bass moved pursuant to CrR 3.6 to suppress the contraband seized in the search of the car. CP 3-8. Mr. Bass argued that under the decision in *Arizona v. Gant*, the search and resulting seizure violated his rights under the Fourth Amendment and art. I, § 7. *Id.* Following the hearing, the Commissioner denied the motion to suppress and subsequently entered written findings of fact and conclusions of law. CP 50-53. Mr. Bass pleaded guilty to the hit and run count prior to the jury trial. RP 82.

The jury subsequently found Mr. Bass guilty of possessing the marijuana with the intent to deliver. CP 35.

#### E. ARGUMENT

1 MR. BASS WAS UNDER ARREST WHEN  
SEIZED BY THE TROOPER AND THE  
RESULTING SEARCH OF THE CAR  
VIOLATED THE FOURTH AMENDMENT AND  
ARTICLE I, SECTION 7

a. Mr. Bass was under custodial arrest when placed in the rear of the Trooper's patrol car. Mr. Bass submits that any reasonable person in his position after being taken out of his car, placed in handcuffs, warned of his *Miranda* rights, and placed in the rear of a police car would believe themselves to be under arrest. In

addition, Mr. Bass submits emerging caselaw holds that a search of a car incident to arrest where the arrestee is handcuffed in the rear of the police car violates the United States and Washington Constitutions. As a result, Mr. Bass requests this Court reverse the denial of his motion to suppress.

This Court reviews the trial court's denial of a CrR 3.6 suppression motion "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." *State v. Cole*, 122 Wn.App. 319, 322-23, 93 P.3d 209 (2004). The trial court's conclusions of law are reviewed *de novo*. *Cole*, 122 Wn.App. at 323.

Probable cause to arrest requires "facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed." *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). Probable cause is based upon the facts and circumstances known to the officer at the time of the arrest. *Id.* Certain traffic offenses, such as driving with a suspended license in the first, second, and third degrees, are criminal offenses. *State v. Reding*, 119 Wn.2d 685, 688-89, 691, 835 P.2d 1019 (1992). Accordingly, a police officer having

probable cause to believe that a person has committed or is committing the offense of driving a vehicle while his or her license is suspended or revoked is authorized to place the driver under custodial arrest without a warrant. RCW 10.31.100(3)(e); *Gaddy*, 152 Wn.2d at 70. Thus, once the police officers were aware Mr. Bass's license was suspended in the third degree, they had probable cause to arrest him.

In determining whether a person is under custodial arrest:

the determination of custody hinges upon the "manifestation" of the arresting officer's intent. In other words, rather than the subjective intent of the officer, the test is whether a reasonable detainee under these circumstances would consider himself or herself under full custodial arrest. Typical manifestations of intent indicating custodial arrest are the handcuffing of the suspect and placement of the suspect in a patrol vehicle, presumably for transport. . . . Telling the suspect that he or she is under arrest also suggests custodial arrest.

*State v. Radka*, 120 Wn.App. 43, 49, 83 P.3d 1038 (2004). "The officers' subjective, unspoken perception that he was not under formal arrest is irrelevant." *State v. Glenn*, 140 Wn.App. 627, 639, 166 P.3d 1235 (2007).

Here, Trooper Moon had probable cause to arrest Mr. Bass for either the misdemeanor offense of hit and run or driving while license suspended in the third degree, and in fact did arrest Mr.

Bass for those offenses. RP 56. Further, when the trooper took Mr. Bass out of his car, the trooper handcuffed Mr. Bass, read Mr. Bass the *Miranda* warnings, and placed Mr. Bass in the rear of the police car. Under these circumstances, a reasonable detainee in Mr. Bass's shoes would have felt he was under arrest.

b. A search incident to arrest cannot be done where the arrestee is safely in the police vehicle. Article I, section 7 of the Washington Constitution prohibits government invasion of private affairs absent authority of law. Const. art. I, § 7. "Authority of law" means a warrant, subject to limited exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). Exceptions to the warrant requirement must be "jealously and carefully drawn." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). They "are not devices to undermine the warrant requirement." *Patton*, 167 Wn.2d at 386. "The State bears a heavy burden to show the search falls within one of the 'narrowly drawn' exceptions." *Garvin*, 166 Wn.2d at 250 (citation omitted).

"[A]n automobile search incident to arrest is not justified 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*, 167 Wn.2d at 384.

After 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.

*State v. Buelna Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

In other words, the vehicle search-incident-to-arrest exception to the warrant requirement applies only if two conditions are satisfied:

- 1) The arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search;  
*and*
- 2) The search is necessary to ensure officer safety or prevent destruction of evidence of the crime of arrest.

*Patton*, 167 Wn.2d at 384.

As Mr. Bass was subject to a full custodial arrest and the search of the car was incident to that arrest, under *Gant* and *Patton*, the search of Mr. Bass’s car while he was handcuffed in the rear of the police car was illegal.

c. The marijuana, money, scales, and packaging should have been suppressed and Mr. Bass is entitled to reversal of his conviction. Because the search of Mr. Bass's car was invalid, the resulting discovery of marijuana should have been suppressed as a fruit of the illegal search. *State v. Ladson*, 138 Wash.2d 343, 359, 979 P.2d 833 (1999) (“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.”). *See also State v. Winterstein*, 167 Wn.2d 620, 633, 636, 220 P.3d 1226 (2009) (“Washington’s exclusionary rule is nearly categorical. . . Evidence obtained as a result of an unreasonable search or seizure must be suppressed.”).

2. A TERRY SEARCH OF A VEHICLE VIOLATES ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION WHERE THE PERSON STOPPED IS SAFELY IN THE POLICE CAR

Art. I, § 7 of the Washington State Constitution states: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

This language prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. This creates “an almost absolute bar to

warrantless arrests, searches, and seizures, with only limited exceptions . . .”

*Buelna Valdez*, 167 Wn.2d at 772, quoting *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), overruled in part by *State v. Stroud*, 106 Wn.2d 144, 150-51, 720 P.2d 436 (1986).

The Washington Supreme Court has long recognized a privacy interest in automobiles and their contents. *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010); *Patton*, 167 Wn.2d at 385, citing *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); *State v. Gibbons*, 118 Wash. 171, 187-88, 203 P. 390 (1922). Thus, the search of Mr. Bass’s car disturbed his private affairs, so the issue becomes whether Trooper Moon had authority of law to search the car.

The “authority of law” requirement of art. I, § 7 is satisfied by a valid warrant or a few jealously guarded exceptions to the warrant requirement. *Patton*. 167 Wn.2d at 386. It is always the State’s burden to establish that an exception to the warrant requirement applies. *Id.* Unless the State carries its burden, this Court must conclude that the search was made without authority of law. *Afana*, 169 Wn.2d at 177. Since the trooper did not have a warrant when he searched Mr. Bass’s car, unless the search fell within one of the

carefully drawn exceptions to the warrant requirement, the search was made without authority of law. *Id.*

The exception relied upon by the trial court was the search for weapons during a *Terry*<sup>5</sup> stop under *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986). In *Kennedy* the court upheld a protective search for weapons of the area under the seat of a car after an officer had removed the driver but left a passenger of a car he stopped when he saw the driver lean over and reach under the seat as though to place something under it. The court reasoned that the furtive gesture gave the officer justification to believe there might be a weapon under the seat to which the passenger had easy access. *Id.* at 11-12.

The exception recognized by *Kennedy* can no longer stand for two important reasons. First, the *Kennedy* Court relied upon Fourth Amendment cases in determining that a protective search for weapons was authorized under art. I, § 7. 107 Wn.2d at 10-13. The decision in *Kennedy* relied on the decision in *Terry* and its decision in *Stroud*, which in itself relied on the decision in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). This sort of analysis has been flatly rejected by the Supreme Court.

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<sup>5</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

To the extent *Stroud* relied on or was persuaded by its interpretation of *Belton*, that interpretation failed to adequately account for the distinction between the language of the Fourth Amendment and article I, section 7. The *Stroud* court balanced privacy interests guaranteed under article I, section 7 with concerns for law enforcement and expediency. It is not the place of the judiciary, however, to weigh constitutional liberties against arguments of public interest or state expediency.

*Buelna-Valdez*, 167 Wn.2d at 775-76 (citation omitted). See also Kurt Walters, *The Stop and Frisk Doctrine in Washington and the Rise and Fall of Independent State Constitutional Analysis*, 64 Wash.L.R. 179, 185 (1989) (“It is apparent that the *Kennedy* court rejected independent state constitutional analysis because it interwove federal and state law without including a ‘plain statement’ explaining that the federal law cited as only for the purpose of guidance.”).

But, more importantly, the decision in *Kennedy* allows police searches not authorized under either the Fourth Amendment or art. I, § 7 for searches incident to *arrest* under *Gant* and *Patton*. Art. I, § 7 requires “no less” than the Fourth Amendment. *Patton*, 167 Wn.2d at 394.

Further, officer safety concerns authorized a search only as a search incident to arrest not pursuant to a *Terry*-type

investigatory stop. In *Buelna Valdez*, a decision handed down shortly after *Patton*, the Supreme Court reiterated that a warrantless search of an automobile is permissible under the *search incident to arrest exception* only “when *that search is necessary to preserve officer safety* or prevent destruction or concealment of evidence of the crime of arrest.” *Buelna Valdez*, 167 Wn.2d at 777 (emphasis added).

In view of *Gant* and the decisions in *Patton* and *Buelna Valdez*, had Mr. Bass been arrested, the question would have been whether the search of the car was justified by a concern for the safety of the arresting officer. *Buelna Valdez*, 167 Wn.2d at 777. But the trial court ruled Mr. Bass was restrained in the back of the police car, thus a search of his car based upon concerns about officer safety concerns does not even apply: the police cannot search the car absent a valid arrest.

Mr. Bass submits the search of the car and resulting seizure of contraband violated his rights under the United States and Washington Constitutions. His conviction must be reversed.

F. CONCLUSION

For the reasons stated, Mr. Bass requests this Court reverse the denial of his motion to suppress and order his conviction dismissed.

DATED this 25th day of February 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', written over a horizontal line.

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

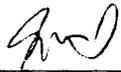
STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 40937-2-II
v.	)	
	)	
AUGUST BASS,	)	
	)	
APPELLANT.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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KELSO, WA 98626-1739		
[X] AUGUST BASS	(X)	U.S. MAIL
2011 BRANDT RD #88	( )	HAND DELIVERY
VANCOUVER, WA 98661	( )	_____

**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2011.

X \_\_\_\_\_ 

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BY:   
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