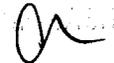


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  _____
DEPUTY

NO. 41235-7-II
Cowlitz Co. Cause NO. 08-1-00870-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BLAKE CHARLES TAMBLYN,

Appellant.

RESPONDENT'S BRIEF

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I. PROCEDURAL HISTORY

The appellant was charged by information with one count of violation of the uniform controlled substances act and with driving under the influence. The appellant entered a guilty plea to the driving under the influence charge in District Court, and filed a motion to suppress the drug evidence under CrR 3.6. The trial court denied the motion to suppress and found the appellant guilty after a stipulated facts bench trial. The instant appeal timely followed.

II. STATEMENT OF THE CASE

On August 4, 2008, Trooper William Knudson of the Washington State Patrol was dispatched to locate a vehicle driving erratically on Interstate Five. Trooper Knudson located a 1992 Toyota matching the description of the reported car, and followed it for a period of time. Trooper Knudson observed that the Toyota was drifting within its lane of travel, and that the car also drifted onto the shoulder of the road while attempting to negotiate a curve. 10RP 6-8.

Trooper Knudson was concerned that the Toyota's driver could be impaired by drugs or alcohol, and stopped the vehicle for the traffic violations. When the officer approached the car, the appellant claimed the Toyota's alignment was the cause of the erratic lane travel. During his

contact with the appellant, Trooper Knudson observed the appellant had pinpoint pupils and track marks on both of his forearms. 10RP 9-10. Based on his training and experience, Trooper Knudson recognized these as signs a person was using or under the influence of narcotics. Trooper Knudson did not see any sign the appellant had been drinking alcohol. When asked by the officer, the appellant claimed that he had been injecting water to wean himself from a heroin addiction. Unsurprisingly, Trooper Knudson did not find this explanation credible. 10RP 10-11.

The appellant then agreed to perform several voluntary field sobriety tests. The appellant performed poorly on three of the four tests. The only test that the appellant could perform satisfactorily was the horizontal gaze nystagmus test, which is designed to detect alcohol intoxication. 10RP 12-13. Based on his investigation, Trooper Knudson then placed the appellant under arrest for driving under the influence. The officer specifically believed the appellant was under the influence of a drug other than alcohol. After arresting the appellant, Trooper Knudson placed him in handcuffs and secured him in the back of a patrol car. 10RP 14.

Trooper Knudson then returned to the appellant's Toyota to conduct a search of the vehicle. At the time of this search, August 2008, Trooper Knudson's training and understanding was that he could lawfully

search the interior of an automobile incident to the arrest of the driver. 10RP 14-15. Indeed, Trooper Knudson had conducted a number of previous vehicle searches after making an arrest for a drug DUI, and would regularly find narcotics, drug paraphernalia, or other drug related contraband inside the vehicle. In the course of searching the appellant's car, Trooper Knudson found a bag containing syringes and a chunk of heroin. 10RP 16-17.

In pre-trial proceedings, the appellant filed a motion under CrR 3.6 to suppress the heroin, arguing the search was improper under Arizona v. Gant, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) and its progeny. The trial court, the Honorable Judge Jill Johanson presiding, heard the testimony described above and then denied the motion. The trial court held that the search was lawful as the officer was searching for evidence of the crime the appellant had been arrested for, and there was probable cause to expect to find drug evidence when the crime at issue was a drug DUI. 10RP 44-45.

III. ISSUES PRESENTED

1. Did the Trial Court Err by Denying the Appellant's Motion to Suppress?

IV. SHORT ANSWERS

1. No.

V. ARGUMENT

I. **The Trial Court Correctly Denied the Motion to Suppress, as There Was Probable Cause to Search for Evidence of the Crime of Arrest.**

The appellant argues the search of his vehicle was an unlawful warrantless search under Gant and State v. Valdez, 16 Wn.2d 761, 224 P.3d 751 (2009). However, this Court has recognized that the police may conduct a warrantless search of vehicle incident to the arrest of the driver if there is probable cause to believe evidence of the crime of arrest would be found. See State v. Louthan, 158 Wn.App. 732, 242 P.3d 954 (2010); State v. Snapp, 153 Wn.App. 485, 219 P.3d 971 (2009); State v. Barnes, 158 Wn.App. 602, 243 P.3d 165 (2010).

In Gant, the United States Supreme Court held that the police may conduct a warrantless search incident to arrest if there is probable cause to believe the vehicle contains evidence of the crime of arrest. 129 S.Ct. at 1719. This ruling has been extended to Washington by this Court's decisions in Snapp, Louthan, and Barnes. This Court has also recognized that the Washington Supreme Court has yet to rule on the crime of arrest exception. The appellant relies on Valdez, 16 Wn.2d 761, for the claim

that Washington does not recognize the crime of arrest exception to the Gant rule. However, the portion of Valdez that addresses this issue is dicta, as the facts of that case did not indicate there was any reason to believe evidence would be found in the car and the area searched was outside the passenger compartment. Thus, the issue was not actually before the court. See Louthan 158 Wn.App. at 751-753.

The appellant cites to State v. Swetz, 160 Wn.App. 122, 247 P.3d 802 (2011), and argues this case requires the evidence be suppressed. The appellant is correct that Swetz construes the holding of Valdez as rejecting the crime of arrest exception. 160 Wn.App. at fn6. However, Swetz does not contain a detailed analysis or rationale of why the Supreme Court's statements on this issue are not dicta, but instead simply states that Valdez has decided the issue. Id. In contrast to this, Louthan contains a detailed and nuanced analysis of the issue, and is the more compelling authority. Therefore, unless and until the Washington Supreme Court actually rules on this issue, the crime of arrest exception applies to this case.

Here, Trooper Knudson clearly had probable cause to believe that evidence of the crime of drug DUI would be found in the appellant's vehicle. The appellant displayed signs of drug use and drug intoxication, and made incredible claims regarding recent drug use. Trooper Knudson's prior experience indicated it was highly probable drugs or drug

paraphernalia would be found in the vehicle, and such contraband would be probative evidence in a drug DUI case. As such, the trial court properly denied the motion to suppress the heroin, as the search falls within the crime of arrest exception.

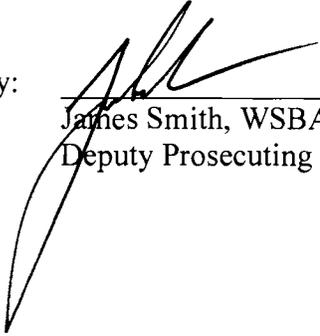
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. The trial court correctly denied the appellant's motion to suppress the evidence against him. The appellant's conviction should stand.

Respectfully submitted this 12th day of August, 2011.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By:


James Smith, WSBA #35537
Deputy Prosecuting Attorney

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

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 BLAKE C. TAMBLYN,)
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 Appellant.)
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NO. 41235-7-II
Cowlitz County No.
08-1-00870-1

CERTIFICATE OF
MAILING

I, Michelle Sasser, certify and declare:

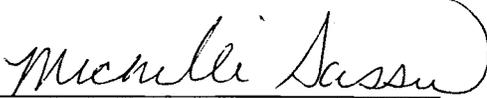
That on the 15th day of August, 2011, I deposited in the mails of
the United States Postal Service, first class mail, a properly stamped and
address envelope, containing Respondent's Brief addressed to the
following parties:

VALERIE MARUSHIGE
ATTORNEY AT LAW
23619 55TH PLACE S.
KENT, WA 98032-3307

COURT OF APPEALS, CLERK
950 BROADWAY, SUITE 300
TACOMA, WA 98402

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

Dated this 15th day of August, 2011.



Michelle Sasser