

Court of Appeals No. 41847-9-II

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

JOSEPH DEFOREST CARTER,

Defendant/Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 10-1-01327-1
The Honorable Elizabeth Martin, Presiding Judge**

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. ASSIGNMENTS OF ERROR.....	1-2
II. ISSUES PRESENTED.....	2-3
1. Does Mr. Carter have standing to challenge the search of the vehicle in which he was arrested?.....	2
2. Where police observe a handgun in “open view” on a the driver’s seat of a vehicle after arresting the driver of the vehicle for reckless driving or attempted eluding of a pursuing police vehicle, may the police seize that handgun without a warrant?.....	2
3. Where firearms are observed in a vehicle by police during the unlawful warrantless seizure of another firearm in that same vehicle, may police seize the subsequently observed firearms without a warrant?.....	2
4. Where police officers have determined that no other persons are in a vehicle and the driver has been secured and is under the supervision of at least one police officer with a drawn weapon, does a threat to officer safety exist such that police may search the vehicle without a warrant upon observing a firearm on the driver’s seat of the vehicle?.	2
5. Is a firearm immediately recognizable as contraband or evidence of a crime such that police may seize it without a warrant where the police know nothing about the firearm other than that the firearm exists at a certain location?.....	2-3

6.	Does the State present sufficient evidence to convict an individual of unlawful possession of a firearm and of the aggravating factor of being armed with a firearm during the commission of another crime where all evidence that the defendant was possibly in possession of a firearm was inadmissible at trial?.....	3
III.	STATEMENT OF THE CASE.....	3-9
A.	Factual Background.....	3
B.	Procedural Background.....	6
IV.	ARGUMENT.....	9-25
1.	Mr. Carter has standing to challenge the search of the vehicle.....	9
2.	The trial court erred in denying Mr. Carter’s motion to suppress.....	1
a.	<i>Standard of Review</i>	11
b.	<i>The police were required to obtain a warrant before they could lawfully search Mr. Carter’s vehicle or seize any item seen therein</i>	12
i.	<u>The guns could not be seized without a warrant under the doctrines of “open view” or “plain view” searches</u>	19
ii.	<u>The guns were not immediately recognizable as contraband or evidence of a crime, thus, the guns could not be seized under the “open view” or “plain view” exceptions to the warrant requirement</u>	21

c. *The trial court's legal conclusion that the guns were lawfully seized and were admissible was contrary to established law*.....23

3. The State presented insufficient admissible evidence to convict Mr. Carter of unlawful possession of a firearm or to establish that Mr. Carter committed any other crime while armed with a firearm.....24

VI. CONCLUSION.....25

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Federal Cases

<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485.. (2009).....	14
<i>Flippo v. West Virginia</i> , 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999).....	12
<i>Katz v. United States</i> , 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).....	13

Washington Cases

<i>State v. Abuan</i> , 161 Wn.App. 135, ---P.3d--- (2011).....	15-16
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	24
<i>State v. Boland</i> , 115 Wn.2d 571, 800 P.2d 1112 (1990).....	10
<i>State v. Buelna Valdez</i> , 167 Wn.2d 761, 224 P.3d 751 (2009).....	13
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	11
<i>State v. Carney</i> , 142 Wn.App. 197, 174 P.3d 142 (2007), <i>review denied</i> 164 Wn.2d 1009, 195 P.3d 87 (2008).....	11
<i>State v. Goucher</i> , 124 Wn.2d 778, 881 P.2d 210 (1994).....	10
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	10
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	24
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	12

<i>State v. Johnson</i> , 104 Wn.App. 489, 17 P.3d 3 (2001).....	21, 22
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	13, 14, 23
<i>State v. Lair</i> , 95 Wn.2d 706, 630 P.2d 427 (1998).....	22
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999), <i>overruled on other grounds by Brendlin v. California</i> , --- U.S. ----, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)1 n.....	1, 12
<i>State v. O'Bremski</i> , 70 Wn.2d 425, 423 P.2d 530 (1967).....	23
<i>State v. Patton</i> , 167 Wn.2d 379, 219 P.3d 651 (2009).....	15
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	24
<i>State v. Simpson</i> , 95 Wn.2d 170, 622 P.2d 1199 (1980).....	11
<i>State v. Swetz</i> , 160 Wn.App. 122, 247 P.3d 802 (2011)....	17, 18, 20-21
<i>State v. Teal</i> , 152 Wn.2d 333, 96 P.3d 974 (2004).....	24
<i>State v. Williams</i> , 142 Wn.2d 17, 11 P.3d 714 (2000).....	10

Other Authorities

WA Const. Art. 1, § 7	10
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I. ASSIGNMENTS OF ERROR

1. The guns were unlawfully seized from Mr. Carter's vehicle.
2. The State presented insufficient admissible evidence to permit the jury to convict Mr. Carter of unlawful possession of a firearm or to find that Mr. Carter was armed with a firearm during the commission of any other crime.
3. Error is assigned to "Reasons for Admissibility or Inadmissibility of the Evidence" number 1 which reads:¹

The three firearms are admissible against the defendant. The revolver was observed by the officer in "open view." While that gun was on the seat inside the Camry, Officer Johnson observed it through the open door and while he was outside the Camry. Officer Johnson was not in a constitutionally protected area when he observed that gun. He immediately recognized that gun as contraband.

4. Error is assigned to "Reasons for Admissibility or Inadmissibility of the Evidence" number 2 which reads:

As the officers could not determine from outside the car whether or not anyone else was hiding in the Camry, officer safety required that one of them enter the Camry and retrieve the revolver.

5. Error is assigned to "Reasons for Admissibility or Inadmissibility of the Evidence" number 3 which reads:

¹ While these "Reasons for Admissibility" contain conclusions of law, and while conclusions of law are typically reviewed de novo (*State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citation omitted), *overruled on other grounds by Brendlin v. California*, --- U.S. ----, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)), in an abundance of caution Mr. Carter assigns error to these "Reasons" since they could be considered to be mixed findings of fact and conclusions of law.

Once inside the Camry to retrieve the revolver, the officer inadvertently saw the .45 caliber Kimber firearm in between the driver's seat and the center console. As that gun was in "plain view," the officer was entitled to retrieve that gun as well. While the Camry was a constitutionally protected area, the officer was entitled to be in that area. He immediately recognized that gun as contraband. While he was rendering that gun safe, he inadvertently saw the Hi-Point firearm on the floorboard. Again, while the Camry was a constitutionally protected area, the officer was entitled to be in that area. He immediately recognized that third gun as contraband.

II. ISSUES PRESENTED

1. Does Mr. Carter have standing to challenge the search of the vehicle in which he was arrested? (Assignments of Error Nos. 1, 2, 3, 4, and 5).
2. Where police observe a handgun in "open view" on a the driver's seat of a vehicle after arresting the driver of the vehicle for reckless driving or attempted eluding of a pursuing police vehicle, may the police seize that handgun without a warrant? (Assignments of Error Nos. 1, 3, 4, and 5).
3. Where firearms are observed in a vehicle by police during the unlawful warrantless seizure of another firearm in that same vehicle, may police seize the subsequently observed firearms without a warrant? (Assignments of Error Nos. 1, 3, 4, and 5).
4. Where police officers have determined that no other persons are in a vehicle and the driver has been secured and is under the supervision of at least one police officer with a drawn weapon, does a threat to officer safety exist such that police may search the vehicle without a warrant upon observing a firearm on the driver's seat of the vehicle? (Assignments of Error Nos. 1, 3, 4, and 5).

5. Is a firearm immediately recognizable as contraband or evidence of a crime such that police may seize it without a warrant where the police know nothing about the firearm other than that the firearm exists at a certain location? (Assignments of error Nos. 1, 3, 4, and 5).
6. Does the State present sufficient evidence to convict an individual of unlawful possession of a firearm and of the aggravating factor of being armed with a firearm during the commission of another crime where all evidence that the defendant was possibly in possession of a firearm was inadmissible at trial? (Assignments of error nos. 1, 2, 3, 4, and 5).

III. STATEMENT OF THE CASE

A. Factual Background

Around 9:45 p.m. on March 25, 2010, Tacoma Police Officers Christopher Martin and Dan Johnson were parked at the curb and watching a house in the 3500 block of South Cushman Street in Tacoma. RP 13, 16, 56-59, 537-546, 641-646. As the officers were watching the house, a vehicle, later determined to be driven by Mr. Joseph Carter, passed within five feet of the passenger side of the officer's vehicle while travelling faster than the legal speed limit. RP 17-21, 59-60, 547-548, 567, 646, 659-660. The officers observed Mr. Carter's vehicle pull to the curb, saw the driver's door open and shut quickly, and then watched as Mr. Carter pulled away from the curb and made a right turn onto 36th Street without signaling or stopping at the stop sign on the corner. RP 21-23, 63-64, 548-550, 649-650. Because of Mr. Carter's strange behavior

and the traffic violations, the officers decided to follow Mr. Carter. RP 23, 550, 651-652.

When the officers approached 36th Street, they observed Mr. Carter's vehicle making a right turn onto Ainsworth without signaling and accelerate. RP 23, 65, 550-551. The officers followed Mr. Carter from 36th onto Ainsworth and observed Mr. Carter make a left turn onto 35th Street without yielding to oncoming traffic. RP 25, 27, 66, 551-552. At this point, the officers felt that Mr. Carter was driving recklessly and attempting to elude the officers so Officer Martin activated the lights and siren on the police vehicle. RP 28, 66, 553. Officer Martin activated the lights and siren just as Mr. Carter made a left turn onto Alaska Street. RP 28, 67, 553.

As the officers turned onto Alaska Street, Mr. Carter's vehicle was almost all the way to 36th Street. RP 30, 555. Mr. Carter turned right onto 36th Street but failed to stop at the stop sign on 36th Street. RP 30-31, 555. The officers lost sight of Mr. Carter's vehicle as they continued on Alaska Street. RP 33, 556. Because they had lost sight of Mr. Carter's vehicle, the officers turned the overhead lights and siren on the patrol car off and began to search for the vehicle. RP 33, 556-557.

Officer Johnson spotted Mr. Carter's vehicle coming to a stop down an alleyway next to Alaska Street. RP 33, 68, 559, 656. The

officers drove into the alley and parked their car next to the driver's side of Mr. Carter's vehicle. 35, 69, 560. Officer Johnson exited the patrol car. When he looked through the windshield he saw that Mr. Carter was sitting in the driver's seat with the seat reclined. RP 35, 69-70, 560-561, 658-659. Officer Martin had also exited the patrol car when Officer Johnson removed his weapon from its holster and announced that the driver of the other vehicle was still in the vehicle. RP 35, 71, 561-562, 659.

Officer Martin approached Mr. Carter's vehicle, opened the driver's door, ordered Mr. Carter to show his hands and exit the vehicle, and, when Mr. Carter did not move, grabbed Mr. Carter by his shirt, pulled him from the car, and threw him to the ground. RP 35-36, 72-73, 565-568, 659-660. Prior to pulling him from the vehicle, Officer Martin could see Mr. Carter's hands by Mr. Carter's waist and could see that Mr. Carter's hands were not concealing anything or reaching for anything. RP 36.

Officer Martin handcuffed Mr. Carter and Officer Johnson looked into the vehicle for other occupants. RP 73, 661-662. As he looked into the vehicle, Officer Johnson observed a handgun on the driver's seat of the vehicle. RP 37, 75, 569, 662. Officer Johnson told Officer Martin about the gun on the seat, so Officer Martin moved Mr. Carter to the

patrol vehicle and then went back and retrieved the gun from the driver's seat while Officer Johnson remained with Mr. Carter. RP 37, 75, 569, 662.

While he was retrieving the handgun from the seat, Officer Martin observed the grips of a second handgun tucked between the driver's seat cushion and the center console of the vehicle. RP 38, 570. While seizing the second gun, Officer Martin observed a third gun tucked under the driver's seat. RP 38, 571, 574. Officer Martin seized this third handgun as well. RP 38, 571, 574. A records check was performed which revealed that Mr. Carter was a felon who was could not lawfully possess firearms. RP 39.

Mr. Carter was transported to the jail. RP 441-444. As Mr. Carter was being searched during booking, police discovered a bag containing 15 small pills and a second bag containing a white powdery substance in one of Mr. Carter's socks. RP 446. The powder was later tested and found to contain cocaine. The pills were later tested and found to contain hydrocodone. RP 476-484.

B. Procedural Background

On March 26, 2010, Mr. Carter was charged with three counts of unlawful possession of a firearm in the second degree, one count of

attempting to elude a pursuing police vehicle, and two counts of unlawful possession of a controlled substance. CP 1-3.

On July 29, 2010, the charges against Mr. Carter were amended to add deadly weapon enhancements to the unlawful possession of a firearm counts, adding a deadly weapon enhancement and three firearm enhancements to the eluding and unlawful possession of controlled substances charges. CP 8-12.

On September 1, 2010, Mr. Carter filed a motion to suppress all evidence found pursuant to the seizure and arrest of Mr. Carter on grounds that the officers lacked probable cause arrest Mr. Carter, the officers lacked a reasonable suspicion that Mr. Carter was involved in criminal activity sufficient to support a *Terry* stop, that the stop of Mr. Carter's vehicle was pretextual, and that the search of the vehicle was unlawful under the Fourth Amendment, Article 1 § 7 and *Arizona v. Gant*. CP 13-29.

On September 14, 2010, the trial court held that the stop of Mr. Carter was not pretextual, that the officers had a reasonable basis to stop Mr. Carter based on his failure to stop at two stop signs, his speeding in a residential area, his failure to pull over in response to the lights and sirens of the patrol car, and that the police had probable cause to arrest Mr. Carter for eluding. RP 369. The court found that the first gun was found

while in “open view” and the second and third guns were found in “plain view.” RP 370. Ultimately, the trial court denied Mr. Carter’s motion to suppress. RP 370-371.

Also on September 14, 2010, the trial court granted the State’s motion to dismiss the no-firearm related weapon enhancements. RP 372.

Trial in this matter began on September 21, 2010. RP 440.

On September 23, 2010, Mr. Carter entered a stipulation that on March 25, 2010, he had previously been convicted of a felony. CP 84.

On September 27, 2010, at the close of the State’s case, Mr. Carter moved for dismissal of the “reckless driving” aggravating factor on the eluding charge. RP 707-708.

On September 28, 2010, the trial court granted Mr. Carter’s motion to dismiss the “reckless driving” aggravator. RP 917-919.

On September 29, 2010, the charges against Mr. Carter were amended a second time. CP 155-158. This second amendment dropped the deadly weapon enhancements from all charges. CP 155-158.

On September 30, 2010, the State filed a Memorandum in Opposition to Mr. Carter’s motion to suppress. CP 159-170. The State argued that Mr. Carter could lawfully have been stopped for speeding and/or failing to stop at controlled intersections. CP 159-170. The State also argued that Mr. Carter could have been lawfully stopped for

attempting to elude a pursuing police vehicle and/or obstruction of a law enforcement officer. CP 159-170. The State further argued that the guns were lawfully seized under the officer safety exception to the warrant requirement, and that the guns could be seized under the “plain view” and “open view” doctrines. CP 159-170.

The jury found Mr. Carter guilty of two counts of unlawful possession of a firearm in the second degree, guilty of attempting to elude a pursuing police vehicle, and guilty of both counts of unlawful possession of a controlled substance. CP 201-206. The jury also found that Mr. Carter was armed with two firearms during the commission of the crimes of attempting to elude a pursuing police vehicle and both counts of unlawful possession of a controlled substance. CP 207-212.

Due to the firearm sentence enhancement, Mr. Carter received a total sentence of 132 months. CP 232-246.

Notice of Appeal was filed on November 1, 2010. CP 249.

On December 1, 2010, Findings of Fact and Conclusions of Law regarding Mr. Carter’s motion to suppress were entered by the trial court. CP 252-257.

IV. ARGUMENT

- 1. Mr. Carter has standing to challenge the search of the vehicle.**

“A defendant may challenge a search or seizure only if he or she has a personal Fourth Amendment privacy interest in the area searched or the property seized. The defendant must personally claim a justifiable, reasonable, or legitimate expectation of privacy that has been invaded by governmental action.” *State v. Goucher*, 124 Wn.2d 778, 787, 881 P.2d 210 (1994) (internal citations omitted).

Although automatic standing has been the subject of some controversy, and has been abandoned by the U.S. Supreme Court, it “still maintains a presence in Washington.” *State v. Williams*, 142 Wn.2d 17, 22, 11 P.3d 714 (2000).

It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. *E.g. State v. Hendrickson*, 129 Wn.2d 61, 69 n. 1, 917 P.2d 563 (1996); *State v. Williams*, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984). Article I, section 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision is violated when the State unreasonably intrudes upon a person’s private affairs. *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990); *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984).

A person may rely on the automatic standing doctrine only if the

challenged police action produced the evidence sought to be used against him. *Williams*, 142 Wn.2d at 23, 11 P.3d 714. To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure. *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). As to the second requirement, possession may be actual or constructive to support a criminal charge. *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969). A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. *Id.* at 29, 459 P.2d 400.

Here, Mr. Carter was charged with three counts of unlawful possession of a firearm. CP 155-158. The guns were found in a vehicle Mr. Carter had been driving, rendering him at least in constructive possession of the guns. Thus, Mr. Carter has standing to challenge the search of the vehicle.

2. The trial court erred in denying Mr. Carter's motion to suppress.

a. Standard of Review.

When reviewing a trial court's ruling on a motion to suppress evidence, appellate courts independently determine whether (1) substantial

evidence supports the trial court's factual findings, and (2) the factual findings support the trial court's conclusions of law. *State v. Carney*, 142 Wn.App. 197, 201, 174 P.3d 142 (2007), *review denied* 164 Wn.2d 1009, 195 P.3d 87 (2008) (*citing State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Dempsey*, 88 Wn.App. 918, 921, 947 P.2d 265 (1997)). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *Hill*, 123 Wn.2d at 644 (*citing State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). We consider any unchallenged findings of fact as verities on appeal. *Hill*, 123 Wn.2d 644 (citations omitted).

Appellate courts review the trial court's conclusions of law **de novo**. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citation omitted), *overruled on other grounds by Brendlin v. California*, - -- U.S. ----, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007) (emphasis added).

b. The police were required to obtain a warrant before they could lawfully search Mr. Carter's vehicle or seize any item seen therein.

"A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement [.]" *Flippo v. West Virginia*, 528 U.S. 11, 120 S.Ct. 7, 8, 145 L.Ed.2d 16 (1999); *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025

(1992).

A warrantless search of constitutionally-protected areas is presumed unreasonable absent proof that one of the few well-established exceptions to the warrant requirement applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

Both the Fourth Amendment to the federal constitution and article I, section 7 of our state constitution prohibit warrantless searches unless one of the narrow exceptions to the warrant requirement applies. *State v. Buelna Valdez*, 167 Wn.2d 761, 768, 771–72, 224 P.3d 751 (2009). Article I, section 7 provides more extensive privacy protections than the Fourth Amendment and creates “an almost absolute bar to warrantless arrests, searches, and seizures.” *Valdez*, 167 Wn.2d at 772, 224 P.3d 751 (internal quotation marks omitted) (*quoting State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983)).

“The warrant requirement is especially important under article I, section 7, of the Washington Constitution **as it is the warrant which provides the ‘authority of law’ referenced therein.**” *Ladson*, 138 Wn.2d at 350, 979 P.2d 833 (emphasis added) (*citing City of Seattle v. Mesiani*, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

The Washington State Supreme Court has stated: “The ultimate

teaching of our case law is that the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.” *Ladson*, 138 Wn.2d 343, 357, 979 P.2d 833.

With regards to searches of vehicles conducted contemporaneously with the arrest of the driver or an occupant of the vehicle, the United States Supreme Court has limited the ability of officers to search the vehicle without a warrant to two specific situations:

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.

Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 1723-1724, 173 L.Ed.2d 485 (2009).

Because Article 1, § 7 of the Washington Constitution is more protective of the privacy rights of Washington citizens than is the Fourth Amendment to the Federal Constitution, the Washington Supreme Court has limited the ability of officers to conduct a warrantless search of a vehicle beyond what is allowed by the Fourth Amendment and *Gant*.

In *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009), The Washington Supreme Court held that article 1 § 7 of the Washington constitution requires “no less” than the Fourth Amendment protections and held 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.

Patton, 167 Wn.2d at 394–95, 219 P.3d 651. The Supreme Court went on to hold that “an 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, 219 P.3d 651.

The Washington Supreme Court expanded on the *Patton* holding in *Valdez*, as was recognized by this court in *State v. Abuan*, 161 Wn.App. 135, ---P.3d--- (2011):

Our Supreme Court subsequently elaborated on [the *Patton*] holding in *Valdez*:

[W]hen 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.

167 Wn.2d at 777, 224 P.3d 751 (emphasis added).

Significantly, the *Valdez* court recognized that *Gant* allows officers to search for evidence of the crime of arrest independent of officer safety or destruction of evidence concerns when conducting a search incident to arrest under the Fourth Amendment. *See* 167 Wn.2d at 770–71, 224 P.3d 751 (*citing Gant*, 129 S.Ct. at 1719). But the *Valdez* court chose not to include that justification in its own holding, limiting the bases of a search incident to arrest under article I, section 7. 167 Wn.2d at 777, 224 P.3d 751 (“[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.”).

Thus, as we recently observed, “[A]rticle I, section 7 limits a search incident to arrest to situations where threats to officer safety or the preservation of evidence prevent the arresting officer from delaying the search to obtain a warrant.” *State v. Swetz*, 160 Wn.App. 122, 132, 247 P.3d 802 (2011) (*citing Valdez*, 167 Wn.2d at 777, 224 P.3d 751; *Patton*, 167 Wn.2d at 394–95, 219 P.3d 651), petition for review filed, (Mar. 11, 2011). In *Swetz*, we held that a police officer's search of a vehicle after arresting its only occupant and securing him in handcuffs in the back of his patrol car violated article I, section 7. 160 Wn.App. at 132,

137, 247 P.3d 802.

Abuan, 161 Wn.App. at *6-*7, --- P.3d ---.

In *Swetz*, Swetz stopped a police officer to tell the officer that Swetz had seen a black bear in the area. *Swetz*, 160 Wn.App. at 126, 247 P.3d 802. The officer drove to the area described by Swetz and saw a bear being chased by a dog. *Swetz*, 160 Wn.App. at 126, 247 P.3d 802. Later that day, the officer pulled up next to Swetz's vehicle and Swetz approached the officer's window. *Swetz*, 160 Wn.App. at 126, 247 P.3d 802. Swetz and the officer engaged in a conversation, during which the officer noted a strong odor of burnt marijuana on Swetz's breath and person. *Swetz*, 160 Wn.App. at 126, 247 P.3d 802. The officer walked with Swetz back to Swetz's vehicle, observed a bag of marijuana sitting on the passenger seat and subsequently arrested Swetz for unlawful possession of marijuana. *Swetz*, 160 Wn.App. at 126, 247 P.3d 802. The officer then searched Swetz's vehicle and found more marijuana, pipes containing marijuana residue, and several containers of Diazepam (Valium). *Swetz*, 160 Wn.App. at 126, 247 P.3d 802. Mr. Swetz was charged with and convicted of one count of possession of marijuana and one count of possession of a controlled substance. *Swetz*, 160 Wn.App. at 126, 247 P.3d 802.

Swetz appealed to this court, arguing that the warrantless search of

his vehicle was unlawful under *Patton* and *Valdez*. *Swetz*, 160 Wn.App. at 127, 247 P.3d 802. This court found that the search of Swetz's vehicle was unlawful since Swetz was in custody at the time of the search and was the sole occupant of his vehicle:

[U]nder *Patton* and *Buelna Valdez*, article I, section 7 limits a search incident to arrest to situations where threats to officer safety or the preservation of evidence prevent the arresting officer from delaying the search to obtain a warrant. See *Buelna Valdez*, 167 Wn.2d at 777, 224 P.3d 751; *Patton*, 167 Wn.2d at 394–95, 219 P.3d 651. Here, Officer Osterdahl testified that he handcuffed Swetz and placed him in the patrol car before searching the vehicle. Officer Osterdahl also testified that Swetz was the sole occupant of the vehicle and no one else was in the vicinity at the time of the arrest and search. Furthermore, the State acknowledges that it “appears that the Washington Supreme Court's recent [*Buelna*] *Valdez* opinion forecloses such an ‘evidence-of-the-crime-of-arrest’ vehicle search where, as here, the sole occupant of the vehicle has been handcuffed and placed in the patrol car.” Br. of Resp't at 5. The State also concedes that if searching for evidence of the crime of arrest does not, alone, justify a search incident to arrest under article I, section 7, “then the search of [Swetz's] vehicle was indeed unlawful, and this case must be reversed and dismissed.” Br. of Resp't at 6. We agree.

Swetz, 160 Wn.App at 132, 137, 247 P.3d 802.

Thus, under Article 1, § 7, where police arrest an individual who had been in a vehicle and secure that individual in a manner where he or she cannot get back into the vehicle to obtain a weapon or destroy evidence, the police **must** obtain a warrant before searching the

individual's vehicle and seizing anything discovered within the vehicle.

This case is nearly identical to *Swetz* both factually and with regard to the legal issues before the court. Both Officer Martin and Officer Johnson testified that Mr. Carter had been handcuffed, escorted away from his vehicle, and placed under the watch of Officer Johnson at the time Officer Martin reached into Mr. Carter's vehicle and seized the firearm observed on the driver's seat. RP 37, 73, 75, 569, 661-662. In fact, at the suppression hearing Officer Martin testified that Mr. Carter was under the control of the officers and "couldn't get himself back into the car" at the time Officer Martin retrieved the first gun from Mr. Carter's vehicle. RP 48. Further, Officer Johnson testified that he inspected Mr. Carter's vehicle for other occupants and did not find any (RP 73) and Officer Martin testified that there were no other people in the alley at the time of Mr. Carter's arrest. RP 578. Thus, no reasons existed to not wait to conduct the search until a telephonic warrant could be obtained.

Application of the above law to the facts of the present case makes clear that Officers Martin and Johnson were required to obtain a search warrant before they could seize any items observed in Mr. Carter's vehicle.

- i. The guns could not be seized without a

warrant under the doctrines of “open view”
or “plain view” searches.

In rendering its decision, the *Swetz* court addressed the argument that the officer’s warrantless seizure of the marijuana sitting in open view on the passenger seat was justified under the “exigent circumstances” exception to the warrant requirement. *Swetz*, 160 Wn.App at 132-133, 247 P.3d 802. Relying on prior decisions of the Washington and United States Supreme Courts, the *Swetz* court categorically rejected the argument that a police officer who sees an item that is clearly contraband in a vehicle during an “open view” search of the vehicle may seize that item without a warrant:

When a law enforcement officer observes something in open view from a lawful vantage point, the observation is not a “search” triggering the protections of article I, section 7. *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986); *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). But the officer’s right to seize the items observed must be justified by a warrant or valid exception, if the items are in a constitutionally protected area. *Kennedy*, 107 Wn.2d at 9–10, 726 P.2d 445. As the *Kennedy* court explained:

[I]f an officer, after making a lawful stop, looks into a car from the outside and sees a weapon or contraband in the car, he has not searched the car. Because there has been no search, article 1, section 7 is not implicated. Once there is an intrusion into the constitutionally protected area, article 1, section 7 is implicated and the intrusion must be justified if it is made without a

warrant.

Kennedy, 107 Wn.2d at 10, 726 P.2d 445; *see also State v. Myrick*, 102 Wn.2d 506, 514–15, 688 P.2d 151 (1984) (“[P]lain view alone is never enough to justify the warrantless seizure of evidence even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.” (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971))); *State v. Lemus*, 103 Wn.App. 94, 102, 11 P.3d 326 (2000) (“The ‘open view’ observation is thus not a search at all but may provide evidence supporting probable cause to constitutionally search; in other words, a search pursuant to a warrant.”).

Swetz, 160 Wn.App. at 134-135, 247 P.3d 802.

Thus, under *Swetz* and the cases cited therein, even though Officer Martin could lawfully observe the existence of the handgun on the seat of Mr. Carter’s vehicle, the officers **could not seize** that handgun without a warrant. Accordingly, the seizure of the handgun and subsequent discovery of the other handguns was unlawful and the guns should have been suppressed.

- ii. The guns were not immediately recognizable as contraband or evidence of a crime, thus, the guns could not be seized under the “open view” or “plain view” exceptions to the warrant requirement.

The plain view doctrine allows officers to seize an item without a warrant if, while acting in the scope of an otherwise authorized search, they acquire probable cause to believe that the item is evidence of a crime.

State v. Johnson, 104 Wn.App. 489, 501, 17 P.3d 3 (2001). The doctrine does not allow an additional, unauthorized search; police must have “immediate knowledge” that they have incriminating evidence before them. *Johnson*, 104 Wn.App. at 501, 17 P.3d 3.

If it is immediately apparent to police officials that there are fruits, instrumentalities, or evidence of a crime before them, they may seize such objects. *State v. Lair*, 95 Wn.2d 706, 630 P.2d 427 (1998). Objects are immediately apparent for purposes of a plain view seizure when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them. *Lair*, 95 Wn.2d at 716, 630 P.2d 427.

Even assuming for the sake of argument that police could seize contraband observed in “open view” without a warrant, the facts known to the police at the time Officer Martin seized the weapons in Mr. Carter’s vehicle were insufficient to provide Officer Martin with “immediate knowledge” that the guns were incriminating evidence. Mr. Carter’s identity, and, therefore the fact that he was a felon prohibited from possessing firearms, was not learned by the police until after the guns had been seized. RP 48. Thus, the police could not have known that the guns were evidence of the crime of unlawful possession of a firearm.

Guns, alone and without knowledge of additional facts, are not

immediately recognizable as evidence of a crime. Thus, Officer Martin had knowledge of insufficient facts to authorize his warrantless seizure of the guns found in Mr. Carter's vehicle. The seizure of those guns was unconstitutional and the guns should have been suppressed.

c. *The trial court's legal conclusion that the guns were lawfully seized and were admissible was contrary to established law.*

Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. *See Ladson*, 138 Wn.2d at 359, 979 P.2d 833. In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. *See State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

As stated above, where the sole occupant of a vehicle has been secured by police, the police must obtain a warrant before searching that vehicle or seizing any items observed in "open view" or "plain view." No such warrant was obtained in this case, rendering all evidence discovered inside of Mr. Carter's vehicle inadmissible as either the fruits of an unlawful warrantless search and seizure (the first gun observed on the driver's seat) or as being derived from an unlawful warrantless search (the second two guns discovered during the seizure of this first gun. Accordingly, the trial court's factual findings did not support its legal

conclusion that evidence of the guns was admissible at trial. The trial court erred in finding that evidence of the guns was admissible.

3. The State presented insufficient admissible evidence to convict Mr. Carter of unlawful possession of a firearm or to establish that Mr. Carter committed any other crime while armed with a firearm.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Where a criminal defendant challenges the sufficiency of the evidence, appellate courts review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). If there is insufficient evidence to prove an element, reversal is required and retrial

is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Here, as discussed above, all evidence of Mr. Carter's actual or constructive possession of any guns on March 25, 2010, was discovered pursuant to unlawful warrantless searches of his vehicle. Thus, all such evidence was inadmissible at his trial. Without this evidence, the State presented insufficient evidence to establish that Mr. Carter possessed any firearms on the night on March 25, 2010 and, therefore, insufficient evidence to convict Mr. Carter of any crime or aggravating factor related to possession of firearms.

VI. CONCLUSION

For the reasons stated above, all evidence that Mr. Carter possessed firearms for any purpose on March 25, 2010, was inadmissible. Accordingly, the State presented insufficient evidence to convict Mr. Carter of unlawful possession of a firearm or of any aggravating factor based on possession of firearms. This court should vacate Mr. Carter's convictions for unlawful possession of firearms and the aggravating factors of being armed with a firearm during the commission of another crime and remand his case dismissal of those charges and aggravators with prejudice and for resentencing.

DATED this 29th day of July, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on July 28^{29th}, 2011, she delivered in person to the Pierce County Prosecutors Office, County-City Building, 930, Tacoma Avenue South, Room 946 Tacoma, Washington 98402, and by United States Mail to appellant, Joseph D. Carter, DOC #709877, Coyote Ridge Corrections Center, Post Office Box 969, Connell, Washington 99362, true and correct copies of this Brief.. This statement is certified to be true and correct under of perjury of the laws of the State of Washington. Signed at Tacoma, Washington July 28, 2011.

STATE OF WASHINGTON
BY [Signature]
DEPUTY

[Signature]
Norma Kinter

AMENDED CERTIFICATE OF SERVICE

The undersigned certifies that on July 29, 2011, she delivered in person to the Pierce County Prosecutors Office, County-City Building, 930, Tacoma Avenue South, Room 946 Tacoma, Washington 98402, and by United States Mail to appellant, Joseph D. Carter, DOC #709877, Coyote Ridge Corrections Center, Post Office Box 769, Connell, Washington 99362, true and correct copies of this Brief.. This statement is certified to be true and correct under of perjury of the laws of the State of Washington. Signed at Tacoma, Washington July 29, 2011.

Norma Kinter