

FILED

DEC 14 2009

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 27895-6-III

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

---

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER D. BROWN,

Appellant.

---

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

The Honorable Kathleen M. O'Connor  
The Honorable Annette S. Plese

---

REPLY BRIEF OF APPELLANT

---

SARAH M. HROBSKY  
Attorney for Appellant

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

**TABLE OF CONTENTS**

A. ARGUMENT ..... 1

    1. EVIDENCE OBTAINED PURSUANT TO THE  
      WARRANTLESS SEARCH OF MR. BROWN'S  
      VEHICLE MUST BE SUPPRESSED. .... 1

        a. The warrantless search of Mr. Brown's vehicle  
           after he was arrested and secured away from  
           the car was in violation of the Fourth Amendment  
           to the United States Constitution and Article I,  
           section 7 of the Washington Constitution. ..... 1

        b. The erroneous admission of evidence obtained  
           pursuant to the warrantless search of Mr.  
           Brown's arrest vehicle is a manifest error that  
           may be raised for the first time on appeal. ..... 4

    2. THE EVIDENCE ESTABLISHED ATTEMPTED  
      ASSAULT ONLY. .... 5

B. CONCLUSION ..... 8

**TABLE OF AUTHORITIES**

**United States Constitution**

Amend. IV ..... 1

**Washington Constitution**

Art. I, sec. 7 ..... 1

**United States Supreme Court Decisions**

*Arizona v. Gant*, 556 U.S. \_\_\_, 129 S.Ct. 1710, 1723,  
173 L.Ed.2d 485 (2009) ..... 1-2

**Washington Supreme Court Decisions**

*State v. Contreras*, 92 Wn.2d 307, 966 P.2d 915 (1998) ..... 4

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) ..... 4, 5

*State v. Patton*, 2009 WL 3384578 (Wash., October 22, 2009)  
..... 1, 2-3

**Washington Court of Appeals Decisions**

*State v. Godsey*, 131 Wn. App. 278, 127 P.3d 11 (2006) ..... 7

*State v. Hall*, 104 Wn. App. 56, 14 P.3d 884 (2000) ..... 6, 7

**Rules and Statutes**

RAP 2.5 ..... 4

RCW 9A.28.020 ..... 5

A. ARGUMENT

1. EVIDENCE OBTAINED PURSUANT TO THE WARRANTLESS SEARCH OF MR. BROWN'S VEHICLE MUST BE SUPPRESSED.

a. The warrantless search of Mr. Brown's vehicle

after he was arrested and secured away from the car was in violation of the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution. The police searched Mr. Brown's car after he was arrested and placed in a patrol car, contrary to federal and state constitutional limits on warrantless searches. 10/28/08 RP 49, 53; 10/29/08 RP 150, 156-57, 159. Article I, section 7 of the Washington Constitution prohibits a warrantless vehicle search incident to arrest "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." *State v. Patton*, 2009 WL 3384578, \*1 (Wash., October 22, 2009) (emphasis added). On the other hand, the Fourth Amendment to the United States Constitution prohibits a warrantless vehicle search incident to the driver's arrest unless "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.” *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S.Ct. 1710, 1723, 173 L.Ed.2d 485 (2009) (emphasis added). Here, because Mr. Brown was secured away from his car and unable to reach the passenger compartment, the police had no authority to conduct the warrantless search.

In *Patton*, an officer went to the defendant’s trailer to serve an outstanding felony warrant and saw the defendant “rummaging around” inside his car that was parked outside the trailer. 2009 WL 3384578, \*1. The officer approached the defendant and announced he was under arrest. *Id.* The defendant ran inside the trailer where he was later taken into custody. *Id.* Backup officers searched the defendant’s car and found two baggies of methamphetamine. *Id.* At his subsequent trial for unlawful possession of methamphetamine, the defendant alleged the search of his car was unconstitutional. *Id.* at \* 2. The Washington Supreme Court agreed and noted, “the automobile search incident to arrest exception [to the warrant requirement] rests on concerns for officer safety and the potential destruction of evidence of the crime of arrest.” *Id.* at \* 4. The Court then concluded, “we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee

poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.” *Id.* at \*7.

The State contends the holding in *Patton* is limited to situations in which there the defendant is arrested outside his vehicle. Br. of Resp. at 11-12. This contention apparently rests on the faulty assumption that the Court used of the term “nexus” as meaning physical proximity. The *Patton* Court stated, “the search incident to arrest exception requires a nexus between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns or concerns for the destruction of evidence of the crime of arrest.” *Id.* at \*1. Thus, in context, the *Patton* Court used the term “nexus” to indicate a connection between the warrantless search and limited circumstances in which a warrantless search is justified, that is, officer safety or preservation of evidence of the crime of arrest.

Here, however, Mr. Brown was secured and in the patrol car at the time of the warrantless search of his car. Therefore, although he was a recent occupant of the car, he no longer posed any threat to the safety of the officers or to the integrity of any evidence that might be inside the car. The evidence obtained as the

result of the unconstitutional warrantless search of Mr. Brown's car must be suppressed.

b. The erroneous admission of evidence obtained pursuant to the warrantless search of Mr. Brown's arrest vehicle is a manifest error that may be raised for the first time on appeal. The admission of evidence of illegal drugs found pursuant to the warrantless search of Mr. Brown's car was a manifest error that is properly raised for the first time on appeal. See RAP 2.5(a). Here, the record contains all the pertinent facts to adequately review the issue and, for the reasons stated, it is highly likely the court would have granted a suppression motion, this issue is properly before the Court. See *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *State v. Contreras*, 92 Wn.2d 307, 313, 966 P.2d 915 (1998).

The State erroneously contends this Court cannot review the issue unless it finds "*defendant's choice*" not to raise the issue below was a "manifest error." Br. of Resp. at 5 (emphasis in original). This contention misstates the "manifest error" standard. The correct standard provides, "[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this

showing of actual prejudice that makes the error 'manifest', allowing appellate review." *McFarland*, 127 Wn.2d at 333.

The State's contention that the trial court would not have granted a suppression motion because the officer "lawfully searched the car" is also erroneous. Br. of Resp. at 7. For the reasons stated, the officer did not have authority to conduct the search because Mr. Brown was arrested and secured away from the vehicle at the time of the search. Therefore, it is highly likely that a suppression motion would have been granted.

This issue is properly raised for the first time on appeal.

2. THE EVIDENCE ESTABLISHED ATTEMPTED ASSAULT ONLY.

There was insufficient evidence to establish Mr. Brown committed an assault, rather than an attempted assault. A person attempts to commit a crime if, with intent to commit a specific crime, the person takes a substantial step toward committing that crime. RCW 9A.28.020(1).

Here, the jury was instructed on the definition of assault:

An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 59 (Instruction No. 5). The jury was also instructed on the definition of intent:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

CP 60 (Instruction No. 6).

Viewing the evidence in the light most favorable to the State, the evidence established that Mr. Brown specifically intended to create apprehension of harm by pointing a weapon at the officer, but he was unable to complete that act because the muzzle of the air gun hit the roof of his car and spun out the window. Therefore, Mr. Brown took a substantial step towards committing assault in the third degree but was prevented from carrying it out. See *State v. Hall*, 104 Wn. App. 56, 65, 14 P.3d 884 (2000) (“[A] defendant could take a substantial step to use unlawful force to intentionally cause fear and apprehension of imminent bodily injury in another person, but ... could be prevented from carrying out that act.”).

The State contends the evidence was sufficient to establish a completed assault because the officer was clearly upset and shaken and the jury returned a guilty verdict. Br. of Resp. at 13-14. However, evidence that the officer did in fact have a reasonable

apprehension satisfies only part of the State's burden of proof; it does not satisfy the State's burden to establish whether Mr. Brown completed "an act done with intent to create in another apprehension and fear of bodily injury." Moreover, the fact that the jury returned a guilty verdict does not relieve this Court from its duty to review the record. The State's reasoning is not persuasive.

In *State v. Godsey*, this Court ruled the defendant was not entitled to an instruction on attempted assault in the third degree, on the grounds the defendant was not prevented from completing the assault. 131 Wn. App. 278, 288, 127 P.3d 11 (2006). In *Hall*, this Court again ruled the defendant was not entitled to an instruction on attempted assault in the third degree, on the grounds the defendant was prevented from making physical contact only because he was in restraints and the officer was able to dodge his attempted head butts. 104 Wn. App. at 65-66. By contrast, in the instant case, Mr. Brown was prevented from completing the intended assault by external circumstances, not because of preventive or evasive action by the officer.

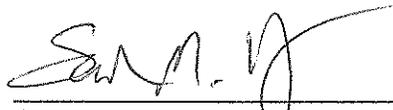
In the absence of sufficient evidence to establish Mr. Brown completed an assault, his conviction for assault in the third degree must be reversed.

B. CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief of Appellant, Mr. Brown requests this Court reverse his conviction for violation of the Uniform Controlled Substances Act, based on evidence obtained as the result of an unlawful vehicle search. He also requests this Court reverse his conviction for assault in the third degree, insofar as the evidence established an attempted assault only.

DATED this 10<sup>th</sup> day of December 2009.

Respectfully submitted,



---

SARAH M. HROBSKY (12352)  
Washington Appellate Project (91052)  
Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 27895-6-III
	)	
CHRISTOPHER BROWN,	)	
	)	
APPELLANT.	)	

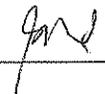
---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] CHRISTOPHER BROWN 296763 ATHANUM VIEW CORRECTIONS CENTER 2009 S 64 <sup>TH</sup> AVE YAKIMA, WA 98903	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF DECEMBER, 2009.

X \_\_\_\_\_  


**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
Phone (206) 587-2711  
Fax (206) 587-2710