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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

SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. STATEMENT OF THE ISSUES 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 4

 1. MR. BROWN CAN CHALLENGE THE
 WARRANTLESS SEARCH OF HIS CAR FOR
 THE FIRST TIME ON APPEAL. 4

 2. THE EVIDENCE UNLAWFULLY OBTAINED
 PURSUANT TO THE WARRANTLESS SEARCH
 OF MR. BROWN'S CAR MUST BE
 SUPPRESSED AND HIS CONVICTIONS FOR
 UNLAWFUL POSSESSION OF DRUGS MUST
 BE REVERSED. 5

D. CONCLUSION 8

TABLE OF AUTHORITIES

United States Constitution

Amend. IV 2

Washington Constitution

Article I, section 7 3

United States Supreme Court Decisions

Arizona v. Gant, 556 U.S. ___, 129 S.Ct. 1710, 1714,
173 L.Ed.2d 485 (2009) 3, 4

Washington Supreme Court Decisions

State v. Garcia-Salgado, 170 Wn.2d 176, 240 P.3d 153 (2010) 6

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1995) 6

State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009) 3, 4, 6

State v. Robinson, No. 83525-0, consolidated with
State v. Millan, No. 83613-2 2011 WL 1434607
(Wash. Apr. 14, 2011) 3, 4, 5, 8

State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) 5-6

Washington Court of Appeals Decision

State v. Lemus, 103 Wn. App. 94, 11 P.3d 326 (2000) 6-7

Rule

RAP 2.5 4

A. STATEMENT OF THE ISSUES

1. Whether Mr. Brown can challenge the warrantless search of his car for the first time on appeal following a change in interpretation of the constitutional parameters of a warrantless vehicle search incident to the arrest of a recent occupant?

2. Whether the trial record was sufficiently developed to determine that the evidence found during the warrantless search of Mr. Brown's car must be suppressed?

B. STATEMENT OF THE CASE

Officer Matthew Lyons stopped appellant Christopher D. Brown for speeding. 10/29/08 RP 128-29. As Officer Lyons prepared to check Mr. Brown's license and registration, Mr. Brown grabbed the butt of a realistic-looking air pistol from between the driver's seat and the consol and swung the pistol towards the open car door. 10/29/08 RP 138-19. However, the muzzle of the pistol hit the inside roof of the car, spun out of Mr. Brown's hand, and landed in the road several feet from the car. 10/29/08 RP 142. Officer Lyons pulled Mr. Brown from the car and placed him in handcuffs. 10/29/08 RP 142-43.

At this time, Deputy Brett Hubbell arrived on the scene. 10/28/08 RP 44-45. Deputy Hubbell placed Mr. Brown under arrest

for assault and secured him in his patrol car. 1/21/09 RP 47. It may be noted that Deputy Hubbell did not expressly indicate he arrested Mr. Brown for assault; however, there was no evidence of any other arrestable offense at that time.

After Mr. Brown was arrested, secured, and placed in the patrol car, the officers conducted a warrantless search of his car. On the front passenger seat, Deputy Hubbell saw a partially opened plastic bag and a glass pipe commonly used to smoke cocaine or methamphetamine. 10/29/08 49. He opened the plastic bag and found cocaine, a film canister containing dihydrocodeinone pills, a controlled substance, and drug paraphernalia. 10/29/08 RP 156. Officer Lyons opened the glove compartment and found more cocaine and another glass pipe. 10/29/08 RP 159.

Following a jury trial, Mr. Brown was convicted of assault in the third degree, unlawful possession of cocaine, and unlawful possession of dihydrocodeinone. CP 40, 41, 63.¹ On February 26, 2009, Mr. Brown filed a Notice of Appeal. CP 106-07.

On April 21, 2009, the United States Supreme Court ruled the Fourth Amendment prohibits a warrantless vehicle search

¹ The jury was unable to reach a verdict on the charge of assault in the third degree and a mistrial was declared. 10/30/08 RP 281. Mr. Brown was subsequently retried and convicted of the assault. CP 67.

incident to a recent occupant's arrest, with two exceptions: 1) the arrestee is unsecured and physically able to access to the interior of the vehicle, or 2) officers have a reasonable belief that evidence of the offense of arrest might be found in the vehicle. *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 1714, 173 L.Ed.2d 485 (2009). On October 22, 2009, the Washington Supreme Court ruled, pursuant to Article I, section 7 of the state constitution, "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." *State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009).

On March 16, 2010, this Court entered an Order Staying Decision pending a decision in the consolidated cases of *State v. Robinson*, Supreme Court No. 83525-0, and *State v. Millan*, Supreme Court No. 83613-2. On April 14, 2011, the Washington Supreme Court issued its decision in the cases. 2011 WL 1434607 (Wash. Apr. 14, 2011). On May 20, 2011, this Court requested supplemental briefing regarding the applicability of *Robinson* and *Millan* (hereinafter *Robinson*) to the present case.

C. ARGUMENT

1. MR. BROWN CAN CHALLENGE THE WARRANTLESS SEARCH OF HIS CAR FOR THE FIRST TIME ON APPEAL.

In *Robinson*, the Washington Supreme Court ruled *Gant* and *Patton* constituted a change of law in Washington, and defendants whose cases were still pending direct review were entitled to retroactive benefit of the new rule. 2011 WL 1434607, at *3-5. The Court further ruled a defendant need not preserve the issue below or demonstrate the existence of a “manifest error affecting a constitutional right,” as otherwise required by RAP 2.5, where 1) the change in law is of constitutional magnitude and is controlling and material to the defendant’s case, 2) the change overrules an existing controlling interpretation, 3) the new interpretation applies retroactively, and 4) the defendant’s trial was completed prior to the change in law. *Id.* at *5-6. The Court specifically noted that RAP 2.5 does not apply under these circumstances, and, therefore, a defendant need not establish the trial court would likely have granted a motion to suppress had it been made. *Id.* at *6.

These rulings are dispositive of the issue preservation question here. *Gant* and *Patton* are controlling and material to the drug charges against Mr. Brown, the cases overrule the previous

controlling interpretation of the constitutional parameters of a warrantless vehicle search incident to arrest, the new interpretation applies retroactively, and Mr. Brown's trial was complete and pending direct appeal when these decisions were issued.

The question of the admissibility of evidence obtained pursuant to the warrantless search of Mr. Brown's car after he was arrested and secured in a patrol car is properly before this Court.

2. THE EVIDENCE UNLAWFULLY OBTAINED PURSUANT TO THE WARRANTLESS SEARCH OF MR. BROWN'S CAR MUST BE SUPPRESSED AND HIS CONVICTIONS FOR UNLAWFUL POSSESSION OF DRUGS MUST BE REVERSED.

In *Robinson*, the Court remanded both consolidated cases for suppression hearings, on the grounds the trial records were not sufficiently developed to determine whether the vehicle searches were justified under an exception to the warrant requirement, even though the searches were not justified as a search incident to arrest. 2011 WL 1434607, at *7. Here, however, remand is not necessary.

A warrantless search is *per se* unreasonable absent several narrowly drawn exceptions, including exigent circumstances, officer safety, plain view, emergency aid, and consent. *State v. Valdez*,

167 Wn.2d 761, 768, 224 P.3d 751 (2009); *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1995). The State bears the burden of establishing the applicability of an exception. *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). Significantly, here, on appeal, the only exception asserted by the State is that of a vehicle search incident to arrest.

The trial record clearly reflects that the warrantless search of Mr. Brown's car incident to his arrest was unlawful. At the time of the search, Mr. Brown was arrested, secured, and in the patrol car. 1/21/09 RP 47. Evidence of the assault, the pistol, was on the ground outside his car. 10/29/08 RP 142. Accordingly, the officers could not reasonably believe that he posed a safety risk or that his vehicle contained evidence of the crime of arrest that could be concealed or destroyed at the time of the search. *See Patton*, 167 Wn.2d at 394-95.

The record also reflects that the search was not justified under the "open view" doctrine. "[T]he 'open view' doctrine applies when an officer observes contraband from a 'nonconstitutionally protected area.' 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.” *State v. Lemus*, 103 Wn. App. 94, 102, 11 P.3d 326 (2000) (internal citations omitted). Officer Lyons testified that he opened the glove compartment to search the interior of that space. 10/29/08 RP 159. Deputy Hubbell testified that he opened the plastic grocery bag to search the contents of the bag. 10/28/08 RP 49. Although Deputy Hubbell was in a “nonconstitutionally protected area” when he observed a glass pipe on the front passenger seat, he did not use that observation to obtain a search warrant. Moreover, Mr. Brown was not charged with possession of drug paraphernalia and the pipe apparently was not tested for drug residue.

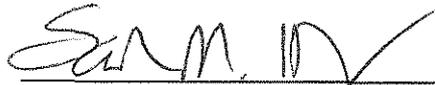
The warrantless search of Mr. Brown’s car did not fall within one of the exceptions to the warrant requirement. The proper remedy is remand for suppression of the evidence found as the result of that search and reversal of Mr. Brown’s convictions for unlawful possession of cocaine and unlawful possession of dihydrocodeinone.

D. CONCLUSION

Pursuant to *Robinson*, Mr. Brown can challenge for the first time on appeal the warrantless search of his car incident to his arrest. The record is sufficient to determine that the evidence obtained during the warrantless search must be suppressed. For the foregoing reasons, and for the reasons set forth in the Brief of Appellant and the Reply Brief of Appellant, Mr. Brown respectfully requests this court reverse his convictions for unlawful possession of cocaine, unlawful possession of dihydrocodeinone, and assault in the third degree.

DATED this 14th day of June 2011.

Respectfully submitted,



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