

FILED

FEB 17 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28407-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

KIM ANN SCHARNHORST,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT

BRIEF OF APPELLANT

DAVID N. GASCH
WSBA No. 18270
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....3

B. STATEMENT OF THE CASE.....4

C. ARGUMENT.....5

The discovery of the contraband in Ms. Scharnhorst’s purse stemmed from the warrantless search of the vehicle that was unreasonable because the arrestee was not within reaching distance of the passenger compartment at the time of the search, and because there was no showing that the vehicle contained evidence of the crime of arrest that could be concealed or destroyed at the time of the search.....5

D. CONCLUSION.....7

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Arizona v. Gant</u> , -- U.S. ---, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)...	5, 6
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	7
<u>State v. Larson</u> , 93 Wn.2d 638, 611 P.2d 771 (1980).....	7
<u>State v. O’Neill</u> , 148 Wash.2d 564, 62 P.3d 489 (2003).....	6
<u>State v. Patton</u> , 167 Wn.2d 379, 219 P.3d 651 (October 22, 2009).....	6

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. Scharnhorst's motion to suppress evidence seized as the result of an unlawful search incident to arrest.

2. The trial court erred in concluding that the officer had probable cause to search the vehicle for evidence of obstruction. Conclusion of Law No. 1, CP 9.

3. The trial court erred in concluding that the officer can search [the vehicle] for items reasonable[y] related to the crime that the person is arrested for. Conclusion of Law No. 7, CP 9.

Issue Pertaining to Assignment of Error

Was the discovery of the contraband in Ms. Scharnhorst's purse that stemmed from the warrantless search of the vehicle unreasonable because the arrestee was not within reaching distance of the passenger compartment at the time of the search, and because there was no showing that the vehicle contained evidence of the crime of arrest that could be concealed or destroyed at the time of the search?

B. STATEMENT OF THE CASE

Kim Scharnhorst was the passenger in a car that was stopped for a traffic violation. RP 5¹. The driver was arrested for obstructing and possession of methamphetamine. RP 5, 7. After the driver had been arrested the trooper decided to search the car incident to the driver's arrest. To do that he had Ms. Scharnhorst get out of the car. RP 5. After she got out the trooper asked Ms. Scharnhorst if anything in the car belonged to her. She indicated her purse. RP 6. The officer retrieved the purse, which he said was unzipped and open, and noticed a set of brass knuckles and what appeared to be a marijuana cigarette. RP 7, CP 13. He then arrested Ms. Scharnhorst for possession of a dangerous weapon. A search of her person revealed a baggy of methamphetamine. RP 7-8.

Ms. Scharnhorst moved to suppress the contents of her purse as the fruits of an unlawful search incident to arrest based on Arizona v. Gant. RP 30. The court denied the motion holding that under Gant, the trooper could lawfully search the car incident to arrest because it was reasonable to believe evidence of the crimes of arrest could be found in the car. RP 36-37. Ms. Scharnhorst was convicted of possession of methamphetamine

¹ All citations are to the 3.6 motion hearing held 6/10/09 unless otherwise indicated.

following a trial to stipulated facts. 8/19/08 RP 2. This appeal followed.
CP 24-25.

C. ARGUMENT

The discovery of the contraband in Ms. Scharnhorst's purse stemmed from the warrantless search of the vehicle that was unreasonable because the arrestee was not within reaching distance of the passenger compartment at the time of the search, and because there was no showing that the vehicle contained evidence of the crime of arrest that could be concealed or destroyed at the time of the search.

In Arizona v. Gant, the U.S. Supreme Court held, "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, --- U.S. ---, 129 S.Ct. 1710, 1718-19, 173 L.Ed.2d 485 (2009).

In the present case it is undisputed that the driver had been arrested, searched, and was away from the vehicle. However, based on the Gant holding, the trial court concluded that the trooper could lawfully search the car incident to arrest because it was reasonable to believe evidence of the crimes of arrest could be found in the car. Id.

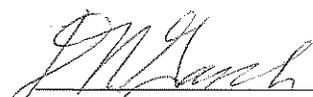
After the Gant decision, the Washington Supreme Court addressed the scope of the search incident to arrest exception under Article I Section 7 of the Washington Constitution in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (October 22, 2009). The Court noted, “We have long recognized that our constitution's express regard for an individual's "private affairs" places strict limits on law enforcement activities in the area of search and seizure.” Patton, 167 Wn.2d 379, 219 P.3d 651, 658 (citing State v. O'Neill, 148 Wash.2d 564, 585-86, 62 P.3d 489 (2003)). The Court went on to hold “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 379, 219 P.3d 651, 658 (emphasis added).

The italicized portion is more restrictive than the holding in *Gant* because it requires proof that the evidence believed to be contained in the vehicle is presently at risk of being concealed or destroyed. No such showing was made in the present case. There was no evidence presented that the trooper could not have taken the time to obtain a warrant without running the risk of the crime related evidence being concealed or destroyed. Therefore, the search of the vehicle incident to the driver's arrest was unlawful. Since the subsequent detention of Ms. Scharnhorst, the removal of her purse, and discovery of contraband stemmed from the illegal search of the vehicle, the evidence seized must be suppressed. State v. Larson, 93 Wn.2d 638, 645-46, 611 P.2d 771 (1980); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

D. CONCLUSION

For the reasons stated, the conviction should be reversed and the case dismissed.

Respectfully submitted February 17, 2010.



David N. Gasch
WSBA #18270
Attorney for Appellant