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SUPREME COURT NO. _____
COURT OF APPEALS NO. 60401-5-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CORYELL ADAMS,

Petitioner.

REC'D

SEP 29 2008

King County Prosecutor
Appellate Unit

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 SEP 29 PM 4:17

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

The Honorable Ronald Kessler, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Coryell Adams asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the published court of appeals decision in State v. Coryell Adams, __ Wn. App. __, 191 P.3d 93 (2008), attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the police illegally searched petitioner's car under the guise of the search-incident-to-arrest exception to the warrant requirement, where petitioner was several steps away from his locked and lawfully parked car at the time of his arrest?

2. Whether the police illegally searched petitioner's car under the guise of the search-incident-to-arrest exception where at the time of the search, petitioner was handcuffed in the back of the patrol car therefore posing no officer safety risk?

D. STATEMENT OF THE CASE

Petitioner Coryell Adams was convicted of possessing cocaine following a stipulated bench trial after the court denied his motion to suppress cocaine found in his car after he was arrested in a Taco Bell

parking lot. CP 1-4, 16, 21-25. The testimony at the motion to suppress hearing established that at the time of his arrest, Adams was several feet from his locked car, and at the time police searched Adams' car, he was handcuffed in the back of the patrol car.

Shortly after midnight on May 24, 2006, deputy Heather Volpe noticed Adams sitting in his car in the parking lot of Goldie's Casino in Shoreline. RP 3-4, 15. Volpe ran the car's plates and learned the registered owner had a misdemeanor warrant for driving with a revoked license out of Pierce County. RP 4, 14. Volpe had passed Adams' car, but turned around upon learning of the warrant. RP 16. Adams drove out of the parking lot and turned southbound onto Aurora Avenue. RP 4.

Adams had turned left into Taco Bell and parked by the time Volpe caught up to him. RP 4-5, 19. Although Volpe claimed Adams parked in a handicap stall, Adams testified he did not.¹ RP 6, 39. Volpe pulled in, activated her lights, and parked at a 45 degree angle behind Adams. RP 5-6, 19.

As Volpe stepped from her patrol car, Adams likewise stepped from his car. According to Volpe, Adams stood in the swing of the open driver's

¹ The court believed Adams on this point and expressly found he did not park in a handicap stall. CP 21-23; RP 65.

side door, yelling at Volpe. RP 6. Adams accused Volpe of racial profiling and asserted she had no legitimate reason to contact him. RP 6-7.

Volpe ordered Adams to get back inside his vehicle because he was being stopped for a traffic violation. RP 7. Volpe testified that Adams slammed his door shut and took 4-5 steps away from the car, stopping in the adjacent parking stall. RP 7-8, 20. According to Volpe, Adams continued yelling. Volpe waited for another deputy to arrive. RP 8, 21.

Volpe had instructed Adams to turn around so she could handcuff him, and was attempting to get him to comply when deputy Wright pulled up. RP 8. Volpe testified that Adams became extremely compliant when Wright arrived and cooperated while the deputies placed him under arrest. RP 8, 23.

Volpe led Adams to the back of her patrol car and searched him, placing Adams' property on her trunk. While Volpe placed Adams in the back of her car and read Adams his rights, Wright took Adams' keys and unlocked his car door. RP 10-11, 24.

When Volpe went to search Adams' car, Wright said he had unlocked the door for her. RP 10, 25. Inside the car in the center console, Volpe saw a small black bag she suspected contained drugs. RP 11. Inside, Volpe found a clear plastic bag containing a white powdery

substance, which subsequently tested positive for cocaine. RP 11-12; CP

3.

Adams argued the search was illegal because there was no probable cause to believe there would be drugs in the car and no legitimate officer safety concern to justify the search:

In this case, Mr. Adams was not stopped for any sort of drug related activity. His car . . . did not need to be searched incident to arrest. The doors were locked, the car was legally parked, and he was not able to reach for any weapons that would have jeopardized officer safety. He should have been give[n] the opportunity to have a friend or family member pick up his car and move it. Nothing in the officer's statement of the stop would have necessitated any sort of warrantless exception to allow them to search his car.

CP 16.

The court upheld the search under the search incident to arrest exception to the warrant requirement.

In Thornton versus United States,² 158 Lawyer's Edition Second 905, 2004, the police discovered that the vehicle's license did not match the make and model. They followed the vehicle to a parking lot. Before the police had the opportunity to pull the car over the driver parked, got out of the vehicle. Police arrested him, searched the vehicle and found a weapon. The Supreme Court held that at least under the Fourth Amendment the police may search the entire passenger compartment whether or not the arrestee

² Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).

was in the car when the stop was made. As long as he was a recent occupant.

Here the Court has found that the defendant was a recent occupant of the vehicle. Police were authorized to stop the car because of the warrant. I conclude that a driver can't defeat a search incident to arrest by getting out of the car, closing the door, and locking it. When first, the driver was seen in the car driving it. Second, where the arrest was very close in time and space to the driving of the vehicle.

RP (5/16/07) 68-69; see also CP 21-23.

On appeal, Adams argued the search was illegal under this Court's decision in State v. Stroud³ and Division Two's decision in State v. Perea,⁴ because at the time of arrest, Adams was several feet from his locked car and therefore did not have ready access to the passenger compartment at the time. Brief of Appellant (BOA) at 5-15.

In disagreeing, the court of appeals distinguished between a locked container and a locked car, finding a locked container inside a car is more difficult to access than a locked car. Appendix at 9. The court concluded Adams had "immediate control" of the car at the time of his arrest so as to justify its search, because he "could have reached it in a couple of steps" and "though he locked the doors, he retained the key." Id.

³ State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986).

⁴ State v. Perea, 85 Wn. App. 339, 932 P.2d 1258 (1997).

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

DIVISION ONE'S PUBLISHED OPINION CONFLICTS WITH THIS COURT'S DECISION IN STROUD, DIVISION TWO'S DECISION IN PEREA AND DIVISION THREE'S DECISION IN STATE V. QUINLIVAN⁵ AND INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The Fourth Amendment and article 1, § 7 of the Washington Constitution prohibit unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Const. Art. 1, § 7; State v. Kinzy, 141 Wn.2d 373, 5 P.3d 668 (2000). "Nonetheless, there are a few jealously and carefully drawn exceptions to the warrant requirement which provide for those cases where the societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate." State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (citing Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)) (internal quotations omitted). The state bears the burden of showing a search or seizure without a warrant falls within one of these exceptions. Kinzy, 141 Wn.2d at 384.

One such exception is a search incident to a valid arrest. In Chimel v. California, the Supreme Court held that incident to a lawful arrest, the

⁵ State v. Quinlivan, 142 Wn. App. 960, 176 P.3d 605 (2008).

police may search the area within the arrestee's "immediate control" or the area into which the arrestee might reach to grab a weapon or destroy evidence. Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). In New York v. Belton, the Court expanded its holding in Chimel and articulated the "bright-line rule" that when an arrestee is occupying an automobile at the time of arrest, the police may search the vehicle's entire passenger compartment incident to the arrest. New York v. Belton, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

Following the Court's ruling in Belton, however, federal and state courts disagreed regarding the scope of an automobile search incident to arrest when the suspect was not occupying the vehicle at the time of arrest. State v. Rathbun, 124 Wn. App. 372, 376, 101 P.3d 119 (2004). Some courts applied the "immediate control" standard articulated in Chimel, while others permitted a Belton search incident to the arrest of a recent occupant that occurs near the vehicle. Rathbun, 124 Wn. App. at 376 n.1 (citing State v. Porter, 102 Wn. App. 327, 333 n.6, 6 P.3d 1245 (2000)).

The Supreme Court addressed the issue in Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004). There, the defendant parked his car and exited the vehicle before the police could pull

him over and arrest him. Thornton, 541 U.S. at 615. The officer arrested the defendant near the vehicle and searched his car incident to arrest. Thornton, 541 U.S. at 615. The court upheld the search, holding that "Belton allows the police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants' of the vehicle. Thornton, 541 U.S. at 622.

The court reasoned that "the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle." Thornton, 541 U.S. at 621. Nevertheless, the Thornton Court limited the scope of such a search, stating: "an arrestee's status as a 'recent occupant' may turn on his *temporal or spatial relationship to the car at the time of the arrest and search.*" Thornton, at 622. (emphasis added).

This Court addressed the scope of a search incident to arrest in State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). There, police officers observed a parked vehicle next to a vending machine in a closed gas station. The headlights were on and the car's engine was running. One of the defendants, Billy Stroud, was standing beside the vending machine, while the other defendant, Herbert Lee Caywood, stood in the swing of the open

passenger door, a couple of feet away from Stroud. Stroud, 106 Wn.2d at 145.

When officers arrived, the door of the vending machine appeared to be open. Upon seeing the officers, Stroud shut the door and grabbed a key from the vending machine door lock. At the officers' request, Stroud handed over a homemade key, apparently designed to open vending machine locks. When officers frisked both defendants, they found a second homemade key in Stroud's possession and several dollars worth of change in Caywood's coat pocket. The officers arrested the defendants for theft and placed them in the back of the patrol car. Id.

One of the officers subsequently looked into the defendants' car and saw a revolver on the backseat. The officer seized the weapon and searched the entire passenger compartment, including an unzipped luggage bag, which contained drugs and a shotgun. Id., at 146. Following the trial court's denial of their motion to suppress, Stroud and Caywood were convicted of unlawfully possessing drugs and firearms. Id.

On review, this Court upheld the search of the car, adopting a bright-line rule akin to that articulated in Belton:

During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search

the passenger compartment of a vehicle for destructible evidence.

Stroud, 106 Wn.2d at 152.

Unlike Belton, however, this Court declined to extend the permissible scope of the search to locked containers within the passenger compartment, in part because the exigencies did not so require:

[T]he danger that the individual either could destroy or hide evidence located within the container or grab a weapon is minimized. The individual would have to spend time unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container. This rule will more adequately address the needs of officers and privacy interests of individuals[.]

Stroud, at 152-53.

Although this Court made no express distinction between occupants and *recent* occupants, Stroud has been construed narrowly. See, e.g., State v. Fore, 56 Wn. App. 339, 347, 783 P.2d 626 (1989). In Fore, the court recognized that the validity of a search under Stroud did not depend on the arrestee being in the vehicle when police arrive. Neither Stroud nor Caywood was in the car when police arrived and both were physically restrained in the police car at the time of the search. But the court also recognized:

Nonetheless, Stroud indicates that a valid vehicle search incident to arrest requires a close physical and

temporal proximity between the arrest and the search.⁶
. . . Although the required degree of proximity is not subject to the same type of "bright-line" analysis as the general rule itself, subsequent decisions have construed Stroud narrowly.

Fore, 56 Wn. App. at 347; see also State v. Porter, 102 Wn. App. at 334 (recognizing case-by-case analysis required).

Thus, the general rule in Washington is that an officer may search a vehicle if it is within the area of the suspect's "immediate control" at the time of his or her arrest. See, e.g., State v. Porter, 102 Wn. App. at 334 (search of defendant's van incident to her son's arrest impermissible because the son had walked 300 feet away from the vehicle and thus, did not have immediate control over the vehicle); Rathbun, 124 Wn. App. at 378 (truck not within Rathbun's immediate control where he was 40-60 feet away at the time of arrest). The "key question" in applying Belton and Stroud is

⁶ For example, in upholding the search in Stroud, the Supreme Court stated:

When applying this rule to the facts of this case, the result is clear. Defendants Stroud and Caywood were lawfully arrested next to their car while the door was still open. The car's engine was running and a gun was located in plain view on the back seat. The officers would be entitled to enter the car without a warrant to retrieve the gun, both under the rule described above, as well as a "plain view" exception to the warrant requirement.

Stroud, 106 Wn.2d at 153.

whether the arrestee had ready access to the passenger compartment at the time of arrest. For instance,

If he could suddenly reach or lunge into the compartment for a weapon or evidence, the police may search the compartment incident to his arrest. If he could not do that, the police may not search the compartment incident to his arrest. Sometimes, this is referred to as having "immediate control" of the compartment.

State v. Johnston, 107 Wn. App. 280, 285-86, 28 P.3d 775 (2001), review denied, 145 Wn.2d 1021, 41 P.3d 483 (2002).

The facts of this case closely resemble those in State v. Perea, 85 Wn. App. 339 (1997), and State v. Quinlivan, 142 Wn. App. 960. An officer who was aware Perea had a suspended driver's license saw Perea driving and radioed another officer to stop him. Officer Wise caught up with Perea just as Perea pulled into the front yard of his house. Perea, 85 Wn. App. at 341.

Wise activated his emergency lights and pulled in behind Perea. Wise saw Perea turn and look in the direction of Wise's vehicle and then immediately step out of his vehicle and close the door very quickly. Officer Wise ordered Perea back to his car, but Perea started to walk toward the house, ignoring Wise's second order to return to the vehicle. By then the first officer had arrived and both officers advised Perea he was under arrest. The police handcuffed Perea, confiscated his keys and put him into the

patrol car. Subsequently, one officer proceeded to verify by a records check that Perea's license was suspended, while the other officer used Perea's car keys to unlock and search the car. A loaded pistol was found under the front seat. Perea, 85 Wn. App. 341. Perea was convicted of unlawfully possessing a firearm. Perea, 85 Wn. App. at 340.

On appeal, Perea argued the trial court erred in finding that the police validly searched his locked vehicle incident to arrest. Perea, 85 Wn. App. 343. At the outset, the court recognized that "[h]ad Perea remained in his car or beside his car, with the door open or unlocked, until he was arrested, Stroud's bright-line rule would have permitted a search of the passenger compartment of the vehicle." Perea, 85 Wn. App. at 344.

Under the circumstances of Perea's case, however, the court concluded the search was not reasonable. In part, the court's decision was based on its conclusion that Perea acted lawfully when he locked the car door, because he was not seized at that point. Perea, 85 Wn. App. 339 (citing California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) (seizure does not occur until the suspect submits to a show of authority or is physically touched by the officer)). The continued validity of this part of Perea's holding is questionable, since this Court has declined to follow Hodari D. State v. Young, 135 Wn.2d 498, 501-05,

510, 957 P.2d 681 (1998). Moreover, immediately after holding that Perea was not "seized" when he locked his door, the court incongruously noted, he "was not free to leave the scene, and by going toward his house he could have been charged with obstructing a public servant in the performance of his duties[.]" Perea, at 344.

But the important part of the decision remains intact. In reversing the trial court's decision, the court relied significantly on the fact the car was locked at the time of Perea's seizure:

We could find no case where officers were permitted to enter a locked car to perform a search incident to arrest. This is not an exigent circumstances case, or a community caretaking case, or the seizure of evidence case. This is not a case where the defendant locked his car after seizure (either directly or by a remote device), or even after disobeying a direction of the police officer to remain inside his vehicle. Rather, this is a warrantless search of a lawfully parked and locked car, without probable cause. As such, it was not authorized by Stroud's bright line rule, even though the defendant was validly arrested nearby.

Perea, 85 Wn. App. at 345.

The result reached in Perea is consistent with this Court's decision in Stroud and its progeny. Because Perea's car was locked, it presented the same degree of danger to officers as a locked container within the car, *i.e.* very little. Moreover, even if Perea's car were unlocked, he had walked away and no longer exercised immediate control over it. In short,

the exigencies did not require that police be allowed to search the car without a warrant.

Division Three reached a similar conclusion in Quinlivan. Quinlivan was stopped for not wearing a seat belt and driving with a suspended license. After learning his truck would be towed, Quinlivan got out of the truck, put the keys in his pocket and sat down on the curb where he was arrested. The court held that because Quinlivan no longer had access to the passenger compartment when he was arrested, the search was improper: "[T]he act of leaving the truck and locking it precludes the search incident to arrest authorized by the court in Stroud." Quinlivan, at 962.

The same is true here. Adams' car was locked, and Adams was several steps away from it at the time of his arrest. As in Perea and Quinlivan, the exigencies did not require that police be allowed to search the car without a warrant. The court of appeals decision in Adams' case conflicts with these decisions as well as Stroud, upon which their reasoning is based.

Significantly, the search incident to arrest exception is not a police entitlement justifying vehicle searches no matter the absence of any exigency. As Division Two stated in Rathbun:

As noted previously, the policy underlying a vehicle search incident to arrest pursuant to Chimel and Belton is

to prevent the destruction of evidence and protect police from danger. Thornton, 124 S. Ct. at 2131. Contrary to the State's position, the ability to search a vehicle incident to the arrest of a vehicle's occupant is not a police entitlement justifying a rule that police may search a vehicle incident to arrest regardless of how far a suspect is from the vehicle. If a suspect flees from a vehicle so that the vehicle is no longer within his or her immediate control at the time of arrest, the exigencies supporting a vehicle search incident to arrest no longer exist and there is no justification for the police to search the vehicle without first obtaining a warrant.

Rathbun, 124 Wn. App. at 380.

In light of the policy justifications for the exception -- officer safety and destruction of evidence -- it may be that Washington courts have misapplied Belton altogether by allowing police to search an arrestee's vehicle incident to arrest when the arrestee is secured and no longer a threat to officer safety or the preservation of evidence. As the court of appeals noted in its decision in this case, the Arizona Supreme Court recently held that when an arrestee is secured and no longer a threat to officer safety or the preservation of evidence, the officer may not search the arrestee's vehicle incident to arrest. State v. Gant, 216 Ariz. 1, 162 P.3d 640 (Ariz. 2007). The Arizona court noted that the decision in Thornton left that question unresolved, and agreed with Justice Scalia's concurrence where he stated that applying the Belton doctrine to justify a search of the car of a person handcuffed and confined in a police car "stretches [the doctrine]

beyond its breaking point." Id. At 4 n.2 (quoting Thornton, 541 U.S. at 625 (Scalia, J., concurring) (alteration in original). The United States Supreme Court granted certiorari in February. Arizona v. Gant, 128 S. Ct. 1443, 170 L. Ed. 2d 274 (U.S. 2008).

If the Arizona Court is correct, the police search of Adams' car likewise stretched the search-incident-to-arrest exception beyond its breaking point. There was no dispute Adams was secured in the back of the patrol car at the time police searched his car. In light of the Gant decision, this Court should accept review to weigh in on this important constitutional question which must be of substantial public interest in order to be pending before the United States Supreme Court.

F. CONCLUSION

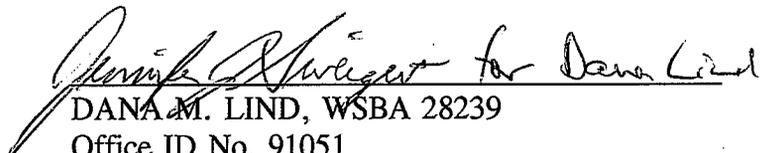
Because Division One's published decision in this case conflicts this Court's decision in Stroud and the decisions of the other divisions, this Court should accept review. RAP 13.4(b)(1), (2), (3). This case also involves an issue of substantial public interest currently pending before the

United States Supreme Court. This Court should accept review to weigh
in on this significant constitutional question. RAP 13.4(b)(4).

DATED this 29th day of September, 2008.

Respectfully submitted,

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

STATE OF WASHINGTON,)	No. 60401-5-1
)	
Respondent,)	
)	
v.)	
)	
CORYELL LEVOI ADAMS,)	PUBLISHED OPINION
)	
Appellant.)	FILED: September 2, 2008

ELLINGTON, J. — The police may search a vehicle incident to the lawful arrest of a recent occupant when that person is in close temporal and spatial proximity to the vehicle at the time of the arrest. The arrestee may not preclude the search simply by locking the vehicle. In this case, Coryell Adams was arrested four to five feet from his car about one minute after being pulled over by a sheriff's deputy. Because the car remained in Adams' immediate control at the time of the arrest, the search of the vehicle was proper. We therefore affirm the court's decision to admit evidence discovered therein.

BACKGROUND

Shortly after midnight, King County Sheriff's Deputy Heather Volpe observed a man sitting in his parked car outside a casino on Aurora Avenue. Volpe checked the license plates and learned that an arrest warrant had been issued in Pierce County for the registered owner for driving with a revoked license. The driver matched the registered owner's description. Volpe turned around to initiate contact.

The driver quickly drove out of the parking lot onto Aurora. Volpe followed. Immediately and without signaling, the driver turned into a Taco Bell and parked. Volpe activated her emergency lights and pulled in about eight feet behind.

As Volpe got out of the patrol car, Adams stepped out of his vehicle, stood in the open swing of the driver's door and yelled at Volpe, challenging the stop as racial profiling. Volpe repeatedly instructed Adams to get back in his car, but he ignored the command and continued yelling. Volpe stayed in the doorway of her patrol car and called for another unit to assist.

Adams slammed the car door, locked it, and stepped four to five feet away into the adjacent parking spot, where he stood screaming at Volpe, raising his arms in an agitated manner and ignoring repeated commands to return to his vehicle.

After a second officer arrived, Adams complied with instructions to turn around. Volpe put him in handcuffs and asked him to identify himself. Adams refused. Volpe frisked Adams and removed his keys and wallet, confirming his identity as the registered owner of the vehicle. Volpe arrested Adams on the warrant and for failing to provide information¹ and secured him in the back of her patrol car.

The other deputy took Adams' keys and unlocked his vehicle. Volpe searched the passenger compartment and found cocaine in a bag in the center console. Volpe arranged to impound the vehicle.

The State charged Adams with possession of cocaine.² Adams moved to suppress the cocaine as fruit of an illegal search. The trial court denied the motion, concluding that

¹ RCW 46.61.020.

² RCW 69.50.4013.

under Thornton v. United States,³ Adams was a “recent occupant of his vehicle.”⁴ The court also concluded that “[a] driver cannot defeat a valid search incident to arrest by getting out of the car and locking the car door when he is seen in the car and driving it, when the arrest is made very close in time and space to the driving of the vehicle.”⁵

Adams agreed to a stipulated bench trial and was convicted as charged.

DISCUSSION

We will affirm a refusal to suppress evidence if substantial evidence supports the court’s findings of fact, and those findings support the court’s conclusions of law.⁶ We review the trial court’s conclusions of law de novo.⁷

A warrantless search is unreasonable per se and can be justified only if it falls within one of the “jealously and carefully drawn” exceptions to the warrant requirement.⁸ One of these exceptions is the search of an automobile pursuant to a lawful custodial arrest.⁹ Under federal law, this exception justifies search of the entire passenger compartment, including any containers within it, even when the suspect has exited the vehicle before his or her arrest.¹⁰ In State v. Stroud, our Supreme Court held that article 1, section 7 of the

³ 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).

⁴ Clerk’s Papers at 22.

⁵ Id. at 22–23.

⁶ State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

⁷ Ross, 106 Wn. App. at 880.

⁸ Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 2590, 61 L. Ed. 2d 235 (1979); State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

⁹ New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); State v. Stroud, 106 Wn.2d 144, 147, 720 P.2d 436 (1986).

¹⁰ Belton, 453 U.S. at 457; Thornton, 541 U.S. at 623–24.

Washington Constitution does not permit the search of locked containers within the passenger compartment.¹¹

The rationale for vehicle searches incident to arrest “rests in part on traditional justifications that a suspect might easily grab a weapon or destroy evidence.”¹² Also important is the “the need for a clear rule, readily understood by police and not depending on differing estimates of what items were or were not within an arrestee’s reach at any particular moment.”¹³ Thus, Washington law permits automobile searches incident to arrest “immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car,” even though, presumably, the exigencies justifying the search no longer exist.¹⁴

While the ability to search “does not depend on an arrestee being in the vehicle when police arrive,” there must be “a close physical and temporal proximity between the arrest and the search.”¹⁵

¹¹ 106 Wn.2d at 152.

¹² State v. Fore, 56 Wn. App. 339, 347, 783 P.2d 626 (1989); Belton, 453 U.S. at 457.

¹³ Thornton, 541 U.S. at 623; see also Stroud, 106 Wn.2d at 151 (“We agree with the Supreme Court’s decision to draw a clearer line to aid police enforcement.”).

¹⁴ Stroud, 106 Wn.2d at 152. We note that the Arizona Supreme Court recently held that when an arrestee is secured and is no longer a threat to officer safety or the preservation of evidence, the officer may not search the arrestee’s vehicle incident to arrest. State v. Gant, 216 Ariz. 1, 162 P.3d 640 (Ariz. 2007). The Arizona court noted that the decision in Thornton left that question unresolved, and agreed with Justice Scalia’s concurrence where he stated that applying the Belton doctrine to justify a search of the car of a person handcuffed and confined in a police car “stretches [the doctrine] beyond its breaking point.” Id. at 4 n.2 (quoting Thornton, 541 U.S. at 625 (Scalia, J., concurring) (alteration in original)). The United States Supreme Court granted certiorari in February. Arizona v. Gant, 128 S. Ct. 1443, 170 L. Ed. 2d 274 (U.S. 2008).

¹⁵ Fore, 56 Wn. App. at 347.

How close the arrestee must be to the vehicle has been the subject of several cases. Division Two of this court addressed the question in State v. Porter¹⁶ and State v. Rathbun.¹⁷ In Porter, the passenger was arrested 300 feet away.¹⁸ The court held the search invalid because when the passenger compartment is not “within an arrestee’s area of ‘immediate control,’ Stroud does not apply.”¹⁹

In Rathbun, the defendant saw police approaching and ran 40 to 60 feet away from the truck he was working on, hopping over a fence along the way.²⁰ The State contended the search was proper because the defendant had access to the truck immediately before his arrest and should not be able to avoid a search by running away.²¹ Division Two disagreed: “If a suspect flees from a vehicle so that the vehicle is no longer within his or her immediate control at the time of arrest, the exigencies supporting a vehicle search incident to arrest no longer exist and there is no justification for the police to search the vehicle without first obtaining a warrant.”²²

Division Three of this court considered this question in State v. Quinlivan,²³ where a driver was stopped because he was not wearing a seat belt and was driving with a suspended license. After learning that his truck would be towed, Quinlivan got out of the

¹⁶ 102 Wn. App. 327, 332, 6 P.3d 1245 (2000).

¹⁷ 124 Wn. App. 372, 101 P.3d 119 (2004).

¹⁸ Porter, 102 Wn. App. at 333.

¹⁹ Id.

²⁰ Rathbun, 124 Wn. App. at 375.

²¹ Id. at 378–79.

²² Id. at 380.

²³ 142 Wn. App. 960, 962, 176 P.3d 605 (2008).

truck, put the keys in his pocket, and sat down on the curb, where he was arrested.²⁴ The deputy testified Quinlivan was 6 to 12 feet away from the truck; Quinlivan testified it was more like 50 feet.²⁵ The court held that because Quinlivan no longer had access to the passenger compartment when he was arrested, the search was improper: “[T]he act of leaving the truck and locking it precludes the search incident to arrest authorized by the court in Stroud.”²⁶ Though the court mentioned that Quinlivan had locked the truck, it is unclear whether and how that fact figured into the analysis.

In two other cases where the defendant locked his car before he was arrested, whether the police needed a warrant turned on whether the defendant had locked the door before or after he was seized.

In State v. Perea,²⁷ a police officer observed the defendant driving a vehicle, and knew that Perea’s license had been suspended. As Perea parked in the front yard of his house, the officer pulled in behind and activated his emergency lights.²⁸ Perea looked at the officer and immediately stepped out of the car, closed and locked the door, and began walking toward his house.²⁹ The officer ordered Perea back to his vehicle, but Perea ignored the orders and continued walking.³⁰ When a second officer arrived, Perea was arrested and handcuffed.³¹ Officers took his car keys, unlocked and searched the car, and

²⁴ Id.

²⁵ Id. at 964.

²⁶ Id. at 962.

²⁷ 85 Wn. App. 339, 340–41, 932 P.2d 1258 (1997).

²⁸ Id. at 341.

²⁹ Id.

³⁰ Id.

³¹ Id.

found a loaded pistol.³² Division Two found that Perea had not been seized when he locked the car doors because he had refused to submit to the officer's authority.³³ The court held that "because Perea lawfully exited and locked his car, the officers had no justification for entry into Perea's car to conduct a search incident to arrest."³⁴ The court distinguished its holding from cases "where the defendant locked his car after seizure (either directly or by a remote device)."³⁵

In State v. O'Neill,³⁶ police made a traffic stop when O'Neill failed to signal. The officer handcuffed and arrested O'Neill for driving with a suspended license and placed him in the back of a patrol car.³⁷ The officer returned to the vehicle, finding it locked with the keys in the ignition.³⁸ He could see drug paraphernalia in plain view from the window, and called for an impound tow.³⁹ When the tow operator opened the door, the officer searched the truck and found cocaine.⁴⁰ O'Neill was then arrested for possessing a controlled substance.⁴¹

Division Three upheld this search, and distinguished Perea on its facts, finding that unlike Perea, O'Neill was inside his vehicle when he was seized (when he submitted to the officer's authority by pulling over, providing information, and stepping from the vehicle at

³² Id. at 340–41.

³³ Id. at 344.

³⁴ Id. at 340.

³⁵ Id. at 345.

³⁶ 110 Wn. App. 604, 606, 43 P.3d 522 (2002).

³⁷ Id.

³⁸ Id.

³⁹ Id. at 606–07.

⁴⁰ Id. at 607.

⁴¹ Id.

the officer's request).⁴² "Although Mr. O'Neill apparently locked his vehicle before or when he exited his truck, this does not prevent a valid search of the vehicle incident to arrest."⁴³

Adams contends his case is like Perea and demands the same result.

We question the usefulness of Perea for two reasons. First, the analysis focuses on the arrestee's proximity to the vehicle at the time of seizure, rather than at the time of arrest. But officer safety and evidence preservation concerns *incident to arrest* provide the rationale for the search. It is the circumstances at the time of arrest, not seizure, that are relevant. Further, the Perea court's analysis as to when Perea was seized derives from California v. Hodari D.,⁴⁴ which our Supreme Court later explicitly rejected.⁴⁵ We decline to rely upon Perea.

Adams acknowledges Perea's infirmity, but nonetheless relies upon it to argue that warrantless searches of locked cars are inconsistent with Stroud's limitation on searching locked containers within a vehicle incident to arrest.

The rationale for the Stroud court's exclusion of locked containers was twofold. First, an individual shows an increased expectation of privacy by locking a container. Second, the danger that the individual could access a weapon or destroy evidence inside a locked container within a vehicle is minimized: "The individual would have to spend time

⁴² Id. at 611.

⁴³ Id.

⁴⁴ 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991).

⁴⁵ State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (rejecting the Hodari D mixed objective/subjective test for determining whether a seizure has occurred under article 1, section 7 of the Washington Constitution).

unlocking the container, during which time the officers have an opportunity to prevent the individual's access to the contents of the container."⁴⁶

Adams contends locking the car doors minimizes the danger that the arrestee will gain access to a weapon or destructible evidence inside the car. We disagree. Whether using a mechanical key or a remote device, it takes only a second to unlock a car door (and, in many cases, one motion opens all doors at the same time). An arrestee could very swiftly gain access to any exposed weapon or evidence inside. This is not so when a locked container puts these items further out of reach. Further, the presence of a locked container inside a vehicle shows an increased expectation of privacy independent of the presence of police, whereas the act of locking a car when confronted by police has many connotations, of which privacy is only one.

We hold, therefore, that a vehicle locked in the presence of investigating officers is not equivalent to a locked container inside the vehicle.

Thus the only question here is whether Adams had "immediate control" or ready access to the passenger compartment of the car after he stepped away. We agree with the trial court that Adams was in close temporal and spatial proximity to his car when he was arrested. He was never more than four or five feet from his car, and was at all times closer to it than was the deputy.⁴⁷ He could have reached it quickly in a couple steps. And though he locked the doors, he retained the keys.

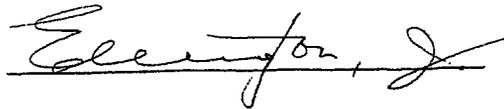
⁴⁶ Stroud, 106 Wn.2d at 152.

⁴⁷ Deputy Volpe testified she stood in the open swing of her patrol car, which was parked "about eight feet from the rear of his back bumper." Report of Proceedings (May 16, 2007) at 6.

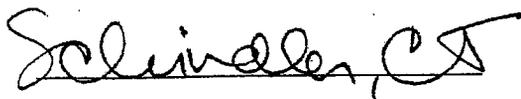
Additionally, unlike the defendants in Porter, Rathbun, and Quinlivan, Adams did not move away from the car. He stood nearby, haranguing the deputy. He was agitated and belligerent, and refused to comply with repeated commands to return to his vehicle or turn around to be handcuffed and frisked. The officer feared for her safety and called for backup. This invokes the officer safety rationale, further distinguishing this case from any upon which Adams relies.

Adams was a recent occupant in immediate control of his car at the time of the arrest. The search was justified.^{48 49}

Affirmed.



WE CONCUR:



⁴⁸ See Thornton, 541 U.S. at 624; Fore, 56 Wn. App. at 347.

⁴⁹ The State contends the evidence was also admissible under the doctrine of inevitable discovery, because Volpe impounded Adams' car and would have discovered the cocaine during a routine inventory search. See State v. Richman, 85 Wn. App. 568, 933 P.2d 1088 (1997) (unlawfully obtained evidence admissible when State proves by preponderance of the evidence that it inevitably would have been discovered under proper and predictable investigatory procedures); State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980) (police may conduct a warrantless inventory search when a car is lawfully impounded unless the impoundment is mere pretext for investigatory search). The State failed to make this argument to the trial court, and consequently there are no factual findings to review. Given our disposition of the case on the search incident to arrest question, we need not reach the merits of the argument. We note, however, that in the absence of factual findings on this issue, the State will rarely make the required showing on appeal.