

SUPREME COURT NO. 82210-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CORYELL ADAMS,

Petitioner.

REC'D

DEC 16 2009

King County Prosecutor
Appellate Unit

RECEIVED
SUPERIOR COURT
STATE OF WASHINGTON
2009 DEC 17 AM 8:03
BY RONALD R. CARPENTER
CLERK

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

The Honorable Ronald Kessler, Judge

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

DANA M. LIND
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

FILED
SUPERIOR COURT
STATE OF WASHINGTON
2009 DEC 30 A 8:12
BY RONALD R. CARPENTER
CLERK

TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ISSUE</u>	1
B. <u>SUPPLEMENTAL ARGUMENT</u>	1
THERE IS NO GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN CASES WHERE A WARRANTLESS SEARCH IS BASED ON AN OFFICER'S MISTAKEN BELIEF HE IS ACTING IN CONFORMITY WITH AN EXCEPTION TO THE WARRANT REQUIREMENT.....	1
C. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Redmond v. Moore</u> 151 Wn.2d 664, 91 P.3d 875 (2004)	12
<u>State v. Armenta</u> 134 Wn.2d 1, 948 P.2d 1280 (1997)	19
<u>State v. Brockob</u> 159 Wn.2d 311, 150 P.3d 59 (2007)	12, 14
<u>State v. Eisfeldt</u> 163 Wn.2d 628, 185 P.3d 580 (2008)	6, 9, 10, 11, 12
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996)	2
<u>State v. Kirwin</u> 165 Wn.2d 818, 203 P.3d 1044 (2009)	6
<u>State v. Ladson</u> 138 Wn.2d 343, 979 P.2d 833 (1999)	2
<u>State v. Morse</u> 156 Wn.2d 1, 123 P.3d 832 (2005)	1, 6, 7, 9, 11, 12, 15, 16
<u>State v. Nall</u> 117 Wn. App. 647, 72 P.3d 200 (2003)	14
<u>State v. Porter</u> 102 Wn. App. 102 Wn. App. 327, 6 P.3d 1245 (2000)	17
<u>State v. Potter</u> 156 Wn.2d 835, 132 P.3d 1089 (2006)	12, 13
<u>State v. White</u> 97 Wn.2d 92, 640 P.2d 92, 640 P.2d 1061 (1982)	2-6, 9, 12-14

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Arizona v. Gant

___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).....16-19

Michigan v. DeFillippo

443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).....3-6, 13, 15

New York v. Belton

453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981)..... 17, 18

Pierson v. Ray

386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967).....4

Terry v. Ohio

392 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).....5

United States v. Gonzales

578 F.3d 1130 (C.A. 9, 2009)..... 13, 14, 19

United States v. Green

324 F.3d 375 (C.A.5 2003)..... 17

United States v. Johnson

457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)..... 19

United States v. Weaver

433 F.3d 1104 (C.A.9 2006)..... 17

OTHER JURISDICTIONS

People v. DeFillippo

80 Mich. App. 197, N.W.2d 921 (1977)3

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.76.0202

U.S. Const. amend. IV.....5, 6, 8, 9, 11, 18

Wash. Const. art. I, section 7 1, 6, 8, 9, 11

A. SUPPLEMENTAL ISSUE

Whether the exclusionary rule applies when an officer conducts a search based on his mistaken, but good faith belief that he is acting in conformity with an exception to the warrant requirement?

B. SUPPLEMENTAL ARGUMENT

THERE IS NO GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN CASES WHERE A WARRANTLESS SEARCH IS BASED ON AN OFFICER'S MISTAKEN BELIEF HE IS ACTING IN CONFORMITY WITH AN EXCEPTION TO THE WARRANT REQUIREMENT.

There is a distinction between an officer's mistaken, but good faith belief that a law is valid and an officer's mistaken, but good faith belief that he is acting in conformity with one of the recognized exceptions to the warrant requirement. This Court has declined to apply the exclusionary rule in the former category, but has always applied the exclusionary rule in the latter. This case fits within the latter category. The state's attempt to force a square peg into a round hole should be rejected.

Under article I, section 7 of the Washington Constitution, warrantless searches are per se unreasonable. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his

home invaded, without authority of law.” Under this provision, the warrant requirement is especially important, as it is the warrant that provides the requisite “authority of law.” State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Exceptions to the warrant requirement are “jealously and carefully drawn.” State v. Hendrickson, 129 Wn.2d 61, 72, 917 P.2d 563 (1996).

This Court first addressed the good faith exception in State v. White, 97 Wn.2d 92, 640 P.2d 92, 640 P.2d 1061 (1982). White was arrested for obstruction after lying to a policeman about where he lived. See former RCW 9A.76.020 (obstructing a public servant).¹ After a night in jail, White confessed to burglarizing a garage and stealing food. White, 97 Wn.2d at 95. The trial court found portions of the obstruction, or “stop-and-identify,” statute unconstitutionally vague, however, and granted White’s motion to suppress. White, 97 Wn.2d at 95.

¹ Under the statute:

Every person who, (1) without lawful excuse shall refuse or knowingly fail to make or furnish any statement, report, or information lawfully required of him by a public servant, or (2) in any such statement or report shall make any knowingly untrue statement to a public servant, or (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor.

On appeal, this Court agreed portions of the statute were unconstitutional. White, 97 Wn.2d at 100. In fact, prior to White, this Court affirmed a Court of Appeals decision invalidating a similarly worded statute on vagueness grounds. White, 97 Wn.2d at 102.

Despite the statute's unconstitutionality, the state asked this Court to reverse the suppression order, based on the good faith exception recognized in Michigan v. DeFillippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). In DeFillippo, the Michigan Court of Appeals invalidated a stop-and-identify statute like that at issue in White. People v. DeFillippo, 80 Mich. App. 197, N.W.2d 921 (1977). Because DeFillippo was arrested pursuant to the invalidated statute, the court ruled DeFillippo's arrest and search were invalid. Id.

The Supreme Court reversed, reasoning that the officer should not be required to anticipate a court would later hold the ordinance invalid:

On this record there was abundant probable cause to satisfy the constitutional prerequisite for an arrest. At that time, of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer, in the course of determining whether

respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional.

DeFillippo, 443 U.S. at 38.

Approving of its prior decision in a civil case, the court stated: "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." DeFillippo, 443 U.S. at 38 (quoting Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967)). The court concluded the purpose of the exclusionary rule – to deter unlawful police action – would not be served by suppressing evidence which, at the time it was found, was the product of a lawful arrest and a lawful search. DeFillippo, 386 U.S. at 38. As indicated, there was never any question that the officer had probable cause to arrest under the statute.

Turning to the state's request in White, this Court first found applicable the exception reserved in DeFillippo. White, 103-104.

As stated in DeFillippo:

The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and

flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.

DeFillippo, 443 U.S. at 38.

Due to this Court's prior approval of the appellate court's decision invalidating a similarly worded statute, this Court held a reasonable person would recognize the infirmities of the provision at issue and would be foreclosed from enforcing it. White, 97 Wn.2d at 104. On this basis, this Court held evidence of White's burglary inadmissible. Id.

But the opinion did not end there, and this Court made two additional holdings. Ordinances aside, this Court held that any seizure is subject to the Fourth Amendment reasonableness test. White, 97 Wn.2d at 105. Applying that test, this Court held the officer's suspicion of criminal activity was reasonable. White, 97 Wn.2d at 105-106. Nevertheless, the length of the detention was not. White, at 106. Accordingly, this Court held that the stop-and-identify statute constituted an unwarranted extension of the Terry² stop. White, 97 Wn.2d at 106-07.

In the final portion of the opinion, this Court held the good faith exception was incompatible with our state constitution:

² Terry v. Ohio, 392 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972).

The result reached by the United States Supreme Court in DeFillippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. As a remedial measure, evidence is excluded only when the purposes of the exclusionary rule can be served. This approach permits the exclusionary remedy to be completely severed from the right to be free from unreasonable governmental intrusions. Const. art. 1, § 7 differs from this interpretation of the Fourth Amendment in that it clearly recognizes an individual's right to privacy with no express limitations.

White, 97 Wn.2d at 110. Therefore, under our state constitution, the exclusionary rule applies whenever an individual's right to privacy is unreasonably invaded. White, at 112.

Arguably, the second and third holdings of White were dicta, as the court first held the stop-and-identify statute fit within the DeFillippo exception as flagrantly unconstitutional. State v. Kirwin, 165 Wn.2d 818, 834, 203 P.3d 1044 (2009) (Madsen, J., concurring) ("On the one hand, it is arguable that the first section of the [White] opinion is dispositive"). In subsequent decisions, however, this Court relied on White's third holding to reject the good faith exception in other circumstances. See e.g. State v. Morse, 156 Wn.2d 1; accord, State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008).

At issue in Morse was the common authority exception to the warrant requirement. Morse was convicted of possessing methamphetamine after a temporary guest in Morse's home allowed police to enter his apartment to look for Sarah Wall, a wanted woman, whom police believed might be staying there. Morse, 156 Wn.2d at 5-6. While looking for Wall, police encountered Morse in his bedroom and saw methamphetamine in his closet. Morse, 156 Wn.2d at 6.

Significantly, before going to Morse's apartment, the police talked to the apartment manager. The manager told the officers that while Wall may have stayed with Morse in the past, she did not believe Wall was there anymore, because bounty hunters had unsuccessfully searched for her in apartment C-108 a few days earlier. The manager also told the officers that Morse was the only tenant on the lease for apartment C-108, and that she was not aware of anyone else living in the apartment. Morse, 156 Wn.2d at 5.

When police arrived at Morse's, a different woman, Pam Dangel, answered. She told the police Wall left a week earlier. The officers did not ask Dangel if she lived at the apartment, or about the nature of her relationship with Morse. Police merely

asked whether they could enter to search for Wall. Morse, 156 Wn.2d at 6. After police entered, they learned Dangel and her husband had been staying with Morse for only a few days. Id.

In holding the search of Morse's home illegal, this Court held the *apparent* authority exception under the Fourth Amendment does not exist under our state constitution. In so holding, this Court noted the differences in text between the Fourth Amendment and article I, section 7 of the Washington Constitution. Addressing the Fourth Amendment, this Court noted it does not prohibit "reasonable" warrantless searches and seizures. The analysis under the Fourth Amendment focuses on whether the police have acted reasonably under the circumstances. Morse, 156 Wn.2d at 9.

Turning to our state constitution, this Court noted our constitution focuses on the rights of the individual, rather than on the reasonableness of the government action:

Unlike in the Fourth Amendment, the word "reasonable" does not appear in any form in the text of article I, section 7 of the Washington Constitution. We have also long declined to create "good faith" exceptions to the exclusionary rule in cases in which warrantless searches were based on a reasonable belief by law enforcement officers that they were acting in conformity with one of the recognized exceptions to the warrant requirement. State v.

White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (“the language of our state constitutional provision ... shall not be diminished by ... a selectively applied exclusionary remedy.”). We have also repeatedly held that article I, section 7 provides greater protection of individual privacy than the Fourth Amendment.

Morse, 156 Wn.2d at 9-10.

Accordingly, this Court held “a police officer’s subjective belief made in good faith about the scope of a consenting party’s authority to consent cannot be used to validate a warrantless search under article I, section 7.” Morse, 156 Wn.2d at 12 (emphasis added). Because the state failed to prove the houseguest shared control of Morse’s apartment, especially of Morse’s bedroom, the common authority exception did not apply, and the police search was unlawful. Morse, 156 Wn.2d at 14-16.

This Court affirmed its rejection of the good faith exception in Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008). At issue in Eisfeldt was the private search doctrine³ and alternatively, the officers’ good faith belief a repairman had authority to consent to search of Eisfeldt’s home. Eisfeldt, 163 Wn.2d at 635-66.

³ Under the private search doctrine, a warrantless search by a state actor does not offend the Fourth Amendment if the search does not expand the scope of the private search. Eisfeldt, 163 Wn.2d at 636.

Eisfeldt was convicted of growing marijuana after a repairman hired by Eisfeldt's landlord found marijuana in the house and called police. The repairman was supposed to fix a diesel leak in the living room. To ventilate the fumes, he went to the attached garage and noticed foam sealant around the door, which he had to break to get into the garage. Inside, he found a garbage bag full of marijuana and wiring. Eisfeldt, 163 Wn.2d at 632-33.

The suspicious repairman called police and led them through the living room and garage. Based on what the police saw, they obtained a search warrant and found evidence the house had contained a marijuana grow operation. Based on this evidence, the police obtained a search warrant for a second house, in which they found an active grow operation. Eisfeldt, 163 Wn.2d at 632-34.

Following an unsuccessful suppression motion, Eisfeldt agreed to a stipulated facts trial and was convicted. Eisfeldt appealed, but the appellate court affirmed on grounds no warrant was required for the initial police search because it did not go beyond the scope of the private search. Eisfeldt, 163 Wn.2d at 633-34.

This Court accepted review and held the private search doctrine inapplicable to our state constitution. Eisfeldt, 163 Wn.2d

at 636-38. But second and more important here, this Court rejected the state's alternative argument that the police reasonably believed the repairman had authority to consent to the search:

Furthermore the police officers' reasonable belief that Piper [the repairman] had authority to consent to the search is irrelevant. The State argues the officers' reasonable belief provides a good-faith exception to the warrant requirement. But unlike the Fourth Amendment, article I, section 7 "focuses on the rights of the individual rather than on the reasonableness of the government action." Morse, 156 Wn.2d at 12, 123 P.3d 832. Rejecting an exception to the warrant requirement based on apparent authority to consent, we have indicated, "while under the Fourth Amendment the focus is on whether the police acted reasonably under the circumstances, under article I, section 7, we focus on expectations of the people being searched and the scope of the consenting party's authority." Id. at 10, 123 P.3d 832. The detective's beliefs, no matter how reasonably held, cannot be used to validate a warrantless search under the Washington Constitution.

Eisfeldt, 163 Wn.2d at 639 (footnote omitted, emphasis added).

This Court reiterated:

The Fourth Amendment, unlike article I, section 7, allows good-faith exceptions to the warrant requirement. Morse, 156 Wn.2d at 9, 123 P.3d 832 ("The Fourth Amendment does not prohibit 'reasonable' warrantless searches and seizures. The analysis under the Fourth Amendment focuses on whether the police have acted reasonably under the circumstances.").

Eisfeldt, 163 Wn.2d at 639, n.10.

Between Morse and Eisfeldt, this Court decided State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), and State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2007), which the state relies on heavily here. At first blush, these cases appear inconsistent with this Court's rejection of the good faith exception in Morse and Eisfeldt. Upon closer inspection, however, Potter and Brockob are inapposite.

In Potter, this Court held its decision in Redmond v. Moore,⁴ invalidating portions of the driving while license suspended statute, did not retroactively render invalid an officer's probable cause arrest for a violation of that statute. This Court reasoned that information from DOL records provided officers with reasonably trustworthy information to establish probable cause to believe the petitioners' licenses were suspended. The subsequent invalidation of some of the license suspension procedures did not void the probable cause that existed to arrest petitioners for the crime of DWLS. Potter, 156 Wn.2d at 842.

In rejecting the petitioner's contrary argument, this Court also clarified its holding in White:

Petitioners rely on State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), where we recognized a

⁴ City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

narrow exception to the general rule that police are charged to enforce laws until and unless they are declared unconstitutional. Under this general rule, an arrest under a statute that is valid at the time of the arrest and supported by probable cause remains valid even if the basis for the arrest is later held unconstitutional. The rule comes from the United States Supreme Court holding in Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), that: “[t]he enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.”

Potter, 156 Wn.2d at 842-43.

As this Court explained, it excluded the burglary evidence in White, based on the exception to the general rule in DeFillippo for flagrantly unconstitutional statutes. Because there were no cases at the time of Potter’s arrest holding that license suspension procedures generally are unconstitutional, the DeFillippo exception did not apply in Potter’s case. Id. at 843.

In Brockbob, one of the consolidated petitioners, Dusten Gonzales also argued his arrest was unlawful, due to the subsequent invalidation of the DWLS statute. Gonzales asserted that by supporting an officer’s authority to arrest based on a statute later declared invalid, the State was effectively urging the court to adopt a good faith exception to the exclusionary rule in violation of

the privacy rights granted under our state constitution. As support, Gonzales cited Division Two's decision in State v. Nall, 117 Wn. App. 647, 72 P.3d 200 (2003).

In rejecting Gonzales' argument, however, this Court noted an important distinction between Nall and Gonzales' situation:

This argument is without merit. Nall dealt with a good faith exception to the *probable cause requirement*, involving a warrant that should have been quashed in Oregon. Id., at 651, 72 P.3d 200. The court held that the arresting officers were bound by any information Oregon authorities knew or should have known at the time of the arrest, and because the Oregon authorities knew the warrant was invalid, the arresting officers lacked probable cause. Id. Here, in contrast, there is no question that Officer Black had probable cause at the time of the arrest. The only issue is that this court *subsequently* eliminated the basis for Gonzales' arrest and he seeks to have the evidence deriving from the arrest suppressed because the circumstances changed *after the fact*. He relies primarily on State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982) for this argument. However, as the State correctly points out, White held that police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is "so grossly and flagrantly unconstitutional' by virtue of a prior dispositive judicial holding that it may not serve as the basis of a valid arrest." White, 97 Wn.2d at 103.

Brockob, 159 Wn.2d at 342, n.19 (italicized emphasis in original, underlined emphasis added).

Thus, this Court has recognized a distinction under our state constitution between an officer's mistaken, but good faith belief in the validity of a law he is enforcing *within constitutional dictates* and an officer's mistaken, but good faith belief he is acting within constitutional dictates. As the court stated in DeFillippo regarding the former scenario, "the enactment of a law forecloses speculation by enforcement officers concerning its constitutionality." DeFillippo, 443 U.S. at 38. Indeed, "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." DeFillippo, 443 U.S. at 38.

But the same is not true when an officer mistakenly believes he is acting within constitutional dictates. It is well settled warrantless searches and seizures are unconstitutional. It is also well settled that the state bears the burden of proving a warrantless search and seizure is justified by probable cause or some other jealously and carefully drawn exception to the warrant requirement. Accordingly, when an officer intrudes into the privacy interests of one of this state's citizens without a warrant, it makes sense he must do so cautiously. As this Court eloquently wrote in Morse:

“Authority” to consent is a matter of status or control and a question of law. The subjective beliefs and understandings of law enforcement officers are irrelevant to the question of “authority.” Law enforcement officers, who seek to conduct a warrantless search based upon the exception of consent, are well advised to ask for the woman and/or man of the house before seeing consent to search a home. If the man or woman of the house is not present, a brief inquiry could determine the identify of the person present and their authority to give consent; this would give police officers the information needed to properly proceed and to assure protection of constitutional rights.

Morse, 156 Wn.2d at 5 (emphasis added). Accordingly, the exclusionary rule applies when an officer acts without authority of law, regardless of his subjective beliefs.

Turning to Adams’ case, Volpe believed she was justified searching Adams’ car pursuant to the search incident to arrest exception. She was mistaken under Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), *as well as pre-Gant law*. See e.g. Supplemental Brief of Petitioner (SBOP) at 2-8; Brief of Appellant (BOA) at 5-15; Petition for Review (PR) at 1-17.

The state argues against application of the exclusionary rule on grounds Volpe was allowed to rely on “presumptively valid *case law*.” Supplemental Brief of Respondent (SBOR) (emphasis in original). At the outset, Adams disagrees there was “presumptively

valid” case law regarding the search incident to arrest exception. Washington cases were decided on a case-by-case basis. See e.g. State v. Porter, 102 Wn. App. 102 Wn. App. 327, 6 P.3d 1245 (2000) (recognizing the validity of vehicle search incident to arrest must be decided on case-by-case basis). Varying results were also the norm in federal court. See Gant, 129 S. Ct. at 1719 (comparing United States v. Green, 324 F.3d 375, 379 (C.A.5 2003) (holding that New York v. Belton⁵ did not authorize a search of an arrestee’s vehicle when he was handcuffed and lying facedown on the ground surrounded by four police officers 6-to-10 feet from the vehicle), with United States v. Weaver, 433 F.3d 1104, 1106 (C.A.9 2006) (upholding a search conducted 10-to-15 minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a patrol car)).

And significantly, the Gant majority stated it was not changing the search-incident-to-arrest exception, but merely clarifying that courts had misinterpreted New York v. Belton by giving it an overly broad reading:

Despite the textual and evidentiary support for the Arizona Supreme Court’s reading of Belton, our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant

⁵ New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

even if there is no possibility to arrestee could gain access to the vehicle at the time of the search.

To read Belton as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the Chimel^[6] exception – a result clearly incompatible with our statement in Belton that it “in no way alters the fundamental principles established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests. 453 U.S., at 460, n. 3, 101 S. Ct. 2860. Accordingly, we reject this reading of Belton and hold that the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Gant, 129 S. Ct. at 1719. Accordingly, vehicle searches incident to a recent occupant's arrest were – according to the Gant majority – anything but “presumptively valid.”

Regardless, the issue here is the police authority to search. As described above, this is a question of law to which the police are entitled no deference. This Court has never held the exclusionary rule does not apply when police incorrectly apply an exception to the warrant requirement.

Finally, even under the Fourth Amendment, the Ninth Circuit has refused the state's invitation to apply the good faith exception to circumstances such as these, because it would undermine the

⁶ Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

rule that “a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.” United States v. Gonzales, 578 F.3d 1130 (C.A. 9, 2009) (quoting United States v. Johnson, 457 U.S. 537, 562, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982)). Because Gant was decided before Adams’ case became final, it applies retroactively to him as well.

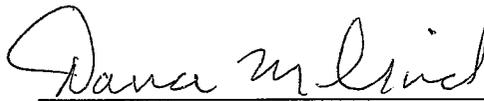
C. CONCLUSION

Because the only evidence supporting Adams’ conviction was illegally obtained, his conviction for possessing cocaine should be reversed and dismissed. State v. Armenta, 134 Wn.2d 1, 9, 18, 948 P.2d 1280 (1997).

Dated this 16th day of December, 2009.

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. LIND, WSBA 28239
Office ID No. 91051
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 82210-7
vs.)	
)	
CORYELL ADAMS,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF DECEMBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SECOND SUPPELMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CORYELL ADAMS
2645 45TH AVENUE SW
SEATTLE, WA 98116

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF DECEMBER 2009.

x. Patrick Mayovsky