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SUPREME COURT  
STATE OF WASHINGTON

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BY RONALD N. KESSLER

SUPREME COURT NO. 82210-7

*bjh*  
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CORYELL ADAMS,

Petitioner.

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

The Honorable Ronald Kessler, Judge

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AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES DISCUSSED IN SUPPLEMENTAL BRIEF

1. Whether the state failed to establish a valid vehicle search incident to arrest, where petitioner was arrested for driving with a suspended license and failing to identify himself and police had already identified him as Coryell Adams and placed him securely in the back of deputy Volpe's patrol car at the time of the search?

2. Whether this Court should refuse to apply the inevitable discovery doctrine to find the illegally obtained evidence admissible where the state did not argue inevitable discovery below, the trial court did not address it and there is no evidence on the record the deputies considered reasonable alternatives to impounding Adams' car?

B. SUPPLEMENTAL STATEMENT OF FACTS

The following facts are undisputed: Adams was secured safely in the patrol car when deputy Volpe searched his car; Adams was arrested on a non-extraditable Pierce County misdemeanor warrant for driving with a suspended license and failing to identify

himself during the traffic stop; Adam's car was legally parked; and the state did not argue inevitable discovery below.<sup>1</sup>

C. SUPPLEMENTAL ARGUMENT

1. BECAUSE ADAMS WAS HANDCUFFED AND SECURED IN THE BACK OF VOLPE'S POLICE CAR WHEN SHE SEARCHED ADAMS' CAR, THE WARRANTLESS SEARCH WAS NOT JUSTIFIED AS A SEARCH INCIDENT TO ARREST.

"Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (footnote omitted). Among the exceptions to the warrant requirement is a search incident to lawful arrest. See Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 2d 652 (1914). The exception derives from interests in officer safety and evidence

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<sup>1</sup> CP 21-23 (trial court's findings and conclusions); Brief of Appellant (BOA) at 3 (Adams was handcuffed in back of patrol car at time of search, citing RP 8, 10-11, 23-25); Brief of Respondent (BOR) at 3 ("As soon as Deputy Volpe had Adams secured in the patrol car, she searched Adams' car," citing RP 11-12); BOR (no error assigned to court's factual findings); BOR at 4 (Adams was arrested for the warrant and failure to identify himself, citing RP 13); BOR at 20-21 (noting appellate court's authority to "affirm a trial court's admission of evidence on any proper basis, even a basis not relied upon by the trial court," and proposing inevitable discovery as alternate basis to affirm); State v. Adams, 146 Wn. App. 595, 606 n.29 191 P.3d 93 (2008) (state did not argue inevitable discovery below).

preservation that are typically implicated in arrest situations. See United States v. Robinson, 414 U.S. 218, 230-234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

In Chimel, the United States Supreme Court held a search incident to arrest may only include the arrestee's person and the area "within his immediate control" – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. Chimel, 395 U.S. at 763. If there is no possibility an arrestee could reach into the area that police seek to search, both justifications for the search-incident-to-arrest exception – officer safety and evidence preservation – are absent and the rule does not apply. Preston v. United States, 376 U.S. 364, 367-368, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964).

Following Chimel, the Supreme Court considered the search-incident-to-arrest exception in the automobile context. New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). The Court held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous

incident of that arrest, search the passenger compartment of the automobile and any containers therein.”<sup>2</sup> Belton, 453 U.S. at 460.

As the Supreme Court recently observed, its opinion in Belton “has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.” Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). But as the Gant Court explained, the unique circumstances in Belton guided its opinion.

A lone police officer in that case stopped a speeding car in which Belton was one of four occupants. While asking for the driver’s license and registration, the officer smelled burnt marijuana and noticed an envelope marked “Supergold” – a name the officer associated with marijuana. Having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees (the officer had but one pair of cuffs), the officer split them up into four separate areas of the

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<sup>2</sup> This Court has held the Washington Constitution provides further protection and prohibits police from searching locked containers within the passenger compartment. State v. Stroud, 106 Wn.2d 144, 152-53, 720 P.2d 436 (1986).

thoroughfare to prevent them from touching each other, searched the car and found cocaine. Belton, 453 U.S. at 456.

Significantly, "[t]here was no suggestion by the parties or *amici* that Chimel authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle. Gant, 129 S. Ct. at 1717.

Thus, the Gant Court clarified that Belton does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Gant, 129 S. Ct. at 1714. On the contrary, "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.

Consistent with its holding in Thornton v. United States,<sup>3</sup> however, the Court also held that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Gant, 129 S. Ct. at 1714, 1719. The Court

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<sup>3</sup> Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 768 (1981).

recognized that in many cases, as when a recent occupant is arrested for a traffic violation, however, there will be no reasonable basis to believe the vehicle contains relevant evidence. Gant, at 1719.

Under Gant, deputy Volpe's search of Adams' car was not legal under the search-incident-to-arrest exception. First, Adams was handcuffed and secured in the deputy's patrol car when Volpe searched the car. Accordingly, officer safety was not implicated. In its brief, the state may argue Adams' anger at what he perceived as racial profiling created an exigency justifying the search. See BOR at 14. Any such argument should be rejected. Under Gant, the safety concern must exist at the time of the search, not the arrest. By the time of the search, Adams was safely secured in the back of Volpe's patrol car.

Second, Adams was arrested on a misdemeanor warrant for driving without a license. Accordingly, the need for evidence preservation was not implicated. Gant, at 1720 ("Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant's car").

In its brief, the state may point out Adams was also arrested for failing to identify himself. CP 22; RP 26. When arrested and handcuffed, Adams refused to identify himself; he suggested that if Volpe were so smart, she should already know his name. RP 8-9. Volpe brought Adams to the back of her police car, where she searched him, removed his wallet and identified him as Coryell Adams. RP 9, 24-25. Volpe placed Adams in the back of her patrol car and read him his rights. RP 24. It was during this time deputy Wright took Adams' keys and unlocked his car. RP 24. Volpe searched it thereafter. RP 25.

At that time, Volpe had already obtained Adams' wallet and identified him as Coryell Adams, the car's registered owner. There was therefore no "reasonable basis" to believe the car contained relevant evidence concerning the offense of arrest – failing to identify himself.

Under Gant, there was no justification for the search. Because Adams was secured in the back of the patrol car and there was no basis for the deputies to believe they would find evidence of the offenses of arrest, neither officer safety nor evidence preservation were implicated. The search was illegal.

2. THE STATE CANNOT CARRY ITS BURDEN TO PROVE THE EVIDENCE WOULD HAVE BEEN INEVITABLY DISCOVERED.

As it did for the first time on appeal, the state may argue the evidence was admissible under the inevitable discovery doctrine. See BOR at 18-21. The inevitable discovery doctrine “permits admission of illegally obtained evidence if the State can prove that the police did not act unreasonably or attempt to accelerate discovery, and would have inevitably discovered the evidence through proper and predictable investigatory procedures.” State v. Richman, 85 Wn. App. 568, 572, 933 P.2d 1088 (1997); Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). The state’s anticipated argument should be rejected for at least three reasons.

First, where the doctrine of inevitable discovery is not raised at the trial court, appellate courts have declined to reach the question. See e.g. State v. Webb, 147 Wn. App. 264, 275, 195 P.3d 550 (2008); State v. Rulan C., 97 Wn. App. 884, 889, 970 P.2d 821 (1999) (declining to address whether inevitable discovery doctrine applies where state did not raise it below and where the requisite factual inquiry was not undertaken by the trial court).

As the Court of Appeals noted in this case:

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.

Adams, 146 Wn. App. at 606, n.49.

Indeed, the state cannot make the required showing here. Although Volpe testified that if she impounds a car, she undertakes an inventory search to make sure there's no million-dollar ring in the car, the court did not weigh her credibility on this statement. And significantly, the court did not find Volpe credible in her assertion that Adams parked in a handicapped stall. CP 22. To accept the state's inevitable discovery argument here, which is a function of the fact-finder, not the appellate court. State v. Thomas,

150 Wn.2d 821, 874, 83 P.3d 970 (2004) ("Credibility determinations are for the trier of fact and are not subject to review").

But perhaps most fatal to the state's anticipated argument, the state did not elicit, and the court did not address, whether Volpe or Wright explored reasonable alternatives to impoundment. See e.g. State v. Houser, 95 Wn.2d at 153 ("it is unreasonable to impound a citizen's vehicle following his or her arrest when there is no probable cause to seize the car and where a reasonable alternative to impoundment exists"); State v. Davis, 29 Wn. App. 691, 699 P.2d 938 (1981) (impoundment of car parked at Northgate Bon Marche parking lot could not be justified on grounds it was necessary to safeguard vehicle, where the officer did not explore any reasonable alternatives). Although RCW 46.55.113 authorizes officer to impound a vehicle, the impoundment must nevertheless be reasonable under the circumstances to comport with constitutional guarantees. State v. Hill, 68 Wn. App. 300, 305, 306, 842 P.2d 996 (1993). Because the state did not elicit any evidence the deputies considered reasonable alternatives, the state cannot establish a valid impound search. Webb, 147 Wn. App. at 270 (in the absence of a finding establishing Webb's proximity to the

vehicle at the time of arrest, state did not bear its burden to show search of Webb's vehicle fell within exception to warrant requirement).

Assuming *arguendo* this Court finds the record sufficiently developed to address the state's anticipated inevitable discovery argument, it should be rejected on the merits, as a reasonable alternative to impound existed: the officers could have just left the car there in the Taco Bell parking lot. The trial court expressly found it was not parked in a handicapped stall. Accordingly, there was no public safety or inconvenience issue. This Court made a similar conclusion in Houser, as did Division Two in Davis, *supra*.

Houser was legally parked off the roadway next to a supermarket. This Court stated leaving it there was a reasonable alternative to impoundment since there was nothing in the officer's report to indicate the officer believed the defendant's presence at the police station to post bond for the charges called for anything but a temporary absence. Houser, 95 Wn.2d at 153. Similarly, here, Adams was arrested on a misdemeanor warrant that turned out to be non-extraditable. CP 22. Although he was also arrested for failing to identify himself, there was likewise no indication from Volpe or Wright that booking Adams on that minor offense would

involve anything but a temporary absence. See RCW 46.61.021(3) (duty to identify oneself to police officer if requested during traffic stop); RCW 46.61.022 (failure to identify oneself is misdemeanor).

The state's argument should also be rejected on the merits because there is no evidence the officers asked Adams if he had any friends at the casino who would be willing to move the car or take charge of it on Adams' behalf. See e.g. State v. Johnston, 107 Wn. App. 280, 28 P.3d 775 (2001) (no valid impound search where record failed to show officers offered Johnston an opportunity to have a friend or relative take charge of the car).

Finally, the state's inevitable discovery argument should be rejected because its application would undermine Adams' constitution right to be free from unreasonable searches. See State v. O'Neill, 148 Wn.2d 564, 592 n.11, 62 P.3d 489 (2003) (inevitable discovery rule inapplicable because there would be no incentive for the State to comply with article I, section 7's requirement that the arrest precede a search incident to arrest). In that same vein, application of the inevitable discovery rule here would provide a disincentive for police to comply with Gant's constitutional requirements for a vehicle search if police can rely on an impound theory to excuse their non-compliance after-the-fact.

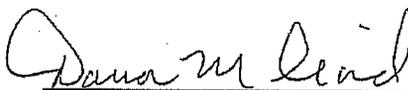
D. CONCLUSION

Under Gant, the search of Adams' car was illegal. The state cannot carry its burden of proof to establish the evidence would have been inevitably discovered, because there is no evidence the deputies considered reasonable alternatives to impoundment. 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 26 day of August, 2009.

Respectfully submitted,

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