

No. 82600-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK JOSEPH AFANA,

Petitioner.

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FILED
SUPREME COURT
STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE
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I. INTEREST OF AMICUS CURIAE

The Washington Defender Association (“WDA”) is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. WDA believes strongly in promoting the rights of indigent persons and upholding the protections guaranteed by Article I, section 7 of the Washington State Constitution, which protects the privacy rights of all citizens. WDA and its members have previously filed amicus briefs on issues relating to privacy interests and due process.

II. ISSUE TO BE ADDRESSED BY AMICUS

Whether the fruits of the unlawful search in this case must be excluded under the Fourth Amendment to the United States Constitution and/or Article I, section 7 of the Washington Constitution.

III. ARGUMENT

In Arizona v. Gant the Court reaffirmed the narrow scope of the search incident to arrest exception with respect to the search of a vehicle. __ U.S. __, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009). The Court concluded, its prior decision in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) only

allowed application of the exception to vehicles where there was reason to believe the arrestee might gain access to the car. Gant, 129 S.Ct. at 1719. Gant refused the invitation of the State of Arizona to broaden that exception.

Similarly in State v. Patton, this Court refused the State's invitation to expand the search incident to arrest exception, articulated in State v. Stroud,¹ to include situations, such as this, where the defendant is secured away from the vehicle and there is no reason to believe evidence of the crime is in the vehicle. 2009 WL 3384578, 6.

Faced with the realization that law enforcement's expansive view has never been judicially endorsed and has now been judicially rejected, the State of Washington now argues that its mistaken view should nonetheless justify the admission of evidence in this case, under a "good-faith" exception to the exclusionary rule of Article I, section 7 of the Washington Constitution.² The State's argument rests on three equally flawed premises. First, the State's argument rests upon the fundamentally incorrect premise that merely because law

¹ State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986).

² Beyond this case, amicus is aware of the same argument being made in favor of admitting unlawfully obtained evidence across the State.

enforcement was employing an incorrect understanding of the exception for so long it was justified in doing so and thus this Court should not suppress the evidence. The State's second false premise is that Gant and Patton changed the law rather than merely recognize what the law has always been. Third, the State ignores the long-established precedent of this Court rejecting any exception to the exclusionary rule of Article I, section 7.

A. THE STATE'S CLAIM THAT THE FRUITS OF THE ILLEGAL SEARCH NEED NOT BE SUPPRESSED BECAUSE THE SEARCH WAS PREMISED UPON "PRESUMPTIVELY VALID" CASE LAW IS CONTRAY TO THE DECISIONS IN GANT AND PATTON

In Belton, the Court concluded the search incident to arrest exception could apply to vehicles only where there was reason to believe the arrestee might gain access to the car. 453 U.S. at 460. In reaching that decision, Belton made clear the scope of that search could be no broader than the scope of a search incident to arrest generally. Id. at 46, n.3 (citing Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). Recognizing the limits it imposed in Belton, the Court in Gant refused to expand the Belton rule to permit a search of a vehicle whenever a driver is arrested without regard to the driver's ability to access the vehicle

or without regard to officer's belief that the car might contain evidence of the crime. Gant 129 S.Ct. at 1719. The Court concluded such an outcome would "untether the rule from the justification underlying the []exception - a result clearly incompatible with . . . Belton." Gant 129 S.Ct. at 1719.³

The scope of an exception to the warrant requirement is "limited by the reasons that brought them into existence." Patton, at 2 (citing State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999)) Thus, Patton, like Gant, reaffirmed the limited by scope of the exception, finding that applying it to facts such as these "stretches [the exception] beyond its breaking point." (Brackets in original, citations omitted.) Patton, at 7.

The State's argument in the present case hinges upon the mistaken premise that its broad reading of the search incident to arrest exception was the state of the law prior to Gant and Patton. The State contends "the constitutional validity of the search incident to arrest rule has been repeatedly endorsed and affirmed by [this Court] over the past twenty-three years." Supplemental Brief of Respondent at 21; see also, Brief of Respondent at 22

³ The Court did allow expansion of Belton to permit a search incident to arrest where there was reason to believe evidence of the crime of arrest was in the vehicle. Gant, 129 S.Ct. at 1719.

(Prior to April 21,, 2009, officers understood that they could search a vehicle incident to arrest”) Neither Gant nor Patton eliminated the search incident to arrest exception as applied to vehicle searches. Instead, both Courts merely rejected the efforts of law enforcement to expand that exception beyond what Belton and Stroud permit. Both Courts simply clarified that exception was never so broad as the State now imagines.

Patton makes clear the Court has never endorsed the sort of automatic search which occurred here. Patton found that following Stroud “the scope of the search incident to arrest exception under . . . Article I section 7 has experienced [a] progressive distortion.” Patton, at 7. Gant similarly denounced the misreading of Belton so as to create a “police entitlement” rather than an exception to the warrant requirement. Gant, 129 S.Ct. at 1718.

The very “entitlement” which Gant and Patton denounce is evidenced in the State’s brief, when it uses the terms “good-faith rule” rather than the “good-faith exception,” Supplemental Brief of Respondent at 15, and the “search incident to arrest rule” rather than the “search incident to arrest exception.” Supplemental Brief of Respondent at 21. Under the “progressive distortion” of Stroud

and Belton, the exception has become the rule, and it is for just that reason that Gant and Patton have reaffirmed what were always narrow exceptions.

Nonetheless the State now claims that its reliance upon that “progressive distortion” requires this Court to craft a previously unrecognized exception to the exclusionary rule. The State maintains law enforcement has relied upon this Court’s “repeated[] endorse[ment]” of the State’s expansive view of the exception. Supplemental Brief of Respondent at 21-22. Thus, the State maintains “there can be little doubt that law enforcement officers can rely on the specific judicial pronouncements when conducting vehicle searches.” Id at 22.

The State’s claim smacks of the sort of “police entitlement” which Gant found to be at odds with the Fourth Amendment. Gant specifically rejected this contention:

We do not agree with the contention in Justice Alito's dissent . . . that consideration of police reliance interests requires a different result. Although it appears that the State's reading of Belton has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the [] exception. . . . The fact that the law enforcement community may view the State's version of the Belton rule as an entitlement

does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence.

(Footnote omitted.)⁴ Gant, 129 S.Ct. at 1722-23.

The State's claim that it relied on "presumptively valid" caselaw is inconsistent with Gant and Patton. Both opinions have made clear that the State's expansive view of the exception was never permitted by their respective precedent. The first two of the State's three flawed premises must be rejected as there was never "presumptively valid" precedent on which the State could rely.

B. THERE CAN BE NO "GOOD FAITH"
EXCEPTION TO THE EXCLUSIONARY RULE
OF ARTICLE I, SECTION 7.

"Article I, section 7 provides greater protection of privacy rights than the Fourth Amendment." State v. Winterstein, 2009 WL 4350257, 6 (citing State v. Morse, 156 Wn.2d 1, 10, 123 P.3d 832 (2005)).

⁴ The omitted footnote recognizes that while police reliance would not allow admission of the evidence, it would shield individual officers from liability in civil suits. The State's brief ignores the text of the opinion, and thus the Court's conclusion, and instead points to that footnote alone as justifying the very result rejected by Gant. Supplemental Brief of Respondent at 22 (citing Gant, 129 S.Ct. at 1723, n.11.)

The language of [Article I, § 7] constitutes a mandate that the right to privacy shall not be diminished by the gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than curbing governmental actions.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Thus, unlike the Fourth Amendment exclusionary rule, the primary purpose of the exclusionary rule mandated by Article I, section 7 is not to deter government action, but instead “*whenever* the right is unreasonably violated, the remedy *must* follow.” (Emphasis in original.) White, 97 Wn.2d at 110.

Recognizing the greater protections provided by the Washington Constitution, White specifically rejected the “good faith” standard set out in Michigan v. DeFilippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). See White, 97 Wn.2d at 109.

The Court concluded

The result reached . . . in DeFilippo is justifiable only if one accepts the basic premise that the exclusionary rule is merely a remedial measure for Fourth Amendment violations. . . . This approach permits the exclusionary remedy to be completely severed from the right to be free from unconstitutional governmental intrusions

White, 97 Wn.2d at 109; see also, Morse, 156 Wn.2d at 9-10

(Washington courts have “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”).

Nonetheless, in the present case the State contends this Court should apply a standard similar to that of DeFilippo. The State’s brief does not acknowledge the reasoning of White nor does it address the long line of cases refusing to adopt a “good-faith” exception. See State v. Wallin, 125 Wn.App. 648, 105 P.3d 1037, review denied, 155 Wn.2d 1012 (2005); State v. Riley, 121 Wn.2d 22, 30, 846 P.2d 1365 (1993); State v. Canady, 116 Wn.2d 853, 857-58, 809 P.2d (1991); State v. Nall, 117 Wn.App. 647, 651, 72 P.3d 200 (2003); State v. Crawly, 61 Wn.App. 29, 808 P.2d 773, review denied, 117 Wn.2d 1009 (1991). This Court has held that the good faith exception is “unworkable and contrary to well established principles.” White, Wn.2d at 106 n.6. The State has offered no reason to reconsider that position.

In fact, this Court has recently reaffirmed the correctness of White. Relying on White and its recognition of the constitutionally mandated exclusion of unlawfully obtained evidence, Winterstein rejected a lower court’s application of the inevitable discovery

exception. Winterstein found such an exception failed to properly “emphasiz[e] the individual privacy rights guaranteed in Article I, section 7” and instead focused upon deterrence. Winterstein, at 8.

As it did in Winterstein, the State here fails to appreciate that the fundamental purpose of the exclusionary rule of Article I, section 7 is the protection of privacy. In fact the State does not mention the protection of privacy at all in its discussion of the purposes of Washington’s exclusionary rule, instead calling deterrence “the most basic purpose of the exclusionary rule.” Brief of Respondent at 22.

This Court has never endorsed an exception to the exclusionary rule which permits admission of the fruits of an unlawful search. Among the chief flaw this Court identified with the inevitable discovery exception as it relates to the protection of privacy rights, was that the exception “does not disregard illegally obtained evidence.” Winterstein, at 8. That flaw exists equally in the “good-faith” exception. In both instances the evidence sought to be admitted is by definition unlawfully obtained, unlike the independent source doctrine in which lawfully obtained evidence will not be suppressed merely because it was also obtained as a result of an independent but unlawful means. See Winterstein, at

7-8. As with the inevitable discovery exception, the “good-faith” exception “is incompatible with the nearly categorical exclusionary rule under Article I, section 7.” Winterstein, at 9.

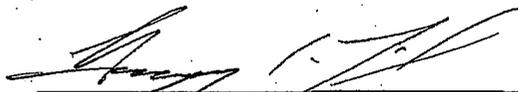
“Our constitutionally mandated exclusionary rule saves Article 1, section 7 from becoming a meaningless promise.” Ladson, 138 Wn.2d at 359. “Without an immediate application of the exclusionary rule whenever an individual’s right to privacy is unreasonably invaded, the protections of the Fourth Amendment and Article 1, Section 7 are seriously eroded”. White, 97 Wn.2d at 111-12. As this Court has repeatedly demonstrated, these are not empty words. Consistent with this holding, this Court has never allowed admission of unconstitutionally obtained evidence under the exclusionary rule of Article I, section 7. The State has offered nothing that warrants departure from that reasoned course.⁵

⁵ Contrary to the State’s argument neither State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), nor State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006), are relevant to this discussion. Each of those case addressed the question of whether a probable cause determination is altered by a statute later found to be unconstitutional. These cases analyze the question of whether there was probable cause to conduct a search in the first place and not the scope of a Washington state citizen’s privacy rights. By concluding police had probable cause, both Potter and Brockob concluded no constitutional violation had occurred, and thus did not apply either the exclusionary rule nor any exceptions to that rule. The question here is not whether the arrest was lawful, but rather, whether police may automatically search a vehicle as a result of that arrest.

IV. CONCLUSION

Because neither this Court nor the United States Supreme Court have ever endorsed the sort of unlawful search at issue here, there was no presumptively valid case law on which law enforcement could rely. Even assuming the State could make out its claim of reliance, Article I, section 7 does not allow for a "good-faith" exception to the constitutionally-mandated exclusionary rule. Thus, WDA urges this Court to conclude the evidence unlawfully seized in this case must be suppressed.

Respectfully submitted this 11th day of December 2009.



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