

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
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NO. 82600-5
IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

MARK JOSEPH AFANA,

Defendant/Appellant.

PETITIONER'S
SUPPLEMENTAL APPELLANT'S BRIEF

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ARGUMENT

The facts and circumstances of Mark Joseph Afana's case provide a prime example of why the reasoning of the United States Supreme Court in *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, ___ L. Ed.2d ___ (2009) should be adopted and applied in accord with Const. art. I, § 7.

Mr. Afana and Ms. Bergeron were legally parked at the corner of Rimrock and Houston in Spokane County. They were watching a movie inside a car. (Findings of Fact 1 and 3; CP 24; Appendix "B" to Petition for Discretionary Review (PDR)).

They were contacted by Deputy Miller. The deputy asked for Mr. Afana's driver's license and identification from Ms. Bergeron. The deputy discovered that she had a misdemeanor warrant for her arrest. (Findings of Fact 4 and 5; Appendix "B" to PDR)

Following Ms. Bergeron's arrest the deputy conducted a search of Mr. Afana's car. He located methamphetamine, marijuana and drug paraphernalia. Mr. Afana was arrested for possession of a controlled substance. (Finding of Fact 6; Appendix "B" to PDR)

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but

upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

“Warrantless searches are *per se* unreasonable.” *State v. Simpson*, 95 Wn.2d 170, 188, 622 P.2d 1199 (1980).

The State carries the burden of proving that an exception to the warrant requirement applies. The State relies upon the search incident to arrest exception.

“The search incident to arrest” principle is an exception to the Fourth Amendment warrant requirement which permits a law enforcement officer to search a person arrested in order to remove any weapons, search for and seize any evidence on the arrestee’s person to prevent its concealment or destruction and to search the area within his immediate control where he might gain possession of a weapon or destructible evidence.

State v. Roberts, 31 Wn. App. 375, 379-80, 642 P.2d 762 (1982). (Emphasis supplied.)

Deputy Miller had authority to search Ms. Bergeron. She was removed from Mr. Afana’s car. She was placed under arrest. Deputy Miller then conducted a search of the car. (RP 5, ll. 14-24)

Mr. Afana was not under arrest at the time his car was searched. He compares his case to the situation in *State v. Porter*, 102 Wn. App. 327, 6 P.3d 1245 (2000).

Ms. Porter was the driver of a van. Her son Charles was with her. An officer observed the van and its occupants. He discovered an outstanding warrant for Charles's arrest. Ms. Porter drove to a gas station, legally parked, and used the telephone. Her son began walking a dog. He was arrested some distance from the van.

The *Porter* Court discussed the search incident to arrest exception as it is applied under Const. art. I, § 7. The Court stated at 330-31:

The rationale underlying a search incident to arrest is the need to prevent the arrestee from obtaining a weapon or disposing of evidence. *Chimel v. California*, 395 U.S. 792, 763, 89 S. Ct. 2034, 23 L. Ed.2d 685 (1969) Thus, police officers are permitted, after a lawful custodial arrest, to search an "arrestee's person in the area 'within his immediate control.'" *Chimel*, 395 U.S. at 763 Where an arrest is initiated in or near a motor vehicle, however, the permissible scope of a search incident to an arrest is governed by *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986); *see also New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed.2d 768 (1981).

The *Porter* Court went on to further explore the parameters of *Stroud*¹ and *Belton*². It ruled at 333:

In *Stroud*, our supreme court adopted the federal test subject to the greater protections of our own constitution, which precludes a search into locked containers. *Stroud*, 106 Wn.2d at 151. *Stroud*, like *Belton*, was meant to provide police officers with a "bright-line" rule allowing them to

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

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

search the interiors of vehicles that were within the area of the arrestee's immediate control at the time the police initiate an arrest. *Stroud*, 106 Wn.2d at 151; *State v. Boyce*, 52 Wn. App. 274, 277, 758 P.2d 1017 (1988). Thus, if the police initiate an arrest and the passenger compartment of a vehicle is not within an arrestee's area of "immediate control," *Stroud* does not apply.

(Emphasis supplied.)

Ms. Porter's conviction was reversed on the basis that her son was arrested away from the van. Mr. Afana contends that it makes no difference if an occupant of a car is arrested some distance from a car, or immediately outside the car. If the person is arrested, handcuffed and placed in a patrol car, that person no longer has access to the other car.

The *Gant* case clearly establishes that law enforcement's analysis of the *Belton* rule, which was adopted in *Stroud*, exceeds the parameters of the search incident to arrest exception. As in *Stroud*, the greater protection of Const. art. I, § 7 should be applied under *Gant* to declare the correct interpretation of the search incident to arrest exception. The *Gant* Court ruled at 129 S. Ct. 1726:

Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. 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 interests that all individuals share in having their constitutional rights fully protected.

Ms. Bergeron was arrested on an outstanding warrant. No evidence of any crime related to that warrant could reasonably be anticipated to be in Mr. Afana's car.

Deputy Miller's initial contact with Mr. Afana and Ms. Bergeron was pursuant to the community caretaking function. Deputy Miller advised them they should leave the area. Once the reason for the contact was obviated no further inquiry was necessary. *See: State v. Kinzy*, 141 Wn.2d 373, 385-87, 5 P.3d 668 (2000).

However, as soon as Deputy Miller discovered the arrest warrant for Ms. Bergeron he activated his emergency equipment and re-contacted the car. Ms. Bergeron was removed from the car, handcuffed and placed in the patrol car.

QUERY: Based upon the *Gant* decision should Const. art. I, § 7 be construed to prohibit a vehicle search when a person is removed from that vehicle and arrested on an outstanding warrant?

Const. art. I, § 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

There is no evidence of any crime being committed.

There is no evidence that either Mr. Afana or Ms. Bergeron were armed.

There is no evidence that the deputy would discover anything in relation to the arrest warrant.

The *Gant* Court succinctly concluded at 129 S. Ct. 1728 that

Police may search a vehicle subject to a recent occupant's arrest **only if the arrestee is within reaching distance of the passenger compartment at the time of the search** or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

(Emphasis supplied.)

The Supreme Court limits the search incident to arrest exception to a person's location at the time the search occurs; not at the time of the arrest. This differs from the bright-line rule in *Stroud*.

Neither of the factual predicates are present in this case. The search does not comply with the search incident to arrest exception. Both the Fourth Amendment to the United States Constitution and Const. art. I, § 7 were violated.

“[T]he search incident to arrest exception to the warrant requirement is narrower” under article I, section 7 than under the Fourth Amendment. *O'Neill* [*State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)] at 584.

State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007).

Since the State Constitution further narrows the search incident to arrest exception, the holding in the *Gant* case has even greater import to Mr. Afana.

The search of Mr. Afana's car was predicated on Ms. Bergeron's arrest. Even though *State v. Cass*, 62 Wn. App. 793, 797, 816 P.2d 57 (1991) authorizes the search of a car following a passenger's arrest based

upon the *Stroud* decision, it should be overruled along with *State v. Mote*, 129 Wn. App. 276, 120 P.3d 596 (2005).

It is Mr. Afana's position that *Gant* negates *Cass* and *Mote* and requires a reevaluation of the bright-line rule in *Stroud*. This is necessarily mandated under Const. art. I, § 7 greater protection analysis.

Mr. Afana is entitled to rely upon the *Gant* ruling even though it occurred post-conviction. His appeal is pending.

An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal.

Roberson v. Perez, 156 Wn.2d 33, 43, 123 P.3d 844 (2005).

Since there has been a change in the law, and it is directly applicable to Mr. Afana's case, he is entitled to its benefit.

Mr. Afana's argument that he is entitled to the benefit of *Gant* falls squarely within the retroactivity analysis of *Personal Restraint of St.*

Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992):

The current retroactivity analysis may be neatly summarized in a two-part standard:

1. A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, **with no exception for cases in which the new rule constitutes a clear break from the past.** *Griffith* [*Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed.2d 649, 107 S. Ct. 708 (1987)] at 328. ...

(Emphasis supplied.)

Any argument by the State that Deputy Miller could in “good faith” rely upon prior precedent cannot be upheld. The “good faith” exception to the warrant requirement has not been adopted by Washington Courts. *See: State v. Crawley*, 61 Wn. App. 29, 35, 808 P.2d 773 (1991); *State v. Wallen*, 125 Wn. App. 648, 665, 105 P.3d 1037 (2005).

Moreover, since the *Gant* case clarifies the search incident to arrest exception, and the State Constitution provides greater protection than the Fourth Amendment, the reasoning underlying the exclusionary rule gains further impetus.

We think the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than on curbing governmental actions. This view toward protecting individual rights is of paramount concern as reflected in a line of Washington Supreme Court cases predating *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 1081, 81 S. Ct. 1684, 84 A.L.R.2d 933 (1961) *See State v. Cyr*, 40 Wn.2d 840, 842, 246 P.2d 480 (1952); *State v. Miles*, 29 Wn.2d 921, 926, 190 P.2d 740 (1948); *State v. Gunkel*, 188 Wash. 528, 534-35, 63 P.2d 376 (1936); *State v. Buckley*, 145 Wash. 87, 258 P. 1030 (1927); *State v. Gibbons*, 118 Wash. 171, 182-88, 203 P. 390 (1922). The important place of the right to privacy in Const. art. I, § 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982).

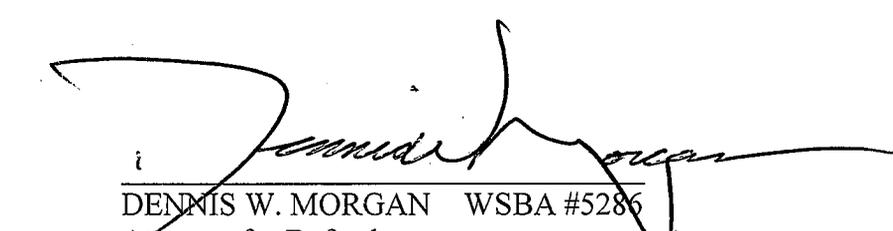
CONCLUSION

The Supreme Court's decision in *Arizona v. Gant*, explicating and refining the search incident to arrest exception, compels a determination that the search of Mr. Afana's car was an unreasonable warrantless search. It violated his constitutional rights under both the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

The Court of Appeals decision reversing the trial court's suppression of the evidence should be reversed and the case remanded to the trial court for dismissal.

DATED this 7th day of July, 2009.

Respectfully submitted,



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