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IN THE SUPREME COURT  
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

vs.

MICHAEL W. ROBINSON,

Petitioner.

*PETITIONER*

SUPPLEMENTAL BRIEF OF APPELLANT

Supreme Court No. 83525-0  
Court of Appeals No. 36918-4-II  
Appeal from the Superior Court for Thurston County  
The Honorable Christine A. Pomeroy, Judge  
Cause No. 07-1-01283-8

THOMAS E. DOYLE, WSBA NO. 10634  
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A. SUPPLEMENTAL STATEMENT OF ISSUES  
PRESENTED FOR REVIEW

01. Whether there is an adequate record for review?
02. Whether Robinson is prohibited from challenging the search for the first time on appeal?
03. Whether the search is excused under the good-faith exception to the warrant requirement?
04. Whether the State waived the issue of the validity of the warrantless search where it presented no argument in the Court of Appeals in response to Robinson's argument in his Statement of Additional Grounds?

B. SUPPLEMENTAL STATEMENT OF THE CASE

On July 7, 2007, Trooper Tony Doughty chased a vehicle driven by Daniel Smith in which Robinson was the sole passenger. [RP 27, 30, 46-48]. When Smith eventually brought the car to a stop, both he and Robinson exited the vehicle before being forced to the ground at gunpoint and handcuffed. [RP 34-37]. A search of the vehicle incident to arrest followed, which revealed stolen property related to an earlier reported residential burglary. [RP 68-107].

In its Supplemental Brief of Respondent, the State contends that the record is inadequate for review, that Robinson is prohibited from challenging the search for the first time on appeal and that in any event the search is excused under the good-faith exception to the warrant

requirement. [Supplemental Br. of Resp't at 1-2]. This reasoning is misplaced.

C. SUPPLEMENTAL ARGUMENT

ROBINSON, WHO DID NOT MOVE AT TRIAL TO SUPPRESS EVIDENCE SEIZED IN A VEHICLE INCIDENT TO ARREST, MAY CHALLENGE THE SEARCH UNDER ARIZONA V. GANT.

01. The Record

A claimed manifest error affecting a constitutional right may be raised for the first time on appeal where, as here, an adequate record exists.

[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.

State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998).

The record here is sufficient for review; it fully demonstrates, as recognized by the Court of Appeals, that a search incident to arrest followed Smith and Robinson's exit from the vehicle and handcuffing by Trooper Doughty. [Slip Op. at 22-23].

02. Robinson is Not Prohibited from Challenging the Warrantless Search for the First Time on Appeal

Where a higher court enters a constitutional ruling in a criminal case, that ruling applies to all cases on direct review. Griffith

v. Kentucky, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); State v. McCormack, 117 Wn.2d 141, 812 P.2d 483 (1991), cert. denied, 502 U.S. 1111 (1992); State v. Blanks, 139 Wn. App. 543, 161 P.3d 455 (2007), review denied, 163 Wn.2d 1046 (2008). The reasons for this are clear: “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication,” taints the “integrity of judicial review” and would result in “actual inequity.” Griffith, 479 U.S. at 322-323. As a result, there is “no exception for cases in which the new rule constitutes a clear break from the past.” In re Personal Restraint of St. Pierre, 118 Wn.2d 321, 326-27, 823 P.2d 492 (1992). Nor will concerns of “reliance” by the State justify departing from the rule. See State v. Hanson, 151 Wn.2d 783, 789-91, 91 P.3d 888 (2004).

Further, the ruling of Gant applies regardless whether the defendant moved to suppress and argued the search was illegal below. State v. Rodriguez, 65 Wn. App. 409, 417, 828 P.2d 636, review denied, 119 Wn.2d 1019 (1992). There can be no “waiver” of the right to raise the issue because, at the time of trial, the parties would have reasonably relied on the then-current understanding of New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1991), and would have assumed the search was lawful under that case. See Rodriguez, 65 Wn. App. at 417.

This issue is of constitutional magnitude and manifest and may be raised for the first time on appeal under RAP 2.5(a)(3). Id.

On the other hand, as noted in Robinson's Petition for Review filed herein [Pet't for Review at 4], Robinson presented argument in the Court of Appeals by way of his Statement of Additional Grounds that the warrantless search was unconstitutional under Chimel v. California, 395 U.S. 752, 232 L. Ed. 2d 685, 89 S. Ct. 2034 (1969), which sets forth the same rationale expressed in Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). And since this was framed in the context of ineffective assistance of counsel for failure to argue the issue at trial, trial counsel was ineffective, with the result that the issue was properly presented for appellate review.

03. The Search Is Not Excused Under the Good-Faith Exception to the Warrant Requirement

The good faith exception does not apply to excuse the warrantless search in this case, since Washington has declined to apply the federal good-faith exception to the exclusionary rule. State v. McCormick, 152 Wn. App. 536, 544, 216 P.3d 475 (2009) (citing State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982)). As noted in both McCormack 216 P.3d at 478 and State v. Harris, 2010 WL 45755 (Wash. Ct. Sapp. Jan 7, 2010), at \*6, article I, section 7 does not recognize a

good-faith exception to the warrant requirement. For this reason, Division I's holding to the contrary in State v. Riley, 2010 WL 427118 (Wash. Ct. App. Feb. 8, 2010) is misplaced.

04. The State is Precluded from Arguing the Validity of the Warrantless Search in Its Supplemental Brief Where It Did Not Address the Issue in the Court of Appeals in Response to Robinson's Argument in His Statement of Additional Grounds

The State did not argue for the validity of the warrantless search in the Court of Appeals, even though, as acknowledged by the State [Supplemental Br. of Resp't at 2], the issue had been addressed in Robinson's Statement of Additional Grounds. On at least two occasions, this court has previously declined to address arguments raised for the first time in supplemental briefs, and should do so in this case. State v. Collins, 121 Wn.2d 168, 179, 847 P.2d 919 (1993); Douglas v. Freeman, 117 Wn.2d 242, 257-58, 814 P.2d 1160 (1991).

D. CONCLUSION

This court should grant Robinson's challenge to the search of the vehicle and reverse his convictions.

DATED this 12<sup>th</sup> day of April 2010.

Thomas E. Doyle  
THOMAS E. DOYLE  
Attorney for Respondent, WSBA 10634

CERTIFICATE

I certify that I mailed a copy of the above Answer by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 12<sup>th</sup> day of April 2010.

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Attorney for Appellant  
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