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SUPREME COURT
STATE OF WASHINGTON

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No. 83525-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE ROBINSON,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS, DIVISION II

Court of Appeals No. 36918-4-II
Thurston County Superior Court No. 07-1-01283-8

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

In this supplemental brief, the State of Washington addresses the significance of Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), as well as pertinent Washington Court of Appeals and Supreme Court cases subsequent to that decision, on the vehicle search in this case. It is the State's position that because Robinson did not bring a motion to suppress in the trial court, he is precluded from raising issues relating to the search on appeal. The State does not dispute that the Gant decision applies to Robinson's case, but it is not possible to tell from the record below whether the search at issue would have met the Gant requirements; the parties had no reason to fully develop the facts at the time, and any conclusions based on the existing record would be speculative. Therefore, even if this court decides that Robinson did not waive a challenge to the search, the matter should be remanded for a reference hearing to supplement the record.

Further, should this court determine that Robinson did not waive his right to challenge the search on appeal, it is the State's position that the good faith exception should apply and that the search should be upheld. The search was proper under pre-Gant

law, and the officers justifiably relied on nearly thirty years of judicial authority in conducting the search incident to arrest.

Robinson's attorney did not raise this issue on direct appeal to the Court of Appeals. He himself raised it in his Statement of Additional Grounds (SAG). The State did not address it in its response brief. Therefore, all of the State's argument is contained in this supplemental brief. The Court of Appeals merely noted that the search was valid as a search incident to arrest. [Slip. Op. at 21] Because the search of the vehicle was not one of the primary issues before it, the summary of facts contained in the Court of Appeals opinion is inadequate for the purposes of this review, and the relevant facts will be set forth below.

II. ISSUES

1. Whether a challenge to the search of a vehicle incident to arrest, based upon Gant and subsequent Washington cases, can be raised for the first time on appeal.

2. Whether the Fourth Amendment or article I, § 7 of the Washington constitution requires suppression of evidence obtained at a time when the search was presumed to be constitutional, but which was subsequently found to be unconstitutional.

3. Whether the Fourth Amendment good faith exception to the exclusionary rule applies when officers rely on established law that is subsequently held to be unconstitutional.

III. STATEMENT OF THE CASE.

A. PROCEDURE.

Robinson did not bring a suppression motion in the trial court. He was convicted by a jury of residential burglary, theft of a firearm, first degree unlawful possession of a firearm, first degree theft, and unlawful possession of methamphetamine while armed with a firearm. [Slip. Op. at 1] The Court of Appeals affirmed all but the unlawful possession of methamphetamine, which it reversed on the grounds of insufficient evidence. The opinion was issued on July 28, 2009. Arizona v. Gant was issued on April 21, 2009.

B. SUBSTANTIVE FACTS.

On July 11, 2007, Washington State Patrol Trooper Tony Doughty was in his patrol car at an intersection in Olympia between 4:00 and 4:30 p.m. [1 RP 27-28] While he waited at the intersection, two cars went by on the cross street in front of him. He heard the sound of vehicles and the screeching of tires, and saw a white vehicle, later determined to be an Acura, followed by a blue vehicle, both of them breaking traction and drifting sideways

through the intersection. [1 RP 29] The trooper followed, estimating that the vehicles were traveling more than 80 miles per hour on a heavily traveled road at a busy time of the day. They turned onto another street, traveling so fast they were being pitched sideways; the Acura passed four or five other vehicles in the oncoming lane and went through a three-way-stop intersection without stopping. [1 RP 31-32] The blue car, a Honda, stopped and the driver yelled to the trooper, "They just stole my vehicle." [1 RP 32-33]

The white Acura pulled into an access road at a middle school. [1 RP 33] As Doughty pulled in behind it, the driver, later identified as Duane Smith, got out and Doughty thought he was going to flee on foot. The trooper drew his weapon and the driver followed commands to get down on the ground. [1 RP 34] The passenger, later identified as Robinson, got out of the car and began walking toward Doughty. [1 RP 35] The trooper ordered him to the ground at gunpoint and although he did not comply at first, he did shortly thereafter go to the ground. Doughty put handcuffs on Smith but had to return to his patrol car to get another set of handcuffs. [1 RP 36-37] He returned and put handcuffs on Robinson. Doughty considered this a felony stop. He called for backup. [1 RP 37]

The driver of the blue Honda was nearby, yelling that the Acura was his and had been stolen. Doughty told him to return to his vehicle until backup arrived. Because it was a hot day, Doughty moved Smith and Robinson to a shady area not otherwise described in the trial testimony. [1 RP 38] Smith was placed under arrest for reckless driving. Backup officers arrived 10 to 15 minutes after the incident began. [1 RP 39]

At trial, Doughty began to testify about the search of the vehicle incident to the arrest, but the prosecutor stopped him and elicited testimony that when he looked into the Acura he could see that the ignition had been punched and was falling off the console. He thought the car was probably stolen. [1 RP 39-40] In his SAG, Robinson argued that the officer searched the car before discovering the tampered-with ignition, [SAG at 36] but the record does not bear that out. He began *testifying* about the search before talking about the ignition, but the record is not clear about the sequence of events.

It also is unclear from the record whether backup officers had arrived before the search began or where Smith and Robinson were at the time. When Detective Clevenger arrived sometime around 5:30 to 6:00 p.m., Robinson was in the back of a patrol car.

[1 RP 112-13] There was no evidence presented regarding where the suspects were at the time the search began.

During the search, Doughty located a loaded handgun behind the passenger seat, determined that Smith had a felony record, and also learned that the gun had been reported stolen. [1 RP 41-43] Numerous other items were found, and because there was “a lot more evidence than what one trooper can deal with,” he called for a sergeant and more troopers. [1 RP 42]

At some point Doughty placed Robinson and Smith under arrest for possession of stolen property regarding the gun. [1 RP 46] As it happened, the driver of the blue Honda was mistaken and the Acura was not his, nor was it stolen. [1 RP 55-56, 119] A number of items in the car were traced to a burglary that had occurred the day before in Olympia. The testimony of the victims identifying the property is at 1 RP at 68-107.

IV. ARGUMENT.

A. ARIZONA V. GANT AND ITS APPLICATION TO PENDING CASES.

Arizona v. Gant was decided on April 21, 2009. It held that the police may search a vehicle incident to the arrest of a recent occupant, without a warrant, only when the person arrested is

unsecured and within reaching distance of the passenger compartment at the time of the search, or when there is reason to believe that the vehicle contains evidence of the crime of arrest. Gant, 129 S. Ct. 1723-24. Gant must be applied to cases which are not yet final. Griffith v. Kentucky, 479 W.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). The result is not an automatic reversal of any conviction based on evidence obtained in a search of a vehicle incident to arrest. Since Gant permits searches where a passenger is unsecured and within reaching distance of the vehicle, or if there is reason to believe that the vehicle contains evidence of the crime of arrest, the current case must be examined to determine if one or both of those conditions were met. The State maintains that the record here is insufficient to determine whether those factors existed, which underscores the reason for not permitting a search issue to be raised for the first time on appeal.

In addition, there is an entirely separate question as to whether suppression of the evidence is required where the search occurred prior to the Gant decision and was conducted pursuant to presumptively valid case law permitting exactly such a search. The State maintains that the federal good faith exception to the exclusionary rule permits this search under the Fourth Amendment,

and that Washington constitution, article I, § 7 also allows for a good faith exception..

B. ROBINSON SHOULD NOT BE PERMITTED TO CHALLENGE THE SEARCH FOR THE FIRST TIME ON APPEAL.

In State v. Kirwin, 165 Wn.2d 818, 203 P.3d 1044 (2009), an opinion issued less than a month before Gant was decided, this court concluded that Kirwin, who did not bring a suppression motion at trial, could challenge the search incident to arrest only if it was a “manifest error affecting a constitutional right.” Id., at 823, citing to other cases. It is appropriate to “preview” the merits of the argument to determine the likelihood of success. Id.

This court has previously held that a claimed error is not “manifest” if the facts necessary to evaluate the claim are not in the appellate record. State v. Kirkpatrick, 160 Wn.2d 873, 881, 161 P.3d 990 (2007). *See also* State v. Contreras, 92 Wn. App. 307, 314, 966 P.2d 915 (1998).

In July of 2009, Division I of the Court of Appeals addressed a similar issue in In re Pers. Restraint of Nichols, 151 Wn. App. 262, 211 P.3d 462 (2009). Nichols had been

convicted on drug charges after police had learned his name from looking at a motel registry. He did not bring any suppression issue in the trial court or on direct appeal, but did so in a personal restraint petition (PRP). While his appeal was pending, the Supreme Court decided State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007), which held unconstitutional the police practice of randomly checking motel registries for names of persons with outstanding warrants. The appeal was decided against him. In deciding the PRP, the Court of Appeals held that Nichols could not challenge the suppression issue because he did not raise it below.¹

A trial court cannot even begin to assess whether a search is unreasonable under article I, § 7 or the Fourth Amendment unless the underlying facts and the legal argument are brought to the court's attention through a motion to suppress. It would be unreasonable to view as constitutional error a trial court's failure to apply the exclusionary rule *sua sponte*.

Nichols, 151 Wn.App. at 271-72.

In August of 2009, Division II of the Court of Appeals reached a similar result on a direct appeal in State v. Millan, 151

¹ Nichols was a collateral review, and Gant would not apply to cases on collateral review because it is a clear break from past rulings. Teague v. Lane, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). Nevertheless, the language of the court in Nichols is instructive.

Wn. App. 492, 212 P.3d 603 (2009). *review granted* ___ Wn. 2d ___ (2010). Millan was removed from his vehicle during the investigation of a domestic violence report, secured in a patrol car, and eventually arrested for driving with a suspended license. His vehicle was searched incident to arrest, a pistol was located, and since Millan had a felony conviction, he was also arrested for first degree unlawful possession of a firearm. He did not move to suppress in the trial court. The Millan court concluded that the rule under both the Fourth Amendment and Washington constitution is that appellate courts do not consider issues raised for the first time on appeal. Id., at 497, 499. An appellant must show a manifest constitutional error, and “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” Id., at 499, citing to State v. McFarland, 127 Wn.2d 332, 333, 899 P.2d 1251 (1995). Citing to State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995), as well as several other cases, the Millan court reiterated that the failure to seek suppression in the trial court waives any error in admitting the evidence. Millan, 151 Wn. App. at 500.

Division II again reached the same result in State v. Nyegaard, ___ Wn. App. ___, ___ P.3d ___ 37829-9-II (Feb. 23,

2009). Nyegaard was arrested for use of drug paraphernalia as he got out of the passenger side of a vehicle. The vehicle was searched incident to arrest and more drugs, cash, several cell phones, and a glass pipe were located. Nyegaard moved to dismiss for lack of evidence, but did not challenge the search. Upon conviction and appeal, he then argued that the search was unconstitutional. The court, relying on Millan, refused to consider the challenge. [Slip Op. at 2-3]

On March 9, 2010, Division II issued an opinion in State v. Cardwell, No. 38684-4-II, refusing to consider a Gant challenge for the first time on appeal, citing to Millan, Nichols, and Mierz.

A different panel of Division II considered the same issue and reached a different conclusion in State v. McCormick, 152 Wn. App. 536, 216 P.3d 475 (2009), *petition for review deferred pending decisions in this consolidated case, as well as State v. Millan*, ___ Wn.2d ___ (2010). The McCormick court rejected the reasoning of Millan, finding that "justice demands that similarly situated defendants whose appeals are pending direct review deserve like treatment following a change in the law." McCormick, 152 Wn.App. at 540, citing to United States v. Johnson, 457 U.S. 537, 556 n. 16, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982). However, McCormick did

bring a suppression motion in the trial court, which was denied. McCormick, 152 Wn.App. at 539. While the court found it irrelevant whether she had or hadn't raised the issue below, McCormick would have been permitted to appeal the issue under Millan. The question of whether failure to challenge the search below waives a challenge on appeal was not before the McCormick court. The State agrees with the dissent in State v. Harris, 36565-1-II (Jan. 7, 2010), that McCormick's discussion regarding Millan is dicta. Harris, Slip Op. at 23 n.7.

An overlapping but slightly differently composed panel of Division II later decided State v. Harris. Harris was stopped because of a stop sign violation. He was arrested for driving with a suspended license, placed in a patrol car, and his car was searched incident to the arrest, where a revolver was found. He was charged with unlawful possession of a firearm in the first degree, did not move to suppress before trial, and was convicted. He challenged the search on appeal only under the Fourth Amendment. Slip Op. at 4 n. 4. A two-judge majority concluded that "[i]t is simply unfair, and a contradiction of the Supreme Court's retroactivity rule, to hold that an appellant cannot challenge a search made unlawful by intervening case law." Slip Op. at 11.

The court found that the record before it “present[ed] an issue of manifest constitutional error prompted by a change in the law.” Id.

The State maintains that McCormick and Harris underscore the reason that a challenge to a search should not be permitted for the first time on appeal in this case. McCormick did raise her challenge below, and thus the opinion doesn’t actually address the issue before it. Even if this court adopts the reasoning in Harris, that court found there was an adequate record for it to determine the constitutionality of the search. The fact pattern in all of these cases is much different from that in Robinson’s. Robinson was not stopped for a traffic violation such that it can reasonably be assumed that no evidence of the crime of arrest would be in the vehicle. Nor is it apparent from the record where he and Smith were at the time of the search. They were handcuffed, but that is all the record reflects. Had there been a hearing and the facts fully developed, it may be that this prong of the Gant test would be satisfied.

The trooper in Robinson’s case had probable cause to believe the Acura was stolen. The car was speeding, driving in the oncoming lane, ignoring stop signs, and at times traveling sideways. It was being pursued by another car, the driver of which

asserted that the Acura had been stolen from him. The ignition had been punched out. The trooper believed that the car was stolen. He held the suspects at gunpoint until they were handcuffed, something not done for gross misdemeanor arrests. He specifically arrested Smith for reckless driving and not theft of a vehicle,² but it cannot be ascertained from the record why he did so. As the law stood at the time, he needed only a valid arrest to search the car, and he may have decided to rely solely on a crime that was a lead pipe cinch. The fact that he did not immediately arrest for the theft of the car does not take away the fact that he had probable cause to do so. An arrest supported by probable cause does not become unlawful if the officer subjectively relies on, and announces, a different offense for which there is no probable cause. State v. Huff, 64 Wn. App. 641, 646, 826 P.2d 698 (1992). By the same rationale, an arrest on one of two potential charges does not destroy the probable cause for the other. Trooper Doughty reasonably believed the car to be stolen, and he would have had reason to believe that evidence of the crime, such as the tools used to punch out the ignition or evidence of ownership of the vehicle, would be found in it. The fact that while he had probable cause to

² Theft of a motor vehicle, RCW 9A.56.065.

arrest for theft of a vehicle he did not articulate that crime when he placed Smith under arrest does not take away from the fact that it was reasonable to believe the car would contain evidence of a crime for which he had probable cause to arrest. The State maintains that this would satisfy Gant.³

Based on the record in Robinson's case, there are insufficient facts for a reviewing court to determine for itself whether the requirements of Gant were met; in other words, there is no manifest error of constitutional magnitude. For this reason, a challenge to the search should not be considered for the first time on appeal. Reversing Robinson's conviction on this ground would go beyond the fairness of concern to the Harris court and hand Robinson a windfall. The State urges this court to follow the reasoning of Nichols, Millan, Nyegaard, and Cardwell, and the cases to which they cite, and hold that the search of a vehicle incident to arrest may not be raised for the first time on appeal, particularly where the record is insufficient. If this court does hold

³ The State recognizes that language in State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009) does not make it clear whether this court would permit the search for evidence of the crime of arrest if there is no threat of destruction or concealment. Id., at 395 ("Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.") The State presumes that the Patton and Gant holdings are equivalent.

that a Gant challenge can be brought for the first time on appeal, this matter should be remanded to the trial court for a reference hearing to determine the facts of the search, as the Harris court did. Slip Op. at 13.

C. A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD APPLY AND EVIDENCE OBTAINED IN RELIANCE ON PRE-GANT CASE LAW SHOULD NOT BE SUPPRESSED.

1. The Fourth Amendment does not require suppression

The exclusionary rule articulated by federal courts is a “judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect” by excluding evidence obtained in an illegal search. United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). In Michigan v. DeFillipo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), the court said:

[T]he purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

Id., at 38 n.3.

As recently as 2009, the United States Supreme Court held that exclusion is always a “last resort,” and follows only where it will deter future violations. Herring v. United States, ___ U.S. ___, 129 S. Ct. 695, 700, 172 L. Ed. 2d 496 (2009). It is not an individual right. Id. In State v. Riley, 62418-1-I (February 2, 2010), Division I of the Court of Appeals analyzed at length the federal good faith exception and concluded it can be applied to permit the admission of evidence obtained in a search conducted before Gant was decided. Slip Op. at 10.

2. Washington Constitution article I, § 7 does not require suppression.

Washington courts, interpreting article I, §7, have concluded that it provides greater protection than the Fourth Amendment. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Even so, the White court held that the exclusionary rule will be applied when “an individual’s right to privacy is unreasonably invaded.” Id., at 111-12. This court has considered the costs of applying the exclusionary rule. “We have little hesitation in concluding that these costs clearly outweigh the limited benefits which would be obtained from excluding the confession because of the illegal arrest.” State v. Bonds, 98 Wn.2d 1, 14, 653 P.2d 1024 (1982).

This court has held that searches or arrests conducted in reliance on statutes that were at the time presumed valid, but later found to be unconstitutional, do not require that the evidence obtained must be suppressed. State v. Potter, 156 Wn.2d 835, 842, 132 P.3d 1089 (2006); State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006). As recently as Kirwin, this court has assumed, without comment, that a search conducted incident to a lawful arrest was valid. Kirwin, 165 Wn.2d at 824. The Gant opinion acknowledged that New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) “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.” Gant, 129 S. Ct. at 1718.

The difference between most of these cases and Robinson’s is only that his involved long-accepted case law rather than an unchallenged statute. The State maintains that this makes no difference in the analysis of the exclusionary rule. The police should be entitled to rely on judicial opinions of the United States and Washington Supreme Courts to the same extent as they do on unquestioned legislation.

The court in Riley also examined the exclusionary rule through the lens of article I, § 7 and concluded that a good faith exception applies under the Washington Constitution when the search was valid up until the day Gant was decided. Riley, Slip Op. at 17. Suppressing the evidence would “not deter police misconduct and would further neither privacy rights nor judicial integrity.” Id.

3. Under the facts of this case, the trooper was relying on long-established pre-Gant case law and the evidence should not be suppressed.

In Robinson’s case, Trooper Doughty conducted the arrest and search as he should have under pre-Gant law. That the search incident to arrest was presumed valid is reflected in the fact that defense counsel did not bring a pre-trial suppression motion, counsel on appeal did not raise the issue, and the Court of Appeals dismissed Robinson’s SAG argument in four sentences. Slip Op. at 21. Because it was not seen as an issue in the court below, the parties had no reason to make a record of all the facts and circumstances that went into the trooper’s actions, and, as argued above, there is reason to believe that if a record had been made, the arrest would still have been constitutionally valid under Gant. Therefore, suppression will further none of the principles underlying

the exclusion rule. The trooper will not be deterred from future unlawful searches by suppressing this evidence. He will no longer conduct similar searches because Gant is now the law. Nor will it protect individual privacy rights from unreasonable government interference, deter the police from unlawfully obtaining evidence, or preserve the dignity of the judiciary, all goals of the exclusionary rule identified in Riley. Slip Op. at 13. When considering the costs versus those benefits, as discussed in Bonds, it is apparent that the State could lose a conviction that is based on overwhelming evidence.

V. CONCLUSION.

For the foregoing reasons, Robinson's challenge to the search of the vehicle in which he was a passenger should be rejected and his convictions affirmed.

Respectfully submitted this 10th day of March, 2010.



Carol La Verne, WSBA# 19229
Attorney for Respondent

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent on all parties or their counsel of record on the date below as follows:

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Carol L. LaVerne

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of March, 2010, at Olympia, Washington.


Chong McAfee