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NO. 38472-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DARRIN LOUTHAN,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey

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APPELLANT'S SUPPLEMENTAL BRIEF  
ADDRESSING GANT, PATTON, AND WINTERSTEIN

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A. SUMMARY OF ARGUMENT

Montesano police lacked authority of law to arrest Louthan. To the extent that the trial court relied on an alternative, hypothetical “reason” for the arrest that was not the actual reason to uphold the ensuing search, the trial court engaged in a species of “inevitable discovery” analysis. This is prohibited under article I, section 7.

Further, even assuming for the sake of argument that “possession of drug paraphernalia” was a valid reason to arrest Louthan, the evidence must still be suppressed because the State cannot show that the police believed the evidence seized from his car would be concealed or destroyed, and that they had these concerns at the time of arrest.

B. ARGUMENT

1. THE TRIAL COURT’S RELIANCE ON AN ALTERNATIVE THEORY TO UPHOLD THE ARREST THAT WAS NOT THE ARRESTING OFFICERS’ ACTUAL REASON VIOLATED ARTICLE I, SECTION 7 AS STATED IN *STATE V. WINTERSTEIN*.

Instead of ruling on the merits of Louthan’s challenge to his arrest for “possession of drug paraphernalia,” the trial court concluded the arrest could be upheld on an alternative ground that

the officers did not themselves cite as a reason for the arrest. Specifically, the court found that the officers could have arrested Louthan for use of drug paraphernalia, although they did not do so. RP 5-9. The court reasoned, “I don’t think it’s material that the officer didn’t make an actual arrest for that offense. He had probable cause to arrest for that offense.” RP 8. Similarly, on appeal the State has argued Louthan’s conviction should be upheld because “[p]robable cause for use of drug paraphernalia, possession of controlled substances, and driving under the influence existed at the time of [Louthan’s] arrest.” Br. Resp. at 11.

As noted in the Brief of Appellant, the trial court’s reasoning is flawed, as the officers could not have arrested Louthan for use of drug paraphernalia because that misdemeanor was not committed in the officers’ presence. Br. App. at 12-14; RCW 10.31.100. And whether probable cause for any other offense existed<sup>2</sup> is immaterial, because reliance on a speculative justification for the arrest that was not the actual reason is an end run around article I, section 7.

Louthan made this same argument in earlier briefing to this Court. Br. App. at 5-7, 12-13; Reply Brief at 16 (citing State v.

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<sup>2</sup> Louthan disputes that there was probable cause to arrest him for this or any other crime. See Reply Brief at 17-18.

O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003), and State v. Moore, 161 Wn.2d 880, 169 P.3d 469 (2007)). The Supreme Court's recent decision in State v. Winterstein, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, No. 80755-8 (December 3, 2009),<sup>3</sup> confirms that Louthan's argument is correct.

In Winterstein, noting article I, section 7's express focus on protecting individual privacy, the Court emphasized the narrow scope of any exceptions to the warrant requirement under article I, section 7. Winterstein at 11-14. Contrasting the "inevitable discovery" doctrine – which is valid under the Fourth Amendment – with the "independent source" doctrine, the Court stressed that under the "independent source" doctrine, "probable cause may exist based on legally obtained evidence; the tainted evidence, however, is suppressed." Id. at 14 (emphasis added). The "inevitable discovery" doctrine, however, is "necessarily speculative and does not disregard illegally obtained evidence." Id. at 15. Under the federal constitution, the doctrine permits evidence to be admitted if the State can "establish by a preponderance of the evidence that the information ultimately or inevitably would have

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<sup>3</sup> Citation to Winterstein shall be to the court's slip opinion, available at <http://www.courts.wa.gov/opinions/pdf/807558.opn.pdf>.

been discovered by lawful means.” Id. (quoting Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 1501, 81 L.Ed.2d 377 (1984)).

After analyzing the historically broad application of article I, section 7, the Court held that the federal doctrine is “incompatible with the nearly categorical exclusionary rule under article I, section 7.” Winterstein at 17. The Court held, “admitting evidence under the inevitable discovery doctrine would leave ‘no incentive for the State to comply with article I, section 7’s requirement that the arrest precede the search.’” Id. (quoting O’Neill, 148 Wn.2d at 592).

The Court’s reasoning is pertinent here. According to the theory endorsed by the trial court and urged by the State on appeal, it does not matter if Louthan’s arrest was illegal, so long as some trial or appellate judge can hypothesize a basis for the arrest that would have been lawful. But this result would leave no incentive for the State to comply with article I, section 7’s requirement that a valid custodial arrest precede the search. Winterstein at 16-17; O’Neill, 148 Wn.2d at 592.

Thus, even assuming there could have been some other reason for Montesano police officers to arrest Louthan besides “possession of drug paraphernalia,” such justification is only relevant if the officers in fact relied on upon this lawful reason. This

is the key distinction between the “independent source” doctrine, which, consistent with article I, section 7, presumes illegally obtained evidence will be suppressed, and the “inevitable discovery” doctrine, which is contrary to article I, section 7’s exclusionary rule. Under Winterstein, any post hoc speculation about hypothetical reasons for Louthan’s arrest violates article I, section 7.

2. EVEN ASSUMING THE ARREST WAS LAWFUL,  
THE SEARCH INCIDENT TO ARREST  
VIOLATED THE FOURTH AMENDMENT AND  
ARTICLE I, SECTION 7 UNDER GANT AND  
*PATTON*.

“[T]o establish the validity of a warrantless search, the State must show the search is justified under one of the carefully drawn exceptions to the warrant requirement.” State v. Patton, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ No. 80518-1, 2009 WL 3384578 at 3 (Oct. 22, 2009). “These exceptions are limited by the reasons that brought them into existence; they are not devices to undermine the warrant requirement.” Id.

In Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), the Supreme Court held that the Fourth Amendment permits police to search areas within an arrestee’s “immediate control,” “in order to remove any weapons [the arrestee]

might seek to use” and “in order to prevent [the] concealment or destruction” of evidence. 395 U.S. at 763. In Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and Patton, the United States Supreme Court and Washington Supreme Court recognized that law enforcement had come to regard the “search incident to arrest” as “a police entitlement rather than as an exception justified by the twin rationales of Chimel,” Patton, 2009 WL 3384578 at 7 (quoting Gant, 129 U.S. at 1718 (citation omitted)). Law enforcement had wrongly concluded that New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), permitted a search of a vehicle incident to an occupant’s arrest any time a custodial arrest was effected, without regard to the rationales that brought the exception into existence.

In Gant and Patton, both the United States and Washington Supreme Courts reiterated the narrow scope of the exception. Gant, 129 U.S. at 1723; Patton, 2009 WL 3384578 at 7. The Courts emphasized that under both the federal and state constitutions:

[T]he 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.

Patton, 2009 WL 3384578 at 7 (emphasis added); see also Gant, 129 S.Ct. at 1723-24.

Louthan did not pose a safety risk. The State may argue that there was a reasonable basis to believe that Louthan's car contained evidence related to the possession of drug paraphernalia; however, article I, section 7 would prohibit such a search absent proof that at the time of the search Louthan was unsecured and near the car. See Patton, 2009 WL 3384578 at 2 ("Officer safety and the risk of destruction of evidence of the crime of arrest are the reasons that brought this exception into existence." (citing State v. Ringer, 100 Wn.2d 686, 693-700, 674 P.2d 1240 (1983))). In Ringer, the Court held that under article I, section 7, in the absence of officer safety concerns or exigent circumstances making the obtaining of a warrant impracticable, police are prohibited from searching a vehicle incident to a recent occupant's arrest. Ringer, 100 Wn.2d at 701-02. In disavowing the plurality opinion in Stroud, the Court in Patton restored the narrow confines of the "search incident to arrest" exception under Ringer. Patton, 2009 WL 3384578 at 4-5.

Even if there were an automobile exception in Washington, Gant and Patton make clear that this is only the beginning of the inquiry. The State must show that this evidence “could be concealed or destroyed, and that these concerns exist at the time of the search.” Patton, 2009 WL 3384578 at 7.

There is no basis whatsoever to conclude that the officers searched Louthan’s vehicle because they were concerned evidence might be concealed or destroyed. Rather, it is plain that the officers were simply conducting a routine search incident to arrest, which they mistakenly believed was permissible under Belton and Stroud. Indeed, this is likely why the police chose to effect a full custodial arrest of Louthan, rather than issuing him a citation for his misdemeanor offense. Gant and Patton establish such a search was never constitutional. Therefore, even if this Court were to somehow find the arrest was lawful, the evidence still must be suppressed.

C. CONCLUSION

Applying Winterstein, Gant, and Patton, this Court should hold that the search of Louthan's vehicle incident to his arrest violated article I, section 7, and the Fourth Amendment. Louthan's conviction should be reversed.

DATED this 14<sup>th</sup> day of December, 2009.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Susan F. Wilk", with the number "25228" written to the right of the signature.

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 38472-8-II
	)	
DARRIN LOUTHAN,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF DECEMBER, 2009 I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF DECEMBER, 2009.

X \_\_\_\_\_ 

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