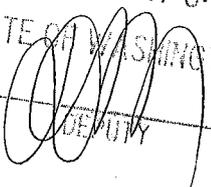


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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

**COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DARRIN L. LOUTHAN

Appellant.

No. 38472-8-II

**RESPONDENT'S
SUPPLEMENTAL BRIEFING**

I. IDENTITY OF MOVING PARTY

COMES NOW the State of Washington, Respondent, by and through Deputy Prosecuting Attorney Edgar M. Korzeniowski, and responds to the Court's Order of December 4, 2009 for supplemental briefing discussing the applicability of *Arizona v. Gant*, 129 S.Ct 1710, 556 U.S. ___, 173 L.Ed. 2d 485 (2009), *State v. Patton*, No. 80518-1, 2009 WL 3384578 (Wash.. Oct. 22, 2009), and *State v. Winterstein*, No. 80755-8, 2009 WL 4350257 (Wash. Dec. 3, 2009).

II. STATEMENT OF RELIEF SOUGHT

The State requests that the Court affirm the Defendant's conviction for reasons stated in the Respondent's brief of June 11, 2009, and this supplemental briefing.

III. STATEMENT OF CASE

The Defendant was stopped for a moving violation (i.e. failing to obey traffic control device). Officer Dwayne Hayden observed the Defendant to have constricted pupils that did not react to light. He also observed that the Defendant's speech was very slurred. There was no odor of alcohol on the Defendant, and the Defendant denied consuming the same. When Officer Hayden requested the Defendant to produce his and insurance, the Defendant produced a 2006 tax return and insisted that it was proof of his insurance. It appeared to Officer Hayden that the Defendant was under the influence of a controlled substance.

While speaking with the Defendant, Officer Hayden also observed an orange juice container, with a tube protruding out of the side that was held by electrical tape, behind the driver's seat. The officer believed, based on his training and experience, that this contrivance was drug paraphernalia.

The Defendant was asked to leave his vehicle (which he was the registered owner of), and was placed into custody. The Defendant was read his *Miranda* rights. A search of the vehicle incident to arrest occurred. The search revealed methamphetamine, heroin, and other drug paraphernalia.

Charges arising from the entire episode were bifurcated into two different courts. The misdemeanor matters were cited out in municipal court and the felony information was filed in superior court as follows: Possession of Drug Paraphernalia in violation of Montesano Municipal Code 8.22.040 under Montesano Municipal Court No. 16789, Driving under the Influence of Drugs under Montesano Municipal Court Cause No. C16790, and Possession of Methamphetamine under Grays Harbor Co. Superior Court Cause No. 07-1-630-6.

The Defendant challenged the constitutionality of the municipal statute criminalizing mere drug possession (MMC 8.22.040). The Court declined to entertain the Defense motion on constitutionality grounds, and found that there was probable cause to arrest under Use of Drug Paraphernalia (RCW 69.50.412). The Defendant lost his 3.6 suppression motion and was found guilty on June 24, 2008 at a stipulated facts trial.

He subsequently plead guilty in Montesano Municipal Court for Possession of Drug Paraphernalia on June 24, 2008.

IV. ARGUMENT

A. Officer Hayden had Probable Cause to Arrest the Defendant for Use of Drug Paraphernalia and Driving under the Influence of Drugs.

The Defendant stipulated to probable cause for arrest for Use of Drug Paraphernalia under RCW 69.50.412 at his stipulated facts trial. The Defendant's level of impairment based on the officer's training and experience could not be accounted but for being under the influence of intoxicants. Officer Hayden observed the Defendant to be in possession of drug paraphernalia.

Officer Hayden could have also arrested the Defendant for Driving under the Influence of Drugs. The validity of drugs based DUI arrests and prosecution pre-dates the DRE program over 70 years.¹ The State of Washington State did not begin to operate its DRE program until

¹ Driving 'under the influence' of 'any narcotic drug' was criminalized as early as 1927. Laws of 1969, ch. 1 sec. 3; Laws of 1965, Ex.Sess., ch. 155, sec. 60; Laws of 1961, ch. 12, sec. 46.56.010; Laws of 1927, ch. 309, sec. 51. The legislature expanded 'under the influence' to 'any drug' beginning in 1975. Laws of 1975, 1st Ex.Sess., ch. 287, sec. 1. It was eventually codified under RCW 46.61.502 in 1979.

1997 and it was operating in only five counties by late 1999.² The validity of arrests for drug-based DUIs for more than 70 years did not depend on compliance with a then non-existent protocol. Instead, like any other crime, whether probable cause for arrest existed depended on whether a trained and experienced officer had knowledge of sufficient circumstances to create a reasonable belief that a suspect probably had been driving while under the influence of some drug. Once the officer arrested that person, further testing, examination, or interrogation might provide the specifics of what drug, but the officer need not have that knowledge to make a valid arrest or to pursue a blood test.³ Requiring an officer to determine category of drug impairment before the arrest puts the car before the horse.

B. The Search of the Defendant's Vehicle was Reasonable because the Vehicle Contained Evidence of the Crime of Arrest that Could be Concealed or Destroyed.

For purposes of the case at bar, *Patton* and *Gant* define the limitations in which an officer can search a vehicle incident to arrest in

² *State v. Baity*, 140 Wn.2d at 5, 991 P.2d 1151 (2000).

³ See *State v. Baldwin*, 109 Wn. App. 516, 524-25, 37 P.3d 1220 (2001), *review denied*, 147 Wn.2d 1020 (2002). This is a notable post-*Baity* case because it was a drugs based DUI prosecution consisting of non-DRE testimony and a medical professional discussing the effects of amitriptyline on the body.

the interests of preserving evidence.⁴ They collectively stand for the proposition that nexus must exist between the crime of arrest, the arrestee, and the vehicle. This Court published an opinion in part, two weeks after *Patton* that is directly on point. The case is called *State v. Snapp*, No. 37210-0, 2009 WL 3720658 (Wash. Ct. App. Nov. 9, 2009).

Mr. Snapp was initially stopped for a moving violation. The officer requested the Mr. Snapp's driver's license, registration, and proof of insurance. The officer observed Mr. Snapp to be fidgety, restless, quick, and jerky. The officer also observed a plastic bag with white powder in the glove box while the Defendant was looking for vehicle registration. It appeared to the officer, based on his training and experience that Mr. Snapp was under the influence of drugs. The officer asked Mr. Snapp whether there were any drugs or paraphernalia in the car, and Mr. Snapp said there was a meth pipe underneath the driver's seat. The meth pipe was retrieved, and Mr. Snapp was subsequently arrested for use of drug paraphernalia. A search of the car revealed a folder containing among other things credit cards and identification

⁴ *Winterstein* concerned the legal standard for warrantless searches of residences of probationers on community custody. The Supreme Court held probable cause is the correct legal standard and not reasonable suspicion. The case at bar is legally and factually distinct. It does not involve a search of a probationer or his residence. The Defendant was in a vehicle which was registered to him, and he was the only occupant.

documents in other peoples' names. The Defendant was ultimately charged with multiple counts of identity theft.

Mr. Snapp had a 3.6 suppression motion and lost. He entered in a *Newton* plea, and as part of his plea agreement, was allowed to appeal the suppression issue. This Court allowed Mr. Snapp to continue his appeal because there was a notation to that effect on his plea agreement. This Court affirmed that Mr. Snapp's odd behavior, plastic baggie containing white substance, and the location of the pipe provided reasonable suspicion to arrest Mr. Snapp. This Court ultimately upheld the search under *Gant* because the officer searched for evidence that was related to the crime for which Mr. Snapp was arrested.

The facts in the case at bar substantially mirror that of *Snapp*. There was probable cause to arrest the Defendant for use of drug paraphernalia, which the Defendant stipulated to for the purposes of the stipulated fact trial. There was probable cause to arrest the Defendant for municipal violation of possession of drug paraphernalia to which the

Defendant plead guilty to.⁵ There was probable cause to arrest the Defendant for Drugs DUI.

The search flowed from crimes of which probable cause existed and were subsequently charged. All of these crimes contained evidence that could have been concealed or destroyed.

V. CONCLUSION

The Court should affirm the Defendant's for the foregoing reasons.

RESPECTFULLY SUBMITTED this 14th day of December,
2009.

H. STEWARD MENEFFEE
Prosecuting Attorney
For Grays Harbor County

BY:


EDGAR M. KORZENIOWSKI
Deputy Prosecuting Attorney
WSBA #35118

⁵ It is notable that the Defendant would like to have it both ways. He plead guilty to the very same municipal statute in municipal court which arose out of the same criminal conduct as the felony drug possession charge, but maintains that this very statute is unconstitutional for purposes of felony drug possession charge. The Defendant should be precluded from appealing on the constitutionality of the municipal statute in light of *Snapp*. He did not preserve a right to appeal the constitutionality of the same in municipal court in his plea agreement.

DECLARATION

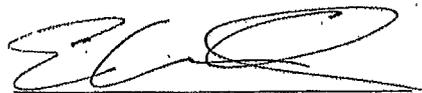
I declare under penalty of perjury of the laws of the State of Washington that on December 14, 2009, I caused to be served in the manner indicated a true and accurate copy of the foregoing Supplemental Response by U.S. Mail (postage pre-paid):

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Washington Appellate Project
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Seattle, WA 98101-3635

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Clerk of the Court
WA State Court of Appeals
950 Broadway, Ste. 300
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