

86399-7

No. 290565

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Appellant,

vs.

LISA ANN BYRD,

Respondent.

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**FILED**  
AUG 23 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

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STATE OF WASHINGTON'S  
PETITION FOR DISCRETIONARY REVIEW

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**A. IDENTIFY OF PETITIONER**

The Petitioner is the plaintiff/appellant State of Washington.

**B. COURT OF APPEALS DECISION**

Petitioner seeks review of the Court of Appeals [Division III] decision terminating review filed on July 19, 2011, in which the court affirmed the decision and judgment of dismissal entered by the Yakima County Superior Court. A copy of the decision is attached hereto as Appendix A.

**C. ISSUES PRESENTED FOR REVIEW**

Did the Court of Appeals err when it affirmed the trial court's order suppressing evidence and dismissing one count of possession of a controlled substance, based upon a search incident to arrest of defendant Lisa Ann Byrd's purse?

The issue raised on appeal dealt with whether the search of the purse, which was located on the defendant's

lap at the time of her arrest for possession of stolen property, and while she was seated within a motor vehicle, was unconstitutional in light of Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), and its progeny.

The State submits that the court should grant the petition for review because the decision of the Court of Appeals is in conflict with the decision of the State Supreme Court in State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992), as well as with a prior decision of the Court of Appeals in State v. Whitney, 156 Wn. App. 405, 232 P.3d 582 (2010), and further, preexisting case law supports a warrantless search of the purse for evidence of the offense of arrest.

Further, the decision below specifically draws into question the scope of a valid search incident to arrest, a significant question of constitutional law. RAP 13.4(b)

**D. STATEMENT OF THE CASE**

While on patrol on the evening of November 17, 2009, Officer Jeff Ely of the Yakima Police Department conducted a traffic stop of a maroon Honda Civic. He had determined that the license plate on the Honda was registered to a different vehicle, an Acura Integra. He was further informed by his dispatcher that the owner of the Acura reported that the plates had been stolen. (RP 4-5)

A male individual who had been driving the Honda indicated that the front seat passenger owned the car. She was identified as Lisa Ann Byrd. (RP 5) Officer Ely took Ms. Byrd into custody for possession of stolen property. As he contacted her, the officer observed that she had a purse on her lap, and her hands were on the purse. (RP 5-6) As she was removed from the vehicle, the officer took the purse out of her lap, and placed it outside the vehicle on the ground. He wanted to make

sure that it was out of her control "because purses contain dangerous things to us". (RP 6)

After both the driver and Ms. Byrd were secured in a patrol vehicle, Officer Ely returned to the purse and searched it for any weapons or contraband "because it was coming with her to the jail because I had her under arrest for possession of stolen property." (RP 6-7)

Inside the purse, the officer found items he recognized to be contraband: glass pipes and white baggies containing a white crystalline substance he recognized as methamphetamine as a result of his training. (RP 7)

Byrd was charged with a single count of possession of a controlled substance, methamphetamine, under Yakima County Superior Court cause number 09-1-02126-6. (CP 38)

She moved to suppress evidence obtained as a result of the search of her purse. (CP 33-37) After a hearing, the court granted the motion and suppressed the

evidence, concluding that the search was unlawful under Gant and Valdez, and that the inevitable discovery doctrine did not apply with respect to what would have been an impound inventory search. (CP 7-10) The case was dismissed. (CP 10) The State timely appealed the suppression order and dismissal. (CP 2-6) The Court of Appeals affirmed.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

1. **The search of the purse was a valid search of Ms. Byrd's person incident to arrest, for evidence of the offense of arrest, and is not affected by *Gant*.**

Under both the Washington and United States Constitutions, a warrant is ordinarily required before officers may conduct a search of a person or place. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). There are a number of narrowly drawn exceptions to the warrant requirement. Id., 165 Wn.2d at 511.

The issue here was decided by the Court of Appeals solely under the Fourth Amendment, which provides:

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.

U.S. Const. Amendment IV

The United States Supreme Court has held that incident to the arrest of a suspect, the Fourth Amendment permits police officers to conduct a warrantless search of the area under a suspect's immediate control into which a suspect might reach to either grab a weapon or to conceal or destroy evidence. Chimel v. California, 395 U.S. 752, 763-66, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). The court stated that its holding was:

Entirely consistent with the recognized principle that, assuming the existence of

probable cause, automobiles and other vehicles may be searched without warrants "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id., at 764, n. 9 (citations omitted)

In New York v. Belton, the court held that where a police officer has made a lawful custodial arrest of the occupant of a vehicle, the officer may undertake a search of the passenger compartment, without violating the Fourth Amendment, as a contemporaneous incident of arrest. Belton, 453 U.S.454, 461, 69 L.Ed.2d 768, 101 S.Ct. 2860 (1981).

Belton was cited by the Washington Supreme Court in State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992). In that case, the court held that a search of the defendant's fanny pack, some 9-17 minutes after he was handcuffed and taken into custody, was reasonable where the arrestee was wearing the fanny pack just before his

arrest, and the search was contemporaneous with the arrest. Id., at 676.

The Smith court applied the two-part test found in Belton, namely that a search incident to arrest is valid under the Fourth Amendment: "(1) if the object searched was within the arrestee's control when he or she was arrested; and (2) if the events occurring after the arrest before the search did not render the search unreasonable." Id., at 681. The court went on to determine that the defendant was in possession of the fanny pack immediately before his arrest, and that the officer acted reasonably in light of the fact that the defendant disobeyed her commands and attempted to run away. Id., at 682-83.

This Court again applied Belton to facts involving a purse in State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989). There, the defendant argued that a search of her purse after she was secured in a patrol car was

unconstitutional, in that there was no longer any danger presented to the officers or the preservation of the evidence. The Court held that the search was not unreasonable since the defendant was not removed from the scene, and the search was close on the heels of the arrest. Id., at 397.

In 2009, the United States Supreme Court issued its opinion in Arizona v. Gant, \_\_\_ U.S. \_\_\_, 29 S.Ct. 1710, 173 L. Ed. 2d 485 (2009), significantly limiting the ability of law enforcement to conduct a warrantless search of a vehicle incident to arrest of an occupant. Such searches are limited to searches of a vehicle incident to arrest under the emergency exceptions for officer safety or to prevent the destruction of evidence where the occupant of the vehicle is handcuffed and secured in a patrol car. Also, the decision added what it referred to as a new exception to the warrant requirement

permitting officers to search a vehicle for evidence of the  
“offense of arrest”. Id., 129 S. Ct. at 1723.

A similar analysis under the Washington State  
Constitution was adopted subsequently in State v.  
Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) and State  
v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009):

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.

Id., at 394-95.

Neither Patton nor Valdez specifically include the  
“offense of arrest” doctrine applied in Gant, but it is not  
precluded, either. Additionally, neither Patton nor  
Valdez afforded an opportunity for application of that  
doctrine, as both defendants were arrested on outstanding  
warrants.

The general exception for search incident to arrest has long been recognized, and has historically been formulated into two distinct propositions. First, search of a person by virtue of lawful arrest, and second, search of the area within the control of the arrestee. United States v. Robinson, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). The first is a search incident to arrest for evidence of the crime of arrest, the second is based upon exigent circumstances.

One of the early cases in Washington, describes the "crime of arrest" doctrine in this manner:

It has always been held that a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from him any evidence tending to prove the crime with which he is charged. If a search may be made of the person or clothing of a person lawfully arrested, then it would follow that a search may also be properly made of his grip or suit case, which he may be carrying. From this it seems to us to follow logically that a similar search, under the same circumstances, may be made of the

automobile of which he has possession and control at the time of his arrest. This is true because the person arrested has the immediate physical possession, not only of the grips or suit cases which he is carrying, but also of the automobile which he is driving and of which he has control.

State v. Hughlett, 124 Wash. 366, 370, 214 P. 841 (1923)

Therefore, preexisting case law in the State of Washington interpreting the "crime of arrest" doctrine would alone dictate a result different from that reached by the Court of Appeals. The officer here removed the purse at the same time he removed Ms. Byrd from the vehicle, so she was in possession of it and in control of it, similar to the fanny pack in Smith. The officer had arrested her for possession of stolen property, and the search of the purse shortly thereafter was reasonable.

While Gant and its progeny may have restricted law enforcement's ability to search a *vehicle*, the analysis provided by Smith, and the doctrine of "crime

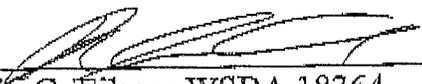
of arrest” remains vital where the search was of an item which was in the possession of the *person* arrested.

Additionally, the Court of Appeals has previously held that it would not extend the principles of Gant to a search of a person. State v. Whitney, 156 Wn. App. 405, 408-09, 232 P.3d 582 (2010). While the facts in Whitney involve a bottle of pills retrieved from the clothing of an arrested driver, there is an apparent conflict with the result reached here where the purse in question was on Ms. Byrd’s person, and the practical effect of the decision is indeed to expand the reach of Gant beyond vehicle searches.

**F. CONCLUSION**

The Court should grant the State of Washington’s Petition for Review, for the reasons outlined above.

Respectfully submitted this 18<sup>th</sup> day of August, 2011.



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Kevin G. Eilmes WSBA 18364  
Deputy Prosecuting Attorney  
Attorney for Appellant

APPENDIX - A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 29056-5-III

Appellant,

Division Three

v.

LISA ANN BYRD,

PUBLISHED OPINION

Respondent.

Kulik, C.J. — We recently held in *State v. Johnson*<sup>1</sup> that the controlling principles laid out in the United States Supreme Court's opinion in *Arizona v. Gant*<sup>2</sup> applied to the search of a vehicle incident to arrest but not to the search of a purse incident to arrest. We now conclude that we were wrong. Here, the defendant sat handcuffed in a patrol car while police searched her purse. The trial judge suppressed the drug evidence found in her purse based on *Gant*. We affirm that decision and the judgment dismissing the prosecution.

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<sup>1</sup> *State v. Johnson*, 155 Wn. App. 270, 281, 229 P.3d 824, review denied, 170 Wn.2d 1006 (2010).

<sup>2</sup> *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009).

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*State v. Byrd*

#### FACTS

Yakima Police Officer Jeff Ely stopped a Honda Civic for using stolen license plates. Officer Ely arrested the driver on an outstanding warrant. The driver told the officer that the car belonged to the passenger, Lisa Byrd.

Officer Ely approached Ms. Byrd. She was sitting in the front passenger seat with a purse on her lap. Officer Ely ordered Ms. Byrd out of the car. He removed the purse from her lap and placed it on the ground outside the car. He arrested Ms. Byrd for possession of stolen property, handcuffed her, and put her in a patrol car. He then searched Ms. Byrd's purse and found methamphetamine and glass pipes with drug residue.

Ms. Byrd was charged with possession of a controlled substance. She moved to suppress the drug evidence, arguing that the search of her purse violated *Gant* and *State v. Valdez*.<sup>3</sup> The trial court concluded that the search incident to arrest exception did not authorize the warrantless search of Ms. Byrd's purse. It suppressed the drug evidence and dismissed the charge against Ms. Byrd. The State appeals the suppression ruling.

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<sup>3</sup> *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).

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*State v. Byrd*

#### DISCUSSION

The State relies on our recent decision in *Johnson* for the proposition that *Gant* does not apply here. In *Johnson*, we indeed held that *Gant* controls the search of a vehicle incident to arrest but not the search of a purse incident to arrest. *Johnson*, 155 Wn. App. at 281. We now conclude that we were wrong.

In *Johnson*, the defendant was stopped for driving with a suspended license. *Id.* at 274. She got out of the car with her purse in hand. *Id.* Police arrested, handcuffed, and placed her in a patrol car. The arresting officer then searched her purse and found methamphetamine. *Id.* The defendant's suppression motion was denied, and she was convicted of possession of a controlled substance. *Id.* at 276. She appealed and urged us to reverse based on the holding in *Gant*. *Id.* at 281. We concluded that *Gant* did not apply because it "applies to warrantless searches of vehicles incident to arrest." *Id.* We concluded that *State v. Smith*,<sup>4</sup> a 1992 Washington Supreme Court case involving the search of a fanny pack incident to arrest, applied and that the search of the defendant's purse was proper under *Smith*. *Johnson*, 155 Wn. App. at 282.

*Smith*, however, is based on a seminal case on the issue of a warrantless search of

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<sup>4</sup> *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992).

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*State v. Byrd*

a vehicle incident to arrest—*New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). *Smith* concluded that *Belton* eliminated the “requirement that a search incident to arrest be justified by separate exigent circumstances.” *Smith*, 119 Wn.2d at 680. It states, “*Belton* ruled that officers who have made a lawful arrest of a car occupant may search any container found within the passenger compartment of that automobile.” *Smith*, 119 Wn.2d at 680. *Smith* then declared that, “[p]ursuant to *Belton*, a search incident to arrest is valid under the Fourth Amendment: (1) if the object searched was within the arrestee’s control when he or she was arrested; and (2) if the events occurring after the arrest but before the search did not render the search unreasonable.” *Id.* at 681. The *Smith* court applied this test to the facts before it and held that the search of a secured arrestee’s fanny pack was reasonable where the arrestee was wearing the fanny pack just before his arrest and the search was contemporaneous with the arrest. *Id.* at 676.

But in 2009, the United States Supreme Court in *Gant* rejected the well-accepted interpretation that *Belton* authorizes the search of a vehicle incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the inside of the vehicle. *Gant*, 129 S. Ct. at 1719. The Court reaffirmed that the search incident to arrest exception “derives from interests in officer safety and evidence preservation.” *Id.* at 1716. It then narrowed the scope of the search incident to arrest exception to include

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only an arrestee's person and the area within his or her immediate control, which is defined as "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)). It noted, "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 129 S. Ct. at 1716. *Gant*, therefore, limits *Belton*, in relevant part, to authorizing the "search [of] a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 1719.

In short, the test announced in *Smith* and applied in *Johnson* is based on a rejected interpretation of *Belton*; an interpretation that *Gant* overruled. We are bound by *Gant*'s interpretation of *Belton*. *Valdez*, 167 Wn.2d at 780 (Johnson, J., concurring). And, while the State argues that *Gant* should not apply because it involved the search of a vehicle incident to arrest, *Gant* and *Belton* simply applied the general rules of the search incident to arrest exception set out in *Chimel* to the automobile context. A search incident to an arrest is a search incident to an arrest whether the object searched is a car or a purse.

*Chimel* did not involve the search of a vehicle. And it "continues to define the

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boundaries of the [search incident to arrest] exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant*, 129 S. Ct. at 1716.

Under *Chimel*, then, the search incident to arrest exception permits an officer to perform a warrantless search of an arrestee and the area within his or her immediate control when an arrest is made. *Chimel*, 395 U.S. at 762-63. This type of warrantless search is justified only by interests in officer safety and the preservation of evidence. *Id.* But such a search is unreasonable where the interests justifying it are absent. *Id.* at 768. That is, an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search. *Gant*, 129 S. Ct. at 1719; *Chimel*, 395 U.S. at 763-64, 768.

Here, Ms. Byrd was secured in a patrol car when her purse was searched. She had no way to access the purse at that time. And the arresting officer was not concerned that she could access a weapon or destroy evidence. The justifications for the search incident to arrest exception, then, did not exist here. The exception did not apply. And the warrantless search of Ms. Byrd's purse violated the Fourth Amendment.

We affirm the trial court's order suppressing the fruit of the search and the

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*State v. Byrd*

judgment dismissing the prosecution.

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Kulik, C.J.

I CONCUR:

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Sweeney, J.

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Brown, J. (dissenting) — Lisa Byrd was sitting in the passenger side of her car when Officer Jeff Ely approached to arrest her for investigation of the stolen license plate on her car. Ms. Byrd's purse was in her lap. Officer Ely ordered her out of the car and removed her purse from her lap. After he arrested her and placed her in a patrol car, he searched the purse for contraband and weapons and found contraband. I do not see how this violates *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710, 173 L. Ed. 3d 485 (2009) or the principles we enunciated in *State v. Johnson*, 155 Wn. App. 270, 229 P.2d 824, *review denied*, 170 Wn.2d 1006 (2010).

Certainly, under *Gant*, the purse was within Ms. Byrd's reach and could even be described as on her person, not only at the stop but at the time of arrest. This case, like *Johnson*, is much like *State v. Smith*, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992), where Mr. Smith's fanny pack fell off during the arrest process and was determined to have been lawfully seized and searched. Here, automobile registration evidence may have been found in Ms. Byrd's purse bearing on the stolen license plates. The purse search was temporally as "contemporaneous" in Ms. Byrd's case as was the search in

*Smith.* After all, an officer cannot perform all arrest functions simultaneously.

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I would reverse the order suppressing Ms. Byrd's purse, and I see no reason to disapprove *Johnson*. Accordingly, I respectfully dissent.

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Brown, J.

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

STATE OF WASHINGTON,	)	NO. 290565
	)	
Plaintiff/Appellant,	)	SWORN STATEMENT OF SERVICE
	)	BY MAIL
vs.	)	
	)	
LISA ANN BYRD,	)	
	)	
Defendant/Respondent.	)	
	)	

I, Elaine Chartrand, state that I am and was at the time of the service of the Petition For Discretionary Review, herein referred to, a citizen of the United States, residing at Yakima, Yakima County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

That on the 18th day of August, 2011, I served upon Susan Marie Gasch, P O Box 30339, Spokane, WA 99223-3005, Attorney for Defendant/Respondent a copy of the aforementioned instrument, by putting the same, enclosed in sealed envelopes, postage paid, into the post office.

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

  
 Elaine Chartrand  
 August 18, 2011  
 at Yakima, WA