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No. 29056-5-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

FILED
JAN 11 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

STATE OF WASHINGTON,
Appellant,

vs.

LISA ANN BYRD,
Respondent.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Blaine G. Gibson, Judge

BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in finding that a purse belonging to the defendant, Lisa Ann Byrd, would have been subject to inventory while Ms. Byrd was being booked. CP 9, Findings of Fact XVI, XVIII, XIX.

2. The trial court erred in concluding that the officer's search of the purse was not lawful as a search incident to arrest, pursuant to Arizona v. Gant, (citation omitted) and State v. Valdez, (citation omitted). CP 9, Conclusions of Law I-V.

3. The trial court erred, as a matter of law, in granting a defense motion to suppress evidence of possession of a controlled substance. CP 10.

(Brief of Appellant, p. 1)

B. RESPONDENT'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Was the suppression motion properly granted where Ms. Byrd was arrested without probable cause?

2. Are Gant and Valdez applicable because the purse was associated with the vehicle at the time of Ms. Byrd's arrest?

3. Is State v. Johnson inapplicable where Ms. Byrd was arrested in a car subject to the safeguards of Gant and Valdez, and she did not remove her purse from the protected area?

C. STATEMENT OF THE CASE

Yakima Police Department Officer Jeff Ely stopped a car based on information that its license plates might have been stolen from another car. Findings of Fact I, II at CP 9; RP 12. Prior to contacting the occupants, the officer checked the Vehicle Identification Number on the dash by using a flashlight. RP 14. The driver was arrested for an outstanding warrant and secured in the officer's police car. Findings of Fact III, IV, V, IX at CP 9; RP 15. The driver indicated that the front seat female passenger owned the car. Finding of Fact V at CP 9.

Based on the driver's statement that the car belonged to the female passenger, Officer Ely intended to arrest her for possession of stolen property. RP 5, 13. The officer approached the passenger, who was seated with her hands on top of the purse in her lap. Finding of Fact VI at CP 9; RP 10, 15--16. Officer Ely removed the purse from the female's lap and placed it nearby on the ground outside the car. Findings of Fact VI, VII at CP 9; RP 6, 10, 17. The officer ordered the female out of the car, arresting her for possession of stolen license plates. Finding of Fact VI at CP 9; RP 5, 7, 11. Officer Ely did not ask the passenger for identification at the time he arrested her and ordered her out of the car. RP 15--16.

Officer Ely then got the passenger out of the car. Finding of Fact VIII at CP 9; RP 17. While removing her from the car, Office Ely couldn't remember if he asked the passenger whether the car was in fact her car. RP 15. The officer handcuffed the passenger, and she was placed in a second officer's police car located about 20 feet away. Findings of Fact VIII, IX at CP 9; RP 6, 8. At this time, the second officer identified the passenger as the defendant, Lisa Byrd. RP 5-6, 15-16.

Officer Ely returned to the purse, and opened it and searched it. Ms. Byrd did not give the officer permission to search the purse. At the time of the search, the purse did not present any danger to the officers and there was no information that the purse contained evidence of a crime or that anything in the purse could be destroyed. At no time would the arrested parties have been able to access the purse. Findings of Fact X, XII, XIII, XV, XVII at CP 9. Officer Ely found Ms. Byrd's ID in the purse. RP 8, 18. The officer searched the purse because Ms. Byrd was under arrest. RP 18.

Officer Ely opened a closed eyeglasses container inside the purse and found a substance and residue on some glass pipes that he suspected was methamphetamine. Finding of Fact XIV at CP 9. Police searched the vehicle after searching the purse, but found nothing of interest. RP 16.

Ms. Byrd was charged with possession of a controlled substance, methamphetamine. CP 38. She moved to suppress evidence obtained as a result of the search of her purse. CP 22--37. After a hearing, the court granted the defense motion and suppressed the evidence. The court concluded that the search was unlawful because although the facts fall slightly outside of Gant and Valdez, the search was not justified as a search incident to arrest and no other exceptions to the requirement of a search warrant applied. CP 8, 10. The court granted the state's motion to dismiss the charge without prejudice. CP 10.

D. ARGUMENT

1. The suppression motion was properly granted where Ms. Byrd was arrested without probable cause.

The suppression motion could properly have been granted on the basis of lack of probable cause to arrest. While Ms. Byrd did not raise this specific issue before the trial court, she did move to suppress evidence gained by the illegal seizure and search of her purse and never waived her right to directly attack the legality of the arrest. *Cf. State v. Trujillo*, 153 Wn. App. 454, 459, 222 P.3d 129 (2009).

Searches and seizures must be supported by probable cause whether or not formal arrest or search by way of warrant has been made.

Dunaway v. New York, 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, 60 L.Ed.2d 824 (1979). An arrest either "with or without a warrant must stand upon firmer ground than mere suspicion." Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 413, 9 L.Ed.2d 441 (1963). The arresting officer must instead possess "probable cause--evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed" (Wong Sun, 371 U.S. at 479, 83 S.Ct. at 413, quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925)) and that the person to be arrested has committed the crime. State v. Walker, 157 Wn.2d 307, 319, 138 P.3d 113 (2006).

"Probable cause 'boils down, in criminal situations, to a simple determination of whether the relevant official, police or judicial, could reasonably believe that the person to be arrested has committed the crime.' " State v. Fisher, 145 Wn.2d 209, 220 n. 47, 35 P.3d 366 (2001) (quoting State v. Klinker, 85 Wn.2d 509, 521, 537 P.2d 268 (1975)). Probable cause is determined by the facts and circumstances " 'within the officer's knowledge at the time of the arrest.' " State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626 (1989), *rev. denied*, 114 Wn.2d 1011, 790 P.2d 168 (1990)(quoting State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979)). Probable cause cannot be supported by information police gain

following an arrest. *See Rios v. United States*, 364 U.S. 253, 261-62, 80 S.Ct. 1431, 1436-37, 4 L.Ed.2d 1688 (1960); *Henry v. United States*, 361 U.S. 98, 103, 80 S.Ct. 168, 171-72, 4 L.Ed.2d 134 (1959).

In the context of this case, "probable cause" means cause to believe the stopped car bore stolen license plates and Ms. Byrd possessed the plates while knowing they were stolen. RCW 9A.56.140. Here, there was reasonable cause to believe the plates were stolen. Officer Ely ran the plates, dispatch said the plates belonged to another vehicle, and the officer was told by the registered owner of the plates that they were missing from her car and apparently stolen. RP 4-5, 12.

However, Officer Ely had no reasonable cause to believe the female passenger in the stopped car possessed – knowingly or otherwise – the license plates on the car. Ms. Byrd was sitting in the car, a rather innocuous fact. She was not driving the car.¹ Ms. Byrd was not holding stolen plates in her lap.² There was no evidence of keys, papers or other items suggesting dominion and control of the car.³

¹ *See, e.g. State v. Mance*, 82 Wn. App. 539, 542-43, 918 P.2d 527 (1996) (probable cause for arrest of driver based on police "hot sheet" relaying owner's report of stolen car's license plate number).

² *See, e.g. State v. Garcia*, 140 Wn. App. 609, 166 P.3d 848 (2007) (probable cause for arrest of defendant wearing jewelry recognized as stolen in a store burglary).

³ *See, e.g. State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003) (probable cause to arrest included admission of holding only key to U-Haul truck, demonstrating dominion and control over the truck and stolen property contained therein).

The sole “fact” known to Officer Ely at the time of arrest was that the driver *said* the car belonged to the female sitting in the front seat. RP 5. While this unverified fact would justify further investigation of Ms. Byrd, it does not rise to the level of probable cause to arrest her. Officer Ely looked at the stopped car’s VIN on the dashboard, but apparently didn’t run it through dispatch to obtain the name of the registered owner. The officer didn’t ask the passenger her name. He didn’t even ask if the car belonged to her. Officer Ely did nothing to verify or corroborate ownership information given by the actual driver of the car, a person the officer had never met before. RP 13. The driver could easily choose to point the finger at the only other person around in order to deflect police inquiry from him.

Ms. Byrd was simply sitting in a car bearing stolen license plates. Officer Ely acted on nothing more than mere suspicion in making the arrest. Ms. Byrd’s arrest was an unlawful seizure without probable cause. All evidence from the subsequent seizure and search of the purse was obtained by exploitation of the primary illegality and must be excluded as “fruit of the poisonous tree.” Wong Sun, 371 U.S. at 479.

2. The search of the purse was unlawful incident to Ms. Byrd's arrest. Gant and Valdez are implicated because the purse was associated with the vehicle.

Unchallenged findings of fact are treated as verities on appeal. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The State herein has not assigned error to any findings of fact that are relevant to the issue here.⁴ A trial court's conclusions of law on a motion to suppress evidence are reviewed *de novo*. State v. Carneh, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

A warrantless search is *per se* unreasonable under article 1, section 7 and the Fourth Amendment of the United States Constitution unless it falls within one of the exceptions to the warrant requirement. State v. Johnson, 128 Wn.2d 431, 446–47, 909 P.2d 293 (1996). The state bears the burden of proving that an exception applies. State v. Ladson, 138 Wn.2d 343, 349–50, 979 P.2d 833 (1999).

A search of a vehicle incident to arrest is a recognized exception to the warrant requirement. State v. Vrieling, 144 Wn.2d 489, 492, 28 P.3d 762 (2001), *citing* State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986).

Under the Fourth Amendment, [p]olice may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1723, 173 L.Ed.2d 485 (2009).

Under Article I, sec. 7 of the Washington Constitution, a warrantless search of an automobile is permissible under the search incident to arrest exception only “when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.” State v. Valdez, 167 Wn.2d 761, 777, 224 P.3d 75 (2009).

In Valdez, police searched inside a car and found packets of methamphetamine underneath a loose, molded cup holder. At the time of the search the arrestee was handcuffed and secured in the backseat of a patrol car. Because the arrestee no longer had access to any portion of his vehicle, the Court held the officers' search of his vehicle was unconstitutional under both the Fourth Amendment and article I, section 7:

Under the Fourth Amendment the arrestee was secured and not within reaching distance of the passenger compartment at the time of the search so neither officer safety nor preservation of

⁴ The State has assigned error only to Findings of Fact XVI, XVIII and XIX at CP 9 (Brief of Appellant, p. 1), and makes no argument regarding those findings in its brief. Brief of Appellant, pp. 1–9.

evidence of the crime of arrest warranted the search. See Gant, 129 S.Ct. at 1719. Furthermore the arrestee was arrested based upon an outstanding arrest warrant; the State has not shown that it was reasonable to believe that evidence relevant to the underlying crime might be found in the vehicle. See Id. (citation omitted).

Under article I, section 7 the search was not necessary to remove any weapons the arrestee could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest that could be concealed or destroyed. The arrestee had no access to his vehicle at the time of the search.

Valdez, 167 Wn.2d at 778. The Court affirmed reversal on appeal of the trial court's denial of the suppression motion, and dismissed the convictions. Id. at 779.

Here, Ms. Byrd was arrested while sitting inside a car. Officer Ely reached inside and took the purse out of the vehicle, placing it on the ground. Ms. Byrd was then taken from the vehicle and secured in a police car. Police later searched the purse. Had the purse remained in the car, the officer's search of it would have been clearly illegal under Valdez. There is no way to determine whether Ms. Byrd would have left the purse inside or taken it with her when the officer made her get out of the car. The removal of the purse was a preemptive action to circumvent the state and federal constitution protections of Valdez and Gant.

Absent the forced removal, the purse was associated with the vehicle. Ms. Byrd did not give the officer permission to search the purse. At the time of the search, the purse did not present any danger to the

officers and there was no information that the purse contained evidence of a crime or that anything in the purse could be destroyed. At no time would the arrested parties have been able to access the purse. Findings of Fact X, XII, XIII, XV, XVII at CP 9. Because the warrantless search was not authorized under Gant and Valdez and the state has not shown any other exceptions to the warrant requirement apply, the search of the purse was unlawful. The trial court properly entered the order of suppression.

3. State v. Johnson does not apply where Ms. Byrd was arrested in a car subject to the safeguards of Gant and Valdez, and she did not remove her purse from the protected area.⁵

The State claims the search of the purse was justified simply as a warrantless search incident to arrest, citing State v. Johnson, 155 Wn. App. 270, 229 P.3d 824 (2010). Brief of Appellant, pp. 7–8. In Johnson, an officer ran a routine check of the vehicle license plates on a moving car. After dispatch advised him that the registered owner's license was suspended, the officer initiated a traffic stop. The defendant pulled into a parking lot. She got out of the car with her purse, and confirmed her identity as the registered owner of the vehicle. The defendant was then

⁵ This Court ordered publication of Johnson on April 22, 2010. The trial court entered its written findings, conclusions and order of suppression on April 29, 2010. The State apparently did not file a motion for reconsideration based on Johnson.

arrested, placed in the back of the patrol car, and her purse was searched.

Johnson, 155 Wn. App. at 274, 282.

Johnson was arrested away from the car she was driving, with her purse in hand. This Court held that the search of the purse did not implicate Gant:

Ms. Johnson exited the car with her purse. ... The police did not obtain her purse by searching the vehicle. In Gant, the item was left inside the car, and the Supreme Court treated the search as a vehicle search.

The search here is not a vehicle search. A search incident to arrest is an exception to the warrant requirement. State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). And a search incident to the arrest of a person may include those items that are immediately associated with the person. See, id. at 677-78, 835 P.2d 1025. 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 681-82, 835 P.2d 1025.

Johnson, 155 Wn. App. at 281-82.

Unlike in Johnson, Ms. Byrd was arrested while she was inside the car and she did not remove her purse from the car. Instead, police seized the purse and removed it from a constitutionally protected area, without lawful justification. There is nothing in the record to suggest that Officer Ely had concerns about the purse located in the car's constitutionally protected interior that would justify its seizure without a warrant. Therefore, since Ms. Byrd was arrested in a car subject to the safeguards of

Gant and Valdez, and did not remove her purse from the protected area,
State v. Johnson does not apply.

E. CONCLUSION

For the stated reasons, Respondent requests that this Court affirm
the trial court's order of suppression and dismissal.

Respectfully submitted this 11th day of January, 2011.



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