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STATE OF WASHINGTON
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No. 80399-7

Court of Appeals No. 29056-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

vs.

Lisa Ann Byrd,
Respondent.

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

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUE PRESENTED

Because there was no officer safety or preservation of evidence basis for search of the purse, the warrantless search of a car occupant's purse incident to the occupant's arrest outside the car was unlawful under Arizona v. Gant¹.

B. 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

¹ 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 435 (2009).

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.

The State timely appealed the suppression order and dismissal. CP 2–6. The Court of Appeals affirmed. State v. Byrd, 162 Wn. App. 612, 258 P.3d 686 (July 19, 2011). The State filed a petition, and review was granted, ___ Wn.2d ___ (November 21, 2011).

C. ARGUMENT

Because there was no officer safety or preservation of evidence basis for search of the purse, the warrantless search of a car occupant's purse incident to the occupant's arrest outside the car was unlawful under Arizona v. Gant.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Mapp v. Ohio, 367 U.S. at 647, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 84 A.L.R.2d 933. Article 1, § 7 of the Washington Constitution provides “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” As a general rule, warrantless searches and seizures are *per se* unreasonable. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (citation omitted). Warrantless searches and seizures may, however, be reasonable under a few 'jealously and carefully drawn' exceptions. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State bears a “heavy burden” of establishing an exception to the warrant requirement by a preponderance of the evidence. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

A search incident to arrest has historically been an exception to the warrant requirement, and allows an immediate search to be conducted in order to secure the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. State v. Valdez 167 Wn.2d 761, 773, 224 P.3d 751 (2009); Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). This exception has been broadly applied to searches of automobiles incident to the arrest of their occupants, and to searches of bags, backpacks and purses incident to the arrest of their owners. *See, e.g.*, State v. Ringer, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983); State v. Stroud, 106 Wn.2d 144, 150–51, 720 P.2d 436 (1986); State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992); New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 678 (1981). Over time, however, “the search incident to arrest exception has been stretched beyond these underlying justifications, permitting searches beyond what was necessary for officer safety and preservation of the evidence of the crime of arrest.” Valdez 167 Wn.2d at 774.

The scope of a permissible search incident to arrest was set forth by the U.S. Supreme Court in Chimel. There, an arrest warrant was issued, and the suspect arrested at his home for burglary of a coin shop. Chimel, 395 U.S. at 753. Upon arrest, officers conducted a detailed search

of his entire home. Id. at 754. The Court held the search extended far beyond the arrestee's person and area within his immediate control, and thus was not necessary to secure the safety of the officers or preserve evidence that could be concealed or destroyed, and was therefore unconstitutional. Id. at 768.

In Belton, the reasoning in Chimel was adapted to the context of a search incident to arrest involving occupants of an automobile. Belton, 453 U.S. at 460. The Belton court cited Chimel for its holding that the scope of the officer's search could extend to the area within the immediate control of the arrestee to prevent the arrestee from securing weapons or concealing or destroying evidence, and reasoned that the occupant of an automobile would have immediate control over the entire passenger compartment. Id. at 460. Under the facts of Belton, the warrantless search was reasonable, and thus constitutional, because the four arrestees were not physically restrained and were sufficiently proximate to the car to gain access. Id. at 455.

In Stroud, this Court recognized that the State constitution provides more privacy protection than its Federal counterpart. Stroud, 106 Wn.2d at 148-50. The Stroud Court nevertheless broadened the scope of the exception, stating, "During the arrest process, including the time

immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence."² Id. at 52. Thus, under Stroud, the fact that a defendant is in custody and in a patrol car during the search, and unable to access evidence or a weapon, was immaterial. Id. at 152.

Subsequently, in Smith, this Court, relying on Belton, adopted a two-part test to establish the validity of a search incident to arrest: "(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." Smith, 119 Wn.2d at 681.³

The Smith Court held that both requirements were met in that case.

As to the first prong,

Smith was wearing the fanny pack when [Officer] Gonzales tackled him. The fanny pack fell off during the struggle that preceded the arrest, and was within 'one or two steps' of Smith at the time of the arrest. Thus Smith was in actual physical possession of the fanny pack just prior to the arrest, and the fanny pack was

² This expansive interpretation of the scope was later overruled in Valdez, 167 Wn.2d at 777.

³ It should be noted that the Smith Court analyzed the exception under the Fourth Amendment, not under Washington's more protective Article 1, section 7. Smith, 119 Wn.2d at 678; *see also* Parker, 139 Wn.2d at 493 (Art. 1, ¶ 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment).

within his reach at the moment of arrest. For search incident to arrest purposes, therefore, the fanny pack was in his control at the time of arrest.

119 Wn.2d at 682. As to the second prong,

[Smith] asserts that the fact that he was handcuffed and in the back of the police car when Gonzales opened his bag rendered the search unreasonable. ... We reject [this] argument [] ... [O]nce she arrested Smith, Officer Gonzales acted reasonably in taking steps necessary to assure her safety. Gonzales' actions were reasonable because Smith initially tried to run away, he disobeyed Gonzales' order to stop, and because the arrest occurred in a parking lot filled with a large group of people. Handcuffing Smith and placing him in the back of the police car prior to any search of the fanny pack were reasonable actions under those circumstances. Therefore the fact that Smith was handcuffed in the back of the police car during the search does not make that search unreasonable.

119 Wn.2d at 682–63.

But in Arizona v. Gant, the United State Supreme Court rejected such broad readings of Belton and of the search incident to arrest exception. Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 435 (2009). There, Rodney Gant was arrested for driving with a suspended license, handcuffed and locked in the back of a patrol car. 129 S.Ct. at 1715. Police officers then searched his car and discovered cocaine in the pocket of a jacket on the backseat. Id.

Gant was charged with possession of a narcotic drug for sale and possession of drug paraphernalia. He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the

Fourth Amendment. Among other things, Gant argued Belton did not authorize the search of his car because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. Gant, 129 S.Ct. at 1715.

The Supreme Court agreed, and rejected the then-prevailing interpretation of Belton as authorizing a vehicle search incident to every recent occupant's arrest. Gant, 129 S.Ct. at 1714. The Court specifically held:

Police may search a vehicle incident to a recent occupant's 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. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Gant, 129 S.Ct. at 1723–24.

Subsequently, in Patton this Court observed:

[T]he Court in Gant issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place 'only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.' Gant, 129 S.Ct. at 1719.

State v. Patton, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). This Court held likewise that under article 1, section 7:

[A]n automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

Patton, 167 Wn.2d at 683. The risk to officer safety or the possibility that evidence will be destroyed must “exist at the time of the search.” 167 Wn.2d at 395.

Then in Valdez, this Court again noted the improper overexpansion of the search incident to arrest exception:

[A]fter an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception. Stroud's expansive interpretation to the contrary was influenced by an improperly broad interpretation of Belton[.]

Valdez, 167 Wn.2d at 777. The Court further noted, “The search incident to arrest exception, born of the common law, arises from the necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of that exception must be so grounded and so limited. Id. at 775.

In this case, Division Three determined Gant does apply to searches of some personal items incident to arrest, and in doing so, found

that the overly permissive test in Smith is no longer good law. State v. Byrd, 162 Wn. App. 612, 616, 258 P.3d 686 (July 19, 2011).⁴

In considering the issue whether Gant applies beyond vehicle searches, Division Three looked to its effect on Belton, which is “a seminal case on the issue of a warrantless search of a vehicle incident to arrest.” Byrd, 162 Wn. App. at 615. It noted that Gant limits Belton “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 616 (quoting Gant, 129 S.Ct. at 1719).

Division Three also recognized that Washington cases, including Smith, that authorized 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, were “based on a rejected interpretation of Belton; an

⁴ As part of its decision in Byrd, Division Three concluded that its prior decision in State v. Johnson, 155 Wn. App. 270, 229 P.3d 824, *rev. denied*, 170 Wn.2d 1006 (2010), was wrong, having relied on Smith to hold that Gant controls the search of a vehicle incident to arrest but not the search of a purse incident to arrest. Byrd, 162 Wn. App. 615–16. In Johnson, the defendant got out of a car with her purse in hand, and was arrested and secured in a police car before the police searched her purse. In its petition for review, the State suggests that the retracted Johnson case and the Bryd decision now conflict with Division Three’s decision in State v. Whitney, 156 Wn. App. 405, 232 P.3d 582 (2010). There, the Court refused to apply Gant to a search of the defendant’s pockets where he had been arrested for driving while license suspended. Id. at 409. Ms. Byrd acknowledges that the search of the defendant’s *person* will always be reasonable under the search incident to arrest exception.

interpretation that Gant overruled.” Byrd, 162 Wn. App. at 616. Division Three went on to hold, “We are bound by Gant’s interpretation of Belton.
Id.

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.

Byrd, 162 Wn. App. at 616–17.

Division Three and the Gant Court recognize that Chimel “continues to define the boundaries of the [search incident to arrest] exception.” Byrd, 162 Wn. App. at 617; Gant, 129 S.Ct. at 1716. Chimel did not involve the search of a vehicle. And under Chimel, an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search. Chimel, 395 U.S. at 763–64; Gant, 129 S.Ct. at 1719.

Division Three properly determined that Gant applies to any search incident to arrest, and “an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search.” Byrd, 162 Wn. App. at 617 (*citing* Gant, 129 S.Ct. at 1719, Chimel, 395 U.S. at 763–64, 768). The court appropriately found that because Ms. Byrd was secured in handcuffs and in the patrol car when her purse was searched,

and 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, “[t]he justifications for the search incident to arrest exception did not exist here.” Byrd, 162 Wn. App. at 617.

Because the warrantless search was not authorized under Chimel, Gant, Patton, Valdez and the state has not shown any other exceptions to the warrant requirement apply, the search of Ms. Byrd’s purse was unconstitutional, and all evidence seized as a result was properly suppressed by the trial court. *See* State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

D. CONCLUSION

For all these reasons, the trial court’s order of suppression and dismissal should be affirmed.

Respectfully submitted on January 20, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 20, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of supplemental brief of respondent:

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Hello, Mr. Carpenter:

I am attaching Ms. Byrd's supplemental brief of respondent, as well as a proof of service upon Mr. Eilmes. Please let me know if you have any questions.

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