

NO. 88267-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM MACDICKEN,

Petitioner.

BRIEF OF AMICUS CURIAE WASHINGTON STATE PATROL

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Patrol (WSP) is a general authority Washington law enforcement agency charged with enforcing criminal laws. The WSP has a substantial interest in this case because a rule requiring an officer not to search an arrestee's nearby baggage after handcuffing presents significant officer and public safety concerns and is unnecessary to further safeguard individual privacy interests. Handcuffing an arrestee is not the equivalent of completely securing the arrestee, and does not reduce the arrestee's baggage to the officer's exclusive control. Law enforcement officers need the ability to search a handcuffed arrestee's bag, immediately following the arrest, to secure the scene, thereby protecting the public and themselves.

The WSP respectfully requests this Court not to adopt a rule that prevents an officer from contemporaneously searching a handcuffed arrestee's nearby baggage in order to prevent the arrestee from obtaining a weapon or destroying evidence. The current limitations of a search incident to arrest as applied by the Court of Appeals in this case adequately protect individual privacy while preserving officer safety.

II. ISSUE ADDRESSED BY AMICUS

Should this Court follow the well-established search incident to arrest principles that allow an officer to search a handcuffed arrestee's

nearby bags incident to arrest when the arrestee has control of the bags immediately before the arrest, there is any conceivable possibility of the arrestee's access to the bags, and the officer searches the bags within a reasonable period of time following the arrest?

III. STATEMENT OF THE CASE

The WSP adopts the statement of facts as set forth in the Court of Appeals opinion, *State v. MacDicken*, 171 Wn. App. 169, 286 P.3d 413 (2012).

IV. ARGUMENT

A. **This Court Should Not Limit The Search Incident To Arrest Exception And Expose Law Enforcement Officers To The Safety Risks Presented By Handcuffed Arrestees.**

This Court has consistently recognized that officer safety is a crucial justification for the search incident to arrest exception to the warrant requirement. The petitioner, Mr. Abraham MacDicken, seeks to significantly limit the applicability of this exception when an arrestee is handcuffed. However, Mr. MacDicken's interpretation of relevant case law is contrary to the central principles underlying a search incident to arrest.

Both the U.S. Constitution's Fourth Amendment and the Washington State Constitution's Article I, section 7 require a law enforcement officer to obtain a warrant before conducting a search. There

are limited exceptions to this general rule. Under the Fourth Amendment, “[a] warrantless search is per se unreasonable, valid only if it shown that the exigencies of the situation made that course imperative.” *State v. Valdez*, 167 Wn.2d 761, 768, 224 P.3d 751 (2009) (citation omitted and internal quotations omitted).

Under article I, section 7, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision “prohibits any disturbance of an individual’s private affairs without authority of law.” *Id.* at 772 (citation omitted and internal quotations omitted). “The authority of law required by article I, section 7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions.” *Id.* (quoting *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008)) (internal quotations omitted).

Under both the Fourth Amendment and Article I, section 7, a search incident to arrest is a valid exception to the warrant requirement. *See U.S. v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); *see also State v. Snapp*, 174 Wn.2d 177, 188-89, 275 P.3d 289 (2012); *State v. Ellison*, 172 Wn. App. 710, 719, 291 P.3d 921 (2013) (“Washington law has long recognized the validity of searching a defendant and the property immediately within his or her control without a warrant in the process of making an arrest.”) (citations omitted).

In *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), the U.S. Supreme Court recognized that after an officer lawfully arrests a suspect, the officer may conduct a warrantless “search of the arrestee’s person and the area within his immediate control.” Specifically, an officer may search “the area from within which [the arrestee] might gain possession of a weapon or destructible evidence.” *Id.*

The search incident to arrest exception is grounded in a concern for officer and public safety, as well as a concern for preservation of evidence.

Chimel noted:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself is frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

395 U.S. at 762-63; *see also State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002) (“The exception has been narrowly drawn to address officer safety and prevent the destruction of evidence.”) (citation omitted).

Consistent with the purposes of a search incident to arrest – officer and public safety and preservation of evidence - the scope and timing of a

search incident to arrest is limited: “1) the area searched must be that area under the arrestee’s immediate control when he was arrested, and 2) events between the time of the arrest and search must not render the search unreasonable.” *U.S. v. Nohara*, 3 F.3d 1239, 1243 (9th Cir. 1993) (citing *U.S. v. Turner*, 926 F.2d 883, 887-88 (9th Cir. 1991), *cert. denied*, 502 U.S. 830, 112 S. Ct. 103, 116 L. Ed. 2d 73 (1991)).

In this case, Mr. MacDicken was arrested based on his suspected involvement in an armed robbery. *MacDicken*, 171 Wn. App. at 171 - 72. When the officers encountered Mr. MacDicken in a parking lot, with three of his associates nearby, they “initiated a high-risk arrest” to take him into custody. *Id.* at 172 (internal quotations omitted). After placing Mr. MacDicken in handcuffs, but before securing him in a patrol vehicle, one of the officers searched the nearby duffel bag and laptop bag he had on his person just before the arrest. *Id.* At the time of the search, the bags were a mere “car length away” from Mr. MacDicken. *Id.*

Accordingly, the search of Mr. MacDicken’s bags fell squarely within the search incident to arrest exception to the warrant requirement. For the reasons expressed below, the WSP respectfully requests that this Court affirm the Court of Appeals and hold that a search of a handcuffed arrestee’s nearby bags, immediately following his arrest, falls within the search incident to arrest exception to the warrant requirement.

B. The Court Of Appeals Correctly Found That The Officer Properly Searched Mr. MacDicken's Bags Incident To Arrest.

1. Handcuffing An Arrestee Does Not Reduce The Arrestee's Baggage Into The Officer's Exclusive Control.

Handcuffing is not the equivalent of fully securing an arrestee in a locked patrol car. "The mere fact that a suspect is handcuffed at the time the search is undertaken does not render the search illegal." *Young v. U.S.*, 982 A.2d 672, 680 (D.C. 2009) (citation omitted). Courts have repeatedly recognized the limitations of handcuffs:

Handcuffs are a temporary restraining device; they limit but do not eliminate a person's ability to perform various acts. They obviously do not impair a person's ability to use his legs and feet, whether to walk, run, or kick. Handcuffs do limit a person's ability to use his hands and arms, but the degree of the effectiveness of handcuffs in this role depends on a variety of factors, including the handcuffed person's size, strength, bone and joint structure, flexibility, and tolerance of pain. Albeit difficult, it is by no means impossible for a handcuffed person to obtain and use a weapon concealed on his person or within lunge reach, and in so doing to cause injury to his intended victim, to a bystander, or even to himself. Finally, like any mechanical device, handcuffs can and do fail on occasion.

U.S. v. Sanders, 994 F.2d 200, 209 (5th Cir. 1993) (citation omitted); *see also U.S. v. Shakir*, 616 F.3d 315, 320 (3rd Cir. 2010) ("we note that handcuffs are not fail-safe."), *cert. denied*, 131 S. Ct. 841, 178 L.Ed.2d 571 (2010). *Shakir* updates *Sanders*' Department of Justice statistics and accounts of attacks on officers by handcuffed detainees. 616 F.3d at 321.

Likewise, in *U.S. v. Perdoma*, 621 F.3d 745, 751-53 (8th Cir. 2010), the majority opinion explains that the case law supports search incident to arrest of the bags of an arrestee who has been handcuffed but has not been fully secured in a locked police car. Indeed, Mr. MacDicken does not cite to any case contrary to the holdings of *Sanders*, *Shakir*, and *Perdoma* – upholding searches incident to arrest in handcuffed-arrestee circumstances parallel to those here.

In addition to the fallibility of handcuffs, courts have recognized the inherent dangers to officers and the public when a suspect is taken into custody. “The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.” *Robinson*, 414 U.S. at 235, n. 5.

Likewise, Mr. MacDicken’s suggestion that a handcuffed suspect is secured and no longer has access to a bag is unsupported by precedent or reality. As recognized in the case law noted above, handcuffing does not eliminate an arrestee’s ability to access a nearby bag for a weapon. Handcuffing also does not reduce the baggage to the officer’s immediate control – particularly if the arrest occurs in a public place with bystanders.

Mr. MacDicken correctly recognizes that the U.S. Supreme Court has clarified the scope of a vehicle search 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*, 556 U.S. 332, 351, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). However, a handcuffed suspect, within a car’s length of the baggage, is certainly within “reaching distance” of any dangerous weapon contained in the bag.

Following the *Gant* decision, courts have recognized “if *Gant* is construed to forbid all container searches after a suspect is handcuffed or held by police, it would . . . effectively eliminate a major element of the search-incident-to-arrest doctrine.” *Shakir*, 616 F.3d at 320. “To hold that a container search incident to arrest may not occur once the suspect is under the control of the police, but before he has been moved away from the item to be searched, would eviscerate this portion of *Chimel*[:] *Gant* did not purport to do any such thing.” *Id.* “Thus, reading *Gant* to prohibit a search incident to arrest whenever an arrestee is handcuffed would expose police to an unreasonable risk of harm.” *Id.* at 321; *see also U.S. v. Gordon*, 895 F. Supp. 2d 1011, 1020 (D. Hawaii 2012) (“the court does not read *Gant* as establishing a bright-line rule that the search-incident-to-arrest exception cannot apply once a suspect is handcuffed.”).

Recently, the Court of Appeals, Division II, considered whether an officer’s search of a handcuffed arrestee’s backpack fell under the search incident to arrest exception. *Ellison*, 172 Wn. App. at 712. The Court

reasoned “*Gant* has not eliminated the officer safety exception to the warrant requirement or the validity of a protective search of the person, objects, and area in the immediate control of the arrestee at the time of arrest as allowed by *Chimel*” *Id.* at 721 (internal quotations omitted). The Court found that the search fell squarely within the search incident to arrest exception, in part, because “[i]t is possible that despite his restraints, [the arrestee] could have escaped and procured a potential weapon from the backpack.” *Id.* at 722.

Similarly here, the fact that Mr. MacDicken was handcuffed did not remove the threat that he could obtain a weapon from his bag merely a car length away. As noted in the State’s supplemental brief, the unfortunate reality is handcuffed arrestees are able to access weapons to harm the officer or the general public. Supp. Brief of Respondent at 6-7, 9, n. 7. Evidence is also vulnerable to destruction in these circumstances. Accordingly, the WSP respectfully asks this Court not to adopt a rule that an officer may not search a bag incident to arrest after the arrestee has been placed in handcuffs.

2. **Mr. MacDicken’s Suggestion That This Court Should Consider Whether There Was A Realistic Possibility That He Could Access The Bags Is Contrary To *Chimel* And *Gant*.**

Mr. MacDicken suggests that this Court should evaluate whether an arrestee was within reaching distance of a bag based on a “realistic

possibility” standard. Petition for Review at 5, 8-10. This suggestion is partly based on the Third Circuit Court of Appeals interpretation of “*Gant* to stand for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it.” *Shakir*, 616 F.3d at 320.

However, while, as noted above in Part IV.B.1, the facts of this case clearly meet a reasonable possibility standard, the suggested standard is inconsistent with binding precedent and jeopardizes officer safety. To justify a search incident to arrest, both *Chimel* and *Gant* only require “a possibility” that an arrestee may access the bag. *See Chimel*, 395 U.S. at 766 (noting the search incident to arrest exception is limited to “the area from which the person arrested might obtain weapons or evidentiary items.”); *Gant*, 556 U.S. at 339.

Applying a realistic possibility standard to searches incident to arrest jeopardizes officer safety. “A police officer’s determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.” *Robinson*, 414 U.S. at 235.

Based upon an officer’s need to quickly assess a volatile situation, the U.S. Supreme Court noted “[t]he authority to search the person

incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the *probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.*” *Id.* (emphasis added).

Gant recognized that “the area within [an arrestee’s] immediate control” is “the area from within which [the arrestee] *might* gain possession of a weapon or destructible evidence.” 556 U.S. at 339 (citation omitted and internal quotations omitted) (emphasis added). The Court further explained that “[i]f 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.” *Id.* (citation omitted) (emphasis added).

Accordingly, a court should not evaluate whether an arrestee presented a realistic possibility of accessing a bag, but rather whether there was *any conceivable* possibility of access. A realistic possibility of access standard invites second guessing an officer’s split-second decisions in the middle of a dangerous situation. While the WSP recognizes that the validity of a search incident to arrest depends on a situation’s specific facts, imposing a realistic possibility standard may result in officers delaying the decision to search a bag in order to try to meticulously

evaluate the situation. Such a delay may have dire consequences for the officer and the public.

As shown in this case, the officers were presented with an armed robbery suspect, in a public parking lot, with three of the suspect's associates in the vicinity. *See MacDicken*, 171 Wn. App. at 171-72. If the officers had stopped to ponder whether Mr. MacDicken presented a realistic possibility of gaining access to his nearby bag, this may have resulted in Mr. MacDicken or a bystander accessing the bag and gaining control of the weapon. Neither *Gant* nor *Chimel* compel such a result.

V. CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 20th day of August, 2013.

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DECLARATION OF
SERVICE

LISSA TREADWAY declares as follows:

On Tuesday, August 20, 2013, pursuant to the agreement for electronic service, I sent via electronic transmission a true and correct copy of the (1) Motion for Leave to File Amicus Brief; (2) Brief of Amicus Curiae Washington State Patrol; and (3) Declaration of Service to the following:

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

RESPECTFULLY SUBMITTED this 20th day of August, 2013.


LISSA TREADWAY