

No. 88267-3  
COA No. 67314-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM MACDICKEN,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Larry E. McKeeman  
The Honorable Joseph P. Wilson

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Abraham Macdicken asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the published Court of Appeals decision in *State v. Abraham Macdicken*, \_\_\_ Wn.App. \_\_\_, 286 P.3d 413 (October 8, 2012). A copy of the decision is in the Appendix at pages A-1 to A-9.

The Court of Appeals denied Mr. Macdicken's motion for reconsideration on November 2, 2102. A copy of the order denying reconsideration is in the Appendix at page B-1.

C. ISSUES PRESENTED FOR REVIEW

1. Under the search incident to arrest exception to the warrant requirement of the Fourth Amendment and article I, section 7, the police may search the defendant incident to his arrest, but may search luggage or bags in the defendant's possession only where the defendant can reach the items and gain access to a weapon or destroy evidence. Where the defendant is handcuffed and no longer has access to the items, interests justifying a search incident to arrest are no longer

present. Where Mr. Macdicken was handcuffed and the two bags in his possession at the time he was stopped subsequently searched by the police without a warrant were no longer within his reach, does a substantial question under the United States and Washington Constitutions arise requiring this Court to reverse the Court of Appeals and find the search of the bag an invalid warrantless search?

2. Has the decision in *State v. Smith*, 119 Wn.2d 675, 835 P.3d 1025 (1992), been overruled *sub silentio* by the subsequent decisions in *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and this Court's decisions in *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 75 (2009), and *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009)?

#### D. STATEMENT OF THE CASE

On June 8, 2010, Krystal Steig and Thomas Brinkley were robbed at gunpoint at a hotel in Lynnwood. CP 58. Among the items taken from Steig and Brinkley were a laptop bag and a duffel bag. A police investigation led to the identification of Abraham Macdicken as the person who committed the robberies. CP 58. A tip led the police to another hotel in Lynnwood where Mr. Macdicken was purported to be. CP 59.

While in the parking lot of this hotel, police officers saw Mr. Macdicken walking out from the hotel carrying a laptop bag and pushing a duffel bag. CP 59. Mr. Macdicken was ordered to the ground, where he was handcuffed. CP 59. Officer Gillebo of the Lynnwood Police turned his attention from Mr. Macdicken to a woman standing nearby who was alleged to be associated with Mr. Macdicken. CP 59. Gillebo arrested this woman, then returned to Mr. Macdicken. CP 59.

By this time, Mr. Macdicken had been helped to his feet by the police and he was leaning against a police car, still handcuffed. CP 59. Gillebo took the two bags that had been in Mr. Macdicken's presence a short distance away and began searching them. CP 60. Inside the bag, Gillebo discovered a handgun, a laptop computer, women's clothing and a letter addressed to Steig. CP 60; 4/28/2011RP 40-41. Gillebo turned the computer on and discovered it belonged to Steig as well. 4/28/2011RP 41-42.

Mr. Macdicken was charged with two counts of first degree robbery while armed with a firearm and first degree unlawful possession of a firearm. CP 55-56. Pretrial, Mr. Macdicken moved to suppress the items seized from him and the fruits discovered inside the

bags as exceeding the scope of a search incident to arrest. CP 75-111. At the hearing, Mr. Macdicken testified that the bags were his and did not belong to Steig. 4/28/2011RP 4-5. The trial court denied the motion to suppress, finding the search valid as a search incident to arrest under *State v. Smith, supra*. CP 61-68. The court also ruled that the decision in *Smith* was unaffected by the subsequent decision of the United States Supreme Court in *Gant*. CP 65-68.

Following a jury trial, Mr. Macdicken was convicted as charged. CP 29-32.<sup>1</sup>

On appeal, the Court of Appeals refused to reach the issue of whether this Court's decision in *Smith* has been overruled, finding instead that under *Chimel v. California*, 395 U.S. 752, 762-63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), Mr. Macdicken *could* have reached the bag to seize a weapon, despite being a car length away and under armed police guard. Decision at 6-7. Based upon this ruling, the Court of Appeals affirmed Mr. Macdicken's conviction. *Id.* at 9.

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<sup>1</sup> Mr. Macdicken did not testify at trial.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. THERE WAS NOT A *REALISTIC* POSSIBILITY FOR MR. MACDICKEN TO GAIN ACCESS TO THE BAGS THUS NEGATING THE SEARCH INCIDENT TO ARREST EXCEPTION

The Fourth Amendment to the United States Constitution protects against unlawful search and seizure. Article I, section 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. Warrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). These exceptions are “jealously and carefully drawn.” *Id.*, quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

The language of article I, section 7 prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional, which creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions . . . .” *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), *overruled in part by State v. Stroud*, 106 Wn.2d 144, 150–51,

720 P.2d 436 (1986). The privacy protections of article I, section 7 are thus more extensive than those provided under the Fourth Amendment. *State v. White*, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982).

Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement. *Ringer*, 100 Wn.2d at 701, *citing State v. Smith*, 88 Wn.2d 127, 135, 559 P.2d 970 (1977), *overruled on other grounds by State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986).

“Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment.” *State v. Kealey*, 80 Wn.App. 162, 170, 907 P.2d 319 (1995), *citing Sanders*, 442 U.S. at 762. The very purpose of piece of luggage is to serve “as a repository for personal, private effects” when one wishes to carry them. *Sanders*, 442 U.S. at 762 n. 9. Thus, in order to search the laptop bag and the duffel bag, the police needed either a warrant or show that one of the enumerated exceptions applied.

Any analysis of the search incident to arrest exception must begin with an examination of the decision in *Chimel, supra*. In *Chimel*, the United States Supreme Court limited searches for weapons or evidence as searches incident to arrest to the area within the suspect’s

*immediate* control, i.e. “the area into which an arrestee might reach in order to grab a weapon or evidentiary inte[m].” *Chimel*, 395 U.S. at 763.

In making its specious conclusion that Mr. Macdicken *might* access the bags and grab a weapon, the Court of Appeals claimed “[c]ases exist where handcuffed individuals have acted extraordinarily, threatening officers and public safety.” Decision at 7. This claim brings to mind Justice O’Connor’s concurrence in *Thornton v. United States*:

The first [reason the search might be justified] is that, despite being handcuffed and secured in the back of a squad car, petitioner might have escaped and retrieved a weapon or evidence from his vehicle—a theory that calls to mind Judge Goldberg’s reference to the mythical arrestee “possessed of the skill of Houdini and the strength of Hercules.” *United States v. Frick*, 490 F.2d 666, 673 (C.A.5 1973) (opinion concurring in part and dissenting in part).

541 U.S. 615, 625-27, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)

(O’Connor, J., concurring).

But, the only case cited by the Court of Appeals in justifying its fantastical conclusion was *United States v. Shakir*, 616 F.3d 315 (3<sup>rd</sup> Cir.), *cert. denied*, 131 S.Ct. 841, 178 L.Ed.2d 571 (2010). Decision at 7 fn. 17. In *Shakir*, the defendant dropped a bag he was holding shortly

before he was arrested in a hotel lobby. The police searched the bag while the defendant was handcuffed and held by two police officers, *but while the bag was still at his feet*, not a car length away as here. The immediate proximity of the defendant was the major rationale for the circuit court authorizing the search, but the *Shakir* Court recognized that the decision in *Gant* had altered the landscape on searches of belongings of the defendant incident to a lawful arrest:

For the foregoing reasons, we hold that a search is permissible incident to a suspect's arrest when, under all the circumstances, there remains a *reasonable possibility* that the arrestee could access a weapon or destructible evidence in the container or area being searched. Although this standard requires something more than the mere theoretical possibility that a suspect might access a weapon or evidence, it remains a lenient standard.”)

*Shakir*, 616 F.3d at 318-21 (emphasis added).

Here, at the time of the search of the bags, Mr. Macdicken was handcuffed, leaning against a car, and restrained by police. CP 59-60. The bags were no longer in Mr. Macdicken's immediate control, and there was no reasonable possibility of Mr. Macdicken retrieving anything from the bags or attempting to destroy anything. Thus the concerns expressed in *Shakir* were not present here.

But more importantly, the United States Supreme Court has also noted that there must be a “real possibility” of access by an arrestee to

weapons or evidence. *Gant*, 556 U.S. at 343 fn. 4. “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 exception are absent and the rules do not apply.” *Id.*, at 339. Thus, absent a *realistic possibility* of an arrestee reaching a weapon, nothing in *Chimel* justifies a search and therefore its rule cannot apply. *Gant*, 556 U.S. 340-41.

As the Court of Appeals noted, “Macdicken *could have possibly reached the bags.*” Decision at 7 (emphasis added). “Could have” is not a realistic possibility but a theoretical one. That is simply not sufficient under *Chimel* or its extensive progeny. Mr. Macdicken was surrounded by at least two armed police officers and at least a *car length* away from the bags. There was no possibility, let alone a reasonable one, that he would be able to reach the bags, reach inside, and withdraw a weapon without being shot dead by one or both of the police officers.

The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel, supra*, at 763, 89 S.Ct. 2034.

*Thornton*, 541 U.S. at 625-27 (O'Connor, J., concurring).

This Court should grant review and rule that there must be a realistic possibility that the defendant can access the bags sufficient to justify the search incident to arrest.

2. THIS COURT SHOULD ALSO GRANT REVIEW TO DETERMINE THAT ITS DECISION IS *STATE v. SMITH* HAS BEEN OVERRULED *SUBSILENTIO* BY *GANT*, *PATTON*, AND *VALDEZ*

The trial court relied on *State v. Smith*, 119 Wn.2d 675, 679-80, 835 P.2d 1025 (1992), in authorizing the search of the bag incident to Mr. Macdicken's arrest. In *Smith*, this Court relied on the United States Supreme Court's decision in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), in authorizing searches of bags incident to arrest. 119 Wn.2d at 679-80. According to the *Smith* Court, "the [United States Supreme] Court did not base its decision on the 'automobile exception' to the warrant requirement," rather, the Court "interpret[ed] the *Belton* rule as applying to all searches incident to arrest, including those not involving automobiles." *Id.*, at 680 n.3.

*Belton's* continued viability regarding the search incident to arrest exception must be questioned in light of the United States Supreme Court's subsequent decision in *Gant*, *supra*, which overruled

the courts' broad interpretation of *Belton*. In *Gant*, the Supreme Court observed that many lower courts had followed the broadest possible reading of the search incident to arrest exception as articulated in *Belton*, with the result that it had come to be regarded as ““a police entitlement rather than as an exception justified by the twin rationales of *Chimel*.”” *Id.* at 1718, quoting *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part). Recognizing that the decision in *Belton* itself purported to follow *Chimel*, the Supreme Court 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.

In *State v. Patton*, this Court agreed that its jurisprudence on the search incident to arrest doctrine had been grossly overextended:

Unfortunately, the scope of the search incident to arrest exception under our article I section 7 has experienced the same sort of progressive distortion that the United States Supreme Court recently recognized resulted in the unwarranted expansion of the search incident to arrest exception under the Fourth Amendment.

167 Wn.2d at 394.

Similarly, in a companion case to *Patton*, this Court attempted to rein in the overextension of the search incident to arrest exception:

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained.

*Valdez*, 167 Wn.2d at 777.<sup>2</sup>

Thus, under article I, section 7, a warrantless search incident to arrest is permissible only when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest. As a consequence, this Court should grant review and rule that *Smith* has been overruled by the decisions in *Gant*, *Patton*, and *Valdez*.

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<sup>2</sup> This Court currently has pending before it the case of *State v. Byrd*, 162 Wn.App. 612, 258 P.3d 686 (2011), *review granted*, 173 Wn.2d 1001 (2011). *Byrd* analyzed a search of a vehicle after the driver and passenger had been removed and placed in the rear of a police car. *Byrd* analyzed the search under the decisions in *Gant*, and *Chimel*. 162 Wn.App. at 616-17. This Court heard argument on May 15, 2012, and a decision is pending.

F. CONCLUSION

For the reasons stated, this Court should grant review, order the items discovered in the search of the bag suppressed, and reverse Mr. Macdicken's conviction.

DATED this 3rd day of December 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

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## APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 67314-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	PUBLISHED OPINION
	)	
ABRAHAM MACDICKEN,	)	
	)	
Appellant.	)	FILED: October 8, 2012
	)	

Leach, C.J. — Abraham MacDicken appeals his convictions of two counts of first degree robbery and one count of unlawful possession of a firearm. He challenges the trial court’s denial of his motion to suppress evidence seized in a search incident to his arrest. A search incident to arrest may include the arrestee’s person and the area “from within which he might gain possession of a weapon or destructible evidence.”<sup>1</sup> Here, officers searched Abraham MacDicken’s bags a car’s length away from where MacDicken stood in handcuffs. Because MacDicken was still within reaching distance of the bags, which the officers feared might contain a firearm, the officers did not exceed the permissible scope of a search incident to arrest. The trial court properly denied MacDicken’s motion to suppress, and we affirm.

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<sup>1</sup> Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

## FACTS

On June 8, 2010, an individual, later identified as MacDicken, robbed Thomas Brinkly and Krystle Steig at gunpoint at a Lynnwood Extended Stay America hotel. Afterward, Brinkly reported to the police that MacDicken had taken several items, including a laptop computer, a cellular telephone, 20 DVDs (digital video discs), and an iPod™. Officers later traced Steig's cellular telephone to a Travelers Inn in Edmonds.

Lynnwood Police Department Detectives Ross Adams and Sean Gillebo went to the Travelers Inn. There, they contacted the occupants of room 327, who were connected with a vehicle identified at the robbery scene. Krystal Ramsey answered the door and told the detectives that only she and two other women were sharing the room. When the detectives discovered that Ramsey had outstanding warrants from another jurisdiction, they took her into custody and called for backup assistance from a uniformed officer.

As the detectives were walking Ramsey to their patrol vehicle, they saw the two remaining occupants of room 327 leave the hotel room. One of the women admitted to Detective Adams that she had outstanding warrants, and he placed her under arrest. Meanwhile, because Detective Gillebo could not confirm Ramsey's warrants, he released her from custody. At this point, Officer

Brad Reorda arrived at the Travelers Inn.

Detective Adams then saw MacDicken, whom he recognized from an Extended Stay America surveillance video, leaving the hotel carrying a laptop bag and pushing a rolling duffel bag. With their weapons drawn, Detective Adams and Officer Reorda initiated a "high-risk" arrest.<sup>2</sup> MacDicken complied with the officers' orders to lie down on the ground, and Detective Adams advised MacDicken that he was under arrest for first degree robbery. Detective Gillebo placed MacDicken in handcuffs.

After handcuffing MacDicken, Detective Gillebo arrested Ramsey for obstruction. Officer Greg Cornett arrived about that time. After arresting Ramsey, Gillebo returned to MacDicken, who was still in handcuffs and was standing outside the patrol car, talking to another officer. Detective Gillebo noticed that the laptop bag and rolling duffel bag were lying on the ground near MacDicken, so he moved them "about a car length away" from MacDicken and searched them. Inside the laptop bag, Detective Gillebo found a small black Kel Tec nine millimeter pistol, a laptop computer belonging to Steig, a pair of

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<sup>2</sup> At the CrR 3.6 hearing, Detective Adams described why he considered the arrest "high-risk," explaining, "Given the nature of the crime, the belief that he was still armed with a firearm, we identified ourselves as police, ordered him to the ground at gunpoint. Once he was in a secured prone position on the ground while myself and Officer Reorda covered him, Detective Gillebo went in and placed him in handcuffs."

women's jeans, a white T-shirt, and a letter addressed to Steig.<sup>3</sup> At the time of the search, two detectives and two uniformed officers were dealing with four individuals in the hotel's public parking lot.

The State charged MacDicken with two counts of first degree robbery while armed with a firearm and one count of first degree unlawful possession of a firearm. MacDicken moved to suppress the evidence obtained from the search of the bags on the basis that the officers had performed an unlawful search incident to arrest. The trial court denied the suppression motion, concluding,

Although handcuffed, the defendant was standing next to the patrol car[;] he could still kick at the officers or reach for a weapon despite the handcuffs. . . . At the time of the arrest and the search, there were three of the defendant's associates in close proximity, only one of which had been arrested. The actions of Det[ective] Gillebo in securing the second of the defendant's associates and removing the bags a short distance from the defendant were not a sufficient intervening event to render the search no longer a search incident to arrest. They were reasonable [steps] taken to assure the safety of Det[ective] Gillebo and the other officers and the public at the time of the arrest and the search incident thereto.

A jury convicted MacDicken as charged and returned a special verdict, finding that MacDicken was armed with a firearm at the time he committed the crimes. MacDicken appeals.

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<sup>3</sup> After being advised of his constitutional rights, MacDicken admitted to stealing the laptop and the laptop bag from Steig.

## STANDARD OF REVIEW

In reviewing the denial of a motion to suppress, we determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law.<sup>4</sup> We review conclusions of law de novo.<sup>5</sup> Unchallenged findings of fact are verities on appeal.<sup>6</sup>

## ANALYSIS

MacDicken claims the officer's search violated his right to privacy under article I, section 7 of the Washington State Constitution.<sup>7</sup> Article I, section 7 prohibits a warrantless search, subject to a limited set of exceptions.<sup>8</sup> The State bears the burden of establishing that an exception to the warrant requirement

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<sup>4</sup> State v. Ross, 106 Wn. App 876, 880, 26 P.3d 298 (2001). Substantial evidence exists if sufficient to persuade a fair-minded, rational person of the truth of the matter asserted. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

<sup>5</sup> State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

<sup>6</sup> State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

<sup>7</sup> Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." MacDicken also cites the Fourth Amendment to the United States Constitution but makes no separate argument on that basis. The State contends that MacDicken lacks standing to raise this issue. In view of our disposition of the search issue, we do not address the State's standing argument, which only relates to the first degree robbery convictions.

<sup>8</sup> State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (identifying the following exceptions to the warrant requirement: exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops).

applies.<sup>9</sup> Under the exclusionary rule, the State may not present evidence seized during an illegal search in its case in chief.<sup>10</sup>

An officer may conduct a warrantless search of limited scope incident to a lawful arrest.<sup>11</sup> The search incident to arrest exception “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.”<sup>12</sup> In Chimel v. California,<sup>13</sup> the United States Supreme Court stated that the permissible scope of a search incident to arrest includes the arrestee’s person and the area within his or her immediate control, meaning “the area from within which he might gain possession of a weapon or destructible evidence.” “That limitation . . . 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.”<sup>14</sup> Thus, if a possibility exists that an arrestee could reach into the area that officers seek to search, both justifications for the search incident to arrest exception are present.<sup>15</sup> Once officers have obtained exclusive

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<sup>9</sup> State v. Kirwin, 165 Wn.2d 818, 824, 203 P.3d 1044 (2009).

<sup>10</sup> State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

<sup>11</sup> Garvin, 166 Wn.2d at 249-50.

<sup>12</sup> Arizona v. Gant, 556 U.S. 332, 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

<sup>13</sup> 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).

<sup>14</sup> Gant, 556 U.S. at 339.

<sup>15</sup> Gant, 556 U.S. at 339.

control of an item, such that no danger exists that the arrestee might gain access to the item to seize a weapon or destroy evidence, officers may not conduct a warrantless search of that item incident to the arrest.<sup>16</sup>

Here, MacDicken could have possibly reached the bags to seize a weapon. The bags were not in Gillebo's exclusive control, and officer safety was a substantial concern during MacDicken's arrest, given the nature of his crime. Officers suspected MacDicken of committing a crime involving a firearm and considered him a "high-risk" arrestee because he was potentially armed. Additionally, the arrest occurred in a public area, and several people associated with MacDicken stood nearby. Although Detective Gillebo moved the bags some distance away from MacDicken, they were still within reaching distance. Therefore, their relocation did not eliminate the possibility of MacDicken accessing them. Neither did the fact that MacDicken was in handcuffs. Cases exist where handcuffed individuals have acted extraordinarily, threatening officers and public safety.<sup>17</sup> Under these circumstances, the search was

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<sup>16</sup> United States v. Chadwick, 433 U.S. 1, 15, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), overruled on other grounds by California v. Acevedo, 500 U.S. 565, 579, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991).

<sup>17</sup> As the Third Circuit has noted, "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. . . . '[I]n 1991 alone . . . at least four police officers were killed by persons who had already been handcuffed.' And

commensurate with the twin justifications for a search incident to arrest—protecting arresting officers and preserving evidence.

MacDicken relies on State v. Byrd<sup>18</sup> and United States v. Maddox.<sup>19</sup> In Byrd and Maddox, however, the defendants were handcuffed and secured in the back of a patrol car at the time the searches occurred.<sup>20</sup> The defendants could no longer reach the searched objects, rendering those cases distinguishable from this one. Unlike the cases where the arrestee is in the back of a police car, MacDicken was not completely removed from the immediate area of the search.<sup>21</sup> A reasonable possibility still existed that MacDicken might access the bags.

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such incidents continue.” United States v. Shakir, 616 F.3d 315, 321 (3rd Cir.) (third alteration in original) (citations omitted) (quoting United States v. Sanders, 994 F.2d 200, 209-10 (5th Cir. 1993)), cert. denied, 131 S. Ct. 841 (2010). “The limitations of handcuffs’ effectiveness are widely known to law enforcement personnel.” Sanders, 994 F.2d at 209.

<sup>18</sup> 162 Wn. App. 612, 258 P.3d 686, review granted, 173 Wn.2d 1001, 268 P.3d 942 (2011).

<sup>19</sup> 614 F.3d 1046 (9th Cir. 2010).

<sup>20</sup> Byrd, 162 Wn. App. at 614; Maddox, 614 F.3d at 1047.

<sup>21</sup> We decline to consider MacDicken’s argument that Gant overruled the case the trial court relied upon to deny his motion to suppress, State v. Smith, 119 Wn.2d 675, 835 P.2d 1025 (1992). Regardless of Smith’s continuing validity, the trial court’s decision to deny MacDicken’s motion is supported by Chimel, a case that the United States Supreme Court reaffirmed in Gant. Gant, 556 U.S. at 343.

CONCLUSION

Because bags possibly containing a weapon were accessible to MacDicken at the time of the search, the warrantless search of them incident to his arrest was lawful. We affirm.

Leach, C. J.

WE CONCUR:

Jan, J.

Becker, J.

## APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 67314-9-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
ABRAHAM MACDICKEN,	)	
	)	
Appellant.	)	
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The appellant, Abraham MacDicken, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 2<sup>nd</sup> day of November, 2012.

FOR THE COURT:

Leach, C. J.  
Judge

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 NOV -2 PM 3:22

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 67314-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Mary Kathleen Webber, DPA  
Snohomish County Prosecutor's Office
- petitioner
- Attorney for other party

*gmr*  
MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: December 3, 2012

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2012 DEC -3 PM 4:21