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SUPREME COURT
STATE OF WASHINGTON
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No. 88267-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABRAHAM MACDICKEN,

Petitioner.

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

The Honorable Joseph P. Wilson

SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. INTRODUCTION

Police officers arrested Abraham MacDicken for robbery as he was leaving a hotel carrying a computer bag and a rolling duffel bag. Mr. MacDicken was immediately handcuffed, placed against a police car, and surrounded by four armed police officers. The bags were placed a car's length away from Mr. MacDicken and immediately searched by one of the officers without a warrant.

Under the Fourth Amendment and article I, section 7, the police may not conduct a warrantless search incident to arrest of any items not in a defendant's *immediate control*. Here, the Court of Appeals held that the search was a valid search incident to arrest because Mr. MacDicken "could have possibly reached the bags to seize a weapon." To the contrary, the bags were no longer in Mr. MacDicken's immediate control and the warrantless search of the bags violated the Fourth Amendment and article I, section 7.

Further, this Court's decision in *State v. Smith*, 119 Wn.2d 675, 679-80, 835 P.2d 1025 (1992), which was based solely on *Belton v. New York*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), which ostensibly authorized the search here, has been effectively overruled by this Court's recent jurisprudence in response to *Arizona v. Gant*, 556

U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and as a result this Court should explicitly overrule *Smith*.

B. ISSUES ON REVIEW

1. Under the Fourth Amendment and article I, section 7, the police cannot search bags that are within the exclusive control of the police without a search warrant. Does a police officer's warrantless search of a bag violate article I, section 7 of the Washington Constitution and the Fourth Amendment when performed "incident to the arrest" of a person who is secured by the police and unable to access a weapon or destroy evidence that may be contained inside a bag in the exclusive control of the police?

2. To the extent this Court's decision in *State v. Smith*, 119 Wn.2d 675, 835 P.2d 1025 (1992), purports to authorize the police search of the bag here, have the intervening decisions in *Arizona v. Gant*, *State v. Patton*, and *State v. Valdez*, overruled *Smith*?

C. STATEMENT OF THE CASE

Abraham MacDicken was arrested at gunpoint for robbery. CP 59. Mr. MacDicken was ordered to lie on the ground, which he did. CP 59. He was handcuffed as he lay on the ground. CP 59.

Two police officers joined two other police officers surrounding Mr. MacDicken. CP 59. Mr. MacDicken was now standing but still handcuffed. CP 59. One officer noted the bags Mr. MacDicken was carrying were lying near Mr. MacDicken, moved them “a car length away from” him, and immediately began searching them. CP 60 (Findings of Fact 26-27). Inside the laptop bag, the officer discovered a handgun, a laptop computer, women’s clothing and a letter addressed to one of the victims. CP 60; 4/28/2011RP 40-41. The officer turned the computer on and discovered it belonged to the victim 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 lawful search incident to arrest. CP 75-111. 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.

The Court of Appeals affirmed the denial of Mr. MacDicken's motion to suppress, ruling that pursuant to *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), he "could have possibly reached the bags to seize a weapon." *State v. MacDicken*, 171 Wn.App. 169, 175, 286 P.3d 413 (2012), *review granted*, 177 Wn.2d 1004 (2013). The Court declined to address whether the decision in *Arizona v. Gant* overruled this Court's decision in *Smith, supra. Id.* at 176 n. 21.

D. ARGUMENT

1. THE BAG WAS IN THE EXCLUSIVE CONTROL OF THE POLICE, THUS THE SUBSEQUENT WARRANTLESS SEARCH WAS ILLEGAL

The Fourth Amendment to the United States Constitution protects against unlawful searches and seizures. Article I, section 7 of the Washington Constitution protects against unwarranted government intrusions into private affairs. Warrantless seizures are per se unreasonable under both the Washington and United States Constitutions, 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 to the warrant requirement 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). 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).

The trial court here found the search of the bag was proper as incident to Mr. MacDicken’s arrest. Under both the Fourth Amendment and article I, section 7, the search here was illegal as the

bags were in the exclusive control of the police and there was no reasonable opportunity for Mr. MacDicken to access the bags.

a. The bags were in the exclusive control of the police, thus under the Fourth Amendment the search was illegal. “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.

In *United States v. Chadwick*, the United States Supreme Court ruled that mere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the warrantless search under the Fourth Amendment:

warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the search is remote in time or place from the arrest, or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (internal quotations and citations omitted), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565, 571, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

In *Chadwick*, federal agents arrested the defendants, placed them in custody, and seized a locked footlocker, which the agents had probable cause to believe contained narcotics. About an hour and a half after the arrest, at a federal building, the agents opened and searched the footlocker, while it was under their exclusive control and while the defendants were securely in custody. *Chadwick*, 433 U.S. at 4-5. The Supreme Court concluded that the warrantless search of the footlocker could not be justified under the Fourth Amendment, because “[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.” *Id.* at 15.

Chadwick relied on the United States Supreme Court’s decision in *Chimel* where the 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]." *Id.* at 763. *Chimel* arose out of the execution of a warrant for the defendant's arrest. The officers entered the defendant's home and handed him a copy of the arrest warrant. Over the defendant's objection, the police, accompanied by the defendant's wife, searched the entire house, the attic, the garage, and a small workshop, allegedly incident to the defendant's arrest. The search lasted approximately 45 minutes to an hour. The United States Supreme Court found the search unreasonable:

Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, 'unreasonable' under the Fourth and Fourteenth Amendments and the petitioner's conviction cannot stand.

Chimel, 395 U.S. at 768.

Here, the bags were no longer in Mr. MacDicken's immediate control but instead in the exclusive control of the police.¹ Mr. MacDicken was handcuffed, leaning against a car, and surrounded by at least four armed police officers, who just moments before had arrested him at gunpoint. Most importantly, the bags were a car's length away from Mr. MacDicken.

In concluding 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."² 171 Wn.App. at 175. The only case cited by the Court of Appeals to justify its broad statement was *United States v. Shakir*, 616 F.3d 315 (3rd Cir.), *cert. denied*, 131 S.Ct. 841, 178

¹ The Supreme Court has construed the phrase "the area within his immediate control" to mean "the area from which [a suspect] might gain possession of a weapon or destructible evidence." *Gant*, 129 S.Ct. at 1716, *Chimel*, 395 U.S. at 763.

² This statement brings to mind Justice Scalia'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) (Scalia, J., concurring).

L.Ed.2d 571 (2010). *MacDicken*, 171 Wn.App. at 176 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. *Id.* at 319 (“Shakir was standing up at the time of the search, he was in a public place with some 20 people around, *and his bag was right next to him.*” (emphasis added)). The Court did caution that the “reasonable possibility that the arrestee could access a weapon . . . in the container,” required “something more than the *mere possibility* that a suspect might access a weapon.” *Id.* at 320 (emphasis added).

Here, at the time of the search of the bags, Mr. MacDicken was handcuffed, leaning against a car, and restrained by armed 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. Under the Fourth Amendment as stated in *Chimel*, the warrantless

search of the bag in the exclusive control of the police was illegal.

Chimel, 395 U.S. at 768.

b. Article I, section 7 of the Washington Constitution barred the police search of the bags no longer in Mr. MacDicken's control. Article I, section 7 of our state constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A warrantless search under article I, section 7 of the constitution is *per se* unreasonable 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).

A valid search warrant establishes the requisite "authority of law." *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010). The State has the burden to establish a valid exception to the warrant requirement applies. *Afana*, 169 Wn.2d at 177. Unless the State carries its burden of proving either the existence of a warrant or an applicable exception, this Court must conclude that the search was made without authority of law. *Afana*, 169 Wn.2d at 177.

In the game-changing decision of *State v. Ringer*, this Court re-examined the search incident to arrest exception, and overruled a number of its prior cases that it deemed inconsistent with the

Washington Constitution. 100 Wn.2d at 698-99.³ *Ringer* noted the historical underpinnings of the search incident to arrest exception and discussed the drift away from independent Washington Constitution analysis. In resurrecting the state constitutional analysis, this Court re-emphasized that article I, section 7 provides greater protection than the Fourth Amendment, especially in the search incident to arrest exception:

We perceive three stages in the prior development of the search incident to arrest exception to the warrant requirement. The exception began as a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee. This was the scope of the exception when Const. art. 1, § 7 was adopted. In the early 20th century, however, both the federal courts and the courts of this state, with little or no reasoned analysis, expanded the exception until it threatened to swallow the general rule that a warrant is required. From 1964, when *Preston v. United States* was decided, until 1981, when it decided *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the United States Supreme Court interpreted the search incident to arrest exception in a manner consistent with its common law origins. In those years we neglected our own state constitution to focus instead on protections provided by U.S. Const. amend. 4.

We choose now to return to the protections of our own constitution and to interpret them consistent with their

³ A historical analysis of the search incident to arrest exception under article I, section 7 can be found in Comment, *Arrested Development: Arizona v. Gant And Article I, Section 7 of the Washington State Constitution*, 85 Wash.L.Rev. 355, 370-79 (2010).

common law beginnings. To do so, however, we find it necessary to overrule several of our previous cases. To a greater or lesser degree, *State v. Hughlett*, 124 Wn. 366, 214 P. 841 (1923); *State v. Deitz*, 136 Wn. 228, 239 P. 386 (1925); *State v. Miller*, 151 Wn. 114, 275 P. 75 (1929); *State v. McCollum*, 17 Wn.2d 85, 136 P.2d 165 (1943); *State v. Cyr*, 40 Wn.2d 840, 246 P.2d 480 (1952); and *State v. Jackovick*, 56 Wn.2d 915, 355 P.2d 976 (1960), are all without historic foundation and are inconsistent with traditional protections against the ability of law enforcement officers to make warrantless searches and seizures. For too long they have been allowed to lie fallow in the fields of our state jurisprudence. To the extent these cases and others not specifically mentioned are inconsistent with this opinion, they are no longer to be followed by the courts of this state.

Id. at 698-99.

Thus, in *Ringer*, this Court announced the test for any future analysis of searches incident to arrest:

Based on our understanding of Const. art. 1, § 7, we conclude that, *when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control. See State v. Michaels, supra.* A warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested. *Compare Dillon v. O'Brien*, 20 L.R.Ir. 300 (Ex.D.1887) with *Leigh v. Cole*, 6 Cox Crim.L.Cas. 329 (Oxford Cir.1853). The right to search incident to arrest “is merely one of those very narrow exceptions to the ‘guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized

exceptions arising from the necessities of the case.”
United States v. Rabinowitz, 339 U.S. 56, 72, 70 S.Ct. 430, 437, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting) (quoting *Robertson v. Baldwin*, 165 U.S. 275, 281, 17 S.Ct. 326, 328, 41 L.Ed. 715 (1897)). The exception must be “jealously and carefully drawn”, and must be strictly confined to the necessities of the situation. *See generally State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

Ringer, 100 Wn2 at 699-700 (emphasis added).

Shortly after the United States Supreme Court issued its decision in *Gant*, this Court had the opportunity to revisit the search incident to arrest exception to the warrant requirement under article I, section 7 of the Washington Constitution. *State v. Patton*, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). Acknowledging that *Ringer* had established the standard and subsequent cases of the Court had deviated from that standard, this Court agreed that its jurisprudence on the search incident to arrest doctrine had again 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.

State v. Buena Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009). *Cf.*

State v. Abuan, 161 Wn.App. 135, 147, 257 P.3d 1 (2011) (had defense counsel challenged the warrantless pat-down of defendant where no articulable suspicion defendant armed, under art. I, sec. 7 court would have been compelled to grant motion to suppress).

While *Patton* and *Buena-Valdez* involved searches of cars, the same rationale should apply to searches incident to arrest of items carried by a defendant. Both decisions were grounded in the analysis of this Court in *Ringer*, which itself was concerned with searches where the defendant was restrained and could no longer access a weapon. Thus, under article I, section 7, if it is possible for the police to obtain a search warrant, they must. 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.

Here, the police had ample time to obtain a search warrant. The bags searched by the police were a car's length away from Mr. MacDicken, who was handcuffed, leaning against a car and surrounded by at least four armed police officers. Officer safety and/or the destruction of evidence was no longer an issue because Mr. MacDicken could not access the bag.

2. RECENT JURISPRUDENCE FROM THIS COURT AND THE UNITED STATES SUPREME COURT HAS EFFECTIVELY OVERRULED THIS COURT'S DECISION IN *STATE v. SMITH*

Here, the trial court relied on *State v. Smith*, 119 Wn.2d 675, 679-80, 835 P.2d 1025 (1992), in authorizing the warrantless search of the bag incident to Mr. MacDicken's arrest. CP 63-67.⁴ The decision in *Smith* has effectively been overruled by the decision in *Gant* as well as subsequent decisions from this Court.

In *Smith*, the defendant was arrested and a fanny pack he had been wearing was seized by the police and placed on the front seat of a police car. Mr. Smith was handcuffed and placed in the rear of the police car. Several minutes after the arrest, a police officer searched

⁴ The trial court also ruled the decision in *Smith* had not been overruled by the decision in *Gant*. CP 66.

the fanny pack, discovering narcotics. Mr. Smith moved to suppress the items discovered in the fanny pack under *Chadwick*.

Deciding *Smith* solely on Fourth Amendment grounds, this Court relied on the United States Supreme Court's decision in *Belton, supra*, in authorizing the search of the fanny pack 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 (emphasis added).

Belton's continued viability regarding the search incident to arrest exception is questionable in light of the United States Supreme Court's subsequent decision in *Gant, supra*, which overruled such a broad interpretation of *Belton*. *Gant*, 129 S.Ct. 1719, 1723. *Gant* 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.

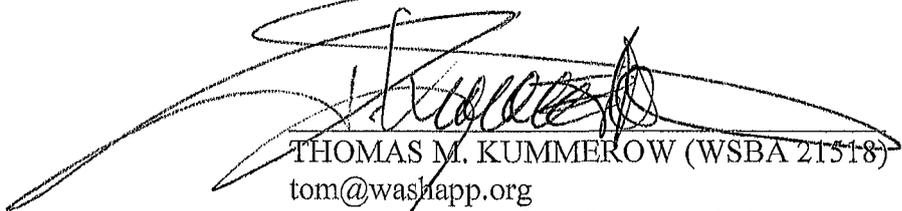
Given the fact that the decision in *Smith* was grounded solely in *Belton*, and *Gant* has overruled such an expansive interpretation of the search incident to arrest exception, the logic underlying *Smith* has disappeared. This Court should overrule the decision in *Smith*.

E. CONCLUSION

For the reasons set forth above, Mr. MacDicken respectfully requests that this Court suppress the evidence obtained pursuant to the unconstitutional search.

DATED this 26th day of July 2013.

Respectfully submitted,



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APPENDIX A

FILED

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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

MACDICKEN, ABRAHAM

Defendant.

No. 10-1-01008-9

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On April 28, 2011, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

- 1.) There is only one contested fact in this case: whether the laptop bag in the defendant's possession at the time of arrest was stolen; all other facts are uncontested.
- 2.) The defendant is charged with First Degree Robbery and Unlawful Possession of a Firearm.

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- 3.) On June 8, 2010, Thomas Brinkley and Krystal Steig were robbed at gunpoint at the Extended Stay America Hotel in Lynnwood, Washington.
- 4.) Ms. Steig is described as diminutive, approximately 5 feet tall and very small or thin.
- 5.) Brinkley and Steig reported the robbery to the police and advised them of a number of items that were taken including a Gateway laptop, cellular phone, DVDs and an iPod.
- 6.) On June 8, 2010, Det. R. Adams of the Lynnwood Police Department viewed a surveillance video from the Extended Stay America Hotel and obtained some still photographs from the video.
- 7.) Brinkley and Steig identified the individual in the still photographs as the person who had robbed each of them at gunpoint.
- 8.) Det. S. Gillebo of the Lynnwood Police Department also saw the still photographs from the video depicting the suspect.
- 9.) On June 9, 2010, Det. Adams and Gillebo went to the Traveller's Inn in Edmonds on a tip that the defendant was there.
- 10.) While there, they contacted a known associate of the defendant, Krystal Ramsey at her hotel room.
- 11.) Ms. Ramsey indicated she was staying there with two female friends only.
- 12.) Ms. Ramsey was arrested on outstanding warrants.
- 13.) The detectives requested a uniformed officer respond to their location.



- 14.) As the detectives were walking Ms. Ramsey to their car in the parking lot, the two other females left the hotel room.
- 15.) While Det. Gillebo was completing the arrest of Ms. Ramsey, Det. Adams contacted the other two females and asked their names.
- 16.) One of the other females, Ms. Black, admitted to having outstanding warrants and was being placed under arrest.
- 17.) At this point, Officer Reorda, a uniformed officer, had arrived to assist.
- 18.) Det. Adams then saw the defendant walking out from the hotel.
- 19.) The defendant was carrying a laptop bag and pushing a rolling duffle bag.
- 20.) Det. Adams and Off. Reorda immediately dropped what they were doing with Ms. Black and conducted a felony/high risk stop of the defendant.
- 21.) Det. Adams advised the defendant he was under arrest for First Degree Robbery and to lie down on the ground. The defendant complied.
- 22.) Det. Gillebo, seeing that Det. Adams and Off. Reorda had guns in their hands, stopped what he was doing with Ms. Ramsay and went over to their location to place handcuffs on the defendant as the defendant lay on the ground.
- 23.) Det. Gillebo then went back to Ms. Ramsey to place her under arrest for Obstructing.
- 24.) Det. Gillebo then immediately returned to the location of the defendant and saw that Officer Cornett had arrived.
- 25.) Det. Gillebo noted that the defendant had now been stood up but was still outside the patrol car.

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- 26.) Det. Gillebo noted the bags that the defendant had in his immediate possession at the time of his arrest were lying on the ground near the defendant.
- 27.) Det. Gillebo picked up the bags and moved them about a car length away from the defendant and began searching them.
- 28.) At this time there were two detectives and two uniformed officers in the public parking lot of the hotel dealing with four individuals; the defendant and his three female associates.
- 29.) Inside the laptop bag was a small black pistol, described as a KelTec 9 mm, a laptop computer identified as belonging to the victim, Krystal Steig, a small pair of jeans and a white tee shirt, and a letter addressed to Ms. Steig, as well as other items not identifiable to any person in particular. There was nothing in the bag identifying the bag as belonging to the defendant.
- 30.) Both detectives testified the jeans in the bag would not fit the three females who had been at the hotel with the defendant; the females with the defendant were 5 or more inches taller than Ms. Steig and much larger or "sturdier", as Det. Adams put it.
- 31.) After being advised of his constitutional rights, the defendant agreed to speak with Det. Adams.
- 32.) When asked, the defendant indicated he had stolen the laptop and the laptop bag from Ms. Steig.
- 33.) Although the defendant testified at the hearing that the laptop bag was his and not stolen from Ms. Steig, indicating he had been given it by an unidentified



person sometime earlier, the court finds this testimony not credible. There is no reason to believe that Det. Adams fabricated the statements from the defendant. Detective Adams wrote his report shortly after the defendant's arrest. He was very specific in his report. *The court finds Det. Adams testimony to be more credible.* If ~~Det. Adams~~ was going to fabricate a statement of that type on the part of the defendant, he could have included both bags in the defendant's possession at the time of arrest as both bags were searched.

- 34.) Two additional bags were seized by the detectives from a vehicle driven by one of the defendant's companions. The bags were identified as belonging to the defendant.
- 35.) Detectives searched the bags from the car without seeking a warrant first.

II. CONCLUSIONS OF LAW

A warrantless search is per se unreasonable under article 1, section 7 of the Washington 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). One exception is a search incident to a valid arrest. Johnson, 128 Wn.2d at 447. A warrantless search incident to a valid arrest is limited to the arrestee's person and the area within his immediate control. Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); see also Johnson, 128 Wn.2d at 451. The rationale underlying a search incident to arrest is the need to prevent the arrestee from obtaining a weapon or disposing of evidence. Chimel, 395 U.S. at 763; Johnson, 128 Wn.2d at 447.

The first issue is whether the defendant has standing to challenge the search of the laptop bag. The defendant himself told Det. Adams he had stolen the laptop bag and the laptop inside it. A person does not have a privacy interest in items that do not belong to him. "Although a person lawfully in possession of property may have sufficient and legitimate expectations, a person who possesses stolen property has no right to exclude others from that property. State v. Hayden, 28 Wash.App. 935, 940-941, 627 P.2d 973 (1981). "As a general rule, the rights assured by the Fourth Amendment are personal rights, (which) ... may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." Hayden at 939, (quoting State v. Simpson, 95 Wn.2d 170, 174, 622 P.2d 1199 (1980), (citing, Rakas v. Illinois, 439 U.S. 128, 138, (99 S.Ct. 421, 428), 58 L.Ed.2d 387 (1978); United States v. Salvucci, 448 U.S. 83, (100 S.Ct. 2547)), 65 L.Ed.2d 619 (1980).

However, Washington State recognizes automatic standing in cases involving possessory offenses the test for which is set forth in State v. Jones. "To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002) (citing State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). In Jones, the possessory offense was Unlawful Possession of a Firearm. As that is one of the offenses the defendant is facing in this case, the court must also address if the search of the laptop bag and rolling duffle bags were valid searches incident to arrest.

The definitive case in Washington on search incident to arrest of a bag or other item associated with a person at the time of arrest is State v. Smith, 119 Wn.2d 675, 835 P.2d 1025(1992). In Smith, the court sets forth the test for search incident to arrest stating: "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." State v. Smith, 119 Wn.2d 675, 681, 835 P.2d 1025 (1992)(citing United States v. Turner, 926 F.2d 883, 887 (9th Cir.), cert. denied, 502 U.S. 830, 112 S.Ct. 103, 116 L.Ed.2d 73 (1991) and United States v. Fleming, 677 F.2d 602, 607 (7th Cir.1982)). The defendant has asked the court to interpret his being arrested and in handcuffs and the bag being moved a short distance away as intervening events that make the search of the bags unreasonable under the Smith analysis. However, the facts in the Smith case, are as follows:

[The arresting officer in that case,] Gonzales handcuffed Smith and retrieved both the fanny pack and one of Smith's shoes. She walked back to her car, placed Smith in the backseat and put the fanny pack on the front seat. At some point Gonzales consulted briefly with another officer at the scene, left the car to pick up full beer bottles that were lying on the ground, and reported via radio that she had a person in custody. She also may have performed a radio warrant check, although she does not remember doing so. Gonzales eventually searched the fanny pack in her car, uncovering a pipe, some packages of marijuana, several plastic baggies, and a scale with cocaine residue. According to the Court of Appeals, the search occurred between 9 and 17 minutes after the arrest.

Smith at 677.

In the instant case, the defendant is arrested and placed in handcuffs by Det. Gillebo. Det. Gillebo leaves the defendant with Det. Adams and another officer to place



another individual under arrest then returns to the defendant's location. The defendant has not even been placed in the backseat of a patrol car yet, but is leaning against the patrol car with the bags in question at his feet, or still within the arm span and certainly within kicking distance of the defendant. The period of time that has elapsed is just a few minutes and the defendant had much more freedom of movement than the defendant in Smith. Det. Gillebo moved the bags a short distance away from the defendant, obviously for officer safety reasons, and searched the bags.

The defendant in this case is asking the court to find the search does not fall under the search incident to arrest exception to the warrant requirement based on the brief delay between the defendant's arrest and the search of the bags and the movement of the bags the short distance away. The defendant has argued the bags were in the exclusive control of the arresting officers and there was no danger the arrestee could gain access to them, so a search warrant should have been sought before the bags were searched. This is almost exactly the ruling of the Court of Appeals that the Supreme Court overruled in Smith (see State v. Smith, 61 Wash.App. 482, 487, 810 P.2d 982(1991)).

In ruling the search was a valid search incident to arrest, the Supreme Court pointed out that an officer removing the arrestee from the area and rendering the area safe did not invalidate a search incident to arrest.

Similarly, once 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. Smith at 682-683.

The court also pointed out that the arrestee could be moved into another room and the search would still be a valid search incident to arrest. "The court found that the officers' action in removing the arrestee from the room prior to the search was a reasonable safety precaution, and that to hold otherwise would be to impose a rule "entirely at odds with safe and sensible police procedures." Smith at 682, (citing United States v. Turner, 926 F.2d 883, 888 (9th Cir.)).

Here the officers had a suspect in an armed robbery in custody in a public parking lot. The suspect had been armed with a firearm. The firearm had not yet been located. 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. There have been numerous cases of assaults on officers perpetrated by individuals who had already been detained in 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. 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. Gillebo and the other officers and the public at the time of the arrest and the search incident thereto.

The defendant also invites this court to apply the principles of Gant to this search incident to arrest of the defendant's person. The court declines to do so. As indicated

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is State v. Whitney, "The facts do not raise Gant principles because it applies to warrantless vehicle searches incident to arrest, here, the search was of Mr. Whitney's person incident to his arrest, not his vehicle." State v. Whitney, 156 Wash.App. 405, 409, 232 P.3d 582 (2010)(review denied 170 Wash.2d 1004, 245 P.3d 226.) Similarly, Gant does not apply to the facts in this case as the defendant was walking at the time of his arrest, and not in a vehicle and the search of the bags was incident to his arrest.

Smith has not been overruled by Gant and its progeny.(see U.S. v. Perdona, 621 F.3d 745, (8th Cir.)(2010); U.S. v. Cartwright, Slip Copy, 2010 WL 3931102, N.D.Okla., (October 5, 2010) United States v. Shakir, 616 F.3d 315(3rd Cir.)(2010)). In Perdona the Eighth Circuit declined to extend Gant to search of the person incident to arrest. "Given our repeated recognition in the non-vehicle search-incident-to-arrest context that it may be possible for an arrestee restrained in a room to reach items in that room, and without any argument as to why the Supreme Court's reasoning with respect to reaching into a vehicle in Gant should control in Perdona's circumstances, we cannot say that the simple fact of Perdona's arrest and restraint left Perdona "clearly ... not within reaching distance of his [bag] at the time of the search." Perdona at 753 (quoting Gant at 1719.) Even in Shakir and Cartwright, cases where the court did apply Gant, the test remains the same as that set forth in Smith.

In Shakir, like this case, the defendant was a person being arrested for armed robbery; the arrest was in a public place; and, associates of the defendant were in the vicinity; the defendant was in handcuffs; and, the bag to be searched was at his feet. Shakir, at 321. The court in Shakir noted that a person in handcuffs can still be very

dangerous. "The Sanders court noted that "in 1991 alone ... at least four police officers were killed by persons who had already been handcuffed". And such incidents continue. See, e.g., United States Dep't of Justice, 2008 Law Enforcement Officers Killed & Assaulted, [http:// www. fbi. gov/ ucr/ killed/ 2008/ summaries. html](http://www.fbi.gov/ucr/killed/2008/summaries.html) (follow "TX" link) (officer killed by handcuffed suspect); United States Dep't of Justice, 2006 Law Enforcement Officers Killed & Assaulted, [http:// www. fbi. gov/ ucr/ killed/ 2006/ summaries. html](http://www.fbi.gov/ucr/killed/2006/summaries.html) (follow "TX" link) (same). 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 (citing United States v. Sanders, 994 F.2d 200, 209-210 (5th Cir.1993).

Similarly, in Cartwright, the defendant was suspected of being involved in an armed robbery. Eight officers moved in to arrest the defendant in a public parking lot as he left a hotel room. He was ordered to drop his bag and get down on his stomach. He was arrested, placed in handcuffs and in the custody of numerous other officers. The bag was picked up and moved approximately 8 feet from Cartwright and searched. Cartwright at 2. The court in that case held, "Given that Cartwright was confined only by handcuffs, members of the public were present, and there was a possibility of an accomplice, an objectively reasonable possibility of access to the bag remained in the area in which Agent Petree conducted the search of Cartwright's bag, and the search was justified as one incident to arrest." Id at 10.

The defendant does not have an expectation of privacy in the items contained in the stolen laptop bag and therefore the evidence seized from the bag is admissible with

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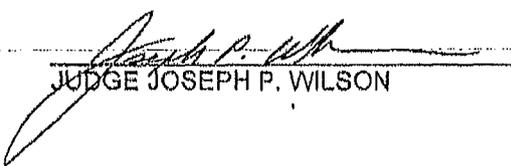
regard to any non-possessionary offense, in this case, the charges of First Degree Robbery with the firearm enhancements.

The defendant does have automatic standing with regard to any possessionary offense arising from items seized from the stolen laptop bag, in this case, Unlawful Possession of a Firearm.

The items were seized from the stolen laptop bag as a result of a valid and reasonable search incident to arrest and are therefore admissible at trial.

The state concedes, and the court agrees, the search of the two duffie bags located in the vehicle of the defendant's associate, Ms. Fuentes, were not reasonable and the items of evidence seized therefrom should be suppressed for trial.

DATED this 12th day of May, 2011.


JUDGE JOSEPH P. WILSON



IN THE SUPREME COURT OF THE STATE OF WASHINGTON

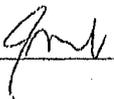
STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 88267-3
)
 ABRAHAM MACDICKEN,)
)
 Petitioner.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
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| [X] | MARY KATHLEEN WEBBER, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201 | (X) U.S. MAIL () HAND DELIVERY () _____ |
| [X] | ABRAHAM MACDICKEN 774117 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769 | (X) U.S. MAIL () HAND DELIVERY () _____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 26TH DAY OF JULY, 2013.

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State v. Abraham MacDicken

No. 88267-3

Please accept the attached documents for filing in the above-subject case:

Supplemental Brief of Petitioner

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