

Supreme Court No. 90188-1
Court of Appeals No. 29056-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

CHAD EDWARD DUNCAN,
Defendant/Petitioner.

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APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT

PETITIONER'S ANSWER TO AMICUS CURIAE BRIEFS OF
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS
AND WASHINGTON STATE PATROL

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A. ARGUMENT

The WAPA and WSP briefs demonstrate a misunderstanding and misuse of the protective sweep and community caretaking exceptions to the warrant requirement when applied to the facts of this case.

1. Under *Arizona v. Gant* and *State v. Snapp*, the interest of police safety is no longer a justification for a protective sweep for weapons once the driver and all occupants are detained in handcuffs.

When a law enforcement officer has a reasonable suspicion, based on articulable facts, that criminal activity has occurred or is occurring, he may stop and briefly detain a person for investigative purposes. *Terry v. Ohio*, 392 U.S. 15, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Similarly, if a law enforcement officer has a reasonable and articulable suspicion that an occupant of a vehicle has been involved in criminal activity, the officer may stop that vehicle for investigative purposes. *Dunaway v. New York*, 442 U.S. 200, 207, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). Once the car is stopped, officers may only conduct a protective sweep of the passenger compartment if they have a reasonable belief based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the officers in believing that the suspect is dangerous and the suspect may gain control of the weapons. *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

In this case, the officers on the scene knew a gun was involved in the drive-by shootings and it was reasonable to believe the gun was inside Mr. Duncan's car. The Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.w2d 485 (2009), and this Court's decision in *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012), have made a protective sweep following a *Terry* stop under these circumstances at least debatable.

In *Gant*, the Supreme Court held that the police may search a vehicle incident to the recent occupant's arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 556 U.S. at 338. In *Snapp*, this Court held that where an arrestee is not within reaching distance of the passenger compartment, a warrantless search of the vehicle is not permitted under the Washington State Constitution even if it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Snapp*, 174 Wn.2d at 197. The *Gant* and *Snapp* Courts noted their holdings did not preclude application or availability of other recognized exceptions to the warrant requirement authorizing a vehicle search "when safety or evidentiary

concerns demand.” *Gant*, 556 U.S. at 346–47; see *Snapp*, 174 Wn.2d at 196 n.13.

Just as with a search of a car incident to the driver’s arrest, the interest of police safety is no longer a justification for a protective sweep for weapons once the driver and all occupants are detained in handcuffs. See *Gant*, 556 U.S. at 339 (noting that if no possibility that the arrested person could reach into the car exists, the justification of protecting officers is absent) and *Snapp*, 174 Wn.2d at 189 (after the suspect exits the vehicle and cannot access it, there is no longer a risk of police officer safety or the destruction of evidence); accord *State v. Valdez*, 167 Wn.2d 761, 778, 224 P.3d 751 (2009). The reasoning in *Gant* and *Snapp* applies equally to a protective sweep of Mr. Duncan’s car for officer safety. After *Gant* and *Snapp*, the officers could not perform a *Terry* protective sweep of Mr. Duncan’s car for weapons, although they reasonably believed he was armed and dangerous, because he and all occupants were handcuffed and removed from the car. A warrant was required.

2. The community caretaking exception to the warrant requirement does not apply where police were conducting a criminal investigation.

Warrantless searches and seizures are per se unreasonable and violate the Fourth Amendment unless an established exception applies.

State v. Acrey, 148 Wn.2d 738, 745–46, 64 P.3d 594 (2003) (citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)).

Police had in their custody occupants and a vehicle matching descriptions given from the drive-by shooting scene and could see shell casings strewn on the floor and seats. While they had grounds to lawfully impound the car¹, it is unlikely a warrantless inventory search for a gun police expected to be present would have passed constitutional muster.² Police had probable cause to search the car for the likely weapon and there were no exigent circumstances preventing them from obtaining a search warrant.

The community caretaking exception recognizes that law enforcement officers provide, and the public expects them to provide, valuable services in the community that are unrelated to their law

¹ *State v. Terrovona*, 105 Wn.2d 632, 647, 716 P.2d 295 (1986) (“A car may be lawfully impounded as evidence of a crime if an officer has probable cause to believe that it was stolen or used in the commission of a felony.”); RCW 46.55.113(2)(d).

² “Routine inventory searches are reasonable under the Fourth Amendment when police follow standard practices and the search is not a pretext for obtaining evidence the police would not be able to obtain otherwise. *South Dakota v. Opperman*, 428 U.S. 364, 375, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976); *State v. White*, 83 Wn. App. 770, 775, 958 P.2d 982 (1996), rev'd on other grounds, 135 Wn.2d 761, 958 P.2d 982 (1998). ... Washington courts have long held that a non-investigatory inventory search of an automobile is proper when conducted in good faith for the purposes of (1) finding, listing, and securing property from loss during detention that belongs to a detained person and (2) protecting police and temporary storage bailees from liability due to dishonest claims of theft. *State v. Houser*, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980); *White*, 83 Wn. App. at 777, 958 P.2d 982.” Justice Charles W. Johnson & Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law: 2013 Update*, 36 *Seattle U. L. Rev.* 1581, 1740 (2013).

enforcement duties. *Acrey*, 148 Wn.2d at 748. For example, they render aid in emergency situations, provide routine checks on the health and safety of citizens, and generally assist those in need. See *id.* The exception encompasses seizures conducted by law enforcement officers in furtherance of their community caretaking functions that are completely divorced from law enforcement. *State v. Houser*, 95 Wn.2d 143, 151–52, 622 P.2d 1218 (1980).

The community caretaking exception allows for warrantless searches when police (1) make a routine check on health and safety or (2) respond to an emergency in order to render aid or assistance. *State v. Link*, 136 Wn. App. 685, 696, 150 P.3d 610 (2007) (citing *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004)). But a proper community caretaking function is divorced from a criminal investigation. *Link*, 136 Wn. App. at 696 (citing *State v. Kypreos*, 115 Wn. App. 207, 217, 61 P.3d 352 (2002), review denied, 149 Wn.2d 1029 (2003)); *Cady v. Dombowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (the motives of the police engaged in community caretaking must be “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”). Recognizing the potential for abuse, the community caretaking functions justification for a warrantless search must

be carefully applied and the “court must be satisfied the emergency is not simply a pretext for conducting an evidentiary search.” *State v. DeArman*, 54 Wn. App. 621, 626, 774 P.2d 1247 (1989) (citing *State v. Lynd*, 54 Wn. App. 18, 21, 771 P.2d 770 (1989)).

Here, WAPA and WSP argue the police were engaged in community caretaking by furthering their broad, ongoing duty to serve and protect the public. But it is always the duty of law enforcement to serve and protect; this duty, standing alone, does not justify warrantless searches and seizures. *Link*, 136 Wn. App. at 696. It is clear that in opening the door and seizing the gun³ the police were neither conducting a routine health or safety check nor responding to an emergency in order to render

³ It appears from testimony during the suppression motion hearing that standard police protocol upon sighting a firearm with evidentiary value in a vehicle was to leave the gun in place and obtain a search warrant.

[Q] Okay. At what point in time was [the gun]t secured, to your knowledge?

[Officer Scherzinger] Uh, in my report I could not tell you. In protocol we usually leave it in the car, since we did find it and it could be used as evidence.

[Q] So from the time that you first saw it until the time that you left you didn't see it removed?

[A] That is correct. (2/14/11 RP 93–94)

[Q] Officer Scherzinger, you indicated that -- you testified that earlier that it's protocol to leave the gun in the car or leave a weapon in the car, uhm, and then get a warrant; is that correct?

[A] Is it -- Well, is it protocol to leave the gun it in the car?

[Q] Yeah. That's what you testified to earlier.

[A] Well, I talked to my sergeants, and that's how they usually do it, yes.

[Q] Okay.

[A] But I don't usually make those decisions, my sergeants do.

[Q] That's fine. But you testified earlier that there's protocol, if you find a gun in the car, you're going to leave it in the car; is that correct?

[A] Correct. (2/14/11 RP 99)

aid or assistance. Instead, the police were actively investigating a possible crime of drive-by shooting and looking for an expected gun. The community caretaking exception to the warrant requirement does not apply here.

3. This Court should not carve out blanket exemptions to established exceptions to the requirement of a search warrant.

WSP and WAPA invite this Court to make a radical departure from case law based on speculative concerns that release to a third-party tow truck operator or authorized driver of a vehicle that contains a known firearm in the passenger compartment presents a physical or liability hazard to the officer, the third party, and the general public. Brief of WSP at 3–11; Brief of WAPA at 6–9. The constitutionality of a seizure depends on its reasonableness, e.g., *United States v. Chadwick*, 433 U.S. 1, 9, 97 S.Ct. 2476, 2482, 53 L.Ed.2d 538 (1977), *Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), and reasonableness is a distinctly fact-based inquiry. *Houser*, 95 Wn.2d at 148; *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). No court can foresee all fact circumstances that might arise in the future, and no ruling can ever be devised to cover all contingencies. In this case, the search for and seizure of the gun was not justified under the protective sweep and

community caretaking exceptions to the warrant requirement. This Court should not expand these narrow exceptions to the warrant requirement to include a blanket justification for the search and removal of firearms from all vehicles that will be towed.

D. CONCLUSION

All fruits of the illegal search of the car and trunk must be suppressed and the matter remanded for retrial. Alternatively the case should be remanded to make an individualized inquiry into Mr. Duncan's current and future ability to pay before imposing LFOs including costs of incarceration and medical care.

Respectfully submitted on November 4, 2015.

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Mr. Carpenter,

Attached for filing is Mr. Duncan's Answer to Amicus Curiae Briefs of WAPA and WSP. Please let me know if you have any questions. Thank you.

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