66543-0

66543-0

NO. 66543-0-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

JAMIE S. HOWE,

Appellant

SUPPLEMENTAL BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
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Attorney for Respondent

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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U.S. CONSTITUTIONAL PROVISIONS

Fourth Amendment 1

I. SUPPLEMENTAL ISSUES

The Court has requested supplemental briefing on the impact of State v. Snapp, No. 84223-0 and 84569-7.

1. Does the decision in Snapp require the Court to suppress evidence found in the defendant's car which formed the basis of the charges in Count I?

2. Where Count II was not based on any evidence obtained as a result of the search of the defendant's car and the jury was instructed to treat each count separately, should Count II be affirmed even if the Court finds Count I should be reversed?

II. SUPPLEMENTAL ARGUMENT

A. SNAPP REQUIRES THIS COURT TO REVERSE THE DEFENDANT'S CONVICITON IN COUNT I.

An automobile search incident to arrest is justified under the Fourth Amendment where (1) an unsecured arrestee is within reaching distance of the interior of the vehicle or (2) the search is for evidence of the crime of arrest. Arizona v. Gant, 556 U.S. 332, 343, 129 S.Ct. 1710, 1719, 173 L.Ed.2d 485 (2009). The Court held the Washington Constitution Article 1, §7 require no less than the Fourth Amendment. State v. Patton, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009). The Court has now held the State Constitution does not permit an automobile search incident to arrest

for evidence of the crime of arrest as an exception to the search warrant requirement in State v. Snapp, __ Wn.2d __, __ P.3d __ (2012).

The search of the defendant's vehicle in this case occurred before the decisions in either Gant or Snapp. The officers acted in good faith that the search was valid pursuant to prior authority from the Supreme Court. State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), overruled, State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009). Nevertheless, unless the search can be justified under some other exception to the warrant requirement, the officer's good faith does not justify the search. State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010).

In Snapp the Court confirmed that the search may still be justified under either the community caretaking function, exigent circumstances, or pursuant to a lawful impound. Snapp n. 13. There is no indication in the record that the search was justified under any of these exceptions. It appears that the officer searched the defendant's car incident to arrest consistent with the Court's earlier decision in Stroud. 10-11-10 RP 34-35, 72-73.

Because the Court has held the justification for the search of the defendant's car does not provide the authority of law required

under Article 1, §7 this Court is constrained to reverse the trial court and suppress the evidence. Valdez, 167 Wn.2d at 778. Because there is no other evidence that would support a conviction in Count I that count must be dismissed. Id.

B. THERE WAS SUFFICIENT INDEPENDENT EVIDENCE SUPPORTING COUNT II.

Count II of the Third Amended Information charged the defendant with Delivery of a Controlled Substance alleged to have been committed on or about December 23, 2008. The charge was based on the controlled buy from the defendant's home.

The evidence supporting that count showed the informant called the defendant to set up the buy. A female voice instructed the informant it was ok to come to her house to buy methamphetamine. She said the gate to her property was frozen, and gave instructions on how to get to the house. The detective had already determined the address was the defendant's 10-11-10 RP 22-26.

Thereafter the informant was searched and found to have no money or drugs on his person. The informant was given buy money. The informant was seen going to the home. A car the police knew was the defendant's was seen in the driveway. A few

minutes later the informant was seen leaving the defendant's home. While there no one else came or went from the residence. When searched the informant did not have any money on him, and no drugs or money in his car. The informant gave police a Christmas bag containing a Christmas card and methamphetamine. The Christmas card had the defendant's picture on it. 10-11-10 RP 24-31, 45-46, 58, 64-66, 79-83.

The defendant does not challenge the sufficiency of this evidence to support the delivery of a controlled substance count. None of the evidence from the January 9 possession with intent to deliver charge formed the basis of the December 23 incident charged in count II. The jury was specifically instructed to treat each count separately. "Your verdict on one count should not control your verdict on the other count." 1 CP. Jurors are presumed to follow the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). The conviction on count II should be unaffected by the disposition of the charge in count I.

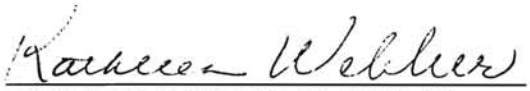
III. CONCLUSION

For the foregoing reasons and the reasons stated in the State's Response Brief the State asks the court to reverse the

conviction in count I, affirm the conviction in count II and remand to the trial court for resentencing on count II.

Respectfully submitted on May 16, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON, Respondent. v. JAMI S. HOWE, Appellant.	No. 66543-0-I AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 16th day of May, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

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containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 16th day of May, 2012.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit