

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STUART ALAN BACHMAN,

Appellant.

No. 38256-3-II

UNPUBLISHED OPINION
AFTER REMAND FROM THE
WASHINGTON SUPREME COURT

Hunt, J. – Stuart Alan Bachman appeals his jury convictions for unlawful possession of a controlled substance (methamphetamine), unlawful use of drug paraphernalia, and second degree unlawful possession of a firearm. He argues that the vehicle search incident to his arrest was illegal and, therefore, the evidence supporting each of these offenses should be suppressed. We agree and remand to the trial court for further proceedings.

FACTS

We incorporate by reference the facts set forth in our November 10, 2009 unpublished opinion affirming Bachman’s convictions. *State v. Bachman*, 153 Wn. App. 1002, ___P.3d ___ (2009). Bachman filed his opening appellate brief before the Supreme Court issued *Arizona v. Gant*;¹ he did not raise a *Gant* challenge in his direct appeal. Nor did he move to amend his

¹ 556 U.S. 332, 129 S. Ct. 1719, 173 L. Ed. 2d 485 (2009).

opening brief after the Supreme Court issued *Gant* in April 2009. Accordingly, in our November 10, 2009 opinion we did not address the legality of the initial car search that led to seizure of the evidence.

Bachman moved for reconsideration of our 2009 opinion, arguing, for the first time, that the vehicle search incident to his arrest was unlawful under *Gant*. Relying on our decision in *State v. Millan*, 151 Wn. App. 492, 212 P.3d 603 (2009), *reversed sub nom State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011), we denied the motion for reconsideration because Bachman had not challenged the vehicle search below and, therefore, he had failed to preserve for appeal whether the search was illegal under *Gant*. See *Spindle* (Order Denying Motion for Reconsideration (filed Jan 6, 2010) (J. Houghton dissenting)).

On September 7, 2011, our Supreme Court granted Bachman's motion for discretionary review and remanded his appeal back to us for reconsideration in light of *Robinson*. *State v. Bachman*, ___ Wn.2d ___, ___ P.3d ___, 2011 WL 3966250 (Wash. Sept. 7, 2011). The parties submitted supplemental briefs addressing the effect of *Robinson* on Bachman's appeal.

Analysis

In *Robinson*, our Supreme Court held that (1) *Gant* applies retroactively to appellants whose cases were pending on direct appeal when the United States Supreme Court issued *Gant*, and (2) failure to raise a suppression issue below does not bar a defendant from raising a *Gant* issue for the first time on appeal if he meets four specific criteria:

We hold that principles of issue preservation, as embodied in RAP 2.5(a), do not apply where (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the

defendant, and (4) the defendant's trial was completed prior to the new interpretation.

Robinson, 171 Wn.2d at 303-06, 307-08.

In its supplement brief, the State concedes that (1) under *Robinson*, Bachman is entitled to challenge for the first time on appeal the vehicle search that led to his arrest and convictions; (2) the search incident to Bachman's arrest was improper under *Gant*; and (3) Bachman is entitled to relief. Accepting the State's concession of legal error,² we hold that the vehicle search and seizure of evidence incident to Bachman's arrest was illegal under *Gant* and under the facts before us in this appeal, and we remand to the trial court for further proceedings consistent with *Robinson*.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, A.C.J.

Johanson, J.

² The State also (1) concedes that without the evidence obtained in the vehicle search "the State cannot sustain Bachman's conviction[s]" and (2) asks us to vacate Bachman's convictions and to "remand the case back to the trial court for entry of a dismissal order." Resp't's Suppl. Br. at 5. Because we reverse on legal grounds and remand for further proceedings, we do not consider the State's proffered factual and procedural concessions, which are more appropriate for the parties and the trial court to address on remand.

No. 38256-3-II