

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LARRY D. EVERETT,

Appellant.

No. 39193-7-II

UNPUBLISHED OPINION

Hunt, J. – Larry D. Everett appeals his bench trial conviction for unlawful possession of methamphetamine. He argues that the trial court erred (1) when it determined that his initial detention was lawful, and (2) in denying his CrR 3.6 motions to suppress the drug evidence officers found in a vehicle search incident to his arrest on an unrelated warrant because the vehicle search was unlawful under *Arizona v. Gant*.¹ The State concedes that “Everett has ‘sufficiently challenged the scope of the search incident to his arrest to preserve the issue for appeal.’” Suppl. Br. of Respondent at 3 (citing *State v. Snapp*, 153 Wn. App. 485, 494, 219 P.3d 971 (2009), review granted, No. 84223-0 (Wash. Oct. 5, 2010)).

The State asks us to remand to the trial court for an evidentiary hearing to determine

¹ *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

whether there are facts to support an exception under *Gant*. Holding that the initial detention was proper, we adopt the State's recommendation and remand to the trial court for a new suppression hearing to determine whether "there were any grounds for the search of Everett's vehicle other than his arrest on outstanding warrants." Suppl. Br. of Resp't at 3.

FACTS

I. Discovery of Drug Evidence

On December 30, 2008, Aberdeen Police Officer Bruce Watts responded to a call from the Aberdeen Dennis Company reporting that someone was in the store trying to pay for goods with a fraudulent check. When Watts arrived, a store employee pointed out a red truck in the parking lot and told him that the people in the truck were with the person who had written the fraudulent check inside the store. The check writer, Shawn M. Vandervort, was still in the store. Larry D. Everett was in the driver's seat; Candace L. Moe was in the passenger's seat.

When Aberdeen Police Officer Timothy Fellows arrived, Watts asked Fellows to contact the people in the truck, telling Fellows that they "were possibly involved in the fraud." Clerk's Papers (CP) at 23. Fellows approached the truck and spoke with Everett and Moe. Everett and Moe identified themselves and told Fellows that they were waiting for their friend "Shawn" who was inside the store. CP at 23. Fellows told Everett and Moe that they were not free to leave and that he was investigating a possible fraud involving "Shawn." CP at 57.

Everett and Moe remained in the truck while officers ran warrant checks. The officers determined² that both Everett and Moe had outstanding arrest warrants,

² According to Fellows, the officers discovered the warrants within 20 minutes of contacting Everett and Moe. According to Everett, it took the officers over an hour to discover the

³ arrested Everett and Moe, and put them in separate patrol cars. Watts then searched the truck “incident to arrest.” CP at 20.

On the truck’s floor, next to the driver’s seat, Watts found a black day planner, which could be closed with a zipper but which was not locked. “[O]n the inside flap in the top zippered pocket [Watts] found a small plastic bag” containing methamphetamine. CP at 20. Watts also found a “weight scale” with white powder residue on it inside the planner. CP at 20.

II. Procedure

The State charged Everett with unlawful possession of methamphetamine. Everett twice moved to suppress the evidence found in the vehicle search. In his first motion,⁴ Everett challenged his initial detention, arguing that Fellows had initially detained him without reasonable suspicion of criminal activity. The trial court orally denied the motion. In his second motion,⁵ Everett moved to suppress the drug evidence, arguing that Watt’s search of the closed day planner exceeded the allowable scope of a search incident to arrest. Based on the record developed at the previous hearing and a police report, the trial court orally denied this motion, too.

On April 15, 2009, just days before the Supreme Court issued *Arizona v. Gant*, 556 U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the trial court filed written findings of fact and

warrants.

³ The record does not disclose any detail about these warrants.

⁴ Everett filed this motion on January 23, 2009.

⁵ Everett filed this second motion on February 26, 2009.

conclusions of law addressing both suppression motions. The trial court concluded that (1) the officers' brief detention of Everett and Moe and the officers' requests for identification while investigating the possible fraud were proper, (2) Watt's search of the "unlocked," CP at 59, planner was a valid search incident to arrest, and (3) the officers had a reasonable and articulable suspicion that Everett was "possibly [] involved in some criminal activity given the fact that they had given [Shawn] Vandervort a ride to the Dennis Company." CP 59-60.

Everett waived a jury trial and agreed to a bench trial based on the record. The trial court found him guilty of unlawful possession of methamphetamine. Everett appeals.

ANALYSIS

Everett argues that (1) the trial court erred when it determined that his initial detention was lawful, and (2) the vehicle search was an unlawful search incident to arrest under *Gant*. We address each argument in turn.

We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Where, as here, the defendant does not challenge any of the trial court's findings of fact, we consider them verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review conclusions of law de novo. *Mendez*, 137 Wn.2d at 214.

I. Valid Initial Detention

Everett first argues that his initial detention was unlawful because Officer Fellows did not

have a well-founded suspicion that Everett and Moe were involved in any criminal activity.⁶ We disagree.

Under the “fellow officer” rule, we examine the cumulative knowledge of all the officers acting as a unit when evaluating whether an officer had sufficient cause to detain an individual. *State v. Wagner-Bennett*, 148 Wn. App. 538, 542, 200 P.3d 739 (2009) (citing *State v. Maesse*, 29 Wn. App. 642, 647, 629 P.2d 1349, *review denied*, 96 Wn.2d 1009 (1981)). An officer who does not have personal knowledge sufficient to justify a detention may still detain someone if (1) the detaining officer acts on the direction or as the result of a communication from a fellow officer; and (2) the police, as a whole, possess sufficient information to justify the detention. *Maesse*, 29 Wn. App. at 646-47.

Here, the officers were responding to a report of someone attempting to use a fraudulent check to purchase goods and a store employee told Officer Watts that the people in the truck were with the person who was attempting to issue the fraudulent check inside the store. Watts then told Fellows that the people in the truck might be involved in the incident the officers were investigating. Given the dispatcher’s and store employee’s information, Watts had sufficient information to justify detaining Everett and Moe, the other vehicle occupant. When Watts communicated this information to Fellows, Fellows had sufficient reason to detain and to question Everett and Moe. Accordingly, we hold that the trial court did not err when it concluded that the initial detention was lawful.

⁶ Although we ultimately remand for further proceedings, we address this issue because it would be dispositive if it had merit and because it could arise again on remand.

II. Search Incident to Arrest

Everett next argues that even though he did not raise the *Gant* issue below, he is entitled to raise it now because it was a manifest constitutional error. He contends that the search was unlawful under *Gant* because, at the time of the search, there was no risk that he or anyone else could access the truck and there was no reason to believe that the truck contained evidence of the crime for which the officers arrested him. We accept the State's concession that Everett preserved the *Gant* issue for appeal,⁷ address the merits of Everett's argument, and remand to the trial court for further proceedings to determine whether there were other grounds supporting the vehicle search that do not fall within the *Gant* prohibition.

Although Everett did not anticipate *Gant*, he argued, inter alia, that Watts exceeded the scope of a reasonable search incident to arrest when he searched the zippered day planner in the vehicle. Under these circumstances, this argument was sufficiently related to the search incident to arrest to have preserved the *Gant* issue for review under RAP 2.5(a). See *Snapp*, 153 Wn. App. at 493; *State v. Bliss*, 153 Wn. App. 197, 207, 222 P.3d 107 (2009).

Additionally, it is clear that the search of the vehicle incident to arrest took place after Everett and Moe had been arrested and secured in patrol cars, facts that clearly implicate *Gant*.

⁷ In its original response, citing *State v. McCormick*, 152 Wn. App. 536, 216 P.3d 475 (2009), petition for review filed, No. 83796-1, the State conceded the *Gant* issue and asked that we remand the matter to allow the trial court to vacate the conviction and to dismiss the charge. We then asked the parties for supplemental briefing addressing *State v. Millan*, 151 Wn. App. 492, 12 P.3d 603 (2009), review granted, 168 Wn.2d 1005 (2010), and *State v. Harris*, 154 Wn. App. 87, 224 P.3d 830 (2010).

In its supplemental brief, however, the State acknowledged and distinguished *Millan*, conceded that Everett had preserved the *Gant* issue for appeal, and asked us to remand to the trial court for further proceedings.

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Nevertheless, because no one was then aware that the law would soon change under *Gant*, the State did not have the opportunity to establish the existence of any potential lawful basis for the vehicle search independent of the warrantless search incident to arrest on an outstanding warrant for an unrelated crime. *See Bliss*, 153 Wn. App. at 207-08. “Thus, the record before us on appeal is insufficiently developed for us to determine whether there are other legally valid facts and reasons to defeat a motion to suppress under *Gant*.” *Bliss*, 153 Wn. App. at 208.

Accordingly, we remand to the trial court to conduct a new CrR 3.6 suppression hearing to consider whether any other exceptions to the warrant requirement might apply to the search of Everett’s truck. *See Bliss*, 153 Wn. App. at 208 (referring to the possibility that “another exception to the warrant requirement” could validate a search made unlawful by the decision (quoting *Gant*, 129 S. Ct. at 1723-24)); RAP 9.11(a) (allowing this court to direct trial court to

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take additional evidence)).

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:

Armstrong, PJ.

Quinn-Brintnall, J.