IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BUDDY DUANE JENKINS, Appellant.	No. 42119-4-II UNPUBLISHED OPINION

Penoyar, J. — Buddy Duane Jenkins appeals his stipulated-facts bench trial conviction for possession of over 40 grams of marijuana.[1] Jenkins argues that the trial court erred by denying his motion to suppress marijuana evidence seized from his car during a warrantless search after his arrest because he was handcuffed and away from his vehicle at the time of the search. We reverse Jenkins's conviction and remand for the trial court to dismiss because officers may perform a warrantless search of a vehicle incident to arrest only if the arrestee is unsecured, they have concerns for officer safety, and they reasonably believe both that: (1) evidence of the crime of arrest is in the vehicle and (2) the evidence could be concealed or destroyed before they could obtain a warrant.

FACTS

Jenkins's physician diagnosed him with diabetes mellitus type 2 and neuropathy of his legs and feet on July 5, 2005. Because both of Jenkins's conditions are debilitating and medical use of marijuana could benefit Jenkins, his physician issued him a medical marijuana authorization. The form Jenkins's physicians used to authorize his medical marijuana specified an expiry date.

[1] RCW 69.50.4013(1).

Jenkins's physicians have issued him written 12-month authorizations to use medical marijuana as palliative care on four occasions. Although there were brief lapses of time in 2007 and 2008 during which Jenkins's medical marijuana authorizations were expired, Jenkins, his physicians, and the State concur that Jenkins has continually suffered from his debilitating conditions from his first diagnosis on July 5, 2005 to the present.

On November 7, 2008, during a three-month lapse of Jenkins's written medical marijuana authorization, Longview police received an anonymous tip that someone fitting Jenkins's description was selling marijuana from a parked vehicle.[2] Based on this tip, Longview police officer Kevin Sawyer contacted Jenkins. Sawyer approached Jenkins's vehicle, engaged him in conversation, and noticed the odor of marijuana emanating from Jenkins's open car window. Based on the odor of marijuana, Sawyer asked Jenkins to exit the vehicle.

Sawyer read Jenkins his *Miranda*[3] rights, which Jenkins understood. Then Jenkins told Sawyer that he had marijuana on him but explained that he was authorized to use it medicinally. Jenkins removed a bag of marijuana from his pants pocket and handed it to Sawyer. This bag contained approximately five grams of marijuana. Sawyer asked to see Jenkins's medical marijuana authorization, but Jenkins did not have any documentation with him. Instead, Jenkins stated that he believed his medical marijuana authorization was at his home. Sawyer placed him under arrest and handcuffed him.

[2] We note that the State received this anonymous tip and conducted this search before the Supreme Court issued its opinion in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

After Sawyer arrested and handcuffed him, Jenkins stood away from his vehicle with a backup officer whom Sawyer had called. Jenkins did not cause Sawyer any concerns for officer safety and Jenkins "was very cooperative throughout." Report of Proceedings at 18. Nonetheless, while Jenkins was handcuffed and standing away from his vehicle with a police officer, Sawyer searched Jenkins's unoccupied car, believing he was performing a vehicle search incident to arrest.

During Sawyer's search of Jenkins's vehicle, Sawyer discovered several bags of marijuana, which totaled approximately 61 grams. Sawyer then transported Jenkins to jail. The State charged Jenkins with possession of more than 40 grams of marijuana without having obtained it based on a valid prescription or physician's order. Jenkins reestablished his written authorization for medical marijuana from a physician on December 6, 2008. Jenkins submitted each of his medical marijuana authorizations, including his December 6 authorization, to the Cowlitz County Prosecuting Attorney's Office on March 3, 2009.

Before trial, Jenkins moved to exclude the marijuana evidence that Sawyer seized in his warrantless search of Jenkins's vehicle because Sawyer did not have a warrant and Jenkins did not pose a threat to officer security and the evidence was not in jeopardy. The trial court denied Jenkins's motion to suppress.

In denying Jenkins's motion to suppress, the trial court found that: (1) Sawyer asked Jenkins to exit his car after smelling marijuana; (2) Sawyer arrested Jenkins and read him his rights, which Jenkins understood; (3) Jenkins stated he had marijuana on him but that he had a medical marijuana card; (4) Jenkins failed to produce his medical marijuana card in response to Sawyer's request; (5) Jenkins handed Sawyer a bag of marijuana from his pants pocket; (6)

Sawyer searched Jenkins's car incident to arrest and found additional marijuana. Based on those findings, the trial court concluded that Sawyer's search of Jenkins's vehicle was appropriate under the Fourth Amendment and the Washington Constitution "because the search was for evidence related to the crime of arrest." Clerk's Papers at 74.

After the trial court denied Jenkins's motions to suppress, Jenkins and the State stipulated to the facts, as described above, for a bench trial. During the stipulated facts bench trial, the trial court analyzed whether Jenkins could assert a medicinal marijuana affirmative defense. The trial court noted that Jenkins stipulated that he did not provide his authorization to Sawyer when Sawyer requested it. Thus, the trial court mused that this stipulation alone could bar Jenkins from asserting his affirmative defense. Further, the trial court concluded that, even if Jenkins had provided his authorization to Sawyer, it would have been insufficient to establish his affirmative defense because it had expired. Although the trial court acknowledged that the parties stipulated that Jenkins's conditions existed at the time of his arrest, it concluded that Jenkins could not assert a medical marijuana affirmative defense because his providers imposed expiry dates on each of his authorizations, so he did not have a valid authorization when he was arrested.

Because the trial court concluded that Jenkins could not assert a medical marijuana affirmative defense, it found him guilty as charged. The court sentenced him to 11 days confinement, which Jenkins had already served. Jenkins appeals his conviction.

ANALYSIS

Jenkins argues that the trial court committed reversible error when it denied his motion to suppress marijuana evidence that the State obtained during a warrantless search of his vehicle after his arrest. The State counters that the officer's warrantless search of Jenkins's vehicle was

a permissible search incident to arrest because the officer had probable cause to arrest and search for evidence of the crime of arrest in Jenkins's car. Jenkins's argument prevails under our Supreme Court's recent decision in *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012).

In general, we review a trial court's denial of a motion to suppress to determine whether substantial evidence supports its findings of fact and whether those findings support its conclusions of law. *State v. Williams*, 135 Wn. App. 915, 922, 146 P.3d 481 (2006). But where there are no disputed facts because the case proceeded on stipulated facts, we review de novo the trial court's conclusions of law upon which it denied the motion to suppress. *Williams*, 135 Wn. App. at 922.

Here, after the trial court denied Jenkins's motion to suppress, the case proceeded on stipulated facts. Because the trial was on stipulated facts, this appeal does not present any question of fact. Accordingly, we review the trial court's denial of Jenkins's motion to suppress de novo. *See Williams*, 135 Wn. App. at 922.

Both the Fourth Amendment and article I, section 7 of the Washington Constitution protect privacy interests, including a person's privacy interest in his or her vehicle and its contents, by prohibiting unreasonable searches and seizures. *See Snapp*, 174 Wn.2d at 187-88. A warrantless search is per se unreasonable, unless an exception to the warrant requirement applies. *Snapp*, 174 Wn.2d at 188. The U.S. Supreme Court recognized that, under the Fourth Amendment, a warrantless search of an automobile incident to the arrest of a recent occupant of that automobile is permissible only when either of two exceptions applies: (1) the arrestee is unsecured and within reaching distance of the passenger compartment of the vehicle at the time of the search or (2) it is reasonable for officers to believe that officers might find evidence related to

the crime of arrest in the automobile. *Arizona v. Gant*, 556 U.S. 332, 350, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring).

Both the Fourth Amendment and our state constitution allow a warrantless search of a vehicle incident to arrest to protect officer safety when the arrestee is unsecured and within reaching distance of the passenger compartment of the vehicle. *Snapp*, 174 Wn.2d at 192. However, our state constitution is more restrictive than the Fourth Amendment and does not allow for a warrantless search of a vehicle incident to arrest merely because officers reasonably believe that they may find evidence of the crime of arrest in the vehicle. *Snapp*, 174 Wn.2d 192; *see also State v. Patton*, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009). Instead, absent concerns for officer safety when the arrestee is unsecured, officers may perform a warrantless search of a vehicle incident to arrest only if they reasonably believe that: (1) evidence of the crime of arrest is in the vehicle *and* (2) the evidence could be concealed or destroyed before they could obtain a warrant. *Snapp*, 174 Wn.2d at 189; *Patton*, 167 Wn.2d at 394-95.

Officers must obtain a warrant when performing a search of a vehicle incident to arrest "'when a search can be delayed to obtain a warrant without running afoul of' concerns for the safety of the officer or to preserve evidence of the crime of arrest from concealment or destruction by the arrestee . . ." *Snapp*, 174 Wn.2d at 195 (*quoting State v. Buelna Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009)).

Here, however, Sawyer testified that Jenkins did not cause him any concerns for officer safety. Moreover, before Sawyer searched Jenkins's car incident to his arrest, Jenkins was handcuffed and standing away from his car with another officer. Even though Sawyer reasonably

believed that he could find evidence of the crime of Jenkins's arrest in his vehicle, Jenkins's vehicle was unoccupied and there is no indication that Sawyer feared the evidence would be concealed or destroyed before he could obtain a warrant. Consequently, neither of the narrow exceptions allowing for a warrantless search of an automobile incident to arrest under the Washington Constitution applied. Thus, Sawyer was required to obtain a warrant before searching Jenkins's car.[4]

Because Sawyer failed to obtain a warrant before searching Jenkins's car, the trial court erred by concluding that the vehicle search was constitutionally permissible. The trial court erred by denying Jenkins's motion to suppress. Because the marijuana evidence seized during the unlawful search of Jenkins's car must be suppressed, the State can prove only that Jenkins possessed the approximately five grams of marijuana that he removed from his pocket and handed to Sawyer. Thus, the State cannot meet its burden of proving its charge that Jenkins unlawfully possessed over 40 grams of marijuana. Thus, we reverse Jenkins's conviction for unlawfully possessing over 40 grams of marijuana and remand for the trial court to dismiss.

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 in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Armstrong, J.

[4] We find no fault on the officers' part; they were proceeding professionally under the known law.

Hunt, J.