IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,		**No. 27415-2-III**
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
MICHELLE MONIQUE DELCHAMBRE,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Sweeney, J. — In April 2009, the United States Supreme Court decided *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). That decision changed the law governing a search incident to arrest by substantially limiting the scope of the permissible search. This appeal was pending when the Court handed down the decision in *Gant*. Here, police found and seized drugs in a search incident to an arrest for driving with a suspended license. The defendant moved to suppress the evidence before trial on the theory that the traffic stop was a pretext. It was not until this appeal that she argued that the police officer exceeded the permissible scope of a search incident to arrest

outlined in *Gant*. We stayed the matter pending our Supreme Court's decision in the related case of *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011). In that case, the Supreme Court held that the principles of waiver and issue preservation do not bar a defendant from challenging for the first time on appeal the admissibility of evidence obtained pursuant to a warrantless search incident to arrest. *Robinson*, 171 Wn.2d at 305-06. Accordingly, we reverse and remand for a rehearing on the suppression issue.

FACTS

Michelle Monique Delchambre drove a car registered to a woman with a suspended license. Richland Police Officer Joe Brazeau stopped her after he determined that Ms. Delchambre generally met the description of the woman whose license was suspended. Ms. Delchambre told the officer she was not the registered owner but that her license was also suspended. Officer Brazeau then arrested Ms. Delchambre for driving with license suspended. And he searched the car incident to that arrest.

He found a black and white Ziploc plastic bag with a Nike symbol on the front, a black straw with white powder residue, and $43 inside a tan wicker-style shoulder purse. He also found a bag containing methamphetamine in the car, along with 5 ounces of a cutting agent. He found digital scales, more Ziploc bags, and a piece of paper with names and numbers behind the car's back seat. Ms. Delchambre was taken to jail. There, police found 5.5 grams of cocaine and 4.94 grams of methamphetamine in her clothes.

The State charged Ms. Delchambre with possession with intent to deliver a controlled substance. Ms. Delchambre moved to suppress the drug evidence seized from her and the car and argued that the initial traffic stop was a pretext, citing *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). Clerk's Papers (CP) at 20. Ms. Delchambre did not argue that the officer's search of her person or the car exceeded the permissible scope of a search incident to an arrest for driving with a suspended license. The trial court concluded that the stop was not a pretext and denied her motion. It then found Ms. Delchambre guilty as charged and sentenced her to 68 months of confinement.

Ms. Delchambre appealed the trial court's denial of her motion to suppress the evidence. We stayed the matter pending the decision and mandate in *Robinson*, 171 Wn.2d 292. On April 14, 2011, our Supreme Court decided *Robinson.*

DISCUSSION

Ms. Delchambre argues for the first time on appeal that the search of the car exceeded the scope of a lawful search incident to arrest and violated rights guaranteed by the Fourth Amendment to the United States Constitution. *See Gant*, 129 S. Ct. at 1723-24. Issues of constitutional interpretation and waiver are questions of law, which we review de novo. *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004).

Generally, a party's failure to raise an issue at trial waives the issue on appeal unless the party can show a "'manifest error affecting a constitutional right.'" *State v.*

McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)). But our Supreme Court recently held "that in a narrow class of cases, insistence on issue preservation would be counterproductive to the goal of judicial efficiency." *Robinson*, 171 Wn.2d at 305.

The *Robinson* court outlined four conditions that must be met to assign error for the first time on appeal:

> (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.

Id. The court then looked at the recent holding in *Gant* and concluded that it represents a new controlling constitutional interpretation of the law governing searches incident to arrest. *Id.* at 303. The court concluded that *Gant* overruled existing interpretations, which allowed an arrest to serve as carte blanche authority for an officer to search an entire car. *Id.* And the court recognized that *Gant* applies retroactively. *Id.*

Here, the *Gant* interpretation is certainly material to Ms. Delchambre's case. Before that decision, the officer's search of Ms. Delchambre's car incident to her arrest would have been accommodated by case law here in Washington and throughout the nation. *See, e.g.*, *New York v. Belton*, 453 U.S. 454, 462-63, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); *State v. Smith*, 119 Wn.2d 675, 681-82, 835 P.2d 1025 (1992); *State v.*

O'Neill, 110 Wn. App. 604, 608-09, 43 P.3d 522 (2002). But *Gant* changed all of that. Now police may search a vehicle incident to 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*, 129 S. Ct. at 1724. Ms. Delchambre's trial was completed prior to this new interpretation.

Similar to *Gant*, the police stopped Ms. Delchambre and arrested her for driving with a suspended license. A search under these circumstances is now unconstitutional. *Id.* at 1723-24. Officer Brazeau made the traffic stop after a routine license plate check revealed the registered owner had a suspended license. Ms. Delchambre failed to produce a valid driver's license. She was arrested for driving with a suspended license. At this point, there can be no valid justification to search for evidence of the offense of arrest. *Id.* That leaves only a concern for officer safety as a justification for the search.

The record does not indicate Ms. Delchambre's location when the search of the vehicle occurred. So it is unclear whether Ms. Delchambre could reach the passenger compartment at the time of the search. But Officer Brazeau searched both the front and back seats of the car and opened several bags. CP at 39-41. The search, then, may have exceeded that allowed by *Gant*, regardless of Ms. Delchambre's location. *Gant*, 129 S. Ct. at 1714 ("police may search incident to arrest only the space within an arrestee's 'immediate control,' meaning 'the area from within which he might gain possession of a

weapon or destructible evidence'" (internal quotation marks omitted) (quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)). In other words, even if Ms. Delchambre stayed in the car following the arrest, a question of fact remains for the trial court as to whether the search of the back compartment of the vehicle and the opening of bags violated *Gant*.

We, then, cannot conclude that this warrantless search was justified by the search incident to arrest exception; nor can we conclude that the search was unlawful. The record on appeal is insufficiently developed because, at the time of trial, the evidence was admissible under earlier search incident to arrest rules. Neither party had the incentive to even make an unlawful search argument. A new CrR 3.6 suppression hearing is required.

We reverse the conviction and remand for a new suppression hearing.

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

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Sweeney, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.