IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint Petition of:	)	**No. 28050-1-III**
	)	
	)	**Division Three**
JOHN FRANCIS FARRELL JR.,	)	
	)	
	)	**UNPUBLISHED OPINION**
Petitioner.	)	
	)	

Siddoway, J. — In a timely personal restraint petition, John Francis Farrell Jr. seeks relief from his 2007 convictions of possession of methamphetamine with intent to deliver and possession of methadone. We find a challenge to his conviction on the basis of *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) to be dispositive. We grant the petition, reverse the convictions, and remand with directions to the trial court to dismiss the charges with prejudice.

FACTS AND PROCEDURAL BACKGROUND

In November 2006, a Spokane police officer stopped a car for having expired license tabs. When the officer ran a driver's license check on the driver—Mr. Farrell—the officer learned that Mr. Farrell's license had been suspended. The officer

arrested Mr. Farrell on that basis, required him to step out of the car, and placed him in handcuffs. In a search of Mr. Farrell's person, the officer found over $600 in cash and a piece of cardboard on which was written a list of names and dollar amounts. The officer concluded it was a drug ledger. Incident to the arrest, the officer searched Mr. Farrell's car and found a black digital scale, drug paraphernalia, and about 73 grams of methamphetamine and methadone.

Mr. Farrell was charged and convicted of possession of a controlled substance with intent to deliver and possession of a controlled substance. His judgment and sentence was affirmed on appeal. *See* Commissioner's Ruling, *State v. Farrell*, No. 26608-7-III (Wash. Ct. App. Jan. 29, 2009). The mandate issued, terminating review, on May 28, 2009. During the pendency of his appeal—on April 21, 2009—the United States Supreme Court decided *Gant.*

On May 4, 2009, Mr. Farrell filed the personal restraint petition (PRP) before us. After considering the record and documents accompanying Mr. Farrell's petition, and in light of the prospect that *Gant* would apply retroactively to Mr. Farrell, we concluded that the petition and its attachments satisfied the prerequisites for a reference hearing. We remanded the matter to the Spokane County Superior Court for that purpose, directing the superior court to enter findings of fact and conclusions of law concerning (1) the circumstances of the November 2006 arrest and search; (2) whether the search of the car

was unlawful under *Gant*; and (3) if the search was unlawful under *Gant*, how Mr. Farrell's judgment and sentence would be affected.

Following the reference hearing, the superior court concluded that the warrantless search of Mr. Farrell's car would have been unlawful if *Gant* had applied at the time of his arrest. It nonetheless concluded that Mr. Farrell waived the suppression issue because he had not raised it before the trial court, on appeal, or even in his PRP. In reaching the last conclusion, the superior court assumed that the *Gant* issue was raised sua sponte by this court. That assumption was mistaken. Mr. Farrell had complained of ineffective assistance of counsel in the petition and had appended a newspaper article that discussed *Gant*, as one example of his counsel's deficient performance. Later, in his reply brief, he complained that the State's response failed to address the application of *Gant*.

Given the superior court's findings and conclusions establishing that the search and seizure were unlawful under *Gant*, the questions that remained in determining Mr. Farrell's right to relief were whether *Gant* applies retroactively and whether the failure to challenge the admission of the evidence in the trial court foreclosed Mr. Farrell from raising it in a PRP.

By this time, the Washington Supreme Court had accepted review of three cases examining (1) whether *Gant* was retroactive, (2) whether retroactive application of *Gant* may be waived, and (3) whether a good faith exception to the *Gant* rule may apply. *State*

v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011) (consolidated with *State v. Millan*, Supreme Court No. 83613-2) and *State v. Afana*, 169 Wn.2d 169, 233 P.3d 879 (2010). We stayed decision on Mr. Farrell's PRP pending the decision and mandate in *Robinson*.

In its April 2011 decision in *Robinson*, the Supreme Court held that *Gant* and *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009) (applying *Gant*) applied retroactively to all state and federal cases that were not yet final, and that the *Gant* issue was preserved for criminal defendants whose trials were completed before *Gant* and *Patton* were decided. *Afana*, decided in July 2010, had established that a good faith exception to the exclusionary rule was incompatible with article I, section 7 of the Washington Constitution. *Afana*, 169 Wn.2d at 184.

The stay in this matter was lifted on June 1, 2011 and we requested supplemental briefing from the State. The State responded with a letter that addressed *Robinson* and concluded, "Applying *Gant* pursuant to the Supreme Court's decision in *State v. Robinson*, the Superior Court's holding that the search was unlawful becomes effective." Letter from Mark Lindsey, Deputy Prosecuting Attorney, Office of the Prosecuting Attorney of Spokane County, to Renee Townsley, Clerk of Court, Wash. Court of Appeals 3, at 3 (June 21, 2011), *In re Pers. Restraint of Farrell*, No. 28050-1-III (Wash. Ct. App.). The State did not, and has not, challenged the superior court's conclusion that the search would have been unlawful had *Gant* applied, or the findings supporting that

conclusion. The State nevertheless declined to join in an agreed order remanding the matter for vacation of the conviction, explaining that it is the State's position that it "was legally justified when it originally filed the charges pursuant to the status of the law as it existed at the time" and that the State "will not agree that the original filing of charges was without legal authority to thereby foreclose petitioner seeking reparation from the State for his convictions." Letter from Mark Lindsey, Deputy Prosecuting Attorney, Office of the Prosecuting Attorney of Spokane County, to Renee Townsley, Clerk of Court, Wash. Court of Appeals 3, at 2 (Oct. 4, 2011), *In re Pers. Restraint of Farrell*, No. 28050-1-III (Wash. Ct. App.).

Absent an agreed order, counsel was appointed for Mr. Farrell and the matter was set for a decision on the merits.

ANALYSIS

To prevail in a PRP, the petitioner must show by a preponderance of the evidence either an error of constitutional magnitude that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004); *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083, *cert. denied*, 528 U.S. 1009 (1999). Mr. Farrell contends prejudicial evidence from the warrantless search of his car was admitted in violation of the federal and state constitutions.

The Fourth Amendment to the United States Constitution protects the right of the people to be secure in their houses and possessions against unreasonable searches and seizures. *State v. Valdez*, 167 Wn.2d 761, 768, 224 P.3d 751 (2009). A warrantless search is per se unreasonable unless the circumstances of the situation made the search imperative. *Id.* Under article I, section 7 of the Washington Constitution, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The privacy protections under article I, section 7 are more extensive than the protections provided by the Fourth Amendment and bar warrantless searches with very limited exceptions. *Valdez*, 167 Wn.2d at 772. Before *Gant*, Washington courts held that the Fourth Amendment and article I, section 7 generally permitted warrantless vehicle searches of a passenger compartment incident to an occupant's arrest. *Robinson*, 171 Wn.2d at 302. Even after a suspect had been arrested, handcuffed, and placed in a patrol car, officers were allowed to search the passenger compartment for weapons or destructible evidence. *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), *overruled by Valdez*, 167 Wn.2d at 777.

In *Gant* the United States Supreme Court announced a new rule governing the warrantless vehicle search incident to arrest exception. 526 U.S. at 343. The exception applies under the Fourth Amendment only if (1) the arrestee is within arm's reach of the passenger compartment at the time of the search or (2) it is reasonable to believe that the

vehicle contains evidence related to the crime of the arrest. *Id.* at 351. "When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Id.* Following *Gant*, the Washington Supreme Court has held that the search of a vehicle incident to arrest is lawful only if, at the time of the search, there is a reasonable basis to believe that the arrestee poses a safety risk or that a search is necessary to prevent destruction or concealment of evidence of the crime of arrest. *Valdez*, 167 Wn.2d at 777; *Patton*, 167 Wn.2d at 394-95.

Bearing in mind the evidence that would have been suppressed applying *Gant*, a review of the record of Mr. Farrell's trial reveals insufficient admissible evidence to prove beyond a reasonable doubt that Mr. Farrell possessed controlled substances. The search of his person produced only $607 in cash and what appeared to be a drug ledger. This evidence is clearly insufficient to establish the element of possession of a controlled substance. *See* RCW 69.50.401(1) (elements of possession of a controlled substance and possession with intent to deliver).

Mr. Farrell has demonstrated that he was prejudiced by the admission of evidence violating the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. Having resolved the petition on this basis, we need not address the additional bases for relief urged by Mr. Farrell.

We grant Mr. Farrell's petition, reverse his convictions, and remand his judgment and sentence to the trial court for dismissal of the charges with prejudice.

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.

_____
Siddoway, J.

WE CONCUR:

_____
Korsmo, A.C.J.

_____
Brown, J.