IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW O'CONNOR, Appellant.	No. 37504-4-II UNPUBLISHED OPINION

Armstrong, J. — Andrew O'Connor appeals his conviction of possessing methamphetamine, arguing that the trial court erred in failing to suppress a methamphetamine pipe found in the truck he was driving and in failing to give the jury a unanimity instruction. In our original unpublished decision in this case, we affirmed O'Connor's conviction. On November 4, 2009, the Supreme Court remanded this case back to our court for reconsideration in light of *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Upon reconsideration, we hold that absent other grounds to support it, the search of O'Connor's truck exceeded the bounds set by *Gant* and its progeny and the evidence obtained in the search must be suppressed. Thus, we reverse and remand to the trial court for a hearing as to whether grounds other than the arrest support the search of O'Connor's truck. If the State cannot show other grounds, the trial court must suppress any evidence gathered from the truck.

Facts

Pacific County Deputy Sheriff Rich Byrd was on patrol in an unmarked car when he saw a truck drive by and enter a nearby beach. Deputy Byrd recognized the driver as O'Connor and the passenger as Angela Mathewson. He believed that Mathewson had outstanding arrest warrants

and followed the truck while confirming that the warrants were active. When the truck stopped to let a dog out, the deputy drove past and positively identified its occupants. He turned around, pulled behind the truck, and activated his emergency lights. When Deputy Byrd left his car and approached the driver, O'Connor had to restrain the dog.

After informing Mathewson that she had outstanding arrest warrants, Byrd asked her to exit the truck. Mathewson said she had to control the dog even though O'Connor was holding it by the collar, and she made furtive movements before stepping out of the truck. After a backup officer arrested her, Deputy Byrd asked O'Connor to get out of the truck so he could search it. The deputy found a large glass pipe on the passenger side of the truck's bench seat, and the white residue in the pipe led him to believe it was used to smoke methamphetamine. He also found a glove that contained a second pipe with residue in the middle of the bench seat, and he believed that the second pipe was used to smoke methamphetamine as well.

Deputy Byrd asked O'Connor if there was methamphetamine in the vehicle, and O'Connor replied that he did not know of any. The deputy then asked O'Connor if he could search his person, and O'Connor told him to go ahead. Deputy Byrd found a baggie in O'Connor's back pocket that appeared to contain methamphetamine. He read O'Connor his *Miranda*[1] rights, and O'Connor admitted that there was methamphetamine in his pocket.

After the State charged O'Connor with one count of possession of methamphetamine, O'Connor filed a motion to suppress all evidence obtained following the search of his person. During the suppression hearing, Deputy Byrd testified that the glove in which one pipe was found was typical of those used in the fishing industry, and he added that O'Connor worked in the

[1] *Miranda v. Arizona*, 396 U.S. 868, 90 S. Ct. 140, 24 L. Ed. 2d 122 (1969).

fishing industry.

Following the hearing, the trial court suppressed all evidence and statements discovered after the search of O'Connor. On the first day of trial, defense counsel moved to suppress the pipe found in the glove as well, arguing that it was clearly associated with O'Connor, the nonarrested driver of the vehicle and, thus, inadmissible under *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999). The trial court ruled that the pipe from the glove was admissible but that the State's witnesses could not testify that they knew O'Conner was a fisherman or that the glove was typical of those used in the fishing industry.

Deputy Byrd testified about the discovery of the pipes and added that both were within O'Connor's reach when he was in the truck. The trial court instructed the jury that possession could be either actual or constructive and that constructive possession occurs "when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession." Clerk's Papers at 39. The State argued in closing that O'Connor was in constructive possession of both pipes, but the defense argued that O'Connor did not know about either pipe and did not control the pipe found on Mathewson's seat. The jury found O'Connor guilty and the trial court imposed a standard range sentence. O'Connor raises two issues in appealing his conviction.

ANALYSIS

I. Legality of the Search

O'Connor argues initially that the trial court erroneously denied his motion to suppress the pipe found in the glove under article I, section 7 of the Washington Constitution.[2]

[2] The State does not challenge O'Connor's standing to challenge the search incident to his

In *Gant*, the United States Supreme Court reassessed the search incident to arrest exception to the warrant requirement of the Fourth Amendment. *Gant* rejected the reading of *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), that predominated in the lower courts, namely, that the Fourth Amendment "allow[s] a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 129 S. Ct. at 1718. The Court held instead that "[p]olice may search a vehicle incident to a recent occupant's 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 1723.

The decision in *Gant* prompted the Washington Supreme Court to reconsider the search incident to arrest exception under article I, section 7 of our state constitution. *State v. Valdez*, ___ P.3d___, 2009 WL 4985242 (Wash. Dec. 24, 2009), at *2; *State v. Patton*, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). The court held that article I, section 7 permits a warrantless search of an automobile under the search incident to arrest exception only when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest. *Valdez*, 2009 WL 4985242, at *8, *Patton*, 167 Wn.2d at 384.

The State does not argue that the search of O'Connor's truck was necessary to preserve officer safety or prevent concealment or destruction of evidence of the crime of arrest. Rather, the State contends that O'Connor has waived the ability to obtain relief from the cases discussed above because he did not file a pretrial motion to suppress that specifically challenged the officer's

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passenger's arrest. *See State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002) (person may rely on the automatic standing doctrine if the challenged police action produced the evidence sought to be used against him, even if he does not claim ownership of the item searched).

authority to search his truck incident to the arrest.

O'Connor did file a motion to suppress on the first day of trial in which he challenged the truck's search, albeit under a theory different than that set forth in *Gant* and *Valdez*. His failure to predict these holdings is not fatal, however, because he would be entitled to relief even if he had not moved to suppress at all. *See State v. Harris*, ___ P.3d ___, 2010 WL 45755 (Wash. App. January 7, 2010), at *6 (failure to move to suppress under pre-*Gant* law does not waive defendant's right to take advantage of *Gant* on appeal); *State v. McCormick*, 152 Wn. App. 536, 216 P.3d 475, 476-77 (2009) (defendants may take advantage of *Gant* on appeal whether or not they moved to suppress before trial).

The search of O'Connor's truck clearly exceeded the bounds of a lawful search incident to arrest under article I, section 7. Because the State did not have the chance to argue below that other grounds might validate the search of O'Connor's truck, however, we reverse and remand to the trial court so that the State may raise such grounds. Because the warrantless search of O'Connor's truck may yet be upheld, we consider the second issue he raises in this appeal.

II. Unanimity Instruction

O'Connor next argues that the trial court erred in failing to give a unanimity instruction requiring the jury to agree on which pipe formed the basis of its guilty verdict.

A fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007); U.S. Const. amend. VI; Wash. Const. art. I, § 21. When the prosecutor presents evidence of several acts which could form the basis of one count, the State must tell the jury which act to rely on in

its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). In multiple act cases, when the State fails to elect which incident it relies on for the conviction or the trial court fails to instruct the jury that it must agree that the same underlying act has been proved beyond a reasonable doubt, the error is harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Crane*, 116 Wn.2d at 325. An alleged failure to offer a unanimity instruction is an error of constitutional magnitude and may be raised for the first time on appeal. *Crane*, 116 Wn.2d at 325.

Where the evidence indicates a continuing course of conduct, no unanimity instruction is needed. *State v. Craven*, 69 Wn. App. 581, 587-88, 849 P.2d 681 (1993). A continuing offense must be distinguished from several distinct acts, each of which could form the basis for a criminal charge. *State v. King*, 75 Wn. App. 899, 902, 878 P.2d 466 (1994) (quoting *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)). To determine whether one continuing offense may be charged, the facts must be evaluated in a commonsense manner. *King*, 75 Wn. App. at 902 (quoting *Petrich*, 101 Wn.2d at 571).

O'Connor argues that either pipe alone could have supported his conviction and that there was no continuing course of conduct to justify the court's failure to offer a unanimity instruction. He contends that the facts here resemble those in *King*, where Division One found the continuing course of conduct exception inapplicable to the defendant's drug possession charge. *King*, 75 Wn. App. at 902-03.

Even though the police found cocaine in the car in which King had been riding just before

his arrest and in his fanny pack during a subsequent inventory search, he was charged with only one count of possession. *King*, 75 Wn. App. at 901. At trial, the State presented evidence of the cocaine found in the car and the cocaine found in the fanny pack, and failed to elect the cocaine upon which it relied for conviction. In rejecting the claim that the failure to elect or to offer a unanimity instruction was excused because the two acts of possession constituted a continuing course of conduct, Division One observed that "[t]he State's evidence tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers. . . . One alleged possession was constructive; the other, actual." *King*, 75 Wn. App. at 903. The court also observed that there was conflicting evidence as to which of the car's occupants possessed the cocaine found therein, as well as conflicting evidence as to King's alleged possession of the cocaine in the fanny pack. King testified that he was unaware of the cocaine in the pack and that the officers must have planted it. *King*, 75 Wn. App. at 904. Given these facts, the failure to offer a unanimity instruction was not harmless error. *King*, 75 Wn. App. at 904.

This result is in contrast to Division One's holding in *State v. Love*, 80 Wn. App. 357, 908 P.2d 395 (1996), where the defendant was charged with possession with intent to deliver. The defendant's possession of cocaine on his person and in his residence reflected his single objective to make money by trafficking cocaine; thus, both instances of possession constituted a continuous course of conduct. *Love*, 80 Wn. App. at 362.

The State argued that O'Connor constructively possessed the two pipes, and that this possession occurred at the same time. Although the pipes were found in different places in the

truck, both were within O'Connor's reach while he was driving. The proximity of the pipes indicated O'Connor's objective to possess and use them both to smoke methamphetamine. Moreover, he asserted the single defense that he did not know about the pipes, and it would have been inconsistent for the jury to conclude that he possessed one pipe and not the other.

Even if the continuing course of conduct exception does not apply, the failure to give the jury a unanimity instruction was harmless. There was no evidence supporting a reasonable doubt as to O'Connor's possession of either pipe. Both were found within his reach in the truck, and the trial court instructed the jury that his dominion and control of the pipes did not need to be exclusive to constitute constructive possession. The failure to give a unanimity instruction under these circumstances was harmless.

We reverse and remand for proceedings in accordance with this opinion.

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.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, C.J.