No. 84223-0

J.M. JOHNSON, J. (dissenting)—Article I, section 7 of the Washington State Constitution affords greater protection for private affairs than does the Fourth Amendment to the United States Constitution, which protects against only "unreasonable searches." However, the majority overstates such heightened protection in the context of lawful arrests. A probable cause standard allowing officers to search for evidence relevant to the crime of arrest is constitutionally permissible. This requirement is derivative of the long standing search incident to arrest exception in this court's decisions under article I, section 7 of our constitution.

The officers in both *State v. Snapp* and *State v. Wright*[1] had probable cause to believe evidence relevant to the crime of arrest might be found in the respective vehicles. Daniel Snapp made a voluntary and noncustodial

[1] These cases were consolidated for review in this court. *State v. Snapp*, 153 Wn. App. 485, 219 P.3d 971 (2009); *State v. Wright*, 155 Wn. App. 537, 230 P.3d 1063 (2010).

admission that there was a "meth" pipe in the car. Strong evidence indicated to Officer Gregorio that marijuana would be found in Roger Wright's car. Officer Gregorio could smell a strong odor of marijuana coming from the vehicle, noticed a large roll of money in plain view, and obtained a voluntary admission from Wright, after *Miranda*[2] rights had been waived, that Wright had been smoking marijuana. Thus, I would affirm the Court of Appeals and the convictions in both cases and respectfully dissent.

A. Legal Standard

This court's case law in the area of search of automobiles incident to arrest has been characterized by a number of changes in direction. The court nearly a century ago held that "a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from him any evidence tending to prove the crime with which he is charged." *State v. Hughlett*, 124 Wash. 366, 370, 214 P. 841 (1923) (dealing with search of an automobile), *overruled* (50 years later) *by State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983).

We also extended this assertion to include the person's grip or suitcase

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

and the interior compartment of the automobile. *Id.* This holding recognized that "the person arrested has the immediate physical possession, not only of the grips or suit cases which he is carrying, but also of the automobile which he is driving and of which he has control." *Id.* Rather than relying on the mobility of the vehicle as had United States Supreme Court cases creating a lower expectation of privacy, *e.g.*, *Arizona v. Gant*, 556 U.S. 332, 343, 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), this statement of law was a logical consequence of the recognized search-incident-to-arrest exception.

This court then reversed *Hughlett* in *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983). The *Ringer* majority held that "[a] warrantless search [after a lawful arrest is made] is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested." *Id.* at 699.

Three years later, the court changed direction again in *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986), which overruled *Ringer* and held that

"officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence." *Id.* at 152. The period for which the passenger compartment could be searched included "the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car." *Id.* A limitation was that officers could not search a locked container or locked glove compartment without obtaining a warrant. *Id.*

After *Gant*, the court reversed course yet again in *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009), which overruled *Stroud* and returned to a rule similar to that in *Ringer*. *See id.* at 777. The court recognized, however, that "[a] warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest." *Id.*

Rather than continuing vacillation of our case law, i.e., *Valdez*, I believe we should adopt analyses derived from our constitution and historical case law. We should recognize the goals of clarity for law enforcement and citizens and heightened protection of individual liberties under article I, section 7 of our constitution. Such a rule of law would allow a search

incident to lawful arrest when there is probable cause to believe evidence relevant to the crime of arrest will be found in the vehicle.

This rule of law provides clarity to law enforcement because officers are trained to be familiar with the probable cause standard. Officers may conduct a search only under specific conditions after the suspect has been arrested, handcuffed, and placed in a patrol car. Additionally, this approach preserves heightened protections under article I, section 7 because the probable cause standard is a higher bar of protection than the reasonable belief standard under the Fourth Amendment to the United States Constitution. Thus, a probable cause standard for evidence relevant to the crime of arrest is more consistent with constitutional principles than eliminating the relevant evidence prong continued in the United States Supreme Court's *Gant* analysis.

B. Probable Cause

Here, the officers in both cases had probable cause to search vehicles for evidence relevant to the crime of arrest. Snapp was lawfully arrested for use of drug paraphernalia because he made a voluntary and noncustodial admission that there was a "meth" pipe in the car. As a result, Trooper Pigott

had probable cause to search the car for the "meth" pipe.

Strong evidence also provided Officer Gregorio probable cause to conclude that marijuana would be found in Wright's car. Wright was arrested under suspicion of possession of marijuana with intent to distribute. Officer Gregorio could smell a strong odor of marijuana coming from the vehicle, noticed Wright's apparent nervousness and a large roll of money in the glove compartment in plain view, and obtained a voluntary admission from Wright (after his *Miranda* rights had been waived) that he had been smoking marijuana. These facts provided probable cause to justify a search of each vehicle for evidence relevant to the crime of arrest.

Conclusion

I would affirm the Court of Appeals and the convictions in both cases. As opposed to the majority's new standard, I would have this court recognize that the constitution allows a search incident to lawful arrest when there is probable cause to believe evidence relevant to the crime of arrest will be found in the vehicle. The defendant's own words in *Snapp* provided the requisite probable cause, and strong evidence provided the requisite probable cause in *Wright*. Thus, I would uphold the search, admission of the evidence,

and convictions of both defendants. Because the majority holds otherwise and continues a confusing analysis justified neither by our constitution nor by relevant precedent, including that of the United States Supreme Court, I respectfully dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR: