

NO. 62418-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DONALD EUGENE RILEY,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 2

 A. PROCEDURAL FACTS 2

 B. SUBSTANTIVE FACTS 2

III. ARGUMENT: ARIZONA v. GANT 4

 A. OVERVIEW 4

 B. RELEVANT PROCEDURAL FACTS 6

 C. SUMMARY OF ARIZONA v. GANT 7

 D. APPLICATION OF ARIZONA v. GANT TO
 PENDING CASES 8

 E. EVIDENCE OBTAINED IN RELIANCE ON
 PRESUMPTIVELY VALID PRE-GANT CASE
 LAW SHOULD NOT BE SUPPRESSED 9

 1. The Fourth Amendment good faith
 exception to the exclusionary rule 9

 2. Under article I, § 7, a search conducted
 in reliance on presumptively valid case
 law should not be suppressed 14

 3. Under the facts of this case, the officers
 were relying on presumptively valid
 pre-Gant case law and the evidence
 should not be suppressed 19

4.	The art. I, § 7 exclusionary rule has traditionally been interpreted consistently with the federal rule	25
F.	CONCLUSION.....	28
IV.	<u>ARGUMENT: OTHER ISSUES</u>	28
A.	THE CrR 3.5 FINDINGS OF FACT HAVE BEEN ENTERED BY THE TRIAL COURT	28
B.	THE TRIAL COURT PROPERLY ADMITTED RILEY'S STATEMENT TO DEPUTY FOWLER.....	29
1.	Factual background: The CrR 3.5 hearing.....	29
2.	Legal standard: implied waiver of <u>Miranda</u> rights	31
3.	The record demonstrates that Riley waived his <u>Miranda</u> rights.....	33
C.	THE EVIDENCE WAS SUFFICIENT TO SUPPORT RILEY'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE	34
V.	<u>CONCLUSION</u>	38

TABLE OF AUTHORITIES

Table of Cases

Federal:

<u>Adams v. New York</u> , 192 U.S. 585, 24 S. Ct. 372, 48 L. Ed. 575 (1905).....	26
<u>Arizona v. Evans</u> , 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).....	13
<u>Arizona v. Gant</u> , ___ U.S. ___, 129 S. Ct. 1710 (2009).....	<i>passim</i>
<u>Boyd v. United States</u> , 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).....	26
<u>Chimel v. California</u> , 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).....	20
<u>Griffith v. Kentucky</u> , 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).....	8
<u>Herring v. United States</u> , ___ U.S. ___, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).....	12, 13, 24
<u>Illinois v. Krull</u> , 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987).....	12
<u>Massachusetts v. Sheppard</u> , 468 U.S. 981, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984).....	13
<u>Michigan v. DeFillippo</u> , 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).....	<i>passim</i>
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	1, 29-33
<u>New York v. Belton</u> , 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).....	20

<u>North Carolina v. Butler</u> , 441 U.S. 369, 99 S. Ct. 1755, L. Ed. 2d 286 (1979).....	32
<u>Olmstead v. United States</u> , 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928).....	23
<u>Stone v. Powell</u> , 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).....	23
<u>Teague v. Lane</u> , 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).....	8
<u>United States v. Calandra</u> , 414 U.S. 338, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974).....	10
<u>United States v. Leon</u> , 468 U.S. 897, 104 S. Ct. 3405 (1984).....	13
<u>Weeks v. United States</u> , 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914).....	26
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963).....	10
 Washington State:	
<u>City of Redmond v. Moore</u> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	16
<u>In re St. Pierre</u> , 118 Wn.2d 321, 823 P.2d 492 (1992).....	8
<u>State v. Adams</u> , 76 Wn.2d 650, 458 P.2d 558 (1969), <u>rev'd on other grounds</u> , 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971).....	31, 32
<u>State v. Athan</u> , 160 Wn.2d 354, 158 P.3d 27 (2007).....	33

<u>State v. Biloche</u> , 66 Wn.2d 325, 402 P.2d 491 (1965).....	27
<u>State v. Bond</u> , 98 Wn.2d 1, 653 P.2d 1024 (1982).....	14, 15, 24
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	<i>passim</i>
<u>State v. Burns</u> , 19 Wash. 52, 52 P. 316 (1898).....	25
<u>State v. Buzzell</u> , 148 Wn. App. 592, 200 P.3d 287 (2009).....	36
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	34
<u>State v. Cashaw</u> , 4 Wn. App. 243, 480 P.2d 528 (1971).....	31, 32
<u>State v. Fladebo</u> , 113 Wn.2d 388, 779 P.2d 707 (1989).....	21
<u>State v. Gibbons</u> , 118 Wash. 171, 203 P. 390 (1922).....	26
<u>State v. Grogan</u> , 147 Wn. App. 511, 195 P.3d 1017 (2008).....	33
<u>State v. Gross</u> , 23 Wn. App. 319, 597 P.2d 894 (1979).....	32
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1988).....	28
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	36
<u>State v. Hundley</u> , 72 Wn. App. 746, 866 P.2d 56 (1994), <i>aff'd</i> , 126 Wn.2d 418, 895 P.2d 403 (1995).....	35

<u>State v. Johnson</u> , 128 Wn.2d 431, 909 P.2d 293 (1996).....	21
<u>State v. Jones</u> , 95 Wn.2d 616, 628 P.2d 472 (1981).....	36
<u>State v. Kirwin</u> , 203 P.3d 1044 (2009).....	16
<u>State v. Mathews</u> , 4 Wn. App. 653, 484 P.2d 942 (1971).....	35
<u>State v. May</u> , 100 Wn. App. 478, 997 P.2d 956 (2000).....	36
<u>State v. Morris</u> , 70 Wn.2d 27, 422 P.2d 27 (1966).....	35
<u>State v. Myers</u> , 86 Wn.2d 419, 545 P.2d 538 (1976).....	31
<u>State v. Nordstrom</u> , 7 Wash. 506, 35 P. 382 (1893).....	25
<u>State v. O'Bremski</u> , 70 Wn.2d 425, 423 P.2d 530 (1967).....	27
<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	21
<u>State v. Partin</u> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	34
<u>State v. Potter</u> , 156 Wn.2d 835, 132 P.3d 1089 (2006).....	<i>passim</i>
<u>State v. Royce</u> , 38 Wash. 11, 80 P. 268 (1905).....	26
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	25
<u>State v. Stroud</u> , 106 Wn.2d 144, 720 P.2d 436 (1986).....	21

<u>State v. Terrovona</u> , 105 Wn.2d 632, 716 P.2d 295 (1986).....	31
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	34
<u>State v. Vrieling</u> , 144 Wn.2d 489, 28 P.3d 762 (2001).....	21
<u>State v. White</u> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	<i>passim</i>
<u>State v. Young</u> , 39 Wn.2d 910, 239 P.2d 858 (1952).....	27

Other Jurisdictions:

<u>Commonwealth v. Dana</u> , 43 Mass. 329 (2 met. 1841).....	25
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Constitutional Provisions

Federal:

U.S. Const. amend. IV	<i>passim</i>
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Washington State:

Const. art. I, § 7.....	<i>passim</i>
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Rules and Regulations

Washington State:

CrR 3.5.....	1, 28, 29, 30, 33
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Other Authorities

4 J. Wigmore, Evidence § 2183
(2nd ed. 1923) 25

I. ISSUES PRESENTED

(1) What is the effect of the recent United States Supreme Court decision in Arizona v. Gant on cases involving a vehicle search incident to arrest that are currently pending in trial courts and on appeal?

(2) Does the “good faith” exception to the exclusionary rule under the Fourth Amendment require suppression of evidence obtained when officers conducted a search under authority of presumptively valid state and federal case law?

(3) Does article I, § 7 of the Washington constitution require suppression of evidence obtained when officers conducted a search under authority of presumptively valid state and federal case law?

(4) Is remand or reversal required now that the trial court has entered written CrR 3.5 findings of fact and conclusions of law?

(5) Did the trial court correctly rule that the defendant knowingly, intelligently, and voluntarily waived his Miranda rights when he agreed to speak with a law enforcement officer?

(6) Was there sufficient evidence for a rational jury to find that the defendant possessed methamphetamine and that his “unwitting possession” defense was not credible?

II. STATEMENT OF THE CASE

A. PROCEDURAL FACTS.

Eugene Riley was charged with one count of possession of methamphetamine. CP 1. Following a jury trial, he was found guilty as charged. CP 14. 3RP 82-85.¹ Imposition of sentence was stayed pending appeal, on the condition that Riley undergo random testing for alcohol and illegal drugs. 4RP 7-8. Riley has since refused to submit to testing as required and is no longer in contact with his caseworker. CP 52-53. A warrant has been issued for his arrest. CP 51. Riley has filed an appeal. CP 14.

B. SUBSTANTIVE FACTS.

On January 7, 2007, at about 12:30 a.m., King County Sheriff's Deputy Fowler stopped Riley for running a red light. 2RP 13-14. After reviewing Riley's license, registration, and insurance, the deputy placed Riley under arrest.² 2RP 14-15. Riley's car was searched incident to his arrest by King County Sheriff's Deputy Thompson, who found suspected

¹ The verbatim report of proceedings will be referred to as follows: 1RP (September 9, 2008), 2RP (September 10, 2008), 3RP (September 11, 2008), and 4RP (September 26, 2008).

² Riley was arrested on an outstanding warrant but the jury was not informed of this fact pursuant to a pre-trial ruling. 1RP 6, 34-35. A stipulation was read to the jury that Riley's arrest was lawful. 2RP 28.

methamphetamine and three glass pipes in the center console of the vehicle between the passenger and driver seats. 2RP 15, 32-33. The pipes were immediately visible when the center console was opened. The pipes appeared to have been used. 2RP 33-34.

Deputy Fowler spoke with Riley at the scene after the suspected methamphetamine was found. Deputy Fowler testified that: “[Riley] told me that he had used methamphetamine and that he had been the only person operating or using the vehicle the last two months although it wasn’t registered to him.”³ 2RP 16.

The vehicle Riley was driving was registered to his brother, Kevin Riley. 2RP 22-23.

The suspected methamphetamine was submitted to the Washington State Patrol Crime Lab and was confirmed to be methamphetamine, as was the residue on the glass pipes. 2RP 16-18; 3RP 12-21.

³ Pursuant to pre-trial motions, this is a redacted version of what Riley actually told the deputy. Riley had also stated that he wanted to receive help for his methamphetamine addiction. See 1RP 8.

In his brief on appeal, Riley incorrectly states that he had been the driver of the vehicle for the previous two weeks; the record clearly establishes that he had driven the car for two months. 2RP 16; 3RP 35, 37-38.

Riley testified in his own defense. He stated that the vehicle he was driving when arrested belonged to his brother, who had loaned it to him. Riley had been driving the vehicle for about “two months.” 3RP 35, 37-38. The car was his primary mode of transportation, and he drove it three or four times a week. 3RP 38. Riley drove the vehicle to work, to the store, to visit friends, to go to dinner and to run errands. 3RP 37-38. Riley testified that he did not recall opening up the center console, but was not sure if he had done so. 3RP 35, 39. Riley denied knowing methamphetamine was in the center console. 3RP 35.

III. ARGUMENT: ARIZONA v. GANT

A. OVERVIEW.

Riley argues that his conviction must be reversed because the search of his vehicle incident to arrest is now prohibited pursuant to the recent United States Supreme Court opinion in Arizona v. Gant, ___ U.S. ___, 129 S. Ct 1710 (2009). It is the State’s position that even if Gant is applied retroactively, and even assuming that the search in this case was improper under Gant, the exclusionary rule should not be applied under either the Fourth Amendment or article I, § 7 of the Washington constitution because

the search was conducted by an officer in reasonable reliance presumptively valid case law.

As a preliminary matter, the State notes that if the vehicle search was improper under pre-Gant case law, it remains improper. In such a circumstance, there is no need to reach the question of the effect of Gant on the case. The search is invalid and the evidence must be suppressed.

Assuming the search would have been proper under pre-Gant case law, the question of the application of Gant to the case must be addressed. The State agrees that Gant applies retroactively to all non-final cases pending in trial courts and on appeal. Gant, however, does not require reversal of every vehicle search conducted incident to arrest. Gant approves of vehicle searches under a variety of circumstances and the facts must be examined on a case-by-case basis to determine whether the search remains valid even under a retroactive application of Gant.

Even if there is no basis to uphold the validity of the search under Gant, the State respectfully submits that evidence obtained during vehicle searches conducted in reliance on pre-Gant case law should not be suppressed. Searches conducted pursuant to

presumptively valid case law remain valid despite the fact that the case law is subsequently deemed to be unconstitutional.

Because Gant was decided under the Fourth Amendment, and did not purport to address or overrule state constitutional law, the analysis should focus on the federal exclusionary rule. The federal exclusionary rule has long recognized reversal is not required when officers relied in good faith on a statute that is subsequently deemed unconstitutional.

The same result holds true, however, under article I, § 7 of the Washington Constitution. As the Washington Supreme Court has recently recognized, convictions obtained under a statute that is subsequently deemed unconstitutional remain valid. The same reasoning applies in this case. There is no basis to suppress the evidence when officers have relied on long-standing and presumptively valid federal and state case law allowing vehicle searches incident to arrest.

B. RELEVANT PROCEDURAL FACTS.

The underlying search at issue in this case occurred on January 7, 2007. The defendant was found guilty after a jury trial.

On April 21, 2009, the United States Supreme Court decided Arizona v. Gant, ___ U.S. ___, 129 S. Ct 1710 (2009), which

restricted the permissible scope of vehicle searches incident to arrest.

On April 28, 2009, Riley filed his opening brief in the Court of Appeals, arguing that the search of his car was improper under Gant and his conviction must be reversed.

C. SUMMARY OF ARIZONA v. GANT.

In Arizona v. Gant, ___ U.S. ___, 129 S. Ct 1710 (2009), the United States Supreme Court adopted two new rules concerning vehicle searches incident to arrest. The first is that police may search a vehicle incident to arrest only when the passenger is unsecured and within reaching distance of the vehicle's passenger compartment. Gant, 129 S. Ct at 1714. The second is that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. Id.

Gant also recognized that vehicle searches might be proper for other reasons, including probable cause to believe that evidence of a crime was present in the vehicle, officer safety, and exigent circumstances. Gant, 129 S. Ct at 1721.

D. APPLICATION OF ARIZONA V. GANT TO PENDING CASES.

The State agrees that Gant must be applied to cases currently pending in trial courts and on direct.⁴ Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past); Teague v. Lane, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); In re St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992).

The analysis, however, does not end with the simple “retroactive” application of Gant. First, under the rules articulated in Gant, the search of a vehicle incident to arrest may still be proper because Gant permits vehicle searches under several alternative basis.⁵ That is, it will be necessary in pending cases to determine whether – under the rules articulated in Gant – the search was nevertheless proper.

⁴ Because Gant articulated a new constitutional rule that represents a clean break from the past it will not apply to cases on collateral review. Teague v. Lane, 489 U.S. 288, 298, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

⁵ It appears that no alternative basis to search exist in this case.

Second, there is a separate question as to whether the exclusionary rule requires suppression of the evidence found during a vehicle search conducted prior to the Gant decision. The State respectfully suggests that under the federal “good faith” exception to the exclusionary rule there is no basis to suppress the evidence obtained in good faith reliance on pre-Gant case law. Moreover, under article I, § 7 of the Washington constitution, when officers conducted a search of a vehicle under authority of presumptively valid case law in effect at the time of the search, the evidence obtained during the vehicle search should not be suppressed.

E. EVIDENCE OBTAINED IN RELIANCE ON PRESUMPTIVELY VALID PRE-GANT CASE LAW SHOULD NOT BE SUPPRESSED.

1. The Fourth Amendment good faith exception to the exclusionary rule.

Absent an exception to the warrant requirement, a warrantless search is impermissible under the Fourth Amendment to the U.S. Constitution.⁶ The exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights *generally through its deterrent effect*” by excluding evidence that is

⁶ Gant was decided purely on Fourth Amendment grounds. Gant, 129 S. Ct at 1714. Absent any basis to address state constitutional issues, the Fourth Amendment analysis is controlling. Nevertheless, the State addresses the good faith exception under both the Fourth Amendment and article I, § 7.

the fruit of an illegal, warrantless search. United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974) (emphasis added). Evidence derived directly or indirectly from illegal police conduct is an ill-gotten gain, “fruit of the poisonous tree,” that should be excluded from evidence. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963). Nevertheless, the United States Supreme Court has recognized that evidence obtained after an illegal search should not be excluded if it was not obtained by the exploitation of the initial illegality. Wong Sun, 371 U.S. at 488.

Consistent with these basic principles, the United States Supreme Court in Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), held that an arrest (and subsequent search) under a statute that was valid at the time of the arrest remains valid even if the statute is later held to be unconstitutional.

In DeFillippo, the Court stated:

At that time [of the underlying arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. *A prudent officer*, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, *should not have been required to anticipate that a court would later hold the ordinance unconstitutional.*

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. *Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.*

DeFillippo, 443 U.S. at 37-38 (emphasis added). The Court further noted that:

[T]he purpose of the exclusionary rule is to deter unlawful police action. *No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search.* To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

DeFillippo, 443 U.S. at 38, n.3 (emphasis added). The Court recognized a “narrow exception” when the law is “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” DeFillippo, 443 U.S. at 37-38.

Accordingly, in DeFillippo, the Supreme Court upheld the arrest, search, and subsequent conviction of the defendant even though the statute that justified the stop was subsequently deemed

to be unconstitutional.⁷ DeFillippo, 443 U.S. at 40; see also Illinois v. Krull, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987) (upholding warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional).

The only difference between DeFillippo and the present case is the nature of the legal authority relied upon by the officer conducting the search. In DeFillippo, the arrest was based on a presumptively valid *statute* that was later ruled unconstitutional. In the present case, the search was conducted pursuant to a procedure upheld as constitutional by well-established and long-standing *judicial pronouncements*. This distinction does not justify a different result.

Law enforcement officers should be entitled to rely on established case law – from both the federal and state courts – in

⁷ DeFillippo is entirely consistent with the Supreme Court’s exclusionary rule analysis. As the U.S. Supreme Court noted in a recent opinion:

[E]xclusion “has always been our last resort, not our first impulse,” ... and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it “result[s] in appreciable deterrence.” ... We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.... Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future....

Herring v. United States, ___ U.S. ___, 129 S. Ct. 695, 700, 172 L. Ed. 2d 496 (2009) (citations omitted).

determining what searches are deemed constitutional. Indeed, in the area of search and seizure it is generally the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particularly those of the Supreme Court, as to the constitutionally permissible scope of searches and seizures are clearly entitled to respect, deference, and reliance by officers in the field.

The good faith exception has been applied by the United States Supreme Court in many contexts involving the reliance by law enforcement officers on presumptively valid assertions by the judiciary.⁸ See e.g., United States v. Leon, 468 U.S. 897, 922, 104 S. Ct. 3405 (1984) (when police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted “in objectively reasonable reliance” on the subsequently invalidated search warrant); Massachusetts v. Sheppard, 468 U.S. 981, 991, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) (exclusionary rule does not apply when a warrant was invalid because a judge forgot to make “clerical corrections”); Arizona v. Evans, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (applying good-faith rule to police who reasonably relied on

⁸ For a recent discussion of federal cases recognizing the “good faith” exception to the exclusionary rule, see Herring, 129 S. Ct. at 704.

mistaken information in a court's database that an arrest warrant was outstanding).

Given this history, there is no reason to conclude that law enforcement officers are not entitled to rely on the ultimate presumptively valid judicial assertion: opinions issued by the United States Supreme Court and Washington Supreme Court.

2. Under article I, § 7, a search conducted in reliance on presumptively valid case law should not be suppressed.

Under article I, § 7, the exclusionary rule has been extended beyond the original Fourth Amendment context. See e.g., State v. Bond, 98 Wn.2d 1, 10-13, 653 P.2d 1024 (1982) (and cases cited therein) (“we view the purpose of the exclusionary rule from a slightly different perspective than does the United States Supreme Court”). However, even under the more stringent article I, § 7 analysis, when officers obtain evidence in reasonable reliance on presumptively valid statute, the exclusionary rule does not apply. The same result should apply when law enforcement officers rely on presumptively valid judicial authority.

In State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), the Washington Supreme Court addressed a situation involving an arrest premised upon a flagrantly unconstitutional “stop and

identify” statute that negated the probable cause requirement of the Fourth Amendment. Id. at 106. The Court concluded that article I, § 7 provided greater protection than the Fourth Amendment, that the officer’s subjective good faith in relying on the statute was not relevant, and that the federal subjective “good faith” exception to the exclusionary rule was not applicable in Washington. Id. at 110.

Nevertheless, the Court in White specifically stated that the remedy of exclusion should be applied only when the underlying right to privacy is “unreasonably violated.” White, 97 Wn.2d at 110-12. Three specific concerns justifying the application of the exclusionary rule were articulated: (1) to protect privacy interests of individuals from *unreasonable* governmental intrusions, (2) to *deter* the police from acting unlawfully in obtaining evidence, and (3) to *preserve the dignity* of the judiciary by refusing to consider evidence obtained by unlawful means. White, 97 Wn.2d. at 109-12; Bond, 98 Wn.2d at 12.

In addition, the Court has emphasized that in applying the exclusionary rule under article I, § 7 it is also appropriate to consider the costs of doing so. See e.g., Bond, 98 Wn. App. at 14 (“we have little hesitation in concluding that the costs [of excluding the evidence are] clearly outweighed by the limited benefits that

would be obtained from excluding the confessions because of the illegal arrest.”) As will be discussed in detail below, none of these concerns are implicated under the unique facts of the present case.

White involved a flagrantly unconstitutional statute. It did not assess a statute or judicial opinion that was presumptively valid.⁹

More recently, however, the Court has explicitly held in two separate cases that an arrest or search conducted in reliance on a presumptively valid statute that was subsequently deemed unconstitutional does not require suppression of the evidence. See State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006); State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006).

In State v. Potter, the defendants maintained that they were unlawfully arrested for driving while their licenses were suspended because, subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional.¹⁰ The defendants in Potter argued that under article I, § 7 evidence of controlled

⁹ For a critique of the White analysis, see State v. Kirwin, 203 P.3d 1044, 1051-54 (2009) (Madsen, J., concurring).

¹⁰ The defendants in Potter were relying on City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

substances found during searches of their vehicles incident to arrest had to be suppressed because their arrests were illegal.

In a unanimous decision, the Court applied the DeFillippo rule under article I, § 7, and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. Potter, 156 Wn.2d at 843.

The Court stated:

In White, we held that a stop-and-identify statute was unconstitutionally vague and, applying the United States Supreme Court's exception to the general rule from DeFillippo, excluded evidence under that narrow exception for a law "so grossly and flagrantly unconstitutional" that any reasonable person would see its flaws.

Potter, 156 Wn.2d at 843 (quoting White, 97 Wn.2d at 103 (quoting DeFillippo, 443 U.S. at 38)).

Under the facts presented in Potter, because there were no prior cases holding that license suspension procedures in general were unconstitutional, there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. Accordingly, applying DeFillippo, the Court affirmed the convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. Potter, 156 Wn.2d at 843.

Similarly, in State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006), a defendant contended that his arrest for driving while his license was suspended and a search incident to that arrest were unlawful for the reasons claimed in Potter. The Court rejected the defendant's argument, stating that:

White held that police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is “so grossly and flagrantly unconstitutional’ by virtue of a prior dispositive judicial holding that it may not serve as the basis for a valid arrest.”

Brockob, 159 Wn.2d at 341 n.19 (quoting White, 97 Wn.2d at 103 (quoting DeFillippo, 443 U.S. at 38)). As in Potter, the Court held that the narrow exception did not apply “because no law relating to driver’s license suspensions had previously been struck down.”

Brockob, 159 Wn.2d at 341, n.19.

Potter and Brockob recognize that White was addressing a unique situation: what should be the remedy when an arrest or search is conducted pursuant to a flagrantly unconstitutional statute. Such arrests and searches are presumptively unreasonable, regardless of the officer’s subjective good faith reliance on the statute. White did not address reliance on a presumptively valid statute. As Potter and Brockob make clear,

however, reliance on the presumptively valid statute is reasonable, does not implicate article I, § 7 because the search was conducted pursuant to authority of law, and does not require suppression of the evidence obtained in the course of the arrest or search.

As discussed above, the only difference between Potter and Brockob and the present case is that the present scenario involves presumptively valid *case law*, as opposed to a presumptively valid *statute*. This distinction should have no bearing on the analysis: the judicial opinions of the United States Supreme Court and the Washington Supreme Court should be viewed as least as presumptively valid as legislative enactments.

3. Under the facts of this case, the officers were relying on presumptively valid pre-Gant case law and the evidence should not be suppressed.

The vehicle search incident to arrest in this case was conducted before the United State Supreme Court decision in Arizona v. Gant, decided on April 21, 2009. Prior to that date, numerous federal and state judicial opinions law allowed vehicle searches incident to arrest. Accordingly, those searches should be upheld because they were conducted pursuant to presumptively valid case law.

There is no doubt that prior to Gant, federal and state courts had unequivocally endorsed the constitutional validity of vehicle searches incident to arrest. This is not a situation such as White where there was a prior suggestion that the rule being applied might be unconstitutional. It is not even the situation addressed in Potter and Brockob where the constitutionality of the statute had never been addressed before (and was thus “presumptively” valid). Instead, this is a situation in which the highest federal and state courts had specifically and repeatedly endorsed the procedures used by law enforcement.

Prior to Gant, federal case law clearly approved a bright-line test allowing the search of a vehicle incident to the lawful arrest of a passenger or occupant. See e.g., Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). This was made clear in Gant which recognized that the Court’s prior opinions have “been *widely understood to allow 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 . . .” and that “*lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a*

police entitlement rather than as an exception.”¹¹ Gant, 129 S. Ct at 1718 (emphasis added).

Likewise, the constitutionality of the search incident to arrest rule had been repeatedly endorsed and affirmed by the Washington Supreme Court over the past twenty-three years. See e.g., State v. Stroud, 106 Wn.2d 144, 153, 720 P.2d 436 (1986); State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001); State v. Parker, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); State v. Johnson, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989).

Thus, this case does not fit within the narrow exception, recognized in DeFillippo and White, that precludes officers from relying upon laws that are “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” The pre-Gant cases may now be viewed as flawed, but the repeated judicial reliance on them for almost 30 years demonstrates that the search incident to arrest rule was neither grossly nor flagrantly unconstitutional.

¹¹ That the majority in Gant spent considerable time arguing that the new rule was justified in spite of the doctrine of *stare decisis* is further evidence that the court was promulgating a new rule that represented a clear break from prior precedent. Gant, 129 S. Ct at 1722-24.

There can be little doubt that law enforcement officers can rely on these specific judicial pronouncements when conducting vehicle searches. To conclude otherwise would be equivalent of asserting that officers could never rely on judicial authority. In this regard, it is significant that the majority opinion in Gant emphasized that officers reasonably relied on pre-Gant precedent and were immune from civil liability for searches conducted in accordance with the Court's previous opinions. Gant, 129 S. Ct at 1723 n.11.

Moreover, the most basic purpose of the exclusionary rule is not furthered in any way by suppression of the evidence in this case. As the Court in DeFillippo noted, no conceivable deterrent effect would be served by suppressing evidence which, at the time it was found, was the product of a lawful search. Prior to April 21, 2009, officers understood that they *could* search a vehicle incident to the arrest of a recent occupant. After April 21, 2009, officers will know that they *cannot* conduct such searches and Gant will deter such conduct. But the retroactive application of the exclusionary rule has no deterrent value at all.

Nor is the preservation of judicial integrity, the other basis sometimes relied upon when applying the exclusionary rule,

implicated in these circumstances.¹² In the context of the reliance by law enforcement officers on judicially created evidentiary rules, judicial integrity is not enhanced by failing to recognize that officers act in reliance on judicial authority. Rather, integrity is preserved by recognizing that law enforcement officers must rely on judicial opinions to guide their behavior and cannot be expected to do otherwise. Integrity is preserved by consistency; it is undermined if officers (and citizens) conclude that they can no longer rely in good faith on clearly articulated judicial pronouncements. Moreover, integrity is not sacrificed when the judiciary changes its mind on a constitutional principle, upon fresh examination of its reasoning, but minimizes the impact of its new ruling as to those who relied on its earlier pronouncements.

Finally, there is a clear cost in this and similarly-situated cases that is not outweighed by any deterrent effect in applying the rule. Evidence of criminal activity was validly obtained pursuant to a vehicle search incident to arrest. There is no deterrent effect on

¹² This rationale was first articulated by Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 483-85, 48 S. Ct. 564, 574-75, 72 L. Ed. 944 (1928). Justice Brandeis argued that when the government is permitted to use illegally obtained evidence in courts of law, the integrity of the judiciary itself is tarnished. See also Stone v. Powell, 428 U.S. 465, 485, 96 S. Ct. 3037, 3048, 49 L. Ed. 2d 1067 (1976), where judicial integrity is mentioned as a secondary rationale); White, 97 Wn.2d at 110.

law enforcement whatsoever by retroactively enforcing a rule the officers knew nothing about. The costs of excluding the evidence obtained in all pending cases with a possible Gant issue are not justified by the potential benefit in deterrence.¹³

In sum, the United States Supreme Court has recognized that the application of the exclusionary rule serves no purpose when officers relied in good faith on a presumptively valid statute. In Potter and Brockob, the Washington Supreme Court has recognized that the exclusionary rule does not apply when officers relied on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. The evidence obtained during the search in the present case should not be suppressed.

¹³ As the U.S. Supreme Court has noted, the benefits of the deterrent effect when applying the exclusionary rule should outweigh the costs:

In addition, the benefits of deterrence must outweigh the costs. . . . “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” ... “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” ... The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that “offends basic concepts of the criminal justice system.” ... “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” ...

Herring v. United States, ___ U.S. ___, 129 S. Ct. 695, 700-01, 172 L. Ed. 2d 496 (2009) (citations omitted); see also Bond, 98 Wn.2d at 14.

4. The art. I, § 7 exclusionary rule has traditionally been interpreted consistently with the federal rule.

That White is an application of the federal exclusionary rule is entirely consistent with the fact that Washington courts have historically interpreted the exclusionary rule in a manner that is generally consistent with federal law. The Washington State Constitution, adopted in 1889, provides that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. At common law, courts took no notice of whether evidence was properly seized; if relevant, it was admissible.¹⁴ Commonwealth v. Dana, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, Evidence § 2183 (2nd ed. 1923). This was the rule recognized in Washington in 1889. State v. Nordstrom, 7 Wash. 506, 35 P. 382 (1893); State v. Burns, 19 Wash. 52, 52 P. 316 (1898).

In 1886, the United States Supreme Court appeared to signal a different approach when it suppressed private papers seized pursuant to a court order, holding that seizure and use of the private papers as evidence was tantamount to compelling the

¹⁴ The meaning and scope of a constitutional provision is determined by examining the law at the time of enactment. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003).

defendant to testify against himself. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). But the United States Supreme Court essentially repudiated Boyd in Adams v. New York, 192 U.S. 585, 598, 24 S. Ct. 372, 48 L. Ed. 575 (1905) (“...the English, and nearly all the American, cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent”).

Like most courts at that time, the Washington Supreme Court specifically rejected Boyd and held that relevant evidence was admissible, regardless of its source. State v. Royce, 38 Wash. 11, 80 P. 268 (1905) (evidence derived from improper search of burglary suspect need not be suppressed).

Nine years later, the United States Supreme Court reintroduced an exclusionary rule. Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). The next year, the Washington Supreme Court followed the U.S. Supreme Court’s lead and announced that an exclusionary rule would be recognized in Washington. State v. Gibbons, 118 Wash. 171, 184-85, 203 P. 390 (1922).

The ensuing decades of exclusionary rule jurisprudence can only be described as chaotic, as both state and federal courts

struggled to find the proper balance between the need to protect constitutional rights and the interest in admitting relevant evidence. See e.g. State v. Young, 39 Wn.2d 910, 917, 239 P.2d 858 (1952).¹⁵ Nonetheless, the Washington Supreme Court has generally followed the application of the rule in federal courts. As the Court said in State v. O'Bremski, 70 Wn.2d 425, 423 P.2d 530 (1967), “[w]e have consistently adhered to the exclusionary rule expounded by the United States Supreme Court...” See also State v. Biloche, 66 Wn.2d 325, 327, 402 P.2d 491 (1965) (“The law is well established in this state, consistent with the decisions of the U.S. Supreme Court, that evidence unlawfully seized will be excluded...”).

In sum, Washington’s exclusionary rule has followed the general contours, progression, and application of the federal exclusionary rule. The Washington Supreme Court’s recognition in Potter and Brockob that the decision in White was simply an application of the narrow exception to the DeFillippo good faith rule is both appropriate and justified.

¹⁵ “We do not wish to recede one iota from our [previous holding]. It is the duty of courts to protect citizens from unwarranted, arbitrary, illegal arrests by officers of the law. But we should not permit our zeal for protection of constitutional rights to blind us to our responsibility to other citizens who have the right to be protected from those who violate the law.” Young, 39 Wn.2d at 917.

F. CONCLUSION.

The State respectfully requests that, for the reasons outlined above, this court uphold of the validity of the search of the vehicle incident to arrest because the officers were acting pursuant to presumptively valid case law at the time the search was conducted.

IV. ARGUMENT: OTHER ISSUES

A. THE CrR 3.5 FINDINGS OF FACT HAVE BEEN ENTERED BY THE TRIAL COURT.

Riley also argues that because the CrR 3.5 findings of fact and conclusions of law were entered belatedly, he is entitled to reversal. The findings of fact and conclusions of law have now been filed.¹⁶ The findings of fact and conclusions of law concisely summarized the court's oral ruling. There is no evidence that the findings were tailored to meet any issue raised on appeal. Riley has not been prejudiced and was fully able to litigate his claim on appeal that the trial court improperly admitted his statement to Deputy Fowler. Neither reversal nor remand is required. See State v. Head, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1988).

¹⁶ The Findings of Fact and Conclusions of Law were entered pending appeal. CP 48-50. The trial prosecutor has certified that he had no contact with the deputy prosecutor preparing the appeal, nor did he have any information regarding the issues on appeal. CP 43-44.

B. THE TRIAL COURT PROPERLY ADMITTED RILEY'S STATEMENT TO DEPUTY FOWLER.

Riley did not make an explicit waiver of his Miranda rights.¹⁷

But Riley's custodial statements were made after he had been advised of his Miranda rights and impliedly waived them and thus were properly admitted into evidence by the trial court.

1. Factual background: The CrR 3.5 hearing.

A CrR 3.5 hearing was held prior to trial. KCS Deputy Fowler was the only witness and testified as follows:

On January 7, 2007, King County Sheriff's Deputy Fowler stopped Riley for running a red light. 1RP 4-5. Riley was arrested on an outstanding warrant. 1RP 6. Riley was placed under arrest. 1RP 6-7. Deputy Fowler read Riley his Miranda rights from a standard issue "Miranda card." This included the right to remain silent, the right to a lawyer, and the right to exercise these rights at any time and to "not answer questions or make any statements." 1RP 7-8.

Deputy Fowler asked Riley if he understood his rights and Riley said that he did. 1RP 8. Deputy Fowler did not explicitly ask Riley if he waived his rights. 1RP 10.

¹⁷ See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

In response to questioning by Deputy Fowler, Riley stated that he had smoked methamphetamine before. He denied that the methamphetamine in the car was his. He said he was currently using methamphetamine and wanted to get treatment for his addiction. Finally, Riley told the deputy that he had been the only individual driving the car for the last two months, even though the car was not registered to him. 1RP 8.

While Riley made these statements, it did not appear to Deputy Fowler that he (Riley) was “under the influence.” 1RP 9. Riley never told Deputy Fowler that he wished to remain silent, nor did he ask for a lawyer. 1RP 9. Finally, Deputy Fowler did not promise, threaten, or coerce Riley into giving a statement. 1RP 9.

After hearing the CrR 3.5 testimony of Deputy Fowler, and oral argument of counsel, the trial court admitted Riley’ statement. The court found that Riley, in agreeing to speak to Deputy Fowler, had made a knowing, intelligent, and voluntary waiver of his rights. 1RP 20. The court found that there was no requirement that the deputy explicitly ask Riley if he wanted to waive his rights and that the option not to talk to the deputy was specifically included in the Miranda rights that were read to him. 1RP 19-20; see also CP 48-50.

2. Legal standard: implied waiver of Miranda rights.

A suspect in a criminal case may waive his right to remain silent provided such waiver is made knowingly, voluntarily and intelligently. Miranda, 384 U.S. at 444. If these elements are satisfied, comments a suspect makes are admissible as evidence. See Miranda, 384 U.S. at 444; State v. Myers, 86 Wn.2d 419, 425-27, 545 P.2d 538 (1976); State v. Cashaw, 4 Wn. App. 243, 251, 480 P.2d 528 (1971).

A valid waiver may be implied from the facts of a custodial interrogation. There is no requirement that there be an express statement by the accused for an effective waiver. But the presumption that an intelligent waiver was made simply from the fact that a statement was eventually given by the suspect after he was warned of his rights is forbidden. Some additional showing is required that the inherently coercive atmosphere of custodial interrogation has not disabled the accused from making a free and rational choice. See generally State v. Adams, 76 Wn.2d 650, 671, 458 P.2d 558 (1969), rev'd on other grounds, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971); State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).

As the United States Supreme Court has observed:

An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case. As was unequivocally said in Miranda, mere silence is not enough. *That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights.* The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, L. Ed. 2d 286 (1979) (footnote omitted, emphasis added).

Implied waiver has been found where the record reveals that a defendant understood his rights and volunteered information after reaching such understanding. See State v. Gross, 23 Wn. App. 319, 324, 597 P.2d 894 (1979); Adams, 76 Wn.2d 670. Waiver has also been inferred when a defendant's answers were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights. Adams, 76 Wn.2d at 671, 458 P.2d 558; Cashaw, 4 Wn. App. at 251.

A trial court's conclusion that a waiver was voluntarily made will not be disturbed on appeal if the trial court found, by a preponderance of the evidence, that the statements were voluntary and substantial evidence in the record supports the finding. State v. Athan, 160 Wn.2d 354, 380, 158 P.3d 27 (2007). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Grogan, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008). The trial court's CrR 3.5 conclusions of law are reviewed de novo. Id. at 516.

3. The record demonstrates that Riley waived his Miranda rights.

In this case, the record demonstrates that Riley waived his Miranda rights knowingly, intelligently, and voluntarily. This is not a case in which the only evidence is the statement Riley gave to the deputy. First, Riley was fully informed of his Miranda rights. Second, he acknowledged that he understood his Miranda rights. Third, he agreed to speak with the deputy immediately indicating he understood his rights. Fourth, Riley was not intoxicated and there is no evidence that he did not understand what he was doing. Fifth, Riley was not threatened or coerced into giving a statement. Finally, Riley never asked to terminate the interview or for an

attorney. These facts sustain the trial court's finding of an implied waiver by Riley of his Miranda rights.

C. THE EVIDENCE WAS SUFFICIENT TO SUPPORT RILEY'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE.

Riley asserts on appeal that there was insufficient evidence to support the conviction for possession of methamphetamine in light of his "unwitting possession" defense. This argument is without merit.

Sufficient evidence supports a conviction if, viewed in the light most favorable to the State, evidence in the record permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). In considering the sufficiency of the evidence, all reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850, 855 (1990).

Riley argues that even if the State established constructive possession, he provided sufficient evidence to prove that the

possession was unwitting. Unwitting possession is a judicially created affirmative defense that may excuse a defendant's behavior, notwithstanding his violation of the letter of the statute. State v. Hundley, 72 Wn. App. 746, 750-51, 866 P.2d 56 (1994), aff'd, 126 Wn.2d 418, 895 P.2d 403 (1995). To successfully assert the affirmative defense of unwitting possession, a defendant must prove by a preponderance of the evidence that he was unaware of his possession, or did not know the nature of the substance. Staley, 123 Wn.2d at 799. Once possession of a narcotic drug has been established, the burden shifts to the defendant to explain away the possession as unwitting, lawful or otherwise excusable. State v. Morris, 70 Wn.2d 27, 422 P.2d 27 (1966). Significantly, whether the defendant possession was actually unwitting is a question for the jury. State v. Mathews, 4 Wn. App. 653, 658, 484 P.2d 942 (1971).

In a footnote, Riley asserts that because the trial court agreed to give an "unwitting possession" instruction he must have proved the defense by a preponderance of the evidence and was entitled to a directed verdict. This argument clearly proves too much. A defendant in a criminal case is "entitled to have the trial court instruct upon [his] theory of the case if there is evidence to

support the theory.” State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). “In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury.” State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from presenting his theory of the case. State v. Jones, 95 Wn.2d 616, 623, 628 P.2d 472 (1981); State v. Buzzell, 148 Wn. App. 592, 598, 200 P.3d 287 (2009).

Nevertheless, once the affirmative defense instruction is given, it remains for the jury to decide whether the defendant has proven the defense and, to the extent this involves a question of credibility, is not subject to review on appeal. If Riley's argument was accepted, every case in which a judge agrees to instruct the jury as to an affirmative defense would automatically require a directed verdict and acquittal.

In the present case, Riley claimed that he did not know that there was methamphetamine in the center console of the car. That was enough to allow the jury to consider his unwitting possession defense; but the jury was not required to accept the defense. Drawing all reasonable inferences in favor of the State, there was sufficient evidence to support the conviction.

Riley admitted that he used methamphetamine and thus knew what that controlled substance was. He admitted that he had been the only driver of the vehicle for almost two months and had driven the car on a regular basis. The glass pipes were immediately visible when the center console was opened. Finally, Riley stated that he did not think he had opened the console, but refused to say for certain that he had not done so. Under these circumstances, a rational trier of fact could find the essential elements of the crime of possession of methamphetamine beyond a reasonable doubt and find that Riley's claim of unwitting possession was not credible.

V. CONCLUSION

For the reasons outlined above, the State of Washington respectfully requests that Riley's conviction for possession of methamphetamine be affirmed.

DATED this 22nd day of June, 2009.

Respectfully submitted,

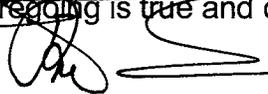
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to THOMAS KUMMEROW, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. EUGENE RILEY, Cause No. 62148-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

06/22/2009

Date

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