

NO. 68444-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

PETER JAMES GREEN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An appellate court can affirm on any basis supported by the record. Although the trial court ruled that, under Gant,<sup>1</sup> the initial warrantless search of a vehicle was a proper search incident to arrest, that ruling cannot stand in light of Snapp.<sup>2</sup> The record, however, provides this Court with two independent bases upon which to affirm– the search was a proper inventory search and, under the independent source doctrine, police lawfully seized the evidence. Should this court affirm the trial court's denial of Green's motion to suppress evidence because its ruling is supported by two independent bases?

2. After police arrest an impaired driver, officers may conduct a warrantless inventory search, provided the search is in preparation for the lawful impound of the vehicle. Police arrested Green for Driving While Under the Influence and Vehicular Assault.<sup>3</sup> During an inventory search, police discovered Sears receipts and a television that prompted a fraud investigation. Was the evidence discovered pursuant to a lawful inventory search?

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<sup>1</sup> Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

<sup>2</sup> State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012).

<sup>3</sup> Green struck a pedestrian, who later died from her injuries. For various reasons the State ultimately declined to file Vehicular Homicide charges against Green.

3. The independent source doctrine applies when evidence is legally seized through a source independent of an illegal search. If the inventory search was unlawful, but police later obtained a search warrant, that authorized the seizure of the same receipts, based on information independent of the inventory search, should this Court hold that the seizure was lawful under the independent source doctrine?

B. STATEMENT OF THE CASE

1. CHARGES.

The State charged Peter Green with five counts of Identity Theft in the Second Degree (count one- victim Johnson, count two- victim Harding, count three- victim Koterly, count four- victim Dang, count six- victim Burnett) and one count of Theft in the Second Degree (count five- victim Johnson).<sup>4</sup> CP 23-26. The jury convicted Green as charged and the trial court imposed a standard range sentence for each count. CP 151-62; 7RP 328.<sup>5</sup>

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<sup>4</sup> Additionally, the State charged Green with Driving While Under the Influence, which was severed for trial. CP 27. Green was later acquitted of that charge.

<sup>5</sup> The Verbatim Report of Proceedings consists of ten volumes: 1RP (10/5/09), 2RP (10/6/09), 3RP (10/7/09), 4RP (10/8/09), 5RP (10/12/09), 6RP (10/13/09), 7RP (3/18/10), 8RP (11/4/10), 9RP (1/6/12), and 10RP (2/17/12). On Green's first appeal the Court remanded for an evidentiary hearing. Volumes 8, 9 and 10 pertain to that evidentiary hearing. See Section B.3, infra.

## 2. SUBSTANTIVE FACTS.

On January 4, 2008, Peter Green hit and killed a woman who was jaywalking. CP 4. Police arrested Green at the scene for Driving Under the Influence because Green appeared intoxicated. 1RP 55; 2RP 11. After Green was transported to Harborview Medical Center for a mandatory blood draw, police investigated and photographed the scene. 2RP 10-13.

Seattle Police Detective Thomas Bacon initially searched Green's Jeep for both inventory and investigatory purposes. 2RP 13-14. During his search, Bacon discovered a large-screen television in the back seat of the car along with a receipt that showed it was purchased with three \$500 Sears giftcards earlier that same day. 2RP 14-15. Bacon thought it was "very unusual" that someone had purchased the television with giftcards. 2RP 15. There were also two other receipts in the Jeep from a different Sears store dated that same day in the Jeep. One receipt was for a disposable cell phone. 2RP 15. Bacon seized the receipts along with two disposable cell phones.<sup>6</sup> 2RP 17.

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<sup>6</sup> The cell phones were not offered at trial and are not otherwise relevant to the issues on appeal.

Bacon conducted two parallel investigations- one for the Vehicular Homicide and one for fraud involving the receipts. 2RP 20. Bacon contacted the Sears store in Redmond, where the television had been purchased, and discovered that the three \$500 giftcards had been bought in Portland, OR, along with another \$1,500 in giftcards. 2RP 18-19. Bacon determined that the credit card number used to purchase the giftcards belonged to Laurie Johnson, a Minnesota resident. 2RP 19. Johnson explained that she had not made or authorized those purchases on her credit card. 2RP 20. Bacon discovered that other unauthorized purchases of Sears giftcards were made with a Richard Burnett's credit card. 4RP 126-27; CP 90.

A few weeks later, Bacon obtained a search warrant to locate further evidence of the Vehicular Homicide. 2RP 23. The warrant authorized a search of Green's Jeep for evidence of drug and alcohol use, "papers of dominion and control," and evidence relating to the identity of a male passenger seen leaving Green's vehicle and tossing down several beer cans immediately after the collision. Ex. 4<sup>7</sup>; CP 76. Although Bacon's affidavit referenced the

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<sup>7</sup> Exhibit 4 is the search warrant and affidavit dated January 30, 2008. Exhibit 5 is the search warrant and affidavit dated February 8, 2008.

initial warrantless inventory search, the affidavit excluded any reference to what he discovered in that search. Ex. 4.

While executing the search warrant, Bacon found a backpack in the back seat. 2RP 24-25. Bacon opened the backpack to look for alcohol, drugs, and paperwork to help him identify Green's passenger. 2RP 25. Inside the backpack, Bacon found five credit cards, all with the same cardholder's name, Jeanne Russell. 2RP 25. Bacon "briefly" glanced at the front and the back of the credit cards and then replaced them in the backpack. CP 77. While the cards appeared to be fraudulent (they had no security codes) Bacon did not believe that he could seize the credit cards under the first search warrant (presumably because the unknown passenger was a male). 9RP 37; CP 76. A week later, Bacon obtained a second search warrant for the credit cards. 2RP 29-30. The second search warrant affidavit contained summaries of Bacon's warrantless inventory search of the vehicle at the crime scene, as well as the search done pursuant to the first search warrant. Ex. 4, 5. The affidavit also included details about Green's prior criminal history; Green had previously used fraudulent identification to purchase a television at Sears and was also a person of interest in a separate fraud investigation. Ex. 5.

After seizing the five credit cards, Bacon discovered that the cards, with Jeanne Russell's name on them, did not belong to Russell. Bacon determined that three of the credit card numbers belonged to three separate individuals (Harding, Koterly and Dang) who lived outside Washington State.<sup>8</sup> 4RP 124-25. Bacon determined that all five victims (Johnson, Burnett, Harding, Koterly and Dang) had purchased airline tickets online from Northwest Airlines, where Green worked. 4RP 127-28.

Pre-trial, Green moved to suppress the credit cards, claiming that Bacon exceeded the scope of the first search warrant when he "examined" the credit cards. CP 10-11; 2RP 70-72, 75. The trial court denied Green's motion and found that Bacon's "brief" examination of the credit cards fell within the scope of the first search warrant and went no further than necessary.<sup>9</sup> CP 77. The court further found that Bacon could have seized the credit cards under the authority of the first search warrant although "seeking a second warrant was probably the best practice." CP 77.

Green's former manager at Northwest Airlines testified that Green's job provided him with access to customers' credit card

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<sup>8</sup> The other two credit card numbers were fake and did not belong to anyone. 4RP 124.

<sup>9</sup> The initial suppression hearing occurred pre-Gant.

numbers. 4RP 191. Internal computer records from Northwest showed Green had accessed the victims' credit card information in the months before and after the collision. 4RP 163-68. The parties stipulated that the out-of-state victims<sup>10</sup> neither knew Green, nor gave him permission to use or possess their credit card information. CP 89-91; 4RP 148-52.

The evidence established that the television (discovered in the Jeep on the day of the collision) had been purchased using giftcards Green had bought using victim Johnson's credit card number. 4RP 224, 228, 230-32.

### 3. FIRST APPEAL.

In Green's first appeal (Court of Appeals 65114-5-I), he raised two issues related to the car searches. Green claimed that Detective Bacon had exceeded the scope of the first warrant when he looked at the credit cards within the backpack. This Court, in an unpublished opinion, rejected that challenge.<sup>11</sup> The Court held that Bacon had not exceeded the scope of the first warrant as he was

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<sup>10</sup> Johnson (count one and five), Harding (count two), Koterly (count three), Dang (count four), and Burnett (count 6).

<sup>11</sup> A copy of the opinion (CP 164-70) is attached as Appendix A for the reader's convenience.

authorized to look for papers to determine the vehicle's occupants and evidence to identify a potential unknown passenger.<sup>12</sup>

CP 168-69. Green also challenged the initial warrantless search under Arizona v. Gant,<sup>13</sup> which had not been decided before Green's trial. This Court remanded for a suppression hearing on the impact of Gant to the initial warrantless search. CP 164.

#### 4. THE REMAND HEARING OCCURRED POST-GANT BUT PRE-SNAPP.

On remand, Green moved, pursuant to Gant, to suppress the Sears receipts that Bacon discovered and seized during his initial warrantless search of the car as well as any evidence that stemmed from that search. Green argued that because he posed no safety risk at the scene (he had been taken to the hospital for a blood draw) and because there was no concern that evidence would be immediately lost or destroyed, Bacon's initial warrantless

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<sup>12</sup> Green argues Bacon's claim that, in part, he seized the receipts because he was trying to identify the occupants of the car, was not credible because Green had already admitted that he was driving. App. Br. at 13 n.8. This argument lacks merit for two reasons. First, the State had to prove, absent Green's admission, that he was the driver, in order to offer his statement under the *corpus delicti* rule. See State v. Hendrickson, 140 Wn. App. 913, 920, 168 P.3d 421 (2007). Moreover, credibility determinations are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

<sup>13</sup> 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

search of the vehicle was illegal. CP 175-78. Green also argued that Bacon's search was not a lawful inventory search. CP 185-91.

Again, because Snapp had not yet been decided, the State argued that the search was lawful on three alternative grounds: (1) the initial search was permitted under Gant because Bacon was looking for evidence related to the crime of arrest<sup>14</sup>; (2) the initial search was permitted as an inventory search done in preparation for lawful impound; and (3) even if the initial search was unlawful, under the independent source doctrine, Bacon lawfully seized the evidence pursuant to a search warrant. CP 179-84, 199-201.

The trial court ruled that Bacon's initial warrantless search was justifiable as both an inventory search and an investigative search.<sup>15</sup> App. B (CP 208-10). Although the court found that Bacon intended to do both searches simultaneously, the court determined that the receipts were found as a part of only the investigatory search. App. B. The court found that the seizure of the receipts was permissible because they could have helped

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<sup>14</sup> The State concedes that Snapp forecloses the State's argument on this point.

<sup>15</sup> A copy of the court's Findings and Conclusions on remand (CP 208-11) is attached as Appendix B for the reader's convenience.

police identify a passenger, a possible witness to the collision. App. B. Additionally, the court found that had Bacon not discovered and seized the receipts during the initial search, he would have found the receipts while serving the first search warrant. App. B. The court did not rule on whether the independent source doctrine applied.

Additional facts will be included in the pertinent sections.

C. ARGUMENT

1. THE SCOPE OF THE INVENTORY SEARCH PERMITTED BACON TO SEIZE THE RECEIPTS.

Green first claims that the trial court erred on remand when it concluded that the initial warrantless search was lawful because Bacon was searching for evidence pertaining to the crime of arrest. The State agrees. Snapp, which held that under Article I, section 7, police may not conduct a search of a car (incident to the driver's arrest) for evidence pertaining to the crime of arrest absent some exigency, resolves this issue against the State.

The initial warrantless search of Green's car, however, was a proper inventory search in preparation for a lawful impound.

Contrary to the trial court's conclusion, the scope of the inventory search permitted Bacon to seize the receipts.<sup>16</sup>

This Court reviews a trial court's denial of a motion to suppress to determine whether substantial evidence supports the factual findings and, if so, whether the findings support the conclusions of law. State v. Dempsey, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). Conclusions of law relating to the suppression of evidence are reviewed *de novo*. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). This Court may affirm on any grounds supported by the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000).

Article I, section 7 of the Washington State Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A valid warrant, subject to a few exceptions, establishes the requisite authority of law. State v. Afana, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010). One

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<sup>16</sup> Although the trial court's conclusion on this issue is labeled as "Finding of Fact I" it is properly reviewed *de novo* as it is a conclusion of law. Findings of fact mislabeled as conclusions of law are reviewed as conclusions of law. State v. Evans, 80 Wn. App. 806, 820 n.35, 911 P.2d 1344 (1996). Green incorrectly claims that the State cannot contest the court's conclusion because the State did not cross-appeal. App. Br. at 15. However, because the State is not requesting affirmative relief, the State may contest an erroneous conclusion without cross-appealing. RAP 2.4(a); 5.1(d); State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

exception to the warrant requirement is an inventory search accompanying a lawful vehicle impound. State v. White, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

Police perform inventory searches as an administrative or caretaking function. State v. Dugas, 109 Wn. App. 592, 597, 36 P.3d 577 (2001). The principal purposes of an inventory search are: (1) to protect the vehicle owner's property; (2) to protect the police against false claims of theft by the owner; and (3) to protect the police from potential danger. White, 135 Wn.2d at 769-70 (citing State v. Houser, 95 Wn.2d 143, 154, 622 P.2d 1218 (1980)). Generally, in conducting an inventory search, police may look inside unlocked containers in the passenger compartment of a vehicle. White, 135 Wn.2d at 772; State v. Montague, 73 Wn.2d 381, 390, 438 P.2d 571 (1968).

An inventory search may be done in preparation of or following impoundment, so long as police have arrested the driver. Montague, 73 Wn.2d at 385. Evidence seized during an inventory search is admissible provided the State can show reasonable cause for impounding the vehicle and the inventory search was not

a farce for an illegal exploratory search. Id. at 390; Houser, 95 Wn.2d at 148.

The trial court found that impoundment was lawful, a finding unchallenged by Green.<sup>17</sup> 10RP 8-9. In finding that Bacon intended to do an inventory search, the trial court concluded that Bacon's inventory search was *not* a farce to conduct an illegal exploratory search. App. B (CP 209-10). However, the court concluded that the discovery of the receipts was a part of only the investigatory search. App. B (CP 209-10).

The trial court reached this erroneous conclusion because it seemingly believed that looking inside a paper bag on the floorboard of a car was not permissible as a part of an inventory search because it is not a normal place where one would keep valuables. 10RP 4-5. However, looking inside a paper bag to determine if it contained valuables was properly within the scope of a lawful inventory search.<sup>18</sup> See Montague, 73 Wn.2d at 383, 387-90 (finding an inventory search proper where police looked

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<sup>17</sup> Police were required by statute to impound Green's vehicle as he was arrested for Driving While Under the Influence. RCW 46.55.360. Additionally, the United States Supreme Court has held that impoundment of vehicles involved in collisions is proper as a part of the "community caretaking" function of police. South Dakota v. Opperman, 428 U.S. 364, 368-69, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

<sup>18</sup> Bacon had to remove the receipts from the paper bag in order to discover that they were not items of value. 9RP 24-25, 46-48.

inside a paper bag found on the floor of a vehicle and found it to contain eight small baggies of marijuana); Cf. State v. Lopez, 70 Wn. App. 259, 262, 856 P.2d 390 (1993) (where, during a search incident to arrest, an officer found a brown paper bag on the floor of a vehicle and discovered that it contained a large bundle of US currency). Thus it is permissible for police to look in such unconventional places— such as a paper bag— during an inventory search of a vehicle to protect a defendant’s property and to protect police against potential civil claims. Because Bacon properly looked inside the paper bag to determine if it contained valuables, this Court should conclude that the receipts were discovered pursuant to a lawful inventory search and affirm on this basis.<sup>19</sup>

2. THE EVIDENCE WAS ADMISSIBLE UNDER THE INDEPENDENT SOURCE DOCTRINE.

Even if this Court finds that Bacon conducted an unlawful inventory search or that the discovery of the Sears receipts went

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<sup>19</sup> There is no dispute that the large television was discovered pursuant to a lawful inventory search as Green has not challenged the court’s conclusion that an inventory search was permissible (although he agrees with the trial court’s limitation on the scope). Even a very limited inventory search would have yielded the discovery of the television which could even be seen from outside the Jeep (although not clearly enough to determine exactly what it was). 9RP 23. The receipts led to the discovery of the fraudulent purchase of the television, therefore, if the receipts are suppressed, count five (for the theft of the television) must be reversed.

beyond the permissible scope of the inventory search, the evidence is admissible under the independent source doctrine. On remand, the trial court did not rule on the State's independent source, however, this Court may affirm on any grounds supported by the record. Bobic, 140 Wn.2d. at 258.

Where police seize evidence pursuant to an unlawful search, the exclusionary rule prohibits the State from introducing the evidence seized. See Murray v. United States, 487 U.S. 533, 537, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). Suppression, however, is inappropriate where "the Government learned of the evidence 'from an independent source.'" Wong Sun v. United States, 371 U.S. 471, 487, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319 (1920), overruled on other grounds by United States v. Havens, 446 U.S. 620 (1980)). A piece of evidence should not become forever off-limits simply because a police officer discovered that piece of evidence in an illegal search. Silverthorne Lumber Co., at 392. Thus, the independent source doctrine provides that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting

police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred. Nix v. Williams, 467 U.S. 431, 443, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). The State bears the burden of establishing by a preponderance of the evidence that the independent source doctrine applies. Murray, 487 U.S. at 540.

The independent source doctrine applies when evidence is legally seized through a source independent of an illegal search. The exception was first recognized by the United States Supreme Court in Silverthorne Lumber Co. The Court in Silverthorne held that although the exclusionary rule forbids any use of illegally seized evidence, “[i]f knowledge of [the evidence] is gained from an independent source [it] may be proved like any [other]. . . .” 251 U.S. at 392.

The seminal case on the independent source doctrine is Murray, supra. In Murray, federal agents made an illegal warrantless entry into a warehouse during surveillance of suspected illicit drug activities. During the illegal entry, the agents observed several burlap-wrapped bales that were later found to contain marijuana. Id. at 535. The agents left the warehouse and returned after they had secured a search warrant. Id. The affidavit

in support of the warrant did not include any reference to the prior entry or to the evidence observed while in the warehouse. Id. at 535-36. The Court remanded the case to determine whether the search pursuant to the warrant was a genuinely independent source of the evidence seized. Id. at 543-44. The Court said that in determining whether evidence is admissible under the independent source exception, the ultimate question is “whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here.” Id. at 542.

The Court in Murray also held that the independent source doctrine does not require the government to return objects seized during an initial illegal search to private control and then physically re-seize them pursuant to a lawful search. Id. The Court explained that the “doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied. So long as a later, lawful seizure is genuinely independent of an earlier, tainted one (which may well be difficult to establish where the seized goods are kept in the police's possession) there is no reason why the

independent source doctrine should not apply.” Id. at 542. See also United States v. Herrold, 962 F.2d 1131 (3d Cir.), cert. denied, 506 U.S. 958 (1992).

In Herrold, a confidential informant (CI) had arranged to purchase a large quantity of cocaine from the defendant. Id. at 1133. Before the transfer, police officers were stationed outside the defendant’s trailer (his residence) conducting surveillance. Id. at 1133-34. When the CI arrived, the defendant exited his trailer and delivered the cocaine in the CI’s car. Id. at 1134. After verifying the delivery had taken place, the officers intended to obtain a search warrant for the trailer. Id. However, they decided to arrest Herrold before obtaining the search warrant.<sup>20</sup> Id.

When an officer confronted and tried to arrest Herrold at the front door of the trailer, Herrold attempted to close the door. Id. The officer prevented Herrold from closing the door and followed him inside. Id. Herrold fled down a hallway but was arrested quickly. Id. While inside the trailer, officers saw a gun and drugs in plain view. Id. They seized the gun (knowing Herrold was a convicted felon) but waited to seize the drugs until after they

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<sup>20</sup> They made this decision based on information from the CI that Herrold was possibly high on crack-cocaine, was “squirrely,” had a firearm, and was planning on leaving the trailer to go to a bar. Herrold, 962 F.2d at 1134.

obtained a search warrant. Id. at 1134-35, 1137. A search warrant was executed later that night. Id. at 1135. The search warrant affidavit detailed the narcotics investigation but also included observations made by police while inside the trailer, namely the gun and additional cocaine. Id. at 1134-35.

Herrold was subsequently charged in federal court for drug trafficking and unlawfully possessing a firearm. Id. at 1133. He successfully moved to suppress both the cocaine and the gun. Id. The Government conceded that the entry into Herrold's trailer and the seizure of the gun were unlawful. The Third Circuit reversed the trial court's suppression order by holding that the independent source doctrine supported admission of both the gun and the cocaine. Id. at 1140-44. The court determined that, even excluding information gathered from the initial unlawful entry and seizure, the warrant was still supported by probable cause. Id. at 1140-44. Additionally, the court found that the officers would have applied for the warrant even if they had not made the illegal entry. Id. at 1144.

The Third Circuit noted that, although the gun was physically seized during the illegal entry, it should not be treated any differently under the independent source doctrine than the cocaine that was later seized pursuant to the warrant. Id. at 1143. It

reasoned that, under Murray, the government was not required to physically put the gun back in the house in order for it to be considered lawfully re-seized under the warrant. Id. Because the warrant clearly authorized the seizure of the gun, and the gun would have been inside the house if not for the earlier seizure, the warrant provided an independent source for the evidence. Id.

The independent source doctrine has long been accepted by Washington courts. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005) (independent source doctrine comports with article I, section 7); State v. Coates, 107 Wn.2d 882, 886-89, 735 P.2d 64 (1987) (impliedly approving of the exception under article I, section 7); State v. O'Bremski, 70 Wn.2d 425, 423 P.2d 530 (1967) (expressly adopting the independent source doctrine); State v. Sadler, 147 Wn. App. 97, 126-27, 193 P.3d 1108 (2008) (remand for determination of whether challenged evidence admissible under independent source doctrine); State v. Smith, 113 Wn. App. 846, 55 P.3d 686 (2002) (independent source doctrine consistent with requirements of article I, section 7), review denied, 149 Wn.2d 1014 (2003); State v. Richman, 85 Wn. App. 568, 575-76, 933 P.2d 1088 (analogizing independent source doctrine to inevitable discovery

rule), review denied, 133 Wn.2d 1028 (1997)<sup>21</sup>; State v. Hall, 53 Wn. App. 296, 305-06, 766 P.2d 512 (1989) (applying independent source doctrine).

In Gaines, the Washington Supreme Court applied the same analysis as the United States Supreme Court had applied in Murray. It held that, under the State Constitution, evidence initially discovered illegally was admissible if the State could show the evidence was discoverable through the execution of a lawful search warrant<sup>22</sup> and where the record showed that the police would have sought the warrant even if the illegal action had not occurred. Gaines, 154 Wn.2d at 722.

- a. Under Herrold, The Evidence Is Admissible Pursuant To The Independent Source Doctrine.

Herrold is on all fours with the instant case. This Court should hold that all of the evidence in this case is admissible under

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<sup>21</sup> The Washington Supreme Court in Winterstein abrogated Richman by holding that the inevitable discovery doctrine did not comport with the Washington State Constitution. State v. Winterstein, 167 Wn.2d at 633. However, the Court explained that the independent source doctrine still permitted the admission of evidence obtained based on a search warrant if the search warrant affidavit established probable cause independent of the illegally-obtained information. Id.

<sup>22</sup> The court held that the warrant was sufficient only if probable cause existed after the redaction of any illegally obtained information. Gaines, 154 Wn.2d at 719-20 (citing Coates, 107 Wn.2d at 888).

the independent source doctrine. While most of the federal and Washington cases on the independent source doctrine involve the physical re-seizure of evidence, the fact that Bacon physically removed the Sears receipts from the car during the initial warrantless search does not render the doctrine inapplicable. The Sears receipts, which contained a man's name, James Jones (9RP 50) could and would have been seized (or re-seized) by Bacon pursuant to the execution of first warrant, had Bacon not already seized them (or had he returned them to the Jeep). Ex. 4. See App. A (unpublished opinion from Green's first appeal explaining that the five credit cards discovered during the execution of the first warrant could have been lawfully seized if they had an arguably male name on them, as the cards would have been relevant to establishing the identity of the male passenger). The same rationale applies to the receipts.

Just as the gun in Herrold was untainted by the original warrantless search and seizure, the receipts are untainted by Bacon's inventory search and seizure because the first warrant provided an independent source for the evidence. Additionally, because Bacon sought the warrant for the purpose of furthering the Vehicular Homicide investigation, there is no question that Bacon

would have sought the first warrant even if he had not conducted the initial warrantless search. 9RP 28, 30-31.<sup>23</sup>

This Court should affirm the trial court's denial of Green's motion to suppress and hold that, under the independent source doctrine, all evidence seized was untainted by the earlier inventory search.

b. The Evidence Used to Convict Green On Counts Two-Four Is Admissible Under the Independent Source Doctrine.

Even if this Court disagrees with the Third Circuit and holds that once the receipts were physically seized they could no longer be lawfully re-seized under the first search warrant, the evidence for counts two, three, and four (victims Harding, Koterly and Dang) is admissible under the independent source doctrine.

This Court has already affirmed a challenge to the scope of the execution of the first warrant and its underlying validity has not been challenged. App. A. Bacon discovered the credit cards (whose numbers belong to victims Harding, Koterly and Dang) in

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<sup>23</sup> This is further supported by the fact that Bacon did not include the discovery of the receipts and his resulting fraud investigation in the search warrant affidavit, as he deemed that information to be irrelevant to the Vehicular Homicide investigation. 9RP 31.

Green's backpack while he was executing the first search warrant. Additionally, Green has never challenged the validity of the second search warrant which authorized the seizure of the credit cards after Bacon saw them and realized they were obviously counterfeit.

Although the affidavit for the second warrant included information discovered during the initial warrantless search, this Court could excise that information under Coates, supra, and determine that the second warrant was still based on probable cause. Even absent the information gathered during the initial search, the warrant contains the observations made by Bacon during the execution of the first warrant<sup>24</sup> as well as Bacon's description of Green's prior conviction for Identity Theft and the facts pertaining to yet another pending fraud investigation in which Green was a person of interest. Additionally, Bacon sought the second warrant to seize the credit cards and any evidence related to those credit cards. Unquestionably, Bacon would have sought the second search warrant even if he had not performed the initial warrantless inventory search. Even if the Sears receipts and the

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<sup>24</sup> This would include observations of five credit cards with a female name loose in Green's backpack, as well as passport photos, a gas receipt in a third person's name and Sears giftcard envelopes. Arguably, the Court could also consider the presence of a large screen television in the car as even a very limited inventory search would have led to its discovery.

evidence stemming from the investigation of those receipts is tainted, the separate evidence pertaining to the credit cards remains untainted, and thus admissible.

D. CONCLUSION

Because the record demonstrated two alternative bases under which the evidence was lawfully seized, the State asks this Court to affirm the trial court's denial of Green's motion to suppress evidence and affirm his convictions.

DATED this 8 day of November, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
SAMANTHA D. KANNER, WSBA #36943  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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 Jan Trasen, 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. PETER GREEN, Cause No. 68444-2-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



\_\_\_\_\_  
Date

COMPTON COUNTY  
STATE OF ILLINOIS  
2012 MAR -3 PM 3:22

APPENDIX A

COPY TO COUNTY JAIL SEP 12 2011

FILED

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I 11 SEP 12 PM 1:10

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 PETER JAMES GREEN, )  
 )  
 Appellant. )

KING COUNTY  
SUPERIOR COURT CLERK  
No. 65114-5-1 SEATTLE, WA

MANDATE

King County

Superior Court No. 09-1-00529-6 SEA

**Court Action Required**

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on August 1, 2011, became the decision terminating review of this court in the above entitled case on September 9, 2011. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

- c: Nancy P. Collins - WAP
- Jan Trasen - WAP
- Peter James Green, Jr.
- Kristin Ann Relyea - KCDPA
- Hon. Richard D. Eadie
- Indeterminate Sentencing Review Board

**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 9th day of September, 2011.

*[Signature]*  
RICHARD D. JOHNSON  
Court Administrator/Clerk of the Court of Appeals, State of Washington, Division I.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 65114-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
PETER JAMES GREEN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 1, 2011
	)	

LAU, J. — Peter Green challenges his convictions for five counts of identity theft and one count of second degree theft. He argues the trial court erred in admitting evidence seized from his car during two searches, only one of which he challenged in the trial court. For the search Green challenged, we reject his claim that the officer unlawfully exceeded the scope of a search warrant by looking at credit cards found inside a backpack while searching for papers of occupancy or evidence of the identity of an unknown passenger. For the search Green did not challenge, while the record is insufficient for us to resolve his claim in this appeal, under State v. Robinson, 171 Wn.2d 292, 305-06, 253 P.3d 84, (2011), we must reject the State's claim of waiver and remand to the trial court to conduct another suppression hearing to allow Green to raise

65114-5-1/2

his argument of an unlawful search incident to arrest. Green raises additional pro se claims that are clearly without merit. We accordingly remand for further proceedings consistent with this opinion.

#### FACTS

On January 24, 2008, Peter Green was driving a Jeep Cherokee that collided with a pedestrian, who ultimately died because of injuries caused by the accident. Police arrested Green at the scene for driving under the influence (DUI) based on a suspicion that Green was intoxicated. Green was transported to a hospital for a mandatory blood draw. Seattle Police Detective Thomas Bacon conducted an initial search of Green's vehicle for inventory and investigatory purposes. He found a large screen television set in the back of the vehicle and paperwork indicating it had been purchased with three \$500 Sears gift cards. In addition, he found a receipt from a different Sears store showing other purchases using the remaining balance on the cards. Finding these circumstances suspicious, the detective seized the receipts along with two disposable cell phones he found in the vehicle.

Green's vehicle was impounded, and on January 30, Detective Bacon sought and obtained a search warrant authorizing a search of the vehicle for items related to the DUI investigation. The warrant specifically authorized seizure of "papers of dominion and control," along with "any evidence of the use of alcohol and/or controlled substances, including marijuana and marijuana paraphernalia." Ex. 4PT at 1. In addition, because an eyewitness had reported seeing a passenger carrying beer cans away from the vehicle after the collision, the warrant also authorized "evidence related

65114-5-1/3

to the identification of an unknown male passenger who was seen exiting the vehicle immediately after the collision occurred.” Ex. 4PT at 1.

Detective Bacon executed the search warrant on January 31. He found a backpack in the rear seat of the vehicle. He opened the backpack to search for evidence of alcohol, drug use, papers confirming Green was the driver, or evidence to help identify the unknown passenger. Inside the backpack were five credit cards with the name “Jeanne Russell” on them. Detective Bacon observed that they were drawn on five different banks and had no security codes listed on them. Because he was at the time primarily investigating the DUI, he left the cards in the backpack. On February 8, Detective Bacon applied for and received a second warrant allowing him to search the car for items relating to fraud or identity theft. In executing this warrant, he seized the credit cards and also discovered and seized additional evidence related to fraudulent purchases and credit cards.

The State eventually charged Green with five counts of second degree identity theft, one count of second degree theft, and one count of DUI.

Before trial, Green brought a motion to suppress. He did not challenge the initial search of the vehicle and argued only that the discovery of the credit cards in the backpack exceeded the scope of the search authorized by the first warrant. The trial court found that Bacon’s discovery and examination of the credit cards fell well within the scope of the search authorized by the warrant and went no further than necessary.

Green was tried for the DUI separately and acquitted of that charge. He was convicted of the remaining counts, and received a standard range sentence. Green appeals.

65114-5-1/4

### ANALYSIS

Green first seeks to challenge the validity of the initial warrantless search of his vehicle under the Fourth Amendment and article I, section 7 of the Washington Constitution pursuant to Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) and State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009); and State v. Afana, 169 Wn.2d 169, 233 P.3d 879 (2010).

The State correctly points out that because of the limited nature of the suppression motion Green brought, the record was not sufficiently developed to address this claim for the first time in this appeal. Green challenged only the second search, conducted pursuant to the January 30 warrant. Facts were not explored that could have justified the initial search as either a search incident to arrest for evidence of the crime of arrest or as an inventory search pursuant to the impound of the vehicle, both of which it would appear present at least facially arguable bases for the search. See, e.g., State v. Wright, 155 Wn. App. 537, 555, 230 P.3d 1063, (search for evidence of the crime of arrest), review granted, 169 Wn.2d 1026 (2010); State v. Morales, 154 Wn. App. 26, 48, 225 P.3d 311 (2010) (inventory search as exception to warrant requirement), review granted, 169 Wn.2d 1001 (2010). The State accordingly argues that Green waived this issue.

It is not proper, however, for us to find that Green waived his claim, at least to the extent that it is based on article I section 7 of the constitution, since the cases Green seeks to rely on for his argument had not yet been decided at the time of his trial. State v. Robinson, 171 Wn.2d 292, 305-06, 253, P.3d 84 (2011). Because Green did not bring a motion to suppress on this basis and the record is therefore insufficient to

65114-5-l/5

address his claim, the proper response is to remand for the trial court to conduct a new suppression hearing at which Green can bring his new motion to suppress and both parties will have the opportunity to appropriately develop the record. Robinson, 171 Wn.2d at 305-06.

Next, Green presents the same argument for suppression that he raised in the trial court—that Detective Bacon’s discovery of the credit cards unlawfully exceeded the scope of the search authorized by the warrant. With this contention, we disagree.

We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). When the appellant does not challenge any of the trial court’s findings of fact, they are considered verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review the court's suppression hearing conclusions de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

Under the Fourth Amendment, a search warrant must describe with particularity the person or place to be searched, which means that it must be sufficiently definite to inform an officer executing the warrant what is being sought with reasonable certainty. State v. Stenson, 132 Wn.2d 668, 691-92, 940 P.2d 1239 (1997). A search pursuant to a warrant exceeds the scope authorized if officers seize property not specifically described in the warrant. State v. Kelley, 52 Wn. App. 581, 585, 762 P.2d 20 (1988). In determining the scope of a search warrant, courts give the words used in the warrant

65114-5-I/6

their commonsense meaning. State v. Cheatam, 112 Wn. App. 778, 783, 51 P.3d 138 (2002), aff'd, 150 Wn.2d 626, 81 P.3d 830 (2003).

Green argues that because the warrant did not specifically identify evidence of fraud or identity theft, Detective Bacon's discovery of the credit cards necessarily exceeded the scope of the warrant. But Green simply ignores the part of the warrant that authorized the seizure of evidence of papers of occupancy related to the vehicle and evidence relating to the identity of the passenger seen removing the beer cans. Had the credit cards carried Green's name, they would have fallen under the former category, and had they contained any other arguably male name, they would have fallen under the latter. Our Supreme Court has long recognized the commonsense reasoning that the authority to seize such items necessarily includes the authority to conduct at least a cursory examination to determine whether papers or other similar items come within the ambit of the warrant. See Stenson, 132 Wn.2d at 694 ("[S]ome innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized.") (quoting Andresen v. Maryland, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 49 L. Ed 2d 627 (1976)).

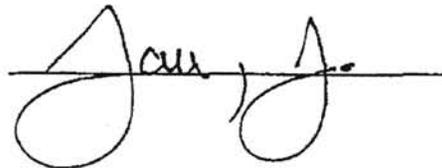
Green has not challenged the trial court's finding that Detective Bacon's brief view of the credit cards "went no further than was physically (and inevitably) necessary to remove the cards from the backpack and briefly glance at the front and back." That finding is therefore binding on this court. Hill, 123 Wn.2d at 644. Because, under Stenson, it was appropriate for the detective to conduct a cursory examination to determine if the credit cards were among the items authorized to be seized, his actions were properly within the scope of the warrant. We accordingly reject Green's claim.

65114-5-1/7

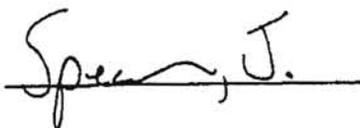
Finally, Green has filed a pro se statement of additional grounds. None of the claims has even debatable merit, and only two justify specific comment here. Green apparently seeks to raise a claim of a double jeopardy violation based on a unit of prosecution analysis for his multiple counts of identity theft. It is clear that the trial court did not err, however, because, in accordance with the governing law regarding the unit of prosecution for identity theft at the time of Green's offense, each count was properly based on a separately named individual whose identity Green unlawfully appropriated. See State v. Leyda, 157 Wn.2d 335, 345, 138 P.3d 610 (2006).<sup>1</sup> Green also seeks relief because the same judge who had authorized the first search warrant considered his motion to suppress. But this claim clearly fails under our Supreme Court's controlling decision in State v. Chamberlin, 161 Wn.2d 30, 162 P.3d 389 (2007).

Green's challenge to the trial court's rulings is without merit. Under Robinson, we must remand to allow him to bring his new motion to suppress in the trial court.

Remanded for further proceedings consistent with this opinion.



WE CONCUR:





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<sup>1</sup> For purposes of this case, Leyda is good law; however, the case has since been overturned by a statutory amendment. See Laws of 2008, ch. 207, §§ 3, 4.

65114-5-1/8

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## APPENDIX B

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 09-1-00529-6 SEA

vs.

PETER JAMES GREEN,

Defendant,

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON  
SUPPLEMENTAL CrR 3.6 MOTION  
TO SUPPRESS PHYSICAL  
EVIDENCE FROM INITIAL SEARCH

A hearing on the admissibility of physical, oral, or identification evidence was held on January 6, 2012 before the Honorable Judge Richard Eadie.<sup>1</sup> After considering the evidence submitted by the parties and hearing argument, to wit: the testimony of Det. Thomas Bacon and Officer Mark Witherbee on January 6, 2012, as well as the transcript of the testimony of Det. Bacon on October 6, 2009 (admitted as Exhibits 1 & 2), and the Findings of Fact and Conclusions of Law from the first CrR 3.6 hearing held on October 6, 2009, the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

<sup>1</sup> This case was remanded to the trial court by the Court of Appeals for the sole purpose of allowing the defendant to move to suppress the evidence recovered during the initial search of his vehicle and develop the record accordingly.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 1

Daniel T. Satterberg, Prosecuting Attorney  
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(206) 296-9010, FAX (206) 296-9009

1  
2 **1. FINDINGS OF FACT:**

- 3 A. The testimony of Det. Bacon from October 6, 2009 as transcribed and admitted as Exhibits 1 & 2 is incorporated by reference.
- 4 B. After receiving a 911 dispatch on January 4, 2008 at about 10:00 p.m., Seattle Police Officer Mark Witherbee responded to the scene of a pedestrian-vehicle collision at 23<sup>rd</sup> Avenue South and South Dearborn Street.
- 5
- 6 C. When Officer Witherbee arrived, the defendant was still seated inside the Jeep Cherokee. The defendant told Officer Witherbee that he was the driver of the Jeep.
- 7
- 8 D. Ten to fifteen minutes after Officer Witherbee arrived, another officer who was certified in drug recognition training, arrived to investigate. Shortly thereafter, the defendant was handcuffed and arrested for Driving While Under the Influence. He was taken to Harborview Medical Center for a blood draw to obtain a BAC measurement.
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- 11 E. After the defendant was taken to Harborview, Officer Witherbee looked inside the Jeep through the windows, but did not search it. Several feet behind the Jeep, Officer Witherbee found two open beer cans.
- 12
- 13 F. Seattle Police Det. Thomas Bacon was at the time, and is currently, assigned to the Traffic Collision Investigation Squad. He was called to investigate the collision on January 4, 2008 because of the seriously injured pedestrian.
- 14
- 15 G. When Det. Bacon arrived, he was told that the defendant had already been arrested for Driving While Under the Influence and had been transported to Harborview. While conducting his scene investigation, Det. Bacon also learned that the pedestrian had died. Det. Bacon decided to have the Jeep seized and impounded because the car itself was potential evidence of the crime and could also contain additional evidence.
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- 18 H. RE Before the Jeep was impounded, Det. Bacon conducted an initial search with the dual purpose: inventorying the contents, and investigating and obtaining evidence related to the fatal collision. Det. Bacon found a large screen TV in the back cargo area, two disposable cell phones and two Sears receipts for a TV, with the same date on the receipt, inside a paper bag on the front passenger floorboard. Det. Bacon seized the cell phones and the receipts during his initial search.
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- 22 I. The purposes of an inventory search pursuant to vehicle impound are to protect the owner's property and the police department from false claims of theft, and to remove potentially dangerous property for the safety of others. The receipts
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WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW - 2

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found in the paper bag were not part of the inventory search, but the investigatory search incident to the defendant's arrest.

- J. Det. Bacon's investigatory search of the Jeep for evidence was reasonable because he was searching for evidence to confirm the identity of the driver, the identity of any passengers, as it was unknown at that time whether there were any passengers in the Jeep during the collision, and any evidence pertaining to whether the defendant was intoxicated at the time of the collision.
- K. Det. Bacon's seizure of the receipts was reasonable because the receipts had the name "James Jones" on them as the purchaser, which could have been the name of a passenger present when the collision occurred.
- L. After the car was impounded, Det. Bacon applied for and was granted the first search warrant for the Jeep on January 30, 2008, which was admitted as Exhibit 4. The search warrant does not include any information Det. Bacon learned as a result of the initial search of the Jeep on the day of the collision.
- M. Had he not discovered and seized the receipts during the initial search, Det. Bacon would have found the receipts inside the paper bag during his search of the Jeep pursuant to the first warrant.
- N. Det. Bacon applied for and was granted a second search warrant on February 8 2008, which was admitted as Exhibit 5.
- O. Det. Bacon did not learn until after the initial search that a male passenger had been seen fleeing the Jeep immediately after the collision.

2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

The Court concludes that probable cause existed to arrest the defendant for Driving While Under the Influence, and once the pedestrian died, Vehicular Homicide. The Court further concludes that the seizure of the defendant's Jeep was valid because the vehicle itself was evidence of the crime and potentially contained evidence of the crimes for which the defendant was arrested.

The Court rules that the initial search of the defendant's Jeep, including the seizure of the receipts in the paper bag, was valid based on the search incident to <sup>RE</sup> ~~arrest exception to the warrant requirement~~ under Art. I, § 7 of the Washington State Constitution, State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), and Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

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In addition to the above written findings and conclusions, the court incorporates by reference its oral findings and conclusions.

Signed this 7<sup>th</sup> day of MARCH, 2012

Richard D Eadie  
JUDGE RICHARD EADIE

Presented by:

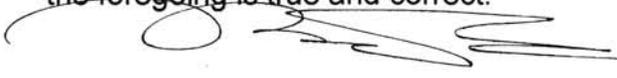
Jennifer S Atchison  
JENNIFER S. ATCHISON, WSBA#33263  
Deputy Prosecuting Attorney

Approved as to Form Only  
George F. Sjurzen  
GEORGE F. SJURSEN, WSBA# 28682  
Attorney for Defendant

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 Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Letter to the Clerk and Counsel and Appendix A and B to Brief of Respondent, in STATE V. PETER GREEN, Cause No. 68444-2-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

11-08-12  
\_\_\_\_\_  
Date