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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DAVID GIBSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 07-1-01042-6

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the challenged findings are verities on appeal where the appellant provides no argument or authority in support of the challenge?
2. Whether the challenged findings are supported by substantial evidence?
3. Whether the stop of the vehicle was lawful where the trial court found that it was not pretextual?
4. Whether the search incident to arrest was lawful under the Fourth Amendment where the defendant had been a recent occupant of the vehicle?
5. Whether the findings and conclusions regarding the bench trial were properly entered so that remand is unnecessary where they were entered after the notice of appeal was filed, but before the appellate filed any briefing or identified any issues on the case?

B. STATEMENT OF THE CASE.

1. Procedure

On February 23, 2007, David Gibson was charged with one count of unlawful manufacture of a controlled substance. CP 1. Gibson filed a motion to suppress the evidence pursuant to CrR 3.6, claiming that the

evidence was obtained unlawfully. CP MOTION. (Also designate State's response.)] The motion was heard on January 17, 2008, before the Honorable Brian Tollefson. CP 50-53 (Memorandum of Journal entry of 01-23-08); RP 01-17-08, p. 4-5.

At the conclusion of the hearing on January 22, 2008, the court issued an oral ruling denying the defendant's motion. RP 01-22-08, p. 24-27. Findings and conclusions were entered on March 28, 2008. CP 8-13.

A bench trial was held on April 1, 2008. CP 14; RP 04-01-08, p. 3-4. At the conclusion of the trial, the court found the defendant guilty. RP 04-07-08, p. 186-190, especially p. 190, ln. 1-5.

The court set sentencing for Thursday, April 10, for the sentencing and May 9th, 2008, for the entry of findings and conclusions for the bench trial. The defendant was in fact sentenced on April 10. CP 19-33; RP 04-10-08, p. 201-203. The notice of appeal was timely filed on April 24, 2008.

The entry of findings and conclusions for the bench trial was apparently continued to June 13, 2008, when the findings were entered. CP 68 (Scheduling order of 05-09-08); CP 69-74 (FFCL Bench Trial).

2. Facts

On February 22, 2007, Deputies from the Pierce County Sheriff's Department went to 12124 State Route 165 East to attempt to serve an arrest warrant on an individual. CP 8, para. 1. The residence is located in

Pierce County, Washington, near the Pierce – King County line. CP 8, para. 1. The deputies confirmed the existence of the warrant prior to going to the property. CP 8, para. 1. The deputies were unsuccessful in locating the individual named in the warrant. CP 8, para. 1. The deputies were not at the property on February 22, 2007, looking for defendant Gibson. CP 11, para. 2.

As the deputies were leaving, Deputy England was the first car down the driveway. CP 8, para. 2. As Deputy England was pulling up to the roadway to leave the property, he observed a vehicle traveling on State Route 165. CP 8, para. 2. The vehicle was a couple hundred feet down State Route 165 when Deputy England first saw it. CP 8-9, para. 2. State Route 165 is a straight and flat road and Deputy England was able to see a quarter to a half mile down the road. CP 9, para. 2.

Deputy England observed the vehicle turn from State Route 165 into the driveway without signaling the turn. CP 9, para. 3. Gibson [the driver] did not use his turn signal when he made the turn from State Route 165 into the driveway of the property at 12124 State Route 165 East. CP 11, para. 3.

England contacted the driver of the vehicle who handed England his driver's license. CP 9, para. 3. The driver was identified as the defendant, David Gibson. CP 9, para. 3. England went back to his patrol

car and ran a driver's status and warrants check. CP 9, para. 3. England discovered that Gibson had an active non-extraditable warrant out of Auburn Municipal Court. CP 9, para. 3. Gibson was identified and found to have an outstanding warrant for his arrest. CP 11, para. 4.

Deputy England could not recall whether he was told that the warrant was extraditable or not. CP 9, para. 3. Pierce County Sheriff's Department policy does not prohibit deputies from arresting individuals on warrants, contacting Auburn Police Department and transferring custody of the individual once the warrant is confirmed. CP 9, para. 3. Deputies also have the option of transporting individuals directly to the Auburn jail depending on call volume. CP 9, para. 3.

Deputy Tjossem was also one of the deputies who had gone to the property to attempt to serve the arrest warrant. CP 9, para. 4. Deputy Tjossem was also leaving the property and saw that Deputy England was conducting a traffic stop. CP 9, para. 4. Deputy England informed Tjossem of the warrant for Gibson's arrest. CP 9, para. 4. The warrant was confirmed and Tjossem took Gibson into custody. CP 9, para. 4. Deputy England informed Deputy Tjossem of the warrant prior to Tjossem making contact with Gibson. CP 9, para. 4.

One of the deputies asked LESA records to contact Auburn Police Department to set up a meeting location in order to transfer custody of Gibson to the Auburn authorities. CP 9, para. 5.

Deputy England is a patrol officer who has routinely patrolled the area where Gibson was contacted for 4 ½ years. CP 9, para. 6. England's duties include regular enforcement of traffic regulations. CP 9, para. 6. England writes 1-2 infractions per week for failing to use a turn signal. CP 9, para. 6.

Deputy England routinely finds individuals with warrants for their arrest – approximately one per week. CP 10, para. 7. During his 4 ½ years patrolling the area, Deputy England has found 20-25 individuals with warrants out of the Auburn or Kent area, and has made arrangements to transport them to a location where they can be turned over to the appropriate law enforcement agencies. CP 10, para. 7. On 5-10 occasions, Deputy England has transported the individuals directly to the Auburn Jail. CP 10, para. 7.

Deputy Tjossem was also a patrol deputy, who has patrolled the area which includes State Route 165 since November, 2004. CP 10, para. 8. During that time, Tjossem has transported approximately 20 individuals with warrants out of Auburn to a location where he meets with

Auburn Police Department and transfers custody of the individual. CP 10, para. 8.

From the residence on State Route 165 where defendant was arrested to the Auburn Jail is a 10 to a 25 minute drive. CP 10, para. 9. It is a 40 to 50 minute drive from the residence to the Pierce County Jail in downtown Tacoma. CP 10, para. 9. Given the location of the stop and the proximity to Auburn, the deputies could make arrangements to meet Auburn Police Department and transfer custody of Gibson, and it is a routine practice for Deputies England and Tjossem to do so. CP 11, para. 5.

After confirming the warrant and placing Gibson under arrest, Deputy Tjossem searched Gibson's vehicle. CP 10, para. 10. Deputy Tjossem is a member of the Pierce County Clandestine Lab Team and has received training in the investigation and dismantling of suspected methamphetamine labs. CP 10, para. 10. Deputy Tjossem has responded to approximately 70 suspected methamphetamine labs during his law enforcement career. CP 10, para. 10.

During the search of Gibson's vehicle, Deputy Tjossem found a 20 pound bag of ammonium sulfate, which can be used to produce anhydrous ammonia, a key ingredient in the manufacture of methamphetamine. CP

10, para. 11. Tjossem also found dry ice which is used to condense ammonia gas into the liquid form. CP 10, para. 11.

During his search, Deputy Tjossem also found lye, Toluene, lithium batteries, a baggie with white powder, a funnel and a coffee grinder with a white residue. CP 11, para. 12. Deputy Tjossem recognized these items as commonly used during the manufacture of methamphetamine. CP 11, para. 12.

Deputy England issued Gibson a citation for Failing to Signal Turn (RCW 46.61.305), No splash Apron/Fenders (RCW 46.37.500) and Unsafe Tire Tread (RCW 46.37.425). CP 11, para. 13. Gibson did not sign the Notice of Infraction as he was in custody by that time. CP 11, para. 13. Deputy England placed the notice of infraction in Gibson's coat pocket. CP 11, para. 13.

During the course of his testimony, the defendant kept changing his story. CP 11, para. 1. The Court found that the defendant's testimony with respect to the events which occurred on February 22, 2007, was not credible. CP 11, para. 1.

The trial court also found that:

None of the deputies testified and there is no evidence that the deputies were using the traffic stop to identify Gibson. Nor is it a fair inference from the officer's testimony that they were using the stop to identify Gibson. [CP 11, para 6.]

This is the only finding to which the defendant assigns error.

The court also entered the following conclusions that:

1. The initial stop of defendant's vehicle was based on a reasonable suspicion that defendant had committed a traffic infraction by failing to use his turn signal.
2. As part of the investigation of the traffic infraction, Deputy England was justified in detaining the defendant for a reasonable period of time in order to identify him, check for outstanding warrant and check the status of defendant's license and vehicle registration.
3. Once the deputies became aware of the existence of the warrant, they were not required to ignore the warrant. The Court has been presented with no authority to suggest that once the warrant was discovered, the police could not arrest on the warrant. Defendant's arrest was therefore lawful.
4. Once the defendant was arrested on the warrant, police had the authority to conduct a search of defendant's vehicle incident to his arrest. The search of defendant's vehicle was a lawful search incident to arrest.
5. The stop of defendant's vehicle was not a pretext stop as police did not stop the vehicle in order to conduct a criminal investigation unrelated to the traffic offense.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S CHALLENGED FINDINGS THAT THE OFFICERS DID NOT USE THE STOP TO IDENTIFY GIBSON AND THAT THE STOP WAS NOT PRETEXTUAL.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal.

State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Hill*, 123 Wn.2d. at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In *Henderson Homes, Inc v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities. *Henderson*, 124 Wn.2d at 244; *see also State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

- a. Substantial Evidence Supports The Court's Finding That There Was No Evidence That The Deputies Were Used The Stop To Identify Gibson Nor That Such An Inference Could Be Fairly Made.

The defendant has challenged the trial court's finding number 6 as to disputed facts. CP 11. The trial court's findings of fact are reviewed for substantial evidence. *State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426 (2008) (citing *State v. Hill*, 123 Wn.2d 647, 647, 870 P.2d 313 (1994)). Substantial evidence exists when there is a sufficient quantity of evidence in the record to persuade a fair-minded rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644.

The appellant has provided no argument or authority in support of his assignment of error to the court's finding. Accordingly, this court should treat the finding as a verity.

Moreover, substantial evidence supports the court's finding number 6 as to disputed facts. The court found:

None of the deputies testified and there is no evidence that the deputies were using the traffic stop to identify Gibson. Nor is it a fair inference from the officer's testimony that they were using the stop to identify Gibson.

Deputy England stated that he generally enforces traffic violations whenever he sees them, which amounts to several times a night. RP 01-17-08, p. 9, ln. 10-16. Deputy England also stated that he would issue an estimated average of two tickets a week for driver's failing to signal turns and at a minimum issue one such ticket a week. RP 01-17-08, p. 20, ln. 3-12.

Deputy England said that for his patrol duties, when he is on duty he is one of only two officers on duty in their patrol area, and that they cover an area of over 700 square miles with 19,000 people therein. RP 01-17-08, p. 40, ln. Accordingly, the officers try to back each other up where possible, and it is not uncommon to have multiple officers participate in a traffic stop because of that. RP 01-17-08, p. 40, ln. 8-23.

Deputy England had gone with a number of other officers to a large property in order to attempt to serve an arrest warrant on an individual. RP 01-17-08, p. 11-13. The officers failed to locate the

individual who was the subject of the warrant, and were leaving the property. RP 01-17-08, p. 12, ln. 5-9; p. 12, ln. 25 to p. 13, ln. 1.

The driveway to the property was very long and unpaved, with a very wide (300') "V" or "Y" shaped opening at SR-165 that funneled down to a two car wide road. RP 01-17-08, p. 13-14; p. 51, ln. 18-25. As he was headed down the driveway to leave and nearing SR-165, Officer England observed a car that was headed southbound and approaching his position. RP 01-17-08, p. 14, ln. 5-22. Deputy England could see the car's headlights coming toward him, and the car was North of the northern part of the driveway heading South. RP 01-17-08, p. 14. The car came down slow and turned into the Northern part of the driveway. RP 01-17-08, p.15, ln. 8-9. The vehicle traveled several hundred feet from when office England first noticed it, until it made the turn into the driveway. RP 01-17-08, p. 16, ln. 13-18. The vehicle slowed, turned into the driveway and stopped while it was in there. RP 01-17-08, p.16, ln. 7-8. The vehicle's reverse lights came on, it failed to signal a turn and made a short U-turn. RP 01-17-08, p. 16, ln. 8-10. At no point prior to making the turn into the driveway did Deputy England see the car activate the turn signal, nor did the driver activate the turn signal as he was making the turn. RP 01-17-08, p. 16, ln. 17-23.

Deputy England pulled onto SR-165, made a U-turn and activated his lights and contacted the vehicle. RP 01-17-08, p. 3-19. Deputy England said that his purpose in making the stop was to make the driver aware that he failed to signal a turn and to see if the turn signal was functioning. RP 01-17-08, p.17, ln. 20-24. Deputy England said he had no purpose for contacting the driver other than in regard to the turn signal violation. RP 01-17-08, p. 17, ln. 25 to p. 18, ln. 3.

Deputy England issued an infraction to Gibson. RP 01-17-08, p. 23, ln. 23-25; CP Exhibit 1. By the time the infraction citation was complete, Gibson was under arrest, so Deputy England noted “in custody” on the signature line and put the citation in the pocket of the jacket Gibson was wearing. RP 01-17-08, p. 47, ln. 20 to p. 48, ln. 15; CP Exhibit 1.

The record provides substantial facts to support the court’s finding. Deputy England stated that he generally issued traffic infractions whenever he saw them, that he issued infractions several times a night and that he would issue about two infractions a week for failure to use a turn signal. Gibson failed to signal, both as he turned into the driveway, and as he attempted to make a U-turn. Deputy England in fact issued the citation to Gibson. Deputy England saw the infraction and had other officers nearby to support the stop.

Rather than showing a pretextual stop, the evidence shows that Deputy England is an attentive and proactive officer who generally issues infractions for all the violations he observes. Accordingly, substantial evidence supported the court's finding that Deputy England's stop of Gibson was not pretextual, and the trial court's finding should be upheld.

- b. Substantial Evidence Supported The Court's Finding (Mislabeled As A Conclusion) That The Stop Of The Vehicle Was Not A Pretext As The Officers Did Not Stop The Vehicle In Order To Conduct A Criminal Investigation Unrelated To The Traffic Offense.

The appellant has assigned error to the court's designated conclusions of laws. Br. App. p. 1, Assignment of Error 3. Conclusion of Law 5 is actually a finding of fact. A finding of fact is erroneously denominated as a conclusion of law will be treated as a finding of fact. *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)).

The appellant has provided no argument or authority in support of his assignment of error to the court's finding. Accordingly, this court should treat the finding as a verity.

Moreover, the finding is supported by substantial evidence.

This finding is substantially similar to finding 6 as to disputed facts which the defendant has challenged. However, this finding pertains to the ultimate factual determination of whether or not the stop was pretextual. Accordingly, the same arguments made in section 1.a. above apply equally to this issue as well. Those arguments are therefore incorporated by reference. However, this finding is also the ultimate factual finding as to whether or not the stop was a pretext. Accordingly, it is also further supported by the court's finding 5 as to disputed facts, especially where that challenged finding is supported by substantial evidence.

For all the foregoing reasons, the court should hold that this finding too is supported by substantial evidence.

2. THE STOP WAS CONSTITUTIONALLY VALID WHERE THE DEFENDANT WAS LEGITIMATELY STOPPED AFTER COMMITTING AN INFRACTION.

The trial court's findings of fact with regard to CrR 3.6 hearings are reviewed for substantial evidence, while conclusions of law and whether a warrantless stop is constitutional are reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 182 P.3d 426 (2008) (citing *State v. Hill*, 123 Wn.2d 647, 647, 870 P.2d 313 (1994)); *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1289 (1997); *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

Unchallenged findings of fact are verities on appeal and an appellate court reviews only those facts to which the appellant has assigned error. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). As indicated and argued above, here, the appellant only assigns error to the finding number 6 as to disputed facts and to Conclusion 5, which is actually also a finding of fact, not a conclusion of law. Br. App. 1, Assignments of Error 2 and 3. [Finding 6 as to disputed facts occurs at CP 11. “Conclusion” 5 occurs at CP 12.] However, as argued above, the challenged findings are supported by substantial evidence.

It is a well established exception to the warrant requirement under both the Washington and Federal Constitutions, that an officer may conduct a *Terry* stop of a vehicle where the officer reasonably suspects, based upon specific objective facts, that the person stopped was engaged in a traffic violation. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007) (citing *State v. Duncan*, 146 Wn.2d, 166, 172-74, 43 P.2d 513 (2002)). Under the Washington Constitution, the question of whether an officer had grounds for a *Terry* stop is tested against the totality of the circumstances, including the officer’s subjective belief. *Day*, 161 Wn.2d at 896 (citing *Ladson*, 138 Wn.2d at 358-59). *See also, State v. O’Neill*,

148 Wn.2d 564, 577, 62 P.3d 489 (2003) (stating that an officer's reasonable suspicions are relevant *once a seizure occurs*, [emphasis in original] and going on to state in note 1 that *Ladson* did not establish a broad principle that the officer's subjective motivation must be considered in determining the reasonableness of a police intrusion [amounting to less than a seizure]).

Unlike the United States Constitution, the Washington Constitution does not tolerate pretextual stops. *Day*, 161 Wn.2d at 896-97 (contrasting *Whren v. United States*, 517 U.S. 806, 813-16, 116 S. Ct. 1769, 135 L.Ed.2d 89 (1996), with *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). *See also, Ladson*, 138 Wn.2d at 350. A stop is pretextual if the officer stops a vehicle to conduct a speculative criminal investigation that is unrelated to the driving and not for the purpose of enforcing the traffic code. *State v. Montes-Malindas*, 144 Wn. App. 254, 256, 182 P.3d 999 (2008) (citing *Ladson*, 138 Wn.2d at 349).

The court found that the purpose of the stop was only to issue an infraction, and was not to identify the driver of the vehicle, nor could such an inference fairly be made. Further, the court found that the stop was not a pretext as it was not made to conduct a criminal investigation unrelated to the traffic offense. Where the defendant makes no argument and cites no authority challenging those findings, they are verities on appeal.

Moreover, where both findings are supported by substantial evidence, as argued above, the stop was not pretextual. Because the stop was not pretextual, it was not unlawful. Accordingly, the defendant's argument is without merit.

3. THE SEARCH INCIDENT TO ARREST WAS
LAWFUL UNDER THE FOURTH AMENDMENT
TO THE UNITED STATES CONSTITUTION.

Here the defendant's argument is based on two points. First, he claims that the officer had no need to search the vehicle for weapons or evidence where the defendant was already secured in the officer's patrol vehicle so that Gibson could not access his own vehicle to obtain a weapon or destroy evidence. Br. App. p. 12-14. Second, he argues that there was no basis to search the car for evidence where the officer was unlikely to find evidence related to the arrest because the defendant was arrested on a warrant. Br. App. 14-16.

Because there is no controlling precedential authority in favor of his position, Gibson urges this court to follow the Arizona Supreme Court's interpretation of the Fourth Amendment that once an arrestee is secured and no longer a threat to the officer or the evidence, the officer may not search the vehicle incident to arrest [without a warrant]. Br. App. 19 (citing *State v. Gant*, 216 Ariz. 1, 3, 162 P.3d 640 (2007)). The United

States Supreme Court has granted review of *Gant* under their case number 07-542. Briefing and oral argument are complete. Oral argument took place on October 7, 2008.¹

To properly understand the issue raised by the appellant, it is necessary to review the history of federal law on the subject of how the Fourth Amendment applies to vehicles.

The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. [United States Constitution, Article IV.]

Some of the Supreme Court's opinions have distinguished between two separate protections of the Fourth Amendment. First there is the

¹ A copy of the docket can be viewed on the following Supreme Court web page: <http://origin.www.supremecourtus.gov/docket/07-542.htm>. *Gant* was previously considered by the U.S. Supreme Court on the issue of whether the search of the vehicle incident to arrest was limited to situations where the officer made contact with the vehicle while the vehicle was still occupied. However, the court did not reach the issue on the merits, instead vacating and remanding the matter to the Arizona Court of Appeals for reconsideration in light of *State v. Dean*, 206 Ariz. 158, 76 P.3d 429 (2003). See, *Thornton v. United States*, 541 U.S. 615, 617, 12 S. Ct. 2127, 158 L.Ed. 2d 905 (2004) (citing *Arizona v. Gant*, 540 U.S. ___, 540 U.S. 963, 157 L.Ed.2d 308, 124 S. Ct. 461 (2003)).

requirement of a warrant for searches (and the limited number of exceptions to that requirement). But a separate protection of the Fourth Amendment is the requirement that searches be reasonable. *See, United States v. Robinson*, 414 U.S. 218, 226, and 235, 94 S. Ct. 467, 38 L.Ed.2d 427 (1973).

In *Terry v. Ohio*, the court held that it is not an unreasonable search and seizure where officers seize a person for purposes of an investigative detention that amounts to less than an arrest where the officer has an articulable suspicion of criminal activity, and in doing so the officer may also conduct a pat-down search of the person where they have a reasonable basis for believing the suspect may be armed or dangerous. *See, Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

In *Berkemer v. McCarty*, in deciding when *Miranda* warnings are required in the context of a traffic stop, the U.S. Supreme Court determined that traffic stops, either for infractions or criminal violations, were analogous to *Terry* stops, and that ordinarily those seizures did not rise to the level where *Miranda* rights applied. *Berkemer v. McCarty*, 468 U.S. 420, 439-440, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984). The court in *Berkemer* implicitly assumed *Terry* stops to enforce the traffic laws did not violate the Fourth Amendment. *See, Berkemer*, 468 U.S. at 439-440. *See also, United States v. Botero-Ospina*, 71 F.3d 783, 786

(10th Cir. 1995). Washington Courts have expressly interpreted the Fourth Amendment in a similar manner. *See State v. Duncan*, 146 Wn.2d 166, 173, 43 P.3d 513 (2002). However, Washington courts have also held that *Terry* detentions may not be used to investigate non-traffic infractions. *Duncan*, 146 Wn.2d at 174.

One term after the U.S. Supreme Court issued its opinion in *Terry v. Ohio*, it issued its opinion in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969). In *Chimel*, the court held that incident to the arrest of a suspect, the Fourth Amendment permitted police officers to conduct a warrantless search of the area under a suspect's immediate control into which a suspect might reach to either grab a weapon or to conceal or destroy evidence. *Chimel*, 395 U.S. at 763-766.²

The court in *Chimel* noted that its holding was:

² The brief of the Appellant refers to these two exceptions as “exigencies,” an apparent reference to the exigent circumstances exceptions to the warrant requirement under the Fourth Amendment. *See* Br. App. 12ff. The cases cited by the appellant do not refer to these two exceptions as “exigencies. However, exigent circumstances include: hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect’s escape, or the risk of danger to the police or other persons inside or outside the dwelling, so that these exceptions may well be exigencies even if the Supreme Court has failed to expressly identify them as such. *See, Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 109 L.Ed.2d 85 (1990). *But See United States v. Robinson*, 414 U.S. 218, 242-43, 94 S. Ct. 467, 38 L.Ed.2d 427 (1973) (Marshall Dissenting) (distinguishing between exigent circumstances and search incident to arrest in the context of a search of an automobile). The appellant appears to have adopted “exigencies” from *Belton*, where the court is using the term generally and not necessarily referring to the formal doctrine of the exigent circumstances exception to the Fourth Amendment’s warrant requirement. *New York v. Belton*, 453 U.S. at 457 (quoting *McDonald v. United States*, 335 U.S. 451, 456, 69 S. Ct. 191, 93 L.Ed.152 (1948).

Entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants “where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.” [*Chimel*, 395 U.S. at 764, n. 9 (quoting *Carroll v. United States*, 267 U.S. 132, 153, 45 S. Ct. 280, 69 L.Ed. 543 (1925)) and citing *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L.Ed. 1879 (1949).]

In *United States v. Robinson*, the court addressed a number of relevant issues relating to the application of the Fourth Amendment to the search of vehicles incident to arrest. See, *Robinson*, 414 U.S. 218. First, the court noted that a search incident to lawful arrest is a traditional exception to the warrant requirement under the Fourth Amendment. *Robinson*, 414 U.S. at 224. The court in *Robinson* noted that the exception had been formulated into two distinct propositions; first, that a search may be made of the person of the arrestee; second, that a search may be made of the area within the arrestee’s control. *Robinson*, 414 U.S. at 224.

The court in *Robinson* expressly rejected the position of the Court of Appeals that where the suspect had been arrested for driving on a suspended license so that no further evidence of the crime could be found on his person, as a search incident to arrest the officer could only conduct

a *Terry* style pat down search for weapons. *Robinson*, 414 U.S. at 227-229. The court instead re-emphasized that a search incident to arrest permitted a very full and unqualified search of the arrestee. *Robinson*, 414 U.S. at 227-230. The court went on to note that the authority for a search incident to arrest rests as much on the need to disarm the suspect as it does on the need to preserve evidence, and that the absence of the latter does not commute the standards for the search to more limited *Terry* standard. *Robinson*, 414 U.S. at 234.

The court in *Robinson* also held that a search incident to arrest is both a reasonable intrusion under the Fourth Amendment, and an exception to the warrant requirement under the Fourth Amendment. *Robinson*, 414 U.S. at 235. The court therefore further held that a search incident to arrest does not require subsequent review by the courts as to whether one of the underlying reasons supporting the search was present. *Robinson*, 414 U.S. at 235.

In *New York v. Belton*, the court held that where a police officer has made a lawful custodial arrest of the occupant of a vehicle, the officer may undertake a search of the passenger compartment without violating the Fourth Amendment as a contemporaneous incident of arrest. *See*,

Thornton v. United States, 541 U.S. 651, 617, 124 S. Ct. 2127, 158 L.Ed.2d 905 (2004) (citing *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L.Ed.2d 768 (1981)).

In *Thornton v. United States*, the court interpreted *Belton* broadly and held that where an arrestee is a recent occupant of a vehicle, officers may search the vehicle incident to the arrest. *Thornton*, 541 U.S. at 623-24. The court based this standard in part on “[t]he need for a clear rule, readily understood by police officers and not depending upon differing estimates of what items were or were not within reach of an arrestee at any particular moment...” *Thornton*, 541 U.S. at 622-23.

However, significantly in *Thornton*, Justice Scalia issued a concurring opinion in which he argued that the court’s opinion in *Thornton* stretched the doctrine of search incident to arrest beyond the breaking point. *Thornton*, 541 U.S. at 625 (Scalia concurring). In his concurrence, Justice Scalia argued that where in practice the vehicles are not searched until after arrestees are detained in handcuffs and placed in the back of a patrol car, there is no meaningful risk of the arrestee accessing the passenger compartment of the vehicle to obtain a weapon (or destroy evidence). *Thornton*, 541 U.S. at 625-28 (Scalia dissenting). Justice Scalia instead argued that the search incident to arrest should be more correctly justified based upon a general interest in gathering

evidence relevant to the crime for which the suspect had been arrested.

Thornton, 541 U.S. at 629 (Scalia dissenting).

Of particular relevance here is that the majority in *Thornton* rejected the argument Justice Scalia made in his concurrence. Accordingly, where the appellant here urges the court to adopt the same position, his doing so is directly contrary to the majority's express holding in *Thornton*. See Br. App. p. 16 (stating, "Police had no reason to believe that evidence relevant to the crime of arrest might be found in Gibson's car and the search plainly did not serve the government's interest in gathering evidence relevant to the crime of arrest.").

Moreover, where the appellant argues that this court should hold the search unlawful were it served neither of the underlying reasons for a search incident to arrest, that argument is directly contrary to the Supreme Court's holding in *Robinson*, where the court expressly stated that the courts do not look to see whether the purposes of search incident to arrest are served. See Br. App. p. 14; *Robinson*, 414 U.S. at 235 (holding that the courts do not look to whether the search supported one of the underlying reasons of officer safety or preservation of evidence).

Further, in *Knowles* the court emphasized that, "[T]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest."

Knowles v. Iowa, 525 U.S. 113, 116, 119 S. Ct. 484, 142 L.Ed.2d 492 (1998) (quoting *United States v. Robinson*, 414 U.S. 218, 234, n. 5, 94 S. Ct. 467, 38 L.Ed.2d 427 (1973)). To the extent the appellant argues that the fact that Gibson was arrested on a warrant for an unknown charge means that there could be no basis for the officer to have a safety concern; that argument would be contrary to the Supreme Court's holding in *Knowles*.

Ultimately, in *Thornton*, the United States Supreme Court held that where a person was a recent occupant in immediate control of the car *at the time of arrest*, the officer is entitled to conduct a search incident to arrest. That was the case here, so that under the existing controlling law, the defendant's Fourth Amendment rights were not violated, and his appeal should be denied as without merit.³

The defendant asks the court to follow the Arizona Supreme Court's analysis in *State v. Gant*. *State v. Gant*, 216 Ariz. 1, 162 P.3d 640 (2007). However, even the court in *Gant* noted that most other courts presented with similar facts have found *Belton* and *Thornton* dispositive of

³ While the appellant has made arguments that the State believes are contrary to current controlling precedent, the State nonetheless recognizes that those arguments are made in order to preserve those issues in the event of a ruling in *Gant* that is favorable to the defendant's case. Therefore, the State is not suggesting that the arguments are improper.

the question whether a search incident to arrest is lawful where the defendant is detained in a police vehicle when the search occurs. *See Gant*, 216 Ariz. at 6. Moreover, the court in *Gant* failed to recognize that in *Robinson* the court specifically held that courts not look to whether the underlying reasons for a search incident to arrest are satisfied, and in its analysis proceeded to undertake precisely the type of analysis that *Robinson* indicated the court should not undertake. *See Gant*, 216 Ariz. at 6.

Nonetheless, as indicated above, the United States Supreme Court has accepted review on *Gant*. According to the docket on the court's web site, the petition was granted

[...] limited to the following Question: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?. [*See*, <http://origin.www.supremecourtus.gov/docket/07-542.htm>.]

Given the question the court has directed the parties to address, it appears possible that there could be a major change in the law forthcoming that could be directly controlling in this case. Where oral argument was completed on October 7, 2008, it would not be unreasonable for this court

to stay any further proceedings pending the court's opinion in *Gant*. This is especially so where the appellant himself makes this request of the court. *See* Br. App., p. 20.

4. REMAND IS UNNECESSARY WHERE THE FINDINGS AND CONCLUSIONS WERE ENTERED AFTER THE NOTICE OF APPEAL AND DESIGNATION OF CLERK'S PAPERS WERE FILED, BUT BEFORE ANY BRIEFING WAS FILED ON THE CASE.

The findings of fact and conclusions of law Re: Bench Trial were filed on June 13, 2008. CP 69-74. This was after the Notice of Appeal (April 24, 2008) and Designation Of Clerk's Papers (June 5, 2008) were filed, however it was before the appellant filed any briefing in the case or identified the issues.

Before a case is remanded, it is possible to enter the findings and conclusions while the appeal is still pending, if the defendant is not prejudiced by their entry. *State v. Garcia*, 146 Wn. App. 821, 826, 193 P.3d 181 (2008). A delay in filing findings of fact and conclusions of law is reversible only if the delay prejudiced a defendant or the findings of fact and conclusions of law were tailored to the issues in the defendant's brief. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

Here, the court did enter findings and conclusions with regard to the bench trial, so a remand for their entry is unnecessary.

D. CONCLUSION.

The challenged findings of fact are verities on appeal where the defendant fails to provide argument or authority in support of his challenge to those findings. Moreover, both challenged findings are supported by substantial evidence.

Where the trial court found that there was no evidence, including no inference to be made that the deputies used the stop to identify Gibson, and where the trial court further found that the stop was not pretextual, the defendant's claim that the stop was an illegal pretext is without merit.

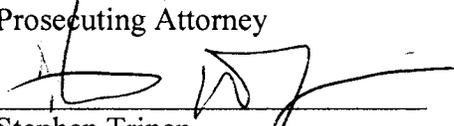
The defendant's claim that his rights under the Fourth Amendment were violated is without merit where the vehicle he had recently occupied was searched incident to arrest while he was handcuffed in the back of the patrol car. Current controlling United States Supreme Court authority establishes that the defendant's rights were not violated under the Fourth Amendment. However, given that *Arizona v. Gant* is currently pending in the United States Supreme Court, it would be reasonable for this court to stay further proceedings until an opinion is issued in *Gant*.

Remand for entry of findings and conclusions to the bench trial is unnecessary where those findings and conclusions were entered shortly after the notice of appeal was filed, and before the defendant had submitted any briefing or identified any issues in this appeal.

For all the foregoing reasons, the defendant's appeal should be denied unless the court stays further proceedings pending the United States Supreme Court issuing an opinion in *State v. Gant*.

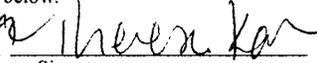
DATED: February 13, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



Stephen Trinen
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-17-09 
Date Signature

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