

NO. 37966-0

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

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL JOHN SCALARA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 07-1-02724-8

CORRECTED BRIEF OF RESPONDENT

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

1. Did the trial court abuse its discretion in denying defendant's motion to suppress when Deputy Maier had a reasonable, articulable suspicion to stop defendant?
2. Whether the defendant waived any challenge to the lawfulness of the search of the vehicle incident to the defendant's arrest where the issue was not raised below?
3. Whether, even if the court were to hold the search incident to arrest unlawful, the evidence should not be suppressed because the officer was acting in good faith on previously established case law?
4. Whether defendant's two convictions for possession of stolen property violate double jeopardy when the unit of prosecution is unambiguous within the statute?

B. STATEMENT OF THE CASE.

1. Procedure

On May 21, 2007, the Pierce County Prosecutor's Office charged MICHAEL JOHN SCALARA, hereinafter "defendant," with two counts of identity theft in the second degree, two counts of possessing stolen property in the second degree, four counts of forgery, and one count of driving while license in suspended or revoked status in the third degree.

CP 1-5. Defendant filed a *Knapstad*¹ motion to dismiss which the court denied after a hearing on the issue. RP (03/12/08) 24. The case proceeded to trial on March 17, 2008, before the Honorable John R. Hickman. RP² (03/17/08) 4.

Hearings pursuant to CrR 3.5 and 3.6 were held together March 17, 2008. RP (03/17/08) 13. The court denied both the motion to suppress defendant's statements pursuant to CrR 3.5 and the motion to suppress all evidence found during the search of defendant's vehicle after his arrest pursuant to CrR 3.6. CP 126-131. Following a jury trial, defendant was found guilty of all charges. CP 117-125. Defendant was sentenced to 57 months in confinement to be followed by 9-18 months of community custody. CP 136-149. Defendant filed a timely notice of appeal. CP 155.

2. Facts relevant to 3.5/3.6 hearing

On May 17, 2007, Deputy Douglas Maier and Deputy Jason Bray were traveling together in one marked police car. RP (03/17/08) 13. As they traveled through an intersection, they noticed the car defendant was driving had an odd license plate on the front. RP (03/17/08) 13, 18. Defendant's car was stopped at the light in the opposite lane of travel of

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986)

² The Verbatim Report of Proceedings is contained in 10 volumes, only some of which are paginated consecutively. Citations to the pages of the record will be preceded by "RP([date of proceeding])." I.e., "RP(03/17/08) 1" refers to the first page of the proceedings of March 17, 2008.

Deputy Maier. RP (03/17/08) 18. Defendant's car had an older styled license plate with a light background and green lettering and numbers. RP (03/17/08) 18. Deputy Maier ran a Department of Licensing (DOL) check on his mobile computer. RP (03/17/08) 20-21. DOL reported the license plate had expired in 1999. RP (03/17/08) 20-21; CP 126, Finding of Fact 1.

As he passed defendant, Deputy Maier noticed in his side mirror that defendant's car had a dealer plate affixed to the back of the car. RP (03/17/08) 22-23; CP 126, Finding of Fact 1. The rear dealer plate was covering where a regular rear plate would go and the rear dealer plate was different than the front plate. RP (03/17/08) 22-23; CP 126, Finding of Fact 1. He also noticed the car was full of numerous items mounded up to the windows. RP (03/17/08) 29, 74; CP 126, Finding of Fact 1. Deputy Maier did a u-turn, activated his overhead lights and pulled in behind defendant. RP (03/17/08) 21, 23.

In response to Deputy Maier's commands, defendant pulled into a gas station. RP (03/17/08) 23-24. Deputy Maier walked to defendant's car and requested defendant's driver's license, registration and proof of insurance. RP (03/17/08) 25-26. Deputy Maier also asked defendant why he had two different license plates on his car. RP (03/17/08) 25-26. Defendant handed Deputy Maier a poorly laminated reproduction of a

dealer identification card and claimed he was a dealer. RP (03/17/08) 26; Finding of Fact 7. Defendant also handed Deputy Maier his license, which had been punched, indicating his license had possibly been suspended at some point. RP (03/17/08) 26.

Deputy Maier ran a check on defendant's license and found that it was suspended in the third degree. RP (03/17/08) 27; CP 127-28, Finding of Fact 7. Defendant was arrested, handcuffed, read his *Miranda*³ rights and placed in the back of the patrol car. RP (03/17/08) 27-33; CP 128, Finding of Fact 8.

Deputy Maier searched defendant's vehicle incident to arrest. RP (03/17/08) 34; CP 128, Finding of Fact 13. The car was full of documents and clothing. RP (03/17/08) 34; CP 128, Finding of Fact 13. Defendant told Deputy Maier that he was moving out of his girlfriend's house and that everything in the car belonged to him. RP (03/17/08) 34. Deputy Maier found vehicle registrations and checks that had different names on them in an unlocked black bag in the car. RP (03/17/08) 34; CP 128-29, Finding of Fact 15.

While Deputy Maier searched the interior of the vehicle, Deputy Bray examined the rear license plate. RP (03/18/08) 98; CP 129, Finding of Fact 18. Deputy Bray removed the dealer plate, which was covering

the existing rear license plate, and discovered it was a laminated piece of cardboard. RP (03/18/08) 98; CP 129, Finding of Fact 18.

Defendant chose to testify at the 3.5/3.6 hearing. RP (03/18/08) 126. Defendant testified that he had been bumper to bumper with the car behind him and there were three cars parked in front of him. RP (03/18/08) 130-31. Defendant said Deputy Maier made eye to eye contact with him for a few seconds as Deputy Maier drove by. RP (03/18/08) 133. After Deputy Maier pulled him over for expired tabs on the front license plate, defendant told Deputy Maier he had a dealer plate in the back, was an employee of Century RV and handed Deputy Maier his dealer card. RP (03/18/08) 136. Deputy Maier arrested defendant for driving with a suspended license. RP (03/18/08) 137-38. Defendant testified that he told Deputy Maier he was holding the checks with random names on them for someone else. RP (03/18/08) 147.

C. ARGUMENT.

As a preliminary matter, the defendant assigns no error to the trial court's findings of fact. Br. App. 2. An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SUPPRESS WHEN DEPUTY MAIER HAD A REASONABLE, ARTICULABLE SUSPICION TO STOP DEFENDANT FOR VIOLATING THE LAW.

The stop of an automobile by a police officer is a seizure within the meaning of the Fourth Amendment, regardless of the purpose of the stop. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). A seizure is reasonable and lawful when it is based on an officer's objectively reasonable suspicion that an individual has engaged in criminal activity. *State v. Armenta* 134 Wn.2d 1, 10, 948 P.2d 1280 (2004). The police are authorized to detain suspects for a brief time for questioning when there is an articulable suspicion, based on objective facts, that the suspect is involved in some type of criminal activity. *Brown v. Texas*, 443 U.S. 47, 49, 99 S. Ct 2637, 61 L. Ed. 2d 357 (1979). An officer may lawfully stop a motor vehicle if he has probable cause to believe a traffic or licensing violation has occurred. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977).

A police officer who observes persons go through series of acts, although each perhaps innocent in itself, but which taken together warrant further investigation, may perform an investigatory *Terry* stop on the individual. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d

889 (1968). An investigative *Terry* stop is among the specific exceptions to the warrant requirement and is based upon less evidence than is needed for probable cause to make an arrest. *State v. Dorey*, 145 Wn. App. 423, 429, 186 P.3d 363 (2008).

The law in Washington requires that vehicle license plates be attached and displayed “in such a manner that they can be plainly seen and read at all times.” RCW 46.16.240. Police officers may stop a person for driving a vehicle with license plates that are displayed incorrectly. *State v. Chapin*, 75 Wn. App. 460, 464, 879 P.2d 300 (1994), *disapproved on other grounds by State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833, (1999).

Dealer plates have limited purpose and use. RCW 46.70.090(3). Dealers may personally use the plate on a vehicle while transporting the “dealer’s own tools, parts, and equipment...” RCW 46.70.090(3)(b). Vehicle dealer license plates should be attached to the rear of the vehicle only and should be capable of distinguishing the classification of the dealer. RCW 46.70.090(1).

Failure to renew an expired registration before operation on the highways of Washington is a traffic infraction. RCW 46.16.160(3). In Washington, stopping a person merely to check the validity of their trip permit is invalid. *State v. Byrd*, 110 Wn. App. 259, 262, 39 P.3d 1010 (2002). But, an officer may stop a vehicle with a trip permit so long as there is an independent basis for the stop. *Byrd*, 110 Wn. App. at 265.

An appellate court reviews whether substantial evidence supports the trial court's factual determinations and whether those factual determinations support the trial court's conclusions of law.⁴ *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). Defendant did not challenge the findings of fact in the present case. Conclusions of law are reviewed de novo to determine whether the court below has committed any errors of law. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996); *State v. Mendez*, 137 Wn.2d 208, 970 P.2d 722 (1999).

In the present case, Deputy Maier had a reasonable, articulable suspicion that entitled him to stop defendant when he noticed defendant's unusual license and dealer plates. Deputy Maier testified at the CrR 3.6 hearing that he initially noticed the vehicle because of the older style front license plate which are not commonly seen on cars anymore. RP (03/17/08) 19. Deputy Maier is an experienced patrol officer having been with the Pierce County Sheriff's Department for six and a half years. RP (03/17/08) 13. He testified that part of his routine duties every day are to run license plates through DOL to check for expired registration, suspended drivers or stolen vehicles. RP (03/17/08) 21. Deputy Maier

⁴ "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).

testified that he runs more than 50 license plates through DOL on every shift. RP (03/17/08) 21.

Deputy Maier ran a license check on defendant's vehicle. RP (03/17/08) 22. The records reflected that defendant's license plate had expired in 1999. RP (03/17/08) 22. As Deputy Maier passed the car defendant was driving, he also noticed a different license plate on the back of the car. RP (03/17/08) 22. He testified it looked similar to a dealer plate. RP (03/17/08) 22. Deputy Maier testified that dealer plates usually have "DLR" running vertically down the side of the plate and numbers horizontally across instead of numbers and letters. RP (03/17/08) 23. The position of the dealer plate also caught Deputy Maier's attention. RP (03/17/08) 23. Deputy Maier stated that he normally sees dealer plates attached to the trunk of the car so the rear plate is still visible. RP (03/17/08) 23. However, defendant's dealer plate was covering the entire rear license plate which is unusual as well. RP (03/17/08) 23.

In *State v. Chapin*, 75 Wn. App. 460, 464, 879 P.2d 300 (1994), *disapproved on other grounds by State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833, (1999), the court held that a police officer had the authority to stop a person driving a vehicle with a rear license plate that was mounted incorrectly in the back windshield. The present case is similar as the law requires that vehicle license plates be visible and unobstructed. RCW 46.16.240. Like Chapin's license plate, the defendant in the present case had mounted his dealer plate over the rear license plate of the vehicle

thereby obscuring the existing rear license plate. As such, Deputy Maier had legal authority to stop the car.

The present case is also similar to *State v. Holmes*, 135 Wn. App. 588, 145 P.3d 1241 (2006), where the court found no error had occurred when a police officer stopped a vehicle with a defective tail light, expired license tabs and an expired three day trip permit. Here, because Deputy Maier had a suspicion based on more than just the fact that defendant was driving with a dealer plate, he had an adequate reason to perform the stop.

Furthermore, when Deputy Maier initially passed defendant, he noticed the back of the car was filled with numerous items. RP (03/17/08) 29. The car had stereo equipment, clothing, and other personal effects piled up to the windows of the car. RP (03/17/08) 29. Because dealer plates are used for specific reasons under RCW 46.70.090(3)(b) and not to transport household items, the numerous items in the car prompted Deputy Maier to investigate further to find out why the plates were on the vehicle, and whether they were being used properly. RP (03/18/08) 29-30.

Based on the expired license plate, unusual looking dealer plate, unusual placement of the dealer plate and numerous items in the car, Deputy Maier had the duty to stop the vehicle to investigate whether defendant was violating the law. Such a determination is a valid and justifiable reason to perform a lawful stop and investigate the matter further.

Defendant's comparison to *State v. Byrd*, 110 Wn. App. 259, 39 P.3d 1010 (2002), is misplaced. In *Byrd*, a police officer pulled over a car solely for the reason of investigating the status of the car's trip permit. *Byrd*, 110 Wn. App. at 264. The officer had no basis to suspect or believe the trip permit was invalid. *Byrd*, 110 Wn. App. at 264. The court held that the State failed to carry its burden of proof as it could provide no other independent basis as the reason that the officer stopped the car. *Byrd*, 110 Wn. App. at 264.

Unlike the facts in *Byrd*, Deputy Maier had multiple reasons to suspect the defendant was violating the law. The expired tabs, unusual placement and look of the dealer plate, and the numerous miscellaneous items in the car combined together created suspicions that Deputy Maier had a duty to investigate.

Affixing a dealer plate to a vehicle does not insulate it from a traffic stop regarding licensing. As demonstrated by the numerous provisions of RCW 96.16, vehicle licensing is highly and specifically regulated by the State. Drivers, owners and dealers must comply with these complex provisions or run the risk of being stopped by police, whose duty it is to enforce these laws.

2. THE DEFENDANT IS NOT ENTITLED TO RELIEF UNDER *ARIZONA v. GANT*.

a. The Defendant Has Waived Any Challenge To The Search Of The Vehicle Pursuant To *Arizona V. Gant*.

The defendant brings this motion to reverse the trial court based on the recently filed opinion of the United States Supreme Court, *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, ___ L. Ed. 2d ___ (April 21, 2009). See Supp. Br. App., p. 3. The defendant makes no argument that because his appeal was pending on direct review at the time *Gant* was decided, the change in the law established in *Gant* applies retroactively. However, the State acknowledges that *Gant* applies retroactively to all cases currently pending on direct review and not yet final. See, e.g., *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649 (1987) (a new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final); *Teague v. Lane*, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); *In re St. Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992).

The analysis, however, does not end with the retroactive application of *Gant*. The issue on appeal is how *Gant* affects the present case. The State's response consists of four issues. First, even though this case is currently pending on appeal, because it involves a challenge to suppress the evidence, the issue is waived because it was not raised before

the trial court. Even though *Gant* applies retroactively, it only affects those cases on appeal where error was preserved below, and the issue in *Gant* is therefore properly before this court. However, here the issue was waived.

Second, under the rules articulated in *Gant* itself, the search here may be proper even if the issues were preserved and *Gant* were to affect this case. This will be discussed in conjunction with the waiver argument.

Third, even if error was preserved so that *Gant* can be applied to this case, and even if under *Gant* the search here was unlawful, there is a separate question as to whether the exclusionary rule requires suppression of the evidence found during the search of the defendant's car. The "good faith" exception to the exclusionary rule applies. Because the officer conducted the search of the defendant's vehicle in good faith and under "authority of law" in effect at the time of the search, the evidence obtained during the vehicle search should not be suppressed.

Fourth, the defendant may not now, or subsequently claim that trial counsel was ineffective for failing to raise the *Gant* suppression issue before the lower court.

As indicated above, the defendant assigns no error to the trial court's findings of fact. 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).

**i. Waiver Under The Law Of
Washington.**

It is long and well established under both the State and Federal constitutions that if an objection to evidence that was allegedly obtained illegally is not asserted timely, it is waived. *See State v. Gunkel*, 188 Wash. 528, 535-36, 63 P.2d 376 (1936); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); *State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968). Where a defendant fails to assert a suppression issue at the trial court level, the defendant has waived that argument and may not raise the issue for the first time on appeal. *State v. Mierz*, 127 Wn.2d 460 468, 901 P.2d 286 (1995); *See also State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967), *cert. denied*, 389 U.S. 871 (1967). The issue is also waived where a defendant raises a suppression issue at the trial court, but fails to pursue the issue. *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1991). Additionally, an appellate court will generally refuse to consider a constitutional question which is raised only in a reply brief. *See State v. Alton*, 89 Wn.2d 737, 575 P.2d 737 (1978). However, in *State v. Kitchen*, the court did consider a constitutional issue raised for the first time in a reply brief where that issue related to the basic constitutional right to a unanimous jury verdict. *State v. Kitchen*, 46 Wn. App. 232, 730 P.2d 103 (1986), *affirmed* 110 Wn.2d 403, 756 P.2d 18 (1982). Accordingly, the error in *Kitchen* was presumably a manifest constitutional error.

At the trial court level, any suppression motion must be raised in a timely manner and the court has authority to reject suppression motions that were not made prior to the start of trial. *See* CrR 4.5(d). CrR 3.6 was adopted in 1975 and specifically governs motions to suppress evidence. Under CrR 3.6, the defendant has the burden of requesting a hearing on suppression issues. *State v. Gould*, 58 Wn. App. 175, 185, 791 P.2d 569 (1990).

CrR 3.6 motions to suppress evidence are heard prior to the time the case is called for trial. *See* Ferguson, 12 & 13 Washington Practice: Criminal Practice and Procedure, Chap. 23 (3d Ed) (citing CrR 4.5(d)); Tegland, 4A Washington Practice Rules Practice, CrR 3.6. Such a standard is implicit in the language of CrR 3.6, where the rule requires the moving party to set forth in a declaration the facts the party expects to be elicited in the event there is an evidentiary hearing. CrR 3.6(a). A pre-trial hearing is further implicated by the rule's language that, based upon the pleadings, the court is to determine whether an evidentiary hearing is required. CrR 3.6(b). All of this implicitly requires a pre-trial hearing. The requirement of a pre-trial hearing is also consistent with the legal standards in Washington prior to the adoption of rule CrR 3.6. *State v. Simms*, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973) (citing *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966); *State v. Robbins*, 37 Wn.2d 431, 224 P.2d 345 (1950)). Moreover, nothing in CrR 3.6 permits or contemplates successive suppression motions.

The interpretation of CrR 3.6 as requiring pre-trial suppression motions is also consistent with CrR 4.5(d), which governs omnibus hearings.

(d) Motions. All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. [....].

Waiver for failure to raise the issue before the trial court applies to suppression motions even where the claimed issue is a constitutional one, and there is a reasonable possibility the motion to suppress would have been successful if the issue had been raised. *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990); *See also State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982), *rev'd. in part on other grounds, State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982). This is because the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not raised *is not* an error in the proceedings below. *See Tarica*, 59 Wn. App. at 372 (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)). (Emphasis added.) In *State v. Baxter*, the court held that the defendant's motion to suppress evidence at the end of the State's case was too late where the defendant was well aware of the circumstances of his arrest at the time the allegedly unlawful evidence was entered. *Baxter*, 68 Wn.2d at 416.

RAP 2.5(a)(3) provides that the court may refuse to review any claim of error which was not raised at the trial court, however the party may raise for the first time a manifest error affecting a constitutional right.

In *State v. Valladares*, the court held that where a defendant raised, and then later withdrew a suppression issue, that it could not be raised for the first time on appeal under RAP 2.5(a)(3) because the rule's discussion of manifest constitutional error contemplates a trial error involving due process rights, as opposed to pre-trial rights. *Valladares*, 31 Wn. App. at 75-76. Moreover, the court in *Valladares* specifically clarified the scope of the exception under RAP 2.5(a)(3) because it was being misconstrued and had been "misread with increasing regularity." *Valladares*, 31 Wn. App. at 75. RAP 2.5(a)(3) is a limited exception to the general rule that issues may not be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 75.

The court in *Valladares* went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible, the admission of that evidence was not a clear violation of the defendant's due process rights, and was therefore not a manifest constitutional error that could be raised for the first time on appeal. *Valladares* 31 Wn. App. at 76 (citing *Baxter*, 68 Wn.2d at 413). Valladares appealed to the Washington Supreme Court, which agreed with and affirmed the Court of Appeal's analysis on this issue of waiver. *See Valladares*, 99 Wn.2d, at 671-72. The Supreme Court held that by, "withdrawing his motion to

suppress the evidence, *Valladares* elected not to take advantage of the mechanism provided for him for excluding the evidence,” and thus waived or abandoned his objections. *Valladares*, 99 Wn.2d at 672.

Only six years after the Court of Appeals in *Valladares* felt the need to clarify “manifest error,” in *State v. Scott*, the Supreme Court again felt the need to clarify construction to be given to the “manifest error standard.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott*, the court held that the proper approach to claims of constitutional error asserted for the first time on appeal is that “[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by “manifest”; and second, “[i]f the claim is constitutional then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard. [...]” *Scott*, 110 Wn.2d at 688.

The standard set forth in *Scott* has subsequently been elaborated into a four-part analysis.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue.

Finally, if the court determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.

State v. Bland, 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).

Moreover, under RAP 2.5(a)(3), while an appellant can raise a manifest error affecting a constitutional error for the first time on appeal, appellate review of the issue is not mandated if the facts necessary for a decision cannot be found in the record, because in such circumstances the error is not “manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)). Additionally, it is worth noting that if a case is appealed a second time, an error of constitutional dimensions will not be considered if the error could have been asserted in the first appeal but was not, because at some point the appellate process must stop. See *State v. Suave*, 100 Wn.2d 84, 86-87 666 P.2d 894 (1983).

Notwithstanding all the controlling precedent on RAP 2.5(a)(3), in *State v. Littlefair* the court held otherwise, and ruled that a suppression issue could be raised for the first time on a second appeal because it was a matter of constitutional magnitude. See *State v. Littlefair*, 129 Wn. App. 330, 337-38, 119 P.3d 359 (2005), *review denied*, 149 Wn.2d 1020, 72 P.3d 761 (2003). The court in *Littlefair* seems to have gone astray because it focused on the constitutional right, but failed to consider the definition of “manifest error.” Compare *Littlefair*, 129 Wn. App. at 338

to *Scott*, 110 Wn.2d at 687 (agreeing with and quoting *Valladares*, 31 Wn. App. at 76 “that the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below’”).

The waiver rule serves the interests of judicial economy by requiring the defendant to raise the challenge in a timely manner that permits the court to consider it without unnecessarily wasting resources. *See State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 429 (1988).

ii. Forfeiture And Waiver Under Federal Law.

Washington courts often look to federal standards for guidance on the issue of waiver. *See Scott*, 110 Wn.2d at 687 (citing 3A C. Wright, Federal Practice and Procedure § 856, at 339-41 (2d ed. 1982); Fed.R. Crim.P. 52(b)). This is because RAP 2.5(a)(3) has its genesis in federal law. *Scott*, 110 Wn.2d at 687, n. 4 (citing Comment (a), RAP 2.5(a)(3), 86 Wn.2d 1152 (1976)). Thus, similar to Washington, under federal law where a ground for suppression is not made timely at the trial court, the issue is waived. *See United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002) (citing Federal Rule of Criminal Procedure 12(b)(3) and holding that ground for suppression not included in pre-trial motion to suppress was waived); *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000)(failure to bring a timely motion to suppress constitutes a waiver

of the issue); *United States v. Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987) (per curiam) (failure to raise a particular ground in support of a motion to suppress constitutes waiver). Under the federal standard, the court may in its discretion grant relief from waiver for “cause shown,” but that requires the defendant to make a particular showing in its brief, something that has not been done here. *See Restrepo-Rua*, 815 F.2d at 1329 (citing *United States v. Gonzales*, 749 F.2d 1329, 1336 (9th Cir. 1984)).

Fed. Rule Crim. Proc 52(b) is analogous to RAP 2.5(a)(3). *Scott*, 110 Wn.2d at 687, n. 4. However, RAP 2.5(a)(3) is significantly narrower because RAP 2.5(a)(3) covers only constitutional errors, while Fed. Rule Crim. Proc. 52(b) covers “plain errors.” *Scott*, 110 Wn.2d at 687, n. 4. Rule 52(b) provides: “PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Rule 52(b) at its adoption was intended as a “restatement of existing law.” *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (quoting Advisory Committee’s Notes on Fed. Rule Crim. Proc. 52, 18 U.S.C. App., p. 833). The rule has only been changed once since its adoption in 2002, and those changes are intended to be stylistic only. *See* Advisory Committee’s Notes to the 2002 Amendments.

The appellate courts’ authority under Rule 52(b) is limited. There must be “error” that is “plain” and it must “affect substantial rights.”

Olano, 507 U.S. at 732. While the rule leaves the decision to correct the forfeited error to the sound discretion of the Court of Appeals, the court should not exercise that discretion unless the error “‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Olano*, 507 U.S. at 732 (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046, 84 L. Ed. 2d 1 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed.555 (1936))).

Federal law makes a careful distinction between error that has been “waived” and error that has been “forfeited.” Forfeiture is the failure to make the timely assertion of a right. *Olano*, 507 U.S. at 733. While under federal law, waiver is the “intentional relinquishment or abandonment of a known right.” *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed.1461 (1938)). “Deviation from a legal rule is ‘error’ unless the rule has been waived.” *Olano*, 507 U.S. at 732-33. As opposed to waiver, mere forfeiture does not extinguish an “error” under Rule 52(b). If a legal rule was violated in district court proceedings and the defendant did not waive the rule, than an “error” has occurred under Rule 52(b) despite the absence of a timely objection. *Olano*, 507 U.S. at 733-34.

“The second limitation on appellate authority under Rule 52(b), is that the error be “plain.” Plain means “clear” or “obvious.” *Olano*, 507 U.S. at 734. The third requirement is that the plain error “affects substantial rights.” In most cases, this means that the error must have

been prejudicial such that it affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. The court then conducts a harmless error analysis, with the defendant having the burden to show prejudice. *Olano*, 507 U.S. 735.

It is also worth noting that Rule 52(b) is permissive, not mandatory, so that the Court of Appeals has authority to order a correction but is not required to do so. *Olano*, 507 U.S. at 735. The discretion conferred by Rule 52(b) should be employed where a miscarriage of justice would otherwise result. *Olano*, 507 U.S. at 736. This means that “the Court of Appeals should correct a plain forfeited error affecting substantial rights if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936)). A plain error affecting substantial rights does not without more satisfy this standard, lest the discretion granted by Rule 51(b) be nullified. *Olano*, 507 U.S. at 737.

The court in *Olano* stated that at a minimum, in order to be plain, an error must be clear under current law. *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 586, 169 L. Ed. 2d 445 (1997) (citing *Olano*, 520 U.S. at 743). But the court in *Olano* declined to consider the situation where the error was unclear at the time of appeal, but became clear on appeal because the applicable law was clarified in the interim. *Olano*, 507 U.S. at 734. That issue was considered by the court in *Johnson*, wherein

the court held that “plain error review applies absent a preserved objection even when the error results from a change in the law that occurs while the case is pending. *United States v. Morelos*, 544 F.3d 916, 921 (8th Cir. 2008). Citing *Johnson*, 520 U.S. at 467. The 9th circuit Court of Appeals has recognized that some narrow exceptions exist to the general rule in that issues raised for the first time on appeal will not be considered. One such exception is where the new issue arises while the appeal is pending because of a change in the law. *U.S. v. Flores-Payson*, 942 F.2d 556, 558 (9th Cir. 1991).

Nonetheless, a change in the law is not sufficient to justify a plain error review of suppression issues not raised below. Under Federal Rule of Criminal Procedure 12(b)(3), a suppression issue must be raised before the trial court. *United States v. Rose*, 538 F.3d 175, 177 (3rd Cir. 2008). Rule 12(b)(3) supercedes the “plain error” standard of Rule 52(b). This is because suppression issues not raised in the trial court “direct a waiver approach” to the analysis. *Rose*, 538 F.3d at 177-79, 182-83 (citing Fed.R.Crim.P. 12(e) (stating that failure to raise the issues prior to trial constitutes waiver)). *See also U.S. v. Chavez-Valencia*, 116 F.3d 127, 129-33 (5th Cir. 1997). Because the failure to raise a suppression issue constitutes waiver of that issue rather than forfeiture, suppression motions raise for the first time on appeal are not subject to a plain error review.

iii. Here The Defendant Waived The Suppression Issue.

Here, as in *Baxter*, the evidence was admitted without any objection on the basis that the defendant now asserts.⁵ See CP 159-60; RP (03-20-08), p. 134, ln. 10-16; p. 135, ln.12-19; p. 152, ln. See generally RP (03-20-08), p. 109, 112, 119, 129-43, 152, 163-64; 144-52. The defendant argued below that: “(a) the initial seizure (traffic stop) was unlawful and as a result all evidence must be suppressed...”; and “(b) the scope of the defendant’s detention exceeded what was lawfully necessary to accomplish the lawful purpose of the investigatory detention,” as well as a claim that the stop was pretextual. See CP 11-12; RP 10, ln. 16 to p. 11, ln. 11; p. 203, ln. 15-18; See generally CP 8-24; RP 203, ln. 10 to p. 210, ln. 16. The defendant waived his claim that the evidence should be suppressed because the officer lacked lawful authority to conduct a search of the vehicle incident to his arrest, and because that claim was waived, it may not now be raised for the first time on appeal. See *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990) (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)); *State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982).

The doctrine of waiver is particularly applicable here under the procedural facts of this case. First, the defendant cites to nothing in the

⁵ The only objections were made to the admission of exhibits 10, 11 and 18, and that was solely on the basis of relevance.

record that indicates that a suppression issue was ever raised challenging the lawfulness of the search of the vehicle incident to arrest where the defendant was detained in the patrol car at the time of the search. *See* CP 8-24. Moreover, after reviewing the record, the State cannot identify any additional documents to designate which indicate any such hearing ever took place.

By not raising the issue before the trial court, the defendant deprived the State of the ability to put forth any relevant evidence and legal theories, including any alternative legal theories that would have supported the search of the vehicle. Some of those alternative theories may have included an inevitable discovery argument, however, as with suppression issues, inevitable discovery arguments must be raised before the trial court or are waived. *See State v. Rulan C.*, 97 Wn. App. 884, 889, 970 P.2d 821 (1999). Alternately, the evidence may have been admissible under other exceptions to the warrant requirement that may or may not have also involved inevitable discovery arguments.

Because the defendant did not raise a challenge to the officer's authority to search the vehicle incident to the arrest of the defendant, the State was not put on notice of the issue and was deprived of the opportunity to develop the record regarding alternative bases supporting the lawfulness of the search or the admission of the evidence. For that reason, the facts necessary for a decision cannot be found in the record and review is unwarranted. *Riley*, 121 Wn.2d at 31-32.

- b. Even If The Court Were To, For Some Reason, Consider The Merits Of The Argument, The Evidence Should Not Be Suppressed Where The Officer Acted In Good Faith.

In the alternative, there is no basis to suppress the evidence found during the search of the defendant's vehicle because the officers were acting "under authority of law" and in reliance upon presumptively valid case law. In this circumstance, the "good faith" exception to the exclusionary rule applies under both the Fourth Amendment and Article 1, § 7 of the Washington constitution.

i. **The Fourth Amendment Good Faith Exception To The Exclusionary Rule Applies.**

In his brief, the defendant relies on the underlying Arizona case in *Gant* to support his assertion that the warrantless search of his car was invalid. *See*, Br. App. 23 (citing *Arizona v. Gant*, 162 P.3d 640 (Ariz 2007)). The United States Supreme Court has now ruled on that case and its opinion in *Gant* was decided purely on Fourth Amendment grounds. *Gant*, 129 S. Ct. at 1716.

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

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

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

In *DeFillippo*, the Court stated:

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

DeFillippo, 443 U.S. at 37-38.

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation

by enforcement officers concerning its constitutionality -- with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement. *DeFillippo*, 443 U.S. at 37-38 (emphasis added). The Court further noted that:

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

DeFillippo, 443 U.S. at 38 (footnote 3, emphasis added).

The Court recognized a “narrow exception” when the law is “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” *DeFillippo*, 443 U.S. at 37-38. Accordingly, in *DeFillippo* the Supreme Court upheld the arrest, search, and subsequent conviction of the defendant even though the statute which justified the stop was subsequently deemed to be unconstitutional.

DeFillippo, 443 U.S. at 40.

The only difference between *DeFillippo* and the present case is that in *DeFillippo* the Court was addressing an arrest based on a presumptively valid statute that was later ruled unconstitutional, whereas

here the situation involves a search upheld as constitutional by well-established and long-standing judicial pronouncements. This distinction does not justify a different result. Law enforcement officers should be entitled to rely on established case law – from both the federal and state courts – in determining what searches are deemed constitutional. Indeed, in the area of search and seizure, it is generally the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particular those of the Supreme Court, as to the constitutionally permissible scope of searches and seizures are clearly entitled to respect, deference, and reliance by officers in the field.

Prior to *Gant*, both the federal and state courts had unequivocally endorsed the constitutional validity of the vehicle searches incident to arrest. See *State v. Vrieling*, 144 Wn.2d 489, 28 P.3d 762 (2001); *United States v. Caseres*, 533 F.3d 1064, 1071 (9th Cir. 2008); *United States v. Weaver*, 433 F.3d 1104, 1107 (9th Cir. 2006). Both cases interpret: *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

The fact that the courts lower than the United States Supreme Court had interpreted the search of a vehicle incident to arrest in this way is made explicitly clear in *Gant* which recognized that the Court’s prior opinions have “been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee

could gain access to the vehicle at the time of the search. . .” and that “lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception.” *Gant*, 129 S. Ct. at 1718.

Likewise, the constitutionality of the search incident to arrest rule was repeatedly confirmed by the Washington Supreme Court over the past 23 years. *See, e.g., State v. Vrieling*, 144 Wn.2d 489; *State v. Parker*, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); *State v. Johnson*, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); *State v. Fladebo*, 113 Wn.2d 388, 779 P.2d 707 (1989).

There can be little doubt that officers relied on these specific judicial pronouncements when conducting vehicle searches. Indeed, the majority opinion in *Gant* emphasized that officers had reasonably relied on pre-*Gant* precedent, and were immune from civil liability for searches conducted in reasonable reliance on the Court’s previous opinions. *Gant*, 129 S. Ct. at 1722, n.11.

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

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

At least one federal court has expressly recognized the application of the “good faith” doctrine to *Gant* cases. See *United States v. Grote*, Memorandum Order, No. CR-08-6057-LRS, ___ F. Supp.2d ___ (E.Dist. Wash. June 16, 2009). However, another has rejected the application of the good faith doctrine to *Gant* cases. *United States v. Buford*, Memorandum Order, No. 3:09-00021, ___ F. Supp.2d ___ (Middle Dist. Tenn. June 11, 2009). It is worth noting that the court in *Buford* failed to consider the United States Supreme Court authority in *DeFillippo*, while the analysis in *Grote* is more rigorous.

In sum, the United States Supreme Court has recognized that the application of the exclusionary rule serves no purpose when officers relied in good faith on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. Pursuant to

the *DeFillippo* “good faith” exception, the evidence obtained during the search in the present case should not be suppressed, and the defendant’s motion for reconsideration should be denied.

ii. The Evidence Should Not Be Suppressed Under Article 1, § 7 Because The Search Was Conducted “Under Authority Of Law” And Pursuant To A Presumptively Valid Case Law.

Up until the court issued its opinion in *Gant*, the position of the Washington Supreme Court was that vehicle searches incident to a lawful arrest are valid under Article 1, § 7. While the defendant cites to some cases applying Article 1, § 7, they do not address the particular issue in *Gant* and in any case are contrary to established Washington authority in cases such as *Vrieling* as discussed in the preceding section. Absent any basis to address state constitutional issues, the defendant’s motion for reconsideration should be reviewed solely under federal Fourth Amendment analysis. However, if the court were to address whether the evidence should be suppressed under an article 1, § 7 exclusionary rule analysis, there is also no basis to suppress the evidence. This is because the pre-*Gant* search was conducted pursuant to authority of law and presumptively valid judicial opinions. See *State v. Johnson*, 128 Wn.2d

431, 446-47, 909 P.2d 293 (1996) (holding that search of a vehicle incident to arrest of an occupant is one of the exceptions to the warrant requirement under Article I, § 7).

In a recent series of cases, the Washington Supreme Court has adopted the “good faith” exception to the exclusionary rule analysis set forth in *Michigan v. DeFillippo*, *supra*. For example, in *State v. Potter*, 156 Wn.2d 835, 132 P.3d 1089 (2006), the defendants maintained that they were unlawfully arrested for driving while their licenses were suspended because, subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional. The defendants in *Potter* contended that under article I, section 7, evidence of controlled substances found in their vehicles during searches incident to their arrests had to be suppressed as a result of the illegal arrests.

In a unanimous decision, the Supreme Court applied the *DeFillippo* rule under article I, section 7, and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. *Potter*, 156 Wn.2d at 843, 132 P.3d 1089. The Court stated:

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

Potter, 156 Wn.2d at 843 (quoting *State v. White*, 97 Wn.2d 92, 103, 640 P.2d 1061 (1982) (quoting *DeFillippo*, 443 U.S. at 38)). Under the facts presented in *Potter*, there were no prior cases holding that license suspension procedures in general were unconstitutional, and thus there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. Accordingly, applying *DeFillippo*, the Court affirmed the defendants' convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. *Potter*, 156 Wn.2d at 843.

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

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

Brockob, 159 Wn.2d at 341 n. 19 (quoting *White*, 97 Wn.2d at 103 (quoting *DeFillippo*, 443 U.S. at 38)). As in *Potter*, the Court held that the narrow exception for grossly and flagrantly unconstitutional laws did

not apply “because no law relating to driver's license suspensions had previously been struck down.” *Brockob*, 159 Wn.2d at 341, n. 19.

Potter and *Brockob* have had the effect of overruling *White* (unanimously, in *Potter*) insofar as *White* can be read to reject the *DeFillippo* good faith reliance on a presumptively valid statute. As discussed above, the only difference between these cases and the present case is that the present case involves presumptively valid case law, as opposed to a presumptively valid statute. This distinction has no bearing on the analysis: the judicial opinions of the State Supreme Court are at least as presumptively valid as legislative enactments.

Applying the analysis from *DeFillippo*, *Potter*, and *Brockob*, the good faith exception to the exclusionary rule applies. Moreover, as previously discussed, there were an overwhelming number of judicial opinions affirming the validity of vehicle searches incident to arrest. This case law was presumptively valid at the time the defendant was arrested. The narrow exception to *DeFillippo* does not apply; that is, there was no gross or flagrant unconstitutionality. Accordingly, the search incident to arrest of the defendant’s vehicle should be upheld because the search was conducted in good faith, under authority of law, and pursuant to presumptively valid case law.

c. The Defendant Cannot Later Claim Ineffective Assistance Of Counsel.

The defendant has not yet alleged ineffective assistance of counsel as a result of the failure to raise a suppression challenge related to the lawfulness of the search of the vehicle incident to the Bliss's arrest. In anticipation that the defendant might assert such an argument, neither should the defendant now be permitted to raise such a challenge in the reply brief. An appellate court will generally refuse to consider a constitutional question which is raised only in a reply brief. *See State v. Alton*, 89 Wn.2d 737, 575 P.2d 737 (1978). Moreover, to raise a claim of ineffective assistance of counsel for the first time on appeal, the defendant is required to establish from the trial record: 1) the facts necessary to adjudicate the claimed error; 2) the trial court would likely have granted the motion if it was made; and 3) the defense counsel had no legitimate tactical basis for not raising the motion in the trial court. *McFarland*, 127 Wn.2d at 333-34; *Riley*, 121 Wn.2d 22.

Counsel, whether in recommending that his or her client enter a plea or that a suppression issue not be pursued, is not ineffective for failing to forecast changes or advances in the law. *See, e.g., In re the Personal Restraint Petition of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998) (counsel could not be faulted for failing to anticipate a change in

the law); *Sherrill v. Hargett*, 184 F.3d 1172, 1176 (10th Cir.), *cert. denied*, 528 U.S. 1009 (1999); *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir.), *cert. denied*, 519 U.S. 1119 (1993) (“The Sixth Amendment does not require counsel to forecast changes or advances in the law, or to press meritless arguments before a court.”); *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.), *cert. denied*, 502 U.S. 831 (1991) (same); *Elledge v. Dugger*, 823 F.2d 1439, 1443 (11th Cir. 1987) (“Reasonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.”). Thus, any argument by the defendant that his conviction must be vacated due to his counsel’s failure to pursue a suppression motion under the rule announced in *Gant* must fail. This is because the propriety of counsel’s conduct must be viewed at the time counsel was required to act. See *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir.), *cert. denied*, 537 U.S. 1093 (2002) (“we have rejected ineffective assistance claims where a defendant ‘faults his former counsel not for failing to find existing law, but for failing to predict future law’ and have warned that clairvoyance is not a required attribute of effective representation.”) (quoting *United States v. Gonzalez Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995)); *United States v. Chambers*, 918 F.2d

1455, 1461 (9th Cir. 1990) (counsel's conduct was not deficient when, at the time of trial, the instruction given to the jury was the standard instruction that had been approved by the appellate court).

The defendant fares no better by arguing that his conviction occurred after the Supreme Court granted review in *Gant* on February 25, 2008. *Arizona v. Gant*, ___ U.S. ___, 128 S. Ct. 1443, 170 L. Ed. 2d 274 (2008). Counsel is not required to preserve an issue after a higher court has granted review of an intermediary appellate court's decision, but not yet passed upon the propriety of the lower court's reasoning. See *United States v. McNamara*, 74 F.3d 514, 516-17 (4th Cir. 1996) (counsel was not constitutionally deficient for following controlling law of circuit that willfulness was not an element of structuring financial transactions to avoid currency reporting requirements, even though Supreme Court had granted certiorari on that issue at time legal advice was given; "an attorney's failure to anticipate a new rule of law was not constitutionally deficient"); *Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995), cert. denied, 517 U.S. 1171 (1996) (trial counsel in capital case was not constitutionally ineffective for failing to preserve an issue at trial based merely on the Supreme Court's grant of certiorari in a case which raised the issue); *Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (ruling that trial counsel was not ineffective by failing to raise *Batson* challenge two days before *Batson* was decided), cert. denied, 504 U.S. 920 (1992).

3. DEFENDANT'S TWO CONVICTIONS FOR
POSSESSION OF STOLEN PROPERTY DO
NOT VIOLATE DOUBLE JEOPARDY AS THE
UNIT OF PROSECUTION IS
UNAMBIGUOUSLY DEFINED WITHIN THE
STATUTE.

The double jeopardy clause of the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prohibits the imposition of multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980); *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002); *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). The federal and state double jeopardy clauses provide identical protections. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Although the protection itself is a constitutional issue, it is for the Legislature to decide what conduct is criminal and to determine the appropriate punishment. *Calle*, 125 Wn.2d at 776. The reviewing court's role is limited to determining whether the Legislature intended to authorize multiple punishments. *Id.* When the trial court has imposed cumulative punishment without legislative authorization, it has also violated the separation of powers doctrine. *See State v. Frohs*, 83 Wn. App. 803, 810, 924 P.2d 384 (1996).

“[W]hen a defendant is convicted of multiple violations of the same statute, the double jeopardy question focuses on what ‘unit of prosecution’ the Legislature intends as the punishable act under the statute.” *Westling*, 145 Wn.2d at 610. The “unit of prosecution” is the legislatively defined scope of the criminal act. *State v. Adel*, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998). This inquiry is resolved by examining the relevant statute in order to ascertain what the Legislature intended. *Id.*; *In re Davis*, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). If the statute is ambiguous as to the unit of prosecution, “the ambiguity should be construed in favor of lenity.” *Adel*, 136 Wn.2d 629 at 634-35. Absent a threshold showing of ambiguity, a court derives a statute’s meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

The first step in determining legislative authorization for punishment is to review the statutes proscribing the offenses and then look to the facts of the case for an individual evaluation. The statutes relevant to the present case state:

- (1) “Possessing stolen property” means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1).

- (1) A person is guilty of possessing stolen property in the second degree if:
 - (a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value.

RCW 9A.56.160(1)(a).

Looking at the statute as it is written, it is clear the legislature unambiguously intended to punish each possession of an item within the specified values as individual crimes. The legislature differentiates the items based on the value they possess. Therefore, each check over \$250 but less than one thousand five hundred dollars constitutes one item of property chargeable under the statute.

Courts have read other portions of RCW 9A.56.160 to be consistent with this interpretation of defining the unit of prosecution. With regard to another subsection of RCW 9A.56.160, courts have held

that the unit of prosecution under it is unambiguous. The legislature has determined that each possession of a stolen access device constitutes one unit of prosecution. See *State v. Varnell*, 162 Wn.2d 165, 174, 170 P.3d 24 (2007); *In re Shale*, 160 Wn.2d 489, 499, 158 P.3d 588 (2007); *State v. Leyda*, 157 Wn.2d 335, 347, 138 P.3d 610 (2006); *State v. Ose*, 156 Wn.2d 140, 142, 124 P.3d 635 (2005). This determination relates to subsection (c) of RCW 9A.56.160(1).

The present case deals with subsection (a) of the same statute. Because the legislature clearly defines the unit of prosecution in subsection (c), it is reasonable to conclude that the legislature similarly intended the unit of prosecution in subsection (a) to be based on the value of each item. Therefore, the unit of prosecution can be understood as based on each item within the specified value defined in the statute under subsection (a).

Finally, defendant's comparison to *State v. McReynolds*, 117 Wn. App. 309, 71 P.3d 663 (2003), is incorrect. *McReynolds* involved multiple defendants convicted of multiple counts of possession of various stolen property. The State wrote out "various household items" or "various electronics" for each grouping of items. *McReynolds*, 117 Wn. App. at 340. Confusion arose concerning whether their course of conduct constituted a single unit of prosecution. *McReynolds*, 117 Wn. App. at

309, 338. The court pointed out that “when a statute defines a crime as a course of conduct over a period of time, ‘then it is a continuous offense.’” *McReynolds*, 117 Wn. App. at 339 (quoting *Harrell v. Israel*, 478 F. Supp. 752, 754-55 (E.D. Wis. 1979)). Because the State charged the McReynoldses with continuous possession of various property during a period of 15 days under RCW 9A.56.140, the unit of prosecution was a single possession. *McReynolds*, 117 Wn. App. at 340.

In the present case, defendant was not charged with continuous possession as in *McReynolds*. Rather, although RCW 9A.56.140 was used to define possession of stolen property, the State charged defendant with two counts of possessing stolen property in the second degree under RCW 9A.56.160(1)(a). Under that statute, as stated above, the unit of prosecution is determined by the value of each item. Because McReynolds was charged under a different statute and the State actually used the words “various” in its description of each property count, that case is distinguishable. *McReynolds*, 117 Wn. App. at 332, 335. Therefore, defendant’s comparison to the charges in *McReynolds* is misplaced as the two statutes authorize charges under different specifications.

In the present case, the statute is unambiguous. The legislature clearly intended for the unit of prosecution to be based on each item within a value range. *McReynolds* is inapplicable as the case discusses a different statute with a different unit of prosecution standard. Defendant's two convictions of possession of stolen property do not violate double jeopardy.

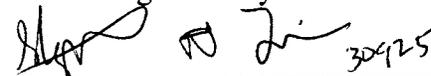
D. CONCLUSION.

The officer had a reasonable suspicion to stop the vehicle where different license plates were attached to the front and rear of the vehicle. The defendant waived any challenge under *Arizona v. Gant* where the issue was not raised below. Moreover, the officers' search of the vehicle incident to arrest was valid under the good faith exception where the

officer was relying upon well established law in conducting the search.
The two convictions for possession of stolen property did not violate
double jeopardy as the units of prosecution for each count was different.
The defendant's claims are without merit and should be denied.

DATED: July 9, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

for  30925

THOMAS C. ROBERTS
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STEPHEN TRINEN
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Chelsey McLean
Rule 9

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.

7-10-09 Chelsey McLean
Date Signature

09 JUL 12 PM 1:52
STATE OF WASHINGTON
BY Chelsey McLean
DEPUTY
COUNTY CLERK

APPENDIX “A”

United States v. Grote

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. BENJAMIN DAVIS GROTE, Defendant.	}	NO. CR-08-6057-LRS ORDER RE GANT
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I. BACKGROUND

On March 26, 2009, this court entered an "Order Denying Motion To Suppress" (Ct. Rec. 119). That order concluded the August 14, 2008 search of Defendant's vehicle was a valid search incident to arrest under the law existing at the time. On April 21, 2009, the U.S. Supreme Court issued its decision in *Arizona v. Gant*, U.S. , 129 S.Ct. 1710 (2009), relating to when a warrantless search incident to arrest is justified. Defendant asks this court to reconsider its "Order Denying Motion To Suppress" in light of *Gant*, and to that end, the parties have provided the court with supplemental briefing, and an evidentiary hearing was held on June 8, 2009. City of Walla Walla police officers Matt Greenland and Michael Moses testified at the hearing.

II. DISCUSSION

A. Validity of Search Incident to Arrest under *Gant*

In *Gant*, the Supreme Court held that a search of a motor vehicle incident to

1 lawful arrest is justified in two circumstances: 1) when the arrestee is unsecured
2 and within reaching distance of the passenger compartment at the time of the
3 search; and 2) when it is reasonable to believe evidence relevant to the crime of
4 arrest "might" be found in the vehicle. 129 S.Ct. at 1723. The Government does
5 not contend Defendant was unsecured and within reaching distance of the
6 passenger compartment at the time the officers searched the vehicle. Officers
7 Greenland and Moses both testified the search was not conducted until after the
8 Defendant had been arrested and placed into the back of Officer Greenland's
9 patrol car. Therefore, the question is whether it was reasonable to believe that
10 evidence relevant to the crime of arrest, Driving Under The Influence (DUI),
11 might be found in Defendant's vehicle.

12 Based on the Ninth Circuit's decision in *United States v. Gorman*, 314 F.3d
13 1105 (9th Cir. 2002), Defendant asserts the "reasonable to believe" standard
14 equates to a probable cause standard. *Gorman* involved the issue of whether
15 police had "reason to believe" that an individual for whom they had an arrest
16 warrant was present in a third party's residence, justifying entry into that residence
17 without a search warrant or consent. A warrantless search of a vehicle incident to
18 arrest requires probable cause to arrest and so the question is whether it should
19 also require probable cause to search the vehicle once probable cause to arrest has
20 been established. Based on *Gorman*, and the fact the automobile exception to the
21 search warrant requirement¹ requires probable cause to believe that a motor
22 vehicle contains contraband and can be moved (*California v. Carney*, 471 U.S.
23 386, 394-95 (1985)), it appears the Ninth Circuit would find the "reasonable to
24 believe" standard referred to in *Gant* equates with a probable cause standard, that

25

26 ¹ This is distinct from the search incident to arrest exception. The rationale
27 for the automobile exception is that vehicles are mobile, can be moved quickly,
28 and the expectation of privacy is reduced by pervasive regulation governing
vehicles. *United States v. Hatley*, 15 F.3d 856, 858 (9th Cir. 1994).

1 being probable cause to believe evidence of the crime of arrest will be located in
2 the vehicle.²

3 Initially, the court finds that based on the totality of the circumstances
4 testified to by the officers, and as reflected in their reports, there was probable
5 cause to arrest the Defendant for DUI, regardless of any concern about the
6 accuracy of the PBT (Portable Breath Test) reading.³ The question is whether
7 based on that lawful arrest, the officers had probable cause to conduct a
8 warrantless search of Defendant's vehicle for evidence of DUI.

9 In *Gant*, the Supreme Court stated:

10 In many cases, as when a recent occupant is arrested for a
11 traffic violation, there will be no reasonable basis to believe
12 the vehicle contains relevant evidence. [Citations omitted].
13 But in others, including *Belton*⁴ and *Thornton*⁵, the offense of
14 arrest will supply a basis for searching the passenger compartment
15 of an arrestee's vehicle and any containers therein.

16 Neither the possibility of access nor the likelihood of discovering
17 offense-related evidence authorized the search in this case. . . . An
18 evidentiary basis for the search was . . . lacking in this case. Whereas
19 Belton and Thornton were arrested for drug offenses, Gant was
20 arrested for driving with a suspended license- an offense for which
21 the police could not expect to find evidence in the passenger
22 compartment of Gant's car. [Citation omitted]. Because police

23 ² The Ninth Circuit alone has held the "reason to believe" standard
24 "embodies the same standard or reasonableness inherent in probable cause." *U.S.*
25 *v. Thomas*, 429 F.3d 282, 286 (D.C. Cir. 2005). Other circuits differing from the
26 Ninth Circuit on this issue include the Sixth Circuit, *U.S. v. Pruitt*, 458 F.3d 477,
27 482-83 (6th Cir. 2006). There is a circuit split because the Supreme Court has not
28 defined what "reasonable to believe" means and it did not do so in *Gant*.

³ Probable cause to arrest was not an issue specifically raised by Defendant
in his initial or supplemental papers.

⁴ *New York v. Belton*, 453 U.S. 454, 455-56, 101 S.Ct. 2860 (1981).

⁵ *Thornton v. United States*, 541 U.S. 615, 618, 124 S.Ct. 2127 (2004)

1 could not reasonably have believed either that Gant could have
 2 accessed his car at the time of the search or that evidence of the
 offense for which he was arrested might have been found therein,
 3 the search in this case was unreasonable.

4 129 S.Ct. at 1719.

5 DUI is a traffic violation. RCW 46.61.502. This court, however, is hesitant
 6 to construe *Gant* as standing for the proposition that a traffic violation, and a DUI
 7 in particular, can never serve as a basis for a search of a vehicle incident to lawful
 8 arrest on the assumption it will never be reasonable to believe that evidence of
 9 DUI will be found in the vehicle. This court is equally hesitant to hold that a
 10 lawful arrest for DUI will always justify a search of a vehicle incident to arrest on
 11 the assumption it will always be reasonable to believe that evidence of DUI will be
 12 found in the vehicle. Resolution of this particular case, however, does not turn on
 application of any *per se* rule.

13 While Officer Greenland spoke with Defendant who was seated in the
 14 driver's seat of the vehicle, Officer Moses went to the passenger side of the
 15 vehicle. From the exterior of the vehicle, Officer Moses was able to observe a
 16 brown paper bag wrapped around a bottle which was located next to the
 17 Defendant. Officer Moses testified that it appeared to be a bottle of alcohol since
 18 liquor stores typically put such bottles in brown paper bags.⁶ The officers testified
 19 that after the initial contact with Defendant in his vehicle, the officers gathered to
 20 confer and left Defendant alone in the vehicle. Officer Moses testified that when
 21

22
 23 ⁶ According to Officer Moses' written report (Ct. Rec. 72-2):

24
 25 I moved to the passenger side and could see inside on
 26 the front seat. There was a brown paper bag like the ones
 27 that wrap a liquor bottle from a liquor store, it also
 28 was in the shape of a liquor bottle laying next to Grote.

1 Defendant was re-contacted, he (Moses) noticed the paper bag had been moved
2 from the front passenger seat to the "back cab area" of the vehicle (the truck),
3 presumably by the Defendant. According to Officer Moses, the bag remained
4 visible from the exterior of the vehicle even after it (the bag) had been moved to
5 the back cab area. After the Defendant had been arrested and placed in the back of
6 Officer Greenland's patrol car, Officer Moses searched the interior of the vehicle.
7 He inspected the contents of the brown paper bag and found that it contained a
8 full, unopened bottle of vodka. Officer Moses acknowledged, however, that he
9 did not inspect the bag first, but rather looked under the driver's seat and
10 discovered a loaded handgun and some blasting caps.

11 To prove DUI, the State must show a defendant operated or was in actual
12 physical control of a vehicle while he was under the influence. Driving under the
13 influence may be proven by one of three alternative methods: (a) a person has,
14 within two hours of driving, an alcohol concentration of 0.08 or higher as shown
15 by analysis of the person's breath or blood; (b) driving a vehicle under the
16 influence of or affected by intoxicating liquor or any drug; or (c) driving a vehicle
17 under the combined influence of or affected by intoxicating liquor and any drug.
18 RCW 46.61.502. The defendant's physical condition is, by definition, a critical
19 element of the crime. *State v. Komoto*, 40 Wn.App. 200, 205, 697 P.2d 1025
20 (1985). An opened bottle of vodka, let alone an unopened bottle, is clearly not,
21 by itself, sufficient to establish DUI. It is, however, potential corroborative
22 evidence of DUI. It potentially corroborates that an individual was operating a
23 motor vehicle in an intoxicated physical condition. An opened bottle, in
24 particular, is arguably evidence of recent alcohol consumption. An unopened
25 bottle can also serve as such evidence, particularly where as here, there is evidence
26 the Defendant attempted to conceal the bottle by moving it to the back cab area of
27 the vehicle following his initial contact with the officers. Furthermore, discovery
28 of an unopened bottle in a vehicle would lead an officer to reasonably believe an

1 opened container of alcohol might be found in the vehicle, thereby justifying a
2 further search of the vehicle for evidence of the same.

3 Probable cause is an objective standard ("reasonable belief") and the
4 subjective motivations of the law enforcement officer are irrelevant. *Whren v.*
5 *United States*, 517 U.S. 806, 813, 116 S.Ct. 1769 (1996). Under the totality of the
6 circumstances in this case (Defendant's physical condition and there appearing to
7 be a bottle of alcohol inside a brown paper bag located next to Defendant in
8 vehicle), it would have been reasonable for an officer to believe that evidence of
9 DUI "might" be found in the vehicle. Accordingly, even under *Gant*, this court
10 concludes the August 14, 2008 search of the vehicle was a valid warrantless
11 search incident to a lawful arrest.⁷

12 13 **B. Good Faith Exception To Exclusionary Rule**

14 Officer Moses testified he did not seize the unopened bottle of vodka and
15 enter it into evidence. There is no indication whether the bottle was used as
16 evidence against the Defendant regarding the DUI charge. Officer Moses did not
17 testify he was searching for evidence of DUI in particular. He acknowledged he
18 did not first inspect the bag which he thought contained a bottle of alcohol.
19 Instead, the first place he searched was under the driver's seat of the vehicle.

20 At the time Officer Moses conducted his search, it was well accepted in the
21 Ninth Circuit and elsewhere that law enforcement officers could search a motor
22 vehicle, and its compartments and containers therein, as a contemporaneous search
23 incident to a lawful arrest, without regard to whether an arrestee was secured or
24 unsecured, and without regard to whether evidence particular to the crime of arrest
25 might be found in the vehicle. *United States v. McLaughlin*, 170 F.3d 889, 891

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27 ⁷ As such, it is unnecessary to consider whether another warrantless search
28 exception, such as the inventory search exception, would apply.

1 (9th Cir. 1999), citing *New York v. Belton*, 453 U.S. 454, 460 (1981). It was
2 understood at that time that “the applicability of the *Belton* rule [did] not
3 depend upon a defendant’s ability to grab items in a car but rather upon
4 whether the search [was] roughly contemporaneous with the arrest.”
5 *McLaughlin*, 170 F.3d at 891-92. (Emphasis added). In other words, it was
6 understood that all that was necessary was a lawful arrest and a search occurring
7 roughly contemporaneous with that arrest. See dissenting opinion of Justice Alito
8 in *Gant*, 129 S.Ct. at 1726-32. When this court was considering Defendant’s
9 motion to suppress prior to the *Gant* decision, Defendant conceded that under the
10 state of the law existing at that time, the warrantless search of the vehicle was a
11 valid search incident to arrest.

12 Even if it was not reasonable for an officer to believe evidence of DUI
13 might be found in the vehicle, and therefore that the search of the vehicle was not
14 a valid warrantless search incident to arrest, the evidence obtained in the search
15 should not be excluded because Officer Moses acted in good faith in conducting
16 the search. Based on the state of the law existing at the time he conducted the
17 search, prior to *Gant*, Officer Moses acted in an objectively reasonable manner in
18 searching the vehicle incident to the Defendant’s lawful arrest. He acted in an
19 objectively reasonable belief that his conduct did not violate the Fourth
20 Amendment.

21 Although the good faith exception to the exclusionary rule originated from a
22 case involving a search conducted pursuant to an invalid warrant, *United States v.*
23 *Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984), this court agrees with other courts
24 which have found the rationale for the exception applies with equal force to
25 invalid warrantless searches. *United States v. Ortiz*, 714 F.Supp. 1569, 1577-80
26 (C.D. Cal. 1989), *affirmed without opinion sub nom.* in *United States v.*
27 *Valenzuela*, 899 F.2d 19 (9th Cir. 1990); *United States v. Planells-Guerra*, 509
28 F.Supp.2d 1000, 1010-16 (D. Utah 2007) (citing cases from the Fifth Circuit Court

1 of Appeals, including *United States v. Ramirez-Lujan*, 976 F.2d 930 (5th Cir.
2 1992); *United States v. De Leon-Reyna*, 930 F.2d 396 (5th Cir. 1991); and *United*
3 *States v. Williams*, 622 F.2d 830 (5th Cir. 1980)). The exclusionary rule is “a
4 judicially created remedy designed to safeguard Fourth Amendment rights
5 generally through its deterrent effects.” *Leon*, 468 U.S. at 906. It is intended to
6 deter future police misconduct, not to cure past violations of a defendant’s rights.
7 *Id.* The exclusionary rule should apply only where its deterrent effect outweighs
8 its “substantial social costs.” *Id.* at 907; *Hudson v. Michigan*, 547 U.S. 586, 591,
9 126 S.Ct. 2159 (2006).

10 Application of the exclusionary rule here clearly will not deter future police
11 misconduct. The simple reason is that the police conduct in question- warrantless
12 searches incident to lawful arrest- will now be evaluated by the new legal standard
13 articulated in *Gant*, not by the legal standard that existed when Officer Moses
14 conducted his search. As there is no deterrent effect to be gained, application of
15 the exclusionary rule cannot be justified considering the substantial social costs
16 imposed by the rule. It is important to point out that Officer Moses made no
17 mistake of law or fact. Instead, he acted reasonably pursuant to the law as it
18 existed at the time he conducted the search of the vehicle. Application of the good
19 faith exception here is not intended to excuse a mistake on the part of Officer
20 Moses, but to recognize that *Gant* represents a change in well-established law on
21 which law enforcement officers once reasonably relied.⁸

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26 ⁸ Whether *Gant* constitutes an overruling of *Belton* and *Thornton*, as
27 asserted by Justice Alito in his dissenting opinion, or whether it does not, as
28 asserted by the majority opinion, there is no question that at a minimum, *Gant*
constitutes a change in how *Belton* and *Thornton* had been interpreted.

1 **III. CONCLUSION**

2 The August 14, 2008 search of the vehicle was a valid search incident to
3 arrest even under *Gant*. Even if it was not a valid search incident to arrest under
4 *Gant*, the good faith exception to the exclusionary rule applies and the evidence
5 obtained during the search should not be excluded. For these reasons, the court
6 reaffirms its March 26, 2009 "Order Denying Motion To Suppress."

7 **IT IS SO ORDERED.** The District Court Executive is directed to enter
8 this order and to provide copies to counsel.

9 **DATED** this 16th day of June, 2009.

10
11 *s/Lonny R. Suko*

12 _____
13 **LONNY R. SUKO**
14 **United States District Judge**

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APPENDIX “A”

U.S. v. Buford



1 of 1 DOCUMENT

UNITED STATES OF AMERICA, v. JERRY T. BUFORD,

Case No. 3:09-00021

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2009 U.S. Dist. LEXIS 48886

June 11, 2009, Decided

June 11, 2009, Filed

COUNSEL: [*1] For Jerry Thomas Buford, Jr., Defendant (1): Hugh Michael Mundy, LEAD ATTORNEY, Federal Public Defender's Office, Nashville, TN.

For USA, Plaintiff: Addison B. Thompson, Jr., LEAD ATTORNEY, Office of the United States Attorney (MDTN), Nashville, TN.

JUDGES: ALETA A. TRAUGER, United States District Judge.

OPINION BY: ALETA A. TRAUGER

OPINION

MEMORANDUM AND ORDER

Pending before the court is defendant Jerry T. Buford's Motion to Suppress Evidence and Statements Obtained in Violation of the *Fourth Amendment*. (Docket No. 33.) For the reasons discussed herein, the defendant's motion will be granted.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are not in dispute and are stated in the defendant's motion and in the Government's response. (Docket Nos. 33 and 36.) Shortly after midnight on May 18, 2008, the defendant was driving a 2000 Chevrolet Blazer in downtown Nashville, Tennessee. Metropolitan Nashville police officer Paul Smith, on patrol in the area, saw the Blazer in traffic, and, despite the fact that no traffic violation had occurred, "ran the tag" on the Blazer. Smith's computer search revealed that there was an outstanding arrest warrant for the owner of the vehicle (the defendant) based on a probation violation. [*2] Seeing this, Smith pulled the Blazer over and,

after a brief, unremarkable conversation with the defendant, Smith took the defendant into custody on the probation violation warrant, handcuffed him, and placed him in the back of his locked patrol car. A passenger in the Blazer was also removed from the car.

After both individuals were secured and were well away from the Blazer¹, additional officers (now on the scene) conducted a search of the Blazer, locating a .45 caliber pistol under a front seat of the vehicle. The passenger denied any knowledge of the gun, was released, and drove the Blazer away from the scene. The defendant, on the other hand, was advised of his *Miranda* rights, and, after those rights were read, stated that he "didn't think [he] should say anything." The defendant was transported to the Davidson County Criminal Justice Center (DCCJC), where he was to be booked on the probation violation. As the defendant and the officers were approaching the DCCJC, the defendant, in conjunction with a conversation about contraband, apparently volunteered that the gun "was in the car [be]cause people try to rob me for the truck." The defendant was charged in this case with unlawful [*3] possession of the gun.

1 Although the Government conceded in its briefing that "the facts underpinning the search ... cannot be supported by '*Gant*' ..." (Docket No. 36 at 1), one of the arresting officers was called to testify at the suppression hearing "to make a record in case of an appeal." The officers' testimony varied slightly from the facts already conceded by the Government, but the Government reaffirmed in open court that the search in this case was impermissible under *Gant*.

On May 6, 2009, the defendant moved to suppress the gun (and his statement about it) in light of the Su-

preme Court's decision in *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (April 21, 2009). In that case, the Court concluded that "police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Id.* at 1723-24. Arguing that the defendant, locked [*4] in the police car, was not within "reaching distance" of the passenger compartment of the Blazer and that it would be unreasonable for the officers to believe that the Blazer contained evidence of a probation violation the basis for which the officers admittedly did not know, the defendant claimed that the officers' search of the Blazer was unreasonable in light of *Gant* and that the gun (and the defendant's subsequent statement about the gun) should be suppressed. (Docket No. 33 at 4.)

In response, the Government concedes that *Gant* is essentially "on all fours" with this case and that, "for purposes of the facts of this specific case, the search incident to the arrest did not fall within the parameters elaborated in *Gant*." (Docket No. 36 at 4.) Further, the Government concedes that *Gant* "applies to all cases that are not yet final, and thus must be considered by this Court in determining whether the search at issue was lawful." (*Id.* citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). That said, the Government argues that "the question whether a search was unlawful, however, is distinct from the question whether the exclusionary rule requires suppression of evidence obtained during [*5] the search." (*Id.*) Indeed, the Government argues that the "good faith" exception, as stated in, among others, *Herring v. United States*, 129 S.Ct. 695, 172 L. Ed. 2d 496 (2009) and *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), dictates that, even though the search was a violation of the defendant's constitutional rights, the gun (and subsequent statement about it) should not be suppressed under the exclusionary rule.

ANALYSIS

As indicated above, the Government concedes that, under *Gant*, the search here was unreasonable, and that *Gant* applies in this case, even though *Gant* was decided after the search. (Docket No. 45 at 4.) The Government argues, however, that the "good faith" exception, as described in *Herring* and *Leon*, operates to permit admission of the gun and the statement, in spite of the constitutional violation.

Earlier this year, the Supreme Court clarified the relationship between a *Fourth Amendment* violation and the exclusionary rule, stating that "[t]he fact that a *Fourth Amendment* violation occurred -- i.e., that a search or arrest was unreasonable -- does not necessarily mean that the exclusionary rule applies. Indeed, exclusion has always been our last resort." *Herring*, 129 S.Ct. at 700 (internal [*6] quotation omitted). The Court went on to state that, before exclusion is warranted, the court should be satisfied that the officers at issue "had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the *Fourth Amendment*." *Id.* at 701. Therefore, where, in conjunction with justifying their search, the officers, at the time of the search, in good faith, relied on a later invalidated proposition or document (*e.g.*, a warrant improperly held open due to a record-keeping error, a subsequently invalidated state statute, or a warrant that subsequently turns out not to be supported by probable cause), the Court has determined that suppression may not be appropriate, largely because the aims of deterring officer misconduct, embodied in the exclusionary rule, are not served by excluding evidence that was obtained by officers acting in good faith. *See Id.*; *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *Illinois v. Krull*, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987)

Here, the Government asks the court to extend the "good faith" exception into less well-charted territory, that is, apply the "good faith" exception where the officers were allegedly relying on a body of case law [*7] generated by the U.S. Supreme Court. By way of a brief review, as the Court stated in *Gant*, at the time of the search in this case, the Supreme Court's decision in *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) was "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Gant*, 129 S. Ct. at 1718. Indeed, just three months before the arrest in this case, the Sixth Circuit, in a case involving an automobile search that occurred while the arrestee was in custody in a police car, relying on the *Belton* line of cases, concluded that "this court has made clear that, under prevailing Supreme Court precedent, the search incident to arrest authority applies even where an item is no longer accessible to the defendant at the time of the search, so long as the defendant had the item within his immediate control near the time of his arrest." *United States v. Nichols*, 512 F.3d 789, 797 (6th Cir. 2008) (internal quotation and citation omitted). That is, the Sixth Circuit concluded that the search of an automobile, incident to the arrest of a recent occupant, was permissible, [*8] even if the recent occupant was nowhere near the car. *Id.* Therefore, at the time of the arrest in this case, a reason-

able officer would have concluded that the search of the automobile in this case was permissible, even though the defendant was already in custody at the time of the search.

This, however, is not the end of the inquiry. As the Government recognizes, there is considerable "tension between the good faith exception and retroactivity doctrine." (Docket No. 45 at 5.) It is well settled that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Therefore, as the Government recognizes, even to the extent that the *Gant* decision is a "clear break" from the *Belton* past, the rule in *Gant* applies with the same force as if *Gant* were on the books at the time of the defendant's arrest. (Docket No. 45 at 4.) This retroactivity rule is consistent with "basic norms of constitutional adjudication" and the "integrity of judicial review," which requires [*9] that courts treat similarly situated defendants the same. *Griffith*, 479 U.S. at 323.

The Government contends that the "retroactivity doctrine" co-exists with the "good faith" exception, because "it appears that the law applies retroactively but the remedy applies prospectively, so long as the officer reasonably relied on the law at the time." (Docket No. 45 at 5.) The Government provides no case support for this proposition, presumably because the proposition is unsupported.² Indeed, the basic problem with the Government's argument is that it takes the broad language of *Herring*, which arose in a completely different context, and attempts to apply it here. In so doing, the Government's argument fails to recognize that, despite the broad language in *Herring*, the Supreme Court has not indicated that the good faith exception should be extended into the realm of Supreme Court jurisprudence and the general area protected by the "retroactivity doctrine."

2 The Government cites two cases for the proposition that "the good faith exception applies" in the context of "good faith reliance on court decisions." (Docket No. 45 at 5 citing *U.S. v. Butz*, 982 F.2d 1378 (9th Cir. 1993) and *U.S. v. Richardson*, 848 F.2d 509 (5th Cir. 1988)). [*10] Neither of these cases supports the general proposition posed by the Government. The *Butz* case involved an intervening change in state law, and the *Richardson* case involved an intervening change in Fifth Circuit law, on a technical issue as to where the Fifth Circuit concluded the "functional equivalent" of the border to be. *Richardson*, 848 F.2d at 511. Neither case considers the

interplay between the retroactivity doctrine as applied to Supreme Court jurisprudence and the good faith exception, which is the core issue here.

Indeed, such an extension of the "good faith" exception would lead to perverse results. For instance, under the Government's argument, there is no basis for distinguishing the petitioner in the "new rule" case from similarly situated defendants whose cases were proceeding when the new rule was announced. That is, from the Government's view of the "good faith" exception, there is no distinction between *Gant* and the defendant here, because both arresting officers were operating in a *Belton* world. Under the Government's argument, then, *Gant* himself would only be entitled to the rather hollow relief of knowing that the search he was subjected to was a violation of his [*11] constitutional rights; that is, he would not be entitled to suppression of the evidence because the evidence was obtained in a good faith reliance on *Belton*. Anyone similarly situated to *Gant* (such as the defendant) who was unfortunate enough to be arrested *pre-Gant* would likewise receive the same hollow relief. Anyone similarly situated to *Gant*, however, who was arrested subsequent to the *Gant* decision would be entitled to suppression of the evidence because the *Gant* decision would eliminate the good faith argument. Therefore, the individual (*Gant*) who successfully convinced the Court that his *Fourth Amendment* rights had been violated would run the risk of criminal penalty, while subsequent defendants might go free, despite being subject to identical intrusions on privacy. Indeed, discussing a defendant similarly situated to the one in this case, one court noted, "[t]o say that an exception exists under the *Leon* rule to the application of [a] United States Supreme Court[] holding ... which would permit the principle of the [] holding to be ignored [in a case subsequent to the holding] ... to Defendant's prejudice, creates logical and rational anomalies in implementation of *Fourth Amendment* [*12] doctrine of a decidedly perverse effect." *U.S. v. Holmes*, 175 F. Supp. 2d 62 n. 6 (D. Me. 2001) (noting the conundrum but not resolving the issue).

Therefore, whatever the broad language of *Herring* may be, the result proffered by the Government cannot be the result intended by that case, as it is inconsistent with the "basic norms of constitutional adjudication" discussed above. *Griffith*, 479 U.S. at 323. The fact that the "good faith" exception was not discussed in *Gant* or in the few cases (involving *pre-Gant* searches) that have applied *Gant* further indicates that there is no judicial momentum to extend the "good faith" exception to this problematic point. See *U.S. v. Mullaney*, 2009 U.S. Dist. LEXIS 44576, 2009 WL 1474305, *3 (D. Idaho May 27, 2009); *Guzman v. City of Chicago*, 565 F.3d 393, 399 (7th Cir. 2009) (noting that, despite cases like *Herring*,

the exclusionary rule is not on "life support" in light of *Gant*).

Finally, the court obviously disagrees with the Government's argument that this "reading of the law would, in effect, eliminate the good faith doctrine." (Docket No. 45 at 5.) The good faith doctrine, as expressed in *Leon*, *Krull*, and *Herring* counsels against suppression where an officer, in good faith, [*13] has conducted an unconstitutional search relying on an invalid document (such as a warrant) or a subsequently overturned state statute. These cases have not gone so far as to extend the doctrine to reliance on decisions of the United States Supreme Court that were reversed or overturned while the defendant's case was on review. Such an extension is without logical support and would create, as discussed above, a series of perverse and unwelcome problems. Therefore, as the "good faith" exception cannot apply in this circumstance, the court will grant the defendant's motion and order the gun suppressed. In light of this

conclusion, the defendant's statement about the gun, which would not have been made unless the defendant was subject to an unconstitutional search, is a "fruit of the poisonous tree" and will also be suppressed. See *Hudson v. Michigan*, 547 U.S. 586, 592, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)).

For the reasons discussed above, the defendant's Motion to Suppress Evidence and Statements (Docket No. 33) is **GRANTED**.

It is so **ORDERED**.

Enter this 11th day of June 2009.

/s/ Aleta A. Trauger

ALETA A. TRAUGER

United States District Judge