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

1. Whether the defendant waived any suppression issue where it was not raised below?
2. Whether, even assuming the evidence was obtained illegally, suppression is not warranted as a remedy where the officer acted in good faith based on existing case law?

B. STATEMENT OF THE CASE.

1. Procedure

On April 24, 2008 the defendant Kevin Cross was charged with two counts of unlawful possession of a firearm in the first degree, and one count of resisting arrest based on an incident that occurred on the 23rd day of April, 2008. CP 1-2. An Amended Information filed June 19, 2008 added a misdemeanor count of harassment and a misdemeanor count of obstructing a law enforcement officer. CP 22-24.

The defense did not file any motion to suppress evidence under CrR 3.6.

The case proceeded to trial and the defendant was convicted of all counts. CP 174-177.

2. Facts

On April 23, 2008 Tacoma Police Officer Lopez-Sanchez pulled a vehicle over for reckless driving. RP 09/29/08, p. 226-232. He arrested the driver for reckless driving and driving with a suspended license. RP 232, ln. 4-6. The driver began resisting the officer and reached into the vehicle toward the center console. RP 09/29/08, p. 233, ln. 18 to p. 234, ln. 18. Officer Lopez-Sanchez forcibly removed the driver from the vehicle. RP 09/29/08, p. 234, ln. 19 to p. 235, ln. 19.

The passenger in the vehicle, Kevin Cross, was moving around in his seat, extremely nervous, hands physically shaking, sweating profusely from his forehead, cheeks, mouth, and nose, with his face flushed. RP 09/29/08, p. 236, ln. 10-21. The defendant, Cross, was initially fidgeting around with both of his hands, which then went directly to his waistband. RP 09/29/08, p. 237, ln. 3. Officer Lopez-Sanchez could not see whether or not there was anything in the waistband or how far Cross was reaching. RP 09/29/08, p. 237, ln. 4-9.

Officer Lopez-Sanchez was still struggling with the driver and feared that Cross was reaching for a weapon. RP 09/29/08, p. 237, ln. 11 to p. 238, ln. 3. Officer Lopez-Sanchez told the defendant to put his hands where the officer could see them and the defendant did not comply. RP 09/29/08, p. 238, ln. 4-8. For safety reasons Officer Lopez-Sanchez made

a decision to get away from the vehicle as fast as he could to get as far away from Cross as possible and pulled the driver away with him, but with the driver still struggling. RP 09/29/08, p. 239, ln. 1-18. As he did so, he lost sight of the defendant and also heard a slapping sound come from the car like an object striking another object. RP 09/29/08, p. 239, ln. 1-24.

Officer Lopez-Sanchez was ultimately able to handcuff the driver during this process. RP 09/29/08, p. 242, ln. 13-25. At that point, the defendant stepped out of the vehicle and turned and ran even though Officer Lopez-Sanchez told him to stop. RP 09/29/08, p.243, ln. 20-23. Officer Lopez-Sanchez gave chase. RP 09/29/08, p.243, ln. 23-25.

Officer Lopez-Sanchez repeatedly ordered the defendant to stop, but he did not. RP 09/29/08, p. 246,ln. 21-25. The defendant cut through several yards and an alley. RP 09/29/08, p. 247, ln. 5-10. The defendant continued running and jumped over a six to eight foot wooden fence and ended up in the backyard of a house, reached another fence, couldn't get over it and stopped and turned to face the officer. RP 09/29/08, p. 249, ln. 8-19. Then the defendant put his fists up in an offensive stance like he was ready to fight. RP 09/29/08, p. 249, ln. 19 to p. 250, ln. 22.

Officer Lopez-Sanchez fired his electronic control tool (taser) at the defendant, but missed as the defendant moved slightly to the left. RP 09/29/08, p. 251, ln. 3 to p. 252, ln. 23. Officer Lopez-Sanchez then used

a leg sweep maneuver to take the defendant to the ground, where the defendant continued to struggle with him. RP 09/29/08, p. 253, ln. 7 to p. 255, ln. 9. Officer Lopez-Sanchez then applied his taser directly to the defendant, after which the defendant gave up and stopped fighting. RP 09/29/08, p. 255, ln. 9-17.

Officer Lopez-Sanchez was able to handcuff the defendant and walk him to the patrol car of Officer Williams who was now in the area looking for them. RP 09/29/08, p. 256, ln. 7-24. During this the defendant was calm, but continued to insult Officer Lopez-Sanchez every way he could. RP 09/29/08, p. 256, ln. 12-16.

While in the back of Officer Williams's patrol car the defendant said if he wasn't in handcuffs that he would kick Officer Williams's ass. RP 09/29/08, p. 331, ln. 2-4. Officer Williams testified that he took the threat seriously even though the defendant was handcuffed and in the back of his car because he has been assaulted by subjects in handcuffs in the past and was concerned the defendant would make an attempt to assault the officers when he was removed from the vehicle at the jail for booking. RP 09/29/08, p. 332, ln. 13 to 333, ln. 24.

Officer Williams found a loaded .357 Magnum revolver in the glove box of the vehicle the defendant had been in. RP 09/29/08, p. 334,

ln. 12-24. In the center console, Officer Lopez-Sanchez found a loaded semi-automatic firearm in a holster. RP 09/29/08, p. 262, ln. 5-22.

C. ARGUMENT.

1. THE SUPPRESSION MOTION WAS WAVIED WHERE IT WAS NOT RAISED BELOW AND *STATE V. MILLAN* IS CONTROLLING.

Before the trial court the defendant brought no motion to suppress evidence pursuant to CrR 3.6. More specifically, the defendant brought no motion to suppress evidence claiming that the officers had no basis to search the vehicle where the defendants were secured in the back of patrol cars at the time the search took place.¹ Now for the first time on appeal, the defendant challenges the evidence admitted at trial claiming it was unlawfully obtained in light of the United States Supreme Court's ruling in *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

The Court of Appeals recently issued an opinion in which it held that suppression issues not raised at the trial court level are waived. *State v. Millan*, Slip. Op. 37172-3-II, ___ Wn. App. ___, 212 P.3d 603 (2009). *Millan* is controlling authority. Where the defendant brought no

¹ The defendant did bring a *Knapstad* challenge to the harassment count, claiming that the evidence in the case did not establish a prima facie case of harassment. The motion was apparently denied as the charge was included in the trial.

suppression motion below, the issue was waived and may not be raised for the first time on appeal. *Millan*, 212 P.3d at 608-09.

2. 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.

- a. The Fourth Amendment Exclusionary Rule is Controlling.

In his supplemental brief, the defendant relies exclusively on *Gant* to support his assertion that the warrantless search of his car was invalid. *See* Supplemental Brief, p. 3-5. *Gant*, was decided purely on Fourth Amendment grounds. *Gant*, 129 S. Ct. at 1716. The defendant makes no argument that the outcome of this case is controlled by article 1, § 7 of the Washington constitution. Nor has the Washington Supreme Court reversed its longstanding position that vehicle searches incident to a lawful arrest are valid under Article 1, § 7. Absent any basis to address state

constitutional issues, the defendant's motion for reconsideration should be reviewed solely under federal Fourth Amendment analysis.

b. The Fourth Amendment Good Faith Exception To The Exclusionary Rule Applies.

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). This 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., *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 searched

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 *DeFillipo*, while the analysis in *Grote* is more rigorous.

However, recently the Ninth Circuit Court of Appeals rejected a good faith argument in the context of a *Gant* issue. In *United States v. Gonzalez* the court held that *Gant* applied to cases retroactively and that application of the good faith doctrine was inconsistent with principles of retroactivity. *United States v. Gonzalez*, Slip. Op., p. 2, ___ F.3d ___, WL 2581738 (9th Cir. 2009). While noting that the court's ruling in *Gonzalez* is not controlling precedent in Washington, the court's reasoning in *Gonzalez* is in any case deeply flawed. The retroactivity and good faith doctrines operate to different purpose. Retroactivity relates to what legal effect precedential opinions have on cases currently pending on appeal. Here the State does not dispute the retroactive application of the rule established in *Gant*. But the fact that the rule of *Gant* applies retroactively does not reach the issue of what remedy is available. Similarly, retroactivity does not change the requirement that the suppression issue must have been preserved below or it was waived.

Retroactivity does not affect the remedy that is available to the defendant. Here the remedy is determined by the good faith doctrine. The point of the good faith doctrine is that the purpose of the suppression of

evidence under the exclusionary rule is not served where officers are acting in good faith reliance on legal authority. Application of the good faith exception to the exclusionary rule in no way undermines the retroactive applicability of precedential authority. On the contrary, it is the Ninth Circuit approach to retroactivity that abrogates the good faith exception to the extent that law enforcement relies on established precedent.²

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.

c. 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.

As discussed above, it is not appropriate to review this case under an article 1, § 7 analysis because the defendant has only sought relief

² The court’s ruling in *Gonzalez* would not affect those good faith cases where law enforcement relied on apparent legal authority, e.g. where they act on a warrant that was signed by a magistrate, but which warrant was legally defective for some other reason.

based on *Gant*, a Fourth Amendment case. However, even if the court were to address whether the evidence should be suppressed under an article 1, § 7 exclusionary rule analysis, there is nevertheless 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, section 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.

D. CONCLUSION

The defendant waived the suppression challenge where it was not raised below and cannot be raised for the first time on appeal. Even if the court were to consider the issue on the merits and were to hold that the evidence was obtained unlawfully, suppression of the evidence is unwarranted as a remedy where the officer acted in good faith based on established precedent. For these reasons, the defendant's challenge to the evidence obtained in the search of the vehicle incident to the defendants' arrest should be denied.

DATED: SEPTEMBER 9, 2009

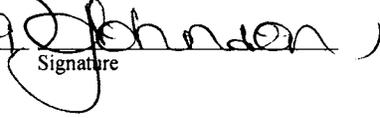
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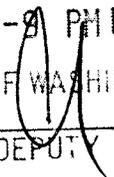
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under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

9/9/09 
Date Signature

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