

No. 38971-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ERICA N. GOOKIN

Appellant.

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STATE OF WASHINGTON  
BY *MS*  
DUPLICATE  
COURT OF APPEALS  
DIVISION II

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge  
Cause No. 08-1-01796-0

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 1

I. Gookin has no standing to challenge the constitutional validity of a vehicle search incident to the arrest of the driver because Gookin was not the subject of that search and Gookin cannot vicariously assert another person’s Fourth Amendment rights..... 1

II. Gookin’s Fourth Amendment rights were not implicated because no seizure occurred ..... 8

III. Even if a seizure occurred, the seizure was lawful because Officer Simper had a reasonable suspicion Gookin was armed and dangerous..... 12

IV. The scope of the pat down was lawful under *Terry v. Ohio* ..... 14

V. Regardless of the *Terry* standard, the pat down was lawful because Gookin consented to the search..... 17

VI. Defense counsel was not ineffective for failing to properly move to suppress evidence..... 20

D. CONCLUSION..... 22

## TABLE OF AUTHORITIES

### U.S. Supreme Court Decisions

<u>Alderman v. United States</u> , 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969).....	2
<u>Arizona v. Gant</u> 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).....	3, 4, 21-23
<u>Berkemer v. McCarty</u> , 468 U.S. 420, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984).....	4
<u>Brendlin v. California</u> , 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).....	8
<u>Brown v. United States</u> , 411 U.S. 223, 230 (1973); 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) .....	2
<u>Jones v. United States</u> , 362, U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960).....	3
<u>Rakas v. Illinois</u> , 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).....	3-5
<u>Simmons v. United States</u> , 390 U.S. 377, 389 (1968), 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) .....	2
<u>State v. Dickerson</u> , 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).....	16
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) .....	7-9, 11-12, 14-15, 17-18, 20, 23
<u>United States v. Calandra</u> , 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).....	2

<u>United States v. Salvucci</u> , 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980).....	3
--	---

**U.S. Court of Appeals Decisions**

<u>United States v. Erwin</u> , 875 F.2d 268, 269 (10th Cir. 1989) .....	4-5
---	-----

<u>United States v. Skowronski</u> , 827 F.2d 1414, 1418 (10 <sup>th</sup> Cir. 1987) .....	5
--	---

**Washington Supreme Court Decisions**

<u>State v. Belieu</u> , 112 Wn.2d 587, 773 P.3d 46 (1989) .....	13
---	----

<u>State v. Collins</u> , 121 Wn.2d 168, 847 P.2d 919 (1993) .....	13, 15
---	--------

<u>State v. Daugherty</u> , 94 Wn.2d 263, 616 P.2d 649 (1980), <u>cert. denied</u> , 450 U.S. 958 (1981).....	14
---	----

<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996) .....	17
--	----

<u>State v. Horrace</u> , 144 Wn.2d 386, 28 P.3d 753 (2001) .....	12
--	----

<u>State v. Hudson</u> , 124 Wn.2d 107, 874 P.2d 160 (1994) .....	15-16
--	-------

<u>State v. Loewen</u> , 79 Wn.2d 562, 647 P.2d 489 (1982) .....	15
---	----

<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	20
--	----

<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999) <u>overruled on other grounds</u> .....	8, 9, 20
<u>State v. Parker</u> , 139 Wn.2d 486, 987 P.2d 73 (1999) .....	9
<u>State v. Reynolds</u> , 144 Wn.2d 282, 27 P.3d 200 (2001) .....	8
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984) .....	12
<u>State v. Williams</u> , 142 Wn.2d 17, 11 P.3d 714 (2000) .....	4, 6, 7
<u>State v. Zake</u> , 119 Wn.2d 563, 834 P.2d 1046 (1992) .....	6

### **Decisions of the Court of Appeals**

<u>State v. Flowers</u> , 57 Wn. App. 636, 789 P.2d 333 (1990) .....	17
<u>State v. Fowler</u> , 76 Wn. App. 168, 883 P.2d 338, 340 (1994) .....	15
<u>State v. Harrington</u> , 144 Wn. App. 558, 562 n.1, 183 P.3d 352 (2008) .....	10, 11, 19
<u>State v. Henry</u> , 80 Wn. App. 910 P.2d 1290 (1995) .....	18-19
<u>State v. Kypreos</u> , 110 Wn. App. 612, 39 P. 3d 371 (2002) .....	6
<u>State v. Lottie</u> , 31 Wn. App. 651, 644 P.2d 707, 710 (1982) .....	21

<u>State v. McCormick,</u> _____ Wn. App. _____, 216 P.3d 475 (2009).....	21
<u>State v. Millan,</u> 151 Wn. App. 492, 212 P.3d 603 (2009), <u>overruled on other grounds,</u> .....	21-22
<u>State v. Nettles,</u> 70 Wn. App. 706, 855 P.2d 699 (1993), <u>review denied</u> 123 Wn.2d 1010 (1994) .....	10
<u>State v. Serran,</u> 14 Wn. App. 462, 544 P.2d 101 (1975).....	13
<u>State v. Soto-Garcia,</u> 68 Wn. App. 20, 841 P.2d 1271 (1992).....	10
<u>State v. Takesgun,</u> 89 Wn. App. 608, 949 P.2d 845 (1998).....	4
<u>State v. Tarica,</u> 59 Wn. App. 368, 798 P.2d 296, 299 (1990), <u>overruled on other grounds,</u> .....	20

**Other Authorities**

Fourth Amendment .....	2, 4-5,7-8, 11-12, 20, 22
Article 1, Section 7, Washington Constitution.....	12

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Gookin has standing to challenge the constitutionality of a vehicle search incident to the arrest of the driver, when the doctrine of automatic standing does not apply and Gookin has no possessory interest in the vehicle searched.
2. Whether Gookin was “seized” for purposes of the Fourth Amendment, when Officer Simper removed Gookin from the vehicle to “control the scene” of the traffic stop.
3. If Gookin was “seized,” whether Officer Simper had a reasonable and articulable suspicion that Gookin was armed and dangerous sufficient to warrant a Terry pat down.
4. If the Terry standard applies, whether Officer Simper exceeded the permissible scope of a Terry pat down, when he removed hypodermic needles from Gookin’s pocket.
5. Whether Gookin’s voluntary consent to the pat down provides an independent legal basis for the frisk.
6. Whether defense counsel was ineffective by failing to properly move to suppress evidence.

B. STATEMENT OF THE CASE.

The State accepts Gookin’s statement of the procedural and substantive facts.

C. ARGUMENT.

- I. Gookin has no standing to challenge the constitutional validity of a vehicle search incident to the arrest of the driver because Gookin was not the subject of that search and Gookin cannot vicariously assert another person’s Fourth Amendment rights.

The exclusionary rule excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Alderman v. United States, 394 U.S. 165, 171, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969). Fruits of illegally obtained evidence are excluded as well. Id. Since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. Id. at 171-72. Thus, "[F]ourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Id. at 174; see Brown v. United States, 411 U.S. 223, 230 (1973); Simmons v. United States, 390 U.S. 377, 389 (1968).

The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Alderman, 394 U.S. at 171-72. "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was

directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Id. at 173 (citing Jones v. United States, 362, U.S. 257, 261, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960) overruled on other grounds, United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980)).

Here, Gookin argues that the vehicle search incident to the arrest of the driver was unconstitutional under Arizona v. Gant; therefore, the evidence seized from the subsequent pat down of her person should be suppressed. (Appellant's Brief 7-13) In this case, Officer Simper conducted a routine traffic stop that resulted in the arrest of the driver for driving with a suspended license. (RP 02/23/09 8-9) The officer instructed Gookin to exit the vehicle so he could conduct a search of the vehicle, incident to the driver's arrest. (RP 02/23/09 11) Officer Simper then patted Gookin down after obtaining her consent. (RP 02/23/09 11) The pat down resulted in the seizure of a plastic bag containing hypodermic needles and heroin. (RP 02/23/09 12-13)

Here, Gookin does not have standing to challenge the legality of the vehicle search incident to the arrest of the driver under federal or Washington law. See Rakas v. Illinois, 439 U.S.

128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000). Thus, Gookin cannot use Arizona v. Gant to vicariously assert an alleged violation of the driver's Fourth Amendment rights. 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

- 1) Under federal law, Gookin has no standing to allege a Gant violation because she has no possessory interest in the vehicle searched.

Under federal law, a vehicle passenger only has standing to challenge the initial stop of the vehicle, but not the search of the vehicle, unless the passenger has a possessory interest in the vehicle. State v. Takesgun, 89 Wn. App. 608, 610-11, 949 P.2d 845 (1998) (citing Rakas v. Illinois, supra, (emphasis added)). This is because "standing to challenge a stop presents issues separate and distinct from standing to challenge a search." Takesgun, 89 Wn. App. at 611 (quoting United States v. Erwin, 875 F.2d 268, 269 (10th Cir. 1989)).

Courts permit passengers to challenge the legality of the driver's traffic stop because the stop constitutes a seizure of both the driver and passenger. Id. at 611 (emphasis added); Berkemer v. McCarty, 468 U.S. 420, 436, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) ("It must be acknowledged at the outset that a traffic stop

significantly curtails the 'freedom of action' of the driver and the passengers. . . .") (emphasis added) (citation and footnote omitted). However, a search of a vehicle does not automatically implicate the passenger's Fourth Amendment rights. Rakas, 439 U.S. 128. A defendant cannot claim a violation of his Fourth Amendment rights based only on the introduction of evidence procured through an illegal search and seizure of a third person's property or premises. Id. at 134; United States v. Skowronski, 827 F.2d 1414, 1418 (10<sup>th</sup> Cir. 1987). A search of another person's vehicle only implicates the passenger's Fourth Amendment rights if the passenger has some possessory interest in 1) the vehicle or 2) the items seized from the vehicle. Erwin, 875 F.2d at 270-71.

Here, Gookin did not own or possess the vehicle and no evidence obtained from the vehicle was used against Gookin in this case. (CP 9) The only evidence used against Gookin was the heroin obtained from a search of her person. Thus, Gookin has no possessory interest in the vehicle searched and she does not have standing to challenge the legality of the search incident to arrest.

- 2) Under Washington law, Gookin does not have "automatic standing" to allege a *Gant* violation because there is no direct relationship between the fruits of the pat down and the challenged vehicle search.

A defendant has "automatic standing" to challenge a search or seizure if: 1) the offense with which he is charged involves possession as an "essential" element of the offense; and 2) the defendant was in possession of the contraband at the time of the contested search or seizure. State v. Zakel, 119 Wn.2d 563, 568, 834 P.2d 1046 (1992). Further, there must be a direct relationship between the fruits of the search and the search the defendant sought to contest. State v. Kypreos, 110 Wn. App. 612, 620 (citing State v. Williams, 142 Wn.2d 17, 23 11 P.3d 714 (2000) ("Inherent in the conditions for automatic standing is the principle that the "fruits of the search" bear a direct relationship to the search the defendant seeks to contest.")).

In Williams, police obtained consent from a third party to enter the third party's home and serve the defendant with an outstanding arrest warrant. 142 Wn.2d at 20. After arrest, the defendant was frisked and police found heroin. Id. The defendant alleged he had automatic standing to challenge the legality of the police entry into the third party's home. Id. The court disagreed and said the defendant had standing to object to an illegal search of his person, but not the entry into the third person's home. Id. at 23. In doing so, the court noted that there must be a direct relationship

between the evidence seized and the search which the defendant seeks to contest. Id. In Williams, the evidence seized was the product of a pat down, not the alleged unlawful entry and search of the third party's home. Id.

As in Williams, Gookin does not have automatic standing to challenge the search of the vehicle, incident to the arrest of the driver, because no evidence seized from the vehicle was used against Gookin. The heroin was found on Gookin's person. Gookin has standing to object to the pat down of her person, but not the search of the vehicle. There is no direct relationship between the "fruits," i.e. the heroin; and the "search" Gookin wishes to contest, i.e. the vehicle. Thus, Gookin does not have "automatic standing" to challenge the vehicle search incident to the driver's arrest.

As such, this court must set aside the issue of the legality of the search incident to arrest and only evaluate whether the pat down of Gookin and the seizure of needles and heroin was lawful. Because the officer's encounter with Gookin was to "secure the scene" and did not amount to a seizure under Terry v. Ohio, the Fourth Amendment is not implicated. 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). However, even if this Court finds the

encounter amounted to a seizure, the pat down was lawful because Officer Simper had a reasonable and articulate suspicion that Gookin was armed and dangerous. See id. Conversely, if this Court finds that Officer Simper did not have a reasonable suspicion to justify a Terry frisk, the pat down was still lawful because Gookin voluntarily consented.

II. Gookin's Fourth Amendment rights were not implicated because no seizure occurred.

Upon stopping a vehicle for a traffic violation, a police officer may order passengers into or out of the vehicle only if the officer is "able to articulate an objective rationale predicated specifically on safety concerns." State v. Reynolds, 144 Wn.2d 282, 288, 27 P.3d 200 (2001) (citing State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722 (1999) overruled on other grounds, Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)) (emphasis added). The circumstances at the scene of the stop determine whether such an articulable, objective rationale exists. Mendez, 137 Wn.2d at 221. In weighing those circumstances, the officer may consider several nonexclusive factors, none of which, standing alone, would automatically meet the objective rationale standard: "the number of officers, the number of vehicle occupants, the

behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge of the occupants." Id. Additionally, in the lead opinion in State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999), the court recognized that the arrest of a vehicle occupant (a circumstance not present in Mendez) supplied an additional factor that an officer could consider when controlling the scene of a vehicle stop:

*A vehicle stop and arrest in and of itself provides officers an objective basis to ensure their safety by "controlling the scene," including ordering passengers in or out of the vehicle as necessary.*

Id. at 502 (emphasis added). If such an objective rationale exists, the intrusion on the passenger is de minimis in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens. Mendez, 137 Wn.2d at 220.

To satisfy this objective rationale, the officer does not need to meet the Terry standard of "reasonable suspicion of criminal activity." Id. Terry must be met only if there is a "seizure," where the purpose of the officer's interaction with the passenger is investigatory. Id. For purposes of controlling the scene of the

traffic stop and to preserve safety there, only the objective rationale standard is applied. Id.

Asking a person engaged in a voluntary encounter with an officer to keep her hands out of her pockets and in plain sight does not constitute a seizure. State v. Harrington, 144 Wn. App. 558, 562 n.1, 183 P.3d 352 (2008) (citing State v. Nettles, 70 Wn. App. 706, 712, 855 P.2d 699 (1993), review denied 123 Wn.2d 1010 (1994)). Further, asking for consent to search does not automatically turn a voluntary meeting into a seizure. Id. at 562. Whether a seizure has occurred depends on the totality of the circumstances. See id.

In Harrington, the court noted that a seizure occurs when the officer: 1) conducts a warrant check, 2) questions the defendant about illegal drug possession, and then 3) requests a search of the defendant. Id. at 562 (citing State v. Soto-Garcia, 68 Wn. App. 20, 841 P.2d 1271 (1992)). Conversely, the court noted that no seizure occurred when the officer walked up to the defendant, asked what he was doing, and obtained consent to conduct a pat down when the defendant kept putting his hands in his pockets. Id. at 561. In doing so, the court noted that the meeting was consensual and

there was no show of authority that would support a finding that the defendant was seized. Id. at 561-62.

Here, Officer Simper's directive to Gookin, to step out of the vehicle so he could safely conduct a search of the vehicle, was constitutionally sound. Officer Simper's directive was based on objective concerns for officer safety, which justified the minimal intrusion on Gookin's privacy. Further, the officer's interaction with Gookin was voluntary and not investigatory in nature. Officer Simper removed Gookin from the vehicle so that he could search the vehicle incident to the driver's arrest, not to investigate whether Gookin was involved in criminal activity. Just as in Harrington, Officer Simper asked Gookin to remove her hands from her pocket and obtained consent to conduct a pat down. (RP 02/23/09 31) There is no evidence that Officer Simper asked Gookin for identification, checked for warrants, or questioned Gookin about any criminal activity prior to the pat down. (RP 02/23/09 31-32) As such, the pat down was not investigatory. Under the totality of the circumstances, this activity does not rise to the level of a seizure and the Terry standard does not apply. Thus, the pat down of Gookin was lawful and Gookin's Fourth Amendment rights were not implicated. However, even if this court finds that the Terry standard

is applicable, the pat down was lawful because Officer Simper had a reasonable and articulable suspicion that Gookin was armed and dangerous.

III. Even if a seizure occurred, the seizure was lawful because Officer Simper had a reasonable suspicion Gookin was armed and dangerous.

Under the Fourth Amendment and article I, section 7 of the Washington Constitution, warrantless searches and seizures are per se unreasonable, and the State bears the burden of demonstrating that a challenged search falls within one of the few narrow exceptions to the general rule. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Under the Terry exception, if a defendant has been lawfully seized, police officers may conduct a protective pat down of a nonsuspected passenger only if “the officer is able to point to specific, articulable facts giving rise to an objectively reasonable belief that the passenger could be armed and dangerous.” State v. Horrace, 144 Wn.2d 386, 399-400, 28 P.3d 753 (2001); Terry, 392 U.S. at 21. As the Court in Terry further explained:

The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger.

392 U.S. at 27.

"A founded suspicion is all that is necessary, *some basis from which the court can determine that the [frisk] was not arbitrary or harassing.*" State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). Thus, a frisk must not be undertaken as a result of the product of the officer's "volatile or inventive imagination" or "simply as an act of harassment." State v. Belieu, 112 Wn.2d 587, 602, 773 P.3d 46 (1989). Rather, the record must evidence "the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so." Id. (citing Terry, 392 U.S. at 28). This is because "[t]he Constitution does not require an officer to wager his physical safety against the odds that a suspected assailant is actually unarmed." State v. Serran, 14 Wn. App. 462, 469-70, 544 P.2d 101 (1975).

Although this Court must independently examine the circumstances surrounding the pat down because of the constitutional right at issue, conclusions entered by a trial court following a suppression hearing carry great significance for a reviewing court. Collins, 121 Wn.2d at 174 (citing State v.

Daugherty, 94 Wn.2d 263, 269, 616 P.2d 649 (1980), cert. denied, 450 U.S. 958 (1981)). Here, the trial court found that Officer Simper had a reasonable and articulable suspicion that Gookin was armed and dangerous. (RP 02/23/09 32-33) In doing so, the court noted:

I will find that the officer was within his rights to do a pat down under those circumstances. . . [W]hen a weapon could be easily concealed in a bulky coat in a situation such as this with the officer making the traffic stop not having any other officers present, this Court feels that this officer in his testimony has established a sufficient basis for concern and, thus, the pat down.

(RP 02/23/09 32-33)

At the suppression hearing Officer Simper testified that he was alone, Gookin had her hands in the pockets of her oversized “puffy” jacket, and that he wanted to make sure Gookin did not have any weapons since he would be in a vulnerable position while searching the vehicle. (RP 02/23/09 13) Thus, Officer Simper had a well-founded suspicion that Gookin might be armed and dangerous. His decision to conduct a pat down was tempered and reasonable. The pat down was not “arbitrary or harassing.” Under these circumstances, Officer Simper was justified in conducting a protective pat down.

IV. The scope of the pat down was lawful under *Terry v. Ohio*.

Under Terry, a limited protective frisk of the suspect's outer clothing is allowed as long as it remains a search for weapons and does not turn into a shopping expedition for contraband. Collins, 121 Wn.2d at 173; State v. Loewen, 79 Wn.2d 562, 567, 647 P.2d 489 (1982) (the frisk must be “confined in scope to an intrusion designed to discover weapons and not drug paraphernalia.”). During the pat down the officer can seize weapons found on the defendant. State v. Fowler, 76 Wn. App. 168, 173, 883 P.2d 338, 340 (1994). If during the pat down, the officer notices an item of questionable identity that might be a weapon, the officer may be justified in reaching into the clothing and removing the item. State v. Hudson, 124 Wn.2d 107, 112-13, 874 P.2d 160 (1994) (citing Terry, 392 U.S. at 30) (when the result of the pat down is inconclusive as to whether an item may or may not be a weapon, the officer may only take action as is necessary to examine such object).

Here, Officer Simper did not exceed the permissible scope of a lawful Terry frisk. Officer Simper testified that while patting down the exterior of Gookin's pockets he immediately recognized hypodermic needles. (RP 02/23/09 11) Hypodermic needles can be used as a weapon. (RP 02/23/09 23) Needles are sharp and

can contain blood pathogens or be used to inject dangerous substances. (RP 02/23/009 33-34) As such, the needles were weapons and Officer Simper was lawfully permitted to remove them.

Additionally, during the pat down an officer can seize contraband that is immediately recognizable to the touch. Hudson, 124 Wn.2d at 115-16. Contraband is “immediately recognizable” if its incriminating nature can be ascertained without sliding, squeezing, or manipulating the object. Id. at 116; State v. Dickerson, 508 U.S. 366, 375, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) (an officer can seize contraband where the officer “feels an object whose contour or mass makes its identity immediately apparent”).

Even if this Court finds that needles are not “weapons,” Officer Simper was permitted to remove the needles pursuant to the plain feel doctrine. Hudson, 124 Wn.2d 127. Since, hypodermic needles are considered contraband; Officer Simper was permitted to remove them from Gookin’s pocket so long as the needles were immediately recognizable. Id. Officer Simper testified that upon feeling “several cylinder objects” he immediately recognized them as hypodermic needles and stopped his search.

(RP 02/23/09 10-11) Officer Simper did not manipulate the needles to obtain their identity. Thus, the scope of the Terry frisk was lawful and Officer Simper was permitted to seize the needles.

V. Regardless of the Terry standard, the pat down was lawful because Gookin consented to the search.

While unnecessary in light of the legality of Officer Simper's actions, Gookin's challenge to the pat down also fails because her voluntary consent provided the legal basis for the search. A warrantless search is constitutional when based on valid consent. State v. Flowers, 57 Wn. App. 636, 644, 789 P.2d 333 (1990); see State v. Hendrickson, 129 Wn.2d 61, 72, 917 P.2d 563 (1996) ("Consent is one of the exceptions to the 'per se unreasonable' rule.").

The record reflects that Officer Simper asked Gookin if he could pat her down for his safety prior to conducting a search of the vehicle and "she acknowledged it. Stated yes and shook her head yes. . . ." (RP 02/23/09 10) Gookin does not claim that her consent was coerced or involuntary. (Appellant's Brief 17-19) Rather, Gookin merely claims that her consent to the pat down search was obtained by exploitation of an illegal seizure and, therefore, must be suppressed. (Appellant's Brief 17)

Gookin cites State v. Henry, for the proposition that her consent must be suppressed because it was “fruit from the poisonous” detention and there was no action by the police that “purged the taint.” (Appellant’s Brief 15-19); 80 Wn. App. 544, 910 P.2d 1290 (1995). However, Henry is inapplicable to this case because Gookin was not unlawfully seized prior to the pat down. See Supra, Sections II-IV. Thus, there was no “taint” to be “purged” and the consent was voluntary.

In Henry, the officer stopped the defendant for two traffic infractions. Henry, 80 Wn. App. at 546. However, after noticing a police radio scanner on the passenger seat, the officer began to ask the defendant if his vehicle had been involved in any recent burglaries or drug transactions in the area. Id. The officer then obtained consent from the defendant to search his vehicle and to search his person. Id. Pursuant to the search, the officer found methamphetamine on the defendant’s person. Id. at 548.

The court held that when the officer “turned his attention to other suspicions” rather than the traffic infractions, the stop escalated into a Terry seizure. Id. at 551. The court noted that the Terry seizure, i.e. the additional questioning, was unlawful because the officer had no reason to believe the defendant was engaged in

criminal activity. Id. The State argued that the subsequent search of the defendant's person was legal and should not be suppressed as "fruits from the poisonous tree" because the defendant voluntarily consented. See id. at 551. The court disagreed, stating that because the initial seizure (the questioning) was illegal and the "taint was not purged," the subsequent consent by the defendant to the search was invalid. See id. In other words, the court said that the consent to search was involuntary because it was the product of an illegal detention. See id. The court explained that the "taint was not purged" because the request to search occurred "simultaneous to the illegal detention; there were no significant events that intervened between the detention and the consent" that would purge the taint and no Miranda warnings were given. Id.

In this case, Gookin cites Henry to allege that her consent was involuntary because she was illegally seized prior to her consent to the pat down. (CP 17) Gookin alleges that the "taint" of the illegal detention was not "purged" because the request to search was simultaneous with her detention; there were no significant events that intervened between the detention and the consent" and no Miranda warnings were given. (Appellant's Brief 17) However, Gookin was never unlawfully seized. As indicated in

the proceeding sections, Officer Simper had the right to direct Gookin from the vehicle to control the scene of the traffic stop, pursuant to Mendez. Officer Simper's directive to Gookin to exit the vehicle was not a "seizure" for purposes of Terry and the Fourth Amendment analysis. Thus, there was no illegal detention. Here, all of Officer Simper's acts were lawful; there was no taint to be purged before obtaining consent. Therefore, Gookin's voluntary consent provided a legal basis for the pat down.

VI. Defense counsel was not ineffective for failing to properly move to suppress evidence.

To establish ineffective assistance of counsel, the defendant must first show that his counsel's performance was deficient. State v. Tarica, 59 Wn. App. 368, 373-74, 798 P.2d 296, 299 (1990), overruled on other grounds, State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Secondly, the defendant must show that such deficient performance prejudiced the defense. Id. This requires a showing that counsel's errors were so egregious that the defendant was deprived of a fair trial that the result is unreliable. Id. Courts apply a strong presumption of reasonableness in scrutinizing whether defense counsel's performance was ineffective. Id. If defense counsel's conduct can be characterized

as legitimate trial strategy or tactics, ineffective assistance of counsel will not be found. Id. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. Id.

It is not ineffective counsel to refuse to present a defense not warranted by demonstrable facts. State v. Lottie, 31 Wn. App. 651, 655, 644 P.2d 707, 710 (1982). Additionally, it is not deficient performance for defense counsel not to anticipate changes in the law. State v. Millan, 151 Wn. App. 492, 502, 212 P.3d 603 (2009), overruled on other grounds, State v. McCormick, 216 P.3d 475 (2009).

Here, it is unclear why Gookin has alleged her defense counsel was ineffective. For purposes of this brief, the State will assume that Gookin alleges it was ineffective assistance of counsel for the defense to: 1) fail to raise a Gant challenge to the vehicle search incident to the arrest of the driver and 2) fail to move to suppress Gookin's voluntary consent to the pat down on the grounds that her detention was unlawful.

Counsel was not ineffective for failing to raise a Gant challenge to the search incident to arrest because at the time of the suppression hearing Gant v. Arizona had not yet been decided.

Furthermore, because Gant is the basis for appellant's claim that her consent was the product of an unlawful detention, defense counsel could not be ineffective for failing to move to suppress on this basis either. Here, both of Gookin's claims of ineffective assistance of counsel are premised on application of Gant v. Arizona, a case that was decided two months after Gookin's suppression hearing. (RP 02/23/09) Counsel is not ineffective for failing to anticipate a change in the law. Millan, 151 Wn. App. at 502.

#### D. CONCLUSION.

Gookin has no standing to challenge the constitutional validity of a vehicle search incident to the arrest of the driver because Gookin does not meet the requirement for automatic standing and does not have a possessory interest in the vehicle searched. Gookin cannot vicariously assert another person's Fourth Amendment rights.

Setting aside the legality of the search incident to arrest, the removal of Gookin from the vehicle, the pat down and the seizure of heroin from her person was lawful. Officer Simper had the legal right to "control the scene" of a traffic stop by removing Gookin from

the vehicle and conducting a pat down. This did not amount to a seizure for Fourth Amendment purposes.

However, even if this Court finds the encounter amounted to a seizure, the pat down was lawful because Officer Simper had a reasonable and articulate suspicion that Gookin was armed and dangerous, under Terry v. Ohio. Conversely, if this Court finds that Officer Simper did not have a reasonable suspicion to justify a Terry frisk, the pat down was still lawful because Gookin voluntarily consented.

Lastly, defense counsel was not ineffective for failing to raise Arizona v. Gant as the basis to suppress evidence because Gant had not yet been decided at the time of the hearing. Counsel is not ineffective for failing to anticipate changes in the law.

Respectfully submitted this 3d day of November, 2009.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

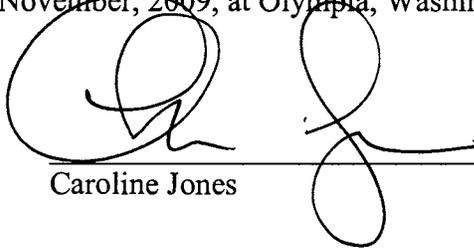
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DIVISION II  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

Dated this 4 day of November, 2009, at Olympia, Washington.

  
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Caroline Jones