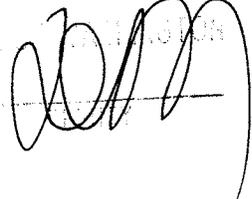


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STATE OF WASHINGTON

BY: 

No. 39789-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

HALEY NICOLE WILSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE FACTS

The State agrees with appellant's statement of the case.

ISSUE PRESENTED

Appellant has not met her burden of showing a manifest injustice that would mandate the withdrawal of her guilty plea.

ARGUMENT

A motion to withdraw a guilty plea is governed by CrR 4.2(f). CrR 4.2(f) places upon the defendant a demanding and stringent burden to show a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, and not obscure. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984); *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). The reason this heavy and demanding burden is placed upon the defendant is that CrR 4.2(d) prevents the court from accepting a guilty plea until it is absolutely satisfied that there is a factual basis for the plea, that the plea has been made voluntarily and competently, and that the defendant understands the nature of the charges to which he is pleading and the consequences of his plea. *Taylor*, 83 Wn.2d at 596.

CrR 4.2(e) requires, furthermore, that if the defendant is pleading guilty based upon a plea agreement with the prosecutor, the plea agreement must become part of the record and the defendant must be instructed that the plea agreement cannot control the judge's discretion. *Id.* CrR 4.2(g) requires the defendant to file a written statement upon his plea of guilty which details not only his basic constitutional rights but sets forth the requirements of CrR 4.2(d) and (e). CrR 4.2(g) requires that the statement be read by or read to the defendant and that the statement be signed by the defendant in the presence of his attorney, the prosecuting attorney and the judge. Basically, CrR 4.2(d), (e), and (g) are carefully designed to make absolutely certain that a defendant's rights have been fully protected before the guilty plea is accepted. *Taylor*, 83 Wn.2d at 596. It is because these great safeguards have been incorporated into the plea process that the demanding "manifest injustice" standard is applied. *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

The Washington Supreme Court recognized four indicia of "manifest injustice" in *State v. Taylor, supra*. These indicia are:

- (1) Denial of effective assistance of counsel;
- (2) The plea was not ratified by the defendant;
- (3) The plea is involuntary;
- (4) The plea agreement was not kept by the prosecution.

Taylor, 83 Wn.2d at 598; *State v. Dixon*, 38 Wn. App. 74, 76, 683 P.2d 1144, *review denied*, 103 Wn.2d 1003 (1984). A "manifest injustice" is

one that is apparent on the record and actually affects appellant's rights. *State v. Millan*, 151 Wn.App. 492, 499, 212 P.3d 603 (2009). "If the facts necessary adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

One of the risks the appellant took in pleading guilty was that the law may change at some point in the future. A defendant may not accept the benefits of a plea bargain and then seek to improve his situation when the legal landscape changes. According to the U.S. Supreme Court:

It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, *he does so under the law then existing*; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. *Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and conviction*, unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.

McMann v. Richardson, 397 U.S. 776, 25 L. Ed. 2d 763, 90 S. Ct. 1441, 1450 (1970)(emphasis added).

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, appellant's contention that her guilty plea must be vacated due to her 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, 1051 (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 appellant fares no better by arguing that her guilty plea was entered 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).

Appellant cites *In re Skylstad*, 160 Wn.2d 944, 162 P.3d 413 (2007) and *In re Personal Restraint of Saint Pierre*, 118 Wn.2d 321, 823 P.2d 492 (1992) for the proposition that Wilson's case was not yet final until "the judgment of conviction has been rendered, the availability of

appeal exhausted, the time for a petition for certiorari has elapsed.” Neither of those cases, and the cases cited therein, involved a plea of guilty; those cases went to trial and the right of appeal was preserved. However, as previously noted, pursuant to CrR 4.2(g) (written statement on plea of guilty) a defendant expressly waives any right to appeal a finding of guilt after a trial when he or she pleads guilty. Appellant further argues that “[f]ailure to raise his suppression challenge and the trial does not constitute a waiver of a *Gant* challenge at the case is not final.” *State v. Harris*, 154 Wn.App. 87, 224 P.3d 830 (2010). Brief of Appellant, p. 7. However, *Harris* did not involve a guilty plea; Harris went to trial and preserved his right to appeal.

It is true that the court in *Harris* declined to hold that he had waived his right to challenge the search under *Gant* for the first time on appeal. However, the State would urge this court to follow the reasoning in *State v. Millan, supra*, wherein it was held that the failure to bring a motion to suppress at the trial court level waived any right to raise the issue for the first time on appeal. As Judge Quinn-Brintnall stated in her dissent in *Harris*:

I begin with the proposition that appellate courts are error - correcting courts that confine their review to the trial court record. Unless a party files a motion to suppress evidence seized pursuant to a constitutionally infirm search, the trial court will not enter findings of fact or conclusions of law and will not issue a ruling. Thus, the record on appeal will contain no ruling to which error may be assigned and it will

contain decision, correct or otherwise, to review.

....

In ruling that this case must be remanded with directions to the trial court to conduct a suppression hearing, the majority speculates that the trial court committed reversible error by admitting evidence to which the defendant did not timely object as required by court rule and applies an improper *de novo* standard of review to the record on appeal.

Harris, at 101-102.

Appellant also cites *State v. Rodriguez*, 65 Wn.App. 409, 828 P.2d 636 (1992) for the proposition that the issue of an unconstitutional search may be raised for the first time on appeal. However, as the court correctly pointed out in *Millan, Rodriguez* “moved to suppress the evidence found in an unwarranted search of his garbage before trial but withdrew the motion and reliance on our opinion in *State v. Boland*, 55 Wn.App. 657, 781 P.2d 490 (1989), *reversed*, 115 Wn.2d 571, 800 P.2d 1112 (1990).... When our Supreme Court reversed a Court of Appeals decision, Division III allowed *Rodriguez* to revive his challenge.” *Millan*, at 500. This court then distinguished *Rodriguez* noting that “*Millan* never filed a motion in the trial court seeking to suppress” and thus “waived his right to appeal the

admission of evidence.” *Millan*, at 500. The same reasoning applies here. Ms. Wilson never filed a motion to suppress.

Be that as it may, this court should be careful not to put the cart before the horse. The issue before it is not whether Ms. Wilson may raise the issue of a potentially unconstitutional search for their first time on appeal; the issue is whether or not the trial court committed error when it denied her motion to withdraw her guilty plea. As has been demonstrated by the cases cited herein, there was no error. If it is not error to fail to bring a motion to suppress under existing law favorable to a defendant (motion may have been successful) it is certainly not error to fail to bring a motion to suppress when a subsequent change in the law favors the defendant.

Furthermore, a claim asserting an unlawful search or seizure raised for the first time on appeal calls for “a fact-specific analysis, which [the reviewing] court is ill equipped to perform.” *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

“The exclusion of improperly obtained evidence is a privilege and can be waived.” *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1996). As the Honorable Judge Dave Edwards said when he denied Ms. Wilson’s motion to withdraw her guilty plea:

“[A]ny time a defendant pleads guilty, as had the defendants in this particular case, from the point of the guilty plea forward, the defendant’s guilt or innocence is determined by his own admission. It’s no longer a matter of what the evidence held or what

would have shown or could have proven. A conviction after a plea of guilty rests almost entirely on the defendant's own admission in open court that he committed the act with which he is charged."

(08-03-09 RP 16).

CONCLUSION

Because counsel's recommendation that the Defendant plead guilty was based upon an accurate assessment of the law as it existed at the time, the appellant has not established the existence of a manifest injustice. Her appeal should be denied and the trial court affirmed.

Respectfully Submitted,

By: 
WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA #15489

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

STATE OF WASHINGTON,

Respondent,

No.: 39789-7-II

v.

DECLARATION OF MAILING

HALEY NICOLE WILSON,

Appellant.

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STATE OF WASHINGTON

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 7th day of July, 2010, I mailed a copy of the Brief of Respondent to Jennifer L. Dobson, Dana M. Lind; Attorneys for Appellant; Nielsen, Broman & Koch, PLLC; 1908 East Madison Street; Seattle, WA 98122, and Haley Nicole Wilson; 801 North Rice Street; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 7th day of July, 2010, at Montesano, Washington.

Barbara Chapman