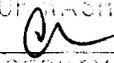


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DIVISION II

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

NO. 40765-5

STATE OF WASHINGTON,

Respondent.

vs.

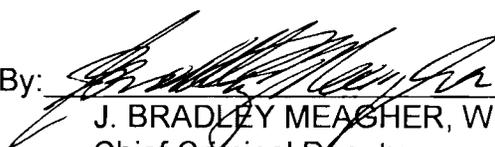
BRIAN EDWARD BRIDGES,

Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

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STATEMENT OF THE CASE

On May 12, 2009, Officer Jeremy Stamper (Mossyrock Police Department) observed a green Chevrolet Camaro traveling westbound on Mossyrock Road West. The officer observed the Camaro traveling at a speed which appeared to the officer to be in excess of the posted 35 mile per hour speed limit.¹ Prior to the vehicle passing his location, Officer Stamper observed the vehicle slow abruptly before continuing to proceed at what appeared to be a speed of between 15 and 20 miles per hour.² The driver of the Camaro saw Stamper and hit the brakes. The front of the car dipped to the ground.³ The time was during daylight hours; the weather was clear.⁴ As the Camaro passed his location, Officer Stamper saw that the license plate tabs affixed to the rear license plate were expired.⁵

Officer Stamper then observed the vehicle turn into the western entry of the semi-circular driveway located at his

¹ RP 5 (February 10, 2010). References to the record will be to the page of either the February 10, 2010 suppression hearing, or the April 19, 2010 Jury trial. References to the Court's Findings of Fact and Conclusions of Law dated February 18, 2010, will be designated "FF" and the paragraph number.

² FF 1.3

³ RP 5 (February 10, 2010)

⁴ RP 6 (February 10, 2010)

⁵ RP 5 (February 10, 2010)

residence.⁶ Officer Stamper drove out of the eastern entry of his semi-circular driveway onto Mossyrock Road West, and then into the western entry of his semi-circular driveway, where he parked behind the defendant's vehicle.⁷ Officer Stamper contacted the defendant at the driver's-side door of the defendant's vehicle. The driver was Brian Edward Bridges, who is the defendant and appellant in this case.

Officer Stamper also observed a female was seated in the front-passenger seat of the defendant's vehicle.

Officer Stamper informed Bridges the reason for the stop (speeding). Bridges was unable to produce a driver's license or any other form of identification.⁸ Officer Stamper returned to his patrol vehicle and ran a check of Bridges' driver's license. The driver's license check on the defendant's driver's license revealed that the defendant's driver's license was valid.⁹

Officer Stamper next ran a check of the defendant's vehicle and discovered that the license plate tabs affixed to the rear license plate of the defendant's vehicle had been issued for a vehicle

⁶ RP 5 (February 10, 2010)

⁷ RP 6 (February 10, 2010)

⁸ RP 7 (February 10, 2010)

⁹ RP 7 (February 10, 2010)

bearing a different license plate number.¹⁰ There was no visible VIN number on the vehicle.¹¹

While Officer Stamper was running the check on the defendant's vehicle, Trooper Nathan Hovinghoff (Washington State Patrol) arrived at the scene to assist. Trooper Hovinghoff exited his patrol cruiser and positioned himself at the front passenger-side door of the defendant's vehicle.¹²

Officer Stamper exited his patrol car and re-contacted Bridges. He thought the car might be stolen because there was no visible VIN number.¹³ When Officer Stamper stood near the driver's side door of Bridges' vehicle, he observed a small, plastic baggie on the floorboard at the defendant's feet.¹⁴ Officer Stamper asked the defendant what was in the bag.¹⁵ Bridges did not answer the officer's question directly, but instead replied that the bag was empty and handed the baggie to Officer Stamper.¹⁶ Officer Stamper observed a small amount of a translucent, crystalline

¹⁰ RP 8 (February 10, 2010)

¹¹ RP 8 (February 10, 2010)

¹² RP 8 (February 10, 2010)

¹³ RP 8 (February 10, 2010)

¹⁴ RP 8 (February 10, 2010)

¹⁵ RP 8 (February 10, 2010)

¹⁶ RP 8 (February 10, 2010)

powder inside the baggie which appeared consistent with that of methamphetamine.¹⁷

Officer Stamper then attempted to locate a vehicle identification number on the door frame of Bridges' vehicle.¹⁸ Stamper opened the car door to ascertain whether there was a vehicle identification number (VIN) on the door frame.¹⁹ While searching for the vehicle identification number on the driver-side doorframe of the Camaro, Officer Stamper placed the baggie that Bridges had given him on the rear floorboard behind where the defendant was seated.²⁰

Trooper Hovinghoff saw Officer Stamper place the baggie on the rear floorboard behind where the defendant was seated.²¹ Officer Stamper walked around the defendant's vehicle to determine whether a vehicle identification number was affixed to the passenger-side door frame. Stamper opened that door to see if the VIN was on that door frame.²² At that point, Trooper Hovinghoff walked around the defendant's vehicle and picked up the plastic

¹⁷ FF 1.20, RP 8 (February 10, 2010)

¹⁸ RP 9 (February 10, 2010)

¹⁹ RP 11 (February 10, 2010)

²⁰ RP 9 (February 10, 2010)

²¹ FF 1.23

²² RP 9 (February 10, 2010)

baggie he watched Officer Stamper place on the rear floorboard of the defendant's vehicle.²³

Trooper Hovinghoff observed a small amount of a white, crystalline powder inside the baggie. He field-tested a quantity of the crystalline powder.²⁴ The result of the field test was positive for methamphetamine.

The substance was sent to the Washington State Crime Lab. It was positively identified by the Washington State Crime Lab as methamphetamine.

ARGUMENT

1. **The interior of the car was not searched.**
 - a. **The small bag of methamphetamine was in open view and the defendant voluntarily gave the bag to the officer.**

"Open view" occurs when an observation is made by a police officer standing outside a constitutionally protected area.²⁵ Entry into the constitutionally protected area must be authorized by some exception to the warrant requirement.²⁶ Applying this to Mr. Bridges, Stamper was standing outside the car when he observed

²³ RP 9(February 10, 2010)

²⁴ RP 9 (February 10, 2010)

²⁵ *State v. Lemus*, 103 Wn.App. 94, 11 P.3d 32 (2000); *State v. Ferro*, 64 Wn.App.181, 182, 823 P.2d 526 (1992), *review denied* 119 Wn.2d 1005 (1992).

²⁶ *State v. Gibson*, 152 Wn.App. 945, 219 P.3d 964 (2009)

the baggie of methamphetamine at the defendant's feet. But Stamper never entered the vehicle. Stamper did not reach into the vehicle to retrieve the baggie. He did not order the defendant to give the baggie to him. Rather, he simply asked a question, "What's in the bag?"

Instead of actually answering Stamper's question, Bridges responded by saying, "It was empty."²⁷ Bridges reached down, grabbed the baggie and voluntarily gave it to the officer.²⁸ Stamper then continued to look for the VIN number.

While Stamper continued to look for the VIN number, he set the baggie down behind the driver as he looked at the door frame. Hovinghoff merely picked up what was already given to Stamper. This entire fact pattern is ignored by the Appellant in his initial argument.

- b. The officer did not "return" the baggie to the defendant such that independent, exigent circumstances would be required to pick the baggie back up again.**

The Appellant cites the *Tibbles* case²⁹ for the proposition that exigent circumstances were necessary for Hovinghoff to retrieve the baggie of methamphetamine. *Tibbles* is

²⁷ RP 8 (February 10, 2010)

²⁸ RP 8 (February 10, 2010)

²⁹ *State v. Tibbles*, 169 Wash.2d 364, 370, 236 P.3d 885 (2010).

distinguishable from this case. Tibbles was pulled over for a defective tail light by Trooper Larsen. Larsen smelled marijuana and informed Tibbles. Tibbles denied having any marijuana. Larsen then searched the interior of Tibbles' car. Larsen found marijuana, a knife and two lighters under the front passenger seat.³⁰ The State argued exigent circumstances existed, those circumstances being the potential destruction of evidence.³¹ The Court held otherwise.³²

The facts in *Tibbles* are not the same as those presented by Mr. Bridges. Bridges voluntarily gave Stamper the baggie of methamphetamine. Stamper did not search the vehicle. Stamper did not give the baggie back to Bridges. The officer merely set the baggie of meth down as he was looking at the door frames of the vehicle. Hovinghoff then picked up what had otherwise been temporarily set down by another police officer. No exigent circumstances existed, but none were needed because the controlled substance was already in the custody of the police. Appellant completely misses this point: The baggie was not picked up by Hovinghoff due to "exigent circumstances." The baggie was

³⁰ *Tibbles*, 169 Wash.2d at 368

³¹ *Tibbles*, 169 Wash.2d at 370

³² *Tibbles*, 169 Wash.2d at 372

picked up by Hovinghoff because Bridges had already voluntarily given it to Stamper, and Hovinghoff did not want to lose it while Stamper was looking for the VIN number. Bridges had relinquished custody of the item well before Hovinghoff grabbed it. It would be no different if Stamper had come back around the car and retrieved it himself.

The Appellant misstates what Stamper did. On page 8 of Appellant's brief, Appellant argues that "Stamper *returned* the baggie to the interior of the car." If the court actually looks to the record cited (RP 8, 17, 24, (February 10, 2010)), the word "return" was used twice by defense counsel on cross examination, but never uttered by Stamper. On page 18, officer Stamper explains, "I had it in my hand and then I opened the door, set it in there as I was looking for the VIN."³³ Stamper did not return the baggie. He merely set it down as he looked for the VIN. Had Stamper actually intended to give the baggie back to Bridges, he would have simply handed it back to him.

In issuing its findings, the Trial Court did not use the word "return" either. The Court found that Stamper had merely "placed"

³³ RP 18 (February 10, 2010)

the baggie behind the defendant.³⁴ No exceptions to the findings were taken by defense counsel.³⁵ Findings that are not challenged become verities on appeal.³⁶

2. Trial counsel for the defense did not argue *Gant* because defense counsel correctly determined this was not a *Gant* (search of a vehicle incident to arrest) case.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient, and the deficiency prejudiced the defendant.³⁷ Deficient performance is performance falling "below and objective standard of reasonableness based on consideration of all the circumstances."³⁸ Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.³⁹ The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the

³⁴ FF 1.23, 1.25

³⁵ RP 24, Second Supplemental Clerk's Papers 1

³⁶ *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A copy of the minute entry is filed with the Plaintiff's Supplemental Designations of Clerk's papers. It reflects that findings were entered. No objections are noted by the Clerk

³⁷ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996): cited in *State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)

³⁸ *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)

³⁹ *Strickland*, 466 U.S. at 690-91

proceedings would have been different.⁴⁰ If either element of the test is not satisfied, the inquiry ends.⁴¹

There is a strong presumption that counsel's performance was reasonable.⁴² When counsel's conduct can be characterized as a legitimate trial strategy or tactics, performance is not deficient.⁴³

Applying this to Bridges' defense counsel, this case is not a "search of a vehicle incident to arrest" case, like *Gant*⁴⁴ and/or *State v. Valdez*.⁴⁵ As noted above, officer Stamper did not return the methamphetamine back to Bridges. Hovinghoff did not search Bridges' car. All Hovinghoff did was pick up what was otherwise already in the custody of officer Stamper.

CONCLUSION

The defendant voluntarily gave officer Stamper the baggie containing the controlled substance (methamphetamine). Stamper momentarily put it down behind the defendant's seat while he was examining the door frame for a VIN number. When Stamper could

⁴⁰ *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)

⁴¹ *Hendrickson*, 129 Wn.2d at 78

⁴² *State v. Studd*, 137 Wn2d 533, 551, 973 P.2d 1049 (1999); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)

⁴³ *Hendrickson*, 129 Wn.2d at 77-78; *McFarland*, 127 Wn.2d at 336

⁴⁴ *Arizona v. Gant* ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed. 2d 485 (2009)

⁴⁵ *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009)

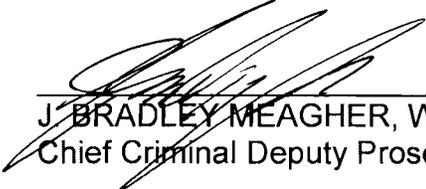
not find the VIN number on the driver's side door frame, he went to the passenger side and inadvertently left the methamphetamine behind the driver. The second officer, Trooper Hovinghoff, secured the baggie of methamphetamine that had already been given to officer Stamper. The methamphetamine was never "returned" to Mr. Bridges, and the trial court's findings in this regard were never challenged. This is not a "search of a vehicle incident to arrest" case because the baggie containing methamphetamine was voluntarily given to the officer by Bridges.

The Appellant's request for relief should be denied and the trial court affirmed.

RESPECTFULLY SUBMITTED this 16 day of February, 2011.

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BY:



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Chief Criminal Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
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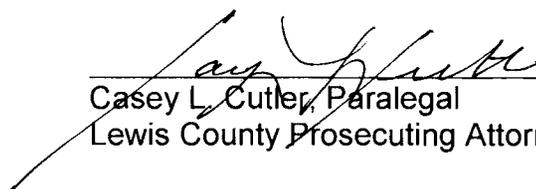
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Ms. Casey Cutler, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 16, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund
Manek R. Mistry
PO Box 6490
Olympia WA 98507

DATED this 16th day of February 2011, at Chehalis, Washington.



Casey L. Cutler, Paralegal
Lewis County Prosecuting Attorney's Office

Declaration of
Mailing