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NO. 40634-9-II

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

LARRY DEAN TYLER,

Appellant.

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PETITION FOR REVIEW

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#### A. IDENTITY OF PETITIONER

Larry D. Tyler asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

#### B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals opinion filed on January 26, 2012. A copy of the decision is in the Appendix at pages 1-17.

#### C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred when it affirmed the trial court's denial of the defendant's CrR 3.6 Motion to suppress the evidence where the defendant did not consent to an inventory search?
2. Whether the Court of Appeals erred when it affirmed the trial court's denial of the defendant's motion to reconsider the decision denying the motion to suppress drug evidence discovered during an inventory search of Tyler's vehicle?
3. Whether the Court of Appeals erred when it affirmed the trial court's denial of the defendant's motion to reopen the case based on the discovery of an April 23, 2009 email authored by the same arresting officer of November 12, 2009?

The email advocated implementing police procedures within the Jefferson County Police Department to "circumvent" the U.S. Supreme Court decision of April 21, 2009 in *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S.Ct. 1710, 173 L. Ed.2d 485 (2009).

4. Whether there was sufficient evidence to support the trial court's

determination of contested facts stated in its Memorandum Opinion?

D. STATEMENT OF THE CASE

*Statement of Procedure*

Larry Dean Tyler was charged in count I with Unlawful Possession of a Controlled Substance-methamphetamine contrary to RCW 69.50.4013(1). CP 2. Count II alleged Use of Drug Paraphernalia in violation of RCW 69.50.412(1). CP 2. Count III charged Driving While License Suspended or Revoked in the Third Degree pursuant to RCW 46.20.342(1)(c). CP 2. All three counts were alleged to have occurred on November 12, 2009. *id.*

The defendant filed a CrR 3.6 motion to suppress the evidence. CP 6. Judge S. Brooke Taylor denied the defendant's motion to suppress. CP 26. The defendant then filed a motion to reconsider on January 29, 2010. CP 31. This was followed by a motion to reopen the CrR 3.6 hearing filed on February 3, 2010. CP 33. The motion to re-open was based on an email authored by the arresting officer: Jefferson County Deputy Sheriff Anglin on April 23, 2009.

The email concerned issues involved in the CrR 3.6 hearing and the United States Supreme Court case of *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S.Ct. 1710, 173 L. Ed.2d 485 (2009). The email stated in part:

“This unfortunate ruling [*Arizona v. Gant*] hinders our ability to continue the efforts that have been enforce for some time. The obvious way to circumvent this is impounding the vehicle and performing an inventory search. The problem with this is that we must afford

the person the chance to contact someone else and determine if it is safely off of the roadway or not. It also obviously limits what we can search as well. The other way around this case and that is the use of a K-9.” CP 36. (See appendix.)

These motions were denied by a written Memorandum Opinion on February 19, 2010. CP 40 (filed 2/23/10.) Thereafter, Mr. Tyler was found guilty of Count I and Count III at a stipulated bench trial conducted on April 19, 2010 before the Honorable Judge Craddock. RP 59-60. He was found not guilty of Count II Possession of Drug Paraphernalia. RP 60. The bench trial was based on stipulated police reports. CP 43. On January 26, 2012 the Court of Appeals for Division II affirmed the defendant’s convictions in a 2-1 decision.

*CrR 3.6 Hearing*

Deputy Brett Anglin testified that he was on duty on November 11, 2009 (sic). RP 9. While patrolling on Highway 104 he noticed a vehicle eastbound going 65 mph in a 60 mph zone. RP 10. A computer check revealed that the registered owner of the vehicle-a female- was suspended in the third degree. Id. Nevertheless, the vehicle was stopped for speeding about “a quarter of a mile from the Hood Canal Bridge.” id.

Upon being stopped the defendant, Larry Dean Tyler, produced a Medicare card “...and stated that he did not have a driver’s license.” id. The passenger was observed “trying to hide a beer can between his legs.” id. The deputy ran both names. The deputy testified to the results of his check: “ I received in the return

that Mr. Tyler was suspended in the third degree, and I also received a return that the passenger was also suspended and had several outstanding warrants.” RP 12.

Tyler was arrested for DWLS 3<sup>rd</sup> degree, searched and placed in the patrol car. id. A trooper arrived and dealt with the passenger. RP 13. The deputy asked Mr. Tyler for consent to search his motor vehicle. Tyler refused. id. The passenger was released because of confusion about whether his warrants were extraditable or not. The deputy called for an impound tow.<sup>1</sup> id

The deputy testified that he had the vehicle impounded because “It was less than a foot on a roadway that was a 60 mile an hour road next to a congested area, which was the Hood Canal Bridge...And also due to the fact that there was no driver on scene that could remove the vehicle within a timely manner.” RP 14. The passenger had possession of Mr. Tyler’s cell phone but was unable to locate anyone to drive the vehicle away. RP 14-15.

The deputy testified that he was impounding the vehicle “solely for the purpose of traffic safety.” RP 15. He did not impound the vehicle for the purposes of searching for an object he had seen when the passenger was attempting to hide something. RP 11. The deputy was able to identify that object as an “energy drink/alcohol” when he first approached the vehicle. RP 15.

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<sup>1</sup> When asked why he called for an impound tow, the deputy responded: “To remove the vehicle from the roadway. It was the busiest part of our road and it was less than a food (sic) away from the fog line.” RP 13.

The deputy then inventoried the vehicle while he waited for the tow truck. RP 16. While conducting the “impounded inventory” the deputy discovered a blue metal container directly underneath the driver’s seat that contained “...a brown wad of cotton along with what appeared to be possibly heroin. Also, behind the seat were two amplifiers where the deputy “...could clearly see a piece of plastic, a Zip-loc container that had white powder in it that is consistent with methamphetamine.” RP 16.

On re-cross examination the deputy testified that he did not know whether there was a state law about inventory searching. And he did not know whether Jefferson County Sheriff’s Office had a policy on inventory searching or if it did he did not know what it stated.<sup>2</sup> RP 24.

*Larry Dean Tyler’s Testimony*

Larry Tyler testified that he was arrested “around noon” on November 12th. RP 30. After he exited his vehicle the deputy asked him if he could search his car. He testified; “I said no.” RP 31. After telling the officer that he would not consent to a search of his motor vehicle, the officer “...went and looked in the car...” id. He was then placed in the back of the patrol car. id. He believed he was handcuffed. RP 32.

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<sup>2</sup> On re-redirect examination Deputy Anglin clarified: “There’s likely a policy, yes. But would I know what it says or how it relates to an inventory search I honestly could not testify, I’d have to go get the policy and read it.” RP 24.

Tyler testified that there was no discussion about impounding his vehicle. id. He testified that there was no discussion about whether he wanted the contents inventoried before the vehicle was impounded.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION TO RE-OPEN THE CASE.

This court should accept review of this petition because the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; namely *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980) (the state must prove that a warrantless inventory search is “conducted in good faith and not as a pretext for an investigatory search.”) RAP 13.4(b)(1).

Moreover, this court should accept review of this petition because this petition involves a significant question of law under the Constitution of the State of Washington and under the Constitution of the United States. RAP 13.4(b)(3); *See Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.485(2009); Fourth and Fourteenth Amendments; Cons. Art. 1, sec. 7.

The defense motioned the trial court to reopen the case based on an email that was received by the defense after the CrR 3.6 hearing. The email was received in response to a Public Records Act disclosure request that was made before the hearing. CP 33. That email- authored by the same deputy who testified at the CrR 3.6 hearing was dated April 23, 2009 and stated in pertinent part:

“This unfortunate ruling [*Arizona v. Gant*] hinders our ability to continue the efforts that have been enforce (sic) for some time. The obvious way to circumvent this is impounding the vehicle and performing an inventory search. The problem with this is that we must afford the person the chance to contact someone else and determine if it is safely off of the roadway or not. It also obviously limits what we can search as well. The other way around this case and that is the use of a K-9.” CP 36 (see appendix.)

The Jefferson County Superior Court showed little interest in Deputy Anglin’s 2009 email involving police procedures designed to “circumvent” the United States Supreme Court’s decision in *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S.Ct. 1710, 173 L. Ed.2d 485 (2009).

However, according to Judge Armstrong’s dissenting opinion:

“But the question is not whether the department changed its procedures because of the e-mail, but whether Deputy Anglin utilized his “way-around - *Gant*” in *post-Gant* traffic stops and, in particular, whether he did so with Tyler.”

Dissenting Opinion at 15.

The Supreme Court’s ruling- that was recommended being circumvented- stated:

“A rule that gives police the power to conduct such a search [*Belton*] whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment- the concern about giving police officers unbridled discretion to rummage at will among a person’s

private effects.” (footnote omitted.)

*Arizona v. Gant*, 129 S.Ct. 1720, referring to *New York v. Belton*, 453 U.S. 4554, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). *Belton* held that an officer may search the passenger compartment of an automobile and any containers therein when the search is contemporaneous with a lawful arrest of the occupant. The *Gant* court held that *Belton* did not authorize a vehicle search incident to a recent occupant’s arrest after the arrested person has been secured and is incapable of accessing the interior of the vehicle.

*Gant* and the case at bench are similar in that each defendant was arrested for driving with a suspended license. Each arrested person was then handcuffed, placed in a patrol car and then had his vehicle searched where illegal drugs were discovered. The words often quoted from *State v. Montague*, 73 Wn.2d. 381, 385, 438 P.2d 571 (1968) echo from the past:

“Neither would this court have any hesitancy in suppressing evidence of crime found during the taking of the inventory, if we found that either the arrest or the impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant.”

Anglin testified under oath at the CrR 3.6 hearing that he was not aware of any policy involving the impounding and/ or inventory search of vehicles. RP 24. His sworn testimony included the following:

Q: Once you made the decision to impound the car

what is the Sheriff's Office policy and, actually, state law require you to do at that point?

A: An inventory search of the vehicle.

Q: Okay. Um, and is there any policy or anything requiring you to ask for consent of the driver to inventory the vehicle once you made that decision to impound?

A: Not that I've ever heard of.<sup>3</sup> RP 22.

According to J. Armstrong's dissenting opinion: "*See Florida v. Wells*, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990) (the lack of standardized procedures by police resulted in the exclusion of marijuana seized from a locked suitcase discovered by police while conducting an inventory search of a vehicle)."

Dissenting Op. At 16-7.Op.

The trial court erred when it denied the defendant's motion to reopen the CrR 3.6 hearing. It is within the discretion of the trial court to reopen a case for additional testimony after the parties have rested. *State v. Loftin*, 76 Wn.2d 350, 458 P.2d 29 (1969) (*State v. Harmon*, 21 Wn.2d 581, 592, 52 P.2d 314 (1944) (motion to re-open case to permit further testimony is within discretion of the trial court) (a trial court will be reversed if there is an abuse of discretion.).

#### *Defendant's Argument*

The defense argued in its written motion to re-open:

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<sup>3</sup> The date of this testimony was January 8, 2010; eight months after the deputy's infamous email. Compare *State v. Williams*, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984). "Clearly, a defendant may reject this protection, [inventory search] preferring to take the chance that no loss will occur." *infra* at 19, n.12.

“The email evidences a possible conspiracy to deprive citizens of their constitutional right to be free of unreasonable searches and seizures guaranteed under the Fourth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. It certainly provides proof of Deputy Anglin’s predisposition to engage in the use of pretext in order to search a vehicle (under an exception to the warrant requirement) despite the lack of evidentiary basis for the search.” CP 33-35.<sup>4</sup>

The trial court stated in its Memorandum Opinion and Order on Motions to Reconsider and to Reopen the following:

“While the email statement by Deputy Anglin is concerning, to the extent that it could be construed as recommending vehicle impounds in every case where the driver is taken into custody, it is not a basis for reopening the instant case, for two reasons. First, the Court has found, and the Defendant admits, that the impound in this case was reasonable, and that finding was supported by the substantial evidence as the Court has previously noted, and to do an impound without doing an inventory would be inappropriate, if not foolish. Second, this arrest, impound and inventory took place prior to the publication of the Gant decision, so the ruling in Gant could not have been the motivation

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<sup>4</sup> Compare Deputy Anglin’s email statement “This unfortunate ruling hinders our ability to continue the efforts that have been enforce for some time.” with the United States Supreme Court’s comment in *Gant*: “The fact that the law enforcement community may view the State’s version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected.” *Arizona v. Gant*, 129 S.Ct. at 1723.

for this inventory search.” CP 41. (see appendix.)

Contrary to the trial court’s conclusion that the United States Supreme Court’s decision “could not have been the motivation for this inventory search”, it was the paramount motivation for the inventory search as disclosed by the chronology of events.

*Arizona v. Gant* was decided on April 21, 2009 according to the the trial court’s own Memorandum Opinion.<sup>5</sup> Deputy Anglin’s email was dated just two days later on “Thursday, April 23, 2009.” CP 36. Consequently, the deputy’s arrest, impound and inventory did not take place “prior to the publication of the Gant decision....” as the trial court determined. The arrest, impound and inventory in this case took place on November 12, 2009, which was six months after *Gant* and the deputy’s response. CP 2,5,9 and 19. (impound and inventory record).

Obviously, the trial court erred in its conclusion that the arrest and inventory took place prior to *Gant* in its written decision denying the motions for reconsideration and to reopen the CrR 3.6 hearing. One primary reason for the trial court’s erroneous conclusion was based on the trial court’s own Memorandum Opinion filed on January 21, 2010. CP 21. In that memorandum the trial court erroneously states in its determination of FACTS :

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<sup>5</sup> The trial court noted and stated in part: “The term “this” appears to be a reference to the U.S. Supreme Court’s decision in *Arizona v. Gant*. \_\_\_\_ U.S\_\_\_\_, 129 S.Ct. 1710 (2009), which was decided on April 21, 2009,” CP 40.

“On February 11, 2009, Jefferson County Deputy Sheriff Brett Anglin, a ten-year veteran patrol officer, observed a vehicle traveling in an easterly direction on S.R. 104 just west of the Hood Canal Bridge which appeared to be speeding.” CP 21. (see appendix.)

The trial court is wrong about the date of this incident. The incident occurred on November 12, 2009 and not on February 11, 2009. This error substantially affected the trial court’s rulings.

Consequently, Deputy’s Anglin’s “circumvention” email of April 23rd, could have been the motivation for this inventory search in November 2009.<sup>6</sup> The Court of Appeals avoided this issue and stated that the defendant, in its motion for reconsideration filed on January 29, 2010-which was before Deputy Anglin’s email was discovered- stated that “The defense does not assert that the impoundment was unreasonable given the circumstances.” CP 32.

**II. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT’S DECISION DENYING THE DEFENDANT’S MOTION TO SUPPRESS THE EVIDENCE.**

The trial court erred when it denied the defendant’s CrR 3.6 motion to suppress the evidence as a result of an alleged inventory search. The appellant’s basic argument is that this inventory search was a pre-text for an evidentiary

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<sup>6</sup> Deputy Anglin was asked what his duties as a patrol officer entail during the CrR 3.6 hearing. He replied: “...traffic enforcement, as well as answering calls.” RP 9. However, in his email of April 23, 2009 he disclosed: “As you know, I have always had an interest in the enforcement of drugs, etc. “ CP 36.

search and that was unlawful. RP 6.

This court should accept review because the decision of the Court of Appeals is in conflict with a decision of the Supreme Court as shown below. RAP 13.4(b)(1). Also, this court should accept review because a significant questions under the Constitution of the State of Washington or of the United States is involved. RAP 13.4(b)(3).

The defendant also argued that because Mr. Tyler did not consent to a search of the vehicle, law enforcement may not conduct a search incident to an arrest by impounding the vehicle and then conduct an “inventory” in order to protect all the parties. CP 32. The defense implied that the search of the vehicle was not conducted in good faith.

An appellate court reviews conclusions of law entered by the a trial court at a suppression hearing de novo. Findings of fact are reviewed for substantial evidence.<sup>7</sup> *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008); *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). “...the ultimate issue is whether under all the facts and circumstances of the particular case there were reasonable grounds for an impoundment.” *State v. Greenway*, 15 Wn.App. 216, 291, 547 P.2d 1231 (1976).

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<sup>7</sup> The trial court entered a written Memorandum Opinion and Order on Motion to Suppress Evidence. CP 21. Compare CrR 3.6(b) entitled “Decision: The court shall state findings of fact and conclusions of law.”

The state bears the burden of proving that an exception to the warrant requirement is applicable to the case at bench. *State v. Duncan*, 146 Wn.2d 172, 43 P.3d 513 (2002); *State v. Vrieling*, 144 Wn.2d 489, 492, 28 P.3d 762 (2001).

Notwithstanding that inventory searches after impoundment are an exception to the warrant requirement, there are limitations and criteria for impoundment that have been judicially imposed that were not followed in the case at bench. For instance, in *State v. White*, 135 Wn.2d 761, 766-7, 958 P.2d (1998) the scope of an inventory search is limited to those areas necessary to fulfill its purpose. See also, Justice Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update* 28 U of W L. Rev. 683 (2005).

Also, the search may not be a pretext for obtaining evidence that law enforcement would not have been able to otherwise obtain. Here, not one but two police officers searched the interior of the vehicle under the pretext of inventorying the vehicle's contents.<sup>8</sup> CP 23; RP 13. From this combination of officers it is inferable that the search was conducted for investigatory reasons and was not conducted in good faith. *State v. Houser*, 95 Wn.2d at 154. One officer's search may be to conduct a "routine" inventory search, but two officers searching a limited space is an exploratory search not conducted in good faith. (Good faith

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<sup>8</sup> The trial court found: "While waiting for the tow truck to arrive, he and the back-up officer conducted a routine inventory search of the passenger compartment." CP 23. The defense contests this mixed finding of fact and of law. (Assignment of error 5.)

requirement is discussed in *State v. Gluck*, 83 Wn.2d 424, 518 P.2d 703 (1974); *State v. Singleton*, 9 Wn.App. 327, 511 P.2d 1396 (1973); *State v. Greenway*, *supra*; and *State v. Montague*, *supra*.)

Applying the above rulings- stemming from *White*- to the facts of this case, there was no need for deputy Anglin to unscrew the top of a one inch by one inch container to determine what its contents may be without a search warrant.<sup>9</sup> According to *State v. Houser*, *supra*, police officers may not open luggage located in an impounded vehicle absent consent or exigent circumstances.

It was clear from the testimony at the hearing that Mr. Tyler did not give officer Anglin consent to search the vehicle. RP 31.<sup>10</sup>

### III. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR RECONSIDERATION.

This court should accept review of this issue based on RAP 13.4(b)(1) and RAP 13.4(b)(3) set forth above. After the trial court's decision was rendered by written memorandum the defense filed a motion for reconsideration. CP 31. The defense stated, as part of its motion, the pretextual search was unreasonable because Mr. Tyler had not consented to a search. CP 32. Inventory searches must

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<sup>9</sup> According to the laboratory report this container held a fiber wad with dark brown residue that was found to contain Heroin. CP 59.

<sup>10</sup> Mr. Tyler was asked: "Q: Do you remember exactly what he asked you? A: Uh, he asked me if he could search the car. Q: And what did you say? A: I said no."

be conducted in good faith. An inventory search following a lawful impoundment-without first obtaining a search warrant-must be conducted in good faith. *State v. Greenway*, 15 Wn.App. at 218 and cases cited therein.

Also argued was the assertion that the search was conducted, as stated in the trial court's memorandum opinion, "pursuant to standard department policies". The defense argued on the issue of good faith: "Officer Anglin may have testified that the search was done "pursuant to standard department policies" (Memorandum Opinion, p.3); however, he also testified on cross examination that he had never read the policy, and didn't know what it required." CP 32.<sup>11</sup>

#### *Abuse of Discretion*

The trial court abused its discretion or was in error. *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "Motions for reconsideration are addressed to the sound discretion of the trial court. *State v. Scott*, 92 Wn.2d 209, 595 P.2d 549 (1979); CR 60 (b)." *State v. Holland*, 30 Wn.App. 366, 375, 635 P.2d 142 (1981), *affirmed*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The trial court abused its discretion because it erroneously determined that the arrest, impoundment and inventory was conducted on February 11, 2009;

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<sup>11</sup> The deputy was asked: "Q: Okay. And you don't know if there is a Jefferson County Sheriff's Office policy on inventory searching, uh, and if there is you don't know what it says, right? A: That is correct." RP 24.

Compare April 23, 2009 email: "This unfortunate ruling hinds our ability to continue the efforts that have been enforce for some time." CP 36.

whereas the actual date of the incident was nine months later on November 12, 2009. CP 2, 5. This foundational error most likely affected the trial court's initial ruling denying suppression of the evidence and affected its decision not to reconsider its suppression decision. If the trial court would have reexamined its suppression decision and its memorandum it would have discovered the colossal mistake it made with the important dates in February, April and November 2009 as they related to this incident.

IV. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S ERRONEOUS STATEMENT OF FACTS.

The trial court entered the following "FACTS" in its written Memorandum Opinion and Order on Motion to Suppress Evidence. CP 21:

"On February 11, 2009, Jefferson County Deputy Sheriff Brett Anglin, a ten-year veteran patrol officer, observed a vehicle traveling in an easterly direction on S.R. 104 just west of the Hood Canal Bridge which appeared to be speeding." CP 21 and

"Deputy Anglin pulled the vehicle over for speeding, and the driver stopped the vehicle approximately one foot outside of the fog line, on the paved shoulder. As he approached the vehicle, Anglin could see the driver was a male, that he had a male passenger, and that both were engaged in furtive movements suggestive of a person attempting to hide something." CP 22 and

"Anglin authorized him to give his cell phone to Bennett to make some calls for help, which were to no avail. Bennett was able to arrange a ride for himself, but not a driver for the vehicle. CP 22 and,

“While waiting for the tow truck to arrive, he and the back-up officer conducted a routine inventory search of the passenger compartment, which he testified was done pursuant to standard department policies to secure personal property and to protect the department and towing company.”<sup>12</sup> CP 23.

The standard of review is the substantial evidence standard. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.)

There was not substantial evidence that “ “On February 11, 2009, ...Deputy Sheriff Brett Anglin...observed a vehicle traveling in an easterly direction on S.R. 104 just west of the Hood Canal Bridge....” CP 21. As shown above by the record, this incident occurred on November 12, 2009. CP 5 (Jefferson County Sheriff’s report.). See also, three counts in the information that alleged the incident date as “...On or about the 12<sup>th</sup> day of November, 2009....” CP 2; Counts I, II and III.

A trial court’s erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). There was not substantial evidence that “...the driver stopped the vehicle approximately one foot outside of the fog line, on the paved shoulder....”

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<sup>12</sup> This assignment of error is discussed under section II of the appellant’s brief, supra at pp 16-19.

CP 22. Larry Tyler testified that when he pulled over he tried to “pull off as far as I could so that there was plenty of room for cars to go by.” RP 32. He stated that he pulled over “A couple, two or three feet” from the fog line. id.<sup>13</sup>

There was no testimony that Deputy Anglin had to stand on the passenger side of the vehicle in order to avoid being struck by traffic that he estimated to be travelling at 60 miles per hour. A fair-minded rational person would believe that Mr. Tyler’s vehicle was safely off the roadway, was not a hazard to traffic and was on the inside of the fog line.

In *State v. Bales*, 15 Wn. App. 834, 552 P.2d 688 (1976) the Court of Appeals affirmed the trial court’s suppression of the evidence. The trial court determined that an impoundment based on the stopped vehicle being parked in a prohibited zone did not provide a reasonable basis to impound the vehicle. The court stated in part: “Although his vehicle was illegally parked, it could have easily been moved a short distance to a legal parking area and temporarily secured against theft. (citations omitted.) (Compare RCW 46.55.113) (see appendix.)

The trial court also found that as deputy Anglin approached the vehicle both passengers “...were engaged in furtive movements suggestive of a person attempting to hide something.” CP 22. Deputy Anglin only testified that the passenger was “trying to hide a beer can between his legs. RP 11. There was no

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<sup>13</sup> “Q: So how far away over the fog line were you able to get your car? A: A couple, two or three feet,” RP 32.

testimony that Larry Tyler acted furtively or attempted to hide anything.

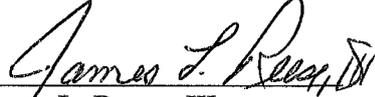
Next, the trial court determined that Deputy Anglin authorized Tyler to give his cell phone to his passenger in order to make some calls for a driver.<sup>14</sup> CP 22. However, Mr. Tyler testified there was no discussion about whether there was someone that could come and pick up his vehicle. RP 33. Tyler also testified that the deputy asked him if the passenger could use his cell phone “for the purpose of getting a ride home.” id. He gave his cell phone to the officer. RP 37.

#### F. CONCLUSION

This court should accept review of this petition and reverse Mr. Tyler’s conviction. In the alternative this court should remand the case to the trial court to reopen the CrR 3.6 hearing based on the contents of the April 23<sup>rd</sup>, 2009 email.

Dated this 26<sup>th</sup> day of February 2012.

Respectfully Submitted,

  
James L. Reese, III  
WSBA #7806  
Court Appointed Attorney

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<sup>14</sup> Compare Deputy Anglin’s email of April 23, 2009, which states in part: “The problem with this [*Arizona v. Gant*] is that we must afford the person the chance to contact someone else and determine if it is safely off of the roadway or not.” CP 36.

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DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

LARRY DEAN TYLER,

Appellant.

No. 40634-9-II

PUBLISHED OPINION

JOHANSON, J. — Larry D. Tyler appeals his convictions following a bench trial for unlawful possession of a controlled substance and third degree driving with a suspended license. He alleges the trial court erred in denying his motion to suppress evidence seized during an inventory search. He contends the inventory search was a mere pretext for an evidentiary search and that an inventory search cannot be conducted without consent. Tyler also argues that the trial court erred in denying his motion to reopen the suppression hearing and that substantial evidence does not support the trial court's findings of facts. We hold that consent was not required, the evidence seized was the product of a lawful inventory search, the trial court properly exercised its discretion, and that substantial evidence supports its findings. Discerning no errors, we affirm.

FACTS

On a narrow and very busy portion of the highway, about a quarter mile before crossing the Hood Canal Bridge, Jefferson County Deputy Sheriff Brett Anglin stopped Tyler's car for speeding. As Deputy Anglin approached the car, he noticed that Tyler's passenger was trying to hide what looked like an alcohol container between his legs. Upon contact by Deputy Anglin, Tyler identified himself and stated he had a suspended license. Deputy Anglin confirmed Tyler's suspended license, arrested him, and placed him in the patrol car.

Deputy Anglin asked Tyler for consent to search the car; Tyler refused. After learning that the registered owner of the car was incarcerated, Deputy Anglin suggested that Tyler's passenger<sup>1</sup> use Tyler's cell phone to find a driver who could move the car. But despite making several calls, the effort was unsuccessful. Because of the car's unsafe location and the lack of a driver, Deputy Anglin called a towing company to impound the car. Deputy Anglin also inventoried the car based on the sheriff office's impound policy and standard practice. The car contained expensive, unsecured stereo equipment. Near these amplifiers, Deputy Anglin saw a clear baggie containing white powder, later identified as methamphetamine.<sup>2</sup>

The State charged Tyler with unlawful possession of a controlled substance, methamphetamine, contrary to RCW 69.50.4013(1); use of drug paraphernalia contrary to RCW 69.50.412(1); and third degree driving with a suspended license contrary to former RCW

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<sup>1</sup> Tyler's passenger, who is not a party to this appeal, could not drive the car because of his suspended license and outstanding warrants.

<sup>2</sup> Deputy Anglin also found a small blue metal container that he opened. It contained a substance later identified as heroin but, because the State did not charge Tyler based on his possession of this heroin, we do not address it or consider it in our analysis.

46.20.342(1)(c) (2008). Tyler moved to suppress the evidence seized from the car arguing that the inventory search was a pretext for an evidentiary search and also that our Supreme Court has stated that police must obtain consent before conducting an inventory search. In a memorandum opinion, the trial court found that the inventory search was not a pretext for an evidentiary search and denied the motion. The same memorandum opinion erroneously listed Tyler's arrest date as February 11, 2009, instead of November 12, 2009.

Tyler then moved for reconsideration, arguing, "The issue is not whether the impound was reasonable (because it was), but whether, in light of Mr. Tyler's request that the vehicle not be searched, Deputy Anglin can do it anyway." Clerk's Papers (CP) at 32. Shortly after filing his motion for reconsideration, Tyler filed a motion to reopen the suppression hearing based on an e-mail that Deputy Anglin wrote to his supervisors, more than six months before Tyler's arrest. In that e-mail, Deputy Anglin asserted that an additional K-9 officer would benefit the department and he attempted to persuade his supervisors to send him to K-9 training. But, the e-mail begins by discussing the United States Supreme Court's ruling in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Tyler argued that language from Deputy Anglin's e-mail showed that Deputy Anglin was predisposed to perform an evidentiary search without cause under the pretext of an inventory search exception and a possible conspiracy to deprive citizens of their constitutional rights.

The trial court denied both motions, ruling that Tyler's concession that Deputy Anglin reasonably impounded the vehicle was "dispositive in this matter." CP at 40. In its memorandum opinion, the trial court ruled that if the vehicle impound was reasonable, a deputy has no alternative but to perform an inventory search. After considering the stipulated police

reports, the trial court found Tyler guilty of unlawful possession of methamphetamine and third degree driving with a suspended license and not guilty of use of drug paraphernalia. Tyler appeals.

## ANALYSIS

### I. MOTION TO SUPPRESS

Tyler argues that the evidence found during Deputy Anglin's inventory search should be suppressed because that search was a pretext for an evidentiary search and because Tyler did not give consent to the search. When reviewing a denial of a CrR 3.6 motion to suppress, we look for substantial evidence in the record to support the trial court's findings of fact. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). We review the trial court's conclusions of law de novo. *Mendez*, 137 Wn.2d at 214.

Article I, section 7 of our constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." A valid warrant, subject to a few jealously guarded exceptions, establishes the requisite "authority of law." *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010) (quoting WASH. CONST. art. 1, § 7). One such exception to the warrant requirement is an inventory search accompanying lawful vehicle impound. *State v. White*, 135 Wn.2d 761, 769-70, 958 P.2d 982 (1998); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State always has the burden to establish that an exception applies. *Afana*, 169 Wn.2d at 177.

When determining whether the fruits of an inventory search following a vehicle impoundment are admissible evidence of a crime, our first question is whether the State can

show reasonable cause for the impoundment. *State v. Houser*, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980). Determining the validity of an impoundment is imperative when deciding whether evidence discovered during an inventory search is admissible in a criminal case. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 83, 196 P.3d 691, 694 (2008).

In this case, Tyler concedes that Deputy Anglin lawfully impounded<sup>3</sup> the vehicle Tyler was driving. Deputy Anglin arrested Tyler for driving with license suspended, leaving the vehicle parked on “the busiest part” of the road “less than a food [sic] away from the fog line,” a quarter of a mile before the Hood Canal Bridge. Report of Proceedings (RP) at 13. Deputy Anglin not only permitted but, in fact, suggested that Tyler’s passenger use Tyler’s cell phone to attempt to locate a driver. Our analysis therefore relies on the undisputed validity of Deputy Anglin’s lawful impound of the vehicle.

It is well settled that police officers may conduct a “good faith” inventory search following a “lawful impoundment” without first obtaining a search warrant. *State v. Bales*, 15 Wn. App. 834, 835, 552 P.2d 688, 689 (1976), *review denied*, 89 Wn.2d 1003 (1977); *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). Unlike a probable cause search, where the purpose is to discover evidence of a crime, the purpose of the inventory search is to perform an

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<sup>3</sup> In Washington, “[a] vehicle may lawfully be impounded if authorized by statute or ordinance. ‘In the absence of statute or ordinance, there must be reasonable cause for the impoundment.’” *State v. Bales*, 15 Wn. App. 834, 835, 552 P.2d 688 (1976) (quoting *State v. Singleton*, 9 Wn. App. 327, 331, 511 P.2d 1396 (1973)), *review denied*, 89 Wn.2d 1003 (1977). RCW 46.55.113(1) expressly authorizes law enforcement “to impound a vehicle when . . . the driver is arrested for [driving with license suspended].” *Potter*, 165 Wn.2d at 73. Additionally, the statute provides that an officer may “take custody of a vehicle, at his or her discretion” if it is “unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety.” RCW 46.55.113(2)(b).

administrative or caretaking function. *State v. Dugas*, 109 Wn. App. 592, 597, 36 P.3d 577 (2001). The principal purposes of an inventory search are: (1) to protect the vehicle owner's property; (2) to protect the police against false claims of theft by the owner; and (3) to protect the police from potential danger.<sup>4</sup> *White*, 135 Wn.2d at 769-70 (citing *Houser*, 95 Wn.2d at 154). Our Supreme Court has recognized that an additional "valid and important" purpose for the inventory search is to protect the public from vandals who might find a firearm or contraband drugs. *Houser*, 95 Wn.2d at 154 n.2 (citing *South Dakota v. Opperman*, 428 U.S. 364, 369, 376 n.10, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976)).

But the *Houser* court noted that such purposes will not serve to justify an inventory search in each and every case. *Houser*, 95 Wn.2d at 154 n.2. Accordingly, the *Houser* court limited the scope of the inventory search to protect against only "substantial risks to property in the vehicle" and invalidated the inventory search of a locked trunk because no reason existed to believe items in the trunk presented a "great danger of theft." *Houser*, 95 Wn.2d at 155.

Here, Deputy Anglin and a backup officer<sup>5</sup> cataloged two expensive, unsecured stereo amplifiers, located in the interior of the car. As a consequence of Deputy Anglin's routine and lawful cataloging, Deputy Anglin saw, in plain view, a clear baggie containing what appeared to be methamphetamine. Deputy Anglin lawfully seized this bag in plain view. *State v. Gibson*,

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<sup>4</sup> Although *White* includes this third purpose while citing *Houser*, 95 Wn.2d at 154 n.2, as further discussed above, the *Houser* court speculated that protecting the police and public from the danger of potential contraband in a vehicle would generally not justify an inventory search.

<sup>5</sup> Tyler argues that the fact that two officers searched shows lack of good faith. Although Tyler offers authority that generally discusses good faith, he fails to support this argument or otherwise persuade us that the number of officers inventorying and recording information is relevant. RAP 10.3(a)(6).

152 Wn. App. 945, 954, 219 P.3d 964 (2009) (“officer may seize evidence without a warrant if he has made a justifiable intrusion and inadvertently sights contraband in plain view.”).

Washington courts “regularly” uphold inventory searches following a lawful impoundment provided the search is not a pretext for a general exploratory search and provided police conducted these searches according to “standardized police procedures which do not give excessive discretion to the police officers.” *State v. Smith*, 76 Wn. App. 9, 14, 882 P.2d 190 (1994), *review denied*, 126 Wn.2d 1003 (1995). The “general” inventory search rule provides:

When . . . the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of a crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person’s detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

*Montague*, 73 Wn.2d at 385; *White*, 135 Wn.2d at 770 (“The general rule in Washington regarding the admissibility of evidence discovered during an inventory search accompanying the impoundment of a vehicle was set forth in *State v. Montague*.”).

Although the general rule does not mention consent, Tyler claims that police must first obtain consent before conducting an inventory search. Tyler relies on dicta from *State v. Williams*, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984).<sup>6</sup> In *Williams*, the court considered

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<sup>6</sup> Based on *Williams*, the federal Court of Appeals has stated, “[u]nder Washington law, State troopers may not conduct a routine inventory search following lawful impoundment of a vehicle without first asking the owner, if present, if he will consent to the search.” *United States v. Wanless*, 882 F.2d 1459, 1463 (9th Cir. 1989). The *Wanless* dissent notes, “[T]he majority relies exclusively on dictum in *Williams* to support its position.” *Wanless*, 882 F.2d at 1468 (Wright J., dissenting).

whether evidence found in petitioner's car was the product of an illegal search incident to arrest or alternatively, a routine inventory search. *Williams*, 102 Wn.2d at 735-36. Regarding the inventory search, the *Williams* court rejected the argument that the search was a valid routine inventory search because the police officer's decision to *impound* the vehicle did not satisfy the requisite criteria. *Williams*, 102 Wn.2d at 743. After resting its determination on this basis, the *Williams* court commented on consent:

However, even if impoundment had been authorized, it is doubtful that the police could have conducted a routine inventory search without asking petitioner if he wanted one done. The purpose of an inventory search is to protect the police from lawsuits arising from mishandling of personal property of a defendant. Clearly, a defendant may reject this protection, preferring to take the chance that no loss will occur. *See generally United States v. Lyons*, 706 F.2d 321, 335 n.23 (D.C. Cir. 1983).

*Williams*, 102 Wn.2d at 743.<sup>7</sup>

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<sup>7</sup> Our Supreme Court also commented, in dicta, on the inventory consent issue. In *White*, the issue was the *scope* of the search rather than the *validity* of the search. *White*, 135 Wn.2d at 770. In *White*, the police searched a trunk based on longstanding police department procedures and the presence of an interior release latch increasing the trunk's accessibility to a "would be thief." *White*, 135 Wn.2d at 771. Our Supreme Court held that "searches of closed and locked trunks are limited to those few situations when manifest necessity exists." *White*, 135 Wn.2d at 772. After determining that the possibility of theft did not rise to manifest necessity, the *White* court offered its thoughts on consent:

Further, the record does not indicate White was ever asked whether he would consent to an inventory search, and the State makes no claim that he was. White was never given the opportunity to reject the protection available and, thus, the search is also suspect under *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). In *Williams*, the court held police may not conduct a routine inventory search following the lawful impoundment of a vehicle without asking the owner, if present, if he or she will consent to the search. *Williams*, 102 Wn.2d at 743, 689 P.2d 1065; *see also United States v. Wanless*, 882 F.2d 1459, 1463 (9th Cir. 1989) (decided on state grounds); Robert F. Utter, Survey of Washington Search and Seizure Law: 1988 Update, 11 U. Puget Sound L. Rev. 411, 578 (1988). In Washington, an individual is free to reject the protection that an inventory search provides and take the chance that no loss will occur.

The U.S. Supreme Court reasoned that police are not required to obtain the owner's consent to inventory a properly impounded car because valid purposes of the inventory search include alerting officers of potential danger (1) to themselves or (2) to the public from items inside the car. *Opperman*, 428 U.S. 364, 376 n.10. Where the court recognizes the purposes of protecting police officers (from more than lawsuit based on property loss) and protecting the public, the car owner cannot waive an inventory after the proper impoundment of the car.<sup>8</sup>

Tyler does not challenge the lawfulness of his arrest; additionally he concedes that Deputy Anglin reasonably impounded his friend's car. Tyler did not own the car, which had expensive, unsecured stereo equipment in the backseat. Deputy Anglin searched the interior of the car in order to find, list, and secure the property from loss during Tyler's detention. *See Montague*, 73 Wn.2d at 385. In cataloging the stereo equipment, Deputy Anglin had plain view of the methamphetamine. Under these facts, we decline to hold that a non-owner's lack of consent invalidated an otherwise valid inventory search. *See Williams*, 102 Wn.2d at 747-48, (Dimmick, J., dissenting).

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We agree with the trial court that it would be inappropriate for Deputy Anglin to impound the car without inventorying the interior contents. Substantial evidence supports the trial court's finding of fact that the search was reasonable under all the circumstances and not a

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*White*, 135 Wn.2d at 771 n.11.

<sup>8</sup>*See United States v. Edwards*, 577 F.2d 883, 894 n.23 (5th Cir.) (en banc) (per curiam) (alternative holding), *cert. denied*, 439 U.S. 968 (1978); *People v. Clark*, 65 Ill. 2d 169, 357 N.E.2d 798, 800 (1976), *cert. denied*, 431 U.S. 918 (1977). *But see United States v. Wilson*, 636 F.2d 1161, 1165 (8th Cir. 1980) (alternative holding); *State v. Killcrease*, 379 So. 2d 737, 739 (La. 1980); *State v. Mangold*, 82 N.J. 575, 586, 414 A.2d 1312, 1317-18 (1980); *State v. Goff*, 166 W. Va. 47, 272 S.E.2d 457, 460 (1980) (dicta).

pretext for an evidentiary search. Therefore, we hold that the trial court did not err when it denied Tyler's motion to suppress evidence.<sup>9</sup> *Mendez*, 137 Wn.2d at 214. We affirm Tyler's convictions.

## II. MOTION TO REOPEN

Tyler also argues that the trial court abused its discretion in denying his motion to reopen the suppression hearing. He argues that Deputy Anglin's e-mail implies that Deputy Anglin might use an inventory search for evidentiary purposes under certain conditions.<sup>10</sup> He further argues the e-mail is possible evidence of a conspiracy to deprive citizens of their constitutional rights. "A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court. The manner of exercising that discretion will not be disturbed on appeal absent manifest abuse. Abuse of discretion is discretion exercised on untenable grounds for untenable reasons." *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991) (citation omitted).

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<sup>9</sup> Tyler similarly argues that the trial court erred in denying his motion to reconsider its denial of his motion to suppress evidence. This argument fails for the reasons stated above.

<sup>10</sup> Although we agree with the trial court that the first paragraph is concerning, we note that it appears less troubling when viewed in context. The first paragraph reads:

This unfortunate ruling [*Gant*, 556 U.S. 332] hinders our ability to continue the efforts that have been enforce [sic] for some time. The obvious way to circumvent this is impounding the vehicle and performing an inventory search. The problem with this is that we must afford the person the chance to contact someone else and determine if it is safely off of the roadway or not. It also obviously limits what we can search as well. The other way around this case and that is the use of a K-9.

CP at 36.

Here, the trial court described Deputy Anglin's e-mail as "concerning" but nevertheless denied the motion to reopen the suppression hearing for the following two reasons:

[T]o the extent that it could be construed as recommending vehicle impounds in every case where the driver is taken into custody, it is not a basis for reopening the instant case. First, the Court has found, and the Defendant admits, that the impound in this case was reasonable, and the finding was supported by substantial evidence as the Court has previously noted, and to do an impound without doing an inventory would be inappropriate, if not foolish. Second, this arrest, impound and inventory took place prior to the publication of the Gant decision, so the ruling in Gant could not have been the motivation for this inventory search.

CP at 41.

The State correctly concedes that the trial court's second reason is untenable because the impound and inventory took place *after* the Supreme Court published *Gant*; however, the State nonetheless asserts that the mistake has no legal effect and the court's first stated reason to deny the motion to reopen does not constitute an abuse of discretion. We agree with the State. We note that, contrary to Tyler's argument, Deputy Anglin's e-mail is not designed to circumvent court decisions but to persuade his supervisors to send him to K-9 training. We also note that Deputy Anglin's position within the department does not give him authority to shape his department's procedures. Nor is there evidence to suggest that he has particular influence with his supervisors or that they altered police procedures based on the e-mail sent six months prior to Tyler's arrest. Finally, we note that even if the letter was evidence that the officer was predisposed to unnecessary impound, here it is agreed the impound was necessary. These circumstances do not support Tyler's argument of a possible conspiracy to deprive citizens of their constitutional rights.

Tyler concedes that the impoundment was reasonable. In addition, the dangerous location of the car, the unavailability of the owner or other lawful driver, and the presence of expensive and unsecured stereo equipment in the interior of the car establish a non-pretextual basis for the inventory search. We hold that the trial court did not deny the motion to reopen on “untenable grounds for untenable reasons” nor did it exhibit manifest abuse of discretion by denying Tyler’s motion to reopen the suppression hearing because the impoundment and resulting inventory search were valid and Deputy Anglin’s e-mail does not alter the facts supporting those findings. *Sanchez*, 60 Wn. App. at 696.

### III. SUFFICIENT EVIDENCE

Tyler argues that substantial evidence does not support the trial court’s findings of facts in its memorandum opinion denying his motion to suppress evidence. Tyler specifically points to these errors: (1) an erroneous date of Tyler’s arrest and (2) the erroneous statement that Tyler and his passenger “both were engaged in furtive movements.” CP at 22.

An error by the trial court that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Non-constitutional error is not prejudicial unless, within reasonable probabilities, the error materially affected the trial’s outcome. *Bourgeois*, 133 Wn.2d at 403. To the extent that the trial court cited the incorrect date when Deputy Anglin stopped Tyler, this error has no legal effect because it had no

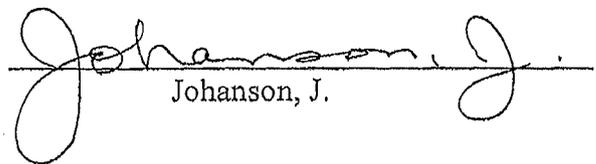
bearing on the ultimate reason for why the court denied Tyler's suppression motion. Similarly, the trial court's error stating that Tyler acted furtively has no bearing on its conclusions.

Tyler also argues that, because portions of Tyler's testimony conflict with Deputy Anglin's testimony, the trial court's findings lack sufficient evidence. But this argument relates to the trial court's credibility determinations. We defer to the trial court, which "had the opportunity to evaluate the witnesses' demeanor. We will review the trial court's inferences and conclusions, but not its findings as to credibility or the weight to be given evidence." *State v. Swan*, 114 Wn.2d 613, 637, 790 P.2d 610 (1990) (quoting *In re Pers. Restraint of Bugai*, 35 Wn. App. 761, 765, 669 P.2d 903 (1983)). Here, because we defer to the trial court's credibility determination and the weight it accords the evidence, Tyler's argument fails.

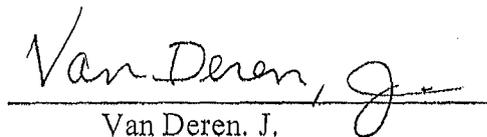
In conclusion, we hold that Deputy Anglin was not required to gain Tyler's consent before performing an inventory search, and the trial court properly exercised its discretion when it denied Tyler's motions because substantial evidence supports the trial court's findings. We also hold that the factual errors in the memorandum opinion were harmless.

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We affirm.

  
Johanson, J.

I concur:

  
Van Deren, J.

ARMSTRONG, J. (dissenting) — The trial court denied Tyler’s motion to reopen the suppression hearing in part because it erroneously believed this inventory search occurred before *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Because of this factual error, the trial court abused its discretion in denying Tyler’s motion to reopen.

We review a trial court’s decision to deny reopening a suppression hearing for an abuse of discretion. A trial court abuses its discretion when its decision is based on untenable grounds. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A trial court’s decision based on facts not supported by the record is based on untenable grounds. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

In denying Tyler’s motion to reopen, the trial court reasoned:

First, the Court has found, and the Defendant admits, that the impound in this case was reasonable, and that finding was supported by substantial evidence as the Court has previously noted, and to do an impound without doing an inventory would be inappropriate, if not foolish. Second, this arrest, impound and inventory took place prior to the publication of the Gant decision, so the ruling in Gant could not have been the motivation for this inventory search.

Clerk’s Papers (CP) at 41.

The State concedes that the second finding is incorrect. The Supreme Court published *Gant* on April 21, 2009, more than six months before the arrest in this case. *Gant*, 556 U.S. 332. Deputy Anglin’s e-mail was sent on April 23, 2009, two days after the *Gant* decision. The deputy arrested Tyler on November 12, 2009, more than six months after *Gant*. Moreover, the trial court’s comment that Tyler “admitted that the impound . . . was reasonable” is questionable. Tyler conceded that the impound was reasonable in his original motion and, arguably, again in

his motion to reconsider. But Tyler did not learn of Deputy Anglin's e-mail until after he moved for the trial court to reconsider. And Tyler did not renew his concession after that or in his briefing to us.

Deputy Anglin wrote in his e-mail that *Gant*:

[H]inders our ability to continue the efforts that have been enforce[sic] for some time. The obvious way to circumvent this is impounding the vehicle and performing an inventory search. The problem with this is that we must afford the person the chance to contact someone else and determine if [the car] is safely off of the roadway or not. It also obviously limits what we can search as well."

CP at 36.

The majority seeks to temper the sting of this by noting that the deputy wrote the message only to persuade his supervisors to send him to K-9 school, the deputy had no supervisory authority in the department, and there is no evidence he influenced his supervisors to alter police procedures. Majority at 11-12. But the question is not whether the department changed its procedures because of the e-mail, but whether Deputy Anglin utilized his "way-around-*Gant*" in post-*Gant* traffic stops and, in particular, whether he did so with Tyler. Moreover, that Deputy Anglin makes the statements in a request for K-9 training sheds no light on whether he intends to circumvent *Gant* with impound inventories. Nothing in this purpose suggests that Deputy Anglin was somehow not serious about his "way-around-*Gant*" proposal.

To be valid, the State must prove that a warrantless inventory search was "conducted in good faith and not as a pretext for an investigatory search." *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980). And to the extent the "good faith" issue turns on disputed facts, only the trial court can resolve them by weighing the evidence and making findings of fact. *See, e.g., State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

Here, Tyler testified at the suppression hearing that as soon as he exited the car, Deputy Anglin asked if he could search it. Tyler said he could not. Deputy Anglin then “went and looked in the car.” Report of Proceedings (RP) at 32. Tyler also denied that the car was within a foot of the fog line and denied that Deputy Anglin ever mentioned impounding and inventorying the car.

Deputy Anglin testified that he asked Tyler for permission to search because the passenger had acted suspiciously in trying to hide a “beer can” and Tyler appeared to be nervous. RP at 15, 17. Deputy Anglin learned that the “beer can” was actually a can of “Sparks”<sup>11</sup> when he got up to the vehicle, well before he sought permission to search. RP at 15. More telling is the deputy’s explanation of what he believed the scope of a consent search to be; he testified it would permit him to “search different areas of the vehicle which would include the trunk, locked containers if he allows us to, cell phones, under the hood.” RP at 13. Deputy Anglin’s request for permission to search signals his early interest in conducting a broad search of the vehicle.

In addition, Deputy Anglin testified that he inventoried the car and found a little blue tin in the vehicle, the size of an Altoid container. The deputy discussed the details of the container and further stated that “honestly, I do not know what they’re used for other than to hold jewelry or illicit drugs.” RP at 20. Deputy Anglin unscrewed the small blue container to look at the contents. Notably, here, Deputy Anglin did not know the Jefferson County Sheriff’s Department’s standard for inventory procedures and whether police are directed to search closed containers in the vehicle. *See Florida v. Wells*, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990) (the lack of standardized procedures by police resulted in the exclusion of marijuana

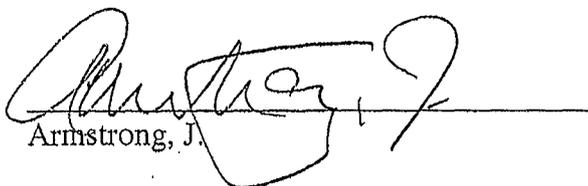
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<sup>11</sup> Sparks is a malt beverage that contains alcohol.

No. 40634-9-II

seized from a locked suitcase discovered by police while conducting an inventory search of a vehicle).

These circumstances together with the deputy's e-mail are more than sufficient to warrant a further hearing to determine whether something is constitutionally amiss with Deputy Anglin's "inventory" of Tyler's vehicle. I would remand for the trial court to reopen the suppression issue.

  
Armstrong, J.

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**From:** "Brett Anglin" <banglin@co.jefferson.wa.us>  
**To:** "Ben Stamper" <bstamper@co.jefferson.wa.us>; "Mike Stringer" <mstringer@co.jefferson.wa.us>;  
"Andy Pernsteiner" <apernsteiner@co.jefferson.wa.us>  
**Cc:** "Anthony Hernandez" <ahernandez@co.jefferson.wa.us>  
**Sent:** Thursday, April 23, 2009 8:03 PM  
**Subject:** RE: Search incident to arrest

Sir's,

This unfortunate ruling hinders our ability to continue the efforts that have been enforce for some time. The obvious way to circumvent this is impounding the vehicle and performing an inventory search. The problem with this is that we must afford the person the chance to contact someone else and determine if it is safely off of the roadway or not. It also obviously limits what we can search as well. The other way around this case and that is the use of a K-9.

I understand that Scott will be attending the narcotic school for K-9's in the coming months, which will be a huge tool to combat the methamphetamine proliferation ( a little George B there) that has consumed Hadlock and the surrounding communities for some time. If used appropriately, and in a Deputies hands that is available to use it, I believe that this ruling will have little effect....

The obvious problem is that Scott is just one Deputy. He will be off three days out of the week and working only 10 hours a day, plus vacations. I understand that budgeting is a concern, however I believe that implementing an additional K-9 would have little cost and many rewards.

The training to attend the school which would include a dog is \$1500.00. Through various contacts though the community I am confident that I can obtain this money, and the maintenance money (food etc) from business leaders and or possibly though the drug fund. Obviously the cost to the department would be a lost Deputy for 6 weeks (one week break between) and 14 hours a month OT. The OT hours per month could be mitigated by a schedule change when there is adequate coverage. Or possibly a combination of the two.

We still have a half cage at the county shop that could be outfitted to work. The cage could be outfitted to fold to a full cage when there is no need to transport a suspect.

As you know, I have always had an interest in the enforcement of drugs etc. This program is relatively low cost and if found too cumbersome, it could be terminated at any time. It also allows a back up in the event that one of the dogs (or Deputies) becomes sick or injured.

The next class at DOC is not until January 2010. I will by no means have my feelings hurt if your decide that this is not in the best interest of JC50 and the citizens of Jeffcol

Respectfully submitted,

Brett Anglin

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**From:** Ben Stamper  
**Sent:** Thursday, April 23, 2009 7:56 AM  
**To:** Adam Newman; Alex Mintz; Anita Hicklin-Reserve Officer; Barb Garrett; Brett Anglin; Brian Anderson; Brian

12/31/2009

FILED

10 JAN 21 PM 1:07

JEFFERSON COUNTY  
RUTH GORDON, CLERK

SUPERIOR COURT OF WASHINGTON  
COUNTY OF JEFFERSON

STATE OF WASHINGTON, )  
Plaintiff, )  
vs. )  
LARRY DEAN TYLER, )  
Defendant. )

NO. 09-1-00197-4

MEMORANDUM OPINION  
AND ORDER ON MOTION  
TO SUPPRESS EVIDENCE

I. MOTION:

Defendant Tyler moves under CrR 3.6 to suppress evidence found in the vehicle he was driving when arrested on February 11, 2009. Defendant contends that the impoundment and inventory search of the vehicle was an impermissible search by virtue of the U.S. Supreme Court's recent decision in Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1710 (2009).

The State responds that the impound was proper per statute, and a necessary exception to the prohibition against warrantless searches.

II. FACTS:

On February 11, 2009, Jefferson County Deputy Sheriff Brett Anglin, a ten-year veteran patrol officer, observed a vehicle traveling in an easterly direction on S.R. 104 just west of the Hood Canal Bridge which appeared to be speeding. He turned around and clocked the vehicle at 65 m.p.h. in a 60 m.p.h. zone. A license plate check disclosed that the registered owner of the vehicle was a female whose license was suspended.

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3 Deputy Anglin pulled the vehicle over for speeding, and the driver stopped the  
4 vehicle approximately one foot outside of the fog line, on the paved shoulder. As he  
5 approached the vehicle, Anglin could see the driver was a male, that he had a male  
6 passenger, and that both were engaged in furtive movements suggestive of a person  
7 attempting to hide something.  
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9 The driver had no license, but produced a medical card identifying him as Larry  
10 Dean Tyler. The passenger was identified verbally as Jeffery N. Bennett. A check with  
11 dispatch revealed both had suspended licenses. Anglin arrested Tyler for DWLS, patted  
12 him down for weapons, placed him in handcuffs and sat him in the backseat of his  
13 patrol car. While he was doing this, the officer he had called for "back-up" arrived and  
14 took Bennett into custody for outstanding warrants, after determining that he had been  
15 trying to hide an open alcoholic beverage can between his legs. The "outstanding  
16 warrants" ultimately were not confirmed, and Bennett was released at the scene.  
17

18 At some time during this process, the exact timing of which is not clear, Anglin  
19 asked for permission to search the vehicle, which was denied by both occupants. Tyler,  
20 who appeared very nervous, informed the arresting officer that his girlfriend, Cheryl A.  
21 King, who owned the vehicle, could not be called to retrieve it because she was in jail in  
22 Clallam County. Anglin authorized him to give his cell phone to Bennett to make some  
23 calls for help, which were to no avail. Bennett was able to arrange a ride for himself,  
24 but not a driver for the vehicle.  
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26 With the vehicle parked on the shoulder of a busy highway, and nobody  
27 available to drive it away, Deputy Anglin decided to impound it and called a private  
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towing company. While waiting for the tow truck to arrive, he and the back-up officer conducted a routine inventory search of the passenger compartment, which he testified was done pursuant to standard department policies to secure personal property and to protect the department and towing company. In his testimony, Deputy Anglin contended that the impound and removal of the vehicle was essential for traffic safety reasons.

In the course of the inventory search the officers found a small, round, blue metal container under the driver's seat which revealed a small quantity of methamphetamine when the lid was screwed off. They also found a small package of methamphetamine powder on the floor behind the driver's seat after sliding the seat forward. It is this evidence which the defendant seeks to suppress.

III. ANALYSIS:

The recent decision in Gant greatly restricted the scope of searches of a vehicle incident to the arrest of its driver, other than a search for evidence of the crime for which the driver is being arrested, and even that will usually required the obtaining of a search warrant once the driver is safely secured in the back of a patrol car.

But this new restriction does not erase the narrow exceptions which allow a warrantless search under certain circumstances. As the Gant court said at 129 S. Ct. 1710, 1723-24:

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

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evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable *unless* police obtain a warrant *or show that another exception to the warrant requirement applies*. (emphasis added).

Inventory searches after impoundment are a recognized exception to the prohibition against warrantless searches. State v. Simpson, 95 Wn. 2d 170, 622 P. 2d 1199 (1980). RCW 46.55.113 specifically authorizes impoundment after an arrest for several enumerated traffic offenses, including Driving While License Suspended, at the discretion of the arresting officer. But, if there is a sober licensed driver available, the exercise of discretion and impoundment will be appropriate only where there is no reasonable alternative. State v. Peterson, 92 Wn. App. 899, 964 P. 2d 1231 (1998). In Peterson the facts were very similar to the instant case: the driver had a suspended license, the owner was not available to retrieve the vehicle or authorize someone else to do so, and leaving the car along side the road did not provide adequate protection for the law enforcement agency authorizing the impound, nor did it adequately provide for traffic safety.

Deputy Anglin opined that it was simply not safe to leave the vehicle parked along a busy highway, just one foot outside the fog line. As a life-time resident of the North Olympic Peninsula, who has driven this stretch of road hundreds of times, this Court can take judicial notice of the following facts: SR 104 is busy and congested at this location as vehicles decelerate to approach the bridge; the intersection at the west end of the bridge is a frequent accident scene; and cars are accelerating and passing each other as they leave the bridge and proceed west on the two lanes provided for

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westbound traffic. It is not a safe place to leave an abandoned vehicle, adding to the congestion and restricted sight lines, and making the vehicle vulnerable to vandalism and theft.

The defendant is correct in asserting that impoundment cannot be a pretext for an explanatory search. State v. Montagne, 73 Wn. 2d 381, 438 P. 2de 571 (1968). "The determinative test, therefore, of the legality of the search is its reasonableness under all of the circumstances." Id. At 389. Here, the defendant's concern is understandably aroused by the fact that the arresting officer sought, and was denied, permission to search, and stated in his testimony that the furtive acts by both occupants made him worried about the availability of weapons. However, with the weapons issue resolved by the removal of both occupants from the vehicle, there was no reason for a general, exploratory search. Any evidence of using the impound as a pretext for a warrantless search is rebutted by the officer's offer to let the passenger call for help, once he knew the owner was in jail and not available to assist to retrieve her vehicle.

The Court is satisfied that the impound was reasonable and not a pretext for an exploratory search. The arresting officer had compelling reasons to impound the vehicle, and having done so, it was incumbent upon him to inventory its content before turning it over to the tow truck driver.

The defendant contends that the blue container did not need to be opened as long as it was inventoried and received. This ignores the fact that it may have contained jewelry, money, or other small items with significant valuable which could be stolen.

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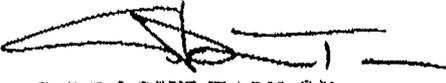
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IV. DECISION:

The Court rules that the impound and inventory search were reasonable under all of the circumstances, and the Motion to Suppress is therefore denied.

DATED this 20<sup>th</sup> day of JAN., 2010.

Respectfully submitted,



S. BROOKE TAYLOR  
JUDGE

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vehicle at or during impound. To impound a vehicle, and then fail to conduct an inventory of its contents because the vehicle operator (in this case, not the owner) denies permission to search, would not only be contrary to department policy, but would expose the Department to future claims needlessly.

While the email statement by Deputy Anglin is concerning, to the extent that it could be construed as recommending vehicle impounds in every case where the driver is taken into custody, it is not a basis for reopening the instant case, for two reasons. First, the Court has found, and the Defendant admits, that the impound in this case was reasonable, and that finding was supported by substantial evidence as the Court has previously noted, and to do an impound without doing an inventory would be inappropriate, if not foolish. Second, this arrest, impound and inventory took place prior to the publication of the Gant decision, so the ruling in Gant could not have been the motivation for this inventory search.

III. DECISION:

For the reasons stated above, the Defendant's Motion for Reconsideration is denied, and the Defendant's Motion to Reopen is denied.

DATED this 19<sup>th</sup> day of FEB., 2010.

Respectfully submitted,



S. BROOKE TAYLOR  
JUDGE

## RCW 46.55.113

Removal by police officer. (*Effective until July 1, 2011.*)

(1) Whenever the driver of a vehicle is arrested for a violation of RCW 46.61.502, 46.61.504, 46.20.342, or 46.20.345, the vehicle is subject to summary impoundment, pursuant to the terms and conditions of an applicable local ordinance or state agency rule at the direction of a law enforcement officer.

(2) In addition, a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances:

(a) Whenever a police officer finds a vehicle standing upon the roadway in violation of any of the provisions of RCW 46.61.500, the officer may provide for the removal of the vehicle or require the driver or other person in charge of the vehicle to move the vehicle to a position off the roadway;

(b) Whenever a police officer finds a vehicle unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety;

(c) Whenever a police officer finds an unattended vehicle at the scene of an accident or when the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property;

(d) Whenever the driver of a vehicle is arrested and taken into custody by a police officer;

(e) Whenever a police officer discovers a vehicle that the officer determines to be a stolen vehicle;

(f) Whenever a vehicle without a special license plate, placard, or decal indicating that the vehicle is being used to transport a person with disabilities under RCW 46.16.381 is parked in a stall or space clearly and conspicuously marked under RCW 46.16.381 which space is provided on private property without charge or on public property;

(g) Upon determining that a person is operating a motor vehicle without a valid and, if required, a specially endorsed driver's license or with a license that has been expired for ninety days or more;

(h) When a vehicle is illegally occupying a truck, commercial loading zone, restricted parking zone, bus, loading, hooded-meter, taxi, street construction or maintenance, or other similar zone where, by order of the director of transportation or chiefs of police or fire or their designees, parking is limited to designated classes of vehicles or is prohibited during certain hours, on designated days or at all times, if the zone has been established with signage for at least twenty-four hours and where the vehicle is interfering with the proper and intended use of the zone. Signage must give notice to the public that a vehicle will be removed if illegally parked in the zone;

(i) When a vehicle with an expired registration of more than forty-five days is parked on a public street.

(3) When an arrest is made for a violation of RCW 46.20.342, if the vehicle is a commercial vehicle and the driver of the vehicle is not the owner of the vehicle, before the summary impoundment directed under subsection (1) of this section, the police officer shall attempt in a reasonable and timely manner to contact the owner of the vehicle and may release the vehicle to the owner if the owner is reasonably available, as long as the owner was not in the vehicle at the time of the stop and arrest and the owner has not received a prior release under this subsection or RCW 46.55.120(1)(a)(ii).

(4) Nothing in this section may derogate from the powers of police officers under the common law. For the purposes of this section, a place of safety may include the business location of a registered tow truck operator.

[2007 c 242 § 1; 2007 c 86 § 1; 2005 c 390 § 5. Prior: 2003 c 178 § 1; 2003 c 177 § 1; 1998 c 203 § 4; 1997 c 86 § 7; 1996 c 89 § 1; 1994 c 275 § 32; 1987 c 311 § 10. Formerly RCW 46.01.005.]

## Notes:

**Reviser's note:** This section was amended by 2007 c 86 § 1 and by 2007 c 242 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Finding -- 1998 c 203:** See note following RCW 46.01.100.

**Short title -- Effective date -- 1994 c 275:** See notes following RCW 46.04.010.

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## RCW 46.55.113

Removal by police officer. (*Effective July 1, 2011.*)

Notary Public  
LARRY D. TYLER  
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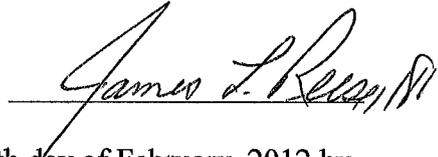
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STATE OF WASHINGTON )  
COUNTY OF KITSAP )

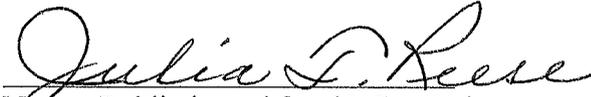
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 27th day of February, 2012, he hand delivered for filing the original Petition for Review in State of Washington v. Larry D. Tyler, No. 40634-9-II to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; mailed one (1) copy of the same to the office of Jefferson County Prosecuting Attorney, P.O. Box 1220, Port Townsend, WA 98368-1220; and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant at his last known address; Larry D. Tyler, 1305 East 1<sup>st</sup> Street, Apt. #8, Port Angeles, WA 98362.



Signed and Attested to before me this 27th day of February, 2012 by  
James L. Reese, III.



Notary Public in and for the State of  
Washington residing at Port Orchard.  
My Appointment Expires: 04/04/13