

NO. 87104-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LARRY D. TYLER,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLES

TABLE OF CONTENTS

	Page
I. STATEMENT OF ISSUES	1
No. 1- No. 4	1
II. STATEMENT OF THE CASE	1
<i>Statement of Procedure</i>	1
<i>CrR 3.6 Hearing</i>	3
<i>Court of Appeals' Holding</i>	6
III. SUMMARY OF ARGUMENT	8
IV. ARGUMENT	10
A. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S DENIAL OF THE MOTION TO RE-OPEN THE CASE.	10
<i>Abuse of Discretion</i>	11
<i>The Requirement of Good Faith</i>	12
<i>The Requirement of Consent</i>	13
<i>Requirement of Standardized Police Procedures</i>	15
B. THE COURT OF APPEALS ERRED WHEN IT DECIDED THAT THE TRIAL COURT'S ERRORS WERE HARMLESS.	18
V. CONCLUSION	20

APPENDIX

Court of Appeals Opinion (pp. 1-17) A
Incident Report 11/12/2009 B
RP 23-24 C
CrR 3.6(b) D

TABLE OF AUTHORITIES

TABLE OF CASES

State v. Bales, 15 Wn.App. 834,
552 P.2d 688 (1976), *review denied*,
89 Wn.2d 1003 (1977) 7,8,12

State v. Bourgeois, 133 Wn.2d 389,
945 P.2d 1120 (1997) 20

State v. Duncan, 146 Wn.2d 166,
43 P.3d 513 (2002) 14

State v. Greenway, 15 Wn.App. 216,
547 P.2d 1231 (1976) 12

State v. Houser, 95 Wn.2d 143,
622 P.2d 1218 (1980) 6,8,13,18

State v. Mennegar, 114 Wn.2d 304,
787 P.2d (1990) 19

State v. Mireles, 73 Wn.App. 605,
821 P.2d 162 (Div. III), *review denied*,
124 Wn.2d 1029 (1994) 15,18

State v. Montague, 73 Wn.2d 381,
438 P.2d 571 (1968) 10,12

State v. Rundquist, 79 Wn.App. 786,
905 P.2d 922 (1995) 12

State v. Sanchez, 60 Wn.App. 687,

806 P.2d 782 (1991)	12
<i>State v. Simpson</i> , 95 Wn.2d 170, 622 P.2d 1199 (1980)	7
<i>State v. Singleton</i> , 9 Wn.App. 327, 511 P.2d 1396 (1973)	7
<i>State v. Smith</i> , 76 Wn.App. 9, 882 P.2d 190 (1994), <i>review denied</i> , 126 Wn.2d 1003 (1995)	13,15
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 982 (1998)	8,9,14
<i>State v. White</i> , 83 Wn.App. 770, 924 P.2d 55 (1996) <i>rev'd on other grounds</i> , 135 Wn.2d 761 (1998)	15
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984)	6,14
<hr/>	
<i>Arizona v. Gant</i> , 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)	1,2,5,8,10,12,20
<i>Cady v. Dombroski</i> , 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973)	12
<i>Colorado v. Bertine</i> , 479 U.S. 367, 93 L.Ed.2d 739 107 S.Ct. 738 (1987)	16
<i>Katz v. United States</i> , 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967)	14
<i>Florida v. Wells</i> , 495 U.S. 1, 109 L.Ed.2d 1, 110 S.Ct. 1632 (1990)	17

South Dakota v. Opperman, 428 U.S. 364,
49 L.Ed.2d 1000, 96 S.Ct. 3092 (1976) 12,15,16

United States v. Wanless, 882 F.2d 1459
(9th Cir. 1989) 13

State v. Mangold, 82 N.J. 575,
414 A.2d 1312 (1980) 9

CONSTITUTIONAL PROVISIONS

Fourth Amendment 9,12,18
Wash. Const. Art. 1, sec. 7 8,18,20

STATUTES

RCW 46.20.342(1(c)) 2
RCW 69.50.4013(1) 2
RCW 69.50.412(1) 2

RULES AND REGULATIONS

CrR 3.6 1,2,3

OTHER AUTHORITIES

Johnson, Justice Charles W., *Survey of Washington
Search and Seizure Law: 2005 Update*,
28, 683 Sea. Univ. LRS (2005) 15

Utter, Justice Robert F., *Survey of Washington Search and
Seizure Law: 1988 Update*, 11 UPS LR 411 (1988) 6,10

I. STATEMENT OF ISSUES

1. Whether the trial court erred when it denied the defendant's CrR 3.6 Motion to suppress the evidence, where neither the driver-arrestee-Mr. Tyler nor the owner, consented to an inventory search?
2. Whether the trial court erred when it denied the defendant's motion to reconsider its decision denying the motion to suppress drug evidence discovered during an inventory search of the vehicle the defendant was driving?
3. Whether the trial court erred when it denied the defendants 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 United States Supreme Court decision of April 21, 2009 in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L. Ed.2d 485 (2009).

4. Whether their was sufficient evidence to support the trial court's determination of contested facts stated in its Memorandum Opinion and Order on Motion to Suppress Evidence?

II. 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 counts occurred on November 12, 2009. id.

The defendant filed a CrR 3.6 motion to suppress the evidence. CP 6. The trial court filed a Memorandum Opinion and Order on Motion to Suppress Evidence and denied the motion to suppress. CP 26.

The defendant then filed a motion to reconsider on January 29, 2010. CP 31. This was followed by defendant's motion to reopen the CrR 3.6 hearing that was filed on February 3, 2010. CP 33.

The motion to re-open was based on an e-mail authored by the arresting officer on April 23, 2009. The e-mail concerned issues involved in the CrR 3.6 hearing, namely the United Supreme Court case of *Arizona v. Gant, supra*. The email stated in 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.)

Both of these motions were denied by a written Memorandum Opinion on February 19, 2010. CP 40. Thereafter, Mr. Tyler was found guilty based on stipulated facts of Count I and Count III at a stipulated bench trial conducted on April 19, 2010. RP 59-60. He was found not guilty of Count II. RP 60.

CrR 3.6 Hearing

Deputy Brett Anglin testified that he was a deputy sheriff for Jefferson County in traffic enforcement. RP 9. He was on duty on November 11 (sic), 2009. id. 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. The vehicle was stopped for speeding.

Upon being stopped, Larry Dean Tyler, "...stated that he did not have a driver's license." RP 11. The passenger was observed "trying to hide a beer can between his legs." id. 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 3rd degree, searched and placed in the patrol car. id. Another deputy arrived and a "trooper" dealt with the passenger. RP 13. Deputy Anglin 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 then called for an impound tow.¹ id

Deputy Anglin 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.

The deputies then inventoried the vehicle while they waited for the tow truck. RP 16. While conducting the “impounded inventory” Deputy

¹ 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.

Anglin 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." id.

On re-cross examination the deputy Anglin testified that before *Gant* an inventory search was called "search incident to arrest." RP 23. He further 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.² RP 24.

Examination of the officer continued about the inventory search procedure. The deputy testified that he initiated the option of the passenger-at the driver's direction- calling someone to pick up the vehicle. RP 27. If someone was contacted- such as the owner- they were given a "...a reasonable amount of time, which is usually less than 30 minutes, the amount of time it would take a tow to get there, as well." RP 28. The third

² 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.

option, besides having the vehicle towed, was to lock it and have the vehicle retrieved at a later time if roadway safety conditions allow. id.

Larry Tyler testified that 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...” RP 32. He was then handcuffed and placed in the back of the patrol car. id.; CP 5.

Court of Appeals’ Holding

The divided Court of Appeals’ opinion held that consent was not required, that the seized evidence was the result of a lawful inventory search and there was substantial evidence to support the court’s rulings.

The majority of the Court of Appeals reasoned that since Tyler had conceded that Deputy Anglin’s impound of the vehicle was reasonable, therefore the only issue to be decided was whether the inventory search was conducted in good faith following a lawful impoundment.³ Op. at 5.

³ The vehicle was impounded pursuant to the community care taking function of the police. “When impoundment would be permitted as part of the police community caretaking function, police must first make an inquiry as to the availability of the owner or the owner’s spouse or friends to move the vehicle.” Justice Robert F. Utter *Survey of Washington Search and Seizure Law: 1988 Update* 11 UPS LR 411, 576 (1988) (citing *State v. Williams*, 102 Wn.2d 733, 743 689 P.2d 1065 (1984); *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980); *State*

J. Armstrong's dissenting opinion questioned the validity of Tyler's concession that the impound was reasonable in light of Tyler's motion to re-open the suppression hearing following disclosure of Deputy Anglin's e-mail. This e-mail suggested circumvention of the landmark, United States Supreme Court decision in *Arizona v. Gant, supra*.

Essentially, the Court of Appeal's majority opinion found that under all the circumstances the search was reasonable and was not a pretext for an evidentiary search. Op. at 9-10. The court held that consent of the owner to inventory the impounded vehicle was not required. However, it based its decision on the less protective federal constitutional standard set forth in *South Dakota v. Opperman*, 428 U.S. 364, 376 n. 10, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). Op. at 9. (Federal courts do not require the owner's permission to search.)

Secondly, the two person majority of the Court of Appeals determined that the trial court did not abuse its discretion when it denied Tyler's motion to reopen the suppression hearing. Op. at 10 (citing *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991) ("A motion to reopen a proceedings for the purpose of introducing additional evidence is

v. Simpson, 95 Wn. 2d 170,189, 622 P.2d 1199 (1980); *State v. Bales*, 15 Wn. App. 834,836-37, 522 P.2d 688 (1976); *State v. Singleton*, 9 Wn. App. 327, 333, 511 P.2d 1396 (1973)).

addressed to the sound discretion of the trial court.”) id.

The Court of Appeals discounted the import of Deputy Anglin’s e-mail. The court noted: “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.” Op. at 11.

The court also discounted the clearly erroneous determination by the trial court that this impound and inventory occurred prior to the *Gant* decision rather than two days after as the record shows.⁴

III. SUMMARY OF ARGUMENT

This appeal calls into question the trend in the law concerning impound and inventory: a narrowly construed exception to the warrant requirement. The reasoning of the Court of Appeals’ decision is at odds with the reasoning and protection of the law as set forth in *State v. White*, 135 Wn.2d 761, 958 P.2d 982 (1998); *State v. Houser*, 95 Wn.2d 143; *State v. Williams*, 102 Wn.2d 733; *State v. Bales*, 15 Wn. App. 834 and Const. Art. 1, sec. 7.

It is now axiomatic that Washington’s constitution provides greater

⁴ According to J. Armstrong: “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*.” Op. at 14.

protection to an individual's right to privacy and protection from searches than does the Fourth Amendment. *White*, 135 Wn. 2d at 769. This protection should be extended to include the obligation of law enforcement to obtain the express permission of the vehicle's owner or spouse or the driver, if the owners are not available.

The Court of Appeals decision focused on the need for an inventory search in this appeal because of the "expensive, unsecured stereo equipment". Op. at 6, 9. Tyler testified that there was no discussion about impounding his vehicle. RP 32-3. He testified that there was no discussion about whether he wanted the contents inventoried before the vehicle was impounded. RP 33.

Yet, Tyler was charged with all illegal items found in the interior of the vehicle. See *State v. Mangold*, 82 N.J.575, 577, 414 A.2d 1312 (1980) (although impoundment is lawful, inventory search of vehicle contents is unlawful when the vehicle's occupants were not first given the opportunity to safeguard their property.)

The Court of Appeal dissenting opinion observed and stated: "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.” Op. at 14-15.

IV. ARGUMENT

A. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT’S DENIAL OF THE MOTION TO RE-OPEN THE CASE.

Gant held “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 evidence of the offense of arrest.” 129 S.Ct. 1723. The court’s concern was the “recurring threat to privacy of countless individuals” where a person is stopped and arrested for a traffic offense and the police thereupon search the interior of the vehicle.⁵ *id.* Deputy Anglin’s concern was expressed in his reactionary e-mail three days later when he wrote: “The obvious way to circumvent this is impounding the vehicle and performing an inventory search.” CP 36.

According to *State v. Montague*, 73 Wn.2d. 381, 389-90, 438 P.2d 571 (1968) the purpose of an inventory search is “...for the dual purpose of

⁵ Impoundment for enforcement of traffic regulation is not mandatory. Utter *Survey of Washington Search and Seizure Law: 1988 Update* 11 UPS LR at 576. See also statement in *Gant* that is contrary to Deputy Anglin’s request to search: “In many cases, as when a recent occupant is arrested for a traffic violation there will be no reasonable basis to believe the vehicle contains relevant evidence.”*Id.* 129 S.Ct. at 1719.

protecting its contents from undue risk during storage and protecting the police and the bailee from false claims of loss or theft.”

Instead of granting citizens of Washington greater protection from “giving officers unbridled discretion to rummage at will among a person’s belongings”- as the United States Supreme Court was concerned about- Deputy Anglin would resort to an inventory search or in his words: “The other way around this case and that is the use of a K-9.” CP 36. According to the defendant’s argument at the time of the motion to reopen: “It certainly provides proof of Deputy Anglin’s predisposition to engage in the use of pretext to search a vehicle...despite the lack of evidentiary basis for the search.”⁶ CP 33-5.

Abuse of Discretion

The Court of Appeals was not alarmed by the deputy’s e-mail and noted instead: “We note that, contrary to Tyler’s argument Deputy Anglin’s e-mail is not designed to circumvent court decisions but to persuade his superiors to send him to K-9 training.” Op. at 11. However, the trial court based its decision not to reopen the case because it erroneously found that the Deputy could not have any motivation to

⁶ The deputy’s e-mail also stated” “If used appropriately, [K-9] and in a Deputies hands that is available to use it, I believe that this ruling will have little effect...” (ellipsis are the author’s) CP 36.

circumvent *Gant* because Tyler's arrest occurred before the *Gant* decision.

This was an abuse of discretion because, as noted by the dissenting opinion: "The Supreme Court published *Gant* on April 21, 2009, more than six months before the arrest in this case." Op. at 14. The dissent stated: "A trial court's decision based on facts not supported by the record is based on untenable grounds." (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)); See, *State v. Sanchez*, 60 Wn.App. at 696 (Abuse of discretion is discretion exercised on untenable grounds for untenable reasons.") Thus, based on the time-line of the case, Deputy Anglin had motivation to circumvent *Gant* during this incident.

The Requirement of Good Faith

An officer's inventory search following an impound must be conducted in "good faith" in lieu of obtaining a search warrant. *State v. Bales*, 15 Wn.App. 834, 835, 552 P.2d 688 (1976), *review denied*, 89 Wn.2d 1003 (1977); *State v. Greenaway*, 15 Wn.App. 216, 547 P.2d 1231 (1976); *Montague*, 73 Wn.2d at 385; This test is also required under the Fourth Amendment. *South Dakota v. Opperman*, 428 U.S. 364, 49 L.Ed.2d 1000, 96 S.Ct.3092 (1976); *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973).

Inventory searches will be upheld on appeal if the search is not a pretext for a general exploratory search. *Montague* at 385. Here, two

police officers thoroughly “inventoried” the subject vehicle and a state trooper was watching the passenger. RP 13; CP 44. However, none of the officers attempted to contact the owner to obtain permission to search the vehicle or to determine who owned the stereo amplifiers: Tyler, his passenger, the vehicle’s owner or someone else. The tension in this appeal is between constitutional courts- who protect privacy rights from unreasonable searches- and law enforcement’s unbridled discretion in conducting inventory searches without the requirement of a warrant.

The Requirement of Consent

According to *United States v. Wanless*, 882 F.2d 1459, 1463 (9th Cir. 1989): “[U]nder Washington law, State troopers may not conduct a routine inventory search following a lawful impoundment of a vehicle without first asking the owner, if present, if he will consent to the search.” This is the federal interpretation of our state’s law. However, this court should grant to the citizens of this state greater protection than under the federal interpretation.

According to *State v. Houser, supra* at 154 the purposes of an inventory search are to find, list, and secure from loss during detention of property “belonging to a detained person” as well as to protect the police and storage bailees from liability. See *Smith*, 76 Wn.app. at 13 “protect the arrestee’s property”. After Tyler refused to consent to search

the deputies next searched the vehicle without personally attempting to contact the owner. RP 14, CP 5.

A warrantless search is presumed unreasonable pursuant to the federal and state constitutions. *Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967); *State v. Duncan* 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). This court stated in *State v. White*:

“Further, the record does not indicate White was ever asked whether he would consent to an inventory search...White was never given the opportunity to reject the protection available, and thus, the search is also suspect under *State v. Williams*...”

135 Wn.2d at 771. According to *State v. Williams*, at 743 “...even if the 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.”⁷

Where it is not possible to obtain the owner’s consent, it becomes paramount to follow standardized inventory procedures in order to conduct a search in good faith with regulation and not as a pretext to an investigatory search. Here, the State was unable to articulate any standardized inventory procedures involving a search by two police

⁷ In *Williams* the driver was referred to as the petitioner. The court stated more broadly in its opinion and in its reasoning: “Clearly, a *defendant* may reject this protection, preferring to take the chance that no loss will occur.” *Williams* at 743 (emphasis mine.)

officers at the same time where the driver of the impounded vehicle stated that he would not consent to the search.

According to Justice Charles W. Johnson *Survey of Washington Search and Seizure Law: 2005 Update* 28, 683 Sea. Univ. LR 467, 683-84 (2005) “Routine inventory searches are reasonable under the Fourth Amendment when police follow standard practices and the search is not a pretext for obtaining evidence the police would not be able to obtain otherwise.”(citing *South Dakota v. Opperman*, 428 U.S. at 375 and *State v. White*, 83 Wn.App. 770, 775, 924 P.2d 55 (1996), *rev’d on other grounds*, 135 Wn.2d 761 (1998)).

Requirement of Standardized Police Procedures

Additionally, the search in this case was not conducted pursuant to the requirement of “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 court stated in *State v. Mireles*, 73 Wn.App. 605, 612, 821 P.2d 162 (Div. III), *review denied*, 124 Wn.2d 1029 (1994):

“The central inquiry in an inventory search is whether it is reasonable under all of the circumstances of the particular case. *Opperman* at 373 (citation omitted). Using this analysis, inventory searches conducted according to standardized police procedures have been upheld as reasonable where there is no showing of excessive discretion or investigatory motive.

Opperman, at 372, *Bertine* at 375.”

(citing *Colorado v. Bertine*, 479 U.S. 367, 93 L.Ed.2d 739, 107 S.Ct. 738 (1987)). Knowledge of the Jefferson County impound procedures and policy was essential when Deputy Anglin was told by Mr. Tyler that he did not have permission to search the vehicle and the deputy then looked into the vehicle .⁸ *Opperman* pointed out that standard procedures are a factor “...to ensure that the intrusion would be limited in scope....” *id.* at 376.

Deputy Anglin testified that he had not read any state law about inventory searching. RP 24. He did not know what the Jefferson County Sheriff’s Office policy was on inventory searching and he did not know what it stated.⁹ RP 24. The deputy testified that he initiated an option of the passenger calling someone to pick up the vehicle. RP 27; Op. at 2.

However, it did not appear from the testimony that Tyler was ever given the opportunity to contact the owner or any other lawful driver

⁸ See J. Armstrong’s dissenting opinion: “Deputy Anglin’s request for permission to search signals his early interest in conducting a broad search of the vehicle.” Op. at 16.

⁹ The deputy testified: “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. Compare Court of Appeals finding: “Deputy Anglin also inventoried the car based on the sheriff office’s impound policy and standard practice.” Op. at 2.

directly before the search. RP 33.¹⁰ Compare Deputy Anglin's e-mail "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 the roadway or not." CP 36.¹¹

In *Florida v. Wells*, 495 U.S. 1, 109 L.Ed.2d 1, 110 S.Ct. 1632 (1990) there was no record of the procedures or policies of the police with regard to opening closed containers found during inventory searches. This lack of standardized procedures resulted in the exclusion of a large amount of marijuana seized by police from a locked suitcase while conducting an inventory search of the defendant's vehicle. The United States Supreme court held that "Absent such a policy, the ...search was not sufficiently

¹⁰ Tyler's testified: "Q. Did Officer Anglin ask you whether there was someone that could come and pick up the vehicle? A. No. Q. Uh, what about this interaction over your telephone with Deputy Anglin and the passenger of the vehicle? A. Uh, the deputy came and asked me if, uh, I was willing to let the passenger use the phone for the purpose of getting a ride home....Q. Uh, did you hear the passenger talking on your telephone? A. No." RP 33.

¹¹ See dissenting opinion: "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."...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." Op. at 16; RP 32.

regulated to satisfy the Fourth Amendment.”¹² id. at 5.

Deputy Anglin’s testified to his understanding of inventory consent searches to allow 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 13. This is the type of general exploratory search that is conducted to obtain evidence. See dissenting opinion. Op. at 16.

Under either the Fourth Amendment or const. Art. 1, sec. 7 the reasonableness of the search is determined by the facts and circumstances of each case. *Mireless*, at 613; *Houser* at 148. Under the facts and circumstances of this case the search was unreasonable for the reasons stated.

B. THE COURT OF APPEALS ERRED WHEN IT DECIDED THAT THE TRIAL COURT’S ERRORS WERE HARMLESS.

Where constitutional rights are at issue the standard of review of trial court findings should be an independent evaluation of the evidence.

¹² According to the Court of Appeals: “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 on consider it in our analysis.” Op. at 2.

Anglin testified that the reason he opened the screw top container was in the event there “could have been possibly jewelry” “Or anything else that was of value.” RP 22. Compare J. Armstrong’s dissenting opinion citing *Wells*: “Notably, here Deputy Anglin did not know the Jefferson county Sheriff’s Department standard for inventory procedures and whether the police are directed to search closed containers in the vehicle.” Op. at 16.

State v. Mennegar, 114 Wn.2d 304, 309-10, 787 P.2d 1347 (1990). The trial court did not enter written findings of fact or conclusions of law as required by CrR 3.6(b) (see appendix). *State v. Smith*, 68 Wn. App. 201, 208, 842 P.2d 494 (1992). Instead, the trial court issued a written Memorandum Opinion. CP 21.

Clearly, the trial court's first finding that this incident occurred on February 11, 2009 was in error. CP 2; Counts I, II and III. More importantly the trial court found that Anglin conducted "...a routine inventory search of the passenger compartment, which he testified was done pursuant to standard department policies...." CP 23. However, based on Deputy's Anglin's testimony on re-direct examination he clarified that he did not know how police policies related to inventory searches. RP 24.

It was not determined what the policy was with regard to a deputy and another officer inventorying the same vehicle at the same time. It is questionable that two officers would "inventory" a vehicle from the same side. The deputy testified that the vehicle was one foot off the roadway. If that were indeed the case, then wouldn't both the other deputy¹³ and Deputy Anglin have had to have been inventorying the vehicle from the right side at the same time?

¹³ Deputy Dennis. CP 5; RP 18.

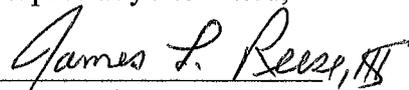
The trial court's errors resulted in prejudice to the defendant and affected the trial court's conclusions of law. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). By mis-stating the date of the incident as February 9, 2009 when it first denied the defendant's motion to suppress the evidence caused the trial court to later error in its conclusion denying the motion to re-open. The court erroneously concluded "...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 41.

V. CONCLUSION

Two officers inventoried the vehicle. Neither showed that they attempted to contact the owner before the search. In the absence of neither the owner's nor the driver's consent to inventory the vehicle, law enforcement should not be authorized pursuant to Cons. art. 1, sec. 7 to search a vehicle without a search warrant. The search in this case was not reasonable because it was not shown to be conducted pursuant to standardized department procedures.

Dated this 4th day of July 2012.

Respectfully submitted,


James L. Reese, III
WSBA 7806
Court Appointed Attorney

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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 passenger¹ 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.²

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

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

² 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 impounded³ 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

³ 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.⁴ *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 officer⁵ 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*,

⁴ 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.

⁵ 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).⁶ In *Williams*, the court considered

⁶ 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 743.⁷

⁷ 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.⁸

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).

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

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

⁸See *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.⁹ *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.¹⁰ 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).

⁹ 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.

¹⁰ 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.

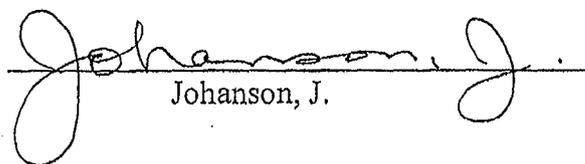
An error by the trial court that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Non-constitutional error is not prejudicial unless, within reasonable probabilities, the error materially affected the trial’s outcome. *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.

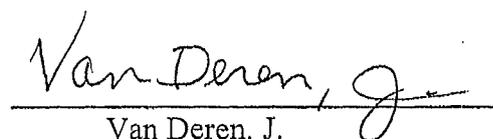
Tyler also argues that, because portions of Tyler's testimony conflict with Deputy Anglin's testimony, the trial court's findings lack sufficient evidence. But this argument relates to the trial court's credibility determinations. We defer to the trial court, which "had the opportunity to evaluate the 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.

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”¹¹ 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.

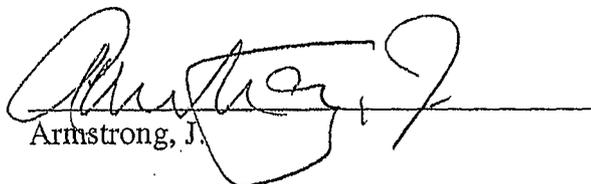
In addition, Deputy Anglin testified that he inventoried the car and found a little blue tin in the vehicle, the size of an Altoid container. The deputy discussed the details of the container and further stated that “honestly, I do not know what they’re used for other than to hold jewelry or illicit 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

¹¹ 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.

0906710

REPORT NUMBER

Jefferson County Sheriff's Office
79 Elkins Rd, Port Hadlock, WA 98339
INCIDENT REPORT



NARRATIVE

REPORTED BY 12 ANGLIN, BRETT

REPORT FILED 11/12/2009

On 11-12-09 at about 1230 I was patrolling Highway 104 heading west when I noticed a blue Chevrolet Camaro, license 093XND. The vehicle was travelling 65 in a posted 60 zone. I ran the plate of the vehicle and received a return that the registered owner, Cheryl A. King, was DWLS in the third degree. As I approached the vehicle, I could tell that it was a male driver. I initiated a vehicle stop and contacted the driver, who was identified as Larry D. Tyler. I informed Tyler that I had stopped him for his speed, which he just nodded in response. Tyler provided me with a Medicare card and stated that he did not have a license. As I was approaching the vehicle, I could tell that the passenger was attempting to conceal an item between his legs. As I got closer to the vehicle I could tell that it was an alcohol container. I asked the passenger for ID, which he verbally gave me as Jeffery N. Bennett.

I returned to my patrol car and ran both through Jeffcom. Jeffcom replied that Tyler was DWLS in the third degree. I approached and informed Tyler that he was under arrest for DWLS 3rd. I secured Tyler in handcuffs and placed him in my patrol vehicle. Bennett was DWLS as well and had several warrants that were eventually not confirmed. I contacted All City towing who was to respond and take custody of the vehicle. I asked Bennett and Tyler for consent to search all containers of the vehicle and Tyler refused.

Deputy Denney and I performed an inventory search of the vehicle. During this search I located a Blue small metal container under the driver's seat. The container was small but could have concealed Jewelry. I opened the container and located a brown substance that appeared to be possibly been Heroin, however it was not NIK tested. I located a clear plastic baggy that contained a white residue. The baggy was located underneath the driver's seat and on the rear floorboard. This was visible once the seat was moved forward to record the amplifiers in the back seat for the impound form. I cut a corner of the baggy and NIK tested it using a methamphetamine NIK test. I received a positive result for the presence of methamphetamine.

I read Tyler his miranda rights from my department issued card. Tyler did not respond to any questioning. All City arrived on scene and took custody of the vehicle. I provided Bennett the cell phone belonging to Tyler per his request. Bennett was able to contact a ride and I transported Tyler to JCSO where he was booked for VUCSA possession of methamphetamine and DWLS 3rd.

I hereby swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Deputy Brett Anglin Port Hadlock, Jefferson County Washington 11-12-09

B

ATTACHMENT

A

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RE-CROSS EXAMINATION

BY MR. DAVIES:

Q: So your understanding is state law requires you to inventory vehicles if you're going to impound them?

A: I do not know state law. I know it's common practice in law enforcement throughout the state.

Q: Well, (*inaudible*) was, you know, search incident to arrest before *Gant* came down, yeah?

A: But we did inventory searches before that, as well. It's just that it was called search incident to arrest then, if anything of evidence was found.

Q: Yeah. So it's kind of a distinction without a difference isn't it? I'll withdraw the question. Uh, so you're not aware of a state law that requires you to do an inventory search, whether the driver of the vehicle wants it or not?

A: I would say I'm ignorant of that.

Q: Sorry?

A: I'm ignorant of that.

Q: Okay.

A: I've never researched it, nor do I know.

Q: But you are aware that there's internal Jefferson County Sheriff's Department policy on inventorying and searching impounded vehicles?

A: I would ha-- assume so. I don't recall the policy directly. I know it's been that way for ten years that I've been there, in every other jurisdiction in that, that I've seen.

Q: So it's almost just habit that you're doing this then?

1 A: Uh...

2 MR. ASHCRAFT: Objection, Your Honor.

3 COURT: Overruled. He can answer.

4 A: It's what I was trained to do.

5 Q: And you were trained before Gant, yes?

6 A: Uh, yes.

7 Q: So you don't know if there's a state law, or what it says about
8 inventory searching, yes?

9 A: I have never read it.

10 Q: Okay. And you don't know if there is a Jefferson County
11 Sheriff's Office policy on inventory searching, uh, and if there
12 is you don't know what it says, right?

13 A: That is correct.

14 Q: All right. Thank you, I don't have any further questions.

15 COURT: Any follow up?

16 RE-REDIRECT EXAMINATION

17 BY MR. ASHCRAFT:

18 Q: So, I just want to make sure I'm clear. So you don't know if
19 there is a policy?

20 A: I'm sure there is, but I have not read it in several years. And
21 it's changed, so, I'm not sure what it says exactly. So testify to
22 what it says, I would not want to.

23 Q: Okay. But you have-- so your testimony would be there is a
24 policy and you have read it though, at some point?

25 A: There's likely a policy, yes. But would I know what it says or
26 how it relates to an inventory search I honestly could not
27 testify, I'd have to go get the policy and then read it.

Guilty as provided for by CrR 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

(3) *Standards for Video Conference Proceedings.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.

[Amended effective September 1, 1995; December 28, 1999; April 3, 2001.]

Comment

Supersedes RCW 10.01.080; RCW 10.46.120, .130; RCW 10.64.020, .030.

RULE 3.5 CONFESSION PROCEDURE

(a) **Requirement for and Time of Hearing.** When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) **Duty of Court to Inform Defendant.** It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) **Duty of Court to Make a Record.** After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) **Rights of Defendant When Statement Is Ruled Admissible.** If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

**RULE 3.6 SUPPRESSION HEARINGS—
DUTY OF COURT**

(a) **Pleadings.** Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) **Hearing.** If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[Adopted effective May 15, 1978; amended effective January 2, 1997.]

4. PROCEDURES PRIOR TO TRIAL

RULE 4.1 ARRAIGNMENT

(a) **Time.**

(1) *Defendant Detained in Jail.* The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of the superior court, if the defendant is (i) detained in the jail of the county where the charges are pending or (ii) subject to conditions of release imposed in connection with the same charges.

(2) *Defendant Not Detained in Jail.* The defendant shall be arraigned not later than 14 days after that

appearance which next follows the filing of the information or indictment, if the defendant is not detained in that jail or subject to such conditions of release. Any delay in bringing the defendant before the court shall not affect the allowable time for arraignment, regardless of the reason for that delay. For purposes of this rule, "appearance" has the meaning defined in CrR 3.3(a)(3)(iii).

(b) **Objection to Arraignment Date—Loss of Right to Object.** A party who objects to the date of arraignment on the ground that it is not within the time limits

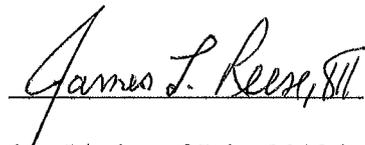
PROOF OF SERVICE

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 5th day of July, 2012, he deposited in the mails of the United States of America, postage prepaid, the original and one (1) copy of Supplemental Brief of Petitioner in State of Washington v. Larry D. Tyler, No. 87104-3, for filing, to the office of Ronald R. Carpenter, Clerk, Supreme Court, Temple of Justice, P.O. Box 40929, Olympia, WA 98504-0920, mailed one (1) copy of the same to Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys, 206 10th Avenue S.E., Olympia, WA 98501, and mailed (1) copy of the same to Appellant at his last known address; Larry D. Tyler, 1305 East 1st Street, Apt. #8, Port Angeles, WA 98362.



Signed and Attested to before me this 5th day of July, 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