

62839-9

62839-9

No. 62839-9-1

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

**STATE OF WASHINGTON, Respondent,**

**v.**

**WILILAM LOREN FIFE, Appellant.**

---

**BRIEF OF RESPONDENT**

---

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2009 OCT 26 PM 11:05

**DAVID S. McEACHRAN,  
Whatcom County Prosecuting Attorney  
By HILARY A. THOMAS  
Appellate Deputy Prosecutor  
Attorney for Respondent  
WSBA #22007**

**Whatcom County Prosecutor's Office  
311 Grand Avenue, Second Floor  
Bellingham, WA 98225  
(360) 676-6784**

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR..... 1

C. FACTS ..... 2

    1. Procedural Facts ..... 2

    2. Substantive Facts ..... 3

D. ARGUMENT ..... 6

    1. While Fife’s motion to suppress did not contest the search of the vehicle incident to arrest, the holding of Gant would apply to the search, but the evidence obtained from the search is admissible upon independent grounds. .... 6

        a. *retroactive application of Gant*..... 7

        b. *probable cause to search the vehicle*..... 9

        c. *inevitable discovery pursuant to an inventory search*..... 12

        d. *good faith exception*..... 15

        e. *Should the Court find that the record is insufficient to support the finding that the challenged evidence would have been admissible under either the theory of inevitable discovery or probable cause, the State moves that the Court remand the matter for additional testimony regarding those issues.*..... 27

    2. The jury instructions did not fail to include an essential element of Unlawful Possession of a Controlled Substance because the statutory proviso regarding a

	<b>valid prescription is an affirmative defense not an element of the crime.....</b>	<b>29</b>
<b>3.</b>	<b>There was sufficient evidence to support the jury’s verdict that Fife unlawfully possessed controlled substances. ....</b>	<b>31</b>
<b>4.</b>	<b>A unanimity instruction was not necessary on the heroin count because the State elected to prosecute under the “prior possession” theory. ....</b>	<b>34</b>
<b>5.</b>	<b>The court did not err in computing Fife’s offender score.....</b>	<b>38</b>
<b>6.</b>	<b>The trial court did not abuse its discretion in running Fife’s confinement terms consecutive pursuant to RCW 9.94A.589(3). ....</b>	<b>44</b>
<b>E.</b>	<b>CONCLUSION .....</b>	<b>46</b>

**TABLE OF AUTHORITIES**

**Washington State Court of Appeals**

In re Delmarter, 124 Wn. App. 154, 101 P.3d 111 (2004), *rev. den.* by In re Shaw, 154 Wn.2d 1024 (2005) ..... 33

In re Detention of Brooks, 94 Wn. App. 716, 973 P.2d 486 (1999), *aff'd in part, rev'd in part on other grounds*, 145 Wn.2d 275 (2001)..... 27

State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), *overruled on other grounds*, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).. 36

State v. Brown, 33 Wn. App. 843, 658 P.2d 44, *rev. den.*, 99 Wn.2d 1012 (1983)..... 30, 31

State v. Champion, 134 Wn. App. 483, 140 P.3d 633 (2006), *rev. den.* 160 Wn.2d 1006 (2007), *cert. den.*, 128 S.Ct. 510 (2007) ..... 45

State v. Eddie, 40 Wn. App. 717, 700 P.2d 751 (1985)..... 33

State v. Gould, 58 Wn. App. 175, 791 P.2d 569 (1990)..... 8

State v. Hernandez, 85 Wn. App. 672, 935 P.2d 623 (1997)..... 32, 33

State v. King, 149 Wn. App. 96, 202 P.3d 351, *rev. den.* \_\_\_ Wn.2d \_\_\_ (2009)..... 45

State v. Labarbera, 128 Wn. App. 343, 115 P.3d 1038 (2005)..... 42

State v. Lampley, 136 Wn. App. 836, 151 P.3d 1001 (2006)..... 45

State v. Lawson, 37 Wn. App. 539, 681 P.2d 867 (1984) ..... 31

State v. Lucero, \_\_\_ Wn. App. \_\_\_, 2009 WL 2915729, ¶ 14, 15 ..... 39, 41

State v. McCormick, \_\_\_ Wn. App. \_\_\_, 216 P.3d 475 ¶10 (2009)... 8, 18, 21

State v. Millan, 151 Wn. App. 492, 212 P.3d 603 (2009) ..... 8, 28

<u>State v. Priest</u> , 147 Wn. App. 662, 196 P.3d 763 (2008), <i>rev. den.</i> , 166 Wn.2d 1007 (2009).....	44
<u>State v. Peterson</u> , 92 Wn. App. 899, 964 P.2d 1231 (1998).....	14
<u>State v. Richman</u> , 85 Wn. App. 568, 933 P.2d 1088, <i>rev. den.</i> 133 Wn.2d 1028 (1997).....	12
<u>State v. Wilson</u> , 113 Wn. App. 122, 52 P.3d 545 (2002), <i>rev. den.</i> , 149 Wn.2d 1006 (2003).....	42

**Washington State Supreme Court**

<u>In re St. Pierre</u> , 118 Wn.2d 321, 823 P.2d 492 (1992).....	8
<u>Sears v. Grange Ins. Ass'n</u> , 111 Wn.2d 636, 762 P.2d 1141 (1988), <i>overruled on other grounds by Butzberger v. Foster</i> , 151 Wn. 2d 396, 89 P.3d 689 (2004).....	27
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000) .....	8
<u>State v. Bradshaw</u> , 152 Wn.2d 528, 98 P.3d 119 (2004).....	30
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997).....	11
<u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006) .....	22, 23, 24
<u>State v. Carver</u> , 113 Wn.2d 591, 781 P.2d 1308, 789 P.2d 306 (1989)....	33
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991), <i>cert. den.</i> , 501 U.S. 1237 (1991).....	36
<u>State v. Ford</u> , 137 Wn. 2d 472, 973 P.2d 452 (1999) .....	3, 8, 42
<u>State v. Joy</u> , 121 Wn.2d 333, 851 P.2d 654 (1993) .....	32
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986) .....	10
<u>State v. Kirwin</u> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	21
<u>State v. Kitchen</u> , 110 Wn. 2d 403, 756 P2 105 (1988) .....	35

<u>State v. McAlpin</u> , 108 Wn.2d 458, 740 P.2d 824 (1987) .....	8
<u>State v. Mendoza</u> , 165 Wn.2d 913, 205 P.3d 113 (2009).....	39, 42
<u>State v. O’Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	12
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984), <i>modified on other grounds</i> , <u>State v. Kitchen</u> , 110 Wn. 2d 403, 756 P.2d 105 (1988).....	35
<u>State v. Potter</u> , 156 Wn.2d 835, 132 P.3d 1089 (2006) .....	22, 23
<u>State v. Ringer</u> , 100 Wn.2d 686, 674 P.2d 1240 (1983).....	9
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	32
<u>State v. Staley</u> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	30
<u>State v. Stroud</u> , 106 Wn.2d 144, 720 P.2d 436 (1986) .....	24
<u>State v. Vrieling</u> , 144 Wn.2d 489, 28 P.3d 762 (2001) .....	24
<u>State v. White</u> , 135 Wn.2d 761, 958 P.2d 982 (1998) (quoting <u>State v. Montague</u> , 73 Wn.2d 381, 438 P.2d 571 (1968)) .....	passim

**Federal Authorities**

<u>Arizona v. Gant</u> , ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) .....	passim
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).....	44
<u>Griffith v. Kentucky</u> , 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987).....	7
<u>Herring v. United States</u> , ___ U.S. ___, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).....	17, 26
<u>Michigan v. DeFillippo</u> , 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).....	16, 17, 23, 24

<u>Olmstead v. United States</u> , 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928).....	25
<u>Teague v. Lane</u> , 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)8	
<u>United States v. Calandra</u> , 414 U.S. 338, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974).....	15
<u>United States v. Gonzales</u> , 578 F.3d 1130 (9 <sup>th</sup> Cir. 2009) .....	18
<u>United States v. Grote</u> , 2009 WL 2068023, 3 (E.D. Wash., 2009).....	18
<u>United States v. McCane</u> , 573 F.3d 1037 (10 <sup>th</sup> Cir. 2009), <i>petition for cert.</i> <i>filed</i> (U.S. Oct. 1, 2009) (No. 09-402) .....	19
<u>United States v. Ross</u> , 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).....	9
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963).....	16

### **Rules and Statutes**

CrR 3.6.....	8, 28
RAP 1.2 and 1.8.....	27
RAP 2.5.....	28
RAP 2.5(a) .....	8
RAP 9.11(a) .....	27
RCW 9.94A.500(1).....	43
RCW 9.94A.500 (2008).....	42
RCW 9.94A.517.....	3
RCW 9.94A.525(1).....	43

RCW 9.94A.530(2).....	39, 41
RCW 9.94A.530(2) (2008) .....	39
RCW 9.94A.589.....	2, 44, 46
RCW 46.55.113 .....	14
RCW 69.50.4013 .....	2, 29, 30
RCW 69.50.506 .....	30

**Other Authorities**

2003 Washington Laws Chapter 53 §1 .....	30
WPIC 50.02.....	30

**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether Arizona v. Gant should be applied retroactively on appeal where the defendant did file a motion to suppress but did not contest the search.
2. Whether the controlled substances found in the search incident to arrest should be suppressed pursuant to Arizona v. Gant, where there was probable cause to search the vehicle for evidence of contraband where the defendant admitted that there were illegal needles and pills inside the car, he appeared to be under the influence of heroin, and he told the officers he had injected himself with heroin earlier that day.
3. Whether the controlled substances found in the search incident to arrest should be suppressed pursuant to Arizona v. Gant, where the drugs inevitably would have been discovered during an inventory search when the vehicle was impounded and towed.
4. Whether evidence found in a search now unlawful under Arizona v. Gant should not be suppressed pursuant to the federal good faith exception to the exclusionary rule where the officers relied in good faith on prevailing caselaw in conducting the search incident to arrest.
5. Whether the jury instructions failed to include an alleged essential element for the offense of unlawful controlled substances where the valid prescription statutory exception is an affirmative defense.
6. Whether there was sufficient evidence of the defendant's unlawful possession of heroin where heroin-related drug paraphernalia found when the defendant was stopped, and the defendant's drug intoxication corroborated defendant's

statement that he had injected himself with heroin earlier that day.

7. Whether a unanimity instruction was required where the prosecutor elected the defendant's prior possession of heroin as the act and used the other heroin-related evidence at the scene of the stop as circumstantial evidence to corroborate the defendant's admission.
8. Whether the sentence imposed should be affirmed where defendant waived his allegation of offender score error by failing to object to the existence of the 1976 burglary below, the documents produced by the State proved the existence of the prior burglary by a preponderance of the evidence and where any error was harmless because the standard range was the same without the inclusion of the burglary.
9. Whether the trial court violated Blakely in imposing the sentence consecutive under RCW 9.94A.589(3) where no additional findings are required and the trial court has total discretion to impose a consecutive sentence under that statute.

## **C. FACTS**

### **1. Procedural Facts**

Appellant William Fife was charged with seven counts of Unlawful Possession of a Controlled Substance, in violation of RCW 69.50.4013(1), for his acts on or about August 2<sup>nd</sup> 2008. CP 99-102. The counts related to seven different substances, count I for hydrocodone, count II for diazepam, count III for alprazolam, count IV for clonazepam, count V for suboxone, count VI for cocaine and count VII for heroin. *Id.* Defense filed a motion to suppress based on the warrantless stop of the

vehicle. CP 103-10. After the motion was denied, Fife was found guilty by jury of all counts. CP 40-43, 58-59. The court also found Fife's statement to the officers to have been voluntary and found them admissible. CP 44-45.

At sentencing, the prosecutor presented evidence of Fife's criminal history, including over 30 misdemeanor and 12 felony convictions. RP 413-15; CP 25, 125. On an offender score range of six to nine, Fife faced 12+ - 24 months of confinement time. RCW 9.94A.517; CP 27. The court found that Fife had an offender score of 8 and imposed the top of the range, 24 months, and expressly ordered it to run consecutively to a sentence imposed on Fife's previous felony conviction under cause number 07-1-01636-1. RP 440; CP 27, 30.

## **2. Substantive Facts**

At the 3.5/3.6 hearing on Nov. 3, 2008, the testimony showed that Whatcom County Sheriff's Office deputies were informed near midnight on August 2, 2008, via broadcast that Fife was believed to be driving a blue or turquoise Ford Probe, in the vicinity of the Guide Meridian near Lynden, that he had a felony warrant out for his arrest, that he had no permanent address and his license to drive was suspended in the third degree. CP 41; RP 20-22. About five minutes later, Dep. Wagenaar spotted and pulled over the Ford Probe which Fife in fact was driving. CP

41; RP 22, 24-25, 27, 29-30. Dep. Wagenaar asked Fife to step out of the car and detained him until the warrant was confirmed, after which he was arrested and read his rights by Dep. Polinder, who had arrived on the scene. RP 31-32, 50.

After Fife indicated he understood his rights, Dep. Polinder informed Fife he was going to search the vehicle and asked Fife if there was anything illegal in the car and to whom the car belonged. RP 51. Fife said he was borrowing the car, that it belonged to Andrea Willis, that he had just been in Lynden picking up some belongings, and that there were needles and probably pills in the car. RP 51. The registered owner for the vehicle was a Lauren Woods. RP 56.

Dep. Polinder, who is trained to detect the presence of controlled substances in humans, opined that Fife appeared to be high on some drug. RP 53. In response to Polinder's question about that, Fife told the deputy that he had used heroin earlier that day and had injected it into his buttocks. RP 53. When Fife was searched pursuant to his arrest, \$1265 was found in his wallet.<sup>1</sup> RP 54. When asked about that, Fife denied selling drugs and stated he had gotten the money from gambling and selling cars. Id.

---

<sup>1</sup> Fife states that the wallet was found inside the car, but the wallet was found on Fife when he was searched. RP 53, 195.

At trial additional testimony was produced regarding the stop. Dep. Wagenaar testified that the car pulled over into a parking lot after he activated his lights. RP 114-15, 161. There was no one else in the car besides Fife. RP 116, 119. Fife was outside the car within one minute after being pulled over, handcuffed, and placed inside one of the patrol cars within a couple minutes thereafter, before the search of the car. RP 117, 134, 141-42, 165. Fife was arrested on the warrant and for driving while license suspended. RP 117. Fife was cooperative but lethargic and his symptoms were consistent with someone who appeared to be under the influence of heroin. RP 124-26, 164-65.

The deputies planned on searching the car incident to arrest pursuant to the Sheriff's policy and standard procedure. RP 120, 162. At first glance, the car had "obvious drug paraphernalia" in it and there were needles "in plain sight," and some needles were located on the floorboard area of the driver's and passenger's sides, and some in the center console area. RP 166-67. Due to the nature of the case, the felony drugs found inside and the fact that Fife's license was suspended, the car was impounded and towed. RP 142, 276-77.

**D. ARGUMENT**

- 1. While Fife's motion to suppress did not contest the search of the vehicle incident to arrest, the holding of Gant would apply to the search, but the evidence obtained from the search is admissible upon independent grounds.**

The State agrees that Gant<sup>2</sup> applies retroactively to this case. Gant, however, does not require reversal of every vehicle search conducted incident to arrest. Gant allows vehicle searches under a variety of circumstances and the facts must be examined on a case-by-case basis to determine whether the search remains valid even under a retroactive application of Gant. Here, the evidence obtained from the search is admissible under the still viable federal exception of a vehicle search based upon probable cause, as well as inevitable discovery via an independent inventory search. Should the Court find that the evidence in the record is insufficient for a determination that there was probable cause to search the car or that the evidence of possession of drugs would have been inevitably discovered during an inventory search, the State would request this Court address the applicability of the good faith exception and/or remand for additional testimony and findings regarding the admissibility of the evidence found in the search post-Gant.

---

<sup>2</sup> Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

*a. retroactive application of Gant*

In Arizona v. Gant, \_\_\_ U.S. \_\_\_, 129 S. Ct 1710, 173 L.Ed.2d 485 (2009), the United States Supreme Court adopted two new rules concerning vehicle searches incident to arrest. The first is that police may search a vehicle incident to arrest only when the occupant is unsecured and within reaching distance of the vehicle's passenger compartment. Gant, 129 S. Ct at 1714. The second is that a vehicle search incident to arrest is allowed when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle. *Id.* Gant, however, also recognized that vehicle searches might be lawful under other bases, including, e.g., probable cause to believe that evidence of a crime was present in the vehicle, officer safety, and exigent circumstances. *Id.*

The State agrees that Gant must be applied to cases currently pending in trial courts and on direct appeal.<sup>3</sup> Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a “clear break” with the past); Teague v.

---

<sup>3</sup> Because Gant articulated a new constitutional rule that represents a clean break from the past it will not apply to cases on collateral review. Teague v. Lane, 489 U.S. 288, 298, 311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

Lane, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); In re St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992). Division II of the Court of Appeals recently held that Gant should be applied retroactively to ensure that “similarly situated defendants whose appeals are pending direct review deserve like treatment following a change in the law.” State v. McCormick, \_\_\_ Wn. App. \_\_\_, 216 P.3d 475, ¶10 (2009). While the defendant’s motion to suppress in this case did not raise the “Gant” issue, and therefore normally he would be precluded from raising this issue for the first time on appeal,<sup>4</sup> as a case pending on appeal at the time of issuance of the decision, Gant applies retroactively to this case. The State, however, does not agree that the evidence obtained during the search of the vehicle should have been suppressed, but rather asserts that it is and was admissible on alternate grounds. *See*, State v. Bobic, 140 Wn.2d 250, 257-258, 996 P.2d 610 (2000) (trial court’s denial of a motion to suppress may be upheld on an alternative ground supported by the record).

---

<sup>4</sup> *See*, State v. Millan, 151 Wn. App. 492, 499-501, 212 P.3d 603 (2009), *disagreed with by State v. McCormick, supra* (defendant waived Gant issue by failing to move for suppression in trial court). In general, issues not raised in the trial court may not be raised on appeal. State v. Ford, 137 Wn. 2d 472, 477, 973 P.2d 452 (1999); RAP 2.5(a). The burden is on the defendant to request a suppression hearing and identify the issue for the trial court. CrR 3.6; State v. Gould, 58 Wn. App. 175, 185, 791 P.2d 569 (1990). “In fairness, the opposing party to a new issue should have an opportunity to be heard on it. This opportunity to be heard should not be delayed until the appellate stage, absent unusual circumstances.” State v. McAlpin, 108 Wn.2d 458, 462, 740 P.2d 824 (1987).

*b. probable cause to search the vehicle*

Under the rules articulated in Gant, evidence obtained pursuant to the search of a vehicle incident to arrest may still be admissible because Gant permits vehicle searches under several alternative bases. One such federal exception to the warrantless search of a vehicle is based on probable cause to believe that the vehicle contains contraband or evidence of a crime. United States v. Ross, 456 U.S. 798, 807-09, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).<sup>5</sup> The scope of such a search is the same as that would be permitted by a warrant issued by a court, and includes containers and packages found inside the vehicle if there is probable cause to suspect contraband within that type of container. *Id.* at 800, 820-21, 824. This exception to the warrant requirement was specifically approved in Gant:

*If there is probable cause to believe a vehicle contains evidence of criminal activity, United States v. Ross... authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by Justice SCALIA's opinion concurring in the judgment in Thornton, which we conclude today are reasonable for purposes of the Fourth Amendment, Ross allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader.*

Gant, 129 S.Ct. at 1721(emphasis added and citation omitted). Thus, if there is probable cause to believe a vehicle might contain evidence of

---

<sup>5</sup> This exception would not apply under State Constitutional grounds. *See State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983).

criminal activity or contraband, a broad search of the inside of the vehicles, including containers within, is justified without a warrant under federal law.

At the time Fife was arrested he appeared to be under the influence of heroin. Prior to the search but after he had been advised of his rights, Fife told the officers that he had injected himself earlier that day with heroin. He also told the officers that he had just retrieved his belongings from someone else's house. When asked whether there was anything illegal inside the vehicle, he told the officers that there were needles and probably pills. He had over one thousand dollars in his wallet. This information constitutes probable cause to believe that there was contraband and/or evidence of criminal activity (driving under the influence) within the vehicle at the time the officers searched the vehicle incident to arrest. In addition, a deputy observed drug paraphernalia, including hypodermic needles on the floorboards of the car and in the center console area in "plain view."<sup>6</sup> Although Gant would require

---

<sup>6</sup> It appears from the record given the location of the needles and drug paraphernalia that at least some of this evidence could have been observed from outside the car, in "open view." An officer's "open view" observation is an observation from a nonconstitutionally protected area, and such observations therefore do not constitute a search. State v. Kennedy, 107 Wn.2d 1, 10, 726 P.2d 445 (1986). It's likely that the deputy who testified is not familiar with the legal distinction between "plain" and "open view."

suppression of the evidence under a search incident to arrest theory, it would uphold the admissibility of the evidence obtained in the search under a probable cause basis.

Fife asserts that there wasn't probable cause to search the vehicle independent of the search incident to arrest.<sup>7</sup> He asserts specifically that his statement to the officers that there were illegal needles in the car cannot be used to establish probable cause because his statement wasn't voluntary. However, his statement was made after he was advised of his rights and the court concluded that his statements to the officers were voluntary and admissible at trial in the CrR 3.5 hearing. Fife has not contested those findings on appeal or assigned error to them.<sup>8</sup> Therefore, this Court may consider that statement in determining whether there was probable cause to search the car for evidence of illegal drug activity and evidence of driving while under the influence of drugs. Even if this Court were not to consider that specific statement in determining probable cause, the rest of the record here is sufficient to establish probable cause.

---

<sup>7</sup> While Fife references Article 1 §7 in his brief, his argument for suppression of evidence is clearly based on Gant and federal, not state, law.

<sup>8</sup> “[F]ailure to assign error to the trial court’s findings on the voluntariness of a confession will leave them verities on appeal.” State v. Broadaway, 133 Wn.2d 118, 133, 942 P.2d 363 (1997).

c. *inevitable discovery pursuant to an inventory search*

The evidence obtained in the search of the vehicle incident to arrest is also admissible because it would have been inevitably discovered during the course of the inventory search of the vehicle. Under the inevitable discovery rule, the State “must prove by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered using lawful measures.” State v. O’Neill, 148 Wn.2d 564, 591, 62 P.3d 489 (2003). Under Washington law, the State must also prove that law enforcement did not act unreasonably in an attempt to accelerate discovery and that the lawful measures used were “proper and predictable investigatory procedures.” State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000). The State must show that the means of obtaining the evidence would truly have been independent and truly inevitable, without speculating as to whether or how the evidence would have been discovered. *Id.* at 18. The State’s required showing, however, may be implied from the circumstances as long as it does not require speculation. *See, State v. Richman*, 85 Wn. App. 568, 578-80, 933 P.2d 1088, *rev. den.* 133 Wn.2d 1028 (1997) (evidence sufficient under inevitable discovery rule where it showed there was probable cause to arrest the defendant for

shoplifting prior to the briefcase being opened and where officer testified that defendant was not free to leave and his routine procedure in a search incident to arrest included searching such containers); State v. White, 76 Wn. App. 801, 809, 888 P.2d 169 (1995), *aff'd on other grounds*, 129 Wn.2d 105 (1996) (evidence that showed officer had probable cause to arrest defendant and had every intention of doing so was sufficient to demonstrate that the evidence would have been obtained inevitably in a search incident to arrest).

Evidence of a crime discovered during a proper inventory search is admissible.

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*, 73 Wash.2d 381, 438 P.2d 571 (1968).

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.

State v. White, 135 Wn.2d 761, 770, 958 P.2d 982 (1998) (quoting State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968)). Under Washington statute, officers are permitted to impound a vehicle when the driver's license has been suspended and/or when the driver has been arrested and taken into custody. RCW 46.55.113(1), (2)(e).

Here the record shows the officers impounded the vehicle and had the vehicle towed. The car did not belong to Fife. Fife indicated that he borrowed the car from someone named Andrea Willis, but the registered owner was someone different. The car was pulled over into a parking area off the roadway, but no one else was in the car besides Fife, and he was arrested on the felony warrant as well as for driving with his license suspended. Even if the officers had not searched the car incident to arrest, the record is sufficient to reflect that the vehicle would have been impounded and towed anyway and the drugs discovered in an inventory search of the car. *See*, State v. Peterson, 92 Wn. App. 899, 964 P.2d 1231 (1998) (impoundment and subsequent inventory search proper where no owner of car present to authorize someone to move car or to authorize leaving the car where it was parked).

*d. good faith exception*<sup>9</sup>

Even if there is no basis to uphold the validity of the search under Gant, the State respectfully submits that evidence obtained during this vehicle search, conducted in reliance on pre-Gant case law, should not be suppressed. The exclusionary rule should not be applied here because the search was conducted by an officer in reasonable reliance on presumptively valid case law. The federal exclusionary rule has long recognized reversal is not required when officers relied in good faith on a statute that is subsequently deemed unconstitutional.<sup>10</sup> There is no basis to suppress the evidence when officers have relied on long-standing and presumptively valid federal and state case law that allows vehicle searches incident to arrest.

The exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights *generally through its deterrent effect*” by excluding evidence that is the fruit of an illegal, warrantless search. United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct 613, 38 L. Ed. 2d 561 (1974) (emphasis added). Evidence derived directly or indirectly

---

<sup>9</sup> It’s the State’s understanding that the issue of the application of the good faith exception to searches determined to be invalid pursuant to Gant is currently before the Washington State Supreme Court in State v. Coreyell Adams, No. 82210-7.

<sup>10</sup> Gant was decided purely on Fourth Amendment grounds. Gant, 129 S. Ct at 1714. Absent any basis to address state constitutional issues, the Fourth Amendment analysis is controlling.

from illegal police conduct is an ill-gotten gain, “fruit of the poisonous tree,” that should be excluded from evidence. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct 407, 9 L. Ed. 2d 441 (1963). The United States Supreme Court, however, has recognized that evidence obtained after an illegal search should not be excluded if it was not obtained by the exploitation of an initial illegality. Wong Sun, 371 U.S. at 488.

Consistent with these basic principles, the United States Supreme Court in Michigan v. DeFillippo, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), held that an arrest (and subsequent search) under a statute that was valid at the time of the arrest remains valid even if the statute is later held to be unconstitutional.

At that time [of the underlying arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. *A prudent officer*, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, *should not have been required to anticipate that a court would later hold the ordinance unconstitutional*. Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality – with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. *Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement*.

DeFillippo, 443 U.S. at 37-38 (emphasis added). The Court further noted:

[T]he purpose of the exclusionary rule is to deter unlawful police action. *No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search.* To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

DeFillippo, 443 U.S. at 38, n.3 (emphasis added). Accordingly, in DeFillippo, the Supreme Court upheld the arrest, search, and subsequent conviction of the defendant even though the statute that justified the stop was subsequently deemed to be unconstitutional.<sup>11</sup> DeFillippo, 443 U.S. at 40.

The only difference between DeFillippo and the present case is the nature of the legal authority relied upon by the officer conducting the search. In DeFillippo, the arrest was based on a presumptively valid *statute* that was later ruled unconstitutional. In the present case, the search was conducted pursuant to a procedure upheld as constitutional by well-

---

<sup>11</sup> DeFillippo is entirely consistent with the U.S. Supreme Court's traditional exclusionary rule analysis. As the Court noted in a recent opinion:

[E]xclusion "has always been our last resort, not our first impulse," ... and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it "result[s] in appreciable deterrence." ... We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation.... Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future....

Herring v. United States, \_\_\_ U.S. \_\_\_, 129 S. Ct. 695, 700, 172 L. Ed. 2d 496 (2009) (citations omitted).

established and long-standing *judicial pronouncements*. This distinction does not justify a different result. Law enforcement officers should be entitled to rely on established case law – from both the federal and state courts – in determining what searches are deemed constitutional. Indeed, in the area of search and seizure it is the courts that establish the “rules,” not the legislative bodies. Judicial decisions, particularly those of the Supreme Court, as to the constitutionally permissible scope of searches and seizures are clearly entitled to respect, deference, and reliance by officers in the field.<sup>12</sup>

Recently the Court of Appeals Division II addressed the good faith exception in the context of a Gant issue and found that it did not apply. State v. McCormick, \_\_\_ Wn. App. \_\_\_, 216 P.3d 475 (2009). In finding that the good faith exception did not apply, the court relied in part upon the Ninth Circuit case of United States v. Gonzales, 578 F.3d 1130 (9<sup>th</sup> Cir. 2009). *Id.* In that case, the Ninth Circuit refused to apply the good faith exception because to do so would create an untenable tension with retroactivity analysis that requires that a new rule apply to all cases

---

<sup>12</sup> This was the result reached by a federal district court in a recent post-Gant case. *See United States v. Grote*, 2009 WL 2068023, 3 (E.D. Wash., 2009) (even if the search of vehicle was not a valid search incident to lawful arrest, the fruits of the search should not be excluded because the officer “conducted the search in objective good faith based on the law as it existed prior to Gant”).

pending direct review. Gonzales, 578 F.3d at 1132. This Court should not follow the analysis in McCormick because its reliance on the Ninth Circuit opinion is of dubious value given the analysis set forth in a Tenth Circuit opinion issued shortly before Gonzales.

In the case of United States v. McCane, 573 F.3d 1037 (10<sup>th</sup> Cir. 2009), *petition for cert. filed* (U.S. Oct. 1, 2009) (No. 09-402), the Tenth Circuit came to a different conclusion and applied the good faith exception to the exclusionary rule in that search incident to arrest case. There the court found that in order to apply the exception the government bore the burden of establishing that the search of the vehicle was based on established precedent and that the “principle of deterrence underlying the exclusionary rule is not undermined” by its application. *Id.* at 1041. The court found that the search conducted incident to arrest was based on the Tenth Circuit’s established precedent and that applying the good faith exception in this circumstance would not undermine the principle of deterrence. *Id.* at 1041-45. In doing so, the court noted that “[t]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence.” *Id.* at 1042 (quoting Herring v. United States, \_\_\_ U.S. \_\_\_, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009)).

Two inseparable principles have emerged from the Supreme Court cases and each builds upon the underlying purpose of the exclusionary rule: deterrence. First, the exclusionary rule

seeks to deter objectively unreasonable police conduct, i.e., conduct which an officer knows or should know violates the Fourth Amendment. *See, e.g., Herring*, 129 S.Ct. at 701-04; *Krull*, 480 U.S. at 348-49, 107 S.Ct. 1160. Second, the purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities, and even if it was appropriate to consider the deterrent effect of the exclusionary rule on other institutions, there would be no significant deterrent effect in excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement. *See, e.g., Evans*, 514 U.S. at 14-15, 115 S.Ct. 1185; *Krull*, 480 U.S. at 351-52, 107 S.Ct. 1160; *Leon*, 468 U.S. at 916-17, 104 S.Ct. 3405. Based upon these principles, we agree with the government that it would be proper for this court to apply the good-faith exception to a search justified under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by a Supreme Court decision.

*Id.* at 1044.

The Tenth Circuit also addressed the retroactivity concern expressed by the Ninth Circuit and concluded that the issue was not whether Gant applied retroactively to the case, it did, but what remedy should be applied given its application:

The issue before us, however, is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy upon application of *Gant* to this case. In *Leon*, the Supreme Court considered the tension between the retroactive application of Fourth Amendment decisions to pending cases and the good-faith exception to the exclusionary rule, stating that retroactivity in this context “has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct.” 468 U.S. at 897, 912-13, 104 S.Ct. 3405. The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit

precedent indicates the good-faith exception should apply in this context. *See Krull*, 480 U.S. at 360, 107 S.Ct. 1160 (declining to apply a court decision declaring a statute unconstitutional to a case pending at the time the decision was rendered and instead applying the good-faith exception to the exclusionary rule because the officer reasonably relied upon the statute in conducting the search).

*Id.* at 1044 n.5.

Fife and McCormick also rely upon State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), in asserting that the good faith exception does not apply in Washington.<sup>13</sup> This reliance is not justified because White addressed the issue under the State Constitution and involved a *flagrantly* unconstitutional statute: it did not assess a statute or judicial opinion that was presumptively valid.<sup>14</sup> In White, the Washington Supreme Court addressed a situation involving an arrest premised upon a flagrantly unconstitutional “stop and identify” statute that negated the probable cause requirement of the Fourth Amendment. *Id.* at 106. The Court concluded that Article I, §7 provided greater protection than the Fourth Amendment, that the officer’s subjective good faith in relying on the statute was not

---

<sup>13</sup> The State in that case acknowledged that “under White Washington does not apply the federal good faith exception” and apparently therefore did not analyze the exception in this context. McCormick, 216 P.3d at 478.

<sup>14</sup> For a critique of the White analysis, *see State v. Kirwin*, 165 Wn.2d 818, 833-36, 203 P.3d 1044 (2009) (Madsen, J., concurring).

relevant, and that the federal subjective “good faith” exception to the exclusionary rule was not applicable in Washington. Id. at 110.

Nevertheless, the Court in White specifically stated that the remedy of exclusion should be applied only when the underlying right to privacy is “unreasonably violated.” White, 97 Wn.2d at 110. Moreover, since White, the Court has explicitly held that an arrest or search conducted in reliance on a presumptively valid statute, subsequently deemed unconstitutional, does not require suppression of the evidence. See, State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006); State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006).

In State v. Potter, the defendants argued that their arrests for driving while license suspended were unlawful because subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional. Potter, 156 Wn.2d at 840-41. They asserted that under Article I, §7 evidence of controlled substances found during searches of their vehicles incident to arrest had to be suppressed because their arrests were unlawful. Id. at 840. In a unanimous decision, the Court applied the DeFillippo rule and held that an arrest under a statute valid at the time of the arrest remains valid even if the basis for the arrest is subsequently found unconstitutional. Id. at 843. The Court stated:

In White, we held that a stop-and-identify statute was unconstitutionally vague and, applying the United States Supreme Court's exception to the general rule from DeFillippo, excluded evidence under that narrow exception for a law "so grossly and flagrantly unconstitutional" that any reasonable person would see its flaws.

Potter, 156 Wn.2d at 843 (quoting White, 97 Wn.2d at 103 (quoting DeFillippo, 443 U.S. at 38)). In Potter, there were no prior cases holding that the license suspension procedures were unconstitutional, thus there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. The Court affirmed the convictions despite the fact that the statutory licensing procedures at issue had subsequently been held to be unconstitutional. Potter, 156 Wn.2d at 843.<sup>15</sup>

White only addressed what the remedy should be when an arrest or search is conducted pursuant to a flagrantly unconstitutional statute. Such arrests and searches are presumptively unreasonable, regardless of the officer's subjective good faith reliance on a statute. As Potter makes clear, however, a search conducted in reliance on a presumptively valid statute is

---

<sup>15</sup> State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006) followed the rationale set forth in Potter and noted:

White held that police officers may rely on the presumptive validity of statutes in determining whether there is probable cause to make an arrest unless the law is "so grossly and flagrantly unconstitutional" by virtue of a prior dispositive judicial holding that it may not serve as the basis for a valid arrest."

reasonable, does not implicate Article I, §7 because the search was conducted pursuant to authority of law, and does not require suppression of the evidence obtained in the course of the arrest or search. The only difference between Potter and Fife's case is that the present scenario involves presumptively valid *case law*, as opposed to a presumptively valid *statute*. This distinction should have no bearing on the analysis: the judicial opinions of the United States Supreme Court and the Washington Supreme Court should be viewed as least as presumptively valid as legislative enactments.<sup>16</sup>

Moreover, the most basic purpose of the exclusionary rule is not furthered in any way by suppression of the evidence in this case. As the Court in DeFillippo noted, no conceivable deterrent effect would be served by suppressing evidence which, at the time it was found, was the product of a lawful search. Prior to Gant, officers understood that they *could* search a vehicle incident to the arrest of a recent occupant. After

---

Brockob, 159 Wn.2d at 341 n.19 (quoting White, 97 Wn.2d at 103 (quoting DeFillippo, 443 U.S. at 38)).

<sup>16</sup> There is no doubt that prior to Gant, federal and Washington law had unequivocally endorsed the constitutional validity of vehicle searches incident to arrest. Gant recognized that the Court's prior opinions have "been *widely understood to allow a vehicle search incident to the arrest of a recent occupant* even if there is no possibility the arrestee could gain access to the vehicle at the time of the search ..." Gant, 129 S. Ct at 1718 (emphasis added). *See also*, State v. Stroud, 106 Wn.2d 144, 153, 720 P.2d 436 (1986); State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001).

Gant, officers will know that they *cannot* conduct such searches and Gant will deter such searches. But the retroactive application of the exclusionary rule under the circumstances here has no deterrent value at all.

Nor is the preservation of judicial integrity, the other basis sometimes relied upon when applying the exclusionary rule, implicated in these circumstances.<sup>17</sup> In the context of the reliance by law enforcement officers on judicially created evidentiary rules, judicial integrity is not enhanced by failing to recognize that officers act in reliance on judicial authority. Rather, integrity is preserved by recognizing that law enforcement officers must rely on judicial opinions to guide their behavior and cannot be expected to do otherwise. Integrity is preserved by consistency; it is undermined if officers (and citizens) conclude that they can no longer rely in good faith on clearly articulated judicial pronouncements. Moreover, integrity is not sacrificed when the judiciary changes its mind on a constitutional principle, upon fresh examination of

---

<sup>17</sup> This rationale was first articulated by Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 483-85, 48 S. Ct. 564, 574-75, 72 L. Ed. 944 (1928). Justice Brandeis argued that when the government is permitted to use illegally obtained evidence in courts of law, the integrity of the judiciary itself is tarnished.

its reasoning, but minimizes the impact of its new ruling as to those who relied on its earlier pronouncements.

There is a clear cost in suppressing evidence validly obtained pursuant to a vehicle search incident to arrest which is not outweighed by any deterrent effect in applying the rule.<sup>18</sup> There is no deterrent effect on law enforcement whatsoever by retroactively enforcing a rule the officers knew nothing about. The United States Supreme Court has recognized that the application of the exclusionary rule serves no purpose when officers relied in good faith on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. The exclusionary rule should not be applied in this case.

---

<sup>18</sup> As the U.S. Supreme Court has noted, the benefits of the deterrent effect when applying the exclusionary rule should outweigh the costs:

In addition, the benefits of deterrence must outweigh the costs. . . . “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” . . . “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” . . . The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that “offends basic concepts of the criminal justice system.” . . . “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” . . .

Herring v. United States, \_\_\_ U.S. \_\_\_, 129 S. Ct. 695, 700-01, 172 L. Ed. 2d 496 (2009) (citations omitted).

- e. *Should the Court find that the record is insufficient to support the finding that the challenged evidence would have been admissible under either the theory of inevitable discovery or probable cause, the State moves that the Court remand the matter for additional testimony regarding those issues.*

Under RAP 9.11, the appellate court may allow a party to supplement the record of the trial court if:

(1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a). The appellate court will accept new evidence only if all six conditions are met. Sears v. Grange Ins. Ass'n, 111 Wn.2d 636, 640, 762 P.2d 1141 (1988), *overruled on other grounds by* Butzberger v. Foster, 151 Wn. 2d 396, 89 P.3d 689 (2004). In certain situations, the appellate court can waive the requirement, pursuant to RAP 1.2 and 1.8, to serve the ends of justice. In re Detention of Brooks, 94 Wn. App. 716, 723, 973 P.2d 486 (1999), *aff'd in part, rev'd in part on other grounds*, 145 Wn.2d 275 (2001) .

The State has not asserted the argument under RAP 2.5 that the defendant failed to raise the Gant argument in his motion to suppress below. As argued above, prior to the Gant decision it was well-settled law that an officer could search an automobile incident to arrest. However, the difficulty with permitting this issue to be asserted for the first time on appeal is that the record below was never fully developed in the context of, and in light of, the Gant decision because the decision was not issued until well after the CrR 3.6 hearing.<sup>19</sup> The contention below centered around the events that occurred *prior* to the stop and the reliability of the information to permit the stop of the vehicle. See CP 40-43, 103-110; RP 78-85. Therefore, certain evidence was not presented and/or more fully developed to support an alternative basis for admissibility of the evidence obtained as a result of the search. The evidence that is in the record before this Court, if not sufficient itself, clearly suggests that additional evidence would probably affect the ultimate outcome of this case. It would be inequitable to decide this case on an issue Fife never raised below without permitting the State an opportunity to respond and to develop a record to address the issue.

---

<sup>19</sup> This lack of a sufficient record to review the Gant issue, including alternative bases for admission of the evidence, was part of the rationale in State v. Millan, 151 Wn. App. 492, 212 P.23d 603, 609 n.6 (2009), holding that there was no trial ruling preserved for appellate review.

2. **The jury instructions did not fail to include an essential element of Unlawful Possession of a Controlled Substance because the statutory proviso regarding a valid prescription is an affirmative defense not an element of the crime.**

Fife next asserts that the jury instructions on counts I-V, Unlawful Possession of a Controlled Substance, failed to include an essential element of that offense, specifically that the defendant did not possession a valid prescription for the drug. The portion of the statute that he references has been held to constitute an affirmative defense, one that the *defendant* bears the burden of proving by a preponderance of the evidence. Fife inexplicably fails to cite to any of the caselaw relevant to this issue. The jury instructions included all the essential elements for unlawful possession of a controlled substance.

Fife was charged in counts I-V with Unlawful Possession of a Controlled Substance pursuant to RCW 69.50.4013(1). That statute provides in pertinent part:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013(1).<sup>20</sup> Chapter 69.50 RCW also provides: “It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment or other pleading or in any trial, hearing, or other proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it.”

RCW 69.50.506(a). In order to prove unlawful possession of a controlled substance, the State need only prove two elements: the nature of the substance and the fact of possession.<sup>21</sup> State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994)<sup>22</sup>; *accord*, State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 119 (2004). After the State has met its burden to prove those two elements, the defendant may, *affirmatively*, assert that his possession was unwitting, authorized by law or otherwise excusable. Staley, 123 Wn.2d at 799 (emphasis added).

The defendant in State v. Brown, 33 Wn. App. 843, 658 P.2d 44, *rev. den.*, 99 Wn.2d 1012 (1983), made the same argument Fife makes here. The court there stated:

In his pro se brief, Brown appears to argue that the State has the burden of proving he did not have a valid prescription for

---

<sup>20</sup> This statute was formerly RCW 69.50.401(d). In 2003 the legislature significantly reorganized the drug statutes, but without substantive changes. *See* 2003 Washington Laws Chapter 53 §1.

<sup>21</sup> See also, WPIC 50.02.

<sup>22</sup> Staley construed former RCW 69.50.401(d), but as noted in the prior footnote, there have been no substantive changes to the statutory requirements.

the drug. This contention is contrary to the law. RCW 69.50.401(d) makes the possession of a controlled substance a crime and the State has the burden of proving the defendant possessed the controlled substance. However, under the exception therein, the defendant has the burden of coming forward with some evidence that the substance was possessed unwittingly or by means of a valid prescription.

Brown, 33 Wn.App. at 847-848; *see also*, State v. Lawson, 37 Wn. App. 539, 542, n.1, 681 P.2d 867 (1984) (under drug possession statutes possession of substance is presumptively unlawful, which presumption may be rebutted by the defendant by establishing one of the statutory exemptions).

The jury instructions here included the required elements of the nature of the substance and the fact of possession by the defendant. CP 80-84 (Inst. 12-16). The instructions conveyed the essential elements required by law.

**3. There was sufficient evidence to support the jury's verdict that Fife unlawfully possessed controlled substances.**

Fife also contends that there was insufficient evidence to convict him of counts I-V and count VII, Unlawful Possession of a Controlled Substance. Specifically he challenges the sufficiency with respect to his alleged element of no valid prescription with respect to counts I-V and the element of the nature of the controlled substance, heroin, with respect to count VII. The State was not required to prove that Fife did not possess a

valid prescription for the controlled substances, therefore the State does not address Fife's assertion that it failed to provide sufficient evidence to prove that he did not possess a valid prescription for the drugs. As is argued in the next section, the State elected to prove Count VII based on Fife's possession of heroin from earlier in the day, using the residue evidence on the scale to corroborate his statement to the officers that he had injected himself. Taking the evidence in the light most favorable to the State, there was sufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt that Fife possessed heroin when he injected himself earlier in the day.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 339. Such a challenge admits the truth of the State's evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Circumstantial evidence is equally reliable as direct evidence." State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The appellate court defers to

the trier of fact on issues of credibility of witnesses and persuasiveness of evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

Expert chemical analysis is not essential to prove the nature of a controlled substance beyond a reasonable doubt. State v. Eddie, 40 Wn. App. 717, 720, 700 P.2d 751 (1985). Lay testimony and circumstantial evidence can be sufficient to prove the identity of a controlled substance. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). A witness with expertise acquired through experience or training may give an opinion as to the identity of a controlled substance. *Id.* at 676. A defendant's confession that the substance was a controlled substance along with a positive field test is sufficient evidence to support a jury's verdict that the substance was a controlled substance. In re Delmarter, 124 Wn. App. 154, 163-64, 101 P.3d 111 (2004), *rev. den.* by In re Shaw, 154 Wn.2d 1024 (2005).

As instructed, the State was required to prove:

- (1) That on or about the 2<sup>nd</sup> day of August 2008, the defendant possessed a controlled substance, to wit: heroin;
- (2) That the acts occurred in the State of Washington.

CP 84 (Inst. No. 18).

The uncontroverted testimony was that the substance Fife injected was heroin. Fife admitted to the officers that he had injected heroin in his

buttocks earlier that day. At the time the officers contacted Fife he appeared to be under the influence of heroin.<sup>23</sup> There were needles inside the car which Fife knew were illegal, including a used, bent needle. RP 131. There was testimony that heroin is commonly injected and that residue found on the scale was consistent with black tar heroin which can be injected with a needle. RP 179, 180-81, 187-88. The lab expert testified that the first test done on the residue indicated the presence of heroin, but the second test was inconclusive, so she could not conclusively identify the substance was heroin. RP 237-39, 245-51. There was also the testimony that Fife had exhibited drug withdrawal symptoms later that night in the jail. RP 291-92. Taken in the light most favorable to the State, Fife's admission along with the circumstantial evidence was sufficient for a rational juror to conclude beyond a reasonable doubt that the substance he had injected earlier that day was heroin.

**4. A unanimity instruction was not necessary on the heroin count because the State elected to prosecute under the "prior possession" theory.**

Fife next contends that it isn't clear from the record that the jury was unanimous in their verdict as to what the factual basis was for the

---

<sup>23</sup> There was no objection to the officer's testimony regarding his opinion that Fife appeared to be under the influence of heroin and the deputy testified regarding his training to detect the presence of controlled substances in humans. RP 164,125-26.

heroin conviction. He alleges that there was testimony regarding three items, residue in a vial, residue on the scale, and the defendant's admission that he had injected heroin earlier that day, any of which could have provided the factual predicate for the jury's verdict on the heroin count. The record shows that the prosecutor elected the "prior possession" as the basis for the heroin charge, and he conveyed this election to the jury. Fife ignores the record when he argues that the prosecutor did not make an election. The prosecutor's references in closing to the vial residue<sup>24</sup> and the residue on the scale provided corroboration in the form of circumstantial evidence for the defendant's admission that the substance he injected earlier in the day was heroin.

A criminal defendant has a right to a unanimous jury verdict. State v. Kitchen, 110 Wn. 2d 403, 409, 756 P2 105 (1988). Under State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *modified on other grounds*, State v. Kitchen, 110 Wn. 2d 403, 756 P.2d 105 (1988), when the State presents evidence of multiple acts, any of which could form the basis of the crime charged, the State must elect which act it is relying upon or the court must instruct the jury that it must be unanimous as to which act

---

<sup>24</sup> The citation in Fife's brief for this argument, page 359, is incorrect. The correct page is 369. Part of the prosecutor's argument regarding the vial residue being heroin was stricken. RP 370.

has been proven beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), *cert. den.*, 501 U.S. 1237 (1991). In order to determine whether the State elected an act it was relying upon, the court considers the charging document, trial record and instructions, as well as the verdict forms. State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), *overruled on other grounds*, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007). If the State fails to elect which act it is relying upon and the trial court fails to instruct on it, the error is presumed to be prejudicial. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The prejudice may be overcome if no rational juror could have a reasonable doubt as to any of the acts alleged. *Id.* at 411.

Here, in response to a motion from the defense, the prosecutor very clearly informed the court and counsel that he was electing to pursue the heroin charge based on “prior possession,” Fife’s statement that he had injected heroin earlier that day. RP 326-27.

My theory is that I mean beyond any doubt he said that he used Heroin earlier that day. He exhibited symptoms that were consistent with his using Heroin that day. There is Heroin stuff all over the car right there with him, bent needles, vials where the drug was sucked out of the needles with residue on that and residue on the scale as well. The scale just corroborates what he said, the fact that he had used earlier.

The prosecutor argued to the jury, specifically regarding count VII, that the evidence of Fife's being under the influence of heroin when he was arrested that day, the paraphernalia in the car, the needles, residue on the scale being consistent with heroin and Fife's symptoms of withdrawals all corroborated Fife's statement that he had injected himself earlier with heroin. RP 377-79.

There is no reason under the sun for Mr. Fife to say that he was using Heroin that day unless it's true. I mean that's not the way the world works. You just – and that's corroborated by everything else that you see here if you look at the totality of the circumstances.

RP 379. In summing up regarding this count, the prosecutor stated: "Did Mr. Fife possess the Heroin when he injected it into his back side earlier that day? Of course he did. It was in his possession and he used it." RP 380. In rebuttal, in response to improper argument of defense counsel<sup>25</sup>, the prosecutor made his election abundantly clear to the jury:

If you look at the instruction what the State is required to prove is that he possessed Heroin at some point on August 2<sup>nd</sup>, 2008. Not my argument not (sic) that he was in possession at the time he was stopped. Clearly, he wasn't. It had already been used.

RP 386. He further clarified that all the other evidence was circumstantial evidence that Fife possessed heroin when he injected it.

---

<sup>25</sup> The court sustained the prosecutor's objection to defense counsel's argument that the State had to prove there was heroin in the car. RP 383-84.

... You have all of that circumstantial evidence that he possessed Heroin at the time that he ingested it into his back side. ... I don't have to prove that he was in possession of Heroin at the time that he was contacted by law enforcement. Just that he possessed it at some point that day.

RP 387-88. In fact, he even distinguished the factual basis for the heroin count from the others: "If you find the drugs were in the car as Mr. Fife was driving down the street *except for the Heroin* if you find those drugs were in his car as he drove the car down the road before he was pulled over you have to find he was in legal possession of those items..." RP 389 (emphasis added). Moreover, the jury was informed that they had to agree and that they had to be unanimous. CP 70, 87 (Inst. 2 &19).

The prosecutor clearly elected to proceed on a "prior possession" theory with respect to count VII and he made clear that election to the jury. On this record there is no basis for asserting that the jury was not unanimous in its verdict on the charge of unlawful possession of heroin.

**5. The court did not err in computing Fife's offender score.**

Fife next contends that the trial court err in calculating his offender score claiming that the documents that the State presented at sentencing were insufficient to prove by a preponderance of the evidence his 1976 conviction for burglary, although he never asserted below that the documents were insufficient. Fife waived this factual error by arguing that

even if the burglary did not wash, the standard range would still be 12-24 months, thereby implying and acknowledging the existence of the fact of the 1976 burglary. Moreover, the documents submitted by the State, an order of probation and a Washington Access to Criminal History were sufficient to prove by a preponderance of evidence the fact of the prior conviction, particularly where there was no objection from defense as to its existence. In addition, any error would have been harmless as the standard range was the same for an offender score seven as for eight.

While legal sentencing errors cannot be waived, errors based on facts can. State v. Lucero, \_\_\_ Wn. App. \_\_\_, 2009 WL 2915729, ¶ 14, 15; *accord*, State v. Mendoza, 165 Wn.2d 913, 927, 205 P.3d 113 (2009). The court may rely upon information that is admitted or acknowledged at the time of sentencing. RCW 9.94A.530(2) (2008). “Acknowledgment” now includes “not objecting to criminal history presented at the time of sentencing” as well as not objecting to information contained in presentence reports. RCW 9.94A.530(2) (2008); Mendoza, 165 Wn.2d at 925.

In State v. Lucero, the defendant asserted on appeal that the trial court had erred in including two out-of-state convictions in his offender score. 2009 WL 2915729 at ¶ 10. While the trial court did not address comparability, the appellate court found that the defendant had

acknowledged the comparability of those convictions at sentencing “when he only argued that the possession conviction washed out and agreed that, with the wash out conviction deleted, his offender score would be a 6,” one less than the score the court was otherwise considering. *Id.* at ¶ 13. The court held that by arguing only wash-out regarding the possession conviction, the defendant had otherwise agreed that the conviction would count towards his offender score and that by agreeing that his offender score was a six, he had acknowledged the comparability of the other conviction. *Id.* Noting that his argument and presentation to the sentencing court was entirely inconsistent with his argument on appeal, the court held that the defendant had waived his ability to appeal the comparability of the convictions. *Id.* at ¶ 14-15.

Likewise in this case, Fife never challenged the existence of his prior burglary from 1976, but only argued that it washed out. Defense counsel agreed that the offender score fell within the 6-9 point range for drug offenses for which the standard range was 12-24 months. RP 412. The State asserted that the offender score was eight. RP 423. After the State presented its documents and understanding of Fife’s criminal history, defense counsel stated:

Your Honor, I have heard the arguments of counsel and the first thing that I want to say is his standard range, even assuming that the court wanted to bootstrap his 1976

conviction by using other felonies that are, in fact, washed out, still falls within and the guide that we get from the state is a 6 to 9 point range or 12–24 months.

RP 429. He continued:

Prior to the 1995 amendments to the SRA, certain felonies washed out if there weren't felony convictions and that's why a number of years ago on a previous charge Mr. Ostlund on behalf of Mr. Fife I think appeared before Your Honor and had a number of convictions stricken from the record. Those washout that Mr. Hulbert has acknowledged that occur. Those are the same wash outs that I think he wants to use to bring that 1976 conviction back to life. Even assuming the court did that, and I object to the court taking that into consideration, that still puts him in the 6 to 9 point range which is still 12 to 24 months. That's the standard range. There is no disagreement about that.

RP 430. Defense counsel never disputed the existence of the 1976 burglary, only whether it should count towards his offender score because of wash-out provisions. Such an argument, like the defendant's in Lucero, presupposes the factual existence of the conviction. Particularly under the revised version of RCW 9.94A.530(2), Fife's failure to object to the factual existence of the 1976 burglary is an acknowledgement of its existence and waives his ability to appeal the existence of the conviction.

Moreover, the documents submitted by the State to prove its existence were sufficient. Under the 2008 version of RCW 9.94A.500, "[a] criminal history summary relating to the defendant from the prosecuting attorney or ... shall be prima facie evidence of the existence

and validity of the convictions listed therein.” RCW 9.94A.500(2008); Mendoza, 165 Wn.2d at 925. While the best evidence of a prior conviction is a certified judgment and sentence, due process only requires “information bearing ‘some minimal indicium of reliability beyond mere allegation.’” Mendoza, 165 Wn.2d at 920 (emphasis omitted), quoting, State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999); *see also*, State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002), *rev. den.*, 149 Wn.2d 1006 (2003) (“State must provide reliable evidence establishing the accuracy of the offender score calculation”). The State is permitted to use other documents of record to establish a prior conviction if it cannot obtain a certified judgment and sentence. State v. Labarbera, 128 Wn. App. 343, 348, 115 P.3d 1038 (2005). A presentence investigation report along with a DISCIS printout are examples of such documents that together are adequate to establish a prior conviction. *Id.*

Here the State produced a copy of the “Order of Probation” that specifically referenced that he was found guilty of Burglary in the Second Degree in 1976, along with a printout from the Washington Access to Criminal History (“WATCH”) database. Ex. 3, 5. The State produced certified copies of judgment and sentences for *all* of Fife’s other felony convictions. CP 125. Fife asserts that the State had to provide a copy of the judgment and sentence for the 1976 burglary conviction, or explain

why it couldn't be obtained before providing other evidence to prove the conviction. All the State was required to prove was the existence of the prior conviction of guilt. RCW 9.94A.500(1); 9.94A.525(1); 9.94A.030(9). The Order of Probation reflecting that Fife was found guilty of burglary, along with the WATCH summary<sup>26</sup> was sufficient proof of this prior conviction, particularly under the revised statute, in effect at the time of sentencing, providing that a summary of criminal history constitutes prima facie evidence of those convictions.<sup>27</sup> Given that Fife did not contest the existence of the conviction or the admissibility of the documents as proof of it, the Order of Probation along with the WATCH summary were proof by a preponderance of the evidence of the existence of the prior 1976 burglary.

Any error with respect to including the 1976 burglary in his offender score would be harmless anyway because whether Fife's offender score was a 6 or a 7, the standard range was the same, 12 – 24 months. “Where the standard range is the same regardless of a recalculation of the offender score, any calculation error is harmless.” State v. Priest, 147 Wn.

---

<sup>26</sup> The burglary is referenced on pages 3-4 of the WATCH printout. Ex. 3.

<sup>27</sup> While a judgment and sentence may be best evidence of a prior conviction, an order of probation from a 1976 conviction may be all that was available. Given that the prosecutor provided certified judgment and sentences for every other felony conviction, it is likely that the prosecutor would have provided one if it had been available.

App. 662, 673, 196 P.3d 763 (2008), *rev. den.*, 166 Wn.2d 1007 (2009).

Here, as agreed by defense counsel, the standard range was the same no matter whether the prior burglary was included in the offender score calculation or not. If there were any error, it was harmless.

**6. The trial court did not abuse its discretion in running Fife's confinement terms consecutive pursuant to RCW 9.94A.589(3).**

Fife asserts that the trial court erred in sentencing him to consecutive sentences. Specifically he alleges that the court did not have the discretion to do so and that Blakely<sup>28</sup> applied to his sentence, thereby requiring jury findings before the court could impose consecutive sentences. Fife does not contest that he was sentenced pursuant to RCW 9.94A.589(3), which does not require jury findings before a court imposes consecutive sentences. The trial court was well within its discretion to impose consecutive sentences in this case.

Fife acknowledges that he was sentenced pursuant to RCW 9.94A.589(3) and that statute applied to his sentence. RCW 9.94A.589(3) provides ... "Whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which

---

<sup>28</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

has been imposed by any court in this ... state ... *unless the court pronouncing the current sentence expressly orders that they be served consecutively.*” RCW 9.94A.589(3). The plain language of the statute permits a sentencing judge to impose a consecutive sentence if the judge expressly orders it: no additional fact-finding is necessary. State v. Champion, 134 Wn. App. 483, 486-87, 140 P.3d 633 (2006), *rev. den.* 160 Wn.2d 1006 (2007), *cert. den.*, 128 S.Ct. 510 (2007). The only requirement for consecutive sentencing under this statutory provision is that the court expressly order that the sentences be served consecutively. *Id.* at 487-88. A consecutive sentence under this statute does not violate Blakely because no additional fact finding is necessary: a judge has “total discretion” under this provision to impose a consecutive sentence. *Id.* at 488; *accord*, State v. Lampley, 136 Wn. App. 836, 843, 151 P.3d 1001 (2006) (sentencing court has total discretion to impose sentence consecutive to one that was imposed for a different felony when “(1) the defendant was not serving a sentence when he committed the current crime and (2) a court imposed the sentence for the different felony after the defendant committed the current crime”); *see also*, State v. King, 149 Wn. App. 96, 101, 202 P.3d 351, *rev. den.* \_\_\_ Wn.2d \_\_\_ (2009) (sentence under RCW 9.94A.589(3) is not an exceptional sentence and

does not require any findings before the court in its discretion imposes consecutive sentencing).

Fife fails to address Champion, a case that addresses the very issue he asserts. The trial court had “total discretion” to impose a consecutive sentence as long as the circumstances of RCW 9.94A.589(3) apply to Fife’s sentence. He acknowledges that section applies. The trial court did not err in requiring that Fife serve this sentence consecutively to the sentence imposed for his felony conviction under cause number 07-1-01676-1.

**E. CONCLUSION**

For the foregoing reasons, the State requests that Fife’s appeal be denied and his convictions and sentence affirmed.

Respectfully submitted this 23<sup>rd</sup> day of October, 2008.

  
\_\_\_\_\_  
HILARY A. THOMAS, WSBA No. 22007  
Appellate Deputy Prosecuting Attorney  
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the United States mail a properly stamped and addressed envelope, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Christopher Gibson, addressed as follows:

Christopher Gibson  
Nielsen Broman & Koch PLLC  
1908 E Madison St  
Seattle WA 98122-2842

Sydney A. Koss  
LEGAL ASSISTANT

10/23/2009  
DATE