

62903-4

62903-4

NO. 62903-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN P. HEESE,

Appellant.

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BRIEF OF RESPONDENT

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I. ISSUES

1. Does the “good faith” exception to the exclusionary rule under the U.S. constitution’s Fourth Amendment require suppression of evidence when officers conduct a search under authority of presumptively valid case law?

2. Does Arizona v. Gant, decided solely under the U.S. constitution’s Fourth Amendment, impact the legality of a search under article I, § 7 of the Washington constitution?

3. Does article I, § 7 of the Washington constitution require suppression of evidence obtained in a search conducted under authority of presumptively valid case law?

II. STATEMENT OF THE CASE

Defendant was charged with Possession of a Controlled Substance, methamphetamine, occurring February 9, 2008. CP 83. An evidentiary hearing on defendant’s motion to suppress was held on October 10, 2008.¹ 1RP 1.

Marysville Police Officer Jacob Robbins testified at that hearing. He recounted that on February 9, 2008, at approximately 1:53 am, he was on duty, patrolling in south Marysville, when he

¹ It does not appear a written motion was ever filed by defendant. The court file contains no copy. A response from the State, however, was filed on October 6, 2008. CP 77-80.

observed a light blue Ford Tempo commit a series of traffic infractions. 1RP 3-4, 17. Robbins activated his overheard lights and the car pulled over to the side of a residential street. Robbins parked his patrol car approximately 20 to 25 feet behind the Tempo. RP 9.

Once stopped, defendant, without any request, emerged from the driver's side front door and stood there approximately a foot away from his car. 1RP 7-8, 16. For safety purposes, Robbins requested he get back inside. Defendant did so. Robbins then approached the Tempo, stopped at the driver's window, and asked defendant his identification. 1RP 7-8. Defendant was the only person in the vehicle. 1RP 27.

Earlier, when Robbins had been following behind the Tempo, he had called in the license plate number to police dispatch. As the Tempo parked, dispatch returned that the owner, defendant, had a misdemeanor warrant for his arrest. 1RP 4. As Robbins stood at the Tempo's window, dispatch confirmed defendant's warrant, informing that it was for driving while suspended in the third degree. Dispatch also reported that defendant's license to drive was currently suspended in the third degree. 1RP 8.

Once back-up arrived, Robbins told defendant about the warrant and that he was under arrest. Defendant stepped out from his vehicle and was handcuffed. His person was searched and his pockets emptied. He was walked from the side of his vehicle to Robbins' patrol car, placed in the rear seat, and belted in. 1RP 10, 21.

Robbins returned to the Tempo to perform a search of the vehicle incident to arrest. 1RP 11. He checked the interior and found a soft, zippered briefcase in the front passenger area. 1RP 11, 25. A small black pouch was inside a zippered compartment. A baggie of methamphetamine and a digital scale were inside the pouch. 1RP 11-16.

In argument, defense attacked the vehicle search, claiming that at the time it was performed there was no concern for officer safety – defendant was in the rear of the Robbins' patrol car, handcuffed. 1RP 47-50.

The State responded that the officer was justified in performing the search. The State noted he was simply following established court guidance, the bright line rule previously announced by the U.S. Supreme Court and, later, Washington Courts in State v. Stroud, 106 Wn.3d 144, 720 P.2d 436 (1986)

and State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008). RP 50-54.

The court denied defendant's motion, indicating the officer's actions were in line with the rules governing a search of a vehicle incident to arrest announced in the above cases and New York v. Belton, 453 U.S. 454, 10 S.Ct 2860, 69 L.Ed. 2d 768 (1981). 1RP 57-64. Findings of fact and conclusions of law consistent were entered stating such. CP 74-76.

Defendant entered a stipulation agreeing to try the matter to the bench on the police reports. CP 70-73. On November 10, 2008, defendant was found guilty of Possession of Methamphetamine. 2RP 5. Defendant was convicted and sentenced on December 18, 2008. CP 18-29.

On April 21, 2009, the U.S. Supreme Court decided Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed. 2d 485 (2009).

III. ARGUMENT²

A. THE FEDERAL CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF THE EVIDENCE

In Arizona v. Gant, 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 passenger is unsecured and within reaching distance of the vehicle's interior at the time of the search. Id. 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. at 1714. The case was decided solely on federal Fourth Amendment grounds. Id. at 1714.

As an initial matter, the State agrees that Gant must be applied to cases currently pending in trial courts and on direct appeal.³ 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

² Large sections of argument are repeated from the Brief of Respondent in State v. Donald Jordan, COA Div.1 62076-2-I, and the Supplemental Brief of Respondent in State v. Coryell Levoi Adams, Supreme Co. No. 82210-7, both prepared by Stephen P. Hobbs, Deputy Prosecuting Attorney, King Co.

³ Because Gant articulated a new constitutional rule that represents a clear 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).

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. 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).

The State further agrees that under the rule subsequently announced in Gant, the search here was improper under the Fourth Amendment. At the time of the search (prior to Gant), however, the search was permissible. Fourth Amendment jurisprudence detailed a bright-line test allowing the search of a vehicle incident to the lawful arrest of a passenger or occupant despite the passenger’s inability to access the vehicle at the time of the *search*. See e.g., Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Indeed, the effect of these prior decisions was touched upon in Gant which recognized they 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”⁴ Id., 129

⁴ That the majority in Gant spent considerable time arguing that the new rule was justified in spite of the doctrine of *stare decisis* is further evidence that the court was promulgating a new rule. Gant, 129 S. Ct at 1722-24.

S. Ct at 1718 (emphasis added).

While it is conceded that Gant applies and constitutes a fundamental change in “search of a vehicle incident to arrest” Fourth Amendment jurisprudence, it is a separate question whether the exclusionary rule requires suppression of evidence where that evidence was collected *prior* to the change. Under the federal “good faith” exception to the exclusionary rule there is no basis to suppress the evidence obtained in good faith reliance on pre-Gant case law.

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 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). Nevertheless, the United States Supreme Court 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.

In DeFillippo, the Court stated:

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). The Court recognized a “narrow exception” when the law is “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” DeFillippo, 443 U.S. at 37-38.

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.⁵ DeFillippo, 443 U.S. at 40; see also Illinois v. Krull, 480 U.S. 340, 349-50, 107 S. Ct. 1160, 94 L. Ed. 2d 364

⁵ 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).

(1987) (upholding warrantless administrative searches performed in good-faith reliance on a statute later declared unconstitutional).

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-established and long-standing *judicial pronouncements*. This distinction does not justify a different result.

The good faith exception has been applied by the United States Supreme Court in many contexts involving the reliance by law enforcement officers on presumptively valid assertions by the judiciary.⁶ See e.g., United States v. Leon, 468 U.S. 897, 922, 104 S. Ct. 3405 (1984) (when police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted “in objectively reasonable reliance” on the subsequently invalidated search warrant); Massachusetts v. Sheppard, 468 U.S. 981, 991, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) (exclusionary rule does not apply when a warrant was

⁶ For a recent discussion of federal cases recognizing the “good faith” exception to the exclusionary rule, see Herring, 129 S. Ct. at 704.

invalid because a judge forgot to make “clerical corrections”); Arizona v. Evans, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (applying good-faith rule to police who reasonably relied on mistaken information in a court’s database that an arrest warrant was outstanding).

The good faith exception has also received Federal Appellate review in the specific context of Gant. In U.S. v. McCane, 573 F.3d 1037 (10th Cir. 2009), a factual scenario almost identical to the present was presented. There, an officer stopped a vehicle after observing traffic violations. After the stop, a records check revealed the driver had a suspended license. Defendant was asked to step from the vehicle, handcuffed, and then placed in the rear of the officer’s patrol car. The officer then returned to defendant’s vehicle where a search of the passenger compartment revealed a handgun (defendant was a prohibited possessor). Id. at 1039-40. On appeal the parties agreed that the search was unlawful in light of Gant, subsequently decided. They disagreed, however, as to whether the evidence should be suppressed in light of the exclusionary rule’s “good faith” exception. Id. at 1040.

The court went on to review the exclusionary rule as examined in several of the cases mentioned above: Leon; Evans; Krull; and Herring. Summarizing, it wrote:

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 reasonably should know violates the Fourth Amendment. Second, the purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities, [...] 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 (citations omitted).

The court found that no deterrent effect would be served given the facts of the case, and, therefore, the good faith exception precluded suppression of the evidence. Id. at 1045.

A different analysis, however, resulted in a contrary holding in U.S. v. Gonzalez, ___ F.3d ___, 2009 WL 2581738 (9th Cir. 2009). There, in a similar pre-Gant vehicle search, the court declined to apply the good faith exception. The court did so, however, based on the notion that such would conflict with the Supreme Court's "retroactivity" line of cases, Griffith in particular.

[*Griffith* stands for the principle that] even decisions constituting a ‘clear break’ with past precedent have retroactive application. This precedent requires us to apply *Gant* to the current case without the overlay of an application of the good faith exception. To hold that *Gant* may not be fully applied here, as the Government urges, would conflict with the Court’s retroactivity precedents.

Gonzalez, 2009 WL 2581738 at 2.

The difficulty with this analysis, however, is that it conflates “retroactivity” principles with “exclusionary” principles, the good faith exception being a sub-principle of the latter. “Retroactivity” concerns whether a newly announced constitutional rule properly applies on direct appeal to a particular case tried *before* the rule was announced. Prior to Griffith, the “retroactivity” line of cases held that whether or not Gant would apply on direct appeal depended on whether Gant constituted a “clear break” with established precedent. See e.g. U.S. v. Johnson, 457 U.S. 537, 562, 102 S.Ct 2579, 73 L.Ed.2d 202 (1982); Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601(1965).

Griffith changed the “retroactivity” rule, doing away with “clear break” analysis. Under Griffith, *all* cases on direct appeal are subject to the new rule regardless of whether they constitute a “clear break” or not. But the *retroactivity rule* involves a separate,

distinct question from the question of whether the *exclusionary rule* mandates suppression of evidence once it is determined (per the retroactivity rule) that the new rule applies.

In short, Griffith informs us that Gant applies to the search performed here. It is a separate question whether the exclusionary rule necessitates suppression of evidence collected in a search in violation of Gant. This distinction was noted by the McCane court:

McCane argues the retroactivity rule announce in [*Griffith*], requires application of the Supreme Court's holding in *Gant* to this case. 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.

McCane, 573 F.3d at 1044, fn.5.

As noted above, the State concedes Gant applies to the search. Ofc. Robbins' search violated the Fourth Amendment. Whether or not the evidence from that search should be excluded, however, turns on whether such exclusion would serve an appropriate deterrent effect in light of federal "good faith" exclusionary precedent. It would not. Officer Robbins, at the time, relied upon the then clear Fourth Amendment jurisprudence permitting a search of the passenger compartment.

Here, the purposes of the federal exclusionary rule could not be furthered by suppression of the evidence given the search was conducted prior to the change in law. Suppression, because of a change in the law *after* the search was conducted cannot logically be said to serve any deterrent objective.

B. THE WASHINGTON STATE CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF THE EVIDENCE.

1. Officer Robbins' Actions Did Not Violate The Washington Constitution Because Article 1, Section 7 Does Not Require An Arrestee Have Access To The Vehicle At The Time Of The Search.

Gant was decided solely on Fourth Amendment grounds. Gant, 129 S. Ct at 1714. The mere fact that the federal Fourth Amendment has changed in interpretation, however, does not mean that the Washington State Constitution has also changed.

[T]he histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a *separate* and important function of our state constitution and courts that is closely associated with our sovereignty.

State v. Coe, 101 Wn.2d 364, 374, 679 P.2d 353 (1984)

(emphasis added).

While we may turn to the Supreme Court's interpretation of the United States Constitution for guidance in establishing a hierarchy of values and principles under the Washington Constitution, we rely,

in the final analysis, upon our own legal foundations in determining its scope and effect.

State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984).

Article 1, section 7, of the Washington State Constitution separately governs vehicle searches incident to arrest. This was established definitely in State v. Stroud, 106 Wn.2d 144, 145, 720 P.2d 436 (1986). There the court upheld the search of a vehicle's passenger compartment after the occupants has been arrested, handcuffed, and placed in the rear of the officer's patrol car.

During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence.

Id. at 152 (emphasis added).

The Washington Supreme Court made it explicitly clear, however, that Stroud was decided under article I, § 7 of the Washington Constitution:

We wish to make clear that our subsequent determination in this case is not based on prior federal case law, and that we decide this case solely on independent state grounds. We believe that our state's constitution, and recent case law interpreting it, mandate the decision we arrive at today. Furthermore, the role we set regarding the automobile exception to the search warrant requirement is not based on federal precedent, as we have

independently weighed the privacy interests individuals have in items within their automobile and the dangers to the officers and law enforcement presented during an arrest of an individual inside an automobile. *Our divergence from the decisions of federal courts is based on this heightened protection of privacy required by our state constitution.*

Stroud, 106 Wn.2d 144 at 149 (emphasis added).

There could not be a clearer statement that Stroud was based on the state, not federal constitution. Thus, defendant's claim that Gant abrogates Stroud is incorrect even if Stroud agreed with some of the logic in the pre-Gant federal cases.

Of course, pursuant to Mapp v. Ohio, individuals are entitled to the protection of the Federal constitution whether or not the State constitution provides similar protections. Mapp v. Ohio, 367 U.S. 643, 654-55, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). But this does not mean that the scope of vehicle searches under article I, § 7 has been narrowed beyond that set forth in Gant and beyond the analysis that has previously – and consistently – been approved by the Washington Supreme Court.

Article I, § 7, unlike the federal Fourth Amendment post Gant, does not preclude a search of a vehicle incident to arrest where the arrestee is no longer within reaching distance of the vehicle's passenger compartment.

2. Even If, As a Result of Gant, The Search Were Improper Under Article I, § 7, The Washington Exclusionary Rule Does Not Require Suppression Of Evidence Gathered In Reliance On Pre-Gant Jurisprudence.

Under article I, § 7, the exclusionary rule has been extended beyond the original Fourth Amendment context. See e.g., State v. Bond, 98 Wn.2d 1, 10-13, 653 P.2d 1024 (1982) (and cases cited therein) (“we view the purpose of the exclusionary rule from a slightly different perspective than does the United States Supreme Court”). However, even under the more stringent article I, § 7 analysis, when officers obtain evidence in reasonable reliance on presumptively valid statute, the exclusionary rule does not apply. The same result should apply when law enforcement officers rely on presumptively valid judicial authority.

In State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), 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

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 110-12. Three specific concerns justifying the application of the exclusionary rule were articulated: (1) to protect privacy interests of individuals from *unreasonable* governmental intrusions, (2) to *deter* the police from acting unlawfully in obtaining evidence, and (3) to *preserve the dignity* of the judiciary by refusing to consider evidence obtained by unlawful means. White, 97 Wn.2d. at 109-12; Bond, 98 Wn.2d at 12.

In addition, the Court has emphasized that in applying the exclusionary rule under article I, § 7 it is also appropriate to consider the costs of doing so. See e.g., Bond, 98 Wn. App. at 14 (“we have little hesitation in concluding that the costs [of excluding the evidence are] clearly outweighed by the limited benefits that would be obtained from excluding the confessions because of the illegal arrest.”) As is discussed in detail below, none of these concerns are implicated under the facts of the present case.

a. Officer Robbins' Search Does Not Constitute An Unreasonable Governmental Intrusion Given It Was Not Based On Flagrantly Unconstitutional Jurisprudence.

White involved a flagrantly unconstitutional statute. It did not assess a statute or judicial opinion that was presumptively valid.⁷ More recently, however, the Court has explicitly held in two cases that an arrest or search conducted in reliance on a presumptively valid statute that was 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, 341-42, 150 P.3d 59 (2006).

In State v. Potter, the defendants maintained that they were unlawfully arrested for driving while their licenses were suspended because, subsequent to their arrests, the State Supreme Court held that the statutory procedures by which the Department of Licensing suspended licenses were unconstitutional.⁸ The defendants in Potter argued 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 illegal.

⁷ For a critique of the White analysis, see State v. Kirwin, 203 P.3d 1044, 1051-54 (2009) (Madsen, J., concurring).

⁸ The defendants in Potter were relying on City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).

In a unanimous decision, the Court applied the DeFillippo rule under article I, § 7, 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. Potter, 156 Wn.2d 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)).

Under the facts presented in Potter, because there were no prior cases holding that license suspension procedures in general were unconstitutional, there was no basis to assume that the statutory provisions were grossly and flagrantly unconstitutional. Accordingly, applying DeFillippo, 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.

Similarly, in State v. Brockob, 159 Wn.2d 311, 341-42, 150 P.3d 59 (2006), a defendant contended that his arrest for

driving while his license was suspended and a search incident to that arrest were unlawful for the reasons claimed in Potter. The Court rejected the defendant's argument, stating that:

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."

Brockob, 159 Wn.2d at 341 n.19 (quoting White, 97 Wn.2d at 103 (quoting DeFillippo, 443 U.S. at 38)). As in Potter, the Court held that the narrow exception did not apply "because no law relating to driver's license suspensions had previously been struck down." Brockob, 159 Wn.2d at 341, n.19.

Potter and Brockob recognize that White was addressing a unique situation: what should be the remedy 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. White did not address reliance on a presumptively valid statute. As Potter and Brockob make clear, however, reliance on the presumptively valid statute is 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 Brockob and the present 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. There can be little doubt that law enforcement officers rely on judicial pronouncements when conducting vehicle searches. To conclude otherwise would be equivalent of asserting that officers could never rely on judicial authority. In this regard, it is noteworthy that the majority in Gant emphasized that officers had reasonably relied on pre-Gant precedent and were thus immune from civil liability for searches conducted in accordance with the Court's previous opinions. Gant, 129 S. Ct at 1723 n.11.

Moreover, this is not a situation such as White where there was a prior suggestion that the rule being applied might be unconstitutional. There is no doubt that prior to Gant, federal and state courts had endorsed the constitutional validity of vehicle

searches incident to arrest. See e.g., Belton; State v. Stud, 106 Wn.2d 144, 153, 720 P.2d 436 (1986); State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989); State v. Parker, 139 Wn.2d 486, 489, 987 P.2d 73 (1999); State v. Johnson, 128 Wn.2d 431, 441, 909 P.2d 293 (1996); State v. Vrieling, 144 Wn.2d 489, 28 P.3d 762 (2001).

It is not even the situation addressed in Potter and Brockob where the constitutionality of the statute had never been addressed before (and was thus “presumptively” valid). Instead, this is a situation in which the highest federal and state courts had specifically and repeatedly endorsed the procedures used by law enforcement.

Thus, this case does not fit within the narrow exception, recognized in DeFillippo and White, precluding officers from relying upon laws that are “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” The pre-Gant cases may now be viewed as flawed, but the repeated judicial reliance on them for almost 30 years demonstrates that the search incident to arrest rule was neither grossly nor flagrantly unconstitutional.

b. Suppression of Evidence Gathered *Before* The Change In Law Cannot Logically Serve As A Deterrence To Searches Conducted Before the Law Was Changed.

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 April 21, 2009, officers understood that they *could* search a vehicle incident to the arrest of a recent occupant. After April 21, 2009, officers will know that they *cannot* conduct such searches and Gant will deter such conduct. But the retroactive application of the exclusionary rule has no deterrent value at all.

c. Judicial Integrity Is Not Heightened By Suppressing Evidence Gathered In Reliance On Prior Judicial Opinions.

Judicial integrity, the other basis relied upon when applying the Washington exclusionary rule, is not compromised in refusing to suppress evidence gathered in reliance on previous judicial decisions.⁹

⁹ This judicial integrity 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), who argued that when the government is permitted to use illegally obtained evidence, the integrity of the judiciary itself is tarnished. See also Stone v. Powell, 428 U.S. 465, 485, 96 S. Ct. 3037, 3048, 49 L. Ed. 2d 1067 (1976) (judicial integrity is mentioned as a secondary rationale); White, 97 Wn.2d at 110.

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

d. The Costs of Suppression Outweigh Any Benefit.

There is a clear cost in this and similarly-situated cases that is not outweighed by any deterrent effect in applying the rule.¹⁰ Evidence of criminal activity was validly obtained pursuant to a

¹⁰ 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); see also Bond, 98 Wn.2d at 14.

vehicle search incident to arrest. There is no deterrent effect on law enforcement whatsoever by retroactively enforcing a rule the officers knew nothing about. The costs of excluding the evidence obtained in all pending cases with a possible Gant issue are not justified by the potential benefit in deterrence.

In Potter and Brockob, the Washington Supreme Court has recognized that the exclusionary rule does not apply when officers relied on a presumptively valid statute. This same reasoning should apply to judicial opinions of long-standing duration. The evidence obtained during the search in the present case should not be suppressed.

e. The Article I, § 7 Exclusionary Rule Has Traditionally Been Interpreted Consistently With The Federal Rule.

That White is an application of the federal exclusionary rule is entirely consistent with the fact that Washington courts have historically interpreted the exclusionary rule in a manner that is consistent with federal law. The Washington State Constitution, adopted in 1889, provides that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. At common law, courts took no notice of whether evidence was properly seized; if relevant, it was

admissible.¹¹ Commonwealth v. Dana, 43 Mass. 329 (2 met. 1841); 4 J. Wigmore, Evidence § 2183 (2nd ed. 1923). This was the rule recognized in Washington as early as 1889. State v. Nordstrom, 7 Wash. 506, 35 P. 382 (1893); State v. Burns, 19 Wash. 52, 52 P. 316 (1898).

In 1886, the United States Supreme Court appeared to signal a different approach when it suppressed private papers seized pursuant to a court order, holding that seizure and use of the private papers as evidence was tantamount to compelling the defendant to testify against himself. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). But the United States Supreme Court essentially repudiated Boyd in Adams v. New York, 192 U.S. 585, 598, 24 S. Ct. 372, 48 L. Ed. 575 (1905) (“...the English, and nearly all the American, cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent”).

Like most courts at that time, the Washington Court specifically rejected Boyd and held that relevant evidence was admissible, regardless of its source. State v. Royce, 38 Wash. 11,

¹¹ The meaning and scope of a constitutional provision is determined by examining the law at the time of enactment. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003).

80 P. 268 (1905) (evidence derived from improper search of burglary suspect need not be suppressed).

Nine years later, the United States Supreme Court reintroduced an exclusionary rule. Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914). The next year, the Washington Supreme Court followed the U.S. Supreme Court's lead and announced that an exclusionary rule would be recognized in Washington. State v. Gibbons, 118 Wash. 171, 184-85, 203 P. 390 (1922).

The ensuing decades of exclusionary rule jurisprudence can only be described as chaotic, as both state and federal courts struggled to find the proper balance between the need to protect constitutional rights and the interest in admitting relevant evidence. See e.g. State v. Young, 39 Wn.2d 910, 917, 239 P.2d 858 (1952).¹² Nonetheless, the Washington Supreme Court has generally followed the application of the rule in federal courts. As the Washington Supreme Court said in State v. O'Bremski, 70 Wn.2d 425, 423 P.2d 530 (1967): "We have consistently adhered

¹² "We do not wish to recede one iota from our [previous holding]. It is the duty of courts to protect citizens from unwarranted, arbitrary, illegal arrests by officers of the law. But we should not permit our zeal for protection of constitutional rights to blind us to our responsibility to other citizens who have the right to be protected from those who violate the law." Young, 39 Wn.2d at 917.

to the exclusionary rule expounded by the United States Supreme Court...” See also State v. Biloche, 66 Wn.2d 325, 327, 402 P.2d 491 (1965) (“The law is well established in this state, *consistent with the decisions of the U.S. Supreme Court*, that evidence unlawfully seized will be excluded...”) (emphasis added).

In sum, Washington’s exclusionary rule has followed the general contours, progression, and application of the federal exclusionary rule. The Washington Supreme Court’s recognition in Potter and Brockob that the decision in White was simply an application of the narrow exception to the DeFillippo good faith rule is both appropriate and justified. 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.

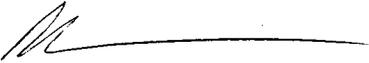
IV. CONCLUSION

For the reasons detailed above, defendant's appeal should be denied and his conviction affirmed.

Respectfully submitted on September 17, 2009.

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