

66543-0

66543-0

NO. 66543-0-1

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

STATE OF WASHINGTON

Respondent

v.

JAMIE S. HOWE,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

2011 NOV 10 AM 11:27

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COURT OF APPEALS, DIV 1
STATE OF WASHINGTON

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I. ISSUES

1. Was the search of the defendant's car for drugs and drug related items a valid search incident to arrest for delivery of a controlled substance?

2. At trial the defendant objected twice when the investigating officer began to testify to what a non-testifying witness said. The trial court sustained the objection, struck the testimony and instructed the jury to disregard it. Was the defendant's right of confrontation violated?

3. At a pre-trial suppression hearing the defendant did not object when the investigating detective testified about what an informant told him.

a. May the defendant claim that her confrontation rights at that hearing was violated for the first time on appeal?

b. Does the defendant have a right of confrontation at a pre-trial evidentiary hearing?

c. Were the statements at issue "testimonial?"

II. STATEMENT OF THE CASE

A. FACTS RELATING TO THE INVESTIGATION.

In December 2008 Detective Vargas of the Snohomish Regional Drug Task Force (SRDTF) was investigating the

defendant, Jamie Howe for drug activity. Another detective in the task force told Detective Vargas that he knew an informant who knew the defendant. Detective Vargas met with the informant, later identified as Shane Heath, and debriefed him. As a result of that contact Detective Vargas had the informant call the defendant and arranged for the purchase of one ounce of methamphetamine on December 23, 2008. 10-11-10 RP 12, 21; 10-12-10 RP 120.

When the informant called the defendant, Detective Vargas listened in on the conversation. He heard a female voice tell the informant that it was okay to come over to her house to purchase methamphetamine. She said the gate to her property was frozen shut so the informant should go through the neighbor's property to get to her house. 10-11-10 RP 22-23.

Detective Olmstad searched the informant and his vehicle. The informant was given \$1,300. \$1,200 was to pay for one ounce of methamphetamine and \$100 was for the informant to make a payment on a debt he owed the defendant. Detective Vargas had already determined the defendant's address. Detectives followed the informant to the defendant's home. The defendant's car was seen parked in the driveway. Detectives watched the informant walk through the neighbor's property and go to her home.

Approximately 10 minutes later, at 9:07 p.m., the detectives saw the informant leave the defendant's home and drive off. No one else came or went from the defendant's home in the 10 minutes that the informant was there. The informant had no contact with anyone either going in or coming out of her home. 10-11-10 RP 24-26, 58, 64-66, 79-81.

The detectives followed the informant to a pre-determined location. They searched him and his vehicle and found no drugs or money. The informant gave Detective Vargas a Christmas gift bag. Inside the bag was an envelope and approximately one ounce of methamphetamine. Inside the envelope was a Christmas card. The card was a photo greeting containing the defendant and her boyfriend Ryan Johnson's picture. In the pre-buy search of the informant's car Officer Olmstad located no drugs, photos or cards. 10-11-10 RP 27-31, 45-47, 81-83.

Detective Vargas next intended to obtain a search warrant of the defendant's home based on the controlled buy. After the controlled buy the defendant's home had been robbed. The detective was not able to confirm the defendant still lived at the home, so he did not follow through with a search warrant. Instead he arranged for the informant to order another purchase of

methamphetamine, and have the defendant deliver it to the informant. The informant did that on January 9, 2009. 10-11-10 RP 33-34.

About 12:30 a.m., which was about 45 minutes after the informant made the call, officers saw the defendant arrive near where the informant lived. A patrol officer stopped the defendant. She was the only occupant of the car. Detective Vargas told the defendant she was under arrest for delivery of a controlled substance, and advised her of her Miranda rights. Detective Vargas then told the defendant he thought she had drugs in her car, and he intended to search it. The defendant denied having drugs, but said if they found any the drugs did not belong to her. 10-11-10 RP 34-35, 72-73; 10-12-10 RP 96.

Detective Vargas found a cloth bag in the back of the defendant's car. The bag contained three Ziplock bags each containing methamphetamine measured out in quantities commonly sold. One bag contained 24.03 grams, a second bag contained 13.44 grams, and the third bag contained 5.46 grams. The bag also contained a digital scale and some packaging material. Each of those items is commonly found in narcotics investigations. 10-11-10 RP 36-40, 50-54.

Detective Emery assisted Detective Vargas in searching the defendant's car. He found a small amount of methamphetamine in a purse in the front passenger compartment. He also found \$693 cash in a wallet in the purse. 10-11-10 RP 71-76.

B. PROCEDURAL FACTS.

The defendant was originally charged with possession of a controlled substance, alleged to have occurred on January 9, 2009. 1 CP 206-207. She was ultimately tried on a Third Amended Information charging Possession of a Controlled Substance With Intent to Manufacture or Deliver, alleged to have been committed on or about January 9, 2009 (count I), and Delivery of a Controlled Substance, alleged to have been committed on or about December 23, 2008 (count II). 1 CP 92-93.

Prior to trial the defendant moved to suppress the evidence on the basis that the officers lacked probable cause to arrest the defendant.¹ The State responded that the controlled buy conducted December 23, 2008 constituted probable cause to arrest her on January 9. 1 CP 174-75.

¹ At the time the defense filed its motion the defendant was only charged with the January 9, 2009 offense. 1 CP 206-07. Prior to the CrR 3.6 hearing the State filed an amended information charging her with a second count involving the December 23, 2008 incident. 1 CP 182-83.

At a CrR 3.6 hearing Detective Vargas testified that he had been contacted by a confidential informant in December 2008. The informant said that he knew the defendant and was aware that he had purchased methamphetamine from her, and knew she sold in quantities of ounces or more. While the informant was not one who Detective Vargas has personally contracted with for information, he had been contracted by another detective that Vargas worked with. Detective Vargas had no reason to believe that the informant was unreliable, or had otherwise violated the terms of his contract. Detective Vargas described the procedure used for a controlled buy from the defendant's home with the confidential informant consistent with his trial testimony recounted above. He also described the January 9 arrest and the circumstances leading up to that arrest. 6-3-10 RP 6-15, 18-19; 6-4-10 RP 23-26.

At the conclusion of the testimony the trial judge sua sponte asked the parties to address the impact Gant² might have on the search of the vehicle incident to arrest. 6-3-10 RP 20. The parties filed supplemental briefing. 1 CP 154-56, 169-71. The court denied the motion to suppress finding the police had probable cause to arrest the defendant based on the December 23 controlled

buy and also on the basis of the informant's call to purchase drugs from the defendant on January 9. The court upheld the search of the defendant's car on the basis that it was a good faith exception relying on State v. Riley, 154 Wn. App. 433, 225 P.2d 462 (2010) and on the basis that the search was for evidence of the crime of arrest. 6-4-10 RP 42 – 46. The court subsequently denied a motion for reconsideration. It stated that the two grounds on which the court relied to deny the motion for reconsideration were independent, and there was probable cause to believe there was evidence of the crime of arrest in the defendant's car at the time of arrest. 2 CP 208. The court entered findings and conclusions consistent with its ruling. 1 CP 58-61.³

At trial the detectives testified to the facts set out in section II.A. The defendant testified that she lived in the same home from August 2008 to April 2009. On December 23, 2008 she came home around 10:30 or 11:00 p.m. 10-12-10 RP 111, 115.

On January 9 the defendant visited her boyfriend in the hospital. Her boyfriend had been injured on December 30 in a home invasion robbery. The defendant was on her way to her

² Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)

³ A copy of the certificate is attached as Appendix A.

friend T.J.'s house from the hospital when she was stopped by the police. She said the backpack and the methamphetamine police found in her car did not belong to her. She also denied the purse in the front seat was hers. She admitted that the money found in the wallet was hers. It had been given to her by her mother. She said she had no idea how the drugs, the purse, or the backpack got into her car, but that a friend had installed a speaker in her car earlier in the day. 10-12-10 RP 116-20.

The defendant knew Shane Heath as a friend of a friend. She had purchased a laptop computer from him. He was in the process of buying a diamond ring from her for his girlfriend. Heath owed the defendant \$600 as of December 2008. She did talk to Heath on December 23 about making a payment on the ring. She told Heath that if she was not there that he could get the ring from Ro, her friend. Ro was instructed to get the money for the ring and put the ring in a gift back with a Christmas card. She said she got \$200 for the ring that day. She neither agreed to give Heath any methamphetamine nor did she deliver any methamphetamine to Heath on December 23. Further she did not intend to deliver methamphetamine to him on January 9 10-12-10 RP 115-16, 121-26.

The jury rejected the defendant's testimony. She was convicted of both counts. 1 CP 4.

III. ARGUMENT

A. POLICE LAWFULLY SEARCHED THE DEFENDANTS CAR FOR EVIDENCE OF THE CRIME OF ARREST.

The defendant argues the search of her car incident to arrest on January 9 violated her right to be free from unlawful search and seizure under both the Fourth Amendment and Washington Constitution article 1, section 7. She asks the Court to reverse the suppression motion and dismiss all charges.

At the time of the search in question here both the State and Federal Constitutional provisions at issue were understood to permit officers to search an automobile incident to arrest even where the arrestee had been detained in a patrol car. State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), overruled, State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009). After the search was conducted the Court decided Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). There the Court held the automobile search incident to arrest exception to the warrant requirement was limited to two circumstances. Police may only search the vehicle incident to a recent occupant's arrest if the arrestee is within reaching distance of the passenger compartment

at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest. Id. at 1719. The Washington Supreme Court subsequently held under article 1, § 7 there must be a nexus between the arrestee, the vehicle, and the crime of arrest, implicating safety concerns, or destruction of evidence. State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009).

At the suppression hearing the trial court upheld the search of the defendant's vehicle first on the basis that it was justified under a good faith exception to the warrant requirement, relying on State v. Riley, 154 Wn. App. 433, 225 P.3d 462 (2010). The Supreme Court later rejected the good faith exception under Article 1, § 7 in State v. Afana, 169 Wn.2d 169, 184, 233 P.3d 879 (2010). The Court's first reason for upholding the search is therefore inconsistent with Afana.

However, on a basis independent of the first rationale, the court correctly held the search was valid. The court found that the officer had probable cause to arrest the defendant for both the delivery on December 23 and the attempted delivery of a controlled substance on January 9. 1 CP 60, 2 CP 208. The court concluded that the officers had reason to believe that evidence of the crime of

attempted delivery of a controlled substance would be found in the defendant's car. 1 CP 60.

The Court has considered the "relevant evidence of the crime of arrest" exception to the warrant requirement for automobiles in State v. Snapp, 153 Wn. App. 485, 219 P.3d 971 (2009), review granted, 169 Wn.2d 1026, 241 P.3d 413 (2010) and State v. Wright, 155 Wn. App. 537, 230 P.3d 1063 (2010), review granted 169 Wn.2d 1026, 241 P.3d 413 (2010).⁴ Each case presents facts similar to the facts in this case.

In Snapp the defendant was pulled over for a traffic infraction. During the course of the stop the trooper developed probable cause to arrest the defendant for possession of drug paraphernalia. The officer arrested the defendant and then searched his car for drugs. Those drugs would help establish the drug paraphernalia was associated with drug use as required by RCW 69.50.412. The Court held the search valid under the Gant exception for relevant evidence. Snapp, 153 Wn. App. at 496-97.

In Wright the defendant was stopped for a traffic infraction. The investigating officer noticed a strong odor of marijuana coming from the car. The defendant appeared nervous, and when he

opened the glove box to get the registration there was a large roll of money. The officer arrested Wright for possession of marijuana. The officer searched the car and found two baggies of marijuana, a bag of oxycodone, and a scale. Wright, 155 Wn. App. at 542-43.

This Court considered the legality of the search under both Gant and Patton. The search was valid under the Fourth Amendment because the arresting officer had reason to believe the car contained evidence of the offense for which he was arrested. Id. at 549. The search was valid under article 1, § 7 because there was a nexus between the defendant, the crime of arrest, and the search of his vehicle. Because the search focused on detecting evidence of the crime of possession of marijuana, and “was no fishing expedition in which the police thought they might discover evidence of some unrelated crime” it was lawful to search the defendant's vehicle. Id. at 553, 555.

Here the court's unchallenged findings of fact establish the defendant was arrested on probable cause for delivery of a controlled substance and attempted delivery of controlled substance. The unchallenged findings are verities on appeal State

⁴ Snapp was consolidated with Wright. Oral argument on these cases was heard on May 19, 2011.

v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

An officer has probable cause for a warrantless arrest when he knows of facts and circumstances which are sufficient to cause a person of reasonable caution to believe that a crime has been committed. State v. Huff, 64 Wn. App. 641, 646, 826 P.2d 698, review denied, 119 Wn.2d 1007, 833 P.2d 387 (1992). A reasonable person in the detective's position would be justified to believe that the defendant gave the informant methamphetamine on December 23 and intended to deliver methamphetamine to him on January 9.

According to the facts found by the trial judge the informant knew the defendant personally, and knew that she sold methamphetamine. A controlled buy from the defendant's home where police knew the defendant lived occurred on December 23. A car the police knew belonged to the defendant was in the driveway. The package the informant gave police when he left the defendant's home contained a Christmas card with the defendant and her boyfriend's picture on it and the drugs. The informant did not have the money police gave him to buy the drugs. Under these circumstances a reasonably cautious person would believe the defendant sold the informant the drugs.

On January 9 police similarly had probable cause to believe that the defendant had drugs in her car. The informant's December 23 information that turned out to be true provided a track record from which police could believe he was telling the truth when he said he set up another delivery from the defendant to him at his home. State v. Fisher, 96 Wn.2d 962, 965-66, 639 P.2d 743, cert. denied, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982), State v. Paradiso, 43 Wn. App. 1, 714, P.2d 1193 , review denied, 105 Wn.2d 1023 (1986). The circumstances also corroborated that the informant has set up a delivery of drugs from the defendant on January 9. The defendant arrived in the vicinity of the informant's home around the time she said she would be there in the car police knew she owned. In these circumstances a reasonably caution person would also believe that the defendant had methamphetamine in her car.

The defendant was arrested on probable cause for delivery of a controlled substance. Like the searches at issue in Snapp and Wright, the police were not on a fishing expedition, but were looking for evidence of a crime associated with the delivery of methamphetamine. Because they were looking for evidence of the crime of arrest, the search was valid under the Fourth Amendment.

The search was also valid under Article 1, § 7 because there was a nexus between the defendant, the crime she had been arrested for, and the items police were searching for. Just prior to the stop and arrest the defendant had been driving her car. She was arrested for delivery of a controlled substance, and the search was for controlled substances.

The defendant seeks to distinguish the facts in this case from those in Wright. The probable cause in Wright was an odor of marijuana coming from the defendant's car. The defendant argues that since the detectives did not smell any methamphetamine in the defendant's car, Wright is not controlling. Probable cause is not so limited. While in Wright probable cause was developed after the stop based on the odor in the car, here probable cause to believe a crime had been and was being committed occurred before the defendant was stopped. Wright cannot be distinguished on that basis.

Similarly the defendant's argument that Valdez controls the outcome of this case is flawed. In Valdez the defendant was stopped for an infraction and arrested on an outstanding warrant. State v. Valdez, 167 Wn.2d 761, 766, 224 P.3d 751 (2009). There was no evidence that the police had reason to believe that

evidence of the crime for which the warrant issued would be found in the defendant's car. The search of his car incident to arrest was unlawful for that reason, and because the defendant was secured in the patrol car at the time of the search. Id. at 778.

The defendant also argues that the relevant crime exception does not apply because the crime of arrest was the December 23 incident. To justify a warrantless search for evidence of the crime of arrest there must be an actual arrest. Probable cause to arrest is not sufficient to justify such a search. State v. Tibbles, 169 Wn.2d 364, 236 P.3d 885 (2010). Because the December 23 buy had been completed, the defendant argues there would be no evidence of that buy in the car. Thus, he argues the search of the defendant's car cannot be justified as a search for evidence of the crime of arrest.

The trial court did not specifically state which incident the arrest was based on. 1 CP 59, Findings of Fact, paragraph 12. The detective testified that he arrested the defendant for a narcotics related offense. 6-3-10 RP 8. He clarified that the December 23 controlled buy was the probable cause he relied on for the arrest. 6-3-10 RP 10, 16. Thus the relevant evidence exception applies if

the police were searching for evidence which could be associated with the December 23 delivery of methamphetamine.

The search here is justified under the relevant evidence exception because police had reason to believe that evidence of the December 23 delivery could be found in the defendant's car. The defendant was known as a methamphetamine dealer. They also had reasonable grounds to believe she was on her way to conduct another drug deal with the informant. A drug dealer's equipment includes scales and packaging material. 10-11-10 RP 52-54. It was reasonable to believe then that this kind of equipment, which would have been used in the December 23 incident, would likely be found in her car on January 9. Furthermore, the police were justified in looking for more methamphetamine. Because the December incident was a controlled buy, evidence the defendant delivered the drugs was based on the informant's statement and circumstantial evidence. If methamphetamine were found in the defendant's car it would confirm that the defendant sold the drugs to the informant in December. Thus the police were looking for evidence of the crime of arrest. The trial court's ruling on the suppression motion should be affirmed.

Finally, it should be noted that even if the Court agrees with the defendant's analysis and reverses the suppression order, that decision would only affect her conviction on count I. The evidence obtained in support of count II, involving the December 23 controlled buy, was wholly independent of any search of the defendant's automobile on January 9. The defendant makes no argument that evidence in the January 9 incident had any effect on the jury's determination of the December 23 count. The jury was instructed to treat each count separately. 1 CP 75. Jurors are presumed to follow the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Since evidence for each count was different, whether or not evidence from the defendant's car should have been suppressed should not have any effect on the outcome of the December 23 incident.

B. THE DEFENDANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS NOT VIOLATED.

At the CrR 3.6 hearing Detective Vargas testified that he was contacted by a confidential source (informant). The informant said he knew the defendant, and that he had purchased methamphetamine from her in the past. He said that sold in quantities of ounces or better. Based on that information the police

conducted a controlled buy. The buy was arranged when the informant made a call. Detective Vargas could hear a female voice telling the informant to come over, and directing the informant to go through the neighbor's property to get to her house. As a result of the investigation detectives arrested the defendant on January 9, 2009. The defense did not object to any of this testimony. 6-3-10 RP 6-8, 12.

At the conclusion of Detective Vargas' testimony the prosecutor said the State had no further witnesses. Defense counsel confirmed for the Court that the defendant did not intend to testify, but noted

I think at this point I think it was anticipated that the actual informant would be testifying. At least that was my anticipation. And I think that that is important because everything is based on what the informant actually told law enforcement.

6-3-10 RP 19.

Defense counsel then asked the court to set over argument to conduct additional research. The Court set the matter over one day. The defense made no other motion to require the informant to testify at the hearing. 6-3-10 RP 20.

By trial the identity of the informant had been revealed to the defense as Shane Heath. The prosecutor noted during pre-trial

motions that Heath had been subpoenaed, but not personally served. In any event Heath was not available, and the prosecutor did not anticipate that he would show up in response to the subpoena. Defense counsel did not object. 10-11-10 RP 10.

At trial on two different occasions Detective Vargas began to relate what the informant told him during the investigation. Defense counsel objected on each occasion on the basis of hearsay. The trial court sustained the objection, struck the testimony and directed the jury to disregard it. 10-11-10 RP 21-22, 27.

The defendant now argues his Sixth Amendment right to Confrontation was violated because Detective Vargas testified to statements made by the non-testifying informant that the defendant sold him drugs on December 23 and January 9⁵. BOA at 42, 45-46. The defendant does not cite to anywhere in the record where Detective Vargas was permitted to testify to the informant's statements in regard to buying methamphetamine from the defendant. Contrary to this unsupported claim the court sustained

⁵ The defendant does not cite where in the record the detective testified that the informant said the defendant sold him drugs on January 9. Because she was arrested on that date before a delivery had been completed the informant would not have said that. The record does not reflect that the detective testified to any hearsay statements made by the informant in regard to the January 9 incident.

the defendant's objections whenever Detective Vargas strayed into a discussion about what the informant said. The court struck that portion of his testimony and directed the jury to disregard it. In addition the judge instructed the jury that "[i]f evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." 1 CP 72.

The jury is presumed to follow the court's instructions. Johnson, 124 Wn. App. at 77. The brief testimony about what the informant said in regards to the defendant selling him drugs was therefore not a part of the evidence introduced against her. Her confrontation rights at trial were not violated.

The defendant does cite to the record of the suppression hearing. The defendant did not raise any objection to Detective Vargas' testimony during that hearing. Her citation to counsel's statement that he thought the informant was going to testify at that hearing is not an objection, but merely an observation. Even if it could be construed as an objection, there were no grounds cited for the claimed objection. A party is generally permitted to assign evidentiary error only on the specific ground made at trial. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). The purpose

resources. State v. O'Hara, 167 Wn.2d 91, 97, 217 P.3d 756 (2010).

A party may raise an issue not properly preserved at trial if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). The party asserting the error has the duty to show that the error is (1) truly of constitutional dimension, and (2) that the error is manifest. O'Hara, 167 Wn.2d at 98. The Court will not assume the alleged error is of constitutional magnitude. Id. Error is manifest if, in the context of the trial, the alleged error actually affected the defendant's rights. State v. Lynn, 67 Wn. App. 339, 345-46, 899 P.2d 1251 (1995). Only if the Court finds the error to be manifest will it address the merits of the claim. Id. Even if the court concludes that an error of constitutional magnitude was committed, the error may be subject to harmless error. Id.

Here the defendant argues that her confrontation rights were violated because the officer testified to statements made by a non-testifying witness relying on Crawford v. Washington, 541 U.S. 36, 125, S.Ct. 1354, 158 L.Ed.2d 177 (2004). However, this Court has held that there is no right to confrontation at a CrR 3.6 evidentiary hearing on a motion to suppress under the Sixth Amendment and

Crawford. State v. Fortun-Cebada, 158 Wn. App. 158, 173, 241 P.3d 800 (2010).

The defendant provides no argument why Fortun-Cebada should be reconsidered. Crawford held that the Confrontation Clause of the Sixth Amendment does not permit the admission of testimonial statements of a witness who does not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity to cross examine him. Crawford, 541 U.S. at 53-54, 68. The Court did not define “testimonial statements” but said at a minimum they included prior testimony at a pre-trial hearing or trial, and to police interrogations. Id. at 68. They include affidavits, custodial examinations and “statements that were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial.” Id. at 52 quoting Brief for National Association of Criminal Defense Lawyers et al. as Amicus Curiae.

The statements at issue were not “testimonial” as the Court indicated that term was to be interpreted. The informants statements were not made as a witness to police interrogator, but rather as a participant in an on-going investigation into drug trafficking. In that regard they are similar to statements made by a

co-conspirator in the furtherance of a conspiracy. Crawford specifically recognized that statements made by co-conspirators are not testimonial and do not implicate the Confrontation Clause. Id. at 56. See also United States v. Allen, 425 F.3d 1231, 1235 (9th Cir. 2005), cert. denied, 547 U.S. 1012, 126 S.Ct. 1487, 164 L.Ed.2d 263 (2006).

Even though by the time of trial the prosecutor intended to call the informant as a witness, there is no indication that the informant or the officers understood that would be the case at the time of the investigation. Many informants' identity are never revealed. The Legislature and the Court have devised rules to balance the interest in protecting the identity of the informant with the defendant's right to compel the attendance of witnesses at trial. State v. Petrana, 73 Wn. App. 779, 871 P.2d 637 (1994), State v. Casal, 103 Wn.2d 812, 699 P.2d 1234 (1985), RCW 5.60.060(5), CrR 4.7(f)(2). Like co-conspirators, an informant would not reasonably believe that his statements made during the investigation would be used at a later trial. Under the circumstances in which the informant's statements were made they are not testimonial.

In addition the statements were not hearsay. Crawford specifically acknowledged that the Confrontation Clause did not bar even testimonial statements that were admitted for some purpose other than the truth of the matter asserted. Crawford, 541 U.S at 59, n. 9. The issue at the CrR 3.6 hearing was whether the police had probable cause to stop the defendant's car and arrest her on January 9. The informant's statements were introduced to as evidence supporting a finding of probable cause. When the informant gave police information that had turned out to be true, it gave police reason to believe his information on January 9 was reliable. Fisher, 96 Wn.2d at 965-66. Thus his statements were not introduced for the truth of what was asserted, but to establish the informant's reliability.

The defendant also cites a number of cases which discuss the defendant's Sixth Amendment Right to compulsory process as it relates to informants. BOA at 39-40. Those cases address when and under what circumstances the defendant is entitled to learn the informant identity. Casa 103 Wn.2d at 813 (when a defendant is entitled to an in camera hearing on a search warrant affiant's veracity regarding statements allegedly made by a secret informant), Petrana, 73 Wn. App. 782 (whether the trial court

abused its discretion in ordering disclosure of a confidential informant), State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984) (discussing the showing a defendant must make in order to be entitled to the informant's name). Where the defendant has made a colorable showing that he is entitled to that information then the State is required to disclose that information in order "to allow the defendant to compel attendance." Petrana, 73 Wn. App. at 784.

Here there is no constitutional question that the defendant's right to compulsory process was denied. The State made no secret of the informant's identity. He was someone the defendant knew through a friend, and with whom she had done business. She had the opportunity to call the informant as a witness, just as the State had. Her right to compulsory process was not denied in this instance.

Because the statements at issue in the suppression hearing neither involved testimonial statements, nor were the defendant's right to compulsory process implicated the defendant has failed to raise an issue of constitutional magnitude. Even if she had, she fails to show how it was manifest. The statements at issue were introduced only at the suppression hearing. That hearing focused on whether police had probable cause to stop the defendant on

January 9. The probable cause was based on the events of December 23. Without considering the informant's statements there was substantial circumstantial evidence that the defendant had delivered drugs on that night.

Police had run the plates on the defendant's car before commencing work with the informant. They knew that she drove a black BMW, which they saw parked in the defendant's driveway on December 23. The informant and his car were searched before and after he went to her home. He went in with money and no drugs, and he came out with drugs and no money. He was not contacted by anyone either going in or coming out of her home. The package containing the methamphetamine also included a Christmas card with the defendant and her boyfriend's names and picture on it. The police set up a second buy through the informant at his house. They were aware of when the defendant was to arrive, and she arrived in the vicinity of the informant's house about the time she was supposed to be there. All of this information overwhelmingly established the police had reason to believe a crime had been committed in December, and was being committed on January 9 when she was stopped.

In addition, the informant's statements added nothing to the court's analysis under Gant. Whether the search was valid was based on testimony regarding the circumstances of the controlled buy and the basis for the arrest. Whether the informant's statements were considered or not, it did not alter the outcome. The defendant fails to establish manifest constitutional error.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the order denying suppression and affirm the defendant's convictions. Alternatively, if the Court finds the trial court should have suppressed evidence of the search the State asks the Court to affirm count II charging the defendant with delivery of a controlled substance on December 23, 2008.

Respectfully submitted on November 8, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

HOWE, JAMI SHAWNELL

Defendant.

No. 09-1-01801-9

CERTIFICATE PURSUANT TO
CrR 3.6 OF THE CRIMINAL RULES
FOR SUPPRESSION HEARING

On June 3, 2010, a hearing was held on the defendant's motion to suppress evidence. The court considered the testimony of the witnesses at the hearing and the arguments and memoranda of counsel. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. In December of 2008, Detective Jose Vargas of the Snohomish Regional Drug Task Force received information from a Confidential Source (CS) about a woman named Jami (subsequently identified as defendant Jami S. Howe) who was dealing methamphetamine in Snohomish County.
2. Detective Vargas asked the CS if he could purchase methamphetamine from the defendant, and the CS confirmed that he could.
3. On December 23, 2008, at the request of Task Force detectives, the CS contacted the defendant and arranged to purchase methamphetamine from her. The defendant instructed the CS to come to her residence in Marysville for the deal. She informed him that her gate was frozen shut, and told him to access her residence through the neighbor's property.

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4. In anticipation of the transaction, Detective Vargas searched the CS and his vehicle for money or contraband, provided the CS with pre-recorded buy money (plus some additional money to cover a debt the CS owed to the defendant), and then followed him to the defendant's residence.
5. When they arrived at the defendant's residence, Detectives Vargas and Olmsted watched as the CS parked in the defendant's neighbor's driveway, exited his vehicle, and walk to the defendant's residence. They noted that the defendant's black BMW was parked in front of the residence. A short time later, the CS returned to his car and drove away.
6. The detectives followed the CS to a pre-arranged meeting location where they again searched his person and vehicle for money or contraband. The CS had none of the buy money, but instead, he had a gift bag containing an ounce of what the detectives recognized to be methamphetamine and a Christmas card with a photograph of the defendant and her boyfriend. Detective Vargas later conducted a field test of the substance and received a presumptive confirmation that it was methamphetamine.
7. The CS told the detectives that he had purchased the methamphetamine from the defendant inside the residence.
8. Several days later, Detective Vargas received information that the defendant and her boyfriend had been the victims of a home-invasion robbery at their residence in Marysville on December 30th or 31st.
9. At the hearing in this matter, the defendant testified that she and her boyfriend had, in fact, been the victims of a home-invasion robbery on December 30th or 31st and that in the several days afterwards, she was spending most of her time each day at the hospital where her boyfriend was being treated for injuries he sustained during the robbery.
10. Detective Vargas drove by the defendant's residence on several occasions after the controlled buy on December 23rd and did not see the defendant's car parked in front.
11. On January 9, 2009, Detective Vargas contacted the CS and asked him to attempt to contact the defendant to find out where she was. Later that evening, around 10:00 p.m., the CS called Detective Vargas and said that he had contacted the defendant and arranged to have her meet him at his residence in Everett to sell him another ounce of methamphetamine.
12. With that information, Task Force detectives and patrol officers from the Everett Police Department set up in the area around the CS's residence and waited for the defendant. When the defendant was seen driving her black BMW into the area a short time later, she was stopped and arrested.
13. Detectives searched the defendant's person and her vehicle. In the defendant's purse, they found a small baggie containing a small amount of suspected methamphetamine.

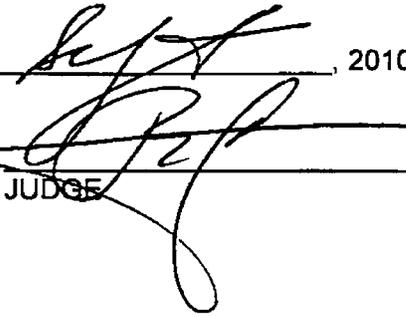
Behind the driver's seat of her car they found a cloth bag containing an ounce of suspected methamphetamine.

II. CONCLUSIONS OF LAW

1. The controlled buy from December 23, 2008 had sufficient indicia of reliability to establish probable cause for the defendant's arrest on January 9, 2009. This was based on the fact that the Confidential Source was searched before and after the purchase, that detectives watched the Confidential Source enter the defendant's residence, that the Confidential Source reported purchasing the suspected methamphetamine from the defendant, and that along with the suspected methamphetamine, the Confidential Source was given a holiday card with the defendant's name and picture on it.
2. The circumstances surrounding the January 9, 2009 operation also provided sufficient indicia of reliability to establish probable cause to arrest the defendant for Attempted Delivery of a Controlled Substance: The Confidential Source called the defendant and arranged to purchase additional methamphetamine from her; she agreed to meet the Confidential Source at his/her residence; Detective Vargas knew the defendant was the registered owner of a black BMW; at the time the Confidential Source and defendant had arranged for the deal, officers saw the defendant driving her black BMW a short distance from the Confidential Source's residence.
3. Based on the fact that the defendant had agreed to meet the Confidential Source at his/her residence to deliver methamphetamine, Task Force detectives had reason to believe that the defendant's vehicle would contain evidence of the crime of Attempted Delivery of a Controlled Substance. Accordingly, the search of her vehicle incident to her arrest was lawful pursuant to Arizona v. Gant and State v. Wright, and not in violation of either the Fourth Amendment or Article I, Section 7 of the Washington Constitution.
4. Moreover, this case occurred before the ~~Supreme Court's decision in Arizona v. Gant~~. Because the detectives were acting in reliance on pre-Gant case law, the search falls under the "good faith" exception to the exclusionary rule. Pursuant to State v. Riley, the evidence seized in the search of the defendant's vehicle is therefore admissible.

The court strikes this paragraph for the reasons set forth in the memorandum decision denying the defendant's motion for reconsideration

DONE IN OPEN COURT this 30 day of Sept, 2010.



JUDGE

Presented by:



MATTHEW D. BALDOCK, #30892
Deputy Prosecuting Attorney

Copy received this _____ day of _____, 2010.



PAUL W. THOMPSON, #35647
Attorney for Defendant

JAMI SHAWNELL HOWE
Defendant